

### 2024 Environmental and Energy Law Forecast

#### FEDERAL

**AIR:**  
**Federal Climate Change Update**  
*Katherine L. Vaccaro, Esq.*

The Biden Administration set lofty goals for addressing the impacts of climate change. Now three years in, the Administration has made some progress. In 2022, Biden enacted the [Inflation Reduction Act](#), which allows the government to invest big in climate solutions and environmental justice efforts. The Act is intended to accelerate a transition to clean energy, with a focus on reducing energy costs for low-income families across the country. The Act also allocates funding to transition the transportation sector, the largest contributor of greenhouse gas emissions in the U.S., away from fossil fuels to zero-emitting vehicles. \$3 billion alone will go to electrifying the Postal Service's fleet of mail trucks, for example. The Act also directs significant resources to increasing awareness of air quality in environmental justice communities, including through both government- and community-led ambient air monitoring. In fact, grants have already been awarded for a number of these projects in our region. Just last month, \$350 million Inflation Reduction Act dollars were committed to help 14 states (including Pennsylvania) reduce methane emissions from the oil and gas sector, the largest contributor of methane emissions in the U.S. The funding was announced by the Environmental Protection Agency (EPA), in partnership with the Department of Energy, on the heels of EPA's release of its final regulation [updating the methane performance standards](#) for new oil and gas facilities and establishing Emission Guidelines for states to follow in developing methane standards for existing sources.

The Administration is separately generating funding through the Bipartisan Infrastructure Law to support the resiliency of the country's infrastructure to climate change, such as droughts, heat, floods, wildfires, and other threats. Part of this effort involves creating a national network of clean hydrogen producers, consumers, and connective infrastructure with the objective of decarbonizing heavy industry and transportation. In our region, funding was awarded for the [Mid-Atlantic Clean Hydrogen Hub \(MACH2\)](#), which spans the Delaware River and includes, Pennsylvania, Delaware, and southern New Jersey. Among other results, the MACH2 project is expected to expand hydrogen distribution infrastructure and develop fueling stations to facilitate hydrogen distribution to more end users, while also yielding air pollution reduction benefits and brownfield remediation opportunities.

Finally with respect to climate change, EPA continued its efforts to update its greenhouse gas reporting rule (codified at 40 C.F.R. Part 98) during 2023, issuing two proposed rule revisions in May and August, respectively. The proposed updates would affect many of the source categories under Part 98, including

by adding five new source categories: Energy Consumption, Coke Calciners, Calcium Carbide Production, Caprolactam, Glyoxal, and Glyoxylic Acid Production, and Ceramics Production. The proposed revisions are also intended to assist EPA in satisfying its obligation, as directed in the Inflation Reduction Act, to impose and collect a charge on methane emissions that exceed certain waste emissions thresholds applicable to petroleum and natural gas systems under 40 C.F.R. Part 98, Subpart W. Most recently, EPA proposed that all of the revisions would become effective on January 1, 2025, covering the 2025 reporting year (with reports due March 31, 2026), with the exception of the proposed requirement to report quantities of fuel, which would also become effective on January 1, 2025, but would cover the 2024 reporting year (reports due March 31, 2025).

## **New Source Review 2024**

***Carol F. McCabe, Esq.***

The Clean Air Act New Source Review program continues to be one of the most complex environmental permitting programs, for permittees and agencies alike. New Source Review, comprised of the Non-Attainment New Source Review (NNSR) and Prevention of Significant (PSD) programs, has been subject to a long history of administration-driven changes in interpretation that largely center around when a modification to a major source may cause a significant net emission increase that triggers heightened permitting requirements, such as Lowest Achievable Emissions Rate and emission offsets under NNSR and Best Available Control Technology and air quality impact assessments under PSD. After several interpretive and rulemaking actions undertaken by the Trump Administration to streamline and simplify New Source Review rules, the Biden Administration has sought to reverse or revise those actions in response to concerns from some states and environmental advocates that EPA's Trump-era moves would weaken New Source Review protections. Our forecast articles in [2022](#) and [2023](#) detail the Biden Administration's plans for New Source Review actions, and 2024 will likely see EPA continuing these efforts.

First, EPA plans to undertake revisions to the Project Emission Accounting Rule this year. This rule was finalized under the Trump Administration in November 2020, allowing permittees to account for emission increases and decreases in the first step of the two-step analysis for determining whether a project causes a significant net emission increase triggering New Source Review requirements. The rule marked a change in approach for EPA, which historically allowed consideration of only emission increases in the "Step 1" determination of whether a significant emission increase would result from a modification and allowed consideration of emission decreases only in the "Step 2" net emission increase analysis, which considers net changes in emissions during a contemporaneous period. Importantly, under EPA's program rules, if a project increase is determined not to be significant in Step 1, then the permittee need not proceed to the Step 2 netting analysis and New Source Review does not apply. While generally favored by industry, the Project Emission Accounting Rule was strongly criticized by certain states and was the subject of a Petition for Reconsideration submitted by a coalition of environmental advocacy groups in January 2021. The Petitioners argued that the Project Emission Accounting Rule failed to ensure that decreases considered in Step 1 are actually related to the proposed project and would tend to allow sources to avoid New Source Review. While EPA denied the Petition for Reconsideration on procedural grounds, EPA has indicated that it would undertake a rulemaking to review the Project Emission Accounting Rule consistent with President Biden's Executive Order 13990 Protecting Public Health and the Environment by Restoring Science to Tackle the Climate Crisis. Based on EPA's most recent Regulatory Agenda, which identified December 2023 as the date for a Notice of Proposed Rulemaking, a proposal should be forthcoming in the

near term. Although EPA has not provided detail on its planned proposal, it seems likely that the scope of the proposed rule will address concerns expressed in the Petition, along with related concepts affecting the manner in which emission increases are calculated in the New Source Review context.

Second, the [Reconsideration of the Fugitive Emissions Rule](#) remains pending. With a comment period that closed in February 2023, EPA has yet to act. The proposed Fugitive Emissions Rule would clarify that fugitive emissions increases will be counted toward significance thresholds in major modification determinations for all source categories, whereas such emissions are counted toward initial major source threshold determinations for only specific source categories listed in the regulations (such as petroleum refineries, portland cement plants, and iron and steel mills). The Fugitive Emissions Rule would also remove a longstanding exemption from New Source Review for circumstances in which New Source Review would be triggered “only if fugitive emissions, to the extent quantifiable, are considered in calculating the potential to emit...” See 52.21(i)(1)(vii). The Fugitive Emissions Rule proposal represents EPA’s latest attempt to end a long and tangled history on this topic by undoing a 2008 rule that had been promulgated under the Bush Administration then almost immediately stayed by the Obama Administration. The 2008 rule was the exact opposite of the current proposal and would have limited consideration of fugitive emissions to only specifically enumerated source categories. In reversing course and thereby broadening the scope of New Source Review applicability, the latest proposal garnered significant adverse comment from some states and industries that foresee the rule adding significant complication and burden to New Source Review permitting, without any real environmental benefit. Perhaps in light of these comments, EPA appears to have delayed finalization of the rule pending further review. EPA’s latest Regulatory Agenda has changed the anticipated date for the final rule to “to be determined.”

Third, EPA’s recently proposed rule Clarifying the Scope of “Applicable Requirements” Under State Operating Permit Programs and the [Federal Operating Permit Program](#), while not directly impacting New Source Review requirements and applicability, seeks to clarify the extent to which such requirements fall within the definition of “applicable requirement” within the Title V operating permit program. Importantly, the proposed rule would clarify that EPA will not revisit the substance of New Source Review permitting decisions in the context of its Title V review authority or in response to Petitions to Object filed by third parties under the Clean Air Act Title V process. Based on EPA’s Regulatory Agenda, the rule is expected to be finalized in June 2024.

Other actions forthcoming in 2024 may include new EPA guidance on minor source permitting programs, and the definition of potential to emit. Also pending is EPA’s proposal to tighten the annual PM<sub>2.5</sub> National Ambient Air Quality Standard, and EPA’s intention to commence a review of the NAAQS for ozone.

## **Proposed Changes to the Reclassification of Major Sources of HAP Emissions as Area Sources (Previously Once-In-Always-In)**

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As part of the issuance of Executive Order 13990, President Biden required EPA to review the final rule entitled “Reclassification of Major Sources as Area Sources under section 112 of the Clean Air Act” (MM2A final rule) and propose a rulemaking either suspending, revising, or rescinding the rule. The MM2A final rule withdrew the long-standing EPA interpretation that a major source of hazardous air pollutant (HAP) emissions subject to a maximum achievable control technology standard (MACT) would always be

classified as a major source and subject to MACT standards even if the source later reduced emissions to below major source thresholds, commonly referred to as the “Once-In-Always-In Policy” (OIAI Policy). The MM2A final rule permitted major sources to reclassify as area sources by reducing their potential to emit to below major source thresholds. See 40 C.F.R. § 63.1(b)(6).

On September 27, 2023, EPA issued a notice of proposed rulemaking reconsidering the withdrawal of the OIAI Policy and the MM2A final rule. EPA’s proposed rule would allow sources to continue to reclassify from major source status to area source status so long as three criteria are met: (1) any permit limitations taken to reclassify from a major source to an area source must be federally enforceable; (2) any such permit limitations must contain safeguards to prevent emission increases after reclassification beyond the applicable major source MACT standard at time of reclassification; and (3) reclassification will only become effective once a permit has been issued containing enforceable conditions and electronic notification has been submitted to the EPA within 15 days after reclassification. Once finalized, sources that reclassified since January 25, 2018 under the MM2A final rule would be required to comply with the additional requirements in order to remain an area source.

The proposed rule would only apply to synthetic minor sources, i.e., sources that have a potential to emit above major source thresholds, are or would be subject to MACT standards, and are taking a restriction to limit the facility’s potential to emit to below major source thresholds. The proposed rule would not apply to (1) a synthetic minor source that has taken restrictions to limit its potential to emit before the source’s first compliance date of the applicable MACT standard, (2) to minor sources that have modified operations such that they are no longer capable of emitting above major source thresholds, or (3) sources that were never a major source.

The public comment period on the proposed rulemaking ended on November 13, 2023 and the rule is expected to be finalized in May 2024.

## **EPA Finalizes New Methane Standards for Oil and Gas Industry, Including Existing Sources** ***Katherine L. Vaccaro, Esq.***

On his first day in office in 2021, President Biden signed an order directing the United States Environmental Protection Agency (EPA) to strengthen regulations under the Clean Air Act to reduce methane emissions from the oil and gas industry, the largest contributor of methane emissions in the United States at approximately 30 percent. In December 2023, EPA released the final regulation, entitled “Standards of Performance for New, Reconstructed, and Modified Sources and Emissions Guidelines for Existing Sources: Oil and Natural Gas Sector Climate Review” (Methane Rule). EPA received nearly 1 million public comments on the proposed version of the rule. Unlike prior air regulations targeting methane emissions from oil and gas facilities, the Methane Rule extends to existing sources.

A climate “super pollutant,” methane is many times more potent than carbon dioxide, and as a result, is responsible for almost one third of the warming from greenhouse gases occurring today. Meaningful reductions in methane emissions are, therefore, expected to yield significant climate benefits, even in the near term. EPA predicts the rule will reduce methane emissions from regulated sources by nearly 80 percent relative to what emissions would be without the rule, and by keeping that methane out of the atmosphere, natural gas that would otherwise be wasted will be able to be recovered and used. The

Methane Rule also regulates emissions of volatile organic compounds (VOC) and some air toxics co-emitted with methane.

The Methane Rule does two things. First, it revises the prior New Source Performance Standards (NSPS) for oil and gas facilities (codified at 40 C.F.R. Part 60, Subparts OOOO and OOOOa) to incorporate more stringent standards for methane and VOC emissions, reflecting what EPA describes as newer technologies and solutions that leading gas-producing states and companies are already using. The revised standards (to be codified at Subpart OOOOb) apply directly to “new” affected oil and gas sources. Second, the Methane Rule establishes “Emission Guidelines” (to be codified at Subpart OOOOc) for states to follow in developing their own plans – due in early 2026 – for reducing methane and VOC emissions from “existing” sources. States can adopt the model rules and presumptive standards in EPA’s Emission Guidelines, or states can develop their own standards as long as they are at least as stringent as EPA’s. An affected source is “new” if it begins construction, modification, or reconstruction after December 6, 2022, and “existing” if it began construction, modification, or reconstruction before that date.

For the most part, the Methane Rule applies to the same equipment and processes covered by the prior NSPS, with the following additions: compressors at centralized tank batteries, liquids unloading, and associated gas from oil wells located at oil and natural gas well sites; and process pumps located at natural gas gathering and boosting compressor stations and within the transmission and storage segment. These source categories are not subject to Subparts OOOO or OOOOa. Key standards under the Methane Rule include the phase out over two years of routine flaring of natural gas from new oil wells and a requirement that all well sites and compressor stations be routinely monitored for leaks. Of particular note, the new rule also permits third parties to use remote-sensing technologies, such as those used on satellites or in aerial surveys, to find large “super-emitter” leaks. When a third party identifies a “super-emitter leak”, and as long as EPA certifies the third party, then facility owners and operators will be notified and required to investigate to pinpoint the source of the leak and ultimately report the results of the inspection to EPA and repair any leaks or releases covered by the regulation. EPA will make all super-emitter data available to the public. We will be tracking this program closely to see how it plays out in practice, paying particular attention to the sufficiency of EPA’s third-party certification and data validation processes, as well as a potential corresponding uptick in citizen suits or other third-party challenges.

#### **HAZARDOUS SUBSTANCES and REMEDIATION:**

#### **Federal PFAS Regulation, Implementation, and Enforcement Set to Continue at Breakneck Pace in 2024**

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In December 2023, EPA released the [Second Annual Progress Report](#) on its 2021 PFAS Strategic Roadmap which sets forth EPA’s accomplishments to-date and plans to regulate per- and polyfluoroalkyl substances (PFAS) through 2024. PFAS regulation during 2023 occurred at a breakneck pace, and 2024 appears to be no different, with EPA planning a number of significant actions to continue to address PFAS across environmental media. Most notably, EPA is seeking to finalize two significant rulemakings in the 1<sup>st</sup> Quarter 2024. The first includes a rule that will designate two PFAS as CERCLA hazardous substances. The second is a rule that will establish national primary drinking water maximum contaminant levels (MCLs)

for PFOA, PFOS, and four additional [PFAS chemicals](#). Both rulemakings are anticipated to have wide-reaching implications. The EPA also plans to continue to roll-out over \$10 billion in dedicated funding from the Bipartisan Infrastructure Law (BIL), known as the Infrastructure Investment and Jobs Act, for investments in drinking water, wastewater, and stormwater infrastructure, as well as funding dedicated to addressing emerging contaminants at legacy Superfund and brownfield sites.

Also new for 2024 is implementation of the Agency's National Enforcement and Compliance Initiative (NECI) for fiscal years 2024 through 2027, which sets six priority areas for federal enforcement. The EPA has listed *Addressing Exposure to PFAS* as its second highest national enforcement priority behind climate change issues.

Lastly, EPA will remain focused on improvements to chemical data availability and public access to such data through release of analytical tools that integrate data on PFAS reporting, testing, and occurrences in communities.

Set forth below is a more detailed summary of the regulatory actions that EPA plans to take under each of the following federal legislative programs by the end of 2024.

### **Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)**

In the Fall of 2022, EPA published a Notice of Proposed Rulemaking in the Federal Register seeking to designate two PFAS—perfluorooctanoic acid (PFOA) and perfluorooctanesulfonic acid (PFOS), including their salts and structural isomers—as CERCLA hazardous substances. The designation of PFOA and PFOS as hazardous substances would require facilities to report PFOA and PFOS releases that meet or exceed a reportable quantity, would trigger remediation obligations, and would enable EPA and private parties to recover costs incurred in cleaning up contamination of these substances.

The EPA anticipates finalizing a rulemaking designating these two aforementioned PFAS as CERCLA hazardous substances in early 2024, and that it is simultaneously developing a PFAS CERCLA enforcement discretion policy with the assistance of public listening sessions.

Relatedly, EPA's NECI for fiscal years 2024 through 2027 addresses enforcement of PFAS once the anticipated CERCLA designation becomes final. Of note, the NECI would focus on implementing EPA's PFAS Strategic Roadmap and holding responsible those who significantly contribute to the release of PFAS into the environment, such as major manufacturers and users of manufactured PFAS, federal facilities that are significant sources of PFAS, and other industrial parties. If PFOA and PFOS are listed as hazardous substances, EPA's NECI states that it does not intend to pursue entities where equitable factors do not support CERCLA responsibility, such as farmers, water utilities, airports, or local fire departments.

In April 2023, EPA also published an advance notice of proposed rulemaking requesting public input on whether the agency should consider designating as CERCLA hazardous substances categories of PFAS; seven specific PFAS substances and their salts and structural isomers; and precursors to PFOA, PFOS and those seven specific substances. Additional regulatory updates on this front are expected in 2024.

### **Safe Drinking Water Act and Clean Water Act (SDWA / CWA)**

#### NPDWR

In March of 2023, the EPA proposed a rulemaking establishing national primary drinking water regulation (NPDWR) for PFOA, PFOS, and four additional PFAS chemicals. After a public comment period, the EPA

is now seeking to finalize the important drinking water rulemaking in January 2024, as the Office of Management and Budget approved the NPDWR just before the New Year. The final rulemaking is anticipated to set individual numerical limits for the Maximum Contaminant Level (MCL) and the Maximum Contaminant Level Goal (MCLG) for PFOA and PFOS. For PFOA and PFOS, the EPA is anticipated to finalize an MCL of 4.0 ng/L for each, as the EPA believes that is the lowest level that can be reliably measured through laboratory analysis. In contrast to the individual limits for PFOA and PFOS, the EPA is anticipated to regulate the remaining four PFAS (PFNA, PFHxS, HFPO-DA, and PFBS) as a mixture and to use a unique hazard index (HI) approach for the limits. A HI is a reference value used to evaluate potential cumulative health risks from exposure to a mixture of chemicals. The EPA has never before used a HI for a national drinking water standard.

Once finalized, Public Water Systems (PWS) throughout the Nation would need to complete initial monitoring for the six PFAS at each entry point to the water distribution system within three years of NPDWR finalization.

#### UCMR 5

Starting in mid-2023 and continuing through 2025, the EPA will continue release of the much-anticipated PFAS occurrence data for public drinking water systems through the [Unregulated Contaminant Monitoring Rule 5 \(UCMR 5\)](#). UCMR 5 requires more than 10,000 public water systems (PWS) across the nation to monitor their systems for an expanded list of 29 individual PFAS compounds and report this information to the Agency, and ultimately to the public. The release of UCMR 5 data in real-time, along with a continuation of quarterly rolling data releases to the public, has generated great interest to-date and is anticipated to further drive regulatory actions and decision-making.

#### CCL 5

Related to occurrence data collected during the UCMR 5 effort referenced above, the EPA will need to complete a Regulatory Determination decision for drinking water associated with its November 2022 Contaminant Candidate List 5 (CCL 5). The CCL 5 contains a list of contaminants that are currently not subject to any proposed or promulgated NPDWR but are known or anticipated to occur in public water systems. In a major development, the EPA's publication of the CCL 5 included PFAS as a group, which according to EPA's structural definition of PFAS, would include over 10,000 individual chemical PFAS substances. EPA must now determine whether or not to regulate at least five contaminants from the CCL 5 (including PFAS as a group) in a separate process called a Regulatory Determination. The Agency will make Regulatory Determinations for the CCL 5 contaminants for which there are sufficient health effects and occurrence data and which present the greatest public health concern. The UCMR 5 occurrence data is sure to play a large role in the agency's decision-making process.

#### Test Methods

Final approval of EPA Test Method 1633 is anticipated in 2024 with the 4<sup>th</sup> draft of the much-anticipated non-drinking water test method having been published in July 2023. This method is a laboratory validated, direct injection EPA method for detection of 40 PFAS in wastewater, surface water, groundwater, soil, biosolids, sediment, landfill leachate, and fish tissue. Once published as final, the EPA is expected to quickly initiate a process to formally codify the Method as an approved Method under the Clean Water Act in 2024.

EPA is also anticipated to continue with validation of Draft EPA Method 1621, which is a single laboratory validated method to screen for organofluorines in wastewater. The draft method is labeled as a screening

method because it does not quantify all organofluorines with the same accuracy and has some known interferences.

### ELG Plan 15

Published in January 2023, the EPA's final Effluent Limitation Guidelines (ELG) Plan 15 described analyses, studies, and rulemakings related to ELGs and pretreatment standards for PFAS. ELGs are national, technology-based regulations developed to control industrial wastewater discharges to surface waters and into publicly owned treatment works. ELGs are intended to represent the greatest pollutant reductions that are economically achievable for an industry. Notably, ELG Plan 15 seeks to revise the ELGs for the (1) Organic Chemicals, Plastics, and Synthetic Fibers (OCPSF) category to address PFAS wastewater discharges from facilities manufacturing PFAS, (2) revise the Metal Finishing ELGs to address PFAS discharges from chromium electroplating facilities, (3) prepare revisions to the ELG applicable to landfills, and (4) conduct detailed studies on PFAS in wastewater discharges from textile and carpet manufacturers. Also, notable and wide-reaching, the EPA announced its intent to initiate a POTW Influent Study of PFAS, which will focus on collecting nationwide data on industrial discharges of PFAS to POTWs, including categories recently reviewed. EPA intends to undertake this study to verify sources of PFAS wastewater and help POTWs assess the need for control measures at the source.

### Ambient Water Quality Criteria

Development of final national recommended ambient water quality criteria for PFOA and PFOS to protect aquatic life will continue in 2024. Draft ambient water quality criteria were previously published in April 2022. EPA will now prepare a response to public comments document, update the draft PFOA and PFOS criteria documents considering public comments, and consider new toxicity data published since September 2021 prior to the agency issuing final recommended criteria. Once finalized, states and authorized tribes can adopt the recommended criteria into water quality standards to protect against effects on aquatic life.

### Biosolids

EPA is currently completing risk assessments for PFOA and PFOS in biosolids, which the EPA has committed to completing by December 2024. In advance of completion of the risk assessments, the EPA, the Environmental Council of the States (ECOS), and the National Association of State Departments of Agriculture (NASDA) have jointly developed Principles for Preventing and Managing PFAS in Biosolids. These principles define key areas for regulators and stakeholders to ensure the fate and transport of PFAS contaminated biosolids do not result in harm to human health of the environment.

### **Clean Air Act (CAA)**

While originally referenced in the PFAS Strategic Roadmap for a target date of Fall 2022, EPA is anticipated to continue evaluating options during 2024 to regulate PFAS under the Clean Air Act, including listing certain PFAS as hazardous air pollutants (HAPs).

In August 2023, the EPA proposed additional data collection from facilities that emit PFAS to the air through the Air Emissions Reporting Rule (AERR), which would seek to collect detailed PFAS data, enabling more refined air quality and exposure modeling. The EPA expects to finalize the rule in July 2024.

EPA is also developing test methods to detect PFAS in stack emissions and ambient air. These include Other Test Method-50 (OTM-50), which the EPA's Office of Research and Development is currently developing for detection of PFAS products of incomplete combustion (PICs), anticipated for publication in

2024. OTM are EPA test methods that have not yet gone through the agency's rulemaking process but are urgently needed to support agency initiatives. EPA is also considering development of sampling and analysis methods for targeted and non-targeted PFAS ambient air measurements. Applications will include fence-line monitoring for fugitive emissions, deposition, and receptor exposure using field deployable Time of Flight/Chemical Ionization Mass Spectrometer and summa canisters and sorbent traps techniques.

### **Federal Guidance on PFAS Destruction**

An update of EPA's *Interim Guidance on Destroying and Disposing of Certain PFAS and PFAS-Containing Materials That Are Not Consumer Products* is planned by early 2024. EPA's Interim Guidance originally published in December 2020 outlined the current state of the science on techniques and treatments that may be used to destroy or dispose of PFAS and PFAS-containing materials from non-consumer products, including Aqueous Film Forming Foam, soil and biosolids, textiles, spent filters, membranes, resins, granular carbon, and other waste from water treatment, landfill leachate containing PFAS, and solid, liquid, or gas waste streams containing PFAS from facilities manufacturing or using PFAS. The guidance does not apply to consumer products, such as non-stick cookware and water-resistant clothing. The guidance generally describes thermal treatment, landfill, and underground injection technologies that may be effective in the destruction or disposal of PFAS and PFAS-containing materials. EPA plans to update this important guidance based on the evolution of PFAS treatment techniques, research and development, and analytical techniques to measure PFAS.

### **Resource Conservation and Recovery Act (RCRA)**

EPA plans to issue a Notice of Proposed Rulemaking designating certain PFAS as Hazardous Constituents under the RCRA program; the proposal is intended as a response to a June 23, 2021 petition by Governor Michelle Lujan Grisham of New Mexico requesting that PFAS be regulated under RCRA, either as a class or as individual chemicals. The proposed rulemaking would add PFOA, PFOS, PFBS, and GenX to the RCRA Hazardous Constituents list under Appendix VIII. This action was anticipated to be published through a Notice of Proposed Rulemaking by the last quarter of 2023. Although EPA missed that deadline, it is expected that the forthcoming rulemaking would subject these four chemicals to corrective action requirements and would be a necessary building block for future work to regulate PFAS as a listed hazardous waste.

A second rulemaking is also anticipated which would clarify that the RCRA Corrective Action Program has the authority to require investigation and cleanup for wastes that meet the statutory definition of hazardous waste, as defined under RCRA section 1004(5). This modification would further clarify that emerging contaminants such as PFAS can be cleaned up through the RCRA corrective action process.

In its Second Annual Progress Report, EPA reported that it expects to propose these two rulemakings once interagency reviews are complete. Further developments are expected in 2024.

### **Emergency Planning and Community Right-to-Know Act (EPCRA)**

A final rule to strengthen PFAS reporting required under the Toxic Release Inventory (TRI) was published in October 2023. EPA's final rule was a major enhancement for TRI reporting purposes and eliminated the de minimis exemption for PFAS manufacturing, processing, or other use reporting thresholds of 100 pounds for each of the listed PFAS subject to TRI reporting. The prior reporting framework allowed facilities that report to TRI to disregard certain de minimis concentrations of PFAS chemicals in mixtures or trade name products (below 1 percent concentration for each of the TRI-listed PFAS). The final rule

eliminated the availability of the de minimis exemption and requires facilities to report on PFAS regardless of their concentration in products. Even more importantly, the EPA's final rule removed the availability of the de minimis exemption for purposes of the Supplier Notification Requirements for all chemicals on the list of chemicals of special concern. This change is designed to help ensure that purchasers of mixtures and trade name products containing such chemicals are informed of their presence in mixtures and products they purchase, regardless of their concentration. Normally, if these constituents are below certain de minimis levels, they are not published or reported on documents such as Safety Data Sheets (SDS) and similar documents provided by suppliers of raw materials and products. This aspect of the final rule takes effect with the first shipment of supplier's products in 2024 and is anticipated to close a significant data gap in PFAS reporting moving forward. This new information availability regarding the presence of PFAS in raw materials and products is anticipated to have wide-ranging implications.

For purposes of TRI reporting moving forward, for Reporting Year 2023 (reporting forms due by July 1, 2024), the EPA added nine additional PFAS to the TRI list for a total of 189 reportable PFAS. For Reporting Year 2024 (reporting forms due by July 1, 2025), the EPA has added seven additional PFAS to the TRI list for a total of 196 reportable PFAS. Facilities in TRI-covered industry sectors should begin tracking and collecting data on these chemicals during 2024.

### **Toxics Substances Control Act (TSCA)**

EPA is engaged in several actions related to PFAS under TSCA. See our [2024 TSCA forecast](#) article for further information.

### **TSCA Continues Focus on PFAS, CBI and Risk Evaluation**

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#### **TSCA PFAS Activities**

Over the past year, EPA continued to use its rulemaking authority under the Toxic Substances Control Act (TSCA) to address the manufacture and use of per- and polyfluoroalkyl substances (PFAS). Under TSCA Section 8(a)(7), which was added as part of the National Defense Authorization Act for fiscal year 2020, EPA was required to promulgate a rule by December 31, 2022, requiring each person that has manufactured a PFAS since January 1, 2011 to report certain information to EPA. On June 28, 2021, EPA published a proposed rule that required manufacturers and importers of PFAS in any year since 2011 to report chemical identity, categories of use, volumes manufactured or imported, and other information. Based on initial feedback, in November 2022, EPA announced that the agency would consider revisions to the PFAS reporting rule that would incorporate a number of exemptions analogous to the ones applicable to the TSCA Chemical Data Reporting Rule (CDR).

At the end of September 2023, EPA released a final rule, but rejected most of the previously suggested exemptions. Under the final PFAS reporting rule, any person who has manufactured for commercial purposes certain PFAS substances at any period from January 1, 2011 through December 31, 2022 must report specific information to EPA, including, among other things, chemical identity, use information, manufactured amounts, environmental and health effect data, and worker exposure data. This rulemaking will result in the publication of the largest-ever dataset of PFAS manufactured in the United States. Whether a PFAS substance is subject to reporting is determined using a structural definition that EPA estimates expands the number of PFAS that must be reported to potentially 1,462 substances. "Manufacturers"

includes importers of both PFAS chemical substances and articles that contain PFAS. Like the CDR, manufacturers are required to report information “to the extent known or reasonably ascertainable by” the manufacturer, but there is no de minimis threshold or exemption for unintentional impurities or byproducts as there is in the CDR. Accordingly, the final rule imposes some level of diligence that could include inquiries outside the organization to “fill gaps in the submitter’s knowledge.” Persons who have only processed, distributed in commerce, used and/or disposed of PFAS, however, are not subject to the final rule. The deadline for most subject PFAS manufacturers to submit the required information is May 8, 2025 (entities that qualify as “small manufacturers” are granted an extra six months). Accordingly, in 2024 companies potentially subject to the PFAS reporting rule will need to conduct the diligence necessary to evaluate the extent of their reporting obligations under the rule.

In addition, in May 2023 the EPA proposed revisions to its Section 5 new chemicals procedural regulations to ensure that new PFAS go through a full safety review process before entering commerce, which would eliminate eligibility for exemptions that had allowed some substances to go through an abbreviated analysis. This includes proposed amendments to the regulations for low volume exemptions (LVEs) and low release and exposure exemptions (LoREXs), which include requiring EPA approval of an exemption notice prior to commencement of manufacture, making per- and polyfluoroalkyl substances (PFAS) categorically ineligible for these exemptions. A final rulemaking is expected in April 2024.

Further tightening the review of new chemicals, in June 2023 the EPA announced a new framework for addressing new PFAS and new uses of PFAS. Under Section 5, EPA is typically required to review new chemicals, including new PFAS and new uses of PFAS, within 90 days, assess the potential risks to human health and the environment of the chemical, and make one of five possible risk determinations. The new framework will categorize PFAS uses that have (1) negligible exposures or no releases under use scenarios, (2) have low - but greater than negligible - potential for release and environmental exposure, and (3) PFAS uses expected to lead to exposure and environmental releases. For negligible or no release scenarios, EPA generally expects to allow the PFAS or the new use of a PFAS to enter commerce after receiving basic information, such as physical-chemical property data about the substance. For greater than negligible PFAS potential for release, EPA anticipates that it will generally expect to require test data in addition to physical chemical properties, such as toxicokinetic data, before allowing manufacturing to commence. For more significant exposure and release scenarios, the EPA generally expects that the substance would not be allowed to enter commerce before extensive testing is conducted on physical/chemical properties, toxicity and fate. The Framework applies to new PFAS or new use notices that are currently under EPA review, as well as any that EPA may receive in the future moving forward.

Finally, on January 8, 2024, EPA announced that it had finalized a significant new use rule (SNUR) under section 5(a)(2) that prohibits the manufacture, import or processing of “inactive” PFAS without notice to EPA and a review by the agency of the risks associated with that PFAS under EPA’s framework for new PFAS and new uses of PFAS (referenced above). According to EPA, this SNUR would affect 329 PFAS that have not been manufactured, imported, or processed in the United States since June 21, 2006. In short, anyone wishing to manufacture or process any of the 329 PFAS is now required to seek EPA review of the activity by submitting a Significant New Use Notice to EPA and complying with any applicable requirements resulting from such review.

### **CBI Claims under TSCA**

In June 2023, EPA published a final rule concerning submitting and supporting confidential business information (CBI) claims under TSCA. The final rule attempts to consolidate the TSCA CBI provisions

currently found in other TSCA regulations and EPA's FOIA regulations into a new Part 703. Substantively, the proposed regulations are generally consistent with the guidance and forms the EPA has been using to implement the confidentiality provisions of the 2016 Lautenberg Act amendments to TSCA. In particular, the new rules confirm that CBI claims must be accompanied by substantiation at the time of submission and provides standardized questions that must be answered on items such as the extent and likelihood of competitive harm upon release of the information. Consistent with the standardized approach, the final rule contemplates using the electronic Central Data Exchange (CDX) platform to submit nearly all substantiation information and for EPA to communicate to submitters any follow-up questions, determinations, or notices of pending expiration of CBI claims. Likewise, any conclusion that a CBI claim is deficient will be communicated through CDX and the submitter will have ten days to correct the deficiency. Notably, EPA declined to include a proposed reconsideration process for denied CBI claims. Instead, the final rule keeps in place an existing process whereby submitters are welcome to contact EPA with any concerns before filing a judicial appeal.

The final TSCA CBI rule may not be the final word on this issue, however, as both environmental and industry groups have challenged the rule before the DC Circuit, with the environmental groups arguing that the rule unlawfully allows EPA to withhold information as CBI, while the industry groups argue that the rule does not do enough to protect CBI from disclosure.

### **TSCA Risk Evaluations—TCE in the Spotlight**

Finally, in 2023, EPA continued to conduct risk re-evaluations, using a “whole chemical approach,” for the “first ten” high priority substances previously evaluated during the Trump Administration. Most notably, in October 2023, EPA proposed a rule that would ban the manufacture, import, processing and distribution in commerce of trichloroethylene (TCE) for all uses, and prohibit the disposal of TCE to industrial pre-treatment, industrial treatment, or publicly owned treatment works. While not unexpected, the decision to ban TCE is not without controversy, and litigation will likely follow adoption of any final rule in 2024. Along these lines, in 2024 EPA is expected to propose rules that would ban the use of methylene chloride, phase out the use of perchloroethylene (PCE), and restrict the use of carbon tetrachloride and asbestos.

EPA has also announced that it is initiating the risk prioritization process for five chemical substances, acetaldehyde, acrylonitrile, benzenamine, vinyl chloride, and 4,4'-Methylenbis (2-chloroniline) (MBOCA), to determine whether they should be designated as “High Priority Substances” for risk evaluation under TSCA Section 6(b). In addition, EPA indicated that it plans to issue a proposed rule that would require manufacturers and importers to submit to EPA certain unpublished health and safety studies. The agency is currently planning for a final rule to be issued in September 2024.

### **EPA Expected to Finalize PFAS Maximum Contaminant Levels**

***Bryan P. Franey, Esq.***

In early 2024, EPA is expected to finalize new maximum contaminant levels (MCLs) and new and revised maximum contaminant level goals (MCLGs) for six PFAS compounds: perfluorooctanoic acid (PFOA) and perfluorooctanesulfonic acid (PFOS), perfluorohexane sulfonic acid (PFHxS), hexafluoropropylene oxide dimer acid (HFPO-DA) and its ammonium salts (commonly known as GenX chemicals), perfluorononanoic acid (PFNA), and perfluorobutane sulfonic acid (PFBS). EPA had originally targeted the end of 2023 as the finalization date.

As we noted in a [March 2023 Client Alert](#), an MCL is an enforceable standard, defined as the maximum level allowed of a contaminant or mixture of contaminants in water that is delivered to any use of a public water system. In contrast, an MCLG is a non-enforceable public health goal, defined as the maximum level of a contaminant in drinking water at which no known or anticipated adverse effect on the health of persons would occur, allowing an adequate margin of safety.

The proposed MCLs and MCLGs are as follows:

Compound	Proposed MCLG	Proposed MCL
PFOA	Zero	4.0 parts per trillion (ppt)
PFOS	Zero	4.0 ppt
PFNA PFHxS HFPO-DA and its ammonium salt PFHxS PFBS	Hazard Index 1.0 (unitless)*	Hazard Index 1.0 (unitless)*

\* The total sum of each PFAS hazard quotient (determined by dividing the measured level of each of the four PFAS in drinking water by a health reference value for each PFAS).

The proposed regulations would require public water systems that detect PFAS above the MCLs to install treatment technology and would impose additional monitoring, recordkeeping and reporting requirements. Once finalized, the MCLs would become the national limits for the six PFAS in drinking water, replacing the individual MCLs promulgated by state (unless the state has established more stringent standards).

Please contact MGKF's Bryan Franey if you have questions about the new MCLs at [bfraney@mankogold.com](mailto:bfraney@mankogold.com) or 484-430-2308.

## **Focus on Emerging Contaminants Will Drive Superfund Activity Even More in 2024** **Garrett D. Trego, Esq.**

The source of funding for 2024 federal Environmental Protection Agency Superfund enforcement is slated to transition from general appropriations to the reinstated Superfund tax brought about by the passage of the Infrastructure Investment and Jobs Act and the [Inflation Reduction Act](#) early in the Biden Administration. High among EPA's identified priorities under this new funding structure for 2024 is continuing to expand the focus on perfluorinated compounds and emerging contaminants at both existing sites and new sites. EPA has noted that the emerging threat associated with these substances has led to fewer Superfund sites obtaining a "ready for reuse" designation in recent years and others having that designation stripped away, based on the need for additional investigation or controls.

With the proposed listing of six perfluorinated compounds as CERCLA "hazardous substances," 2024 is likely to shift regulators' focus from the investigation phase for these substances to the feasibility study and remedy phases. Along with the continued steady progress of the federal Superfund program, it will not be a surprise to see an increased number of proposed additions to the National Priority List where these emerging contaminants are key remediation drivers, and other existing sites re-examining how they are addressed.

## **EPA Will Be Active in FIFRA Enforcement on Antimicrobial Pesticides**

**Garrett D. Trego, Esq.**

A “pesticide,” as defined for regulatory purposes under the Federal Insecticide Fungicide and Rodenticide Act (FIFRA) is anything *intended* to mitigate a pest, including microbial pests like bacteria and viruses. Manufacturers, importers, distributors, and retailers must be aware that if promotional materials suggest a product will kill, limit, or otherwise control such a pest, EPA and state environmental or agricultural agencies are likely to assert jurisdiction.

The range of products potentially subject to FIFRA regulation continues to surprise some, particularly as EPA’s enforcement of these regulations increased with the pandemic. Companies surprised by enforcement of these regulations are often further disappointed to discover the significance of the civil penalties associated with alleged violations of the statute. EPA continues to negotiate [significant settlements](#) in this area, with no sign of slowing down in 2024.

With respect to rulemaking, EPA has proposed [new rules on treated seed and treated paint products](#), often already subject to FIFRA regulations but exempt from certain requirements through the “treated article” exemption in 40 CFR 152.25(a). The new rule is targeted at increasing awareness of potential risks associated with the pesticides used to treat these products by ensuring that warnings associated with the underlying pesticides are passed on with the final product. Comment on this rule closed in December 2023, and a final version may be promulgated in 2024.

## **WATER:**

### **US Supreme Court Narrows Scope of CWA Jurisdiction Over Wetlands; EPA and Army Corps Finalize Rule in Response; and the Litigation Keeps on Coming**

**Todd D. Kantorczyk, Esq.**

When we updated the ongoing saga that is the effort to define the extent of wetlands that qualify as Waters of the United States (WOTUS) subject to federal Clean Water Act jurisdiction as part of the [2023 Forecast](#) issue, the EPA and the Department of the Army had just announced a final rule that reverted to the WOTUS definition in place before 2015. That rule took effect in March 2023, and shortly thereafter 26 states and various industry groups filed lawsuits challenging the rule. The actions resulted in two injunctions that blocked implementation of the rule in 26 states. As predicted, however, the Supreme Court subsequently issued its decision in *Sackett v. EPA*, which significantly narrowed the scope of adjacent wetlands that qualify as WOTUS by explicitly rejecting the “significant nexus” test that was in place before 2015 and replacing it with a “continuous surface connection test.” As a result, in September 2023 USEPA issued an amended final rule to conform with the *Sackett* ruling. Of course, litigation has resumed, once again raising the prospect of a patchwork of rules to determine when federal permits are necessary for projects that impact wetlands.

As noted, the holding in *Sackett* limited the authority of EPA to regulate wetlands by embracing a “continuous surface connection test” to determine if adjacent wetlands are subject to the Clean Water Act (CWA). In doing so, the Court explicitly rejected Justice Kennedy’s “significant nexus” test from *Rapanos v. United States*. While the 9-0 decision was unanimous in judgment by holding that the Sacketts’ wetland was not subject to federal jurisdiction, the court was sharply divided as to the test to determine when an

adjacent wetland qualifies as a WOTUS. A five-justice majority held that the CWA's jurisdiction includes only adjacent wetlands that are indistinguishable from WOTUS due to a continuous surface connection. Under this framework, for an adjacent wetland to be subject to CWA jurisdiction, the adjacent body of water must constitute a WOTUS, and the adjacent wetland must have a continuous surface connection with the WOTUS, such that it is difficult to determine where the body of water ends, and the wetland begins. A more detailed description of the *Sackett* case can be found in our [May 2023 MGKF Litigation blog post](#).

Following the *Sackett* decision, the agencies requested and received stays in the litigation challenging the March 2023 WOTUS rule so that the agencies could amend the rule to conform with *Sackett*. This conforming rule was issued as a final rule at the beginning of September 2023. Consistent with the *Sackett* decision, the September 2023 WOTUS rule removed all references to the significant nexus test and limited the term "adjacent" to mean having a continuous surface connection.

Issuance of the September conforming rule, however, did not resolve the WOTUS litigation that had been stayed following *Sackett*. Indeed, the plaintiffs have recently sought to revive those lawsuits, in one case amending the complaint to argue that the September conforming rule still exceeds CWA authority and that the agencies violated that Administrative Procedure Act by foregoing public comment. Additionally, House Democrats and Senate Republicans have floated bills to amend the CWA and redefine WOTUS, although prospects for either bill are low given the current makeup on Congress.

In sum, while the universe of wetlands subject to federal jurisdiction is likely be smaller in 2024 than in years past due to the *Sackett* decision and issuance of the September final rule, the back and forth, and resultant uncertainty surrounding the scope of WOTUS subject to CWA jurisdiction will continue to persist and bears watching as the pending cases move forward.

## **UCMR5 Compliance Expected to Increase Available Public Data on PFAS Compounds in Drinking Water and Support Potential Future Rulemaking**

***Brenda H. Gotanda, Esq. and Technical Consultant Will Hitchcock***

Sampling required by EPA's Fifth Unregulated Contaminant Monitoring Rule 5 (UCMR5) will continue in the year ahead, resulting in greater public awareness of the presence of per- and polyfluoroalkyl substances (PFAS) in public drinking water as well as providing key data for potential future PFAS rulemaking and compliance.

UCMR5 requires certain public water systems to sample and analyze their water for 29 PFAS compounds (and lithium) between 2023 and 2025 and to submit the data to EPA. The UCMR5 monitoring rule is used to collect nationally representative data on contaminants that EPA suspects are present in drinking water, but for which no regulatory standards have been established under the Safe Drinking Water Act. The required monitoring provides EPA with information on the occurrence and levels of specified unregulated contaminants in the nation's drinking water. Among other things, the required monitoring is expected to provide EPA with a better understanding of where and to what extent different PFAS co-occur with each other in drinking water, and to help it make determinations about potential future regulation of PFAS (and lithium) and other actions to protect public health under the Safe Drinking Water Act. In March 2023, EPA [proposed to regulate six types of PFAS in drinking water](#) through a proposed National Primary Drinking

Water Regulation. If finalized as proposed, covered public water systems would be allowed to use data collected under UCMR5 to satisfy certain initial monitoring requirements.

EPA makes the monitoring data available to the public on its UCMR5 website and provides periodic summaries of the data. Currently, only about 15 percent of the expected sampling data has been made publicly available. Thus, we expect to see considerably more data released in the year ahead. Based on EPA's most recent summary of UCMR5 data (published in October 2023), PFOA and PFOS were detected above EPA's Health Advisory Levels for 9.5 percent and 10.7 percent, respectively, of the public water systems with results to date.

The Bipartisan Infrastructure Law has made considerable public funding available to address water supplies impacted by PFAS, particularly for those serving small or disadvantaged communities. Our firm represents public water system operators addressing PFAS issues and has provided guidance on UCMR5 sampling and other matters. If you have questions or would like assistance, please contact [Will Hitchcock](#) or [Brenda Gotanda](#) at our firm.

## **EPA Proposes Federal Water Quality Standards to Protect Fish Propagation in the Delaware River**

***Brenda H. Gotanda, Esq.***

As we head into 2024, the United States Environmental Protection Agency (EPA) is seeking to establish federal water quality standards for certain zones of the Delaware River in Pennsylvania, New Jersey, and Delaware in order to increase protection of fish and aquatic life. In particular, EPA is proposing to add a new designated use of aquatic life propagation and to establish associated water quality criteria to raise the dissolved oxygen levels in the waterbody. The proposed federal water quality standards would apply to the areas of Delaware River designated as Zone 3, Zone 4, and the upper portion of Zone 5, which stretches roughly from the Philadelphia, PA and Camden, NJ area down to Wilmington, DE (river miles 108.4 to 70.0).

On December 21, 2023, EPA published a proposed rule in the Federal Register to elevate the designated use of the covered waters from "maintenance" and "passage" of fish and other aquatic life to a designated use that includes "propagation" of resident and migratory aquatic life. EPA views propagation as the production, growth, and survival of early life stages of aquatic species that result in the addition of new individuals to the population. The proposal, if finalized, would also establish water quality criteria for dissolved oxygen that EPA believes are necessary to support propagation. According to EPA, it based the proposed new criteria on the oxygen needs of the most oxygen-sensitive fish species in the covered waters, the Shortnose Sturgeon and the Atlantic Sturgeon, both federally listed endangered species.

EPA's regulatory action follows an [Administrator's Determination](#) issued by EPA on December 1, 2022 in which it concluded that the broader designated use of "propagation," and corresponding dissolved oxygen criteria to support that use, are necessary to meet the requirements of the Clean Water Act. EPA's Determination was issued in response to a petition submitted by a group of non-governmental organizations (NGO) that sought to bypass an ongoing rulemaking process that was already underway at the Delaware River Basin Commission (DRBC). DRBC had adopted a resolution in 2017 ([Resolution 2017-4](#)) directing its staff to initiate a rulemaking process on propagation, but to first undertake necessary

scientific and technical studies to determine what would be the highest attainable use and associated dissolved oxygen criteria. DRBC undertook a multi-year analysis that involved, among other things, 3-D water quality modeling and a series of studies to evaluate the physical, chemical, biological, social and economic factors affecting the attainment of uses. In September 2022, DRBC released its draft report entitled [Analysis of Attainability: Improving Dissolved Oxygen and Aquatic Life Uses in The Delaware River Estuary](#). The NGO petition sought to put EPA in the lead on rulemaking. Following issuance of EPA’s Determination, DRBC suspended its own rulemaking process and deferred to EPA, stating that it will work with EPA and the affected states and stakeholders with respect to implementation of new standards.

In the proposed rule, EPA states that its proposed designated use of “protection and propagation of resident and migratory aquatic life” would apply in addition to any designated uses already established by the states for areas under their jurisdiction. According to EPA, this federally established designated use would apply in Pennsylvania and New Jersey, which do not already have propagation as a use in the zones but would not apply in Delaware since that state already has water quality standards that include propagation and apply to the waterbody.

EPA is proposing to establish federal dissolved oxygen water quality criteria that would replace existing criteria for the affected zones of the Delaware River in all three states. The proposed criteria, shown in Table 1 below, include magnitude, duration, and exceedance frequency elements that would be set for three distinct seasons. The magnitude element indicates the required minimum level of dissolved oxygen in the waterbody and the duration element indicates the time period over which dissolved oxygen levels are averaged for comparison with the magnitude percentage. The exceedance frequency element indicates how often each magnitude level can be exceeded during the season while still ensuring that the designated use is protected. EPA notes that a dissolved oxygen exceedance occurs when the oxygen level in the water is below the criterion value. EPA has proposed to use a single dissolved oxygen criterion value in two seasons (*Spawning and Larval Development* season and *Overwintering* season) and to use two individually applicable criteria (both levels must be attained) in the third season (*Juvenile Development* season).

<b>Table 1 EPA’s Proposed Dissolved Oxygen Criteria</b>			
<b>Season</b>	<b>Magnitude (Percent Oxygen Saturation)</b>	<b>Duration</b>	<b>Exceedance Frequency</b>
<i>Spawning and Larval Development</i> (March 1 – June 30)	66%	Daily Average	10% (12 Days Cumulative)
<i>Juvenile Development</i> (July 1 – October 31)	66%	Daily Average	10% (12 Days Cumulative)
	74%	Daily Average	50% (61 Days Cumulative)
<i>Overwintering</i> (November 1 – February 28/29)	66%	Daily Average	10% (12 Days Cumulative)

If finalized, the new standards may form the basis for new limits in NPDES discharge permits issued by the states to dischargers with a reasonable potential to exceed the new standards. However, EPA also notes that states may also consider alternative regulatory approaches for implementation such as the use of variances and permit compliance schedules where appropriate under the Clean Water Act.

EPA anticipates that additional pollution control technologies will be required at certain wastewater treatment plants to reduce effluent ammonia nitrogen concentrations and raise effluent dissolved oxygen concentrations in order to meet the new water quality standards. It has estimated annualized compliance costs to be over \$137 million (applied over a 30-year period with a 3 percent discount rate) in total.

Noting that it is only proposing to establish federal water quality criteria addressing dissolved oxygen in specified zones, EPA recommends in its proposal that the states of Delaware, Pennsylvania and New Jersey undertake an evaluation to determine whether any aquatic life water quality criteria for other pollutants or parameters should be added or revised for the specified zones or other zones of the Delaware River in order to ensure they are sufficient to support the designated use that EPA establishes as part of a final rulemaking.

EPA is accepting comments on the proposed rulemaking through February 20, 2024.

If you have questions concerning the proposal or are seeking assistance in preparing comments, please contact [Brenda Gotanda](#) at 484-430-2327.

## **OTHER FEDERAL ISSUES:**

### **Feds Continued to Advance Environmental Justice Priorities in 2023, But Questions on Effectiveness and Authority Emerge**

***Todd D. Kantorczyk, Esq.***

At this time last year, we reported on how both EPA and the US Department of Justice (DOJ) made structural changes and issued a number of policy and guidance documents intended to facilitate implementation of the environmental justice (EJ) priorities articulated at the outset of the Biden Administration through enforcement of existing environmental laws. In 2023, both agencies continued those efforts and reported on measurable progress with respect to EJ concerns. At the same time, and as we predicted, the pursuit of EJ priorities at the federal level has not been without challenges. In particular, the ultimate outcome of the EPA's civil rights investigation into Louisiana's environmental permitting practices, which was [noted in last year's issue](#), may establish some limits on EPA authority to pursue EJ initiatives absent additional statutory authority.

## **EPA**

The pace of structural changes and new policy and guidance documents related to EJ coming out of EPA in 2023 was somewhat slower as compared to 2022, as EPA worked to integrate the programs announced in 2022. At the outset of 2023, EPA released guidance on assessing cumulative impacts as an addendum to EPA's *Legal Tools to Advance Environmental Justice* document, which itself was updated in 2022. The addendum was intended to provide "further detail and analysis, and some illustrative examples of the Agency's authority to advance environmental justice and equity by addressing cumulative impacts." In

August, EPA updated its mapping and screening tool, EJSCREEN, for the third time. This most recent update, among other things, adds a new indicator to quantify health impacts from air exposure to Toxic Release Inventory (TRI) chemicals. Most recently, EPA proposed changes to its *Technical Guidance Document for Assessing Environmental Justice in Regulatory Analysis*, which was first released in 2016. Among other things, this document updates various EJ definitions and emphasizes the need for consideration of EJ issues early in the rulemaking process. Interestingly, in a section about multiple exposures and cumulative effects—an important issue for EJ assessments—EPA acknowledges that the science regarding assessments of cumulative risks is “evolving” and does not provide a specific assessment approach.

EPA made significant strides in 2023 regarding enforcement activities in EJ communities. In its 2022-26 Strategic Plan, EPA had set a goal to increase the percentage of annual on-site inspections in EJ communities from 30 percent to 55 percent by 2026. At the end of 2023, EPA announced that it has already achieved this goal, with 60 percent of onsite inspections occurring in EJ communities. Additionally, of almost 1,800 civil settlements, over 55 percent related to facilities in EJ communities.

## DOJ

Like EPA, DOJ continued to make progress in 2023 on previously announced EJ priorities. In October, DOJ released its first Comprehensive Environmental Justice Enforcement Strategy Annual Report. The report steps through each of the [four principles of the DOJ EJ strategy announced in 2022](#), noting the progress made under each principle. In particular, the report notes that each of the 94 US Attorneys’ offices has appointed at least one civil or criminal prosecutor to serve as an Environmental Justice Coordinator. And throughout the report, DOJ highlights efforts surrounding enforcement pursued by its Civil, Civil Rights and Environment and Natural Resource Divisions, including:

- Interim resolution of its first Title VI EJ investigation into the Alabama Department of Public Health concerning its onsite wastewater disposal program in Lowndes County;
- A settlement of an EJ investigation of the City of Houston’s response to illegal dumping in Black and Latino neighborhoods;
- A lawsuit and settlement with City and State officials concerning the drinking water system in Jackson, Mississippi; and
- A lawsuit against Denka Performance Elastomers concerning chloropene emissions coming out of EPA’s EJ investigation of the Louisiana Department of Environmental Quality air permitting program.

## Potential EJ Pushback in 2024?

While 2023 saw EJ efforts by both EPA and DOJ continue to advance using current statutory authority, there were some developments that could signal a more complicated path for EJ initiatives in 2024. For example, In August, EPA’s Office of Inspector General released a report of its audit of actions taken by EPA to address disproportionate effects to disadvantaged communities at the 35<sup>th</sup> Avenue Superfund Site in Birmingham, AL. The audit concluded that despite EPA developing guidance and plans, EJ issues remained “siloes” in individual programs, and that improved coordination and performance measures were necessary to be able to address cumulative impacts in EJ communities.

Additionally, state targets of EPA EJ enforcement efforts have begun to challenge the extent of EPA’s authority in the EJ space. Most notably, readers may recall that in 2022, EPA and the State of Louisiana entered into negotiations as to whether the State’s air permitting program had “an adverse and disparate

impact on Black residents.... resulted in disparate impacts” in violation of Title VI of the Civil Right Act. After negotiations broke down, the State sued EPA, and sought a preliminary injunction to prevent EPA from applying disparate impact and cumulative impact requirements as part of its oversight of Louisiana’s permit program. Shortly thereafter, EPA dropped its investigation and moved to dismiss the case as moot, stating that it had filed a separate lawsuit against Denka Performance Elastomers (as noted above) and that EPA planned to conduct its own cumulative impact analysis. Louisiana, however, opposed the motion to dismiss, arguing that the proper standard under Title VI is intentional discrimination, and the continued concern over disparate and cumulative impacts was unlawful. EPA’s motion remains pending before the US District Court for Western Louisiana. A ruling from the Court that intentional discrimination from is necessary to support an EJ based Title VI claim could seriously hamper EPA and DOJ EJ enforcement efforts going forward.

In short, in 2024 we expect EPA, DOJ and other federal agencies to continue to incorporate EJ concerns into policies, guidance and procedures, although the pace of new documents being issued may not be as furious in years past. We also expect EJ related enforcement efforts to increase. At the same time, states and other stakeholders have begun to push back, and those efforts, in particular the Louisiana matter, could significantly alter the course of federal EJ enforcement going forward.

## **Pennsylvania Hydrogen Hubs – A Vision for Pennsylvania’s Clean Energy Future**

***Diana A. Silva, Esq.***

In late-October 2023, the Biden Administration announced that it would provide \$1.6 billion to help fund the creation of two hydrogen hubs – the [Mid-Atlantic Clean Hydrogen Hub, known as “MACH2,”](#) and the [Appalachian Regional Clean Hydrogen Hub, known as “ARCH2”](#) – both of which are located in part in the Commonwealth of Pennsylvania. MACH2 is slated for development in the broader Philadelphia metro area and involves a coalition of states on both sides of the Delaware River including Pennsylvania, New Jersey, and Delaware. MACH2 involves a broad list of benefactors and partners including government entities, regional universities, labor organizations, and key industry stakeholders, including electric and gas utilities, energy companies, petrochemical companies, and regional manufacturers. ARCH2 is situated on the opposite side of the Commonwealth in the broader Pittsburgh metro area and adjacent Ohio and West Virginia. ARCH2 likewise involves a broad coalition of state and local governments, academic institutions, labor organizations, and private industries located throughout the Appalachian region.

Federal funding for the hydrogen hubs comes from the 2021 Infrastructure and Investment Jobs Act and is being administered by the U.S. Department of Energy’s Office of Clean Energy Demonstration, which allocated \$7 billion to fund the development of hydrogen hubs across the country. The funding was awarded through a competitive process, and in 2023 only seven hydrogen hubs were provided funding, including both MACH2 and ARCH2.

Hydrogen is utilized for a variety of domestic energy needs, and can be used for electrical power generation, transportation fuel, and as feedstock for various manufacturing and industrial processes. The hydrogen hubs are anticipated to produce low-cost clean hydrogen, develop hydrogen pipelines, storage vessels, and fueling stations, and support other downstream projects and facilities that will utilize the clean hydrogen as fuel or feedstock.

Preliminary concept plans for projects involved in MACH2 include development of fleet fueling stations, retrofitting existing pipelines and above-ground storage tanks for hydrogen transport and storage, carbon capture projects, and providing connections to end-users of hydrogen for manufacturing industries in the broader Philadelphia region.

For ARCH2, which is located in one of the largest natural-gas producing regions in the world generated from the Marcellus and Utica shale formations, proposed projects include development of hydrogen fuel storage and delivery stations, power generation and residential fuel cells, transportation fuels, carbon capture projects, development of pipelines and storage facilities, low-carbon ammonia production, and connections to end-users of hydrogen in manufacturing facilities.

Both MACH2 and ARCH2 are expected to create tens of thousands of new jobs. MACH2 is anticipated to create more than 20,800 direct jobs, including 13,400 in the construction sector and 6,400 permanent jobs. Likewise, ARCH2 is anticipated to create over 21,000 direct jobs, including more than 18,000 construction jobs and 3,000 permanent jobs. Both projects incorporate community benefit plans and workforce initiatives to ensure that projects are developed in a manner that will reinvigorate local economies and provide opportunities for professional development in the local area.

As funding was just awarded for MACH2 and ARCH2 in the final quarter of 2023, 2024 is likely to bring a flurry of activity for both hydrogen hubs, as funds begin to be distributed from the federal government, and the proposed projects move from the conceptual stage to implementation. There are four anticipated phases for use of the federal funding – which so far has only been awarded for the first phase of the process. Phase 1 encompasses initial planning and analysis of proposed projects to determine if they are feasible and financially viable and requires detailed plans to be developed within 12-8 months, i.e., by late-2024 to mid-2025. Phase 2 will include completion of engineering designs, permitting, and related agreements, and is anticipated to begin within 2-3 years, i.e., in 2025-2026. Phase 3 will include the implementation of the projects through beginning installation and construction. Phase 4 anticipates that the hydrogen hubs will be fully operating, with continued data analysis to evaluate the hydrogen hub's performance and financial viability. Each phase of the process will include community engagement and involvement of local stakeholders.

The MACH2 and ARCH2 hydrogen hubs present a unique opportunity for the Commonwealth of Pennsylvania to leverage its existing infrastructure, technical capabilities, scientific and academic strengths, labor force, and manufacturing and industrial operations to continue to serve as a model for the development of clean and sustainable energy.

## **Review of Supreme Court Docket** ***Shoshana (Suzanne Ilene) Schiller, Esq.***

### **Like A Good Neighbor? Supreme Court Will Hear Argument on Cross-State Pollution Plan**

On December 20, 2023, the United States Supreme Court consolidated and scheduled oral argument on several emergency applications seeking a stay of the EPA's "Good Neighbor Rule," which requires more than 20 states to reduce air pollution that impacts downwind states who must meet certain health-based air

quality standards for ground-level ozone. And the Court will go to the heart of the matter, requesting that the parties “be prepared to address . . . issues related to the challenge based on [State Implementation Plan] disapprovals [and] whether the emissions controls imposed by the Rule are reasonable regardless of the number of States subject to the Rule.”

Under the Clean Air Act, states must submit State Implementation Plans (SIPs), to be approved by EPA, setting forth how the state intends to meet national air quality standards for air pollutants. EPA further requires upwind states to address in their SIPs emissions that cause downwind states to exceed the air quality standards through no “fault” of their own. In 2021, the EPA rejected SIPs from 21 states because they did not adequately control for ozone emissions in downwind states. This then triggered EPA’s obligation to create a national plan for the states whose SIPs were not approved and in March of 2023, EPA issued the Good Neighbor Rule for those states.

Petitions for Review were filed in the D.C. Circuit by a number of states whose SIPs were disapproved, as well as industry groups and companies particularly affected by the emissions limitations. Among other things, the state petitioners claim that the Rule violates the Clean Air Act’s provisions directing each state to be responsible for controlling emissions within their state. Certain industry players also sought relief, contending that the Rule’s standards are vague, irrational and cannot be met without significantly overburdening businesses. On the other hand, several states subject to the Rule, including Pennsylvania, New Jersey, New York and Delaware, have sided with EPA along with a number of public interest entities. Interestingly, the Justices did not stay the rule pending oral argument, nor did they treat the applications for stay as petitions for review. As a result, the current proceedings in the D.C. Circuit will continue, at least until the Court rules on the stay applications.

### **Chevron Deference Reaches the High Court, For Real This Time**

*Chevron* Deference is the principle by which courts will generally defer to an agency’s interpretation of an ambiguous statute and is so named because of its first articulation in the case of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). However, in recent years, its potency has been slowly eroding with the apparent encouragement of the Supreme Court. Most recently, in *West Virginia v. EPA*, 597 U.S. \_\_\_ (2022), the Supreme Court struck down EPA rulemaking under the Clean Air Act on the ground that it was a “major question” of economic and political significance. In doing so, the Supreme Court essentially ran an end run around *Chevron* without addressing it head on.

This year, however, the Supreme Court will be taking on two cases, *Relentless v. Department of Commerce*, No. 22-1219, and *Loper Bright Enterprises v. Raimondo*, No. 22-451, to directly confront the continued viability of *Chevron*. Scheduled for argument in January, the issue before the Court is whether *Chevron* should be overruled or “clarified” such that ambiguity is unlikely to be found. Under the current make-up of the Court, it seems unlikely that *Chevron* will survive in its current form. Justices Thomas, Kavanaugh, Gorsuch and Alito have all, in various ways, signaled their disapproval of the doctrine. The potential impact of overturning *Chevron* is vast, as it could significantly undermine the ability of federal agencies to issue and enforce regulations to effectuate the laws the Congress enacts. And in few areas of the law is an agency’s expertise as fundamental to rulemaking as in the field of environmental law.

### **When Is a Fee an Unconstitutional Taking?**

Also in January, the Court will hear oral argument on *Sheetz v. County of El Dorado, California*, No. 22-1074.

As a condition to receiving a building permit for a new home, the County of El Dorado imposed a “traffic impact mitigation fee” on landowner George Sheetz. Sheetz challenged the fee, arguing that, among other things, it violated the Takings Clause because there was no nexus or “rough proportionality” between the fee and the impact that would result from the building of his home. The California trial and appellate court rejected the argument, but the Supreme Court seems poised to disagree. If it does, the Court’s decision is likely to have a significant impact on municipalities’ abilities to charge environmental mitigation fees.

### **When Does a Rule Challenge Accrue?**

Another case this term that could have significance for environmental law is *Corner Post v. Bd. of Governors of the Fed. Reserve Sys.*, No. 22-1088. Under the Administrative Procedure Act (APA), the statute of limitations to challenge an agency rule is six years. But ... six years from when? In this case, the Supreme Court will decide whether a claim under the APA “first accrues” when an agency issues a rule, even if in the abstract there is no injury to the plaintiff, or when the rule first causes harm to the plaintiff.

In the case at bar, in 2011, the Federal Reserve set the fee for bank processing of debit card transactions at 21 cents per transaction, even though the actual cost is much less. In 2018, Corner Post, a convenience store, opened for business and in 2021, filed a challenge to the fee as unreasonable and not proportional to the actual transaction costs. Both the district court and the Eighth Circuit held that Corner Post’s claim was barred by the six-year limitations period, which ran in 2017. But of course, Corner Post could not have challenged the rule then because it wasn’t even in business at the time. In September, the Supreme Court agreed to hear the case during the current term and its decision could open up a floodgate of challenges to long-established administrative rules, including those issued by the EPA.

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