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Environment, Energy, and Resources Law

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# The Year in Review 2023

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AMERICANBARASSOCIATION

Environment, Energy,  
and Resources Section



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Environment, Energy, and Resources Law

# The Year in Review 2023



AMERICAN **BAR** ASSOCIATION

Environment, Energy,  
and Resources Section

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## SUMMARY OF CONTENTS

<b>Introduction</b> .....	v
<b>Highlights of The Year in Review 2023</b> .....	vi

### **Substantive Committees**

Chapter A: Air.....	A-1
Chapter B: Biodiversity .....	B-1
Chapter C: Climate Change .....	C-1
Chapter D: Energy .....	D-1
Chapter E: Enforcement and Litigation .....	E-1
Chapter F: Environmental, Social, Governance, and Sustainability.....	F-1
Chapter G: Food and Agriculture .....	G-1
Chapter H: Forest Resources .....	H-1
Chapter I: Indigenous Law.....	I-1
Chapter J: In-House Counsel .....	J-1
Chapter K: International Law .....	K-1
Chapter L: Mining.....	L-1
Chapter M: Nuclear Law .....	M-1
Chapter N: Oceans and Coasts.....	N-1
Chapter O: Oil and Gas.....	O-1
Chapter P: Pesticides and Chemicals.....	P-1
Chapter Q: Project Development.....	Q-1
Chapter R: Public Land and Resources .....	R-1
Chapter S: Science and Technology .....	S-1
Chapter T: Superfund and Cost Recovery .....	T-1
Chapter U: Transactions and Brownfields Redevelopment.....	U-1
Chapter V: Waste and Resource Recovery.....	V-1
Chapter W: Water Quality and Wetlands .....	W-1
Chapter X: Water Resources.....	X-1

### **Council-Related Committees**

Chapter Y: Constitutional Law .....	Y-1
Chapter Z: Environmental Justice.....	Z-1
Chapter AA: Ethics and the Profession .....	AA-1

## INTRODUCTION

*The Year in Review: 2023* is the fortieth annual summary of developments in environmental, energy, and resources law. It is being made available without charge again, as a benefit to members of the Section of Environment, Energy, and Resources of the American Bar Association.

*The Year in Review* reflects the dedication and hard work of many individuals. Typically, members of a Section committee draft the analysis in that committee's area of expertise. The manuscript is then transmitted to the committee's Year in Review Vice Chair or designated primary author who reviews it before sending it to The University of Tulsa College of Law.

Among the students deserving special thanks are Maddie Brady, William Orr, and Kayla Tunley. Thank you also to the students on *The Year in Review* staff for their assistance in editing and their dedication to this publication. The time and effort put forth in such a compressed period indicates a commitment to quality and to providing information regarding substantive developments in law of the area.

A final thank you must be extended to Erin Potter Sullenger, Special Committee Chair on *The Year in Review*; Mason Gregg, Section Editorial Associate; Sean Dixon, Section Publications Officer; and Dana Jonusaitis, Section Director. Their time and efforts were instrumental in making the editing and publication process run smoothly.

The result of this process is a concise, comprehensive, and timely analysis of current developments in areas of law that are of crucial interest to Section members. All of us associated with *The Year in Review* are proud of our work and pleased to be of service to our profession.

Jordan "Lizzie" Faletto  
Student Editor-in-Chief

Warigia Bowman  
Faculty Advisor

Tulsa, Oklahoma  
April 15, 2024

## 2023 Year in Review Highlights<sup>1</sup>

If you are on the hunt for a resource that can provide a snapshot of key developments in 2023 in the areas of environmental, energy, and resource law – look no further! You’ve arrived at the right place. Welcome to the *2023 Year in Review*.

The ABA SEER’s *Year in Review* is organized into chapters that correspond with and are written by members in each of the SEER substantive committees, as well as three chapters that cover topics that transcend our committees, namely Constitutional Law, Environmental Justice, and Ethics. Each committee organizes and writes its chapter as an annual report, focusing on significant developments, events, cases, regulations, and other notable policy changes that occurred in the prior calendar year. It is not the intent of the committees, nor the *Year in Review* to capture all developments. This Highlights section offers a brief snapshot of a few of the topics discussed by more than one of the committees, as well as noting a handful of unique developments that may be of interest to all SEER members. Just like the *Year in Review*, the Highlights section is not a comprehensive summary and by no means captures all of the topics mentioned by multiple committees. Instead, it serves as a starting point for you, the reader, identifying a few hot topics and what chapters to explore for different discussions and perspectives on those topics.

### Environmental Justice

While several committees highlight developments in the area of environmental justice, the *2023 Year in Review* includes, for the first time, a stand-alone chapter on environmental justice. The **Environmental Justice** chapter examines developments at the federal and state levels, as well as action taken by the American Bar Association. These developments include the issuance of a comprehensive Presidential Executive Order on EJ; implementation of the EJ aspects of the Inflation Reduction Act; EPA’s issuance of guidance to distribute billions to support EJ; New York State’s adoption of a groundbreaking environmental justice law; New Jersey’s issuance of first-of-a-kind EJ regulations; judicial rejection of EJ-based claims; and the ABA’s issuance of a “Blueprint to Advance Environmental Justice.”

### Ongoing developments related to PFAS regulation and litigation

For the past several years, the topic of per- and polyfluoroalkyl substances (PFAS) was a hot topic among the SEER committees, and the *2023 Year in Review* is no different. Collectively, these committees provide a broad perspective of the legal developments around PFAS substances. The most thorough discussion is found in the **Pesticides and Chemicals** chapter. There, you can find updates ranging from EPA’s proposed Significant New Use Rule (SNUR) on the manufacture of PFAS, certain ongoing litigation related to PFAS, and a snapshot of state PFAS legislation. What could be considered a “must read” for all SEER members is the thorough review and discussion offered in the **Transactions and Brownfields Redevelopment** chapter. The committee walks readers through how PFAS impacts real estate due diligence, particularly when conducting a Phase I and Phase

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<sup>1</sup>The Highlights for the *Year in Review* is written by Erin Potter Sullenger, Senior Counsel, Environmental, Health and Safety, at The Williams Companies in Tulsa, Oklahoma. She is the Chair of the Special Committee for the *Year in Review*. The Chair would like to acknowledge the superb editing job by the students at the University of Tulsa College of Law on this year’s publication.



II Site Assessments. The **International Law** committee provides information concerning a proposal from the European Chemical Agency (ECHA) to restrict PFAS across Europe. The **Science and Technology** committee discusses developments in judicial challenges to the EPA’s PFAS health advisory. The **Enforcement and Litigation** committee kicks off its chapter with a discussion of PFAS developments in federal and state regulation and a discussion around the request for medical monitoring in most PFAS litigation. The committee also notes that “Addressing Exposure to PFAS” is listed in the EPA’s Office of Enforcement and Compliance Assurance’s (OECA) National Enforcement and Compliance Initiatives. Finally, the **Food and Agriculture** committee highlights several pieces of PFAS legislation in the states.

#### Climate disclosure laws and regulations

A growing clamor for improved corporate disclosures concerning climate risks, greenhouse gas emissions, and climate adaptation continued in 2023, with California’s climate disclosure laws garnering much attention. The **Environmental, Social, Governance, and Sustainability** committee provides a very nice summary and overview of California’s laws around climate data accountability, financial risk disclosure, and carbon market disclosure. Additionally, the committee offers perspective on additional activity related to the Security and Exchange Commission’s (SEC) proposed rule for The Enhancement and Standardization of Climate-Related Disclosures for Investors. The SEC proposed rule is also discussed by the **International Law** and **Food and Agriculture** committees.

#### Infrastructure needs and development

In the wake of the Bipartisan Infrastructure Bill, several committees provided updates regarding infrastructure investment, assessments, and needs. The **Climate Change** committee discussed updates to the National Transmission Needs Study from the Department of Energy (DOE), as well as investments DOE is making in other energy infrastructures, such as hydrogen hubs. Many states are also keenly interested in ensuring the resilience of energy systems and took steps in 2023 to enact laws and implement policies with that as an end goal. The **Energy** committee also highlighted investment in tribal energy infrastructure and provides a thorough discussion of capital available for funding energy infrastructure projects through several pieces of congressional legislation. The **Project Development** committee gives updates concerning progress across the country in developing electric vehicle infrastructure. The **Waste and Resource Recovery** committee shares how funding from the Bipartisan Infrastructure Bill is going towards expanding the recycling and waste management infrastructure systems in an effort to build a circular economy.

#### Greenhouse gas emissions (GHG) legislative and regulatory developments

The **Air** committee discusses several proposed rules from the U.S. Environmental Protection Agency concerning GHG emissions from motor vehicles, as well as the proposed amendments to the Greenhouse Gas Reporting Rule and the proposed rule setting stricter new source performance standards for GHG emissions from new and modified fossil fuel power plants. The **Climate Change** committee outlined the proposed rule to implement the newly added section 136 of the Clean Air Act, creating a direct charge for methane emissions. This committee also summarized the Interim Guidance published by the Council on Environmental Quality on considering GHG emissions and climate change when conducting an environmental analysis under the National Environmental Policy Act (NEPA). The **Oil and Gas** committee discusses a new law in Colorado that sets the state

on a path towards eliminating GHG emissions from electricity generation, gas utilities, and transportation. Additionally, the **Forest Resources** committee includes an update on a proposed rule from the U.S. Forest Service to allow carbon capture and sequestration projects on national forests and grasslands, furthering the Biden Administration’s goal to reduce GHG emissions.

#### The “Grab Bag” of other interesting developments

- **Artificial intelligence in the legal practice:** The **Ethics** chapter in the *2023 Year in Review* includes an interesting discussion on formal guidance issued by the California Bar’s Committee on Professional Responsibility and the use of artificial intelligence (AI) in the legal practice. California is the first state to issue this guidance.
- **Licenses for nuclear power reactors:** The **Nuclear Law** committee provides an update on the developments in issuing new or renewal licenses for nuclear power reactors, noting there are ninety-three operating commercial nuclear power reactors in the U.S.
- **Successful corporate veil piercing:** The **Superfund** committee includes a case on parent-corporation owner liability under CERCLA, in which a federal court found the plaintiff presented sufficient evidence to maintain a corporate veil piercing claim.
- **Presidential proclamations under the Antiquities Act:** The **Public Lands** committee follows several cases from 2023 in which there was a challenge to several presidential proclamations in which President Biden expanded the acreage dedicated to different national monuments. The **Indigenous Law** committee also highlights one of these cases involving the Bears Ears National Monument and the Grand Staircase Escalante National Monument.
- **Challenges to offshore wind:** The **Biodiversity** committee discusses several legal challenges to federal approvals granted for the development of offshore wind projects. Many of these challenges allege inadequate environmental assessments or consultations regarding the Endangered Species Act. The **Oceans and Coasts** committee offers additional insight into this topic as well, providing information on several judicial and administrative developments that impact offshore wind development.
- **Water rights and changes to Waters of the United States:** In 2023, the U.S. Supreme Court issued a decision in *Sackett v. EPA* concerning the definition of “waters of the United States.” The **Constitutional Law** and **Water Quality and Wetlands** committees each provide a quick overview of the Court’s decision and how the decision was still somewhat divided among the Justices. The **Water Quality and Wetlands** committee also discusses the regulatory revisions undertaken by the U.S. EPA in response to the *Sackett* decision.
- **Ownership of Produced Water:** In addition to a catalogue of water rights and water resource developments across the U.S., the **Water Resources** committee includes an interesting case out of Texas involving the first appellate decision in Texas involving the question of ownership of produced water between the owners of the surface estate and an oil and gas lessee.
- **Highlighting the importance of engaging with the regulators during the regulatory development process:** Utilizing a case study around an issue that arose for nuclear power facilities, the **In-House Counsel** committee provides a thorough illustration of the importance of engaging with regulators and participating in the administrative rule-making process.

- **Interagency Working Group on Mining Laws, Regulations, and Permitting:** The **Mining** committee updates SEER members on the release of a final report from the Department of Interior’s Interagency Working Group on Mining Laws, Regulations, and Permitting. The committee highlights some of the central recommendations from the final report.

We hope these highlights entice you to explore the *2023 Year in Review!*

## Chapter E: ENFORCEMENT AND LITIGATION 2023 ANNUAL REPORT<sup>1</sup>

### I. UPDATES TO PFAS REGULATION AND LITIGATION

#### A. *Regulatory Updates*

##### 1. Federal

During 2023, the U.S. Environmental Protection Agency (“EPA”) engaged in a variety of regulatory activities, including setting guidelines for effluent limitations, regulating the amount of per- and polyfluoroalkyl substances (“PFAS”) in drinking water, and enhancing reporting requirements related to PFAS. Starting in January, EPA released its final Effluent Limitations Guidelines (“ELGs”) Plan 15, including a determination that revised ELGs and pretreatment standards are warranted for reducing PFAS in leachate discharges from landfills, an announcement of an expansion of the ongoing study of PFAS discharges from textile manufacturers, and a new study of publicly owned treatment works (“POTW”) influents.<sup>2</sup> EPA also proposed a rule that would prevent anyone from starting or resuming without complete EPA review and risk determination the manufacture, processing, or use of an estimated 300 PFAS that have not been made or used for many years, known as “inactive PFAS.”<sup>3</sup>

In March 2023, EPA proposed to establish legally enforceable levels for six PFAS chemicals known to occur in drinking water: perfluorooctanoic acid (“PFOA”), perfluorooctane sulfonic acid (“PFOS”), perfluorononanoic acid (“PFNA”), hexafluoropropylene oxide dimer acid (“HFPO-DA, and its ammonium salt, which are commonly referred to together as “GenX chemicals”), perfluorohexane sulfonic acid (“PFHxS”), and perfluorobutane sulfonic acid (“PFBS”).<sup>4</sup>

In June 2023, EPA released a framework for addressing new uses of PFAS under the Toxic Substances Control Act (“TSCA”), which requires EPA to undertake an extensive evaluation before the chemicals enter commerce<sup>5</sup>

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<sup>1</sup>This report was authored by Inga C. Caldwell, of Cole Schotz, P.C.; Leland P. Frost, of KMCL LLP; Heather Lee Miller, Ph.D., of Historical Research Associates, Inc.; and David B. Weinstein, of Greenberg Traurig, LLP. Jennifer M. Faggion, and Madeleine Voigt of Greenberg Traurig, LLP; Jack F. Devine, of KMCL LLP; Joseph Zaleski of Shook, Hardy & Bacon L.L.P.; Riley Desper and Andrew R. Stewart of Sidley Austin LLP; J. Tom Boer and Maia H. Jorgensen, of Hogan Lovells US LLP, with international research assistance from Ernesto Morell, of Hogan Lovells International LLP; Edward K. Roggenkamp IV, of Nossaman LLP; Julian Harrell of Faegre Drinker Biddle & Reath LLP; Jared J. Standish of Geosyntec Consultants; and Talia Gordner of McMillan LLP.

<sup>2</sup>U.S. ENVTL. PROT. AGENCY, EPA-821-R-22-004, [EFFLUENT GUIDELINES PROGRAM PLAN 15](#) (2023).

<sup>3</sup>[Per- and Poly-Fluoroalkyl Chemical Substances Designated as Inactive on the TSCA Inventory; Significant New Use Rule](#), 88 Fed. Reg. 4937 (proposed Jan. 26, 2023) (to be codified at 40 C.F.R. pt. 721).

<sup>4</sup>[PFAS National Primary Drinking Water Regulation Rulemaking](#), 88 Fed. Reg. 18,638 (proposed Mar. 29, 2023) (to be codified at 40 C.F.R. pts. 141, 142).

<sup>5</sup>U.S. ENVTL. PROT. AGENCY, [Framework for TSCA New Chemicals Review of PFAS Premanufacture Notices \(PMNs\) and Significant New Use Notices \(SNUNs\)](#) (June 28, 2023).

EPA released important data in August 2023.<sup>6</sup> As part of the fifth Unregulated Contaminant Monitoring Rule (“UCMR 5”), EPA is conducting the most comprehensive monitoring effort for PFAS ever at every large and midsize public water system in America and at hundreds of small water systems. Specifically, this data will improve EPA’s understanding of the frequency that 29 PFAS are found in the nation’s drinking water.

In October 2023, EPA finalized two separate but analogous rulemakings concerning the recordkeeping and reporting requirements related to PFAS.<sup>7</sup> First, it released a final rule that eliminates an exemption that allowed facilities to avoid reporting information on PFAS when those chemicals were used in small concentrations.<sup>8</sup> Second, PFAS are now subject to the same reporting requirements as other chemicals of special concern.<sup>9</sup>

Also, in October 2023, EPA published a final rule that will provide EPA, its partners, and the public with the largest-ever dataset of PFAS manufactured and used in the United States.<sup>10</sup> The rule requires all manufacturers and importers of PFAS and PFAS-containing products in any year since January 1, 2011, to report information to EPA on “PFAS uses, production volumes, byproducts, disposal, exposures, and existing information on environmental or health effects.”<sup>11</sup>

## 2. State

In addition to the actions taken by EPA, several states set forth regulations related to PFAS, including bans on PFAS in all or specific products.<sup>12</sup> The first-in-the-nation ban on PFAS in all products in Maine began under LD1503.<sup>13</sup> It bans intentionally added PFAS from all products of any kind sold in the state and includes deadlines that set limitations on how long industry is allowed to adapt. The law aims to ban the use of PFAS except when it is “unavoidable.”<sup>14</sup>

New York implemented laws banning intentionally added PFAS in paper-based plates, cups, bowls, and other food packaging under its Hazardous Packaging Act.<sup>15</sup> Similarly, California banned the sale and distribution of paper food packaging made with

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<sup>6</sup>[Fifth Unregulated Contaminant Monitoring Rule Data Finder](#), U.S. ENVTL. PROT. AGENCY (last updated Apr. 11, 2024).

<sup>7</sup>Adam R. Troutwine & Jacob M. Levin, [October PFAS Regulatory Update](#), THE NAT’L L. REV. (Nov. 6, 2023).

<sup>8</sup>[Changes to Reporting Requirements for Per- and Polyfluoroalkyl Substances and to Supplier Notifications for Chemicals of Special Concern; Community Right-to-Know Toxic Chemical Release Reporting](#), 87 Fed. Reg. 74,379 (proposed Dec. 5, 2022) (to be codified at 40 C.F.R. pt. 372).

<sup>9</sup>[Changes to Reporting Requirements for Per- and Polyfluoroalkyl Substances and to Supplier Notifications for Chemicals of Special Concern; Community Right-to-Know Toxic Chemical Release Reporting](#), 88 Fed. Reg. 74,360 (Oct. 31, 2023) (to be codified at 40 C.F.R. pt. 372).

<sup>10</sup>[Toxic Substances Control Act Reporting and Recordkeeping Requirements for Perfluoroalkyl and Polyfluoroalkyl Substances](#), 88 Fed. Reg. 70,516 (Oct. 11, 2023) (to be codified at 40 C.F.R. pt. 705).

<sup>11</sup>*Id.* at 70,517.

<sup>12</sup>Zach Bright, [PFAS Bans, Restrictions Go Into Effect in States in 2023 \(1\)](#), BLOOMBERG L. (Jan. 4, 2023)(subscription required).

<sup>13</sup>An Act To Stop Perfluoroalkyl and Polyfluoroalkyl Substances Pollution, Pub. L. No. 477, 38 MRSA § 1612 (2021).

<sup>14</sup>*Id.* at 3.

<sup>15</sup>Bright, *supra* note 12.

intentionally added PFAS.<sup>16</sup> The law requires food packaging manufacturers to use the “least toxic alternative” when replacing PFAS chemicals and requires cookware manufacturers to disclose PFAS.<sup>17</sup> Minnesota enacted a similar statute that makes it illegal for a person to manufacture or knowingly sell, offer for sale, distribute for sale, distribute, or offer for use in Minnesota a food package that contains intentionally added PFAS.<sup>18</sup>

## B. *Medical Monitoring*

As regulatory focus related to PFAS continues to grow, courts across the nation have experienced a surge of PFAS litigation over the past few years.<sup>19</sup> One of the most common causes of action in these suits is medical monitoring.<sup>20</sup> Medical monitoring is a “nontraditional” tort that seeks to recover “the economic costs of the extra medical check-ups” that a plaintiff expects to incur as a result of his or her exposure to a product.<sup>21</sup> Medical monitoring claims are often asserted in toxic tort suits where the plaintiff was exposed to an allegedly harmful substance that causes latent symptoms.<sup>22</sup>

However, whether a plaintiff with latent symptoms is entitled to damages depends on location. Currently, thirteen states allow recovery of medical monitoring damages without requiring the plaintiff to prove a present physical injury, while twenty-eight states require a showing.<sup>23</sup> The remaining states have either not yet addressed the issue or have conflicting opinions. Importantly, the U.S. Supreme Court has rejected no-injury medical-monitoring claims for the federal common law.<sup>24</sup>

At the federal level, courts deciding whether to allow a medical monitoring claim grapple with standing.<sup>25</sup> In fact, a PFAS-medical monitoring claim is at the forefront of the issue, as the Sixth Circuit is currently charged with determining whether a plaintiff alleging PFAS exposure has standing for medical-monitoring relief.<sup>26</sup>

The case, styled as *3M v. Hardwick*, is a medical-monitoring class action that, if certified, could encompass over 330 million individuals.<sup>27</sup> However, the prospective relief sought hinges on whether the class has standing under Article III.<sup>28</sup> Relying on the Supreme Court’s 2013 decision in *Clapper v. Amnesty International*, Defendant-Appellants argue that plaintiff Hardwick has failed to show a “certainly impending” future injury and thus,

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<sup>16</sup>AB1200, Gen. Assemb., Reg. Sess. (Cal. 2021).

<sup>17</sup>*Id.*

<sup>18</sup>Minn. Stat. § 325F.075 (2023).

<sup>19</sup>[PFAS UPDATE: LITIGATION TRENDS IN PFAS CONSUMER PRODUCT LITIGATION FROM 2021 TO 2022](#), BRYAN CAVE LEIGHTON PAISNER (June 8, 2023).

<sup>20</sup>Sheila L. Birbaum et al., [PFAS: Expected Litigation Trends](#), DECHERT LLP (April 2021).

<sup>21</sup>Jerise Henson, [What is Medical Monitoring?](#), THE MASS TORT INST. (May 28, 2021) (citation omitted).

<sup>22</sup>David A. Fusco et al., [American Law Institute Vote on Medical Monitoring Could Spur Increased “No-Injury” Claims](#), THE NAT’L L. REV. (May 17, 2023).

<sup>23</sup>*Id.*

<sup>24</sup>*Id.*

<sup>25</sup>Conor Winters, [Bridging the Gap: State Legislative Creation of Medical Monitoring Rights](#), THE GEORGETOWN ENVTL. L. REV. (Nov. 14, 2023); *see also* Christopher Mason, [Yet another thing to worry about: The evolving law of standing in state courts when federal standing is lacking](#), NIXON PEABODY (Apr. 13, 2020).

<sup>26</sup>John Gardella, [Hardwick Case Briefing One of Most Significant PFAS Legal Briefs Yet](#), THE NAT’L L. REV. (Jan. 3, 2023).

<sup>27</sup>[Opening Brief of Defendants-Appellants](#) at 14, *3M v. Hardwick* (6th Cir. Dec. 21, 2022) (No. 22-3765, ECF No. 54).

<sup>28</sup>*Id.* at 5.

is not entitled to prospective relief such as medical monitoring.<sup>29</sup> In *Clapper*, the Supreme Court held that standing for claims based on impending or future harm requires the plaintiff to demonstrate that the harm is “certainly impending” to satisfy the injury-in-fact requirement of Article III.<sup>30</sup> The proposed class in *Hardwick* encompasses “any individual residing within the United States at the time of class certification for one year or more since 1977 with 0.05 parts per trillion or more of PFAO and at least 0.05 parts per trillion or more of any other PFAS in their blood serum.” Thus, determining whether the proposed class’s PFAS-exposure created future harm that is “certainly impending” enough to amount to an injury, as the Sixth Circuit will here, is no easy task.

In response to alleged PFAS exposures in particular, some states are beginning to enact medical monitoring legislation.<sup>31</sup> In March 2023, Minnesota lawmakers introduced [HF2794/SF2727](#), which creates a medical monitoring cause of action for individuals exposed to proven toxic substances.<sup>32</sup> Vermont became the first state in the nation to enact similar legislation in 2022.<sup>33</sup>

A national medical monitoring tort would seemingly provide clarity and level the playing field. In May 2023, the American Law Institute was set to vote on a proposed rule for the Third Restatement of Torts that would recognize a claim for medical monitoring in the absence of a physical injury.<sup>34</sup> Proponents argue that a national tort can help bridge the gap between exposure and onset of illness, thereby improving health outcomes and lowering medical bills.<sup>35</sup> Others counter that “recognizing a medical monitoring cause of action would be akin to recognizing a cause of action for fear of future illness.”<sup>36</sup>

### C. Case Developments

The U.S. Supreme Court declined to review a \$40 million verdict against E. I. du Pont de Nemours & Co. (“DuPont”) pertaining to an Ohio lawsuit arising from a release of “forever chemicals.”<sup>37</sup> The verdict was the result of one of the thousands of lawsuits alleging that a West Virginia DuPont plant discharged PFOA into the Ohio River, causing cancer and other illnesses in the surrounding populations. Those cases have been consolidated in multidistrict litigation (“MDL”) in Ohio Federal Court. The underlying plaintiff, Mr. Abbott, won in the district court in 2021, arguing that DuPont’s contamination of the Ohio River caused his cancer.<sup>38</sup> DuPont argued that the court’s use of a prior bellwether trial to establish liability in the Abbott matter was improper and that results from bellwether trials are not binding against the company in every other case pending in the MDL. DuPont argued that differences between the Abbott matter and the bellwether trials, such as proximity to the DuPont facility, rendered the determination of liability in the bellwether trial inapplicable in the individual Abbott case. In denying

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<sup>29</sup>*Id.* at 20.

<sup>30</sup>*See* *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 409 (2013).

<sup>31</sup>Winters, *supra* note 25.

<sup>32</sup>[H.R. 2794, 93rd Gen. Assemb., Reg. Sess. \(Minn. 2023\)](#).

<sup>33</sup>12 V.S.A. § 7201.

<sup>34</sup>*RESTATEMENT OF THE LAW THIRD, Torts: Miscellaneous Provisions*, THE AM. L. INST. (2023).

<sup>35</sup>Winters, *supra* note 25.

<sup>36</sup>Larry P. Schiffer, [Can Fear or Emotional Distress Associated With COVID-19 Be a “Bodily Injury”?](#), THE NAT’L L. REV. (Apr. 1, 2020).

<sup>37</sup>*In Re: E. I. Du Pont de Nemours and Company C-8 Personal Injury Litigation*, 54 F.4th 912 (6th Cir. 2022), *cert. denied*, No. 23-12, 2023 WL 8007334 (U.S. Nov. 20, 2023) (J. Thomas, dissenting) (discussing nonmutual offensive collateral estoppel concerns).

<sup>38</sup>*In Re E. I. Du Pont de Nemours & Co. C-8 Pers. Inj. Litig.*, 529 F. Supp. 3d 720 (S.D. Ohio 2021).



certiorari, the Supreme Court provided no explanation.

Michigan Attorney General Dana Nessel reached a \$3.2 million settlement in Michigan's PFAS-related lawsuit against Asahi Kasei Plastics North America, Inc. ("Asahi") pertaining to Asahi's former Brighton, Michigan, facility.<sup>39</sup> Michigan alleged that Asahi's ownership and operation of a custom reinforced plastic compounding business resulted in the release of PFAS into the environment.<sup>40</sup> Among other things, the settlement requires Asahi to engage in extensive monitoring of, and investigations into, PFAS levels in soil, groundwater, and surface water discharged from the former site. Asahi's investigation and work plans must be approved by the Michigan Department of Environment, Great Lakes, and Energy. Work plans that are of significant public interest may be required to undergo a comment period as well. Finally, Asahi must pay the state's past and future monitoring costs, as well as the state's costs of litigation, including attorney fees. Asahi was one of seventeen PFAS defendants named in Attorney General Nessel's 2020 PFAS lawsuit. Of the original seventeen defendants, six cases proceeded to trial, and *Asahi* is the first of the six to be resolved.<sup>41</sup>

In June 2023, 3M Company and DuPont proposed settlements in their South Carolina MDL related to aqueous film-forming foam ("AFFF") containing PFAS.<sup>42</sup> The proposed settlement was announced on the eve of the MDL's first bellwether trial, *City of Stuart v. 3M Co.*, obviating the need for the trial to begin as scheduled.<sup>43</sup> Under the proposed terms, 3M would pay up to \$12.5 billion, and DuPont up to \$1.185 billion, to resolve all liability pertaining to their manufacture and supply of AFFF, which allegedly led to the contamination of municipal water supplies around the nation. DuPont's fairness hearing occurred on December 14, 2023, and 3M's will be held on February 2, 2024. In late July, a group of twenty-two state attorneys general filed a motion to intervene in the settlement proceedings and in opposition to 3M's proposed settlement.<sup>44</sup> As a result of that opposition, an amended settlement proposal was submitted on August 28, 2023, which removed indemnity clause provisions that would have offered 3M greater protections following the settlement. The South Carolina District Court issued an order preliminarily

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<sup>39</sup>[Nessel v. Asahi Kasei Plastics North America Inc., No. 20-030909-NZ](#) (Mich. 44th Cir. Ct. Jan. 12, 2023) (Consent Decree).

<sup>40</sup>*Id.* at 3.

<sup>41</sup>[Press Release](#), State of Mich., AG Nessel Announces Landmark Settlement in First PFAS Case (Jan. 30, 2023) (Other ongoing Michigan PFAS cases include: *Nessel v. 3M, et al.*, (PFAS manufacturers) removed from Kent Circuit Court (No. 20-03366-NZ(Quist)) to MDL Case No. 3873 in U.S. District Court in South Carolina (Gergel); *Nessel v. Chemguard, et al.* (manufacturers of commercial firefighting foam) pending in MDL No. 3873; *Nessel v. E. I. Dupont de Nemours, et al.* (manufacturers of mil-spec firefighting foam) pending in MDL No. 3873; *Nessel, et al. v. FKI Hardware, Inc.*, pending in Kent Circuit Court (No. 2022-09032-CE (Quist)); and *Nessel v. Domtar Industries, Inc.*, pending in St. Clair Circuit Court (No. 22-002604-NZ (Lane))).

<sup>42</sup>*In Re: Aqueous Film-Forming Foams Prod. Liab. Litig.*, 357 F. Supp. 3d 1391 (J.P.M.L. 2018) (MDL No. 2873) (granting consolidation of the original 75 actions, giving rise to the MDL).

<sup>43</sup>*In re Aqueous Film-Forming Foams Prod. Liab. Litig.*, No. 2:18-CV-3487-RMG, 2023 WL 3686120, at \*1 (D.S.C. May 26, 2023) (order dispensing with City of Stuart's omnibus motion in limine in preparation for trial).

<sup>44</sup>States' and Sovereigns' Omnibus Opposition to Plaintiffs' Motion for Preliminary Approval of Class Settlement, for Certification of Settlement Class and for Permission to Disseminate Class Notice, [In Re: Aqueous Film-Forming Foams Prod. Liab. Litig., No. 2:18-CV-3487-RMG](#) (D.S.C. July 26, 2023) (related to *City of Camden, et al. v. 3M Company*, No. 2:230cv093147-RMG).



approving the amended settlement proposed by 3M on August 29, 2023.<sup>45</sup> The court previously approved the DuPont proposed settlement on August 22, 2023.<sup>46</sup> The settlement is far from final and still must be approved as to both defendants in separate fairness hearings.

## II. CONSTITUTIONAL LAW DEVELOPMENTS

### A. *Supreme Court Allows Constitutional Challenge of Agency Action in Federal Court Prior to Conclusion of Administrative Enforcement Process*

On April 14, 2023, the U.S. Supreme Court issued an opinion in the case of *Axon Enterprises, Inc. v. Federal Trade Commission, et al.*<sup>47</sup> in which the unanimous Court held that federal district courts retain jurisdiction to hear challenges related to the constitutionality of agency actions or structures even before the conclusion of the administrative enforcement process.

The case involved two separate underlying causes of action in which respondents each filed suit in federal district court challenging the constitutionality of administrative enforcement proceedings brought against them by the Securities and Exchange Commission and the Federal Trade Commission, respectively.<sup>48</sup> In each underlying case, the federal district court dismissed the suit for lack of jurisdiction, citing the relevant statutes,<sup>49</sup> under which each agency brought the enforcement action and finding that the judicial review schemes in those statutes only permit federal judicial review in an appellate court after the conclusion of the administrative review and adjudication process. However, the Supreme Court analyzed these challenges using three factors previously developed in the case of *Thunder Basin Coal Company v. Reich*<sup>50</sup> and determined that Congress did not intend to displace a district court’s federal-question jurisdiction, per 28 U.S.C. § 1331, over challenges to the constitutionality of the underlying enforcement action or the agency’s structure because doing so would “foreclose all meaningful judicial review,” these constitutional challenges were wholly “collateral” to the administrative enforcement actions, and these constitutional issues were “outside the Commission’s competence and expertise.”<sup>51</sup>

The Court’s decision in *Axon Enterprises* may pave the way for more federal district court suits challenging the fundamental constitutionality of administrative enforcement actions or administrative and regulatory structures during, or in parallel with, administrative adjudication of regulatory enforcement actions.

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<sup>45</sup>[In Re: Aqueous Film-Forming Foams Prod. Liab. Litig., No. 2:23-cv-03147-RMG, Preliminary Approval Order for Settlement Between Public Water Systems and 3M Company](#) (D.S.C. Aug. 29, 2023) (Entry Number 3626).

<sup>46</sup>[In Re: Aqueous Film-Forming Foams Prod. Liab. Litig., No. 2:23-cv-03147-RMG](#) (D.S.C. Aug. 22, 2023) (Entry Number 3603).

<sup>47</sup>*Axon Enterprise, Inc. v. Federal Trade Commission et al.*, No. 21-86; consolidated with *Securities and Exchange Commission, et al. v. Cochran*, No. 21-1239.

<sup>48</sup>*Axon Enterprise*, slip op. at 3.

<sup>49</sup>Securities Exchange Act, 15 U.S.C. § 78a *et seq.*; Federal Trade Commission Act, 15 U.S.C. § 41 *et seq.*

<sup>50</sup>510 U.S. 200 (1994).

<sup>51</sup>*Axon Enterprise*, slip op. at 1–17; *see also* slip op. at 17 (“All three Thunder Basin factors thus point in the same direction—toward allowing district court review of Axon’s and Cochran’s claims that the structure, or even existence, of an agency violates the Constitution”).

B. *New Youth Climate Change Litigation Raises Additional Constitutional Claims Against EPA*

On December 10, 2023, a group of eighteen children ranging in age from eight to seventeen years old filed a Complaint<sup>52</sup> in the U.S. District Court for the Central District of California against EPA Administrator Michael Regan and the United States. The Complaint alleges that EPA has violated the children’s constitutional rights by failing to more aggressively regulate and curtail what the Complaint calls “climate pollution” or the “carbon dioxide (CO<sub>2</sub>), methane, nitrous oxide, and fluorinated gases, the ‘greenhouse gases’ that are emitted to, disposed of, and accumulate in the atmosphere by human activity” (the “*G. B. Case*”).<sup>53</sup>

Further, the Complaint alleges that EPA has “forged an unlawful path by authorizing levels of climate pollution that have destabilized the very foundation and ordered liberty of children’s lives, including Plaintiffs’.”<sup>54</sup> Specifically, the Complaint raises constitutional claims against EPA, including violations of the Equal Protection Clause, violations of the Fifth Amendment’s Due Process Clause (including a violation of the right to life and a violation of an implied “right to a life-sustaining climate system on which all life depends”), and a violation of Article II’s Take Care Clause.<sup>55</sup> The Complaint seeks declaratory relief.<sup>56</sup> No substantive motions have yet been filed and no merits briefing schedule has yet been set in the *G. B. Case*.

The *G. B. Case* bears similarities to *Juliana, et al. v. United States of America, et al.*,<sup>57</sup> which has recently restarted in federal district court in Oregon. First filed in 2015, *Juliana* involves a group of youth plaintiffs who brought suit against a number of federal agencies, including EPA, alleging constitutional violations related to alleged discrimination and harms caused by climate change and those agencies’ continued permitting and authorization of fossil fuel–related projects and activities. On June 1, 2023, a federal district court allowed plaintiffs to file a second amended complaint in the case<sup>58</sup> after the U.S. Court of Appeals for the Ninth Circuit dismissed the original complaint in 2020 for lack of Article III standing, citing a lack of redressability in the relief sought by the plaintiffs.<sup>59</sup> The *Juliana* plaintiffs filed a second amended complaint on June 8, 2023, narrowing the relief sought to declaratory relief.<sup>60</sup> The Department of Justice has filed a motion to dismiss the second amended complaint.<sup>61</sup>

### III. EPA’S ENFORCEMENT PRIORITIES

For over two decades, EPA’s Office of Enforcement and Compliance Assurance (“OECA”) has selected National Enforcement and Compliance Initiatives (“NECIs”) to invest federal enforcement resources into what EPA deems the “most serious and

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<sup>52</sup>[Complaint](#), *G. B. et al. v. U.S. Env’tl. Prot. Agency et al.*, No. 2:23-cv-10345-MWF-AGR (C.D. Cal. Dec. 12, 2023).

<sup>53</sup>*Id.* at ¶¶ 9–10, n. 2.

<sup>54</sup>*Id.* at ¶ 9.

<sup>55</sup>*Id.* at ¶¶ 335–386.

<sup>56</sup>*Id.* at Prayer for Relief (¶¶ 1–7).

<sup>57</sup>Silke Goldberg and Ben Rubinstein, [Juliana v. United States, No. 6:15-cv-01517-AA \(D. Or.\)](#), Herbert Smith Freehills (Oct. 18, 2018).

<sup>58</sup>[Opinion and Order](#), *Juliana v. United States*, ECF No. 540 at 2 (June 1, 2023).

<sup>59</sup>*Juliana v. United States*, 947 F.3d 1159 (9th Cir. 2020).

<sup>60</sup>[Second Amended Complaint](#), *Juliana v. United States*, No. 6:15-cv-01517-AA, ECF No. 542 (D. Or. June 8, 2023).

<sup>61</sup>[Motion to Dismiss](#), *Juliana v. United States*, No. 6:15-cv-01517-AA, ECF No. 547 (D. Or. June 22, 2023).

widespread environmental problems.”<sup>62</sup> Earlier this year, OECA announced the six FY 2024—2027 NECIs, introducing three new initiatives on climate change, PFAS exposure, and coal ash contamination.<sup>63</sup> To promote key goals in the FY 2022—2026 EPA Strategic Plan, all six initiatives collectively aim to advance environmental justice and further climate action.<sup>64</sup>

#### A. *Mitigating Climate Change*

OECA created a new climate change mitigation initiative to respond to the threat of climate change to public health, resources, and ecosystems.<sup>65</sup> The NECI will focus on two climate “super-pollutants”: methane and hydrofluorocarbons (“HFCs”).<sup>66</sup> To reduce methane emissions, OECA will increase enforcement of existing air pollution requirements at oil and gas facilities and landfills—such as the Clean Air Act’s (“CAA”) New Source Performance Standards—but any newly promulgated rules on methane emission reduction could also be enforced.<sup>67</sup> To address the use, importation, and production of HFCs, OECA will focus on the phasedown schedule under the American Innovation and Manufacturing Act (“AIM Act”) and the Kigali Amendments to the Montreal Protocol, looking to criminal and civil enforcement of the AIM Act when necessary.<sup>68</sup>

#### B. *Addressing Exposure to PFAS*

Another initiative OECA introduced in this cycle addresses persistent PFAS contamination across the United States, with an emphasis on potential risks to drinking water supplies, through EPA’s statutory authority under the Resource Conservation and Recovery Act (“RCRA”), Clean Water Act (“CWA”), Safe Drinking Water Act (“SDWA”), and Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”).<sup>69</sup> While continuing to respond to violations of these statutes, OECA will initially focus on identifying and characterizing the extent of contamination near federal facilities and facilities that use and manufacture PFAS.<sup>70</sup> Then, in FY 2025, OECA will consider bringing additional enforcement actions where appropriate.<sup>71</sup> In addition, if EPA designates PFOA and PFOS acid as hazardous substances under CERCLA,<sup>72</sup> OECA will implement EPA’s PFAS Strategic Roadmap to hold responsible major manufacturers

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<sup>62</sup>[Memorandum](#) from U.S. Env’tl. Prot. Agency on FY 2024–2027 National Enforcement and Compliance Initiatives to Reg’l Adm’rs et al. (Aug. 17, 2023).

<sup>63</sup>*Id.*

<sup>64</sup>[Memorandum](#) from U.S. Env’tl. Prot. Agency on Updated Policy for EPA’s Enforcement and Compliance Initiatives to Reg’l Adm’rs et al. (Dec. 20, 2022); *see* FY 2022–2026 EPA Strategic Plan, U.S. ENV’T PROT. AGENCY, March 2022, at 9–37.

<sup>65</sup>Memorandum on FY 2024–2027 National Enforcement and Compliance Initiatives, *supra* note 62; *see also* [Memorandum](#) from U.S. Env’t Prot. Agency on EPA’s Climate Enforcement and Compliance Strategy to Off. of Env’t & Compliance Assurance Dirs. et al. (Sept. 28, 2023).

<sup>66</sup>Memorandum on FY 2024–2027 National Enforcement and Compliance Initiatives, *supra* note 62.

<sup>67</sup>*Id.* at 2–3.

<sup>68</sup>*Id.* at 3.

<sup>69</sup>*Id.*

<sup>70</sup>*Id.* at 4.

<sup>71</sup>*Id.*

<sup>72</sup>*See* [Proposed Designation of Perfluorooctanoic Acid \(PFOA\) and Perfluorooctanesulfonic Acid \(PFOS\) as CERCLA Hazardous Substances](#), U.S. ENVTL. PROT. AGENCY (last updated Oct. 30, 2023).

and users, other industrial parties, and federal facilities that are “significant sources of PFAS.”<sup>73</sup>

C. *Protecting Communities from Coal Ash Contamination*

OECA’s final new NECI will apply to facilities regulated under RCRA coal combustion residual requirements.<sup>74</sup> This initiative was designed to address widespread noncompliance with these requirements, particularly to protect communities, many of which face environmental justice concerns, surrounding coal ash facilities from associated serious health effects such as cancer.<sup>75</sup> As a primarily federally run program, OECA will focus on investigating noncomplying coal ash facilities and taking enforcement action to improve the water resources of the affected communities.<sup>76</sup>

D. *Reducing Air Toxics in Overburdened Communities*

Originally titled *Creating Cleaner Air for Communities by Reducing Excess Emissions of Harmful Pollutants*, this FY 2020–2023 NECI addressed hazardous air pollutants (“HAPs”) regulations and National Ambient Air Quality Standards for ozone.<sup>77</sup> For this cycle, EPA modified the initiative to focus on overburdened communities (“OBCs”) facing the worst levels of HAPs—such as benzene, ethylene oxide, and formaldehyde—which the EPA regions and states will select.<sup>78</sup> OECA will address HAPs noncompliance in these areas through investigation and enforcement actions, with relief tailored to each community’s specific concerns.<sup>79</sup>

E. *Increasing Compliance with Drinking Water Standards*

OECA will also work to further improve residential drinking water systems’ compliance with SDWA through its continuance of this FY 2020–2023 NECI, originally titled *Reducing Noncompliance with Drinking Water Standards at Community Water Systems*.<sup>80</sup> During the first cycle, this initiative decreased SDWA violations and increased collaborative training efforts according to OECA.<sup>81</sup> The second cycle of this NECI will

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<sup>73</sup>Memorandum on FY 2024–2027 National Enforcement and Compliance Initiatives, *supra* note 62, at 3. (Note that OECA “does not intend to pursue entities where equitable factors do not support CERCLA responsibility, such as farmers, water utilities, airports, or local fire departments, much as OECA exercises CERCLA enforcement discretion in other areas.”)

<sup>74</sup>*Id.* at 4.

<sup>75</sup>*Id.*

<sup>76</sup>*Id.* at 1.

<sup>77</sup>[National Enforcement and Compliance Initiative: Creating Cleaner Air for Communities by Reducing Excess Emissions of Harmful Pollutants](#), U.S. ENVTL. PROT. AGENCY (last updated Dec. 18, 2023).

<sup>78</sup>Memorandum on FY 2024–2027 National Enforcement and Compliance Initiatives, *supra* note 62, at 1,4-5.

<sup>79</sup>*Id.* at 5.

<sup>80</sup>*Id.*

<sup>81</sup>[National Enforcement and Compliance Initiative: Reducing Noncompliance with Drinking Water Standards at Community Water Systems](#), U.S. ENVTL. PROT. AGENCY (last updated Dec. 18, 2023).

involve increased compliance assistance and enforcement actions to address continued noncompliance, especially in OBCs.<sup>82</sup>

#### F. Chemical Accident Risk Reduction

The final continuing FY 2020–2023 initiative—originally titled *Reducing Risks of Accidental Releases at Industrial and Chemical Facilities*—addresses inadequate risk and safety management at facilities regulated under CAA’s section 112(r) risk management program.<sup>83</sup> This continuation is a response to continued, frequent releases of two high-risk hazardous substances: anhydrous ammonia used mostly as agriculture fertilizer or refrigerant and hydrogen fluoride used by petrochemical manufacturers.<sup>84</sup> OECA will rely on all of its enforcement methods, including the imposition of criminal liability when applicable.<sup>85</sup>

#### G. Discontinued FY 2020–2023 NECIs

Three FY 2020–2023 NECIs—addressing hazardous waste facilities’ emissions, defeat devices, and CWA permit compliance—were retired, but the associated environmental issues will continue to be addressed through baseline enforcement programs run by EPA, the EPA regions, and the states.<sup>86</sup>

The first discontinued NECI—titled *Reducing Hazardous Air Emissions from Hazardous Waste Facilities*—addressed emissions from the improper management of hazardous waste at facilities subject to RCRA organic air emission standards.<sup>87</sup> Under this NECI, EPA assessed millions of dollars in civil penalties and set up extensive training and resources for states and industry to build capacity to conduct compliance monitoring and initiate follow-up enforcement actions where appropriate.<sup>88</sup>

The discontinued *Stopping Aftermarket Defeat Devices for Vehicles and Engines* initiative involved the upstream manufacturing and distribution of “defeat devices” designed to bypass required emissions controls on vehicles and engines.<sup>89</sup> This NECI led to over 130 civil and criminal enforcement actions under the CAA.<sup>90</sup> Under this baseline program, OECA and the EPA regions will continue investigations, enforcement, and compliance assistance.<sup>91</sup>

Finally, through collaborative efforts under the discontinued *Reducing Significant Non-Compliance with National Pollutant Discharge Elimination System* NECI, EPA and

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<sup>82</sup>Memorandum on FY 2024–2027 National Enforcement and Compliance Initiatives, *supra* note 62.

<sup>83</sup>*Id.*; [National Enforcement and Compliance Initiative: Reducing Noncompliance with Drinking Water Standards at Community Water Systems](#), U.S. ENVTL. PROT. AGENCY (last updated Dec. 18, 2023).

<sup>84</sup>Memorandum on FY 2024–2027 National Enforcement and Compliance Initiatives, *supra* note 62, at 6.

<sup>85</sup>*Id.* at 2,6-7.

<sup>86</sup>*Id.* at 6-7

<sup>87</sup>[National Enforcement and Compliance Initiative: Reducing Hazardous Air Emissions from Hazardous Waste Facilities](#) U.S. ENVTL. PROT. AGENCY (last updated Dec. 18, 2023).

<sup>88</sup>*Id.*

<sup>89</sup>[National Enforcement and Compliance Initiative: Stopping Aftermarket Defeat Devices for Vehicles and Engines](#), U.S. ENVTL. PROT. AGENCY (last updated Dec. 18, 2023).

<sup>90</sup>Memorandum on FY 2024–2027 National Enforcement and Compliance Initiatives, *supra* note 62, at 6.

<sup>91</sup>*Id.*



the states undertook a comprehensive review and analysis of compliance data and effected a large reduction in significantly noncomplying permittees.<sup>92</sup> With a focus on remaining permit violators, EPA and the states will continue instituting enforcement actions and providing technical support to permittees to solve common compliance problems that often result from inadequately trained operators or a lack of sufficient funding.<sup>93</sup>

#### IV. UPDATE ON 6PPD REGULATION AND LITIGATION

##### A. 6PPD: What It Is and Why You Should Care

*N*-(1,3-dimethylbutyl)-*N*'-phenyl-*p*-phenylenediamine (“6PPD”) is a rubber antioxidant used to prevent tires from physically degrading due to reactions with ozone and other airborne reactive oxygen species.<sup>94</sup> It has been used since the 1960s, and today it is the primary antidegradation agent used in tires throughout the world. As tires wear down through road contact, 6PPD can be released to the environment. Recent scientific studies have found that when 6PPD reacts with ozone it can form 6PPD-quinone (“6PPD-q”).<sup>95</sup>

In early 2021, a team of researchers from Washington state published a study in *Science* indicating that 6PPD-q, even in very small water concentrations (~1 microgram), can induce “acute mortality” in Pacific Northwest coho salmon (*Oncorhynchus kisutch*).<sup>96</sup> As a result of its toxicity to aquatic species, the study postulated that the presence of 6PPD-q in the environment was contributing to the collapse of coho salmon populations in Puget Sound.<sup>97</sup>

The U.S. Tire Manufacturers Association (“USTMA”), a trade group, has pointed out that 6PPD-q is not used in tire manufacturing and is only a transformation product of 6PPD that may form as the result of environmental exposure.<sup>98</sup> The group has noted that while 6PPD has been extensively studied, there is more limited information available about 6PPD-q. As a result, USTMA stated that the group and its members are committed to collaborating with researchers and regulators to examine 6PPD-q further to resolve knowledge gaps and assess appropriate regulatory action.<sup>99</sup>

Since publication of the 2021 scientific study, legal developments related to 6PPD-q have progressed quickly. As such, the story of 6PPD illustrates how swift regulatory responses and court challenges can develop in response to new scientific assessments of emerging chemicals. In years past, it may have taken a decade or longer to see significant regulatory and legal action in response to new scientific evidence. In contrast, in the few years since the 2021 study was published, 6PPD has faced increasing scrutiny from EPA, while state regulators in California and Washington have taken independent steps to

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<sup>92</sup>[National Enforcement and Compliance Initiative: Reducing Significant Non-Compliance with National Pollutant Discharge Elimination System](#), U.S. ENVTL. PROT. AGENCY (last updated Dec. 18, 2023).

<sup>93</sup>Memorandum on FY 2024–2027 National Enforcement and Compliance Initiatives, *supra* note 62.

<sup>94</sup>See [Safer Chemicals Research Page for 6PPD-quinone](#), U.S. ENVTL. PROT. AGENCY (last updated Feb. 2, 2024).

<sup>95</sup>*Id.*

<sup>96</sup>Tian, Z. et al., [A ubiquitous tire rubber-derived chemical induces acute mortality in coho salmon](#), 371 SCIENCE 185, 187 (Dec. 3, 2020).

<sup>97</sup>*Id.*; See also Tian, Z. et al., [Erratum for the report “a ubiquitous tire rubber-derived chemical induces acute mortality in coho salmon.”](#) 375 SCIENCE (Feb. 18, 2022) (last visited Dec. 28, 2023).

<sup>98</sup>[6PPD and Tire Manufacturing](#), U.S. TIRE MANUFACTURERS ASS’N (last visited December 28, 2023).

<sup>99</sup>*Id.*

regulate 6PPD. Much of the concern about 6PPD has been driven by a coalition of U.S.-based environmental groups and Tribes that have advocated for administrative remedies to regulate 6PPD while, concomitantly, pursuing litigation to restrict its use. While the European Commission has not yet taken extensive action on 6PPD, it has begun to focus more generally on environmental concerns associated with tires.

## B. Regulatory Developments

### 1. Federal, Toxic Substances Control Act Petition and Regulatory Action

On November 2, 2023, EPA announced that it would initiate multiple regulatory actions for 6PPD pursuant to its authority under TSCA section 6.<sup>100</sup> The decision came following an August 1, 2023, petition filed by EarthJustice, on behalf of the Yurok Tribe, Port Gamble S’Klallam Tribe, and Puyallup Tribe of Indians, under section 21,<sup>101</sup> calling on EPA to “establish regulations prohibiting the manufacturing, processing, use, and distribution” of 6PPD.<sup>102</sup>

While EPA has not committed to a specific rulemaking timeframe or outcome, it announced that it would publish an Advance Notice of Proposed Rulemaking for 6PPD by fall 2024 pursuant to TSCA section 6, to determine whether there is an unreasonable risk associated with 6PPD,<sup>103</sup> and separately finalize a rule under TSCA section 8(d)—requiring “manufacturers (including importers) of 6PPD to report lists and copies of unpublished health and safety studies to EPA by the end of 2024.”<sup>104</sup> EPA has also established a cross-agency working group to “facilitate inter-program office coordination”<sup>105</sup> for 6PPD-q and has made 6PPD one of its research priorities for the 2023–2026 research cycle.<sup>106</sup>

### 2. State

#### a. California Safer Consumer Products Regulations

In March 2022, the California Department of Toxic Substances Control (“DTSC”) published a report on 6PPD that concluded motor vehicle tires should be designated as a “priority product” pursuant to article 3 of the California Safer Consumer Products (“SCP”)

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<sup>100</sup>15 U.S.C. § 2605(a); See U.S. Env’tl. Prot. Agency, [Re: Petition ID No. 001845: Toxic Substances Control Act Section 21 Petition Regarding N-\(1,3-Dimethylbutyl\)-N’-phenyl-p-phenylenediamine \(CASRN 793-24-8, aka 6PPD\) in Tires—Final EPA Response to Petition](#) at 3 (Nov. 2, 2023)[hereinafter U.S. Env’tl. Prot. Agency November 2 Decision Letter].

<sup>101</sup>[15 U.S.C. § 2620.](#)

<sup>102</sup>[Letter](#) from EarthJustice to EPA Administrator Regan Regarding Citizen Petition under TSCA Section 21 to Prohibit 6PPD in Tires (Aug. 1, 2023).

<sup>103</sup>U.S. Env’tl. Prot. Agency November 2 Decision Letter, *supra* note 100, at 6.

<sup>104</sup>[Press Release](#), U.S. Env’tl. Prot. Agency, EPA Grants Tribal Petition to Protect Salmon from Lethal Chemical (last updated Nov. 2, 2023).

<sup>105</sup>U.S. Env’tl. Prot. Agency November 2 Decision Letter, *supra* note 100, at 3.

<sup>106</sup>See [Safe and Sustainable Water Resources: Strategic Research Action Plan Fiscal Years 2023-2026](#), U.S. ENVTL. PROT. AGENCY 13 (Oct. 2022) (Research Area 10 is dedicated to research on stormwater management, including “Evaluations of industrial inputs . . . including contaminants that can affect human health and the environment (e.g., 6ppd-quinone)”); EFFLUENT GUIDELINES PROGRAM PLAN 15, *supra* note 94 (Attorneys are encouraged to monitor EPA’s Safer Chemicals Research page for 6PPD-quinone may provide updates on its research efforts related to the chemical).

regulations.<sup>107</sup> The SCP regulatory regime, adopted a decade ago, provides authority for DTSC to require manufacturers (or other responsible entities) to seek safer alternatives to chemical ingredients in widely used products.

Final regulatory text, adding tires containing 6PPD as a priority product, was published in May 2023 and approved on July 3, 2023.<sup>108</sup> The DTSC designation, which took effect on October 1, 2023,<sup>109</sup> requires all “responsible entities”<sup>110</sup> to prepare and submit preliminary analysis reports,<sup>111</sup> evaluating available 6PPD alternatives, by March 29, 2024 (within 180 days after the effective date of the regulation).<sup>112</sup>

### b. Washington Priority Toxic Chemical Listing

6PPD is now listed as a priority toxic chemical under Washington state law.<sup>113</sup> The Washington State Department of Ecology (“Ecology”) is actively developing methods to test and monitor 6PPD and 6PPD-q in the environment so it can identify areas most affected by these chemicals. On May 18, 2021, the Washington State Legislature passed a proviso authorizing the release of funds to Ecology to support research efforts to identify priority areas affected by 6PPD.<sup>114</sup> Ecology submitted an initial report of its findings in October 2022.<sup>115</sup> The report identified assessment strategies for determining which ecosystems in the State of Washington should be prioritized for further research and monitoring and control measures.<sup>116</sup> The report indicated that the management and assessment of 6PPD-q will require a multi-disciplinary approach, using a variety of tools, including the adoption of appropriate regulations in the future.<sup>117</sup>

### 3. European Union

The European Union has taken a slightly different approach to regulating tires. While questions were raised about 6PPD in 2022, when the European Commission (“Commission”) was developing a draft proposal to regulate emissions from tires (the “Euro 7” proposal), the Commission preliminarily dismissed the idea of regulating 6PPD due to concerns over the lack of sufficient evidence.<sup>118</sup> However, this has not precluded the Commission from evaluating environmental impacts associated with tire usage. The Commission published the draft Euro 7 proposal focused on regulating, among other

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<sup>107</sup>CAL. CODE REGS. tit. 22, §§ [69503.7-69504](#).

<sup>108</sup>See [Listing Motor Vehicle Tires Containing N-\(1,3-Dimethylbutyl\)-N-phenyl-p-phenylenediamine \(6PPD\) as a Priority Product](#), DEP’T. OF TOXIC SUBSTANCES CONTROL (last visited Feb. 16, 2024).

<sup>109</sup>*Id.*

<sup>110</sup>CAL. CODE REGS. tit. 22, § [69501.1\(a\)\(60\)](#) (All manufacturers, importers, assembler, or retailers of tires containing 6PPD are “responsible entities” within the meaning of the regulations.).

<sup>111</sup>See CAL. CODE REGS. tit. 22, § [69505](#).

<sup>112</sup>See CAL. CODE REGS. tit. 22, § [69511.7\(h\)](#).

<sup>113</sup>See [Tire anti-degradant \(6PPD\) and 6PPD-quinone](#), STATE OF WASH. DEP’T. OF ECOLOGY (last visited Feb. 16, 2024).

<sup>114</sup>[S.B. 5092](#) § 302(23), 67th Leg., 2021 Reg. Sess. (Wash. 2021).

<sup>115</sup>See [6PPD in Road Runoff: Assessment and Mitigation Strategies](#), STATE OF WASH. DEP’T. OF ECOLOGY (Oct.2022).

<sup>116</sup>*Id.*

<sup>117</sup>*Id.* at 47.

<sup>118</sup>See, e.g., [EUR. PARL. DOC.](#) (E-007042) (2020); [EUR. PARL. DOC.](#) (E-002319) (2023).



things, microplastics and particulate matter from tires on November 10, 2022.<sup>119</sup>

The Euro 7 proposal, which the European Parliament approved November 9, 2023,<sup>120</sup> marks the first time the Commission has proposed regulations focusing on non-exhaust emissions from vehicles. The legislative process to set the basis for the Euro 7 standard will be completed during 2024, but specific limits for tire emissions will be defined at a later stage, with detailed provisions required by 2026.<sup>121</sup>

### C. *Litigation in the United States*

On August 15, 2023, EarthJustice sent notices to thirteen U.S. tire manufacturers alleging violations of section 9 of the Endangered Species Act (“ESA”)<sup>122</sup> related to illegal take of coho salmon, Chinook salmon, and steelhead trout as a result of environmental releases of 6PPD-q, and announced their intent to sue on behalf of the Institute for Fisheries Resources and Pacific Coast Federation of Fishermen’s Associations.<sup>123</sup> After waiting the requisite 60 days, EarthJustice promptly filed suit against the tire manufacturers in the Northern District of California on November 8, 2023.<sup>124</sup> The complaint asks the court to declare that the defendant tire manufacturers are unlawfully taking ESA-protected fish species in violation of the ESA, enjoin the defendants from continuing the unauthorized take of ESA-protected aquatic species, and award attorneys’ fees and costs.<sup>125</sup>

## V. OFFSHORE WIND LITIGATION

The nascent offshore wind industry saw several decisions, including the first decisions upholding, on the merits, the government’s environmental review and permitting for an offshore wind farm in federal waters.

### A. *Leasing*

The court in *Save Long Beach Island v. U.S. Department of the Interior*<sup>126</sup> rejected claims under the National Environmental Policy Act (“NEPA”)<sup>127</sup> and ESA<sup>128</sup> challenging the Bureau of Ocean Energy Management’s (“BOEM”) identification of wind leasing areas in the New York Bight. The court relied on *Fisheries Survival Fund v. Haaland*,<sup>129</sup> which held a NEPA challenge to an offshore wind lease was unripe because it did not authorize activities within the leased area, so it was not the “irreversible and irretrievable commitment” by an agency needed to make a NEPA challenge ripe for review.<sup>130</sup>

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<sup>119</sup>[Press Release](#), Eur. Comm’n, Commission proposes new Euro 7 standards to reduce pollutant emissions from vehicles and improve air quality (Nov. 10, 2022).

<sup>120</sup>[Press Release](#), Eur. Parl., Euro 7:MEPs support new rules to cut down pollutant emissions (Sept. 11, 2023).

<sup>121</sup>*See id.*

<sup>122</sup>[16 U.S.C. § 1540\(g\)](#).

<sup>123</sup>[Letter](#) from Earth Justice to U.S. Tire Manufacturer (Aug. 15, 2023) (on file with author).

<sup>124</sup>*Institute For Fisheries Resources et al. v. Bridgestone Americas, Inc. et al.*, No. 3:2023cv05748 (N.D. Cal Nov. 8, 2023) (complaint for declaratory and injunctive relief).

<sup>125</sup>*Id.*

<sup>126</sup>No. 22-cv-55, 2023 WL 2424608 (D.D.C. Mar. 9, 2023).

<sup>127</sup>42 U.S.C. §§ 4321 – 4370m-12.

<sup>128</sup>16 U.S.C. §§ 1531 – 1544.

<sup>129</sup>858 F. App’x 371, 372 (D.C. Cir. 2021).

<sup>130</sup>*Id.*

B. *DOE Grant Funding*

The court in *American Bird Conservancy v. Granholm*<sup>131</sup> considered a NEPA challenge to Department of Energy (“DOE”) funding for Project Icebreaker, a six-turbine pilot project proposed for Lake Erie. The court found that plaintiffs lacked standing to assert that DOE should have prepared an environmental impact statement rather than an environmental assessment because the Plaintiffs “have not linked the causal chain between a purported NEPA error and [their] interests, because DOE has made no decision based on its NEPA analysis.”<sup>132</sup> The court also found that the U.S. Army Corps of Engineers (“Corps”) had not violated CWA section 404,<sup>133</sup> deferring to the Corps’ alternatives analysis and its determination that uncertainty about Project Icebreaker’s impact on bird and bat populations did not render it “contrary to the public interest.”<sup>134</sup>

C. *Project Approvals*

1. South Fork Wind

In *Mahoney v. Department of Interior*, the plaintiffs asserted that the NEPA review and CWA section 404 permit for South Fork Wind had failed to consider the effects that trenching for the project’s export cable could have on groundwater contamination.<sup>135</sup> The court held the plaintiffs lacked standing, because the cable route was approved by the New York Public Service Commission and was outside the federal agencies’ jurisdiction; therefore, the plaintiffs’ alleged that injury was not fairly traceable to the agencies’ conduct.<sup>136</sup>

2. Vineyard Wind

Four lawsuits seeking to block the Vineyard Wind project—the first utility-scale offshore wind project in the United States, which is currently under construction offshore of Massachusetts, and will have a capacity of 800 megawatts when completed—were resolved by summary judgment.

a. Standing Determinations

In *Nantucket Residents Against Turbines v. BOEM* (“ACK RATS”), the District of Massachusetts found that the plaintiffs had “marginally”<sup>137</sup> demonstrated standing but only as to ESA claims relating to the endangered North Atlantic right whale (“NARW”) and not Vineyard Wind’s potential effects on air quality.<sup>138</sup> The court also found standing under the Marine Mammal Protection Act (“MMPA”) for the plaintiff in *Melone v. Coit*,<sup>139</sup> who had expressed interest in protecting the NARW and taken part in whale-watching. The court noted that there are less than 400 remaining NARW, so even a slightly increased risk

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<sup>131</sup>No. 19-3694 (TJK), 2023 WL 6276618 (D.D.C. Sept. 26, 2023).

<sup>132</sup>*Id.* at \*4.

<sup>133</sup>*Id.* at \*4-5.

<sup>134</sup>*Id.* at \*5.

<sup>135</sup>22-cv-01305-FB-ST, 2022 WL 1093199 (E.D.N.Y. Apr. 12, 2022).

<sup>136</sup>*Id.* at \*2.

<sup>137</sup>1:21-cv-11390-IT at 28 (D. Mass. May. 17, 2023), *appeal docketed*, No. 23-1501 (1st Cir. June 20, 2023).

<sup>138</sup>*Id.* at 30.

<sup>139</sup>1:21-cv-11171-IT, 2023 WL 5002764 (D. Mass. Aug. 4, 2023), *appeal docketed*, No. 23-1736 (1st Cir. Sept. 8, 2023).

could harm Melone’s interest in viewing the species. Thus, Melone had standing based on his contention that the National Marine Fisheries Service (“NMFS”) had increased the likelihood of harm to the whale and reduced Melone’s chances of observing it in the future.<sup>140</sup>

The court addressed standing for fishing companies and a fishing industry group in the consolidated cases *Seafreeze Shoreside v. Dep’t of Interior and Responsible Offshore Development Alliance v. Dep’t of Interior* (“*Seafreeze/RODA*”).<sup>141</sup> The court found that none of the commercial entities had standing to assert aesthetic or environmental interests on behalf of their owners or employees, the industry group did not have standing to assert non-economic injuries on behalf of its members, and their alleged economic injuries did not provide standing under the ESA, MMPA, or NEPA.<sup>142</sup>

#### b. Merits Decisions

The *ACK RATS* plaintiffs claimed that NMFS’s Biological Opinion failed to address five studies on the NARW and therefore did not rely on the “best scientific and commercial data available.”<sup>143</sup> The court found that NMFS had considered those studies and deferred to NMFS’s evaluation of the data and conclusion that Vineyard Wind would not jeopardize the continued existence of the NARW.<sup>144</sup> The court also rejected the argument that NMFS and BOEM failed to consider the impact of Vineyard Wind’s construction on the NARW and dismissed the plaintiff’s ESA and NEPA claims, both of which relied on impacts to the NARW.<sup>145</sup>

In *Melone*, the court determined that procedural defects in NMFS’s issuance of an incidental harassment authorization for the NARW were harmless error.<sup>146</sup> The court also rejected Melone’s arguments that NMFS had misinterpreted the MMPA, deferring to the agency’s statutory interpretation.<sup>147</sup>

In *Seafreeze/RODA*, the court rejected claims under CWA section 404, finding that the Corps’ alternatives analysis complied with the CWA and its cumulative impacts analysis was properly limited to the transmission cable corridor that was the subject of the permit.<sup>148</sup> The court also dismissed several claims under the Outer Continental Shelf Lands Act (“OCSLA”)<sup>149</sup> as time-barred and found that BOEM acted within its discretion in balancing the interests protected by OCSLA.<sup>150</sup>

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<sup>140</sup>*Id.*

<sup>141</sup>2023 WL 6691015 (D. Mass. Oct. 12, 2023), *appeal docketed*, No. 23-1853 (1st Cir. Oct. 20, 2023).

<sup>142</sup>2023 WL 6691015 at \*11–16.

<sup>143</sup>*Nantucket Residents Against Turbines*, 1:21-cv-11390-IT (D. Mass. 17, 2023) (*see* 16 U.S.C. § 1536(a)(2), 50 C.F.R. § 402.14(g)(8)).

<sup>144</sup>*Id.* at 40.

<sup>145</sup>*Id.* at 45, 47, 52.

<sup>146</sup>*Melone*, 2023 WL 5002764 at \*15 (D. Mass. Aug. 4, 2023).

<sup>147</sup>*Id.* at \*16–27 (For example, the court evaluated the suite of mitigation measures required by NMFS, including protected species observers and vessel speed restrictions, pointed out that Melone had not offered any evidence to undermine NMFS’s conclusion that those mitigation measures would result in the “least practicable impact” to the species as required by the MMPA, and rejected Melone’s contention that those mitigation measures were inadequate.); *Id.* at \*25–26.

<sup>148</sup>2023 WL 6691015 at \*16–\*18.

<sup>149</sup>43 U.S.C. §§ 1331 – 1356c.

<sup>150</sup>2023 WL 6691015 at \*19–\*23 (citing 43 U.S.C. § 1337(p)(4)).

## VI. THREE 2023 ESG ENFORCEMENT AND LITIGATION TRENDS TO KEEP WATCHING IN 2024

In the context of the continually evolving framework of environmental, social, and governance (“ESG”), 2023 saw several ESG-related enforcement and litigation trends develop, including some with far-reaching implications. At a high level, regulators and stakeholders are taking more aggressive stances against greenwashing, increasing the importance of claim substantiation—the significance of this will continue into 2024 and beyond. Items of specific importance are the impending carbon- and climate-related disclosure compliance regime established by the California legislature; increased greenwashing litigation, including class actions; and new regulations impacting environmental justice (“EJ”) compliance and strategy.

### A. *California’s Climate- and Carbon-Related Mandatory Reporting*

On October 7, 2023, California governor Gavin Newsom signed three climate- and carbon-related bills into law: Senate Bills [253](#)<sup>151</sup> and [261](#)<sup>152</sup>, known as the Climate Corporate Data Accountability Act (“CCDAA”) and the Climate-Related Financial Risk Act (“CRFRA”), respectively, along with California Assembly Bill (“AB”) [1305](#)<sup>153</sup> (also known as the Voluntary Carbon Market Disclosures Act (“VCMDA”). The VCMDA, effective January 1, 2024, requires companies doing business in California that purchase and use carbon offsets and/or make “net zero” or “carbon neutral” or carbon or GHG emissions reductions claims in California, to make website disclosures about the underlying carbon reduction or removal projects and/or company sustainability programs substantiating such usage and/or claims, including, without limitation, those relating to project details and data as well as entities selling the offsets, how program progress is measured, whether third-party verification is obtained, and the accuracy of such claims.<sup>154</sup>

Key disclosure requirements aimed at combatting greenwashing include requiring companies to provide documentation of the veracity of “net zero,” “carbon neutral,” or similar claims, how interim progress or successful accomplishment of these goals will be measured, and whether a third party has verified the claims.<sup>155</sup> Additionally, companies purchasing or using voluntary carbon offsets must provide information about the actual voluntary carbon offset project itself.<sup>156</sup>

Companies subject to AB 1305, especially those making “net zero,” “carbon neutral,” and/or similar claims in California, will need to understand the universe of those claims and take steps to evaluate whether each of those claims are/can be substantiated.

### B. *Increasing Greenwashing Litigation*

In addition to regulatory risk, greenwashing litigation claims against “household” brands continued in 2023 across various sectors, including fashion, retail, food/beverage, and aviation. As regulatory stakeholders in the United States catch up with corporate claims of being “carbon neutral” and “net zero,” it is foreseeable that greenwashing claims (under consumer protection laws, for example) will increase.

To date, litigants in greenwashing cases have achieved various results on both the plaintiffs’ and defendants’ sides. In cases where defendants have prevailed in part, courts

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<sup>151</sup>CAL. HEALTH & SAFETY CODE § 38532.

<sup>152</sup>CAL. HEALTH & SAFETY CODE § 38533.

<sup>153</sup>CAL. HEALTH & SAFETY CODE § 44475 – 44475.2.

<sup>154</sup>*See id.*

<sup>155</sup>CAL. HEALTH & SAFETY CODE § 44475.2.

<sup>156</sup>CAL. HEALTH & SAFETY CODE § 44475.1.

have been hesitant to find fault with so-called puffery statements that a reasonable consumer would not interpret as factual and/or statements found to be aspirational.<sup>157</sup> That said, for companies seeking to improve their posture against such litigation, efforts toward evaluating and documenting rigorous substantiation are imperative.

### C. *Environmental Justice Regulations*

With passage of [Executive Order](#) (“EO”) 14096 on April 21, 2023, the Biden administration called for the “advance[ment] [of] environmental justice for all by implementing and enforcing the Nation’s environmental and civil rights laws, preventing pollution, addressing climate change and its effects, and working to clean up legacy pollution that is harming human health and the environment.”<sup>158</sup> Applicable to all federal agencies within the Executive Branch, EO 14096 requires development of Environmental Justice Strategic Plans that provide agency-specific roadmaps that weave together their unique mission with the White House’s EJ charges. To support agency work, the Council on Environmental Quality recently [released](#) its guidance document, *Strategic Planning to Advance Environmental Justice*.<sup>159</sup>

At the state level, New Jersey became the first to [ratify](#) an Environmental Justice Law and implementing rules.<sup>160</sup> This legislation requires the New Jersey Department of Environmental Protection to evaluate environmental and public health impacts of certain facilities on overburdened communities (“OBCs”) when reviewing certain permitting applications. While this set of rules applies to a limited type of facility seeking permitting in New Jersey, there have been multiple instances of permit denials—based on an applicant’s failure to avoid disproportionate impacts on OBCs. To keep abreast of new laws, regulations, and rules in 2024, the Environmental Justice State by State [website](#) is a useful resource.<sup>161</sup>

## VII. IMPACT OF CANADIAN REGULATION OF EMERGING CONTAMINANTS ON U.S.–CANADA TRADE

The scope and number of emerging contaminants continue to expand as substances are newly identified as harmful to the environment and human health, studied, regulated, and in some instances, banned. In today’s globalized world, such evolution does not happen in a vacuum; instead, information is shared across borders to inform and develop regulations and practices to address such growing concerns and risks.

Canadian regulation of emerging contaminants can directly affect American businesses, whether doing business in Canada or doing business with Canadians, including supply chains, manufacturing operations, trade, retail, and waste management. Given the interconnection of North American supply chains across the U.S.–Canada border, increased regulation of substances and products in Canada impacts manufacturers, distributors, and retailers in the United States who supply such substances or products into Canada as well as distributors, retailers, and consumers in the United States who purchase such substances or products exported from Canada.

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<sup>157</sup>See, e.g., [Dwyer v. Allbirds, Inc.](#), Case 7:21-cv-05238-CS (S.D.N.Y. 2022).

<sup>158</sup>Exec. Order No. 14,096, 88 Fed. Reg. 25,251 (Apr. 21, 2023).

<sup>159</sup>[Strategic Planning to Advance Environmental Justice: Under Executive Order 14096, Revitalizing Our Nation’s Commitment to Environmental Justice for All](#), WHITE HOUSE CEQ (Oct. 2023).

<sup>160</sup>[Environmental Justice Rules Frequently Asked Questions](#), N.J.A.C. 7:1C, N.J. DEP’T OF ENVTL. PROT. (last visited Apr. 14, 2024).

<sup>161</sup>[Environmental Justice State by State](#), VT. L. SCHOOL/ENV’T JUST. CLINIC (last visited Apr. 14, 2024).



In 2023, the highest-profile emerging contaminants in Canada were microplastics and PFAS with pharmaceutical and personal care products (“PPCPs”) and tire and brake tread trailing but picking up speed behind them.

From this list, Canada has made the most progress in regulating microplastics through its broader regulation of single-use plastic products. In particular, there has been a national ban implemented for certain single-use products<sup>162</sup> (and some overlapping or more expansive bans at the provincial level), an increase of extended producer responsibility programs for end-of-life and plastic products recycling at the provincial level, the development of a plastics registry to inform the study of plastic production and supply in Canada,<sup>163</sup> and a proposed recycling labeling regulation to ensure consistent and more accurate recycling information available to the public and recycling facilities.<sup>164</sup> These developments target plastic products more generally but have an underlying intention and purpose of reducing the quantity of microplastics in the environment.

With respect to PFAS, Canada currently prohibits certain PFAS substances and their precursors, including PFOS, PFOA, and perfluorocarboxylic acids (“LC-PFCAs”), from being manufactured, used, sold, offered for sale, or imported into Canada with some exemptions for certain uses involving AFFF, photolithography, and photographic film,<sup>165</sup> which are anticipated to be phased out in the near future. In the meantime, the Canadian government has been researching and monitoring PFAS since 2021 to inform future regulation of these substances. In 2023, the government announced its [intention](#) to regulate PFAS as a class, as opposed to regulating only specific varieties of PFAS.<sup>166</sup> The study is expected to be concluded in 2024 with proposed regulations to follow.

While microplastics and PFAS make media headlines, PPCPs and tire and brake treads have garnered significantly less attention. While PPCPs are being studied on a more local scale, often because of concerns raised by the public, the focus of Canadian and local governments is on the assessment of the presence of PPCPs in and studying their impacts on the environment. Similarly, the scope of impacts from particulate emitted from automobile tires and brake wear are in the research stage and does not appear to be the focus of any proposed regulation. However, in both instances, it is reasonable to anticipate additional attention to and possible regulation of these substances in Canada in the future.

Companies doing business in Canada or with Canadians involving these emerging contaminants should consider whether any of their products are subject to existing, proposed, or future regulation (or even bans) in Canada as well as products targeted for additional regulation through stewardship, labeling, or reporting requirements. A proactive approach to compliance with Canadian laws is key to ensuring American businesses are not caught by surprise as Canadians implement additional regulation of such materials.

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<sup>162</sup>Single-Use Plastics Prohibition Regulations, 1999 (SOR/2022-138).

<sup>163</sup>[Notice of Intent to Issue a Notice under Section 46 of the Act with Respect to Reporting of Certain Plastic Products for 2024, 2025, and 2026](#), CANADA GAZETTE, Part I, Vol. 157, No. 52 (Dec. 30, 2023).

<sup>164</sup>[Recycled Content and Labelling Rules for Plastics: Regulatory Framework Paper](#), ENV’T AND CLIMATE CHANGE CANADA (last updated May 5, 2023).

<sup>165</sup>Prohibition of Certain Toxic Substances Regulations, 2012 (SOR/2012-285).

<sup>166</sup>[Draft State of Per- and Polyfluoroalkyl Substances \(PFAS\) Report](#), ENV’T AND CLIMATE CHANGE CANADA (May 2023).