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2026 Environmental and Energy Law Forecast

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EPA FY 2026 Outlook: Staffing, Policy, and Shutdown Effects

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EPA's first quarter of the 2026 Fiscal Year was dominated by the longest government shutdown in U.S. history, with reopening of the Agency occurring just before the typical end-of-the-calendar-year slow down. The remainder of Fiscal Year 2026 will be governed in no small measure by the ongoing appropriations process, including the threat of yet another shutdown at the end of January. 2026 may be a year of uncertainty and unintended consequences for both the Agency and the regulated community.

Impact of the Shutdown

While the prolonged shutdown impacted both EPA's mission and personnel, one of the early indicators of these impacts will be the annual Brownfields grant application process. Every year EPA makes hundreds of millions of dollars in Brownfields funding available to local governments and nonprofits organizations to assess and cleanup eligible contaminated sites. Typically, applications for this funding are due sometime in November, but the shutdown forced EPA to move that deadline to January 28, 2026. The uncertainty and confusion surrounding the updated deadline may lead some potential applicants to miss the deadline or "sit out" this grant cycle.

Moreover, applying for a Brownfield grant is time and resource intensive, and many small local governments rely on technical assistance provided by EPA contractors to write a successful grant application and to identify the sometimes-subtle year-to-year changes in the grant application criteria and ensure their application addresses those changes. However, the government shutdown meant that many government contractors were also closed for business; hence, many small local governments and non-profits were not able to get the support they need to prepare a successful grant application. The combination of these factors could have a significant impact in the quantity and quality of Brownfield applications submitted in the 2026 grant cycle. Manko Gold Katcher & Fox can assist eligible entities navigate the uncertainties of the Brownfield grant process, including reviewing candidate properties for legal compliance, identifying technical assistance providers, and reviewing the complete application for legal sufficiency.

Feeling the Effects of Reduction in Personnel

While the final numbers are not yet in, EPA has incurred a significant reduction in staff, and – because the incentives to retire were particularly attractive to those closer to retirement age – a disproportionate number of those departing are senior, experienced staff. While EPA may claim that the reduction in staff will not result in loss of institutional knowledge, concerns in the regulated community focus on EPA's ability to timely respond to inquiries, for example responding to requests for comfort letters or prospective purchaser agreements. Many redevelopment projects are extremely time sensitive, and a delay in getting the necessary EPA approvals can spell the difference between a successful project or a "walk away" by a frustrated potential purchaser.

Another area impacted by personnel loss is in permit drafting or review. While the Trump Administration is committed to streamlining and expediting permit reviews, this may prove difficult with a reduced and inexperienced team. The

Agency can always get a permit "out the door" by a certain date, but a poorly drafted permit (or one with an inadequate record to support it) is ripe for a legal challenge, and the time saved by expediting the review can easily be dwarfed by the time lost in extended litigation. Permit applicants can improve their chances of obtaining a defensible permit in a timely fashion by communicating early and often with the EPA permit project team, and supporting the process by providing necessary technical support for the administrative record to ensure the permit can survive legal challenge.

Enforcement Policy – Clear Intentions – Unforeseen Consequences?
On December 5, 2025, EPA issued its "Compliance First" memo, which deemphasizes formal enforcement – especially civil litigation – in favor of an expeditious return to compliance. This has led some to speculate that state environmental agencies would begin to take the lead on environmental enforcement, but this may not be possible. Many states get a significant portion of their environmental enforcement budget from EPA, and early indications are that these states can expect to see a significant reduction in this funding. So, there appears to be no doubt that the regulated community can expect a reduction in Federal and state environmental enforcement, but does that mean there are no concerns on the enforcement horizon? There is some evidence to the contrary.

A review of hiring websites demonstrates that environmental public interest groups have been aggressively hiring since the beginning of 2025. They have particularly focused on litigation attorneys and have been scooping up experienced professionals separating from EPA. Moreover, during the Biden Administration many of these groups took advantage of generous grant opportunities to stock up on a myriad of technical devices (e.g., flare cameras, fence-line monitors, and drones) that allow them to conduct off-site monitoring of regulated entities to a degree here-to-fore unknown. Many environmental statutes include citizen suit provisions that allow citizens groups to directly enforce these statutes, but only if they first give notice to the applicable governmental agencies, and those agencies decline to enforce. These community-based groups can be aggressive in their demands, including attorney fees, and are not limited by enforcement discretion policies that can temper governmental approaches to enforcement. Will these "private attorneys general" pick up the enforcement "slack" left by EPA and the states? This remains to be seen, but if public interest environmental groups begin to aggressively occupy the space vacated by governmental agencies, the regulated community may feel as if they have escaped the frying pan only to land in the fire.

EPA Enforcement in 2026 Expected to be Heavily Influenced by Pritzlaff Memo

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On December 5, 2025, EPA Acting Assistant Administrator Craig Pritzlaff released an internal memo to EPA enforcement leaders outlining a "compliance first" strategy for both ongoing and new agency enforcement cases. The memo, entitled *Reinforcing a "Compliance First" Orientation for Compliance Assurance and Civil Enforcement Activities* establishes a clear vision for EPA's going forward approach to environmental compliance:

> *This policy reinforces prioritizing environmental compliance across all OECA civil judicial and administrative enforcement activities in the most efficient, most economical, and swiftest means possible, while ensuring that our actions align with the clearest, most defensible interpretations of our statutory and regulatory mandates.*

Citing as its foundation various Executive Orders and EPA guidance established under the Trump Administration, the Compliance First Policy identifies an enforcement framework that is based in the first instance on ensuring that compliance is achieved in the most efficient and quickest manner possible, using the following tools:

- EPA's **"Compliance Assistance Toolkit"** such as proactive outreach and training and voluntary find and fix programs;
- **State Partner Coordination** that promotes cooperative federalism and deference and support in program areas in which authorized states have primary jurisdiction;
- **Open Communication** with states, Tribes, and regulated entities to ensure efficiency and a "no surprises" framework;
- **Findings of Violation** that are clear and unambiguous, well-tailored, based on the best reading of the relevant statute or regulation, avoid expansive interpretations and reflect a consistent approach across EPA programs;
- **Compliance Requirements and Injunctive Relief**, where necessary, that is that is well-tailored to address specific violations, achieves compliance quickly, and is based on clear legal remedies and requirements; and
- **Reasoned Decision Making** on noncompliance and enforcement decisions based on the "LEAP" factors, consisting of law, evidence, analysis, programmatic impact, and stakeholder impact. Importantly, with respect to stakeholder impact, the memo contemplates acting swiftly to limit actions by third parties that may, through citizen suit litigation, "unfairly impact policy through abusive litigation tactics."

The Pritzlaff memo is clear that certain circumstances may nonetheless warrant immediate formal enforcement response, such as violations that present significant harm to human health and the environment, or where there is "serious, blatant, or knowing and repetitive noncompliance suggesting a lack of internal institutional controls and complete disregard of law." Nonetheless, the Pritzlaff memo may fundamentally alter EPA's enforcement approach in the coming year by prioritizing well-tailored enforcement decisions that promote a speedy return to compliance, with appropriate deference to state authorities in delegated programs. Under this approach, expansive interpretations and injunctive relief will be disfavored, with EPA making a clear move away from the April 26, 2021, EPA Memorandum entitled *Using All Appropriate Injunctive Relief Tools in Civil Enforcement Settlements* by rescinding the memo and suspending the use of settlement tools such as advanced monitoring, third-party audits and enhanced public reporting of compliance data. Further, measures designed to address past harm to communities, such as mitigation, stipulated remedies, and supplemental environmental projects, will be discontinued until additional guidance may be issued.

PFAS and Chemical Regulation:

Federal PFAS Regulation and Litigation: Developments, Implementation, and What to Expect in the Second Year of the Trump Administration

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Over the last two years, there has been a flurry of activity at the federal level related to the regulation of PFAS. In 2024, the Biden EPA finalized significant PFAS rulemakings under the Safe Drinking Water Act (SDWA) and Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), proposed regulations under the Resource Conservation and Recovery Act (RCRA), issued a significant guidance document on PFAS waste disposal and water quality criteria, and continued major PFAS data

collection and disclosure efforts under the Clean Water Act (CWA), SDWA, Toxic Substance Control Act (TSCA), and Emergency Planning and Community Right-to-Know Act (EPCRA).

As the Trump Administration took office in 2025, major questions hung over the fate of these regulatory and data collection efforts. In many respects, the Trump Administration has moved forward with PFAS regulation, but with relaxed deadlines and reduced requirements.

As we move into 2026, the Trump Administration is poised to press forward with PFAS regulations under RCRA and the CWA, while modifying deadlines and regulations under the SDWA and TSCA. The Trump Administration will also be defending appeals of the PFAS maximum contaminant levels under the SDWA and the PFOA/PFOS hazardous substance designation under CERCLA with decisions in those cases possible by the end of 2026.

Set forth below is a more detailed summary of the regulatory developments from EPA under each of the following federal legislative programs and anticipated activities throughout 2026.

Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)
In April 2024, EPA under the Biden Administration finalized a rulemaking designating perfluorooctanoic acid (PFOA) and perfluorooctanesulfonic acid (PFOS) (including their salts and structural isomers) as hazardous substances under CERCLA. The designation of PFOA and PFOS as hazardous substances under CERCLA has had an immediate impact on real estate transactions. Environmental professionals conducting an ASTM Phase I Environmental Site Assessment (for purpose of seeking landowner liability protections under CERCLA) must include PFOA and PFOS in the evaluation. Determining whether a release of PFOA and PFOS occurred in the past has proven difficult in some cases and has resulted in a wide range of conclusions by environmental professionals, which can complicate or delay transactions. The longer-term impacts are uncertain but potentially substantial. The wide-spread nature of PFOA and PFOS and the ultra-low remediation standards could greatly expand cleanup obligations at existing Superfund sites or add many new sites to the National Priorities List.

Shortly after EPA promulgated the final rule designating PFOA and PFOS as hazardous substances under CERCLA, several industry groups, led by the U.S. Chamber of Commerce, filed suit to challenge that decision in the D.C. Circuit. In February 2025, the D.C. Circuit granted a request by EPA to hold the case in abeyance pending the Trump Administration's review of the hazardous substance designation. In September 2025, the Trump Administration announced that it intended to keep the hazardous substance designation for PFOA and PFAS and would defend the rule. The case was removed from abeyance and briefing resumed in November and December 2025. Oral argument is currently scheduled for January 20, 2026, with a decision possible later in the year.

Two other issues to watch in 2026 relate to the status of "passive receivers" of PFOA and PFOS and EPA's plan to propose a framework for guiding future hazardous substance designations (the "Framework Rule"). First, with respect to "passive receivers," EPA announced that it intended to work with Congress to amend CERCLA to provide "passive receivers" with statutory protection from liability for PFOA and PFOS. CERCLA's retroactive and strict liability scheme can broadly apply to entities such as publicly owned wastewater treatment plants, farms, fire departments, or landfills that did not manufacture or generate PFOA or PFOS, but "passively received" PFOA and PFOS in raw materials, products, or wastes. Several members of Congress have raised concerns with EPA that local municipalities (and thus local ratepayers or taxpayers) may be on the hook for significant cleanup costs for any contamination from such passive

receivers. EPA has previously issued guidance indicating that it would exercise enforcement discretion against certain passive receivers and focus instead on PFAS manufacturers or upstream users.

Second, with respect to the Framework Rule, EPA announced that the rule would provide a uniform approach to future hazardous substance designations, including how EPA would consider the costs of proposed designations. The Framework Rule will provide a process for EPA to potentially designate other PFAS compounds as hazardous substances under CERCLA.

Safe Drinking Water Act and Clean Water Act

PFAS MCL / National Primary Drinking Water Regulations

In May 2025, EPA announced that it intended to keep the maximum contaminant levels (MCLs) under the National Primary Drinking Water Regulations (NPDWR) for PFOA and PFOS but rescind the MCLs finalized by EPA during the Biden Administration in 2024 for four other PFAS compounds. In addition, EPA announced that it intended to extend the compliance deadline for the PFOA and PFOS MCLs from April 26, 2029, until April 26, 2031, and establish a "federal exemption framework" for certain water systems facing challenges such as economic hardship or lack of alternative water sources. According to EPA's most recent Unified Agenda, EPA originally identified October 2025 as the target proposal date with a goal of finalizing the rule modifications by spring 2026. However, as of the publication date of this article, no proposed rule had been issued by EPA.

In deciding to keep the MCLs for PFOA and PFOS, the Trump EPA also committed to defending the rulemaking in a challenge brought by several industry groups before the D.C. Circuit. The case (*American Water Works Association v. EPA*, Case No. 24-1188) is currently being briefed with a decision possible in the second half of 2026.

Unregulated Contaminant Monitoring Rule (UCMR 5)

Starting in mid-2023 and continuing through early 2026, the EPA has been releasing the much-anticipated PFAS occurrence data for public drinking water systems through the UCMR 5. Officially ending in December 2025, the UCMR 5 required 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 EPA, and ultimately to the public. The release of UCMR 5 data, which has been published quarterly 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 as referenced below.

Based on the most recent release of data (as of this publication), the EPA's *Data Summary: October 2025* indicates that the data released to date represent approximately 89 percent of the total PFAS occurrence results that the EPA expects to receive under the UCMR 5 effort. Based on the data that has been collected, EPA estimates that 7.8 percent of small PWSs (serving fewer than 3,300 people), 8.8 percent of small PWSs (serving 3,300 to 10,000 people), and 15.3 percent of large PWSs (serving more than 10,000 people) that have reported a full set of UCMR 5 results for at least one location had an average for one or more detection of PFAS that was greater than the respective MCL(s).

Additional data releases and finalization of the UCMR 5 data set is expected in early 2026.

Preliminary Regulatory Determination (RD 5) and CCL 5

As related to occurrence data collected during the UCMR 5 effort referenced above, EPA had completed a *Preliminary Regulatory Determination* decision (known as RD 5) for drinking water associated with its November 2022 Contaminant Candidate List 5 (CCL 5). The CCL 5 contained a list of contaminants that were then not subject to any proposed or promulgated National Public Drinking Water Regulation (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 have included over 10,000 individual chemical PFAS substances. On January 15, 2025, EPA published an *Announcement of Preliminary Regulatory Determinations for Contaminants on the Fifth Drinking Water Contaminant Candidate List*. Since EPA already made a determination to regulate six PFAS as referenced above, the Agency had decided not to regulate PFAS as a group under the NPDWR at this time. However, the EPA under the Biden Administration had originally cautioned that as data under the UCMR 5 were being collected concurrently with the RD 5 evaluation process, EPA intended to evaluate the full UCMR 5 dataset once it is available and would consider making regulatory determinations for the additional PFAS included contaminants in UCMR 5 in the future.

Per the Spring Unified Agenda, it is anticipated that a notice of proposed rulemaking will be published in early 2026 seeking to withdraw the regulatory determination for these PFAS and it appears unlikely that the current Trump Administration would seek to incorporate additional PFAS as part of any future Regulatory Determination actions.

Preliminary Effluent Guidelines (ELGs) Program Plan 16

Published on December 16, 2024, the EPA's *Preliminary Effluent Guidelines Program Plan 16* (Preliminary Plan 16) 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, as part of the Preliminary Plan 16 (and previous Plan 15), EPA is seeking 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, and (3) prepare revisions to the ELG applicable to landfills by collecting the data necessary to revise the ELG, which may include data collection from the industry and analysis of wastewater samples. EPA was also initiating a detailed study of PFAS processors to develop a more complete understanding of these facilities and their discharges to determine if revisions to the existing ELGs are appropriate.

Also, notable, and wide-reaching, EPA announced its intent to continue with 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's intention to undertake this study was to verify sources of PFAS in wastewater and help POTWs assess the need for control measures at the source. While the EPA sought to undertake the actions outlined in Preliminary Plan 16 and to continue with implementation of Plan 15, the commencement and pace of these activities depend on the agency's Fiscal Year 2025 -2026 appropriations and operating plan.

With respect to regulatory developments, EPA's most recent Unified Agenda lists both the ELGs for the OCPSF and Metal Finishing categories for notice of proposed rulemaking in January and July of 2026, respectively.

Test Methods and Methods Update Rule 22 (MUR 22)
Toward the end of the Biden Administration, the EPA issued a proposed rulemaking, known as the Methods Update Rule 22 (MUR 22). Under the proposed MUR 22, two important PFAS analytical methods are being sought for incorporation into the Code of Federal Regulations (C.F.R.). These include EPA Method 1633A (December 2024) which 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. Second, EPA Method 1621 (January 2024) is a single laboratory validated method to screen for organofluorines in wastewater. Method 1621 is labeled as a screening method because it does not quantify all organofluorines with the same accuracy and has some known interferences. The MUR 22 proposal seeks to formally codify the PFAS Method 1633A and Method 1621 as approved methods under 40 C.F.R Part 136.

According to the most recent Unified Agenda, the Trump Administration anticipates finalizing the MUR 22 rulemaking in early 2026. Approval of these methods through finalization of MUR 22 will support the much-anticipated *Organic Chemicals, Plastics, and Synthetic Fibers (OCPSF) Effluent Limitations Guidelines and Standards* (40 CFR Part 414) rulemaking to address PFAS discharges from facilities manufacturing PFAS.

Ambient Human Health Water Quality Criteria
Published in late December 2024, EPA's *Draft National Recommended Human Health Ambient Water Quality Criteria for PFOA, PFOS, and PFBS* proposed stringent surface water quality criteria and national recommendations to states and Tribes authorized to establish their own water quality standards under the Clean Water Act. For example, the draft criterion for PFOA (water + organism) was established at an ultra-low threshold of 0.0009 ng/l (one ng/l equals one part per trillion). The EPA has received numerous comments on the draft criteria and will prepare a response to public comments document, update the draft criteria documents considering public comments, and consider new toxicity data prior to issuing final recommended criteria. Several commenters have suggested that, if finalized as drafted, the draft criteria would result in most waters of the nation being unable to meet the new criteria. Once finalized, states and authorized tribes can adopt the recommended criteria into water quality standards and establish numeric effluent limits for regulated facilities. It remains unclear at this time if the Trump Administration will prioritize finalizing the draft criteria in light of other PFAS-related regulatory priorities.

Biosolids Risk Assessment
As published in January 2025, EPA's *Draft Sewage Sludge Risk Assessment for Perfluorooctanoic Acid (PFOA) and Perfluorooctane Sulfonic Acid (PFOS)* establishes that there may be human health risks exceeding acceptable thresholds for land application of sewage sludge containing 1 part per billion (ppb) of PFOA or PFOS. The draft risk assessment reflects EPA's latest scientific understanding of the potential risks to human health and the environment posed by the presence of PFOA and PFOS in sewage sludge that is land applied as a soil conditioner or fertilizer (on agricultural, forested, and other lands), surface disposed (e.g., placed in a sewage sludge-only landfill called a monofill), or incinerated. EPA has received numerous comments on the draft risk assessment and may make changes prior to finalizing the guidance. While it remains unclear at this time if the Trump Administration will prioritize finalizing the draft risk assessment, it should be noted that the same toxicological underpinnings used to establish the MCLs under the National Primary Drinking Water Regulations were used in the draft biosolids risk assessment.

Clean Air Act (CAA)
EPA's intent to regulate PFAS under the CAA was first referenced in the EPA's PFAS Strategic Roadmap with a target date of Fall 2022. It remains unclear at this point, however, if the Trump Administration still

intends to potentially regulate air emissions of PFAS, including listing certain PFAS as hazardous air pollutants (HAPs) under Section 112 of the CAA. Importantly, in 2024, three states submitted a petition to EPA requesting that the Agency designate certain PFAS as HAPs, but the petition does not appear to have garnered much attention from the current Administration.

In August 2023, EPA proposed a rulemaking for 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. EPA was originally scheduled to finalize the rule in December 2024, however, EPA's most recent Unified Agenda does not list this regulatory development as a near-term or long-term action.

EPA has also continued development and finalization of test methods to detect PFAS in stack emissions and ambient air. These methods include Other Test Method-50 (OTM-50) and work on a future Other Test Method-55 (OTM-55), which the EPA's former Office of Research and Development (ORD) was developing for detection of PFAS products of incomplete combustion. It is unclear if the new iteration of ORD, known as the *Office of Applied Science and Environmental Solutions*, will pick up the test method development process and publish any new PFAS methods in 2026. OTMs are EPA test methods that have not yet gone through EPA's rulemaking process but are needed to support agency initiatives. EPA was also previously considering development of sampling and analysis methods for targeted and non-targeted PFAS ambient air measurements. Applications would 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. However, with the recent restructuring and reductions in force at the EPA's research division, it remains unclear what types of air monitoring research efforts will occur in 2026 and beyond.

Federal Guidance on PFAS Destruction

A third update of *EPA's Guidance on Destroying and Disposing of Certain PFAS and PFAS-Containing Materials That Are Not Consumer Products* is anticipated to be released in early 2026. EPA's Interim Guidance originally published in December 2020 (and subsequently updated in the Spring of 2024) outlined the then-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. As announced by the Trump Administration in April 2025, EPA plans to update this important guidance on an annual basis moving forward, based on the evolution of PFAS treatment techniques, research and development, and analytical techniques to measure PFAS.

Resource Conservation and Recovery Act (RCRA)

As outlined in our article from March 2024, EPA published two proposed rules that would allow EPA to regulate certain PFAS and other emerging chemicals of concern under RCRA. Specifically, these rulemakings, if adopted, would make these substances subject to investigation and cleanup requirements at permitted hazardous waste facilities. Perhaps more significantly, one of the proposals would put the foundation in place for future designation of waste containing particular PFAS as listed hazardous wastes.

The proposed rulemaking would add PFOA, PFOS, PFBS, and GenX to the RCRA Hazardous Constituents list under Appendix VIII.

According to EPA's most recent Unified Agenda, the Trump EPA intends to finalize the proposed rule by April 2026.

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

A proposed rule to strengthen and potentially significantly expand PFAS reporting required under the Toxic Release Inventory (TRI) was published in October 2024. EPA's proposed rule sought to add 16 individual PFAS and 15 PFAS categories to the TRI and designate them as chemicals of special concern. EPA also proposed to reclassify some PFAS previously added to the TRI individually as part of a PFAS category and clarify how PFAS are automatically added to the TRI under the National Defense Authorization Act (NDAA). EPA is evaluating comments received on the proposed rule and will consider how to address PFAS compound categories and what events may trigger the automatic addition of a PFAS to the TRI. Pursuant to the most recent Unified Agenda, EPA intends to publish as a final rulemaking in early 2026.

Another proposed TRI rulemaking was published in January 2025, which clarifies when companies must notify a customer that one of their mixtures or trade name products contains a PFAS listed on the TRI in accordance with Section 7321(c) of the Fiscal Year 2020 National Defense Authorization Act. Pursuant to the most recent Unified Agenda, EPA intends to publish as a final rulemaking in late 2026.

Finally, for Reporting Year 2025 (reporting forms due by July 1, 2026), the NDAA automatically added nine additional PFAS to the TRI list (for a total of 205 chemicals). The addition of these nine PFAS was finalized in a January 2025 rulemaking. Facilities in TRI-covered industry sectors should have begun tracking and collecting data on these chemicals during 2025.

Toxics Substances Control Act (TSCA) Section 8(a)(7) Reporting

In a major development from November 2025, the Trump Administration published proposed deregulatory amendments to the TSCA Section 8(a)(7) implementing regulations for reporting and recordkeeping requirements for PFAS. The amendments address proposed deregulatory elements to the EPA's final rule from October 2023 which requires manufacturers (including importers) of PFAS in any year between 2011–2022 to report certain data to EPA related to exposure and environmental and health effects. Under TSCA Section 8(a)(7), which was added as part of the National Defense Authorization Act for fiscal year 2020, 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. The original rulemaking was to result in the publication of the largest-ever dataset of PFAS manufactured (including imported) in the United States. Whether a PFAS substance is subject to reporting is determined using a structural definition, which EPA estimates the number of PFAS that are subject to the reporting rule are over 1,400 unique substances. Under the original rule, "Manufacturers" include importers of both PFAS chemical substances and articles that contain PFAS. Like other TSCA reporting rules, such as the Chemical Data Reporting (CDR) Rule, manufacturers are required to report information "to the extent known or reasonably ascertainable by" the manufacturer. However, unlike CDR, there are no *de minimis* thresholds or exemptions for unintentional impurities or byproducts for the Section 8(a)(7) rule. Accordingly, the original Section 8(a)(7) rule imposed 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 PFAS manufacturers to submit the required information has been extended multiple times, now to October 13, 2026 (entities that qualify as "small manufacturers" are granted an extra six months). For additional detail, please review our article covering EPA's proposed changes to TSCA Section 8(a)(7).

EPA to Revise TSCA Risk Evaluation Framework for Existing Chemicals in 2026

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In September 2025, EPA proposed significant revisions to Toxic Substances Control Act (TSCA) risk evaluation framework for existing chemicals that "rescind or revise" key elements of the framework that were finalized in May 2024 under the Biden Administration. Most notably, regarding EPA's evaluation under TSCA Section 6 as to whether an existing chemical presents an unreasonable risk of injury to health or the environment, the proposed rule abandons the "whole chemical approach" adopted under the May 2024 rule that required a single risk determination for all conditions of use, in favor of the previous approach under the Trump Administration, which requires a risk evaluation for each condition of use. In addition, the proposed rule again allows EPA to assess workplace exposure risks assuming under most circumstances use of compliant personal protective equipment. The proposed rule also reinstates the definition of "weight of scientific evidence" and, consistent with the administration's policy, removes the phrase "overburdened communities" from the definition of "potentially exposed or susceptible subpopulations" that EPA must consider in its risk determinations. Finally, the proposed rule removes a provision that required assessment of exposure routes and pathways regulated under other federal statutes. Accordingly, future unreasonable risk determinations can exclude exposure routes and pathways that have been or are being addressed by other EPA programs.

Comments on the proposed risk evaluation were due by November 7, 2025, and it is anticipated that EPA will issue a final rule sometime in 2026.

TSCA Section 8(a)(7) PFAS Reporting Requirements Likely to Become Final in Early 2026

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The Trump Administration issued a proposed rule in the Federal Register on November 13, 2025, with the public comment period closing on December 29, 2025, regarding new exceptions and carve outs associated with the onerous TSCA Section 8(a)(7) PFAS reporting requirements. The rule is expected to become final in early 2026, triggering reporting requirements for many commercial and industrial entities.

As a recap of the prior iterations of the rule, TSCA was amended in 2020 to require that any person that manufactures (including imports) or has manufactured (including importation of) PFAS or PFAS-containing articles in any year since January 1, 2011, must electronically report information regarding PFAS uses, production volumes, disposal, exposures, and hazards. The 2011 date appears in the text of the statute. *See* 15 U.S.C. § 2607(a)(7). Under the Biden Administration, EPA issued a final rule regarding these recordkeeping and reporting requirements in October 2023 with an effective date of November 13, 2023. The rule established a "lookback" reporting period from January 1, 2011 to December 31, 2022 that remains unchanged. Since that final rule was issued, EPA has twice pushed back the deadline for lookback reporting, first in September 2024 and then in May 2025., Under the proposed rule, the current deadline of April 2026 would be extended again to a reporting period that will begin 60 days after the effective date of

the final rule and last for a period of three months.

In addition to extending the reporting period, the proposed rule contains exemptions from the reporting requirement, including for: (1) PFAS manufactured (including imported) in mixtures or products at concentrations 0.1% or lower; (2) imported articles (as otherwise defined by TSCA); (3) certain byproducts; (4) impurities; (5) research and development chemicals; and (6) non-isolated intermediates. EPA articulated that inclusion of the exemptions—and the related reduced reporting scope under the rule—was more consistent with TSCA's statutory commands that it be carried out in a reasonable and prudent manner and with due consideration for the economic, environmental, and social costs of any agency action. Under the revised rule, the regulatory burden would be shifted primarily to manufacturers of PFAS, the entities that EPA believes are most likely to have the data and information EPA is seeking. The Agency anticipates the cost savings that would result if the proposed rule is adopted to be in the range of $786–843 million.

The previous iterations of the rule did not include reporting exemptions and those contained in the proposed rule are significant. The most impactful exemptions and their proposed scope are outlined below:

- ***De minimis*:** In the rule, EPA proposes a "de minimis concentration exemption for reportable PFAS in mixtures or articles under which PFAS concentrations below 0.1% would be exempt from reporting." The exemption would apply regardless of total production volume of the mixture or article.

- **Imported articles:** This proposed exemption would apply to "exempt PFAS imported as part of an article from the scope of reportable activities." The proposed rule defines an article by reference to 40 C.F.R. § 704.3 and means a manufactured item that is a specific shape or design, that has an end use dependent on that shape or design, and which will be largely unchanged before its intended end use. Imported articles are exempted from reporting regardless of how much PFAS they may contain.

- **Byproducts, Impurities, and Non-Isolated Intermediates:** The proposed rule would exempt manufacturers of PFAS as byproducts, impurities, or non-isolated intermediates as defined under 40 C.F.R. § 720.30(h) from lookback reporting. EPA believes these exemptions reflect a practical approach to the reporting requirement, focusing the Agency on those PFAS that are more commercially relevant while relieving regulated parties of regulatory burden.

- **R&D Chemicals:** The exemption would relieve manufacturers of PFAS to be used solely as research and development chemicals from reporting under the proposed rule. This exemption has no threshold limit, as EPA has determined that information regarding such PFAS chemicals is not likely to improve the Agency's understanding of exposures and risks of PFAS under TSCA.

With the publication of the proposed rule in the Federal Register, EPA expressed interest in receiving comments on the level of the de minimis exemption, including "comments on a 1.0% *de minimis* exemption for PFAS in mixtures and articles instead of the proposed 0.1% *de minimis* exemption." The Agency also sought comment on the articles exemption and the proposed amendment to the submission period. Thus, it is possible that the scope of these exemptions may expand even further in the final rule.

We anticipate the final rule will be issued in the first quarter of 2026, though it is possible publication may slip to the early summer months. However, under either the current version of the rule or the anticipated

final rule, regulated parties should begin to undertake an audit of their operations and assess application of these reporting requirements as soon as possible in the new year.

EPA Maintains PFOA and PFOS CERCLA Designations and Signals Additional PFAS Remediation Activity in 2026

Todd D. Kantorczyk, Esq.

While the Trump Administration has worked to undo many of the environmental policies of the Biden Administration, it has taken a more measured approach when it comes to the cleanup of PFAS contaminated sites. Looking at 2026, we expect continued movement on this topic, with potential new rules, new legislation and ongoing litigation shaping the scope of cleanup liability for PFAS compounds under both CERCLA and RCRA.

In 2024 the Biden Administration advanced rules designed to use CERCLA and RCRA cleanup authority to address PFAS impacts to soil and groundwater, most notably publishing a final rule that designated PFOA and PFOS as hazardous substances under CERCLA. In September, EPA announced that it would maintain the designation of PFOA and PFOS as CERCLA hazardous substances and moved to lift the abeyance of the petition before the DC Circuit challenging the designations. A future ruling on this DC Circuit petition could further affect the PFOA and PFOS designations.

As part of the September announcement, EPA highlighted its concern regarding the potential liability of passive receivers, such as landfills and wastewater treatment works, and advocated for a "statutory fix" from Congress to protect these passive receivers from cleanup costs. To that end, Congress is currently considering various proposals to limit such liability. In addition, EPA's September announcement indicated that EPA intends to develop a "Framework Rule" to provide a more definitive approach regarding future CERCLA hazardous substance designations, which will include the consideration of costs associated with such designations. Presumably, this means that the April 2023 Advanced Notice of Proposed Rulemaking, which identified seven additional PFAS compounds for CERCLA hazardous substance designation, will not be moving forward for the time being. Consistent with that position, there is no update on this rule in the most recent unified regulatory agenda for EPA.

By contrast, the most recent unified regulatory agenda indicates that another pair of rules proposed in February 2024 to add nine PFAS compounds as hazardous constituents under RCRA, and amending the definition of hazardous waste as it relates to releases from permitted treatment, storage, and disposal facilities (TSDFs), is set to be finalized in April 2026. These rules, if finalized, would require TSDFs engaged in RCRA corrective action to investigate and, if necessary, remediate PFAS releases, and is an important regulatory precursor to designating wastes containing PFAS compounds as RCRA hazardous wastes.

Litigation

Key Supreme Court Environmental Law Rulings: 2025 Highlights and 2026 Outlook

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The United States Supreme Court issued several impactful decisions in environmental law cases in 2025 and is set to hear or consider several more in 2026.

Cases Decided in 2025

***City and County of San Francisco, California v. EPA*, 145 S. Ct. 704 (2025)**

In March, the Court held, in a 5-4 decision, that the Clean Water Act does not authorize the EPA to include so-called "end-result" provisions in NPDES permits, which are provisions that hold the permittee responsible for water quality in the body of water into which the permittee discharges pollutants. Under these provisions, a permittee could be

penalized if that body of water does not meet certain standards, even if the permittee has followed all specific discharge requirements set forth in its permit. The circumstances of this case related to a permit for one of San Francisco's wastewater treatment facilities, which discharges into the Pacific Ocean. In 2019, EPA had imposed two new requirements on the permit: a prohibition on any discharges that "contribute to a violation of any applicable water quality standard" for receiving waters (i.e., the Pacific Ocean); and a prohibition on any treatment or discharge that "create[s] pollution, contamination, or nuisance as defined by" a provision of the California Water Code. The Supreme Court ruled that EPA exceeded its authority by placing these provisions into the permit, explaining that EPA has authority to impose "limitations" that are necessary to meet water quality standards, but not to simply require that the water quality standards themselves be met. The Court emphasized that it is the permit writer's job to determine what specific steps a permittee must take to ensure water quality. This decision should provide greater clarity to permit holders by requiring clear compliance standards in NPDES permits.

***Seven County Infrastructure Coalition v. Eagle County, Colorado*, 145 S. Ct. 1497 (2025)**

As we reported in June, in an opinion authored by Justice Kavanaugh, the Court held that the D.C. Circuit had failed to give the substantial deference owed to federal agencies when they issue environmental impact statements (EIS) under the National Environmental Policy Act (NEPA). In addition, the Court ruled that the D.C. Circuit improperly had required the agency to consider the environmental impacts of projects "separate in time and place" from the specific project being evaluated by the agency. On the specific facts of the case, the agency had approved the construction and operation of an 88-mile stretch of railroad to transport crude oil, and the lower court faulted the agency for not having considered the effects of increased oil drilling and refining. The Court took the opportunity to emphasize that some courts have engaged in "overly intrusive" review of agency EISs, allowing NEPA to become a tool used to stop or slow down projects. This decision should help sharpen the scope of the "project" under NEPA review and tamp down on efforts by project opponents to bring broader environmental issues into the analysis of a project's impacts.

***EPA v. Calumet Shreveport Refining, LLC*, 145 S. Ct. 1735 (2025)**

In a 7-2 decision, the Court clarified the two-step framework for determining venue under the Clean Air Act (CAA) and, applying that framework, concluded that the dispute before it belonged in the D.C. Circuit. The case involved challenges brought by several small refineries to EPA's denial of their petitions to be granted exemptions from the CAA's renewable fuel program. The EPA had asserted these challenges must be brought in the D.C. Circuit because the denials were "nationally applicable" actions, given that EPA had aggregated numerous similar petitions and collectively denied them. The Supreme Court rejected this position, concluding that the "action" at issue in each petition involved only the petitioning refinery and thus was "locally or regionally applicable." But the Court agreed with EPA's alternative position that its denials nevertheless were "based on a determination of nationwide scope or effect," and therefore venue in the D.C. Circuit was proper. Justice Gorsuch, in a dissent joined by the Chief Justice, criticized the Court's "new" test for determining venue under the CAA and predicted that it is "likely to render simple venue questions unnecessarily difficult and expensive to resolve." More details can be found in our blog post on this case.

***Diamond Alternative Energy, LLC v. EPA*, 145 S. Ct. 2121 (2025)**

In this case, which we reported on in June, the Court concluded that the petitioners, a group of fuel producers, had standing to challenge EPA's approval of California regulations requiring automakers to produce fewer gas-powered vehicles and more electric vehicles. The sole legal issue concerned the "redressability" prong of the standing inquiry; namely, whether a judgment in the fuel producers' favor would redress their asserted injury. The fuel producers argued that the California regulations would reduce the number of gas-powered cars on the road, leading to a decrease in fuel sales. In response, the EPA and California maintained that even in the absence of the regulations, consumer demand for electric vehicles would exceed the manufacturing level required by the regulations, so invalidating the regulations would not increase fuel sales. The Court concluded that "commonsense economic principles support the fuel producers' standing," reasoning that the regulations were likely to cause at least some reduction in demand for fuel, so their invalidation would redress the fuel producers' economic injury. And the Court emphasized that the very purpose of the regulations was to reduce the use of gasoline. Based on this reasoning, the Court rejected EPA and California's contention that the fuel producers should have introduced more evidence, such

as affidavits from expert economists; "to show redressability, the plaintiff must simply 'show a predictable chain of events' that would likely result from judicial relief and redress the plaintiff's injury."

Cases To Be Decided in 2026

***Chevron USA Inc. v. Plaquemines Parish, Louisiana* (No. 24-813)**

Several Louisiana parishes sued Chevron in state court, seeking to hold the company liable under Louisiana's State and Local Coastal Resources Management Act of 1978 for damages allegedly resulting from the company's past oil exploration and production activities. Chevron removed the challenges to federal court on the basis that those activities were conducted under contracts with the federal government, invoking the federal-officer removal statute. The federal district court remanded to state court and the Fifth Circuit affirmed. The Supreme Court will address whether, following a 2011 amendment to the federal-officer removal statute, the removing party must show a causal connection between the lawsuit and an act performed under the direction of the federal government rather than merely demonstrating that the suit is related to such an act. During oral arguments heard on January 12, 2026, several justices questioned the potentially sweeping scope of removal advocated by *Chevron* and by the United States, which offered argument in support of *Chevron*'s reading of the removal statute. With Justice Alito recused due to a financial conflict, it remains to be seen how the remaining eight justices will rule.

***Galette v. New Jersey Transit Corporation* (No. 24-1021)**

In this consolidated appeal from decisions by the highest courts of Pennsylvania and New York, the Court will consider whether the New Jersey Transit Corporation is an arm of the State of New Jersey for interstate sovereign immunity purposes. Two separate tort lawsuits were filed against NJ Transit, one in Pennsylvania and the other in New York. The Supreme Court of Pennsylvania recognized NJ Transit as an arm of New Jersey and held that sovereign immunity barred suit. But the New York Court of Appeals reached the opposite conclusion. This appeal may offer the U.S. Supreme Court an opportunity to clarify the analysis that determines when state-created entities enjoy sovereign immunity from suit in the courts of other states. The Court heard oral arguments on January 14, 2026. Although several justices were skeptical of New Jersey's argument that NJ Transit, which was established as a corporation, could nevertheless be considered part of the State of New Jersey based on a multifactor test, there ultimately was no clear indication how the Court will come out on the question.

Pending Petitions for Certiorari

***Suncor Energy Inc. v. County Commissioners of Boulder County* (No. 25-170)**

Petitioners are energy companies that produce and sell fossil fuels, who seek review of a decision of the Colorado Supreme Court that allowed common-law tort claims for climate-change-related harms to advance. Petitioners contend that these state-law claims are preempted by federal law because the claims relate to harms allegedly caused by interstate and international greenhouse gas emissions and their effect on the global climate. If the Court were to take up this petition, it may signal that there are at least four justices interested in entertaining some version of petitioners' preemption theory, which could significantly curtail the many and various ongoing efforts to seek remedies for climate-change-related harms in state courts across the country. It is not clear to what extent EPA's proposed decision to rescind the 2009 Endangerment Finding could impact the preemption analysis. The petition was distributed for the Court's conference of January 16, 2026.

***Monsanto Co. v. Salas & Monsanto Co. v. Durnell & Monsanto Co. v. Johnson* (Nos. 24-1068 & 1097 & 1098)**

As stated by petitioner Monsanto, the question presented by these petitions is whether the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) "preempts a state-law failure-to warn claim where EPA has repeatedly concluded that the warning is not required, and the warning cannot be added to a product without EPA approval." On January 16, 2026, the Court granted the petition in the *Durnell* case, which stems from a state-court trial verdict in favor of plaintiff-respondent John Durnell, who claimed that exposure to Roundup caused his non-Hodgkin's lymphoma. The Court granted Monsanto's petition limited to the following rephrased question: "Whether the Federal Insecticide, Fungicide, and Rodenticide Act

preempts a label-based failure-to-warn claim where EPA has not required the warning." The case will be argued during the spring of 2026.

Whitmer v. Enbridge Energy, LP **(No. 25-582)**
As stated by petitioner, the Governor of the State of Michigan, the question presented by this petition is "[w]hether a State is the real party in interest, and therefore entitled to sovereign immunity, where a private plaintiff sues state officials in federal court for relief that would diminish, but not necessarily extinguish, the State's ownership and control of its sovereign lands." The case stems from Michigan's revocation and termination of an easement that had allowed an energy company to construct and operate pipelines on state lands located beneath navigable waters. The easement holder sued state officials, seeking an order preventing state officials from impeding the operation of its pipelines, and the U.S. Court of Appeals for the Sixth Circuit allowed the lawsuit to proceed. The court of appeals concluded that state sovereign immunity did not apply because the energy company's requested relief would not completely divest the State of ownership and regulatory control over the lands. In its petition for certiorari, Michigan maintains that this case presents an opportunity for the Supreme Court to resolve a circuit split regarding whether the *Ex parte Young* doctrine allows lawsuits to proceed in federal court when the sought-after relief would diminish, but not completely extinguish, a state's ownership and control over lands. As of January 15, 2026, briefing on the petition had not yet concluded.

Recently Denied Petitions for Certiorari
Alaska v. United States **(No. 25-320)**
On January 12, 2026, the Court denied Alaska's petition for certiorari, which sought review of "[w]hether the United States can regulate fishing on Alaska's navigable waters under the Alaska National Interest Lands Conservation Act, when its statutory authority is limited to 'public lands' and that term is defined as 'lands, waters, and interests therein…the title to which is in the United States.'" The dispute stemmed from Alaska's effort to open certain waters to gillnet fishers who are not federally qualified rural subsistence fishers, and the United States' lawsuit to stop Alaska from doing so. The Court's denial of Alaska's petition leaves in place the decision of the U.S. Court of Appeals for the Ninth Circuit siding with the federal government regarding the proper interpretation of "public lands" under the Alaska National Interest Lands Conservation Act.

United National Foods, Inc. v. National Labor Relations Board **(No. 25-369)**
Although not an environmental case, this petition raised questions about how courts should apply the Supreme Court's recent *Loper Bright* decision, which overturned the *Chevron* deference doctrine, as well as issues regarding the precedential value of judicial decisions that applied *Chevron* prior to *Loper Bright*. The case previously was before the Supreme Court, in 2024; in a summary order, the Court vacated a prior decision of the U.S. Court of Appeals for the Fifth Circuit and remanded to that court for further consideration in light of *Loper Bright*. Upon remand, the Fifth Circuit reached the same conclusion as it had previously, namely that the National Labor Relations Board (NLRB) had acted within its authority when it determined that NLRB's acting general counsel had discretion to withdraw a complaint filed against certain labor unions. In doing so, the Fifth Circuit considered a relevant pre-*Loper Bright* Supreme Court precedent and observed that the decision "remains good law." In its petition for certiorari, United National Foods contended that the Fifth Circuit upon remand did not faithfully apply the independent judicial statutory inquiry required under *Loper Bright* and improperly relied upon pre-*Loper Bright* precedent.
The Court denied the petition on January 12, 2026.

Shelby County v. Couser **(No. 25-419)**
As stated by petitioner Shelby County and other local government entities and officials, the question presented by this petition was "[w]hether a state or local law regulating the location or routing of an interstate pipeline is a preempted 'safety standard' under the Pipeline Safety Act when a court concludes that the law was primarily motivated by safety concerns." The Court denied the petition on January 12, 2026, leaving in place the decision by the U.S. Court of Appeals for the Eighth Circuit, which concluded that the Pipeline Safety Act preempted certain local ordinances regulating pipelines.

Air:

New Source Review Permitting

Carol F. McCabe, Esq.

As we enter 2026, New Source Review (NSR) continues to be among the most complex and challenging of permitting programs. The second half of 2025 brought some meaningful interpretive and policy changes to NSR, with a few more on the horizon. These developments are worth watching, especially for new energy projects in planning stages, including those related to data centers. State-specific responses to these announcements remain to be seen in many cases, but these actions have the potential to provide better clarity to project proponents on certain concepts that have fluctuated over time and by administration.

First, EPA determined in July that it would withdraw its 2024 proposed rule entitled *Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NNSR): Regulations Related to Project Emissions Accounting; Withdrawal of Proposed Rule* on the basis that there is insufficient justification for the rule, and out of concern that the proposal could result in unnecessary additional burden on regulated entities and state, tribal and local air agencies that implement the NSR regulations. *See* 90 Fed. Reg. 34206 (July 21, 2025). In short, the proposed rule published under the Biden Administration would have partially rolled back the concept of project emission accounting that was codified under the first Trump Administration, which allowed for both increases and decreases to be accounted for under "Step 1" of the NSR applicability process. The Biden rule would have revised the definition of "project" under the federal NSR rules in order to provide clarity and to avoid either over – or under-aggregation in determining the scope of a project for which emission increases and decreases may be counted in Step 1. In addition, the proposed rule would have imposed additional recordkeeping and reporting requirements and may have required decreases counted in Step 1 to be enforceable. For each proposed change, EPA reviewed comments received and determined that the changes would impose additional burden and uncertainty on stationary sources without clear and justifiable corresponding benefits. The withdrawal can be found here.

Second, on September 2, 2025 EPA Assistant Administrator Aaron Szabo issued a letter to the Maricopa County Air Quality Department signaling a more flexible approach toward the prohibition against "beginning actual construction" prior to permit issuance under the New Source Review program. Whereas EPA and state agencies have historically taken a restrictive view of acceptable pre-permit activities, this recent guidance from EPA is more forgiving, agreeing that an initial phase of construction proposed by semiconductor manufacturer TSMC Arizona Corporation, the would-be permittee, would not run afoul of the prohibition. Whereas prior guidance would have considered the construction of building supports, foundation, and shell, among other activities, as beginning actual construction, EPA agreed with Maricopa County that if a structure contains no emissions unit(s) it is not a 'source' subject to Clean Air Act permitting authorities because it does not emit or have the potential to emit pollutants. Referring back to a March 2020 guidance issued under the first Trump Administration, the letter states: [c]*onsistent with the views expressed in the March 2020 Draft Guidance, the EPA continues to recognize that the definition of the term "begin actual construction" in EPA's regulation prohibits "the initiation of physical on-site construction on an emissions unit" and that this does not prohibit initiation of physical on-site construction of those parts of a facility that do not qualify as an emission unit.* Stating EPA's intention to provide more clarity through rulemaking, Assistant Administrator Szabo was careful to note that Maricopa County has discretion to interpret its existing regulations in a manner consistent with EPA's current stance. Further, any construction activities undertaken by TSMC prior to issuance of an NSR permit would be done at risk, as the County would retain the discretion to deny any subsequent application to construct if applicable criteria are not met.

In addition, TSMC's time and resources expended on construction prior to obtaining a permit (so-called "equity in the ground") should not justify any subsequent permit decision. EPA's Regulatory Agenda indicated that a Notice of Proposed Rulemaking is planned for January 2026, and a final rule is expected September 2026.

Third, in a September 15, 2025 memorandum issued by Administrator Zeldin entitled *EPA Policy on Enforceability and Use of the Actual-to-Projected-Actual Applicability Test in Determining Major Modification Applicability in New Source Review Preconstruction Permitting: Reinstatement of 2017 Memorandum,* EPA has reinstated the 2017 memorandum authored by then Administrator Scott Pruitt entitled *New Source Review Preconstruction Permitting Requirements: Enforceability and Use of the Actual-to-Projected-Actual Applicability Test in Determining Major Modification Applicability" ("2017 Memorandum* . Our 2017 article provided a detailed summary of this memo, which served to signal EPA's intent to not "second guess" permit applicants' good faith calculations of projected actual emissions in NSR permit applications, including where an applicant intends to actively manage future emissions to avoid significant increases. Instead, in evaluating the potential need for NSR enforcement, EPA will focus on whether the actual post-project emission increases should have triggered NSR requirements.

Finally, on September 18, 2025, EPA Administrator Lee Zeldin issued *a memorandum entitled New Source Review Program "Reactivation Policy"* which serves to signal a change in EPA's historical presumption that a major stationary source that was idle for two or more years was permanently shut down and thus subject to NSR permitting requirements applicable to a newly constructed source prior to restarting operations. *Citing Port Hamilton Refining and Transportation, LLLP v. EPA*, 87 F .4th 188 (3d Cir. 2023), the memo stated EPA's determination that the reactivation of an idled source will not trigger NSR permit requirements unless modifications to the source qualify it as a "major modification" under applicable regulations based on the nature of the change and the magnitude of any resulting increase in emissions.

Each of these actions are no doubt an effort by the Trump Administration to ease permitting burdens on permit applicants and to clarify NSR rules that have been subject to stringent interpretations over the long history of the NSR program. However, it is important to note that states with delegated NSR programs have the discretion to accept or reject EPA's interpretations of these key NSR concepts. Because air permitting is often the longest lead time permitting action for significant new projects or expansions and carries with it the risk of third party attention and appeals, a clear understanding of the current NSR landscape is paramount for project planning and risk mitigation.

EPA's Proposed Retreat from Regulating Greenhouse Gases

Michael Dillon, Esq. and Kelly A. Hanna, Esq.

In 2025, EPA proposed to rescind greenhouse gas (GHG) regulations including the 2009 Endangerment Finding that serves as the underpinning of much of EPA's efforts to establish GHG emission limitations as well as the Agency's and Greenhouse Gas Reporting Program that requires mandatory GHG emissions reporting from wide sectors of the economy. Both proposals received extensive public comment, to which EPA must review and respond before finalizing the proposed recissions anticipated for later in 2026.

Proposed Recission of the 2009 Endangerment Finding

In the early 2000's, several organizations petitioned EPA to regulate GHG emissions from motor vehicles

under Section 202(a) of the Clean Air Act (CAA). Section 202(a) requires EPA to establish emission standards for "any air pollutant" emitted by new motor vehicles or new motor vehicle engines that "cause, or contribute to, air pollution" which may "reasonably be anticipated to endanger public health or welfare." When EPA denied the petition on the basis that GHGs are not "air pollutants," the organizations appealed. Eventually, the Supreme Court of the United States held in *Massachusetts v. EPA*, 549 U.S. 497 (2007) that GHG emissions from motor vehicles may qualify as "air pollutants" subject to regulation under Section 202(a) if EPA makes the requisite determination that GHGs "cause or contribute to air pollution" that may reasonably be anticipated to endanger public health or welfare. EPA eventually promulgated the Endangerment Finding in December 2009 finding that "six [GHGs] taken in combination endanger both the public health and welfare of current and future generations" and that motor vehicles in particular contributed to the buildup of GHGs in the atmosphere. *See* 74 Fed. Reg. 66496 (Dec. 15, 2009). EPA then used the Endangerment Finding to promulgate emission standards for vehicles under Section 202(a) of the CAA.

Since then, EPA has relied on the Endangerment Finding to regulate GHG emissions beyond the transportation sector, including oil and gas facilities and fossil fuel-fired power plants. In President Trump's very first executive order of his second term, *Unleashing American Energy* (Jan. 20, 2025), the Endangerment Finding was expressly identified as a rule to be evaluated by EPA for its "legality and continued applicability." Thereafter, in August 2025, EPA proposed to repeal all GHG emission standards for light-duty and medium-duty vehicles, heavy-duty vehicles, and heavy-duty engines under 40 C.F.R. Parts 85, 86, 1036, and 1037, with "conforming adjustments" to other vehicle-related provisions. EPA's stated rationale reflects a sharp shift in legal interpretation. 90 Fed. Reg. 36288 (Aug. 1, 2025). Specifically, the Agency argues that intervening Supreme Court decisions issued since *Massachusetts v. EPA* — including *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302 (2014); *West Virginia v. EPA*, 597 U.S. 697 (2022); *Loper Bright Enters. v. Raimondo*, 603 U.S. 369 (2024) — have clarified the limits of agency authority. According to EPA, the term "air pollution" is best understood as addressing local or regional harms, not global climate change, and regulating worldwide GHGs under Section 202(a) presents a "major question" of political and economic significance that Congress must clearly authorize. On the scientific front, EPA asserts that newer research undermines earlier conclusions about the potential changes to public health and welfare resulting from GHG emissions, and that reducing motor vehicle emissions would not measurably affect atmospheric GHG concentrations or the pace of climate change.

If finalized, any regulatory program that depends on GHGs being classified as "pollutants" with the potential to impact public health under the CAA could be vulnerable. Litigation risk may also shift, as state tort claims that were previously preempted by federal GHG regulations could gain traction. Moreover, vehicle manufacturers have invested heavily in technologies and compliance strategies built around existing standards, and rescission has the potential to disrupt long-term planning.

EPA received over half a million comments on this proposal, underscoring its political and economic significance.

Proposed Recission of the Greenhouse Gas Reporting Program

Separately, EPA has proposed to dismantle much of the Greenhouse Gas Reporting Program (GHGRP or the "Program"), which requires businesses and other entities in certain regulated sectors to report annual GHG emissions. The Program was created by EPA pursuant to its authority under Section 114 of the CAA in response to a directive from Congress in its 2008 Consolidated Appropriations Act. Section 114 provides EPA with the ability to request information from regulated entities for the purpose of, among other things,

"developing or assisting in the development of" any implementation plan, standard of performance, emission standard, or regulation of solid waste combustion.

Under the proposed recission of the Program, reporting obligations would be eliminated for all source categories except petroleum and natural gas operations under Subpart W, which would be deferred until 2034 and tied to EPA's Waste Emissions Charge authority. 90 Fed. Reg. 44591 (Sept. 16, 2025). For all other regulated sectors, reporting would end after completion of 2024 submissions.

EPA contends that the Program is unlawful because the data collected is not used to further EPA actions or obligations under the CAA, including New Source Performance Standards or National Emissions Standards for Hazardous Air Pollutants. In the alternative, EPA argues that its authority to collect information under Section 114 is discretionary; therefore, EPA will be exercising its discretionary authority in rescinding the program. The Agency also cites Executive Order 14192, *Unleashing Prosperity through Deregulation*, and asserts that the data collected under the Program are unnecessary because EPA can obtain similar information through targeted information collection requests under Section 114. Further, EPA justifies recission based on estimated nationwide savings of approximately $303 million annually through 2033.

Some of the roughly 50,000 comments submitted to the regulatory docket point out that the proposed GHGRP rescission raises legal questions about statutory authority and the role of executive orders in dismantling long-standing regulatory programs. Recission also has the potential to create practical challenges, as many federal and state programs rely on GHGRP data, and states use federal reporting to inform their own climate initiatives. States without independent reporting regimes may move to create them. Recission would also impact corporate sustainability reporting as many reporters rely on the information submitted to the Program to shape disclosures to shareholders and market participants.

Taken together, EPA's proposed actions signal a potential turning point in federal GHG regulation. Whether these proposals survive legal challenge will shape the next phase of climate policy.

Affirmative Defenses and Startup, Shutdown, and Malfunction – Where Are We Headed in 2026?

Carol F. McCabe, Esq. and Kelly A. Hanna, Esq.

In 2025, the United States Court of Appeals for the District of Columbia Circuit made an important decision regarding a highly contested issue: affirmative defense provisions applicable to excess emissions that occur during emergency events. *SSM Litig. Grp. v. EPA*, 150 F.4th 953 (D.C. Cir. 2025). The treatment of excess emissions during emergencies, along with related provisions dealing with startup, shutdown, and malfunction (SSM) events, have a long and somewhat tangled history under the Clean Air Act (CAA or the Act). In short, the concept that emission standards should apply on a continuous basis has been pitted against the practical reality that industrial facilities experience operational conditions, including unavoidable upsets, which may result in excess emissions. This tension has caused confusion and risk for regulated sources, while EPA policies have shifted over time and important decisions from the D.C. Circuit have further refined the regulatory and enforcement landscape under the Clean Air Act.

Beginning in the 1990s, EPA promulgated a mix of SSM exemptions and affirmative defenses in state implementation plans (SIPs), Title V operating permits, and federal technology-based standards. These

provisions recognized the potential infeasibility of complying with numeric emission limitations during SSM and upset events and instead required sources to comply with good operating practices to minimize emissions during such events. However, in 2008, the D.C. Circuit rejected what it characterized as "blanket" SSM exemptions in emissions standards promulgated under Section 112 of the Act as incompatible with the Act's requirement for continuous emission limitations under Section 302(k). *See Sierra Club v. EPA*, 551 F.3d 1019 (D.C. Cir. 2008). EPA responded in a manner that many regulated sources regarded as an overcorrection; by embarking on a campaign to remove SSM provisions from all CAA categorical standards (not just the general provisions of Subpart A of Part 63 which were the focus of the *Sierra Club* decision) and by targeting similar provisions in SIPs. Later, in 2014, the D.C. Circuit held in *NRDC v. EPA*, 749 F.3d 1055 (D.C. Cir. 2014) that EPA could not include affirmative defense provisions in emissions standards applicable to Portland cement facilities promulgated pursuant to Section 112 because such provisions intruded on courts' exclusive authority to assess penalties in civil suits brought under the Act. Again, EPA interpreted this decision broadly and set out to remove affirmative defense provisions from SIPs and state and federal operating permit programs. Specifically, EPA issued "SIP Calls," wherein it required states with SSM exemptions or affirmative defense provisions to revise their SIPs and remove such provisions. In addition, EPA finalized a rule rescinding the affirmative defense provisions in its own Title V operating program regulations. *See* 88 Fed. Reg. 47029 (July 21, 2023).

EPA's aggressive rollbacks of SSM and affirmative defense provisions triggered a wave of litigation. In 2024, the D.C. Circuit partially vacated EPA's SIP Calls in *Environ. Comm. Fl. Elec. Power v. EPA*, 94 F.4th 77. The court's holding focused primarily on the exact language of CAA Section 110 which requires SIPs to include "enforceable emission limitations and *other* control measures . . . as may be *necessary and appropriate* to meet the applicable requirements of this chapter." CCA § 110(a)(2); 42 U.S.C. § 7410(a)(2) (emphasis added). In this respect, the court found that EPA failed to analyze whether the SIP provisions at issue could qualify as "other control measures" that are "necessary or appropriate"—or, conversely, whether operation during SSM is "necessary and appropriate"—in order for the states to meet the requirements of the Act. 94 F.4th at 101. For this reason, the court determined that EPA's "blanket call of automatic [SSM] exemptions" was inappropriate. The court applied the same logic to vacate EPA's SIP Calls as they pertained to "director's discretion provisions" that give state officials discretion to grant SSM-related exemptions, as well as provisions containing "complete affirmative defense[s] to an action brought for non-compliance." *Id.* at 111, 114.

The *Florida Electric* court's partial vacatur of EPA's SIP calls does not appear to be an unrestricted endorsement of federal or state rules containing automatic exemption, director's discretion, or affirmative defense provisions as being in conformance with the Act. Most significantly, the broader question of whether affirmative defense provisions comport with the Act was analyzed more recently, in the September 2025 *SSM Litigation Group* decision. There, the D.C. Circuit reversed EPA's recission of the federal Title V operating permit program affirmative defense provisions, finding that the Agency acted arbitrarily. Notably, the Court distinguished between "complete" affirmative defenses and *ex ante* exemptions and found that the former are permitted by the statutory language of the CAA because they do not "render an emission limitation non-continuous," but rather serve as a complete "defense to liability." 150 F.4th 593, 600 (D.C. Cir. 2025). Conversely, the court reiterated that *ex ante* exemptions are impermissible because they "suspend[] emission standards during certain times," consistent with the court's previous holding in *Sierra Club*. *Id.* In a Petition for Rehearing *En Banc*, environmental intervenors argue that EPA's logic with respect to complete affirmative defenses versus *ex ante* exemptions "draws on a distinction without a difference." *See* Environmental Respondent-Intervenors' Petition for Rehearing *En Banc* at 9, *SSM Litig. Grp. v. EPA*, No. 23-1267 (D.C. Cir. Oct. 20, 2025).

However, EPA's stance under the current administration appears to align with the D.C. Circuit and with the industry challengers to the 2023 SIP rule. In opposing the Petition for Rehearing *En Banc*, EPA stated:

> *In summary, the panel opinion makes clear that EPA may promulgate, approve, or otherwise allow for a "complete affirmative defense" that "relates to the antecedent question of liability" rather than "the judiciary's authority to award 'appropriate civil penalties'" if there is such liability, Op. at 10, and that such defenses do not "render an emission limitation non-continuous" in violation of the Clean Air Act, id. at 13. Thus, EPA may restore the complete affirmative defense provision that EPA had removed from the title V regulations and need not object to the issuance of title V permits that contain complete affirmative defenses for this reason, see 42 U.S.C § 7661d(b), nor should EPA disapprove any complete affirmative defense contained in a state implementation plan submission that otherwise meets applicable Clean Air Act requirements, see id. § 7410(k)(3). EPA likewise is not prohibited from including complete affirmative defenses in its national emission standards. See id. §§ 7411, 7412.*

Respondent's Opposition to Respondent-Intervenors' Petition for Rehearing *En Banc* at 6, *SSM Litig. Grp. v. EPA*, No. 23-1267 (D.C. Cir. Dec. 12, 2025).

EPA's position here, and the D.C. Circuit's subsequent denial of rehearing, No. 23-1267, 2026 WL 20227 (D.C. Cir. Jan. 2, 2026), is good news for Title V permittees and sources regulated by categorical standards under Sections 111 and 112 of the Clean Air Act. The *SSM Litigation Group* decision has brought back to life the very practical reality that excess emissions during emergency events may be excused under certain conditions.

Moving forward, EPA and state agencies will be on solid ground in implementing narrowly tailored, complete affirmative defenses applicable to excess emissions during emergency events. Likewise, EPA appears poised to rethink its aggressive campaign of removing SSM provisions from categorical rules under the Clean Air Act. EPA already appears to be shifting toward promulgating work practice standards, rather than emission limitations, during periods of SSM. Indeed, EPA recently proposed such a standard within the National Emission Standards for Hazardous Air Pollutants (NESHAP) governing Hazardous Waste Combustors (HWCs), finding that a work practice standard is appropriate during periods of SSM "where it is not feasible to accurately measure emissions." *See* 90 Fed. Reg. 50814 (Nov. 10, 2025). Further, although the HWC regulations do not currently contain any affirmative defenses applicable to periods of SSM, EPA requested comment on whether and how it should establish regulations within the HWC rules and other standards promulgated pursuant to Sections 111 and 112 of the Act in response to the D.C. Circuit's *SSM Litigation Group* decision. *Id.* at 50847.

It's a new year for SSM and affirmative defenses, and additional regulatory developments may be on the horizon. In the meantime, Title V facilities should take advantage of available protections and review existing permit and SIP conditions to evaluate whether SSM or affirmative defense protections may apply, and seek to ensure those provisions are satisfied should an operational upset occur that may affect compliance with emission limitations.

Feel free to contact Carol McCabe or Kelly Hanna with any questions you might have about these issues.

Risk Management Program Rule – What Changed and What's Ahead in 2026

Kelly A. Hanna, Esq. and Technical Consultant Michael C. Nines, P.E., LEED AP

EPA's Risk Management Program (RMP), established under Section 112(r) of the Clean Air Act, is intended to minimize risk at industrial facilities that handle certain "extremely hazardous substances" by requiring the preparation of risk management plans to examine potential chemical release scenarios and outline prevention and emergency response procedures. The RMP has been the subject of several regulatory changes since its inception in 1990. Last year, we wrote about the finalization of the Biden Administration's *Safer Communities by Chemical Accident Prevention Rule*, 89 Fed. Reg. 17622 (Mar. 11, 2024) (SCCAP), which had introduced expanded requirements like Safer Technology and Alternatives Analyses (STAA) and third-party audits, enhanced incident investigations, and explicitly required facilities to consider "natural hazards" associated with climate change during hazard evaluations. The SCCAP Rule faced immediate legal challenges, including requests for EPA to reconsider the SCCAP Rule by the RMP Coalition and petitions for review filed in the United States Court of Appeal for the District of Columbia Circuit.

Under the Biden Administration, EPA denied the RMP Coalition's petition for reconsideration, but following the transition to the Trump Administration, EPA announced in March 2025 that it would reconsider the SCCAP Rule, while simultaneously moving to hold all pending litigation in abeyance. EPA's 2025 Spring Unified Agenda illustrated EPA's plan to initiate a new rulemaking in August of 2025 and issue a final rule by January 2026 with the intent to align the RMP with EPA's stated priorities to "ensure clean air, land, and water for every American; restore American energy dominance; and promote cooperative federalism and cross-agency partnership while reducing regulatory burden on facilities." However, in moving to hold the litigation in abeyance, EPA stated that it intended to finalize a new RMP rule later than anticipated, in "late 2026." *State of Oklahoma v. EPA*, No. 24-1125 (D.C. Cir. Mar. 6, 2025) (Doc. No. 2104221).

Therefore, the regulated industry and other concerned parties should expect to see a proposed rule revising or rescinding certain of the requirements from the SCCAP Rule published in the Federal Register in early 2026. For now, the SCCAP Rule remains in effect, including the May 10, 2027 deadline to comply with the rule's new provisions.

Data Centers:

Data Centers are Big Business, but Developers Need to Evaluate Air Permitting Strategies for Backup Power

Katherine L. Vaccaro, Esq.

About a year ago, EPA Administrator Lee Zeldin announced EPA's Powering the Great American Comeback Initiative. One of the Initiative's pillars is to "Make the United States the Artificial Intelligence Capital of the World" by promoting the development of large data centers capable of handling AI's massive computing demands. Since then, new and expanded data centers have been springing up across the country. The planning, siting, construction, and commencement of operation of a large-scale data center are likely to require multiple environmental permits, including those relating to site development, use of storage tanks, water consumption and cooling, and arguably most critical, permits authorizing the installation and operation of sources of air emissions.

With significant power demands, data centers are commonly located near or co-located with existing electric generating facilities. This allows the computing equipment to tap most if not all its power directly from the utility. But additional sources of power may also be needed at data centers, both to supplement available capacity from the grid and to ensure continuous power to computing equipment in the event of an interruption in the primary supply. Backup generators powered by reciprocating internal combustion engines (RICE) are the most common type of backup power generation equipment. These engines generate varying amounts of air emissions depending on age, engine specifications, and fuel type, among other characteristics. For this reason, RICE are subject to federal and state air quality regulations as well as preconstruction permitting requirements imposed at the state level. President Trump's 2025 Executive Order "Declaring a National Energy Emergency," describes an affordable and reliable energy supply and the integrity of our nation's electrical grid as fundamental to the national and economic security, recognizes backup generators powered by RICE as a valuable tool in maintaining grid reliability.

Without onsite electricity generation, backup generators are the most significant air emission sources at data centers. In fact, large data centers may include hundreds of generators, each with a capacity of 2-3 megawatts or more. Diesel-fired RICE emit oxides of nitrogen, carbon monoxide, volatile organic compounds, particulate matter, sulfur dioxide, and formaldehyde, which is a hazardous air pollutant. The total potential emissions of these pollutants must be accounted for when applying for air permits. Likewise, the county in which the data center is proposed to be located is an important strategic consideration in determining the type of air permit required, because different counties have different emissions thresholds that determine the stringency of the applicable preconstruction air permitting program, e.g., nonattainment New Source Review and Prevention of Significant Deterioration.

As demand for data centers continues to increase, developers should carefully consider environmental permitting strategies, with a particular focus on air emissions. A thoughtful approach at the outset will help in securing the necessary approvals while at the same time girding projects against litigation that continues to proliferate. For more information, please contact Kate Vaccaro at 484-430-5700.

Anticipated Third-Party Litigation Targeting Data Centers in 2026

Kate Campbell, Esq. and Sean F. Fahy, Esq.

Environmental litigation brought by third parties is increasingly targeting data center development, and that trend is expected to accelerate in 2026. As demand for cloud computing, artificial intelligence, and hyperscale infrastructure continues to grow, data centers are drawing heightened scrutiny for their energy consumption, water usage, emissions profiles, and siting considerations, particularly when compared to older, smaller facilities. What began primarily as advocacy and regulatory engagement is now evolving into coordinated litigation strategies that reach beyond traditional zoning and land use disputes and into complex environmental regulatory challenges.

In Virginia, multiple lawsuits have been filed against developers and environmental review agencies challenging the individual and cumulative environmental impacts of "Digital Gateway," a proposed data center development that, if constructed, would reportedly be the largest in the world, spanning approximately 2,100 acres. Similarly, in Minnesota, the Minnesota Center for Environmental Advocacy has filed suit challenging a municipality's environmental review of "Project Skyway," a proposed 482-acre mixed-use development that includes at least 100 acres of data centers. The challenge alleges deficiencies in the environmental analysis, including its failure to include a mitigation plan with specific, enforceable

measures. And in Tennessee, a coalition of civil rights and environmental groups challenged an air quality permit authorizing the operation of 15 methane gas turbines at a Memphis data center built by Elon Musks's data center company, xAi. Although that appeal was dismissed as moot last month, it underscores the growing likelihood that air emissions permitting, often coupled with environmental justice claims asserting disproportionate impacts on surrounding communities, will be a focal point of future challenges.

Importantly, many of these cases may be less about ultimate success on the merits and more about the real-world consequences of litigation. Even where claims lack merit, litigation can delay construction, complicate financing, increase carrying costs, and create reputational risk. Experienced third-party plaintiffs recognize that schedule disruption alone can have meaningful implications for large-scale data center projects, particularly those tied to customer commitments, power purchase agreements, or phased development plans.

These developments underscore a growing set of risks for data center developers, owners, and operators, but they also point to concrete steps that can be taken to mitigate exposure. Those steps include stress-testing permit applications and environmental reviews, carefully documenting engagement with regulators and stakeholders, and evaluating litigation risk in parallel with permitting timelines. Early and close coordination among legal, environmental, and development teams is critical, as is planning for the possibility of litigation even where regulatory approvals appear well-supported.

Looking ahead, 2026 is likely to mark a shift from episodic challenges to a more systematic litigation strategy by third parties targeting data center development, as demand for these facilities continues to grow.

OSHA

One Year In: OSHA's Direction Under the Second Trump Administration

Jill Hyman Kaplan, Esq. and Sean C. Kellem, Esq.

With one year of the second Trump Administration nearly complete, we can take stock of what has changed and what remains consistent under new OSHA leadership and preview what we expect from OSHA in 2026.

First, David Keeling was confirmed as Assistant Secretary of Labor for Occupational Safety and Health this past October. Assistant Secretary Keeling comes to OSHA after a long career in private industry, including at UPS and Amazon. During his confirmation hearing, Keeling expressed an intent to modernize and update OSHA's Voluntary Protection Programs (VPP), among other goals. While employers have sometimes been reluctant to enroll in VPP, fearing increased attention to their sites, for certain businesses these programs can provide a net benefit, particularly with the indication that OSHA is attempting to encourage participation by more types of businesses, and it will be worth paying attention to OSHA's anticipated efforts to update the VPP under Assistant Secretary Keeling's leadership.

In September of 2025, the Trump Administration announced its semiannual regulatory agenda, featuring several OSHA proposals. OSHA continues to reevaluate the proposed rule relating to heat injury and illness prevention that was issued under the prior administration. The new administration has now twice

extended the public comment period on this proposed rulemaking. We expect to learn more in 2026 about whether OSHA intends to finalize the Biden-era rule or withdraw or revise it.

Also included in the semiannual regulatory agenda are proposed rules to revise certain substance-specific respirator requirements to allow different types of respirators to be used and to align these requirements with OSHA's more general respiratory protection standard. Substances addressed include asbestos, benzene, cadmium, inorganic arsenic, and lead, as well as other substances. This and other proposals are described as being consistent with Executive Orders aimed at reducing the regulatory burden on business.

In May 2025, OSHA issued a new instruction for its National Emphasis Program (NEP) to identify and reduce or eliminate amputation hazards in manufacturing industries. Under the new instruction, businesses with ten or fewer employees in low-hazard industries, as well as businesses inspected under this NEP within the previous 24 months and with no reported amputations in that time period, will not be subject to programmed inspection. OSHA has continuing NEPs in other areas of interest, including a warehousing and distribution centers NEP whose governing instruction will expire in July 2026. Our firm will be keeping a close watch on OSHA's NEP activities, including whether expiring instructions will be renewed by the new administration.

Water:

Clean Water Act "Waters of the United States" Update

Brenda H. Gotanda, Esq., Todd D. Kantorczyk, Esq., and Sean F. Fahy, Esq.

As highlighted in our recent Client Alert, *Trump Administration Proposes Rule to Revise and Narrow Definition of Waters of the United States*, on November 17, 2025, the Environmental Protection Agency and the U.S. Army Corps of Engineers (the "Agencies") announced a proposed rule (the "Proposed Rule") to revise and narrow the definition of "waters of the United States" (WOTUS) under the Clean Water Act (CWA). During the 45-day comment public comment period for the Proposed Rule, the Agencies received upwards of 29,000 comments reflecting a broad range of views regarding the Proposed Rule. Despite many comments requesting an extension of the comment period, no extension was granted and the comment period closed on January 5, 2026, marking the beginning of the Agencies' process to review the record and finalize the rule. In the coming year, we expect continued debate over the Proposed Rule, issuance of a final rule, potential litigation grounded in the issues raised during the comment period, and potential changes to state environmental regimes looking to fill regulatory gaps created by the federal rule.

Comments to the Proposed Rule provide insight into the coming debate and future potential litigation. Many organizations, such as the National Association of Home Builders, strongly support the Proposed Rule and highlighted the importance of adding a regulatory definition of "continuous surface connection," establishing clear jurisdiction exclusions around ditches and wastewater treatment devices and aligning the definition of WOTUS more consistently with the Supreme Court's decision in *Sackett v. Environmental Protection Agency*. Likewise, the American Public Works Association was generally supportive of the Proposed Rule, but questioned the Agencies' definition of "wet season," a new concept in the Proposed Rule for use in evaluating a "continuous surface connection." Some organizations, such as the Pacific Legal Foundation (PLF), a public interest law firm focusing on individual and property rights, asked the Agencies to go even a step further. The PLF advocates that the Agencies should adopt an alternative approach to the Proposed

Rule whereby WOTUS would be defined only to encompass traditional navigable waters, tributaries that directly flow into those waters, and wetlands with a continuous surface connection to such waters, as informed by Justice Thomas's concurrence in the *Sackett* decision.

On the other end, there are many organizations and individuals that strongly oppose the rule, often focusing their comments on potential adverse environmental impacts and lack of scientific support for the framework adopted in the Proposed Rule. Some large environmental organizations have submitted comments critical of the Proposed Rule, claiming that it will significantly scale back protections for America's waters. For example, the Environmental Protection Network (EPN), an organization comprised of former EPA career staff and political appointees, urged the Agencies to abandon the Proposed Rule and leave intact the 2023 Conforming Rule, which was promulgated by the Agencies in response to the *Sackett* decision. The EPN argues that the Proposed Rule, among other things, violates the purpose of the CWA to restore and maintain the chemical, physical, and biological integrity of the Nation's waters; proposes scientifically indefensible definitions of "relatively permanent flow," "continuous surface connection," "tributary," and "wet season"; and misconstrues the term navigable waters. Based on comments submitted and public statements from these environmental organizations, it appears they are likely setting the stage for potential litigation over the rule if it is finalized in current form.

Beyond litigation, we may also see some states taking action to expand state regulation of surface waters to fill in the gaps created by the Proposed Rule's narrowing of the WOTUS definition. For example, in response to the *Sackett* decision removing certain wetlands from federal jurisdiction, Colorado created a new state-level permitting program for dredge and fill activities designed to protect state water resources. Some have estimated that roughly 50 percent of state waters in Colorado lost federal protections as a result of the *Sackett* decision given the significant number of intermittent or non-contiguous waters in the state. This filling-the-gap approach may expand to other states, with different jurisdictions taking different approaches to protecting streams and wetlands and potentially making the regulatory landscape more complex.

Now that the 45-day comment period has ended, the Agencies will turn to reviewing the comments, responding to significant comments, and considering any changes to the Proposed Rule that may be warranted in a final rule based on comments received. As has occurred with prior WOTUS rulemakings, we expect litigation over the scope of the rule to ensue once it is finalized. The combination of the final WOTUS rule, rulings in litigation over the final rule, along with State's efforts to step in and fill the gaps left by the final rule (or in anticipation of the final rule) could (once again) result in a shifting landscape for aquatic resource permitting in 2026.

If you have questions concerning EPA's Proposed Rule or state regulation of waters and wetlands, please contact MGKF's Sean Fahy, Todd Kantorczyk or Brenda Gotanda.

States and EPA Work to Address the Challenges of NPDES Permitting for Indirect Discharges

Brenda H. Gotanda, Esq.

EPA and the States have been confronting the many challenges associated with implementation of the permitting required by the landmark decision of the U.S. Supreme Court in *County of Maui, Hawaii v.*

Hawaii Wildlife Fund, 140 S.Ct. 1462 (2020). In *Maui*, the Court ruled that the federal Clean Water Act requires a National Pollutant Discharge Elimination System (NPDES) permit for the discharge from a point source of pollutants that reach navigable waters (also known as waters of the United States or WOTUS) after traveling through groundwater if that indirect discharge is the functional equivalent (FE) of a direct discharge from the point source into the WOTUS. The regulatory agencies have been working to develop strategies to address the difficulties in identifying, prioritizing, and permitting the multitude of indirect discharges that may now require NPDES permits. While it has been five years since the *Maui* ruling, there are still many issues to resolve given the complexity of subsurface discharges to groundwater, determining functional equivalence, and developing appropriate permit terms and conditions.

EPA has a webpage devoted to this issue with agency guidance and responses to over 25 Frequently Asked Questions (FAQs) regarding the permitting of discharges that travel through groundwater to surface waters. The FAQs address topics such as application of the factors that the Supreme Court identified as potentially relevant to determining whether a discharge is the FE of a direct discharge. Those FE factors include: (1) transit time, (2) distance traveled, (3) the nature of the material through which the pollutant travels, (4) the extent to which the pollutant is diluted or chemically changed as it travels, (5) the amount of pollutant entering the navigable waters relative to the amount of the pollutant that leaves the point source, (6) the manner by or area in which the pollutant enters the navigable waters, and (7) the degree to which the pollution (at that point) has maintained its specific identity. The *Maui* decision noted that these and other factors may be relevant to determining whether an indirect discharge is similar enough to a direct discharge to be functionally equivalent and to require a NPDES permit. It also postulated that future cases and agency guidance, rulemaking, and permitting would likely inform the issue going forward.

The EPA FAQs state that facility operators with releases to groundwater are, in the first instance, responsible for determining whether they need a NPDES permit for the discharge, and they should request a meeting with their permitting agency to help identify the information that the agency will need to review the FE analysis and process the application. They also state that while the FE analysis is necessarily site-specific, a general permit approach could be used by permitting agencies for certain types of discharges.

EPA's webpage states that it was last updated in October 2025, which suggests that it reflects the current position of the Trump Administration. Notably, EPA's guidance document posted on the website ("Applying the Supreme Court's *County of Maui v. Hawaii Wildlife Fund* Decision in the Clean Water Act Section 402 National Pollutant Discharge Elimination System Permit Program to Discharges through Groundwater") was initially published for comment by the Biden Administration EPA on November 27, 2023 after it rescinded a guidance document on this same topic issued by EPA during the first Trump Administration in 2021. The 2023 guidance is still designated as "draft guidance," however, and it remains to be seen whether the current Trump Administration EPA will finalize, modify, or replace the 2023 draft guidance or any of the posted FAQs.

Most states have been delegated authority by EPA to implement the federal NPDES permitting program and, as such, they are on the front lines of this issue with primary responsibility for sorting out how to go about implementing the *Maui* decision and for permitting indirect discharges that meet the FE threshold.

A primary example is in Hawaii, where the Department of Health Clean Water Branch (DOH) has responsibility for implementing the federal NPDES program. Hawaii has many subsurface-type discharges (e.g., underground injection control (UIC), on-site disposal systems (OSDS) with ground discharge, etc.) that historically have not received NPDES permits and DOH has expressed concerns about the potential

for this FE permitting effort to overwhelm its limited staff and resources. As such, it has been working to develop an implementation strategy and meeting with stakeholders to gather input. It held five stakeholder workshops in 2024. In those workshops, DOH identified the following as the overall goals for its strategy:

Identify potentially affected facilities

- Depending on what types of facilities are included, universe could be over 100,000 potential permittees

Prioritize facilities for regulatory coverage

- DOH is working to create "functional equivalency scores" as part of a ranking system to help prioritize permitting efforts

Develop a permitting strategy that:

- Acknowledges both general permits (GPs) (for similar types of facilities) and individual permits may be needed.
- Requires facilities to make the decision to seek permit coverage in accordance with the longstanding principles of the NPDES program.
- Includes FE discharge determination criteria for applicability.
- Creates regulatory certainty for potentially affected facilities.
- Addresses the new FE requirement using DOH's current limited resources.
- Creates cross-programmatic consistency across affected DOH programs regarding UIC, wastewater reuse, NPDES permits, OSDS approvals, etc.
- Promotes "no discharge" alternatives, such as wastewater reuse.

Determine what is needed to support the permitting strategy (e.g., revisions to statutes and rules, resources)

Some of the NPDES FE permitting challenges identified during the DOH stakeholder workshops included the following:

- Determining functional equivalency and identifying applicable facilities.
- Potential high number of applicable facilities and comparatively low permitting resources.
- Appropriately identifying pollutants of concern while accounting for subsurface dilution and chemical changes due to transit time, distance traveled and contact with different substrates and pollutants contained in the groundwater.
- Assessing the potential impacts on a surface water - does the discharge cause or contribute to an exceedance of applicable water quality?
- Establishing permit limits without knowledge of dilution or potential chemical changes.
- Low nutrient water quality criteria in Hawaii.
- Identifying discharge location(s).
- GPs are challenging to create with different facility types and pollutants.
- TMDLs can be difficult to address in a GP.
- Discharger education and understanding of the NPDES program.
- Feasibility of new dischargers to comply.

As part of its implementation strategy, DOH is working to develop one or more NPDES general permits for similar types of FE discharges, which may help to ease the permitting burden on the agency and permittees.

Throughout the coming year, we expect to see more courts and agencies across the nation continue to confront the complex challenges of implementing the *Maui* decision with respect to indirect subsurface discharges. If you have questions about this article or NPDES permit requirements, please contact Brenda Gotanda.