Institute for ENERGY LAW

ENERGY INDUSTRY ENVIRONMENTAL LAW CONFERENCE

May 18, 2018 | Houston, Texas

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NATIONAL ENERGY INDUSTRY ENVIRONMENTAL LAW CONFERENCE

May 18, 2018 | Houston, Texas

Presented by
Institute for Energy Law
of
The Center for American and International Law

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Stephen G. Ellison
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Houston, Texas

I attended the University of Texas (bachelors in Finance in 1983 and JD in 1986) and then practiced at the Underwood Firm in Amarillo, Texaco's Legal Department in Denver, Coastal Corporation's Legal Department in Houston and for the last 18 years with Conoco, now ConocoPhillips, in Houston where I am the Global Managing Counsel for HSE Legal. For the last 25 years my practice has focused exclusively on health, safety and environmental regulatory compliance and enforcement issues.

Personal information: I've been married to Tracey Ellison for 30 years and we have five children.

Kirsten L. Nathanson
Crowell & Moring LLP
Washington, DC

Kirsten L. Nathanson is a partner in the Environment & Natural Resources Group at Crowell & Moring LLP, focusing on environmental litigation, enforcement defense, risk assessment, and regulatory counseling under the major federal environmental and public lands statutes. She currently serves as a Vice Chair of the firm's Environment & Natural Resources Group Steering Committee. Her litigation experience encompasses citizen suit defense, regulatory challenges, remediation cost recovery and defense, Administrative Procedure Act actions, and EPA enforcement across nearly all federal environmental laws.

Among her current representative engagements, she is engaged in CERCLA contribution litigation against the United States for a major energy company, represents leading crop protection companies in ESA-FIFRA litigation challenging product registrations, serves as federal environmental counsel to several corporations across multiple facilities and CERCLA sites, including significant landfill and contaminated sediment waterway sites, represents a major coal producer in multiple citizen suit litigation matters challenging federal leasing and mine plan approval actions, and works as Clean Water Act regulatory and litigation counsel to multiple national trade associations.

Kirsten has been recognized as a leading environmental lawyer in Washington, D.C. by *Chambers and Partners USA* since 2013. Her experience includes federal district court motions and trial practice and federal appellate oral arguments. She is admitted to practice before the U.S. Supreme Court and numerous federal appellate and district courts nationwide.

Kirsten currently serves as co-chair of the firm's Diversity Council. Kirsten was a founding President of the Washington, D.C. Chapter of the Women's Energy Network in 2011-2012 and continues to engage in activities with both the local and national WEN organizations. She is a past president and a member of the Board of Trustees of the Energy & Mineral Law Foundation and has also led the Crowell & Moring Women Attorneys' Network.

COOPERATIVE FEDERALISM AND THE FUTURE OF STATE ENVIRONMENTAL REGULATION AND ENFORCEMENT

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About Tim

Tim Wilkins is a partner in the Environmental Strategies Group at Bracewell LLP. His clients rely on him for strategic environmental advice at the federal and state levels, including permitting assistance, the defense of environmental enforcement actions and assistance with the environmental aspects of major transactions. He has overseen environmental compliance audits involving thousands of locations, handled hundreds of environmental audit disclosures and pioneered the development and use of U.S. EPA's audit policy for new owners. Clients also note in *Chambers USA* that Tim is "fantastic, detailed and very strong with management systems" as well as capable of delivering "practical, cost-effective solutions for his clients" (2011).

Tim serves as the Managing Partner of Bracewell's Austin office. In addition to his duties at Bracewell, Tim periodically teaches the course in Corporate Environmental Law at The University of Texas School of Law.

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On January 11, 2016, Dr. Chuck Carr Brown became Secretary of the Louisiana Department of Environmental Quality. Brown had previously served as assistant secretary for environmental services in the mid-2000s. He left LDEQ to start up a successful consulting firm. He returned to LDEQ to serve an old friend and neighbor from his hometown of Amite, Governor John Bel Edwards.

Brown's insistence on relying on science and following the rules has informed his decisions and leadership style as he has dealt with a staff whose numbers declined under years of steady downsizing and with a steady parade of natural disasters.

In 2016, the worst flood in recorded history hit the Baton Rouge area, inundating more than 100,000 homes. Mountains of debris lined streets in East Baton Rouge, Livingston and Ascension parishes. Referencing a plan he himself had authored during his first tenure in response to Hurricane Katrina's aftermath, Brown devised a strategy that included temporary staging areas, a move that contractors credited with speeding up debris removal by a third. He did all this while dealing with his own flooded home.

Brown has re-emphasized LDEQ's core values, re-established the Office of Environmental Assessment and taken a hands-on approach to air quality goals. He is a strong advocate of alternative fuels and has a vision of an alternative fuels corridor that will stimulate infrastructure development. He is keenly interested in alternative fuels vehicles, especially EVs.

Brown possesses a B.S. in chemistry from the University of Southern Mississippi. He holds a Master of Public Administration from Southern University A&M College and a Doctorate of Philosophy in Public Policy/Environmental Policy from the Nelson Mandela School of Public Policy and Urban Affairs at Southern University A&M College.

Prior to rejoining LDEQ, Brown left positions as president and CEO of Brown and Associates, LLC, a firm specializing in the delivery of environmental services, governmental relations, and issue management; and vice-president of the Metro Service Group, a New Orleans-based firm that consults in waste collection, vertical and horizontal construction and emergency response.

Brown currently serves as Chairman of the Environmental Council of States Waste Committee.

Martha E. Rudolph
Colorado Department of Public Health and Environment
Denver, Colorado

Martha E. Rudolph is the Director of Environmental Programs for the Colorado Department of Public Health and Environment where she oversees the Air Quality, Environmental Health and Sustainability, Hazardous Materials and Waste Management, and Water Quality Divisions. Ms. Rudolph has been with the Department since 2007, and served as the Executive Director of the Department in 2010.

In 2015/2016, Ms. Rudolph was President of the Environmental Council of States, the national non-profit, non-partisan association of state and territorial environmental agency leaders. She currently serves on the Board of Directors for the Environmental Research Institute of the States and is a co-chair of the ECOS Shale Gas Caucus. Previously Ms. Rudolph was the Chair of the ECOS Air Committee and the Vice Chair of the ECOS Planning Committee. She is a member of the Division on Earth and Life Studies of The National Academies of Sciences, Engineering, and Medicine, a state advisor for the Georgetown Climate Center, and a member of the American College of Environmental Lawyers.

A graduate of the Georgetown University Law Center, Ms. Rudolph is an environmental attorney, and served for 14 years in the Colorado Attorney General's Office. She has been in private practice in Denver, and was an assistant general counsel for Kinder Morgan Inc., a natural gas and energy transportation company.

Bryan W. Shaw, Ph.D., P.E.
Texas Commission on Environmental Quality
Austin, Texas

Dr. Bryan W. Shaw of Elgin was appointed to the Texas Commission on Environmental Quality by Gov. Rick Perry on Nov. 1, 2007. The Texas Senate confirmed his appointment on May 5, 2009 and he was appointed chairman on Sept. 10, 2009.

Shaw is an associate professor in the Biological and Agricultural Engineering Department of Texas A&M University (TAMU) with many of his courses focused on air pollution engineering. The majority of his research at TAMU concentrates on air pollution, air pollution abatement, dispersion model development and emission factor development. Shaw was formerly associate director of the Center for Agricultural Air Quality Engineering and Science, and formerly served as Acting Lead Scientist for Air Quality and Special Assistant to the Chief of the U.S. Department of Agriculture Natural Resources Conservation Service.

Shaw served as a member of the U.S. Environmental Protection Agency (EPA) Science Advisory Board (SAB) Committee on Integrated Nitrogen, as well as the EPA SAB Environmental Engineering Committee and the Ad Hoc Panel for review of EPA's Risk and Technology Review Assessment Plan. Additionally, he is a member of the U.S. Department of Agriculture–Agricultural Air Quality Task Force. Since his appointment to the TCEQ, Shaw has served on the Texas Environmental Flows Advisory Group and as chair of the Texas Advisory Panel on Federal Environmental Regulations.

Shaw received a bachelor's and master's degree in agricultural engineering from TAMU and a doctorate degree in agricultural engineering from the University of Illinois at Urbana-Champaign.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JAN 2 2 2018

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

MEMORANDUM

SUBJECT: Interim OECA Guidance on Enhancing Regional-State Planning and Communication on Compliance Assurance Work in Authorized States

FROM: Susan Parker Bodine
Assistant Administrator

TO: Regional Administrators

Introduction and Scope

The U.S. Environmental Protection Agency's FY2018-2022 Strategic Plan establishes both *cooperative federalism* (Goal 2) and *compliance with the law* (Objective 3.1) as fundamental priorities for the agency. In particular, Objective 2.1 states that the EPA will: "Improve environmental protection through shared governance and enhanced collaboration with State, tribal, local, and federal partners using the full range of compliance assurance tools." In using our compliance assurance tools, Objective 3.1 stresses the need to maintain a level playing field, stating that noncompliance with the law "unfairly tilts the field of economic competition in favor of those that skirt the law."

To help develop these priorities, the EPA and ECOS formed the ECOS-EPA Workgroup on State & Federal Collaboration in Compliance Assurance that kicked off in September 2017 (hereinafter "the Compliance Assurance Collaboration Workgroup"). This workgroup is expected to develop principles and best practices for State and EPA collaboration in inspections and enforcement, work planning and implementation, National Enforcement Initiatives, and outcome and performance measurement.

Today's Interim Guidance is being issued in order to immediately begin the movement toward a more collaborative partnership between the EPA and authorized States, with the expectation that this Interim Guidance will be updated after the Compliance Assurance Collaboration Workgroup has finished its work. It applies to all EPA compliance assurance activities, such as inspections and enforcement, in authorized State environmental programs (coordination with other state agencies and Tribal governments is also encouraged).[1]

[1] This Interim Guidance is consistent with the principles of the U.S. EPA Deputy Administrator's 1986 *Revised Policy Framework for State/EPA Enforcement Agreements*, but with an updated emphasis on cooperative federalism. The 1986 Revised Policy already incorporates a great deal of flexibility. The EPA will exercise that flexibility in support of cooperative federalism. This Interim Guidance should be regarded as the starting point for EPA and State collaboration while it is in effect. The agency has not decided if and/or how the 1986 *Revised Policy* Framework should be revised or updated.

Periodic Joint Work Planning

1) Each Region should meet, preferably in-person, with the senior leadership in each of its States, as appropriate and agreed-upon, based on needs and styles of the specific State-Regional relationship.

    a) As a practical matter, discussions of specific inspections and enforcement actions are likely to occur at the career management level among States and Regions. This means Regions should have procedures in place for ensuring senior Regional leadership have the information and the procedures for keeping the State's political leadership informed of the nature of work sharing arrangements and collaboration between the State and the EPA on compliance assurance work and issues, such as any high profile inspections and enforcement actions that are planned (based on the considerations discussed in paragraph 2 of this section). This communication up and down the management chain within EPA Regions and the States is critical for maintaining a collaborative relationship with "no surprises." Such communications may vary to meet the needs of individual Regions and States, but the key consideration is that the procedures for communicating up and down are known and implemented.

2) At these meeting(s) and/or conference calls, the Region and the State should discuss and share information on at least these important topics:

    a) The environmental compliance problems and needs in the State, the compliance assurance priorities for the State and the Region, and how the combined resources of the State and the EPA could be used to effectively address these needs and ensure a level playing field.
    b) The Region and the State could share lists of facilities planned to be inspected in that year or quarter (depending on the planning time line), and discuss who should do those inspections. If lists of planned inspections are exchanged, there should be a common understanding between the Region and the State concerning if/when a facility will be informed of the inspection in advance.
    c) EPA Regions and States should provide explanations of why specific facilities are proposed for inspection so that they can engage in a meaningful discussion about the value and need for the inspections, priorities, and capacity. This is not simply exchanging lists of planned inspections for informational purposes.
    d) How the Region and State will use their combined resources to meet national inspection coverage expectations per applicable Compliance Monitoring Strategies, and whether an alternative compliance monitoring approach is appropriate.
    e) Any planned program audits (e.g., per the State Review Framework), and the results of any program audits that suggest a State program deficiency. EPA findings should be considered preliminary until the State has had an opportunity to review and respond. The Region should provide the State with an opportunity to address a confirmed deficiency within a reasonable time frame before taking any direct action arising out of the audit (except where public health or the environment would be harmed without expeditious action).

State Primacy in Authorized Programs

1) With respect to inspections and enforcement, the EPA will generally defer to authorized States as the primary day-to-day implementer of their authorized/delegated programs, except in specific situations. The EPA believes that exceptions to this general practice should be identified through close communication and involvement of upper management of both agencies.

2) Examples of the types of situations that could warrant EPA involvement in individual inspections and enforcement following close communication and involvement of upper management of both agencies include, but are not limited to:

   a) Program audits indicate a need for the EPA to fill a gap until the State program deficiency is addressed.
   b) Emergency situations or, situations where there is significant risk to public health and the environment.
   c) Significant noncompliance that the State has not timely or appropriately addressed.
   d) Actions that require specialized EPA equipment (e.g., infrared camera) and/or expertise.
   e) Federal and State owned/operated facilities.
   f) Actions to consistently address widespread noncompliance problems in a sector/program (such as the National Enforcement Initiatives[2]), to address companies with facilities in multiple States, or where there are cross-boundary impacts affecting other States, tribes, or nations.
   g) Program oversight inspections.
   h) Responses to State requests for assistance in a specific situation, or broader work-sharing arrangements in which the EPA takes the lead in particular sub-programs, sectors, or geographic areas.
   i) Serious violations that need to be investigated and addressed by the EPA's criminal enforcement program.

3) Where the EPA identifies violations at a facility, but the State requests that it take the lead for remedying the violations, the Region should defer to the State except where the EPA believes that some EPA involvement is warranted (as described in paragraph 2, above). Such matters should be discussed between upper management of both agencies. If the State takes over the lead on such a case, the Region and the State should have a clear understanding of what the EPA considers to be a timely and appropriate response and the Region should document this understanding with the State. Regions should keep a record of these decisions and periodically assess how well this is working.

4) In a circumstance where senior leadership in the Region and State do not agree on a particular matter (such as, the appropriate enforcement response to a violation, whether there is a violation, or how federal law or EPA policy should be interpreted or implemented), the matter should be elevated to the OECA Assistant Administrator for a decision. This elevation is important to ensure a consistent national program among States and the EPA and a level playing field for regulated entities.

Evaluation of this Interim Guidance and Limitations

1) By September 28, 2018, Regions should provide OECA with a progress report on their work in following this Interim Guidance, including their views on how well it is working and areas for improvement. In July 2018, OECA will provide the Regions with a format for this progress report.

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[2] EPA engagement with the States on the current NEI strategies will likely include: (1) implementing a standard way to solicit State input into prioritization of facilities for attention within the NEI strategies; (2) continuing to offer training to States for a particular NEI strategy; (3) routinely inviting States to participate on NEI inspections; and (4) supporting opportunities for interested States to address noncompliance such that violations are addressed consistent with national expectations with progress and results reported to EPA. Going forward, the EPA will enhance State engagement in identifying potential changes to the current NEIs and the next round of NEIs.

2) OECA will solicit State views on how well the guidance is working and areas for improvement.

3) In FY2019, the EPA will review this Interim Guidance and update it as appropriate based on input from the Regions in their progress reports and recommendations, input from state, federal, tribal and local compliance partners, and work-products from the Compliance Assurance Collaboration Workgroup.

4) This Interim Guidance is intended for use by EPA personnel and does not create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers, or any person. This Interim Guidance is not intended to supersede any statutory or regulatory requirements or agency policy. Any inconsistencies between this Interim Guidance and any statute, regulation, or policy should be resolved in favor of the relevant statutory or regulatory requirement, or policy document. The EPA may revise, replace or discontinue this Interim Guidance at any time.

cc: Lawrence Starfield, Principal Deputy Assistant Administrator, OECA
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FY 2018-2022 EPA Strategic Plan

February 12, 2018

U.S. Environmental Protection Agency

Washington, DC 20460

EPA's Mission

To Protect Human Health and the Environment

Goal 1 - Core Mission: Deliver real results to provide Americans with clean air, land, and water, and ensure chemical safety.

- **Objective 1.1 – Improve Air Quality**
- **Objective 1.2 – Provide for Clean and Safe Water**
- **Objective 1.3 – Revitalize Land and Prevent Contamination**
- **Objective 1.4 – Ensure Safety of Chemicals in the Marketplace**

Goal 2 - Cooperative Federalism: Rebalance the power between Washington and the states to create tangible environmental results for the American people.

- **Objective 2.1 – Enhance Shared Accountability**
- **Objective 2.2 – Increase Transparency and Public Participation**

Goal 3 - Rule of Law and Process: Administer the law, as Congress intended, to refocus the Agency on its statutory obligations under the law.

- **Objective 3.1 – Compliance with the Law**
- **Objective 3.2 – Create Consistency and Certainty**
- **Objective 3.3 – Prioritize Robust Science**
- **Objective 3.4 – Streamline and Modernize**
- **Objective 3.5 – Improve Efficiency and Effectiveness**

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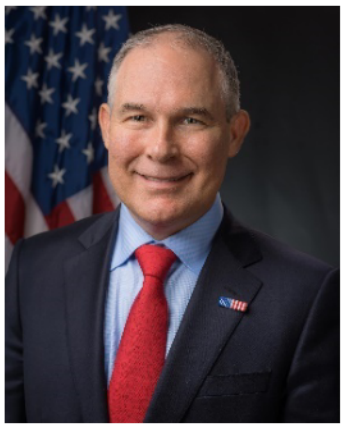
Administrator's Message



I am proud to present the U.S. Environmental Protection Agency's FY 2018 – FY 2022 Strategic Plan, which emphasizes the EPA's "Back-to-Basics" agenda. The agenda set out in this plan has three over-arching goals which reflect my core philosophies: (1) refocus the agency back to its core mission; (2) restore power to the states through cooperative federalism; and (3) lead the agency through improved processes and adhere to the rule of law.

The agency's mission of protecting human health and the environment resonates with all Americans; we all can agree that we want our future generations to inherit a cleaner, healthier environment that supports a thriving economy.

Our nation has made great progress in making rivers and lakes safer for swimming and boating, reducing the smog that clouded city skies, cleaning up lands that were once used as hidden chemical dumps and providing Americans greater access to information on chemical safety. However, we still have important work to do.

We must create a sense of shared accountability between states, tribes and the federal government to achieve positive environmental results. Along with faithfully following the rule of law, improves the processes by which the EPA has operated and is crucial to advance the agency's mission.

Air

- Over the next five years, the EPA will prioritize key activities to support attainment of the national ambient air quality standards (NAAQS) and implementation of stationary source regulations.
- We will work with our state and tribal partners to rapidly approve their implementation plans for attaining air quality standards to reduce contaminants that cause or exacerbate health issues.

Water

- We will modernize and update aging drinking water, wastewater and stormwater infrastructure which the American public depends on.
- The agency will continue to leverage the State Revolving Funds (SRFs) and *Water Infrastructure Finance and Innovation Act* (WIFIA) to assist states, tribes, municipalities and private entities to finance high-priority infrastructure investments that protect human health and the environment.

Land

- I am placing particular emphasis on my top priority list of Superfund sites and will implement Superfund Task Force recommendations to accelerate the pace of cleanups and promote site reuse, while addressing risks to human health and the environment.
- The agency will accelerate cleanup by re-prioritizing some resources to focus on remedial actions, construction completions, ready-for-reuse determinations and National Priorities List site deletions.

Chemicals

- We will prioritize the safety of chemicals in the marketplace in the implementation of the new *Frank R. Lautenberg Chemical Safety for the 21st Century Act*, which modernizes the *Toxic Substances and Control Act* (TSCA).
- To achieve this, the EPA will focus on meeting its statutory requirements and mandatory deadlines of TSCA and ensure our reviews are efficient, effective and transparent to stakeholders.

More than 45 years after the creation of the EPA most states, and to a lesser extent territories and tribes, are authorized to implement delegated federal environmental programs within their jurisdictions. Recognizing the congressionally intended responsibilities of our state, local and tribal partners, we must adapt and modernize our practices to reduce duplication of effort and tailor oversight of delegated programs.

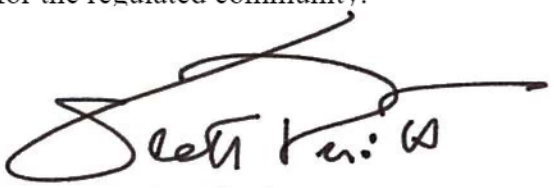
For example, the EPA will expand its compliance assistance work by continuing to partner with third-party organizations and federal agencies to support existing web-based, sector-specific compliance assistance centers and seek to develop new centers. I will lead an assessment of our shared governance to clarify the agency's statutory roles and responsibilities and tailor state oversight to maximize our return on investment and reduce burden on states.

Over the next five years, the EPA will improve its processes and reinvigorate the rule of law as it administers environmental regulations as Congress intended and will refocus the agency on its core statutory obligations.

I am a firm believer that federal agencies exist to administer laws passed by Congress, in accordance with the will of this body. The EPA will ensure compliance with the law by providing consistency and certainty for the regulated community and clarify the impact of proposed actions on human health, the environment and the economy to provide a clear path and timeline for entities to achieve compliance.

Further, we will reform our approach to regulatory development and prioritize meeting our statutory deadlines to ensure that expectations for the regulated community and the public are clear and comprehensive. The EPA will also employ business process improvement strategies, such as Lean, to improve efficiencies in all permitting processes, working alongside states to streamline the review of state-issued permits and to improve our internal business processes.

I believe we can accomplish the environmental and human health outcomes outlined in this Strategic Plan by increasing collaboration with other external partners and striving to achieve improved consistency and certainty for the regulated community.



E. Scott Pruitt

Introduction

EPA's Mission: To Protect Human Health and the Environment

Goal 1 – Core Mission: Deliver real results to provide Americans with clean air, land, and water, and ensure chemical safety.

Goal 2 – Cooperative Federalism: Rebalance the power between Washington and the states to create tangible environmental results for the American people.

Goal 3 – Rule of Law and Process: Administer the law, as Congress intended, to refocus the Agency on its statutory obligations under the law.

The U.S. Environmental Protection Agency (EPA) developed this *FY 2018-2022 EPA Strategic Plan (*the *Plan)* to: (1) refocus the Agency back to its core mission; (2) restore power to the states through cooperative federalism; and (3) lead the Agency through improved processes and adhere to the rule of law. The *FY 2018-2022 EPA Strategic Plan* sharply refocuses EPA on its role of supporting the primary implementers of environmental programs – states and federally-recognized Indian tribes[1] – by streamlining programs and processes, reducing duplication of effort, providing greater transparency and listening opportunities, and enabling the Agency to focus on its core mission work. Process, the rule of law, and cooperative federalism are necessary for an efficient and effective Agency to provide tangible and real environmental results to the American people.

EPA's senior managers will use this *Plan* routinely as a management tool to guide the Agency's path forward, tracking progress and assessing and addressing risks and challenges that could potentially interfere with EPA's ability to accomplish its goals. The three strategic goals established in the *Plan* are supported by strategic objectives and strategic measures[2] focused on advancing human health and environmental results over the next five years. These longer-term strategic measures are supported by annual measures included in the annual performance plans and budgets that EPA submits to Congress. The strategies and strategic measures in this *Plan* highlight key areas in which the Agency will make the most dramatic changes over the next five years and are not intended to address all ongoing programs. The annual performance plans and budgets, and supporting annual and operational measures, address a broader range of the Agency's work. In addition, the Agency will hold quarterly and monthly meetings to assess progress toward annual and long-term strategic measures.

The EPA Administrator established two-year agency priority goals (APGs) for accelerating progress on EPA priorities. APGs reflect agency leadership's top near-term priorities for implementing performance improvement. EPA's APGs were selected from among the suite of strategic measures. EPA will support these priority goals by developing two-year implementation plans and reporting quarterly progress.

[1] Tribes include all federally-recognized tribes, including Alaska Native Villages (as issued by the Secretary of the Interior).

[2] Strategic measures are the measurable results the Agency is working to achieve over the life of the *Plan* and are supported by data quality records (DQRs), which provide details such as the methods of measurement and other important contextual information such as baselines. DQRs can be found at https://www.epa.gov/planandbudget/results.

FY 2018-2019 Agency Priority Goals

APG-1: Improve air quality by implementing pollution control measures to reduce the number of nonattainment areas. By September 30, 2019, EPA, in close collaboration with states, will reduce the number of nonattainment areas to 138 from a baseline of 166.

APG-2: Empower communities to leverage EPA water infrastructure investments. By September 30, 2019, EPA will increase by $16 billion the non-federal dollars leveraged by EPA water infrastructure finance programs (Clean Water and Drinking Water State Revolving Funds and the Water Infrastructure Finance and Innovation Act).

APG-3: Accelerate the pace of cleanups and return sites to beneficial use in their communities. By September 30, 2019, EPA will make an additional 102 Superfund sites and 1,368 brownfields sites ready for anticipated use (RAU).

APG-4: Meet new statutory requirements to improve the safety of chemicals in commerce. By September 30, 2019, EPA will complete in accordance with statutory timelines (excluding statutorily-allowable extensions): 100% of required EPA-initiated Toxic Substances Control Act (TSCA) risk evaluations for existing chemicals; 100% of required TSCA risk management actions for existing chemicals; and 80% of TSCA pre-manufacture notice final determinations.

APG-5: Increase environmental law compliance rate. Through September 30, 2019, EPA will increase compliance by reducing the percentage of Clean Water Act (CWA) National Pollutant Discharge Elimination System (NPDES) permittees in significant noncompliance with their permit limits to 21% from a baseline of 24%.

APG-6: Accelerate permitting-related decisions. By September 30, 2019, EPA will reduce by 50% the number of permitting-related decisions that exceed six months.

The *FY 2018-2022 EPA Strategic Plan* is supported by other, more detailed Agency plans in specific areas. For example, EPA's Human Capital Operating Plan details the actions the Agency will execute to achieve its overarching human capital goals, and EPA's Information Technology/Information Management Strategic Plan will guide efforts to support and modernize the Agency's technology and data infrastructure. The EPA's workforce and reform efforts will support streamlining efforts to work more efficiently and effectively in the future. The many activities described in these plans align with and help position the Agency to achieve the strategic goals and objectives presented in this *Plan.*

EPA is also in the process of deploying a Lean management system specifically designed to deliver measurable results that align with this *Plan*. Lean is a set of principles and tools designed to identify and eliminate waste from processes while maximizing customer value and return on taxpayer investment. EPA will standardize and streamline processes to strengthen efficiency and quality to better meet mission goals and objectives. Under the Administrator's leadership, EPA will become a Lean organization.

Strategies to achieve EPA's goals and objectives are also informed by gathering evidence related to environmental problems and evaluating the effectiveness of the strategies that the programs use to address them. Examples of recent evidence and evaluation efforts used to develop this *FY 2018-2022 EPA Strategic Plan* and a preliminary list of future planned efforts can be found at https://www.epa.gov/planandbudget/strategicplan.

The GPRA (Government Performance and Results Act) Modernization Act of 2010 directs agencies to consult with the Congress and requires that they solicit and consider the views and suggestions of those entities likely to be interested in or potentially affected by a strategic plan. Consultation with EPA's federal, state, tribal, and local government partners and its many stakeholders is integral to the Agency's strategic planning process. In developing the *FY 2018-2022 EPA Strategic Plan*, EPA issued a *Federal Register* notice and used www.regulations.gov to encourage and share feedback on the draft *Plan*. The Agency also sent notifications on the availability of the draft *Plan* to leaders of the Agency's Congressional authorizing, appropriations, and oversight committees, and notified all federally-recognized Indian tribes of the opportunity for consultation and coordination. These outreach efforts resulted in unique submissions from approximately 5,000 organizations and individuals.

Goal 1 - Core Mission:
Deliver real results to provide Americans with clean air, land, and water, and ensure chemical safety.

Pollution comes in many forms with myriad impacts on human health and the environment. With the goal of clean and safe air, water, and land for all Americans, Congress enacted a range of environmental statutes that spell out EPA's core responsibilities. Our nation has come a long way since EPA was established in 1970. We have made great progress in making rivers and lakes safe for swimming and boating, reducing the smog that clouded city skies, cleaning up lands that were once used as hidden chemical dumps, and providing Americans greater access to information on the safety of the chemicals all around us. Today we can see enormous progress—yet we still have important work to do.

EPA has established priorities for advancing progress over the next five years in each of its core mission areas—land, air, water—as well as chemicals. The Agency will focus on speeding the cleanup of Superfund and brownfields sites, and will use a list of top priority sites to advance progress on Superfund sites of particular concern. We will work with states and tribes to more rapidly approve their implementation plans for attaining air quality standards, reducing contaminants that can cause or exacerbate health issues. We will work with our state and tribal partners to provide for clean and safe water by updating aging infrastructure, both for drinking water and wastewater systems. EPA's top priority for ensuring the safety of chemicals in the marketplace is the implementation of the new Frank R. Lautenberg Chemical Safety for the 21st Century Act, which modernizes the Toxic Substances and Control Act (TSCA) by creating new standards and processes for assessing chemical safety within specific deadlines. These efforts will be supported by strong compliance assurance and enforcement in collaboration with our state and tribal partners, up-to-date training for partners, and use of the best available science and research to address current and future environmental hazards, develop new approaches, and improve the foundation for decision making.

The Agency will collaborate more efficiently and effectively with other federal agencies, states, tribes, local governments, communities, and other partners and stakeholders to address existing pollution and prevent future problems. EPA will directly implement federal environmental laws in Indian country where eligible tribes have not taken on program responsibility.

With our partners, we will pay particular attention to vulnerable populations. Children and the elderly, for example, may be at significantly greater risk from elevated exposure or increased susceptibility to the harmful effects of environmental contaminants. Some low-income and minority communities may face greater risks because of proximity to contaminated sites or because fewer resources are available to avoid exposure to pollutants. Tribal ways of life such as traditional subsistence hunting, fishing, and gathering also may increase exposure to contaminants and increase risks. Much work remains and, together with our partners, we will continue making progress in protecting human health and the environment.

Objective 1.1 - Improve Air Quality:

Work with states and tribes to accurately measure air quality and ensure that more Americans are living and working in areas that meet high air quality standards.

Introduction

As part of its mission to protect human health and the environment, EPA is dedicated to improving the quality of the nation's air. From 1970 to 2016, aggregate national emissions of the six criteria air pollutants[3] were reduced over 70 percent, while gross domestic product grew by over 253 percent. Despite this progress, in 2016, more than 120 million people lived in counties with monitored air quality that did not meet standards for at least one criteria pollutant. EPA's work to control emissions of air pollutants is critical to continued progress in reducing public health risks and improving the quality of the environment. Over the next five years, EPA will conduct a wide range of activities that contribute to improving air quality and protecting human health and the environment.

Strategic Measure

- SM-1 By September 30, 2022, reduce the number of nonattainment areas to 101[4].

Strategies for Achieving the Objective

EPA works in cooperation with states, tribes, and local governments to design and implement air quality standards and programs. EPA relies on other federal agencies, academia, researchers, industry, other organizations, and the public. These partnerships are critical to achieving improvements in air quality and reducing public health risks.

EPA will prioritize key activities to support attainment of the national ambient air quality standards (NAAQS) and implementation of stationary source regulations. The Agency will address its Clean Air Act (CAA) responsibilities by collaborating with and providing technical assistance to states and tribes to develop plans and implement decisions that administer the NAAQS and visibility programs; taking federal oversight actions such as approving state implementation plan/tribal implementation plan (SIP/TIP) submittals consistent with statutory obligations; developing regulations and guidance to implement standards; and addressing transported air pollution. EPA will focus on ways to improve the efficiency and effectiveness of the SIP/TIP process, including the Agency's own review process, with a goal of maximizing timely processing of state/tribal-requested implementation plan actions to help move more quickly to attainment.

EPA will operate effective nationwide and multi-state programs, such as the acid rain program and the cross-state air pollution rule, which address global, national, and regional air pollutants from the power sector and other large stationary sources. The Agency also will develop and provide data, analysis, and technical tools and assistance to industries, states, tribes, and communities to meet CAA obligations and other statutory requirements.

EPA also develops, implements, and ensures compliance with national emission standards to reduce mobile source-related air pollution from light-duty cars and trucks, heavy-duty trucks and buses, nonroad engines and vehicles, and their fuels—a priority for the Agency to ensure that industry has the certainty it

[3] The Clean Air Act (CAA) requires EPA to set National Ambient Air Quality Standards (NAAQS) for six common air pollutants including carbon monoxide, lead, ground-level ozone, nitrogen dioxide, particulate matter, and sulfur dioxide.
[4] The baseline is 166 nonattainment areas as of 10/1/2017.

needs while protecting human health and the environment and to support improvements in air quality and moving areas into attainment. The Agency evaluates new emission control technologies and provides information to state, tribal, and local air quality managers on a variety of transportation programs. EPA will review and approve vehicle and engine emissions certification applications and perform its compliance oversight functions on priority matters where there is evidence to suggest noncompliance. The Agency will also conduct pre-certification confirmatory testing for emissions and fuel economy for passenger cars.

EPA develops and implements national emission standards for stationary and mobile sources and works with state, tribal, and local air agencies to address air toxics problems in communities. For stationary sources, pursuant to the CAA, EPA develops initial air toxics emissions standards for categories of industrial sources and reviews these standards' risk reduction and technological currency according to timeframes set by the Act. EPA will conduct these reviews to meet CAA requirements and to ensure that the air toxics rules appropriately protect public health.

To support our partners in meeting their CAA obligations, EPA will provide grants and technical assistance to state, tribal, and local air pollution control agencies to manage and implement their individual air quality programs, including funding for air quality monitoring. State and tribal air quality monitoring, which provides critical information for developing clean air plans, for research, and for public awareness, will be a focus of the Administration.

EPA will prioritize efforts to reduce the production, import, and use of ozone depleting substances (ODS), including reviewing and listing alternatives that are safer for the stratospheric ozone layer through implementation of Title VI of the CAA and the Montreal Protocol.

EPA also is responsible for measuring and monitoring ambient radiation and radioactive materials and assessing radioactive contamination in the environment. The Agency supports federal radiological emergency response and recovery operations under the National Response Framework and the National Oil and Hazardous Substances Pollution Contingency Plan and will assist states, tribes, and other partners, as appropriate. EPA will design essential training and conduct exercises to improve our nation's radiation response preparedness.

External Factors and Emerging Issues

Emerging measurement and information technologies are shifting the paradigm for air quality data. Traditionally, state, tribal, and local air programs, along with EPA, have been the primary resource for collecting, storing, sharing, and communicating air data. Increasingly, air quality information is also available from nontraditional sources, such as satellites or sensors. Additionally, big data companies are becoming involved in storing, analyzing, and presenting publicly available air quality data alongside other data sets. These developments are expected to have profound influence on understanding air quality, as well as determining the most cost-effective ways to improve air quality. EPA partners with states and tribes through efforts such as E-Enterprise, and with other entities in a variety of ways to ensure that the Agency advances appropriate technologies and stays abreast of emerging technologies.

EPA engages in both domestic and international forums to address the depletion of the stratospheric ozone layer, a global problem that cannot be solved by domestic action alone. Success relies on joint action.

Lastly, there are several emerging issues and external factors that will affect how EPA protects the public from unnecessary exposure to radiation, including evolving policies on radioactive waste management, uranium extraction and processing technologies, a decrease in available radiation expertise, and new

science on radiation health effects. The Agency will focus on education, including formal and informal training in the areas of health physics, radiation science, radiation risk communications, and emergency response to fill existing and emerging gaps.

Objective 1.2 - Provide for Clean and Safe Water:

Ensure waters are clean through improved water infrastructure and, in partnership with states and tribes, sustainably manage programs to support drinking water, aquatic ecosystems, and recreational, economic, and subsistence activities.

Introduction

The nation's water resources are the lifeblood of our communities, supporting our economy and way of life. Across the country we depend upon reliable sources of clean and safe water. Just a few decades ago, many of the nation's rivers, lakes, and estuaries were grossly polluted, wastewater sources received little or no treatment, and drinking water systems provided very limited treatment to water coming through the tap. Now over 90 percent of the population receives safe drinking water from community water systems regulated by EPA or delegated states and tribes, and many formerly impaired waters have been restored and support recreational and public health uses that contribute to healthy economies.

We have made significant progress since enactment of the Clean Water Act (CWA); Safe Drinking Water Act; and Marine Protection, Research, and Sanctuaries Act. However, serious water resource and water infrastructure challenges remain. Many communities need to improve and maintain both drinking water and wastewater infrastructure and develop the capacity to comply with new and existing standards. Tens of thousands of homes, primarily in tribal and disadvantaged communities and the territories, lack access to basic sanitation and drinking water.

Over the next five years, EPA will work with states, tribes, territories, and local communities to better safeguard human health; maintain, restore, and improve water quality; and make America's water systems sustainable and secure, supporting new technology and innovation wherever possible.

Strategic Measures

- SM-2 By September 30, 2022, reduce the number of community water systems out of compliance with health-based standards to 2,700[5].
- SM-3 By September 30, 2022, increase by $40 billion the non-federal dollars leveraged by EPA water infrastructure finance programs (CWSRF, DWSRF, and WIFIA)[6].
- SM-4 By September 30, 2022, reduce the number of square miles of watershed with surface water not meeting standards by 37,000 square miles[7].

Strategies for Achieving the Objective

Invest in infrastructure to spur environmental benefits and economic growth

Supporting state, tribal, and local efforts to modernize the outdated drinking water, wastewater, and stormwater infrastructure on which the American public depends is a top priority for EPA. The Agency

[5] Baseline is 3,600 community water systems out of compliance with health-based standards as of FY 2017.

[6] The baseline is $32 billion in non-federal dollars leveraged from the CWSRF and DWSRF between FY 2013 and FY 2017 (i.e., loans made from recycled loan repayments, bond proceeds, state match, and interest earnings). The baseline does not include WIFIA leveraged dollars because the program's first loans are anticipated to close in FY 2018.

[7] Draft baseline is 464,020 square miles of impaired waters as of 9/2017, to be updated in 10/2018.

will promote construction of infrastructure in tribal and, small, rural, and disadvantaged communities. EPA's state revolving fund (SRF) and Water Infrastructure Finance and Innovation Act (WIFIA) programs will allow the Agency, states, tribes, municipalities, and private entities to finance high-priority infrastructure investments that protect human health and the environment. The revolving nature of the SRFs and the leveraging capacity of WIFIA greatly multiply the federal investment. For the clean water SRF, EPA estimates that every federal dollar contributed thus far has resulted in close to three dollars of investment in water infrastructure. For the drinking water SRF, for every one dollar the federal government has invested, the states, in total, delivered $1.80 in assistance to drinking water systems. For WIFIA, for every $1 million in credit subsidy appropriations, EPA could potentially provide approximately $100 million in direct credit assistance, resulting in an estimated $200 million in total infrastructure investment.

Protect Human Health

Sustaining the quality of our water resources is essential to safeguarding human health. More than 300 million people living in the United States rely on the safety of tap water provided by public water systems that are subject to national drinking water standards. EPA will help protect human health and make America's water systems secure by:

- Providing financial assistance to states, tribes, and territories to assist public water systems in protecting and maintaining drinking water quality;
- Strengthening compliance with drinking water standards to ensure protection of public health by enhancing the technical, managerial, and financial capability of those systems;
- Continuing to protect and restore water resources, including sources of drinking water, from contamination;
- Taking actions to address known and emerging contaminants that endanger human health;
- Supporting states, tribes, territories, and local communities in implementing water programs by providing guidance, training, and information;
- Ensuring the security and preparedness of the nation's drinking water supplies by implementing EPA's national security responsibilities for the water sector; and
- Protecting underground sources of drinking water by providing for the safe injection of fluids underground for storage, disposal, enhanced recovery of oil and gas, or minerals recovery.

Recent challenges in Flint, Michigan and elsewhere highlighted the need to strengthen EPA's implementation of the Safe Drinking Water Act to ensure we protect and build upon the enormous public health benefits achieved through the provision of safe drinking water throughout the country. The Agency's highest priorities include reducing exposure to lead in the nation's drinking water systems, ensuring continuous compliance with contaminant limits, responding quickly to emerging concerns, and improving the nation's aging and insufficient drinking water infrastructure to address significant needs. EPA is also collaborating with states and tribes to share more complete data from monitoring at public water systems through the Safe Drinking Water Information System (SDWIS). This will allow for better targeting of funding and technical assistance resources, and improve data quality while increasing public access to drinking water data.

Human health and recreational criteria are the foundation for state, tribal, and territorial tools to safeguard human health. Over the next five years we will improve our understanding of emerging potential waterborne threats to human health; provide technical assistance and resources to help the states, tribes, and territories monitor and prevent harmful exposures; and develop new or revised criteria as needed.

Protect and Restore Water Quality

Protecting the nation's waters relies on cooperation among EPA, states, tribes, territories, and local communities and involves a suite of programs to protect and improve water quality in the country's rivers, lakes, wetlands, and streams, as well as in estuarine, coastal, and ocean waters. EPA will foster strong partnerships with other federal agencies, states, tribes, local governments, and other organizations that facilitate achieving water quality goals while supporting robust economic growth. In partnership with states, tribes, territories, and local governments, EPA core water programs will:

- Develop recommended water quality criteria for protecting designated uses of water;
- Assist states, authorized tribes, and territories in adopting water quality standards that support designated uses;
- Establish pollution reduction targets for impaired waters;
- Improve water quality by financing traditional and nature-based wastewater treatment infrastructure;
- Develop national effluent guidelines that set a technology-based floor;
- Work with partners to protect and restore wetlands and coastal and ocean water resources;
- In cooperation with the Army Corps of Engineers, work with states and tribes interested in assuming the Clean Water Act Section 404 program;
- Prevent or reduce the discharge of pollutants;
- Update analytical methods that enable precise analysis; and
- Conduct monitoring and assessment so we know the status of the nation's waters.

EPA will partner with states and tribes to implement the National Aquatic Resource Surveys (NARS)[8] to provide nationally-consistent and scientifically-defensible assessments of America's waters. These surveys will support EPA and its partners in identifying actions to protect and restore water quality and in assessing whether these efforts are improving water quality over time.

External Factors and Emerging Issues

Water quality programs face challenges such as increases in nutrient loadings, nonpoint source[9] and stormwater runoff, and aging infrastructure. EPA is carefully examining the potential impacts of and solutions to these issues. Many important water quality problems have complex causes that can only be addressed through strategic use of federal, state, tribal, and local authorities. EPA will work closely with its partners to ensure that these issues are addressed in a coordinated and effective manner, particularly where water quality issues cross jurisdictional lines. The Agency will implement the National Aquatic Resource Surveys to support collection of nationally-consistent data to support these efforts.

EPA is working with external partners and stakeholders to address the barriers to and incentives for ways that technology and innovation can accelerate improvements in water infrastructure and protection and restoration of waters. Some key market opportunities for innovative practices and technology to help address current and emerging water resource issues are identified in EPA's Blueprint for Integrating Technology Innovation into the National Water Program.[10]

[8] Read more on NARS: https://www.epa.gov/national-aquatic-resource-surveys
[9] Read more about nonpoint source pollution: https://www.epa.gov/nps
[10] Read more about the technology blueprint: https://www.epa.gov/innovation/water-technology-innovation-blueprints

Objective 1.3 - Revitalize Land and Prevent Contamination:

Provide better leadership and management to properly clean up contaminated sites to revitalize and return the land back to communities.

Introduction

EPA works to improve the health and livelihood of all Americans by cleaning up and returning land to productive use, preventing contamination, and responding to emergencies. Challenging and complex environmental problems persist at many contaminated properties, including contaminated soil, sediment, surface water, and groundwater that can cause human health concerns.

One of EPA's top priorities is accelerating progress on Superfund sites. EPA recently convened a Superfund Task Force that identified 42 recommendations to streamline and improve the Superfund process. Over the next five years, these recommendations and other innovative ideas will be considered and applied to Superfund sites with priority given to addressing National Priority List (NPL) sites.[11]

EPA collaborates with other federal agencies, industry, states, tribes, and local communities to enhance the livability and economic vitality of neighborhoods. The Agency works with international, state, tribal, and local governments, and other federal agencies to achieve goals and help communities understand and address risks posed by releases of hazardous substances into the environment. EPA's efforts are guided by scientific data, tools, and research that inform decisions on addressing contaminated properties and preparing for and addressing emerging contaminants.

Strategic Measures

- SM-5 By September 30, 2022, make 255 additional Superfund sites ready for anticipated use (RAU) site-wide[12].
- SM-6 By September 30, 2022, make 3,420 additional brownfields sites RAU[13].
- SM-7 By September 30, 2022, make 536 additional Resource Conservation and Recovery Act (RCRA) corrective action facilities RAU[14].
- SM-8 By September 30, 2022, complete 56,000 additional leaking underground storage tank (LUST) cleanups that meet risk-based standards for human exposure and groundwater migration[15].

Strategies for Achieving the Objective

Cleaning Up Contaminated Sites

Over the next five years, EPA will focus special attention on the Administrator's top priority Superfund sites and will implement Superfund Task Force recommendations to accelerate the pace of cleanups and promote reuse, while addressing risks to human health and the environment. Cleanup actions can take

[11] Please see the Superfund Task Force Recommendations at https://www.epa.gov/sites/production/files/2017-07/documents/superfund_task_force_report.pdf

[12] By the end of FY 2017, 836 Superfund sites had been made RAU site-wide.

[13] By the end of FY 2017, 5,993 brownfield properties/sites had been made RAU.

[14] By the end of FY 2017, 1,232 RCRA corrective action facilities had been made RAU site-wide.

[15] By the end of FY 2017, 469,898 LUST cleanups had been completed.

from a few months for relatively straight-forward soil excavation or capping remedies to several decades for complex, large, area-wide groundwater, sediment, or mining remedies. NPL sites in the investigation stages will be expedited by developing strategies that apply new technologies and innovative approaches. NPL sites at which remedies already have been selected will be prioritized for faster completion and deletion from the NPL, as will sites that have been on the NPL for five years or longer without significant progress. Finally, the Agency will aim to accelerate cleanup by re-prioritizing some resources to focus on remedial actions, construction completions, ready-for-reuse determinations, and NPL site deletions.

In addition, EPA will work with communities to revitalize their brownfield sites and return them to productive use, advancing environmental and human health protection while stimulating economic development and job creation. EPA will award competitive grants to communities, states, and tribes to assess, clean up, and plan reuse of brownfield properties that are contaminated or perceived to be contaminated. To reduce risks from exposure to waste, consistent with RCRA, EPA or authorized states will oversee and manage cleanups by the owners or operators. There are currently 3,779 facilities subject to RCRA corrective action. EPA will support, along with its state and tribal partners, the cleanup of LUST sites and work to revitalize abandoned facilities. These cleanups protect people from exposure to contaminants, and can improve property values[16] and provide redevelopment opportunities.

Preparedness and Response

EPA prepares for the possibility of nationally-significant incidents and provides guidance and technical assistance to state, tribal, and local planning and response organizations to strengthen their preparedness. During an incident, EPA works to prevent, mitigate, or contain the release of chemical, oil, radiological, biological, or hazardous materials. The Agency will work with industry, states, tribes, and local communities to ensure national safety and security for responses. EPA homeland security research fills critical scientific and technological gaps, enhancing the Agency's ability to carry out its mandated national preparedness and emergency response and recovery obligations, and informing disaster response and guidance. EPA develops the tools, methods, and data needed to implement our environmental statutes effectively and support EPA and local emergency responders in characterizing chemical, biological, or radiological (CBR) contamination; assessing exposure and risks to human health; cleaning up impacted areas; and improving community resilience.

Preventing Contamination

With its state and tribal partners, EPA works to prevent releases of contamination, allowing the productive use of facilities and land and contributing to communities' economic vitality[17]. In partnership with tribes, the Agency directly provides training, compliance assistance, and inspection support to implement the updated underground storage tank (UST) regulations in Indian country. EPA also helps to prevent chemical releases by reviewing approximately 12,500 risk management plans (RMPs) and delivering RMP inspector training for federal and state inspectors. EPA seeks to prevent and prepare for accidental releases from chemical facilities that store hazardous chemicals by requiring chemical facilities that store a certain amount of hazardous chemicals to analyze the potential for accidental releases and possible consequences, develop an accident prevention program, and coordinate with communities to ensure that all are prepared to respond to a release.

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[16] A 2016 study found that high profile UST releases decrease nearby property values by 4% - 6%. Once cleanup is completed, nearby property values rebound by a similar margin. (Guignet, Dennis, Robin Jenkins, Matthew Ranson, and Patrick Walsh (2016), "Do Housing Values Respond to Underground Storage Tank Releases? Evidence from High-Profile Cases across the United States," US EPA National Center for Environmental Economics Working Paper, 2016-01, Washington, DC, March.) Available at: https://www.epa.gov/sites/production/files/2016-05/documents/2016-01.pdf

[17] This work will be done consistent with the government-wide National Response Framework and the National Disaster Recovery Framework.

EPA will update and improve the efficiency of the RCRA hazardous waste regulations to meet the needs of today's business and industry to ensure protective standards for managing hazardous waste. To prevent future environmental contamination and to protect the health of the estimated 20 million people living within a mile of a hazardous waste management facility,[18] EPA will support states to issue, update, or maintain RCRA permits for the approximately 20,000 hazardous waste units (such as incinerators and landfills) at these facilities. EPA also will issue polychlorinated biphenyl (PCB) cleanup, storage, and disposal approvals, since this work cannot be delegated to states or tribes.

EPA will improve and modernize hazardous waste transportation and tracking by implementing the Hazardous Waste Electronic Manifest Establishment Act, enacted on October 5, 2012. The fee-based e-Manifest system will provide better knowledge of waste generation and final disposition, enhanced access to manifest information, and greater transparency for the public about hazardous waste shipments. It will also reduce the burden associated with paper manifests by between 300,000 and 700,000 hours.[19]

As authorized in the Water Infrastructure Improvements for the Nation Act of 2016, EPA will help states develop plans, work to approve state permit programs for coal ash disposal, coordinate closely with the states on guidance for evaluating state permit programs, and implement a coal ash permit program in Indian country.

Over the next five years, EPA will provide technical assistance, assets, and outreach to industry, states, tribes, and local communities as part of its effort to ensure national safety and security for inland oil incidents. There are approximately 580,000 spill prevention, control, and countermeasure facilities, including a high-risk subset of 4,600 facility response plan facilities required to ensure that resources will be available to respond in the event of a discharge.

External Factors and Emerging Issues

A number of factors may delay cleanup timelines. For example, new scientific information (such as new toxicity information or a new analytical method) can call previous determinations into question. In general, cleanup standards have become more stringent over the years, and discovery of new pathways and emerging contaminants (such as vapor intrusion and per- and polyfluoroalkyl substances [PFAS]) have made remediation of remaining Superfund sites more challenging. Many of the Superfund sites remaining on the National Priorities List—including sediment, mining, and large groundwater sites—are large, contain multiple areas of contamination, and require more complex remediation efforts. Discovery of new sites, newly detected contamination, or emerging contaminants can also impact cleanup schedules.

Several external factors and emerging issues may affect the overall success of EPA's waste management and chemical facility risk programs. Rapidly changing technology, emerging new waste streams, and aging infrastructure present challenges, as does the complexity of issues and consideration of specific solutions for varying waste streams and situations.

The Agency recognizes that our state, tribal, local, and regional government partners face challenges in fully characterizing environmental outcomes associated with land. Over the next five years, EPA will emphasize the importance of engaging stakeholders at all levels and from all perspectives in making cleanup and land revitalization decisions.

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[18] U.S. EPA, Office of Land and Emergency Management Estimate. 2014. Data collected includes: (1) site information as of the end of FY 2011 from RCRAInfo, and (2) census data from the 2007-2011 American Community Survey.

[19] From a 2009 programmatic estimate, cited in *Hazardous Waste Management System; Modification of the Hazardous Waste Manifest System; Electronic Manifests; Final Rule.* 40 CFR § 260, 262, 263, 264, 265, and 271.

Objective 1.4 - Ensure Safety of Chemicals in the Marketplace:

Effectively implement the Toxic Substances Control Act, and the Federal Insecticide, Fungicide, and Rodenticide Act, to ensure new and existing chemicals and pesticides are reviewed for their potential risks to human health and the environment and actions are taken when necessary.

Introduction

Chemicals and pesticides released into the environment as a result of their manufacture, processing, use, or disposal can threaten human health and the environment. EPA gathers and assesses information about the risks associated with chemicals and pesticides and implements risk management strategies when needed. EPA's research efforts will help advance the Agency's ability to assess chemicals more rapidly and accurately.

In 2016, TSCA was amended by the Frank R. Lautenberg Chemical Safety for the 21st Century Act. The amendments give EPA significant new, as well as continuing, responsibilities for reviewing chemicals in or entering commerce to prevent unreasonable risks to human health and the environment, including unreasonable risks to potentially exposed or susceptible subpopulations. Proper implementation, as Congress intended, of the TSCA amendments is one of EPA's top priorities.

The Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) is the primary federal law governing oversight of pesticide manufacture, distribution, and use in the United States. FIFRA requires EPA to register pesticides based on a finding that they will not cause unreasonable adverse effects on people and the environment, taking into account the economic, social, and environmental costs and benefits of the use of the pesticide. Each time the law was amended, Congress strengthened FIFRA's safety standards while continuing to require consideration of pesticide benefits.

In addition to FIFRA, the Federal Food, Drug, and Cosmetic Act (FFDCA) governs the maximum allowable level of pesticides in and on food grown and sold in the United States. The legal level of a pesticide residue on a food or food item is referred to as a tolerance. FFDCA requires that the establishment, modification, or revocation of tolerances be based on a finding of a "reasonable certainty of no harm." When evaluating the establishment, modification, or revocation of a tolerance, EPA tries to harmonize the tolerance with the maximum residue levels (MRLs) set by other countries to enhance the trade of agricultural commodities.

Strategic Measures

- SM-9 By September 30, 2022, complete all EPA-initiated TSCA risk evaluations for existing chemicals in accordance with statutory timelines[20].

- SM-10 By September 30, 2022, complete all TSCA risk management actions for existing chemicals in accordance with statutory timelines[21].

- SM-11 By September 30, 2022, complete all TSCA pre-manufacture notice final determinations in accordance with statutory timelines[22].

[20] There is no baseline for this measure, as the program is operating under new statutory authority.

[21] There is no baseline for this measure, as the program is operating under new statutory authority.

[22] Baseline is 11.7% of determinations made within 90 days in FY 2017.

- SM-12 By September 30, 2022, complete all cases of Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)-mandated decisions for the pesticides registration review program[23].

- SM-13 By September 30, 2022, reduce the Pesticide Registration Improvement Act (PRIA) registration decision timeframe by an average of 60 days[24].

Strategies for Achieving the Objective

Chemicals

Over the next five years, EPA will focus on meeting the statutory requirements and mandatory deadlines of the amended TSCA and ensuring that the reviews are efficient, effective, and transparent to EPA's stakeholders. EPA will ensure that decisions are based on science, are transparent, use methods and tools that are based on the weight of scientific evidence, are consistent with the best available scientific information, and are reasonable and consistent with the intended use of the information.

Under the chemical data reporting (CDR) rule, EPA collects basic exposure-related information from manufacturers (including importers) on the types, quantities, and uses of chemical substances produced domestically or imported into the United States. Since the enactment of TSCA in 1976, many new chemicals have entered commerce following review by EPA under the TSCA new chemicals program. Once in commerce, these chemicals are considered existing chemicals in commerce. The amended TSCA provides a framework for making progress in understanding and managing the risks associated with existing chemicals to prevent unreasonable risk posed by their manufacturing, processing, distribution, use or disposal. The Act requires EPA to identify high- and low-priority existing chemicals and evaluate high-priority chemicals against a new risk-based safety standard. By December 2019, EPA must complete risk evaluations for the first ten high-priority chemicals, ramp up the risk evaluation process so that 20 high-priority chemicals are under evaluation at all times, and identify 20 low-priority chemicals which will not undergo further evaluation at this time. Chemical risk evaluations of existing chemicals must be completed within three years. Transparency and stakeholder engagement are vital parts of the process, as they help inform EPA's prioritization and risk evaluation of existing chemicals.

The Agency has two years to address unreasonable risks identified as warranted for action by the findings of the chemical risk evaluations[25]. Risk management actions may include prohibiting, restricting, or modifying the manufacture, processing, distribution in commerce or commercial use, modifying the labeling, recordkeeping, and other restrictions.

For new chemicals, EPA reviews and takes action on approximately 1,000 new chemical notices -- including exemption notices—submitted by industry annually, including pre-manufacture notices (PMNs), to ensure that the chemicals are not likely to pose unreasonable risk before being allowed to commercialize. To prevent such risk, EPA may establish risk reduction/management requirements through the new chemical review process to protect workers, consumers or the environment. The 2016 TSCA amendments created additional new requirements for positive determinations of chemical safety, which have resulted in changes to EPA's assessment process for new chemicals. In particular, for each new chemical notice, EPA now has 90 days to make an affirmative determination of safety based on

[23] Baseline is 251 decisions completed by the close of FY 2017 out of the known universe of 725.

[24] Baseline is an average timeframe of 655 days (range: 93-2,086 days) for PRIA decisions for 68 new active ingredients completed in FY 2015-2017.

[25] TSCA section 6(c)(1) requires final regulatory action within 2 years of publication of the final risk evaluation but allows for an extension to this deadline "for not more than 2 years."

whether the chemical substance will present, may present, or is not likely to present an unreasonable risk to human health or the environment, or that the available information is insufficient to enable the Agency to make any of the above determinations. All four of these outcomes constitute final determinations on pre-manufacture notices and thus count toward EPA's strategic target of completing 100% of such determinations within statutory timelines. Under the TSCA amendments, if EPA makes an "insufficient information" determination, the Agency will work with the submitter to conduct testing needed to make a determination or will impose restrictions on the substance that prevent exposure from occurring.

EPA will protect legitimate claims of confidentiality of the identity of chemicals. With limited exceptions provided by statute, the Agency will review within 90 days all chemical identity confidential business information (CBI) claims requiring substantiation under TSCA Section 14(c)(3) and a representative subset, comprising at least 25 percent, of all other CBI claims. Timely review of CBI claims will help to increase transparency of chemical data. Additionally, EPA is developing guidance required by TSCA, as amended, to address how states, tribes, and medical professionals in an emergency situation may gain access to CBI information.

The Agency uses a variety of tools and approaches to assess, prevent, and reduce chemical releases and exposures, and empowers stakeholders by ensuring access to chemical data and other information and expertise. EPA annually publishes the Toxics Release Inventory (TRI), a public database that contains release and other waste management information (e.g., recycling) and pollution prevention data on over 650 toxic chemicals from approximately 20,000 industrial and federal facilities.

Pesticides

EPA is responsible for licensing (registering) and periodically reevaluating (registration review) pesticides to protect consumers, pesticide users, workers who may be exposed to pesticides, children, and other sensitive populations, while considering the benefits associated with the use of the pesticide. EPA seeks public input on all pesticide reevaluations; all new active ingredients; first food uses; and the establishment, modification, or revocation of tolerances. For example, the rules governing the registration review program[26] typically provide for three distinct comment periods at various stages of the review process. In making pesticide decisions, the Agency often seeks input from stakeholders to address specific information, such as real-world use patterns and benefits to the user community.

EPA works with other federal, state, and tribal agencies, trade organizations, industry, and non-governmental organizations to ensure the effective and safe use of pesticides. EPA also has long provided financial support and expertise to states and tribes so that they can provide training, education, and outreach to pesticide applicators about the safe, proper, and legal use of pesticides. States and tribes work with farmers, businesses, and public agencies to protect human health and the environment and serve as a critical part of job training and business growth in rural areas.

External Factors and Emerging Issues

The amended TSCA provides EPA the authority to collect user fees designed to defray 25 percent of the Agency's costs to administer TSCA Sections 4, 5, 6, and 14. While EPA is directed by the statute to design the fees to collect 25 percent of the costs of administering these sections, it has no control over exactly how much revenue the fees will generate. That will be determined in large part by how the fee-paying community responds to the new fees in terms of their number of fee-related submissions or requests.

[26] 40 CFR 155 – Registration Standards and Registration Review

New pests and disease vectors carried by pests create challenges for managing pesticides. EPA works closely with public health officials, researchers, and agricultural experts to identify emerging pests; and, with industry, to expeditiously register pesticides that address issues while ensuring pesticide safety. Assessing and appropriately addressing risks is complex. The Agency must determine safe, effective methods of pesticide use, weighing differing risks for humans and ecosystems. For example, one pesticide may have lower risks for humans than do other pesticides, but have increased risks for pollinators or endangered species. Similarly, a pesticide may have risks for humans, but may be appropriate to fight mosquitos that carry diseases that also pose risks to humans.

EPA continues to conduct education and outreach with tribes. One challenge is ensuring that the flow of information on the safe use of pesticides reaches all federally-recognized tribes across the country, and comes in forms that result in protective actions on the ground.

Goal 2 – Cooperative Federalism: Rebalance the power between Washington and the states to create tangible environmental results for the American people.

The idea that environmental protection is a shared responsibility between the states, tribes, and the federal government is embedded in our environmental laws, which in many cases provide states and tribes the opportunity and responsibility for implementing environmental protection programs. More than 45 years after the creation of EPA and the enactment of a broad set of federal environmental protection laws, most states, and to a lesser extent territories and tribes, are authorized to implement environmental programs within their jurisdictions in lieu of EPA-administered federal programs. Specifically, states have assumed more than 96 percent of the delegable authorities under federal law.[27] EPA retains responsibility for directly implementing federal environmental programs in much of Indian country where eligible tribes have not received delegable authorities. There are also programs that by statute may not be delegated to the states or tribes. Recognizing these evolving responsibilities, EPA headquarters and regions will facilitate constructive dialogue with states and tribes to ensure maximum utilization of resources. EPA will adapt its practices to reduce duplication of effort with authorized states and tribes, and tailor its oversight of delegated programs.

Cooperative federalism – the relationship between states, tribes and EPA – is not just about who makes decisions, but about how decisions are made and a sense of shared accountability to provide positive environmental results. EPA understands that improvements to protecting human health and the environment cannot be achieved by any actor operating alone, but only when the states, tribes, and EPA, in conjunction with affected communities, work together in a spirit of trust, collaboration, and partnership. Effective environmental protection is best achieved when EPA and its state and tribal partners work from a foundation of transparency, early collaboration – including public participation – and a spirit of shared accountability for the outcomes of this joint work. This foundation involves active platforms for public participation, including building the capacity of the most vulnerable community stakeholders to provide input. With these public participation opportunities, the beneficiaries of environmental protection – the American people – will be able to more meaningfully engage through their communities, their local governments, and their state and tribal governments. Including the public's voice, particularly the voices of the most vulnerable to environmental and public health challenges among us, in EPA's policy, regulatory, and assistance work is essential to meeting their needs as the Agency implements its statutory responsibilities.

EPA also recognizes that meeting the needs of states, tribes, local governments, and communities, and achieving environmental improvements cannot be done in isolation from economic growth. Opportunities for prosperous economic growth and clean air, water, and land are lost without effective infrastructure investments that align with community needs. This is especially true for infrastructure investments that repair existing systems, support revitalization of existing communities and buildings, take advantage of existing roads, and lead to the cleanup and redevelopment of previously-used sites and buildings. Currently, there is a need for significant infrastructure investments. EPA will play a role in meeting this need by aligning its relevant programs to catalyze other resources, supporting beneficial infrastructure investments, and meeting community needs for thriving economies and improved environmental and human health outcomes.

[27] Environmental Council of the States (ECOS) Paper, "Cooperative Federalism 2.0," June 2017

Objective 2.1 - Enhance Shared Accountability:

Improve environmental protection through shared governance and enhanced collaboration with state, tribal, local, and federal partners using the full range of compliance assurance tools.

Introduction

In the spirit of cooperative federalism, EPA and its partners have made enormous progress in protecting air, water, and land resources. EPA recognizes that states and tribes vary in the environmental challenges that they face due to variations in geography, population density, and other factors. EPA will maximize the flexibilities provided by law to take each state's unique situation into account when making regulatory and policy decisions. EPA directly implements the majority of federal environmental programs in Indian country. The Agency actively works with tribes to develop their capacity to administer environmental programs and to enable tribes that choose to implement federal environmental laws and programs for their lands. The unique relationship among EPA and its co-regulators is the foundation of the nation's environmental protection system; each organization fulfills a critical role based on its expertise, abilities, and responsibilities in protecting and improving human health and the environment.

EPA recognizes the advances states and tribes have made in implementing environmental laws and programs. This Administration will undertake a series of initiatives to rethink and assess where we are and where we want to be with respect to shared governance. These initiatives will clarify the Agency's statutory roles and responsibilities and tailor state and tribal oversight to maximize our return on investment and reduce burden on states and tribes, while ensuring continued progress in meeting environmental laws.

In addition, EPA, with its state, tribal, and local partners, ensures consistent and fair enforcement of federal environmental laws and regulations. The Agency works jointly with its co-regulators to protect human health and the environment, using a full set of compliance assurance tools, such as compliance assistance and monitoring; electronic reporting; traditional enforcement; grants to states and tribes; and tribal capacity building. EPA is building on progress made using E-Enterprise for the Environment, a platform for transformative change that operationalizes cooperative federalism principles. EPA's E-Enterprise partnership with states and tribes modernizes the way we do the business of environmental protection.

Strategic Measures

- SM-14 By September 30, 2022, increase the number of grant commitments achieved by states, tribes, and local communities[28].

- SM-15 By September 30, 2022, increase the use of alternative shared governance approaches to address state, tribal, and local community reviews[29].

[28] Baseline will be determined in FY 2018.
[29] Baseline will be determined in FY 2018.

Strategies for Achieving the Objective

Shared Governance

To develop a future model of shared governance that takes into account the progress states and tribes have made in protecting human health and the environment, the Agency will undertake an analysis of EPA's statutory roles and responsibilities to determine what we have to do and assess what we want to do in light of priorities. The Agency will work with states and tribes to find alternative approaches to shared governance, seeking to provide flexibility and streamline oversight of state and tribal programs. As part of this process, the Agency will seek to understand which approaches currently are working well for state, tribal and local co-regulators. EPA will pilot new approaches to oversight (e.g., permit reviews) where we have the legal flexibility to do so and streamline those processes by which EPA reviews and approves state and tribal actions. EPA will continue to work with states and tribes through E-Enterprise, focused on how we work and plan together, agree on priorities, and allocate roles and responsibilities to update processes and programs. Through shared governance – engaging early and meaningfully with states and tribes – the Agency will use E-Enterprise to deliver streamlined processes as well as accessible, reliable information and data that benefit co-regulators and the regulated community.

The National Environmental Performance Partnership System (NEPPS) has long served as a model for advancing cooperative federalism by providing the flexibility needed to address the unique needs of individual states and tribes to achieve the best environmental results. NEPPS is a performance-based approach for organizing working relationships with states and many tribes, providing specific benefits, such as greater flexibility to assess environmental conditions, shared priorities, and strategically leveraged resources, thus improving cooperative federalism, shared governance, and shared accountability. EPA will work with states and tribes to strengthen cooperative federalism principles through NEPPS, and intends to make NEPPS training available for state and tribal stakeholders.

EPA will work closely with states and tribes on NEPPS, Performance Partnership Grants (PPGs), and related policies. PPGs are a financial tool that allows states and tribes to combine separate "streams" of categorical grant funding, from across 20 eligible categorical grants, into one multi-program grant with a single budget. The goal of the review is to understand PPG utilization and outline a course of action addressing the challenges, leveraging lessons learned and progress achieved over the last 22 years. The intent is to provide states and tribes the flexibility to maximize human health and environmental protection achieved by the funds; further enhance the federal, state, and/or tribal partnership; and promote the goals of NEPPS.

EPA will respect the important role governors play in cooperative federalism and will seek their views and perspectives on compliance assistance and other opportunities to improve EPA-state partnerships. In addition, the Agency will work to strengthen intergovernmental consultation methods to engage stakeholders and hear diverse views on the impacts of prospective regulations.

Local governments also have a unique relationship with EPA as partners and often as innovative problem solvers. EPA works with local governments to build stronger and more robust partnerships and bring local concerns forward into Agency decision making. As part of these efforts, EPA seeks advice from the Local Government Advisory Committee (LGAC), a chartered policy committee comprising elected and appointed local officials, on the impacts of the Agency's regulations and policies on local governments.

Consistent with the 1984 Indian Policy and EPA Policies on consultation and treaty rights[30], EPA will work on a government-to-government basis to build tribal capacity to implement federal programs through delegations, authorizations, and primacy designations to enable tribes to meaningfully participate in the Agency's policy making, standard setting, and direct implementation activities under federal environmental statutes[31]. EPA will work with individual tribes to develop and implement an EPA-Tribal Environmental Plan (ETEP), a joint planning document for achieving stronger environmental and human health protection in Indian country. ETEPs identify tribal, EPA, and shared priorities, and the roles and responsibilities for addressing those priorities.

EPA will focus its direct implementation efforts on areas of high need for human health or environmental protection, including programs identified in the ETEP for which tribes are not eligible, as well as those for which tribes do not currently anticipate seeking delegation, authorization, or primacy. In carrying out its direct implementation activities, EPA will work closely with tribes to develop tribal capacity for programs for which they do not anticipate seeking delegation, authorization, or primacy. EPA will also encourage tribes to participate in policy making and to assume appropriate partial roles in the implementation of programs, including through the use of Direct Implementation Tribal Cooperative Agreements (DITCAs) or other agreements, as available.

Compliance Assurance

Over the next five years, the Agency will look for cost-effective ways to enhance the compliance assurance tool box in collaboration with its state, tribal, local, federal, and industry partners. For example, the E-Enterprise Web Portal offers a platform or gateway for making shared services available to states, tribes, and EPA to transact business (e.g., e-permitting and reporting). It also provides information for the regulated community (e.g., compliance assistance information). Tools and services are designed to enhance efficiency, reduce burden on the regulated community, and improve environmental outcomes. EPA will expand its compliance assistance work by continuing to partner with third-party organizations and federal agencies to support the 17 existing web-based, sector-specific compliance assistance centers[32] and developing new centers. In general, an expanded and modernized compliance assurance tool box will enhance EPA's ability to tailor compliance assurance approaches to the differing needs and challenges among states and regulated entities. EPA is also working closely with states and tribes to develop new compliance tools and approaches to make programs more effective and efficient in promoting compliance and remedying violations. Some of the Agency's ongoing collaborative efforts with the Environmental Council of the States (ECOS) include[33] producing webinars to help identify new compliance approaches that EPA could pilot and evaluate, increasing availability of training, and preparing for advances in pollution monitoring technology[34].

A key component of EPA's overall compliance assurance program is compliance monitoring. Compliance monitoring allows the regulatory agencies to detect noncompliance and promote compliance with the nation's environmental laws. Effective targeting of compliance monitoring plays a central role in

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[30] "EPA Policy for the Administration of Environmental Programs on Indian Reservations," "EPA Policy on Consultation and Coordination with Indian Tribes," and "EPA Policy on Consultation and Coordination with Indian Tribes: Guidance for Discussing Tribal Treaty Rights."

[31] The Tribal Consultation Opportunities Tracking System (TCOTS) publicizes upcoming and current EPA consultation opportunities for tribal governments and can be located here: https://TCOTS.epa.gov.

[32] For more information on compliance assistance centers, see https://www.epa.gov/compliance/compliance-assistance-centers.

[33] For more information on OECA's collaboration with ECOS via E-Enterprise, see Article: Advanced Monitoring Technology: Opportunities and Challenges. A Path Forward for EPA, States, and Tribes.

[34] For more information on a broader range of collaborations between OECA and ECOS, see Compendia of Next Generation Compliance Examples in Water, Air, Waste, and Cleanup Programs.

achieving the goals EPA has set for protecting human health and the environment. EPA, state, and tribal inspectors often provide regulated entities with compliance assistance during the inspection process. On a national level, EPA works closely with individual states, tribes, and state and tribal associations to develop, modernize, and implement national compliance monitoring strategies to ensure a level playing field for regulated entities across the country. EPA principally focuses compliance monitoring activities, such as field inspections, electronic reporting, and data analysis tools, for those programs that are not delegated to states and tribes. The Agency provides monitoring, program evaluations, and capacity building to support and complement authorized state, tribal, and local government programs. The Agency will work with its state and tribal partners to enhance compliance monitoring tools and increase the use of Lean practices. Through E-Enterprise for the Environment, EPA, states, tribes, and territories will collaborate to develop smart mobile tools to enhance the effectiveness and efficiency of state, tribal, and EPA inspectors, and support advanced monitoring technology.

International Partnerships

To achieve the Agency's domestic environmental and human health objectives, the EPA will work with international partners to address international sources of pollution, as well as the impacts of pollution from the United States on other countries and the global environment. Pollution impacts air, water, food crops, and food chains, and can accumulate in foods such as fish. EPA efforts will include working with international partners to strengthen environmental laws and governance to more closely align with U.S. standards and practices and to help level the playing field for U.S. industry.

External Factors and Emerging Issues

Advances in the field of information technology and social science research may offer innovative ways to promote compliance. EPA is partnering with states to help prepare for and use these technologies and research to carry out our statutory obligations. The Agency also is working with the academic community on additional research to develop innovation in promoting compliance. EPA also will work closely with ECOS; the National Tribal Caucus; state and tribal program associations; and individual states, tribes, and territories to implement the Administrator's vision for cooperative federalism. In partnership with ECOS, EPA plans to develop principles and best practices for enhancing collaboration among EPA and states on compliance assurance work. In addition, EPA will continue to work with ECOS, the Association of State and Territorial Solid Waste Management Officials (ASTSWMO), and individual states to develop an integrated hardware/software solution that supports documenting and conducting inspections.

Objective 2.2 - Increase Transparency and Public Participation:

Listen to and collaborate with impacted stakeholders and provide effective platforms for public participation and meaningful engagement.

Introduction

EPA will strengthen its community-driven approach, which emphasizes public participation to better partner with states, tribes, and communities and to maximize the support and resources of the entire Agency to create tangible environmental results. The Agency will deploy its collective resources and expertise to collaborate with states, tribes, and communities and support locally-led, community-driven solutions to improved environmental protection and economic growth. EPA will increase transparency with industry, environmental groups, and other stakeholders, and will facilitate public participation, emphasizing cooperation and collaboration, especially at the early stages of Agency actions. This will provide a more comprehensive understanding of community needs.

The Agency also will coordinate better across its programs and with federal partners to ensure mutual efforts are aligned. EPA will include consideration of vulnerable groups and communities in decisions, and will reflect community needs in its actions and investments, recognizing that the needs of rural communities may not be the same as urban areas. Increasing transparency and public participation in EPA's work with other agencies will enhance the Agency's ability to partner with states, tribes, and local governments and increase responsiveness to the needs of their most vulnerable communities. EPA will serve as a convener and leverage resources with new and existing partners to deliver services more efficiently and effectively. The Agency also will engage with regulated entities to identify reforms to more efficiently and effectively meet the nation's environmental goals.

Strategic Measure

- SM-16 By September 30, 2022, eliminate the backlog and meet statutory deadlines for responding to Freedom of Information Act (FOIA) requests[35].

Strategies for Achieving the Objective

Over the next five years, EPA will meet community needs through public participation and will build community capacity through grants, technical assistance, partnering, and meaningful engagement. The Agency will leverage recommendations provided by federal advisory committees, such as the National Environmental Justice Advisory Council (NEJAC), LGAC, and Children's Health Protection Advisory Committee (CHPAC), and focus on partnerships representing vulnerable populations, such as youth, the elderly, and low-income communities. Specifically, the Agency will engage with the focus communities identified by EPA regions to understand each community's goals and identify its environmental priorities and needs, recognizing that rural communities and more urban areas may have different priorities.

EPA will continue to provide loans and grants to states and tribes to improve infrastructure. Given that investment in infrastructure is necessary for economic growth and environmental protection and that EPA investments are catalytic to both, the Agency's efforts will be used to support private and public investment in economic revitalization and improved environmental outcomes across the country. This requires that EPA strengthen its infrastructure and community assistance programs (e.g., the clean water SRF, drinking water SRF, Water Infrastructure Finance and Innovation Act, environmental justice,

[35] Baseline will be determined in FY 2018.

community revitalization, and brownfields area-wide planning grant programs) to better align EPA investments with each other and with other federal investments in pursuit of economic revitalization and improved environmental outcomes. At the same time, EPA will ensure that it is serving disadvantaged communities, leveraging private investment to improve the economy, and protecting human health and the environment.

EPA will work in a focused manner to make infrastructure and public health protection investments in communities with and through partners such as states and tribes. To further integrate and implement community environmental considerations within EPA programs, the Agency will create tools to facilitate incorporation of community understanding, needs, and concerns across program activities, and advance more systematic incorporation of existing tools and needs, such as use of the Environmental Justice Screening and Mapping Tool (EJSCREEN) and EnviroAtlas. EPA will develop a cross-Agency communities team to lead regional involvement in and resourcing of community-based environmental work through a fully-integrated resource platform.

The Agency will coordinate across the federal government – EPA regions partnering with federal agencies in focus communities – to deliver services more efficiently and effectively. EPA will utilize such partnerships to leverage resources and expertise from across EPA and a range of outside partners to advance economic revitalization through the environmental and health goals of communities. EPA will look for opportunities for early engagement with state, local, and tribal co-regulators through existing advisory committees and other forums. The Agency will also continue leadership of and involvement in the Office of Management and Budget (OMB) Community Solutions Taskforce to better access and leverage resources from across federal agencies, and will strengthen coordination with the Interagency Working Group on Environmental Justice to better integrate EPA priorities and support and engage communities. In addition, EPA will support and align its work with the activities and priorities of the President's Task Force on Environmental Health Risks and Safety Risks to Children.

EPA will work on the E-Enterprise Web Portal's Assistance Gateway, which provides tools and resources for communities to facilitate two-way communication between the public and environmental agencies. The Agency will determine how EPA, states, and tribes can most effectively harness and benefit from the recent, rapid development of environmental monitoring technologies that are smaller, more portable, and less expensive than traditional methods. EPA will pursue innovative technologies without compromising the accuracy of the information collected. In consultation with state, tribal, and local partners, EPA will make monitoring data publicly available, providing context and relevancy. EPA will support the E-Enterprise Assistance Gateway that will enhance collaboration and communication with communities. The Agency will seek to increase the number and type of public participation platforms it has to ensure that the public can meaningfully participate in all of EPA's work—including policy making, regulatory development, outreach, education, and community engagement.

EPA will also focus on reducing the FOIA backlog the Agency has built up over the years, and enhancing the FOIA process. The complexity and volume of electronic documents required to be searched, collected, and reviewed has increased over time. The Agency will ensure that it can support the timely searching and collection of electronically-stored information for purposes of responding to FOIA requests and other information needs in a cost-effective, sustainable manner. This should not only help the Agency provide the public information requested, but also reduce the fees and lawsuits the Agency incurs from missing FOIA response deadlines.

External Factors and Emerging Issues

Resources are critical to the expansion of technical assistance directed at communities and state, tribal, and local government partners that support community-focused engagement and collaboration. Staff must

be available for a wide variety of implementation activities such as direct community engagement and support, intra- and inter-agency coordination, and partnering effectively with states and tribes.

In addition, the challenges of coordinating across offices within EPA and with other federal agencies can inhibit the identification and delivery of creative solutions and services that can lead to tangible results for communities and a more effective leveraging of government resources. EPA recognizes the need to communicate successes and achievements related to this work, both to market its effectiveness and to teach new partners and practitioners how to replicate successful models and approaches.

Goal 3: Rule of Law and Process: Administer the law, as Congress intended, to refocus the Agency on its statutory obligations under the law.

EPA will seek to reinvigorate the rule of law and process as it administers the environmental laws as Congress intended, and to refocus the Agency on its basic statutory obligations. To accomplish this, EPA will work cooperatively with states and tribes to ensure compliance with the law, as well as to create consistency and certainty for the regulated community. Of course, EPA will take civil or criminal enforcement action against violators of environmental laws.

A robust enforcement program is critically important for addressing violations and promoting deterrence, and supports the Agency's mission of protecting human health and the environment. Ensuring compliance with the law also ensures consistency and certainty for the regulated community so it has a complete understanding of the impact of proposed actions on human health, the environment, and the economy, and a clear path and timeline to achieve that compliance. EPA's policies and rules will reflect common sense, consistent with the Agency's statutory authorities, and provide greater regulatory and economic certainty for the public. EPA will enforce the rule of law in a timely manner and take action against those that violate environmental laws to the detriment of human health or the environment.

One of EPA's highest priorities must be to create consistency and certainty for the regulated community. Consistency in how the laws and regulations are applied across the country is part of that process. EPA will undertake a variety of efforts to ensure that consistency in application of laws and regulations is evaluated and addressed, while respecting the unique circumstances of each state and tribe. EPA recognizes the importance of applying rules and policies consistently as well as creating certainty by meeting the statutory deadlines that are required for EPA's actions. The rule of law must also be built on the application of robust science that is conducted to help the Agency meet its mission and support the states and tribes in achieving their environmental goals. Research, in conjunction with user-friendly applications needed to apply the science to real-world problems, will help move EPA and the states forward in making timely decisions based on science.

Carrying out this goal requires that EPA improve the efficiency of its internal business and administrative operations. First, EPA's business operations, specifically the vast permitting processes established by the different environmental statutes, are key to ensuring economic growth and human health and environmental protection. Over the next five years, EPA will modernize its permitting practices to increase the timeliness of reviews and decisions, while working more collaboratively, transparently, and cost effectively to achieve the Agency's mission. The second part of improving internal operations includes reducing EPA's overhead and creating more efficient and effective administrative processes (e.g., acquisition) that allow EPA to accomplish its core mission work.

Objective 3.1 - Compliance with the Law:

Timely enforce environmental laws to increase compliance rates and promote cleanup of contaminated sites through the use of all of EPA's compliance assurance tools, especially enforcement actions to address environmental violations.

Introduction

For decades, the protections mandated by federal environmental laws have been essential to the growth of American prosperity. Noncompliance with those laws diminishes shared prosperity and unfairly tilts the field of economic competition in favor of those that skirt the law. To carry out its mission to protect human health and the environment, EPA, in collaboration with state and tribal partners, relies on a strong national compliance assurance and cleanup enforcement program. An effective enforcement program is key to ensuring that the ambitious goals of the nation's environmental statutes are realized.

EPA's enforcement priorities remain focused on cleaning up hazardous waste sites and addressing the most significant violations consistent with EPA's statutory authorities. EPA takes the overwhelming majority of its enforcement actions in programs that are: (1) not delegable to a state or tribe; (2) in states or tribes that have not sought authorization to implement a delegable program; or (3) in states or tribes that do not have the resources or expertise, or that seek assistance from the Agency—and these actions are taken in coordination with the states and tribes. For states and tribes with authorized programs, EPA, states, and tribes share enforcement responsibility, with primary enforcement responsibility residing with the state[36] or tribe. Further, EPA is responsible for addressing violations that occur in Indian country in the absence of an approved program.

Even in states or tribes authorized to implement a program, EPA serves a critical role in addressing serious national noncompliance problems, such as those affecting multiple states or tribes, and in serving as a backstop for instances when a state or tribe does not timely or appropriately address serious noncompliance. EPA also may assist a state or tribe in remedying noncompliance problems when the state or tribe is unable to address the problem because it lacks the capability or resources, such as in actions against other federal or state agencies. For some serious violations, the Agency and states or tribes may decide that the best approach is a joint enforcement action. Further, EPA will take immediate action when there is an environmental emergency, such as an oil spill or chemical accident. Through the State Review Framework (SRF), EPA periodically reviews authorized state compliance monitoring and enforcement programs, using criteria agreed upon by states, to evaluate performance against national compliance monitoring or enforcement program standards. When states do not achieve standards, the Agency works with them to make progress. However, EPA may also take a lead implementation role when authorized states have a documented history of failure to make progress toward meeting national standards.

In all of its work, EPA's enforcement program strives to address noncompliance in an efficient and timely manner, applying a broad range of enforcement and compliance tools to achieve the goal of reducing noncompliance.

[36] See e.g., ECOS Resolution 98-9, U.S. EPA Enforcement in Delegated States (revised September 28, 2016), describing the EPA and state roles in enforcement in authorized states: "WHEREAS, U.S. EPA and the States have bilaterally developed policy agreements which reflect those roles and which recognize the primary responsibility for enforcement action resides with the States, with U.S. EPA taking enforcement action principally where the State requests assistance, is unwilling or unable to take timely and appropriate enforcement actions, or in actions of national interest, or in actions involving multiple state jurisdictions."

Strategic Measures

- SM-17 By September 30, 2022, reduce the average time from violation identification to correction[37].
- SM-18 By September 30, 2022, increase the environmental law compliance rate[38].

Strategies for Achieving the Objective

Civil Enforcement

The overall goal of EPA's civil enforcement program is to maximize compliance with the nation's environmental laws and regulations to protect human health and the environment. The Agency works closely with the U.S. Department of Justice, states, tribes, territories, and local agencies to ensure consistent and fair enforcement of all major environmental statutes. EPA will seek to strengthen environmental partnerships with its state and tribal partners, encourage regulated entities to correct violations rapidly, ensure that violators do not realize an economic benefit from noncompliance, and pursue enforcement to deter future violations.

EPA recognizes that significant environmental progress has been made over the years, much of it due to enforcement efforts by EPA, states, tribes, and local communities. To maximize compliance over the next five years, the Agency will refocus efforts toward areas with significant noncompliance issues and where enforcement can address the most substantial impacts to human health and the environment. EPA also recognizes the role of states and tribes as the primary implementers, where authorized by EPA to implement the federal statutes, and will focus compliance assurance and enforcement resources on direct implementation responsibilities, addressing the most significant violations, and assisting authorized states and tribes in meeting national standards. For example, the Agency will provide expertise and implement compliance monitoring strategies that will ensure a level playing field. EPA is responsible for direct implementation for programs that are not delegable or where a state or tribe has not sought or obtained the authority to implement a particular program (or program component). Examples of non-delegable programs include the CAA mobile source program, pesticide labeling and registration under FIFRA, virtually all compliance assurance and enforcement in Indian country, enforcement of the federal Superfund cleanup program, and enforcement of non-delegated portions of various other laws, including RCRA, the CWA, and stratospheric ozone under the CAA. EPA also will pursue enforcement actions at federal facilities where significant violations are discovered, will ensure that federal facilities are held to the same standards as the private sector, and will provide technical and scientific support to states and tribes with authorized programs.

Criminal Enforcement

EPA's Criminal Enforcement program enforces the nation's environmental laws through targeted investigation of criminal conduct committed by individual and corporate defendants that threaten public health and the environment. Over the next five years, EPA will collaborate and coordinate with the U.S. Department of Justice and state, tribal, and local law enforcement counterparts to ensure that the Agency

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[37] Baseline will be determined in FY 2018.

[38] This concept will be piloted by focusing initially on increasing the percentage of Clean Water Act (CWA) National Pollutant Discharge Elimination System (NPDES) permittees not in significant noncompliance with their permit limits to 88% from a baseline of 76% from Q4 FY 2016 to Q3 FY 2017. Other program areas may be included in this strategic measure during the FY 2018-2022 timeframe.

responds to violations as quickly and effectively as possible. EPA enforces the nation's environmental laws through targeted investigation of criminal conduct committed by individual and corporate defendants that threatens human health and the environment. The Agency plays a critical role across the country since states and tribes have limited capacity to prosecute environmental crimes. The Agency will focus resources on the most egregious environmental cases (i.e., those presenting significant human health and environmental impacts).

Cleanup Enforcement

Through the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA, or Superfund), EPA will facilitate prompt site cleanup and use an "enforcement first" approach that maximizes the participation of liable and viable parties in performing and paying for cleanups. The Agency will protect communities by ensuring that potentially responsible parties (PRPs) conduct cleanups at Superfund sites, preserving federal taxpayer dollars for sites where there are no viable contributing parties, and by recovering costs if the EPA expends Superfund-appropriated dollars to clean up sites. EPA also will address liability concerns that can be a barrier to potential reuse. Addressing the risks posed by Superfund sites and returning them to productive use strengthens the economy and spurs economic growth.

Over the next five years, EPA will focus its resources on the highest priority sites, particularly those that may present an immediate risk to human health or the environment. In accordance with the Superfund Task Force Report, the Agency will improve and revitalize the Superfund program to ensure that contaminated sites across the country are remediated to protect human health and the environment, and returned to beneficial reuse as expeditiously as possible. At federally-owned sites, EPA will also focus on resolving formal disputes under the federal facility agreements.

External Factors and Emerging Issues

Advanced monitoring technology and information technology are rapidly evolving, and advances in these fields offer great opportunities for improving the ability of EPA, states, and tribes to ensure compliance. EPA, states, and tribes do, however, face challenges in keeping up with the rapid pace of change in these technologies. In addition, social science research and knowledge may offer innovative ways to promote compliance. EPA is partnering with states and tribes to help prepare for and use these advanced monitoring technologies, consistent with statutory and regulatory obligations. The Agency will collaborate with ECOS and state associations to maximize the use of these technologies and modernize programs. EPA, in collaboration with states, is working with the academic community to identify new ways to improve compliance. For example, EPA will work with states and academics to pilot and evaluate innovative compliance methods.[39] EPA will work with states to integrate advanced pollution monitoring and information technology into Agency work.

[39] ECOS Resolution 17-2: On the Value of Diverse and Innovative Approaches to Advance Compliance (2017)

Objective 3.2 - Create Consistency and Certainty:

Outline exactly what is expected of the regulated community to ensure good stewardship and positive environmental outcomes.

Introduction

The regulatory framework is inherently dynamic. As part of its statutory obligations, EPA is required to publish many regulations within a set timeframe each year that implement environmental programs and assist the Agency in meeting its core mission. These regulations address newly mandated responsibilities as well as updates and revisions to existing regulations. As EPA meets its obligations to protect human health and the environment through regulatory action, it must also meet another key responsibility – minimizing "regulatory uncertainty" that unnecessarily causes businesses and communities to face delays, planning inefficiencies, and compliance complexities that impede environmental protection, economic growth, and development. EPA will employ a set of strategies to reduce regulatory uncertainty while continuing to improve human health and environmental outcomes consistent with the Agency's authorities as established by Congress and while considering unique state, tribal, and local circumstances. These strategies, which reflect EPA's commitment to cooperative federalism and commitment to the rule of law, will also help advance Agency goals for streamlining and modernizing permitting and enhancing shared accountability.

Strategic Measures

- SM-19 By September 30, 2022, meet 100% of legal deadlines imposed on EPA.
- SM-20 By September 30, 2022, eliminate unnecessary or duplicative reporting burdens to the regulated community by 10,000,000 hours[40].

Strategies for Achieving the Objective

As EPA issues new or revised regulations, businesses and individuals can find it challenging to know which rules apply to them and to adjust their compliance strategies. Over the next five years, EPA will reinvigorate its approach to regulatory development and prioritize meeting its statutory deadlines to ensure that expectations for the regulated community and the public are clear and comprehensive and that Agency actions are defensible and consistent with its authorities. The Agency will use new approaches and flexible tools to minimize regulatory uncertainty and will communicate more comprehensively to realize more consistent and better environmental outcomes, while centering work on statutory and regulatory obligations. EPA will strengthen working relationships with industry sectors to better understand their needs and challenges in implementing Agency requirements and with communities to understand their concerns. This knowledge will enable the Agency to develop better policies and regulations to protect human health and the environment in line with the authorities given to EPA by Congress.

On average, the EPA faces approximately 20 legal challenges under the various environmental statutes each year that assert that the Agency missed a statutory or regulatory deadline for taking an action or unreasonably delayed taking an action. In addition, the Agency faces nearly the same number of legal challenges under FOIA for failure to comply with the deadlines in that law. Responding to these challenges often diverts significant EPA resources away from priority activities, and could impact the

[40] Baseline is estimated at 173,849,665 information collection and reporting hours.

Agency's ability to fulfill its commitments. In order to facilitate achievement of this goal, EPA will undertake a systematic mapping of the processes associated with these obligations and implement improvements where needed.

In addition, EPA will develop and engage stakeholders in reviewing a draft base catalog of responsibilities that statutes require EPA to perform in programs delegated to states and tribes. The base catalog, to be complete by 2019 and subsequently updated as necessary, will provide EPA a foundation to make decisions that reduce contradictory policy determinations at headquarters and across regions. It will also support EPA cooperative federalism commitments aimed at minimizing duplication and overlap among regions, headquarters, states, and tribes. This effort also leverages the commitment that EPA is making under cooperative federalism to identify, for all environmental media, an inventory and timeline for state-led permits that EPA reviews.

The Agency will ensure consistent implementation of policies across all regions. EPA will also work towards more cooperative decision making between EPA's regions and headquarters, when necessary. EPA will review regulatory guidance documents to identify key opportunities and will clarify and realign Agency approaches to improve consistency and clarity. EPA will strengthen working relationships with states, tribes, and local communities to transfer knowledge, leveraging its commitments under cooperative federalism, such as collaboration under E-Enterprise for the Environment. EPA will make available to states and tribes tools or services designed by other federal agencies, states, tribes, or local communities that enhance efficiency and reduce burden on the regulated community while ensuring protection of human health and the environment.

EPA will work with states and tribes to achieve this objective without overburdening those entities with costly unnecessary reporting systems and technology. Building on efforts to date, such as under E-Enterprise, EPA will collaborate with its partners on systems and services, including but not limited to:

- E-reporting: A systematic digital approach that enables states, tribes, and the regulated community to move from paper-based to electronic reporting.
- The Environmental Information Exchange Network: Managed under the collaborative leadership of EPA, states, territories, and tribes, a communication, data, and services platform for submitting and sharing environmental information among partners to foster informed decision making.
- SPeCS for SIPs (State Plan Electronic Collection System for State Implementation Plans): A web-based system for authorized state, tribal, and local governments to submit and manage SIPs under the Clean Air Act.

External Factors and Emerging Issues

A number of factors and emerging issues may impede the Agency's ability to meet this strategic objective. Sustainable resource levels and a strong workforce are critical to success. Proposing and finalizing regulations is often a multi-year process, which can be challenged by lawsuits causing further delays. For example, technical complexity also creates challenges in meeting aggressive deadlines.

Objective 3.3 - Prioritize Robust Science:

Refocus the EPA's robust research and scientific analysis to inform policy making.

Introduction

EPA will identify, assess, conduct, and apply the best available science to address current and future environmental hazards, develop new approaches, and improve the scientific foundation for environmental protection decisions. EPA conducts problem-driven, interdisciplinary research to address specific environmental risks, and is committed to using science and innovation to reduce risks to human health and the environment, based on needs identified by EPA's program and regional offices and as well as state and tribal partners. Specifically, over the next five years, the Agency will strengthen alignment of its research to support EPA programs, regions, states, and tribes in accomplishing their top human health and environmental protection priorities for improved air quality, clean and safe water, revitalized land, and chemical safety[41]. Working closely with ECOS and its subsidiary, the Environmental Research Institute of the States (ERIS), the Agency will strive to connect state research needs with Agency priorities, and work to improve communication of research results. Through the public-private coalition Interstate Technology and Regulatory Council[42], EPA will encourage the adoption of innovative technologies and solutions. The Agency will also emphasize the translation of its work products for end user application and feedback.

EPA research will be reviewed by various scientific advisory boards (e.g., Board of Scientific Counselors) that are made up of recognized experts in various scientific, engineering, and social science fields and may be from industry; business; public and private research institutes or organizations; academia; federal, state, tribal, and local governments; nongovernmental organizations; and other relevant interest areas.

Strategic Measure

- SM-21 By September 30, 2022, increase the number of research products meeting customer needs[43].

Strategies for Achieving the Objective

Air Quality

EPA's research will advance the science and provide the information critical to improve air quality and to inform stationary source regulations; vehicle and fuel standards and certification; emission inventories; air quality assessments; and domestic ozone actions. The results of Agency research to support air quality program priorities will inform EPA programs; state, tribal, and local air programs; communities; and individuals about measures and strategies to reduce air pollution. Researchers will publish peer-reviewed scientific journal articles to disseminate research findings as appropriate and consistent with resource and program needs.

[41] EPA research under Homeland Security supports efforts outlined in Core Mission (Goal 1) objectives.

[42] For more information on the Interstate Technology and Regulatory Council, go to http://www.itrcweb.org/.

[43] Baseline will be determined in FY 2018.

Over the next five years, the Agency will:

- Deliver state-of-the-art tools for states and tribes to use in identifying effective emission reduction strategies to meet national ambient air quality standards and enhance air quality measurement methods used to ascertain compliance with NAAQS.
- Assess human and ecosystem exposures and effects associated with air pollutants on individual, community, regional, and global scales.
- Develop and evaluate approaches to prevent and reduce pollution, particularly sustainable, cost-effective, and innovative multi-pollutant and sector-based approaches.
- Provide human exposure and environmental modeling, monitoring, metrics, and information needed to inform air quality decision making at the state, tribal, and local level.

Safe and Sustainable Water Resources

EPA will develop innovative, cost-effective solutions to current, emerging, and long-term water resource challenges for complex chemical and biological contaminants. Using a systems approach to develop scientific and technological solutions for protecting human health and aquatic ecosystems, EPA researchers partner with program experts; federal and state agencies; tribes; local communities; academia; nongovernmental organizations; and private stakeholders.

Over the next five years, the Agency will:

- Support safe drinking water by focusing research on assessing the distribution, composition, remediation, and health impacts of known and emerging chemical and biological contaminants.
- Improve methods for fast and efficient waterborne pathogen monitoring in recreational waters.
- Investigate health impacts from exposure to harmful algal/cyanobacteria toxins, and develop innovative methods to monitor, characterize, and predict blooms for early action.
- Support states and tribes in meeting their priorities and setting water quality and aquatic life thresholds.
- Assist states, tribes, communities, and utilities in addressing stormwater and wastewater infrastructure needs through applied modeling, technical assistance, and capture-and-reuse risk assessments.
- Provide water reuse research support on potable and non-potable use guidance for states and tribes.

Sustainable and Healthy Communities

EPA will conduct research to support regulatory activities and protocol development for the National Oil and Hazardous Substances Pollution Contingency Plan and provide on-demand technical support at cleanup sites managed by federal, state or tribal governments, as well as assistance during emergencies. The Agency conducts health, environmental engineering, and ecological research and prepares planning and analysis tools for localities nationwide to use in facilitating regulatory compliance and improving environmental and health outcomes.

Over the next five years, EPA will:

- Provide technical support to the states and tribes through technical support centers for remediating CERCLA-designated contaminated sites and returning them to productive use.
- Assist regional, state, tribal, and local leaders in reducing costs and setting science-based cleanup levels in areas designated under CERCLA.

- Characterize sites and contaminants released from leaking underground storage tanks identified under the LUST Trust Fund.
- Work with the ECOS/ERIS to evaluate the causal relationships between ecosystem goods and services and human health, and to document these relationships using EnviroAtlas.
- Assess the impact of pollution (e.g., health impact assessments) on such vulnerable groups as children, tribes, environmental justice communities, and other susceptible populations.

Chemical Safety

EPA will evaluate and predict impacts from chemical use and disposal, and provide states and tribes with information, tools, and methods to make better informed, more timely decisions about the thousands of chemicals in the United States. The Agency will produce innovative tools that accelerate the pace of data-driven evaluations, enable knowledge-based decisions that protect human health, and advance the science required to anticipate and solve problems.

Over the next five years, EPA will:

- Provide tools to more efficiently and cost-effectively evaluate the biological activity and health risks of chemicals and reduce the use of toxicity tests to animals.
- Use ToxCast/Tox21 data to develop high-throughput risk assessments, particularly for chemicals for which adequate risk assessment information has been historically unavailable.
- Develop online software tools to provide information on thousands of chemicals and integrate health, environmental, and exposure data to support regulatory and prioritization decisions.
- Explore how high-throughput exposure and hazard information can be combined to predict the potential for exposure and risk to susceptible subpopulations.
- Conduct nanoparticle research by using life-cycle analyses, evaluating impacts on ecosystem health, and supporting the development of safer nanomaterials in private industry.

Human Health Risk Assessment

EPA also will focus on the science of assessments that inform Agency, state, and tribal decisions and policies. These risk assessments provide the research and technical support needed to ensure safety of chemicals in the marketplace, revitalize and return land to communities, provide clean and safe water, and work with states and tribes to improve air quality.

Over the next five years, EPA will:

- Develop a portfolio of chemical evaluation products that use the best available science for use by EPA, states, tribes, and other federal agencies.
- Provide research and scientific support for proper TSCA implementation, as Congress intended.
- Develop assessment products, peer-reviewed toxicity values, and advanced exposure assessment tools to help inform Superfund and hazardous waste cleanups as required by RCRA and CERCLA.
- Provide scientific support to the risk and technology reviews conducted under the CAA.
- Provide integrated science assessments (ISAs) to support decisions to retain or revise the national ambient air quality standards. ISAs also inform benefit-cost and other analyses conducted by state, tribal, and local officials to support implementation of air quality management programs.
- Provide research and technical support to deliver safe drinking water by evaluating exposures to and health impacts of known and emerging chemical and biological contaminants.
- Work with states and tribes on research and development of new assessment technologies.

External Factors and Emerging Issues

EPA faces a number of challenges in its commitment to conducting robust science. For example, aging information technology infrastructure presents a risk to information security and limits the capacity for information management. Recruiting and maintaining a strong workforce with appropriate scientific and technical skillsets are also critical to EPA's research efforts.

Objective 3.4 - Streamline and Modernize:

Issue permits more quickly and modernize our permitting and reporting systems.

Introduction

EPA implements a host of environmental statutes that affect the regulated community. Permitting requirements under these statutes can impose a variety of costs, including direct costs and opportunity costs related to uncertainty, delay, and cancellation. Delays in the approval of permits and modifications by federal, state, or tribal permitting authorities can postpone or prevent manufacturers from building, expanding, or beginning operations, even if the affected operations ultimately may be deemed suitable as proposed. Delays can also impact construction of major infrastructure projects. EPA is committed to speeding up the processing of permits and modifications to create certainty for the business community, leading to more jobs, increased economic prosperity, and streamlined permit renewals, which incorporate up-to-date information and requirements more quickly, thereby improving environmental protection. Further, EPA will continue to convert permit applications and reports that rely on paper submissions to electronic processing in order to reduce burden, shorten the wait for approval decisions, and increase the opportunity for public transparency.

Strategic Measure

- SM-22 By September 30, 2022, reach all permitting-related decisions within six months.

Strategies for Achieving the Objective

Over the next five years, EPA will systematically collect and report permitting data for each of its permitting programs. The Agency will employ business process improvement strategies, such as Lean, to increase efficiencies in all permitting processes and meet our commitments. The Agency will also work with states and use Lean techniques to streamline the review of state-issued permits. Solutions may include conducting earlier triage and communications, conducting Agency reviews in parallel with public reviews, and/or focusing reviews where they add the most value.

EPA will consider where policy changes can improve permitting efficiency without sacrificing environmental results. Examples include expanding the scope of minor permit modifications to reduce the number of permit reviews required, reinvigorating the use of plant-wide applicability limits (PALs) to reduce unnecessary permitting transactions, and increasing states' ability to incorporate federal regulations by reference, enabling them to adjust quickly and efficiently to new regulatory provisions.

EPA will modernize permitting and reporting processes through efforts such as E-Enterprise for the Environment, a shared governance model with EPA, states, and tribes. EPA will work with states and tribes to achieve this objective without overburdening those entities with costly unnecessary reporting systems and technology. Building on efforts to date, EPA will collaborate with its partners on the following systematic process improvements:

- E-Enterprise Web Portal: A web portal that allows the states, tribes, regulated community, and EPA to transact business, such as permitting and reporting, and provides easy access to needed information.
- E-permitting: An online system to ensure the ability to apply for, track the status of, and receive a permit electronically.

External Factors and Emerging Issues

Sustainable resource levels for states, tribes, and EPA are critical to efforts to streamline and modernize permitting processes. Support from states and tribes, including state and tribal capacity for maintaining and increasing delegation, is also critical to streamlining and modernizing permitting processes. The global shift to digital services for communication and transaction raises expectations of EPA stakeholders and provides more robust approaches and technologies for developing electronic services.

Objective 3.5 - Improve Efficiency and Effectiveness:

Provide proper leadership and internal operations management to ensure that the Agency is fulfilling its mission.

Introduction

To support its mission to protect human health and the environment, EPA will improve the efficiency and effectiveness of its business processes. Focus areas will include financial, facility, human resource, contract, grant, and information technology/information management. EPA will improve its future workforce, modernize and streamline its business practices, and take advantage of new collaborative and cost-effective tools and technologies. The Agency will build a modern and secure work environment that will protect critical information and support its efforts to address the environmental problems of the 21st century. EPA will work to alleviate challenges associated with outdated or non-existent policies, tension between centralized and decentralized approaches, myriad federal acquisition and grants requirements, complex processes, and fluctuating levels of expertise across Agency programs.

Strategic Measures

- SM-23 By September 30, 2022, reduce unused office and warehouse space by 850,641 square feet[44].
- SM-24 By September 30, 2022, reduce procurement processing times by achieving 100% of procurement action lead times (PALT)[45].
- SM-25 By September 30, 2022, improve 250 operational processes.
- SM-26 By September 30, 2022, increase enterprise adoption of shared services by four[46].

Strategies for Achieving the Objective

EPA will modernize and improve business processes and operations to promote transparency, efficiency, and effectiveness; enhance collaborative, results-driven partnerships with internal and external business partners; recruit, develop, and maintain a highly-skilled, diverse, and engaged workforce; and improve the capabilities and cost-effectiveness of its information technology (IT) and information management (IM) systems.

EPA will apply Lean principles and will leverage input from customer-focused councils, advisory groups, surveys, workgroups, acquisition partnership initiatives, technical user groups, portfolio reviews, and federal advisory committees to identify business process streamlining opportunities. To improve the efficiency and cost effectiveness of its operations, EPA will standardize and streamline internal business processes in its acquisition and grants processes and systems, and use additional federal and/or internal shared services when supported by business case analysis.

EPA will ensure its workforce is positioned to accomplish the Agency's mission effectively by providing access to quality training and development opportunities that will improve staff's and managers' skills, knowledge, and performance, and prepare them to capitalize on opportunities that advance progress. EPA

[44] Baseline is 5,264,846 square feet as of FY 2017.

[45] Baseline for FY 2017 is under development.

[46] Baseline is 5 administrative systems/operations shared services in FY 2017.

will improve its workforce planning and management, strengthen its Senior Executive Service, and focus on developing and maintaining a highly-skilled technical workforce.

EPA also will transform and modernize its information systems, tools, and processes to improve how the Agency collaborates both internally and with external stakeholders. EPA will enhance the power of information by delivering on-demand data to the right people at the right time. To enable the Agency, its partners, and the public effectively to acquire, generate, manage, use, and share information – a critical resource in protecting human health and the environment – EPA will improve its IT/IM capabilities and customer experiences. EPA will employ enterprise risk management and financial data analytics to support data management decision making, using the enterprise risk management framework mandated by OMB Circular A-123.

To ensure that critical environmental and human health information is adequately protected, EPA will strengthen its cybersecurity posture. The Agency will focus on implementing two key cybersecurity priorities—the mandated federal-government-wide Continuous Diagnostics and Mitigation (CDM) effort, and the complementary EPA-specific Cyber Risk Mitigation Projects (CRMPs). These two priorities introduce or improve upon dozens of cybersecurity capabilities, enhance the Agency's ability to respond to threats, and improve EPA's privacy posture via the Privacy Act of 1974. EPA will work closely with the Department of Homeland Security and other partners in implementing CDM capabilities.

To better understand complex interactions between pollutants and the environment and address the environmental problems of the 21st century effectively and efficiently, EPA and its partners analyze large volumes of data. EPA will develop a comprehensive data management strategy that addresses the collection, management, and use of data generated both internally and from external partners including states, tribes, grantees, the regulated community, and citizen science. The Agency will deploy new data analysis, data visualization, and geospatial tools in a Cloud-based framework to enable analysis and provide the basis for informed decision making.

Environmental decision making across media programs requires access to high-quality data and analytics. EPA will build shared IT services, maximizing the benefits of our investments and ensuring consistency and scalability in tools and services. Over the next five years, EPA programs that receive submissions from outside the Agency, whether from the reporting community, states, tribes, or local governments, will rely increasingly on centrally-developed and maintained information services, decreasing the volume of computer code each program must develop and maintain. Shared services will reduce reporting burden for submitting entities and improve data quality for EPA. EPA programs, states, and tribes must establish a common catalog of shared services and agree to a minimum set of common standards and practices.

The Agency will enhance its extensive information resources by designing an enterprise-wide information architecture that will facilitate the electronic management of data and information, as well as multimodal access, effective searching, and ease of use. The Agency's future information management architecture will support official recordkeeping requirements, as well as daily document management, business processes, information access, and legal needs of EPA employees and organizations, while also being flexible, scalable, and cost effective.

External Factors and Emerging Issues

EPA faces a number of factors that may impede its ability to promote effective and efficient internal operations. The Agency's ability to attract and retain staff skilled in human resources, IT/IM, cybersecurity, and acquisition management and staff with scientific and technical expertise is a continuing challenge in improving Agency operations. A lack of category-focused skills and business acumen can negatively affect strategic sourcing decisions. Myriad federal acquisition and grant requirements, complex

processes, and varying levels of expertise across Agency programs often prevent the timely awarding of contract and grant vehicles to meet Agency demands. EPA must increase its competencies in these areas through a robust training program for staff and managers.

Without standard business processes, EPA cannot achieve its objectives. For example, tension between local needs and Agency-wide strategies may result in missed opportunities to make effective strategic sourcing decisions. This not only impedes Agency efforts to modernize business processes and streamline IT infrastructure, but also affects the ability of government shared service providers to serve additional customers and use standard software to achieve efficiencies and cost savings. Furthermore, continually changing IT/IM and security requirements and variation among states and tribes require development of a holistic "Enterprise-Level Vision and Data Strategy" that optimizes both business processes and solutions; aligns all data programs, resources, and budgets; and strengthens the Agency's enterprise risk strategies. Demands for IT/IM services will continue to grow, due to the increasing volume of environmental data and increased expectations of other agencies, regulated entities, the public, and EPA staff. As cybersecurity risks evolve, protecting EPA's information assets will continue to be a priority.

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COOPERATIVE FEDERALISM 2.0:

Achieving and *Maintaining* a Clean Environment and *Protecting* Public Health

JUNE 2017

ECOS

Introduction

The Environmental Council of the States (ECOS) is the national nonprofit, nonpartisan association of state and territorial environmental agency leaders. Its purpose is to improve the capability of state environmental agencies and their leaders to protect and improve human health and the environment of our nation.

The following document was produced through a consensus-based process among the members of ECOS. It is respectfully shared by ECOS with all who desire to participate in a conversation related to these matters. Please feel free to direct questions or comments to ECOS Executive Director and General Counsel Alexandra Dunn at adunn@ecos.org or 202.266.4929, or to any of the undersigned officers.

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ECOS

COOPERATIVE FEDERALISM 2.0:

Achieving and *Maintaining* a **Clean Environment** and *Protecting* **Public Health**

A national conversation is underway as to the best and highest purpose for state and federal environmental regulators from 2017 forward. We are convinced a recalibration of state and federal roles can lead to more effective environmental management at lower cost — that this is a call for a Cooperative Federalism 2.0. The purpose of this paper is to stimulate and advance this important national conversation. We have an opportunity to engage the Administration, Congress, and all other parties and interests in how states and the U.S. Environmental Protection Agency (U.S. EPA) can put the "meat on the bone" and more fully define what we mean by Cooperative Federalism 2.0 from a policy, operational, and fiscal standpoint that ensures effective public health and environmental protections. We believe that through this concept we can build on the foundations of national statutes, learn from the innovations and successes of state programs, and confidently meet the challenge of providing 21st century environmental protection with the best of 21st century methods and relationships.

As states evaluate the future of environmental protection, we believe each of the key roles and functions laid out in this document is crucial for high quality, nimble, reliable, and transparent environmental and public health protection across the nation. We look forward to engaging others on how they see this important relationship.

Background

When the foundation of environmental protection was established in the United States in the late 1960s and early 1970s, a key, constitutionally based tenet was cooperative federalism. Under this tenet, the U.S. Congress establishes the law, the federal government implements the law through national minimum standards for the media/pollutant in question, and states can seek authorization or delegation to implement the programs needed to achieve these standards. Generally, states may develop programs to go beyond these standards if a state chooses to do so.

Initially, when states first began to implement programs delegated to them in the 1970s and 1980s, many state programs benefitted not only from federal funding, but also from significant U.S. EPA oversight. Over the last 45 years, states have become the primary implementers of these environmental statutes, such that today, states have assumed more than 96 percent of the delegable authorities under federal law. These state programs have now matured, and states have undertaken many continuous improvement efforts to address new environmental challenges and to modernize and streamline decision-making processes. Indeed, from the first fledgling state programs to those we implement today, we have always sought out ways to be better and inspire public confidence in our efforts. States are a critical part of achieving our nation's environmental and public health goals and mandated responsibilities in an effective and efficient way.

Document Structure

This document contains two parts. Part I enumerates, as principles, the roles and functions of states and U.S. EPA in cooperative federalism. The state and U.S. EPA principles we lay out here must be taken together; the principles reflect corollary responsibilities. These principles, which are laid out in the following table, are derived from a deep reflection on the current tenor and functioning of state/EPA relationships. Part II then documents 2.0 an initial list of important policy-neutral issues where the application of Cooperative Federalism could be focused.

Part I: Principles of the Roles and Functions of States and U.S. EPA in Cooperative Federalism

	Principles of the States' Role and Function in Cooperative Federalism	Principles of the Federal Role and Function in Cooperative Federalism
1	States should be engaged, as key partners with the federal government, in the development of national minimum standards to protect human health and the environment, and in any federal requirements regarding implementation of those standards. States bring experience in identifying and understanding evolving science and emerging environmental challenges, and in developing effective programmatic options and alternatives. In particular, states have first-hand knowledge of how to ensure successful implementation of programs designed to meet these standards including experience communicating with the regulated community and the public.	U.S. EPA should continue to lead in setting and adopting national minimum standards to protect public health and the environment.
2	States are the preferred implementing entities for national environmental regulatory programs for which federal statutes authorize their delegation. Only where states elect not to pursue delegated federal authority, do not provide the resources necessary to meet national regulatory minimum standards, or have a documented history of failure to make progress toward meeting national standards, should U.S. EPA implement these environmental programs.	U.S. EPA should be the lead implementer of national environmental regulatory programs in those instances where states decline to assume this role, where the states fail to appropriately implement such programs, or where federal statutes establish that role for the federal government.
3	States should have flexibility to determine the best way for their programs to achieve national minimum standards that enables them to incorporate and integrate their unique geophysical, ecological, social, and economic conditions.	U.S. EPA should involve states as partners early and often in developing federal environmental and public health policy, and should specifically seek state and other stakeholder input on the efficacy of new or changed standards or program requirements.
4	States should engage local governments, regulated entities, tribes, and the public, as well as recognize community and equity concerns, in implementation of national environmental regulatory programs, policies, and standards.	U.S. EPA should ensure appropriate federal consultation with Native American tribes in the implementation of federal environmental and public health policies, programs, and standards.
5	States should be the primary enforcement authority for programs delegated to the states and have the ability access federal enforcement authorities when federal enforcement is needed or appropriate.	U.S. EPA should respect the states' role as the primary implementer of national environmental regulatory programs and not review individual state implementation decisions, including enforcement, on a routine or recurring basis unless programmatic audits identify this need or particular circumstances compel federal action.

	Principles of the States' Role and Function in Cooperative Federalism	Principles of the Federal Role and Function in Cooperative Federalism
6	States should gather, maintain, and share information transparently with U.S. EPA and the public on how human health and the environment are protected, based on nationally agreed upon measures and metrics, through the activities states conduct and the environmental outcomes states achieve for federally delegated programs.	U.S. EPA should periodically and routinely audit state implementation programs authorized or delegated to achieve national minimum standards (including adequacy of state implementing authorities and resources). These audits should be based on criteria mutually developed by states and U.S. EPA in light of federal regulations and grant requirements. When a state is not adequately achieving standards, U.S. EPA should be able to take appropriate action to ensure that a state will make consistent progress. Ultimately, if a state is not making sufficient progress, U.S. EPA should be able to reassume a lead implementation role.
7	Consistent with Constitutional principles, states should be encouraged through flexible federal requirements to develop, pursue, and implement state innovations to effectively and efficiently achieve desired environmental outcomes. States should generally have the ability to set standards that are more stringent or that are broader in scope than federal standards.	U.S. EPA has a role as a convener and facilitator in important pollutant-related interstate issues to efficiently support multi-state solutions and in some cases, to ensure final decision-making. States' willingness to work on these types of issues collectively and collaboratively with each other is also critical for success. Regional collaborations of national significance often require additional assistance (i.e., technical or scientific support, funding, regulatory accountability, and dispute resolution) that U.S. EPA should have the capacity to provide.
8	States should work cooperatively with U.S. EPA in the development of shared services, implementation toolkits, and other key resources to facilitate permitting and reporting functions and to efficiently use resources to accomplish these tasks as well as shared functions.	U.S. EPA should maintain a robust scientific research and data gathering capacity to effectively inform and establish national regulatory minimum standards based on sound science, to understand how best to respond to complex environmental pollution challenges, to respond to emerging pollutants, to incorporate modern technologies, and to efficiently determine protective alternative remediation strategies and other solutions to facilitate protection of human health and the environment. The federal government has well-developed capacity to keep abreast of emerging challenges and to research potentially successful technologies or remedies for current challenges that no single state has the capacity to replicate or replace.
9	States that choose to implement federal programs should be both adequately funded by the federal government to do so as Congress directed in authorizing statutes and should also invest state resources (either directly or through fees or other methods) sufficient to implement a successful program.	U.S. EPA should have sufficient resources to meet these responsibilities and to financially support states in the implementation of federal statutes and programs. U.S. EPA should have sufficient resources to meet all obligations to states and to ensure timely review and decisions on program submittals by the states. The level of federal support to states implementing federal programs, policies, and standards should be calibrated to the scope and complexity of federal requirements that states must achieve in order to assume or continue implementation responsibility.

Part II: Changes Implied by Cooperative Federalism 2.0

Our state environmental programs exist to provide the level of environmental and human health protection promised to the American people through our national and state statutes. The key principles articulated above spark the following observations and entreaties for consideration by all parties with an interest in these critical matters. Many of them are buttressed by work underway between U.S. EPA and the states. However, the full embodiment of the principles clearly means a change from business as usual for most states and U.S. EPA and requires a willingness for U.S. EPA and the Congress to align the state/federal relationship with the current realities and responsibilities of state implementation of national regulatory programs. States are willing and eager to engage in this important dialogue.

A. Ensuring adequate capital and operating resources to fully implement federal environmental laws has been and must remain a priority focus. Robust cooperative federalism cannot be achieved if one party or the other is not capable of performing its critical functions. Inadequate implementation by states benefits no one; insufficient or non-timely performance by U.S. EPA hurts everyone. Both states and U.S. EPA need to perform as required and expected under a truly effective cooperative federalism. Neither party can, nor should be expected to, perform the important functions needed by the other for each to be successful. For example, adequate capital requirements for clean water (including drinking water) are a crucial public health necessity and a shared responsibility between the federal government, the states, and local governments. The federal government should financially support state implementation efforts commensurate with the complexity and breadth of federal requirements. Furthermore, when states implement federally delegated authorities, they must continue to provide a level of resources commensurate with their responsibilities. In the event there are decreases in the level of support for the operation of federally delegated programs by either federal or state governments, it is critical that there be a shared understanding, and transparency around, what work may no longer be performed by either party.

B. With robust engagement of all interests, including states, U.S. EPA should identify key outcomes for implementing federal environmental and public health laws that each federal program, standard, or policy is intended to accomplish. U.S. EPA should seek to demonstrate this through environmental and service delivery (i.e., time) "outcome" metrics rather than "output" metrics. These metrics should be understandable to the regulated community and the public. States should report at regular and consistent intervals to U.S. EPA and the public, through these agreed-upon and, to the extent possible, nationally consistent metrics, what environmental, public health, and service delivery outcomes the state-implemented federal programs, policies, and standards have achieved.

C. U.S. EPA and states' working relationships should be continually reviewed, improved, and reformed to conform with the key principles. EPA's oversight of state's performance should emphasize developing, aligning, and mutually supporting efforts that successfully address environmental challenges instead of routinely reviewing state's individual implementation actions. Such cooperative efforts should include development of new regulations and guidance consistent with the key principles, review of past practices and regulations that may be outdated and inefficient (and hence should be modified or eliminated), and determination of how regional and national consistency on implementation can be harmonized with state flexibility and innovation in implementation. There are significant ongoing efforts ready for scale to accomplish this, including E-Enterprise, in which U.S. EPA, states, and tribes jointly identify, manage, and implement projects designed to improve agency performance, implement efficiencies, and reduce burdens on the public and the regulated community. The widespread adoption of business process improvement techniques by states and U.S. EPA shows the benefit of continuing and expanding this effort through adoption of the principles.

D. Healthy and vibrant communities and economies rely upon both effective environmental protection and resilient economic growth. Achieving national minimum standards contributes greatly to the former; implementing efficient and effective programs contributes greatly to the latter. State flexibility to determine the best way for its programs to achieve national minimum standards that accounts for unique geophysical, ecological, social, and economic conditions is a particularly important aspect of ensuring that environmental protection and economic prosperity go hand-in-hand with healthy and vibrant communities.

E. As the scope and breadth of environmental programs has grown to address the issues upon which they are focused, assuring regulatory compliance has become increasingly complex. Robust and appropriate enforcement of regulations is a key aspect of compliance assurance, both by stopping and remedying non-compliance and by creating a climate of deterrence for other potential deliberate violators. States see significant benefit in providing focused compliance assistance and assurance programs that assist the regulated community to come into compliance by increasing its understanding of regulatory requirements and by developing effective ways to achieve compliance. Providing assistance is critical to support the vast number of entities that want to be in compliance. Creating a connection to those entities who may need compliance support can prevent them from becoming cases for formal enforcement action. States are implementing a wide range of such programs and developing methods to measure overall compliance, as well as the effectiveness of these programs.

F. Support for small communities to help improve community health and build necessary resilience to sustain it is needed across the nation. National minimum standards often represent significant financial burdens on these communities, which can be considerably exacerbated when investments are considered one program or one pollutant at a time. States and U.S. EPA have begun to address this pressing challenge, but ensuring that all communities in need of this support — and capable of implementing it responsibly — receive it, remains elusive.

G. As our environmental challenges become more complex and diffuse, novel approaches are needed that will depend upon comprehensive cooperative federalism to be successful. Pollutants are often found to have cumulative and synergistic relationships that are difficult to address under our single pollutant-by-pollutant statutory approach. Pollutants also do not respect political boundaries, highlighting the need for multi-state and multi-national approaches and cooperation.

Conclusion and Next Steps

We strongly believe that positive reforms and improvements to the bedrock of cooperative federalism are needed and warranted at this time to create and implement environmental protection programs worthy of 21st century challenges. States are eager to engage our federal partners, and others who have a keen interest in how the states and federal governments perform their roles, on how we can move forward consistent with these principles, in order to protect the environment and public health of our great nation.

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STATE ENVIRONMENTAL REGULATORS:
TRENDS IN REGULATION AND ENFORCEMENT AND THE NEW FOCUS ON "COOPERATIVE FEDERALISM"

Institute for Energy Law's Energy Industry Environmental Law Conference

May 19, 2018

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ECOS WHITE PAPER: COOPERATIVE FEDERALISM 2.0

- June 2017 white paper – Nine Principles:
  - EPA sets minimum national standards with State participation
  - EPA leads on national programs where statute requires or States decline
  - EPA should involve States early and often, seek State input
  - EPA should engage tribes, States should engage locals and the public
  - EPA should respect State role as primary implementer, esp. enforcement
  - States report outcomes to EPA; EPA audits programs, intervenes only if needed
  - EPA should continue leadership on interstate complications
  - EPA should maintain robust, centralized scientific capabilities
  - EPA should continue to provide funding support to State agencies

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COOPERATIVE FEDERALISM ACTIVITY SINCE ECOS PAPER

- Administrator's State Action Tour – multiple addresses
- Formal "Federalism Consultation" on WOTUS, Lead and Copper Rule, others
- Interim Guidance January 2018 from OECA Head Susan Bodine
- Goal #2 in Agency's 2018-2022 Strategic Plan, Issued February 2018
- April 2018 Hearing in Senate Environment and Public Works Subcommittee on Clean Air and Nuclear Safety

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VIEW FROM WASHINGTON – STATUS OF THE TRUMP/PRUITT REGULATORY AGENDA

Robert Meyers, *Crowell & Moring LLP*

Robert Meyers
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Bob Meyers is a partner in the Washington, D.C. office of Crowell & Moring and a member of the firm's Environment & Natural Resources Group, where he provides regulatory counseling for clients on a wide range of energy and environmental issues, including Clean Air Act (CAA) requirements and greenhouse gas regulations. Bob has also represented clients before U.S. Court of Appeals with regard to numerous CAA regulatory challenges and before EPA and state regulatory bodies with respect to CAA permitting actions. He has also provided regulatory counseling and representation concerning EPA enforcement actions.

Bob formerly led the Office of Air and Radiation of the U.S. Environmental Protection Agency (EPA), serving as Acting Assistant Administrator and Principal Deputy Assistant Administrator for that office. Prior to his work at EPA, Bob served as Deputy Chief Counsel for Energy and Environment and Environmental Counsel for the House Energy and Commerce Committee. His Clean Air Act experience dates back to the mid-1980s and includes work on the conference committee for the seminal 1990 Clean Air Act Amendments. As a result, Bob has extensive experience and expertise in relation to both stationary and mobile source regulations, national ambient air quality standards, fuels and fuel additives, hazardous air pollutants, and ozone-depleting substances.

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The View from D.C.

The Status of EPA's Deregulatory Agenda

Robert Meyers

May 18, 2018

Great Ambition, Largely Untested

- EPA has proposed or is considering proposing to roll back or revise more than 60 federal environmental rules.
- Few have been finalized, and it is not clear how those will fare in court.
- 2018 is a critical year for finalizing major rulemakings if the Administration intends to defend them in court.
- EPA's efforts to stay effectiveness of Obama-era rules without additional notice-and-comment rulemaking has largely been stymied by the courts.
- EPA and the White House have issued a number of guidance documents, which may be nearly as effective as rulemakings in adjusting federal environmental policy.

Administrator Pruitt seeks to roll back dozens of rules, streamline permitting and other reviews, and devolve authority to the States. But much is still just proposed.

What's Been Done?

Final Rules and Guidance Issued by EPA

A Handful of Significant Final Rules

- **Financial Responsibility Requirements Under CERCLA Section 108(b) for Classes of Facilities in the Hardrock Mining Industry**
  Section 108(b) of CERCLA establishes certain authorities concerning financial responsibility requirements. EPA proposed requirements for the hardrock mining industry on January 11, 2017. By court order, it was required to issue a final decision by December 1, 2017. In its final decision, EPA determined no federal financial assurance requirements for the industry were necessary. 83 Fed. Reg. 7556 (Feb. 21, 2018).
- **Renewable Fuel Standards for 2018**
  EPA is required to set volumetric standards for renewable fuels used in transportation fuel for each calendar year. 82 Fed. Reg. 58486 (Dec. 12, 2017).
- **New Source Performance Standards for Methane Emissions from Oil & Gas Facilities**
  On March 12, 2018, EPA published a final rule removing from the fugitive emission requirements of the NSPS the requirement for completion of delayed repair during unscheduled or emergency vent blowdowns.
- **Framework Rules for Revised Toxic Substances Control Act**
  EPA has issued three rules to implement the revised Act: the Prioritization Process Rule; the Risk Evaluation Process Rule; and the Inventory Rule. It has also proposed a Fees Rule.
- **NOx NAAQS Retained**
  On April 6, 2018, EPA issued a final rule retaining the current (2010) 1-hour standard of 100 ppb and an annual standard of 53 ppb.

Delays of Effective Dates of Final Rules

- **Waters of the United States (WOTUS) Rule Applicability Date Delay**
  On January 31, 2018, EPA and the Army Corps of Engineers finalized a rule postponing applicability of the WOTUS Rule for two years, until February 6, 2020, to allow the Agencies time to reconsider the WOTUS Rule.
- **Steam EGU Effluent Limitations Guideline Compliance Date Postponement**
  On September 13, 2017, EPA finalized a rule postponing for two years certain compliance dates for the effluent limitations guidelines and standards for steam electric power plants, to allow EPA time to conduct a rulemaking to potentially revise certain best available technology economically achievable ("BAT") limitations and pretreatment standards.

Guidance, Memoranda, and Other Actions

- **Guidance Memo Deferring to Owner/Operator's Emissions Calculations for New Source Review**
  On December 7, 2017, EPA issued guidance that informs the regulated community that EPA will not second guess a source owner or operator's "projected actual emissions" calculations for determining whether a modification will result in a significant increase in emissions under NSR.
- **Guidance Memo on Netting of Emissions Increases and Decreases Under NSR**
  On March 13, 2018, EPA issued guidance that informs the regulated community that both emissions increases *and* decreases from a proposed project at an existing major stationary source may be taken into account under Step 1 of the major modification applicability process under NSR.
- **Guidance Memo Withdrawing "Once-in, Always-in" Policy Under Section 112**
  On January 25, 2018, EPA issued guidance withdrawing a 1995 memorandum opining that once a source was determined to be a major source of hazardous air pollutant emissions, it would always be treated as such. Under the new guidance, a source that takes an enforceable limit on its potential to emit below the major source thresholds may be regulated as an "area source."`
- **Cancellation of Information Collection Request Regarding Methane Emissions from Oil and Gas Sources**
  ICR issued on November 10, 2016. Withdrawn on April 2, 2017, at request of 11 states, as unduly burdensome.

Guidance, Memoranda, and Other Actions

- **Cancellation of Information Collection Request Regarding Methane Emissions from Oil and Gas Sources**
  ICR issued on November 10, 2016. Withdrawn on April 2, 2017, at request of 11 states, as unduly burdensome.

- **Memorandum on Common Control**
  April 30, 2018 letter to Pennsylvania DEP regarding when emissions from separate facilities should be considered to be under common control for purposes of new source review. New memorandum focuses on the authority of one entity to dictate decisions of the other entity (and therefore considered part of a single source).

What's Been Stopped?

Judicial Review of EPA's Actions

Courts Are Insisting on Full Rulemaking

Executive's attempts to stay Obama-era rules through administrative "short cuts" blocked

- **Administrative Procedure Act Section 705**
  APA Section 705 provides that, "[w]hen an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review." The Bureau of Land Management ("BLM") invoked Section 705 to delay already-effective Obama-era regulations pending reconsideration by the Agency. On October 4, 2017, a federal district court in California invalidated BLM's administrative stay of the rule, holding that an agency cannot postpone the effectiveness of a rule that is already effective. *California v. U.S. Bureau of Land Management*, No. 3:17-cv-03804-EDL (N.D. CA).

- **Clean Air Act Section 307(d)(7)(B)**
  CAA Section 307(d)(7)(B) authorizes EPA to stay a rule's effectiveness for up to 90 days when a person demonstrates to EPA that an objection to that rule could not have been raised within the public comment period or arose after the period for public comment, thus requiring reconsideration of the rule. EPA invoked section 307(d)(7)(B) to stay portions of the NSPS for fugitive emissions of methane and other pollutants by the natural gas industry while EPA reconsidered the NSPS. On July 3, 2017, a divided panel of the D.C. Circuit held that EPA lacked authority to invoke this provision where the grounds for objection were not new and could have been raised during the comment period. The court noted that EPA could seek to postpone the rule's compliance requirements through notice-and-comment rulemaking. *Clean Air Council v. Pruitt*, No. 17-1145 (D.C. Cir.).

- **Notice-and-Comment Delays Not Necessarily in the Clear**
  In three recent cases, courts have questioned whether agencies can delay rules simply for the sake of reconsideration, even after notice and comment. *California v. U.S. Bureau of Land Management*, No. 3:17-cv-07187-WHO (N.D. CA) (Feb. 22, 2018) (order granting preliminary injunction); *Pineros Y Campesinos Unidos Del Noroeste v. Pruitt*, No. 4:17-cv-03434-JSW (N.D. CA) (March 21, 2018) (four days' notice not enough to comport with APA before delaying effective date of Pesticide Rule); *Air Alliance Houston v. EPA*, No. 17-1755 (D.C. Cir.) (March 23, 2018) (ordering EPA to produce comprehensive list of notice-and-comment rules delaying effective date of a rule due solely to reconsideration).

What's Coming?

Rulemakings in the Pipeline

Anticipated Clean Air Act Rulemakings

- **Clean Power Plan (CPP) Repeal/Replacement**
  The CPP, a signature rulemaking of Obama's EPA, has been stayed since February 2016. EPA has proposed to repeal the CPP on grounds it exceeds EPA's authority. Separately, EPA has sought comment through an Advance Notice of Proposed Rulemaking on a far narrower replacement rule. EPA is expected to propose a replacement rule in mid-2018 and finalize both rulemakings early 2019.
- **Mercury and Air Toxics Standards (MATS)**
  MATS has been in place since 2012 and has largely been implemented, yet the battles continue. EPA Air Chief Bill Wehrum has stated publicly that he believes the underlying finding that it is "appropriate and necessary" to regulate power plant mercury emissions is wrong, and he promises to revisit it, likely this summer. It is not clear what effect that could have on MATS itself.
- **2015 Ozone NAAQS**
  In 2015, EPA established a new ozone NAAQS of 70 ppb. Litigation over that NAAQS has been stayed while EPA considers whether that level is too low, particularly given that it may be at or below background levels in some areas of the country. Recent indications are that EPA may not reconsider, but will reevaluate the NAAQS as part of its periodic, 2020 NAAQS review.
- **2022-2025 Light-Duty Vehicle Greenhouse Gas and Fuel Economy Standards**
  EPA is currently reassessing Model Year 2022-2025 light duty vehicle standards, promulgated in 2012 . The National Highway Traffic Safety Administration is also in the process of setting CAFE (mpg) standards for the same model years. California's CAA authority to receive a waiver for its own state standards could be affected or reevaluated.

Anticipated Clean Water Act Rulemakings

- **Waters of the United States Rule**
  EPA and the Corps of Engineers promulgated a broad rule in 2015 asserting federal jurisdiction over permitting in wide array of waters that have a "significant nexus" to waters of the United States. In March 2017, the Agencies notified the public of their intent to rescind that rule. No final rule has been signed.
- **Effluent Limitations Guidelines for Steam EGUs**
  EPA expects to conduct a rulemaking to potentially revise certain best available technology economically achievable ("BAT") effluent limitations and pretreatment standards for existing sources ("PSES") for the steam electric power generating point source category. No proposal has been published.

Anticipated Resource Conservation & Recovery Act Rulemaking

- **Coal Combustion Residuals (CCR) Rule**
  EPA is reconsidering certain provisions of the Obama-era CCR Rule. A proposed rule (the first of two anticipated) signed on March 1, 2018, would allow alternative performance standards for coal ash disposal units with operating permits issued under an approved state or federal coal ash permit program. EPA plans to propose additional revisions to the CCR Rule later in 2018.

Regulatory Process/Transparency

- **Strengthening Transparency in Regulatory Science**

  EPA has proposed rule to require that regulatory decisions (defined as "significant regulatory actions" subject to review by the Office of Management and Budget) identify underlying "dose response data" and "pivotal regulatory science." The proposed rule would additionally require description and explanations of the assumptions used in studies and models as well as explicit consideration of "high quality studies." Independent peer review would be required of all pivotal regulatory science used in regulatory decisions. 83 Fed. Reg. 18768 (Apr. 30, 2018)

- **Update to NEPA Regulations**

  Prerule regulatory package currently pending at OMB; likely will be advanced notice of proposed rulemaking. Administration previously advocated "One Agency, One Decision" environmental permitting review, including a two year deadline on issuing Findings of No Significant Impact or Records of Decision. Legislative Outline for Rebuilding Infrastructure in America.

- **Increasing Consistency, Reliability, and Transparency in the Rulemaking Process**
  Initiative is at prerule stage. According to EPA regulatory agenda the goal is to increase consistency across EPA divisions and offices regarding the consideration of costs in rulemaking.

Final Thoughts

- **Undoing Existing Rules is No Easier Than Promulgating New Ones**
  - Courts seem to be requiring full process, no shortcuts
  - To survive judicial review, deregulatory actions must be well-reasoned, supported by record
  - Rulemaking defense takes as much time as rulemaking. Rules not finalized by the end of 2018 may not be through the courts before the next presidential election
- **Guidance and Interpretive Rules Are Proving Effective Gap Fillers**
  - No notice-and-comment rulemaking required
  - But cannot be binding on agency or on public
  - Courts are likely to strike down guidance that veers into legislative rulemaking
- **Enforcement Discretion**
  - EPA may choose to prosecute fewer violations, or defer to states, but citizen suit provisions make this protection somewhat illusory.

Questions?


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IN-HOUSE ENVIRONMENTAL, HEALTH AND SAFETY PERSPECTIVE: "WHAT KEEPS US UP AT NIGHT?"

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Among her current representative engagements, she is engaged in CERCLA contribution litigation against the United States for a major energy company, represents leading crop protection companies in ESA-FIFRA litigation challenging product registrations, serves as federal environmental counsel to several corporations across multiple facilities and CERCLA sites, including significant landfill and contaminated sediment waterway sites, represents a major coal producer in multiple citizen suit litigation matters challenging federal leasing and mine plan approval actions, and works as Clean Water Act regulatory and litigation counsel to multiple national trade associations.

Kirsten has been recognized as a leading environmental lawyer in Washington, D.C. by *Chambers and Partners USA* since 2013. Her experience includes federal district court motions and trial practice and federal appellate oral arguments. She is admitted to practice before the U.S. Supreme Court and numerous federal appellate and district courts nationwide.

Kirsten currently serves as co-chair of the firm's Diversity Council. Kirsten was a founding President of the Washington, D.C. Chapter of the Women's Energy Network in 2011-2012 and continues to engage in activities with both the local and national WEN organizations. She is a past president and a member of the Board of Trustees of the Energy & Mineral Law Foundation and has also led the Crowell & Moring Women Attorneys' Network.

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Prior to joining ExxonMobil, Mr. Armstrong was an environmental attorney at the Ohio EPA and also held private practice positions with law firms in Pittsburgh and Atlanta focusing on the Clean Air Act, Clean Water Act and a variety of environmental enforcement matters.
Mr. Armstrong graduated cum laude in 1986 with a B.A. in History from the University of Akron and obtained his J.D. with honors in 1989 from the Ohio State University College of Law.

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Hamada was previously managing counsel, Environmental and Regulatory for Phillips 66. He joined Phillips Petroleum in 2001 as a senior counsel in the West Coast Legal office. Prior to joining Phillips Petroleum, Hamada was a partner at the law firm Keesal, Young and Logan in Long Beach, California. Hamada was recognized as a California Super Lawyer Rising Star and has received a AV® Preeminent rating by Martindale-Hubbell in Legal Ability and Ethical Standards for the past 20 years.

Born in Los Angeles, California, Hamada earned his Bachelor of Arts in political science with honors from the University of California at Irvine in 1986. He also holds a Masters in public policy from the University of Chicago and received his Juris Doctorate from Loyola Law School in Los Angeles in 1992.

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Becky Raftery has been with BP America for ten years, and is the Managing Counsel for the US HSSE team. That team provides regulatory support to the downstream business, the Gulf of Mexico, and other businesses and functions in the US. Becky has worked on a number of regulatory and litigation matters since joining BP. Becky joined BP after practicing at a large Chicago law firm where she represented a wide variety of clients in environmental and safety matters and was a partner in the Environmental Law Group.

Becky graduated from Northwestern University and the University of Michigan Law School and is licensed in Illinois and Nevada

PRIORITIES OF THE ENVIRONMENTAL PROTECTION AGENCY

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Anne L. Idsal serves as the Regional Administrator for EPA Region 6. Her responsibilities include overseeing the states of Arkansas, Louisiana, Oklahoma, New Mexico, and Texas, and 66 Tribal Nations. Ms. Idsal joined the Agency having spent her career working for the Texas state government in helping shape environmental and land policy for the state.

Anne Idsal served as the first female Chief Clerk of the Texas General Land Office where she oversaw all budget and expenditure matters, and initiated the Office's reorganization efforts to optimize business functions and provide cost-savings for taxpayers. She previously served as the general counsel to Texas General Land Office where she provided substantive and procedural legal counsel to the Commissioner and led an office of attorneys on issues relating to oil and gas, coastal lands, public lands, financial transactions, and general law. An experienced Texas lawyer with extensive government experience, Ms. Idsal served as General Counsel to the Texas Commission on Environmental Quality, where she provided legal counsel to the Commissioners and oversaw the offices of the Chief Clerk, Public Interest Counsel, and Chief Auditor. She also served as a Special Counsel to the Chairman, providing counsel on policy development and implementation.

Ms. Idsal holds a Bachelor of Arts in Politics from Washington and Lee University, and a law degree from Baylor University.

ENVIRONMENTAL LITIGATION – TRENDS AND COMING THREATS

Janet L. McQuaid, *BakerHostetler*

Loulan J. Pitre, *Kelly Hart Pitre*

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Janet McQuaid is an attorney with Baker Hostetler LLP. She has over twenty-five years of experience in environmental law. Before joining Baker Hostetler in 2017, she worked for more than eleven years as a chemical engineer for ExxonMobil, four years as in-house counsel for El Paso Corporation (now Kinder Morgan), and more than twenty years with Norton Rose Fulbright LLP. Janet works for clients in many industries, but has particular experience in the oil and gas production, transportation, refining, and petrochemical industries.

Janet frequently helps clients appeal permits and defend against permit appeals before environmental review boards, recently including a major pipeline project in Pennsylvania and a mine in Ohio. She has defended many clients against administrative and civil enforcement by environmental regulatory agencies and is currently defending a municipality in a civil enforcement action under CWA 404 and a manufacturer against Superfund and property damage claims, both in federal district court. She has helped other lawyers in her firm successfully defend against challenges based on NEPA to various types of energy project approvals. She has also handled several appeals of state and federal rules on behalf of energy trade associations.

Janet graduated from the University of Pittsburgh in 1978 (BSChE), Houston Baptist University in 1989 (MBA), and The University of Texas in 1992 (JD), where she was Chief Manuscript Editor of the Texas Law Review. Janet is licensed and actively practices law in Texas, Colorado, Pennsylvania, West Virginia, and Ohio. After more than 30 years in Texas, Janet moved home to Southwestern Pennsylvania in 2011, where she serves on the Executive Board of the United Way of Washington County, Pennsylvania.

Loulan J. Pitre
Kelly Hart Pitre
New Orleans, Louisiana

Loulan Pitre leads the Louisiana offices of Kelly Hart and focuses his work on energy, natural resources and the environment. His law practice concentrates on the most challenging aspects of doing business in and protecting the vulnerable environment of Louisiana's working coast. He has represented oil and gas and other industrial companies, real estate developers, financial institutions, ports, levee districts and other public entities, and players in the construction and service industries such as contractors, engineers, and material suppliers. While serving as a member of the Louisiana House of Representatives from 2000 to 2008, he was intimately involved in the development of the state's coastal restoration and protection program and large transportation infrastructure projects such as the elevated highway to Port Fourchon. He has carried that knowledge and experience into his law practice.
Loulan has wide experience with the major federal environmental statutes, and in particular the Coastal Zone Management Act, the Clean Water Act, the Rivers and Harbors Act, the Oil Pollution Act, the Comprehensive Environmental Response, Compensation, and Liability Act, the Clean Air Act, the National Environmental Policy Act, and their Louisiana counterparts. Loulan is very familiar with the Louisiana law concerning public and private finance, procurement, and contracting. His experience includes traditional finance and procurement methods for both public and private projects, such as bidding and requests for proposals, as well as more innovative methods such as public private partnerships, securitization, and toll bonds. He is ranked in Chambers, BestLawyers, and SuperLawyers, and is a frequent speaker and writer. He is an experienced negotiator and is trained in both arbitration and mediation. He teaches International Oil & Gas Law as an Adjunct Assistant Professor of Law at Tulane Law School.

Loulan is also extremely well known for his practice in legacy litigation in which landowners and public entities sue oil and gas companies alleging environmental damage from oil and gas exploration and production operations. These cases often involve claims in the hundreds of millions of dollars. As lead trial counsel in Meaux et al. v. Hilcorp et al., he defended two oil and gas exploration and production companies from claims of environmental damage. After a three-week trial, plaintiffs asked the jury for over $60 million dollars. Instead, the jury's verdict resulted in no liability for defendants, a result that withstood appeal.

Loulan grew up in Cut Off in southern Lafourche Parish, Louisiana, which has grown in the past century from a collection of small Cajun French fishing villages to the central hub of the Gulf of Mexico deepwater oil and gas industry at Port Fourchon. Thus, from an early age he has understood the intricate challenges of living and working on the Louisiana coast. At South Lafourche High School, Loulan was a National Merit Scholar, a Presidential Scholar (one of 121 nationwide), and a Telluride Association Summer Program Scholar (one of 20 nationwide). He then spent seven years at Harvard, where he earned his bachelor and law degrees and numerous honors. He wrote his Harvard College magna cum laude honors thesis about a 19th century village on the Louisiana coast and his Harvard Law School senior paper about aspects of the Louisiana Constitution. He then returned to Louisiana, ultimately serving his home town as attorney to the Greater Lafourche Port Commission during a period of explosive expansion and as a member of the Louisiana House of Representatives. He now lives in New Orleans. He is married to Tiffany Peperone Pitre and has four children.

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- **Transport**

Elizabeth Weaver has practiced for more than 30 years in the field of environmental law and litigation, handling a wide range of matters, focusing on Superfund, RCRA, toxic torts and water. She has tried Superfund cases to judgment and has strong experience in all facets of CERCLA practice, including serving as common counsel at complex sites. She has handled and tried or resolved numerous private cost recovery actions. Elizabeth is currently serving as counsel to a major petroleum company in connection with a range of claims relating to the Portland Harbor Superfund Site.

In addition to her many years of CERCLA litigation experience, Elizabeth has a wide range of experience in RCRA permitting and compliance issues, groundwater contamination suits, citizen suits under the Clean Air Act, Proposition 65, and regulatory and compliance matters. She has served as a trusted advisor to companies in the sale or purchase of brownfield properties. Due to her depth of knowledge in the environmental field, she headed a team of attorneys at her prior firm that served as national environmental counsel to a major petroleum company in all of its environmental litigation matters nationwide, litigating and resolving cases across the country involving property damage, tort, nuisance, and trespass claims, as well as statutory claims. She has also handled several criminal environmental matters.

- ## Education

  JD, Duke University School of Law, 1980
  BA, *magna cum laude*, Duke University, 1977

  Elizabeth is admitted to practice law in federal and state courts in California and Florida.

- ## Representative experience

  Hazardous waste and Superfund:

  - Currently represents major oil company in claims for response costs and natural resource damages at Portland Harbor Superfund Site

- Currently represents party in claims alleging contamination of groundwater at North Hollywood Superfund Site
- Obtained dismissal of nuisance and other claims by local government seeking to impose local requirements on Superfund site cleanup in Illinois, upheld on appeal by 7th Circuit
- Obtained summary judgment in suit for contribution against waste haulers
- Litigated case against municipalities and public agencies for their role at a Superfund site in Los Angeles County, resulting in tens of million dollars in settlements
- After allocation trial, obtained judgment of 100% allocation of clean-up costs to United States government at Del Amo Superfund Site

Groundwater contamination, product liability and toxic tort:

- Defended manufacturer in "sick in building" tort case; settled favorably in late 2015
- Represented two major oil companies in multi-district litigation in New York for nationwide groundwater contamination relating to MTBE, a gasoline oxygenate
- Served as liaison counsel in California state-wide MTBE litigation against major petroleum retailers
- Defended Proposition 65 discharge cases at mining operation

Transactional and regulatory:

- Recently advised client in the sale of major brownfields property in Los Angeles
- Resolved RCRA enforcement issues at hazardous waste treatment facility
- RCRA permitting of treatment facility
- Mediated disputes among companies over cost-sharing in non-litigation context

- Admissions
  - California State Bar
- Rankings and recognitions
  - Chambers USA, California: Environment, *Chambers & Partners*, 2008 - 2017
  - Southern California Super Lawyer, *Thomson Reuters*, 2004 - 2018
  - Southern California's Top Rated Lawyers, *LexisNexis Martindale-Hubbell*, 2012 - 2013
  - Lawyer of the Year, Los Angeles: Environmental Law, *Best Lawyers*, 2018
  - The Best Lawyers in America, *Best Lawyers*, 2013 - 2018
- Publications
  - "New Life for Brownfields: Contaminated Site Liabilities Can be Successfully Managed," *The Metropolitan Corporate Counsel,* April 1997
- Speaking engagements
  - "Environmental Emergencies and Enforcement Actions -- How to Respond to a Warrant, a Raid, or a Release," Annual Environmental Health and Safety Conference, Long Beach, California, February 15, 2012
- Memberships and activities
  - American Bar Association, Section of Environment, Energy and Resources
  - State Bar of California, Environmental Law Section
  - Los Angeles County Bar Association, Section of Environmental Law
  - American Cancer Society - Los Angeles Chapter
  - LACBA Domestic Violence Project

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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Environmental Litigation – Trends and Coming Threats
Rocky Mountain and Appalachia (Federal and Selected State)
IEL Energy Industry Environmental Law Conference

Houston, Texas – May 18, 2018

Janet McQuaid[1]
Baker & Hostetler LLP

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

[1] Counsel, Baker & Hostetler LLP, jmcquaid@bakerlaw.com, 303-764-4046. Licensed in Texas (1992), Colorado, Pennsylvania, West Virginia, and Ohio.
[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*.

Legacy Litigation Update—Old and New

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I. INTRODUCTION

In the first footnote of its 2010 opinion in *Marin v. Exxon Mobil Corp.*,[1] the Louisiana Supreme Court defined legacy litigation:

> "Legacy litigation" refers to hundreds of cases filed by landowners seeking damages from oil and gas exploration companies for alleged environmental damage in the wake of this Court's decision in Corbello v. Iowa Production, 02-0826 (La. 2/25/03), 850 So. 2d 686. These types of actions are known as "legacy litigation" because they often arise from operations conducted many decades ago, leaving an unwanted "legacy" in the form of actual or alleged contamination. Loulan Pitre, Jr., "Legacy Litigation" and Act 312 of 2006, 20 Tul. Envtl. L.J. 347, 34 (Summer 2007).[2]

I was very proud of this definition because the Supreme Court attributed it to me. Too bad: my definition was wrong.

[1] *Marin v. Exxon Mobil Corp.*, 09-2368, p. 1 n.1 (La. 10/19/10) 48 So. 3d 234, 238 n.1 (citing Loulan Pitre, Jr., *"Legacy Litigation" and Act 312 of 2006*, 20 Tul. Envtl. L.J. 347, 348 (2007)).
[2] *Id.*

The purpose of this paper is to support my presentation at the 62nd LSU Mineral Law Institute, "Legacy Litigation Update." This topic was last presented at the Institute two years ago. This paper will not go into detail on the background of legacy litigation. For that, I refer you to previous articles on the subject, including my 2007 article in the Tulane Environmental Law Journal[3] and my 2012 article in the LSU Journal of Energy Law and Resources.[4] Rather, this paper will survey a number of important developments in the subject matter over the past two years. Given, the scope of a fifty-minute presentation, these developments will be surveyed, not presented in detail.

The most significant development is that legacy litigation is no longer just for landowners. Rather, public entities have joined the party. Prominent and highly controversial legislation has been brought by the Southeast Louisiana Flood Protection Authority-East and the Parishes of Plaquemines and Jefferson. I will call these cases, brought by public entities or derivative of claims by public entities, "New Legacy."

Legacy litigation by landowners—I will call these "Old Legacy"—also continued. Yet more legislation on the subject was enacted in 2014. And we also saw several court decisions affecting legacy litigation.

II. LEGACY LITIGATION UPDATE

A. New Legacy

In the past two years there have been three manifestations of what I call New Legacy:

1. Litigation by the Southeast Louisiana Flood Protection Authority-East;
2. Litigation by the Parishes of Plaquemines and Jefferson; and
3. Coming full circle, litigation by private landowners bringing claims derivative of those brought by the Parishes of Plaquemines and Jefferson.

1. SLFPA-E Litigation

On July 24, 2013, the Board of Commissioners of the Southeast-Louisiana Flood Protection Authority-East ("SLFPA-E") filed a petition in the Civil District Court for the Parish of Orleans.[5] The petition generally asserted that a larger number of defendants conducted oil and gas operations in a so-called "Buffer Zone" east of the Mississippi River and generally east and southeast of the New Orleans metropolitan area.[6] The petition went on to allege that these oil and gas activities contributed to coastal erosion and made the east bank of the New Orleans

[3] Loulan Pitre, Jr., *"Legacy Litigation" and Act 312 of 2006*, 20 Tul. Envtl. L.J. 347, 348 (2007).

[4] Loulan Pitre, Jr., *Six Years Later: Louisiana Legacy Lawsuits Since Act 312*, 1 LSU J. Energy L. & Resources, 93 (2012).

[5] *Bd. of Comm'rs of the Se. La. Flood Prot. Auth.-E. v. Tenn. Gas Pipeline Co.*, No. 13-5410, 2015 WL 691348, at *2 (E.D. La. Feb. 13, 2015).

[6] *Id.* at *1.

metropolitan area more vulnerable to severe weather and flooding.[7] The primary actions complained of was the dredging of canals, along with other activities.[8]

The petition asserted six causes of action: negligence, strict liability, natural servitude of drain, public nuisance, private nuisance, and breach of contract—third party beneficiary.[9] Plaintiff prayed for both damages and injunctive relief in the form of restoration activities.[10] While couching the claims as state law claims, the petition specifically asserted that the defendants' activities and violated federal law and regulations in three specific areas: the Rivers and Harbors Act of 1899, under which the Army Corp of Engineers regulates navigation and flood control; the Clean Water Act of 1972, regulating the dredging and maintenance of canals, and the Coastal Zone Management Act of 1972.[11]

A defendant removed the case to federal court, and the plaintiff moved to remand.[12] The federal court denied remand, finding that federal question jurisdiction existed in the case pursuant to an exception to the "well-pleaded complaint" rule.[13] Thus, even though the claims were brought under state law, the court found that federal issues were necessarily raised, actually disputed, substantial and capable of resolution without disrupting the federal-state balance approved by Congress.[14]

While the motion to remand was pending, there were initiatives elsewhere designed to halt the litigation. The Louisiana Oil and Gas Association ("LOGA") commenced litigation in the Nineteenth Judicial District Court for the Parish of East Baton Rouge challenging the efficacy of the Attorney General's approval of the SLFPA-E's hiring of special counsel for this litigation.[15] The district court upheld the hiring.[16] More dramatically, Governor Jindal supported litigation intended to remove the SLFPA-E's authority to bring the litigation, which ultimately resulted in the passage of Act 544 of the 2014 Regular Session of the Louisiana Legislature.[17] The Judge in the case ruled that Act 544 did not apply to the SLFPA-E and that it was unconstitutional,[18] and similar arguments were made to the federal court in the SLFPA-E litigation.[19]

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[7] *Id.*
[8] *Id.* at *1-*2.
[9] *Id.* at *2.
[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] *Id.* at *2-*3.
[15] *The La. Oil & Gas Ass'n, Inc. v. Honorable James D. "Buddy" Caldwell, in his capacity as Attorney Gen. of the State of La.*, No. 626798 "D", 19th JDC, East Baton Rouge Parish, Louisiana.
[16] *Id.*
[17] Act of June 6, 2014, No. 544, 2014 La. Sess. Law. Serv. Act 544 (S.B. 469)(West) (codified as amended at La. Rev. Stat. Ann. § 49:214.36(O) (2014)).
[18] *The La. Oil & Gas Ass'n, Inc. v. Honorable James D. "Buddy" Caldwell, in his capacity as Attorney Gen. of the State of La.*, No. 626798 "D", 19th JDC, East Baton Rouge Parish, Louisiana.
[19] *Bd. of Comm'rs of the Se. La. Flood Prot. Auth.-E. v. Tenn. Gas Pipeline Co.,* No. 13-5410, Doc. 389-1 (E.D. La. Aug. 6, 2014).

The federal district court, however, on February 13, 2015 dismissed all of the SLFPA-E's claims with prejudice without reaching any of the arguments based on Act 544.[20] Instead, the court granted defendants' motion to dismiss for failure to state a claim under Rule 12(b)(6).[21] The court found that the duties imposed upon defendants under the federal statues cited by plaintiff do not extend to the protection or benefit of the SLFPA-E.[22] Therefore, the court found that a Louisiana duty-risk analysis negated any possible liability under negligence[23] or strict liability.[24] The court then agreed with the defendants that a claims based on a natural servitude of drain could not be supported under the circumstances.[25] The court dismissed the public and private nuisance claims on the basis that a "neighbor" relationship did not exist.[26] And finally, the court held that the SLFPA-E was not a contractual third-party beneficiary of any permits issues to the defendants.[27] On February 20, 2015, counsel for the SLFPA-E filed a notice of appeal of this decision to the United States Fifth Circuit Court of Appeal.[28]

2. Parish Litigation

On or about November 8 and 11, 2013, the Parish of Plaquemines and the Parish of Jefferson filed a total of 28 separate lawsuits.[29] Each of these lawsuits named multiple defendants alleged to have conducted oil and gas operations in an "Operational Area" consisting of one or more oil and gas fields.[30] Other than the oil and gas fields and defendants named, however, the allegations of each petition were essentially identical.[31] The claims were asserted based on the Louisiana State and Local Coastal Resources Management Act of 1978, La. R.S. § 49:214.21 et seq. (the "CZM Laws" or "SLCRMA") and related regulations and orders.[32] The CZM Laws generally require a Coastal Use Permit ("CUP") before engaging in certain uses in the defined Coastal Zone.[33] The CZM Laws distinguish between uses of state concern and uses of local concern.[34] Although oil and gas activities are designated as issues of state concern, these lawsuits allege that the parishes have the right to enforce the CZM Laws with respect to issues of

[20] *Bd. of Comm'rs of the Se. La. Flood Prot. Auth.-E. v. Tenn. Gas Pipeline Co.*, No. 13-5410, 2015 WL 691348 (E.D. La. Feb. 13, 2015).
[21] *Id.* at *14.
[22] *Id.* at *7-*9.
[23] *Id.*
[24] *Id.* at * 9-*10.
[25] *Id.* at *10-*12.
[26] *Id.* at *12-*13.
[27] *Id.* at *13-*14.
[28] *Bd. of Comm'rs of the Se. La. Flood Prot. Auth.-E. v. Tenn. Gas Pipeline Co.*, No. 13-5410, Doc. 531 (E.D. La. Feb. 20, 2015).
[29] See, e.g., *Parish of Plaquemines v. Total Petrochemical & Ref. USA, Inc.*, No. 13-06693, Doc. 87 (E.D. La. Dec. 2, 2014); *see also* cases listed at www.loga.la.
[30] *Id.* at 2-3.
[31] *See* records of cases cited at www.loga.la.
[32] See, e.g., *Parish of Plaquemines v. Total Petrochemical & Ref. USA, Inc.*, No. 13-06693, Doc. 87 at p. 2 (E.D. La. 12/02/14); *see also* cases listed at www.loga.la..
[33] La. Rev. Stat. § 49:214.30.
[34] La. Rev. Stat. § 49:214.25.

state concern,[35] even though the state, not the parishes, has the exclusive right to grant permits regarding issues of state concern.[36] The petitions generally allege permit violations in connection with canals and waste pits.[37]

Defendants removed each of the 28 cases, alleging diversity jurisdiction and several bases for federal question jurisdiction.[38] On December 1, 2014, Judge Zainey rejected all of the bases for federal court jurisdiction and remanded the case in *The Parish of Plaquemines versus Total Petrochemical & Refining USA, Inc., et al.*, Civil Action No. 13-6693, Section "A" (2), United States District Court, Eastern District of Louisiana.[39] Remand has also been ordered in several of the other cases, while in most of the cases the motions to remand remain pending.[40] None of the federal courts has yet denied remand.[41]

The government of Plaquemines Parish, meanwhile, may be re-considering the litigation. On February 26, 2015, the Plaquemines Council is considering a resolution instructing their attorneys to "temporarily cease and desist working on the legal action currently pending under the Coastal Zone Management Act" and "to provide a comprehensive update status update and full accounting of costs and fees incurred to date in this matter."[42]

3. Landowner Litigation Derivative of Parish Litigation

At least four actions have been filed in which private landowners claims that their land has been damaged by the violations alleged in the Parish litigation.[43] Based on these "findings" by the Parishes, these lawsuits assert claims in negligence, strict liability, public nuisance, private nuisance, and breach of contract—third party beneficiary and seek damages as well as injunctive relief in the form of restoration activities, as well as attorney fees and other relief.[44] These cases have been removed to federal court,[45] with motions to remand to be readily expected, and no other action thus far.

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[35] See, e.g., *Parish of Plaquemines v. Total Petrochemical & Ref. USA, Inc.*, No. 13-06693, Doc. 87 (E.D. La. Dec. 2, 2014); *see also* cases listed at www.loga.la.

[36] La. Rev. Stat. § 49:214.30(A)(1).

[37] See, e.g., *Parish of Plaquemines v. Total Petrochemical & Ref. USA, Inc.*, No. 13-06693, Doc. 87 (E.D. La. Dec. 2, 2014); *see also* cases listed at www.loga.la.

[38] *Id.* at 3-4.

[39] *Id.* at 6-53.

[40] *See* records of cases cited at www.loga.la.

[41] *Id.*

[42] *See* www.plaquemines.la.

[43] *Borne v. Chevron U.S.A. Holdings Inc.*, No. 744-218 "M", 24th JDC, Jefferson Parish, Louisiana; *Easterling v. Hilcorp Energy*, No. 61,798 "B", 25th JDC, Plaquemines Parish, Louisiana; *Bernstein v. Atl. Richfield Co.*, No. 744-226 "M", 24th JDC, Jefferson Parish, Louisiana; *Defelice Land Co. v. ConocoPhillips Co.*, No. 61-926 "A", 25th JDC, Plaquemines Parish, Louisiana.

[44] *Id.*

[45] *Id.*

B. Old Legacy

1. Legislation

In 2014, Act No. 400 of the Louisiana Legislature[46] once again[47] amended La. R.S. 30:29,[48] which was first enacted in Act No. 312 of the 2006 Regular Session of the Louisiana Legislature[49] and is still commonly known as Act 312. Act No. 400 amended La. R.S. 30:39 prospectively[50] in the following respects:

- Providing in La. R.S. 30:29(B)(6) that parties dismissed as a result of a preliminary hearing shall be entitled to receive an award of reasonable attorney fees and costs after they have received a judgment of dismissal with prejudice following a non-appealable judgment on the claims asserted by the party against whom the preliminary dismissal was granted.[51]

- The following language was added to La. R.S. 30:29(C)(2) regarding limited admissions of liability: "In all cases in which a party makes a limited admission of liability under the provisions of the Code of Civil Procedure Art. 1563, there shall be a rebuttable presumption that the plan approved or structured by the department, after consultation with the Department of Environmental Quality as appropriate, shall be the most feasible plan to evaluate or remediate to applicable regulatory standards the environmental damage for which responsibility is admitted. For cases tried by a jury, the court shall instruct the jury regarding this presumption if so requested by a party."[52]

- Language was amended in La. R.S. 30:29(H)(1) to clarify procedure with respect to awards with respect to additional remediation in excess of the requirements of the feasible plans adopted by the court.[53]

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[46] Act of June 2, 2014, No. 400, 2014 La. Sess. Law. Serv. 736 (West) (codified as amended at La. Rev. Stat. Ann. § 30:29 (2014); La. Code Civ. Proc. art. 1563)).

[47] *See* Act of June 12, 2012, No. 754, 2012 La. Acts. 3072 (codified as amended at La. Code Civ. Proc. Ann. arts. 1552, 1563 (2014); Act of June 12, 2012, No. 779, 2012 La. Acts. 3149 (codified as amended at La. Rev. Stat. Ann. § 30:29 (2014).

[48] La. Rev. Stat. Ann. § 30:29.

[49] Act of June 8, 2006, No. 312, 2006 La. Acts 1472 (codified as amended at La. Rev. Stat. Ann. §§ 30:29, :29.1, :82, :89.1, :2015.1 (2014).

[50] Act No. 400 provides at Section 3: "The provisions of this Act shall not apply to any case in which the court, on or before May 15, 2014, has issued or signed an order setting the case for trial, regardless of whether such trial setting is continued." Act of June 2, 2014, No. 400, 2014 La. Sess. Law. Serv. 736 (West).

[51] Act of June 2, 2014, No. 400, 2014 La. Sess. Law. Serv. 736 (West) (codified as amended at La. Rev. Stat. Ann. § 30:29 (2014).

[52] *Id.*

[53] *Id.*

- "Contamination" has been defined in La. R.S. 30:29(I)(1) to mean "the introduction or presence of substances or contaminants into a usable groundwater aquifer, an underground source of drinking water (USDW) or soil in such quantities as to render them unsuitable for their reasonably intended purposes."[54]

- La. R.S. 30:29(M) has been added, providing that in an action governed by La. R.S. 30:29, damages may be awarded only for the following:

  (1) The cost of funding the feasible plan adopted by the court.

  (2) The cost of additional remediation only if required by an express contractual provision providing for remediation to original condition or to some other specific remediation standard.

  (3) The cost of evaluating, correcting or repairing environmental damage upon a showing that such damage was caused by unreasonable or excessive operations based on rules, regulations, lease terms and implied lease obligations arising by operation of law, or standards applicable at the time of the activity complained of, provided that such damage is not duplicative of damages awarded under Paragraphs (1) or (2) of this Subsection.

  (4) The cost of non-remediation damages.

  However, these provisions shall not be construed to alter the traditional burden of proof or to imply the existence or extent of damages in any action, nor shall it affect an award of reasonable attorney fees or costs La. R.S. 30:29.[55]

- Code of Civil Procedure Article 1563 has been amended to provide that in the case of a limited admission of responsibility under La. R.S. 30:29, there shall be a rebuttable presumption that the plan approved or structured by the department, after consultation with the Department of Environmental Quality as appropriate, shall be the most feasible plan to evaluate or remediate the environmental damage under the applicable regulatory standards pursuant to the provisions of R.S. 30:29. For cases tried by a jury, the court shall instruct the jury regarding this presumption if requested by a party.[56]

2. Cases

a. Excess Damages: *Savoie*

Savoie v. Richard[57] dealt with an appeal of a judgment against Shell Oil Company and SWEPI LP (collectively "Shell") awarding plaintiffs $34 million in damages for remediation of their land to state regulations and $18 million to remediate the property to comply with the

[54] *Id.*
[55] *Id.*
[56] *Id.*
[57] 13-1370 (La. App. 3 Cir. 4/2/14), 137 So. 3d 78, *reh'g denied* (La. App. 3 Cir. 4/21/14), *writ denied* 152 So. 3d 880 (La. 11/14/14).

applicable mineral leases.[58] After the jury verdict the matter had proceeded to the Louisiana Department of Natural Resources in accordance with Act 312, and the DNR adopted a remediation plan that would cost approximately an estimated $4 million.[59] The district court adopted this plan held that $4 million would be deposited in the registry of the court to fund remediation, and that the remaining $30 million found by the jury for remediation to state regulations would be paid to the plaintiffs, in addition to the other $18 million.[60]

While the Third Circuit found that the jury instructions were confusing, it did not overturn the jury's verdict.[61] However, the court of appeal amended the judgment entered by the court, finding that "the remedy for remediation to state regulatory standards is no longer a private monetary award, but rather specific performance of the remediation to those state standards that serve the public interest."[62] The plaintiffs could have but did not submit their own plan to contest the $4 million plan.[63] Thus, the court of appeal reasoned, Act 312 required that the amount of the jury's verdict for remediation to state regulations in excess of the amount necessary to do so would be returned to the responsible party.[64] The court of appeal required that the entire $34 million be deposited in the registry of the court until the remediation was complete, but at that time any remaining money should be returned to Shell.[65] The court of appeal, upheld, however, the judgment in favor of plaintiffs for $18 million in "excess damages," finding that the jury found that the mineral lease required a more expensive remediation than state regulations.[66] The Louisiana Supreme court denied writs.[67]

b. Subsequent Purchaser: *Pierce* and *Global Marketing*

Pierce v. Atlantic Richfield Co.[68] involves application of the "subsequent purchaser" doctrine.[69] The children of Mr. Pierce, who had passed away in 1998, had obtained the property by judgment of possession in 1998 and had sold it to one of the defendants in 2011.[70] Thus, the Pierce Children no longer owned the waste dump site for which they sought damages.[71] The court of appeal, on *de novo* review, found that the doctrine of confusion applied when the property was sold to one of the defendants who allegedly contaminated the property.[72] Additionally, because the judgment of possession contained no specific assignment or subrogation of a personal action to bring a property damage claims related to the properties, the

[58] *Id.* at 80-81.
[59] *Id.* at 81.
[60] *Id.* at 81-82.
[61] *Id.* at 83.
[62] *Id.* at 86.
[63] *Id.*
[64] *Id.* at 87.
[65] *Id.*
[66] *Id.* at 90.
[67] 152 So. 3d 880 (La. 11/14/14).
[68] 13-1103, 2014 WL 1047061 (La. App. 3 Cir. 3/19/14), writ granted, 152 So. 3d 162 (La. 11/7/14).
[69] *Id.*
[70] *Id.* at *1.
[71] *Id.* at *6.
[72] *Id.* at *7.

court held that the Pierce children did not acquire a personal right to sue for damages that allegedly occurred before their ownership.[73] The Louisiana Supreme Court has granted writs in this case,[74] and the result will be closely watched.

Global Mktg. Solutions v. Blue Mill Farms, Inc.[75] also involves the subsequent purchaser doctrine.[76] The plaintiff had purchased the property at issue by act of cash sale in 2005.[77] The plaintiff alleged that it discovered contamination after purchasing the land.[78] The defendants moved for summary judgment based on the subsequent purchaser doctrine.[79] The court of appeal found that Eagle Pipe was correctly applied by the district court in granting the motion for summary judgment dismissing all of plaintiff's clams.[80] The plaintiff argued that the were asserting real rights and obligations under Louisiana Civil Code Article 667, but the Court of Appeal found that a lease, including a mineral lease, does not convey any real right or title to the property leases, but only a personal right.[81] These personal rights are not transferred to a successor by particular title without a clear stipulation to that effect.[82] The Court of Appeal also rejected the plaintiff's arguments based on continuing tort, third-party beneficiary, and *Magnolia Coal*.[83] The Court of Appeal affirmed the district court's grant of summary judgment dismissing all of plaintiff's claims.[84]

[73] *Id.*
[74] 152 So. 3d 162 (La. 11/7/14).
[75] 2013-2132 (La. App. 1 Cir. 9/19/14), 153 So. 3d 1209.
[76] *Id.*
[77] *Id.* at 1211.
[78] *Id.*
[79] *Id.* at 1211-12.
[80] *Id.* at 1215.
[81] *Id*
[82] *Id.*
[83] *Id.* at 1216-17.
[84] *Id.* at 1218.

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Environmental Litigation Trends and Threats Rocky Mountains and Appalachia

IEL Energy Industry Environmental Law Conference

Houston, Texas
May 18, 2018

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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Agenda

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- Federal Deregulatory Litigation
- Youth Activist Lawsuits (Colo.)
- [Not Boulder v. Suncor (III.D)]
- [Not NEPA Challenges (III.C)]

Appalachia

- PA Environmental Rights Amendment
- "Conduit Theory" of CWA Liability
- [Not PA Trespass by Fracture (IV.E)]
- [Not Ohio Ballot Initiatives (IV.B)]

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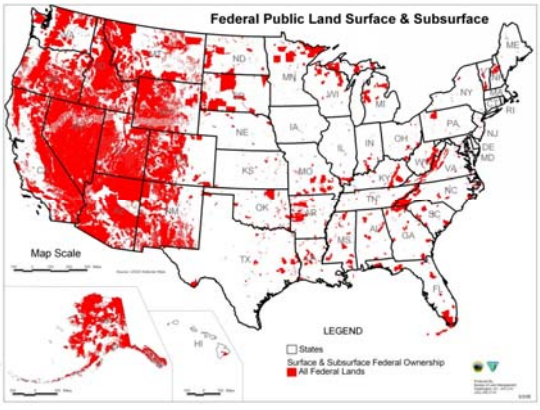
Federal Lands

Deregulatory Lawsuits

- Regulation-forcing litigation (I.B)
- Deregulatory Challenges (I.C-I.D)
  - Compliance date deferrals
  - Rule rescissions
  - Rule reconsiderations
- "Dysfunctional" administrative law
  - Finality
  - Ripeness, Mootness
  - Comity
- Venue confusion
  - Merits in one court (*e.g.*, D. Wyo)
  - Deferrals in another (*e.g.*, N.D. Cal.)

The Federal Mineral Estate



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Regulation-Forcing Litigation

- 2016 NSPS OOOOa (FR 6/16)
  - EPA stayed 3 mos. for reconsideration (FR 6/17)
  - Clean Air Council et al. sued EPA in D.C. Cir. (6/17)
  - EPA proposed rule postponing 2-years (FR 6/17)
  - D.C. Cir. vacated 3-month stay (7/17)
- 20?? Emission Guidelines Existing Sources
  - EPA withdrew 2016 ICR (FR 3/17)
  - Fourteen "Blue" States sued EPA in D.D.C. (4/18)

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Deregulatory Lawsuits

BLM Venting & Flaring Rule (FR 11/16)

(1) Imposed "Phase-In Provisions" on new and existing wells by 1/17/2018

(2) Challenged in D. Wyo. (11/16)
- By IPAA, WEA, WY, MT …
- Intervener-Δs: CA, NM, ENGOs

BLM Postponement Notice (FR 6/17)

(3) Postponed ≥1/17/18 compliance dates until rulemaking complete

(4) Challenged in N.D. Cal. (7/17)
- By CA, NM, ENGOs
- Intervener-Δs: IPAA, WEA, WY, MT …

(5) Vacated by N.D. Cal. (10/4/17)

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Deregulatory Lawsuits

BLM Venting & Flaring Rule (FR 11/16)

(10) D. Wyo. stayed "Phase-In Provisions" pending decision on the merits (4/18)*

(11) CA, NM, ENGOs appealed to 10th Cir

(12) IPAA et al. filed motion to dismiss

(13) CA, NM et al.'s response due 5/21/18

* See next slide.

BLM Suspension Rule (FR 12/8/17)

(6) Suspended "Phase-In Provisions" compliance dates 1 year

(7) Challenged in N.D. Cal. (7/17)

- By CA, NM, ENGOs
- Intervener-Δs: IPAA, WEA, WY, MT …

(8) Motion to transfer venue denied (2/18)

- "Inextricably intertwined" cases; but
- Raise different legal issues
- Court not interfere with π's venue choice

(9) BLM appealed to 9th Circuit (pending)

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Deregulatory Lawsuits

"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."

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Deregulatory Lawsuits

2015 BLM Hydraulic Fracturing Rule

(1) WY, CO, IPAA, WEA challenged in D. Wyo.
  – "End-run" around 2005 EPAct (SDWA exemption)
(2) D. Wyo. stayed before effective date (since 1/15)
(3) CA, NM, ENGOs appealed stay to 10th Cir.
(4) D. Wyo. set rule aside on merits (6/16)
(5) CA, NM, ENGOs appealed on merits to 10th Cir.

(7) In light of *proposed* rule, the 10th Cir. dismissed CA et al.'s appeal as "prudentially unripe" (9/17)
  – Remanded to D. Wyo. with instructions to dismiss w/o prejudice and vacate judgment; but then …
  – Stayed the mandate (*i.e.*, still extant in D. Wyo.)

2017 BLM HF Rescission Rule

(6) BLM proposed to rescind the HF Rule (7/17)

(8) BLM finalized the Rescission Rule (12/17)
(9) Plaintiffs CA, NM, ENGOs challenged Rescission Rule in N.D. Cal. (1/18)
(10) BLM moved to transfer venue to D. Wyo. (3/18)

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Youth Activist Lawsuits*

- *Juliana* [+ 20 π's**] *v. United States* (D. Or.)
  - Also Plaintiffs Earth Guardians, Sierra Club
  - Defendants Obama, then Trump, and US Agencies
  - Defendant-Interveners NAM, AFPM, API
- D. Or. denied dismissal (4/16)
- NAM, AFPM, API withdrew (6/17)
- 9th Cir. denied US mandamus (3/18)
- Trial starts October 29, 2018

* www.OurChildren'sTrust.org
**Includes Plaintiff in *Martinez v. COGCC* (III.A)

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Youth Activist Lawsuits

"Atmospheric Trust Principle" claims:

- Air and atmosphere are in the *res* of the public trust
- Legislature and agencies are public trustees
- Present and future generations are beneficiaries
- Trustees owe a fiduciary duty to protect the *res* against "substantial impairment," which amounts to an affirmative duty to restore its balance
- Courts have a duty to enforce the trust obligations

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Martinez v. COGCC (Colo. App. 2017)

- Xiuhtezcatl Martinez (+ 6 minors) petitioned for rule that COGCC would 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."

- COGCC denied, and Colo. district court agreed
  - COGCC must balance O&G development and public health, safety, and welfare
  - Delegation of non-delegable duty to promulgate rules

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Martinez v. COGCC (Colo. App. 2017)

C.R.S. 34-60-102(1)(a)(1)

"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."

C.R.S. 34-60-106(2)(d)

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

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Martinez v. COGCC (Colo. App. 2017)

- Colo. Ct. App. reversed (2-1):
  - Acknowledged that Colorado had rejected "public trust doctrine"*; but
  - Held "consistent with" and "to the extent that" indicate a "condition that must be fulfilled rather than mere balancing"
  - Did not reach merits of the Petition
- Colo. Supreme Court granted petition for review (1/18). Sole issue:

  "Whether the court of appeals erred in determining that the Colorado Oil and Gas Commission misinterpreted section 34-60-102(1)(a)(1), C.R.S. as requiring a balance between oil and gas development and public health, safety, and welfare."

* *Citing Longmont v. COGCC* (Colo. 2016)).

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PA Constitution, Article I, Section 27 (1971)

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.

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Payne v. Kassab (Pa. Commw. 1973)

- Was there compliance with all applicable statutes and regulations relevant to the protection of the Commonwealth's public natural resources?
- Does the record demonstrate a reasonable effort to reduce the environmental incursion to a minimum?
- 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?

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Robinson Twp. v. Commw. (Pa. 2013)

- Plurality opinion found Payne test too narrow, and therefore:

  "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 interests."

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Pennsylvania EDF v. Commw. (Pa. 2017)

- Narrow issues regarding use of Lease Funds
- But broad statements in *Payne*:

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

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Common Pleas / Commw. Ct. Cases

- *Gorsline v. Fairfield Twp.* (Pa. Commw. 2015) (upholding, pet. Granted. Oral argument 3/17.
- *Markwest v. Cecil Twp.* (Pa. Commw. 3/18) (extra-statutory conditions unreasonable) (unpublished)
- *Delaware Riverkeeper v. Sunoco Pipeline* (Pa. Commw. 2018) ("We are not persuaded that the cases signify that an intent to protect public natural resources trumps all other legal concerns raised by every type of party under all circumstances.")

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"Conduit Theory" of CWA Discharge

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

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

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"Conduit Theory" of CWA Discharge

- **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 or may be discharged. . . .

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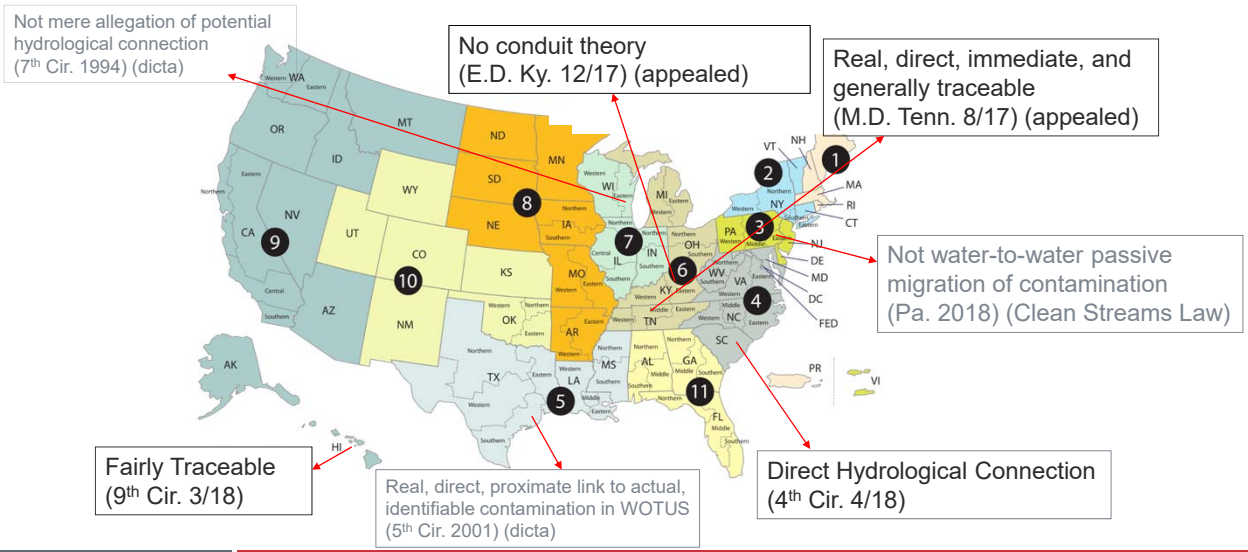
"Conduit" Theory of CWA Discharge



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Trends and Threats

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Environmental Litigation — Trends and Coming Threats: The West Coast

Elizabeth Weaver
Partner
Norton Rose Fulbright US LLP
May 18, 2018

Topics

- Municipalities' Climate Change Lawsuits
- Climate Change Citizen Suits
- PCB Lawsuits
- Questions

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Municipalities' Climate Change Lawsuits

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Climate Change Lawsuits

- Overview
- San Francisco and Oakland lawsuits
- Marin, San Mateo, and Imperial Beach lawsuits
- Colorado Lawsuit

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Climate Change Lawsuits:
Overview

- Lawsuits by municipalities against oil and gas companies
  - Seven California cities and three counties have sued oil and gas companies
- Premise
  - Public Nuisance claim: An unreasonable interference with a right common to the general public
    - Companies have produced fossil fuels for decades knowing about climate risk created by fossil fuels and have attempted to undermine climate science and deceive consumers about the dangers
    - Causing "global-warming induced sea level rise"
    - Plaintiffs want defendant oil companies to pay cost of constructing seawalls and rebuilding submerged roads and infrastructure

Climate Change Lawsuits:
San Francisco and Oakland Lawsuits

- Background
  - Filed parallel lawsuits on Sept. 19, 2017
    - *San Francisco v. BP P.L.C. et al.*, CGC-17-561370 (Cal. Super. Ct.)
    - *Oakland v. BP P.L.C. et al.*, RG17875889 (Cal. Super. Ct.)
  - State court
    - Cases filed in California Superior Court
  - Seeking damages from five fossil fuel companies over sea level rise caused by fossil fuels produced by defendants

Climate Change Lawsuits:
San Francisco and Oakland Lawsuits

- Allegations
  - Fossil fuels are primary cause of global warming
  - Defendants produced and continue to produce massive quantities of fossil fuels
  - Defendants had full knowledge that fossil fuels cause global warming
  - Defendants promoted fossil fuels despite knowledge
  - Cities will incur climate change injuries through expenditures to abate global warming nuisance (i.e., sea level rise)

Climate Change Lawsuits:
San Francisco and Oakland Lawsuits

- Cause of Action: Public Nuisance on behalf of the people
  - Defendants (ExxonMobil, BP, Chevron, ConocoPhillips, and Royal Dutch Shell) created the public nuisance of climate change impacts—primarily sea level rise—by producing fossil fuels that are the principal cause of global warming
- Relief Requested
  - Abatement fund
    - Seeking order to compel defendants to pay for the coastal infrastructure necessary to protect against sea level rise caused by global warming

Climate Change Lawsuits:
San Francisco and Oakland Lawsuits

- Recent Developments
  - Removal
    - Both cases removed to federal court by defendants
    - Judge Alsup denied cities' motions to remand
      - Cities argued that public nuisance under state law
      - Judge held the cities' nuisance claims are "necessarily governed by federal common law" because they "address the national and international geophysical phenomenon of global warming"
  - Climate science tutorial
    - Judge Alsup ordered a climate science tutorial on the following:
      - (1) history of the scientific study of climate change
      - (2) best science now available on global warming

Climate Change Lawsuits:
San Francisco and Oakland Lawsuits

- Recent Developments
  - Amicus Brief
    - U.S. DOJ invited to file amicus brief on question of "whether (and the extent to which) federal common law should afford relief of the type requested by the complaints."
    - DOJ's amicus brief says that the cities' claims should not be governed by federal common law.
      - (1) Claims are precluded by the Clean Air Act
      - (2) Congress and the executive branch have authority over foreign relations, including the authority to negotiate international climate change deals, and federal laws allow fossil fuel production on public lands
  - Motions to Dismiss
    - All defendants filed motions to dismiss for lack of jurisdiction on April 19, 2018; replies filed on May 10, 2018

Climate Change Lawsuits:
Marin, San Mateo, and Imperial Beach

- Overview
  - Counties of Marin and San Mateo and city of Imperial Beach filed separate lawsuits in state court, all with Sher Edling LLP as outside counsel
  - Claims premised on sea level rise and include public nuisance, trespass, and negligent failure to warn
- Remand and interlocutory appeal
  - Cases removed to federal court by defendants
  - Disagreeing with Judge Alsup's decision in the San Francisco and Oakland lawsuits, Judge Chhabria remanded the cases to state court
  - Judge Chhabria agreed to stay his remand order while jurisdiction question is appealed to the Ninth Circuit

Climate Change Lawsuits:
Colorado Lawsuit

- Overview
  - Colorado communities of Boulder County, San Miguel County, and the City of Boulder filed a lawsuit against Suncor and ExxonMobil on April 17, 2018 in state court
  - First climate change lawsuit brought in the interior
- Claims
  - Public and private nuisance, trespass, unjust enrichment, violation of Colorado consumer protection law
  - Seeking past and future damages and costs to mitigate climate impacts
- Injury
  - Drought, increased wildfires, heat waves, floods

Climate Change Citizen Suits

Climate Change Citizen Suits

- Overview
- Recent Activity

Climate Change Citizen Suits:
Overview

- Citizen suits
  - Major environmental statutes provide a cause of action for individuals and groups to act as private attorneys general by suing for alleged environmental violations
- Waves of climate change citizen suits across the country in response to Trump Administration
  - EPA's funding slashed
  - Enforcement not prioritized
  - Sue and settle ended
  - Sharp increase in donations to environmental non-profit groups

Climate Change Citizen Suits:
Recent Activity

- *Juliana v. United States*, 6:15-cv-01517-TC (D. Or.)
  - 21 youths filed lawsuit seeking declaratory and injunctive relief claiming that government violated their constitutional rights to life and liberty by failing to take action against global warming and that the government has violated the public trust doctrine
  - Trial date set for February 2018
- 9th Circuit rejected writ of mandamus
  - Defendants petitioned for writ of mandamus to reverse District Court's decision not to dismiss the case
  - Defendants argued that the Ninth Circuit should direct the District Court to dismiss the case because it lacked merit
    - The Ninth Circuit held that plaintiffs' theories are unprecedented and thus "the absence of controlling precedent in this case weighs strongly against a finding of clear error."

PCB Lawsuits

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PCB Lawsuits

- Overview
- Recent Developments

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PCB Lawsuits:
Overview

- Lawsuits against Monsanto Co. over PCB contamination
  - Cities: Oregon: Portland, Port of Portland*; California: Oakland, Berkeley, San Jose, Long Beach, San Diego; Washington: Spokane, Seattle
  - States: Washington, Oregon, Ohio
- Premise
  - Monsanto (exclusively) produced and sold PCBs knowing that PCBs were toxic and that discharge of PCBs was "inevitable"
  - Public nuisance theory: An unreasonable interference with a right common to the general public
    - Public right = use and enjoyment of waterways
    - Special injury = municipalities operate stormwater and water conveyance systems that PCBs enter through runoff and that is discharged into, and thereby contaminates, waterways

PCB Lawsuits:
Recent Developments

- Stays until cities exhaust administrative remedies
  - Northern District of California cases (Berkeley, Oakland, San Jose): stayed
  - Central District of California case (Long Beach): motion to stay pending before the court
  - Southern District of California (San Diego): declined to stay
- Motions to dismiss on statute of limitations
  - Cities were aware or should have been aware of PCB contamination decades ago
  - No dismissals on this basis
- Jurisdiction
  - Washington case: federal district court remanded to state court; Monsanto petitioned 9th Circuit to reverse and return to district court

Questions?

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GOING GLOBAL: EXPANDING THE SCOPE OF ENVIRONMENTAL REVIEW FOR THE ENERGY SECTOR

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Area of Emphasis

Joe Reinhart is a shareholder and co-chairman of the Energy and Natural Resources Group of Babst Calland. He is also a member of the Firm's Environmental Group. His environmental practice focuses on areas of environmental law that concern oil and gas well development, chemical plant operations, coal mining and non-coal mining. In addition, Mr. Reinhart's practice includes the application of state and federal laws governing the disposal of produced waters and other wastes generated by gas, coal and electric utility industries. Mr. Reinhart also routinely counsels clients concerning risk-based remediation programs, such as Pennsylvania's Act 2 Program, particularly as they relate to wastes derived from fossil fuels.

Mr. Reinhart has more than 30 years of experience with environmental law. He has represented industrial and commercial clients in many complex permitting and enforcement matters under federal and state laws. Mr. Reinhart has negotiated consent orders with agencies to resolve liabilities associated with reclamation and remediation obligations under SMCRA, CERCLA, RCRA, the SDWA, the Pennsylvania Oil and Gas Act, the Solid Waste Management Act, the Pennsylvania Hazardous Sites Cleanup Act and the Pennsylvania Clean Streams Law. He has negotiated environmental provisions in business transactions involving coal mines, petrochemical facilities and industrial properties across the United States.

Mr. Reinhart frequently lectures on new developments in environmental law and has provided comments on behalf of industry to agency regulatory initiatives. Beginning in 2003, and annually thereafter, he has been appointed by the secretaries of the Pennsylvania Department of Environmental Protection to the Pennsylvania Solid Waste Advisory Committee (SWAC). In addition, Mr. Reinhart is a Trustee of the Energy and Mineral Law Foundation, where he presently serves on its Law Student Scholarship Committee. He also served as co-chair of the *Oil & Gas Program* at the 60th Annual Rocky Mountain Mineral Law Institute in Vail, Colorado and chaired the *Oil & Gas Program* at the 2015 Annual Energy and Mineral Law Foundation Institute in Amelia Island, Florida.

Background

Mr. Reinhart earned his B.A. from the University of Notre Dame in 1981 and his J.D. from the University of Pittsburgh School of Law in 1984. From 1984–1988, he served as counsel to the Pennsylvania Department of Environmental Resources. Mr. Reinhart joined the law firm in 1988 and served as chairman of the Environmental Group for eight years.

Memberships and Affiliations

Mr. Reinhart is licensed to practice in Pennsylvania and West Virginia. He is a member of the Allegheny County, Pennsylvania, West Virginia and the American Bar associations. Mr. Reinhart has been listed in *The Best Lawyers in America*© since 2003 in the Energy Law, Environmental Law, Litigation – Environmental, and Natural Resources Law sections and was named the *Best Lawyers*® 2018 Energy Law "Lawyer of the Year" in Pittsburgh, Pa. Since 2005, he has been ranked among Pennsylvania's top environmental lawyers in Chambers USA's America's Leading Business Lawyers.

Publications/Presentations

Reinhart, Joseph K., "Environmental Permitting and Issues for the Petrochemical Industry," Energy & Mineral Law Foundation's Special Institute on Petrochemicals, April 11, 2018.

Reinhart, Joseph K., "Government and NGO Perspectives on the Environmental Rights Amendment and Other Current Environmental Issues," Pitt Law's 2018 Energy Law and Policy Institute Conference, March 15, 2018.

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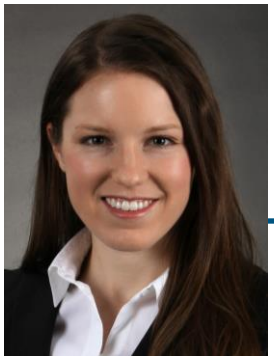

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Area of Emphasis

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Ms. Graham regularly counsels companies in the chemical, oil and gas, cement and other industrial sectors regarding the environmental requirements affecting their operations. Her core practice involves assisting clients with day-to-day compliance and permitting needs for facilities located around the country, often in conjunction with technical consultants. She has experience with state and federal agency information requests and enforcement actions, as well as environmental litigation matters such as permit appeals and citizen suits. She also provides environmental due diligence services for corporate transactions.

Background

In 2008, Ms. Graham graduated *summa cum laude* with distinction in research from Cornell University, where she earned a B.S. in Natural Resources and focused her studies on Resource Policy and Management. Her work as a Cornell Presidential Research Scholar was published in the *Journal of Forestry* and her enthusiasm for environmental policy won her the title of Morris K. Udall Scholar.

Ms. Graham is a 2011 *magna cum laude* graduate of the University of Pittsburgh School of Law, earning both a J.D. and a certificate in advanced study of environmental law, science and policy. She was a Dean's Scholarship recipient and a Pitt Law Fellows Scholar. Ms. Graham was an Articles Editor for the *University of Pittsburgh Law Review*. She also served for three years as an elected class representative in the Student Bar Association. During her time at Pitt Law, Ms. Graham received the School of Law Community Service Award and was elected to the Order of the Coif.

Ms. Graham has work experience with county, state and federal environmental agencies. She was an intern in the U.S. Army Corps of Engineers, Pittsburgh District Office of Counsel during her final year of law school. Also during law school, Ms. Graham participated in the Blackstone Legal Fellowship, a ministry and leadership program of Alliance Defending Freedom.

Memberships and Affiliations

Ms. Graham is admitted in Pennsylvania and is a member of the Pennsylvania and Allegheny County Bar associations. In 2017, the Office of the Governor appointed Ms. Graham to the Pennsylvania Conservation & Natural Resources Advisory Council. She also currently serves on the University of Pittsburgh Law Alumni Association Board of Governors. Past community involvement includes service on the Pennsylvania State Board of Veterinary Medicine and the Diocesan Pastoral Council for the Catholic Diocese of Pittsburgh.

Ms. Graham is an active member of the Marcellus Shale Coalition, the Pennsylvania Independent Oil and Gas Association (PIOGA), Women's Energy Network, Appalachia Chapter, and the Air & Waste Management Association, Allegheny Mountain Section.

Going Global: Expanding the Scope of Environmental Review for the Energy Sector

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I. Introduction

On August 22, 2017, the U.S. Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") rendered an opinion which highlighted a decades-old problem: how far must an administrative agency go when considering the possible environmental impacts of a proposed project? The case involved a decision by the Federal Energy Regulatory Commission ("FERC" or "Commission") to approve a major interstate pipeline project that would deliver natural gas to power plants in Florida. The central question in the case was whether FERC was obligated to evaluate the greenhouse gas ("GHG") emissions that would result from burning the natural gas in the downstream power plants. Under the circumstances, the connection between the pipeline project under review and the downstream GHG emissions is obviously attenuated. Nevertheless, in *Sierra Club v. FERC*, a panel of the D.C. Circuit held that yes, FERC's environmental review must go that far.

While this case was largely about the *scope* of environmental review, it invites a broader discussion about *how* agencies and project developers are to evaluate GHG emissions and *what level* of GHG emissions is too harmful in the context of climate change. Climate change is inherently an issue of global concern. It is also increasingly the subject of public attention and debate, particularly with respect to energy sector projects like pipelines and mining leases. Environmental groups seeking to pull the plug on fossil fuel development celebrated the *Sierra Club v. FERC* decision as a significant "win," perhaps setting the stage for future challenges. This paper provides an overview of *Sierra Club v. FERC* (including FERC's action on remand), highlights similar cases which may be of interest, and examines what expanding environmental review to include climate change could mean for agencies and energy developers alike.

II. Case Study: *Sierra Club v. FERC*

a. Background

The first major environmental law in the United States, known as the National Environmental Policy Act of 1969 ("NEPA"), established a broad national framework for protecting the environment. NEPA is a procedural statute that requires federal agencies to evaluate the environmental and related social and economic impacts of proposed actions prior to making decisions. It requires agencies to follow certain procedures, gather public input and take a "hard look" at various factors, but it does not require a particular substantive decision or outcome. NEPA can apply to a wide range of federal actions, including but not limited to permit

approvals. Private companies frequently become involved in the NEPA process when they need a permit issued by a federal agency, such as FERC or the U.S. Army Corps of Engineers.

Depending on the circumstances of a project, the reviewing agency may be required to prepare a NEPA decision document known as an environmental impact statement ("EIS"). NEPA requires the preparation of an EIS for "major Federal actions significantly affecting the quality of the human environment."[1] Decades of case law have developed around the meaning of this statutory obligation. It presents an ongoing challenge for agencies as they seek to define the scope of information that must be considered when evaluating a proposed project.

Pursuant to Section 7 of the Natural Gas Act, a pipeline developer must obtain a certificate of public convenience and necessity (also known as a "Section 7 certificate") from FERC prior to constructing an interstate natural gas pipeline.[2] The certificate authorizes the holder to acquire rights-of-way from unwilling landowners through eminent domain proceedings.[3]

On February 2, 2016, FERC issued the Section 7 certificates for the Southeast Market Pipelines ("SMP") Project. Scheduled for completion in 2021, the project consists of three separate but connected natural gas transmission pipelines in Alabama, Georgia and Florida. One of these pipelines, Sabal Trail, is a 515-mile interstate pipeline transporting natural gas to Southeast markets, including natural gas-fired power generators in Florida. Sabal Trail is considered the "linchpin" of the overall project because it connects the Hillabee Expansion Project in Alabama (upstream) with the Florida Southeast Connection Project in Florida (downstream).

Environmental groups and landowners who opposed the SMP Project asked FERC for a rehearing with respect to the Section 7 certificates as well as a stay of construction. FERC denied the stay and project construction began in August 2016. Shortly thereafter, on September 7, 2016, FERC denied the request for rehearing.

The landowners and environmental groups, led by the Sierra Club, petitioned the D.C. Circuit for review of FERC's decision to approve the SMP Project. The petitioners argued that the NEPA analysis performed by FERC was deficient. In relevant part, the Sierra Club alleged that FERC should have estimated the GHG emissions from natural gas-fired power plants downstream in Florida and considered the effects that those emissions will have on climate change. Although FERC did discuss GHG emissions and climate change to some extent in the final EIS issued for the project in December 2015 ("2015 FEIS"), the agency had declined to engage in "speculative analyses" concerning the "relationship between the proposed project and upstream development or downstream end-use."[4] Thus, while the 2015 FEIS did quantify the direct construction and operation-related GHG emissions from the SMP Project, it did not analyze downstream GHG emissions generated by end users of the natural gas. FERC noted in the 2015 FEIS that "there is no standard methodology to determine how the proposed SMP

[1] *See* 42 U.S.C. § 4332(2)(C).
[2] *See* 15 U.S.C. § 717f.
[3] *See id.* at § 717f(h).
[4] FERC, Southeast Market Pipelines Project—Final Environmental Impact Statement, Vol. 1, 3-297 (Dec. 2015).

Project's incremental contribution to GHGs would translate into physical effects of the global environment."[5] Overall, FERC concluded in the 2015 FEIS that the SMP Project "would not result in a significant impact on the environment."[6]

b. August 2017 D.C. Circuit Opinion

On August 22, 2017, a panel of D.C. Circuit judges vacated the Section 7 certificates for the SMP Project and remanded the matter to FERC for preparation of a new EIS. The court agreed with the Sierra Club, finding that "FERC's environmental impact statement did not contain enough information on the greenhouse-gas emissions that will result from burning the gas that the pipelines will carry."[7] The court observed that the natural gas traveling through the SMP Project pipelines will be going to power plants in Florida, where it will be burned, resulting in carbon dioxide emissions to the atmosphere that add to the greenhouse effect—the primary contributing factor in global climate change.[8] According to the court, FERC must *quantify* and consider the *significance* of the power plant emissions that will be made possible by the pipelines or explain in more detail why such analysis cannot be done.[9] Without quantifying the SMP Project's GHG emissions and comparing them to regional emission reduction goals, for example, the court said it would be impossible for FERC and the public to engage in the kind of informed review that is required by NEPA.[10] The court also specifically directed FERC to explain on remand the agency's current position on the use of a "social cost of carbon" protocol developed by an interagency working group to monetize the harm associated with an incremental increase in emissions.[11]

When an agency conducts a NEPA review, it must consider both the direct and indirect environmental effects of the project under review.[12] By definition, indirect effects are those which are "caused by the [project] and are later in time or farther removed in distance, but are still *reasonably foreseeable*."[13] The critical question posed to the court in *Sierra Club v. FERC*

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[5] *Id*.
[6] *Id*. at 5-1. FERC assumed that the SMP Project would comply with all applicable laws and that the companies would implement various measures to avoid, minimize and mitigate impacts, including measures recommend by FERC.
[7] 867 F.3d 1357, 1363 (D.C. Cir. 2017).
[8] *See id.* at 1371.
[9] *See id.* at 1374.
[10] *See id.*
[11] *See id.* at 1375. In 2010, a federal interagency working group issued a social cost of carbon technical support document to inform agencies' cost-benefit analyses in the rulemaking process. The 2010 technical support document was later revised. *See, e.g.*, Interagency Working Group on Social Cost of Greenhouse Gases, "Technical Support Document: Technical Update of the Social Cost of Carbon for Regulatory Impact Analysis Under Executive Order 12866" (Aug. 2016), *available at* https://19january2017snapshot.epa.gov/climatechange/social-cost-carbon-technical-documentation_.html (last visited Apr. 24, 2018).
[12] *See* 40 C.F.R. § 1502.16.
[13] *Id*. at § 1508.8(b) (emphasis added). The definition of "effects" at 40 C.F.R. § 1508.8 includes the following commentary: "Effects and impacts as used in these regulations are synonymous. Effects includes ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative. Effects may also include those resulting from actions which may have both beneficial and detrimental effects, even if on balance the agency believes that the effect will be beneficial."

was: "[w]hat are the 'reasonably foreseeable' effects of authorizing a pipeline that will transport natural gas to Florida power plants?"[14]

It was certainly foreseeable that the gas will be burned in the Florida power plants. This was, in fact, the primary purpose of the SMP Project. (At the time of the D.C. Circuit opinion, two major Florida utility companies had already committed to purchasing almost all the gas that would be transported by the SMP Project.[15]) The court said it was also foreseeable—and FERC did not dispute—that burning the gas in the power plants will emit "carbon compounds that contribute to climate change."[16] However, the pipeline developers argued that because FERC had no real legal authority to prevent these emissions from happening, FERC was not obligated to consider them in its NEPA analysis. Rejecting this argument, the court determined that the GHG emissions from existing and proposed downstream power plants "are an indirect effect of authorizing this project, which FERC could reasonably foresee, and which the agency has legal authority to mitigate."[17] The court reasoned that under the Natural Gas Act, FERC could deny a Section 7 certificate if it concluded that a pipeline project presented too much harm to the environment. Therefore, according to the court, FERC is a "legally relevant cause" of the indirect effects of a pipeline it approves.[18]

Judge Janice Rogers Brown authored the lone dissent, stating that the majority misunderstood the concept of "reasonably foreseeable."[19] In Judge Brown's opinion, FERC was not a legally relevant cause of the GHG emissions from downstream power plants. A critical fact in this case is that power plants downstream of the SMP Project are regulated by state agencies. Under the Florida Power Plant Siting Act, for example, a power plant cannot be built or expanded in the state of Florida unless a license is first obtained from the Florida Power Plant Siting Board. According to Judge Brown, "[t]his breaks the chain of causation" between FERC's decision to approve the SMP Project and the GHG emissions from downstream power plants.[20] FERC ultimately had no authority to control whether the power plants would actually be built or continue to operate, and therefore could not prevent the GHGs from being emitted. On this critical point, she noted, the majority departed from recent controlling precedent involving FERC's review of liquified natural gas terminals.[21] Judge Brown concluded that the SMP Project 2015 FEIS was reasonable in scope and entitled to deference. In her view, "when the occurrence of an indirect environmental effect is contingent upon the issuance of a license from a separate agency, the agency under review is not required to address those indirect effects in its NEPA analysis."[22]

c. Aftermath and FERC's Action on Remand

[14] 867 F.3d at 1371-72.
[15] *Id*. at 1364.
[16] *Id*. at 1372.
[17] *Id*. at 1374.
[18] *Id.* at 1373.
[19] *See id*. at 1380.
[20] *Id*. at 1382.
[21] *See id.* at 1381-83 (citing *Sierra Club v. FERC (Freeport)*, 827 F.3d 36 (D.C. Cir. 2016), *Sierra Club v. FERC (Sabine Pass)*, 827 F.3d 59 (D.C. Cir. 2016), *EarthReports, Inc. v. FERC*, 828 F.3d 949 (D.C. Cir. 2016), and *Sierra Club v. FERC*, 672 Fed. Appx. 38 (D.C. Cir. 2016)).
[22] *Id.* at 1380.

FERC acted quickly in response to the D.C. Circuit opinion. On September 27, 2017, FERC staff issued a draft supplemental environmental impact statement ("SEIS") which incorporated by reference and expanded upon the GHG emissions analysis presented in the 2015 FEIS for the SMP Project. The "SEIS estimates the greenhouse gas emissions generated by the SMP Project's customers' downstream facilities, describes the methodology used to determine these estimates, discusses context for understanding the magnitude of these emissions, and addresses the value of using the social cost of carbon tool."[23] By this time, completed portions of the SMP Project had already been authorized to commence service.[24] FERC subsequently received 111 comment letters concerning the draft SEIS.

Meanwhile, the SMP Project developers and FERC filed petitions for rehearing with the D.C. Circuit in early October 2017. These petitions were denied in late January 2018. On February 5, 2018, FERC issued the final SEIS, including therein its responses to the public comments. Interestingly, FERC quantified worst-case scenario GHG emissions, *i.e.*, assuming combustion of all natural gas that could possibly be transported by the SMP Project, and still concluded that the SMP Project is an environmentally acceptable action. Furthermore, although FERC "recognize[d] that fossil fuel GHG emissions are the primary driver of climate change; [FERC] could not find a suitable method to attribute discrete environmental effects to GHG emissions."[25] There was no reliable way to connect SMP Project-related emissions to climate impacts on a global, regional or local scale. Likewise, FERC noted that "[t]here are no widely accepted international, federal, or state definitions of what is considered a 'significant' emission rate for GHG emissions."[26] Finally, FERC maintained its position that the social cost of carbon protocol is "not appropriate for use in project-level NEPA reviews."[27]

The following day, February 6, 2018, the SMP Project developers and FERC filed motions to stay the D.C. Circuit mandate to give FERC sufficient time to issue a new Section 7 certificate order on remand. Otherwise, absent a stay of the mandate, the D.C. Circuit order which vacated the previously issued Section 7 certificates would go into effect, obligating the SMP Project pipelines to cease operation and potentially disrupting natural gas and electricity service in Florida. The notice of availability for the final SEIS was published on February 13, 2018.[28] FERC's request for a stay of the mandate was later granted.[29]

On March 14, 2018, the FERC commissioners voted 3-2 to affirm the conclusion in the SEIS that the SMP Project is an environmentally acceptable action, and on that basis the Commission reinstated the project authorization. The 26-page majority opinion discusses at

[23] 82 Fed. Reg. 46233 (Oct. 4, 2017).
[24] According to the draft SEIS, "in June and July 2017, Commission staff authorized the pipelines to commence service on completed facilities." FERC, Southeast Market Pipelines Project—Draft Supplemental Environmental Impact Statement, 1 (Sept. 2017).
[25] *See* FERC, Southeast Market Pipelines Project—Final Supplemental Environmental Impact Statement, 6 (Feb. 2018).
[26] *Id*. at 7.
[27] *Id*. at 8.
[28] *See* 83 Fed. Reg. 6172.
[29] The D.C. Circuit eventually issued its mandate to FERC on March 30, 2018, effectively ending the D.C. Circuit proceedings.

length FERC's responsibilities and jurisdiction under the Natural Gas Act and NEPA. The Commission took issue with the D.C. Circuit's apparent view that FERC's jurisdiction under Section 7 of the Natural Gas Act extends to the end use of natural gas. Recall that the D.C. Circuit determined that FERC is a legally relevant cause of the environmental effects of the pipelines it approves because FERC could deny a Section 7 certificate upon concluding that a pipeline project presented too much harm to the environment. In the Commission's remand opinion, the majority posits that if FERC was "to deny a pipeline certificate on the basis of impacts stemming from the end use of the gas transported, that decision would rest on a finding not 'that the *pipeline* would be too harmful to the environment,' [as the D.C. Circuit presumed], but rather that the *end use* of the gas would be too harmful to the environment."[30] According to the Commission, this determination is beyond the scope of FERC's authority under the Natural Gas Act. Policy issues surrounding the use of gas should be decided by Congress or the Executive Branch at the national level, not FERC in the context of a specific project. The Commission also used its opinion to more fully explain why the social cost of carbon protocol is not appropriate for environmental review of natural gas infrastructure projects. For instance, the Commission noted that FERC does not (and is not required to) conduct a monetized cost-benefit analysis in its NEPA review, in part because siting gas infrastructure involves qualitative judgments.[31] Commissioners Cheryl LaFleur and Richard Glick each authored a dissenting opinion, rejecting the contention that FERC cannot meaningfully evaluate the significance of downstream GHG emissions.

III. Noteworthy Policy Updates

When Donald Trump assumed the role of President in early 2017, the new administration quickly set in motion plans to reverse course on Obama-era climate change initiatives and to reduce regulatory burdens for industry. For example, on March 28, 2017, President Trump signed Executive Order ("EO") 13783 entitled, "Promoting Energy Independence and Economic Growth," to promote domestic energy development and avoid regulatory burdens that "unnecessarily encumber energy production, constrain economic growth, and prevent job creation."[32] Among other things, EO 13783 disbanded the Interagency Working Group on Social Cost of Greenhouse Gases ("IWG") and withdrew certain social cost of carbon-related documents issued by the IWG as "no longer representative of governmental policy."[33] Instead, for purposes of "monetizing the value of changes in greenhouse gas emissions resulting from regulations," EO 13783 directed agencies to rely on the Office of Management and Budget's "Circular A-4" (dated September 17, 2003), which provides a general framework for cost-benefit analyses.[34] EO 13783 also directed the Council on Environmental Quality to rescind its guidance document entitled, "Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in National Environmental Policy Act Reviews" ("CEQ Guidance").[35] Interestingly, the D.C. Circuit made

[30] Order on Remand Reinstating Certificate and Abandonment Authorization, 162 F.E.R.C. ¶ 61,233, 13 (Mar. 14, 2018).
[31] *Id*. at 18.
[32] 82 Fed. Reg. 16093, 16093 (Mar. 31, 2017).
[33] *Id*. at 16095.
[34] *Id*. at 16096.
[35] *Id*. at 16094.

no mention of EO 13783 or the withdrawal of these key policy documents when it rendered the *Sierra Club v. FERC* decision a few months later.

Another example of Trump's deregulatory efforts is EO 13807 ("Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure"), signed in August 2017. The stated purpose of EO 13807 is "to ensure that the Federal environmental review and permitting process for infrastructure projects is coordinated, predictable, and transparent."[36] Twelve federal agencies, including FERC, signed a memorandum of understanding on April 9, 2018 to implement EO 13807 by establishing a coordinated and timely environmental review process for major infrastructure projects.[37]

In December 2017, shortly after the *Sierra Club v. FERC* decision, FERC announced that it will revisit its existing policy regarding review of proposed natural gas pipelines. Specifically, FERC plans to review the "Policy Statement on Certification of New Interstate Natural Gas Pipeline Facilities" issued by the agency in 1999. According to FERC Chairman Kevin McIntyre, "Much has changed in the energy world since 1999, and it is incumbent upon us to take another look at the way in which we assess the value and the viability of our pipeline applications."[38] On April 19, 2018, FERC issued a notice of inquiry ("NOI") to be published in the *Federal Register* seeking public comment on, among other issues, how the agency evaluates the environmental impact of a proposed project.[39] The NOI acknowledges "an increased interest regarding the Commission's evaluation of the impact that greenhouse gas (GHG) emissions associated with a proposed project have on global climate change."[40] Comments are due 60 days after publication.

IV. Additional Cases for Further Reading

Like *Sierra Club v. FERC*, the following cases address issues related to climate change and the scope of agency review. This section includes a sample of recent cases for the general interest of the reader and is not intended to provide an exhaustive list of relevant precedent.

a. *WildEarth Guardians v. U.S. Bureau of Land Mgmt.*, 870 F.3d 1222 (10th Cir. 2017)

Environmental groups challenged the NEPA analysis associated with a decision by the U.S. Department of the Interior, Bureau of Land Management ("BLM") to approve four coal leases in Wyoming's Powder River Basin, claiming that BLM failed to appropriately consider the impact of the leases on national carbon dioxide emissions. The federal district court ruled in

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[36] 82 Fed. Reg. 40463, 40463 (Aug. 24, 2017).
[37] News Release, "EPA Administrator Pruitt Praises Permitting MOU to Accelerate Crucial Infrastructure Projects," (Apr. 9, 2018), *available at* https://www.epa.gov/newsreleases/epa-administrator-pruitt-praises-permitting-mou-accelerate-crucial-infrastructure (last visited Apr. 24, 2018).
[38] News Release, "FERC to Review its 1999 Pipeline Policy Statement," (Dec. 21, 2017), *available at* https://www.ferc.gov/media/news-releases/2017/2017-4/12-21-17.asp#.Wtyf4S-ZNBw (last visited Apr. 24, 2018).
[39] *See* News Release, "Commission Initiates Notice of Inquiry into Pipeline Certificate Policy Statement," (Apr. 19, 2018), *available at* https://www.ferc.gov/media/news-releases/2018/2018-2/04-19-18-C-1.asp#.Wtyeei-ZNBw (last visited Apr. 24, 2018).
[40] Notice of Inquiry, Certification of New Interstate Natural Gas Facilities, 163 F.E.R.C. ¶ 61,042, 2-3 (Apr. 19, 2018).

favor of BLM.[41] On appeal, the U.S. Court of Appeals for the Tenth Circuit ("10th Circuit") decided on September 15, 2017 to reverse and remand to BLM for a revised NEPA analysis. The 10th Circuit rejected BLM's substitution theory, *i.e.*, that coal would be sourced from *somewhere* if not from the proposed leases, and that the impact on national emissions therefore did not vary between BLM's decision and the "no action" alternative. Despite rejecting the NEPA analysis, the 10th Circuit declined to vacate the leases.

b. *Montana Envtl. Info. Ctr. v. U.S. Office of Surface Mining*, 274 F. Supp. 3d 1074 (D. Mont. 2017), *amended in part, adhered to in part by Montana Envtl. Info. Ctr. v. U.S. Office of Surface Mining*, No. 15-cv-106 (D. Mont. Nov. 3, 2017)

On August 14, 2017, a Montana federal district court ruled that the U.S. Department of the Interior, Office of Surface Mining Reclamation and Enforcement ("OSM") unreasonably limited the scope of its NEPA review in support of a coal mine expansion project, because OSM failed to sufficiently evaluate the indirect and cumulative effects of coal transportation, coal combustion and greenhouse gas emissions.[42] The court vacated the environmental assessment ("EA") prepared under NEPA, remanded to OSM and enjoined mining activity pending compliance with NEPA.[43] On October 31, 2017, the court narrowed the scope of the injunction to allow for limited mining activity. The remainder of the court's August 14th judgement continued in effect.[44]

c. *High Country Conservation Advocates v. U.S. Forest Serv.*, No. 17-cv-3025 (D. Col. appeal filed Dec. 15, 2017)

In 2014, a federal district court in Colorado held that it was arbitrary and capricious for the U.S. Forest Service ("USFS") and BLM to open a National Forest roadless area to coal mining without adequately justifying why the social cost of carbon protocol was not used for the final EIS.[45] (The agency action was particularly suspect because the social cost of carbon analysis was included in a preliminary EA for the same project.) Following the district court opinion, the agencies conducted a new NEPA analysis and ultimately approved the mine expansion project. In December 2017, environmental groups appealed the agencies' more recent actions as arbitrary and capricious, alleging NEPA violations, including that USFS failed to properly analyze the "reasonably foreseeable" effect of adding more coal to the market and thus encouraging demand for coal-fired electricity (resulting in more climate pollution).[46] The environmental groups also alleged that the agencies again failed to use "scientifically valid and available tools (the social cost of carbon protocol) or provide a rational explanation for why that approach is not appropriate" when evaluating the climate impacts of the project.[47]

d. *AquAlliance v. U.S. Bureau of Reclamation*, 287 F. Supp. 3d 969 (E.D. Cal. 2018)

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[41] *See WildEarth Guardians v. U.S. Forest Serv.*, 120 F. Supp. 3d 1237 (D. Wyo. 2015).
[42] *See Montana Envtl. Info. Ctr. v. OSM*, 274 F. Supp. 3d 1074 (D. Mont. 2017).
[43] *Id*.
[44] *See Montana Envtl. Info. Ctr. v. OSM*, No. 15-cv-106 (D. Mont. Nov. 3, 2017).
[45] *See High Country Conservation Advocates v. U.S. Forest Serv.*, 52 F. Supp. 3d 1174, 1193 (D. Colo. 2014).
[46] Complaint at 3-4, *High Country Conservation Advocates v. U.S. Forest Serv.*, No. 17-3025 (D. Colo. Dec. 15, 2017).
[47] *Id*. at 4.

Water resource management and environmental organizations challenged several agencies' collective review and approval of a 10-year water transfer program in California. The environmental impacts of the program were assessed in an "Environmental Impact Statement/Environmental Impact Report" prepared pursuant to NEPA and the California Environmental Quality Act ("CEQA"), a state law which is similar to NEPA. Plaintiffs argued that the environmental review document failed to meaningfully assess impacts associated with climate change, such as sea level rise, in violation of both NEPA and CEQA. On February 15, 2018, the federal district court, in relevant part, granted the plaintiffs' motion for summary judgment that the analysis of climate change violates NEPA, but denied the motion with respect to CEQA.[48]

e. *Appalachian Voices v. FERC*, No. 17-1271 (D.C. Cir. appeal filed Dec. 22, 2017)

Following the D.C. Circuit's decision in *Sierra Club v. FERC*, environmental groups challenged FERC's approval for the development of the Mountain Valley Pipeline through Virginia and West Virginia. Plaintiffs claim that FERC violated NEPA by failing to appropriately evaluate the climate change impacts of the end use of the natural gas transported by the pipeline.[49] In February 2018, FERC asked the D.C. Circuit to hold the litigation in abeyance while it responds to pending requests for administrative rehearing.

f. *W. Org. of Res. Councils v. BLM*, No. 16-cv-21, 2018 WL 1475470 (D. Mont. Mar. 26, 2018)

Environmental groups challenged BLM's NEPA review surrounding Resource Management Plans ("RMPs") for the Powder River Basin in Wyoming and Montana, arguing that BLM failed to consider: "(1) alternatives that would reduce the amount of coal available for leasing in each field office; (2) measures that would reduce methane emissions from resource development; (3) direct, indirect, and cumulative impacts of the fossil fuel development under the plans."[50] An RMP is a programmatic document required by the Federal Land Policy and Management Act of 1976 to guide the management of federal lands. In March 2018, the federal district court held that "[i]n light of the degree of foreseeability and specificity of information available to the agency while completing the EIS, NEPA requires BLM to consider in the EIS the environmental consequences of the downstream combustion of the coal, oil and gas resources potentially open to development under these RMPs."[51] However, the court also held that "BLM's failure to measure the cumulative impacts of its fossil fuel management by either of Plaintiffs' suggested metrics [such as the social cost of carbon protocol] does not present a 'clear error of judgment.'"[52]

g. *W. Org. of Res. Councils v. Zinke*, No. 15-5294 (D.C. Cir. appeal filed Oct. 28, 2015)

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[48] *See AquAlliance v. U.S. Bureau of Reclamation*, 287 F. Supp. 3d 969, 1023-1032 (E.D. Cal. 2018).
[49] *See* Petitioners' Preliminary Statement of Issues at 3, *Appalachian Voices v. FERC*, No. 17-1271 (D.C. Cir. Feb. 5, 2018).
[50] *W. Org. of Res. Councils v. BLM*, No. 16-cv-21, 2018 WL 1475470, *1 (D. Mont. Mar. 26, 2018).
[51] *Id*. at *13.
[52] *Id*. at *14.

In 2015, the U.S. District Court for the District of Columbia held that BLM had "no duty to supplement the 1979 programmatic EIS for the federal coal management program because there is no remaining or ongoing major federal action."[53] Shortly thereafter, environmental groups appealed to the D.C. Circuit, alleging that BLM violated NEPA by failing to either: (1) supplement the 1979 EIS in light of new circumstances and information, particularly information related to climate change, or (2) prepare a new programmatic EIS for the federal coal management program.[54] Oral argument was held before the D.C. Circuit on March 23, 2018.

In 2016, the Obama Administration began preparation of a programmatic EIS for the federal coal management program to update the 1979 analysis and imposed a moratorium on most new leasing until the NEPA review is complete. However, in March 2017, the Trump Administration repealed the moratorium without completing the programmatic EIS. Environmental groups challenged this repeal, arguing that BLM must evaluate impacts from climate disruption caused by extracting and burning fossil fuels.[55]

h. *Weymouth v. FERC*, No. 17-1135 (D.C. Cir. appeal filed May 24, 2017)

The town of Weymouth, Massachusetts, as well as environmental and municipal groups filed suit in May 2017 to challenge FERC's review of the Atlantic Bridge natural gas pipeline project in New York and New England. Challengers argued that FERC erred in preparing an EA in lieu of a more stringent EIS and failed to adequately consider GHG emissions.[56] As of April 2018, final briefs are due in August 2018.

V. Evaluating the Impact of Expanded Environmental Review

a. What is the Standard?

The *Sierra Club v. FERC* case and others like it present a challenging question for energy sector projects: to what extent should climate change be incorporated into environmental reviews? Climate change is a hotly debated topic with global reach and long-term consequences. How far in time and space may or must an agency go when evaluating greenhouse gas emissions? At what point will the inquiry end?

There will likely be continued debate over what impacts may be considered reasonably foreseeable for the energy sector. In *Sierra Club v. FERC*, the natural gas was being transported primarily to power plants. It is not clear if the downstream environmental effects of gas transported by a pipeline for *other* end uses (e.g., feedstock at a chemical plant) would also be considered reasonably foreseeable. How might the *Sierra Club v. FERC* decision influence other industries? Imagine a federal agency decision to approve a major interstate highway project which is expected to increase the number of vehicles on the road. Are the vehicle GHG emissions reasonably foreseeable? Probably; fuel-combusting vehicles are widely acknowledged

[53] *W. Org. of Res. Councils v. Jewell*, 124 F. Supp. 3d 7, 13 (Dist. D.C. 2015).
[54] Statement of Issues to be Raised, *W. Org. of Res. Councils v. Zinke*, No. 15-5294 (D.C. Cir. Nov. 25, 2015).
[55] *See Citizens for Clean Energy v. BLM*, No. 17-cv-30 (D. Mont. appeal filed Mar. 29, 2017).
[56] Petitioners' Nonbinding Statement of Issues at 2, *Weymouth v. FERC*, No. 17-1135 (D.C. Cir. July 4, 2017).

as a major source of domestic GHG emissions. What about GHG emissions associated with the landfill disposal of the additional vehicles per year that will be "totaled" due to collisions on the new highway system?

Another key question is: what metric should reviewing agencies use to measure climate impacts? Is there a best approach for quantifying emissions? How do we *attribute* discrete impacts on the global environment to GHG emissions associated with a site-specific project? Many would argue that it is impossible to link project emissions to global impacts without relying on mere opinion and subjective analyses. Others would say there is plenty of reliable science available to support this calculation.

Even if it is possible to measure climate impacts, there is also a qualitative question of what level of GHG emissions is too much. There is currently no universally accepted, objective standard for defining what constitutes a *significant* climate impact. Admittedly, there are some tools available. The plaintiff environmental groups in *Western Organization of Resource Councils v. BLM* offered that the agency could have used the social cost of carbon protocol or a "global carbon budget."[57] The carbon budget approach "caps the amount of greenhouse gases that may be emitted worldwide to stay below a certain warming threshold," beyond which the plaintiffs argued may result in severe and irreparable harm.[58] For better or worse, President Trump's EO 13783 withdrew the social cost of carbon-related policy documents and disbanded the interagency working group that developed them. The CEQ Guidance was also withdrawn. Whatever the controlling standard for agency review is or becomes, it seems most logical that it be on a project-level basis. FERC noted in the SMP Project final SEIS that "global models are not suited to determine the incremental impact(s) of individual projects, due both to scale and overwhelming complexity."[59] The CEQ Guidance contemplated site-specific project review, but it is no longer recognized as official government policy. While some of the analytical tools and policies championed by environmental groups may be useful for rulemakings or broadly applicable policy decisions, they may fall short when it comes to estimating a site-specific project's impacts on the environment.

As illustrated by the case law developing around the issue of climate change impacts in environmental review (see Section IV above), there is no consensus on how to evaluate GHG emissions. Disagreements abound on how the emissions are to be measured and assessed. The cases reviewed indicate that where courts have been critical of agency efforts (or lack thereof) to consider climate change impacts they have not offered a clear guiding standard for how the agency ought to proceed. Unfortunately, this area of environmental law appears to be riddled with more questions than answers, at least for now.

b. Consequences for Agencies and Industry

Following *Sierra Club v. FERC*, it is likely that federal agencies may take a broader approach to NEPA reviews and devote additional attention to GHG emissions. A lack of consensus regarding the appropriate standard for agency review creates uncertainty for the

[57] *See W. Org. of Res. Councils v. BLM*, No. 16-cv-21, 2018 WL 1475470, *14 (D. Mont. Mar. 26, 2018).
[58] *Id*.
[59] FERC, Southeast Market Pipelines Project—Final Supplemental Environmental Impact Statement, 6 (Feb. 2018).

energy industry. It also puts permitting agencies in the difficult position of having to develop an administrative record that can withstand judicial scrutiny, a job that can entail multiple years of data collection, consultation, and assessment. Applicants may be asked to submit more expansive and detailed information to support an agency's analysis. Even in situations where it is not feasible to evaluate indirect GHG emissions, the evolving case law suggests that the agency must still provide a satisfactory explanation for its feasibility determination. Meanwhile, courts are left with significant discretion to decide whether an agency's environmental review missed the mark. Judicial opinions which insist that agencies evaluate climate change impacts seem entirely at odds with Trump Administration efforts to ease permitting burdens for industry.

For large-scale, high-profile projects, an applicant may anticipate scrutiny regarding GHG emissions, in which case it might be appropriate to include a supportive climate impacts analysis in the application. Consider whether it is possible to promote any *benefits* that the proposed project may have with respect to climate change. In the case of *Sierra Club v. FERC*, for example, project developers were able to tout the indisputable demand for natural gas in the State of Florida and the fact that coal and oil-fired power plants in Florida were either retiring or converting in response to the increased availability of gas. At the same time, however, applicants should be careful to avoid raising an issue that would otherwise go unnoticed. Perhaps stakeholders are only interested in endangered species or water quality issues. In this situation it may be best to present climate change information only upon request.

Many environmental permitting decisions implicate both federal and state agencies. For example, an energy project that will impact water bodies in Pennsylvania may trigger joint review by the Pennsylvania Department of Environmental Protection and the U.S. Army Corps of Engineers. If climate change is a project risk that must be studied exhaustively, which agency will decide when enough is enough? *Sierra Club v. FERC* presented a situation in which the primary reviewing agency, FERC, was obligated to consider impacts that arguably exceeded the scope of its statutory authority. Both the final SEIS for the SMP Project and the Commission's majority opinion emphasized that federal and state regulatory agencies *other than FERC* are responsible for regulating downstream GHG emissions. If a reviewing agency is forced to consider impacts beyond its authority, the agency may be ill-equipped to do so. The review may be duplicative of another agency's work and therefore inefficient. It may also require additional agency coordination that could extend the length of the permitting process.

The *Sierra Club v. FERC* decision could also influence the broader discussion (beyond the NEPA context) about how climate change concerns play into agency decision making. In theory, any permitting program in which the reviewing agency is obligated to consider the "public interest" is at risk of being interpreted as encompassing climate change considerations. In the Commonwealth of Pennsylvania, for example, the state constitution includes a broad "Environmental Rights Amendment" ("ERA") which provides:

> 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.

Recent developments in Pennsylvania case law suggest that Commonwealth agencies will need to take a fresh look at how their decision to approve a proposed project satisfies the ERA.[60] The practical problem with this shift in jurisprudence is that it opens a Pandora's box of possible impacts that a reviewing agency may need to consider. Environmental groups are already criticizing agency actions for failing to adequately address harms such as groundwater degradation associated with a landfill.[61] It seems like only a matter of time before environmental advocates claim that GHG emissions from a project will negatively impact the global climate in violation of Pennsylvanians' rights under the ERA.[62]

Finally, the *Sierra Club v. FERC* decision will likely continue to bolster environmental groups seeking to challenge industrial and commercial development in general. Public interest groups like Sierra Club are increasingly active in challenging permitting decisions based upon GHG implications of fossil fuel development. The *Appalachian Voices* case described in Section IV above (in which plaintiffs claim that FERC should have considered downstream GHG emissions) is a testament to the fact that *Sierra Club v. FERC* has added fuel to the fire.

VI. Conclusion

Expanding the scope of environmental review to include a project's possible impacts on the global climate invites an untethered analysis. Unfortunately, the trending case law suggests that courts (for the foreseeable future, at least) may be unlikely to put bounds on this analysis. At the same time, however, it appears that courts expect agencies to seriously consider the climate change impacts of a proposed project. Developers who are involved in major energy projects and know they will be subject to NEPA-like review would be wise to proactively establish an administrative record that (1) demonstrates the need for the project and (2) addresses climate change impacts. Courts will expect more than a cursory examination of the issue, despite the many uncertainties and variables associated with evaluating climate change. While there is no such thing as a "perfect" energy source, in terms of environmental impact, environmental groups focused on climate change will no doubt continue to use litigation to push for an end to fossil fuel development.

[60] *Pennsylvania Envtl. Def. Found. v. Commonwealth*, 161 A.3d 911 (Pa. 2017).
[61] *See Friends of Lackawanna v. Commonwealth*, EHB Docket No. 2015-063 (Nov. 8, 2017).
[62] *See, e.g., Funk v. Wolf*, 144 A.3d 228 (Pa. Commw. Ct. 2016) (dismissing petition of interest group which alleged that state government's failure to develop and implement a comprehensive plan to regulate carbon dioxide emissions violated the ERA).

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Going Global:
Expanding the Scope of Environmental Review for the Energy Sector

May 18, 2018

Joseph K. Reinhart, Esq. and Meredith Odato Graham, Esq.

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Overview

- Introduction
- Case study: *Sierra Club v. FERC*
- Policy updates
- Evaluating the impact of expanded environmental review
- Conclusion

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What is Climate Change?

"Climate change is an inevitable and urgent **global challenge** with **long-term** implications for the sustainable development of all countries."

United Nations, Division for Sustainable Development

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Source: http://research.un.org/en/climate-change

National Environmental Policy Act (NEPA)

- Procedural statute – no particular outcome required
- Triggered by major Federal action significantly affecting quality of human environment
- Agency must take a "**hard look**" at the environmental consequences of its decision
  - Consider indirect effects that are "reasonably foreseeable"
- Public participation

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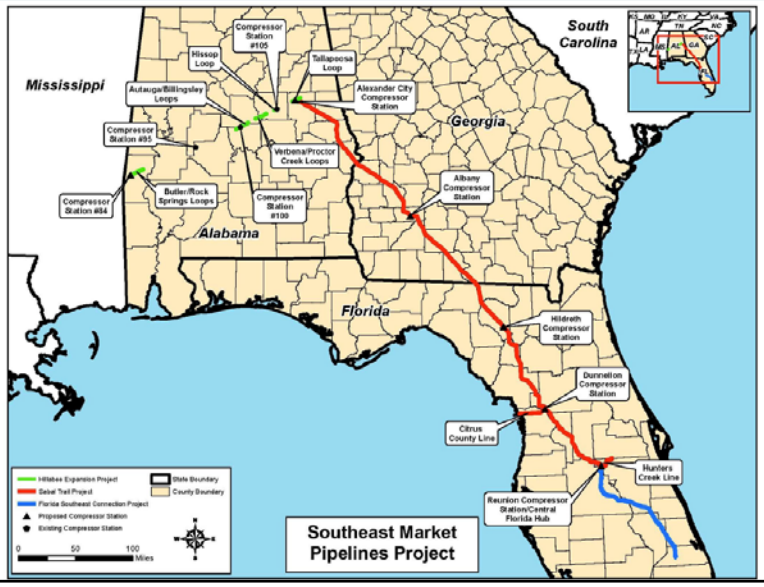
Sierra Club v. FERC – Background



Source: FERC 2014 Notice of Intent to Prepare EIS

Sierra Club v. FERC – Background

- December 2015: Final EIS
- February 2016: Section 7 certificates issued
- August 2016: Project construction begins
- September 2016: FERC administrative rehearing denied and lawsuit filed by Sierra Club, et. al

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Sierra Club v. FERC – D.C. Circuit Opinion

- *Sierra Club v. FERC*, D.C. Cir. No. 16-1329 (Aug. 22, 2017)
  - "…at a minimum, FERC should have estimated the **amount** of power-plant carbon emissions that the pipelines will make possible."
    - EIS "needed to include a discussion of the '**significance**' of this indirect effect..."
  - Remanded to FERC for preparation of new EIS
  - Vacated the Section 7 certificates

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Sierra Club v. FERC – Aftermath

- September 2017: Draft Supplemental EIS
- February 2018: Final Supplemental EIS
- March 2018: FERC reinstates Section 7 certificates

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Source: https://www.ferc.gov/about/com-mem.asp

Sierra Club v. FERC – Aftermath

SIERRA CLUB

"[FERC] is **nothing but a rubber stamp** for polluting corporations…

These dirty, dangerous pipelines threaten our health, climate, and communities, and it's irresponsible to build them at a time when clean, renewable energy is abundant and affordable."

Sierra Club, Beyond Dirty Fuels Campaign

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Source: https://www.sierraclub.org/press-releases/2018/03/sabal-trail-ferc-again-earns-rubber-stamp-reputation

Additional Cases for Further Reading

- Conference paper identifies 8 other example cases
- NEPA review of coal leases, gas pipelines, etc.
- Project-level and programmatic decisions
- Courts expect agencies to meaningfully consider climate change or justify why it cannot be done

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Noteworthy Policy Updates

- Exec. Order 13783, "Promoting Energy Independence and Economic Growth" (Mar. 2017)
  - Rescinded CEQ guidance for GHGs in NEPA reviews
  - Disbanded Interagency Working Group on GHGs
  - Withdrew social cost of carbon documents
- Exec. Order 13807, "Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure" (Aug. 2017)

Source: https://www.whitehouse.gov/people/donald-j-trump/

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Noteworthy Policy Updates

- FERC Notice of Inquiry (Apr. 2018)
  - Should FERC revise its approach to certifying new natural gas transportation facilities?
  - Responding to "increased interest" in FERC's evaluation of GHG emissions and global climate change
  - Public comments due June 25, 2018

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Evaluating the Impact of Expanded Review

- What is the standard?
  - Scope: which emissions should be considered?
  - Quantify: how should we measure emissions?
  - Attribute: will project emissions impact the global climate?
  - Value: what level of GHG emissions is too much?

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Evaluating the Impact of Expanded Review

- Consequences for agencies and industry
  - GHG emissions in project application
  - Coordination between multiple agencies
  - Environmental group activity
  - Judicial scrutiny of administrative record

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Evaluating the Impact of Expanded Review

"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."

Pennsylvania Constitution, Article I, Section 27

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Project Planning Considerations

- Any "public interest" standard for agency review is potentially at risk of encompassing climate change
- Anticipate scrutiny for large-scale, high-profile fossil fuel projects
- Demonstrate need (social utility) for the project

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Conclusion

- Climate change is a global issue
- Challenging for project-level environmental review
  - Lack of consensus re. standards
  - Consequences for agencies and industry
- Courts expect agencies to consider climate change in NEPA reviews, despite uncertainties

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LITIGATING CONTRIBUTION CLAIMS UNDER THE OIL POLLUTION ACT

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Ashley Peck has more than a decade of experience representing energy and resource companies in complex environmental litigation and compliance matters, including defending and pursuing claims under the Clean Water Act, Oil Pollution Act, Comprehensive Environmental Response Compensation and Liability Act, Resource Conservation and Recovery Act and other environmental statutes. Ms. Peck has substantial experience resolving environmental citizen suits, appealing and defending agency permitting decisions before administrative tribunals, and defending criminal and civil enforcement actions brought by the EPA and state environmental agencies. She also serves as a trusted advisor on National Pollutant Discharge Elimination System (NPDES) and Section 404 wetland permitting matters, Section 401 water quality certifications, and other regulatory matters under the Clean Water Act and its state analogs.

Ms. Peck is a partner in Holland & Hart, LLP's Environment, Energy and Natural Resources group, one of the largest environmental groups in the country. She has been recognized by *Chambers USA: America's Leading Lawyers for Business*, Environment, Natural Resources & Regulatory Industries and Super Lawyers®, Rising Star (Environmental).

Litigating Contribution Claims Under the Oil Pollution Act

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In the aftermath of an oil spill, operators must focus on rapid environmental cleanup, restoration of natural resources, and compensation of affected parties – all under intense public and regulatory scrutiny with costs accumulating in the tens of millions of dollars or more. Under the federal Oil Pollution Act ("OPA"), this heightened response is the responsibility of the operator regardless of what caused the oil spill. This statutory scheme serves the purpose of ensuring a quick and comprehensive oil spill response, but can also have the unintended consequence of allowing tortfeasors that may have caused or contributed to the spill to escape or significantly delay liability. Although OPA provides statutory mechanisms for recovering costs incurred, case law addressing these provisions is not well developed. A handful of more recent court decisions have directly addressed the contours of OPA's statutory contribution provision, providing guidance to operators on future recovery of costs but leaving some issues unresolved.

A. Oil Pollution Act Contribution Provision

OPA, originally enacted as an amendment to the Clean Water Act, sets forth a comprehensive federal statutory scheme for oil spill response, imposing liability on responsible parties – defined as anyone who owns, leases or operates the source of the oil – for the costs of an oil spill. 33 U.S.C. § 2701 *et seq.*; §§ 2702(a), 2701(32). To that end, "OPA sets forth a comprehensive list of recoverable damages, including: removal costs; damage to natural resources and real or personal property; loss of government revenues, lost profits and earning capacity; and costs of increased or additional public services occasioned by the unlawful act." *South Port Marine, LLC v. Gulf Oil Ltd. Partnership*, 234 F.3d 58, 64 (1st Cir. 2000).

"Responsible parties are strictly liable for cleanup costs and damages and are first in line to pay for damages that may arise under OPA." *Nguyen v. American Commercial Lines, L.L.C.*, 805 F.3d 134, 138 (5th Cir. 2015); *see also* 33 U.S.C. § 2702(a). "While responsible parties may be held strictly liable, these parties may later seek contribution and indemnification from other parties whose actions contributed to the oil spill." *Nguyen*, 805 F.3d at 138 n.2 (citing 33 U.S.C. § 2709-2710, 2713). Similarly, "when faced with claims by a third party, the responsible party can either establish that a third party was the sole cause and liable for any removal costs and damages pursuant to § 2702(d)(1)(A) or allege that a third party was the sole cause, pay the claims properly presented in accordance with § 2713 and be subrogated to the rights of those claimants paid pursuant to § 2702(d)(1)(B)." *Marathon Pipe Line Co. v. LaRoche Industries, Inc.*, 944 F.Supp. 476, 479 (E.D. La. 1996) (emphases in original). "Should the responsible party not be able to establish that a third party was the sole cause of the discharge, OPA provides for an action in contribution." *Id.* (citing 33 U.S.C. § 2709).

Section 1009 of OPA addressing contribution claims simply provides:

> A person may bring a civil action *for contribution* against any other person *who is liable or potentially liable under this Act or another law*. The action shall be brought in accordance with section 2717 of this title

33 U.S.C. § 2709 (emphasis added).

Two other provisions of OPA frame § 1009. First, § 1002 provides that a "responsible party" is strictly liable for "removal costs" and specific "damages" following an oil spill. *See* 33 U.S.C. § 2702(a). OPA defines a "responsible party" broadly, to include anyone who owns, leases or operates the source of an oil spill. *See id*. at § 2701(32). Consequently, under § 1002(a), entities that own, lease or operate potential sources of an oil spill, including pipelines, vessels, or storage tanks, are initially strictly liable for millions of dollars in cleanup costs and damages even if they did not cause the oil spill.

Second, § 1002(d) of OPA provides that if the oil spill's cleanup costs were "caused *solely* by an act or omission of one or more third parties," then the third party may be treated as the "responsible party" under § 1002(a). In other words, under § 1002(d), facility owners have a right to indemnity against third parties who are the "sole cause" of the expenses incurred under OPA in cleaning up an oil spill. In many cases, given the complicated facts and circumstances that may lead up to an oil spill and the costs of response, combined with the ambiguity in the statutory language, it may be difficult to definitively prove "sole cause." Thus, responsible parties must often pursue § 1009 contribution claims to ensure at least partial recovery of costs. Yet unlike contribution claims under the Comprehensive Environmental Response Compensation and Liability Act ("CERCLA"), there is not a well-developed body of case law to guide litigants in pursuing and defending claims under § 1009.

Some defendants whose actions have contributed to, but may not have been the sole cause of, oil spills have sought to exploit a perceived ambiguity in the language of these three sections. They argue that § 1009's "under this Act" clause means that a right to contribution arises only against parties who are found "liable or potentially liable" under another provision of OPA. They argue the only provision that applies to non-contracting third parties is § 1002(d), which is titled "liability of third parties." Thus, the argument goes, third parties are only liable for contribution if they are the "sole cause" of the oil spill, or if they are liable under "another law," which typically means "state law." Because many states have severely limited or altogether eliminated contribution claims through liability reform acts, defendants have sought to avoid any liability for an oil spill even if their acts or omissions accounts for ninety-nine percent (99%) of the cause of the oil spill. Only four courts have addressed this issue.

B. Recent Court Decisions

In *In re Settoon Towing*, the Fifth Circuit held that OPA creates a federal statutory right to contribution for removal costs and damages resulting from an oil spill independent of state or other law. *In re Settoon Towing*, 859 F.3d 340 (5th Cir. June 9, 2017). More specifically, the

court held that § 1009 of OPA creates a right to contribution against third parties even if they are not the "sole cause" of the oil spill or resulting expenses. The court addressed whether the owner of a tug that was designated as a "responsible party" under OPA could pursue a contribution claim under § 1009 against the operator of another towing barge that collided with the barge carrying the oil. The trial court had determined that the "responsible party" was 35% at fault for the oil spill, and the barge owner bore the remaining 65% fault. The case turned on whether OPA provides a separate right of contribution because no other law provided a right to recovery. The court held that interpreting § 1009 to require sole-cause liability "would wholly eliminate contribution *under the Act* and restrict a Responsible Party to seek reimbursement for cleanup expenses only from a later-designated solely-at-fault entity." Thus, the court concluded that "the most reasonable interpretation of the language of the OPA, . . . grants to an OPA Responsible Party the right to receive contribution from other entities who were partially at fault for a discharge of oil."

Prior to *Settoon*, only two other courts had addressed the issue in passing. In *Maytag Corp. v. Navistar Int'l Transp. Corp.*, 219 F.3d 587, 590 (7th Cir. 2000), the Seventh Circuit opined in a footnote that "contribution under the [OPA] is available only from a person liable under some other provision of the [OPA] or another statute." But the court in *Maytag* expressly refused to "resolv[e] any issue about the potential scope of recovery under the [OPA]." *See Maytag*, 219 F.3d at 579. Thus, while litigants wishing to limit the scope of § 1009 often rely on *Maytag*, that opinion is not entirely apposite.

A district court in Illinois almost provided support for those wishing to limit § 1009 to "sole cause" third parties. *See United States v. Egan Marine Corp.*, 808 F.Supp.2d 1065, 1082 (N.D. Ill. 2011) ("*Egan I*"). In *Egan I*, EMC was designated as the "responsible party" following an oil spill, and sought contribution from Exxon. The court dismissed the claim, reasoning that "EMC has not produced a genuine issue of material fact that Exxon solely caused the oil spill. As such, OPA does not provide grounds for contribution." But on a motion to reconsider, that court acknowledged that it had misstated the law. *See United States v. Egan Marine Corp.*, Case No. 1:08-cv-03160, Dkt. No. 303 (N.D. Ill. Aug. 30, 2011) ("*Egan II*"). Instead, the court recognized in *Egan II* that "the proper statement of the law" is that a party may seek contribution under § 1009 of OPA where the defendant has either solely "or partially" caused the oil spill.

Most recently, a district court in Utah adopted *Settoon*'s interpretation of § 1009 in holding that Chevron Pipe Line Company could pursue a contribution claim against a power company that it alleged caused a pipeline rupture. The court rejected a claim that a Utah law eliminating pure comparative fault abrogated a § 1009 claim against a party that was not the sole cause of the oil spill. Instead, the court held that section §1009 "does create an independent statutory right to pursue contribution, as that term is traditionally defined (i.e., allocation of proportionate fault), against a liable, or potentially liable, third-party who may have been a partial cause of the spill." *Chevron Pipe Line Co. v. Pacificorp*, 2017 WL 3382065, at * 6 (Utah D. Aug. 4, 2017).

Thus, the courts that have analyzed the issue directly have unanimously held that § 1009 entitles a "responsible party" a federal statutory right to contribution against non-sole cause third parties.

C. Unresolved Questions

Although future courts are likely to follow the Fifth Circuit in *Settoon* in addressing whether § 1009 creates a right to contribution, a handful of other unresolved issues may pose hurdles to litigating claims under this section. These include the following:

- The Scope of Recoverable Expenses: OPA applies explicitly to "removal costs" and "damages." While both terms are broadly defined under OPA, they do not include significant expenses that virtually every "responsible party" incurs when complying with OPA's strict liability regime. This raises some questions ripe for litigation. For example, may a "responsible party" recover for payments made to a state agency acting as a "natural resources" trustee under delegated authority? What about payments made to third parties for personal injuries sustained as a result of the oil spill – or while removing the oil?

- Court or Jury: A related question is whether a court or jury gets to decide the amount of compensable removal costs or damages recoverable under OPA. One court has held that "removal costs" under OPA are claims for restitution under "an avalanche of authorities" interpreting CERCLA. *See United States v. Viking Resources, Inc.*, 607 F.Supp.2d 808 (S.T. Texas 2009). Generally, restitution is an equitable remedy tried to the court. Moreover, § 1002(b) prescribes that recoverable removal costs are only those for acts that are "consistent with the National Contingency Plan," and at least one court has pointed out that "consistency with the NCP" is a determined by the court as a matter of law. *See City of Tulsa v. Tyson Foods, Inc.*, 2003 WL 26098561 at *2 (N.D. Okl. March 13, 2003). Thus, it appears that there may be no right to a jury trial at least with respect to "removal costs."

- Liability Standard: Another unresolved issue is the standard of liability used in apportioning causal fault to joint tortfeasors. In other words, is a non-sole cause third party strictly liable for the expenses incurred in cleaning up an oil spill? Or is the third party liable only to the extent of its negligence? If the latter, what defenses may the third party raise? As noted above, the responsible party is initially "strictly liable" and thus it would seem appropriate to extend the same standard to joint tortfeasors. On the other hand, applying different standards to responsible parties may be justifiable because presumably they can insure against the risk of loss of oil spills.

LITIGATING CONTRIBUTION CLAIMS

Under the

OIL POLLUTION ACT

ASHLEY A. PECK
HOLLAND & HART LLP

ENERGY INDUSTRY ENVIRONMENTAL LAW CONFERENCE
MAY 18, 2018

HOLLAND&HART

LEGAL OVERVIEW

Oil Pollution Act

33 U.S.C. § 2701 *et seq.*

- Comprehensive federal statutory scheme for oil spill response.
- Enacted in 1990 after Exxon Valdez and other large spills.
- Addresses liability, recoverable costs, trust fund, penalties.

NATIONAL POLLUTION FUNDS CENTER
U.S. COAST GUARD

HOLLAND&HART

LEGAL OVERVIEW – KEY STATUTORY PROVISIONS

Responsible Party

- Anyone who owns, leases or operates the source of an oil spill is strictly liable.
- Pipelines, vessels, storage tanks, tanker trucks.

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LEGAL OVERVIEW – KEY STATUTORY PROVISIONS

Liability for

- "Removal costs" – costs incurred in response (remediation, oversight, etc.)
- "Damages" – natural resources, property, subsistence, revenues, profits, public services.

4

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OPA SPILL RESPONSE PROCESS

- Unified Command
- Shoreline Cleanup Assessment Team
- Multiple regulatory agencies
- Demand for immediate action

5

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OPA - CONTRIBUTION PROVISION

Section 1009:

- "A person may bring a civil action *for contribution* against any other person *who is liable or potentially liable under this Act or another law*. The action shall be brought in accordance with section 2717 of this title." 33 U.S.C. § 2709.

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RELATED PROVISIONS

Liability- a "responsible party" is strictly liable for "removal costs" and specific "damages" following an oil spill.

Subrogation Right - if the oil spill's cleanup costs were "caused *solely* by an act or omission of one or more third parties," then the third party may be treated as the "responsible party" under § 1002(a).

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SETTOON TOWING

8

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SETTOON TOWING

- *In re Settoon Towing* (2017)
  - OPA Contribution Provision v. Maritime Law
  - Is pure economic loss recoverable from non-sole cause third party under OPA?

9

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SETTOON TOWING

- Held: OPA creates a federal statutory right to contribution for removal costs and damages resulting from an oil spill independent of state or maritime law.

- Defendant barge owner need not be the "sole cause" of the oil spill or resulting expenses to be held liable.

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PRIOR CASES TOUCHING ON "SOLE CAUSE"

- *Maytag Corp. v. Navistar Int'l Transp. Corp.*
- *United States v. Egan Marine Corp.*

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RED BUTTE OIL SPILL

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RED BUTTE OIL SPILL

- *Chevron Pipe Line Co. v. Pacificorp (2017)*
  - OPA Contribution Provision v. State Liability Reform Law

Held: Chevron Pipe Line Company could pursue a contribution claim against a power company that it alleged caused a pipeline rupture.

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RED BUTTE OIL SPILL

- Utah law eliminating pure comparative fault did not abrogate OPA contribution claim against a third party that may not have been the sole cause of the oil spill.
- §1009 – creates an independent statutory right to pursue contribution from a "third-party who may have been a partial cause of the spill."

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UNRESOLVED ISSUES

- The Scope of Recoverable Expenses:
  - Agency penalties?
  - Natural resource project costs – state versus federal.
  - Personal injury?

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UNRESOLVED ISSUES

- Court or Jury:
  - Are “damages” claims for restitution and therefore tried to jury?
  - Recoverable removal costs are only those for acts that are “consistent with the National Contingency Plan,” - determined by the court as a matter of law.

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UNRESOLVED ISSUES

- Liability Standard:
  - How to apportion causal fault to joint tortfeasors?
  - Strict liability or negligence standard?

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LITIGATION CONSIDERATIONS

Discovery preparation

- Internal Investigation Reports
- Internal correspondence
- Privilege and work product

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LITIGATION CONSIDERATIONS

Agency Investigations

- Reports
- Settlement Agreements
- Penalties

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LITIGATION CONSIDERATIONS

Building Damages Case

- Recordkeeping
- NCP consistency
- Cost justifications

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UPDATE ON ENVIRONMENTAL AND HUMAN RIGHTS ISSUES IN INTERNATIONAL ARBITRATION

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Hal Fiske is an international counsel at ConocoPhillips, with a focus on developing countries. Hal worked in China and Vietnam for 18 years; as outside counsel in an international law firm, and as Managing Counsel for ConocoPhillips China. Hal currently handles mostly African matters for ConocoPhillips. He is a graduate of Brown University and Boston College Law School and speaks Mandarin Chinese and French.

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Alex James is the Halliburton Global Sustainability Manager with responsibility for external reporting and engagement on sustainable development matters, including human rights. He leads the creation of the Halliburton Corporate Sustainability Report and works closely with Investor Relations and Business Development teams to inform and engage external stakeholders on Halliburton ESG performance. In addition, he acts as a subject matter expert for sustainable development issues across Halliburton's global business, supporting Operations, Supply Chain and Legal teams to reduce ESG impacts.

Prior to joining Halliburton in 2014, Alex was a partner in a boutique sustainability strategy consultancy in London.

Alex holds a masters degree in Environmental Technology from Imperial College London, and is a Fellow of the Institute of Chartered Accountants in England and Wales, a practitioner member of the Institute for Environmental Management and Assessment, and a Fellow of the RSA.

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For more than 25 years, Carol has defended clients in all aspects of environmental law, including international arbitration, U.S. federal and state litigation, and environmental compliance. She has focused for the last 15 years on environmental issues arising in the energy space – both oil and gas and mining.

Examples of her experience include: representing Chevron Corporation and Texaco Petroleum Company on the environmental issues in the investment arbitration against the Republic of Ecuador; representing The Renco Group, Inc. on the environmental issues in its investment arbitration under the UNCITRAL rules against the Government of Peru; advising an international oil and gas company on southeast Asia litigation arising out of environmental issues related to its operations. In addition, she has represented energy companies in oilfield contamination disputes in the U.S., both in court and before administration oil and gas boards. Carol is currently representing oil and gas clients in defense of climate change litigation in the U.S.

Carol has spoken and written on numerous topics, including environmental issues arising out of decommissioning; defense of environmental claims arising out of international investor/state arbitration; remediation of historic oil and gas operations; and ecosystem damages.

Environmental and Human Rights Considerations for International Energy Companies

Carol M. Wood, Ginny Castelan, King & Spalding

I. INTRODUCTION

Environmental and human rights issues involving energy companies, foreign sovereigns and NGOs are on the rise. This paper looks at the ways environmental and human rights issues have arisen in international disputes over the past few years, as well as discusses recent developments in international human rights claims seeking to curtail fossil fuel production and use based on climate change concerns.

II. ENVIRONMENTAL CONTAMINATION CLAIMS BY STATES

In the international context, the liability of companies for environmental impacts typically arises in the context of an investment case against the host government. The investor company will bring an investment claim against the host state, which will in turn initiate a claim against the company for environmental damage in an effort to reduce or eliminate any potential damages if the State is found liable for breaching its international obligations toward the investor. Following are two examples.

A. ENVIRONMENTAL CLAIMS ASSERTED BY STATES IN RESPONSE TO INVESTOR TREATY CLAIMS

1. Burlington v. Ecuador and Perenco v. Ecuador[1]

The dispute between Burlington Resources Inc. ("Burlington") and Perenco Ecuador Limited ("Perenco") arose out of Ecuador's response to increased oil prices in the 2000's. Ecuador sought to benefit from the increased oil prices by imposing a 99% "extraordinary profits" tax on oil companies operating in its jurisdiction (among other measures). This tax applied to Burlington and Perenco, who had previously invested together in certain exploration areas or "blocks" in Ecuador.[2] Burlington and Perenco refused to pay this tax, after which Ecuador seized the companies' concession.[3]

In 2008, Burlington and Perenco each filed a bilateral investment treaty ("BIT") arbitration, claiming that Ecuador illegally expropriated their property, thereby violating the U.S.-Ecuador BIT, and the France-Ecuador BIT, respectively.[4] Both claimants brought

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1 *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Award on Liability (Dec. 14, 2012) [hereinafter, "*Burlington* Liability Award"]; *Perenco Ecuador Ltd. v. Republic of Ecuador and Petroecuador*, ICSID Case No. ARB/08/6, Decision on Remaining Issues of Jurisdiction and Liability (Sep. 12, 2014) [hereinafter "*Perenco* Jurisdiction and Liability Award"]

2 *Burlington* Liability Award ¶ 35; *Perenco* Jurisdiction and Liability Award ¶ 101.

3 *Burlington* Liability Award ¶¶ 53-56; *Perenco* Jurisdiction and Liability Award ¶¶ 153-166.

4 *Burlington* Liability Award ¶¶ 5, 67; *Perenco* Jurisdiction and Liability Award ¶¶ 4, 6.

additional claims that Ecuador violated its contractual and treaty obligations, including that Ecuador failed to accord the claimants fair and equitable treatment as required by the applicable BITs.[5]

In an effort to offset any potential liability, Ecuador brought counterclaims against the companies in both cases, seeking to hold each company jointly and severally liable for alleged environmental damage in the former concession area.[6] Burlington and Perenco agreed to the existing tribunals' jurisdiction to resolve Ecuador's environmental claims, citing the parties' desire for judicial economy and consistency.[7] In the *Burlington* case, a site visit was held to examine the alleged contamination. The tribunal in the *Perenco* case did not conduct a site visit.

In August 2015, the *Perenco* tribunal issued an Interim Decision in which it made significant legal findings, including defining environmental harm under Ecuadorian law by reference to regulatory limits rather than the "background values" or "base values" (i.e., the normally occurring levels of certain elements found in the natural environment) that Ecuador argued should apply.[8] In addition, the *Perenco* tribunal made some technical findings, including appropriate means of determining the volume of soil that requires remediation.[9]

While the *Perenco* tribunal found in favor of the claimant on these issues of fact and law, it found that it was "uncomfortable with simply picking one set of experts' conclusions over the other."[10] Instead, the *Perenco* tribunal appointed its own expert to investigate the sites before ruling on the extent of remediation and remediation damages.[11] In the interim, the tribunal urged

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5 *See e.g.*, *Perenco* Jurisdiction and Liability Award ¶ 286 (listing Perenco's claims as included in its request for relief).

6 *Perenco Ecuador Ltd. v. Republic of Ecuador*, ICSID Case No. ARB/08/6, Interim Decision on the Environmental Counterclaim ¶ 53 (Aug. 11, 2015) [hereinafter "*Perenco* Counterclaims Decision"]; *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Counterclaims ¶ 55(i) (Feb. 7, 2017) [hereinafter "*Burlington* Counterclaims Decision"].

7 *See Burlington* Counterclaims Decision ¶ 60; *Perenco* Counterclaim Decision ¶ 5.

8 *Perenco* Counterclaim Decision ¶ 321 ("After carefully considering the arguments and the evidence, the Tribunal does not accept Ecuador's arguments that its hydrocarbons regulatory regime does not sufficiently protect the environment and therefore should give way to the 'background values' or 'base values' methodology . . . ."); *see also id.* ¶ 50.

9 *Perenco* Counterclaim Decision ¶¶ 449-456 (concluding that "the general use of delineation in the industry when seeking to determine the existence and extent of contamination, the difficulty exhibited by [Ecuador's expert] when seeking to explain what they had done in the modelling exercise, [Perenco's expert's] contrasting testimony which was clear and convincing, considered together with the demonstrative exhibits employed by the Parties, has created such strong doubt in the Tribunal's mind that it is compelled to reject the mapping exercise in its entirety. Given its view as to the frailties of [Ecuador's expert's] mapping exercise, the Tribunal considers that delineation of contaminated sites is the appropriate means of ascertaining the volume of soil that requires remediation.")

10 *Id.* ¶ 585.

11 *Id.* ¶¶ 586-587.

the parties to settle based on the findings that the tribunal had already made.[12] The parties are currently waiting for a final award.

In February 2017, the *Burlington* tribunal issued a "Decision on Ecuador's Counterclaims"[13] and a "Decision on Reconsideration and Award."[14] It awarded Ecuador only $39 million of its alleged $2.5 billion environmental damages, which consisted of $33 million soil remediation, $5 million groundwater remediation, $1 million for site abandonment.[15]

In its decision, the tribunal made significant legal findings on environmental harm. Like the *Perenco* tribunal, the *Burlington* tribunal concluded that regulatory limits, rather than background values should apply to determine the extent of any alleged contamination.[16] The tribunal also concluded Ecuador had the "burden to make a showing of harm plausibly connected to [Burlington's] activities" but that Burlington "then ha[d] the burden of proving its absence."[17]

The *Burlington* Decision on Ecuador's Counterclaims is notable because the tribunal extensively engaged in the technical issues in the case. Moreover, it did not adopt either party's technical methodology wholesale but instead developed its own approach to assess the extent of the impacted areas and volumes of contaminated soils. In addition, the *Burlington* tribunal relied on its own site visit observations, including its observations of the use of land.

Shortly after the *Burlington* tribunal issued its Decision on Ecuador's Counterclaims and Decision on Reconsideration and Award, Ecuador filed an application to annul the latter.[18] The ICSID Secretary-General then notified the parties of a provisional stay of the enforcement of the award, pending the constitution of an ad hoc committee to consider the annulment. In August 2017, the *Burlington* ad hoc committee lifted the provisional stay of enforcement.[19]

The parties settled in December 2017, precluding the need for recognition and enforcement proceedings.

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[12] *Id.* ¶ 611(9) ("[T]he Parties are instructed to review the findings made in this Decision and to consult with each other with a view to discussing whether it would be possible to arrive at a settlement of this counterclaim in a manner consistent with this Decision. Any communications or documents exchanged by the Parties in connection with such discussions shall be on a without prejudice basis and shall not be disclosed to the Tribunal or to the Tribunal's expert in the event that no settlement is reached.").

[13] *Burlington* Counterclaims Decision.

[14] *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Reconsideration and Award (Feb. 7, 2017).

[15] *Burlington* Counterclaims Decision ¶¶ 889, 1099.

[16] *Id.* ¶¶ 291 ("[I]t is the Tribunal's view that environmental harm is defined by reference to regulatory criteria. . . . In other words, an oilfield operator could not be considered to have caused environmental harm if permissible limits were observed, since precisely these permissible limits allow determining when a negative impact crosses the threshold of harm.").

[17] *Id.* ¶ 226.

[18] *Burlington Resources, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5 – Annulment Proceeding, Decision on Stay of Enforcement of the Award ¶ 1 (Aug. 31, 2017).

[19] *Id.* ¶ 8.

2. Investment Claim Involving an Environmental Judgment and Environmental Counterclaims – *Chevron v. Ecuador*

In February 2011, a court in Lago Agrio, Ecuador issued an $18 billion judgment against Chevron (later reduced to $9.5 billion) for alleged contamination resulting from crude oil production in the Oriente region of Ecuador.

On September 23, 2009, while the dispute in Lago Agrio was ongoing, Chevron and TexPet (Chevron's subsidiary that operated in Ecuador) sought relief against Ecuador under the U.S.-Ecuador BIT. The claimants asserted that TexPet had been released from all environmental impact arising out of the former Consortium's activities and that Ecuador and Petroecuador were responsible for any remaining and future remediation work.[20] After the Lago Agrio judgment was issued, the claimants also introduced evidence that fraud and corruption were used to procure the Lago Agrio judgment.[21] Chevron has asked the tribunal for declaratory relief and for an indemnity related to the potential enforcement of the Lago Agrio judgment against it.

In defense, Ecuador argued that any indemnity the tribunal grants should be offset by the amount of Chevron's actual liability.[22] To this end, Ecuador has argued that the tribunal must conduct its own analysis of the alleged environmental harm.[23]

The tribunal has ordered Ecuador to prevent enforcement of the contested judgment while the arbitration proceedings are ongoing. On February 9, 2011, the tribunal ordered Ecuador to take all measures at its disposal to suspend enforcement or recognition of any judgment that the Lago Agrio court would render against Chevron.[24] On January 25, 2012, the tribunal reiterated that Ecuador should take all measures available to suspend or cause to be suspended the recognition of the judgment.[25] Again, on February 16, 2012, the tribunal once again directed Ecuador to take "all measures necessary to suspend or cause to be suspended the recognition or enforcement both within and outside Ecuador of the Ecuadorian appellate judgment" that confirmed the Lago Agrio judgment.[26] On February 7, 2013, the tribunal found that Ecuador had violated the tribunal's directives and the international law due to its failure to comply with its awards.

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[20] *Chevron Corp. and Texaco Petroleum Co. v. Republic of Ecuador*, PCA Case No. 2009-23, Claimants' Notice of Arbitration, §VI (Sept. 23, 2009).

[21] *See, e.g., Chevron Corp. and Texaco Petroleum Co. v. Republic of Ecuador*, PCA Case No. 2009-23, Claimants' Supplemental Memorial on the Merits (Mar. 20, 2012).

[22] *Chevron Corp. and Texaco Petroleum Co.. v. Republic of Ecuador*, PCA Case No. 2009-23, Ecuador's Track 2 Counter-Memorial on the Merits ¶ 448 (Feb. 18, 2013).

[23] *Id.* ¶ 450.

[24] *Chevron Corp. and Texaco Petroleum Co. v. Republic of Ecuador*, PCA Case No. 2009-23, Tribunal's Order on Interim Measures § E (Feb. 9, 2011).

[25] *Chevron Corp. and Texaco Petroleum Co. v. Republic of Ecuador*, PCA Case No. 2009-23, First Interim Award on Interim Measures § (VI) (Jan. 25, 2012).

[26] *Chevron Corp. and Texaco Petroleum Co. v. Republic of Ecuador*, PCA Case No. 2009-23, Second Interim Award on Interim Measures ¶ 3(i) (Feb. 16, 2012)

Ecuador unsuccessfully sought to set-aside the interim measures awards and the partial arbitral awards. On January 7, 2014, Ecuador asked the District Court of the Hague in the Netherlands (the legal seat of the arbitration) to set aside all of the tribunal's awards. Ecuador argued, inter alia, that (i) there is no valid arbitration agreement; (ii) the awards violate public policy; and (iii) the arbitrators did not comply with their mandate.[27] On January 20, 2016, a three-member panel of the Hague District Court denied Ecuador's petition and ordered it to pay the costs of the proceeding.[28] On July 18, 2017, the Hague Court of Appeal denied Ecuador's appeal seeking to set aside all of the tribunal's awards to date.

With respect to the environmental claims underlying the dispute, the tribunal determined on September 17, 2013, that the claimants were "Releasees" under the applicable settlement and release agreements.[29] It also concluded that, while the scope of those agreements would not extend to any environmental claim made by an individual for personal injury to himself or to his personal property, they did conclusively resolve any collective or diffuse claim made against the companies by Ecuador under the Ecuadorian Constitution or by any individual not claiming personal harm.[30]

A merits hearing was held in May 2015, where the tribunal heard testimony on the merits of the dispute, including environmental issues. The tribunal also conducted a site visit in June 2015. An award on those issues is pending.

B. STRATEGIES FOR ENERGY COMPANIES TO DEFEND AGAINST INTERNATIONAL ENVIRONMENTAL CONTAMINATION CLAIMS

1. Common Environmental Damage Allegations

Staying informed as to types of environmental claims made in international cases is key to minimizing the risk of ultimately facing such a claim. Some of the most common claims center on the extent of the remediation historic operations might require, which depends on the applicable standards, as well as, a State would argue, the alleged misconduct of the oil company.

First, a State will typically assert that the energy company's operations failed to comply with industry standards and historic laws. As seen in *Burlington v. Ecuador* and *Perenco v. Ecuador*, a State may argue that its own regulations do not apply, and that instead, the tribunal should apply a stricter standard, such as remediating to "background" or "base" levels—i.e., the level of a contaminant that naturally occurs in the environment.

As evidence, States in arbitration against energy companies will seek internal company documents during document production attempting to argue that they are evidence of non-compliance with industry and company standards and host country laws. In pursuit of this

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[27] *Republic of Ecuador v. Chevron Corp.*, Case No. C/09/477457 / HA ZA 14-1291, Judgment, District Court of the Hague, Jan. 20, 2016, § 3.2.

[28] *Id.* §§ 5.1-5.3.

[29] *Chevron Corp. and Texaco Petroleum Co. v. Republic of Ecuador*, PCA Case No. 2009-23, First Partial Award on Track 1 ¶ 112 (Sept. 17, 2013).

[30] *Id.*

strategy, the State will seize on any language that suggests indifference or callousness toward environmental concerns.

The State will typically argue that substandard operations caused large-scale contamination, which the energy company knew about and covered up. It will then argue that this contamination has caused or has the potential to cause significant health and ecosystem impacts.

In the context of a State's counterclaim against an energy company in an investment dispute, the State will argue that extensive and costly remediation is needed to restore the environment to original or safe conditions. On this basis, the State will seek compensation from the energy company to conduct the remediation, which would obviously lessen or completely offset the damages the oil company is seeking against the State.

2. Strategies to Defend against State's Claims of Environmental Contamination

One strategy in defending against potential State environmental contamination claims is to think long-term. History has shown that disputes over historic exploration and production operations are likely to occur. The more thoughtful and well-documented a remediation – whether in response to an operational spill or upon exiting an asset – the better armed the company will be to defeat subsequent environmental damage claims.

Next, an energy company should evaluate whether to conduct environmental due diligence on an asset it is preparing to transfer. Similar to the practice in the United States, this would allow the company to understand potential future liabilities and address those liabilities by conducting remediation before transfer or addressing through contractual language.

Third, if an energy company conducts remediation, either through ongoing operations or a transfer, it should use defensible remediation standards and technology, especially if the host country does not have a robust regulatory remediation program. If the remediation is subsequently challenged, very likely comparisons will be made with the company's U.S. remediations and any subsequent host country remediation standards and methods. The company should also evaluate coordinating with regional or local stakeholders.

In line with the previous point, energy companies should coordinate all remediation activities and decisions with the host country and, as applicable, with the national energy company. By coordinating with them and obtaining approval of all remediation decisions, including remediation standards and methods, (and documenting such approval) companies can minimize their risk of liability. Energy companies should additionally seek a release for the remediation, as well as from liability for any residual environmental impacts.

Even after remediating the area to the satisfaction of the host State, energy companies should anticipate claims related to residual environmental impacts in the area, if not from the State then potentially NGOs or other third parties. It is likely that environmental impacts will remain post-remediation because, for example, risk-based standards do not require complete elimination of all environmental impacts or because of subsequent operators. Companies should therefore anticipate legal or media claims based on residual impacts and be prepared to explain

why such impacts that remain are not harmful or distinguish its operations from subsequent operators.

During due diligence and remediation, evaluate using the most defensible data collection and analysis techniques, such as analytical test methods, quality assurance and quality control ("QA/QC") and the potential need for non-traditional analytical reports. These issues will be scrutinized in any subsequent proceeding.

In addition, companies engaged in remediation should be mindful of documents generated leading up to and during the remediation as those documents could come into play in subsequent disputes. The decisions made in selecting and implementing the assessment or remediation of operations should be clear, follow company policy and applicable regulations. If any sensitive issues arise or could arise out of the assessment and remediation process, it is also important to lay the foundation to claim privilege.

Depending on the circumstances it may also make sense to involve neutrals during the remediation process. To this end, companies should evaluate potential collaboration with a reputable non-governmental organization or similar local neutral, to develop and present the most reasonable remediation approach. Including such entities ensures that the remediation will be carried out successfully and lend additional credibility to the company's remediation efforts.

C. SPECIAL CONSIDERATIONS FOR ENVIRONMENTAL CONTAMINATION CLAIMS

1. Does the Tribunal have Jurisdiction over Counterclaims?

It is likely that an investment treaty tribunal will have jurisdiction over counterclaims by the State against the investor. However, a tribunal's decision on jurisdiction over a State's counterclaim will turn on the scope of the parties' agreement to arbitrate, i.e., the language of the applicable treaty. The language of the dispute resolution provision of investment treaties typically refers to any disputes arising between the State party to the treaty and an investor of the other party to the treaty (although there are some cases in which tribunals have found that the treaty does not contemplate counterclaims by States).

As an example, the tribunal in *Urbaser v. Argentina*, concluded that it did have jurisdiction over the State's counterclaim. The relevant provision of the BIT in that case provided:

> Disputes arising between a Party and an investor of the other Party in connection with investments within the meaning of this Agreement, shall as far as possible, be settled amicably between the parties to the dispute [before proceeding to arbitration].[31]

The tribunal reasoned that "[t]his provision is completely neutral as to the identity of the claimant or respondent in an investment dispute arising 'between the parties.' It does not indicate that a State Party could not sue an investor in relation to a dispute concerning an investment."[32]

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[31] *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic*, ICSID Case No. ARB/07/26, Award ¶ 1143 (Dec. 8, 2016) (quoting the Spain-Argentina BIT).

[32] *Id.* ¶ 1143.

However, there is some authority holding that the counterclaim must have a "close connection" with the investors' primary claim.[33] But the tribunal in *Urbaser v. Argentina* found that the fact that both the claim and the counterclaim were based on the same investment and related to the same concession was sufficient to establish such a connection.[34]

In any event, a company may find it beneficial to resolve any environmental disputes in front of a neutral forum, such as an international tribunal, for the same reasons that it hopes to benefit from having its investment dispute resolved in a neutral forum. Depending on the circumstances of the case, the resulting decision may be binding on domestic courts and therefore prevent the company from being sued in a less favorable forum. The *res judicata* effect of an arbitral award is a complex issue that would require analysis before determining that an international award would have such *res judicata* effect. But the issue is worth investigating before opposing a State's counterclaim based on the jurisdiction of the tribunal. If it is reasonably certain that a State's environmental counterclaim would be finally resolved in a preclusive manner by the tribunal, it may be advantageous for a company to accept the jurisdiction of the tribunal.

2. Applicable Environmental Standards

One issue that will always arise is the applicable environmental standard. Similar to U.S. litigation, those asserting environmental damage usually claim per contract or statute that the property should be remediated to background or original condition. This was Ecuador's position in *Burlington Resources* and *Perenco*, which the tribunals rejected. Sometimes the environmental standards that currently apply may be more stringent than those that applied at the time of remediation. In a transfer of the property that situation should be considered and addressed through contractual language and/or through analysis of the most appropriate standard at the time of remediation. More likely than not, any environmental contamination claim will involve justification of the remediation standard that was used.

3. Use of Experts

Environmental disputes typically involve party experts to analyze the presence and extent of any environmental impacts and/or evaluate prior remediation. Depending on the environmental media involved, this could include a need for a number of scientific disciplines. In addition, following the civil law tradition, the tribunal may appoint its own expert.

4. Use of Site Visits

Tribunals in environmental cases, such as *Burlington*, have conducted site visits as part of the arbitration process. If this occurs, close attention should be given to the numerous issues that the parties will need to negotiate, including travel and site logistics, security, recordings and whether the visit becomes part of the arbitration record.

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[33] *See, e.g., Paushok B.V. v. Czech Republic*, UNCITRAL, Decision on Jurisdiction over Czech Republic's Counterclaim ¶ 27 (May 7, 2004).

[34] *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic*, ICSID Case No. ARB/07/26, Award ¶ 1151 (Dec. 8, 2016).

III. CLAIMS AGAINST STATES FOR MEASURES OSTENSIBLY AIMED AT ADDRESSING ENVIRONMENTAL CONCERNS

While the most obvious international environmental dispute may arise out of claims against private entities for environmental impacts, companies should also be aware of *their* rights against host States that may overreach when regulating or otherwise taking measures to address environmental concerns. It is uncontroversial that States have the right to take measures to protect the environment and to prevent private actors from harming the environment. However, States may not use environmental concerns as a mere pretext to favor companies or industries within their jurisdiction. In other words, the mere invocation of environmental concerns is not a silver bullet that eliminates a State's obligations toward investors (typically enshrined in the applicable BIT, multi-lateral treaty, or, in some cases, public international law).

A. STATES MAY REGULATE ENVIRONMENTAL ISSUES BUT MUST HAVE LEGITIMATE ENVIRONMENTAL CONCERNS AND REFRAIN FROM DISCRIMINATING AGAINST FOREIGN INVESTORS

The need to balance a State's right to regulate in response to environmental concerns and its obligation to promote and protect foreign investment is evident in a series of decisions that exemplify a tribunals' need to balance these competing interests. In two of the cases discussed below, the tribunals found that State measures ostensibly taken to protect the environment did not actually seek to protect a legitimate environmental interest but instead benefited local companies at the expense of foreign investors. But in the third case, the tribunal found that the United States (in particular the State of California) had a legitimate interest in taking measures to protect the environment. These cases make clear that States may not rely on environmental concerns to benefit domestic companies at the expense of foreign investors.

1. *S.D. Myers v. Canada*

This issue arose in the late 1990's when a family-owned American company's investment in Canada was affected by Canada's environmental policies.[35] The company, S.D. Myers International ("S.D. Myers"), remediated transformer oil and equipment to remove a contaminant called polychlorinated biphenyl ("PCB"), which required the destruction of PCBs and PCB waste material.[36] In the 1970's PCBs were recognized as highly toxic substances and were therefore heavily regulated by both domestic law and internationally by treaties (including the Basel Convention)—which restricted the import and export of PCBs.[37]

S.D Myers, which was located only 100 kilometers from the Canadian border, entered the Canadian market for remediation of PCBs when only one Canadian competitor existed and was located thousands of miles from the majority of Canada's PCB inventory and thousands of miles from S.D. Myers.[38] At this point, it was unclear whether national or international law would

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[35] *S.D. Myers, Inc. v. Gov't of Canada*, UNCITRAL, Partial Award ¶¶ 89, 123-127 (Nov. 13, 2000).

[36] *Id.* ¶ 91, 94.

[37] *Id.* ¶¶ 98-109.

[38] *Id.* ¶ 112.

permit S.D. Myers to transport PCB from Canada to the U.S. for remediation.[39] However, the U.S. Environmental Protection Agency provided S.D. Myers with express permission to import PCBs and PCB waste from Canada into the U.S. for disposal.[40] As a result of EPA's decision, Canada had to determine whether it would also permit PCBs to be exported to the U.S. in light of its internal policies and treaty obligations.[41] Ultimately, Canada resolved to close the Canada-U.S. border to PCB transport in 1995.[42]

S.D. Myers brought claims in international arbitration against Canada, alleging that Canada violated its NAFTA obligations to S.D. Myers by failing to treat S.D. Myers equally with Canadian companies and without discrimination and that it failed to treat S.D. Myers fairly and equitably.[43] In particular, it argued that Canada's decision to close the border for the transport of PCB waste was a protectionist measure that granted better treatment to S.D. Myer's Canadian competitors.[44]

In November 2000, an international tribunal ruled in favor of S.D. Myers and held Canada liable for breaching NAFTA. It concluded that the ban prohibiting exports of PCBs "were intended primarily to protect the Canadian PCB disposal industry" and that "there was no legitimate environmental reason for introducing the ban."[45] Moreover, "the practical effect [of the ban] was that [S.D. Myers] and its investment were prevented from carrying out the business they planned to undertake, which was a clear disadvantage in comparison to its Canadian competitors."[46] Although the tribunal recognized that Canada had a legitimate interest in ensuring that it had the ability to process PCBs within Canada in the future by ensuring the development of the PCB disposal industry in Canada, it considered that the State could have taken other measures to protect that interest that would not have disproportionately benefited Canadian companies over foreign companies. For example, Canada could have offered subsidies to Canadian companies or require that all government remediation work be granted to local companies.[47]

Thus, *S.D. Myers* is a prime example of an investor asserting its rights in the face of discriminatory regulations based on environmental issues.

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39 *Id.* ¶¶ 98-109.

40 *Id.* ¶ 118.

41 *Id.* ¶ 121.

42 *Id.* ¶¶ 123-26. Canada did re-open the border for transport of PCB waste in February 1997. However, a U.S. Ninth Circuit decision closed the border again in July 1997.

43 *Id.* ¶ 130.

44 *Id.* ¶¶ 131, 134-35.

45 *Id.* ¶¶ 194, 195.

46 *Id.* ¶ 193.

47 *Id.* ¶¶ 253-257.

2. *Tecmed v. Mexico*

A few years later, in 2003, another tribunal found that Mexico violated the Spain-Mexico BIT by refusing to renew a Spanish company's permit to operate a waste disposal site.[48] In *Tecmed v. Mexico*, the investor, Técnicas Medioambientalies S.A. ("Tecmed"), a Spanish company, claimed that the Instituto Nacional de Ecología's (National Ecology Institute or "INE") refusal to renew Tecmed's license to operate a hazardous waste facility resulted in an act tantamount to expropriation in violation of the BIT.[49] In response, Mexico argued that INE's exercise of its regulatory power to grant and revoke licenses could not constitute a measure tantamount to expropriation and was not subject to the legal review of an international tribunal.[50] In addition, Mexico claimed that Tecmed had not fulfilled certain requirements necessary to maintain its license and had paid fines for improperly transporting toxic waste from a plant in Baja California.[51]

However, the Tribunal concluded that INE's decision to revoke Tecmed's license was not actually based on concerns over a serious threat to public health or to the environment caused by Tecmed's actions, but rather, a measure taken pursuant to political and social pressure from the residents of Hermosillo, Sonora, who objected to the location of the toxic waste plant.[52] In reaching this conclusion, the tribunal noted that the consultations between INE and the governor of Sonora mainly concerned the location of a plant and the social and political concerns of INE, and not public health and environmental reasons.[53] The tribunal also found it relevant that Tecmed had agreed to re-locate its plant as long as it could continue to operate while searching for a new location.[54] For these reasons, the tribunal found that the revocation of the license was an arbitrary measure that deprived Tecmed of the value of its investment.[55] In addition to finding that Mexico expropriated Tecmed's investment, it found that Mexico's actions were arbitrary and non-transparent and therefore violated the fair and equitable treatment standard imposed by the BIT.[56]

3. *Methanex v. United States*

Finally, in *Methanex v. United States*, Methanex (a Canadian corporation and the world's largest producer of methanol) claimed that the United States illegally expropriated its investment

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[48] *Tecnicas Medioambientales Tecmed S.A v. United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award ¶ 201 (May 29, 2003).

[49] *Id.* ¶¶ 41-45.

[50] *Id.* ¶¶ 46-51.

[51] *Id.* ¶ 50.

[52] *Id.* ¶ 131.

[53] *Id.* ¶¶ 131-34.

[54] *Id.* ¶ 142.

[55] *Id.* ¶ 151.

[56] *Id.* ¶ 174.

under NAFTA when California banned the sale of MTBE.[57] California banned MTBE based on a study that it requested, which showed the health risks of the compound—an oxygenate added to petroleum in order to lower vehicle emissions.[58] However, California did not ban a competing petroleum additive based on ethanol—ETBE—which was manufactured mainly by a single U.S. company, Archer Daniels Midland.[59] The claimant in this case, Methanex, did not actually produce MTBE but produced methanol—an ingredient used in the production of MTBE.

Methanex argued that the Governor of California conspired with Archer Daniels Midland to provide beneficial treatment to ethanol over MTBE. This argument rested on fantastic allegations involving the Californian Governor that bordered on unlawful conduct.[60] The tribunal, however, rejected Methanex claims, finding that California had a legitimate interest in banning MTBE:

> To our minds, the scientific and administrative record establishes clearly that Governor Davis and the California agencies acted with a view to protecting the environmental interests of the citizens of California, and not with the intent to harm foreign methanol producers.[61]

In reaching its conclusion, the tribunal considered the evidence that Methanex presented that allegedly showed that the ban resulted from the Governor of California's intent to solicit campaign contributions from Methanex's competitor. It concluded that the "evidential record establishes no ill will towards Methanex or methanol."[62] Instead, "[f]aced with a widespread and potentially serious MTBE contamination of its water resources, California ordered a careful assessment of the problem and thereafter responded reasonably to independent findings that large volumes of the state's ground and surface water had become polluted by MTBE and that preventative measures were called for."[63]

B. BREACH OF HOST COUNTRY ENVIRONMENTAL LAW AMOUNTED TO BREACH OF MINIMUM STANDARD OF TREATMENT AND NATIONAL TREATMENT – *BILCON V. CANADA*

In another investment case dealing with the environmental policy of a host State, a group of Canadian investors brought a NAFTA claim against Canada for refusing to allow the development of a proposed quarry and marine terminal in Nova Scotia, Canada, for

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[57] *Methanex Corp. v. United States of America*, Final Award of the Tribunal on Jurisdiction and Merits, ¶ 1 (Aug. 3, 2005).

[58] *See Id.* at Part I, Chapter A - ¶ 1, Part III – Chapter A - ¶ 102.

[59] *See Id.* at Part I, Chapter A - ¶ 1, Part II – Chapter E - ¶ 5, Part III – Chapter A - ¶ 102.

[60] *See e.g.*, *Id.* at Part II – Chapter E - ¶ 5.

[61] *Id.* at Part IV – Chapter E - ¶ 20.

[62] *Id.* at Part IV – Chapter E - ¶ 20.

[63] *Id.* at Part IV – Chapter E - ¶ 20.

environmental reasons.[64] This case is notable because the outcome has been described as a "remarkable step backwards in environmental protection."[65]

Bilcon arose out of the claimants' environmental application to build a quarry and marine terminal in Nova Scotia. That application was ultimately submitted to a joint review panel (a "JRP")—"the most rigorous, protracted and expensive kind of review" in Canada.[66] Claimants argued that this kind of environmental review was never used for its kind of project and was instead reserved for projects of greater magnitude and entailing greater environmental risk.[67] They alleged that, in order to address the issues raised in the review, they engaged 35 experts and produced an Environmental Impact Statement that spanned over 3,000 pages.[68] However, according to the claimants, an anti-American discriminatory bias infected the public process, and the resulting JRP Report relied on the "core community values" expressed during the public hearings to assess the project.[69] The JRP did not assess whether the project would leave "significant adverse effects after mitigation," which was the standard required under the applicable Canadian law.[70]

Canada defended its decision to subject the claimants' application to a JRP, noting the sensitivity of the marine environment that could have been affected by the proposed quarry and marine terminal and the concerns expressed within the local community.[71] Canada also argued that claimants were notified of the "community core values" approach adopted by the JRP, which was consistent with Canadian law.[72]

The tribunal found that Canada did breach Article 1105 of NAFTA, which provides that a State's conduct must meet the minimum standard of treatment under international law, even though the tribunal acknowledged the high threshold for the conduct of a host State to breach Article 1105 must be sufficiently serious or "grossly unfair" in order to amount to a breach.[73] In finding that the State failed to meet the minimum standard of treatment, the tribunal noted that the claimants were encouraged to invest in the proposed quarry, including by spending millions of dollars on an Environmental Impact Assessment, based on Canada's representation that they needed to comply with all current applicable laws.[74] Instead, the JRP adopted an unprecedented

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64 *Bilcon of Delaware, Inc. et al. v. Gov't of Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability (Mar. 17, 2015).

65 *Id.* ¶ 51.

66 *Id.* ¶ 15.

67 *Id.* ¶ 16.

68 *Id.* ¶ 18.

69 *Id.* ¶¶ 18-20.

70 *Id.* ¶ 21.

71 *Id.* ¶¶ 29-33.

72 *Id.* ¶ 35.

73 *Id.* ¶¶ 442-446.

74 *Id.* ¶¶ 447-449.

approach to its review of the Environmental Impact Assessment and failed to sufficiently notify the claimants of this approach in advance of the review.[75] The tribunal concluded:

> [T]he Investors were encouraged to engage in a regulatory approval process costing millions of dollars and other corporate resources that was in retrospect unwinnable from the outset, even though the Investors were specifically encouraged by government officials and the laws of federal Canada to believe that they could succeed on the basis of the individual merits of their case. . . . In the end, the JRP's decision was effectively to impose a moratorium on projects of the category involved here—a kind of zoning decision.[76]

The tribunal concluded that Canada had violated the treaty and moved to the quantum phase of the case. The tribunal recently heard the parties arguments on quantum in February 2018, in a public hearing held in Toronto.[77]

In his dissent, Canada's appointment to the tribunal, Donald McRae, disagreed that the "high standard" for breach of Article 1105 can be "met simply by an allegation of a breach of Canadian law."[78] He further argued that the implications of the majority's decision would have far-reaching effects for environmental reviews in Canada, as well as in other countries. He pointed out that the claimants could have sought review of the JRP's decision within Canada, but they did not. Instead, according to McRae, "the majority has . . . add[ed] a further control over environmental review panels" noting that "[f]ailure to comply with Canadian law by a review panel now becomes the basis for a NAFTA claim allowing a claimant to bypass the domestic remedy provided for such a departure from Canadian law."[79] In McRae's opinion, this was a "serious intrusion into domestic jurisdiction and will create a chill on the operation of environmental review panels."[80]

Canada is currently seeking to set aside the tribunal's decision, arguing that the tribunal exceeded its jurisdiction.

C. COMPENSATION DUE FOR EXPROPRIATION TAKEN FOR ENVIRONMENTAL PURPOSE – *SANTA ELENA V. COSTA RICA*

As can be seen above, a State's interest in the environment is not a silver bullet that will relieve it of its treaty obligations to foreign investors. Similarly, taking property for an environmental purpose does not relieve a State of compensating the investor who suffered from such a taking.

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75 *Id.* ¶¶ 450-451.

76 *Id.* ¶¶ 453-54.

77 PCA Press Release, "Bilcon of Delaware et al v. Government of Canada," The Hague, Feb. 6, 2017, *available at* https://www.italaw.com/sites/default/files/case-documents/italaw9486.pdf.

78 *Bilcon of Delaware, Inc. et al. v. Gov't of Canada*, PCA Case No. 2009-04, Dissenting Opinion of Professor Donald McRae ¶ 2 (Mar. 10, 2015).

79 *Id.* ¶ 48.

80 *Id.* ¶ 48.

The tribunal in *Santa Elena v. Costa Rica* reached this conclusion, confirming that an environmental purpose is just like any other purpose for which a State may expropriate—in such cases, the State may expropriate the property but must satisfy all of the requirements of a legal taking imposed by the BIT, including by providing just compensation:

> While an expropriation or taking for environmental reasons may be classified as a taking for a public purpose, and thus may be legitimate, the fact that the Property was taken for this reason does not affect either the nature or the measure of the compensation to be paid for the taking . . . . The international source of the obligation to protect the environment makes no difference" [81]

Thus, the application of an international treaty aimed at protecting the environment does not relieve a state of its obligation to pay full compensation for taking an investor's property.

D. ENVIRONMENTAL ISSUES ARISING DURING THE ENFORCEMENT OF AN AWARD AGAINST A STATE

Companies that have won an arbitral award against a State resolving the State's environmental claims may have to revisit those environmental issues in enforcement proceedings. This may arise under the New York Convention's "public policy" exception to recognition and enforcement. But although protecting the environment comprises part of the public policy of most Sates—the mere allegation by a State of environmental harm is not enough to prevent the enforcement of an award on public policy grounds.

In *Crystallex v. Venezuela*, Venezuela fought the confirmation of an award against it in the U.S. District Court for the District of Columbia, arguing that "confirming the award would harm the public policy of the United States that States have the sovereign right to regulate the environmental impact of industrial activities because Venezuela's conduct toward Crystallex was intended to protect Venezuela's environment."[82]

The D.C. District Court rejected this argument, noting that the public policy exception to confirmation in the New York Convention is construed narrowly such that only violations of the forum State's most basic notions of morality and justice would merit a refusal to confirm.[83] This argument was rejected because the public policy exception in the New York Convention is to be construed narrowly. The court found no violation of public policy under this narrow construction, reasoning that the tribunal "cast serious doubt on whether Venezuela's assertions of environmental concerns motivated its actions" and that Venezuela failed to "demonstrat[e] that holding it to the terms of its own treaty would violated [the U.S.'s] basic notions of morality and justice."[84]

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[81] *Compañía del Desarrollo de Santa Elena, S.A. and Republic of Costa Rica*, ICSID Case No. ARB/96/1, Final Award ¶ 71 (Feb. 17, 2000).

[82] *Crystallex Int'l Corp. v. Bolivarian Republic of Venezuela*, Memorandum Opinion, Civil Action No. 16-0661, at 27 (D.D.C. Mar. 25, 2017) (internal quotation marks omitted).

[83] *Id.* at 28.

[84] *Id.*

The D.C. District Court's interpretation of the New York Convention confirms that a mere allegation of environmental harm is typically insufficient to engage the public policy exception to confirmation and recognition of an arbitral award.

E. RECOMMENDATIONS TO COMPANIES AFFECTED BY STATE'S ACTS

While States have the right (and the obligation, as discussed further below) to take measures aimed at protecting the environment, companies affected by such measures should be aware of their rights as well. As a first step, before investing in another country, a company should identify any potentially applicable treaties that could provide some measure of protection. Knowing what treaties a host State has signed and the level of protection each treaty affords will also allow companies to structure their investment to obtain treaty protection.

Foreign investors must also be aware of their rights when facing environmental restrictions imposed by a State. These rights will depend on the applicable treaty. For example, investors will typically be protected against State action that is discriminatory—ie., action that favors local companies over foreign companies. If a State institutes environmental actions that disproportionately affect foreign investors over their local competitors, the State could be held liable for taking measures that harmed the investment. Being aware of these and other rights will help a company determine whether it has a claim against a State for overreaching when it takes environmental action that affects the company.

IV. HUMAN RIGHTS CONSIDERATIONS IN INTERNATIONAL ENERGY INVESTMENTS

Claims of human rights impacts associated with international investments have become an increasingly important consideration in the past few years. That trend is continuing in investment treaty disputes, where it is raised by States as a defense to a treaty claim. In addition, based on a recent advisory opinion by the Inter-American Court of Human Rights, a State Party to the American Convention on Human Rights has an obligation to avoid transboundary environmental damage that may impact human rights of persons outside their territory. Finally, States and third parties are seeking support before human rights commissions and international courts to rule that fossil fuel investment and use is the major cause of climate change, which in turn affects a human right to a healthy environment.

A. HUMAN RIGHTS ISSUES IN INVESTMENT TREATY DISPUTES

In investment arbitration disputes, human rights claims are being raised by States as defenses to investment claims, i.e., the State has human rights obligations that supersedes its investment treaty obligation. Most tribunals that have considered these claims have implicitly rejected them because the claims have not involved true conflicts between human rights and investment obligations.[85] The ICSID award in *Urbaser v. Argentina* is the first to provide a detailed discussion of a host state's human rights counterclaim and suggest that private actors,

[85] *See Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Award ¶ 230 (June 21, 2011) (recounting Argentina's argument regarding human rights); *Sempra Energy Int'l v. Argentine Republic*, ICSID Case No. ARB/02/16, Award ¶¶ 331-32 (Sept. 28, 2007).

such as investors, might be bound by human rights obligations, even though the tribunal ultimately concluded it was not applicable to the claimants in this case.

In *Urbaser v. Argentina*, the Spanish claimants argued that Argentina breached the Spain-Argentina investment treaty by failing to accord the claimant fair and equitable treatment, taking unjustified and discriminatory measures against the claimant, and illegally expropriating the claimant's investment.[86] The claimants had invested in a concession to provide water and sewage services to the Province of Greater Buenos Aires.[87] It argued that the development of the project was obstructed by the Province's authorities in violation of the treaty.[88] The concession was ultimately terminated after the economic crisis in Argentina when the Argentine peso depreciated to such an extent that the project became uneconomical for the investors due to the decreased value of the tariffs due to the concession-holder. But the Argentine government failed to renegotiate a tariff rate based on the new value of the Argentine peso.[89]

Argentina counterclaimed, alleging that claimants' failure to provide necessary investment in the water and sewage concession, which would have guaranteed the basic human right to water and sanitation.[90] Argentina argued that, by doing so, claimants "violated the principles of good faith and *pacta sunt servanda*" and that such failure affected "basic human rights, as well as the health and the environment of thousands of persons, most of which lived in extreme poverty."[91] Argentina rested its counterclaim on the Universal Declaration of Human Rights of 1948, which it considered part of customary international law.[92]

Notably, the tribunal recognized that private actors such as the claimants held an international law obligation not to engage in activity aimed at destroying human rights.[93] However, the tribunal rejected Argentina's counterclaim, noting that it is the State's obligation to enforce the human right to water and that obligation cannot be passed to private actors:

> While it is thus correct to state that the State's obligation is based on its obligation to enforce the human right to water of all individuals under its jurisdiction, this is not the case for the investors who pursue . . . the same goal, but on the basis of the Concession and not under an obligation derived from the human right to water. Indeed, the enforcement of the human right to water represents an obligation to perform. Such obligation is imposed upon States.[94]

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86 *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic*, ICSID Case No. ARB/07/26, Award ¶ 35 (Dec. 8, 2016).

87 *Id.* ¶ 34.

88 *Id.*

89 *Id.*

90 *Id.* ¶ 1156.

91 *Id.*

92 *Id.* ¶ 1158.

93 *Id.* ¶ 1199.

94 *Id.* ¶ 1210.

In addition, the tribunal considered that the claimants' investment in the concession did not cause them to undertake any human rights obligations deriving from international law: "[The concession-holder's] performance and its shareholders' investment were certainly designed as a substantial contribution to the enforcement of the population's right to water. Nevertheless, the mere relevance of this human right under international law does not imply that [the concession-holder] and its shareholders were holding corresponding obligations equally based on international law."[95] Thus, the tribunal rejected Argentina's human rights counterclaim.

B. ADVISORY OPINION OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS ON HUMAN RIGHTS AND THE PROTECTION OF THE ENVIRONMENT

In February of 2018, the Inter-American Court of Human Rights issued an advisory opinion in response to Colombia's request for clarification of a State's obligations for transboundary environmental impacts on the human rights of a person in another State. The Court advised that a State Party to the American Convention, upon being aware that a planned investment or project under their jurisdiction could cause a risk of significant transboundary damage, it must consult with the other States potentially impacted and consult and negotiate in good faith. Arguably, this opinion could lead to human rights claims arising from transboundary pollution of international on-shore or off-shore investments.[96]

C. USE OF HUMAN RIGHTS CLAIMS AS A WAY TO ADDRESS CLIMATE CHANGE BY LIMITING FOSSIL FUEL PRODUCTION AND USE

Philippines: In 2015, a group of Filipino citizens and NGOs, including Greenpeace, filed a petition before the Philippine Commission on Human Rights ("CHR") in which they seek to hold 50 energy companies (so-called "Carbon Majors") responsible for climate change.[97] The petitioners seek a comprehensive investigation of climate change and ocean acidification and the resulting human rights implications.[98] They also ask the Commission to decide whether the Carbon Majors have breached their responsibilities towards the Filipino people.[99] The petitioners request that the Commission recommend appropriate legislative "accountability mechanisms" to the Philippine congress and recommend that other States, especially where the Carbon Majors are incorporated, take preventive or remediative steps to prevent human rights violations from climate change.[100] Similar to tort claims recently filed in the U.S. against fossil fuel companies, the petition relies on a report by Richard Heede of the Climate Accountability

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95 *Id.* ¶ 1212.

96 Giovanny Vega-Barbosa and Lorraine Aboagye, *Human Rights and the Protection of the Environment: The Advisory Opinion of the Inter-American Court of Human Rights*, EJIL: *TALK!* (Feb. 26, 2018), https://www.ejiltalk.org/human-rights-and-the-protection-of-the-environment-the-advisory-opinion-of-the-inter-american-court-of-human-rights/.

97 *Greenpeace Southeast Asia (Philippines) et al. v. Chevron et al.*, Case No.: CHR-NI-2016-0001, Petition requesting for investigation of the responsibility of the Carbon Majors for human rights violations or threats of violations resulting from the impacts of climate change (May 9, 2016), available at http://www.greenpeace.org/seasia/ph/PageFiles/735291/Petitioners-and-Annexes/CC-HR-Petition.pdf (petition originally filed Sept. 22, 2015).

98 *Id.* at 59.

99 *Id.*

100 *Id.* at 45, 60.

Institute ("Heede Report"), which attributes responsibility to various fossil fuel companies for world-wide greenhouse gas emissions.[101]

The CHR is not an adjudicatory body. It cannot impose civil or criminal penalties. It is a fact-finding and policy recommending body centered on violations of civil and political rights. It can make recommendations to the Filipino authorities, but it cannot award damages and it has no enforcement authority.

In December 2017, the Commission agreed to investigate the petition and it has already held some hearings in the Philippines. It states that it plans to also hold hearings in the United States and England and to release its resolution in response to the petition by the first quarter of 2019.[102] This appears to be one in a wave of disputes surrounding climate change, including the Netherlands, Ireland and Germany.

The Netherlands: In a landmark 2015 case, the Hague District Court ordered the Dutch government to take measures to reduce greenhouse gas emissions in the Netherlands by at least 25 percent compared with 1990 emissions levels. The nonprofit group, Urgenda, brought the action against the Dutch State on its own behalf and on behalf of 886 individuals, who claimed that the Netherlands' policy was insufficient to meet its duty of care to reduce carbon dioxide emissions.[103] The court concluded that the Dutch State does have a duty of care to take mitigation measures to reduce greenhouse gas emissions.[104] It further found that the State's current policy to reduce emissions was insufficient and ordered the State to reduce the nation's emissions.[105] This case was the first in which a State was ordered to change its policy with respect to climate change.

Ireland: In 2017, the High Court of Ireland for the first time recognized an independent constitutional right to a healthy environment, which could have implications for Ireland's climate change goals.[106] The issue arose in the context of an application by Friends of the Irish Environment and others to prevent Fingal County from allowing the Dublin Airport Authority to build an additional runway because it would result in additional greenhouse gas emissions and hasten the pace of climate change.[107] Local residents filed suit against the county council, which was combined with a second, similar claim brought by the nonprofit, Friends of the Irish Environment, which seeks to protect the Irish environment.[108] The court ultimately did not grant

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[101] *Id.* at 4.

[102] GMA News Online, "CHR sets 2019 target for results of landmark rights-based climate change probe, Dec. 12, 2017.

[103] *Urgenda Found. v. State of the Netherlands (Ministry of Infrastructure and the Env't),* Case No. C/09/456689/ HA ZA 13-1396, Judgment, District Court of the Hague, June 24, 2015.

[104] *Id.* ¶ 4.83.

[105] *Id.* ¶¶ 4.84, 5.1.

[106] *Merriman et al. v. Fingal County Council; Friends of the Irish Env't CLG v. Fingal County Council*, Judgment 2017 Nos. 201 344 JR (Nov. 21, 2017) (Ireland).

[107] *Id.* ¶ 1.

[108] *Id.* ¶¶ 2-3.

the petitioners the relief sought, but did recognize the constitutional right to a healthy environment:

> A right to an environment that is consistent with the human dignity and well-being of citizens at large is an essential condition for the fulfilment of all human rights. It is an indispensable existential right that is enjoyed universally, yet which is vested personally as a right that presents and can be seen always to have presented, and to enjoy protection, under Art. 40.3.1˚ of the Constitution. It is not so utopian a right that it can never be enforced. Once concretised into specific duties and obligations, its enforcement is entirely practicable. Even so, every dimension of the right to an environment that is consistent with the human dignity and well-being of citizens at large does not . . . require to be apprehended and to be described in detail before that right can be recognised to exist. Concrete duties and responsibilities will fall in time to be defined and demarcated. But to start down that path of definition and demarcation, one first has to recognise that there is a personal constitutional right to an environment that is consistent with the human dignity and well-being of citizens at large and upon which those duties and responsibilities will be constructed. This court does.[109]

This decision is significant because it will allow individuals to pursue actions against the State to force it to take action that will protect the environment or to refrain from taking actions that may harm the environment. Germany: In November 2015, a Peruvian farmer began a lawsuit in Germany against a private company for its alleged role in contributing to climate change. Saúl Luciano Lliuya argued that RWE (Germany's second largest electricity producer) was at least partially responsible for causing climate change and ultimately melting mountain glaciers near Huaraz.[110] A 2013 climate study had determined that RWE bore 0.5 percent of the responsibility for all climate change since the beginning of industrialization.[111] Based on that study, Lliuya claimed damages of 0.5. percent of the cost he and Huaraz authorities had spent to establish flood protections, as well as declaratory and injunctive relief.[112] The district court dismissed the claim, but on November 30, 2017, the appeals court reversed the lower court

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[109] *Id.* ¶ 264.

[110] *Lliuya v. RWE* Summary, London School of Economics, Grantham Research Institute on Climate Change and the Environment, *available at* http://www.lse.ac.uk/GranthamInstitute/litigation/lliuya-v-rwe/.

[111] *Peruvian farmer sues German energy giant for contributing to climate change*, THE GUARDIAN (Nov. 13, 2017), *available at* https://www.theguardian.com/world/2017/nov/14/peruvian-farmer-sues-german-energy-giant-rwe-climate-change; *Lliuya v. RWE* Summary, London School of Economics, Grantham Research Institute on Climate Change and the Environment, *available at* http://www.lse.ac.uk/GranthamInstitute/litigation/lliuya-v-rwe/.

[112] *Lliuya v. RWE* Summary, London School of Economics, Grantham Research Institute on Climate Change and the Environment, *available at* http://www.lse.ac.uk/GranthamInstitute/litigation/lliuya-v-rwe/.

decision, finding for the first time that a private company could potentially be held liable for its contributions to climate change.[113]

V. CONCLUSION

The development of international environmental and human rights law will continue to be an area to watch for any company with or contemplating international energy investments.

[113] *Lliuya v. RWE* Summary, London School of Economics, Grantham Research Institute on Climate Change and the Environment, *available at* http://www.lse.ac.uk/GranthamInstitute/litigation/lliuya-v-rwe/.

Energy Industry Environmental Law Conference

May 18, 2018

Environmental and Human Rights Considerations for International Energy Companies

Carol M. Wood, Partner, King & Spalding LLP, Houston
Hal Fiske, Senior Counsel, International, ConocoPhillips Company, Houston
Alex James, Global Sustainability Manager, Halliburton Company, Houston

KING & SPALDING ConocoPhillips HALLIBURTON

International Environmental and Human Rights Disputes

Environmental Counterclaims by States – *Burlington/Perenco v. Ecuador*

- Burlington/Perenco concession was seized by Ecuador after failure to pay new 99% "extraordinary profits" taxes
- Burlington and Perenco filed separate BIT arbitrations in 2008 for expropriation and fair and equitable treatment (FET) violations
- Tribunals found Ecuador violated expropriation and FET provisions, respectively
- Ecuador brought counterclaims for environmental damages, and Burlington/Perenco agreed to ICSID jurisdiction — Tribunal site visit only held in Burlington

Burlington Resources Inc. v. Republic of Ecuador, ICSID Case No. ARB/08/5;
Perenco Ecuador Ltd. v. Republic of Ecuador and Petroecuador, ICSID Case No. ARB/08/6

Environmental Counterclaims by States - *Perenco v. Ecuador*

- Perenco tribunal issued Interim Decision (August 2015)
- Made significant legal findings, including defining environmental harm under Ecuadorian law by reference to regulatory limits (not background values)
- Made some technical findings, including appropriate means of determining the volume of soil that requires remediation
- But appointed its own expert to investigate the sites before ruling on the extent of remediation and remediation damages; expert inspection ongoing
- Urged the parties to settle; no final Award yet

Perenco Ecuador Ltd. v. Republic of Ecuador and Petroecuador

Environmental Counterclaims by States – *Burlington v. Ecuador*

- Burlington Tribunal issued Decision and final Award in 2017, awarding Ecuador only $39 million of its alleged $2.5 billion environmental damages ($33 million soil remediation, $5 million groundwater, $1 million site abandonment)
- Made significant legal findings on environmental harm (regulatory limits, not background); burden of proof (Ecuador's burden to show harm, Burlington to prove absence)
- Extensively engaged in technical issues; did not adopt either parties' technical methodology wholesale but developed its own approach to assess extent of impacted areas and volumes of contaminated soils
- Relied on site visit observations, including land use;
- Ecuador filed Annulment Application; the *ad hoc* Committee lifted the provisional stay of enforcement (August 2017)

Burlington Resources Inc. v. Republic of Ecuador

Environmental Judgment and Environmental Defense to Damages – *Chevron v. Ecuador*

- Ecuadorian court issued a $9.5 billion environmental Judgment against Chevron
- Chevron filed a BIT arbitration, claiming:
  - the Judgment breached an environmental settlement between Ecuador and Texaco, thus breaching an Investment Agreement (settlement agreement was supplementary to the concession agreement)
  - the Judgment was based on fraud, corruption and fundamental due process violations, thus breaching the BIT
  - the Judgment constituted a denial of justice under customary international law
- Ecuador raised environmental issues as a defense to damages
- Merits hearing held in May, 2015 where environmental testimony and arguments made; Tribunal site visit in June, 2015
- Award Pending

Climate Change – Greenpeace Petition before Philippine Commission on Human Rights

- NATURE OF COMMISSION
  - Fact-Finding and policy recommending body, centered on violations of civil and political rights
  - NOT an adjudicatory body – cannot impose civil or criminal penalties, but can make factual findings
- RELIEF GREENPEACE SEEKS FROM COMMISSION
  - Conduct a comprehensive investigation of climate change
  - Investigate human rights implications
  - Decide whether the "Carbon Majors" (relying on Heede report) have breached their responsibilities towards Filipino people
  - Recommend appropriate legislative "accountability mechanisms" to the Philippine congress
  - Recommend that President "call upon other States, especially where the investor-owned Carbon Majors are incorporated," to take preventive or remediative steps to prevent human rights violations from climate change.
  - Ask "Carbon Majors" to submit plans on how climate change will be remedied and prevented
- PROCEEDINGS TO DATE AND LIKELY NEXT STEPS
  - Objections to jurisdiction
  - Commission conducting public fact-finding hearings, one hearing completed, seven more planned including NYC and London
  - Expect to issue findings in 2019

Advice on Environmental and Human Rights Issues in International Investments

SOME LIKE IT HOT: CURRENT ETHICAL ISSUES FOR ENVIRONMENTAL LAWYERS

Daniella D. Landers, *Reed Smith LLP*

Debra Tsuchiyama Baker, *Baker • Wotring LLP*

Mary Clair Lyons, *Kinder Morgan, Inc.*

ReedSmith

Driving progress
through partnership

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Daniella focuses her practice on a broad range of environmental compliance, transactional and litigation matters. She counsels energy companies, manufacturers, industrial facilities, financial institutions, real estate interests and other businesses on complex environmental and related land use issues, including environmental risk assessment, crisis management and incident response, environmental permitting and compliance, environmental due diligence in acquisitions and transactions, management of environmental issues affecting the upstream, midstream, downstream, and renewables/alternative energy sectors, natural resources damages claims, climate change initiatives, and pollution exposure disputes.

Daniella frequently counsels clients on corrective actions, brownfields redevelopment, environmental closures and groundwater remediation as well as assists in the review and audit of operations to address air, water and waste compliance issues for manufacturing, industrial or waste disposal facilities. She has been seconded by clients as in-house counsel on several occasions to handle environmental issues.

Daniella helps clients navigate environmental crises and develop legal response strategies tailored to each specific situation. She handles governmental investigations of environmental matters, environmental enforcement defense, responses to citizen protest actions, cost recovery claims and Superfund litigation.

Additionally, she is a prolific speaker and writer on environmental, energy and litigation issues. She has been featured in Law360 articles and on National Public Radio (KUHF). She serves as an adjunct professor at the University of Houston Law Center.

Education

University of Texas School of Law

University of Southern California, M.P.A.

Purdue University, B.A., with distinction

Court Admissions

U.S. Supreme Court

U.S. Court of Appeals - Fifth Circuit

U.S. District Court - Eastern District of Texas

U.S. District Court - Southern District of Texas

U.S. District Court - Western District of Texas

U.S. District Court - Eastern District of Michigan

Professional Admissions

Texas

Michigan

Honors and Awards

- National Diversity Council, Houston Top 15 Business Women Award, 2017
- Greater Houston Women's Chamber of Commerce, Women in the Fast Lane Role Model, 2016
- State Bar of Texas, African-American Law Section, Outstanding Achievement Award, 2016
- Top Environmental and Land Use Attorney *Houstonia Magazine*, November/December 2016
- *Legal 500*, 2011–2015
- *Super Lawyers Rising Stars*, 2005, 2007–2009
- Center for Houston's Future, Graduate, 2009
- Leadership Houston, Graduate, 2005

Recent Speaking Engagements

- 10 October 2017 Strafford Webinar Series
  "Managing Environmental Risks in Mergers, Acquisitions, Spin-Offs and Reorganizations"
- 5 April 2017 Managing Global Corporate Environmental Risk: The International Trend Toward Expanded Environmental Liability

- 5 April 2017 Pipeline and Energy Expo, Tulsa, Oklahoma
  "Legal Implications of Pipeline Mishaps"
- 24 February 2017 South Texas Law Review's 23rd Annual Law Review Symposium, Houston, Texas
  "Ethics in Environmental & Energy Law"
- 16-17 February 2017 Institute for Energy Law's 68th Annual Oil and Gas Law Conference, Houston, Texas
  "Losing Ground in Louisiana: Coastal Erosion Litigation and the Impact on the Energy Industry"
- 18 July 2016 NBA Energy Forum, St. Louis, Missouri
  "Energy Regulatory and Policy Update"
- 3-4 February 2016 46th Annual Advanced Course Environmental Law 2016, Washington, D.C.
  "Key Environmental Issues in the Production of Energy"
- 18 January 2016 Strafford Webinar Series
  "Managing Environmental Risks in Mergers Acquisitions, Spin-Offs and Reorganizations"
- 30 September 2015 Energy Bar Association Primer: Environmental Law, Atlanta, Georgia
  "Practical Considerations in the Intersection of Environmental Laws and Energy"
- 22 July 2015 National Bar Association Annual Convention, Los Angeles, California
  "Oil & Gas Law: Opportunities in a Distressed Market"

Professional and Community Affiliations

- Houston Volunteer Lawyers, Board of Directors
- State Bar of Texas, Legal Services to the Poor
- Houston Bar Association, Board of Directors
- Texas Association of Environmental Professionals
- Greater Houston Partnership, Environmental and Energy Policy Advisory Committee
- American Bar Association, Section of the Environment, Energy, and Resources
- National Bar Association, Energy, Environmental and Public Utilities Section
- Women in Energy Network, Houston Chapter, Executive Member
- Harris County Dispute Resolution Center, Volunteer Mediator
- Center for Women in Law, Leaders Circle
- Law360's Environmental Editorial Advisory Board
- Pipeline + Energy Expo Advisory Board Member

BAKER · WOTRING LLP

Debra Tsuchiyama Baker is a founding and managing partner of Baker • Wotring LLP, a nationally-recognized environmental litigation and regulatory law firm providing innovative and results-oriented representation to some of the world's largest domestic and international clients in significant and complex environmental matters across the country for more than 17 years. Ms. Baker has practiced environmental law for more than 33 years and obtained her law degree from the Georgetown University Law Center, where she received the Magoichi Kato Scholarship Award for Academic Excellence for Japanese American students. She obtained a Bachelor of Science degree, Summa Cum Laude, from the University of Maryland. Baker • Wotring LLP is based in Houston, Texas and is a nationally-certified women and minority-owned firm, holding certifications from NAMWOLF (National Association of Minority and Women Owned Law Firms), WBENC (Women's Business Enterprise National Council), NMSDC (National Minority Supplier Development Council), MBE (Minority Business Enterprise) from the City of Houston, and is a certified State of Texas HUB (Historically Underutilized Business).

Ms. Baker has been retained in connection with some of the largest environmental matters in the country, including international representation in emergency response and litigation arising out of the Deepwater Horizon Gulf Oil Spill, representation in complex litigation arising out of contamination of waterways resulting in a $100 million recovery for her client, handling legal issues for one of the largest brownfield redevelopment sites in the nation and recently representing one of the largest data companies in the world as part of the negotiating team handling Texas environmental issues and components of a $3 billion divestiture. The Firm's combination of environmental regulatory and litigation capabilities has been nationally recognized by the U.S. News & World Report and Chambers USA has identified Ms. Baker as one of the most capable environmental lawyers in the country. The Firm has also been included in the American Lawyer's list of "Go-To Top 500 Firms" named by top Fortune 500 General Counsel.

Ms. Baker's environmental practice encompasses the full spectrum of regulatory and litigation issues, with an emphasis on the handling of difficult and complex multi-party environmental cases, Superfund, regulatory counseling and representation in enforcement, permitting, catastrophic release response, compliance and environmental support in corporate/real estate due diligence, mergers, acquisitions and divestitures. As part of her environmental transactional practice, she has structured environmental risk programs to facilitate divestitures of thousands of impacted gas station and convenience store sites, hundreds of dry cleaning plants, sales and risk allocation in connection with numerous historical industrial facilities and has assisted in the decommissioning of oil and gas producing properties and impacted radioactive properties associated with natural resources production, along with other energy-related matters for major oil companies, independents, pipelines and other users of oil and gas industry pipe and tubulars. Ms. Baker has served as an Adjunct Professor of Environmental Law at the University of Houston Law Center and her firm provided initial funding to create that law school's Environment, Energy & Natural Resources (EENR) Center which links energy issues with impacts on environment and natural resources and provides a forum for education and discussion of the most important issues of the day, such as climate change, air pollution, clean coal and renewable energy. In addition to being a founding partner of the EENR Center, Ms. Baker also served as an Adjunct Professor of Environmental Law at South Texas College of Law, and was co-founder and past Chair of the Houston Bar Association's Environmental Law Section. She is a prolific speaker on topics of environmental law and ethics, has authored several books and published more than 50 articles on environmental law and has testified in a variety of cases as an expert witness on environmental law in the United States and Canada.

She is also active in bar, law school, community and civic activities, having been appointed by Mayor Sylvester Turner as Co-Chair of his 2016 Transition Team, where she selected and supervised 13 mayoral transition committees to develop policy recommendations for the Mayor on economic development, comprehensive financial reform, infrastructure, public safety, traffic and transportation, among other topics. Ms. Baker also actively promotes issues concerning the environment, minority advancement and gender equality issues, among others. Ms. Baker was featured on the cover of Diversity & The Bar magazine, a publication of the Minority Corporate Counsel Association, in connection with her work in the area of diversity. She is the recipient of the Ma'at Justice Award, awarded annually by the State Bar of Texas Women and the Law Section to an individual who has actively addressed the needs and issues of women in the legal profession and the community. Ms. Baker was also awarded the Texas Bar Foundation's Dan Rugeley Price Award presented to an outstanding practitioner dedicated to the bar and public. Most recently, Ms. Baker was selected by the Association of Women Attorneys to receive the 2018 Premier Women in Law Award for her work in the area of diversity and charitable fund-raising for law-related charities. Along with a team of dedicated volunteers, Debra's 25 years of work and unique fund-raising efforts in writing and serving as a producer of Houston's annual all-lawyer charitable Night Court show (Lawyers Entertaining for Charity) have culminated in that project reaching its record-setting goal of raising more than one million dollars for law-related charities devoted to seeking justice for women and children, Ms. Baker was a former Chair of the Houston Bar Foundation, the HBA's 501(c)(3) charitable foundation, and other appointments have included serving on the Board of Directors of the Asian American Bar Association, as Vice Chair of the State Bar of Texas Standing Committee on Women in the Profession, and Co-Chair of the Houston Bar Association's Gender Fairness Committee, among others. Prior to forming the Baker • Wotring LLP firm, Ms. Baker headed the Environmental Law Practice group for the 120-lawyer firm of Mayor, Day, Caldwell & Keeton, L.L.P. for over a decade and also practiced environmental law in the D.C. and Houston offices of Fulbright & Jaworski, L.L.P. She is admitted to practice in both the District of Columbia and Texas. Her full resume and list of publications, speeches, selected examples of environmental highlights, expert witness experience, and gender diversity initiatives can be viewed at www.bakerwotring.com.

Robert W. Johnson
Exxon Mobil Corporation
Spring, Texas

Rob Johnson is Assistant General Counsel – Legal Services for Exxon Mobil Corporation, located in Houston, Texas. His areas of responsibility include leadership and management of the teams providing legal support on Environmental & Safety, Global Procurement, Real Estate, and Information Technology issues to ExxonMobil's businesses in the United States, and to ExxonMobil affiliates operating around the world. In addition, he is a member of the ExxonMobil Law Department Management Committee. He is the Law Management Committee Contact for ExxonMobil's award-winning Pro Bono Committee.

Rob served as ExxonMobil's Chief Attorney for Environmental & Safety from 2008 to 2012. From the time of the merger of Exxon and Mobil until 2008, he was Assistant Chief Attorney for ExxonMobil Production Company, where he was responsible for legal advice to ExxonMobil production operations and affiliates operating in the United States, West Africa, and Asia-Pacific. Prior to the merger of Exxon and Mobil, Rob was General Counsel of Mobil Exploration and Producing, U.S., Mobil's domestic upstream affiliate. Prior to joining Mobil, he was an associate in the Washington, D.C. office of Hunton & Williams.

Rob is active in pro bono and community work, including the Boy Scouts of America, the Alumni Advisory Board and School of Public Affairs Dean's Council of American University in Washington, D.C. He is currently Chairman of the Board of Directors of Interfaith of The Woodlands and the Interfaith Community Clinic. He is also a member of the Board of the Houston Volunteer Lawyers. Rob was named a 2017 Hometown Hero by Interfaith of The Woodlands for his service to the community.

Rob earned a Bachelor of Science in political science and economics from the American University and his law degree from the Georgetown University School of Law. He and his wife Christine reside in The Woodlands, Texas. They have two sons.

Mary Clair Lyons
Kinder Morgan, Inc.
Houston, Texas

Mary Clair Lyons has been an Assistant General Counsel with Kinder Morgan, Inc. specializing in environmental, health and safety law for the past five years. Kinder Morgan is one of the largest energy infrastructure companies in North America with approximately 85,000 miles of pipelines and 152 terminals. Prior to Kinder Morgan, she worked in the HSE field, primarily in the refining sector, for over 20 years as both a lawyer and a technical specialist. She holds a B.S. in Geology from Rensselaer Polytechnic Institute and a J.D. from Lewis and Clark, Northwestern School of Law.

SOME LIKE IT HOT:

Current Ethical Issues for Environmental Lawyers

IEL Energy Industry Environmental Law Conference

Houston, Texas

May 18, 2018

Speakers:

Daniella D. Landers, Reed Smith LLP (Moderator)

Debra Tsuchiyama Baker, Baker • Wotring LLP

Robert W. Johnson, Assistant General Counsel – Legal Services, Exxon Mobil Corporation

Mary Clair Lyons, Assistant General Counsel- Environmental, Kinder Morgan, Inc.

RULES AND SUPPORTING DOCUMENTS

Texas Disciplinary Rules of Professional Conduct

TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT

Rule 1.01 Competent and Diligent Representation

(a) A lawyer shall not accept or continue employment in a legal matter which the lawyer knows or should know is beyond the lawyer's competence, unless:

(1) another lawyer who is competent to handle the matter is, with the prior informed consent of the client, associated in the matter; or

(2) the advice or assistance of the lawyer is reasonably required in an emergency and the lawyer limits the advice and assistance to that which is reasonably necessary in the circumstances.

(b) In representing a client, a lawyer shall not:

(1) neglect a legal matter entrusted to the lawyer; or

(2) frequently fail to carry out completely the obligations that the lawyer owes to a client or clients.

(c) As used in this Rule neglect signifies inattentiveness involving a conscious disregard for the responsibilities owed to a client or clients.

Comment:

Accepting Employment

1. A lawyer generally should not accept or continue employment in any area of the law in which the lawyer is not and will not be prepared to render competent legal services. Competence is defined in Terminology as possession of the legal knowledge, skill, and training reasonably necessary for the representation. Competent representation contemplates appropriate application by the lawyer of that legal knowledge, skill and training, reasonable thoroughness in the study and analysis of the law and facts, and reasonable attentiveness to the responsibilities owed to the client.

2. In determining whether a matter is beyond a lawyer's competence, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience in the field in question, the preparation and study the lawyer will be able to give the matter, and whether it is feasible either to refer the matter to or associate a lawyer of established competence in the field in question. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more elaborate treatment than matters of lesser consequences.

3. A lawyer may not need to have special training or prior experience to accept employment to handle legal problems of a type with which the lawyer is unfamiliar. Although expertise in a particular field of law may be useful in some circumstances, the appropriate proficiency in many

instances is that of a general practitioner. A newly admitted lawyer can be as competent in some matters as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge.

4. A lawyer possessing the normal skill and training reasonably necessary for the representation of a client in an area of law is not subject to discipline for accepting employment in a matter in which, in order to represent the client properly, the lawyer must become more competent in regard to relevant legal knowledge by additional study and investigation. If the additional study and preparation will result in unusual delay or expense to the client, the lawyer should not accept employment except with the informed consent of the client.

5. A lawyer offered employment or employed in a matter beyond the lawyer's competence generally must decline or withdraw from the employment or, with the prior informed consent of the client, associate a lawyer who is competent in the matter. Paragraph (a)(2) permits a lawyer, however, to give advice or assistance in an emergency in a matter even though the lawyer does not have the skill ordinarily required if referral to or consultation with another lawyer would be impractical and if the assistance is limited to that which is reasonably necessary in the circumstances.

Competent and Diligent Representation

6. Having accepted employment, a lawyer should act with competence, commitment and dedication to the interest of the client and with zeal in advocacy upon the client's behalf. A lawyer should feel a moral or professional obligation to pursue a matter on behalf of a client with reasonable diligence and promptness despite opposition, obstruction or personal inconvenience to the lawyer. A lawyer's workload should be controlled so that each matter can be handled with diligence and competence. As provided in paragraph (a), an incompetent lawyer is subject to discipline.

Neglect

7. Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Under paragraph (b), a lawyer is subject to professional discipline for neglecting a particular legal matter as well as for frequent failures to carry out fully the obligations owed to one or more clients. A lawyer who acts in good faith is not subject to discipline, under those provisions for an isolated inadvertent or unskilled act or omission, tactical error, or error of judgment. Because delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness, there is a duty to communicate reasonably with clients; see Rule 1.03.

Maintaining Competence

8. Because of the vital role of lawyers in the legal process, each lawyer should strive to become and remain proficient and competent in the practice of law. To maintain the requisite knowledge

and skill of a competent practitioner, a lawyer should engage in continuing study and education. If a system of peer review has been established, the lawyer should consider making use of it in appropriate circumstances. Isolated instances of faulty conduct or decision should be identified for purposes of additional study or instruction.

Rule 1.03 Communication

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Comment:

1. The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. For example, a lawyer negotiating on behalf of a client should provide the client with facts relevant to the matter, inform the client of communications from another party and take other reasonable steps to permit the client to make a decision regarding a serious offer from another party. A lawyer who receives from opposing counsel either an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case should promptly inform the client of its substance unless prior discussions with the client have left it clear that the proposal will be unacceptable. See Comment 2 to Rule 1.02.

2. Adequacy of communication depends in part on the kind of advice or assistance involved. For example, in negotiations where there is time to explain a proposal the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that might injure or coerce others. On the other hand, a lawyer ordinarily cannot be expected to describe trial or negotiation strategy in detail. Moreover, in certain situations practical exigency may require a lawyer to act for a client without prior consultation. The guiding principle is that the lawyer should reasonably fulfill client expectations for information consistent with the duty to act in the client's best interests, and the clients overall requirements as to the character of representation.

3. Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impractical, as for example, where the client is a child or suffers from mental disability; see paragraph 5. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization. See Rule 1.13.

Where many routine matters are involved, a system of limited or occasional reporting may bearranged with the client.

Withholding Information

4. In some circumstances, a lawyer may be justified in delaying transmission of information when the lawyer reasonably believes the client would be likely to react imprudently to an immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. Similarly, rules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client. Rule 3.04(d) sets forth the lawyer's obligations with respect to such rules or orders. A lawyer may not, however, withhold information to serve the lawyer's own interest or convenience.

Client Under a Disability

5. In addition to communicating with any legal representative, a lawyer should seek to maintain reasonable communication with a client under a disability, insofar as possible. When a lawyer reasonably believes a client suffers a mental disability or is not legally competent, it may not be possible to maintain the usual attorney-client relationship. Nevertheless, the client may have the ability to understand, deliberate upon, and reach conclusions about some matters affecting the client's own wellbeing. Furthermore, to an increasing extent the law recognizes intermediate degrees of competence. For example, childrens' opinions regarding their own custody are given some weight. The fact that a client suffers a disability does not diminish the desirability of treating the client with attention and respect. See also Rule 1.02(e) and Rule 1.05, Comment 17.

Rule 1.05 Confidentiality of Information

(a) Confidential information includes both privileged information and unprivileged client information. Privileged information refers to the information of a client protected by the lawyer-client privilege of Rule 5.03 of the Texas Rules of Evidence or of Rule 5.03 of the Texas Rules of Criminal Evidence or by the principles of attorney-client privilege governed by Rule 5.01 of the Federal Rules of Evidence for United States Courts and Magistrates. Unprivileged client information means all information relating to a client or furnished by the client, other than privileged information, acquired by the lawyer during the course of or by reason of the representation of the client.

(b) Except as permitted by paragraphs (c) and (d), or as required by paragraphs (e), and (f), a lawyer shall not knowingly:

1) Reveal confidential information of a client or a former client to:

   (i) a person that the client has instructed is not to receive the information; or (i) a person that the client has instructed is not to receive the information; or

   (ii) anyone else, other than the client, the client's representatives, or the members, associates, or employees of the lawyer's law firm.

2) Use confidential information of a client to the disadvantage of the client unless the client consents after consultations.

3) Use confidential information of a former client to the disadvantage of the former client after the representation is concluded unless the former client consents after consultation or the confidential information has become generally known.

4) Use privileged information of a client for the advantage of the lawyer or of a third

5) person, unless the client consents after consultation.

(c) A lawyer may reveal confidential information:

1) When the lawyer has been expressly authorized to do so in order to carry out the representation.

2) When the client consents after consultation.

3) To the client, the client's representatives, or the members, associates, and employees of the lawyers firm, except when otherwise instructed by the client.

4) When the lawyer has reason to believe it is necessary to do so in order to comply with a court order, a Texas Disciplinary Rule of Professional Conduct, or other law.

5) To the extent reasonably necessary to enforce a claim or establish a defense on behalf of the lawyer in a controversy between the lawyer and the client.

6) To establish a defense to a criminal charge, civil claim or disciplinary complaint against the lawyer or the lawyer's associates based upon conduct involving the client or the representation of the client.

7) When the lawyer has reason to believe it is necessary to do so in order to prevent the client from committing a criminal or fraudulent act.

8) To the extent revelation reasonably appears necessary to rectify the consequences of client's criminal or fraudulent act in the commission of which the lawyer's services had been used.

(d) A lawyer also may reveal unprivileged client information.

1) When impliedly authorized to do so in order to carry out the representation.

2) When the lawyer has reason to believe it is necessary to do so in order to:

(i) carry out the representation effectively;

(ii) defend the lawyer or the lawyer's employees or associates against a claim of wrongful conduct;

(iii) respond to allegations in any proceeding concerning the lawyers representation of the client; or

(iv) prove the services rendered to a client, or the reasonable value thereof, or both, in an action against another person or organization responsible for the payment of the fee for services rendered to the client.

(e) When a lawyer has confidential information clearly establishing that a client is likely to commit a criminal or fraudulent act that is likely to result in death or substantial bodily harm to a person, the lawyer shall reveal confidential information to the extent revelation reasonably appears necessary to prevent the client from committing the criminal or fraudulent act. (f) A lawyer shall reveal confidential information when required to do so by Rule 3.03(a)(2), 3.03(b), or by Rule 4.01(b).

Comment:

Confidentiality Generally

1. Both the fiduciary relationship existing between lawyer and client and the proper functioning of the legal system require the preservation by the lawyer of confidential information of one who has employed or sought to employ the lawyer. Free discussion should prevail between lawyer and client in order for the lawyer to be fully informed and for the client to obtain the 24 full benefit of the legal system. The ethical obligation of the lawyer to protect the confidential information of the client not only facilitates the proper representation of the client but also encourages potential clients to seek early legal assistance.

2. Subject to the mandatory disclosure requirements of paragraphs (e) and (f) the lawyer generally should be required to maintain confidentiality of information acquired by the lawyer during the course of or by reason of the representation of the client. This principle involves an ethical obligation not to use the information to the detriment of the client or for the benefit of the lawyer or a third person. In regard to an evaluation of a matter affecting a client for use by a third person, see Rule 2.02.

3. The principle of confidentiality is given effect not only in the Texas Disciplinary Rules of Professional Conduct but also in the law of evidence regarding the attorney-client privilege and in the law of agency. The attorney-client privilege, developed through many decades, provides the client a right to prevent certain confidential communications from being revealed by compulsion of law. Several sound exceptions to confidentiality have been developed in the evidence law of privilege. Exceptions exist in evidence law where the services of the lawyer were sought or used by a client in planning or committing a crime or fraud as well as where issues have arisen as to breach of duty by the lawyer or by the client to the other.

4. Rule 1.05 reinforces the principles of evidence law relating to the attorney-client privilege. Rule 1.05 also furnishes considerable protection to other information falling outside the scope of the privilege Rule 1.05 extends ethical protection generally to unprivileged information relating to the client or furnished by the client during the course of or by reason of the representation of the client. In this respect Rule 1.05 accords with general fiduciary principles of agency.

5. The requirement of confidentiality applies to government lawyers who may disagree with the policy goals that their representation is designed to advance.

Disclosure for Benefit of Client

6. A lawyer may be expressly authorized to make disclosures to carry out the representation and generally is recognized as having implied-in-fact authority to make disclosures about a client when appropriate in carrying out the representation to the extent that the client's instructions do not limit that authority. In litigation, for example, a lawyer may disclose information by admitting a fact that cannot properly be disputed, or in negotiation by making a disclosure that facilitates a satisfactory conclusion. The effect of Rule 1.05 is to require the lawyer to invoke, for the client, the attorney-client privilege when applicable; but if the court improperly denies the privilege, under paragraph (c)(4) the lawyer may testify as ordered by the court or may test the ruling as permitted by Rule 3.04(d).

7. In the course of a firms practice, lawyers may disclose to each other and to appropriate employee's information relating to a client, unless the client has instructed that particular information be confined to specified lawyers. Sub-paragraphs (b)(l) and (c)(3) continue these practices concerning disclosure of confidential information within the firm.

Use of Information

8. Following sound principles of agency law, sub-paragraphs (b)(2) and (4) subject a lawyer to discipline for using information relating to the representation in a manner disadvantageous to the client or beneficial to the lawyer or a third person, absent the informed consent of the client. The duty not to misuse client information continues after the client-lawyer relationship has terminated. Therefore, the lawyer is forbidden by sub-paragraph (b)(3) to use, in absence of the client's informed consent, confidential information of the former client to the client's disadvantage, unless the information is generally known.

Discretionary Disclosure Adverse to Client

9. In becoming privy to information about a client, a lawyer may foresee that the client intends serious and perhaps irreparable harm. To the extent a lawyer is prohibited from making disclosure, the interests of the potential victim are sacrificed in favor of preserving the client's information-usually unprivileged information-even though the client's purpose is wrongful. On the other hand, a client who knows or believes that a lawyer is required or permitted to disclose a client's wrongful purposes may be inhibited from revealing facts which would enable the lawyer to counsel effectively against wrongful action. Rule 1.05 thus involves balancing the interests of one group of potential victims against those of another. The criteria provided by the Rule are discussed below. 10. Rule 5.03 (d)(l) Texas Rules of Civil Evidence (Tex. R. Civ. Evid.), and Rule 5.03(d)(1), Texas Rules of Criminal Evidence (Tex R. Crim. Evid.), indicate the underlying public policy of furnishing no protection to client information where the client seeks or uses the services of the lawyer to aid in the commission of a crime or fraud. That public policy governs the dictates of Rule 1.05. Where the client is planning or engaging in criminal or fraudulent conduct or where the culpability of the lawyers conduct is involved, full protection of client information is not justified.

11. Several other situations must be distinguished. First, the lawyer may not counsel or assist a client in conduct that is criminal or fraudulent. See Rule 1.02(c). As noted in the Comment to

that Rule there can be situations where the lawyer may have to reveal information relating to the representation in order to avoid assisting a client's criminal or fraudulent conduct, and subparagraph (c)(4) permits doing so. A lawyer's duty under Rule 3.03(a) not to use false or fabricated evidence is a special instance of the duty prescribed in Rule 1.02(c) to avoid assisting a client in criminal or fraudulent conduct, and sub-paragraph (c)(4) permits revealing information necessary to comply with Rule 3.03(a) or (b). The same is true of compliance with Rule 4.01. See also paragraph (f).

12. Second, the lawyer may have been innocently involved in past conduct by the client that was criminal or fraudulent. In such a situation the lawyer has not violated Rule 1.02(c), because to counsel or assist criminal or fraudulent conduct requires knowing that the conduct is of that character. Since the lawyer's services were made an instrument of the client's crime or fraud, the lawyer has a legitimate interest both in rectifying the consequences of such conduct and in avoiding charges that the lawyer's participation was culpable. Sub-paragraph (c)(6) and (8) give the lawyer professional discretion to reveal both unprivileged and privileged information in order to serve those interests. See paragraph (g). In view of Tex. R. Civ. Evid. Rule 5.03(d)(1), and Tex. R. Crim. Evid. 5.03(d)(1), however, rarely will such information be privileged.

13. Third, the lawyer may learn that a client intends prospective conduct that is criminal or fraudulent. The lawyer's knowledge of the client's purpose may enable the lawyer to prevent commission of the prospective crime or fraud. When the threatened injury is grave, the lawyer's interest in preventing the harm may be more compelling than the interest in preserving confidentiality of information. As stated in sub-paragraph (c)(7), the lawyer has professional discretion, based on reasonable appearances, to reveal both privileged and unprivileged information in order to prevent the client's commission of any criminal or fraudulent act. In some situations of this sort, disclosure is mandatory. See paragraph (e) and Comments 18-20.

14. The lawyers exercise of discretion under paragraphs (c) and (d) involves consideration of such factors as the magnitude, proximity, and likelihood of the contemplated wrong, the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction, and factors that may extenuate the client's conduct in question. In any case a disclosure adverse to the client's interest should be no greater than the lawyer believes necessary to the purpose. Although preventive action is permitted by paragraphs (c) and (d), failure to take preventive action does not violate those paragraphs. But see paragraphs (e) and (f). Because these rules do not define standards of civil liability of lawyers for professional conduct, paragraphs (c) and (d) do not create a duty on the lawyer to make any disclosure and no civil liability is intended to arise from the failure to make such disclosure.

15. A lawyer entitled to a fee necessarily must be permitted to prove the services rendered in an action to collect it, and this necessity is recognized by sub-paragraphs (c)(5) and (d)(2)(iv). This aspect of the rule, in regard to privileged information, expresses the principle that the beneficiary of a fiduciary relationship may not exploit the relationship to the detriment of the fiduciary. Any disclosure by the lawyer, however, should be as protective of the client's interests as possible.

16. If the client is an organization, a lawyer also should refer to Rule 1.12 in order to determine the appropriate conduct in connection with this Rule.

Client Under a Disability

17. In some situations, Rule 1.02(g) requires a lawyer representing a client under a disability to seek the appointment of a legal representative for the client or to seek other orders for the 27 protection of the client. The client may or may not, in a particular matter, effectively consent to the lawyer's revealing to the court confidential information and facts reasonably necessary to secure the desired appointment or order. Nevertheless, the lawyer is authorized by paragraph (c)(4) to reveal such information in order to comply with Rule 1.02(g). See also paragraph 5, Comment to Rule 1.03.

Mandatory Disclosure Adverse to Client

18. Rule 1.05(e) and (f) place upon a lawyer professional obligations in certain situations to make disclosure in order to prevent certain serious crimes by a client or to prevent involvement by the lawyer in a client's crimes or frauds. Except when death or serious bodily harm is likely to result, a lawyer's obligation is to dissuade the client from committing the crime or fraud or to persuade the client to take corrective action; see Rule 1.02 (d) and (e).

19. Because it is very difficult for a lawyer to know when a client's criminal or fraudulent purpose actually will be carried out, the lawyer is required by paragraph (e) to act only if the lawyer has information clearly establishing the likelihood of such acts and consequences. If the information shows clearly that the client's contemplated crime or fraud is likely to result in death or serious injury, the lawyer must seek to avoid those lamentable results by revealing information necessary to prevent the criminal or fraudulent act. When the threatened crime or fraud is likely to have the less serious result of substantial injury to the financial interests or property of another, the lawyer is not required to reveal preventive information but may do so in conformity to paragraph (c) (7). See also paragraph (f); Rule 1.02 (d) and (e); and Rule 3.03 (b) and (c).

20. Although a violation of paragraph (e) will subject a lawyer to disciplinary action, the lawyer's decisions whether or how to act should not constitute grounds for discipline unless the lawyer's conduct in the light of those decisions was unreasonable under all existing circumstances as they reasonably appeared to the lawyer. This construction necessarily follows from the fact that paragraph (e) bases the lawyer's affirmative duty to act on how the situation reasonably appears to the lawyer, while that imposed by paragraph (f) arises only when a lawyer "knows" that the lawyers services have been misused by the client. See also Rule 3.03(b).

Withdrawal

21. If the lawyer's services will be used by the client in materially furthering a course of criminal or fraudulent conduct, the lawyer must withdraw, as stated in Rule 1.15(a)(1). After withdrawal, a lawyer's conduct continues to be governed by Rule 1.05. However, the lawyer's duties of disclosure under paragraph (e) of the Rule, insofar as such duties are mandatory, do not survive the end of the relationship even though disclosure remains permissible under paragraphs (6), (7), and (8) if the further requirements of such paragraph are met. Neither this Rule nor Rule 1.15 prevents the lawyer from giving notice of the fact of withdrawal, and no rule forbids the lawyer to withdraw or disaffirm any opinion, document, affirmation, or the like. 28

Other Rules

22. Various other Texas Disciplinary Rules of Professional Conduct permit or require a lawyer to disclose information relating to the representation. See Rules 1.07, 1.12, 2.02, 3.03 and 4.01. In addition to these provisions, a lawyer may be obligated by other provisions of statutes or other law to give information about a client. Whether another provision of law supersedes Rule 1.05 is a matter of interpretation beyond the scope of these Rules, but sub-paragraph (c)(4) protects the lawyer from discipline who acts on reasonable belief as to the effect of such laws.

Rule 1.06 Conflict of Interest: General Rule

(a) A lawyer shall not represent opposing parties to the same litigation.

(b) In other situations and except to the extent permitted by paragraph (c), a lawyer shall not represent a person if the representation of that person:

(1) involves a substantially related matter in which that person's interests are materially and directly adverse to the interests of another client of the lawyer or the lawyers firm; or

(2) reasonably appears to be or become adversely limited by the lawyers or law firm's responsibilities to another client or to a third person or by the lawyers or law firm's own interests.

(c) A lawyer may represent a client in the circumstances described in (b) if:

(1) the lawyer reasonably believes the representation of each client will not be materially affected; and

(2) each affected or potentially affected client consents to such representation after full disclosure of the existence, nature, implications, and possible adverse consequences of the common representation and the advantages involved, if any.

(d) A lawyer who has represented multiple parties in a matter shall not thereafter represent any of such parties in a dispute among the parties arising out of the matter, unless prior consent is obtained from all such parties to the dispute.

(e) If a lawyer has accepted representation in violation of this Rule, or if multiple representation properly accepted becomes improper under this Rule, the lawyer shall promptly withdraw from one or more representations to the extent necessary for any remaining representation not to be in violation of these Rules.

(f) If a lawyer would be prohibited by this Rule from engaging in particular conduct, no other lawyer while a member or associated with that lawyer's firm may engage in that conduct.

Comment:

Loyalty to a Client

1. Loyalty is an essential element in the lawyer's relationship to a client. An impermissible conflict of interest may exist before representation is undertaken, in which event the representation should be declined. If such a conflict arises after representation has been undertaken, the lawyer must take effective action to eliminate the conflict, including withdrawal if necessary to rectify the situation. See also Rule 1.16. When more than one client is involved and the lawyer withdraws because a conflict arises after representation, whether the lawyer may continue to represent any of the clients is determined by this Rule and Rules 1.05 and 1.09. See also Rule 1.07(c). Under this Rule, any conflict that prevents a particular lawyer from undertaking or continuing a representation of a client also prevents any other lawyer who is or becomes a member of or an associate with that lawyer's firm from doing so. See paragraph (f).

2. A fundamental principle recognized by paragraph (a) is that a lawyer may not represent opposing parties in litigation. The term opposing parties as used in this Rule contemplates a situation where a judgment favorable to one of the parties will directly impact unfavorably upon the other party. Moreover, as a general proposition loyalty to a client prohibits undertaking representation directly adverse to the representation of that client in a substantially related matter unless that client's fully informed consent is obtained and unless the lawyer reasonably believes that the lawyer's representation will be reasonably protective of that client's interests. Paragraphs (b) and (c) express that general concept.

Conflict in Litigation

3. Paragraph (a) prohibits representation of opposing parties in litigation. Simultaneous representation of parties whose interests in litigation are not actually directly adverse but where the potential for conflict exists, such as co-plaintiffs or co-defendants, is governed by paragraph (b). An impermissible conflict may exist or develop by reason of substantial discrepancy in the party's testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal cases as well as civil. The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one co-defendant. On the other hand, common representation of persons having similar interests is proper if the risk of adverse effect is minimal and the requirements of paragraph (b) are met. Compare Rule 1.07 involving intermediation between clients.

Conflict with Lawyers Own Interests

4. Loyalty to a client is impaired not only by the representation of opposing parties in situations within paragraphs (a) and (b)(l) but also in any situation when a lawyer may not be able to consider, recommend or carry out an appropriate course of action for one client because of the 30 lawyer's own interests or responsibilities to others. The conflict in effect forecloses alternatives that would otherwise be available to the client. Paragraph (b)(2) addresses such situations. A potential possible conflict does not itself necessarily preclude the representation. The critical

questions are the likelihood that a conflict exists or will eventuate and, if it does, whether it will materially and adversely affect the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client. It is for the client to decide whether the client wishes to accommodate the other interest involved. However, the client's consent to the representation by the lawyer of another whose interests are directly adverse is insufficient unless the lawyer also believes that there will be no materially adverse effect upon the interests of either client. See paragraph (c).

5. The lawyer's own interests should not be permitted to have adverse effect on representation of a client, even where paragraph (b)(2) is not violated. For example, a lawyer's need for income should not lead the lawyer to undertake matters that cannot be handled competently and at reasonable fee. See Rules 1.01 and 1.04. If the probity of a lawyer's own conduct in a transaction is in question, it may be difficult for the lawyer to give a client detached advice. A lawyer should not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed interest.

Meaning of Directly Adverse

6. Within the meaning of Rule 1.06(b), the representation of one client is directly adverse to the representation of another client if the lawyer's independent judgment on behalf of a client or the lawyer's ability or willingness to consider, recommend or carry out a course of action will be or is reasonably likely to be adversely affected by the lawyer's representation of, or responsibilities to, the other client. The dual representation also is directly adverse if the lawyer reasonably appears to be called upon to espouse adverse positions in the same matter or a related matter. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only generally adverse, such as competing economic enterprises, does not constitute the representation of directly adverse interests. Even when neither paragraph (a) nor (b) is applicable, a lawyer should realize that a business rivalry or personal differences between two clients or potential clients may be so important to one or both that one or the other would consider it contrary to its interests to have the same lawyer as its rival even in unrelated matters; and in those situations a wise lawyer would forego the dual representation.

Full Disclosure and Informed Consent

7. A client under some circumstances may consent to representation notwithstanding a conflict or potential conflict. However, as indicated in paragraph (c)(l), when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved should not ask for such agreement or provide representation on the basis of the client's consent. When more than one client is involved, the question of conflict must be resolved as to each client. Moreover, there may be circumstances where it is impossible to make the full disclosure necessary to obtain informed consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the 31 disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent.

8. Disclosure and consent are not formalities. Disclosure sufficient for sophisticated clients may not be sufficient to permit less sophisticated clients to provide fully informed consent. While it is

not required that the disclosure and consent be in writing, it would be prudent for the lawyer to provide potential dual clients with at least a written summary of the considerations disclosed.

9. In certain situations, such as in the preparation of loan papers or the preparation of a partnership agreement, a lawyer might have properly undertaken multiple representation and be confronted subsequently by a dispute among those clients in regard to that matter. Paragraph (d) forbids the representation of any of those parties in regard to that dispute unless informed consent is obtained from all of the parties to the dispute who had been represented by the lawyer in that matter.

10. A lawyer may represent parties having antagonistic positions on a legal question that has arisen in different cases, unless representation of either client would be adversely affected. Thus, it is ordinarily not improper to assert such positions in cases pending in different trial courts, but it may be improper to do so in cases pending at the same time in an appellate court.

11. Ordinarily, it is not advisable for a lawyer to act as advocate against a client the lawyer represents in some other matter, even if the other matter is wholly unrelated and even if paragraphs (a), (b) and (d) are not applicable. However, there are circumstances in which a lawyer may act as advocate against a client, for a lawyer is free to do so unless this Rule or another rule of the Texas Disciplinary Rules of Professional Conduct would be violated. For example, a lawyer representing an enterprise with diverse operations may accept employment as an advocate against the enterprise in a matter unrelated to any matter being handled for the enterprise if the representation of one client is not directly adverse to the representation of the other client. The propriety of concurrent representation can depend on the nature of the litigation. For example, a suit charging fraud entails conflict to a degree not involved in a suit for declaratory judgment concerning statutory interpretation.

Interest of Person Paying for a Lawyers Service

12. A lawyer may be paid from a source other than the client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty to the client. See Rule 1.08(e). For example, when an insurer and its insured have conflicting interests in a matter arising from a liability insurance agreement, and the insurer is required to provide special counsel for the insured, the arrangement should assure the special counsel's professional independence. So also, when a corporation and its directors or employees are involved in a controversy in which they have conflicting interests, the corporation may provide funds for separate legal representation of the directors or employees, if the clients consent after consultation and the arrangement ensures the lawyer's professional independence.

Non-litigation Conflict Situations

13. Conflicts of interest in contexts other than litigation sometimes may be difficult to assess. Relevant factors in determining whether there is potential for adverse effect include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that actual conflict will arise and the likely prejudice to the client from the conflict if it does arise. The question is often one of proximity and degree.

14. For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation may be permissible where the clients are generally aligned in interest even though there is some difference of interest among them.

15. Conflict questions may also arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may arise. In estate administration it may be unclear whether the client is the fiduciary or is the estate or trust including its beneficiaries. The lawyer should make clear the relationship to the parties involved.

16. A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the two roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board and the possibility of the corporations obtaining legal advice from another lawyer in such situations. If there is material risk that the dual role will compromise the lawyer's independence of professional judgment, the lawyer should not serve as a director.

Conflict Charged by an Opposing Party

17. Raising questions of conflict of interest is primarily the responsibility of the lawyer undertaking the representation. In litigation, a court may raise the question when there is reason to infer that the lawyer has neglected the responsibility. In a criminal case, inquiry by the court is generally required when a lawyer represents multiple defendants. Where the conflict is such as clearly to call in question the fair or efficient administration of justice, opposing counsel may properly raise the question. Such an objection should be viewed with great caution, however, for it can be misused as a technique of harassment. See Preamble: Scope.

18. Except when the absolute prohibition of this rule applies or in litigation when a court passes upon issues of conflicting interests in determining a question of disqualification of counsel, resolving questions of conflict of interests may require decisions by all affected clients as well as by the lawyer.

Rule 1.07 Conflict of Interest: Intermediary

(a) A lawyer shall not act as intermediary between clients unless:

(1) the lawyer consults with each client concerning the implications of the common representation, including the advantages and risks involved, and the effect on the attorney-client privileges, and obtains each client's written consent to the common representation;

(2) the lawyer reasonably believes that the matter can be resolved without the necessity of contested litigation on terms compatible with the client's best interests, that each client will be able to make adequately informed decisions in the matter and that there is little risk of material prejudice to the interests of any of the clients if the contemplated resolution is unsuccessful; and

(3) the lawyer reasonably believes that the common representation can be undertaken impartially and without improper effect on other responsibilities the lawyer has to any of the clients.

(b) While acting as intermediary, the lawyer shall consult with each client concerning the decision to be made and the considerations relevant in making them, so that each client can make adequately informed decisions.

(c) A lawyer shall withdraw as intermediary if any of the clients so requests, or if any of the conditions stated in paragraph (a) is no longer satisfied. Upon withdrawal, the lawyer shall not continue to represent any of the clients in the matter that was the subject of the intermediation.

(d) Within the meaning of this Rule, a lawyer acts as intermediary if the lawyer represents two or more parties with potentially conflicting interests.

(e) If a lawyer would be prohibited by this Rule from engaging in particular conduct, no other lawyer while a member of or associated with that lawyer's firm may engage in that conduct.

Comment:

1. A lawyer acting as intermediary may seek to establish or adjust a relationship between clients on an amicable and mutually advantageous basis. For example, the lawyer may assist in organizing a business in which two or more clients are entrepreneurs, in working out the financial reorganization of an enterprise in which two or more clients have an interest, in arranging a property distribution in settlement of an estate or in mediating a dispute between clients. The lawyer seeks to resolve potentially conflicting interests by developing the parties' mutual interests. The alternative can be that each party may have to obtain separate representation, with the possibility in some situations of incurring additional cost, complication or even litigation. Given these and other relevant factors, all the clients may prefer that the lawyer act as intermediary.

2. Because confusion can arise as to the lawyer's role where each party is not separately represented, it is important that the lawyer make clear the relationship; hence, the requirement of written consent. Moreover, a lawyer should not permit his personal interests to influence his advice relative to a suggestion by his client that additional counsel be employed. See also Rule 1.06 (b).

3. The Rule does not apply to a lawyer acting as arbitrator or mediator between or among parties who are not clients of the lawyer, even where the lawyer has been appointed with the concurrence of the parties. In performing such a role the lawyer may be subject to applicable codes of ethics, such as the Code of Ethics for Arbitration in Commercial Disputes prepared by a joint Committee of the American Bar Association and the American Arbitration Association.

4. In considering whether to act as intermediary between clients, a lawyer should be mindful that if the intermediation fails the result can be additional cost, embarrassment and recrimination. In some situations, the risk of failure is so great that intermediation is plainly impossible. Moreover, a lawyer cannot undertake common representation of clients between whom contested litigation is reasonably expected or who contemplate contentious negotiations. More generally, if the

relationship between the parties has already assumed definite antagonism, the possibility that the client's interests can be adjusted by intermediation ordinarily is not very good.

5. The appropriateness of intermediation can depend on its form. Forms of intermediation range from informal arbitration, where each client's case is presented by the respective client and the lawyer decides the outcome, to mediation, to common representation where the client's interests are substantially though not entirely compatible. One form may be appropriate in circumstances where another would not. Other relevant factors are whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating a relationship between the parties or terminating one.

Confidentiality and Privilege

6. A particularly important factor in determining the appropriateness of intermediation is the effect on client-lawyer confidentiality and the attorney-client privilege. In a common representation, the lawyer is still required both to keep each client adequately informed and to maintain confidentiality of information relating to the representation, except as to such clients. See Rules 1.03 and 1.05. Complying with both requirements while acting as intermediary requires a delicate balance. If the balance cannot be maintained, the common representation is improper. With regard to the attorney-client privilege, the general rule is that as between commonly represented clients the privilege does not attach. Hence, it must be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised.

7. Since the lawyer is required to be impartial between commonly represented clients, intermediation is improper when that impartiality cannot be maintained. For example, a lawyer 35 who has represented one of the clients for a long period and in a variety of matters might have difficulty being impartial between that client and one to whom the lawyer has only recently been introduced.

Consultation

8. In acting as intermediary between clients, the lawyer should consult with the clients on the implications of doing so, and proceed only upon informed consent based on such a consultation. The consultation should make clear that the lawyer's role is not that of partisanship normally expected in other circumstances.

9. Paragraph (b) is an application of the principle expressed in Rule 1.03. Where the lawyer is intermediary, the clients ordinarily must assume greater responsibility for decisions than when each client is independently represented.

10. Under this Rule, any condition or circumstance that prevents a particular lawyer either from acting as intermediary between clients, or from representing those clients individually in connection with a matter after an unsuccessful intermediation, also prevents any other lawyer who is or becomes a member of or associates with that lawyer's firm from doing so. See paragraphs (c) and (e).

Withdrawal

11. In the event of withdrawal by one or more parties from the enterprise, the lawyer may continue to act for the remaining parties and the enterprise. See also Rule 1.06 (c) (2) which authorizes continuation of the representation with consent.

Rule 1.15 Declining or Terminating Representation

(a) A lawyer shall decline to represent a client or, where representation has commenced, shall withdraw, except as stated in paragraph (c), from the representation of a client, if:

(1) the representation will result in violation of Rule 3.08, other applicable rules of professional conduct or other law;

(2) the lawyer's physical, mental or psychological condition materially impairs the lawyers fitness to represent the client; or

(3) the lawyer is discharged, with or without good cause.

(b) Except as required by paragraph (a), a lawyer shall not withdraw from representing a client unless:

(1) withdrawal can be accomplished without material adverse effect on the interests of the client;

(2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes may be criminal or fraudulent;

(3) the client has used the lawyer's services to perpetrate a crime or fraud;

(4) a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent or with which the lawyer has fundamental disagreement;

(5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services, including an obligation to pay the lawyer's fee as agreed, and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(7) other good cause for withdrawal exists.

(c) When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payments of fee that has not been earned. The lawyer may

retain papers relating to the client to the extent permitted by other law only if such retention will not prejudice the client in the subject matter of the representation.

Comment:

1. A lawyer should not accept representation in a matter unless it can be performed competently, promptly, and without improper conflict of interest. See generally Rules 1.01, 1.06, 1.07, 1.08, and 1.09. Having accepted the representation, a lawyer normally should endeavor to handle the matter to completion. Nevertheless, in certain situations the lawyer must terminate the representation and in certain other situations the lawyer is permitted to withdraw.

Mandatory Withdrawal

2. A lawyer ordinarily must decline employment if the employment will cause the lawyer to engage in conduct that the lawyer knows is illegal or that violates the Texas Disciplinary Rules of Professional Conduct. Rule 1.15(a)(1); cf. Rules 1. 02(c), 3.01, 3.02, 3.03, 3.04, 3.08, 4.01, and 8.04. Similarly, paragraph (a)(l) of this Rule requires a lawyer to withdraw from employment when the lawyer knows that the employment will result in a violation of a rule of professional conduct or other law. The lawyer is not obliged to decline or withdraw simply because the client suggests such a course of conduct; a client may have made such a suggestion in the ill-founded hope that a lawyer will not be constrained by a professional obligation. Cf. Rule 1.02(c) and (d).

3. When a lawyer has been appointed to represent a client and in certain other instances in litigation, withdrawal ordinarily requires approval of the appointing authority or presiding judge. See also Rule 6.01. Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The tribunal may wish an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient. See also Rule 1.06(e).

Discharge

4. A client has the power to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services, and paragraph (a) of this Rule requires that the discharged lawyer withdraw. Where future dispute about the withdrawal may be anticipated, it may be advisable to prepare a written statement reciting the circumstances. 5. Whether a client can discharge an appointed counsel depends on the applicable law. A client seeking to do so should be given full explanation of the consequences. In some instances the consequences may include a decision by the appointing authority or presiding judge that appointment of successor counsel is unjustified, thus requiring the client to represent himself.

Mentally Incompetent Client

6. If the client is mentally incompetent, the client may lack the legal capacity to discharge the lawyer (see paragraphs 11 and 12 of Comment to Rule 1.02), and in any event the discharge may be seriously adverse to the clients' interests. The lawyer should make special effort to help the

incompetent client consider the consequences (see paragraph 5 of Comment to Rule 1.03) and in some situations may initiate proceedings for a conservatorship or similar protection of the client. See Rule 1.02(e).

Optional Withdrawal

7. Paragraph (b) supplements paragraph (a) by permitting a lawyer to withdraw from representation in some certain additional circumstances. The lawyer has the option to withdraw if it can be accomplished without material adverse effect on the client's interests. Withdrawal is also justified if the client persists in a course of action that the lawyer reasonably believes is criminal or fraudulent, for a lawyer is not required to be associated with such conduct even if the lawyer does not further it. A lawyer is not required to discontinue the representation until the lawyer knows the conduct will be illegal or in violation of these rules, at which point the lawyer's withdrawal is mandated by paragraph (a)(l). Withdrawal is also permitted if the lawyer's services were misused in the past. The lawyer also may withdraw where the client insists on pursuing a repugnant or imprudent objective or one with which the lawyer has fundamental disagreement. A lawyer may withdraw if the client refuses, after being duly warned, to abide by the terms of an agreement relating to the representation, such as an agreement concerning fees or court costs or an agreement limiting the objectives of the representation.

8. Withdrawal permitted by paragraph (b)(2) through (7) is optional with the lawyer even though the withdrawal may have a material adverse effect upon the interests of the client.

Assisting the Client Upon Withdrawal

9. In every instance of withdrawal and even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client. See paragraph (d). The lawyer may retain papers as security for a fee only to the extent permitted by law.

10. Other rules, in addition to Rule 1.15, require or suggest withdrawal in certain situations. See Rules 1.01, 1.05 Comment 22, 1.06(e) and 1.07(c), 1.11(c), 1.12(d), and 3.08(a).

Rule 3.03 Candor Toward the Tribunal

(a) A lawyer shall not knowingly:

(1) make a false statement of material fact or law to a tribunal;

(2) fail to disclose a fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act;

(3) in an ex parte proceeding, fail to disclose to the tribunal an unprivileged fact which the lawyer reasonably believes should be known by that entity for it to make an informed decision;

(4) fail to disclose to the tribunal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(5) offer or use evidence that the lawyer knows to be false. (b) If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall make a good faith effort to persuade the client to authorize the lawyer to correct or withdraw the false evidence. If such efforts are unsuccessful, the lawyer shall take reasonable remedial measures, including disclosure of the true facts. (c) The duties stated in paragraphs (a) and (b) continue until remedial legal measures are no longer reasonably possible.

Comment:

1. The advocate's task is to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client is qualified by the advocate's duty of candor to the tribunal.

Factual Representations by Lawyer

2. An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein, for litigation documents ordinarily present assertions by the client, or by someone on the client's behalf, and not assertions by the lawyer. Compare Rule 3.01. However, an assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or a representation of fact in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. The obligation prescribed in Rule 1.02(c) not to counsel a client to commit or assist the client in committing a fraud applies in litigation. See the Comments to Rules 1.02(c) and 8.04(a).

Misleading Legal Argument

3. Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but should recognize the existence of pertinent legal authorities. Furthermore, as stated in paragraph (a)(4), an advocate has a duty to disclose directly adverse authority in the controlling 61 jurisdiction which has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.

Ex Parte Proceedings

4. Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party. However, in an ex parte proceeding, such as an application for a temporary restraining order, there is no balance of presentation by opposing advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make disclosures of unprivileged material facts known to the lawyer if the lawyer reasonably believes the tribunal will not reach a just decision unless informed of those facts.

Anticipated False Evidence

5. On occasion a lawyer may be asked to place into evidence testimony or other material that the lawyer knows to be false. Initially in such situations, a lawyer should urge the client or other person involved to not offer false or fabricated evidence. However, whether such evidence is provided by the client or by another person, the lawyer must refuse to offer it, regardless of the client's wishes. As to a lawyer's right to refuse to offer testimony or other evidence that the lawyer believes is false, see paragraph 15 of this Comment.

6. If the request to place false testimony or other material into evidence came from the lawyer's client, the lawyer also would be justified in seeking to withdraw from the case. See Rules 1.15(a)(I) and (b)(2), (4). If withdrawal is allowed by the tribunal, the lawyer may be authorized under Rule 1.05(c)(7) to reveal the reasons for that withdrawal to any other lawyer subsequently retained by the client in the matter; but normally that Rule would not allow the lawyer to reveal that information to another person or to the tribunal. If the lawyer either chooses not to withdraw or is not allowed to do so by the tribunal, the lawyer should again urge the client not to offer false testimony or other evidence and advise the client of the steps the lawyer will take if such false evidence is offered. Even though the lawyer does not receive satisfactory assurances that the client or other witness will testify truthfully as to a particular matter, the lawyer may use that person as a witness as to other matters that the lawyer believes will not result in perjured testimony.

Past False Evidence

7. It is possible, however, that a lawyer will place testimony or other material into evidence and only later learn of its falsity. When such testimony or other evidence is offered by the client, problems arise between the lawyer's duty to keep the client's revelations confidential and the lawyer's duty of candor to the tribunal. Under this Rule, upon ascertaining that material testimony or other evidence is false, the lawyer must first seek to persuade the client to correct 62 the false testimony or to withdraw the false evidence. If the persuasion is ineffective, the lawyer must take additional remedial measures.

8. When a lawyer learns that the lawyer's services have been improperly utilized in a civil case to place false testimony or other material into evidence, the rule generally recognized is that the lawyer must disclose the existence of the deception to the court or to the other party, if necessary rectify the deception. See paragraph (b) and Rule 1.05(h). See also Rule 1.05(g). Such a disclosure can result in grave consequences to the client, including not only a sense of betrayal by the lawyer but also loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer would be aiding in the deception of the tribunal or jury, thereby subverting the truth-finding process which the adversary system is designed to implement. See Rule 1.02(c).

Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer's advice to reveal the false evidence and insist that the lawyer keep silent. Thus the client could in effect coerce the lawyer into being a party to fraud on the court.

Perjury by a Criminal Defendant

9. Whether an advocate for a criminally accused has the same duty of disclosure has been intensely debated. While it is agreed that in such cases, as in others, the lawyer should seek to persuade the client to refrain from suborning or offering perjuries testimony or other false evidence, there has been dispute concerning the lawyer's duty when that persuasion fails. If the confrontation with the client occurs before trial, the lawyer ordinarily can withdraw. Withdrawal before trial may not be possible, however, either because trial is imminent, or because the confrontation with the client does not take place until the trial itself, or because no other counsel is available.

10. The proper resolution of the lawyer's dilemma in criminal cases is complicated by two considerations. The first is the substantial penalties that a criminal accused will face upon conviction, and the lawyer's resulting reluctance to impair any defenses the accused wishes to offer on his own behalf having any possible basis in fact. The second is the right of a defendant to take the stand should he so desire, even over the objections of the lawyer. Consequently, in any criminal case where the accused either insists on testifying when the lawyer knows that the testimony is perjurious or else surprises the lawyer with such testimony at trial, the lawyer's effort to rectify the situation can increase the likelihood of the client's being convicted as well as opening the possibility of a prosecution for perjury. On the other hand, if the lawyer does not exercise control over the proof, the lawyer participates, although in a merely passive way, in deception of the court.

11. Three resolutions of this dilemma have been proposed. One is to permit the accused to testify by a narrative without guidance through the lawyer's questioning. This compromises both contending principles; it exempts the lawyer from the duty to disclose false evidence but subjects the client to an implicit disclosure of information imparted to counsel. Another suggested resolution is that the advocate be entirely excused from the duty to reveal perjury if 63 the perjury is that of the client. This solution, however, makes the advocate a knowing instrument of perjury.

12. The other resolution of the dilemma, and the one this Rule adopts, is that the lawyer must take a reasonable remedial measure which may include revealing the client's perjury. A criminal accused has a right to the assistance of an advocate, a right to testify and a right of confidential communication with counsel. However, an accused should not have a right to assistance of counsel in committing perjury. Furthermore, an advocate has an obligation, not only in professional ethics but under the law as well, to avoid implication in the commission of perjury or other falsification of evidence.

False Evidence Not Introduced by the Lawyer

13. A lawyer may have introduced the testimony of a client or other witness who testified truthfully under direct examination, but who offered false testimony or other evidence during examination by another party. Although the lawyer should urge that the false evidence be corrected or withdrawn, the full range of obligation imposed by paragraphs (a)(5) and (b) of this Rule do not apply to such situations. A subsequent use of that false testimony or other evidence by the lawyer in support of the client's case, however, would violate paragraph (a)(5).

Duration of Obligation

14. The time limit on the obligation to rectify the presentation of false testimony or other evidence varies from case to case but continues as long as there is a reasonable possibility of taking corrective legal actions before a tribunal.

Refusing to Offer Proof Believed to be False

15. A lawyer may refuse to offer evidence that the lawyer reasonably believes is untrustworthy, even if the lawyer does not know that the evidence is false. That discretion should be exercised cautiously, however, in order not to impair the legitimate interests of the client. Where a client wishes to have such suspect evidence introduced, generally the lawyer should do so and allow the finder of fact to assess its probative value. A lawyer's obligations under paragraphs (a)(2), (a)(5) and (b) of this Rule are not triggered by the introduction of testimony or other evidence that is believed by the lawyer to be false, but not known to be so. Rule 4.01 Truthfulness in Statements to Others In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid making the lawyer a party to a criminal act or knowingly assisting a fraudulent act perpetrated by a client.

Comment:

False Statements of Fact

1. Paragraph (a) of this Rule refers to statements of material fact. Whether a particular statement should be regarded as one of material fact can depend on the circumstances. For example, certain types of statements ordinarily are not taken as statements of material fact because they are viewed as matters of opinion or conjecture. Estimates of price or value placed on the subject of a transaction are in this category. Similarly, under generally accepted conventions in negotiation, a party's supposed intentions as to an acceptable settlement of a claim may be viewed merely as negotiating positions rather than as accurate representations of material fact. Likewise, according to commercial conventions, the fact that a particular transaction is being undertaken on behalf of an undisclosed principal need not be disclosed except where non-disclosure of the principal would constitute fraud.

2. A lawyer violates paragraph (a) of this Rule either by making a false statement of law or material fact or by incorporating or affirming such a statement made by another person. Such statements will violate this Rule, however, only if the lawyer knows they are false and intends thereby to mislead. As to a lawyer's duty to decline or terminate representation in such situations, see Rule 1.15. 77

Failure to Disclose A Material Fact

3. Paragraph (b) of this Rule also relates only to failures to disclose material facts. Generally, in the course of representing a client a lawyer has no duty to inform a third person of relevant or

material facts, except as required by law or by applicable rules of practice or procedure, such as formal discovery. However, a lawyer must not allow fidelity to a client to become a vehicle for a criminal act or a fraud being perpetrated by that client. Consequently a lawyer must disclose a material fact to a third party if the lawyer knows that the client is perpetrating a crime or a fraud and the lawyer knows that disclosure is necessary to prevent the lawyer from becoming a party to that crime or fraud. Failure to disclose under such circumstances is misconduct only if the lawyer intends thereby to mislead.

4. When a lawyer discovers that a client has committed a criminal or fraudulent act in the course of which the lawyer's services have been used, or that the client is committing or intends to commit any criminal or fraudulent act, other of these Rules require the lawyer to urge the client to take appropriate action. See Rules 1.02(d), (e), (f); 3.03(b). Since the disclosures called for by paragraph (b) of this Rule will be necessary only if the lawyer's attempts to counsel his client not to commit the crime or fraud are unsuccessful, a lawyer is not authorized to make them without having first undertaken those other remedial actions. See also Rule 1.05.

Fraud by a Client

5. A lawyer should never knowingly assist a client in the commission of a criminal act or a fraudulent act. See Rule 1.02(c).

6. This rule governs a lawyer's conduct during the course of representing a client. If the lawyer has terminated representation prior to learning of a client's intention to commit a criminal or fraudulent act, paragraph (b) of this Rule does not apply. See Fraud under TERMINOLOGY.

Regulatory Disclosure Requirements

REGULATORY DISCLOSURE REQUIREMENTS

22 TAC § 137.57 Engineer Shall be Objective and Truthful

(a) Engineers shall issue statements only in an objective and truthful manner. Engineers should strive to make affected parties aware of the engineers' professional concerns regarding particular actions or projects, and of the consequences of engineering decisions or judgments that are overruled or disregarded.

(b) The issuance of oral or written assertions in the practice of engineering shall not be:

(1) fraudulent,

(2) deceitful, or

(3) misleading or shall not in any manner whatsoever tend to create a misleading impression.

(c) The engineer shall disclose a possible conflict of interest to a potential or current client or employer upon discovery of the possible conflict.

(d) A conflict of interest exists when an engineer accepts employment when a reasonable probability exists that the engineer's own financial, business, property, or personal interests may affect any professional judgment, decisions, or practices exercised on behalf of the client or employer. An engineer may accept such an employment only if all parties involved in the potential conflict of interest are fully informed in writing and the client or employer confirms the knowledge of the potential conflict in writing. An engineer in a conflict of interest employment shall maintain the interests of the client and other parties as provided by §137.61 of this title (relating to Engineers Shall Maintain Confidentiality of Clients) and other rules and statutes.

22 TAC § 137.63 Engineer's Responsibility to the Profession

(a) Engineers shall engage in professional and business activities in an honest and ethical manner. Engineers should strive to promote responsibility, commitment, and ethics both in the education and practice phases of engineering. They should attempt to enhance society's awareness of engineers' responsibilities to the public and encourage the communication of these principles of ethical conduct among engineers.

(b) The engineer shall:

(1) endeavor to meet all of the applicable professional practice requirements of federal, state and local statutes, codes, regulations, rules, ordinances, or standards in the performance of engineering services;

(2) exercise reasonable care or diligence to prevent the engineer's partners, associates, and employees from engaging in conduct which, if done by the engineer, would violate

any provision of the Texas Engineering Practice Act, general board rule, or any of the professional practice requirements of federal, state and local statutes, codes, regulations, rules or ordinances in the performance of engineering services;

(3) exercise reasonable care to prevent the association of the engineer's name, professional identification, seal, firm or business name in connection with any venture or enterprise which the engineer knows, or should have known, is engaging in trade, business or professional practices of a fraudulent, deceitful, or dishonest nature, or any action which violates any provision of the Texas Engineering Practice Act or board rules;

(4) act as faithful agent for their employers or clients;

(5) conduct engineering and related business affairs in a manner that is respectful of the client, involved parties, and employees. Inappropriate behaviors or patterns of inappropriate behaviors may include, but are not limited to, misrepresentation in billing; unprofessional correspondence or language; sale and/or performance of unnecessary work; or conduct that harasses or intimidates another party; and

(6) practice engineering in a careful and diligent manner.

(c) The engineer shall not:

(1) aid or abet, directly or indirectly, any unlicensed person or business entity in the unlawful practice of engineering;

(2) maliciously injure or attempt to injure or damage the personal or professional reputation of another by any means. This does not preclude an engineer from giving a frank but private appraisal of engineers or other persons or firms when requested by a client or prospective employer;

(3) retaliate against a person who provides reference material for an application for a license or who in good faith attempts to bring forward an allegation of wrongdoing;

(4) give, offer or promise to pay or deliver, directly or indirectly, any commission, gift, favor, gratuity, benefit, or reward as an inducement to secure any specific engineering work or assignment;

(5) accept compensation or benefits from more than one party for services pertaining to the same project or assignment; or

(6) solicit professional employment in any false or misleading advertising.

30 TAC § 305.125 (19)

Conditions applicable to all permits issued under this chapter, and which shall be incorporated into each permit expressly or by reference to this chapter are as follows.

(1) The permittee has a duty to comply with all permit conditions. Failure to comply with any permit condition is a violation of the permit and statutes under which it was issued and is grounds for enforcement action, for permit amendment, revocation or suspension, or for denial of a permit renewal application or an application for a permit for another facility.

(2) The permittee must apply for an amendment or renewal before the expiration of the existing permit in order to continue a permitted activity after the expiration date of the permit. Authorization to continue such activity terminates upon the effective denial of said application.

(3) It is not a defense for a permittee in an enforcement action that it would have been necessary to halt or reduce the permitted activity to maintain compliance with the permit conditions.

(4) The permittee shall take all reasonable steps to minimize or prevent any discharge or sludge use or disposal or other permit violation which has a reasonable likelihood of adversely affecting human health or the environment.

(5) The permittee shall at all times properly operate and maintain all facilities and systems of treatment and control (and related appurtenances) installed or used by the permittee to achieve compliance with the permit conditions. For Underground Injection Control permits proper operation and maintenance includes effective performance, adequate funding, adequate operator staffing and training, and adequate laboratory and process controls, including appropriate quality assurance procedures. This provision requires the operation of back-up or auxiliary facilities or similar systems only when necessary to achieve compliance with the permit conditions.

(6) The permittee shall furnish to the executive director, upon request and within a reasonable time, any information to determine whether cause exists for amending, revoking, suspending, or terminating the permit, and copies of records required to be kept by the permit.

(7) The permittee shall give notice to the executive director before physical alterations or additions to the permitted facility if such alterations or additions would require a permit amendment or result in a violation of permit requirements.

(8) Authorization from the commission is required before beginning any change in the permitted facility or activity that would result in noncompliance with other permit requirements.

(9) The permittee shall report any noncompliance to the executive director which may endanger human health or safety, or the environment.

(A) Such information shall be provided orally within 24 hours from the time the permittee becomes aware of the noncompliance. A written submission shall also be provided within five

days of the time the permittee becomes aware of the noncompliance. The written submission shall contain a description of the noncompliance and its cause; the potential danger to human health or safety, or the environment; the period of noncompliance, including exact dates and times; if the noncompliance has not been corrected, the time it is expected to continue; and steps taken or planned to reduce, eliminate, and prevent recurrence of the noncompliance, and to mitigate its adverse effects.

(B) The following must be reported within 24 hours under this paragraph:

(i) any unanticipated bypass which exceeds any effluent limitation in a Texas Pollutant Discharge Elimination System permit; and

(ii) violation of a maximum daily discharge limitation for any pollutants listed in a Texas Pollutant Discharge Elimination System permit to be reported within 24 hours.

(C) Holders of radioactive material licenses issued under Chapter 336 of this title (relating to Radioactive Substance Rules) shall report noncompliances/incidents to the executive director according to the requirements of §336.335 of this title (relating to Reporting Requirements for Incidents).

(10) Inspection and entry shall be allowed under Texas Water Code, Chapters 26 - 28 and 32, Texas Health and Safety Code, §§361.032, 361.033, 361.037, and 401.063, and 40 Code of Federal Regulations (CFR) §122.41(i). The statement in Texas Water Code, §26.014, that commission entry of a facility shall occur in accordance with an establishment's rules and regulations concerning safety, internal security, and fire protection is not grounds for denial or restriction of entry to any part of the facility, but merely describes the commission's duty to observe appropriate rules and regulations during an inspection.

(11) Monitoring and reporting requirements are as follows.

(A) Monitoring samples and measurements shall be taken at times and in a manner so as to be representative of the monitored activity.

(B) Except as otherwise required by Chapter 336 of this title or for records of monitoring information required by a permit related to the permittee's sewage sludge use and disposal activities, which shall be retained for a period of at least five years (or longer as required by 40 CFR Part 503), monitoring and reporting records, including strip charts and records of calibration and maintenance, copies of all records required by the permit, records of all data used to complete the application for this permit, and the certification required by 40 CFR §264.73(b)(9) shall be retained at the facility site for a period of three years from the date of the record or sample, measurement, report, application, or certification. This period shall be extended at the request of the executive director.

(C) Records of monitoring activities shall include:

(i) date, time, and place of sample or measurement;

(ii) identity of individual who collected the sample or made the measurement;

(iii) date of analysis;

(iv) identity of the individual and laboratory who performed the analysis;

(v) the technique or method of analysis; and

(vi) the results of the analysis or measurement.

(12) Any noncompliance other than that specified in this section, or any required information not submitted or submitted incorrectly shall be reported to the executive director as promptly as possible.

(13) A permit may be transferred only according to the provisions of §305.64 of this title (relating to Transfer of Permits).

(14) All reports and other information requested by the executive director shall be signed by the person and in the manner required by §305.128 of this title (relating to Signatories to Reports).

(15) A permit may be amended, suspended and reissued, or revoked for cause. The filing of a request by the permittee for a permit amendment, suspension and reissuance, or termination, or a notification of planned changes or anticipated noncompliance, does not stay any permit condition.

(16) A permit does not convey any property rights of any sort, or any exclusive privilege.

(17) Monitoring results shall be provided at the intervals specified in the permit.

(18) Reports of compliance or noncompliance with, or any progress reports on, interim and final requirements contained in any compliance schedule of the permit shall be submitted no later than 14 days following each schedule date.

(19) Where the permittee becomes aware that it failed to submit any relevant facts in a permit application, or submitted incorrect information in an application, or in any report to the executive director, it shall promptly submit such facts or information.

(20) The permittee is subject to administrative, civil, and criminal penalties, as applicable, under Texas Water Code, §§26.136, 26.212, and 26.213 for violations including, but not limited to, the following:

(A) negligently or knowingly violating Clean Water Act (CWA), §§301, 302, 306, 307, 308, 318, or 405, or any condition or limitation implementing any sections in a permit issued under CWA, §402, or any requirement imposed in a pretreatment program approved under CWA, §402(a)(3) or (b)(8);

(B) falsifying, tampering with, or knowingly rendering inaccurate any monitoring device or method required to be maintained under a permit; or
(C) knowingly making any false statement, representation, or certification in any record or other document submitted or required to be maintained under a permit, including monitoring reports or reports of compliance or noncompliance.

(21) For hazardous waste management facility permits, the executive director may require the permittee to establish and maintain an information repository at any time, based on the factors set forth in 40 CFR §124.33(b), as amended December 11, 1995, in the *Federal Register* (60 FR 63417). The information repository will be governed by the provisions in 40 CFR §124.33(c) - (f), as amended December 11, 1995, in the *Federal Register* (60 FR 63417).

(22) Notice of bankruptcy.

(A) Each permittee shall notify the executive director, in writing, immediately following the filing of a voluntary or involuntary petition for bankruptcy under any chapter of Title 11 (Bankruptcy) of the United States Code (11 USC) by or against:

(i) the permittee;

(ii) an entity (as that term is defined in 11 USC, §101(14)) controlling the permittee or listing the permit or permittee as property of the estate; or

(iii) an affiliate (as that term is defined in 11 USC, §101(2)) of the permittee.

(B) This notification must indicate:

(i) the name of the permittee;

(ii) the permit number(s);

(iii) the bankruptcy court in which the petition for bankruptcy was filed; and

(iv) the date of filing of the petition.

30 TAC § 335.204.e(13)

(a) This subchapter establishes minimum standards for the location of facilities used for the storage, processing, and disposal of hazardous waste. These standards are to be applied in the evaluation of an application for a permit to manage hazardous waste. Except as otherwise provided in this section, this subchapter applies to permit applications for new hazardous management facilities and areal expansions of existing hazardous waste management facilities, filed on or after September 1, 1984. These sections do not apply to the following:

(1) permit applications submitted pursuant to §335.2(c) of this title (relating to Permit Required), §335.43(b) of this title (relating to Permit Required), and §335.45(b) of this title (relating to Effect on Existing Facilities), including any revision submitted pursuant

to §305.51 of this title (relating to Revision of Applications for Hazardous Waste Permits);

(2) permit applications filed pursuant to §335.2(a) of this title (relating to Permit Required) which have been submitted in accordance with Chapter 305 of this title (relating to Consolidated Permits) and which have been declared to be administratively complete pursuant to §281.3 of this title (relating to Initial Review) prior to September 1, 1984; and

(3) on-site remedial actions conducted pursuant to the federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 United States Code §9601 et seq., as amended by the Superfund Amendments Reauthorization Act of 1986 or the Texas Solid Waste Disposal Act, Texas Civil Statutes, Article 4477-7, §13.

(b) The standards contained in §§335.204(a)(6)-(9), 335.204(b)(7)-(12), 335.204(c)(6)-(11), 335.204(d)(6)-(11), 335.204(e)(8)-(13) are not applicable to facilities that have submitted a notice of intent to file a permit application pursuant to §335.391 of this title (relating to Pre-Application Review) prior to May 3, 1988, or to facilities that have filed permit applications pursuant to §335.2(a) of this title (relating to Permit Required) which were submitted in accordance with Chapter 305 of this title (relating to Consolidated Permits) and that were declared to be administratively complete pursuant to §281.3 of this title (relating to Initial Review) prior to May 3, 1988.

(c) The purpose of this subchapter is to condition issuance of a permit for a new hazardous waste management facility or the areal expansion of an existing hazardous waste management facility on selection of a site that reasonably minimizes possible contamination of surface water and groundwater; to define the characteristics that make an area unsuitable for a hazardous waste management facility; and to prohibit issuance of a permit for a facility to be located in an area determined to be unsuitable, unless the design, construction and operational features of the facility will prevent adverse effects from unsuitable site characteristics. Nothing herein is intended to restrict or abrogate the commission's general authority under the Solid Waste Disposal Act to review site suitability for all facilities which manage municipal hazardous waste or industrial solid waste.

30 TAC § 137.55 Engineers Shall Protect the Public

(a) Engineers shall be entrusted to protect the health, safety, property, and welfare of the public in the practice of their profession. The public as used in this section and other rules is defined as any individual(s), client(s), business or public entities, or any member of the general population whose normal course of life might reasonably include an interaction of any sort with the engineering work of the license holder.

(b) Engineers shall not perform any engineering function which, when measured by generally accepted engineering standards or procedures, is reasonably likely to result in the endangerment of lives, health, safety, property, or welfare of the public. Any act or conduct which constitutes incompetence or gross negligence, or a criminal violation of law, constitutes misconduct and shall be censurable by the board.

(c) Engineers shall first notify involved parties of any engineering decisions or practices that might endanger the health, safety, property or welfare of the public. When, in an engineer's judgment, any risk to the public remains unresolved, that engineer shall report any fraud, gross negligence, incompetence, misconduct, unethical or illegal conduct to the board or to proper civil or criminal authorities.

(d) Engineers should strive to adequately examine the environmental impact of their actions and projects, including the prudent use and conservation of resources and energy, in order to make informed recommendations and decisions.

Recent Proposed Amendments to ABA Models Rules of Professional Conduct

About the Model Rules

The ABA Model Rules of Professional Conduct were adopted by the ABA House of Delegates in 1983. They serve as models for the ethics rules of most jurisdictions. Before the adoption of the Model Rules, the ABA model was the 1969 Model Code of Professional Responsibility. Preceding the Model Code were the 1908 Canons of Professional Ethics (last amended in 1963).

Implementation of Model Rules Changes

The Center for Professional Responsibility Policy Implementation Committee assist states in their implementation of changes to the Model Rules. Its site includes a chart on the status of each jurisdiction's review of the Rule changes.

A Legislative History

This Legislative History traces the Model Rules of Professional Conduct (Model Rules) from the appointment of the ABA Commission on Evaluation of Professional Standards (" Kutak Commission") in 1977 through the year 2005. It includes the first presentation of the Model Rules format to the American Bar Association House of Delegates, the adoption of the Model Rules, and the many amendments to the Model Rules that have been adopted or proposed through August 2005.

AUGUST 2012 AMENDMENTS TO
ABA MODEL RULES OF PROFESSIONAL CONDUCT

Rule 1.0 Terminology

(a) "Belief" or "believes" denotes that the person involved actually supposed the fact in question to be true. A person's belief may be inferred from circumstances.

(b) "Confirmed in writing," when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See paragraph (e) for the definition of "informed consent." If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

(c) "Firm" or "law firm" denotes a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization.

(d) "Fraud" or "fraudulent" denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive.

(e) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

(f) "Knowingly," "known," or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

(g) "Partner" denotes a member of a partnership, a shareholder in a law firm organized as a professional corporation, or a member of an association authorized to practice law.

(h) "Reasonable" or "reasonably" when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.

(i) "Reasonable belief" or "reasonably believes" when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

(j) "Reasonably should know" when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.

(k) "Screened" denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.

(l) "Substantial" when used in reference to degree or extent denotes a material matter of clear and weighty importance.

(m) "Tribunal" denotes a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter.

(n) "Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or videorecording, and ~~e-mail~~ electronic communications. A "signed" writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

Comment

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Screened

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[9] The purpose of screening is to assure the affected parties that confidential information known by the personally disqualified lawyer remains protected. The personally disqualified lawyer should acknowledge the obligation not to communicate with any of the other lawyers in the firm with respect to the matter. Similarly, other lawyers in the firm who are working on the matter should be informed that the screening is in place and that they may not communicate with the personally disqualified lawyer with respect to the matter. Additional screening measures that are appropriate for the particular matter will depend on the circumstances. To implement, reinforce and remind all affected lawyers of the presence of the screening, it may be appropriate for the firm to undertake such procedures as a written undertaking by the screened lawyer to avoid any communication with other firm personnel and any contact with any firm files or other ~~materials~~ information, including information in electronic form, relating to the matter, written notice and instructions to all other firm personnel forbidding any communication with the screened lawyer relating to the matter, denial of access by the screened lawyer to firm files or other ~~materials~~ information, including information in electronic form, relating to the matter, and periodic reminders of the screen to the screened lawyer and all other firm personnel.

...

Rule 1.1 Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Comment

...

Retaining or Contracting With Other Lawyers

[6] Before a lawyer retains or contracts with other lawyers outside the lawyer's own firm to provide or assist in the provision of legal services to a client, the lawyer should ordinarily obtain informed consent from the client and must reasonably believe that the other lawyers' services will contribute to the competent and ethical representation of the client. See also Rules 1.2 (allocation of authority), 1.4 (communication with client), 1.5(e) (fee sharing), 1.6 (confidentiality), and 5.5(a) (unauthorized practice of law). The reasonableness of the decision to retain or contract with other lawyers outside the lawyer's own firm will depend upon the circumstances, including the education, experience and reputation of the nonfirm lawyers; the nature of the services assigned to the nonfirm lawyers; and the legal protections, professional conduct rules, and ethical environments of the jurisdictions in which the services will be performed, particularly relating to confidential information.

[7] When lawyers from more than one law firm are providing legal services to the client on a particular matter, the lawyers ordinarily should consult with each other and the client about the scope of their respective representations and the allocation of responsibility among them. See Rule 1.2. When making allocations of responsibility in a matter pending before a tribunal, lawyers and parties may have additional obligations that are a matter of law beyond the scope of these Rules.

Maintaining Competence

[~~6~~8] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

Rule 1.4 Communication

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Comment

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Communicating with Client

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[4] A lawyer's regular communication with clients will minimize the occasions on which a client will need to request information concerning the representation. When a client makes a reasonable request for information, however, paragraph (a)(4) requires prompt compliance with the request, or if a prompt response is not feasible, that the lawyer, or a member of the lawyer's staff, acknowledge receipt of the request and advise the client when a response may be expected. ~~Client telephone calls should be promptly returned or acknowledged.~~ A lawyer should promptly respond to or acknowledge client communications.

...

Rule 1.6 Confidentiality of Information

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(4) to secure legal advice about the lawyer's compliance with these Rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; ~~or~~

(6) to comply with other law or a court order.~~;~~ or

(7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

Comment

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Detection of Conflicts of Interest

[13] Paragraph (b)(7) recognizes that lawyers in different firms may need to disclose limited information to each other to detect and resolve conflicts of interest, such as when a lawyer is considering an association with another firm, two or more firms are considering a merger, or a lawyer is considering the purchase of a law practice. See Rule 1.17, Comment [7]. Under these circumstances, lawyers and law firms are permitted to disclose limited information, but only once substantive discussions regarding the new relationship have occurred. Any such disclosure should ordinarily include no more than

the identity of the persons and entities involved in a matter, a brief summary of the general issues involved, and information about whether the matter has terminated. Even this limited information, however, should be disclosed only to the extent reasonably necessary to detect and resolve conflicts of interest that might arise from the possible new relationship. Moreover, the disclosure of any information is prohibited if it would compromise the attorney-client privilege or otherwise prejudice the client (e.g., the fact that a corporate client is seeking advice on a corporate takeover that has not been publicly announced; that a person has consulted a lawyer about the possibility of divorce before the person's intentions are known to the person's spouse; or that a person has consulted a lawyer about a criminal investigation that has not led to a public charge). Under those circumstances, paragraph (a) prohibits disclosure unless the client or former client gives informed consent. A lawyer's fiduciary duty to the lawyer's firm may also govern a lawyer's conduct when exploring an association with another firm and is beyond the scope of these Rules.

[14] Any information disclosed pursuant to paragraph (b)(7) may be used or further disclosed only to the extent necessary to detect and resolve conflicts of interest. Paragraph (b)(7) does not restrict the use of information acquired by means independent of any disclosure pursuant to paragraph (b)(7). Paragraph (b)(7) also does not affect the disclosure of information within a law firm when the disclosure is otherwise authorized, see Comment [5], such as when a lawyer in a firm discloses information to another lawyer in the same firm to detect and resolve conflicts of interest that could arise in connection with undertaking a new representation.

[15~~3~~] A lawyer may be ordered to reveal information relating to the representation of a client by a court or by another tribunal or governmental entity claiming authority pursuant to other law to compel the disclosure. Absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all nonfrivolous claims that the order is not authorized by other law or that the information sought is protected against disclosure by the attorney-client privilege or other applicable law. In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal to the extent required by Rule 1.4. Unless review is sought, however, paragraph (b)(6) permits the lawyer to comply with the court's order.

[16~~4~~] Paragraph (b) permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified. Where practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose. If the disclosure will be made in connection with a judicial proceeding, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

[17~~5~~] Paragraph (b) permits but does not require the disclosure of information relating to a client's representation to accomplish the purposes specified in paragraphs (b)(1) through (b)(6). In exercising the discretion conferred by this Rule, the lawyer may consider such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question. A lawyer's decision not to

disclose as permitted by paragraph (b) does not violate this Rule. Disclosure may be required, however, by other Rules. Some Rules require disclosure only if such disclosure would be permitted by paragraph (b). See Rules 1.2(d), 4.1(b), 8.1 and 8.3. Rule 3.3, on the other hand, requires disclosure in some circumstances regardless of whether such disclosure is permitted by this Rule. See Rule 3.3(c).

Acting Competently to Preserve Confidentiality

[186] Paragraph (c) requires a ~~A~~ lawyer ~~must~~ to act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3. The unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the access or disclosure. Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use). A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to forgo security measures that would otherwise be required by this Rule. Whether a lawyer may be required to take additional steps to safeguard a client's information in order to comply with other law, such as state and federal laws that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information, is beyond the scope of these Rules. For a lawyer's duties when sharing information with nonlawyers outside the lawyer's own firm, see Rule 5.3, Comments [3]-[4].

[197] When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule. Whether a lawyer may be required to take additional steps in order to comply with other law, such as state and federal laws that govern data privacy, is beyond the scope of these Rules.

Former Client

[20~~18~~] The duty of confidentiality continues after the client-lawyer relationship has terminated. See Rule 1.9(c)(2). See Rule 1.9(c)(1) for the prohibition against using such information to the disadvantage of the former client.

...

Rule 1.17 Sale of Law Practice

A lawyer or a law firm may sell or purchase a law practice, or an area of law practice, including good will, if the following conditions are satisfied:

(a) The seller ceases to engage in the private practice of law, or in the area of practice that has been sold, [in the geographic area] [in the jurisdiction] (a jurisdiction may elect either version) in which the practice has been conducted;

(b) The entire practice, or the entire area of practice, is sold to one or more lawyers or law firms;

(c) The seller gives written notice to each of the seller's clients regarding:

(1) the proposed sale;

(2) the client's right to retain other counsel or to take possession of the file; and

(3) the fact that the client's consent to the transfer of the client's files will be presumed if the client does not take any action or does not otherwise object within ninety (90) days of receipt of the notice.

If a client cannot be given notice, the representation of that client may be transferred to the purchaser only upon entry of an order so authorizing by a court having jurisdiction. The seller may disclose to the court in camera information relating to the representation only to the extent necessary to obtain an order authorizing the transfer of a file.

(d) The fees charged clients shall not be increased by reason of the sale.

Comment

...

Client Confidences, Consent and Notice

[7] Negotiations between seller and prospective purchaser prior to disclosure of information relating to a specific representation of an identifiable client no more violate the confidentiality provisions of Model Rule 1.6 than do preliminary discussions concerning the possible association of another lawyer or mergers between firms, with respect to which client consent is not required. See Rule 1.6(b)(7). Providing the purchaser access to ~~client-specific~~ detailed information relating to the representation, ~~and to~~ such as the client's file, however, requires client consent. The Rule provides that before such information can be disclosed by the seller to the purchaser the client must be given actual written notice of the contemplated sale, including the identity of the purchaser, and must be told that the decision to consent or make other arrangements must be made within 90 days. If nothing is heard from the client within that time, consent to the sale is presumed.

...

Rule 1.18: Duties to Prospective Client

(a) A person who ~~discusses~~ consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has ~~had discussions with~~ learned information from a prospective client shall not use or reveal that information ~~learned in the consultation~~, except as Rule 1.9 would permit with respect to information of a former client.

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:

(1) both the affected client and the prospective client have given informed consent, confirmed in writing, or:

(2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and

(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(ii) written notice is promptly given to the prospective client.

Comment

[1] Prospective clients, like clients, may disclose information to a lawyer, place documents or other property in the lawyer's custody, or rely on the lawyer's advice. A lawyer's ~~discussions~~ consultations with a prospective client usually are limited in time and depth and leave both the prospective client and the lawyer free (and sometimes required) to proceed no further. Hence, prospective clients should receive some but not all of the protection afforded clients.

[2] ~~Not all persons who communicate information to a lawyer are entitled to protection under this Rule.~~ A person becomes a prospective client by consulting with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter. Whether communications, including written, oral, or electronic communications, constitute a consultation depends on the circumstances. For example, a consultation is likely to have occurred if a lawyer, either in person or through the lawyer's advertising in any medium, specifically requests or invites the submission of information about a potential representation without clear and reasonably understandable warnings and cautionary statements that limit the lawyer's obligations, and a person provides information in response. See also Comment [4]. In contrast, a consultation does not

occur if a person provides information to a lawyer in response to advertising that merely describes the lawyer's education, experience, areas of practice, and contact information, or provides legal information of general interest. ~~A person who communicates~~ Such a person communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, and is thus not a "prospective client." ~~within the meaning of paragraph (a).~~ Moreover, a person who communicates with a lawyer for the purpose of disqualifying the lawyer is not a "prospective client."

...

[4] In order to avoid acquiring disqualifying information from a prospective client, a lawyer considering whether or not to undertake a new matter should limit ~~the initial interview~~ the initial consultation to only such information as reasonably appears necessary for that purpose. Where the information indicates that a conflict of interest or other reason for non-representation exists, the lawyer should so inform the prospective client or decline the representation. If the prospective client wishes to retain the lawyer, and if consent is possible under Rule 1.7, then consent from all affected present or former clients must be obtained before accepting the representation.

[5] A lawyer may condition ~~conversations~~ a consultation with a prospective client on the person's informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter. See Rule 1.0(e) for the definition of informed consent. If the agreement expressly so provides, the prospective client may also consent to the lawyer's subsequent use of information received from the prospective client.

...

Rule 4.4 Respect for Rights of Third Persons

(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

(b) A lawyer who receives a document or electronically stored information relating to the representation of the lawyer's client and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender.

Comment

...

[2] Paragraph (b) recognizes that lawyers sometimes receive a documents or electronically stored information that ~~were~~ was mistakenly sent or produced by opposing parties or their lawyers. A document or electronically stored information is inadvertently sent when it is accidentally transmitted, such as when an email or letter is misaddressed or a document or electronically stored information is accidentally included with information that was intentionally transmitted. If a lawyer knows or reasonably should know that such a document or electronically stored information was sent inadvertently, then this Rule requires the lawyer to promptly notify the sender in order to permit that person to take protective measures. Whether the lawyer is required to take additional steps, such as returning or deleting the document or electronically stored information ~~original document~~, is a matter of law beyond the scope of these Rules, as is the question of whether the privileged status of a document or electronically stored information has been waived. Similarly, this Rule does not address the legal duties of a lawyer who receives a document or electronically stored information that the lawyer knows or reasonably should know may have been ~~wrongfully~~ inappropriately obtained by the sending person. For purposes of this Rule, "document or electronically stored information" includes, in addition to paper documents, email and other forms of electronically stored information, including embedded data (commonly referred to as "metadata"), that is ~~email or other electronic modes of transmission~~ subject to being read or put into readable form. Metadata in electronic documents creates an obligation under this Rule only if the receiving lawyer knows or reasonably should know that the metadata was inadvertently sent to the receiving lawyer.

[3] Some lawyers may choose to return a document or delete electronically stored information unread, for example, when the lawyer learns before receiving it ~~the document~~ that it was inadvertently sent ~~to the wrong address~~. Where a lawyer is not required by applicable law to do so, the decision to voluntarily return such a document or delete electronically stored information is a matter of professional judgment ordinarily reserved to the lawyer. See Rules 1.2 and 1.4.

...

Rule 5.3 Responsibilities Regarding Nonlawyer Assistancets

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Comment

[~~2~~1] Paragraph (a) requires lawyers with managerial authority within a law firm to make reasonable efforts ~~to establish internal policies and procedures designed to provide~~ to ensure that the firm has in effect measures giving reasonable assurance that nonlawyers in the firm and nonlawyers outside the firm who work on firm matters ~~will~~ act in a way compatible with the professional obligations of the lawyer. ~~with the Rules of Professional Conduct~~. See Comment [6] to Rule 1.1 (retaining lawyers outside the firm) and Comment [1] to Rule 5.1~~,~~ (responsibilities with respect to lawyers within a firm). Paragraph (b) applies to lawyers who have supervisory authority over ~~the work of a nonlawyer.~~ such nonlawyers within or outside the firm. Paragraph (c) specifies the circumstances in which a lawyer is responsible for the conduct of ~~a nonlawyer~~ such nonlawyers within or outside the firm that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer.

Nonlawyers Within the Firm

[~~1~~2] Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns, and paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services. A lawyer must give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product. The measures employed in supervising nonlawyers should take account of the fact that they do not have legal training and are not subject to professional discipline.

Nonlawyers Outside the Firm

[3] A lawyer may use nonlawyers outside the firm to assist the lawyer in rendering legal services to the client. Examples include the retention of an investigative or paraprofessional service, hiring a document management company to create and maintain a database for complex litigation, sending client documents to a third party for printing or scanning, and using an Internet-based service to store client information. When using such services outside the firm, a lawyer must make reasonable efforts to ensure that the services are provided in a manner that is compatible with the lawyer's professional obligations. The extent of this obligation will depend upon the circumstances, including the education, experience and reputation of the nonlawyer; the nature of the services involved; the terms of any arrangements concerning the protection of client information; and the legal and ethical environments of the jurisdictions in which the services will be performed, particularly with regard to confidentiality. See also Rules 1.1 (competence), 1.2 (allocation of authority), 1.4 (communication with client), 1.6 (confidentiality), 5.4(a) (professional independence of the lawyer), and 5.5(a) (unauthorized practice of law). When retaining or directing a nonlawyer outside the firm, a lawyer should communicate directions appropriate under the circumstances to give reasonable assurance that the nonlawyer's conduct is compatible with the professional obligations of the lawyer.

[4] Where the client directs the selection of a particular nonlawyer service provider outside the firm, the lawyer ordinarily should agree with the client concerning the allocation of responsibility for monitoring as between the client and the lawyer. See Rule 1.2. When making such an allocation in a matter pending before a tribunal, lawyers and parties may have additional obligations that are a matter of law beyond the scope of these Rules.

Rule 5.5 Unauthorized Practice Of Law; Multijurisdictional Practice Of Law

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or

(4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

(d) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services <u>through an office or other systematic and continuous presence</u> in this jurisdiction that:

(1) are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission; or

(2) are services that the lawyer is authorized by federal or other law <u>or rule</u> to provide in this jurisdiction.

Comment

...

[1] A lawyer may practice law only in a jurisdiction in which the lawyer is authorized to practice. A lawyer may be admitted to practice law in a jurisdiction on a regular basis or may be authorized by court rule or order or by law to practice for a limited purpose or on a restricted basis. Paragraph (a) applies to unauthorized practice of law by a lawyer, whether through the lawyer's direct action or by the lawyer assisting

another person. For example, a lawyer may not assist a person in practicing law in violation of the rules governing professional conduct in that person's jurisdiction.

[4] Other than as authorized by law or this Rule, a lawyer who is not admitted to practice generally in this jurisdiction violates paragraph (b)(1) if the lawyer establishes an office or other systematic and continuous presence in this jurisdiction for the practice of law. Presence may be systematic and continuous even if the lawyer is not physically present here. Such a lawyer must not hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction. See also Rules 7.1(a) and 7.5(b).

...

[18] Paragraph (d)(2) recognizes that a lawyer may provide legal services in a jurisdiction in which the lawyer is not licensed when authorized to do so by federal or other law, which includes statute, court rule, executive regulation or judicial precedent. See, e.g., The ABA Model Rule on Practice Pending Admission.

...

[21] Paragraphs (c) and (d) do not authorize communications advertising legal services ~~to prospective clients~~ in this jurisdiction by lawyers who are admitted to practice in other jurisdictions. Whether and how lawyers may communicate the availability of their services ~~to prospective clients~~ in this jurisdiction is governed by Rules 7.1 to 7.5.

...

Rule 7.1 Communications Concerning a Lawyer's Services

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

Comment

...

[3] An advertisement that truthfully reports a lawyer's achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case. Similarly, an unsubstantiated comparison of the lawyer's services or fees with the services or fees of other lawyers may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison can be substantiated. The inclusion of an appropriate disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead the public. ~~a prospective client.~~

...

Rule 7.2 Advertising

(a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through written, recorded or electronic communication, including public media.

(b) A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may

(1) pay the reasonable costs of advertisements or communications permitted by this Rule;

(2) pay the usual charges of a legal services plan or a not-for-profit or qualified lawyer referral service. A qualified lawyer referral service is a lawyer referral service that has been approved by an appropriate regulatory authority;

(3) pay for a law practice in accordance with Rule 1.17; and

(4) refer clients to another lawyer or a nonlawyer professional pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the lawyer, if

(i) the reciprocal referral agreement is not exclusive, and

(ii) the client is informed of the existence and nature of the agreement.

(c) Any communication made pursuant to this Rule shall include the name and office address of at least one lawyer or law firm responsible for its content.

Comment

[1] To assist the public in learning about and obtaining legal services, lawyers should be allowed to make known their services not only through reputation but also through organized information campaigns in the form of advertising. Advertising involves an active quest for clients, contrary to the tradition that a lawyer should not seek clientele. However, the public's need to know about legal services can be fulfilled in part through advertising. This need is particularly acute in the case of persons of moderate means who have not made extensive use of legal services. The interest in expanding public information about legal services ought to prevail over tradition. Nevertheless, advertising by lawyers entails the risk of practices that are misleading or overreaching.

[2] This Rule permits public dissemination of information concerning a lawyer's name or firm name, address, email address, website, and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements; a lawyer's foreign language ability; names of references and, with their consent, names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance.

[3] Questions of effectiveness and taste in advertising are matters of speculation and subjective judgment. Some jurisdictions have had extensive prohibitions against television and other forms of advertising, against advertising going beyond specified facts about a lawyer, or against "undignified" advertising. Television, the Internet, and other forms of electronic communication are ~~is~~ now ~~one of~~ among the most powerful media for getting information to the public, particularly persons of low and moderate income;

prohibiting television, Internet, and other forms of electronic advertising, therefore, would impede the flow of information about legal services to many sectors of the public. Limiting the information that may be advertised has a similar effect and assumes that the bar can accurately forecast the kind of information that the public would regard as relevant. ~~Similarly, electronic media, such as the Internet, can be an important source of information about legal services, and lawful communication by electronic mail is permitted by this Rule.~~ But see Rule 7.3(a) for the prohibition against ~~the~~ a solicitation ~~of a prospective client~~ through a real-time electronic exchange initiated by the lawyer. ~~that is not initiated by the prospective client~~.

...

Paying Others to Recommend a Lawyer

[5] Except as permitted under paragraphs (b)(1)-(b)(4), ~~L~~lawyers are not permitted to pay others for ~~channeling professional work~~ recommending the lawyer's services or for channeling professional work in a manner that violates Rule 7.3. A communication contains a recommendation if it endorses or vouches for a lawyer's credentials, abilities, competence, character, or other professional qualities. Paragraph (b)(1), however, allows a lawyer to pay for advertising and communications permitted by this Rule, including the costs of print directory listings, on-line directory listings, newspaper ads, television and radio airtime, domain-name registrations, sponsorship fees, ~~banner ads,~~ Internet-based advertisements, and group advertising. A lawyer may compensate employees, agents and vendors who are engaged to provide marketing or client development services, such as publicists, public-relations personnel, business-development staff and website designers. Moreover, a lawyer may pay others for generating client leads, such as Internet-based client leads, as long as the lead generator does not recommend the lawyer, any payment to the lead generator is consistent with Rules 1.5(e) (division of fees) and 5.4 (professional independence of the lawyer), and the lead generator's communications are consistent with Rule 7.1 (communications concerning a lawyer's services). To comply with Rule 7.1, a lawyer must not pay a lead generator that states, implies, or creates a reasonable impression that it is recommending the lawyer, is making the referral without payment from the lawyer, or has analyzed a person's legal problems when determining which lawyer should receive the referral. See also Rule 5.3 ~~for the~~ (duties of lawyers and law firms with respect to the conduct of nonlawyers); Rule 8.4(a) (duty to avoid violating the Rules through the acts of another). ~~who prepare marketing materials for them.~~

[6] A lawyer may pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service. A legal service plan is a prepaid or group legal service plan or a similar delivery system that assists people who seek ~~prospective clients~~ to secure legal representation. A lawyer referral service, on the other hand, is any organization that holds itself out to the public as a lawyer referral service. Such referral services are understood by ~~laypersons~~ the public to be consumer-oriented organizations that provide unbiased referrals to lawyers with appropriate experience in the subject matter of the representation and afford other client protections, such as complaint procedures or malpractice insurance requirements. Consequently, this Rule only permits a lawyer to pay the usual charges of a not-for-profit or qualified lawyer referral service. A qualified lawyer referral service is one that is approved by an appropriate regulatory authority as affording adequate protections for the public. ~~prospective clients.~~ See, e.g.,

the American Bar Association's Model Supreme Court Rules Governing Lawyer Referral Services and Model Lawyer Referral and Information Service Quality Assurance Act (requiring that organizations that are identified as lawyer referral services (i) permit the participation of all lawyers who are licensed and eligible to practice in the jurisdiction and who meet reasonable objective eligibility requirements as may be established by the referral service for the protection of the public ~~prospective clients~~; (ii) require each participating lawyer to carry reasonably adequate malpractice insurance; (iii) act reasonably to assess client satisfaction and address client complaints; and (iv) do not make referrals ~~prospective clients~~ to lawyers who own, operate or are employed by the referral service).

[7] A lawyer who accepts assignments or referrals from a legal service plan or referrals from a lawyer referral service must act reasonably to assure that the activities of the plan or service are compatible with the lawyer's professional obligations. See Rule 5.3. Legal service plans and lawyer referral services may communicate with ~~prospective clients~~ the public, but such communication must be in conformity with these Rules. Thus, advertising must not be false or misleading, as would be the case if the communications of a group advertising program or a group legal services plan would mislead the public ~~prospective clients~~ to think that it was a lawyer referral service sponsored by a state agency or bar association. Nor could the lawyer allow in-person, telephonic, or real-time contacts that would violate Rule 7.3.

...

Rule 7.3 ~~Direct Contact with Prospective~~ Solicitation of Clients

(a) A lawyer shall not by in-person, live telephone or real-time electronic contact, solicit professional employment ~~from a prospective client~~ when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted:

(1) is a lawyer; or

(2) has a family, close personal, or prior professional relationship with the lawyer.

(b) A lawyer shall not solicit professional employment ~~from a prospective client~~ by written, recorded or electronic communication or by in-person, telephone or real-time electronic contact even when not otherwise prohibited by paragraph (a), if:

(1) the ~~prospective client~~ target of the solicitation has made known to the lawyer a desire not to be solicited by the lawyer; or

(2) the solicitation involves coercion, duress or harassment.

(c) Every written, recorded or electronic communication from a lawyer soliciting professional employment from anyone ~~a prospective client~~ known to be in need of legal services in a particular matter shall include the words "Advertising Material" on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication, unless the recipient of the communication is a person specified in paragraphs (a)(1) or (a)(2).

(d) Notwithstanding the prohibitions in paragraph (a), a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses in-person or telephone contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

Comment

[1] A solicitation is a targeted communication initiated by the lawyer that is directed to a specific person and that offers to provide, or can reasonably be understood as offering to provide, legal services. In contrast, a lawyer's communication typically does not constitute a solicitation if it is directed to the general public, such as through a billboard, an Internet banner advertisement, a website or a television commercial, or if it is in response to a request for information or is automatically generated in response to Internet searches.

[~~1~~2] There is a potential for abuse when a solicitation involves ~~inherent in~~ direct in-person, live telephone or real-time electronic contact by a lawyer with someone ~~a prospective client~~ known to need legal services. These forms of contact ~~between a lawyer and a prospective client~~ subject ~~the layperson~~ a person to the private importuning of the trained advocate in a direct interpersonal encounter. The person ~~prospective client~~, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult fully to evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer's presence and insistence

upon being retained immediately. The situation is fraught with the possibility of undue influence, intimidation, and over-reaching.

[~~2~~3] This potential for abuse inherent in direct in-person, live telephone or real-time electronic solicitation ~~of prospective clients~~ justifies its prohibition, particularly since lawyers have ~~advertising and written and recorded communication permitted under Rule 7.2 offer~~ alternative means of conveying necessary information to those who may be in need of legal services. ~~Advertising and written and recorded~~ In particular, communications~~,~~ can ~~which may be~~ be mailed ~~or autodialed~~ or transmitted by email or other electronic means that do not involve real-time contact and do not violate other laws governing solicitations. These forms of communications and solicitations make it possible for the public ~~a prospective client~~ to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting ~~the prospective client~~ the public to direct in-person, telephone or real-time electronic persuasion that may overwhelm ~~the client's~~ a person's judgment.

[~~3~~4] The use of general advertising and written, recorded or electronic communications to transmit information from lawyer to the public ~~prospective client~~, rather than direct in-person, live telephone or real-time electronic contact, will help to assure that the information flows cleanly as well as freely. The contents of advertisements and communications permitted under Rule 7.2 can be permanently recorded so that they cannot be disputed and may be shared with others who know the lawyer. This potential for informal review is itself likely to help guard against statements and claims that might constitute false and misleading communications, in violation of Rule 7.1. The contents of direct-in-person, live telephone or real-time electronic ~~conversations between a lawyer and a prospective client~~ contact can be disputed and may not be subject to third-party scrutiny. Consequently, they are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading.

[~~4~~5] There is far less likelihood that a lawyer would engage in abusive practices against ~~an individual who is~~ a former client, or a person with whom the lawyer has close personal or family relationship, or in situations in which the lawyer is motivated by considerations other than the lawyer's pecuniary gain. Nor is there a serious potential for abuse when the person contacted is a lawyer. Consequently, the general prohibition in Rule 7.3(a) and the requirements of Rule 7.3(c) are not applicable in those situations. Also, paragraph (a) is not intended to prohibit a lawyer from participating in constitutionally protected activities of public or charitable legal-service organizations or bona fide political, social, civic, fraternal, employee or trade organizations whose purposes include providing or recommending legal services to ~~its~~ their members or beneficiaries.

[~~5~~6] But even permitted forms of solicitation can be abused. Thus, any solicitation which contains information which is false or misleading within the meaning of Rule 7.1, which involves coercion, duress or harassment within the meaning of Rule 7.3(b)(2), or which involves contact with ~~a prospective client~~ someone who has made known to the lawyer a desire not to be solicited by the lawyer within the meaning of Rule 7.3(b)(1) is prohibited. Moreover, if after sending a letter or other communication ~~to a client~~ as permitted by Rule 7.2 the lawyer receives no response, any further effort to communicate with the recipient of the communication ~~prospective client~~ may violate the provisions of

Rule 7.3(b).

[~~6~~7] This Rule is not intended to prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a group or prepaid legal plan for their members, insureds, beneficiaries or other third parties for the purpose of informing such entities of the availability of and details concerning the plan or arrangement which the lawyer or lawyer's firm is willing to offer. This form of communication is not directed to people who are seeking legal services for themselves. ~~a prospective client~~. Rather, it is usually addressed to an individual acting in a fiduciary capacity seeking a supplier of legal services for others who may, if they choose, become prospective clients of the lawyer. Under these circumstances, the activity which the lawyer undertakes in communicating with such representatives and the type of information transmitted to the individual are functionally similar to and serve the same purpose as advertising permitted under Rule 7.2.

[~~7~~8] The requirement in Rule 7.3(c) that certain communications be marked "Advertising Material" does not apply to communications sent in response to requests of potential clients or their spokespersons or sponsors. General announcements by lawyers, including changes in personnel or office location, do not constitute communications soliciting professional employment from a client known to be in need of legal services within the meaning of this Rule.

[~~8~~9] Paragraph (d) of this Rule permits a lawyer to participate with an organization which uses personal contact to solicit members for its group or prepaid legal service plan, provided that the personal contact is not undertaken by any lawyer who would be a provider of legal services through the plan. The organization must not be owned by or directed (whether as manager or otherwise) by any lawyer or law firm that participates in the plan. For example, paragraph (d) would not permit a lawyer to create an organization controlled directly or indirectly by the lawyer and use the organization for the in-person or telephone solicitation of legal employment of the lawyer through memberships in the plan or otherwise. The communication permitted by these organizations also must not be directed to a person known to need legal services in a particular matter, but is to be designed to inform potential plan members generally of another means of affordable legal services. Lawyers who participate in a legal service plan must reasonably assure that the plan sponsors are in compliance with Rules 7.1, 7.2 and 7.3(b). See 8.4(a).

...

AUGUST 2012 AMENDMENTS
TO OTHER ABA POLICIES

ABA Model Rule on Practice Pending Admission [NEW]

1. A lawyer currently holding an active license to practice law in another U.S. jurisdiction and who has been engaged in the active practice of law for three of the last five years, may provide legal services in this jurisdiction through an office or other systematic and continuous presence for no more than [365] days, provided that the lawyer:

   a. is not disbarred or suspended from practice in any jurisdiction and is not currently subject to discipline or a pending disciplinary matter in any jurisdiction;

   b. has not previously been denied admission to practice in this jurisdiction or failed this jurisdiction's bar examination;

   c. notifies Disciplinary Counsel and the Admissions Authority in writing prior to initiating practice in this jurisdiction that the lawyer will be doing so pursuant to the authority in this Rule;

   d. submits within [45] days of first establishing an office or other systematic and continuous presence for the practice of law in this jurisdiction a complete application for admission by motion or by examination;

   e. reasonably expects to fulfill all of this jurisdiction's requirements for that form of admission;

   f. associates with a lawyer who is admitted to practice in this jurisdiction;

   g. complies with Rules 7.1 and 7.5 of the Model Rules of Professional Conduct [or jurisdictional equivalent] in all communications with the public and clients regarding the nature and scope of the lawyer's practice authority in this jurisdiction; and

   h. pays any annual client protection fund assessment.

2. A lawyer currently licensed as a foreign legal consultant in another U.S. jurisdiction may provide legal services in this jurisdiction through an office or other systematic and continuous presence for no more than [365] days, provided that the lawyer:

   a. provides services that are limited to those that may be provided in this jurisdiction by foreign legal consultants;

   b. is a member in good standing of a recognized legal profession in the foreign jurisdiction, the members of which are admitted to practice as lawyers or counselors at law or the equivalent, and are subject to effective regulation and discipline by a duly constituted professional body or a public authority;

   c. submits within [45] days of first establishing an office or other systematic and continuous presence for the practice of law in this jurisdiction a complete application for admission to practice as a foreign legal consultant;

d. reasonably expects to fulfill all of this jurisdiction's requirements for admission as a foreign legal consultant; and

e. meets the requirements of paragraphs 1(a), (b), (c), (f), (g), and (h) of this Rule.

3. Prior to admission by motion, through examination, or as a foreign legal consultant, the lawyer may not appear before a tribunal in this jurisdiction that requires *pro hac vice* admission unless the lawyer is granted such admission.

4. The lawyer must immediately notify Disciplinary Counsel and the Admissions Authority in this jurisdiction if the lawyer becomes subject to a disciplinary matter or disciplinary sanctions in any other jurisdiction at any time during the [365] days of practice authorized by this Rule. The Admissions Authority shall take into account such information in determining whether to grant the lawyer's application for admission to this jurisdiction.

5. The authority in this Rule shall terminate immediately if:

a. the lawyer withdraws the application for admission by motion, by examination, or as a foreign legal consultant, or if such application is denied, prior to the expiration of [365] days;

b. the lawyer fails to file the application for admission within [45] days of first establishing an office or other systematic and continuous presence for the practice of law in this jurisdiction;

c. the lawyer fails to remain in compliance with Paragraph 1 of this Rule;

d. the lawyer is disbarred or suspended in any other jurisdiction in which the lawyer is licensed to practice law; or

e. the lawyer has not complied with the notification requirements of Paragraph 4 of this Rule.

6. Upon the termination of authority pursuant to Paragraph 5, the lawyer, within [30] days, shall:

a. cease to occupy an office or other systematic and continuous presence for the practice of law in this jurisdiction unless authorized to do so pursuant to another Rule;

b. notify all clients being represented in pending matters, and opposing counsel or co-counsel of the termination of the lawyer's authority to practice pursuant to this Rule;

c. not undertake any new representation that would require the lawyer to be admitted to practice law in this jurisdiction; and

d. take all other necessary steps to protect the interests of the lawyer's clients.

7. Upon the denial of the lawyer's application for admission by motion, by examination, or as a foreign legal consultant, the Admissions Authority shall immediately notify Disciplinary Counsel that the authority granted by this Rule has terminated.

8. The Court, in its discretion, may extend the time limits set forth in this Rule for good cause shown.

Comment

[1] This Rule recognizes that a lawyer admitted in another jurisdiction may need to relocate to or commence practice in this jurisdiction, sometimes on short notice. The admissions process can take considerable time, thus placing a lawyer at risk of engaging in the unauthorized practice of law and leaving the lawyer's clients without the benefit of their chosen counsel. This Rule closes this gap by authorizing the lawyer to practice in this jurisdiction for a limited period of time, up to 365 days, subject to restrictions, while the lawyer diligently seeks admission. The practice authority provided pursuant to this Rule commences immediately upon the lawyer's establishment of an office or other systematic and continuous presence for the practice of law.

[2] Paragraph 1(f) requires a lawyer practicing in this jurisdiction pursuant to the authority granted under this Rule to associate with a lawyer who is admitted to practice law in this jurisdiction. The association between the incoming lawyer and the lawyer licensed in this jurisdiction is akin to that between a local lawyer and a lawyer practicing in a jurisdiction on a temporary basis pursuant to Model Rule of Professional Conduct 5.5(c)(1).

[3] While exercising practice authority pursuant to this Rule, a lawyer cannot hold out to the public or otherwise represent that the lawyer is admitted to practice in this jurisdiction. See Model Rule of Professional Conduct 5.5(b)(2). Because such a lawyer will typically be assumed to be admitted to practice in this jurisdiction, that lawyer must disclose the limited practice authority and jurisdiction of licensure in all communications with potential clients, such as on business cards, websites, and letterhead. Further, the lawyer must disclose the limited practice authority to all potential clients before agreeing to represent them. See Model Rules 7.1 and 7.5(b).

[4] The provisions of paragraph 5 (a) through (d) of this Rule are necessary to avoid prejudicing the rights of existing clients or other parties. Thirty days should be sufficient for the lawyer to wind up his or her practice in this jurisdiction in an orderly manner.

ABA Model Rule on Admission by Motion

1. An applicant who meets the requirements of (a) through (g) of this Rule may, upon motion, be admitted to the practice of law in this jurisdiction. The applicant shall:

    (a) have been admitted to practice law in another state, territory, or the District of Columbia;
    (b) hold a J.D. or LL.B. degree from a law school approved by the Council of the Section of Legal Education and Admissions to the Bar of the American Bar Association at the time the applicant matriculated or graduated;
    (c) have been primarily engaged in the active practice of law in one or more states, territories or the District of Columbia for ~~five~~ three of the ~~seven~~ five years immediately preceding the date upon which the application is filed;
    (d) establish that the applicant is currently a member in good standing in all jurisdictions where admitted;
    (e) establish that the applicant is not currently subject to lawyer discipline or the subject of a pending disciplinary matter in any jurisdiction;
    (f) establish that the applicant possesses the character and fitness to practice law in this jurisdiction; and
    (g) designate the Clerk of the jurisdiction's highest court for service of process.

For purposes of this ~~r~~Rule, the "active practice of law" shall include the following activities, if performed in a jurisdiction in which the applicant is admitted and authorized to practice, or if performed in a jurisdiction that affirmatively permits such activity by a lawyer not admitted in that jurisdiction; however, in no event shall any activities that were performed pursuant to the Model Rule on Practice Pending Admission or in advance of bar admission in some state, territory, or the District of Columbia be accepted toward the durational requirement:

    (a) Representation of one or more clients in the private practice of law;
    (b) Service as a lawyer with a local, state, territorial or federal agency, including military service;
    (c) Teaching law at a law school approved by the Council of the Section of Legal Education and Admissions to the Bar of the American Bar Association;
    (d) Service as a judge in a federal, state, territorial or local court of record;
    (e) Service as a judicial law clerk; or
    (f) Service as in-house counsel provided to the lawyer's employer or its organizational affiliates.

3. For purposes of this ~~r~~Rule, the active practice of law shall not include work that, as undertaken, constituted the unauthorized practice of law in the jurisdiction in which it was performed or in the jurisdiction in which the clients receiving the unauthorized services were located.

4. An applicant who has failed a bar examination administered in this jurisdiction within five years of the date of filing an application under this ~~r~~Rule shall not be eligible for admission on motion.

FURTHER RESOLVED: That the American Bar Association urges jurisdictions that have not adopted the Model Rule on Admission by Motion to do so, and urges jurisdictions that have adopted admission by motion procedures to eliminate any restrictions that do not appear in the Model Rule on Admission by Motion.

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AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY
SECTION OF CIVIL RIGHTS AND SOCIAL JUSTICE
COMMISSION ON DISABILITY RIGHTS
DIVERSITY & INCLUSION 360 COMMISSION
COMMISSION ON RACIAL AND ETHNIC DIVERSITY IN THE PROFESSION
COMMISSION ON SEXUAL ORIENTATION AND GENDER IDENTITY
COMMISSION ON WOMEN IN THE PROFESSION

REPORT TO THE HOUSE OF DELEGATES

REVISED RESOLUTION

RESOLVED, That the American Bar Association amends Rule 8.4 and Comment of the ABA Model Rules of Professional Conduct as follows (insertions underlined, deletions ~~struck through~~):

Rule 8.4: Misconduct

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law; ~~or~~

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law; or

(g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination ~~harass or discriminate~~ on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This ~~Rule~~ paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.

Comment

[1] Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so or do so through the acts of another, as when they request or instruct an agent to do so on the lawyer's behalf. Paragraph (a), however, does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.

[2] Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

~~[3] A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.~~

[3] Discrimination and harassment by lawyers in violation of paragraph (g) undermines confidence in the legal profession and the legal system. Such discrimination includes harmful verbal or physical conduct that manifests bias or prejudice towards others ~~because of their membership or perceived membership in one or more of the groups listed in paragraph (g).~~ Harassment includes sexual harassment and derogatory or demeaning verbal or physical conduct ~~towards a person who is, or is perceived to be, a member of one of the groups.~~ Sexual harassment includes unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature. The substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (g).

[4] Conduct related to the practice of law includes representing clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business or social activities in connection with the practice of law. ~~Paragraph (g) does not prohibit conduct undertaken to promote diversity.~~ Lawyers may engage in conduct undertaken to promote diversity and inclusion without violating this Rule by, for example, implementing initiatives aimed at

recruiting, hiring, retaining and advancing diverse employees or sponsoring diverse law student organizations.

~~[5] Paragraph (g) does not prohibit legitimate advocacy that is material and relevant to factual or legal issues or arguments in a representation.~~ A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (g). A lawyer does not violate paragraph (g) by limiting the scope or subject matter of the lawyer's practice or by limiting the lawyer's practice to members of underserved populations in accordance with these Rules and other law. A lawyer may charge and collect reasonable fees and expenses for a representation. Rule 1.5(a). Lawyers also should be mindful of their professional obligations under Rule 6.1 to provide legal services to those who are unable to pay, and their obligation under Rule 6.2 not to avoid appointments from a tribunal except for good cause. *See* Rule 6.2(a), (b) and (c). A lawyer's representation of a client does not constitute an endorsement by the lawyer of the client's views or activities. *See* Rule 1.2(b).

~~[4]~~ [6] A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of Rule 1.2(d) concerning a good faith challenge to the validity, scope, meaning or application of the law apply to challenges of legal regulation of the practice of law.

~~[5]~~ [7] Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.

REVISED 109

REPORT

"Lawyers have a unique position in society as professionals responsible for making our society better. Our rules of professional conduct require more than mere compliance with the law. Because of our unique position as licensed professionals and the power that it brings, we are the standard by which all should aspire. Discrimination and harassment . . . is, and unfortunately continues to be, a problem in our profession and in society. Existing steps have not been enough to end such discrimination and harassment."

ABA President Paulette Brown, February 7, 2016 public hearing on amendments to ABA Model Rule 8.4, San Diego, California.

I. Introduction and Background

The American Bar Association has long recognized its responsibility to represent the legal profession and promote the public's interest in equal justice for all. Since 1983, when the Model Rules of Professional Conduct ("Model Rules") were first adopted by the Association, they have been an invaluable tool through which the Association has met these dual responsibilities and led the way toward a more just, diverse and fair legal system. Lawyers, judges, law students and the public across the country and around the world look to the ABA for this leadership.

Since 1983, the Association has also spearheaded other efforts to promote diversity and fairness. In 2008 ABA President Bill Neukum led the Association to reformulate its objectives into four major "Goals" that were adopted by the House of Delegates.[1] Goal III is entitled, "Eliminate Bias and Enhance Diversity." It includes the following two objectives:

1. Promote full and equal participation in the association, our profession, and the justice system by all persons.
2. Eliminate bias in the legal profession and the justice system.

A year before the adoption of Goal III the Association had already taken steps to address the second Goal III objective. In 2007 the House of Delegates adopted revisions to the Model Code of Judicial Conduct to include Rule 2.3, entitled, "Bias, Prejudice and Harassment." This rule prohibits judges from speaking or behaving in a way that manifests, "bias or prejudice," and from engaging in harassment, "based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation." It also calls upon judges to require lawyers to refrain from these activities in proceedings before the court.[2] This current proposal now before the House will further implement the Association's Goal III objectives by placing a similar provision into the Model Rules for lawyers.

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[1] ABA MISSION AND GOALS, http://www.americanbar.org/about_the_aba/aba-mission-goals.html (last visited May 9, 2016).

[2] Rule 2.3(C) of the ABA Model Code of Judicial Conduct reads: "A judge shall require lawyers in proceedings before the court to refrain from manifesting bias or prejudice, or engaging in harassment, based upon attributes including but not limited to race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, against parties, witnesses, lawyers, or others."

When the Model Rules were first adopted in 1983 they did not include any mention of or reference to bias, prejudice, harassment or discrimination. An effort was made in 1994 to correct this omission; the Young Lawyers Division and the Standing Committee on Ethics and Professional Responsibility (SCEPR") each proposed language to add a new paragraph (g) to Rule 8.4, "Professional Misconduct," to specifically identify bias and prejudice as professional misconduct. However, in the face of opposition these proposals were withdrawn before being voted on in the House. But many members of the Association realized that something needed to be done to address this omission from the Model Rules. Thus, four years later, in February 1998, the Criminal Justice Section and SCEPR developed separate proposals to add a new antidiscrimination provision into the Model Rules. These proposals were then combined into Comment [3] to Model Rule 8.4, which was adopted by the House at the Association's Annual Meeting in August 1998. This Comment [3] is discussed in more detail below. Hereinafter this Report refers to current Comment [3] to 8.4 as "the current provision."

It is important to acknowledge that the current provision was a necessary and significant first step to address the issues of bias, prejudice, discrimination and harassment in the Model Rules. But it should not be the last step for the following reasons. It was adopted before the Association adopted Goal III as Association policy and does not fully implement the Association's Goal III objectives. It was also adopted before the establishment of the Commission on Sexual Orientation and Gender Identity, one of the co-sponsors of this Resolution, and the record does not disclose the participation of any of the other Goal III Commissions—the Commission on Women in the Profession, Commission on Racial and Ethnic Diversity in the Profession, and the Commission on Disability Rights—that are the catalysts for these current amendments to the Model Rules.

Second, Comments are not Rules; they have no authority as such. Authority is found only in the language of the Rules. "The Comments are intended as guides to interpretation, but the text of each Rule is authoritative."[3]

Third, even if the text of the current provision were in a Rule it would be severely limited in scope: It applies (i) only to conduct by a lawyer that occurs in the course of representing a client, and (ii) *only* if such conduct is also determined to be "prejudicial to the administration of justice." As the Association's Goal III Commissions noted in their May 2014 letter to SCEPR:

> It [the current provision] addresses bias and prejudice only within the scope of legal representation and only when it is prejudicial to the administration of justice. This limitation fails to cover bias or prejudice in other professional capacities (including attorneys as advisors, counselors, and lobbyists) or other professional settings (such as law schools, corporate law departments, and employer-employee relationships within law firms). The comment also does not address harassment at all, even though the judicial rules do so.

In addition, despite the fact that Comments are not Rules, a false perception has developed over the years that the current provision is equivalent to a Rule. In fact, this is the only example in the Model Rules where a Comment is purported to "solve" an ethical issue that otherwise would require resolution through a Rule. Now—thirty-three years after the Model Rules were first

[3] MODEL RULES OF PROF'L CONDUCT, Preamble & Scope [21] (2016).

adopted and eighteen years after the first step was taken to address this issue—it is time to address this concern in the black letter of the Rules themselves. In the words of ABA President Paulette Brown: "The fact is that skin color, gender, age, sexual orientation, various forms of ability and religion still have a huge effect on how people are treated."[4] As the Recommendation and Report of the Oregon New Lawyers to the Assembly of the Young Lawyers Division at the Annual Meeting 2015 stated: "The current Model Rules of Professional Conduct (the "Model Rules"), however, do not yet reflect the monumental achievements that have been accomplished to protect clients and the public against harassment and intimidation."[5] The Association should now correct this omission. It is in the public's interest. It is in the profession's interest. It makes it clear that discrimination, harassment, bias and prejudice do not belong in conduct related to the practice of law.

II. Process

Over the past two years, SCEPR has publicly engaged in a transparent investigation to determine, first whether, and then how, the Model Rules should be amended to reflect the changes in law and practice since 1998. The emphasis has been on open discussion and publishing drafts of proposals to solicit feedback, suggestions and comments. SCEPR painstakingly took that feedback into account in subsequent drafts, until a final proposal was prepared.

This process began on May 13, 2014 when SCEPR received a joint letter from the Association's four Goal III Commissions: the Commission on Women in the Profession, Commission on Racial and Ethnic Diversity in the Profession, Commission on Disability Rights, and the Commission on Sexual Orientation and Gender Identify. The Chairs of these Commissions wrote to the SCEPR asking it to develop a proposal to amend the Model Rules of Professional Conduct to better address issues of harassment and discrimination and to implement Goal III. These Commissions explained that the current provision is insufficient because it "does not facially address bias, discrimination, or harassment and does not thoroughly address the scope of the issue in the legal profession or legal system."[6]

In the fall of 2014 a Working Group was formed under the auspices of SCEPR and chaired by immediate past SCEPR chair Paula Frederick, chief disciplinary counsel for the State Bar of Georgia. The Working Group members consisted of one representative each from SCEPR, the Association of Professional Responsibility Lawyers ("APRL"), the National Organization of Bar Counsel ("NOBC") and each of the Goal III Commissions. The Working Group held many teleconference meetings and two in-person meetings. After a year of work Chair Frederick

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[4] Paulette Brown, *Inclusion Not Exclusion: Understanding Implicit Bias is Key to Ensuring An Inclusive Profession*, ABA J. (Jan. 1, 2016, 4:00 AM), http://www.abajournal.com/magazine/article/inclusion_exclusion_understanding_implicit_bias_is_key_to_ensuring.

[5] In August 2015, unaware that the Standing Committee on Ethics and Professional Responsibility was researching this issue at the request of the Goal III Commissions, the Oregon State Bar New Lawyers Division drafted a proposal to amend the Model Rules of Professional Conduct to include an anti-harassment provision in the black letter. They submitted their proposal to the Young Lawyers Division Assembly for consideration. The Young Lawyers Division deferred on the Oregon proposal after learning of the work of the Standing Committee on Ethics and Professional Responsibility and the Goal III Commissions.

[6] Letter to Paula J. Frederick, Chair, ABA Standing Committee on Ethics and Professional Responsibility 2011-2014.

presented a memorandum of the Working Group's deliberations and conclusions to SCEPR in May 2015. In it, the Working Group concluded that there was a need to amend Model Rule 8.4 to provide a comprehensive antidiscrimination provision that was nonetheless limited to the practice of law, in the black letter of the rule itself, and not just in a Comment.

On July 8, 2015, after receipt and consideration of this memorandum, SCEPR prepared, released for comment and posted on its website a Working Discussion Draft of a proposal to amend Model Rule of Professional Conduct 8.4. SCEPR also announced and hosted an open invitation Roundtable discussion on this Draft at the Annual Meeting in Chicago on July 31, 2015.

At the Roundtable and in subsequent written communications SCEPR received numerous comments about the Working Discussion Draft. After studying the comments and input from the Roundtable, SCEPR published in December 2015 a revised draft of a proposal to add Rule 8.4(g), together with proposed new Comments to Rule 8.4. SCEPR also announced to the Association, including on the House of Delegates listserv, that it would host a Public Hearing at the Midyear Meeting in San Diego in February 2016.[7] Written comments were also invited.[8] President Brown and past President Laurel Bellows were among those who testified at the hearing in support of adding an antidiscrimination provision to the black letter Rule 8.4.

After further study and consideration SCEPR made substantial and significant changes to its proposal, taking into account the many comments it received on its earlier drafts.

III. Need for this Amendment to the Model Rules

As noted above, in August 1998 the American Bar Association House of Delegates adopted the current provision: Comment [3] to Model Rule of Professional Conduct 8.4, *Misconduct,* which explains that certain conduct may be considered "conduct prejudicial to the administration of justice," in violation of paragraph (d) to Rule 8.4, including when a lawyer knowingly manifests, by words or conduct, bias or prejudice against certain groups of persons, while in the course of representing a client *but only* when those words or conduct are also "prejudicial to the administration of justice."

Yet as the Preamble and Scope of the Model Rules makes clear, "Comments do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules."[9] Thus, the ABA did not squarely and forthrightly address prejudice, bias, discrimination and harassment as would have been the case if this conduct were addressed in the text of a Model Rule. Changing the Comment to a black letter rule makes an important statement to our profession and the public that the profession does not tolerate prejudice, bias, discrimination and harassment. It also clearly puts lawyers on notice that refraining from such conduct is more than an illustration in a comment to a rule about the administration of justice. It is a specific requirement.

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[7] *American Bar Association Public Hearing* (Feb. 7, 2016), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_model_rule%208_4_comments/february_2016_public_hearing_transcript.authcheckdam.pdf.

[8] MODEL RULE OF PROFESSIONAL CONDUCT 8.4 DEC. 22 DRAFT PROPOSAL COMMENTS RECEIVED, http://www.americanbar.org/groups/professional_responsibility/committees_commissions/ethicsandprofessionalresponsibility/modruleprofconduct8_4.html (last visited May 9, 2016).

[9] MODEL RULES OF PROF'L CONDUCT, Preamble & Scope [14] & [21] (2016).

Therefore, SCEPR, along with its co-sponsors, proposes amending ABA Model Rule of Professional Conduct 8.4 to further implement Goal III by bringing into the black letter of the Rules an antidiscrimination and anti-harassment provision. This action is consistent with other actions taken by the Association to implement Goal III and to eliminate bias in the legal profession and the justice system.

For example, in February 2015, the ABA House of Delegates adopted revised *ABA Standards for Criminal Justice: Prosecution Function and Defense Function,* which now include anti-bias provisions. These provisions appear in Standards 3-1.6 of the Prosecution Function Standards, and Standard 4.16 of the Defense Function Standards.[10] The Standards explain that prosecutors and defense counsel should not, "manifest or exercise, by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, gender identity or socioeconomic status." This statement appears in the black letter of the Standards, not in a comment. And, as noted above, one year before the adoption of Goal III, the Association directly addressed prejudice, bias and harassment in the black letter of Model Rule 2.3 in the 2007 Model Code of Judicial Conduct.

Some opponents to bringing an antidiscrimination and anti-harassment provision into the black letter of the Model Rules have suggested that the amendment is not necessary—that the current provision provides the proper level of guidance to lawyers. Evidence from the ABA and around the country suggests otherwise. For example:

- Twenty-five jurisdictions have not waited for the Association to act. They have already concluded that the current Comment to an ABA Model Rule does not adequately address discriminatory or harassing behavior by lawyers. As a result, they have adopted antidiscrimination and/or anti-harassment provisions into the black letter of their rules of professional conduct.[11] By contrast, only thirteen jurisdictions have decided to address this

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[10] ABA FOURTH EDITION CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION, http://www.americanbar.org/groups/criminal_justice/standards.html (last visited May 9, 2016); ABA FOURTH EDITION CRIMINAL JUSTICE STANDARDS FOR THE DEFENSE FUNCTION, http://www.americanbar.org/groups/criminal_justice/standards/DefenseFunctionFourthEdition.html (last visited May 9, 2016).

[11] *See* California Rule of Prof'l Conduct 2-400; Colorado Rule of Prof'l Conduct 8.4(g); Florida Rule of Prof'l Conduct 4-8.4(d); Idaho Rule of Prof'l Conduct 4.4 (a); Illinois Rule of Prof'l Conduct 8.4(j); Indiana Rule of Prof'l Conduct 8.4(g); Iowa Rule of Prof'l Conduct 8.4(g); Maryland Lawyers' Rules of Prof'l Conduct 8.4(e); Massachusetts Rule of Prof'l Conduct 3.4(i); Michigan Rule of Prof'l Conduct 6.5; Minnesota Rule of Prof'l Conduct 8.4(h); Missouri Rule of Prof'l Conduct 4-8.4(g); Nebraska Rule of Prof'l Conduct 8.4(d); New Jersey Rule of Prof'l Conduct 8.4(g); New Mexico Rule of Prof'l Conduct 16-300; New York Rule of Prof'l Conduct 8.4(g); North Dakota Rule of Prof'l Conduct 8.4(f); Ohio Rule of Prof'l Conduct 8.4(g); Oregon Rule of Prof'l Conduct 8.4(a)(7); Rhode Island Rule of Prof'l Conduct 8.4(d); Texas Rule of Prof'l Conduct 5.08; Vermont Rule of Prof'l Conduct 8.4(g); Washington Rule of Prof'l Conduct 8.4(g); Wisconsin Rule of Prof'l Conduct 8.4(i); D.C. Rule of Prof'l Conduct 9.1.

issue in a Comment similar to the current Comment in the Model Rules.[12] Fourteen states do not address this issue at all in their Rules of Professional Conduct.[13]

- As noted above, the ABA has already brought antidiscrimination and anti-harassment provisions into the black letter of other conduct codes like the *ABA Standards for Criminal Justice: Prosecution Function and Defense Function* and the 2007 ABA Model Code of Judicial Conduct, Rule 2.3.
- The Florida Bar's Young Lawyer's Division reported this year that in a survey of its female members, 43% of respondents reported they had experienced gender bias in their career.[14]
- The supreme courts of the jurisdictions that have black letter rules with antidiscrimination and anti-harassment provisions have not seen a surge in complaints based on these provisions. Where appropriate, they are disciplining lawyers for discriminatory and harassing conduct.[15]

IV. Summary of Proposed Amendments

A. Prohibited Activity

SCEPR's proposal adds a new paragraph (g) to Rule 8.4, to prohibit conduct by a lawyer related to the practice of law that harasses or discriminates against members of specified groups. New Comment [3] defines the prohibited behavior.

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[12] *See* Arizona Rule of Prof'l Conduct 8.4, cmt.; Arkansas Rule of Prof'l Conduct 8.4, cmt. [3]; Connecticut Rule of Prof'l Conduct 8.4, Commentary; Delaware Lawyers' Rule of Prof'l Conduct 8.4, cmt. [3]; Idaho Rule of Prof'l Conduct 8.4, cmt. [3]; Maine Rule of Prof'l Conduct 8.4, cmt. [3]; North Carolina Rule of Prof'l Conduct 8.4, cmt. [5]; South Carolina Rule of Prof'l Conduct 8.4, cmt. [3]; South Dakota Rule of Prof'l Conduct 8.4, cmt. [3]; Tennessee Rule of Prof'l Conduct 8.4, cmt. [3]; Utah Rule of Prof'l Conduct 8.4, cmt. [3]; Wyoming Rule of Prof'l Conduct 8.4, cmt. [3]; West Virginia Rule of Prof'l Conduct 8.4, cmt. [3].

[13] The states that do not address this issue in their rules include Alabama, Alaska, Georgia, Hawaii, Kansas, Kentucky, Louisiana, Mississippi, Montana, Nevada, New Hampshire, Oklahoma, Pennsylvania, and Virginia.

[14] The Florida Bar, *Results of the 2015 YLD Survey on Women in the Legal Profession* (Dec. 2015), http://www.floridabar.org/TFB/TFBResources.nsf/Attachments/13AC70483401E7C785257F640064CF63/$FILE/RESULTS%20OF%202015%20SURVEY.pdf?OpenElement.

[15] In 2015 the Iowa Supreme Court disciplined a lawyer for sexually harassing four female clients and one female employee. *In re* Moothart, 860 N.W.2d 598 (2015). The Wisconsin Supreme Court in 2014 disciplined a district attorney for texting the victim of domestic abuse writing that he wished the victim was not a client because she was "a cool person to know." On one day, the lawyer sent 19 text messages asking whether the victim was the "kind of girl who likes secret contact with an older married elected DA . . . the riskier the better." One day later, the lawyer sent the victim 8 text messages telling the victim that she was pretty and beautiful and that he had a $350,000 home. *In re* Kratz, 851 N.W.2d 219 (2014). The Minnesota Supreme Court in 2013 disciplined a lawyer who, while acting as an adjunct professor and supervising law students in a clinic, made unwelcome comments about the student's appearance; engaged in unwelcome physical contact of a sexual nature with the student; and attempted to convince the student to recant complaints she had made to authorities about him. *In re* Griffith, 838 N.W.2d 792 (2013). The Washington Supreme Court in 2012 disciplined a lawyer, who was representing his wife and her business in dispute with employee who was Canadian. The lawyer sent two ex parte communications to the trial judge asking questions like: are you going to believe an alien or a U.S. citizen? *In re* McGrath, 280 P.3d 1091 (2012). The Indiana Supreme Court in 2009 disciplined a lawyer who, while representing a father at a child support modification hearing, made repeated disparaging references to the facts that the mother was not a U.S. citizen and was receiving legal services at no charge. *In re* Campiti, 937 N.E.2d 340 (2009). The Indiana Supreme Court in 2005 disciplined a lawyer who represented a husband in an action for dissolution of marriage. Throughout the custody proceedings the lawyer referred to the wife being seen around town in the presence of a "black male" and that such association was placing the children in harm's way. During a hearing, the lawyer referred to the African-American man as "the black guy" and "the black man." *In re* Thomsen, 837 N.E.2d 1011 (2005).

Proposed new black letter Rule 8.4(g) does not use the terms "manifests . . . bias or prejudice"[16] that appear in the current provision. Instead, the new rule adopts the terms "harassment and discrimination" that already appear in a large body of substantive law, antidiscrimination and anti-harassment statutes, and case law nationwide and in the Model Judicial Code. For example, in new Comment [3], "harassment" is defined as including "sexual harassment and derogatory or demeaning verbal or physical conduct . . . . of a sexual nature." This definition is based on the language of Rule 2.3(C) of the ABA Model Code of Judicial Conduct and its Comment [4], adopted by the House in 2007 and applicable to lawyers in proceedings before a court.[17]

Discrimination is defined in new Comment [3] as "harmful verbal or physical conduct that manifests bias or prejudice towards others." This is based in part on ABA Model Code of Judicial Conduct, Rule 2.3, Comment [3], which notes that harassment, one form of discrimination, includes "verbal or physical conduct," and on the current rule, which prohibits lawyers from manifesting bias or prejudice while representing clients.

Proposed new Comment [3] also explains, "The substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (g)." This provision makes clear that the substantive law on antidiscrimination and anti-harassment is not necessarily dispositive in the disciplinary context. Thus, conduct that has a discriminatory impact alone, while possibly dispositive elsewhere, would not necessarily result in discipline under new Rule 8.4(g). But, substantive law regarding discrimination and harassment can also guide a lawyer's conduct. As the Preamble to the Model Rules explains, "A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs."[18]

B. Knowledge Requirement

SCEPR has received substantial and helpful comment that the absence of a "mens rea" standard in the rule would provide inadequate guidance to lawyers and disciplinary authorities. After consultation with cosponsors, SCEPR concluded that the alternative standards "knows or reasonably should know" should be included in the new rule. Consequently, revised Rule 8.4(g) would make it professional misconduct for a lawyer to "engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination...."

Both "knows" and "reasonably should know" are defined in the Model Rules. Rule 1.0(f) defines "knows" to denote "actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances." The inference to be made in this situation is not what the lawyer should or might have known, but whether one can infer from the circumstances what the lawyer actually knew. Thus, this is a subjective standard; it depends on ascertaining the lawyer's actual state of mind. The evidence, or "circumstances," may or may not support an inference about what the lawyer knew about his or her conduct.

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[16] The phrase, "manifestations of bias or prejudice" is utilized in proposed new Comment [3].

[17] ABA Model Code of Judicial Conduct Rule 2.3, Comment [4] reads: "Sexual harassment includes but is not limited to sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature that is unwelcome."

[18] MODEL RULES OF PROF'L CONDUCT, Preamble & Scope [5] (2016).

Rule 1.0(j) defines "reasonably should know" when used in reference to a lawyer to denote "that a lawyer of reasonable prudence and competence would ascertain the matter in question." The test here is whether a lawyer of reasonable prudence and competence would have comprehended the facts in question. Thus, this is an objective standard; it does not depend on the particular lawyer's actual state of mind. Rather, it asks what a lawyer of reasonable prudence and competence would have comprehended from the circumstances presented.

SCEPR believes that any standard for the conduct to be addressed in Rule 8.4(g) must include as alternatives, both the "knowing" and "reasonably should know" standards as defined in Rule 1.0. As noted, one standard is a subjective and the other is objective. Thus, they do not overlap; and one cannot serve as a substitute for the other. Taken together, these two standards provide a safeguard for lawyers against overaggressive prosecutions for conduct they could not have known was harassment or discrimination, as well as a safeguard against evasive defenses of conduct that any reasonable lawyer would have known is harassment or discrimination.

There is also ample precedent for using the "knows or reasonably should know" formulation in proposed Rule 8.4(g). It has been part of the Model Rules since 1983. Currently, it is used in Rule 1.13(f), Rule 2.3(b), Rule 2.4(b), Rule 3.6(a), Rule 4.3 [twice] and Rule 4.4(b).

"Harassment" and "discrimination" are terms that denote actual conduct. As explained in proposed new Comment [3], both "harassment" and "discrimination" are defined to include verbal and physical conduct against others. The proposed rule would not expand on what would be considered harassment and discrimination under federal and state law. Thus, the terms used in the rule—"harassment" and "discrimination"—by their nature incorporate a measure of intentionality while also setting a minimum standard of acceptable conduct. This does not mean that complainants should have to establish their claims in civil courts before bringing disciplinary claims. Rather, it means that the rule intends that these words have the meaning established at law.

The addition of "knows or reasonably should know" as a part of the standard for the lawyer supports the rule's focus on conduct and resolves concerns of vagueness or uncertainty about what behavior is expected of the lawyer.

C. Scope of the Rule

Proposed Rule 8.4(g) makes it professional misconduct for a lawyer to harass or discriminate while engaged in "conduct related to the practice of law" when the lawyer knew or reasonably should have known the conduct was harassment or discrimination. The proposed rule is constitutionally limited; it does not seek to regulate harassment or discrimination by a lawyer that occurs outside the scope of the lawyer's practice of law, nor does it limit a lawyer's representational role in our legal system. It does not limit the scope of the legal advice a lawyer may render to clients, which is addressed in Model Rule 1.2. It permits legitimate advocacy. It does not change the circumstances under which a lawyer may accept, decline or withdraw from a representation. To the contrary, the proposal makes clear that Model Rule 1.16 addresses such conduct. The proposal also does not limit a lawyer's ability to charge and collect a reasonable fee for legal services, which remains governed by Rule 1.5.

Note also that while the provision in current Comment [3] limits the scope of Rule 8.4(d) to situations where the lawyer is representing clients, Rule 8.4(d) itself is not so limited. In fact, lawyers have been disciplined under Rule 8.4(d) for conduct that does not involve the representation of clients.[19]

Some commenters expressed concern that the phrase, "conduct related to the practice of law," is vague. "The definition of the practice of law is established by law and varies from one jurisdiction to another."[20] The phrase "conduct related to" is elucidated in the proposed new Comments and is consistent with other terms and phrases used in the Rules that have been upheld against vagueness challenges.[21] The proposed scope of Rule 8.4(g) is similar to the scope of existing antidiscrimination provisions in many states.[22]

Proposed new Comment [4] explains that conduct related to the practice of law includes, "representing clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business or social activities *in connection with the practice of law*." (Emphasis added.) The nexus of the conduct regulated by the rule is that it is conduct lawyers are permitted or required to engage in because of their work as a lawyer.

The scope of proposed 8.4(g) is actually narrower and more limited than is the scope of other Model Rules. "[T]here are Rules that apply to lawyers who are not active in the practice of law or to practicing lawyers even when they are acting in a nonprofessional capacity."[23] For example, paragraph (c) to Rule 8.4 declares that it is professional misconduct for a lawyer to engage in conduct "involving dishonesty, fraud, deceit or misrepresentation." Such conduct need not be

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[19] *See, e.g.*, Neal v. Clinton, 2001 WL 34355768 (Ark. Cir. Ct. Jan. 19, 2001).

[20] MODEL RULES OF PROF'L CONDUCT R. 5.5 cmt. [2].

[21] *See, e.g.*, Grievance Adm'r v. Fieger, 719 N.E.2d 123 (Mich. 2016) (rejecting a vagueness challenge to rules requiring lawyers to "treat with courtesy and respect all person involved in the legal process" and prohibiting "undignified or discourteous conduct toward [a] tribunal"); Chief Disciplinary Counsel v. Zelotes, 98 A.3d 852 (Conn. 2014) (rejecting a vagueness challenge to "conduct prejudicial to the administration of justice"); Florida Bar v. Von Zamft, 814 So. 2d 385 (2002); *In re* Anonymous Member of South Carolina Bar, 709 S.E.2d 633 (2011) (rejecting a vagueness challenge to the following required civility clause: "To opposing parties and their counsel, I pledge fairness, integrity, and civility . . . . "); Canatella v. Stovitz, 365 F.Supp.2d 1064 (N.D. Cal. 2005) (rejecting a vagueness challenge to these terms regulating lawyers in the California Business and Profession Code: "willful," "moral turpitude," "dishonesty," and "corruption"); Motley v. Virginia State Bar, 536 S.E.2d 97 (Va. 2000) (rejecting a vagueness challenge to a rule requiring lawyers to keep client's "reasonably informed about matters in which the lawyer's services are being rendered"); *In re* Disciplinary Proceedings Against Beaver, 510 N.W.2d 129 (Wis. 1994) (rejecting a vagueness challenge to a rule against "offensive personality").

[22] *See* Florida Rule of Professional Conduct 4-8.4(d) which addresses conduct "in connection with the practice of law"; Indiana Rule of Prof'l Conduct 8.4(g) which addresses conduct a lawyer undertakes in the lawyer's "professional capacity"; Iowa Rule of Prof'l Conduct 8.4(g) which addresses conduct "in the practice of law"; Maryland Lawyers' Rules of Prof'l Conduct 8.4(e) with the scope of "when acting in a professional capacity"; Minnesota Rule of Prof'l Conduct 8.4(h) addressing conduct "in connection with a lawyer's professional activities"; New Jersey Rule of Prof'l Conduct 8.4(g) addressing when a lawyer's conduct is performed "in a professional capacity"; New York Rule of Prof'l Conduct 8.4(g) covering conduct "in the practice of law"; Ohio Rule of Prof'l Conduct 8.4(g) addressing when lawyer "engage, in a professional capacity, in conduct"; Washington Rule of Prof'l Conduct 8.4(g) covering "connection with the lawyer's professional activities"; and Wisconsin Rule of Prof'l Conduct 8.4(i) with a scope of conduct "in connection with the lawyer's professional activities."

[23] MODEL RULES OF PROF'L CONDUCT, Preamble [3].

related to the lawyer's practice of law, but may reflect adversely on the lawyer's fitness to practice law or involve moral turpitude.[24]

However, insofar as proposed Rule 8.4(g) applies to "conduct related to the practice of law," it is broader than the current provision. This change is necessary. The professional roles of lawyers include conduct that goes well beyond the representation of clients before tribunals. Lawyers are also officers of the court, managers of their law practices and public citizens having a special responsibility for the administration justice.[25] Lawyers routinely engage in organized bar-related activities to promote access to the legal system and improvements in the law. Lawyers engage in mentoring and social activities related to the practice of law. And, of course, lawyers are licensed by a jurisdiction's highest court with the privilege of practicing law. The ethics rules should make clear that the profession will not tolerate harassment and discrimination in any conduct related to the practice of law.

Therefore, proposed Comment [4] explains that operating or managing a law firm is conduct related to the practice of law. This includes the terms and conditions of employment. Some commentators objected to the inclusion of workplace harassment and discrimination within the scope of the Rule on the ground that it would bring employment law into the Model Rules. This objection is misplaced. First, in at least two jurisdictions that have adopted an antidiscrimination Rule, the provision is focused entirely on employment and the workplace.[26] Other jurisdictions have also included workplace harassment and discrimination among the conduct prohibited in their Rules.[27] Second, professional misconduct under the Model Rules already applies to substantive areas of the law such as fraud and misrepresentation. Third, that part of the management of a law practice that includes the solicitation of clients and advertising of legal services is already subjects of regulation under the Model Rules.[28] And fourth, this would not be the first time the House of Delegates adopted policy on the terms and conditions of lawyer employment. In 2007, the House of Delegates adopted as ABA policy a recommendation that law firms should discontinue mandatory age-based retirement polices,[29] and earlier, in 1992, the House recognized that "sexual harassment is a serious problem in all types of workplace settings, including the legal profession, and constitutes a discriminatory and unprofessional practice that must not be tolerated in any work

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[24] MODEL RULES OF PROF'L CONDUCT R. 8.4 cmt. [2].

[25] MODEL RULES OF PROF'L CONDUCT, Preamble [1] & [6].

[26] *See* D.C. Rule of Prof'l Conduct 9.1 & Vermont Rule of Prof'l Conduct 8.4(g). The lawyer population for Washington DC is 52,711 and Vermont is 2,326. Additional lawyer demographic information is available on the American Bar Association website: http://www.americanbar.org/resources_for_lawyers/profession_statistics.html.

[27] Other jurisdictions have specifically included workplace harassment and discrimination among the conduct prohibited in their Rules. Some jurisdictions that have included workplace harassment and discrimination as professional misconduct require a prior finding of employment discrimination by another tribunal. *See* California Rule of Prof'l Conduct 2-400 (lawyer population 167,690); Illinois Rule of Prof'l conduct 8.4(j) (lawyer population 63,060); New Jersey Rule of Prof'l Conduct 8.4(g) (lawyer population 41,569); and New York Rule of Prof'l Conduct 8.4(g) (lawyer population 175,195). Some jurisdictions that have included workplace harassment and discrimination as professional misconduct require that the conduct be unlawful. S*ee, e.g.*, Iowa Rule of Prof'l Conduct 8.4(g) (lawyer population of 7,560); Ohio Rule of Prof'l Conduct 8.4(g) (lawyer population 38,237); and Minnesota Rule of Prof'l Conduct 8.4(h) (lawyer population 24,952). Maryland has included workplace harassment and discrimination as professional misconduct when the conduct is prejudicial to the administration of justice. Maryland Lawyers' Rules of Prof'l Conduct 8.4(e), cmt. [3] (lawyer population 24,142).

[28] *See* MODEL RULES OF PROFESSIONAL CONDUCT R. 7.1 - 7.6.

[29] ABA HOUSE OF DELEGATES RESOLUTION 10A (Aug. 2007).

environment."[30] When such conduct is engaged in by lawyers it is appropriate and necessary to identify it for what it is: professional misconduct.

This Rule, however, is not intended to replace employment discrimination law. The many jurisdictions that already have adopted similar rules have not experienced a mass influx of complaints based on employment discrimination or harassment. There is also no evidence from these jurisdictions that disciplinary counsel became the tribunal of first resort for workplace harassment or discrimination claims against lawyers. This Rule would not prohibit disciplinary counsel from deferring action on complaints, pending other investigations or actions.

Equally important, the ABA should not adopt a rule that would apply to lawyers acting outside of their own law firms or law practices but not to lawyers acting within their offices, toward each other and subordinates. Such a dichotomy is unreasonable and unsupportable.

As also explained in proposed new Comment [4], conduct related to the practice of law includes activities such as law firm dinners and other nominally social events at which lawyers are present solely because of their association with their law firm or in connection with their practice of law. SCEPR was presented with substantial anecdotal information that sexual harassment takes place at such events. "Conduct related to the practice of law" includes these activities.

Finally with respect to the scope of the rule, some commentators suggested that because legal remedies are available for discrimination and harassment in other forums, the bar should not permit an ethics claim to be brought on that basis until the claim has first been presented to a legal tribunal and the tribunal has found the lawyer guilty of or liable for harassment or discrimination.

SCEPR has considered and rejected this approach for a number of reasons. Such a requirement is without precedent in the Model Rules. There is no such limitation in the current provision. Legal ethics rules are not dependent upon or limited by statutory or common law claims. The ABA takes pride in the fact that "the legal profession is largely self-governing."[31] As such, "a lawyer's failure to comply with an obligation or prohibition imposed by a Rule is a basis for invoking the disciplinary process," not the civil legal system.[32] The two systems run on separate tracks.

The Association has never before required that a party first invoke the civil legal system before filing a grievance through the disciplinary system. In fact, as a self-governing profession we have made it clear that "[v]iolation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached."[33] Thus, legal remedies are available for conduct, such as fraud, deceit or misrepresentation, which also are prohibited by paragraph (c) to Rule 8.4, but a claimant is not required as a condition of filing a grievance based on fraud, deceit or misrepresentation to have brought and won a civil action against the respondent lawyer, or for the lawyer to have been charged with and convicted

[30] ABA HOUSE OF DELEGATES RESOLUTION 117 (Feb. 1992).
[31] MODEL RULES OF PROFESSIONAL CONDUCT, Preamble & Scope [10].
[32] MODEL RULES OF PROFESSIONAL CONDUCT, Preamble & Scope [19].
[33] MODEL RULES OF PROFESSIONAL CONDUCT, Preamble & Scope [20].

of a crime.[34] To now impose such a requirement, only for claims based on harassment and discrimination, would set a terrible precedent and send the wrong message to the public.

In addition, the Model Rules of Professional Conduct reflect ABA policy. Since 1989, the ABA House of Delegates has adopted policies promoting the equal treatment of all persons regardless of sexual orientation or gender identity.[35] Many states, however, have not extended protection in areas like employment to lesbian, gay, or transgender persons.[36] A Model Rule should not be limited by such restrictions that do not reflect ABA policy. Of course, states and other jurisdictions may adapt ABA policy to meet their individual and particular circumstances.

D. Protected Groups

New Rule 8.4(g) would retain the groups protected by the current provision.[37] In addition, new 8.4(g) would also include "ethnicity," "gender identity," and "marital status." The antidiscrimination provision in the ABA Model Code of Judicial Conduct, revised and adopted by the House of Delegates in 2007, already requires judges to ensure that lawyers in proceedings before the court refrain from manifesting bias or prejudice and from harassing another based on that person's marital status and ethnicity. The drafters believe that this same prohibition also should be applicable to lawyers in conduct related to the practice of law not merely to lawyers in proceedings before the court.

"Gender identity" is added as a protected group at the request of the ABA's Goal III Commissions. As used in the Rule this term includes "gender expression", which is a form of gender identity. These terms encompass persons whose current gender identity and expression are different from their designations at birth.[38] The Equal Employment Opportunities Commission interprets Title VII as prohibiting discrimination against employees on the basis of sexual orientation and gender identity.[39] In 2015, the ABA House adopted revised Criminal Justice Standards for the Defense Function and the Prosecution Function. Both sets of Standards explains that defense counsel and prosecutors should not manifest bias or prejudice based on another's gender identity. To ensure notice to lawyers and to make these provisions more parallel, the Goal III Commission on Sexual

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[34] *E.g.*, People v. Odom, 941 P.2d 919 (Colo. 1997) (lawyer disciplined for committing a crime for which he was never charged).

[35] A list of ABA policies supporting the expansion of civil rights to and protection of persons based on their sexual orientation and gender identity can be found here: http://www.americanbar.org/groups/sexual_orientation/policy.html.

[36] For a list of states that have not extended protection in areas like employment to LGBT individuals see: https://www.aclu.org/map/non-discrimination-laws-state-state-information-map.

[37] Some commenters advised eliminating references to any specific groups from the Rule. SCEPR concluded that this would risk including within the scope of the Rule appropriate distinctions that are properly made in professional life. For example, a law firm or lawyer may display "geographic bias" by interviewing for employment only persons who have expressed a willingness to relocate to a particular state or city. It was thought preferable to specifically identify the groups to be covered under the Rule.

[38] The U.S. Office of Personnel Management Diversity & Inclusion Reference Materials defines gender identity as "the individual's internal sense of being male or female. The way an individual expresses his or her gender identity is frequently called 'gender expression,' and may or may not conform to social stereotypes associated with a particular gender." *See Diversity & Inclusion Reference* Materials, UNITED STATES OFFICE OF PERSONNEL MANAGEMENT, https://www.opm.gov/policy-data-oversight/diversity-and-inclusion/reference-materials/gender-identity-guidance/ (last visited May 9, 2016).

[39] https://www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm

Orientation and Gender Identity recommended that gender identity be added to the black letter of paragraph (g). New Comment [3] notes that applicable law may be used as a guide to interpreting paragraph (g). Under the Americans with Disabilities Act discrimination against persons with disabilities includes the failure to make the reasonable accommodations necessary for such person to function in a work environment.[40]

Some commenters objected to retaining the term "socioeconomic status" in new paragraph (g). This term is included in the current provision and also is in the Model Code of Judicial Conduct. An Indiana disciplinary case, *In re Campiti*, 937 N.E.2d 340 (2009), provides guidance as to the meaning of the term. In that matter, a lawyer was reprimanded for disparaging references he made at trial about a litigant's socioeconomic status: the litigant was receiving free legal services. SCEPR has found no instance where this term in an ethics rule has been misused or applied indiscriminately in any jurisdiction. SCEPR concluded that the unintended consequences of removing this group would be more detrimental than the consequences of keeping it in.

Discrimination against persons based on their source of income or acceptance of free or low-cost legal services would be examples of discrimination based on socioeconomic status. However, new Comment [5] makes clear that the Rule does not limit a lawyer's ability to charge and collect a reasonable fee and reimbursement of expenses, nor does it affect a lawyer's ability to limit the scope of his or her practice.

SCEPR was concerned, however, that this Rule not be read as undermining a lawyer's pro bono obligations or duty to accept court-appointed clients. Therefore, proposed Comment [5] does encourage lawyers to be mindful of their professional obligations under Rule 6.1 to provide legal services to those who are unable to pay, and their obligation under Rule 6.2 to not avoid appointments from a tribunal except for "good cause."

E. Promoting Diversity

Proposed new Comment [4] to Rule 8.4 makes clear that paragraph (g) does not prohibit conduct undertaken by lawyers to promote diversity. As stated in the first Goal III Objective, the Association is committed to promoting full and equal participation in the Association, our profession and the justice system by all persons. According to the ABA Lawyer Demographics for 2016, the legal profession is 64% male and 36% female.[41] The most recent figures for racial demographics are from the 2010 census showing 88% White, 5% Black, 4% Hispanic, and 3% Asian Pacific American, with all other ethnicities less than one percent.[42] Goal III guides the ABA toward greater diversity in our profession and the justice system, and Rule 8.4(g) seeks to further that goal.

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[40] A reasonable accommodation is a modification or adjustment to a job, the work environment, or the way things usually are done that enables a qualified individual with a disability to enjoy an equal employment opportunity. Examples of reasonable accommodations include making existing facilities accessible; job restructuring; part-time or modified work schedules; acquiring or modifying equipment; changing tests, training materials, or policies; providing qualified readers or interpreters; and reassignment to a vacant position.

[41] American Bar Association, *Lawyer Demographics Year 2016* (2016), http://www.americanbar.org/content/dam/aba/administrative/market_research/lawyer-demographics-tables-2016.authcheckdam.pdf.

[42] *Id.*

F. How New Rule 8.4(g) Affects Other Model Rules of Professional Conduct

When SCEPR released a draft proposal in December 2015 to amend Model Rule 8.4, some commenters expressed concern about how proposed new Rule 8.4(g) would affect other Rules of Professional Conduct. As a result, SCEPR's proposal to create new Rule 8.4(g) now includes a discussion of its effect on certain other Model Rules.

For example, commenters questioned how new Rule 8.4(g) would affect a lawyer's ability to accept, refuse or withdraw from a representation. To make it clear that proposed new Rule 8.4(g) is not intended to change the ethics rules affecting those decisions, the drafters included in paragraph (g) a sentence from Washington State's Rule 8.4(g), which reads: "This Rule does not limit the ability of a lawyer to accept, decline, or withdraw from a representation in accordance with Rule 1.16." Rule 1.16 defines when a lawyer shall and when a lawyer may decline or withdraw from a representation. Rule 1.16(a) explains that a lawyer shall not represent a client or must withdraw from representing a client if: "(1) the representation will result in violation of the rules of professional conduct or other law." Examples of a representation that would violate the Rules of Professional Conduct are representing a client when the lawyer does not have the legal competence to do so (*See* Rule 1.1) and representing a client with whom the lawyer has a conflict of interest (*See* Rules 1.7, 1.9, 1.10, 1.11, and 1.12).

To address concerns that this proposal would cause lawyers to reject clients with unpopular views or controversial positions, SCEPR included in proposed new Comment [5] a statement reminding lawyers that a lawyer's representation of a client does not constitute an endorsement by the lawyer of the client's views or activities, with a citation to Model Rule 1.2(b). That Rule reads: "A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities."

Also, with respect to this rule as with respect to all the ethics Rules, Rule 5.1 provides that a managing or supervisory lawyer shall make reasonable efforts to insure that the lawyer's firm or practice has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct. Such efforts will build upon efforts already being made to give reasonable assurance that lawyers in a firm conform to current Rule 8.4(d) and Comment [3] and are not manifesting bias or prejudice in the course of representing a client that is prejudicial to the administration of justice.

SCEPR has also agreed to develop a formal Ethics Opinion discussing Model Rule 5.3 and its relationship to the other ethics rules, including this new Rule.

G. Legitimate Advocacy

Paragraph (g) includes the following sentence: "This paragraph does not preclude legitimate advice or advocacy consistent with these Rules." The sentence recognizes the balance in the Rules that exists presently in current Comment [3] to Rule 8.4. It also expands the current sentence in the existing comment by adding the word "advice," as the scope of new Rule 8.4(g) is now not limited to "the course of representing a client" but includes "conduct related to the practice of law."

H. Peremptory Challenges

The following sentence appears in the current provision: "A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule." SCEPR and the other cosponsors agreed to retain the sentence in the comments.

V. CONCLUSION

As noted at the beginning of this Report the Association has a responsibility to lead the profession in promoting equal justice under law. This includes working to eliminate bias in the legal profession. In 2007 the Model Judicial Code was amended to do just that. Twenty-five jurisdictions have also acted to amend their rules of professional conduct to address this issue directly. It is time to follow suit and amend the Model Rules. The Association needs to address such an important and substantive issue in a Rule itself, not just in a Comment.

Proposed new paragraph (g) to Rule 8.4 is a reasonable, limited and necessary addition to the Model Rules of Professional Conduct. It will make it clear that it is professional misconduct to engage in conduct that the lawyer knows or reasonably should know constitutes harassment or discrimination while engaged in conduct related to the practice of law. And as has already been shown in the jurisdictions that have such a rule, it will not impose an undue burden on lawyers.

As the premier association of attorneys in the world, the ABA should lead antidiscrimination, anti-harassment, and diversity efforts not just in the courtroom, but wherever it occurs in conduct by lawyers related to the practice of law. The public expects no less of us. Adopting the Resolution will advance this most important goal.

Respectfully submitted,

Myles V. Lynk, Chair
Standing Committee on Ethics and Professional Responsibility
August 2016

SOME LIKE IT HOT:

CURRENT ETHICAL ISSUES IN ENVIRONMENTAL LAW

IEL Energy Industry Environmental Law Conference – Houston, Texas

May 18, 2018

OVERVIEW

- Environmental Experts & Ethics
- Duty to Disclose
- Conflicts of Interest
- Complex Compliance Situations
- Environmental Ethics in a Digital World
- #MeToo

POLL EVERYWHERE INSTRUCTIONS

- The link to test from your phone:

www.pollev.com/reedsmith023

ENVIRONMENTAL EXPERTS & ETHICS

Unauthorized Practice of Law

EXPERTS & ETHICS

COMMON SCENARIO:

Providing expert opinion in litigation

- Expert from Rampage Environmental Group in deposition says:

"First of all, I'm not a lawyer, but I do from time to time interpret regulations from a technical perspective, and I have reached the conclusion that my client's facilities are exempt under the State's environmental Rule XXX.XX"

EXPERTS & ETHICS

- Expert both in deposition and in written report gives:
  - Interpretation of legal rules;
  - Applies those rules to facts of client's activities; and
  - Offers and opinion that client's activities fall outside of scope of rules.

Is this practice by the consultant ethical?

A. Yes, consultants are permitted to interpret laws and regulations.

B. No, consultants are not bound by lawyer's rules of professional conduct.

CONSULTANTS/ENGINEERS – QUALIFICATIONS

- **Texas Occupations Code § 1001.003**
- Practice of Engineering means:
  - "[T]he performance of or an offer or attempt to perform any public or private service or creative work, the adequate performance of which requires engineering education, training, and experience in applying special knowledge or judgment of the mathematical, physical, or engineering sciences to that service or creative work."

PRACTICE OF ENGINEERING

- Practice of Engineering includes, for example:
  - Consultation, investigation, analysis, planning, engineering for program management, providing an expert engineering opinion or testimony, engineering for testing or evaluating materials for construction;
  - Design or conceptual design of engineering works or systems;
  - Development or optimization of plans and specifications for engineering works;

PRACTICE OF ENGINEERING

- Practice of Engineering Does Not Include:
  - Practice of Law

- Practice of Engineering definition does not include interpreting environmental rules and regulations

PRACTICE OF ENGINEERING

- Practice of Engineering includes, for example:
  - Planning the use or alteration of land for water;
  - Performing an engineering survey or study;
  - Engineering for construction, alteration, or repair of real property;
  - Engineering for preparation of an operating or maintenance manual;
  - Planning the use or alteration of land for water;
  - Performing an engineering survey or study;
  - Engineering for construction, alteration, or repair of real property;
  - Engineering for preparation of an operating or maintenance manual;

PRACTICE OF LAW

- **Practice of Law is defined in Texas Government Code § 81.101.**
- Practice of Law means:
  - "the preparation of a pleading or other document incident to an action or special proceeding or the management of the action or proceeding on behalf of a client before a judge or court as well as a service rendered out of court, including the giving of advice or the rendering of any service requiring the use of legal skill or knowledge, such as preparing a will, contract, or other instrument, the legal effect of which under the facts and conclusions involved must be carefully determined."

PRACTICE OF LAW

- "The definition is not exclusive and does not deprive the judicial branch of the power and authority under both this chapter and the adjudicated cases to determine whether other services and acts not enumerated may constitute the practice of law."

- Courts can add to activities that constitute the practice of law

OTHER APPLICABLE RULES

- **Rule 5.5: Unauthorized Practice of Law; Multi-jurisdictional Practice of Law**
  - a) A **lawyer** shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

  - **Focus is on the behavior and activities of lawyers, not consultants or other non-lawyers**

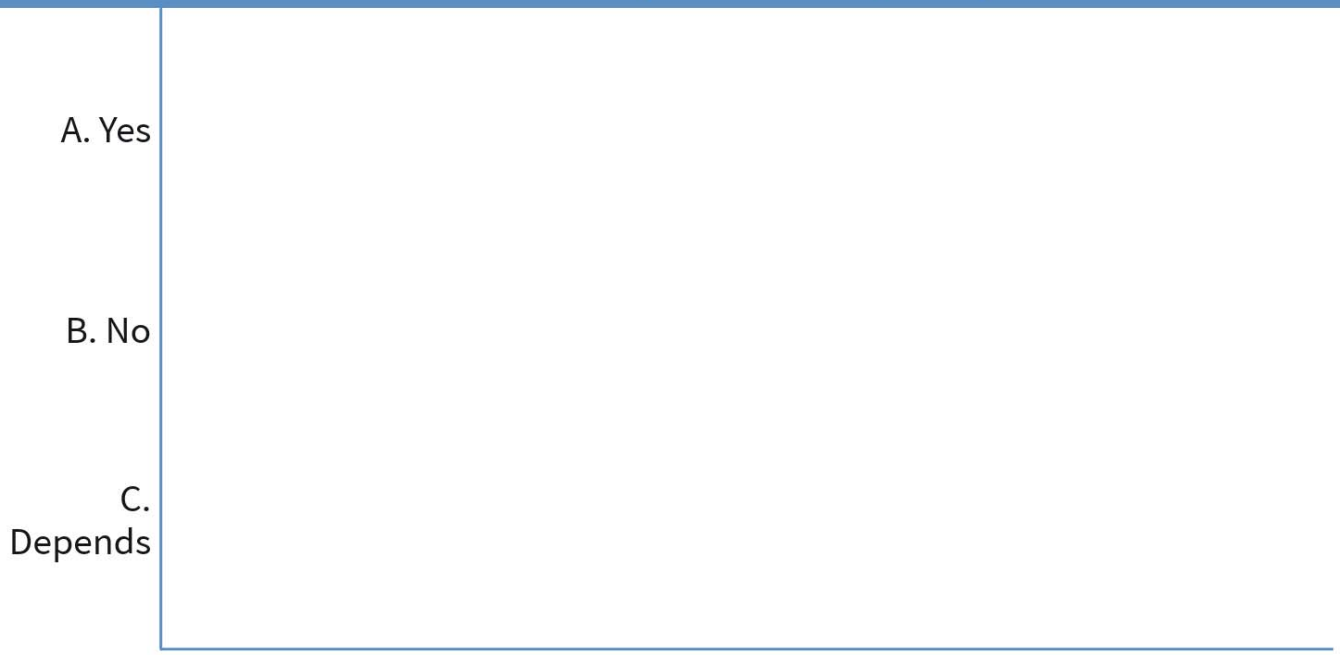
CLIENTS AND REPORTING

Disclosure Requirements

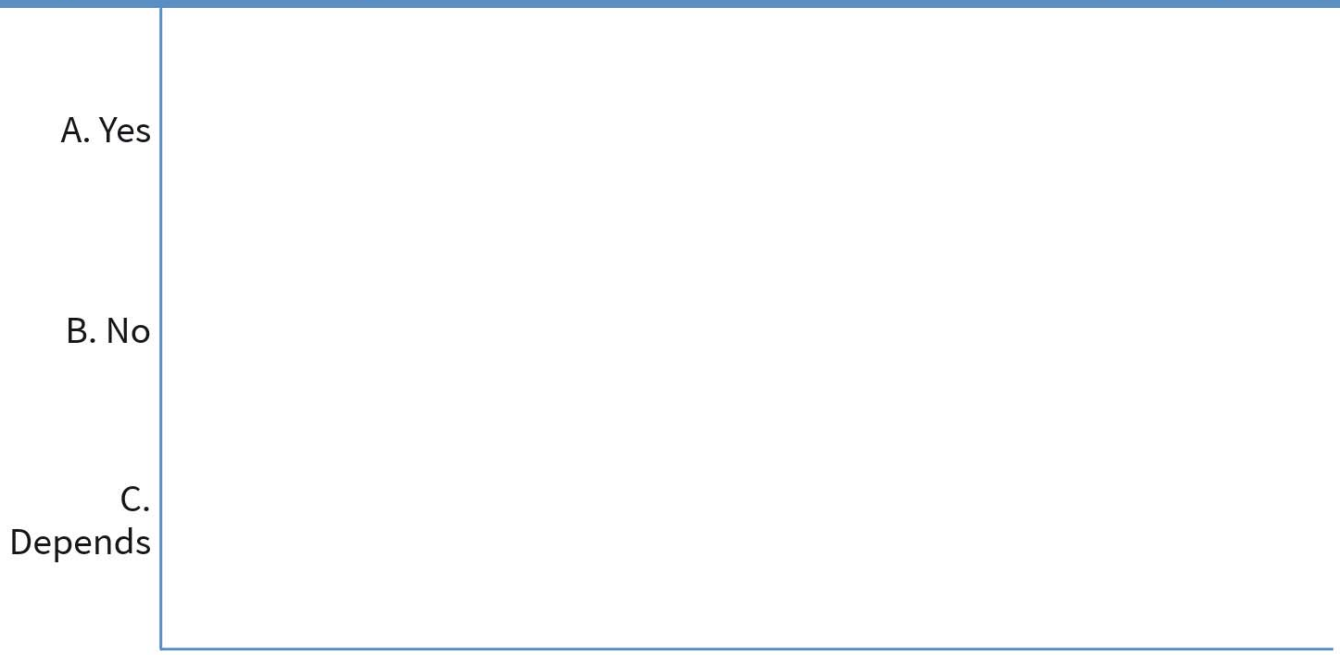
DILEMMA

- The Avenger Co. reports that a pipe bursts at a nearby Texas facility, which has resulted in a spill of unknown chemicals to the soil and groundwater.
- The engineer's investigation confirms that the spill ***does not present a risk of "reasonable certain death or substantial bodily injury***" but that it will pose ecological harm and risks of minor human health risks.
- The business manager decides that it does not want to report the spill to any regulatory body and instructs legal counsel not to do anything further about this matter.

Does the in-house or outside lawyer have a duty to report this event?



Does your answer change if federal or state environmental laws require reporting?



ETHICAL REPORTING OBLIGATIONS

MODEL RULE 1.05(a) Confidentiality of Information

- **Confidentiality includes both privileged and non-privileged information**.
- Privileged information refers to the information of a client protected by the lawyer-client privilege of Rule 5.3 of the Texas Rules of Evidence.
- Unprivileged information means all information relating to a client or furnished by the client acquired during the course of or by reason of the representation.

ETHICAL REPORTING OBLIGATIONS

MODEL RULE 1.05(b) Confidentiality of Information

- The lawyer shall not knowingly:
  - Reveal confidential information of a client to anyone else other than the client or its representatives.
  - **Use confidential information of a client to the disadvantage of the client unless the client consents after consultation.**

THE PLOT THICKENS…

What if the spill requires reporting under either federal or state statutes?

- The engineer (assuming membership in NPSE) would not be restrained from disclosure.
  - **22 TAC s. 137.63 (Engineer's Responsibility to the Profession)**
- **Model Rule 5.3 (Responsibilities Regarding Non-Lawyers)**
  - "…with respect to a non-lawyer employed by or associated with a lawyer…[the] lawyer having direct supervisory authority over the non-lawyer shall make reasonable efforts ensure that the person's conduct is compatible with the professional obligations of the lawyer."

CONFLICTS OF INTEREST

DILEMMA

- You have been asked by Black Panther Corp. (BPC) in a multi-party cost recovery matter where BPC may be adverse to Kilmonger LP.
- A conflicts check reveals that the firm has never represented Kilmonger, but has represented W'Kabi Inc., which is the parent of Kilmonger, in a merger transaction.
- The retainer agreement in the merger says that your firm represents W'Kabi and all associated companies.

Is there an existing conflict? Do you need to obtain consent?

A. YES to both

B. NO to both

C. YES to 1st question; NO to 2nd question

D. NO to 1st question; YES to 2nd question

E. None of the above; I am confused!

DILEMMA

- You obtain consent from W'Kabi to represent Black Panther Corp.
- The position on substantive legal issues you will be arguing in Black Panther's defense is directly contrary to the position you are advocating on behalf of another client in a different and unrelated pending matter.
- The other client finds out and wants you withdraw from the Black Panther representation.

Is arguing two sides of the same legal issue a conflict?

A. YES, the lawyer must withdraw immediately.

B. NO, withdrawal is not required.

APPLICABLE RULES

Rule 1.7 Conflict of Interest: Current Clients

(a) A lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

APPLICABLE RULES

Rule 1.7 Conflict of Interest: Current Clients

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

HISTORICAL NONCOMPLIANCE ISSUES

Complex Compliance Situations

COMPLEX COMPLIANCE SITUATIONS

- Two legal requirements directly conflict.
- Full compliance would have adverse effects on the public.
- Severe disruption of supply (e.g., severe weather event or major pipeline outage).
- Inadvertent noncompliance is discovered and returning to full compliance cannot be immediately achieved.
- A new legal requirement is imposed with inadequate lead time or has severe unintended consequences.
- A government entity fails to act in a timely manner.
- Failure to process timely and complete permit renewal.
- Failure to exercise waiver authority under applicable law.

DILEMMA – DISCOVERY OF NONCOMPLIANCE

- A major facility had a number of complex and vaguely worded air emission permits. Certain interpretations were adopted over many years, sometimes in consultation with government officials (e.g., agreement to deem a typographical error in a permit corrected.)
- An internal review concluded some operations and emissions could not be reconciled with a reasonable interpretation of permit terms. It was also concluded the facility should seek to replace vague permit conditions with ones clearly authorizing its desired operations.
- The plan was to approach the agency, disclose the permit problems, seek a consent order to legalize current operations while new permits were negotiated, and pay a penalty for any permit noncompliance the agency reasonably determined to exist.
- A signed consent order would make the facility's operations legally compliant, but until the consent order could be finalized the facility would have to shut down or else operate out of compliance with permit provisions.

DECISION FRAMEWORK & ETHICAL CONSIDERATIONS

- Determine whether achieving compliance is not reasonably possible in the near term (e.g., extenuating circumstances)
- Develop a compliance and gap closure plan
- Nature and timing of steps is a case-by-case determination
- Reasonable measures to minimize, mitigate or offset duration and extent of noncompliance should be addressed
- Stewardship process to ensure issue is resolved

DECISION FRAMEWORK & ETHICAL CONSIDERATIONS

- Consider whether disclosure to governmental authority is appropriate.
- Is disclosure legally required?
- Even if not required, is disclosure prudent given the nature of the issue, regulatory system, government policy or public expectations?
- Timing Issues?
- Review should proceed as quickly as possible consistent with developing adequate data and analysis to support decision-making.

ENVIRONMENTAL ETHICS IN A DIGITAL WORLD

SOCIAL NETWORKING AND BLOGGING

DILEMMA

- During the course of environmental litigation, you discover that the a key witness for the plaintiff (Ms. Deadpool) has accounts on Facebook and LinkedIn.
- You believe that the witness has information on her pages that would impeach her at trial.
- You ask your administrative assistant to try to "friend" the witness using her real name, but not revealing where she works.
- The witness accepts your assistant's request, but does not reveal any additional personal information.

Has the lawyer engaged in professional misconduct?

A. The lawyer is not responsible for her assistant's actions.

B. The lawyer did not make a false statement of material fact to the witness

C. All of the above.

D. None of the above.

APPLICABLE RULES

- **Model Rule 1.6: Confidentiality Rule**
  - Lawyers may not discuss confidential client information in blogs, Facebook, LinkedIn or other social media apps.

- **Model Rule 5.3: Regarding Non-lawyer Assistants**
  - "…a lawyer shall be responsible for conduct of such a person that would be in violation of the Rules of Professional Misconduct if engaged in by a lawyer if (1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved…."

APPLICABLE RULES

- **Model Rule 4.1 Truthfulness in Statement to Others**
  - In the course of representing a client, a client shall not knowingly make a false statement of material fact or law to a third party.
- **Model Rule 7.1 Communications Concerning a Lawyers Services**
  - "A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false if it contains a material misrepresentation of fact or law, or omits a fact necessary to make a statement considered as a whole not materially misleading."

APPLICABLE RULES

- **Model Rule 8.4: Misconduct**
  - It is professional misconduct for a lawyer to:

    (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

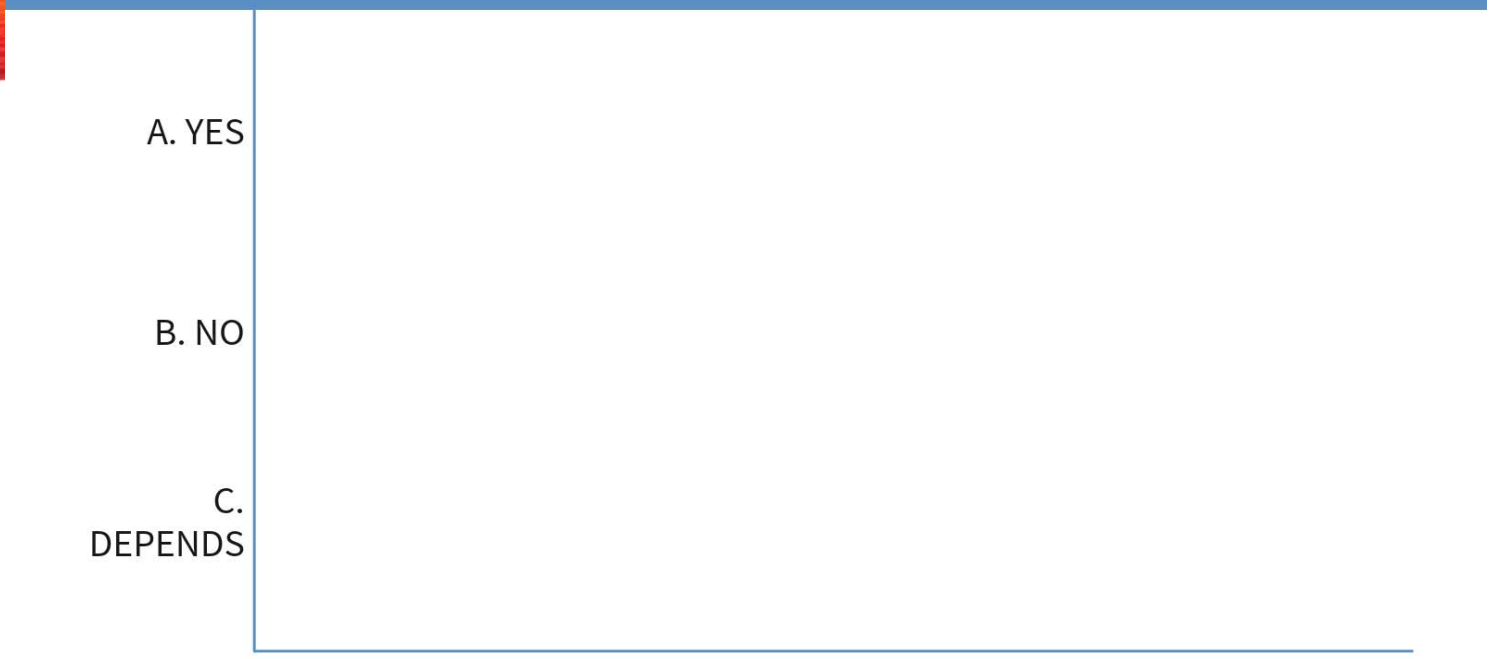
    (c) engage in misconduct involving dishonesty, fraud, deceit or misrepresentation:"

    (d) engage in conduct that is prejudicial to the administration of justice;

DILEMMA

- Associate Tarana Burke is working late on an environmental matter for a client.
- Senior Partner Harry Weinstein states: "Hon, it's nearly midnight, what are you doing here so late? Just go home, and I may call you later."
- As she is leaving, Weinstein says to her "You know, women should stay home and have babies and not practice law."
- Tarana looks surprised by this statement, but says nothing.
- Weinstein sees this and responds: "Sweetie, don't get your panties in a wad. If you want to work in this industry you gotta be tough like a man."

Is Weinstein's statement a violation of the Texas Rules of Professional Misconduct?



APPLICABLE RULES

TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT

Rule 5.08. Prohibited Discriminatory Activities

- (a) A lawyer shall not willfully, *in connection with an adjudicatory proceeding*, except as provided in paragraph (b), manifest, by words or conduct, bias or prejudice based on race, color, national origin, religion, disability, age, sex, or sexual orientation towards any person involved in that proceeding in any capacity.

- Currently, there is no specific rule on sexual harassment.

APPLICABLE RULES

New ABA Model Rule 8.4(g): Misconduct

- **It is professional misconduct for a lawyer to: ...(g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law**. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.

APPLICABLE RULES

- Does the answer change if this is the Dubai office of a US firm?
- **ABA Model Rule 8.5 Disciplinary Authority; Choice of Law**
  - (a) Disciplinary Authority. A lawyer admitted to practice in this jurisdiction is **subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs**. A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct.

WRAP UP & QUESTIONS