Environmental Litigation – Trends and Coming Threats
Rocky Mountain and Appalachia (Federal and Selected State)
Energy Industry Environmental Law Conference
Houston, Texas – May 18, 2018

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Rocky Mountain and Appalachia (Federal and Selected State)
IEL Energy Industry Environmental Law Conference

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This paper outlines selected federal and state environmental litigation affecting onshore oil and gas operations in the Rocky Mountain and Appalachian states. Due to time and space constraints, it is not possible to cover all of the many lawsuits involving environmental issues in the oil and gas industry of significance in these regions. The author chose the cases she summarizes in this paper from hundreds of decisions and pending lawsuits of possible interest to conferees. Other recent decisions and pending lawsuits may be of interest to oil and gas industry stakeholders, but this paper does not cover them due to time and space constraints. [2]

The views expressed in this paper are those of the author, and do not necessarily reflect the views of her firm or its clients. This paper is for general information and is not intended to be, and should not be taken as, legal advice.

I. Federal Rule Challenges

A. Methane.—2016 NSPS Subpart OOOOa, and 2017 Stay (D.C. Cir. 2017)

1. On June 3, 2016, EPA published final New Source Performance Standard ("NSPS") Subpart OOOOa, to become effective August 2, 2016, to control pollutant greenhouse gas ("GHG") emissions from affected facilities in the crude oil and natural gas category that commence construction, modification, or reconstruction after September 18, 2015.[3]

    a. Implements part of President Obama's Climate Action Strategy. Per EPA, intended to reduce methane, volatile organic compounds (VOCs) (an ozone precursor), and toxic air pollutants (e.g., benzene)

    b. Requires, *e.g.*, "green completions" at wellheads, leak detection and repair ("LDAR"), and fugitive emission controls for methane on compressors, pneumatic controllers, pneumatic pumps, storage

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[2] For example, there are many lawsuits in which opponents of lease sales, master development plans, and FERC certificated pipelines (among other federal actions) allege failure to consider purportedly greater impacts of hydraulic fracturing and alleged downstream impacts of climate change of energy projects under NEPA. Another panel at this conference will cover those lawsuits, and this paper does not cover them.
[3] 40 CFR 60.5360a-60.5432a; 81 Fed. Reg. 35824 (June 3, 2016).

vessels, and gas processing facilities.NSPS OOOOa was part of 3-rule package. Also published on the same date:

c. Included a Final Source Determination Rule (a/k/a "aggregation") clarifying EPA's air permitting rules as they apply to the oil and natural gas industry.[4]

d. Also a Federal Implementation Plan for EPA's Indian Country Minor New Source Review ("NSR") program for oil and gas production sources.[5]

2. On August 2, 2016, API, IPAA joined by various Independent Associations, Texas O&G Association, and GPA Midstream Association, petitioned EPA for reconsideration of NSPS OOOOa under CAA 307(d)(7)(b).

3. CAA 307(d)(7)(b) limits judicial review to matters raised during public comment unless it was impracticable to raise a material objection at that time, in which case EPA is required to reconsider the rule:

a. "Only an objection to a rule or procedure which was raised with reasonable specificity during the period for public comment (including any public hearing) may be raised during judicial review. If the person raising an objection can demonstrate to the Administrator that it was impracticable to raise such objection within such time or if the grounds for such objection arose after the period for public comment (but within the time specified for judicial review) and if such objection is of central relevance to the outcome of the rule, the Administrator shall convene a proceeding for reconsideration of the rule and provide the same procedural rights as would have been afforded had the information been available at the time the rule was proposed. If the Administrator refuses to convene such a proceeding, such person may seek review of such refusal in the United States court of appeals for the appropriate circuit (as provided in subsection (b) of this section). Such reconsideration shall not postpone the effectiveness of the rule. The effectiveness of the rule may be stayed during such reconsideration, however, by the Administrator or the court for a period not to exceed three months."[6]

[4] 40 CFR 51.165(a) & App. S (SIP Implementation),52.21(b)(6)(i) (Prevention of Significant Deterioration), 70.2 (State Operating Permit programs), 71.2 (Federal Operating Permit Programs); Source Determination for Certain Emission Units in the Oil and Gas Sector, 81 Fed. Reg. 35622 (June 3, 2016).
[5] 40 CFR 49.101-49.105, 49.151-49.167; Federal Implementation Plan for True Minor Sources in Indian Country in the Oil and Natural Gas Production and Natural Gas Processing Segments of the Oil and Natural Gas Sector; Amendments to the Federal Minor New Source Review Program in Indian Country To Address Requirements for True Minor Sources in the Oil and Natural Gas Sector, 81 Fed. Reg. 35944 (June 3, 2016).
[6] 42 USC 7607(d)(7)(B).

4. For example, IPAA's petition requested reconsideration of the final rule, which:

   a. Removed a proposed exemption for low production well (15 barrels of oil equivalent ("boe")/day) from leak detection and repair ("LDAR") and reduced emission completions ("RECs") requirements.

   b. Required in Section 60.5375a of Subpart OOOOa that a separator be "onsite during the entirety of the flowback period," which was not part of the proposal and imposes an unnecessary cost on many conventional wells drilled by independents.

   c. Imposed various requirements associated with "technical infeasibility" that were not proposed or mentioned in the proposed rule that increase the cost of compliance with disproportionate impacts on independent operators (*e.g.*, requiring without proposing that Professional Engineers ("PE") certify connections of pneumatic pumps (§60.5393a) or closed vent systems (§60.5411a(d) are not technically feasible at brownfield sites; removing a proposed "technical infeasibility" option altogether for controls at "greenfields," without discussing or defining a brownfield versus a greenfield); adding recordkeeping requirements added in Subpart OOOOa, at end of §60.5420a(c)(1)(iii)(A), associated with technical infeasibility, which were not part of the proposed rule).

   d. Other issues arguably addressed in some manner during the rulemaking but requiring further discussion; e.g.--

      i. "The definition of 'modification' as it relates to refractured wells and the LDAR requirements needs to be clarified and changed. The refracturing of wells does not necessarily mean emissions will increase. Emissions must increase to meet the NSPS definition of modification. As currently defined, Subpart OOOOa would unjustifiably subject "existing sources" that have not necessarily been modified to extensive and costly requirements."

      ii. "Certain oil wells should be exempt from the LDAR requirements. Similarly, there should be a different definition of "low pressure well."

      iii. "There should be an 'off ramp' for the LDAR requirements when existing wells or new wells become 'low production'or marginal wells.

iv. "Although Subpart OOOOa provides a state equivalency process for LDAR programs, the procedure set forth in the regulations (§60.5398a) is overly burdensome to the point that states are unlikely to avail themselves of the provisions."

v. "The digital/video LDAR related requirements (§60.5420a) are unnecessary and should be removed."

vi. "EPA should reinstate options to reduce the emission surveys to annual surveys."

vii. "While certain operators might prefer the consistency of bi-annual surveys, many independent operators and small entities would still benefit from the ability to reduce survey frequency by demonstrating few/no leaks during consecutive surveys."

viii. "Extended implementation periods are necessary and warranted for small entities that lack the bargaining power and resources (and the in-house capabilities) to contract with consultants to undertake the surveys, testing and documentation required by Subpart OOOOa."

5. On June 5, 2017, EPA published notice in the Federal Register granting the petitions for reconsideration and convening a proceeding to reconsider certain aspects of the rule and staying the effective date for of the fugitive emissions requirements until 90 days from a June 2, 2017, effective date, of the stay until August 31, 2017.[7] The reconsideration will apply to:

   a. The applicability of the fugitive emissions requirements to low production well sites;

   b. The process and criteria for requesting and receiving approval for the use of an alternative means of emission limitations (AMEL) for purposes of compliance with the fugitive emissions requirements in the 2016 Rule;

   c. The requirements for certification of closed vent system by a professional engineer; and

   d. The well site pneumatic pump standards.

6. In the June 4, 2017, Federal Register notice, EPA also stayed the fugitive emission requirements at all well sites, the standards for pneumatic pumps

[7] 82 Fed. Reg. 25730, 25730 (June 5, 2017) ("The stay of §§ 60.5393a(b) through (c), 60.5397a, 60.5410a(e)(2) through (5) and (j), 60.5411a(d), 60.5415a(h), 60.5420a(b)(7), (8), and (12), and (c)(15) through (17) is effective from June 2, 2017, until August 31, 2017").

at well sites, and the certification by a professional engineer requirements, on the grounds that two of the issues under consideration (para. I.A.5.a and I.A.5.b) define the universe of facilities subject to the 2016 Rule and, it was reasonable to stay the effectiveness of these requirements in the 2016 Rule, pending reconsideration, for three months.[8]

7. On June 5, 2017, "six environmental groups—Environmental Defense Fund, Natural Resources Defense Council, Environmental Integrity Project, Earthworks, Clean Air Council, and Sierra Club—filed with the D.C. Circuit an 'emergency motion for a stay or, in the alternative, summary vacatur.' According to Environmental Petitioners, EPA's stay violate[d] CAA section 307(d)(7)(B) because 'all of the issues Administrator Pruitt identified could have been, *and actually were*, raised (and extensively deliberated) during the comment period.'"[9]

    a. There were 45 interveners (including 15 states and Chicago on behalf Petitioners, and 10 states and 19 industry groups on behalf of EPA) plus 2 amici (Texas and North Dakota)

8. On June 16, 2017, EPA published a proposed rule in the Federal Register proposing to stay the 2016 Rule for two years after the date of publication of a final stay rule in the Federal Register. During the stay, EPA would reconsider the issues raised in the reconsideration petitions regarding fugitive emissions, pneumatic pumps, and certification by professional engineer requirements. In addition, during the stay, EPA intends to look broadly at the entire 2016 Rule.

    a. The comment period on the proposed rule staying NSPS OOOOa closed on August 9, 2017.

    b. On November 8, 2017, EPA issued a Notice of Data Availability ("NODA") seeking comment on EPA's legal authority to issue a rule staying the 2016 Rule; the technological, resource, and economic challenges (*i.e.*, technical feasibility) with implementing the fugitive emissions requirements, well site pneumatic pump standards, and the requirements for certification of closed vent systems by a professional engineer; and providing an updated cost savings and forgone benefits analysis for the 2-year stay.

    c. The comment period on the NODA closed December 9, 2017.

    d. EPA has not finalized the proposed 2-year stay.

9. On July 3, 2017, the D.C. Circuit held that EPA's decision to reconsider a rule was not a final agency action, and the Court lacked jurisdiction to

[8] 82 Fed. Reg. at 25733.
[9] Clean Air Council v. Pruitt, 862 F.3d 1, 6 (D.C. Cir. 2017) (emphasis by the Court).

review EPA's decision to reconsider. The Court held, however, that decision to stay the rule was a "final agency action" subject to judicial review.[10]

a. The D.C. Circuit vacated the stay, holding that EPA's decision to stay the rule was "arbitrary and capricious" on the grounds that the final rule was the "logical outgrowth" of the proposed rule, and because "[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. Because it was thus not 'impracticable' for industry groups to have raised such objections during the notice and comment period, CAA section 307(d)(7)(B) did not require reconsideration and did not authorize the stay. EPA's decision to impose a stay, in other words, was 'arbitrary, capricious, [and] ... in excess of [its] ... statutory ... authority.' 42 U.S.C. § 7607(d)(9)(A), (C). We shall therefore grant Environmental Petitioners' motion to vacate the stay."

b. The D.C. Circuit "emphasize[d], however, that nothing in [its] opinion in any way limits EPA's authority to reconsider the final rule and to proceed with its June 16 NPRM. Although EPA had no section 307(d)(7)(B) *obligation* to reconsider the methane rule, it is free to do so as long as 'the new policy is permissible under the statute ..., there are good reasons for it, and ... the agency *believes* it to be better.'" [11]

10. Absent a final rule promulgating a 2-year stay, all of the provisions of NSPS OOOOa, including those EPA proposed to stay, are in effect and enforceable.

B. Methane—Emission Guidelines Existing Sources (filed D.D.C. 4/5/18)

1. On November 9, 2016, EPA finalized an information collection request (ICR) to obtain information for use in addressing existing source emissions from the oil and natural gas sector. EPA described the Methane ICR as "a critical step toward meeting the Obama Administration's commitment to reduce emissions from existing oil and gas sources, as part of the President's *Climate Action Plan: Strategy to Reduce Methane Emissions.*"[12]

[10] 862 F.3d at 7 (with Circuit Judge Brown dissenting).
[11] 862 F.3d at 14 (citing *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515, 129 S.Ct. 1800, 173 L.Ed.2d 738 (2009) (emphasis inside single quotation marks by the Supreme Court)).
[12] EPA Fact Sheet (available at https://www.epa.gov/sites/production/files/2016-11/documents/oil-gas-final-icr-factsheet.pdf)

2. In 2016, EPA sent letters to more than 15,000 owners and operators in the oil and gas industry, requiring them to provide information. The information request comprised two parts: An ''operator survey'' that asked for basic information on the numbers and types of equipment at onshore oil and gas production facilities in the United States, and a ''facility survey'' asking for more detailed information on sources of methane emissions and emissions control devices or practices in use by a representative sampling of facilities in several segments of the oil and gas industry. EPA is withdrawing both parts of the information request.

3. On March 1, 2017, EPA received a letter from eleven state Attorneys General or Governors of Mississippi and Kentucky, expressing concern with the burdens on businesses imposed by the pending requests, and asking that the ICR be suspended and withdrawn.[13]

4. On March 2, 2017, EPA withdrew the information request.[14]

5. On June 29, 2017, fourteen States,[15] DC, and Chicago gave notice of intent to sue EPA for failure to promulgate rules limiting methane emissions from existing sources in the oil and gas sector.[16]

6. On April 5, 2018, the fourteen States, DC, and Chicago filed a Complaint in US District Court for the District of Columbia styled State of New York et al. v. Pruitt (Case No. 1:18-cv-0077).

7. The 2017 Notice of Intent to Sue and 2018 Complaint contend that:

   "When EPA establishes performance standards for new sources in a particular source category, EPA is also required under section 111(d) and applicable regulations to publish guidelines for controlling emissions from existing sources in that source category, subject to two narrow exceptions not applicable here. EPA's regulations provide that such guidelines will be issued "[c]oncurrently upon or after proposal of [section 111(b)] standards of performance for the control of a designated pollutant from affected facilities." 40 C.F.R. § 60.22(a).

[13] Letter from Texas Attorney General Ken Paxton et al. to EPA Administrator Scott Pruitt (March 1, 2017) (available at https://www.epa.gov/controlling-air-pollution-oil-and-natural-gas-industry/oil-and-gas-industry-information-requests). The eleven states were Texas, Alabama, Arizona, Kansas, Kentucky, Louisiana, Mississippi, Montana, Oklahoma, South Carolina, and West Virginia.
[14] Notice Regarding Withdrawal of Obligation to Submit Information, 82 Fed. Reg 12817 (March 7, 2017) (publishing notice of withdrawal announced March 2, 2017).
[15] The States were New York, California (and the California Air Resources Board), Connecticut, Illinois, Iowa, Maine, Maryland, New Mexico, Oregon, Rhode Island, Vermont, Washington, the Commonwealths of Massachusetts and Pennsylvania, as well as the District of Columbia and the City of Chicago.
[16] Letter from New York Attorney General Eric T. Schneiderman et al. to EPA Administrator Scott Pruitt (June 29, 2017) (available at https://ag.ny.gov/press-release/ag-schneiderman-leads-15-ags-vowing-lawsuit-if-trump-administration-continues-ignoring) (hereinafter 2017 Methane Notice of Intent to Sue).

a. The 2017 Notice also states that "[i]n the absence of Federal action, a number of states—including Colorado, Pennsylvania, Ohio, Wyoming, and California—have proceeded with regulations or other legal requirements to prevent leaks from the oil and gas sector. . . ." from both new and existing sources.[17]

8. CAA 111(d) is quoted in full below. Note that it does not expressly authorize or require EPA to promulgate performance standards, but places that responsibility on the States.

STANDARDS OF PERFORMANCE FOR EXISTING SOURCES; REMAINING USEFUL LIFE OF SOURCE

(1) The Administrator shall prescribe regulations which shall establish a procedure similar to that provided by section 7410 of this title under which each State shall submit to the Administrator a plan which (A) establishes standards of performance for any existing source for any air pollutant (i) for which air quality criteria have not been issued or which is not included on a list published under section 7408(a) of this title or emitted from a source category which is regulated under section 7412 of this title but (ii) to which a standard of performance under this section would apply if such existing source were a new source, and (B) provides for the implementation and enforcement of such standards of performance. Regulations of the Administrator under this paragraph shall permit the State in applying a standard of performance to any particular source under a plan submitted under this paragraph to take into consideration, among other factors, the remaining useful life of the existing source to which such standard applies.

(2) The Administrator shall have the same authority—
(A) to prescribe a plan for a State in cases where the State fails to submit a satisfactory plan as he would have under section 7410(c) of this title in the case of failure to submit an implementation plan, and
(B) to enforce the provisions of such plan in cases where the State fails to enforce them as he would have under sections 7413 and 7414 of this title with respect to an implementation plan.

In promulgating a standard of performance under a plan prescribed under this paragraph, the Administrator shall take into consideration, among other factors, remaining useful lives of the sources in the category of sources to which such standard applies.

[17] 2017 Notice of Intent to Sue at 5.

9. 40 CFR 60.22 is quoted in full below.

§60.22 Publication of guideline documents, emission guidelines, and final compliance times.

(a) Concurrently upon or after proposal of standards of performance for the control of a designated pollutant from affected facilities, the Administrator will publish a draft guideline document containing information pertinent to control of the designated pollutant form designated facilities. Notice of the availability of the draft guideline document will be published in the Federal Register and public comments on its contents will be invited. After consideration of public comments and upon or after promulgation of standards of performance for control of a designated pollutant from affected facilities, a final guideline document will be published and notice of its availability will be published in the Federal Register.

(b) Guideline documents published under this section will provide information for the development of State plans, such as:

(1) Information concerning known or suspected endangerment of public health or welfare caused, or contributed to, by the designated pollutant.

(2) A description of systems of emission reduction which, in the judgment of the Administrator, have been adequately demonstrated.

(3) Information on the degree of emission reduction which is achievable with each system, together with information on the costs and environmental effects of applying each system to designated facilities.

(4) Incremental periods of time normally expected to be necessary for the design, installation, and startup of identified control systems.

(5) An emission guideline that reflects the application of the best system of emission reduction (considering the cost of such reduction) that has been adequately demonstrated for designated facilities, and the time within which compliance with emission standards of equivalent stringency can be achieved. The Administrator will specify different emission guidelines or compliance times or both for different sizes, types, and classes of designated facilities when costs of control, physical limitations, geographical location, or similar factors make subcategorization appropriate.

(6) Such other available information as the Administrator determines may contribute to the formulation of State plans.

(c) Except as provided in paragraph (d)(1) of this section, the emission guidelines and compliance times referred to in paragraph (b)(5) of this

section will be proposed for comment upon publication of the draft guideline document, and after consideration of comments will be promulgated in subpart C of this part with such modifications as may be appropriate.

(d)(1) If the Administrator determines that a designated pollutant may cause or contribute to endangerment of public welfare, but that adverse effects on public health have not been demonstrated, he will include the determination in the draft guideline document and in the Federal Register notice of its availability. Except as provided in paragraph (d)(2) of this section, paragraph (c) of this section shall be inapplicable in such cases.

(2) If the Administrator determines at any time on the basis of new information that a prior determination under paragraph (d)(1) of this section is incorrect or no longer correct, he will publish notice of the determination in the Federal Register, revise the guideline document as necessary under paragraph (a) of this section, and propose and promulgate emission guidelines and compliance times under paragraph (c) of this section.

10. In finalizing 40 CFR 60.22, quoted above, EPA covered four pages in the 1975 Federal Register notice for this rule in order to find—ultimately by inference—"authority" under CAA 111(d) and its legislative history for EPA, rather than the states, to establish emission standards (a/k/a/ "guidelines") for existing sources and to "require, as a basis for [State Implementation Plan] approval, that the States establish emission standards that (except in cases of economic hardship) are equivalent to or more stringent than EPA's emission guidelines."[18]

11. EPA's 1975 inference of "authority" to promulgate existing-source guidelines did not reach the issue of whether EPA is "required" to promulgate them. EPA acknowledged as much in 1975, where it stated, "If there is to be substantive review [of a State's existing-source standards], there must be criteria for the review, and EPA believes it is desirable (if not legally required) that the criteria be made known in advance to the States, to industry, and to the general public."[19]

12. As an aside, the 1975 Federal Register notice states that Section 60.22(d)(1) "allows States more flexibility in establishing plans for control of welfare-related pollutants than is provided for plans involving health-related pollutants. Accordingly, the proposed regulations have been revised to provide that States may balance the emission guidelines, compliance times and other information in EPA's guideline documents

[18] Standards of Performance for New Stationary Sources, 40 Fed. Reg. 53340, 53341-44 (Nov. 17, 1975).
[19] 40 Fed. Reg. at 53343.

against other factors in establishing emission standards, compliance schedules, and variances for welfare related pollutants"[20]

C. Methane—2016 BLM Venting & Flaring Suspension Rule & Stay (appeals pending 9th & 10th Cirs.)

1. Competing Litigation Tracks, Dueling Decisions

a. Wyoming—Industry/States challenges opposing 2016 Venting & Flaring Rule on substantive grounds

b. California—Environmental Groups and CA/NM challenges blocking BLM changes to 2016 Venting & Flaring Rule on notice-and-comment rulemaking procedural grounds

2. On November 18, 2016, as part of President Obama's Climate Action Plan, BLM published final regulations on "Waste Prevention and Resource Conservation" (a/k/a the "2016 BLM Venting and Flaring Rule"),[21] effective January 17, 2017.

a. The 2016 BLM Venting and Flaring Rule applies to "[a]ll onshore wells, tanks, compressors, and other equipment located on a Federal or Indian lease or a federally approved unit or communitized area."

i. Note, applicable to both existing and new wells and equipment

b. Prohibits venting of natural gas, except in emergencies and other limited situations defined in the Rule.[22]

c. Required operators to capture an increasing percentage of produced gas for sale or use on lease, phasing out flaring of associated gas from oil wells over time, as set out below. These provisions are currently stayed. See paragraph 10 of this section.

i. "Beginning January 17, 2018, the operator's capture percentage must equal:

(1) For each month during the period from January 17, 2018 until December 31, 2019: 85 percent;
(2) For each month during the period from January 1, 2020 until December 31, 2022: 90 percent;
(3) For each month during the period from January 1, 2023 until December 31, 2025: 95 percent; and

[20] 40 Fed. Reg. at 53344.
[21] 43 CFR pt. 3179; 81 Fed. Reg. 83008, 83080.
[22] 43 CFR 3179.6.

(4) For each month beginning January 1, 2026: 98 percent."[23]

ii. For leases issued before the effective date, "BLM may approve a lower capture percentage if the operator demonstrates, and BLM agrees, that the applicable capture percentage . . . would impose such costs as to cause the operator to cease production and abandon significant recoverable oil."[24]

iii. Beginning January 17, 2018, measure or calculate the volume of gas flared and report to BLM.[25]

d. Effective January 17, 2017 [later extended and currently stayed, see paragraphs 7 and 10 below], requires operators to conduct semi-annual inspections for leaks at well sites and quarterly inspections at compressor stations using specified digital technology, to repair leaks within 30 days, and to keep records and submit annual reports to BLM of inspection results and repairs. This part of the Rule is subtitled "Leak Detection and Repair" ("LDAR").[26]

e. By January 17, 2018 [later extended and currently stayed, see paragraphs 7 and 10 below], requires operators to "update old, inefficient equipment and to follow best practices to minimize waste through venting. These provisions address gas losses from pneumatic controllers, pneumatic diaphragm pumps, storage vessels, liquids unloading, and well drilling and completions."[27]

3. On November 15, 2016,[28] IPAA and the Western Energy Alliance ("WEA") challenged the 2016 BLM Venting & Flaring Rule in US District Court for the District of Wyoming (Case No. 165-cv-280). On November 18, 2016, the States of Wyoming and Montana also filed suit challenging the rule (Case No. 164-cv-285 Lead).

a. North Dakota and Texas intervened in opposition to the rule.

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[23] 43 CFR 3179.7(b).
[24] 43 CFR 3179.8(a).
[25] 43 CFR 3179.9.
[26] 43 CFR 3179.301-.305. EPA published amendments to two narrow aspects of the LDARs on March 12, 2018. The amendments relate to repairs during unplanned shutdowns and monitoring surveys on the Alaskan North Slope. They are not material to this paper. *See* 83 Fed. Reg. 10628 (Mar. 12, 2018).
[27] 81 Fed. Reg. at 83011-8301; *see also* (codified at 43 CFR 3179.201 (pneumatic controllers), 3179.202 (pneumatic diaphragm pumps), 3179.203 (storage vessels), 3179.204 (downhole well maintenance and liquids unloading)).
[28] BLM had given notice on its web site of issuance of the Venting and Flaring Rule a few days before BLM the Rule in the Federal Register on November 18, 2016. *See* IPAA/WEA Complaint at 2 n.1 (Nov. 15, 2017) (D.Ct. Wyo. Case No. 16-cv-280).

b. API filed an amicus brief in opposition to the rule.

c. Interveners in support of the rule were: California, New Mexico, Wyoming Outdoor Council, Center for Biological Diversity, Sierra, Club, NRDC, National Wildlife Fund, Diné Citizens Against Ruining Our Environment, and eight other ENGOs.

4. On June 15, 2017, BLM published notice that it was postponing the not-yet-elapsed compliance dates in the 2016 BLM Venting & Flaring Rule.[29]

a. BLM justified the planned postponement based on Section 705 of the Administrative Procedure Act ("APA"), which provides:

"When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review.'' The Rule obligates operators to comply with its "capture percentage," flaring measurement, pneumatic equipment, storage tank, and LDAR provisions beginning on January 17, 2018. This compliance date has not yet passed and is within the meaning of the term "effective date" as that term is used in Section 705 of the APA."

b. The postponement would apply only to provisions for which the compliance date had not yet passed; *i.e.*, only to the phase-in provisions. The phase-on provisions were the more burdensome and costly of the Rule's requirements and were not to become effective until January 17, 2018. These included:

"Pursuant to Section 705 of the APA, the BLM hereby postpones the future compliance dates for the following sections affected by the final rule entitled, 'Waste Prevention, Production Subject to Royalties, and Resource Conservation,' pending judicial review: 43 CFR 3179.7, 3179.9, 3179.201, 3179.202, 3179.203, and 3179.301– 3179.305. BLM will publish a document announcing the outcome of that review."

c. Provisions of the rule for which the compliance date had already passed were not affected by the postponement, as stated in the Federal Register notice:

"Compliance with certain other provisions of the Rule is already mandatory, including the requirement that operators submit a ''waste minimization plan'' with applications for permits to drill (43 CFR 3162.3–1), new regulations for the royalty-free use of production (43 CFR subpart 3178), new regulatory definitions of ''unavoidably lost'' and ''avoidably lost'' oil and gas (43 CFR 3179.4), limits on venting and flaring during drilling and

[29] 83 Fed. Reg. 27430 (June 15, 2017).

production operations (43 CFR 3179.101–179.105), and requirements for downhole well maintenance and liquids unloading (43 CFR 3179.204)."

d. The "Postponement Notice" did not say what the new compliance dates would be. BLM intended to review them and "separately, the BLM intends to conduct notice-and-comment rulemaking to suspend or extend the compliance dates of those sections affected by the Rule," and did so as discussed in paragraph 7 of this section.

5. On July 5, 2017, and July 10, 2017, several of the Environmental Groups and the States of California and New Mexico challenged the Postponement Notice in the Northern District of California.[30]

6. On October 4, 2017, the California Northern District Court, on motions for summary judgment (before Defendants had answered the Complaint or filed the administrative record), held unlawful and vacated the Postponement Notice, thereby reinstating the (by then) three-and-one-half month away compliance dates for the phase-in provisions. The rationale in Magistrate Judge Elizabeth D. Laporte's order granting the motions for summary judgment was:

a. The term "effective date" and "compliance date" have distinct meanings, Section 705 uses the former date, and the "effective date" of the 2016 Venting & Flaring Rule was January 17, 2017 (not the compliance dates of January 17, 2018).

b. BLM had looked at industry costs but (according to the Northern District), had ignored benefits of the rule, and therefore had not shown that "justice so requires" the Postponement Notice. Magistrate Judge Laporte wrote:

"If the words 'justice so requires' are to mean anything, they must satisfy the fundamental understanding of justice: that it requires an impartial look at the balance struck between the two sides of the scale, as the iconic statue of the blindfolded goddess of justice holding the scales aloft depicts. Merely to look at only one side of the scales, whether solely the costs or solely the benefits, flunks this basic requirement."

c. BLM initially appealed (9th Cir. Case No. 17456) but on March 19, 2018, voluntarily dismissed its appeal, possibly because subsequent events overtook the Postponement Notice.

[30] See California and New Mexico, et al. v. BLM, No. 3;17-CV-03884-EDL (N.D. Cal.); Sierra Club, et al v. Zinke, No. 3:17-CV-03885-EDL (N.D. Cal.).

7. On October 5, 2017, BLM proposed, and on December 8, 2017, it finalized, the 2017 Delay Rule (a/k/a the "Suspension Rule"), which postponed the implementation of the compliance requirements for the phase-in provisions for 1 year, until January 17, 2019, and adjusted the gas capture years accordingly.[31] The effective date was January 8, 2018.

8. On December 19, 2017, the Environmental Groups, California, and New Mexico, appealed the 2017 Suspension Rule in the Northern District of California and sought a preliminary injunction enjoining the delayed compliance dates pending the Northern District's decision on the merits.[32]

9. On February 22, 2018, Judge William H. Orrick denied the Defendants' motion to transfer venue to Wyoming and granted a preliminary injunction against the deferred compliance dates.[33]

    a. Judge Orrick denied BLM and the States' motion to change venue.

        i. Although he agreed the cases were "inextricably intertwined due to the implications on timing and effectiveness of the Waste Prevention Rule's provisions, they are otherwise substantively distinct, and the challenges to each raise unique legal questions and require the evaluation of two separate rules promulgated for different reasons"; and

        ii. "The legal issues concerning the Waste Prevention Rule in the District of Wyoming go to the substance of that regulation; this lawsuit addresses the BLM's alleged procedural failure to justify a different rule, the Suspension Rule. The legal issues are distinct. In light of plaintiffs' choice of forum, venue is appropriate" in the Northern District of California."

    b. Judge Orrick granted Plaintiffs' motion for a preliminary injunction, stating, based largely on contradictions between the Obama EPA's statements in support of the rule and the Trump EPA's statements opposing it, thus finding:

> "The BLM's reasoning behind the Suspension Rule is untethered to evidence contradicting the reasons for implementing the Waste Prevention Rule, and so plaintiffs are likely to prevail on the merits. They have shown irreparable injury caused by the waste

[31] Final Rule; Waste Prevention, Production Subject to Royalties, and Resource Conservation; Delay and Suspension of Certain Requirements, 82 Fed. Reg. 58050, 58072 (Dec. 8, 2017).
[32] Sierra Club et al v. Ryan Zinke et al., No. 3:17-cv-07187; State of California et al v. Bureau of Land Management et al., No. 3:17-cv-071186.
[33] The February 22, 2018 Order is ECF No. 89 in the *California* case and ECF No. 80 in the *Sierra Club* case.

> of publicly owned natural gas, increased air pollution and associated health impacts, and exacerbated climate impacts. Plaintiffs are entitled to a preliminary injunction on this record."

10. On April 4, 2018, the Wyoming district court (Judge Scott W. Skavdahl) stayed implementation of the "phase-in provisions" listed below until finalization of the Revision Rule.

    a. The provisions stayed by Judge Skavdahl's order are:

        i. 3179.7 (gas capture requirements)

        ii. 3179.9 (measuring and reporting volumes)

        iii. 3179.201 (pneumatic controller requirements)

        iv. 3179.202 (pneumatic diaphragm pump requirements)

        v. 3179.203 (storage vessel requirements)

        vi. 3179.301-305 (leak detection and repair requirements)

    b. The remaining provisions of the Rule have been in effect since January 17, 2017, and remain in effect. The Wyoming district court's action essentially preserves the status quo that has existed since January 17, 2017, when the 2016 BLM Venting & Flaring Rule first took effect.

11. On April 6-9, Environmental Groups, California, and New Mexico appealed Judge Skavdahl's order staying implementation of the phase-in provisions to the Tenth Circuit (Nos. 18-8027 and 18-8029).

12. On April 6, 2018, Environmental Group-Interveners filed a motion with the Wyoming district court asking the court to stay its own order staying implementation of the phase-in provisions of the 2016 rule pending appeal.

    a. BLM, States, and Industry Groups filed responses in opposition on April 16, 2018.

    b. Environmental Groups' reply filed April 17, 2018

13. On April 16, 2018, States-Appellees, Wyoming and Montana (in No. 18-8027) and the Industry Petitioners-Appellees (in 18-8027) filed motions to dismiss Environmental Groups' appeal of Judge Skavdahl's order staying the Phase-In provisions for lack of appellate jurisdiction on finality grounds.

a. Environmental Groups-Appellants' responses due to Tenth Circuit on April 30, 2018.

14. On April 23, 2018, BLM appealed the February 22, 2018, Order Denying Motion to Transfer Venue and Granting Preliminary Injunction to the Ninth Circuit. Opening briefs are due May 21, 2018.

15. Current Status: Phase-In Provisions are currently stayed by the Wyoming district court. But "inextricably intertwined" questions of timing of these provisions are being raised before the Ninth and Tenth Circuits, putting several issues of administrative law and procedure on a collision course; for example—

a. Venue—Who is interfering with whose choice of forum?

b. Comity—Do the California district court's decisions on the Postponement and Suspension Rules interfere with Wyoming court's authority to decide motions to stay pending appeal? Or vice versa?

c. APA Section 705 Issues—Definition of "Effective Date" and "Compliance Date"?

d. What is the agency's burden of proof on delaying a compliance date? What does "when justice requires" mean?

16. Judge Skavdahl's order observes:

> "Sadly, and frustratingly, this case is symbolic of the dysfunction in the current state of administrative law. And unfortunately, it is not the first time this dysfunction has frustrated the administrative review process in this Court."[34]

Citing State of Wyoming, et al. v Dep't of Interior, No. 15-CV-043-S (D. Wyo.), the litigation summarized in the next section of this paper.

D. BLM—2015 Hydraulic Fracturing Rule Rescission (N.D. Cal. filed 1/24/18)

1. Issued by BLM in March 2015, to become effective June 24, 2015, to apply to all wells regulated by the BLM (Federal, tribal, or individual Indian trust or restricted fee lands)[35] Established "new requirements to ensure wellbore integrity, protect water quality, and enhance public

[34] Order Staying Implementation of Rule Provisions and Staying Action Pending Finalization of Revision Rule (Case Nos. 2:16-cv-0280 and 2:16-cv-0285) (D.Ct. Wyo. April 4, 2018).
[35] Oil and Gas; Hydraulic Fracturing on Federal and Indian Lands, 80 Fed. Reg. 16128 (Mar. 26, 2015). BLM had proposed the rule in May 2012 and issued a supplemental proposal in supplemental proposal a year later. 78 Fed. Reg. 31636 (May 24, 2013); 77 Fed. Reg. 27691 (May 11, 2012).

disclosure of chemicals and other details of hydraulic fracturing operations. The rule requires an operator planning to conduct hydraulic fracturing to do the following"[36]:

a. Submit detailed information about the proposed operation, including wellbore geology, the location of faults and fractures, the depths of all usable water, estimated volume of fluid to be used, and estimated direction and length of fractures, to the BLM

b. Design and implement a casing and cementing program that follows best practices and meets performance standards to protect and isolate usable water, defined generally as those waters containing less than 10,000 parts per million of total dissolved solids (TDS);

c. Monitor cementing operations during well construction;

d. Take remedial action if there are indications of inadequate cementing, and demonstrate to the BLM that the remedial action was successful;

e. Perform a successful mechanical integrity test (MIT) prior to the hydraulic fracturing operation;

f. Monitor annulus pressure during a hydraulic fracturing operation;

g. Manage recovered fluids in rigid enclosed, covered or netted and screened above-ground storage tanks, with very limited exceptions that must be approved on a case-by-case basis;

h. Disclose the chemicals used to the BLM and the public, with limited exceptions for material demonstrated through affidavit to be trade secrets;

i. Provide documentation of all of the above actions to the BLM.

2. Comments submitted by industry in 2012[37] objected to the 2012 proposed rule based on, *e.g.*—

a. Lack of jurisdiction; attempted "end run" around Energy Policy Act of 2005 exemption of hydraulic fracturing from regulation under the Safe Drinking Water Act.

[36] 80 Fed. Reg. at 16129.
[37] Letter from IPAA and Western Energy Alliance to BLM (Sep. 10, 2012), e-filed on www.regulations.gov and available in the rulemaking docket at BLM-2012-0001-7373.

b. Lack of basis for the rule, citing statements by EPA and DOI that it had not found evidence of groundwater contamination from hydraulic fracturing fluid injection

c. Duplication of and inconsistency with State regulation of hydraulic fracturing

d. Interference with State jurisdiction over water rights by allowing BLM staff to direct operators to use, or not, water from various sources, without Federal jurisdiction, and failure to comply with E.O. 13132 requiring a Federalism Assessment

e. Flawed, required economic analyses due to under-estimation of the costs of the rule ($11k/well[38] versus $254k/well and $233k/refracture) and therefore wrongly concluding that several statutes and executive orders are either satisfied or do not apply (e.g., the Paperwork Reduction Act, the Small Business Regulatory Enforcement Fairness Act, the Unfunded Mandates Reform Act, the Regulatory Flexibility Act)

f. Failure to protect Confidential Business Information in required disclosures of chemical composition of fracturing fluid

g. Unfettered discretion to BLM staff to require "any information"

h. Failure to adequately analyze socioeconomic impacts of the proposed rule in a proper NEPA analysis and potential, because of BLM's application process, for each well stimulation proposal to required separate NEPA analysis

3. The 2015 BLM Hydraulic Fracturing Rule was challenged by States of Wyoming, Colorado, IPAA, and Western Energy Alliance in US District Court for the District of Wyoming.[39]

a. Intervenor-Petitioners (challenging the rule): North Dakota, Utah, Ute Indian Tribe

b. Intervenor-Respondents (in support of the rule): Sierra Club and six other environmental groups

[38] 80 Fed. Reg. at 16130.
[39] Petitions for Review file State of Wyoming et al. v. US Department of Interior, D.Ct. Wyoming No. 15-CV-00043 (Lead). The Industry Petitioners docket number in the Wyoming district court was 15-CV-000041.

4. All of the Petitioners and Intervenor-Petitioners moved for a preliminary injunction against enforcement of the rule pending the outcome of the challenge to the rule.[40]

5. On June 21, 2015, the Wyoming district court issued an order (filed June 24, 2015, postponing the effective date of the 2015 BLM HF Rule until BLM lodged the administrative record and the Wyoming district court ruled on the motions for preliminary injunction.[41]

6. On September 30, 2015, the Wyoming district court granted the Industry's and Wyoming/Colorado's motions for preliminary injunction staying the BLM Hydraulic Fracturing Rule pending the court's decision on the merits of the appeal.[42] The rule, therefore, had not become effective. The court's opinion strongly signaled that the district court would ultimately rule for Industry and Wyoming/Colorado on the merits, holding:

> "The issue presented here is whether the [Energy Policy Act of 2005's ("EPAct's")] explicit removal of the EPA's regulatory authority over non-diesel hydraulic fracturing likewise precludes the BLM from regulating that activity, thereby removing fracking from the realm of federal regulation. Although the BLM does not claim authority for its Fracking Rule under the [Safe Drinking Water Act ("SDWA")], a statute administered by the EPA, it defies common sense to interpret the more general authority granted by the [Minerals Leasing Act ("MLA")] and FLPMA as providing the BLM authority to regulate fracking when Congress has directly spoken to the issue in the EPAct. The SDWA specifically addresses protection of underground sources of drinking water through regulation of "underground injection," and Congressional intent as expressed in the EPAct indicates clearly that hydraulic fracturing is not subject to federal regulation unless it involves the use of diesel fuels. . . .
>
> It seems the BLM is attempting to do an end-run around the EPAct; however, regulation of an activity must be by Congressional authority, not administrative fiat. The Court finds the intent of Congress is clear, so that is the end of the matter; "for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."[43]

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[40] Motion for Preliminary Injunction of Petitioners Independent Petroleum Association of America and Western Energy Alliance (ECF No. 11 in 15-CV- 041), Wyoming and Colorado's Motion for Preliminary Injunction (ECF No. 32 in 15-CV-043), North Dakota's Motion for Preliminary Injunction (ECF No. 52 in 15-CV-043), and Motion for Preliminary Injunction filed by Ute Indian Tribe (ECF No. 89 in 15-CV-043).
[41] ECF Nos. 96-97 in Wyo. D.Ct. Case No. 15-CV-043.
[42] Wyoming v. Jewell, 136 F.3d 1317, 1354 (2015), ECF No. 130 in Wyo. D.Ct. Case No. 15-CV-043.
[43] *Id*. at 1335-36.

7. On November 27, 2015, the Department of Interior and Sierra Club and the other environmental group interveners appealed the Wyoming district court's preliminary injunction order staying the BLM Hydraulic Fracturing Rule pending decision on the merits to the Tenth Circuit.[44]

   a. The appeal concerned only the statutory authority issues that the Wyoming district court had determined.

   b. In July 2016, the Tenth Circuit dismissed the appeal for mootness (granting motions of the Industry/States challengers) and remanded with instructions to vacate the preliminary injunction (granting motions of the Environmental Groups), in light of the Wyoming district court's decision on the merits, discussed in paragraph I.D.8, below. [45]

8. On June 21, 2016, the Wyoming district court issued its decision setting aside the 2015 BLM Hydraulic Fracturing Rule (filed June 24, 2016) on the merits.

   a. The court held that BLM lacked statutory authority to regulated hydraulic fracturing (consistent with its preliminary injunction reasoning):

      "Having explicitly removed the only source of specific federal agency authority over fracking, it defies common sense for the BLM to argue that Congress intended to allow it to regulate the same activity under a general statute that says nothing about hydraulic fracturing. Despite the lack of authority, the BLM persisted in its rulemaking efforts. Comments made by the EPA itself suggest that the Fracking Rule is an attempt to resurrect EPA's pre-2005 EP Act authority {see DOI AR 0103278_002-3); that is, the BLM is attempting to regulate hydraulic fracturing as underground injection wells in a manner that the EPA would have done under the SDWA absent the 2005 EP Act. The BLM has attempted an end-run around the 2005 EP Act; however, regulation of an activity must be by Congressional authority, not administrative fiat. The Court finds the intent of Congress is clear, so that is the end of the matter; 'for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.'"

[44] Wyoming v. Zinke, No. 16-8068 (10th Cir.), ECF No. 1..
[45] Wyoming v. Zinke, No. 16–8068 (10th Cir.), 2016 WL 3853806 (July 13, 2016).

b. Because it held that BLM lacked authority for the rule, the district court did not reach the issue of whether the 2015 rule was arbitrary and capricious.

9. On June 24, 2016, the Environmental Groups appealed the Wyoming district court's decision to the Tenth Circuit. Briefing concluded in October 2016, and oral argument was set for March 2017.

10. Between January 2017 and March 2017, President Trump issued various executive orders directing BLM to reconsider the 2015 BLM Hydraulic Fracturing Rule, and BLM published notice of its intent to issue a proposed rule rescinding the 2015 BLM Hydraulic Fracturing Rule.[46]

11. On July 25, 2017, BLM published in the Federal Register a proposal to rescind the 2015 BLM Hydraulic Fracturing Rule (the "Rescission Rule"),[47] which it published as final on December 29, 2017.[48] BLM summarized the effect of the Rescission Rule as follows:

> "This final rule restores the regulations in part 3160 of the CFR to exactly as they were before the 2015 rule, except for changes to those regulations that were made by other rules published between March 26, 2015 (the date of publication of the 2015 final rule) and now, and the phrase ''perform nonroutine fracturing jobs,'' which is not restored to the list of subsequent operations requiring prior approval in section 3162.3–2(a). None of the amendments to part 3160 by other rules are relevant to this rulemaking."[49]

12. On September 30, 2017, in light of the *proposed* rule, the Tenth Circuit:

a. Dismissed the Environmental Groups' appeals as prudentially unripe, rather than merely abating them, because there was no court-ordered timeline to promulgate the proposed Rescission Rule, and BLM admitted at oral argument that the comment period might be extended by 60 days (all 3 panel judges concurred); and

b. Vacated the district court's judgment invalidating the 2015 BLM Hydraulic Fracturing Rule, reasoning that is what the Tenth Circuit usually does with unripe appeals; and

[46] *See* Sierra Club v. Zinke, 871 F.3d 1133, 1140 (2017) (discussing Executive Orders and Federal Register notices in the first quarter of 2017).
[47] Oil and Gas; Hydraulic Fracturing on Federal and Indian Lands; Rescission of a 2015 Rule; Proposed Rule; 82 Fed. Reg. 34464 (July 25, 2017).
[48] Oil and Gas; Hydraulic Fracturing on Federal and Indian Lands; Rescission of a 2015 Rule; Final Rule, 82 Fed. Reg. 61924 (Dec. 29, 2017).
[49] 82 Fed. Reg. at 61945.

c. Remanded to the district court with instructions to dismiss the underlying action without prejudice, again because that was usual practice.

d. Judge Hartz joined on dismissal of the Tenth Circuit appeal (paragraph (a)) but dissented on paragraphs (b) and (c). Judge Hartz would not have vacated but would have remanded to the district court to decide what to do with the 2015 Rule.

e. Industry and States filed petitions for rehearing and rehearing en banc, which the Tenth Circuit denied on December 27, 2017.

f. However, the Tenth Circuit granted BLM's request, in order to give it time to finalize the Rescission Rule, to instruct the Wyoming district court to stay issuance of the mandate until January 12, 2018.[50] The mandate has not yet issued (see below).

13. On December 29, 2017, BLM finalized the Rescission Rule.[51]

14. On January 11, 2018, the Ute Tribe filed a motion to dismiss the Appeal, and to not vacate the district court decision. North Dakota followed with a similar motion on January 23, 2018. BLM opposes both motions.

15. On January 24, 2018, Sierra Club and the other environmental groups filed a complaint in the Northern District of California challenging the Rescission Rule. In their complaint, the Environmental Groups allege:

a. Claim I.—Arbitrary and capricious decision making

b. Claim II.—Failure to issue comprehensive regulations to balance energy development and environmental protection allegedly required under the Federal Land Policy and Management Act (FLPMA), the Mineral Leasing Act (MLA), the Indian Mineral Leasing Act (IMLA)

c. Claim III.—Failure to comply with the National Environmental Policy Act failing to take a hard look at the environmental impacts of the Rescission Rule, including but not limited to alleged contamination from waste pits

16. Currently in the Northern District of California, BLM and Industry Groups (IPAA, Western Energy Alliance) are seeking to transfer venue to Wyoming district court. Here is the introduction from BLM's motion to transfer the case:

[50] Sierra Club v. Zinke, 10th Cir. No. 18-08068, Doc. No. 01019921125 (Dec. 27, 2017).
[51] 82 Fed. Reg. 61924.

> "These two cases—which challenge BLM's rescission of the HF Rule—should be transferred to the District of Wyoming. The Wyoming Court has already adjudicated the merits of the HF Rule, become familiar with its complex and technical subject matter, preliminarily enjoined BLM from enforcing the HF Rule, and issued a final judgment setting aside the HF Rule. The relief that Plaintiffs seek here—namely, reinstatement of the HF Rule—directly conflicts with the Wyoming Court's judgment.[1] Accordingly, transfer is in the interest of justice, will prevent inconsistent judgments, and will conserve judicial resources. In addition, transfer to the District of Wyoming will place this litigation in a forum that is far more connected to the rescission of the HF Rule than the Northern District of California, which has less than 0.2% of California's statewide oil and gas production and whose oil and gas production is less than 0.01% of the oil and gas production in the District of Wyoming. The interest of justice outweighs Plaintiffs' choice of venue, thus warranting transfer."[52]

II. "Conduit Theory" of Clean Water Act Liability

A. Key Clean Water Act Provisions

1. CWA 502(7) defines the phrase "navigable waters" to mean:

   "the waters of the United States, including the territorial seas"

2. CWA 301 Illegality of pollutant discharges, states (emphasis by the author):

   "Except as in compliance with this section and sections . . . [402 NPDES permits] . . . , and [404 Dredge & Fill permits], the *discharge* of any pollutant by any person shall be unlawful."

3. CWA 502(12), defines the phrase "discharge of a pollutant" to mean:

   "any *addition* of any pollutant to navigable waters *from any point source*."

4. CWA 502(14) defines "point source" as

   "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, *conduit*, *well*, *discrete fissure*, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include

[52] BLM Motion to Transfer Case (Mar. 21, 2018), ECF No. 36, in Sierra Club v. Zinke (N.D. Cal. 4:18-cv-00524).

agricultural stormwater discharges and return flows from irrigated agriculture."

B. Plaintiffs' Three Theories of Groundwater Liability under CWA

As summarized by the Kentucky district court discussed in part II.E.3 of this paper, the Plaintiffs' possible arguments that groundwater is regulated under the CWA are:

1. Groundwater is a navigable water.--"First, hydrologically connected groundwater could itself constitute a 'navigable water' under the CWA such that an adding a pollutant to hydrologically connected groundwater would constitute the discharge of a pollutant "*to* navigable waters.'"

2. Groundwater is a point source.--"Second, hydrologically connected groundwater could constitute a 'point source' under the CWA such that discharging a pollutant to a "navigable water" from hydrologically connected groundwater would constitute a discharge '*from* any point source.'"

3. Groundwater is a conveyance (or "conduit").--"Third, hydrologically connected groundwater could constitute a non-point source conveyance that falls within the CWA even though it is itself neither a point source nor a navigable water."[53]

    a. This so-called "Conduit Theory" is what is currently being litigated in the 4th, 6th, and 9th Circuits. As framed by district court in *Hawai'i Wildlife Fund*, the "Conduit Theory" issue is as follows (emphasis by the Court):

    "While there appears to be a split in authority over whether groundwater pollution violates the Clean Water Act, this split may largely flow from a lack of clarity by courts as to whether they are determining that groundwater itself may or may not be regulated under the Clean Water Act or are determining that groundwater may or may not be regulated when it serves as a conduit to water that is indeed regulated. Almost every court that has allowed unpermitted discharges into groundwater has done so under the theory that the groundwater is not *itself* "water of the United States." That is, those courts were not determining whether discharging pollutants into groundwater *conduits* required a permit."[54]

[53] Kentucky Waterways Alliance v. Kentucky Utilities Co., ECF No. 31, Mem. Opinion and Order filed Dec. 28, 2017 (E.D. Ky. Case No. 5:17-cv-00292).
[54] Hawai'i Wildlife Fund, 24 F.Supp3d 980, 996 (D. Hawai'i 2014), *affirmed*, 886 F.3d 737 (9th Cir. 2018).

b. Author Observation: CWA 301 and 402 create strict liability violations. Citizen groups can obtain injunctive relief for ongoing violations under CWA 505, obtain attorneys' fees, and/or force EPA or the delegated state to impose penalties.[55] An overbroad application of the CWA to groundwater contamination could supplant not only state control over intra-state groundwater and land use, but could also obviate key aspects of common-law torts of negligence, nuisance, trespass, and public nuisance.

C. Hawai'i Wildlife Fund v. County of Maui (9th Cir. Mar. 2018)

1. Hawai'i Wildlife Fund moved for summary judgment on County of Maui's liability under the CWA, which the district court granted, and the Ninth Circuit affirmed.

2. According to the (undisputed) facts described in the Fourth Circuit's opinion:

a. The County of Maui wastewater authority operated four underground injection wells for disposal of sanitary wastewater.

b. Dye injected into Wells 3 and 4 emerged at two seep locations near shore (in the Pacific Ocean) 84 days after injection. The study concluded that the emergence of the dye "conclusively demonstrate[s] that a hydrogeologic connection exists between LWRF Injection Wells 3 and 4 and the nearby coastal waters of West Maui."[56]

c. The study estimated that "'64% of the dye injected into Wells 3 and 4 will [eventually be] discharged at the submarine spring areas.' As a result of that finding, the report also concluded that '64% of the treated wastewater injected into [the] wells currently discharges from the submarine spring areas' and into the ocean."[57]

d. The County was aware that effluent injected into the wells would eventually reach the ocean. "When the Facility underwent environmental review in February 1973, the County's consultant—Dr. Michael Chun—stated effluent that was not used for reclamation purposes would be injected into the wells and that these pollutants would then enter the ocean some distance from the shore. The County further confirmed this in its reassessment of the Facility in 1991."[58]

[55] CWA 505(a), 42 USC 1365(a).
[56] Hawai'i Wildlife Fund, 886 F.3d at 743.
[57] Hawai'i Wildlife Fund, 886 F.3d at 743.
[58] Hawai'i Wildlife Fund, 886 F.3d at 742.

e. Pursuant to a 2001 consent decree between EPA and the County, the County had applied for but as of 2014 not yet received a CWA 401 water quality certification from the State of Hawai'i in connection with EPA's renewal of the County's underground injection permit Outside the consent decree, in 2012, the County had also applied for but as of 2014 had not yet received a CWA 402 permit. [59]

3. County of Maui argued (emphasis by the court): "[T]he point source itself must convey the pollutants *directly* into the navigable water under the CWA. As the wells here discharge into groundwater, and then *indirectly* into the Pacific Ocean, the County asserts they do not come within the ambit of the statute."[60]

4. US EPA, as *amicus curiae*, proposed to the Ninth Circuit that the Court adopt "a liability rule requiring a 'direct hydrological connection' between the point source and the navigable water," also stating:

"EPA's longstanding position is that a discharge from a point source to jurisdictional surface waters that moves through groundwater with a direct hydrological connection comes under the purview of the CWA's permitting requirements. *E.g.*, Amendments to the Water Quality Standards Regulations that Pertain to Standards on Indian Reservations, 56 Fed. Reg. 64,876, 64,982 (Dec. 12, 1991) ("[T]he affected ground waters are not considered 'waters of the United States' but discharges to them are regulated because such discharges are effectively discharges to the directly connected surface waters.")."[61]

5. Various California county and municipal water agencies and national water/wastewater trade associations filed amicus briefs in support of the County of Maui, arguing for reversal of the district court on the grounds that:

a. The Hawai'i district court ignored the point source requirement of the NPDES program, which required that NPDES permit requirements apply only when pollutants reach navigable waters by a discernible, confined and discrete conveyance

b. The conduit theory confuses point source analysis with the significant nexus test and waters of the US jurisprudence

[59] Hawai'i Wildlife Fund, F.Supp.3d 980, 985 (D. Hawai'i 2014).
[60] Hawai'i Wildlife Fund, 886 F.3d at 745-46.
[61] ECF No. 40, Brief for the United States as Amicus in Support of [Hawai'i Wildlife Fund] (9th Cir. Case No. 15-17447) (filed May 31, 2016).

c. The groundwater at issue is neither a water of the US nor a point source

6. The Association of American Railroads, National Association of Manufacturers, and other industry groups also participated as *amicus curiae*, and their arguments before the Ninth Circuit's initial opinion were similar to the water agencies' arguments.

a. After the Ninth Circuit's initial opinion, on the motion for rehearing en banc, the California water agencies, industry groups, and Eighteen States[62] *amicus curiae* argued in support of the County of Maui's petition for rehearing en banc that the Court should reject the "fairly traceable" and "hydrological connection" standard and construe the CWA "not to require an NPDES permit for pollutants that reach navigable waters through groundwater migration."[63]

b. Excerpts from the Industry Groups' amicus motion and brief in support of the motion for rehearing en banc follow:

i. "The panel's 'fairly traceable' standard effectively eliminates the distinction between point source discharges and nonpoint source pollution; thus, it should be reconsidered and reversed *en banc*. Nearly all nonpoint source pollution can be traced back to some conveyance, structure, or facility meeting the point source definition. If the panel's decision stands, nearly all water pollution could suddenly become subject to federal NPDES permitting, contrary to Congress's clear intent. By ignoring the means by which pollutants are added to navigable waters, the panel's 'fairly traceable' standard opens the door to imposing NPDES requirements not just on diffuse groundwater migration, but also on other 'paradigmatic examples of nonpoint source pollution,' such as "runoff or windblown pollutants from any identifiable source, whether channeled or not."

ii. "The panel's 'fairly traceable' standard all but ensures that well-meaning people and businesses will be left guessing about whether they are subject to potentially massive criminal and civil penalties under the CWA. The

[62] Arizona, Alabama, Alaska, Arkansas, Georgia, Indiana, Kansas, Louisiana, Missouri, Montana, Nebraska, Nevada, Oklahoma, South Carolina, Texas, Utah, West Virginia, and Wyoming.
[63] ECF No. 73-2, Brief of Association of American Railroads et al. in Support of [County of Maui's] Motion for Rehearing En Banc (9th Cir. Case No. 15-17447) (filed March 12, 2018). These parties also filed an amicus brief in support of the County of Maui prior to the judgment. ECF No. 12 (9th Cir. Case No. 15-17447) (filed March 28, 2016).

> alternative, reasonable reading presented on appeal—that NPDES permit requirements apply only when pollutants reach navigable waters by a discernible, confined and discrete conveyance and thus, states regulate diffuse sources of pollution under other programs—presents no such due process troubles."

7. **Holding**: The Ninth Circuit held "the County liable under the CWA because (1) the County discharged pollutants from a point source, (2) the pollutants are fairly traceable from the point source to a navigable water such that the discharge is the functional equivalent of a discharge into the navigable water, and (3) the pollutant levels reaching navigable water are more than *de minimis*.

8. The Ninth Circuit denied the motions for rehearing. In an amended opinion filed March 30, 2018, the Ninth Circuit reconciled the contrary case law cited by the water agencies, eighteen states, and industry with the Court's "fairly traceable" standard on the grounds that, in the case before the Court, there was an "actual" hydrological connection, whereas in the contrary cases, there was merely a "potential" hydrological connection:

> "We assume without deciding the groundwater here is neither a point source nor a navigable water under the CWA. Hence, it does not affect our analysis that some of our sister circuits have concluded that groundwater is not a navigable water. *See Rice v. Harken Expl.*, 250 F.3d 264, 270 (5th Cir. 2001); *Vill. of Oconomowoc Lake v. Dayton Hudson Corp.*, 24 F.3d 962, 965 (7th Cir. 1994). We are not suggesting that the CWA regulates all groundwater. Rather, in fidelity to the statute, we are reinforcing that the Act regulates point source discharges to a navigable water, and that liability may attach when a point source discharge is conveyed to a navigable water through groundwater. Our holding is therefore consistent with *Rice*, where the Fifth Circuit required some evidence of a link between discharges and contamination of navigable waters, 250 F.3d at 272, and with *Dayton Hudson*, where the Seventh Circuit only considered allegations of a "potential [rather than an actual] connection between ground waters and surface waters," 24 F.3d at 965.

9. Observations by Author of Paper:

   a. The Seventh Circuit in *Dayton Hudson* was discussing the definition of "navigable waters." not "discharge from a point source." The Seventh Circuit dismissed for lack of subject matter jurisdiction. The Seventh Circuit's opinion is quoted in relevant part below:

> "What of the possibility that water from the pond will enter the local ground waters, and thence underground aquifers that feed lakes and streams that are part of the "waters of the United States"? . . . Neither the Clean Water Act nor the EPA's definition asserts authority over ground waters, just because these may be hydrologically connected with surface waters.:[64]

b. Likewise, the Fifth Circuit in *Rice* was discussing the definition of "navigable waters" under the Oil Pollution Act (which is the same as the CWA), not the definition of "discharge from a point source." The Fifth Circuit's opinion granting Harken's motion for summary judgment is quoted in relevant part below:

> "In light of Congress's decision not to regulate ground waters under the CWA/OPA, we are reluctant to construe the OPA in such a way as to apply to discharges onto land, with seepage into groundwater, that have only an indirect, remote, and attenuated connection with an identifiable body of "navigable waters." We must construe the OPA in such a way as to respect Congress's decision to leave the regulation of groundwater to the States. Accordingly, we hold that a generalized assertion that covered surface waters will eventually be affected by remote, gradual, natural seepage from the contaminated groundwater is insufficient to establish liability under the OPA. In this connection, we also note that such a construction is entirely consistent with the occasion which prompted the Act's passage.
>
> The Rices have offered significant evidence that the groundwater under Big Creek Ranch has been contaminated by oil discharges onto the surface of ranch land. But, the only evidence the Rices have produced of the hydrological connection between this groundwater and the Canadian River is a general assertion by their expert that the Canadian River is down gradient from Big Creek Ranch. Drake's report briefly mentions a hydrological connection between the groundwater and the Canadian River, but there is nothing in the report or in Drake's deposition to indicate the level of threat to, or any actual oil contamination in, the Canadian River. There is no discussion of flow rates into the river, and no estimate of when or to what extent the contaminants in the groundwater will affect the Canadian River. There is also no evidence of any present or past contamination of the Canadian River. The only evidence in the record that any protected body of water is threatened by Harken's activities is Drake's general assertion that eventually the

[64] Vill. of Oconomowoc Lake v. Dayton Hudson Corp. 24 F.2d 962, 965 (7th Cir. 1994) (regarding whether an isolated, six-acre pond was a "water of the United States" even if the pond drains to groundwater and thence to navigable waters).

groundwater under the ranch will enter the Canadian river. The ground water under Big Creek Ranch is, as a matter of law, not protected by the OPA. And, the Rices have failed to produce evidence of a close, direct and proximate link between Harken's discharges of oil and any resulting actual, identifiable oil contamination of a particular body of natural surface water that satisfies the jurisdictional requirements of the OPA. Summary judgment for Harken was appropriate."[65]

c. The Ninth Circuit also relies on *Abston Construction* in support of its decision, because the County of Maui "at least initially" collected the wastewater.[66] Abston involved storm water runoff from mining operations, without mention of groundwater "conduits." The Fifth Circuit held the overland storm water discharges were subject to the CWA, in relevant part as follows:

> "We agree with the Government's argument. Gravity flow, resulting in a discharge into a navigable body of water, may be part of a point source discharge if the miner at least initially collected or channeled the water and other materials. A point source of pollution may also be present where miners design spoil piles from discarded overburden such that, during periods of precipitation, erosion of spoil pile walls results in discharges into a navigable body of water by means of ditches, gullies and similar conveyances, even if the miners have done nothing beyond the mere collection of rock and other materials. The ultimate question is whether pollutants were discharged from "discernible, confined, and discrete conveyance(s)" either by gravitational or nongravitational means. Nothing in the Act relieves miners from liability simply because the operators did not actually construct those conveyances, so long as they are reasonably likely to be the means by which pollutants are ultimately deposited into a navigable body of water. Conveyances of pollution formed either as a result of natural erosion or by material means, and which constitute a component of a mine drainage system, may fit the statutory definition and thereby subject the operators to liability under the Act.

10. **Status:** County of Maui intends to appeal the Ninth Circuit's decision to the US Supreme Court.[67] The petition would be due June 28, 2018.[68]

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[65] *Rice*, 250 F.3d at 272 (5th Cir. 2001)
[66] *See* Hawai'i Wildlife Fund, 886 F.3d at 747.
[67] ECF No. 86, County of Maui's Motion to Stay Mandate (filed Apr. 3, 2018) (9th Cir. Case No. 15-17447).
[68] Sup. Ct. R. 13(1).

D. Upstate Forever v. Kinder Morgan Energy Partners LP (4th Cir. Apr. 2018)

1. Plaintiffs' Allegations in Complaint were as follows[69]:

a. Pipeline broke six to eight feet underground in Anderson County, SC. The pipeline leak was repaired within a few days of discovering the leak and remediation efforts commenced.[70]

b. 369k gallons of gasoline and related contaminants allegedly spilled out into soil and ground water ; 209k gallons recovered; 160k gallons alleged by Plaintiffs to remain. It was undisputed that gasoline and petroleum products remain at the spill site and that remediation is ongoing.[71]

c. Location of pipeline break was upgradient from two tributaries of the Savannah River—Browns Creek and Cupboard Creek—and their adjacent wetlands. Browns Creek and an adjacent wetland were 1,000 feet downgradient of the break, and Cupboard Creek and a second wetland was 400 feet downgradient of the break

d. Gasoline contaminants from the pipeline are allegedly seeping into Browns Creek, Cupboard Creek, and their adjacent wetlands, as well as into Broadway Lake, Lake Secession, Lake Russell, and the Savannah River

e. Browns Creek and Cupboard Creek and their adjacent wetlands are navigable waters within the meaning of the CWA (which according to the opinion Kinder Morgan does not dispute)[72]

2. Alleged Violations: Plaintiffs alleged two violations of CWA:

a. discharges of pollutants from point sources to navigable waters without a permit; and

b. continuing violation via discharges of pollutants that continue to pass through ground water with a "direct hydrological connection" to navigable waters

[69] *See* Upstate Forever v. Kinder Morgan Energy Partners LP, 887 F.3d 637, 643-44 (4th Cir. 2018).
[70] *See* Upstate Forever v. Kinder Morgan Energy Partners LP, 252 F.Supp.3d 488, 491 (D.S.C. 2017), *reversed*, 887 F.3d at
[71] *See* Upstate Forever, 252 F.Supp.3d at 491.
[72] *See* Upstate Forever, F.3d at 644 n.3.

3. Kinder Morgan moved to dismiss under F.R.C.P 12(b)(6).[73] The South Carolina district court dismissed on two grounds[74]:

    a. Failure to state a claim because the pipeline had been repaired and no longer was discharging pollutants directly into navigable waters (and courts have "jurisdiction" over CWA citizen suits only if the complaint alleges an ongoing violation[75]); and

    b. Lack of subject matter jurisdiction over the complaint, because the CWA did not encompass the movement of pollutants through groundwater that is hydrologically connected to navigable waters.

4. On April 12, 2018, the Fourth Circuit vacated and remanded, based on the following rationale (emphasis by the author):

    a. "Discharge of a pollutant" is defined in the Act as "any addition of any pollutant to navigable waters from any point source."[76]

    b. The pipeline was a point source.

    c. Allegation that pollutants originating from ruptured underground pipeline continued to be *added* to navigable waters through ground water, even though pipeline had been repaired, sufficiently alleged an ongoing violation of CWA for groups to seek injunctive relief against pipeline owner to abate a continuous or intermittent violation under CWA citizen-suit provision

    d. CWA citizen-suit provision requiring that the defendant "be in violation of" an "effluent standard or limitation," does not require that a point source continue to release a pollutant for there to be an ongoing violation, but only that there be an *ongoing addition* of pollutants to navigable waters, regardless of whether a defendant's conduct causing the violation is ongoing.

    e. The definition [of "discharge of a pollutant"] does not place temporal conditions on the discharge of a pollutant from a point source. Nor does the definition limit discharges under the Act to additions of pollutants to navigable waters from a point source that continues actively to release such pollutants. Instead, the

[73] *See* Upstate Forever v. Kinder Morgan Energy Partners LP, 252 F.Supp.3d 488, 481 (D.S.C. 2017) ("In order to survive a Rule 12(b)(6) motion, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'").
[74] *See* Upstate Forever, 252 F.Supp.3d 488 (D.S.C. 2017).
[75] Upstate Forever v. Kinder Morgan Energy Partners LP, 887 F.3d 637, 646-47 (4th Cir. 2018) ("In *Gwaltney*, the Supreme Court emphasized that the CWA, like other environmental statutes, authorizes 'prospective relief' that only can be attained while a violation is ongoing and susceptible to remediation." (citing Gwaltney v. Chesapeake Bay Found., 484 U.S. 57, 62, 108 S.Ct. 376 (484 U.S. at 57, 108 S.Ct. 376); 15 U.S.C. § 2619(a)(1) (authorizing citizen suits against persons "alleged to be in violation of" the statute); 42 U.S.C. § 6972 (same)).
[76] Upstate Forever, 887 F.3d at 648 (quoting 33 U.S.C. § 1362(12)(A)).

precondition for alleging a cognizable discharge of a pollutant is only that the plaintiff allege an *ongoing addition* to navigable waters originating from a point source.

5. **Holding:** CWA does not require a discharge be directly from a point source into navigable waters in order for the discharge to constitute a violation of the CWA. A plaintiff need only allege a *direct hydrological connection* between groundwater and navigable waters in order to state a claim under the CWA for a discharge of a pollutant that passes through groundwater.

    a. The allegation that pollutants were discharging into navigable waters less than 1,000 feet from the pipeline rupture was enough to state a claim.

    b. Apparently undisputed traceability of pollutants in measureable quantities from a point source to the navigable waters was an important factor.

    c. "We do not hold that the CWA covers discharges to ground water itself. Instead, we hold only that an alleged discharge of pollutants, reaching navigable waters located 1000 feet or less from the point source by means of ground water with a direct hydrological connection to such navigable waters, falls within the scope of the CWA."[77]

6. The Fourth Circuit distinguished contrary case law on groundwater based on the lack in other decisions of evidence of a hydrological connection to navigable waters:

    a. Hamker v. Diamond Shamrock Chemical Co., 765 F.2d 392, 397 (5th Cir. 1985) (discharge of oil alleged to be leaking only into groundwater and onto grasslands, rather than discharge reaching navigable water);

    b. Conn. Coastal Fishermen's Ass'n v. Remington Arms Co. 989 F.2d 1305, 1312-13 (2d Cir. 1993) (regarding pollution from lead shot which, according to the Fourth Circuit, held that "continuing effects of pollutants *already* 'deposited' into a navigable water did not constitute a continuing violation, whereas in the present case before the Fourth Circuit, "plaintiffs allege . . . that pollutants *continue to be added to* navigable waters, a violation encompassed within the Act's statutory definition" (emphasis by the Fourth Circuit)).

[77] Upstate Forever, 887 F.3d at 653.

7. The Fourth Circuit cited three cases in support of its holding that involved point source discharges that flowed over land to navigable waters. The three overland cases were:

   a. Waterkeeper Alliance, Inc. v EPA, 399 F.3d 486, 510-11 (2nd. Cir. 2005) (in which the Second Circuit rejected Farm Petitioners contention that "the CAFO Rule violates the Clean Water Act because the rule would regulate 'uncollected' discharges from land areas under the control of a CAFO; in effect, the Farm Petitioners claim that runoff from land application areas, unless 'collected' or 'channelized' at the land application area itself, does not constitute a point source discharge," which argument the Second Circuit rejected because in its "view, regardless of whether or not runoff is collected at the land application area, itself, any discharge from a land area under the control of a CAFO is a point source discharge subject to regulation because it is a discharge from a *CAFO*.")

   b. Concerned Area Residents for Env't v. Southview Farm, 34 F.3d 114, 119 (2nd Cir. 1994) (holding that liquid manure that passed from tanks through intervening fields to nearby waters constituted a discharge from a point source).

   c. Rapanos v. United States, 547 U.S. 715, 743, 126 S.Ct. 2208 (2006) ("The Act does not forbid the 'addition of any pollutant *directly* to navigable waters from any point source,' but rather the 'addition of any pollutant *to* navigable waters.'" (quoting J. Scalia) (emphasis by the Supreme Court)).

8. The Fourth Circuit cited in support of its holding two cases that it characterized as involving underground flows:

   a. Hawai'i Wildlife Fund v. County of Maui, 886 F.3d 737 (9th Cir. Feb. 2018) (involving an indirect discharge at two seep locations in the Pacific Ocean of sanitary wastewater disposed via onshore underground injection wells, and holding that indirect discharges need only be "fairly traceable" from the point source (wells) to the navigable water).

   b. Sierra Club v. El Paso Gold Mines, Inc., 421 F.3d 1133, 1137, 1148–50 (10th Cir. 2005) (holding that a discharge that passed through a 2.5-mile tunnel between mine shaft and navigable water could be covered under CWA).

9. On April 26, 2018, Kinder Morgan filed a petition for rehearing and rehearing en banc by the Fourth Circuit on the grounds that the decision in *Upstate Forever* conflicts with *Gwaltney v. Smithfield* (S.Ct. 1987) (regarding ongoing violations) and 30 years of consistent case law, and

presents an exceptionally important question of law. (Petitions like this are in summary form and do not go into detail regarding arguments.)

10. Amici filed a brief in support of the petition by Edison Electric Institute, National Association of Clean Water Agencies, National League of Cities, National Mining Association, Utility Water Act Group, US Chamber of Commerce, and National Association of Manufacturers.[78] Arguments included:

    a. The Fourth Circuit's decision ignores the definition of "point source," which Supreme Court has held triggers NPDES only where a point source "convey[s], transport[s] or introduce[s] the pollutant to navigable waters."[79]

    b. In *Miccosukee*, the Supreme Court held that the "definition makes plain" that "a point source need not be the original source of the pollutant," but "it need[s] [to] … *convey* the pollutant to 'navigable waters.'" *Id.* at 105 (emphasis added).

    c. In refusing to limit the NPDES program to pollution that reaches navigable waters by way of a point source, the decision conflicts with South Florida Water Management District v. Miccosukee Tribe of Indians, 541 U.S. 95 (2004), Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York, 273 F.3d 481 (2d Cir. 2001), and Sierra Club v. Abston Construction Co., 620 F.2d 41 (5th Cir. 1980), among other cases.

    d. In contravention of Utility Air Regulatory Group v. Environmental Protection Agency, 134 S. Ct. 2427 (2014) ("UARG"), and Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, 531 U.S. 159 (2001) ("SWANCC"), the majority expanded the NPDES program to millions of previously unpermitted sources and readjusted the federal-state balance without clear congressional authorization.

    e. Contrary to concerns about the CWA expressed in U.S. Army Corps of Engineers v. Hawkes Co., 136 S. Ct. 1807 (2016), and Sackett v. Environmental Protection Agency, 566 U.S. 120 (2012), the . . . fact-specific inquiry into whether there is a "direct hydrological connection" is the antithesis of the "clarity and predictability" the NPDES program needs.

[78] Upstate Forever, ECF No. 117 filed May 3, 2018 (4th Cir. Case No. 17-1895).
[79] Upstate Forever, 887 F.3d at 659 (Floyd, J., dissenting) ("For there to be an *ongoing* CWA violation, a point source must currently be involved in the discharging activity by adding, conveying, transporting, or introducing pollutants to navigable waters").

i. For example, the decision does not explain how "direct" a connection must be or what constitutes a sufficiently "measurable quantit[y]" of pollutants. There now will be more permits, testing, and litigation as regulated entities are "left to feel their way on a case-by-case basis." *Sackett*, 566 U.S. at 124 (quotation marks omitted).

i. **Status:** On May 4, 2018, the Fourth Circuit requested a response from plaintiffs by May 14, 2018 to Kinder Morgan's motion for rehearing.

E. Conflicting Tennessee and Kentucky Decisions (review pending 6th Cir.)

1. The two district court decisions discussed below reach different conclusions on the "conduit theory." They will be submitted to the same panel of the Sixth Circuit on the same day.[80] Briefs have been filed and the parties are in the process of scheduling oral argument.

2. Tennessee Clean Water Network v. Tennessee Valley Authority (6th Cir. Case No. 17-06155).[81]

a. This citizen suit involves coal combustion residual piles stored in unlined areas in the vicinity of karst formations. After a bench trial, the district court found TVA in violation of the CWA and ordered TVA to excavate and move coal ash piles to a lined site that offers reasonable assurances that it will not discharge waste into the waters of the United States.

b. TVA appealed. On appeal, the Sixth Circuit will be asked to review, among other things, the district court's order, after a bench trial that:

i. "A cause of action based on an unauthorized point source discharge may be brought under the CWA based on discharges through groundwater, if the hydrologic connection between the source of the pollutants and navigable waters is direct, immediate, and can generally be traced"; but

[80] ECF No. 34-1, Order Coordinating Appeals (Apr. 20, 2018) (coordinating but "only insofar as the two appeals will be submitted to the same panel on the same day.")

[81] US EPA is not participating as amici in this lawsuit. The states mentioned in Footnote 81 are not participating as amici in support of Kentucky Waterways Alliance, nor are any of the environmental NGOs. Eighteen States are participating as amici in support of TVA: Alabama, *Kentucky*, Arkansas, Georgia, Indiana, Kansas, Louisiana, Missouri, Montana, Nebraska, South Carolina, Texas, Utah, West Virginia, Oklahoma, Wisconsin, Wyoming, and the Mississippi DEQ. In addition, amici in support of TVA include the US, TN, and KY Chambers of Commerce intervened, along with National Association of Manufacturers, American Chemical Society, American Iron & Steel Institute, and various other industry, utility, and farm trade associations.

ii. "The requirement that a plaintiff be able to trace pollutants' passage from their source to navigable waters does not require that the plaintiff be able map every inch of that path with perfect precision. . . . As long as a connection is shown to be real, direct, and immediate, there is no statutory, constitutional, or policy reason to require that every twist and turn of its path be precisely traced." [82]

c. The author of this paper notes that the district court's decision collects and summarizes numerous district and circuit court cases relating to the conduit theory as of approximately December 2017.[83]

3. Kentucky Waterways Alliance v. Kentucky Utilities (6th Cir. Case No. 18-05115)[84]

a. This citizen suit involves coal combustion residual landfills, which plaintiffs allege are discharging contaminated groundwater via a network of springs into Herrington Lake, a recreational and fishing area, without a permit, in violation of CWA 301 and 402. The district court dismissed plaintiffs' CWA cause of action with prejudice for failure to state a claim under the CWA.

b. Plaintiffs appealed. On appeal, the Sixth Circuit will be asked to review the Eastern District of Kentucky's finding that:

"[T]he discharge of pollutants to a navigable water via hydrologically connected groundwater is not subject to the CWA's NPDES permit requirement. As a result, the plaintiffs' allegations are insufficient to state a claim for the unlawful 'discharge of a pollutant' without a permit under the CWA, and the plaintiffs' CWA claim will be dismissed."

[82] Tennessee Clean Water Network v. Tennessee Valley Authority, 273 F.Supp.3d. 775, 826-27 (M.D. Tenn. 2017).
[83] *Id*. p. 826 (paras. 359-360).
[84] US EPA is not participating as amici in this lawsuit. The States of Tennessee, Maryland, California, Washington, and Massachusetts are participating as amici in support of Plaintiffs. Eighteen States are participating as amici in support of TVA: Alabama, Arkansas, Georgia, Indiana, Kansas, Kentucky, Louisiana, Missouri, Montana, Nebraska, Oklahoma, South Carolina, Texas, Utah, West Virginia, Wisconsin, Wyoming, and Missouri; also the US and Kentucky Chambers of Commerce, National Association of Manufacturers, other industry groups, and several local and national water/wastewater agencies.

III. Rocky Mountain

A. Youth Activism: *Martinez v COGCC* (Colo. App. 2017), rev. granted (1/28/18)

1. Petitioners Xiuhtezcatl Martinez and six other minors submitted a petition for rulemaking to the Colorado Oil and Gas Conservation Commission ("COGCC"), which requested COGCC to:

   "not issue any permits for the drilling of a well for oil and gas unless the best available science demonstrates, and an independent, third party organization confirms, that drilling can occur in a manner that does not cumulatively, with other actions, impair Colorado's atmosphere, water, wildlife, and land resources, does not adversely impact human health and does not contribute to climate change."

2. COGCC denied the petition on grounds that:

   "[C]oncluding that (1) the proposed rule mandated action that was beyond the limited statutory authority delegated by the General Assembly in the Act; (2) review by a third party — as Petitioners requested — contradicted the Commission's nondelegable duty to promulgate rules under section 34-60-106(11)(a)(II) and is contrary to the Act; and (3) the public trust doctrine, which Petitioners relied on to support their request, has been expressly rejected in Colorado."[85]

3. Colorado statute states it is in the public interest to:

   "Foster the responsible, balanced development, production, and utilization of the natural resources of oil and gas in the state of Colorado in a manner consistent with protection of public health, safety, and welfare, including protection of the environment and wildlife resources."[86]

4. With respect to Argument (1) summarized in paragraph III.A.2 of this outline, COGCC and interveners API and Colorado Petroleum Association argued that the rule proposed by Petitioners was beyond the COGCC's statutory authority under C.R.S. 34-60-102(1)(a)(I), which required COGCC to balance oil and gas development and public health, safety, and welfare. COGCC relied in part on 34-60-106(2)(d), which requires COGCC authority to regulated oil and gas operations as follows:

   "The commission has the authority to regulate ... [o]il and gas operations so as to prevent and mitigate significant adverse

[85] Martinez v. Colorado Oil and Gas Commission, --- P.3d ---, 2017 WL 1089556 (Colo. App. 2017) (describing Colorado district court's rationale for affirming COGCC).
[86] C.R.S. 34-60-102(1)(a)(I).

environmental impacts on any air, water, soil, or biological resource resulting from oil and gas operations to the extent necessary to protect public health, safety, and welfare, including protection of the environment and wildlife resources, taking into consideration cost-effectiveness and technical feasibility."[87]

5. The majority found that "to the extent" in 34-60-106(2)(d) evidences the same intent as "consistent with" in 34-60-120(1)(a)(I) "to elevate the importance of public health, safety, and welfare above a mere balancing."[88]

6. The Court of Appeals reversed and remanded to the district court:

   a. **Holding:** Provision of the Oil and Gas Conservation Act declaring it in public interest to foster responsible, balanced development, production, and utilization of oil and gas "in a manner consistent with" protection of public health, safety, and welfare, including protection of the environment and wildlife resources, does not indicate a balancing test but rather a condition that must be fulfilled[89]; but

   b. Did not reach the merits of whether the COGCC should adopt Petitioners proposed rule; and

   c. Did not reach the constitutional / public trust issue:

      i. "Because we conclude[d] that the Commission erred in its interpretation of the Act and reverse, we need not address Petitioners' constitutional arguments."

      ii. Both the majority and the dissent acknowledged that the Colorado Supreme Court had held that the public trust doctrine did not apply in Colorado.[90]

7. On January 29, 2018, the Colorado Supreme Court granted COGCC et al.'s petition for review on the sole issue of "Whether the court of appeals erred in determining that the Colorado Oil and Gas Commission misinterpreted section 34–60–102(l)(a)(I), C.R.S. as requiring a balance between oil and gas development and public health, safety, and welfare."[91]

B. Climate Change: Boulder County et al. v. Suncor et al. (filed April 2018)

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[87] *Martinez*, 2017 WL 1089556 (dissent by J. Booras) (quoting C.R.S. 34-60-106(2)(d)).
[88] *Martinez*, 2017 WL 1089556 para. 27.
[89] *Martinez*, 2017 WL 1089556 at para. 21.
[90] *Martinez*, 2017 WL 1089556 at n.2; *id* at 10 (dissent) (both citing City of Longmont v. Colorado Oil & Gas Association, 2016 CO 29, para. 62, 369 P.3d 573).
[91] 2018 WL 582105.

1. Board of County Commissioners of Boulder County, Board of County Commissioners of San Miguel County and the City of Boulder sued Suncor Energy and ExxonMobil Corporation[92]

2. Causes of action alleged by Plaintiffs Boulder County et al.:

    a. First: Public nuisance, with requisite "special injury" by the public nuisance brought about Defendants' actions altering the climate being the Plaintiffs' special responsibility to respond to and abate its hazards, and because they and their property and assets are especially vulnerable to the impacts of climate change; *e.g.*, transportation, flood control and water supply infrastructure, high-altitude reservoirs and park land.

    b. Second: Private nuisance, with rights (e.g., lease, ownership, other) to property within their jurisdictions.

    c. Third: Trespass, from climate-change-caused flood waters, snow, etc., and invasive species being caused to enter Plaintiffs' properties, and Defendants knew, with substantial certainty, that the use of their fossil fuel products would both cause climate change and cause these invasions of Plaintiffs' property.

    d. Fourth: Unjust Enrichment, because Defendants knew use of fossil fuels would cause climate change and have profited and continue to profit from not incurring the costs necessary to reduce the impacts of Defendants' contributions to climate change.

    e. Fifth: Violations of Colorado's Deceptive Trade Practices Act, by failing to disclose information Defendants knew about the true cost and harms from the use of their products.

3. Relief requested by Plaintiffs:

    a. Monetary past and future damages and costs to mitigate the impact of climate change, such as the costs to analyze, evaluate, mitigate, abate, and/or remediate the impacts of climate change.

    b. Damages to compensate Plaintiffs for past and reasonably certain future damages, including but not limited to decreased value in water rights; decreased value in agricultural holdings and real property; increased administrative and staffing costs; monitoring costs; costs of past mitigation efforts; and all other costs and harms described in the Complaint.

[92] Boulder County Commissioners et al. v Suncor et al., Complaint filed April 17, 2018, in Colo. D. Ct. Case No. 2018CV030349, available at 2018 WL 1866670.

c. Remediation and/or abatement of the hazards discussed in the Complaint by any other practical means.

d. But *not* to enjoin any oil and gas operations or sales in the State of Colorado, or elsewhere, nor to enforce emissions controls of any kind, nor for damages or abatement relief for injuries to or occurring on federal lands.

4. Claims are similar to those of California defendants San Francisco and various Northern California counties and cities (*e.g.*, CA counties of Santa Cruz, Marin, and San Mateo, and cities of Oakland, Richmond, and Imperial CA); New York City[93]; King County, WA; and reportedly four other such lawsuits (in addition to Boulder); except:

a. Boulder County's alleged Fourth and Fifth causes of action are unique to Boulder County and Colorado state law;

b. Boulder County seeks treble damages, which Plaintiffs do not request in the other lawsuits, and likely stem from the Fifth alleged cause of action; and

c. The California defendants (e.g., San Mateo, Santa Cruz) sued many more oil, gas, refining, and coal companies (about 40 in all) and in addition to public and private nuisance and trespass, allege strict liability for design defect and failure to warn; negligence for failure to warn; and regular negligence.

5. Status

a. The California cities and counties filed their complaints in the state trial courts[94] (as did the Boulder and Washington plaintiffs). There is a split of authority in N.D. Cal. regarding whether the cases belong in state or federal court.

i. The California defendants removed to N.D. Cal.

ii. The California plaintiffs moved to remand to state court. Two N.D. Cal. judges hearing the motions to remand reached opposite conclusions.

[93] Complaint in City of New York v. BP et al. (filed Jan. 9, 2018), 2018 WL 345319 (S.D.N.Y. Case No. 18 cv 182).
[94] *See, e.g.*, Complaint in County of San Mateo v. Chevron Corp. et al., in Superior Court of California (July 27, 2017), 2017 WL 3048970 (Sup. Ct. Cas No 17CIV0322). According to www.insideclimatenews.org, separate California lawsuits were filed in California Superior Court by San Mateo County (July 17, 2017), Marin County (July 17, 2017), City of Imperial Beach (July 27, 2017), San Francisco (July 29, 2017), Oakland (July 29, 2017), Santa Cruz and Santa Cruz County (July 29, 2017), and City of Richmond (Jan. 22. 2018).

(a) Judge Alsup denied, ruling that the San Francisco and Oakland lawsuits should be tried in federal court.[95]

(b) Judge Chhabria granted, ruling that the climate change lawsuits by San Mateo and Marin counties and City of Imperial Beach were best adjudicated in California state courts,[96]

(1) The defendants appealed Judge Chhabria's remand order to the Ninth Circuit to determine whether removal is proper under the federal-officer statute or any of defendants' other grounds for removal.[97]

(2) Judge Chhabria has stayed the San Mateo et al. case in the N.D. Cal. pending the Ninth Circuit's decision on his order to remand to state court.

b. In the Colorado and Washington state courts, defendants' responses to the complaints had not yet been filed as of the date of this paper. Disputes over state versus federal jurisdiction are likely.

c. Meanwhile, in the N.D. Cal., defendants in the San Francisco and Oakland filed motions to dismiss for lack of jurisdiction and failure to state a claim, which motions are pending

i. On April 18, 2018, in the N.D. Cal. (San Francisco and Oakland cases), the United States and Fifteen States filed amicus briefs in support of dismissal.[98]

d. In S.D.N.Y, on May 4, 2018, Chevron, ConocoPhillips, and Exxon filed a joint motion to dismiss in S.D.N.Y. (as well as individual motions addressing individual issues).

i. No amicus parties had appeared as of the date this paper was submitted

ii. However, several defendants (BP, Shell) were served later than the US-based defendants, and their motions to dismiss

[95] *See, e.g.*, ECF No. 134, Denial of Remand in City of Oakland (N.D. Cal. Case No. 3:17-cv-06012-WHA).
[96] *See, e.g.*, ECF No. 233, Remand Order in County of San Mateo (N.D. Cal. Case No. 3:17-cv-04929-VC).
[97] *See, e.g.*, County of San Mateo v. Chevron Corporation (9th Cir. Case No. 18-80049)
[98] States of Indiana, Alabama, Arkansas, Colorado, Georgia, Kansas, Louisiana, Nebraska, Oklahoma, South Carolina, Texas, Utah, West Virginia, Wisconsin, and Wyoming.

have not yet been filed. The district court may still allow amicus parties.

C. NEPA Consideration of CO2 Emissions in Coal Leases (10th Cir. 9/2017)

1. BLM finalized an Environmental Impact Statement under NEPA to allow it to lease four coal tracts that would extend the life of two existing surface mines near Wright, Wyoming (the "Wright Area Leases"), located in the Powder River Basin.

   a. In preparing the Draft EIS, BLM compared its preferred action to a no-action alternative in which none of the coal leases would be issued, as it was required to do under CEQ regulations implementing NEPA. 40 C.F.R. § 1502.14.

   b. Regarding carbon dioxide emissions and impacts on climate change, BLM concluded (over objections from environmental groups) that there would be no appreciable difference between the United States' total carbon dioxide emissions under its preferred alternative and the no-action alternative.

      i. BLM concluded that, even if it did not approve the proposed leases, the same amount of coal would be sourced from elsewhere, and thus there was no difference between the proposed action and the no action alternative in this respect.

      ii. The Tenth Circuit referred to BLM's conclusion as the "perfect substitution assumption."

2. In *WildEarth Guardians v. BLM*,[99] WildEarth Guardians and Sierra Club sued BLM in Wyoming district court.

   a. The Plaintiffs objected to BLM's no action alternative analysis before the district court, among numerous other issues, but the district court did not specifically address the no-action alternative.

   b. The district court upheld the BLM's actions as reasonable, and Plaintiffs timely appealed the issue of BLM's "perfect substitution assumption."

3. The Plaintiffs appealed to the Tenth Circuit on the sole issue of BLM's no-action analysis. The Tenth Circuit found that the no-action analysis arbitrary and capricious because[100]:

[99] Wild Earth Guardians v. BLM, 120 F.Supp.3d 1237, 1273 (D. Wyo. 2015).
[100] WildEarth Guardians v. BLM, 870 F.3d 1222, 1240 (10th Cir. 2017).

a. It contradicted was contradicted by some of the principle sources in the administrative record on which BLM relied. For example, a 2008 EIA "report supports what one might intuitively assume: when coal carries a higher price, for whatever reason that may be the nation burns less coal in favor of other sources. A force that drives up the cost of coal could thus drive down coal consumption."

b. Even if not contradicted, the "perfect substitution assumption" was "arbitrary and capricious because the assumption itself is irrational (i.e., contrary to basic supply and demand principles)."

c. Just because BLM had not used an economic modeling technique did not make the no-action arbitrary and capricious, but (a) and (b) did.

d. The Tenth Circuit therefore:

i. Reversed the Wyoming district court with instructions to enter an order requiring BLM to revise its FEIS and ROD; and

ii. Declined to vacate the leases. Three of the four leases had been sold and were already being mined.

IV. Appalachia

A. OH Wayne National Forest, Ctr. for Biodiversity (S.D. Ohio filed 5/2/17)

1. Parties:

a. Plaintiffs: Center for Biological Diversity, Heartwood, Ohio Environmental Council, Heartwood, and Sierra Club

b. Defendants: US Forest Service, BLM, and US Fish & Wildlife Service

c. Intervener-Defendants: API, IPAA (motions granted September 2017), and Eclipse Resources (a majority leaseholder on significant acreages) (motion granted April 2018)

2. Allegations made by Plaintiffs in the Amended Complaint include[101]:

[101] ECF No. 24, Amended Complaint filed July 5, 2017, in Center for Biological Diversity v. US Forest Service (S.D. Ohio Case No. 2:17-cv-0072).

a. BLM's December 2016 sale of leases on 17 parcels (679.48 acres) in the Wayne National Forest's Marietta Unit allegedly failed to comply with NEPA

b. In October, 2016, BLM finalized an Environmental Assessment ("EA") and Finding of No Significant Impact ("FONSI") for opening the Marietta Unit (40,000 acres), of which oil and gas operators had nominated 18,000 acres for potential leasing.

c. On information and belief, BLM would continue to hold quarterly lease sales until all 18,000 acres have been leased.

d. The EA and FONSI prepared for the Marietta Unit allegedly relied on a 2006 Final Environmental Impact Statement ("FEIS") and 2012 Supplemental Impact Report ("SIR") for their analysis of the effects of leasing, which were inadequate and are outdated.

e. The 2006 FEIS and 2012 SIR allegedly did not take into account significant new information on fracking and horizontal drilling operations, and the 2012 SIR was not subject to public comment.

f. BLM leasing will open up private minerals and surface to new development, and new hydraulic fracturing techniques allegedly have greater impacts than conventional drilling on land area disturbed, water resources, seismicity, wildlife, greenhouse gas emissions, and climate change (including impacts on bats).

g. Hydraulic fracturing will allegedly threaten endangered mussels downstream from lease parcels, as well as the endangered Indiana bat, the threatened Northern long-eared bat, and the tri-colored bat, which bats are over-stressed by existing habitat fragmentation, white-nose syndrome, and climate change.

3. Violations Alleged

a. The Federal Agencies allegedly failed to take a "hard look" at the new information on climate change, white-nose syndrome in bats, and other alleged impacts of hydraulic fracturing, and should have prepared a new Environmental Impact Statement. It's failure to do so violated NEPA

b. The Federal Agencies allegedly should have reinitiated consultation with the US Fish & Wildlife Service based on "new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered," and by failing to do so violated the ESA.

4. Relief requested by Plaintiffs:

a. Declarations of violations of NEPA

b. Preliminary and permanent injunction setting aside the 2016 EA and FONSI, and all actions based on it (*i.e.*, the December 2016 sale of 679.43 acres and any other leases or approvals)

c. Injunction against new oil and gas leasing in the Marietta Unit until BLM completes a supplemental EIS

d. Injunction against any person or entity from constructing new wells or other projects authorized under the 2016 EA and FONSI or 2006 EIA until BLM completes a supplemental EIS

5. Status

a. The Federal Agencies lodged the Administrative Record for the challenged leasing decisions with the S.D. Ohio on February 6, 2018

b. Plaintiffs are challenging the Administrative Record and attempting to supplement it with (1) Plaintiffs' comment letters addressed to BLM and copied to the Forest Service on the lease sale, along with 51 exhibits thereto, which plaintiffs say were omitted from the Forest Service record (although they are in BLM's record); and (2) a new exhibit, a sample application to drill submitted by Eclipse.

i. Federal Agencies oppose the supplementation on the grounds that BLM's record should not be in the Forest Service's record, and Eclipse's APD was not before the agency decision makers on the lease sales and is therefore not part of the administrative record.

ii. A hearing on Plaintiff's motion to supplement is scheduled for June 5, 2018.

c. BLM continues to hold lease quarterly sales in the Wayne National Forest, Marietta Unit (*e.g.*, two parcels totaling 345 acres sold for $1,837 in March 2018 to Magnum Producing L.P. out of Corpus Christi, TX, but no Ohio acreage scheduled for sale in June 2018)

B. Ohio Ballot Referenda Banning Hydraulic Fracturing

1. Ohio statute states:

a. "The regulation of oil and gas activities is a matter of general statewide interest that requires uniform statewide regulation, and this chapter and rules adopted under it constitute a comprehensive

plan with respect to all aspects of the locating, drilling, well stimulation, completing, and operating of oil and gas wells within this state, including site construction and restoration, permitting related to those activities, and the disposal of wastes from those wells. . . ." [102]; but

b. "Nothing in this section affects the authority granted to . . . local authorities in section . . . 723.01 and 4513.34 of the Revised Code, provided that the authority granted under those sections shall not be exercised in a manner that discriminates against, unfairly impedes, or obstructs oil and gas activities and operations regulated under this chapter."[103]

2. In 2015, the Ohio Supreme Court, in a divided opinion, held that municipalities cannot enforce ordinances against oil and gas drilling that conflict with state law, and a conflict exists if "the ordinance permits or licenses that which the statute forbids and prohibits, and vice versa"[104]

a. The of Munroe Falls ordinances regarding zoning and oil and gas drilling required certain zoning certificates, wait times, fee payments, and public hearing, prior to any drilling, which conflicted with statewide statute regulating oil and gas wells and production,

b. The city's ordinances related to same subject matter as R.C. 1509.02, and ordinances prohibited what statute allowed, namely state-licensed oil and gas production within the city, and

c. The ordinances sought to extinguish privileges granted by valid state permit through enforcement of regulations, and statute explicitly prohibited municipalities from obstructing operations covered by statute, and

d. The ordinance violated O.R.C. 1509 by unfairly impeding or obstructing oil and gas activities and production operations that the state had permitted under R.C. Chapter 1509.

[102] O.R.C. 1509.02 (also establishing the Ohio Department of Natural Resource, Division of Oil and Gas, as the "sole and exclusive authority to regulate permitting, location, and spacing of oil and gas wells and production operations within the state" except those regulated by federal laws for which oversight has been delegated to the Ohio EPA, as well as Ohio's isolated wetlands program, over which Ohio EPA has authority by state statute (O.R.C. 6111.02-.028).
[103] *Id*.
[104] State ex rel. Morrision v. Beck Energy Corp., 37 N.E. 128 (Ohio 2015) (plurality opinion per French, J., with two justices concurring and one justice concurring only in the judgment) (three justices dissented).

3. Citizen groups continue to petition municipalities to place referenda on ballots that called for the municipality to ban or discriminate against oil and gas activities in the municipality.

    a. Prior to April 2017, the Ohio municipal code required municipal election boards to place a referendum on the ballot so long as the proposed initiative falls within the scope of the permissible subject matter of a municipal initiative.

        i. The election board *could* refuse to certify a ballot measure if it was beyond the board's authority to enact.

        ii. The election board *could* not refuse to certify a ballot measure based on the board's assessment that the measure, in substance, would be unconstitutional.[105]

        iii. "It is fair to say that it is sometimes difficult to distinguish between a provision that a municipality is not authorized to adopt by legislative action (something an elections board may determine . . .) and one that is simply unconstitutional (something an elections board may not determine . . .). But that is the line our caselaw has drawn."[106]

    b. Effective in April 2017, the Ohio Legislature enacted H.B. 463, which revised the Municipal Code to require county election boards to determine, in addition to the scope-of-municipal-authority question, the question of whether the proposed municipal ordinance was constitutional; i.e., the county board of elections must now (emphasis added):

        "Examine each . . . petition . . . received by the board to determine whether the petition falls within the scope of authority to enact via initiative and whether the petition satisfied the statutory prerequisites to place the issue on the ballot, *as described in division (M) of section 3501.38 of the Revised Code*. The petition shall be invalid if any portion of the petition is not within the initiative power."[107]

    c. The cross reference to section 3501.38(M), as revised by H.B.462, requires the election board to examine the constitutionality of the proposed ballot initiative to determine (emphasis added):

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[105] *See* State ex rel. Flak v. Betras, 95 N.E.3d 329, 332-333 (Ohio 2017).
[106] State ex rel. Flak v. Betras, 95 N.E.3d 329, 333 (Ohio 2017) (discussing and deciding the case under pre-H.B. 463 jurisprudence, and expressly pretermitting the question of H.B. 463's constitutionality under the Ohio constitution).
[107] State ex rel. Flak v. Betras, 95 N.E.3d 329, 337 (Ohio 2017) (Fischer, J. dissenting) (quoting ORC 3501.11(K)(2)).

> (a) Whether the petition falls within the scope of a municipal political subdivision's authority to enact via initiative, *including, if applicable, the limitations placed by Sections 3 and 7 of Article XVIII of the Ohio Constitution on the authority of municipal corporations to adopt local police, sanitary, and other similar regulations as are not in conflict with general laws*, and whether the petition satisfies the statutory prerequisites to place the issue on the ballot. The petition shall be invalid if any portion of the petition is not within the initiative power; or
>
> (b) Whether the petition falls within the scope of a county's authority to enact via initiative, including whether the petition conforms to the requirements set forth in Section 3 of Article X of the Ohio Constitution, including the exercise of only those powers that have vested in, and the performance of all duties imposed upon counties and county officers by law, and whether the petition satisfies the statutory prerequisites to place the issue on the ballot.[108]

d. If the petitioned-for initiative does not satisfy the standard, the county election board must not put it on the ballot.

e. Ohio Supreme Court Justice Fischer would hold HB 463 unconstitutional, on the grounds that it requires the county election boards to make substantive constitutional and legal determinations about the ballot-worthiness of the proposal that are reserved to the judiciary, and therefore violate the separation-of-powers doctrine in the Ohio constitution.[109]

4. The Ohio Supreme Court has so far not reached the constitutional issue on HB 463, but has instead decided ballot-initiative cases on pre-HB 463 grounds of whether the municipality had the power to enact the requested ordinance. The two cases decided by the Ohio Supreme Court so far are hard to reconcile. They are discussed below.

a. 2017 Youngstown Referendum: *Flak v.* Betras.--In 2017, four citizens ("Relators") obtained enough valid petitions to place an amendment to the Youngstown City Charter on the November 2017 ballot. The amendment was known as "Youngstown Drinking Water Protection Bill of Rights" (the "Water Amendment"), which:

[108] State ex rel. Flak v. Betras, 95 N.E. 3d 329, 331 (Ohio 2017) (Fischer, J. dissenting) (quoting from 3601.38(M)(1)).
[109] State ex rel. Flak v. Betras, 95 N.E. 3d 329, 342 (Ohio 2017) (Fischer, J. dissenting) (quoting from 3601.38(M)(1)).

"[D]eclared that the people of Youngstown, 'along with ecosystems and natural communities within the city, possess the right to clean water, air, and soil, and to be free from activities that would violate this right and expose citizens to the harmful effects of contaminants in their water supply, including, but not limited to, the drilling of new wells or extraction of oil and gas.' Section (b) of the Water Amendment contains the same language as Section (d) of the Elections Amendment, *authorizing private citizens to enforce their rights through nonviolent direct action or by filing suit as a private attorney general*. And the Water Amendment also contains the provision barring 'City of Youngstown law enforcement, and cooperating agencies acting within the jurisdiction of the City of Youngstown' from 'surveil[ing], detain[ing], arrest[ing], or otherwise imped[ing] natural persons enforcing these rights."[110]

i. **Holding**: In a divided opinion, the Ohio Supreme Court held that proposed amendments, which purported to create private causes of action, were beyond scope of city's authority to enact by initiative, and thus the county election board properly excluded then from ballot.[111] The Court declined to reach the constitutionality of HB 463, because the case could be decided on statutory grounds.

b. 2018 Youngstown Referendum: Another "Youngstown Drinking Water Protection Bill of Rights was proposed for the May 2018 ballot

i. "The proposed [2018] charter amendment, if adopted by Youngtown's electors, would in general terms (1) recognize certain rights of Youngstown residents and of "ecosystems and natural communities within the city" to "clean water, air, and soil" and to be free from certain fossil-fuel drilling and extraction activities, (2) require the city to prosecute violations of the amendment and allow the city to recover attorney fees and expert costs incurred in prosecuting violations, (3) impose strict liability on any government or corporation that violates the rights established by the amendment, (4) restrict the use of funds allocated to the city's water and sewer infrastructure, and (5) give the

[110] State ex rel. Flak v. Betras, 95 N.E.3d 329, 331 (Ohio 2017) (describing the Water Amendment).
[111] State ex rel. Flak v. Betras, 95 N.E. 3d 329, 333 (Ohio 2017) (denying mandamus in per curiam opinion).

people of Youngstown the right "to compel their governments to protect their rights, health, and safety."[112]

ii. **Holding in per curiam opinion**: In a divided opinion (C.J. O'Connor plus 3 of 7 justices joining), the Ohio Supreme Court granted the writ of mandamus requiring the election board to place the proposed charter amendment on the ballot. Although the proposed amendment would not necessarily be constitutional or legally enforceable if enacted, it did not create a new cause of action, and therefore the election board must place it on the ballot. The requirement that the city prosecute violations and establishment of a strict-liability mens rea might become elements of future ordinances, but that requirement was vague and aspirational and did nothing without further legislative action by the city.

iii. **J. Fischer, concurring in judgment only**: Would have reached the issue of the constitutionality of HB 463, held the requirement of HB 463 that the election board evaluate the constitutionality of the ballot proposal unconstitutional as a violation of separation of powers, and granted the writ requiring the measure to be placed on the ballot.

iv. **J. French, dissenting (J. O'Donnell joining)**: Would have held that the requirement to create "strict liability violations" of the charter amendment created new causes of action, which is beyond a municipality's scope of authority, and would have denied the writ of mandamus.

5. Status: The 2018 Water Amendment appeared on the May 8, 2018, ballot, and was rejected by voters (54% to 44%).[113] This is the seventh time Youngstown has defeated a hydraulic fracturing ban. However, according to reports in the Youngstown Vindicator, proponents of the 2017 and 2018 Water Amendments will continue to propose charter amendments for the city's election ballots.

C. PA "Environmental Rights Amendment" Challenges

[112] State ex rel. Khumprakob v. Mahoning County Board of Elections, --- N.E.3d. ---, 2018 WL 1960645, at *1 (Ohio 2018).

[113] The 2018 Water Amendment did appear on the May 8, 2018 ballot. According to the Youngstown Vindicator, the citizens intend to request that it also be placed on the August 2018 ballot. The ballot is available at this link: https://www.voterfind.com/mahoningoh/data/20180508P/0001%20%201D.pdf?636618058619091830, The Youngstown Vindicator report is here: http://www.vindy.com/news/2018/may/09/youngstown-anti-fracking-initiative-fail/.

1. Article I, Section 27. Constitution of the Commonwealth of Pennsylvania (enacted 1971), states:

   "Natural resources and the public estate.

   The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people."

2. In *Payne I* (1973), the PA Commonwealth Court articulated a three-part test to determine whether a use of Commonwealth land violated Section 27:

   "(1) Was there compliance with all applicable statutes and regulations relevant to the protection of the Commonwealth's public natural resources?

   (2) Does the record demonstrate a reasonable effort to reduce the environmental incursion to a minimum?

   (3) Does the environmental harm which will result from the challenged decision or action so clearly outweigh the benefits to be derived therefrom that to proceed further would be an abuse of discretion?"[114]

3. In *Robinson Township*, the Pennsylvania Supreme Court upheld a Commonwealth Court in invalidating parts of a recently enacted statute, commonly known as "Act 13."

   a. The parts of Act 13 relevant to this paper, Sections 3215(b)(4) and 3304, would have "implement[ed] a uniform and statewide regulatory regime of the oil and gas industry by articulating narrow parameters within which local government may adopt ordinances that impinge upon the development of these resources."[115]

   b. The Court found that the *Payne* test "describes the Commonwealth's obligations—both as trustee and under the first

[114] Payne v. Kassab, 312 A.2d 86, 94 (Pa. Commw. 1973) ("*Payne I*"), *aff'd,* 361 A.2d 263, 273 (Pa. 1976 (*Payne II*) (noting that the statute challenged in Payne I contained elaborate safeguards such that a breach of Section 27 would not occur, but not elaborating on further on the applicable standard.).
[115] Robinson Twp. v. Commonwealth of Pennsylvania, 623 A.3d 901, 931 (Pa. 2013) (plurality opinion) (citing See 58 Pa.C.S. §§ 3215(b)(4), 3304).

clause of Section 27—in much narrower terms than the constitutional provision."[116]

c. The Court therefore found the *Payne* test "is inappropriate to determine matters outside the narrowest category of cases, *i.e.*, those cases in which a challenge is premised simply upon an alleged failure to comply with statutory standards enacted to advance Section 27 interest."[117]

d. The Court held that Sections 3215(b)(4) and 3304 establishing statewide standards and procedures for municipal exceptions for oil and gas development violate the Environmental Rights Amendment.[118]

e. Author observations:

i. The "narrow" category to which *Payne* test would continue to apply should encompass permit challenges by environmental groups and agency rulemakings; *i.e.*, if the permit or rulemaking is consistent with the applicable statute or ordinance.

ii. No extra-statutory "Environmental Rights Amendment" obligations should lie unless the underlying (often longstanding, sometimes federally imposed) statute is determined to be unconstitutional.

iii. Most of the disputes over the Environmental Rights Amendment are occurring at the local level over enactment of local ordinances and granting of conditional use permits by municipalities (and Pennsylvania has approximately 2,500 municipalities)

4. Gorsline v. Fairfield Twp.—In a closely watched case, the Pennsylvania Supreme Court has granted a petition for appeal to two individuals on the issues listed below (as framed by the Petitioners). The Commonwealth Court upheld a permit issued by the Township to Markwest Liberty Midstream,[119] and the individuals appealed to the Supreme Court. Oral argument was in March 2017. The compressor station has been constructed and is operating.

(1) Does the Commonwealth Court's decision below, that an industrial shale gas development is similar to and compatible with

[116] *Id*. at 967.
[117] *Id*. at 967.
[118] *Id*. at 984.
[119] Gorsline v. Fairfield Twp., 123 A.3d 1142 (Pa. Commw. Ct. 2015).

> uses expressly permitted in a [n] R–A District, conflict with this Court's decision in *Robinson Township?*
>
> (2) Did the Commonwealth Court commit an error of law in deciding that an industrial shale gas development is similar to and compatible with a "public service facility" in an R–A District when the Township made no factual finding or legal conclusion to that effect, the record contains no substantial evidence to support that determination, and the company's own witness testified that shale gas development was *not* similar to a "public service facility" in an R–A District?
>
> (3) Did the Commonwealth Court improperly decide that *MarkWest Liberty Midstream,* wherein it held that a compressor station is similar to and compatible with a "public service facility" in a Light Industrial District, also compels the conclusion that an industrial shale gas development is similar to and compatible with a "public service facility" in an R–A District designed for quiet, residential development and not industrial land uses?
>
> (4) Did the Commonwealth Court commit an error of law by relying on prior conditional use approvals that the Township issued for uses not expressly permitted in the R–A District, in order to support its decision that an industrial shale gas development is similar to and compatible with uses expressly permitted in the R–A District? [120]

5. Pennsylvania Environmental Defense Fund ("PEDF") v. Commonwealth of Pennsylvania.—This Supreme Court decision, in a divided decision (4-2, with one judge not participating), addressed three relatively narrow issues regarding whether statutory enactments allowing the transfer of Lease Funds (royalties) from leasing of state lands for oil and gas extraction to the General Fund to help balance the state budget violated the Environmental Rights Amendment.

   a. The Commonwealth Court had relied on the *Payne* test to analyze the issues.

   b. Although the issues before the Supreme Court were narrow, and all "[t]he parties, various amici, and the plurality in *Robinson Township* all reject the three-part test . . . in *Payne I*," the Court's language in *PEDF* rejecting the *Payne* test was broad;

      > "The *Payne I* test, which is unrelated to the text of Section 27 and the trust principles animating it, strips the constitutional provision of its meaning.

[120] Gorsline v. Fairfield Twp., 139 A.3d 178 (Pa. 2016).

> Accordingly, we reject the test developed by the Commonwealth Court as the appropriate standard for deciding Article I, Section 27 challenges."[121]

Author observation: This statement is arguably *dicta*, to the extent that it was broader than necessary to decide the case before the court.

c. The Supreme Court then went on to apply *private* trust principles and case law interpreting them, to prohibit the General Assembly's use of Lease Funds except for the purpose of conserving and maintaining natural resources:

> "[T]he legislature violates Section 27 when it diverts proceeds from oil and gas development to a non-trust purpose without exercising its fiduciary duties as trustee. The DCNR is not the only agency committed to conserving and maintaining our public natural resources, and the General Assembly would not run afoul of the constitution by appropriating trust funds to some other initiative or agency dedicated to effectuating Section 27. . . . However, if proceeds are moved to the General Fund, an accounting is likely necessary to ensure that the funds are ultimately used in accordance with the trustee's obligation to conserve and maintain our natural resources."

6. Notwithstanding *Robinson Twp.* and *PEDF*, the Commonwealth Court continues to decide cases that uphold oil and gas permits and invalidate over-broad municipal ordinances on various grounds.[122]

D. PA Spill Penalty Calculations

1. In EQT v. PADEP,[123] the Pennsylvania Supreme Court "water-to-water" theory of continuing violations for discharges in violation of Pennsylvania's Clean Streams Law, pursuant to which PADEP sought a $4.5 million penalty from EQT.

2. Section 301 states:

[121] PEDF v. Commonwealth, 161 A.3d 911. 929 (Pa. 2017).
[122] *See, e.g.,* Markwest Liberty Midstream and Resources LLC v. Cecil Twp., 2018 WL 1440892 (Pa. Commw. Ct. 2018) (mem.) (holding various extra-statutory provisions "unreasonable") (unpublished opinion); Delaware Riverkeeper Nework v. Sunoco Pipeline L.P., 179 A.3d 670, 696 (Pa. Commw. 2018) (in a case involving a PUC-regulated pipeline, "We are not persuaded that the cases signify an intent to protect public natural resources trumps all other legal concerns raised by every type of party under all circumstances.").
[123] EQT Production Company v. Dep't of Envt'l Protection of Pennsylvania, --- A.3d ---, 2018 WL 1516385 (Pa. 2018).

> No person or municipality shall place or permit to be placed, or discharged or permit to flow, or continue to discharge or permit to flow, into any of the [any and all rivers, streams creeks, rivulets, impoundments, ditches, water courses, storm sewers, lakes, dammed water, ponds, springs and all other bodies or channels of conveyance of surface and underground water, or parts thereof, whether natural or artificial ...] any industrial wastes, except as hereinafter provided in this act.[124]

3. EQT had a release of hydraulic fracturing fluid from an impoundment. Much of the penalty exposure was premised on a "continuing violation" theory predicated on passive migration of contaminants from soil into water," for which a separate civil penalty may be assessed for each day of the alleged violation."[125]

4. PADEP argued for a "water-to-water" theory of liability; specifically as reported by the Supreme Court (emphasis added, record citations omitted):

> "DEP then described EQT's penalty exposure as follows. The agency explained that evidence would demonstrate that: industrial waste from the company's impoundment remained in bedrock and soil beneath the impoundment's liner for a period of time longer than EQT contemplated in its portrayal of an "actual discharge"; industrial waste can bind to the soil or perch above an aquifer, "continually polluting new groundwater as groundwater flows through the column of bound or perched industrial waste"; EQT's "*plume of pollution ... progressively and over time moved into regions of uncontaminated areas of surface and groundwater"; and this would continue for months or years*. In these passages, DEP appears to have been advancing its soil-to-water migration theory, the continuing-violation theory such as was the subject of the complaint. The passages can also be read more broadly, however, to suggest new infractions as contaminants spread from discrete bodies of water into new regions of water, a water-to-water theory of serial violations upon which the Department would come to focus upon more specifically. Even more broadly, the Department charged that EQT was subject to civil penalties for *"[e]ach day that [the company's] impact upon a water of the Commonwealth constitutes 'pollution' " and on each day that the industrial waste that was to be contained in the impoundment impairs waters of the Commonwealth*."[126]

[124] 35 P.S. §§ 691.1, 691.301.
[125] *Id*.
[126] *Id*. at *2.

5. The Pa. Supreme Court rejected PADEP's argument on the "water-to-water" theory:

> "Of the competing constructions, we find it most reasonable to conclude the Legislature was focused on protecting the waters of the Commonwealth with reference to the places of initial entry. Again, we find this to be the most natural reading of the statute. Moreover, we agree with EQT that, had the General Assembly intended differently, it would have been a simple matter to address water-to-water migration in express terms. At the very least, had the Legislature wished to codify the water-to-water theory, it could have sanctioned movement of contaminants "into or among" any of the waters of the Commonwealth, rather than merely "into" any such waters."[127]

6. The Pa. Supreme Court declined to reach PADEP's "soil-to-water" theory, but observed that it expected the Commonwealth Court would reach the soil-to-water theory on remand; *i.e.*, whether as EQT contends, a"some action or inaction by the polluter" is necessary "to give rise to a continuing violations."[128]

E. PA Trespass by Hydraulic Fracturing

1. In a recent decision, in *Briggs v. Southwestern Energy Production Company*,[129] the Superior Court of Pennsylvania (an intermediate appellate court) held that claims for drainage of oil and gas from hydraulic fracturing were not precluded by the rule of capture.

2. Southwestern Energy Production Company holds a valid oil and gas lease and operates shale gas wells on property adjacent to the Briggs family's tract, on which no oil and gas lease is in effect. The Briggs family alleged that Southwestern's wells were unlawfully draining gas from beneath their land as a result of fissures induced by hydraulic fracturing.

3. Southwestern countered that the Briggs family's claims were barred by the rule of capture: the concept that there is no liability for capturing oil and gas that drains from another's land. The trial court ruled for Southwestern on summary judgment, holding that the rule of capture precluded the Briggs claims as a matter of law.

4. The Superior Court reversed the trial court and remanded, concluding:

> "In light of the distinctions between hydraulic fracturing and conventional gas drilling, we conclude that the rule of capture does

[127] *Id*. at *15.
[128] *Id*. at *16-17.
[129] Briggs v. Southwestern Energy Production Company, --- A.3d ---, 2018 WL 1572729 (Pa. Super. Ct. 2018)

not preclude liability for trespass due to hydraulic fracturing. Therefore, hydraulic fracturing may constitute an actionable trespass where subsurface fractures, fracturing fluid and proppant cross boundary lines and extend into the subsurface estate of an adjoining property for which the operator does not have a mineral lease, resulting in the extraction of natural gas from beneath the adjoining landowner's property."[130]

5. The court offered three reasons for its decision:

   a. The rule of capture assumes that oil and gas are capable of migrating freely within a reservoir according to changes in pressure and without regard to surface property lines, but due to the low permeability of shale formations shale gas is not capable of migrating to an adjoining tract absent the application of an artificial force.[131]

   b. Under the rule of capture, the traditional remedy for a landowner impacted by a neighbor's well was to drill an offsetting well to avoid drainage, to "go and do likewise." Since hydraulic fracturing is a "costly and specialized endeavor" that the average landowner cannot conduct, this was not a realistic remedy for the Briggs family.[132]

   c. While the court acknowledged the evidentiary burden facing the Briggs family and the difficulties in calculating damages for gas extracted through hydraulic fracturing, it did not believe that these difficulties were sufficient to preclude the Briggs family's claims.[133]

6. The *Briggs* decision was rendered by two Superior Court judges, with one of the three-judge panel not participating. On April 16, 2018, Southwestern requested rehearing *en banc* by all nine Superior Court judges.

7. The *Briggs* decision raises many questions that make it an unsettling precedent for oil and gas operators. For further analysis of the rationale and holding in the *Briggs* case, please see Baker Hostetler LLP's article at this link (registration required):

   https://www.law360.com/articles/1035615?utm_source=rss&utm_medium=rss&utm_campaign=articles_search

[130] *Id*. at *9.
[131] *Id*. at *8.
[132] *Id*. at *9.
[133] *Id*.