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2017 YEAR-END ENVIRONMENTAL UPDATE FOR THE OIL & GAS INDUSTRY

To Our Clients and Friends:

With the beginning of a new presidential administration, 2017 was a year of notable transition in key areas of environmental law and policy. Not surprisingly, few sectors experienced that transition more than the oil and gas sector. At the signing of his Executive Order on Promoting Energy Independence and Economic Growth, President Trump announced in March that we are seeing the "start of a new era in American energy and production."

New regulatory activity in 2017 was heavily directed towards reconsideration of previously promulgated regulations and policies, with an emphasis on those impacting greenhouse gases (*i.e.*, CO_2 and methane). In addition to climate-related actions—at both the federal and state levels—2017 saw other key developments in areas of site remediation, water pollution, permitting, and leasing that will impact conventional and unconventional oil and gas exploration in the coming year. Other cases addressed important cross-cutting litigation issues concerning evidentiary standards, jurisdiction, and defenses. On the transactional side, we saw strong merger and acquisition activity through the third quarter of 2017.

We are pleased to report on these and other major developments in the environmental field that particularly impacted the energy industry. Below are snapshots of important climate change developments, other regulatory and policy developments, enforcement initiatives, and other notable litigation and business trends that impacted the sector in 2017. More detailed information is available by clicking on the appropriate links to the full report, which appears below the summaries, and which contains analyses of additional cases and developments that may impact your business.

We are happy to discuss these and other developments, and their implications for your business – today and in the future. Thank you, and we hope you have another successful year in 2018.

Climate Change and Greenhouse Gases – Regulatory Actions, Notable Cases, and Governance Trends

When President Trump assumed office in January 2017, the Justice Department was defending challenges to some of the most central regulatory actions undertaken by the previous administration to address greenhouse gas emissions. EPA's Clean Power Plan, its implementation having been stayed by the Supreme Court pending judicial review, was awaiting a decision by the D.C. Circuit following an *en banc* oral argument in September 2016. EPA and DOI rules to address methane emissions from certain oil and gas sources were also in the midst of litigation, with looming compliance deadlines. On March 28, 2017, President Trump – accompanied by the Vice President, the Secretaries of Energy and

Interior, and the EPA Administrator – signed the Executive Order on Energy Independence, thereby officially launching a broad review of these and other regulations and policies impacting America's energy sector. The Justice Department immediately filed a notice of the Executive Order with the D.C. Circuit, announcing the initiation of a review of the Clean Power Plan, and seeking abeyance of the litigation, and EPA and DOI began to take steps to reconsider prior carbon dioxide and methane emission regulations, and to further delay certain pertinent regulatory compliance deadlines during the period of reconsideration.

Clean Power Plan Repeal – On October 16, 2017, EPA published a proposed rule to repeal the Clean Power Plan on the grounds that it exceeded EPA's statutory authority under a proposed change in the Agency's interpretation of Section 111 of the Clean Air Act. The key legal interpretation at issue concerned the authority of EPA to issues emissions guidelines that contemplate covered sources taking actions "beyond the fenceline" of their facilities to meet governing emissions reduction standards. The public comment period was extended until January 16, 2018 (and is further expected to be extended until April 26, 2018), and EPA recently announced its intention to schedule additional "listening sessions" in San Francisco, CA, Gillette, WY, and Kansas City, MO.

Clean Power Plan Replacement – On December 18, 2017, EPA published an Advanced Notice of Proposed Rulemaking ("ANPRM") to solicit information from the public as EPA considers whether or not to propose a future rule setting emission guidelines to limit greenhouse gases from existing electric utility generating units. Specifically, EPA solicits comment on the roles, responsibilities, and limitations of the federal government, state governments, and regulated entities in developing any Clean Power Plan replacement rule, and also on the appropriate scope of such a rule and associated technologies and approaches. EPA is accepting public comments on the ANPRM until February 26, 2018.

Methane: EPA and DOI Rule Reconsiderations and Implementation Delays – On March 2, 2017, EPA withdrew its Information Collection Request previously issued to owners and operators in the oil and gas industry seeking information on equipment and emissions at existing oil and gas operations. In April, EPA announced it would reconsider certain fugitive emissions requirements in its final rule (issues in August 2016) setting emissions standards for new, reconstructed, and modified oil and gas operation sources, and after unsuccessfully seeking a temporary stay of the rule during reconsideration, it formally proposed a two-year stay of the new source performance standards. Similarly, on October 5, 2017, DOI proposed to delay until January 2019 certain requirements in its 2016 rule addressing flaring and venting at oil and gas operations.

Changes to Regulatory Economic Analysis of Carbon/Methane Rules – Pursuant to Executive Order 12866, issued by President Clinton in 1993, federal agencies are to assess the costs and benefits of significant proposed rules. President Obama created the Interagency Working Group on the Social Cost of Carbon in part to provide a reasoned economic basis for the assessment of costs or benefits associated with rulemakings designed to address greenhouse gases. President Trump disbanded that Working Group in 2017, and agencies such as EPA and DOI made significant changes in the manner in which they calculated the Social Cost of Carbon (and also the Social Cost of Methane). The result of these economic methodology changes – including using an increased discount rate, limiting assessment of "co-benefits," and considering only costs based on effects within the United States – impacts the analysis and presentation of the costs and benefits of any subsequent proposed rules addressing carbon or methane emissions.

U.S. Withdrawal from Paris Agreement – On June 1, 2017, President Trump announced that the U.S. would withdraw from the Paris Agreement, though it remains a signatory to the U.N. Framework Convention on Climate Change. Under the terms of the Paris Agreement, however, parties may not formally provide valid notice of withdrawal until November 4, 2019 (three years after the Agreement entered into force), and may not subsequently withdraw until November 4, 2020 (coincidentally the day after the next U.S. Presidential election). Following the President's announcement, several initiatives were launched to coordinate state, local, and private sector actions to address climate change, including the formation of a Climate Mayors group (nearly 400 mayors, co-chaired by the Mayors of Los Angeles, Houston, Boston, and Knoxville), and America's Pledge (co-chaired by Michael Bloomberg and California Governor Brown).

Climate Change Lawsuits and State Attorney General Investigations – 2017 saw a dramatic rise in the number of lawsuits filed in state and federal courts, as well as in foreign jurisdictions, to address alleged injuries relating to climate change. In July 2017, the Counties of Marin and San Mateo, and the City of Imperial Beach, filed separate suits in California state courts against thirty-seven fossil-fuel companies, claiming that defendants were liable for injuries allegedly related to climate change and sea level rise. San Francisco and Oakland filed similar complaints against a smaller group of large fossil-fuel companies. Recently, on January 9, 2018, New York City filed a similar lawsuit. These cases are on the heels of an earlier lawsuit filed by an Oregon-based group called Our Children's Trust against the U.S. government, under a public trust doctrine, seeking broad greenhouse gas restrictions nationwide. The district court in Oregon denied the U.S. government's motion to dismiss, and the Ninth Circuit heard oral argument on December 11, 2017 on the government's petition for a writ of mandamus. International judicial fora are also increasingly seeing climate change-related lawsuits, with actions having been filed in the Netherlands, Norway, Switzerland, India, and New Zealand, among other countries.

State and Local Legislative Activities – In July 2017, the California legislature took action to extend the state's cap-and-trade program (AB 32) from January 1, 2021 through December 31, 2030. Other states, and notably many cities (the Climate Mayors, for example, maintain a compendium of municipal actions undertaken in response to climate change), have taken additional steps in 2017 to address climate change mitigation.

Climate-Related Disclosures and Investor/Shareholder Resolutions and Trends – 2017 saw a significant increase in shareholder proposals focused on environmental issues, with the largest group pertaining to climate change. For the first time, three such climate change proposals seeking, among other things, detailed climate-risk analyses and exposure data, received majority support. Significantly, in March 2017, Blackrock announced in its 2017-2018 engagement priorities that it is focusing on companies' approaches to adapting to and mitigating climate risks. Vanguard also updated its proxy voting guidelines in 2017 to focus on increased scrutiny of the merits of environmental and climate-related proposals.

Other Regulatory and Litigation Developments

The past year also saw a number of significant cases and regulatory developments in other areas that could impact the oil and gas sector this year and beyond. Courts continued to scrutinize challenged regulations, at the federal and state levels, and private parties brought a variety of litigation claims involving pipeline spills, infrastructure and plant expansions, endangered species, oil and gas drilling, and more. In addition, several potential litigation trends emerged in 2017, and the Trump administration may also be moving to significantly reassess its approach to the permitting of new sources under the Clean Air Act.

Here are some of the highlights:

Renewable Fuel Standards – On July 28, 2017, the D.C. Circuit issued an opinion overturning EPA's interpretation of certain waiver authorities in the Renewable Fuel Standard program. In an effort to justify its departure from statutorily mandated renewable fuel volumes, EPA sought to use demand-side constraints to support a waiver based on "inadequate domestic supply." The court vacated EPA's decision to reduce total RFS volume requirements for 2016, and remanded to the Agency for consideration in light of the opinion. On November 30, 2017, EPA also finalized volume requirements for renewable fuels in 2018 (petitions to review that rule have already been filed with the D.C. Circuit). The Tenth Circuit also struck down EPA's prior denial of a small refinery exemption petition submitted by a Wyoming refinery based upon economic hardship.

Natural Gas Exports – The D.C. Circuit rejected claims brought by environmental groups, who challenged the Department of Energy's Environmental Impact Statement recommending the approval of an application to export natural gas to various non-free trade countries. The court found the Department's environmental assessment to be adequate, finding that a more detailed examination of the relationship between increased export and domestic pricing was not required.

Opening Areas for New Energy Exploration – On January 4, 2018, Secretary Zinke announced an expansion of the Outer Continental Shelf oil and gas leasing program, through a Draft Proposed Program for 2019-2024 that includes forty-seven potential lease sales in twenty-five of the twenty-six planning areas. Public meetings will be scheduled, and comments accepted, prior to DOI issuing a Proposed Program and Draft Programmatic EIS. Within days of this announcement, however, Secretary Zinke removed the coastline of Florida from consideration for future offshore drilling. In addition, the final tax-reform package signed into law by President Trump in December 2017, known as the Tax Cuts and Jobs Act, opened non-wilderness 1002 Area of the Alaska National Wildlife Refuge ("ANWR") for oil exploration.

FERC Required to Consider Downstream Emissions Projections of Pipeline – FERC had previously approved the construction and operation of the Southeast Market Pipelines Project, which was projected to carry over one billion cubic feet of natural gas to destinations in the Southeast. Upon challenge under the National Environmental Policy Act, on August 22, 2017, the D.C. Circuit held that FERC should have estimated and considered power plant carbon emissions that would foreseeably result from the natural gas distribution from the pipeline project. FERC subsequently issued a Supplemental EIS on September 27, 2017.

County Ordered to Consider Risk of Hazardous Material Release in Refinery Expansion – Kern County, California approved a proposal to expand a refinery by increasing rail facilities to better accommodate increased Bakken crude deliveries. A California appeals court held that the Environmental Impact Report issued pursuant to CEQA failed to adequately estimate risks of hazardous materials release, and remanded the case for further proceedings.

U.S. Government Found to be Liable for Cleanup as "Owner" of Contaminated Property – The Tenth Circuit found that the U.S. is liable under CERCLA as an "owner" of a contaminated mining site on federal land. The court rejected the government's arguments that it lacked certain indicia of ownership and control.

Waters of the United States: No Solution on the Horizon – Since the Supreme Court's decision in *Rapanos*, the jurisdictional extent of the Clean Water Act has been unclear. On June 29, 2015, following public notice and comment, the Agencies published a final rule defining the scope of the phrase "waters of the United States." Thirty-one States and a number of other parties sought judicial review of the rule in various district and circuit courts. Ultimately, on October 9, 2015, the Sixth Circuit stayed the 2015 Clean Water Rule nationwide. On January 13, 2017, the U.S. Supreme Court granted *certiorari* on the question of whether the court of appeals has original jurisdiction to review challenges to the 2015 Clean Water Rule.

On February 28, 2017, President Trump issued an Executive Order entitled "Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the 'Waters of the United States' Rule." In accordance with the Executive Order, the EPA and the Corps of Engineers proposed a rule to rescind the 2015 Clean Water Rule on June 27, 2017. On November 16, 2017, the Agencies proposed to amend the effective date of the 2015 Clean Water Rule, proposing that the 2015 Clean Water Rule would not go into effect until two years after the proposal was finalized and published in the Federal Register.

In addition to the uncertainty caused by changing regulatory landscape, many courts are now addressing issues of alleged groundwater contamination, and theories of Clean Water Act ("CWA") liability. In Virginia, one federal court found CWA liability arising from purported arsenic discharges from coal ash, and a finding of a sufficient hydrological connection between groundwater and surface water. In South Carolina, the district court held that contamination from a leaking pipeline that migrated through soil and groundwater into a wetland constituted non-point source pollution not covered by the CWA.

Anticipated Agency Reassessment of Clean Air Act's New Source Review Program – As part of the Trump administration's efforts to reduce regulatory burdens, EPA and the Department of Commerce each identified comprehensive New Source Review ("NSR") reform as a priority. In October 2017, EPA announced that it would convene an NSR Task Force to identify opportunities for streamlining permitting processes, or pursuing regulatory or policy change to increase flexibilities and decrease certain burdens. On December 7, 2017, as part of this overall effort, Administrator Pruitt announced a change in EPA's NSR policy, ensuring that the Agency would rely more upon a company's assessment and explanations concerning potential to emit when determining NSR applicability.

Recovery of Remediation Costs at Unused Power Sites. The Supreme Court of Ohio affirmed the Ohio Public Utilities Commission's decision to permit recovery of remediation costs at retired manufactured gas plants through rate adjustments.

Federal Courts Continue to Draw Jurisdictional Lines over Domestic Energy Production. The U.S. District Court of the District of Oklahoma rejected Sierra Club's citizen suit alleging that natural gas companies caused earthquakes in the state. Sierra Club sought a variety of injunctive relief to limit exploration activities. The district court declined to exercise jurisdiction, and dismissed the case noting that Oklahoma agencies were empowered to address the issues, not federal courts. In another case, the Fourth Circuit also sided with a state's right to regulate mining—supporting Virginia's right to ban uranium mining despite the Atomic Energy Act's preemptive scope.

Fifth Circuit Limits the Scope of the Oil Pollution Act's Third-Party Defense. The Fifth Circuit found that a party may not assert the Oil Pollution Act's third-party defense where a discharge was caused in connection with a contractual relationship that relates to the act or omission "in the sense that the third party's acts and omissions would not have occurred but for the contractual relationship." This decision limits the availability of the third-party defense under the OPA.

No Duty for Oil Companies to Protect State Board from Increased Flood Protection Costs. Several parishes in Louisiana have sued oil and gas developers, alleging that damage to the coast caused by drilling and canal dredging contributed to the loss of coastal wetlands. The wetlands form a hurricane buffer for New Orleans and the authority argued their loss meant more work and expense in protecting and maintaining levees. In 2015, a federal lawsuit filed against ninety-seven companies by the a levee board was dismissed by the U.S. District Court of Louisiana. This year, that dismissal was upheld by the Fifth Circuit, which found that neither federal nor Louisiana law created a duty to protect the parishes from coastal erosion. The Supreme Court declined to hear plaintiff's appeal. Time will tell whether the Fifth Circuit's decision will influence the various other related state court cases that remain pending.

Tort Litigation: Significant Case Updates – 2017 saw several developments in the civil litigation matters brought by plaintiffs against oil and gas companies. These include:

- The Eighth Circuit affirmed a district court's denial of class certification because plaintiffs could not show that common questions of law or fact were present in their claim that Exxon had failed to properly maintain its pipeline in violation of property easements.

- In a fracking dispute, the Eighth Circuit overturned a district court decision excluding plaintiff's expert report and granting the company's motion for summary judgment. On appeal, the Eighth Circuit reversed, finding the district court abused its discretion by excluding plaintiffs' expert, and that the plaintiff had submitted enough facts to enable a reasonable jury to find that waste had migrated under plaintiffs' property.

- A Mississippi Court of Appeals found that the operation of a gas pipeline is not an ultrahazardous activity that supports a strict liability finding. The court noted that the transportation of liquid propane is highly regulated, that propane is commonly used in homes and industries, and is generally "of great value to commerce and local, regional, and nationwide communities."

- The U.S. District Court for the Northern District of Oklahoma found that the operation of an oil refinery and tank farm could constitute an ultrahazardous activity. In this case, a landowner brought suit against the former operators of a refinery that once existed on land plaintiffs now occupy. Though the court dismissed claims for negligence per se and fraud, it declined to dismiss Plaintiffs' strict liability claim, finding that "allegations that the Operational Defendants failed to exercise due care are not mutually exclusive with a claim of strict liability" based on ultrahazardous activity.

- Several federal cases also provided additional guidance on the admissibility of expert testimony. The Eighth Circuit appears to have lowered the bar for scientific reliability, finding that a "crude and imperfect" expert report on fate and transport issues should have been admitted by the district court. Despite obvious flaws, the court found the report "was scientifically valid, could properly be applied to the facts of this case, and, therefore, was reliable *enough* to assist the trier of fact." On the other hand, the Sixth Circuit affirmed the exclusion of a toxicology expert because he had failed to proffer "actual proof" to support his opinion. Finally, in the Middle District of Alabama, the district court excluded plaintiff's experts because they did not offer supportable opinions regarding medical causation, and had no proof that any plaintiff was exposed to a specific dose of an emission. The court excluded the opinions because they failed to meet the Eleventh Circuit's clear *McClain* standard, which states that "the individual must have been exposed to a sufficient amount of the substance in question to elicit the health effect in question."

National Enforcement Initiatives

EPA's National Enforcement Initiatives Focusing on Air and Energy Extraction – EPA selects National Enforcement Initiatives every three years, and recently has focused on energy extraction activities, including flaring and venting, and reducing hazardous air pollutants. Though recent reports suggested a downturn in the number of enforcement actions undertaken by EPA in 2017 – with approximately 1900 enforcement actions commenced nationally – it is expected that enforcement activity in 2018 will likely increase as investigations mature and enforcement priorities are set by the Agency leadership. Indeed, for most of 2017, the relevant EPA offices were led by career officials in acting capacities. With the Senate confirmation of William Wehrum to lead EPA's Office of Air and Radiation (confirmed on November 9, 2017), Susan Bodine to lead EPA's Office of Enforcement and Compliance Assurance (confirmed on December 7, 2017), David Ross to lead EPA's Office of Water, and Matthew Leopold to be EPA's General Counsel (both confirmed on December 14, 2017), EPA's political leadership in areas most likely to drive enforcement affecting the oil and gas industry are now in place. President Trump's nominee to lead the Justice Department's Environment & Natural Resources Division, Jeffrey Clarke, has not yet been confirmed, and that Division continues to be led by Acting Assistant Attorney General Jeffrey Wood.

The 2017 Energy Mergers and Acquisition Roundup

Oil and Gas Sector M&A Activity Strong in 2017 – The global oil and gas industry had approximately $137 billion in M&A activity in the first half of 2017, representing a significant increase relative to the prior year. Key strengths appear to be activity in the upstream sector, though the midstream segment saw several significant deals in 2017 as well. Power and utilities M&A activity, on the other hand, posted lower numbers in general than the prior year, though infrastructure transactions appear poised to drive M&A activity in 2018.

More detailed analyses of these and related topics follow.

Climate Change and Greenhouse Gases – Regulatory Actions, Notable Cases, and Governance Trends

Over the past year, efforts to address climate change have risen to the forefront of domestic and international jurisdictions alike. These efforts, however, have not been limited to legislative action. Rather, both state and private actors have been the targets of climate change-related litigation and investigations around the world. It remains to be seen how effective these efforts will be, but it is clear plaintiffs and investigative bodies are continuing to pursue novel claims relating to climate change.

EPA's Clean Power Plan – Repeal Proposal and Potential Replacement Options

On October 23, 2015, EPA finalized a rule pursuant to Section 111 of the Clean Air Act, referred to as the "Clean Power Plan," which set guidelines for carbon dioxide (CO_2) emissions from existing fossil fuel-fired power plants.[1] The Agency stated that the Clean Power Plan was intended to "lead to significant reductions in CO2 emissions [by 2030], result in cleaner generation from the existing power plant fleet, and support continued investments by the industry in cleaner power generation to ensure reliable, affordable electricity now and into the future."[2]

Twenty-seven states and a variety of other parties challenged the Clean Power Plan, seeking review of the rule by the United States Court of Appeals for the District of Columbia Circuit.[3] In February 2016, the United States Supreme Court stayed the implementation of the Clean Power Plan rule pending the resolution of that legal challenge.[4]

On March 28, 2017, while that action remained pending before the D.C. Circuit, President Trump signed his Executive Order on Energy Independence, directing EPA to review and, if appropriate, "publish for notice and comment proposed rules suspending, revising, or rescinding" the Clean Power Plan.[5] In April, in light of the Trump administration's decision to review the Clean Power Plan, the D.C. Circuit held the litigation in abeyance, requiring periodic status reports from the government.[6] The D.C. Circuit has extended the stay of litigation several times since, and EPA's most recent status report to the court submitted on January 10, 2018 requested that the court continue to hold the case in abeyance pending conclusion of ongoing related rulemakings.

On October 16, 2017, EPA formally proposed to repeal the Clean Power Plan.[7] In the proposed rule, EPA articulated a revised interpretation of the Clean Air Act ("CAA") provision upon which the Clean Power Plan is based, proposing that CAA section 111(a)(1) should be construed to mean that emission reduction measures "must be based on a physical or operational change to a building, structure, facility, or installation at that source, rather than measures that the source's owner or operator can implement on behalf of the source at another location."[8] Under such an interpretation, the EPA determined that the Clean Power Plan "exceeds the EPA's statutory authority and would be repealed."[9] The comment period on the proposed rule has been extended until January 16, 2018, and EPA is reportedly considering a further extension of the comment period until April 26, 2018.

In Clean Power Plan repeal proposal, EPA did not offer any alternative to the existing framework, noting that "[t]he EPA has not determined the scope of any potential rule under CAA section 111(d) to regulate greenhouse gas ("GHG") emissions from existing EGUs, and, if it will issue such a rule, when it will do so and what form that rule will take."[10] On December 18, 2017, EPA issued an Advance Notice of Proposed Rulemaking ("ANPRM") to solicit information from the public about a potential Clean Power Plan replacement rulemaking. EPA specifically sought comment on several topics relating to the roles and responsibilities of the State and EPA in regulating GHGs from existing power plants, and the Agency's interpretation of Clean Air Act Section 111(a)(1) as limiting applicable emission measures to those that can be applied to or at a stationary source, at the source-specific level. EPA is accepting public comments on the ANPRM until February 26, 2018.

In spite of the EPA's recent actions in proposing to repeal the Clean Power Plan and to solicit comment on possible options for replacing the regulation, a number of states have proceeded with implementing the requirements of the plan locally, even though it is yet to go into effect nationally. California, for example, published its compliance plan for the Clean Power Plan on August 5, 2016, and it released the final version of that plan in July 2017.[11] Separately, fifteen states—California, Colorado, Connecticut, Delaware, Hawaii, Massachusetts, Minnesota, New York, North Carolina, Oregon, Puerto Rico, Rhode Island, Vermont, Virginia, and Washington—formed the United States Climate Alliance and reaffirmed their "commit[ment] to meeting the Clean Power Plan targets."[12]

2017: Methane Regulation Update

EPA – New Source Performance Standards

The EPA's Methane Rule (new source performance standards under the Clean Air Act), went into effect on August 2, 2016, and required regulated entities to monitor their sources for certain fugitive emissions of methane, and to provide EPA with a monitoring report identifying those leaks by June 3, 2017. 40 C.F.R. § 60.5397a(f).

On April 18, 2017, EPA announced that it would reconsider its "fugitive emissions monitoring requirements" and issued an administrative stay of the compliance date for those requirements. Letter from E. Scott Pruitt to Howard J. Feldman, Shannon S. Broome, James D. Elliott, & Matt Hite, Convening a Proceeding for Reconsideration, at 2 (Apr. 18, 2017).

On June 5, 2017, EPA published a notice of reconsideration and partial stay in the Federal Register, staying the implementation of parts of the Methane Rule for ninety days pending reconsideration. 82 Fed. Reg. at 25,731–32. The notice specified that it went into effect on June 2, 2017, before the effective day of the regulation, even though the notice itself was published after the regulation's effective date. *Id*.

In response to this action, environmental groups filed an emergency motion in the United States Court of Appeals, District of Columbia Circuit arguing that the concerns and issues raised by EPA as necessitating the stay, had or could have been previously considered in the regular comment period for the proposed rule. EPA and industry groups argued that the stay was lawful.

The thrust of EPA's rationale for the reconsideration and the stay was that industry groups didn't have the proper time and opportunity to comment on the proposed rule. But on July 3, 2017, the court ruled against EPA and the industry and explained that "[t]he administrative record . . . makes clear that industry groups had ample opportunity to comment on all four issues on which EPA granted reconsideration, and indeed, that in several instances the agency incorporated those comments directly into the final rule." *Clean Air Council v. Pruitt*, 862 F.3d 1, 14 (D.C. Cir. 2017). And therefore, "EPA's decision to impose a stay, in other words, was 'arbitrary, capricious, [and] . . . in excess of [its] . . . statutory . . . authority.'" *Id*. After a brief reprieve from this ruling, the court essentially reaffirmed its July 5, 2017 ruling on July 31, 2017, thereby paving the way for the EPA's methane regulations to take effect and a petition for rehearing was denied.

To address the impending compliance deadlines in the rule, on June 16, 2017 EPA proposed to extend its stay for two years, thereby allowing EPA to reconsider the entire rule more broadly. 82 Fed. Reg. 27,645 (June 16, 2017). The D.C. court that was considering the temporary stay was clear that its ruling on the unlawfulness of that action did not in any way limit "EPA's authority to reconsider the final rule and to proceed with its June 16 NPRM." *Clean Air Council*, 862 F.3d at 14. On November 1, 2017, EPA issued a Notice of Data Availability for its proposed methane rule stay, including additional information relative to perceived rule implementation challenges (i.e., possibility of a phase-in period), and new cost analysis. This rule has not yet been finalized.

While the Methane Rule addressed emissions from new sources, EPA had previously issued an Information Collection Request to existing sources that could be used in any subsequent regulation of those sources. On March 2, 2017, following several States' requests, EPA withdrew the ICR based, in part, upon a further assessment of its anticipated costs.

BLM – Flaring and Venting

On November 18, 2016, BLM issued the Waste Prevention, Production Subject to Royalties, and Resource Conservation Rule (the "Rule"). *See* 81 Fed. Reg. 83,008. The rule sought to reduce natural gas waste and focused on venting and flaring of natural gas. *Id*. The Rule's effective date was January 17, 2017. *Id*. After the publication of the rule, industry groups filed suit to stop its implementation, but those suits were ultimately denied and the rule was allowed to take effect. *See Wyoming v. United States Dep't of the Interior*, No. 2:16-CV-0280-SWS, 2017 WL 161428, at *12 (D. Wyo. Jan. 16, 2017)

On June 15, 2017, BLM issued a notice that it was postponing certain trigger dates in the rule. *See* Waste Prevention, Production Subject to Royalties, and Resource Conservation; Postponement of Certain Compliance Dates, 82 Fed. Reg. 27,430. The affected compliance deadlines are not until January 17, 2018. *Id*.

In July 2017, the State of California, the State of New Mexico, and seventeen conservation and tribal groups filed suit alleging that the decision by BLM to delay the implementation of the methane rules was unlawful. *State v. United States Bureau of Land Mgmt.*, No. 17-CV-03804-EDL, 2017 WL 4416409, at *3 (N.D. Cal. Oct. 4, 2017). Plaintiffs in the lawsuit contended that the BLM essentially had not properly considered the impact of the postponement of the rule. *Id*. And on October 4, 2017 the court ruled that "[b]ecause of the complete failure to consider the foregone benefits of compliance, Defendants have failed to" show that "justice so requires" the postponement of the rule. *Id*. at *13. Therefore, the court ultimately vacated the postponement of the rule allowing the rule to move forward and take effect in 2018. *Id*. at *14.

On October 5, 2017, BLM published an NPRM to delay the implementation of the BLM methane rule Waste Prevention, Production Subject to Royalties, and Resource Conservation; Delay and Suspension of Certain Requirements, 82 Fed. Reg. 46458. The rule proposes "to temporarily suspend or delay certain requirements contained in the 2016 final rule until January 17, 2019" so the BLM can review "the 2016 final rule" in order to avoid costs on operators. *Id*.

Additionally, on December 8, 2017, the BLM filed a notice of appeal of the Northern District of California's October ruling.

EPA and DOT – Reexamining Tailpipe Emissions Rules

In August 2017, EPA and the Department of Transportation ("DOT") opened a public comment period on the reconsideration of the January 2017 Final Determination for greenhouse gas emissions standards for cars and light trucks for model years ("MY") 2022-2025. Separately, the EPA is also taking comment on whether the MY 2021 standards are appropriate.

EPA regulations require the EPA to determine whether or not existing standards for model years remain appropriate under section 202(a) of the Clean Air Act. President Trump first announced in March 2017 that he was directing the EPA to review its car and light-duty truck tailpipe emissions standards for MY 2022 through 2025, and his administration later indicated its intent to reopen the matter of the standards for MY 2021. California, thirteen other states, and Washington, D.C. have already adopted stringent tailpipe standards through 2025, as authorized by provisions of the federal Clean Air Act. If, in an attempt to avoid a national patchwork of fuel efficiency regulations, the EPA attacks this authority after relaxing fuel efficiency standards for MY 2021 through 2025, California and like-minded states will almost certainly sue the agency.

In addition, EPA and DOT announced in August 2017 formal steps to begin reconsidering the greenhouse gas pollution and fuel economy standards of large trucks, focused on the standards for freight trailers. The standards set by the Obama administration for medium- and heavy-duty vehicles for MY 2021-2027 closed a regulatory loophole for new large truck components known as trailers and gliders (in essence, truck frames with old engines), applying heavy-duty vehicle standards to these truck components for the first time. The compliance deadline had been set for the beginning of 2018. However, in response to industry concerns that EPA lacked the requisite authority under the Clean Air Act to regulate the trailer and glider sectors, EPA announced it would be reexamining this tailpipe emissions rule.

The EPA's Shifting Regulatory Cost-Benefit Analysis

The standard rulemaking procedure of EPA and other federal regulatory agencies typically includes an analysis of the potential economic costs and benefits resulting from the promulgation of a new rule. In 2017, EPA altered its formula for conducting this cost-benefit analysis, shifting the perceived value of certain areas of environmental regulation, particularly measures designed to address climate change. An example of this change is the EPA's updated estimate of the social cost of carbon ("SCC").

The SCC is meant to be a comprehensive estimate of economic damage caused by climate change, and served as a metric for assigning a monetary value to regulatory efforts designed to limit carbon emissions. A lower SCC can diminish the estimated benefits of regulations that reduce carbon emissions, thereby impacting any ultimate cost-benefit analysis pertaining to a regulatory proposal.

In 2009, the Obama administration created the Interagency Working Group on the Social Cost of Carbon, assigning the working group the complex task of quantifying a cost relative to a ton of carbon dioxide emitted to the atmosphere. EPA, prior to 2017, used the working group's most recent central estimate—$45 dollars per ton (adjusted for inflation) in 2020—in its regulatory economic analysis of the Clean Power Plan.

In March 2017, President Trump issued an Executive Order which disbanded the working group and stated that the group's reports and findings would "be withdrawn as no longer representative of governmental policy." The Executive Order directed agencies to instead comply with a 2003 OMB guidance on regulatory impact analysis which emphasized focusing on the benefits and costs that accrue to citizens and residents of the United States when valuing changes in greenhouse gas emissions, as distinct from including global benefits and costs in the calculus.

The initial impact of the Executive Order was felt in October, when EPA proposed to repeal the CPP. The proposal explains the consequences of such a repeal, and estimates the cost of one ton of emissions of carbon dioxide to be between $1 and $6 in the year 2020, a reduction of 87% to 97% from the figure used by the Obama administration.

Three principal factors drove the drastic divergence between the SCC calculations of the two presidential administrations:

Abandoning the Global Perspective. Climate change, to a greater extent than any other environmental issue, is a phenomenon wherein domestic activity within an individual nation can cause significant environmental impacts on a global scale. Nevertheless, as the EPA spokesman remarked in October, the agency's CPP repeal proposal "presents a scenario looking specifically at domestic climate impacts." Whereas President Obama's EPA took a global approach to calculating the SCC, considering costs stemming from developments abroad, President Trump's EPA is now calculating the cost of carbon only based on effects within the United States. This policy has decreased the updated SCC figure relative to calculations that incorporated global costs.

Modifying the Accounting of Co-Benefits. The EPA no longer counts a portion of the health benefits that the Obama administration predicted would arise as side effects of reducing carbon emissions. President Obama's EPA accounted for the fact that levels of sulfur dioxide, nitrogen dioxide and particulate matter would decline along with greenhouse gases as a result of the CPP. In contrast, EPA now does not count the benefits of any such reductions if the pollutants are already below levels the agency has deemed safe in other regulatory standards. For example, with regard to particulate matter, the agency's new cost-benefit analysis assumes there is no more risk to human health below the levels currently required by the National Ambient Air Quality Standards, which is 12 micrograms per cubic meter of fine particles (PM2.5).

Increased Discount Rates. When economists determine the present value of costs or benefits that will be realized in the future, their standard practice is to discount the future costs or benefits by a certain rate. In the context of climate change regulation, this "discount rate" conceptually represents the opportunity cost of spending society's dollars on mitigating climate change (rather than what those resources may have otherwise been invested in). Increasing the discount rate effectively reduces the estimated cost of emitting carbon, since many of the costs of climate change appear in the distant future. The standard Obama-era practice was to apply a 2.5, 3, and 5% annual discount rate in the climate change context. In the CPP repeal proposal, however, EPA considered 3% and 7% annual discount rates for the SCC. Given the decades over which the discount rate is applied in this context, employing the 7% rate in particular applies substantial downward pressure on the SCC, reducing the value of the avoided costs that result from regulating carbon output.

These methodological changes have had a similar impact on EPA's social cost of methane metric. The agency recently set an interim social cost of methane at $55 per metric ton in 2020, over twenty-five times less than the estimate of the Obama administration. Similar to its treatment of carbon emissions, in doing so EPA only considered the domestic cost of methane emissions and employed higher discount rates in its calculation.

It is likely that these changes to the economic analysis for carbon and methane limits will be subject to judicial scrutiny in the context of any challenge to future Clean Power Plan repeal and/or replacement rulemakings.

California & New York: Climate Change Cases

In July 2017, the Counties of Marin and San Mateo and the City of Imperial Beach filed separate lawsuits against thirty-seven fossil-fuel companies, claiming that the companies were liable under various theories of California tort law, including public nuisance, private nuisance, strict liability, negligence, and trespass, for injuries related to climate change and sea level rise.[13] Two additional cities—San Francisco and Oakland—filed similar complaints against five fossil-fuel companies on September 19, but asserted only causes of action for public nuisance, also based on climate change and sea level rise.[14] The defendants have removed all of these actions to U.S. District Court for the Northern District of California. The plaintiffs in the actions have filed motions to remand, and briefing on those motions is proceeding. Recently, the County of Santa Cruz, the City of Santa Cruz, and the City of New York filed similar lawsuits.[15]

Oregon: Juliana v. United States

In August 2015, twenty-one individuals aged 8-19, certain environmental organizations, and former NASA climate scientist James Hansen, filed an action against the United States and multiple agencies and officials in federal court in Oregon.[16] The *Juliana* case is one of several similar cases brought by an Oregon-based advocacy group called Our Children's Trust. The plaintiffs claim that the government's failure to curb emissions has caused damaging effects relating to climate change, in violation of the plaintiffs' constitutional rights to life, liberty, and property. They seek an injunction and measures to restrict emissions under the "public trust" doctrine, arguing that the government has a duty to preserve certain natural resources in trust for future generations. The government sought dismissal of the case, arguing that the public trust doctrine does not apply to the federal government. After the district court denied the motions to dismiss, the federal government filed a petition for a writ of mandamus with the Ninth Circuit, which stayed the district court litigation in July, pending resolution of the mandamus petition. The Ninth Circuit held oral argument on December 11 and the matter has been submitted.

Conservation Law Foundation Lawsuits

The Boston-based Conservation Law Foundation ("CLF") sued Exxon in September 2016, for failure to consider climate change impacts in its plans under federal environmental statutes.[17] The court subsequently granted in part and denied in part Exxon's motion to dismiss, holding that CLF did not have standing to sue for alleged injuries from future sea level rise or increased storms and flooding, but that the group did have standing to challenge actions that could cause pollution in the near future. CLF filed an amended complaint on October 20, 2017. A similar lawsuit was filed in federal court in Rhode Island in August 2017 against Royal Dutch Shell.[18] CLF filed an amended complaint on October 25.

Other Civil Lawsuits

In September 2017, Stanford University professor Mark Jacobson filed a defamation lawsuit against the National Academy of Sciences and an independent researcher, Dr. Christopher Clack, who challenged Professor Jacobson's methods and results in asserting that 10% of U.S. energy needs could be met with renewables. The plaintiff seeks $10 million in damages based on allegations that Dr. Clack and the journal knowingly published false and misleading statements regarding his work.

Exxon has been subject to two class action lawsuits relating to climate change. In November 2016, a putative securities fraud class action against Exxon was filed in the Northern District of Texas, based on allegedly false statements about the value of its reserves.[19] The same month, a group of former Exxon employees filed a putative class action against Exxon under the Employee Retirement Income Security Act, alleging that Exxon executives breached their fiduciary duties by investing in Exxon stock whose value they knew or should have known was artificially inflated due to business risks associated with climate change.[20]

State Attorney General Investigations of Exxon Mobil Corp.

On November 4, 2015, the New York Attorney General ("NYAG") served Exxon with a subpoena under the State's Martin Act, which generally prohibits deception related to the sale of securities.[21] NYAG reportedly sought documents dating back to 1977 relating to whether Exxon misled the public and investors about the possible risks of climate change, in light of the company's historical scientific research in that area.[22] NYAG has since shifted its focus to whether Exxon adequately wrote down the value of its assets in view of the decline of oil prices and the potential impact of current and future regulation of greenhouse gases.[23] Most recently, NYAG has focused on how the company applies its internal proxy cost of carbon to investment decisions, arguing that how the company applies that cost internally is inconsistent with public representations about it.[24]

On March 29, 2016, a group of Democratic seventeen state attorneys general held a press conference to announce their intention to investigate potential deception relating to climate change in the fossil fuel industry.[25] Around that same time, several state attorneys general, including Massachusetts,[26] California,[27] and the U.S. Virgin Islands,[28] announced that they were opening investigations into Exxon.

ExxonMobil has challenged the subpoenas issued to the company in several different fora. It filed suit in state and federal courts in Texas, alleging that the investigations were an abuse of process, violated ExxonMobil's rights under the U.S. and Texas Constitutions, and constituted viewpoint discrimination.[29] ExxonMobil also filed suit in Massachusetts state court, where the state Supreme Judicial Court heard oral argument in December 2017.[30] While ExxonMobil has been producing documents to NYAG, it also continues to challenge the scope of the subpoena in New York state court.[31] Most recently, ExxonMobil was denied leave to appeal a decision requiring the production of documents from its auditor,[32] and ExxonMobil was also ordered to produce certain employees, including the employee of a Canadian subsidiary, for depositions.[33]

Legislative Activity

On July 17, 2017, the California legislature passed Assembly Bill ("AB") 398[34] to extend the state's cap-and-trade program (AB 32) from January 1, 2021 through December 31, 2030. AB 398 was passed in conjunction with AB 617,[35] which directs the development of a Community Air Protection Program.

International Activity

While U.S. judicial and legislative activity on climate change is the primary focus of this update, the area has also seen significant recent developments in the international arena. Chief among these developments is the pursuit of cases abroad that are similar to the *Juliana* case in the United States, and which seek to force governmental regulation of greenhouse gas emissions. The most notable of these cases is the *Urgenda* case in the Netherlands; the plaintiffs in June 2015 obtained a decision ordering the government to take more action to reduce greenhouse gas emissions in the country.[36] The government has appealed the result, but a decision is still pending. Following the success of the *Urgenda* case, a number of similar actions seeking to force government regulation have been filed in other countries, such as India,[37] Switzerland,[38] New Zealand,[39] and Norway.[40] Additionally, infrastructure and construction projects and new power plants have been challenged in Austria[41] and South Africa[42] on the basis that they would increase emissions and contribute to climate change.

International climate change cases have also been filed against corporations. In Germany, for example, an action was filed in December 2015 against the German energy firm RWE by a Peruvian farmer.[43] And in the Philippines, a petition against forty-seven fossil fuel companies was filed by Greenpeace Southeast Asia and other organizations with the Philippines Human Rights Commission.[44] Similarly, a group of more than one hundred citizen groups and nineteen communities filed a complaint in the Philippines against the World Bank's International Finance Corporation for allegedly fueling climate change through its investments in a Philippine bank.[45] Finally, in Australia, in August 2017, shareholders filed suit against Commonwealth Bank of Australia for failing to acknowledge the risks of climate change in its business,[46] but voluntarily dismissed the case the next month after the Bank acknowledged climate change risks in its annual report.[47]

2017 Proxy Season - Climate Change Shareholder/Governance

As in 2016, shareholder proposals focused on environmental issues were popular during the 2017 proxy season. The largest group of environmental proposals submitted during the 2017 proxy season related to climate change, with sixty-nine such proposals submitted in 2017 compared to sixty-three in 2016. Shareholder proposals focused on climate change were submitted not just to oil and gas companies, but also to companies in the financial services and technology industries. Institutional Shareholder Services ("ISS"), a leading proxy advisory firm, recommended that shareholders vote "for" twenty-three of the twenty-eight proposals (or 82.1%) voted on in 2017 and "for" twenty-seven of the thirty-seven proposals (or 73.0%) of the proposals voted on in 2016.

In 2017, there was an unprecedented level of shareholder support for environmental proposals, with three climate change proposals receiving majority support and climate change proposals averaging support of 32.6% of votes cast. This compares to one climate change proposal receiving majority support in 2016 and climate change proposals averaging support of 24.2% of votes cast.

Each of the three climate change proposals that passed requested the company to prepare a report on the impact of climate change policies, including an analysis of the impacts of commitments to limit global temperature change to two degrees Celsius:

- At Occidental Petroleum Corp., the proposal received support of 67.3% of votes cast by the company's shareholders. In an unprecedented move, BlackRock issued a press release announcing that it had supported the shareholder proposal.

- PPL Corp., a utility holding company, received the proposal from the New York State Common Retirement Fund, and it received support of 56.8% of votes cast by the company's shareholders, including CalPERS and other pension funds.

- At Exxon Mobil, the proposal received support from about 62.1% of votes cast by the company's shareholders.

These votes reflect the new willingness of institutional investors to support environmental proposals and the effect of increased pressure from their clients to influence companies on environmental issues. In addition, the same proposal was submitted to eighteen other companies and voted on at ten companies, where it averaged 45.6% of votes cast.

While various factors contributed to the success of the three climate change proposals that received majority support in 2017, several prominent institutional investors issued update guidance that may have influenced shareholder support.

In March 2017, BlackRock announced in its 2017-2018 engagement priorities that it expects boards to have "demonstrable fluency in how climate risk affects the business and management's approach to adapting and mitigating the risk," and that where it has concerns that a board is not "dealing with a material risk appropriately," it may signal that concern through its vote. Vanguard also updated its proxy voting guidelines in 2017 to provide that it would evaluate each environmental proposal on the merits and may support those proposals with a demonstrable link to long-term shareholder value.

Additionally, ISS and Glass Lewis, the two most prominent proxy advisory firms, issued their updated 2018 voting guidelines. ISS clarified that, when evaluating climate change shareholder proposals, it will now assess a company's disclosure of its process for identifying, measuring and managing climate change risks. Glass Lewis indicated that while it is generally supportive of the disclosure recommendations developed by The Task Force on Climate-Related Financial Disclosure, Glass Lewis will evaluate climate change proposals on a case-by-case basis.

The Task Force on Climate-Related Financial Disclosures released its Final Recommendations Report on Climate-Related Financial Disclosures in June 2017. The report offers recommendations to companies concerning the type of financial disclosures that best enable the markets to measure and respond to climate change.

In addition, the Sustainability Accounting Standards Board ("SASB") has extended the public comment period for its Sustainability Reporting Guidelines (the "SASB Guidelines") through January 31, 2018. The SASB Guidelines address important sustainability topics, including greenhouse gas emissions, and offer companies guidance on suitable metrics and disclosure practices. On December 6, 2017, SASB announced that it would create sector advisory boards to provide feedback on and inform its codified standards and released its annual State of Disclosure report in December.

Other Regulatory and Litigation Developments

Renewable Fuel Standard Rule

On July 28, 2017, the D.C. Circuit issued an opinion overturning EPA's interpretation of certain waiver authorities in the Renewable Fuel Standard program.[48] In an effort to justify its departure from statutorily mandated renewable fuel volumes, EPA sought to use demand-side constraints to support a waiver based on "inadequate domestic supply." The court vacated EPA's decision to reduce total RFS volume requirements for 2016, and remanded to the Agency for consideration in light of the opinion. The Court found that the waver "does not allow EPA to consider the volume of renewable fuel that is available to ultimate consumers or the demand-side constraints that affect the consumption of renewable fuel by consumers."

In November 2017, the EPA signed the final annual volume rule setting cellulosic, advanced and total renewable fuel obligations for 2018, and biomass-based diesel obligations for 2019. The EPA set the 2018 cellulosic requirement at 288 million gallons, about 10 million gallons higher than for 2017. In setting the levels for advanced and total renewable fuel, the EPA exercised its "cellulosic" waiver authority, which authorizes the agency to reduce advanced and total renewable fuel by an equal or lesser amount as the agency reduces the cellulosic requirement in relation to the default volume requirement in the RFS statute. Having reduced the cellulosic requirement by 6.712 billion gallons relative to the 2018 statutory level of 7 billion gallons, the EPA reduced the 2018 statutory requirements for advanced and total renewable fuels by this same amount. The result is an advanced requirement of 4.29 billion gallons and a total renewable fuel requirement of 19.29 billion gallons—each of these levels about 10 million gallons higher than in 2017. The EPA set the 2019 requirement for biomass-based diesel at 2.1 billion gallons, the same level as it required for 2018.

This is the first time that the EPA has reduced advanced and total renewable volumes by the full amount by which it reduced the cellulosic requirement. That is, in prior years the EPA has reduced advanced and total volumes by a lesser amount, effectively allowing non-cellulosic advanced fuels to fill part of the gap left by lower cellulosic production. But the EPA has chosen not to do that for 2018, based on its assessment that the greenhouse gas reduction and other benefits of higher standards are limited relative to the potential increased costs.

Separately, the Tenth Circuit also struck down EPA's prior denial of a small refinery exemption petition submitted by a Wyoming refinery based upon economic hardship.[49] In a 2005 amendment to the Clean Air Act, Congress required oil refineries to increase use of renewable fuels. Noting the impact this rule might have on small refineries, Congress permitted the EPA to make case-by-case exceptions for refineries suffering a "disproportionate economic hardship." According to the EPA, to fall within that safe harbor a refinery must show that compliance with the renewable-fuel mandate would threaten the refinery's "ongoing future viability." In 2013, a small Wyoming oil refinery petitioned the EPA for a renewable-fuel mandate exemption. The EPA denied the petition, finding that the refinery "appeared to be profitable enough to pay the cost of the [ ] Program." The refinery appealed. The Tenth Circuit held that the EPA's interpretation conflicted with the Clean Air Act's plain language because, "[a]s a matter of common sense, an experience that causes hardship is less burdensome than an experience that threatens one's [viability]." The EPA's interpretation also ignored the word "disproportionate," which "inherently requires a comparative evaluation." The EPA also impermissibly focused on a single criterion—the refinery's ongoing viability—to the exclusion of all other relevant factors. The court thus vacated the EPA's denial and remanded the case to the agency for further proceedings.

Natural Gas Exports to "Non-Free Trade Countries"

Freeport LNG Expansion requested permission from the Department of Energy to export natural gas to various non-free trade countries. The DOE granted the application and issued an Environmental Impact Statement ("EIS") that "disclosed the various ways shale gas production might impact the water, air, and land resources surrounding production activities." Plaintiffs alleged that the EIS failed to "specifically project where or to what extent the impacts of increased production might occur in response to any particular amount of exports." Environmental groups argued this rendered the statement inadequate. In rejecting the environmental groups' arguments, the D.C. Circuit held that DOE's EIS need not quantify precisely how increased exports might affect domestic natural gas production because, given the pace of technological innovation, any causal connection between increased exports and ramped-up production was not reasonably foreseeable; and, DOE could not accurately assess where the gas would be produced, or predict locale-specific environmental impacts.[50] In addition, the court held that DOE need not evaluate whether increased exports might raise domestic prices, leading the power sector to switch from gas to coal generation. This case removed a major hurdle to the export of natural gas to non-free trade countries.

Expanding Energy Exploration to U.S. Coastal Waters & ANWR

On January 4, 2018, the Trump administration announced its intention to allow new offshore oil and gas drilling in nearly all U.S. coastal waters, opening access to leases off California for the first time in decades and opening more than a billion acres in the Arctic and along the Eastern Seaboard. Consistent with his administration's 2017-2022 offshore drilling plan, President Obama had blocked drilling on about 94% of the outer continental shelf, banning new oil and gas drilling in federal waters in the Atlantic and Arctic oceans weeks before leaving office. However, in April 2017, President Trump signed an Executive Order requiring the Interior Department to reconsider President Obama's five-year plan.

The department's new draft National Outer Continental Shelf Oil and Gas Leasing Program for 2019-2024 would render over 90% of the outer continental shelf's total acreage available to drillers for leasing, a national record.[51] The Interior Department would open twenty-five of twenty-six regions of the outer continental shelf, leaving only the North Aleutian Basin—which President George Bush protected in an executive order—exempted from drilling, and Interior officials said they intended to hold forty-seven lease sales between 2019 and 2024, including nineteen off the coast of Alaska and twelve in the Gulf of Mexico. Seven areas offered for new drilling would be in Pacific waters off of California, where drilling has been off limits since a 1969 oil spill near Santa Barbara. Finalizing the Interior department's new offshore drilling plan could take as long as eighteen months, according to experts. Comments on the plan are due by March 9, 2018. Challenges to the plan are expected in courts and Congress.

The final tax-reform package signed into law by President Trump in December 2017, known as the Tax Cuts and Jobs Act, opened non-wilderness 1002 Area of the Alaska National Wildlife Refuge ("ANWR") for oil exploration. The legislation lifts an almost forty-year old ban on prospecting for oil and natural gas in the refuge's coastal plain, which for decades has been one of the highest-profile battlegrounds in the debate between oil and gas production advocates and conservationists. Despite the lifting of the ban, the region is unlikely to be a hotbed of interest for the oil and gas industry, at least for the time being. Given the inhospitable conditions in Alaska, oil would have to sell at about $70 a barrel to make most of it economical to recover. Oil prices have hovered around $55 a barrel for the past year, recently peaking at $63.

FERC Required to Make Additional Environmental Impact Findings on Southeast Market Pipelines Project

On February 2, 2016, FERC approved the construction and operation of the Southeast Market Pipelines Project, comprising three new interstate natural gas pipelines in the southeastern United States, which was projected to be completed in 2021 and able to carry over one billion cubic feet of natural gas. Environmental groups and landowners sought a stay of construction, which was denied by FERC. They then petitioned the D.C. Circuit for review, arguing that FERC's environmental impact statement "failed to adequately consider the project's contribution to greenhouse-gas emissions and its impact on low-income and minority communities . . . that Sabal Trail's service rates were based on an invalid methodology, . . . that FERC used an insufficiently transparent process to approve the pipeline certificates," and that there were failures of oversight.

The Court found that "the EIS acknowledged and considered the substance of all the concerns" of the environmental groups, and explained why the proposed alternatives "would do more harm than good."[52] Nonetheless, it explained that National Environmental Policy Act of 1969 required an EIS to discuss all "reasonably foreseeable" environmental consequences, which were deemed to include the possibility that power plants would burn gas, generating carbon dioxide, which once in the atmosphere would contribute to the greenhouse effect and climate change. The court thus concluded that "FERC should have estimated the amount of power-plant carbon emissions that the pipelines will make possible" and that it "should have . . . given a quantitative estimate of the downstream greenhouse emissions that will result[.]" The Court remanded the case to FERC to prepare a new EIS. The Supplemental EIS was issued on September 28, 2017, and comments were due on November 20, 2017. [53]

Court Orders County to Consider Risk of Release of Hazardous Materials in Refinery Expansion Project

Alon USA proposed the "Alon Bakersfield Refinery Crude Flexibility Project" to the County of Kern, California for the purpose of "allow[ing] flexibility for [an] existing refinery [located near Bakersfield] to process a variety of crude oils on-site." The project expanded the train facilities in order to "increase the plant's potential to receive crude oil from the Bakken formation in northwestern North Dakota," which is more volatile and likely to explode in the event of a rail incident than other crude oils. The County approved the project and certified an environmental impact report ("EIR"). Plaintiff environmental groups challenged the approval, arguing that certifying the EIR violated the California Environmental Quality Act ("CEQA") because the EIR "(1) erroneously used the refinery's operational volume from 2007 as the baseline; (2) incorrectly relied upon the refinery's participation in California's cap-and-trade program to conclude the project's greenhouse gas emissions would be less than significant; and (3) underestimated the project's rail transport impacts[.]" The court found that the EIR's baseline choice complied with the CEQA and that the EIR's discussion of greenhouse gases contained no error. But it rejected an approval and remanded for further consideration because the EIR underestimated the risk of release of hazardous materials during rail transportation.[54]

Tenth Circuit Finds United States Liable for Cleanup on Federal Property

The Tenth Circuit held that the United States is an "owner," and therefore a "potentially responsible party" under CERCLA, because it possessed legal title to relevant portions of a Superfund site at the time hazardous substances were deposited.[55] The case arose from a Superfund site near Questa, New Mexico. Chevron—which had long operated a mine on the site—sued the United States and asked for a declaration that the government is strictly liable as an owner for its share of the cleanup costs. The United States argued that although it held "bare legal title" to the property, it lacked other indicia of ownership. Relying on the dictionary definition of "owner," the Tenth Circuit held that "[f]or purposes of CERCLA . . . an owner includes the legal title holder of contaminated land." This decision makes it easier for those identified as potentially responsible parties to show that the United States itself is a potentially responsible party with respect to mining and other energy development projects located on federal property.

Clean Water Rule and the Definition of "Waters of the United States"

In 1972, Congress enacted the Clean Water Act ("CWA") "to restore and maintain the chemical, physical and biological integrity of the Nation's waters." To help achieve that purpose, the CWA prohibits the discharge of any pollutants to "navigable waters." The CWA provides that "[t]he term 'navigable waters' means the waters of the United States, including the territorial seas."

The CWA is administered by both the Environmental Protection Agency ("EPA") and the U.S. Army Corps of Engineers (together with the EPA, the "Agencies"). During the 1980s, the Agencies adopted substantially similar definitions of "waters of the United States," which included: waters used for interstate or foreign commerce; all interstate waters and wetlands; intrastate lakes, rivers, streams, wetlands natural ponds, etc., the use of which could affect interstate commerce or foreign commerce; tributaries of, and wetlands adjacent to, these identified bodies of water.[56]

In *Rapanos v. United States*, a four-Justice plurality opinion, authored by Justice Scalia, interpreted the term "waters of the United States" as covering "relatively permanent, standing or continuously flowing bodies of water" that are connected to traditional navigable waters as well as wetlands with "continuous surface connection" to such bodies of water.[57] Justice Kennedy concurred with the plurality judgment, but in his view, waters and wetlands should be covered by the CWA when they have a "'significant nexus' to waters that are or were navigable in fact or that could reasonably be so made." This meant that wetlands had to "significantly affect the chemical, physical, and biological integrity" of other covered waters more readily understood as "navigable" in order to warrant protection. In contrast, "when wetlands' effects of water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term 'navigable waters.'" Although the dissenting Justices would have affirmed the court of appeals' application of the Agencies' regulations, they concluded that the term "waters of the United States" encompasses all tributaries and wetlands that satisfy "either the plurality's [standard] or Justice Kennedy's."

In 2008, after the *Rapanos* decision, the Agencies issued joint guidance to address waters at issue in that decision, and indicated that "waters of the United States" included traditional navigable waters and their adjacent wetlands, relatively permanent waters and wetlands that abut them, and water with a significant nexus to a traditional navigable water. After issuance of this guidance, Members of Congress, developers, farmers, state and local governments, environmental organizations, energy companies and other parties asked the Agencies to replace the guidance with a regulation that would provide certainty and clarity on the scope of waters protected by the CWA.

On June 29, 2015, following public notice and comment, the Agencies published a final rule defining the scope of the phrase "waters of the United States" (the "2015 Clean Water Rule"). Thirty-one States and a number of other parties sought judicial review of the 2015 Clean Water Rule in various district and circuit courts. Ultimately, on October 9, 2015, the Sixth Circuit stayed the 2015 Clean Water Rule nationwide to restore the "pre-Rule regime, pending judicial review."[58] Pursuant to that order, the Agencies implemented the CWA pursuant to the regulatory regime that preceded the 2015 Clean Water Rule.

On January 13, 2017, the U.S. Supreme Court granted *certiorari* on the question of whether the Court of Appeals has original jurisdiction to review challenges to the 2015 Clean Water Rule The Sixth Circuit subsequently granted petitioners' motion to hold in abeyance the briefing schedule in the litigation challenging the 2015 Clean Water Rule pending the Supreme Court decision on jurisdiction.

On February 28, 2017, President Trump issued an Executive Order entitled "Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the 'Waters of the United States' Rule." The stated policy of the Order was to "ensure that the Nation's navigable waters are kept free from pollution, while at the same time promoting economic growth, minimizing regulatory uncertainty, and showing due regard for the roles of the Congress and the States under the Constitution." The Order further directed the Agencies to review the 2015 Rule for consistency with this policy, to issue a proposed rule rescinding or revising the 2015 Rule, and to consider interpreting the term "navigable waters" in a manner consistent with Justice Scalia's plurality opinion in *Rapanos*.

On June 27, 2017, the Agencies proposed a rule to rescind the 2015 Clean Water Rule and re-codify in the Code of Federal Regulations ("CFR") the regulatory text that preceded the 2015 Clean Water Rule and that the Agencies are currently implementing under the court stay, informed by applicable guidance documents and consistent with *Rapanos*. The proposed rule retains exclusions from the definition of "waters of the United States" for prior converted cropland and waste treatment systems. This rulemaking was the first step in a two-step response to the February 28, 2017 Executive Order, intended to ensure certainty as the scope of CWA jurisdiction on an interim basis as the Agencies proceeded to engage in the second step, namely, the development of a new definition of "waters of the United States" taking into consideration the principles that Justice Scalia outlined in the *Rapanos* plurality decision.

On November 16, 2017, the Agencies proposed to amend the effective date of the 2015 Clean Water Rule. In order to give the Agencies more time to reconsider the definition of "waters of the United States," the Agencies proposed that the 2015 Clean Water Rule would not go into effect until two years after the proposal was finalized and published in the Federal Register.

Courts Continue to Disagree Whether Discharges into Groundwater Run Afoul of Clean Water Act

On one side of the issue, the District of South Carolina ruled that an oil pipeline leak that contaminated soil and groundwater did not violate the Clean Water Act.[59] The case arose from the discharge of petroleum into the soil. The fuel migrated through the earth to nearby wetlands; it also directly polluted groundwater that was hydrologically connected to a nearby watershed. The court first held that "[t]he migration of pollutants through soil and groundwater is nonpoint source pollution," and thus outside the purview of the CWA. It also held that the CWA did not prohibit discharges into groundwater, given that the CWA only regulated discharges into the "navigable waters" of the United States. Because the statute referred to "groundwater" and "navigable waters" as separate concepts, the court reasoned that Congress considered them to be distinct.

On the other side, the Eastern District of Virginia found that releases to groundwater are point sources governed by the CWA.[60] The defendant stored coal ash in a storage pond and landfill. Runoff from the disposal sites deposited arsenic in nearby groundwater. The court held that the defendant violated the CWA by discharging arsenic into the groundwater. The court first explained that Congress's goal of "protect[ing] the water quality of the nation's surface water" would be thwarted if companies could discharge pollutants directly into hydrologically connected groundwater. It further noted the EPA's "longstanding view that the CWA covers discharges of pollutants to groundwater that flow to surface waters through a direct hydrological connection." The court then found that the coal ash piles qualified as a "point source," reasoning that the defendant had intentionally concentrated the coal ash and its constituent pollutants in one location.

Anticipated New Source Review ("NSR") Program Reform

Over the past year, the U.S. Environmental Protection Agency's New Source Review program[61] has been identified as one of several regulatory programs targeted for reform by the Trump Administration. On January 24, 2017, President Trump signed a Presidential Memorandum on Streamlining Permitting and Reducing Regulatory Burdens for Domestic Manufacturing.[62] That memorandum directed the Secretary of Commerce to solicit input from industry stakeholders "concerning the impact of Federal regulations on domestic manufacturing" and to develop a proposal "setting forth a plan to streamline Federal permitting processes for domestic manufacturing and to reduce regulatory burdens affecting domestic manufacturers."[63] Two months later, the President also issued Executive Order 13,783, "Promoting Energy Independence and Economic Growth," which directed federal agencies to conduct a review of existing regulations, guidance, and other agency actions "that potentially burden the development or use of domestically produced energy resources."[64]

On October 6, 2017, in response to the Presidential Memorandum, the U.S. Department of Commerce published its report, entitled "Streamlining Permitting and Reducing Regulatory Burdens for Domestic Manufacturing."[65] The report identified the NSR program as a "Priority Area for Reform," and it outlined ten potential changes to the program to address concerns raised by industry.[66] Those changes are:

- Enforce the one-year turnaround time on NSR and PSD permit applications;
- Reduce statute of limitations on challenges or appeals to one year;
- Allow non-emitting construction activities to commence prior to receiving a permit;
- Consider options to revise the definition of Routine Maintenance, Repair & Replacement ("RMRR") to provide more flexibility;
- Promote and facilitate use of flexible permitting mechanisms;
- Develop opportunities to streamline NSR applicability determinations and/or to reduce the number of facilities and projects that may be subject to NSR;
- Issue guidance on modeling concurrent with promulgation of revised NAAQs, to ensure timely clarification on modeling required as part of an NSR application;
- Consider opportunities to "grandfather" NSR applications following revision of an NAAQS;
- Consider opportunities to emphasize key aspects of the Best Available Control Technology ("BACT") analysis including, but not limited to, expectations regarding technology determinations; and
- Consider opportunities to expand the purchasing offsets outside of the local areas as well as other offset-related revisions which would provide increased flexibility and burden reduction.[67]

The Report set a deadline of December 31, 2017, for regulatory reform task forces to deliver to the President an action plan to address the regulatory burden and permitting reform issues highlighted in the report.[68]

On October 25, 2017, in response to the Presidential Memorandum and to Executive Order 13,783, EPA published its own report examining the potential burden imposed by agency oversight and regulations on the domestic energy industry.[69] The report identified comprehensive NSR reform as one of four key initiatives designed to "further the goal of reducing unnecessary burdens on the development and use of domestic energy resources."[70] EPA acknowledged a variety of concerns expressed in comments by industry, including the length and complexity of the NSR permitting process, the high application and construction costs, and the availability and costs of emissions offsets in nonattainment areas, all of which could risk discouraging new construction projects and slowing domestic energy resource growth.[71]

In an effort to address those concerns, EPA identified several opportunities for improving the NSR process, including streamlining the application and permitting process, reviewing burdens created by the emissions offsets structure, improving the federal-state relationship, and clarifying the means by which a facility currently classified as a major source can become an area source.[72] In order to "achieve meaningful NSR reform," the agency stated that EPA Administrator Scott Pruitt intends to convene an NSR Reform Task Force in the coming months.[73]

On December 7, 2017, as part of the administration's efforts to overhaul the NSR program, Administrator Pruitt signed a memorandum announcing a major change in the EPA's NSR policy. Specifically, the agency indicated that it will defer to a company's assessment of whether the NSR permitting requirements apply to one of its facilities, rather than using the agency's own projections of a facility's potential future emissions to determine applicability as it has done historically.[74] While the memorandum states that it "is not final agency action," and instead "merely clarifies the EPA's current understanding" of NSR regulations,[75] the new policy could nevertheless have significant implications on the NSR permitting process.

As the events of the past year have made clear, the Trump administration and the EPA under Administrator Pruitt are gearing up to make significant changes to a number of regulatory regimes impacting domestic industrial interests, with a particular focus on the NSR program.[76] While such initiatives will undoubtedly remain popular with industry and advocacy groups, NSR reform will face significant legal challenges, as such efforts have been the target of protracted litigation in the past,[77] and serious reform will require substantial administrative and legislative action before any changes can be implemented.

Recovery of Remediation Costs at Unused Power Sites

Duke Energy's predecessors in interest operated two manufactured gas plants near downtown Cincinnati until 1928 and 1963, which now contain hazardous substances. As the current owner or operator of these facilities, Duke is liable for remediation under CERCLA, and sought to recover remediation costs. In response, several consumer and industry groups argued that Duke could not recover remediation costs because the sites were no longer "used and useful" in rendering utilities services. The Supreme Court of Ohio affirmed the Public Utilities Commission's decision allowing recovery, finding that "because Duke is seeking to recover costs—and not its capital investment in the plants' property and facilities—the commission correctly refused to apply the used-and-useful standard."[78]

Federal Courts Continue to Draw Jurisdictional Lines over Domestic Energy Production

The United States District Court for the District of Oklahoma dismissed the Sierra Club's citizen suit alleging that defendants' fracking activities had increased the number and severity of earthquakes in Oklahoma.[79] Sierra Club sought declaratory and injunctive relief requiring natural gas companies to (1) reduce the amount of waste injected into the ground, (2) reinforce oil pipelines, underground storage tanks, and other vulnerable structures, and (3) establish an independent earthquake monitoring unit. The court declined to exercise jurisdiction based on the Burford Abstention and Primary Jurisdiction doctrines. Both doctrines aim to prevent federal courts from meddling with complex state administrative processes. The court noted that federal and state laws tasked the Oklahoma Corporation Commission ("OCC") with enforcing fracking regulations. The court stressed that federal judicial intervention would undercut the state's efforts to establish a coherent earthquake-mitigation policy. It emphasized that the OCC enjoyed a degree of flexibility and technical expertise that the court "could not hope to match." And the court expressed disquiet that it was being asked not to adjudicate a discrete regulatory violation, but rather to micromanage the entire industry.

On Feb. 17, 2017, the Fourth Circuit decided *Virginia Uranium v. John Warren*, upholding a lower court decision that approved a Virginia law banning uranium mining despite the Atomic Energy Act's preemptive scope.[80] The Atomic Energy Act regulates nearly every aspect of the uranium fuel cycle. It requires any person to obtain a license from the Nuclear Regulatory Commission and comply with its safety regulations if they wish to "transfer or receive in interstate commerce, manufacture, produce, transfer, acquire, own, possess, import or export" any radioactive "byproduct material"—which includes "the tailings or wastes produced by the extraction or concentration of uranium."[81]

The U.S. Supreme Court previously held in *Pacific Gas* that the AEA occupies the field of radiological safety of uranium production, including the wastes generated from uranium mining. States can regulate non-safety aspects of nuclear power production, but not safety regulations.[82] The majority opinion in *Virginia Uranium* avoided the application of field preemption by ruling that the AEA does address traditional mining on non-federal lands. The AEA expressly covers in-situ mining and mining on federal lands, but it is silent on traditional mining on private lands (save for the regulation of mining waste). Thus, Virginia's ban on such activity, even though the commonwealth conceded that it was concerned only with the safety of the mining activity, survived the preemption analysis. The court also found that the ban on mining did not conflict with the AEA's express purpose of encouraging national uranium development, citing the fact that 90% of enrichment activities in the United States consisted of recycled and foreign-obtained uranium. Judge William Byrd Traxler disagreed with the opinion and wrote a lengthy and detailed dissent. He found Virginia's admission that it was prohibiting mining due to safety concerns fatal under the Pacific Gas framework. Citing a number of previous circuit opinions that broadly interpreted AEA preemption over radiological safety issues, he argued that the state ban was both field and conflict preempted. Virginia Uranium filed certiorari petition, and the Supreme Court has requested the opinion of the Solicitor General.[83]

Fifth Circuit Limits the Scope of the Oil Pollution Act's Third-Party Defense

The Oil Pollution Act ("OPA"), which was enacted in 1990 in response to the Exxon Valdez spill, was "intended to streamline federal law so as to provide quick and efficient cleanup of oil spills, compensate victims of such spills, and internalize the costs of spills within the petroleum industry."[84] The OPA creates a strict-liability regime for certain "responsible parties," and also provides several complete defenses to liability.

The Fifth Circuit recently analyzed one of those defenses, which provides that a party is not liable if the discharge at issue was "caused solely by … an act or omission by a third party, other than an employee or agent of the responsible party or a third party whose act or omission occurs in connection with any contractual relationship with the responsible party." 33 U.S.C. § 2703(a)(3).[85] In *United States v. American Commercial Lines, L.L.C.*, the Fifth Circuit held that a party could not assert the OPA's third-party defense where a discharge was caused by a third-party contractor because the relevant "act or omission" occurred "in connection with" their contractual relationship. Rejecting the Second Circuit's interpretation of similar language in CERCLA, the Fifth Circuit held that an "act or omission" is "in connection with" a contractual relationship where they "relate to the contractual relationship in the sense that the third party's acts and omissions would not have occurred but for that contractual relationship." The Fifth Circuit's recent decision has not yet been embraced by any other court, but it remains to be seen whether it will affect the defenses available not just to the transporters of oil, as was the case in *American Commercial Lines*, but also to companies engaged in the exploration and production of oil, to which the OPA also applies.

No Duty for Oil Companies to Protect State Board from Increased Flood Protection Costs

The Board of Commissioners of the Southeast Louisiana Flood Protection Authority–East filed a lawsuit in Louisiana state court against ninety-seven companies involved in oil exploration off the southern coast of the United States, alleging that these activities caused infrastructural and ecological damage to coastal lands, which increased the risk of flooding. Although the Board sought recovery solely under state law, each cause of action turned on whether the companies violated duties imposed by federal law—the Rivers and Harbors Act, the Clean Water Act, and the Coastal Zone Management Act. The district court denied the Board's motion to remand, but dismissed the action for failure to state a claim upon which relief could be granted. The Fifth Circuit affirmed on appeal, concluding that "neither federal law nor Louisiana law creates a duty that binds Defendants to protect the Board from increased flood protection costs that arise out of the coastal erosion allegedly caused by Defendants' dredging activities."[86] The Supreme Court declined to hear plaintiff's appeal. Time will tell whether the Fifth Circuit's decision influenced the various state court cases that remain pending. Further, this case may serve to stymie attempts to predicate state law tort claims on violations of federal environmental statutes.

Tort Litigation: Case Updates

Exxon Beats Class Action over Maintenance of Oil Pipeline

Exxon operated an 850 mile pipeline that ran from Texas to Illinois, which, in accordance with a series of easements, traversed dozens of parcels of private property. The property owners brought a class action claiming that Exxon violated the easements by failing to maintain the pipeline, thereby damaging plaintiffs' properties. The Eighth Circuit affirmed the district court's denial of class certification, holding that the plaintiffs failed to show that common questions of law or fact predominated over issues affecting only individual members.[87] The court reasoned that the pipeline impacted each property differently, and that each parcel's individualized attributes complicated class-wide resolution. The court also upheld the dismissal of the named-plaintiffs' claims, reasoning that Arkansas law imposed no affirmative duty of maintenance or repair.

Court Sides with Landowner and Allows Fracking Case to Proceed Against Gas Company

Southwestern Energy Co. ("SWE") disposed of fracking waste through a well it drilled on land neighboring the plaintiffs' property. Plaintiffs sued for trespass and unjust enrichment. Due to the lack of evidence of surface contamination and the cost of drilling to obtain a sample or creating a computer model, plaintiffs relied on expert testimony regarding the radial flow of the fracking waste. The district court ruled the expert report inadmissible, and granted SWE's motion for summary judgment. On appeal, the Eighth Circuit reversed, finding the district court abused its discretion by excluding plaintiffs' expert, and that the following facts, while thin, could enable a reasonable jury to find that the waste migrated under plaintiffs' property: (1) an SWE representative stated that the area under plaintiffs' property would be filled up by the waste injected in the well; (2) SWE tried to lease a well on plaintiffs' ground first; (3) the close proximity of the SWE well to plaintiffs' property line; and (4) a large volume of waste was injected into a small leased area.[88]

Pipeline Operators Not Strictly Liable for Injuries Caused by Pipeline Explosion

In 2007, a gas pipeline rupture near Carmichael, Mississippi, resulting in an explosion that damaged property more than a mile away. The property owner sued Dixie Pipeline, Co., the operator of the pipeline, and argued that it was strictly liable for damages caused by the explosion. The Mississippi Court of Appeals held that the operation of a gas pipeline failed to constitute an ultrahazardous activity, which would support strict liability.[89] The court noted that the transportation of liquid propane is highly regulated, that propane is commonly used in homes and industries, and is generally "of great value to commerce and local, regional, and nationwide communities." Based on these factors, the court held that pipeline operators are not strictly liable for injuries caused by pipeline explosions.

Strict Liability for Ultrahazardous Activity Claim Moves Forward Against Oil Refinery Operators

Plaintiffs allege that BP, p.l.c. ("BP"), Marathon Oil Corporation, Marathon Petroleum Corporation, and Kinder Morgan, Inc. (collectively, the "Operational Defendants") "formerly operated an oil refinery and 'tank farm' on plaintiffs' property and that they abandoned such refinery 'without assuring their operations had not and would not affect the environment or the persons and property' and 'covered up and buried refinery products and chemicals' without notice to Plaintiffs." The plaintiffs were advised by the Oklahoma Department of Environmental Quality on July 3, 2013 that continuing to live on the property could jeopardize their health and safety. On June 24, 2015, plaintiffs filed suit against the Operational Defendants, alleging negligence, nuisance, unjust enrichment, strict liability, and fraud. Although the court dismissed claims for negligence per se and fraud, it declined to dismiss Plaintiffs' strict liability claim, finding that "allegations that the Operational Defendants failed to exercise due care are not mutually exclusive with a claim of strict liability" based on ultrahazardous activity.[90]

Medical Causation Evidentiary Requirements

The Eighth Circuit may have lowered the bar for the type of evidence experts can rely on and present in their reports. In this case, property owners alleged a fracking company had trespassed on and contaminated their property by disposing of fracking waste near their property. Plaintiffs did not produce any evidence of surface contamination on their property, but they relied in part on an expert to calculate the expected radial flow of the fracking waste. The district court excluded the expert, finding that the expert's report was "not based on sufficient facts or data" and "contained many simplifying assumptions[,]" among other "methodological problems." Despite this, the Eighth Circuit held that the expert report was relevant and that the expert was qualified, even though the report "may be crude and imperfect[,]" as none of the issues identified by the district court "make it so unreliable that it should be excluded." The court found the report "was scientifically valid, could properly be applied to the facts of this case, and, therefore, was reliable enough to assist the trier of fact."[91]

The Sixth Circuit, however, held that a district court had properly excluded a toxicology expert's testimony as unreliable.[92] Plaintiffs who lived near defendant's steel mill brought suit alleging their health will suffer due to elevated levels of manganese found on their properties. Manganese is a chemical that has many industrial metal alloy uses, and defendant had previously entered into a settlement with the Ohio Environmental Protective Agency with respect to alleged violations of emission regulations. Plaintiffs relied in part on testimony from a toxicology expert to establish the alleged damages to plaintiffs' properties. The district court held the expert's opinion was inadmissible because he had failed to test his hypotheses in a "timely and reliable manner or to validate [his] hypotheses by reference to generally accepted scientific principles[.]" The expert's opinion was "conclusory" and his assertions were "too broad, general, and vague to be helpful to the trier of fact." On appeal, the Sixth Circuit affirmed the district court's holding, noting that the expert had failed to proffer "actual proof" to support his opinion.

In a recent mass tort action, the U.S. District Court for the Middle District of Alabama granted summary judgment in favor of defendant International Paper Company ("IP"), for whom Gibson Dunn served as lead counsel, on substantially all of the tort claims asserted by more than 300 plaintiffs.[93] In that case, 322 individual plaintiffs alleged that air emissions from an IP pulp and paper mill in Prattville, Alabama caused or exacerbated dozens of diseases and various forms of property damage. The plaintiffs asserted causes of action for negligence, wantonness, nuisance, trespass, abnormally dangerous activity, and fraudulent suppression. On May 24, 2017, the court granted IP's motions for summary judgment in their entirety and excluded nearly all of plaintiffs' expert opinions. As this case involved a substance that the medical community did not generally recognize both its toxicity and its cause of the alleged injury, the court conducted a more extensive *Daubert* analysis of plaintiffs' causation experts. In its analysis, the court found that plaintiffs' experts did not purport to offer opinions regarding medical causation, or that any plaintiff was exposed to a specific dose of an emission, and therefore failed to meet the Eleventh Circuit's *McClain* standard, which states that "the individual must have been exposed to a sufficient amount of the substance in question to elicit the health effect in question." *McClain v. Metabolife Intern., Inc.*, 401 F.3d 1233, 1242 (11th Cir. 2005). As a result, plaintiffs' experts could not testify regarding the potential health effects of the emissions.

National Enforcement Initiatives

National Enforcement Initiatives ("NEI") are EPA programs that seek to address widespread non-compliance with U.S. environmental laws on an industry-by-industry basis. For each NEI program, EPA will identify what it believes are common areas of non-compliance in a given industry and then it will publish that list of common violations, so the industry is on notice of best practices in relation to the regulations that EPA believes are being violated. EPA thereafter will focus resources on identifying instances of industry participants violating the identified environmental laws. The result of this widespread enforcement effort, typically, is that a number companies of the given industry will settle enforcement actions with EPA by way of a consent decree, which may give the agency greater oversight or enforcement power and require the company to upgrade systems and pay civil penalties.

EPA selects NEI every three years—the last period beginning with the fiscal year starting on October 1, 2016. Presently, there are eight NEI, roughly grouped under the following four categories: Air, Energy Extraction, Hazardous Chemicals, and Water. In this update we focus on four NEI falling under the first two of the above-listed categories. Specifically, we address NEI with particular relevance to the oil and gas industry and with updates associated with program maturity, changes in scope, or recent enforcement activity.

The NEI addressed below are (i) Ensuring Energy Extraction Activities Comply with Environmental Laws ("Energy Extraction"), (ii) Refining and Flaring,[94] and (iii) Cutting Hazardous Air Pollutants ("Hazardous Air Pollutants (HAPs)").

1. Energy Extraction

In 2015, EPA released a compliance alert aimed at advising oil and gas companies as to "whether their vapor control systems were properly designed, sized, operated, and maintained such that emissions from storage vessels may be controlled in compliance with applicable federal and state regulations."[95] A key concern expressed by EPA was that many oil and gas extraction operators did not employ the requisite emission control design or technology which was necessary to capture Volatile Organic Chemical ("VOC") vapors that were prone to escape the storage vessels in predominate use by those companies. Specifically, under a combination of federal laws—such as the New Source Performance Standards for Crude Oil and Natural Gas Production, Transmission and Distribution—and federally enforceable State Implementation Plans, operators with the potential to emit greater than six tons of VOCs per year are required to reduce such emissions by at least 95 %.

The following two factors were listed as the primary points of failure by the industry participants in not complying with their obligation to reduce VOCs: (i) inadequate design and sizing of vapor control systems, and (ii) inadequate vapor control system operation and maintenance practices. EPA then offered the following guidance to help operators comply with the law:

- Reduce liquid pressure prior to transferring the liquid to atmospheric storage vessels;
- Increase size of piping used for vent lines (and capacity of control device if necessary);
- Prevent liquid collection in vent lines;
- Eliminate any unintentional natural gas carry-through
- Ensure proper maintenance and set points for pressure relief valves; and
- Minimize emissions from thief hatches.

At the time of this 2015 Compliance Alert, EPA announced a settlement that it had reached with Noble Energy Company for violating the applicable environmental laws concerning storage vessels and VOCs. As part of that settlement, Noble Energy committed to the following:

- Upgrading, monitoring, and maintaining effective vapor control systems;
- Third-party audits;
- Evaluating pressure relief devices;
- Installing pressure monitors on vapor control systems; and
- Installing tank truck loadout control systems.

EPA's press release for the Noble Energy settlement estimated that these controls cost the company $60 million (in addition to approximately $10 million in costs associated with civil penalties, mitigation, and supplemental environmental projects required by the settlement).

In addition, to the Noble Energy settlement, the EPA reached a tentative settlement agreement with Oklahoma-based Devon Energy late in the Obama administration. The agreement was to include a requirement for Devon Energy to undertake a mitigation project and a supplemental environmental project in addition to paying a six-figure fine for allegedly emitting more than eighty tons of VOCs per year. However, shortly after Administrator Pruitt entered office, Devon Energy announced that it would no longer agree to the previously drafted terms of the settlement. EPA has not publicly commented on this matter and the case is yet to be resolved.

Notwithstanding Devon Energy's experience, which tends to indicate that the Trump administration will not pursue enforcement under this NEI aggressively, at least one company has finalized a settlement under this NEI in 2017. PDC Energy recently finalized a settlement agreement, which included a $1.7 million civil penalty and required the company to spend $18 million on upgraded systems and compliance monitoring. It is likely that this enforcement action and settlement was largely negotiated prior to Administrator Pruitt's tenure at EPA. For that reason, it will be informative to see what cases are initiated during Administrator Pruitt's tenure as EPA Administrator.

2. Refining and Flaring Initiatives

Refining and Flaring Initiatives are two distinct NEI historically aimed at petroleum refineries. In the last several years, however, EPA has recently expanded the Flaring NEI to pursue enforcement against chemical manufacturing facilities (primarily associated with refining processes). The aim of both NEIs is to reduce nitrogen oxides and sulfur dioxides emissions from a variety of process units such as cat crackers, heaters, boilers, and flares.

EPA has settled enforcement actions with thirty-seven companies based on the petroleum refining and flaring NEI, and those companies represent collectively more than 95% of the petroleum refining capacity in the United States. In total EPA has collected more than $116 million in civil penalties and required the performance of more than $116 in supplemental environmental projects. The settling companies have also committed to investing more than $7 billion in control technologies.

These NEIs are winding down, as many of the industry participants are already under consent decrees due to prior enforcement actions. That said, additional enforcement under this NEI is anticipated in two respects. First, a number of petroleum refineries with historical Refining Initiative settlements may be separately subject to enforcement under the Flaring Initiative for their hydrocarbon flares (particularly if those flares do not have flare gas recovery). Second, chemical manufacturing facilities associated with the oil and gas sector – such as olefin manufacturing – may see enforcement activity under the Flaring Initiative. For example, in October 2017, EPA settled claims against Exxon Mobil for flaring at five chemical manufacturing facilities. The settlement included a $2.5 million fine and injunctive relief worth more than $310 million.

3. Hazardous Air Pollutants ("HAPs")

In 2016, EPA announced its new NEI for the fiscal years 2017 – 2019. Among those NEI, was the program aimed at cutting HAPs, also known as air toxics. In reality, this program is not entirely new. Instead, it expands EPA's existing and ongoing efforts to reduce air toxic emissions from high-emission industries, such as petroleum refining and chemical manufacturing.

The HAP NEI for 2017 – 2019 goes beyond the petroleum refinery industry and was specifically expanded to target additional sources of pollution. The NEI will now seek to curb emissions from operators of large product storage tanks as well as hazardous waste generator, treatment, storage and disposal facilities. EPA's focus with these facilities will be addressing violations related to leak detection and repair requirement for storage tanks, and hazardous waste tanks and related equipment. There have not been any major enforcement actions settled under this expanded initiative. Time will tell if the Pruitt EPA follows through forcefully on this Obama-era program.

4. Water Enforcement

About a year has passed since one of EPA's new National Enforcement Initiatives for fiscal years 2017 – 2019—Keeping Industrial Pollutants Out of the Nation's Waters ("KIPONW" or "Initiative")—formally took effect. This new Initiative signaled EPA's commitment to increased enforcement of the National Pollutant Discharge Elimination System ("NPDES") of the Clean Water Act ("CWA") in certain industrial sectors. However, one year later, EPA's published statistics on NPDES permit violations and enforcement actions do not indicate an uptick in activity.

The NPDES constitutes the fundamental regulatory framework for implementing the CWA's prohibition against unpermitted discharge of pollutants from point sources into streams, rivers, lakes, and other waters of the United States. Facilities seeking to discharge pollutants into waters covered by the CWA may apply for an individual permit or seek coverage under an existing general permit. Such permits typically limit the amount of pollutants that may be discharged, mandate treatment of effluent, and require the facility to monitor its discharges and report exceedances of the permit limits. Violations of the permit may trigger enforcement actions by EPA or authorized state regulatory agencies.

Every three years, the EPA selects National Enforcement Initiatives ("NEIs") "in order to focus federal resources on the most important environmental problems where noncompliance is a factor and where federal enforcement attention can make a difference." NEIs "are in addition to EPA's core enforcement work."

On September 15, 2015, EPA opened the public comment period on several NEIs. The Notice for the KIPONW Initiative identifies nutrient and metal pollution as particular concerns, and asserts that "[c]ertain industrial sectors contribute a disproportionate amount of the pollution over discharge limits." It singles out "[m]ining, chemical manufacturing, food processing and primary metals manufacturing" as "top sectors that have many violations and are responsible for contributing to surface water pollution and putting our drinking water at risk." The Notice claims that "[a] number of facilities in the top sectors discharge pollution in excess of their permit limits."

The Notice further explains that the Initiative would "allow for a national approach" for companies with facilities in multiple states and "would support a consistent national strategy to achieve compliance across industry sectors." Since authorized state agencies are largely responsible for implementing the NPDES, this focus on developing a "national approach" or "national strategy" may indicate EPA's intent to assume a more direct role in monitoring and enforcing compliance with discharge limits, at least in the targeted industrial sectors.

Public comments on KIPONW were few and mostly negative. The American Chemistry Council took issue with EPA's failure to support its claim that the chemical industry is one of the "industrial sectors [that] contribute a disproportionate amount of the pollution over discharge limits." The American Petroleum Institute also criticized the absence of data to document the alleged pollution problem and further questioned how a "national approach" would accomplish more than the NPDES permit program already does.

EPA's February 2016 news release announcing adoption of the Initiative was also brief and offered scant additional information. It explained that EPA's focus on the chosen industrial sectors was "driven by water pollution data," and that the Initiative would "build compliance with Clean Water Act discharge permits and cut illegal pollution discharges."

EPA's generic descriptions of the Initiative provide little insight into how EPA enforcement will change. But, one year later, we are able to analyze the EPA's data on permit violations and enforcement actions. The data do not appear to be consistent with a noticeable increase in enforcement, either generally or in the targeted industries. Overall, the numbers of formal and informal enforcement actions across the entire NPDES program were slightly lower in 2017 compared to previous years. Median monetary penalties also fell in 2017. At the same time, non-compliance rates climbed to their highest levels since 2013.

A similar picture emerges from the industry-specific data. Judicial and administrative federal enforcement cases in the "Metal Mining" sector fell from ten in 2015, to five in 2016, and down to just one in 2017. Federal enforcement cases also dropped in the "Primary Metal Industries" sector, and remained flat in the "Chemicals and Allied Products" and "Food and Kindred Products" sectors. The number of on-site inspections at permitted facilities within these sectors during FY 2017 also remained roughly at or below the inspection rates of previous years. Meanwhile, permit violations in 2017 were clearly elevated over 2016 and 2015 in all four sectors. For example, Metal Mining went from about 800 violations in each of 2015 and 2016 to over 1,000 in 2017. There were also more than 1,000 violations during 2017 in the Chemicals and Allied Products sector compared to 814 violations in 2016 and 651 violations in 2015. Because violations rose, a decreased need for enforcement cannot explain flat or falling enforcement indicators in 2017.

In sum, the data we reviewed suggest that the KIPONW Initiative has not been a major priority in FY 2017. This may reflect changes at EPA under the current administration, or it may show that criticism of the NEI's lack of data support and vaguely defined goals was well-founded. That said, there are many ways to parse the compliance and enforcement data. EPA may also have taken a more surgical approach to implementing the Initiative that has not produced an appreciable change in the national statistics. It remains to be seen whether EPA will increase enforcement in the future.

The 2017 Energy Mergers and Acquisition Roundup

Energy M&A activity in 2017 has been a tale of two sectors. Activity has been generally been strong through the third quarter of 2017 in the oil and gas sector, whereas power and utilities M&A has experienced a downturn after a hot 2016. Below we highlight this year's significant M&A trends in these sectors, and take a glimpse at the outlook for energy M&A activity in 2018.

Oil & Gas

2017 has brought forth vigorous M&A activity in the oil and gas sector, particularly in the first quarter and in the upstream segment. The global oil and gas industry witnessed $137 billion in M&A activity in the first half of 2017—a significant bump up from the $87 billion deal flow in the first half of 2016—and oil and gas dealmakers remained cautiously optimistic through the third quarter of the year.[96] Dealmakers have been encouraged by higher commodity prices and signs of an oil and gas market recovery, with the fossil fuel friendly disposition of the Trump administration also likely bolstering M&A activity in the United States.

Here are the headline developments from this year.

Asset Deal Popularity. Asset-based deals have been harnessed to refocus and reinforce portfolio positions to form a stronger platform from which to prosper during the expected market recovery. This global trend was particularly prevalent in the Permian Basin and the rest of North America in the first half of the year, with the Permian experiencing a shift of focus from securing entry positions to focusing on add-ons that enhance development opportunities.[97]

Permian Dominance in the U.S. As of September 2017, 86% of the year's U.S. oil and gas deals were in the Permian Basin. The region saw twenty deals in 1Q17 with a total value of approximately $21.4 billion and another eleven deals in 2Q17 totaling approximately $4.5 billion. Most of the deals fell in the $500 million to $1 billion range.[98] In one of the highest value Permian transactions of the year, ExxonMobil paid $5.6 billion for acreage positions of BOPCO (the Permian holdings of the Bass family) totaling 275,000 leased acres, facilitating the expansion of its presence in this growth area for onshore oil production.[99]

Although capital investments in the Permian Basin are likely to continue to rise over the next several years, strong deal activity in the region in the first half of the year pushed prices and valuations, making other, less active basins, such as the Bakken, more attractive to investors, and dealmakers consequently looked beyond the Permian with greater frequency heading into the third quarter.[100]

The Eagle Ford saw the second highest number of deals in 1Q17 with five deals totaling $7 billion, while the Marcellus region saw the second highest number of deals in 2Q17 with a total value of $10.2 billion. In November 2017, EQT Corporation completed the acquisition of Rice Energy for approximately $6.7 billion, the highest valued Marcellus transaction and one of the most prominent oil and gas deals of the year. The deal makes EQT the largest producer of natural gas in the United States and the leading player in the Marcellus/Utica region.[101]

Upstream Strength. This year has seen a predominance of upstream deals, which have been boosted by crude oil price levels. The upstream segment had a 60% share of U.S. deal volume and a 50% share of deal value in 1Q17, and a 56% share of deal volume and a 54% share of deal value in 2Q17.[102] Globally, by mid-year, the value of upstream deals had already reached approximately 69% of the total value of upstream deals in all of 2016,[103] and the upstream segment, particularly shale deals, remained a major contributor to deal-making activity in the U.S. through 3Q17.[104]

The downstream segment has also maintained a healthy pace of deal activity in the U.S., as global deal values in the first half of 2017 reached 47% of those for all of 2016.[105] The U.S. downstream segment then experienced its strongest third quarter since 2014 as more major producing national oil companies aimed to secure improved access to downstream refined products markets.[106]

Midstream M&A, on the other hand, has slowed to a trickle as concerns over the indebtedness of midstream companies mount in the investor community.[107] However, it is largely in this space that mega deals (deals over $1 billion) have continued to transpire—four of the seven mega deals in the third quarter were in the midstream segment.[108]

Other Late Developments. While value across U.S. deals decreased in the third quarter, down 36% since the last quarter and 58% year-over-year, to $23.61 billion, there were fifty-three announced deals, an increase on both a sequential and year-over-year basis, demonstrating that investors remained interested in the sector. M&A activity in 3Q17 was defined by smaller, add-on acquisitions. Mega deals continued the downward slide they began in the first quarter of 2017; the seven announced in the third quarter were worth $11.74 billion, the lowest share of total deal value and volume since the second quarter of 2016.[109]

Elsewhere, in Canada, the third quarter witnessed a realignment of holdings in the Canadian oil sands, with the exit of some international majors, leaving more of this play in the hands of Canadian operators.[110]

Looking to 2018, domestic drivers of deal activity, such the prospect of increased interest rates, and global drivers, such as sustained higher commodity prices, may continue to spur oil and gas M&A activity forward in the U.S., even as the buzz over a friendlier regulatory environment begins to fade. However, if the oil market stabilization and recovery process seems to drag for longer than previously anticipated, risk and uncertainty may dampen a further upturn in transactions.

Power & Utilities

2016 saw the highest level of M&A activity in power and utilities sector in the past several years, with a total deal value of $126 billion, and M&A activity in 2017 has struggled to keep pace.[111] Infrastructure transactions have driven deal flow and corporate deals have driven deal value in what has been a cooler year for M&A in this sector, in terms of both deal volume and value and the prevalence of mega deals.[112]

U.S. M&A activity was stronger in 1Q17 than in 4Q16, but was down significantly compared with the first quarter of 2016. Overall, there were fewer mega deals, both quarter-to-quarter and year-over-year. Most of the deal flow in the first quarter sprang from transmission and distribution assets. Deal value during the quarter was driven by large corporate deals, which accounted for $9.1 billion or 71% of total deal value, with most of that value stemming from AltaGas's proposed $6.6 billion acquisition of WGL Holdings. Canadian companies were hungry for U.S. investment opportunities, with inbound deals representing $7.2 billion or 56% of total deal value in the first quarter.[113]

Despite the early slowdown, executives were expressing a record level of interest in pursuing M&A deals, and while deal volume generally slid throughout the year, the third quarter witnessed an uptick in deal value and the volume of mega deals. Total North American deal value in 3Q17 was the highest quarterly deal value since 4Q17. With four mega deals, total deal value was $44.9 billion, compared to $6.5 billion in 2Q17 and $78.1 billion in 3Q16. The largest announced deal was the Sempra Energy agreement to acquire Energy Future Holdings Corp. for $18.8 billion.[114]

Utility transactions such as Sempra's and corporate deals once again drove deal value in the third quarter, with corporate deals accounting for $41.8 billion or 93% of total deal value. Strategic buyers also generated the largest share of deal value, consistent with prior quarters, while strategic and financial buyers split deal volume. Inbound deals from Canadian investors were down from earlier in the year, totaling $5.4 billion in deal value. Finally, renewable deal activity was limited to 1% of total deal value.[115]

In North America, infrastructure transactions will likely continue to drive M&A activity in 2018, as gas-fired generation and renewable resources play an increasingly prominent role in the region's energy mix. In addition, with the decades-long industry trend of consolidation set to continue, small and mid-cap utilities will remain potential acquisition targets.[116] Many larger utilities may shift from buying small companies toward engaging in mergers of equals, due to the extent to which they have leveraged their balance sheets and regulatory concerns surrounding such leverage. Such a shift would likely decrease individual deal value, but boost deal volume.[117] A compression in deal value may also be expected going forward as the prospect of additional interest rate increases loom, although dealmakers will continue to remain interested in regulated yields for as long as the current low interest rate environment persists.[118]

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[1] Final Rule, Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662, 64,663 (Oct. 23, 2015) (Clean Power Plan).

[2] *Id.* at 64,663–64.

[3] *West Virginia v. EPA*, Doc. No. 1,673,071, No. 15-1363 (D.C. Cir. Apr. 28, 2017).

[4] *West Virginia v. EPA*, 136 S. Ct. 1000, 194 L. Ed. 2d 17 (2016).

[5] Exec. Order No. 13,783, 82 Fed. Reg. 16,093, 16,095 (Mar. 28, 2017).

[6] *West Virginia v. EPA*, Doc. No. 1,673,071, No. 15-1363 (D.C. Cir. Apr. 28, 2017).

[7] Proposed Rule, Repeal of Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 82 Fed. Reg. 48,035-02 (Oct. 16, 2017).

[8] *Id.* at 48,039.

[9] *Id.* at 48,036.

[10] *Id.* at 48,036.

[11] California Air Resources Board, "California's Proposed Compliance Plan for the Federal Clean Power Plan" (July 26, 2017), https://www.arb.ca.gov/cc/powerplants/meetings/07272017/final-proposed-plan.pdf.

[12] U.S. Climate Alliance, "Statement on EPA Repeal of Clean Power Plan" (Oct. 9, 2017).

[13] *County of San Mateo v. Chevron Corp. et al.*, Case No. 3:17-cv-4929 (N.D. Cal.); *City of Imperial Bea h v. Chevron Corp. et al.*, Case No. 3:17-cv-4934 (N.D. Cal.); *County of Marin v. Chevron Corp. et al.*, Case No. 3:17-cv-4935 (N.D. Cal.).

[14] *City Attorney of Oakland v. BP p.l.c. et al.*, Case No. 3:17-cv-06011 (N.D. Cal.); *City Attorney of San Francisco v. BP p.l.c. et al.*, Case No. 3:17-cv-06012 (N.D. Cal.).

[15] *County of Santa Cruz v. Chevron Corp., et al.*, 17-cv-03242 (Santa Cruz Cty. Sup. Ct. filed Dec. 20, 2017); *City of Santa Cruz v. Chevron Corp., et al.*, 17-cv-03243 (Santa Cruz Cty. Sup. Ct. filed Dec. 20, 2017); *City of New York v. BP P.L.C., et al.*, 1:18-cv-182 (S.D.N.Y. filed Jan. 9, 2018).

[16] *Juliana v. United States*, Case No. 15-cv-1517-TC (D. Or.).

[17] *Conservation Law Foundation, Inc. v. Exxon Corp., et al.*, Case No. 16-11590 (D. Mass.).

[18] *Conservation Law Foundation, Inc. v. Shell Oil Prods. US, et al.*, Case No. 17-cv-00396 (D.R.I.).

[19] *Ramirez, et al. v. Exxon Mobil Corp., et al.*, Case No. 16-cv-3111 (N.D. Tex.).

[20] *Attia, et al. v. Exxon Mobil Corp., et al.*, Case No. 16-cv-3484 (S.D. Tex.).

[21] *Exxon Mobil Investigated for Possible Climate Change Lies by New York Attorney General*, N.Y. Times (Nov. 5, 2017).

[22] The NYAG investigation followed two pieces of investigative journalism on Exxon's historical record on climate change. *Exxon: The Road Not Taken*, Inside Climate News (Sept. 2016); *What Exxon Knew About the Earth's Melting Arctic*, L.A. Times (Oct. 9, 2015).

[23] *Exxon Mobil Fraud Inquiry Said to Focus More on Future Than Past*, N.Y. Times (Aug. 19, 2016); *New York Attorney General Alleges Exxon Misled Investors on Climate*, Wall St. J. (June 2, 2017). The SEC also reportedly investigated Exxon's reserves accounting practices. Bradley Olson & Aruna Viswanatha, *SEC Investigating Exxon on Valuing of Assets,* Accounting *Practices*, Wall St. J. (Sept. 20, 2016).

[24] *Exxon Emissions Costs Accounting 'May Be a Sham,' New York State Says*, N.Y. Times (June 2, 2017).

[25] *Climate Fraud Investigation of Exxon Draws Attention of 17 Attorneys General*, Inside Climate News (Mar. 30, 2016). Attorneys General from the following states and territories participated in the "coalition": CA, CT, DC, IL, IA, ME, MD, MA, MN, NM, NY, OR, RI, VA, VT, WA, and the USVI.

[26] The Massachusetts AG issued a subpoena to Exxon on April 19, 2016. *AGO's Exxon Investigation*, Attorney General of Massachusetts (last accessed Dec. 7, 2016), http://bit.ly/2hgivy7.

[27] The California Attorney General at the time (now Senator Kamala Harris) announced in January 2016 that her office was opening an investigation into Exxon, but it does not appear that a subpoena was ever issued. *California investigating whether Exxon Mobil lied about climate change*, The Hill (Jan. 20, 2016); *In Climate Fraud Case Against Exxon, Many Waiting for California's Big Move*, Climate Liability News (Sept. 18, 2017).

[28] The USVI AG, working with plaintiffs' firm Cohen Milstein, subpoenaed Exxon in March 2016 under the territory's anti-racketeering laws. Exxon challenged the subpoena in Texas federal court, and the AG later withdrew it. *U.S. Virgin Islands to withdraw subpoena in climate probe into Exxon*, Reuters (June 29, 2016).

[29] Exxon filed an action against NYAG in federal court, and after the Massachusetts AG issued its subpoena, Exxon added it to the action. The NYAG/Massachusetts action was transferred to the U.S. District Court for the Southern District of New York in March 2017, where it is still pending. *Exxon Mobil Corp. v. Schneiderman*, No. 17-cv-2301 (S.D.N.Y.); *Texas judge kicks Exxon climate lawsuit to New York court*, Reuters (Mar. 29, 2017). Exxon filed suit against the USVI in Texas state court, which was dismissed after the USVI AG agreed to withdraw its subpoena. *U.S. Virgin Islands to withdraw*

subpoena in climate probe into Exxon, Reuters (June 29, 2016); *Exxon Mobil Corp. v. Walker*, No. 017-284890-16 (Tarrant Cnty. Ct.).

[30] *Exxon takes climate-change probe fight to Massachusetts top court*, Reuters (Dec. 5, 2017).

[31] *People of the State of New York v. Pricewaterhouse Coopers LLP*, No. 451962-2016 (N.Y. Sup. Ct.); *see also*

[32] *Top NY Court Won't Take Up Exxon Climate Subpoena Appeal*, Law360 (Sept. 12, 2017).

[33] *Judge OKs Deposition of Tar Sands Employee in Exxon Climate Fraud Probe*, Inside Climate News (June 16, 2017).

[34] Assem. Bill No. 398 (2017-2018 Reg. Sess.).

[35] Assem. Bill No. 617 (2017-2018 Reg. Sess.).

[36] *Urgenda Foundation v. The Netherlands* (Ministry of Infrastructure and the Environment) Hague DC C/09/456689/HA 2A 13-1396 (Chamber for Commercial Affairs, 24 June 2015); Decision and Summary *available at* http://bit.ly/1N9DivW.

[37] *Ridhima Pandey v. Union of India & Central Pollution Control Board*, OA No. 187/2017 (Nat'l Green Trib. Mar. 2017), http://bit.ly/2nYxDXR.

[38] *Verein KlimaSeniorinnen Schweiz (Senior Women for Climate Protection) v. Federal Council* (Nov. 25, 2016), http://bit.ly/2BQo4Nk. In May 2017, the Swiss government rejected the complaint, noting that parliament, and not the courts, is responsible for setting climate policy. *Environment Ministry Snubs 'Climate Complaint,'* SwissInfo (May 17, 2017), http://bit.ly/2BW6yYG.

[39] *Climate Case: The Student vs the Minister*, New Zealand Herald, http://bit.ly/2qP0ptZ. The case was dismissed in November 2017 as moot because the recently elected government has updated the country's emissions targets.

[40] Writ of Summons, *Greenpeace Nordic Assoc. & Natur Og Ungdum (Nature & Youth) v. Norway*, Case No. 16-166674TVI-OTIR/06 (Oslo Dist. Ct. Oct. 18, 2016), http://bit.ly/2jaASds. On January 4, 2018, the district court in Oslo dismissed plaintiff's claims.

[41] *Climate Change Concerns Prompt Court to Block Vienna Airport Expansion*, Inside Climate News (Feb. 15, 2017), https://insideclimatenews.org/news/14022017/climate-change-vienna-airport-paris-climate-agreement-james-hansen.

[42] *Victory in SA's First Climate Change Case*, Earthlife Africa (Mar. 8, 2017), http://earthlife.org.za/2017/03/08/victory-in-sas-first-climate-change-case/.

[43] Press Release, Germanwatch, Historic Breakthrough with Global Impact in "Climate Lawsuit" (Nov. 30, 2017), https://germanwatch.org/en/14795. The case was initially dismissed, but in November 2017, the higher regional court in Hamm ruled that the case can move to the evidentiary stages.

[44] Notice, *In re Nat'l Inquiry on the Impact of Climate Change on the Human Rights of the Filipino People and the Responsibility therefor, if any, of the "Carbon Majors,"* No. CHR-NI-2016-0001 (Philippines Comm'n on Human Rights Oct. 18, 2017), http://www.greenpeace.org/seasia/ph/PageFiles/735291/Notice_on_preliminary_conference_of_parties/Notice.pdf.

[45] Complaint Concerning IFC Investments in and Financing to RCBC (Oct. 11, 2017), https://www.inclusivedevelopment.net/wp-content/uploads/2017/10/Letter-of-Complaint-to-CAO_Phillippines-Coal-final.pdf.

[46] Concise Statement, *Guy Abrahams v. Commonwealth Bank of Australia*, VID879/2017 (Fed. Ct. Victoria, Aug. 8, 2017), https://www.envirojustice.org.au/sites/default/files/files/170807%20Concise%20Statement%20(as%20filed).pdf.

[47] Gareth Hutchens, *Commonwealth Bank Shareholders Drop Suit over Nondisclosure of Climate Risks*, The Guardian (Sept. 21, 2017), https://www.theguardian.com/australia-news/2017/sep/21/commonwealth-bank-shareholders-drop-suit-over-non-disclosure-of-climate-risks.

[48] *Americans for Clean Energy v. EPA*, 864 F.3d 691 (D.C. Cir. 2017).

[49] *Sinclair Wyo. Ref. Co. v. EPA*, 874 F.3d 1159 (10th Cir. 2017).

[50] *Sierra Club v. DOE*, 867 F.3d 189 (D.C. Cir. 2017).

[51] https://www.boem.gov/NP-Draft-Proposed-Program-2019-2024.

[52] *Sierra Club v. FERC*, 867 F.3d 1357 (D.C. Cir. 2017).

[53] https://www.ferc.gov/industries/gas/enviro/eis/2017/09-27-17-DEIS/supplemental-DEIS.pdf.

[54] *Ass'n of Irritated Residents v. Kern Cty. Bd. of Supervisors*, No. F073892, 2017 WL 5590096 (Cal. Ct. App. Nov. 21, 2017).

[55] *Chevron Mining Inc. v. United States*, 863 F.3d 1261 (10th Cir. 2017).

[56] *See* 51 FR 41206, Nov. 13, 1986, *amending* 33 CFR 328.3; 53 FR 20764, June 6, 1988, *amending* 40 CFR 232.2).

[57] 547 U.S. 715 (2006).

[58] *In re U.S. Dep't of Def. and U.S. Envtl. Protection Agency Final Rule: Clean Water Rule*, No. 15-3751 (lead), slip op. at 6.

[59] *Upstate Forever v. Kinder Morgan Energy Partners*, 252 F. Supp. 3d 488 (D.S.C. 2017).

[60] *Sierra Club v. Va. Elec. & Power Co.*, 247 F. Supp. 3d 753 (E.D. Va. 2017).

[61] The NSR program is a preconstruction permitting program that aims to ensure that air quality is protected when stationary sources of air pollution are newly built or modified. *See* U.S. EPA, *New Source Review (NSR) Permitting*, https://www.epa.gov/nsr. NSR permits specifying the extent of construction allowed under the permit, and also imposes limitations on emissions from the source and the frequency of the operation of the source. U.S. EPA, *Learn About New Source Review*, https://www.epa.gov/nsr/learn-about-new-source-review. There are three types of NSR permits: (1) Prevention of Significant Deterioration ("PSD") permits, which are required for new major sources or a major source making a major modification in areas that meet the National Ambient Air Quality Standards ("NAAQS"); (2) Nonattainment NSR permits, which are required for new major sources or major sources making a major modification in areas that do not meet one or more of the NAAQS; and (3) Minor Source permits. *Id.*

[62] Presidential Memorandum on Streamlining Permitting and Reducing Regulatory Burdens for Domestic Manufacturing, 82 Fed. Reg. 8,667 (Jan. 24, 2017).

[63] *Id.*

[64] Exec. Order No. 13,783, 82 Fed. Reg. 16,093 (Mar. 28, 2017).

[65] U.S. Dep't of Commerce, "Streamlining Permitting and Reducing Regulatory Burdens for Domestic Manufacturing" (Oct. 6, 2017), https://www.commerce.gov/sites/commerce.gov/files/streamlining_permitting_and_reducing_regulatory_burdens_for_domestic_manufacturing.pdf.

[66] *Id.* at 43–44.

[67] *Id.*

[68] *Id.* at 48.

[69] U.S. EPA, "Final Report on Review of Agency Actions that Potentially Burden the Safe, Efficient Development of Domestic Energy Resources Under Executive Order 13783" (Oct. 25, 2017), https://www.epa.gov/sites/production/files/2017-10/documents/eo-13783-final-report-10-25-2017.pdf.

[70] *Id.* at 2.

[71] *Id.* at 2–3.

[72] *Id.* at 3.

[73] *Id.*

[74] U.S. EPA, Memorandum, "New Source Review Preconstruction Permitting Requirements: Enforceability and Use of the Actual-to-Proceed-Actual Applicability Test in Determining Major Modification Applicability" (Dec. 7, 2017) at 8 ("The EPA does not intend to substitute its judgement [sic] for that of the owner or operator by 'second guessing' the owner or operator's emissions projections.").

[75] *Id.* at 2.

[76] Indeed, the recently appointed Assistant Administrator for EPA's Office of Air and Radiation, Bill Wehrum, was a leading litigator on NSR issues and was an integral part of several key decisions affecting the scope of the NSR program in his prior position in the Agency under President George W. Bush. *See, e.g.*, William L. Wehrum, U.S. EPA, "Source Determinations for Oil and Gas Industries" (Jan. 12, 2007), https://www.epa.gov/sites/production/files/2015-07/documents/oilgas.pdf.

[77] *See, e.g.*, U.S. EPA, "Fact Sheet – Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NSR): Removal of Vacated Elements" (Jun. 5, 2007), https://www.epa.gov/sites/production/files/2015-12/documents/20070605fs.pdf (discussing court ruling vacating portions of 2002 NSR improvement rule).

[78] *In re Application of Duke Energy Ohio, Inc*., 82 N.E.3d 1148 (Ohio 2017) (Vectren Energy Delivery of Ohio, Inc. participated as an intervening appellee).

[79] *Sierra Club v. Chesapeake Operating, LLC*, 248 F. Supp. 3d 1194 (D. Okla. 2017).

[80] 848 F.3d 590 (4th Cir. 2017).

[81] 42 U.S.C. §§ 2111(a), 2014(e)(2); *see also* 42 U.S.C. § 2111(b).

[82] *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190 (1983).

[83] *See* Supreme Court Docket 16-1275.

[84] *United States v. Am. Commercial Lines, L.L.C.*, 875 F.3d 170, 173-74 (5th Cir. 2017) (*quoting Rice v. Harken Exploration Co*., 250 F.3d 264, 266 (5th Cir. 2001)).

[85] 875 F.3d at 175-76.

[86] *Bd. of Comm'ns of Se. La. Flood Prot. Auth.-East v. Tenn. Gas Pipeline Co*., 850 F.3d 714 (5th Cir. 2017), *cert. denied sub nom*. No. 17-99, 2017 WL 4869188 (U.S. Oct. 30, 2017).

[87] *Webb v. Exxon Mobil Corp*., 856 F.3d 1150 (8th Cir. 2017).

[88] *Hill v. Sw. Energy Co.*, 858 F.3d 481 (8th Cir. 2017).

[89] *Elmore v. Dixie Pipeline Co.*, --- So.3d --- (Miss. Ct. App. 2017).

[90] *Bristow First Assembly of God v. BP p.l.c.*, No. 15-523, 2017 WL 3123661 (N.D. Okla. July 21, 2017).

[91] *Hill*, 858 F.3d at 481.

[92] *Abrams v. Nucor Steel Marion, Inc.*, No. 15-4422 (6th Cir. May 25, 2017).

[93] *Brantley v. International Paper Co*., No. 09-230, 2017 WL 2292767 (M.D. Ala. May 24, 2017); 2017 WL 3325085 (M.D. Ala. Aug. 3, 2017).

[94] Refinery and Flaring are separate NEI, but we have grouped them in this update as each NEI addresses issues typically experienced by two common industry groups – refineries and chemical manufacturers.

[95] U.S. EPA, Compliance Alert: EPA Observes Air Emissions from Controlled Storage Vessels at Onshore Oil and Natural Gas Production Facilities, at 1 (Sept. 2015), *available at https://www.epa.gov/sites/production/files/2015-09/documents/oilgascompliancealert.pdf*.

[96] Deloitte Center for Energy Solutions, *Oil and Gas Mergers and Acquisitions Report—Midyear 2017, Overcoming the Headwinds* 1 (2017).

[97] *Id.*

[98] Keisha Bandz, *Where Most 2017 Energy M&A Deals Took Place*, Key Trends in Energy Sector Mergers and Acquisitions in 2017, http://marketrealist.com/2017/09/where-most-energy-ma-deals-took-place (Sept. 25, 2017).

[99] Deloitte, *supra* n.1 at 4.

[100] PriceWaterhouseCoopers LLP, *US Oil & Gas Deals insights third quarter 2017* 1 (2017).

[101] Deloitte, *supra* n.1 at 4.

[102] Keisha Bandz, *This Sector Dominated M&A Activity in Energy Section in 2017*, Key Trends in Energy Sector Mergers and Acquisitions in 2017, http://marketrealist.com/2017/09/this-sector-dominated-ma-activity-in-energy-sector-in-2017 (Sept. 25, 2017).

[103] Deloitte, *supra* n.1 at 2.

[104] PriceWaterhouseCoopers LLP, *supra* n.5.

[105] Deloitte, *supra* n.1 at 2.

[106] PriceWaterhouseCoopers LLP, *supra* n.5 at 5.

[107] S&P Global, *Midstream dealmaking dries up as debt concerns mount*, Energy M&A Rev. 1 (Sept. 2017).

[108] PriceWaterhouseCoopers LLP, *supra* n.5 at 5.

[109] PriceWaterhouseCoopers LLP, *supra* n.5.

[110] Deloitte, *supra* n.1 at 6.

[111] Peter Maloney, *Despite high-profile denials, power sector M&A strength to continue*, Utility Dive, https://www.utilitydive.com/news/despite-high-profile-denials-power-sector-ma-strength-to-continue/441467/ (May 1, 2017).

[112] PriceWaterhouseCoopers LLP, *North American Power & Utilities Deal Insights Q3 2017* 1 (2017).

[113] Maloney, *supra* n.16.

[114] PriceWaterhouseCoopers LLP, *supra* n.17.

[115] *Id.*

[116] PriceWaterhouseCoopers LLP, *supra* n.5 at 5.

[117] Maloney, *supra* n.16.

[118] PriceWaterhouseCoopers LLP, *supra* n.5 at 5.

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