PART I: ILLINOIS ENVIRONMENTAL CASE LAW UPDATE

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PART II: SIGNIFICANT FEDERAL CASES AND INITIATIVES 2017

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I. ILLINOIS ENVIRONMENTAL CASE LAW OF 2017

2017 was a very light year for reported Illinois cases impacting environmental law with only one case being published. This article presents a summary of the case which addresses post-closure care of landfills.

A. *D&L Landfill, Inc. v. Illinois Pollution Control Board, et al.*, 2017 IL App (5th) 160071[1]

This case came on appeal of the Illinois Pollution Control Board's ("Board") denial of D&L Landfills Inc.'s ("D&L") request for certification that it had completed post-closure care of its sanitary landfill located in Greenville, Illinois.[2] The landfill owned by D&L had been permitted by the Illinois Environmental Protection Agency ("IEPA") for disposal of general municipal waste and a small volume of dewatered sewage sludge since May of 1974.[3] The site had been operated as a city dump since 1967.[4] When the Board amended the landfill regulations, D&L opted to close the landfill and notified the IEPA of such on August 7, 1992.[5] Closure would allow D&L to avoid the new landfill requirements.[6] D&L had submitted an initial plan to

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1. D&L Landfill, Inc. v. Ill. Pollution Control Bd., 2017 IL App (5th) 160071, 83 N.E.3d 10 (5th Dist. 2017).
2. *Id.* ¶ 1, 83 N.E.3d at 11.
3. *Id.* ¶ 3.
4. *Id.* ¶ 2.
5. *Id.* ¶ 4, 83 N.E.3d at 11–12.
6. *Id.*

close the landfill which was approved by the IEPA on February 15, 1991, and a supplemental permit was issued providing for the landfill's closure plan, post-closure care, and groundwater monitoring.[7] The plan included requirements for final cover of the landfill and maintaining the site for 15 years.[8] After several modified plans and supplemental permits, the IEPA approved the closure activities for the landfill on January 21, 1997, and identified August 31, 1996, as the beginning of the "15-year minimum post-closure care period."[9] More than 15 years after the approved closure plan, on December 31, 2012, D&L filed a supplemental permit application to end post-closure care at the site.[10] The application acknowledged that in 2012 there had been exceedances of the chemical levels in the groundwater.[11] The IEPA conducted an inspection on January 18, 2013, and noted that there was erosion, settling, ponding water, and significant leachate collection.[12] Additionally, the February 2013 groundwater monitors identified levels of ethyl ether, tetrahydrofuran, chlorobenzene, total arsenic, total organic halogens and dissolved boron exceeding naturally existing value.[13]

The IEPA denied the closure certification in February 2013.[14] The IEPA indicated D&L had failed to provide proof that granting the closure would not result in violations of the Act, noting that the site exceeded groundwater limitations, contained eroded and ponded areas, and that final cover needed to be repaired.[15] On August 14, 2013, D&L informed the IEPA that the erosion had been corrected and the exceedances were trending downward, but failed to actually address the groundwater exceedances.[16] After a meeting on December 3, 2014, and several extensions on the decision deadline, the IEPA finally issued a denial of application for certification of completion of post-closure care on December 29, 2014.[17] The IEPA stated that as D&L had numerous unaddressed groundwater exceedances it could not determine that the site would not cause future violations of the Board regulations codified at 807.313 and 807.315.[18] D&L filed a petition for review to the Board.[19] At the Board, the IEPA and D&L filed cross-motions for summary judgment.[20] Both D&L and the IEPA argued the proper applicability of Section 22.17(a) of the Illinois Environmental Protection

7. *Id*. ¶ 5, 83 N.E.3d at 12.
8. *Id*.
9. *Id*. ¶ 6.
10. *Id*. ¶ 7.
11. *Id*.
12. *Id*. ¶ 8.
13. *Id*.
14. *Id*. ¶ 9.
15. *Id*.
16. *Id*. ¶¶ 10-11, 83 N.E.3d at 12-13.
17. *Id*. ¶¶ 11-12, 83 N.E.3d at 13.
18. *Id*. ¶ 12. *See infra* note 25 for text of Sections 807.313 and 807.315.
19. *Id*. ¶ 13.
20. *Id*.

Act.[21] Section 22.17(a) provides: "[t]he owner and operator of a sanitary landfill site . . . shall monitor gas, water and settling at the completed site for a period of 15 years after the site is completed or closed, or such longer period as may be required by Board or federal regulation."[22] The Board affirmed the IEPA's denial of certification of completion of post-closure care; subsequently, D&L petitioned the Appellate Court for administrative review.[23] As the central issue regarding the proper construction of Section 22.17(a) was a question of law the Appellate Court conducted a *de novo* review.[24]

D&L asked the court to reverse the Board and IEPA, asserting three different grounds as to why the decisions were wrong.[25] First, D&L argued that "as a matter of law" it was only required to monitor its landfill for 15 years after completing final cover unless a longer period is prescribed by regulation.[26] Secondly, D&L asserted that it fixed the final cover, the only abatable problem identified.[27] Finally, D&L argued that Part 620 groundwater standards are not applicable to landfills permitted under Part 807.[28]

In addressing the issues raised by the parties, the Appellate Court first looked to the statutory purpose of the Illinois Environmental Protection Act, recognizing that it should be construed liberally to achieve its purpose to "restore, protect and enhance the quality of the environment, and to assure that adverse effects upon the environment are fully considered and borne by those that cause them."[29] As the dispute centered on statutory interpretation, the court reiterated the relevant rules of statutory construction to be considered: that "[i]f the language of the statute in issue is clear and unambiguous, the court must interpret the statute according to its terms without resorting to aids of construction."[30] All statutory provisions should be harmonized and read together so that no part is rendered superfluous and the court presumes the legislature did not "intend absurd, inconvenient, or unjust results."[31]

The Appellate Court first addressed D&L's assertion that the language of 22.17(a) required a regulatory amendment to extend post-closure care beyond 15 years.[32] The court rejected this argument as incongruent with

21. *Id*. ¶¶ 14-15, 83 N.E.3d at 13–14.
22. 415 ILL. COMP. STAT. 5/22.17(a) (West 2012); *D&L Landfill*, 2017 IL App (5th) 160071, ¶ 14.
23. *D&L Landfill*, 2017 IL App (5th) 160071, ¶ 18, 83 N.E.3d at 14.
24. *Id*. ¶ 21, 83 N.E.3d at 15.
25. *Id*. ¶ 19, 83 N.E.3d at 14–15.
26. *Id*.
27. *Id*.
28. *Id*.
29. 415 ILCS 5/2 (b) and (c) (West 2014); *D&L Landfill*, 2017 IL App (5th) 160071, ¶23, 83 N.E.3d at 15.
30. *D&L Landfill*, 2017 IL App (5th) 160071, ¶21, 83 N.E.3d at 15.
31. *Id*. ¶ 23.
32. *Id*. ¶ 24, 83 N.E.3d at 15–16.

Section 807.524(c), which prohibits the IEPA from granting closure if future violations are possible.[33] The interpretation that D&L argued would result in a violation of the rules of statutory construction as the language of 22.17(a) would supersede the requirements of 807.524(c).[34] Such an interpretation violated the rule of statutory construction that every provision should be given its meaning and would result in an illogical incongruency.[35] The Appellate Court specifically noted that the qualifier of 22.17(a) "or such longer period as may be required by Board or federal regulations" recognized issues may arise during the post-closure care period that have an environmental impact and therefore require a longer post-closure care period.[36]

In its appeal, D&L also asserted that it "abated damage to the final cover which was the only abatable problem at the site."[37] Although not specifically stated, D&L's challenge was to the applicability of Sections 807.313 and 807.315[38] of the Board Regulations to its site.[39] The Appellate Court rejected this implication and found that Section 807.313 and 807.315 of the Board regulations applied to D&L, agreeing with the Board's determination that even though D&L was not "operating," its operation had resulted in the ground water exceedances.[40] The Court concluded that the IEPA had the authority to require D&L to continue to monitor groundwater until it reached acceptable levels as set forth in the regulations and denial of certification of post-closure was consistent with the Act and Board regulations.[41]

The final basis of D&L's appeal was that part 620 groundwater regulations were not applicable to part 807 landfills.[42] The Court rejected this argument as well and found that the Board correctly applied the part 620 groundwater regulations.[43] The Appellate Court found that there was no language in Part 620 exempting sanitary landfills and the Court should not read into statutory language exceptions that were not expressed.[44] The court

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33. *Id*. ¶ 28, 83 N.E.3d at 16 (*citing* ILL. ADMIN. CODE tit. 35, § 807.524(c) (1985)).
34. *Id*. ¶ 29.
35. *Id*.
36. *Id*.
37. *Id*. ¶ 31, 83 N.E.3d at 17.
38. ILL. ADMIN. CODE tit. 35, § 807.313 (2011) ("No person shall cause or allow operation of a sanitary landfill so as to cause or threaten or allow the discharge of any contaminants into the environment..."); Ill. Admin. Code tit. 35, § 807.315 (2011) ("No person shall cause or allow the development or operation of a sanitary landfill unless the applicant proves to the satisfaction of the [IEPA] that no damage or hazard will result to waters of the State because of the development and operation of the sanitary landfill.").
39. *See D&L Landfill*, 2017 IL App (5th) 160071, ¶¶ 14, 19, 31, 83 N.E.3d at 13–15, 17. (D&L arguing that 807.313 and 807.315 did not apply to part 807 landfills after post-closure as it was closing a landfill, not operating.).
40. *Id*. ¶ 30, 83 N.E.3d at 17.
41. *Id*. ¶ 31.
42. *Id*. ¶¶ 19, 32, 83 N.E.3d at 15, 17.
43. *Id*. ¶ 32, 83 N.E.3d at 17.
44. *Id*. ¶ 33, 83 N.E.3d at 17.

also noted that, in its December 31, 2012, application D&L acknowledged that the Part 620 values were used to assess the groundwater conditions at its landfill and, by its own admission, the landfill exceeded these regulations.[45]

In rejecting D&L's argument on the applicability of the Part 620 groundwater regulations, the Appellate Court distinguished the case relied upon by D&L—*Illinois Environmental Protection Agency v. Jersey Sanitation Corp*.[46] *Jersey Sanitation* was a petition to review conditions imposed by the IEPA on a supplemental permit application.[47] The Fourth District Appellate Court upheld the Board's decision in the *Jersey Sanitation* case, in large part because Jersey's application provided for groundwater monitoring to be evaluated against the water quality standards.[48] The D&L court distinguished this case from *Jersey Sanitation* by noting that conditions imposed by the IEPA in *Jersey Sanitation* were unnecessarily redundant.[49] The Court further noted that a subsequent enforcement action against Jersey Sanitation found that the Part 620 regulations had been violated and therefore Section 807.313 and 807.315 of the Board's regulations were violated.[50]

In summary, the Appellate Court found that the Section 22.17(a) 15-year post-closure monitoring is not a final date for purposes of granting a certification of closure.[51] If the IEPA finds that there is a possibility of a future violation an extension of the post-closure care timeline will be upheld.[52] Additionally, groundwater regulations are applicable to landfills in post-closure, even if the site is not being actively operated as a landfill. [53]

45. *Id*. ¶ 34.
46. Ill. Envt'l Prot. Agency v. Jersey Sanitation Corp., 784 N.E.2d 867 (Ill. App. Ct. 4th Dist. 2003).
47. *Id*. at 869.
48. *Id*. at 876.
49. *D&L Landfill*, 2017 IL App (5th) 160071, ¶ 37, 83 N.E.3d at 18–19.
50. *Id*. ¶ 38, 83 N.E.3d at 19.
51. *Id*. ¶ 28, 83 N.E.3d at 16.
52. *Id*.
53. *Id*. ¶ 30, 83 N.E. 3d at 17.

II. SIGNIFICANT FEDERAL CASES AND INITIATIVES 2017

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A. An Overview of Significant Federal Cases of 2017

1. Murr v. Wisconsin, 137 S. Ct. *1933 (2017)*

Petitioners, siblings in the Murr family, own two adjacent parcels of property along the St. Croix River, which forms part of the boundary between Wisconsin and Minnesota.[54] The St. Croix River is protected under federal, state, and local law.[55] The Murrs became interested in selling one of their parcels of property, Lot E, which was under common ownership with another lot, Lot F. However, both properties were subject to regulations that prevented the use or sale of adjacent lots under common ownership as separate building sites unless they have at least one acre of land suitable for development.[56] Based on the topography of the area, the Murrs' properties did not have more than one acre of land that is suitable for development.[57] The Murrs filed suit, alleging that the regulations worked a regulatory taking that deprived them of all, or practically all, of the use of Lot E.[58] The Circuit Court of St. Croix County granted summary judgment to the State, finding that the Murrs had other options to enjoy and use their property, and that they had not been deprived of all economic value of their property because the decrease in market value of the unified lots was less than 10 percent.[59] The Wisconsin Court of Appeals affirmed, holding that the takings analysis properly focused on the two lots together and that, using that framework, the regulations did not effect a taking.[60] In a 5-3 decision (Justice Gorsuch was not confirmed at the time that the Court held argument), the Supreme Court affirmed, holding that the Appellate Court was correct to analyze the Murrs' properties as a single unit in assessing the effect of the challenged governmental action.[61]

In so holding, Justice Kennedy, writing for the Court, rejected the Wisconsin court's rule that contiguous lots under common ownership should

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54. Murr v. Wisconsin, 137 S. Ct. 1933, 1940 (2017).
55. *Id.*
56. *Id.* at 1940–41.
57. *Id.* at 1940.
58. *Id.* at 1941.
59. *Id.*
60. *Id.*
61. *Id.* at 1949.

always be considered one parcel.[62] The Court also rejected the Murrs' proposed test, which would have resulted in a presumption that lot lines, as established by state law, set the boundaries of the relevant "property."[63] Instead, the Court applied a multi-factor balancing test that requires courts to consider a number of factors to "determine whether reasonable expectations about property ownership would lead a landowner to anticipate that his holdings would be treated as one parcel or, instead, as separate tracts."[64] Those factors include (i) the treatment of the land under state and local law; (ii) the physical characteristics of the land; and (iii) the prospective value of the regulated land.[65] In applying the multi-factor balancing test, the Court found that all three of the factors cut in favor of treating the two lots as one parcel.[66]

In dissent, Chief Justice Roberts, joined by Justices Thomas and Alito, wrote that while they were not "troubled" by the majority's "bottom-line conclusion" that there was no regulatory taking, but criticized the majority for "concluding that the definition of the 'private property' at issue in a case such as this turns on an elaborate test looking not only to state and local law" but also to multiple seemingly broad factors.[67] In a separate dissent, Justice Thomas wrote that the original understanding of the Takings Clause was limited to physical appropriation of property or its functional equivalent and urged taking "a fresh look at our regulatory takings jurisprudence to see whether it can be grounded in the original public meaning" of the Constitution.[68]

In summary, *Murr* does not fundamentally alter the law of regulatory takings. Instead, it prevents property owners from subdividing their property and segregating out those portions that are subject to development restrictions in order to claim a regulatory taking has occurred.

2. Asarco LLC v. Atlantic Richfield Co.*, 866 F.3d 1108 (9th Cir. 2017)*

"Section 113(f)(3)(B) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA") allows persons who have taken actions to clean up hazardous waste sites to seek monetary contribution from other parties who are also responsible for the contamination."[69] "This provision of CERCLA provides that a person who has 'resolved its liability' for 'some or all of a response action or for some or

62. *Id.*
63. *Id.* at 1947–48.
64. *Id.* at 1945.
65. *Id.*
66. *Id.* at 1948–49.
67. *Id.* at 1950 (Roberts, C.J., dissenting).
68. *Id.* at 1957.
69. Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. § 9613(f)(3)(B) (2012).

all of the costs of such action' pursuant to a settlement agreement with the United States government or EPA 'may seek contribution from any person who is not party to a settlement.'"[70] That is, CERCLA allows a potentially responsible party ("PRP") who has paid money to satisfy a settlement agreement to pursue § 113(f) contribution.[71] However, "CERCLA imposes a three-year statute of limitations after entry of a judicially approved settlement, during which a party may bring a contribution action."[72] In *Asarco LLC v. Atlantic Richfield Co*., the Ninth Circuit addressed the question of what it means for a party to have "resolved" its liability with the government, thus triggering the 3-year statute of limitations.[73]

Asarco involved the cleanup of the East Helena Superfund Site (the "Site"), located in an industrial area in Montana.[74] Asarco was the lead smelter, operating from more than a century, and also operated zinc fuming plant, which it purchased from its predecessor, Anaconda Mining Company, in 1972.[75] Asarco and Anaconda's operations resulted in air, soil, and water contamination.[76] In 1984, the EPA added the Site to the National Priorities List under CERLCA, and in the late 1980s, identified Asarco and Anaconda as PRPs under CERCLA, but only sought remedial action from Asarco.[77] "In 1998, the United States brought claims against Asarco for civil penalties and injunctive relief under RCRA and the Clean Water Act ('CWA')."[78] Asarco settled the case with the United States and entered into a consent decree.[79] The 1998 RCRA Consent Decree assessed civil penalties against Asarco and required Asarco to undertake remedial actions to address past violations.[80]

However, Asarco failed to meet its cleanup obligations, and later in 2005, filed for Chapter 11 bankruptcy protection.[81] "The United States and Montana filed proofs of claim in the bankruptcy action, asserting claims under CERCLA."[82] In 2009, "the bankruptcy court entered a consent decree under CERCLA between the United States, Montana, and Asarco," which established a "custodial trust" for the Site, turned over cleanup of the Site to a trustee, and required Asarco to pay $99.294 million, which the court found "fully resolved and satisfied" its obligations under the 1998 RCRA Consent Decree.[83]

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70. *Id*.
71. United States v. Atl. Research Corp., 551 U.S. 128, 139 (2007).
72. 42 U.S.C. § 9613(g)(3).
73. Asarco LLC v. Atl. Richfield Co., 866 F.3d 1108, 1113 (9th Cir. 2017).
74. *Id*. at 1114.
75. *Id*.
76. *Id*.
77. *Id*.
78. *Id*.
79. *Id*.
80. *Id*.
81. *Id*. at 1114–15.
82. *Id*. at 1115.
83. *Id*.

In 2012, Asarco brought a CERCLA 113(f)(3)(B) action against Atlantic Richfield, the corporate successor to Anaconda, seeking contribution for its financial liability under the 2009 CERCLA Decree.[84] Atlantic Richfield moved for summary judgment on the ground that Asarco's action was untimely because the three-year statute of limitations began running with the 1998 RCRA Consent Decree.[85] Asarco responded that the RCRA Consent Decree could not trigger the limitations period under CERCLA.[86] The District Court agreed with Atlantic Richfield, finding that CERCLA required only that a settlement agreement address a "response action," not that the response action be entered into under CERCLA, and dismissed the action.[87]

Asarco appealed to the Ninth Circuit, which reversed, vacated the summary judgment ruling, and remanded the action for further proceedings.[88] The Ninth Circuit held that, given the plain text of CERCLA, a non-CERCLA settlement agreement may form the basis for a CERCLA contribution action, and thus trigger the three-year statute of limitations.[89] (In so holding, the Ninth Circuit noted that there is a circuit split on this issue, with the Second Circuit coming to the opposite conclusion.)[90]

However, the court found that the 1998 RCRA Consent Decree did not trigger the statute of limitations because it did not "resolve" Asarco's liability.[91] First, the court held that the 1998 RCRA Consent Decree was limited to resolving the government's claims for civil penalties, even though the underlying lawsuit sought civil penalties and injunctive relief.[92] Second, the court held that the 1998 RCRA Consent Decree contained numerous references to Asarco's continued legal exposure.[93] Finally, the 1998 RCRA Consent Decree specifically stated that "[n]otwithstanding compliance with the terms of this Decree, Asarco is not released from liability, if any, for the costs of any response actions taken or authorized by EPA under any applicable statute, including CERCLA."[94] All of these factors led the court to conclude that "the 1998 RCRA Decree did not just leave open some of the United States' enforcement options, it preserved all of them.[95] Because the Decree did not settle definitively any of Asarco's response obligations, it did

84. *Id.*
85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.* at 1129.
89. *Id.*
90. *Id.* 1120.
91. *Id.* at 1126.
92. *Id.*
93. *Id.*
94. *Id.*
95. *Id.*

not resolve Asarco's liability" and Asarco could not have brought a contribution action pursuant to the 1998 RCRA Consent Decree.[96]

By contrast, the court found that the 2009 CERCLA Decree did fully resolve Asarco's liability, because as noted above, the bankruptcy court who entered the decree specifically noted that Asarco's liabilities for response costs at the Site were "fully resolved and satisfied."[97]

Asarco, therefore, makes clear that the specific language used in any particular settlement agreement entered into between a PRP and the government has important implications for that PRP's abilities and obligations to later bring a CERCLA § 113(f)(3)(B) contribution action. And, given the growing circuit split among the circuits on whether a non-CERCLA settlement can trigger the three-year statute of limitations, this issue may soon be resolved by the Supreme Court.

3. Southern Illinois Power Cooperative v. EPA*, 863 F.3d 666 (7th Cir. 2017)*

"The Clean Air Act establishes a comprehensive program for controlling and improving the nation's air quality through both state and federal regulation."[98] "The Act directs the EPA to establish National Ambient Air Quality Standards ('NAAQS'), which set the maximum permissible atmospheric concentrations for certain harmful air pollutants."[99] "Within two years of revising or setting a new NAAQS, the EPA must evaluate compliance with the standard and classify geographic regions around the country as areas of 'attainment' or 'nonattainment' (or designate them as 'unclassifiable')."[100] "In doing so, the EPA solicits recommendations from the state regulators on how to designate areas within the state."[101] "If the EPA disagrees with a state's recommendation for any particular area, it notifies the state and allows an opportunity for public comment on its proposed modification.[102] "The EPA then promulgates a final rule listing and explaining the designations, §7407(d)(1)(B)(i), (d)(2), which in turn affects a state's obligations in developing a state implementation plan to maintain or achieve air quality standards, see 42 U.S.C. §§ 7410, 7471, 7502.[103]

"In 2010, the EPA revised the NAAQS for sulfur dioxide."[104] Subsequently, the EPA was sued by the Sierra Club for its failure to complete

96. *Id.*
97. *Id.* at 1115
98. S. Ill. Power Coop. v. EPA, 863 F.3d 666, 668 (7th Cir. 2017).
99. *Id.*
100. *Id.*; 42 U.S.C. § 7407(d) (1)(A), (d)(1)(B)(i) (2012).
101. *S. Ill. Power Coop.*, 863 F.3d at 668.
102. *Id.*; §7407(d)(1)(A), (d)(1)(B)(ii); ATK Launch Sys., Inc. v. EPA, 651 F.3d 1194, 1195 (10th Cir. 2011).
103. *S. Ill. Power Coop.*, 863 F.3d at 668.
104. *Id.*

the compliance designations within the time provided by the Clean Air Act.[105] Specifically, the issue is the EPA designation for Williamson County in southern Illinois.[106] The EPA had solicited recommendations from the states regarding the new NAAQS for sulfur dioxide, and Illinois regulators promptly recommended that the EPA designate Williamson County as an attainment area.[107] The EPA reviewed the proposed designations from the state regulators and announced its intention to reject their recommendation and instead designate Williamson County as an area of nonattainment.[108] The EPA provided a technical support document explaining that the modeling method used by the state regulators was flawed, and further solicited public comments on the proposed designation.[109]

"Southern Illinois Power Cooperative ("SIPC"), which operates a large power plant in Williamson County, submitted public comments opposing the nonattainment designation."[110] SIPC challenged the technical basis for the EPA's designation, and submitted alternative modeling results showing that the area surrounding the power plaint met the new NAAQS.[111] The EPA reviewed SIPC's submission and other public comments, but did not change its recommendation. In July of 2016, the EPA promulgated a final rule listing its designations under the new NAAQS, including nonattainment designation for Williamson County.[112]

SIPC filed a timely petition for review with the Seventh Circuit under the judicial-review provision of the Clean Air Act, § 7607(b)(1).[113] The EPA moved to dismiss the petition for lack of jurisdiction or improper venue, and in the alternative, moved to transfer the petition to the D.C. Circuit to be consolidated with six other petitions challenging the NAAQS designations.[114]

SIPC opposed the motion, relying primarily on a 25 year old case, *Madison Gas & Elec. Co. v. EPA*, 4 F.3d 529 (7th Cir. 1993).[115] In *Madison Gas*, the Seventh Circuit held that a petition challenging "an element of a national program" based on an "entirely local factor" could be brought in the regional circuit court.[116] However, upon review in 2017, the Seventh Circuit found that the holding of *Madison Gas* conflicted with the text of § 7607(b)(1) and had also drawn criticism from other circuits.[117] The

105. *Id.* at 669.
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.*
112. *Id.*
113. *Id.*
114. *Id.* at 669–70.
115. *Id.* at 670.
116. Madison Gas & Elec. Co. v. EPA, 4 F.3d 529, 530–31 (7th Cir. 1993).
117. S. Ill. Power Coop., 863 F.3d at 670.

Seventh Circuit overruled *Madison Gas*, and held that SIPC was required to bring its petition in the D.C. Circuit.[118]

The court reasoned that because the Clean Air Act provides that a petition for review of a "nationally applicable" final agency action "may be filed *only* in the United States Court of Appeals for the District of Columbia," a challenge to the EPA's designations pursuant to the sulfur dioxide NAAQS must be brought in the D.C. Circuit.[119] The court characterized the EPA's designations as "a final rule of broad geographic scope" and "promulgated pursuant to a common, nationwide analytical method," finding that they were nationally applicable pursuant to § 7607(b)(1).[120] The court rejected the "intermediate approach" suggested by *Madison Gas*, which allowed an "entirely local factor" of a national program to be reviewed by the regional circuit court, and held that such an approach cannot be reconciled with the plain text of the Clean Air Act.[121]

In so holding, the Seventh Circuit has now joined the other circuits that have addressed this issue, and which had also rejected the intermediate approach suggested in *Madison Gas*.[122] However, in 2016, the Eight Circuit relied on *Madison Gas* and endorsed the intermediate approach.[123] It is likely that the EPA will use its victory in *Southern Illinois Power Coop. v. EPA* to challenge the approach used in the Eighth Circuit.

4. Sierra Club v. North Dakota, *868 F.3d 1062 (9th Cir. 2017)*

Sierra Club v. North Dakota is another case concerning the sulfur dioxide NAAQS promulgated by the EPA pursuant to the Clean Air Act.[124] Following the EPA's issuance of new NAAQS for sulfur dioxide, the EPA is given two years to issue its designations regarding which areas comply with the NAAQS.[125] The EPA was unable to meet the initial two-year deadline and opted for the one-year statutory extension, which gave it through June of 2013 to issue its designations.[126] However, by August of 2013, the EPA had only designated only 29 areas within the country, and over 3,000 counties throughout the country remained undesignated.[127]

The Sierra Club sued the EPA pursuant to the Clean Air Act's citizen suit provision, 42 U.S.C. § 7604(a)(2), seeking to compel the EPA to issue

118. *Id.* at 673–74.
119. *Id.* at 670.
120. *Id.* at 671.
121. *Id.*
122. *See* ATK Launch Sys., Inc. v. EPA, 651 F.3d 1194 (10th Cir. 2011); Texas Mun. Power Agency v. EPA, 89 F.3d 858, 867 (D.C. Cir. 1996).
123. Nat'l Parks Conservation Ass'n v. EPA, 816 F.3d 989 (8th Cir. 2016).
124. Sierra Club v. North Dakota, 868 F.3d 1062 (9th Cir. 2017).
125. *Id.* at 1065.
126. *Id.*
127. *Id.*

designations.[128] Shortly thereafter, the States (North Dakota, Arizona, Kentucky, Nevada, Louisiana, and Texas) moved to intervene in the Sierra Club's lawsuit, asserting that they had a "significant protectable interest" in the terms of any remedial order or settlement that would result.[129] The EPA did not dispute that it missed its three-year deadline, and summary judgment was entered as to liability in favor of Sierra Club.[130] The district court directed the parties to confer on an appropriate remedy.[131] While efforts to reach a global resolution among the EPA, Sierra Club, and the states failed, the EPA and Sierra Club agreed to a settlement that he States declined to join.[132] "Under that settlement, the EPA must roll out designations in three phases, with the final promulgations of designations no later than December 31, 2020, more than seven years after the June 2013 deadline" required by the Clean Air Act.[133]

The EPA and Sierra Club "submitted a proposed Consent Decree to the district court and published the Consent Decree in the Federal Register for notice and comment."[134] More than one hundred comments were submitted in response to the proposed Consent Decree, including some by the State intervenors in this this case.[135] The court subsequently held a hearing, in which the States participated.[136] Afterwards, the court entered the Consent Decree, finding it was "fair, adequate and reasonable" over the States' objection.[137] Importantly, the court saw no barrier in the Consent Decree keeping the States from pursuing relief or claims in other actions regarding the EPA's failure to comply with the time restraints in the Clean Air Act.[138]

On appeal, the States sought to block the entry of the Consent Decree and raised three objections: (1) the Consent Decree improperly disposes of their claims; (2) the Consent Decree imposes duties and obligations on the States without their consent; and (3) the Consent Decree is not "fair, adequate and reasonable" because its deadlines far exceed the Clean Air Act's three-year period to promulgate designations.[139]

The Ninth Circuit affirmed the district court's findings and held that the States could not stop the Sierra Club and the EPA from resolving their disputes through the Consent Decree.[140] The court relied on the Supreme Court case *Local No. 93, International Ass'n of Firefighters v. City of*

128. *Id.*
129. *Id.*
130. *Id.* at 1065–66.
131. *Id.* at 1066.
132. *Id.*
133. *Id.*
134. *Id.*
135. *Id.*
136. *Id.*
137. *Id.*
138. *Id.*
139. *Id.*
140. *Id.* at 1069.

Cleveland, 478 U.S. 501 (1986), in which the Court held that a consent decree was properly entered over the objections of a third party because "one party —whether an original party, a party that was joined later, or an intervenor—c[annot] preclude other parties from settling their own disputes and thereby withdrawing from the litigation."[141] Similarly, here, the Ninth Circuit held that while an intervenor must be heard on whether to approve a consent decree, it cannot stop other litigants from resolving their dispute by withholding its consent to a decree.[142]

Thus, the court rejected each of the States' three objections. First, the court held that by its very terms, the Consent Decree leaves the States' claims intact and does not prejudice the States' independent claims.[143] The Ninth Circuit relied on the following language in the Consent Decree:

> [n]othing in the terms of this Consent Decree shall be construed to waive any remedies or defenses the parties may have" under the Clean Air Act, as well as language from the district court which recognized that the States "will still be free to pursue earlier deadlines in [other] actions.[144]

Second, the court held that the Consent Decree does not subject the States to any explicit obligations, and only the Sierra Club and the EPA can be held in contempt for failure to comply with the Consent Decree's terms.[145] Finally, the court rejected the States' third objection, finding that, "in the end, what the States really take issue with is that the EPA blew the deadline to promulgate NAAQS designations . . . . That failure to comply with the statutorily prescribed timeline—and the EPA's continued failure to remedy the problem—has left the States in their alleged planning purgatory. But it is not the Consent Decree that inflicts this 'regulatory limbo.'"[146] In summary, the court held that the Consent Decree was nothing more than an agreement between the Sierra Club and the EPA that, as long as the EPA met the deadlines agreed to with the Sierra Club, the Sierra Club would not advance its lawsuit against the EPA. However, because there was nothing in the Consent Decree that prevented the States from pursuing claims against the EPA and forcing the EPA to comply with earlier deadlines, the States cannot block the Consent Decree merely by withholding their consent.

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141. Local No. 93, Inter. Ass'n of Firefighters v. City of Cleveland ("Local No. 93"), 478 U.S. 501, 528–29 (1986).
142. *Sierra Club*, 868 F.3d at 1066.
143. *Id.* at 1067.
144. *Id.*
145. *Id.*
146. *Id.* at 1068.

5. Mays v. City of Flint, Mich.*, 871 F.3d 437 (6th Cir. 2017)*

"This case arises out of the drinking-water crisis in Flint, Michigan."[147] The plaintiffs are residents of the City of Flint who seek to represent a class of similarly situated individuals.[148] They allege that they were harmed, since April 2014, by the toxic condition of the Flint water supply.[149] The plaintiffs filed suit against several City and State officials in state court, asserting state tort claims.[150]

The defendants, employees of the Michigan Department of Environmental Quality ("MDEQ"), removed the action from state court to federal court, even though they recognized that complete diversity of citizenship was lacking and no federal question was presented on the face of the complaint.[151] Instead, the defendants invoked the "federal-officer removal" provision under 28 U.S.C. § 1442(a)(1), contending that all of the conduct in question was performed under the supervision and direction of the United States EPA.[152] Second, the defendants contended that the plaintiffs' claims necessarily implicate a substantial federal issue that merits federal-question jurisdiction under 28 U.S.C. § 1441.[153] The plaintiffs objected to removal and filed a motion seeking to have the district court remand the case back to the state court.[154] The district court did remand the case and the defendants appealed.[155]

The Sixth Circuit affirmed the district court's ruling and rejected both of the defendants' bases for removal.[156] First, the court held that federal-officer removal did not apply to the defendants in this case.[157] Section 1442(a)(1) provides for removal of actions against that "[t]he United States or any agency thereof or any officer (*or any person acting under that officer*) of the United States or of any agency thereof, in an official or individual capacity, for or relating to any act under color of such office."[158] (emphasis added). The court relied on the Supreme Court's most recent federal-officer removal case, *Watson v. Philip Morris Cos*., 551 U.S. 142 (2007), which held that the word "under" must refer to "what has been described as a relationship that involves acting in a certain capacity, considered in relation to one holding a superior position or office."[159] (quotations omitted). That is, simply

147. Mays v. City of Flint, Mich., 871 F.3d 437, 440 (6th Cir. 2017).
148. *Id.*
149. *Id.* at 440–41.
150. *Id.*
151. *Id.* at 441.
152. *Id.*
153. *Id.*
154. *Id.* at 442.
155. *Id.*
156. *Id.* at 450.
157. *Id.* at 449.
158. 28 U.S.C. § 1442(a)(1) (2012).
159. Watson v. Philip Morris Cos., 551 U.S. 142, 151 (2007).

complying with a regulation is insufficient, even if the regulatory scheme is highly detailed and the defendant's activities are highly supervised and monitored.[160] Here, the defendants argued that because the EPA delegated to the MDEQ, the primary enforcement authority over the Safe Drinking Water Act ("SDWA"), the defendants were acting under the EPA.[161] Based on the defendants' failure to produce a contract, or any evidence of an employer/employee relationship, or even any evidence of a principal/agent arrangement between the MDEQ and the EPA, the court rejected the defendants' claim that they were "acting under" the EPA and entitled to federal-officer removal.[162]

The Sixth Circuit also rejected the defendants' argument that the case presented a substantial federal question that merited removal pursuant to 28 U.S.C. § 1441.[163] The plaintiffs alleged state-law claims of gross negligence, fraud, assault and battery, and intentional infliction of emotional distress.[164] However, the defendants argued that because the complaint alleges that the defendants breached duties to the plaintiffs that were based on the SDWA and the EPA's Lead and Copper Rule ("LCR"), the interpretation of the LCR were "inherently tied to" the determination of whether the defendants were negligent.[165] The court characterized this argument as "vague" and found that the defendants failed to meet their burden of establishing that federal jurisdiction existed.[166]

B. Major Executive Branch Actions Regarding Environmental Laws

1. Presidential Executive Order on Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the "Waters of the United States" Rule (February 28, 2017)

In 2015, during President Obama's tenure, the EPA and the U.S. Army Corps of Engineers ("Corps") issued the Waters of the United States ("WOTUS") rule.[167] The WOTUS rule defined the scope of federal jurisdiction under the Clean Water Act ("CWA") and adopted an expansive view of the types of wetlands and other waterbodies to be considered "waters of the United States," which triggered the need for federal permits or authorizations prior to engaging in activities within, or affecting, those waters.[168]

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160. *Id*. at 153.
161. *Mays*, 871 F.3d at 444.
162. *Id.* at 444–47.
163. *Id.* at 449–50.
164. *Id.* at 449.
165. *Id.*
166. *Mays*, 871 F.3d at 449.
167. Clean Water Rule, 33 C.F.R. § 328 (2018).
168. *Id*. § 328.3.

On February 28, 2017, President Trump signed an executive order intended to roll back the WOTUS rule promulgated by the EPA under Obama.[169] Trump's executive order instructs the EPA and the Corps to review the WOTUS rule for consistency with a stated policy finding it to be "in the national interest to ensure that the Nation's navigable waters are kept free from pollution, while at the same time promoting economic growth, minimizing regulatory uncertainty, and showing due regard for the roles played by Congress and the States under the Constitution."[170] It further instructed the EPA and the Corps to engage in the process of a rule-making to withdraw the WOTUS rule and to take appropriate actions in the courts where the rule is in litigation.[171]

Additionally, the Order instructs the EPA and the Corps to "consider" interpreting the term "navigable waters" as defined in 33 U.S.C. § 1362(7) in a manner consistent with the opinion of Justice Scalia in *Rapanos v. United States*.[172] In *Rapanos*, a 4-1-4 split decision, Justice Scalia stated in the plurality opinion: "[t]he phrase 'the waters of the United States' includes only those relatively permanent, standing or continuously flowing bodies of water 'forming geographic features' that are described in ordinary parlance as 'streams,' 'oceans, rivers, [and] lakes.'"[173] Scalia went on to say "[the phrase] does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall."[174] By contrast, Justice Kennedy, in a concurring opinion, proposed that CWA jurisdiction should extend to wetlands adjacent to waters that have a "significant nexus" to traditional navigable waters.[175]

Therefore, by instructing the EPA and the Corps to focus on Justice Scalia's opinion, the Executive Order signed by Trump indicates that the new administration prefers a much more narrow definition of "navigable waters" and reduced federal jurisdiction over waters of the United States.

It is worth noting that immediately following the issuance of the WOTUS rule, it was challenged by states, industry, and environmental groups in numerous federal cases.[176] On October 9, 2015, the Sixth Circuit granted a stay of the WOTUS rule, effective nationwide, and this stay remains in effect while litigation continues.[177] On June 27, 2017, the EPA and the Corps unveiled a proposed rule that would replace the stayed 2015

169. Exec. Order No. 13778, 82 Fed. Reg. 12497 (Feb. 28, 2017).
170. *Id.* § 1.
171. *Id.* § 2(a), (c).
172. *Id.* § 3.
173. Rapanos v. United States, 547 U.S. 715, 739 (2006).
174. *Id.*
175. *Id.* at 717.
176. *In re* EPA, 803 F.3d 804, 805 (6th Cir. 2015).
177. *Id.* at 809.

definition of waters of the United States and put in place the same regulatory text that existed prior to the WOTUS rule in 2015.[178]

2. Scott Pruitt, EPA Administrator, Memorandum regarding Prioritizing the Superfund Program (May 22, 2017)

On May 22, 2017, the EPA administrator Scott Pruitt issued an internal memorandum titled "Prioritizing the Superfund Program."[179] In the memorandum, Pruitt wrote that the Superfund program is a vital function of the EPA, and he intended to restore Superfund and the EPA's land and water cleanup efforts to their rightful place at the center of the agency's core mission.[180] He wrote that "[i]n my interactions and meetings with Congress, governors, local officials and concerned citizens, I have heard that some Superfund cleanups take too long to start and too long to complete."[181]

In order to remedy this and "properly prioritize" the Superfund program, Pruitt indicated that he was taking two immediate actions.[182] First, in order to "promote increased oversight, accountability and consistency in remedy selections, authority delegated to the assistant administrator for Office of Land and Emergency Management and the regional administrators to select remedies to cost $50 million or more at sites shall be retained by the Administrator."[183] Second, notwithstanding the aforementioned change, "regional administrators and their staffs shall more closely and more frequently coordinate with the Administrator's office throughout the process of developing and evaluating alternatives and selecting a remedy, particularly at sites with remedies estimated to cost $50 million or more."[184]

In addition to the above two "immediate" actions, Pruitt indicated he was establishing a task force to provide recommendations "on how the agency can restructure the cleanup process, realign incentives of all involved parties to promote expeditious remediation, reduce the burden on cooperating parties, incentivize parties to remediate sites, encourage private investment in cleanups and sites and promote the revitalization of properties across the country."[185] The task force will be chaired by Albert Kelly, a senior advisor to the Administrator, and will include leaders from OLEM, the Office of Enforcement and Compliance Assurance, the Office of General Counsel,

178. Definition of "Waters of the United States"—Recodification of Pre-Existing Rules, 82 Fed. Reg. 34899 (proposed July 27, 2017).
179. E. SCOTT PRUITT, E.P.A., PRIORITIZING THE SUPERFUND PROGRAM, (May 22, 2017) (Memorandum), https://www.epa.gov/superfund/prioritizing-superfund-program-memo-epa-administrator-scott-pruitt-agency-management.
180. *Id.*
181. *Id.*
182. *Id.*
183. *Id.*
184. *Id.*
185. *Id.*

EPA Region 3 (as the lead region for the Superfund program) and other offices as appropriate.[186]

Pruitt instructed the task force to, within 30 days, provide him with a detailed set of recommendations on actions that the agency can take to (i) streamline and improve the efficiency and efficacy of the Superfund program, including reducing the time required for cleanups; (ii) overhaul and streamline the process used to develop prospective purchaser agreements, bona fide prospective purchaser status, comfort letters, ready-for-reuse determinations, and other administrative tools used to incentive private investment at sites; (iii) improve the remedy development and selection process and promote consistency in remedy selection; (iv) use alternative and non-traditional approaches for financing site cleanups; (v) reduce the administrative and overhead costs borne by parties remediating contaminated sites, including a reexamination of the level of agency oversight necessary; and (vi) improve the agency's interactions with key stakeholders under the Superfund program and expand the role that state and local governments and public-private partnership play in the Superfund program.[187]

Pruitt's memorandum evidences a centralization of authority for the Superfund program to the Administrator. By rescinding the regional authorities' ability to select major remedies, and by creating a task force that is chaired by a close advisor to the Administrator, it is clear Pruitt intends to centralize decision making regarding major cleanups under the Superfund program. While the effect of this centralization is not yet known, it may result in the program being applied more consistently.

3. Presidential Executive Order on Promoting Energy Independence and Economic Growth (March 28, 2017)

President Trump's March 28, 2017, Executive Order on Promoting Energy Independence and Economic Growth is sweeping in nature and initiates rollbacks on more than 30 Obama-era environmental documents and regulations.[188]

Section one of the Order, under the heading of "Policy," establishes policy directives that provide an indication of the Trump administration's approach to environmental policy.[189] In five separate directives, the Order establishes sweeping instructions to review and rescind any regulations that unduly burden the development of domestic energy resources.[190] The Order instructs that because "[i]t is in the national interest to promote clean and safe development of our Nation's vast energy resources, while at the same time

186. *Id.*
187. *Id.*
188. Exec. Order No. 13783, 82 Fed. Reg. 16093 (Mar. 28, 2017).
189. *Id.* § 1.
190. *Id.* § 1(a)-(e).

avoiding regulatory burdens that unnecessarily encumber energy production, constrain economic growth, and prevent job creation," and because "[i]t is further in the national interest to ensure that the Nation's electricity is affordable, reliable, safe, secure, and clean, and that it can be produced from coal, natural gas, nuclear material, flowing water, and other domestic sources, including renewable sources," executive departments and agencies are to "immediately review existing regulations that potentially burden the development or use of domestically produced energy resources and appropriately suspend, revise, or rescind those that unduly burden the development of domestic energy resources beyond the degree necessary to protect the public interest or otherwise comply with the law."[191]

Section one further directs the agencies to "take appropriate actions to promote clean air and clean water for the American people, while also respecting the proper roles of the Congress and the States concerning these matters in our constitutional republic."[192] Finally, the Order recognizes that "necessary and appropriate environmental regulations comply with the law, are of greater benefit than cost, when permissible, achieve environmental improvements for the American people, and are developed through transparent processes that employ the best available peer-reviewed science and economics."[193]

Section two of the Order calls for the immediate review of all agency actions that potentially burden the safe, efficient development of domestic energy resources.[194] This section requires "heads of agencies" to review all existing regulations, orders, guidance documents, or other similar agency actions that potentially burden the development or use of domestically produced energy resources, with particular attention to oil, natural gas, coal, and nuclear energy resources.[195] It defines "burden" to mean "unnecessarily obstructing, delaying, curtailing or otherwise imposing significant costs on the siting, permitting, production, utilization, transmission, or delivery of energy resources."[196] The Order then outlines the process by which agencies should carry out the review.[197]

First, within forty-five days, the head of each agency shall develop and submit a plan to carry out the review to the Director of the Office of Management and Budget (the "OMB Director").[198] Second, the head of each agency "shall submit a draft final report detailing the agency actions described," which must include specific recommendations that could alleviate or eliminate aspects of agency actions that burden domestic energy

191. *Id.* § 1(a)-(c).
192. *Id.* § 1(d).
193. *Id.* § 1(e).
194. *Id.* § 2.
195. *Id.* § 2(a).
196. *Id.* § 2(b).
197. *Id.* § 2(c).
198. *Id.*

production within 120 days.[199] Third, the report shall be finalized, unless the OMB Director extends that deadline, within 180 days.[200]

Section three of the order revokes or rescinds seven Obama-era executive actions.[201] Section four of the Order calls for the EPA to review the Clean Power Plan and related rules and agency actions.[202] The EPA is specifically directed to "immediately" take all steps necessary to review the final rules from 2015 entitled "Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units," and "Standards of Performance for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units."[203] Additionally, the EPA is directed to immediately review the 2015 proposed rule entitled "Federal Plan Requirements for Greenhouse Gas Emissions From Electric Utility Generating Units Constructed on or Before January 8, 2014; Model Trading Rules; Amendments to Framework Regulations; Proposed Rule."[204] The EPA Administrator is further instructed to take action to "suspend, revise, or rescind," the "Legal Memorandum Accompanying Clean Power Plan for Certain Issues," published with the Clean Power Plan.[205] Finally, this section enables the Attorney General to request that courts stay litigation pertaining to the Clean Power Plan while the EPA addresses it on an administrative level.[206]

Section five of the Order calls for agencies to use "estimates of costs and benefits in their regulatory analyses that are based on the best available science and economics."[207] The Order disbands the Interagency Working Group on Social Cost of Greenhouse Gases, and withdraws six technical updates issued by the Interagency Working Group as "no longer representative of governmental policy."[208] Further, the Order states that "effective immediately," when monetizing the value of changes in greenhouse gas emissions resulting from regulations, "agencies shall ensure

199. *Id.* § 2(d).
200. *Id.* § 2(e).
201. *Id.* § 3(a)-(b) (listing the four executive actions to be revoked as: Executive Order 13653 of November 1, 2013 (Preparing the United States for the Impacts of Climate Change), The Presidential Memorandum of June 25, 2013 (Power Sector Carbon Pollution Standards), The Presidential Memorandum of November 3, 2015 (Mitigating Impacts on Natural Resources from Development and Encouraging Related Private Investment), and The Presidential Memorandum of September 21, 2016 (Climate Change and National Security), and the two executive actions to be rescinded as The Report of the Executive Office of the President of June 2013 (The President's Climate Action Plan) and The Report of the Executive Office of the President of March 2014 (Climate Action Plan Strategy to Reduce Methane Emissions)).
202. *Id.* § 4.
203. *Id.* § 4(b).
204. *Id.*
205. *Id.* § 4(c).
206. *Id.* § 4(d).
207. *Id.* § 5(a).
208. *Id.* § 5(b).

. . . that any such estimates are consistent with the guidance contained in OMB Circular A-4 of September 17, 2003."[209]

Section six of the Order instructs the Secretary of the Interior to amend or withdraw Secretary's Order 3388, dated January 15, 2016, entitled "Discretionary Programmatic Environmental Impact Statement to Modernize the Federal Coal Program" and to lift any moratoria on—and instead commence—Federal land coal leasing activities.[210]

Finally, Section seven of the Order instructs the EPA Administrator to review regulations related to the United States' oil and gas development.[211] In so doing, the Administrator is to review and withdraw five final rules promulgated by the EPA during the Obama presidency.[212] The Attorney General is again enabled to request that courts stay litigation regarding these changes until the administrative review is completed.[213]

4. EPA Proposed Rule, Repeal of Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 40 CFR Part 60 (October 10, 2017)

In compliance with President Trump's executive order directing the EPA to review and rescind the Clean Power Plan ("CPP"), on October 16, 2017, the EPA promulgated a proposed rule to repeal the CPP.[214] The EPA promulgated the CPP on October 23, 2015, under Section 111 of the Clean Air Act, which authorizes the EPA to issue nationally applicable new source performance standards limiting air pollution.[215] The CPP aimed to reduce carbon dioxide emissions from electrical power generation by thirty-two percent by 2030, relative to 2005 levels.[216] The CPP was focused on reducing emissions from coal burning power plants, as well as increasing the use of renewable energy.[217]

Following President Trump's directive to repeal the CPP, the EPA indicated that it had reviewed the CPP and as a result, proposed a change in the legal interpretation of Section 111 of the Clean Air Act that is "consistent with the C[lean] A[ir] A[ct]'s text, context, structure, purpose, and legislative history, as well as with the Agency's historical understanding and exercise

209. *Id.* § 5(c).
210. *Id.* § 6.
211. *Id.* § 7.
212. *Id.* § 7(b).
213. *Id.* § 7(c).
214. Repeal of Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 82 Fed. Reg. 48035-02 (proposed Oct. 16, 2017) (codified at 40 C.F.R. pt. 60).
215. 42 U.S.C. § 7411(f)(2)(C) (2015).
216. Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64661 (proposed Oct. 23, 2015) (codified at 40 C.F.R. pt. 60).
217. *Id.*

of its statutory authority."[218] Under the interpretation in the EPA's proposed rule, the CPP exceeds the EPA's statutory authority and must be repealed.[219]

At this time, the EPA invited comments on the legal interpretation addressed in the proposed rule, but did not address the scope of any potential rule under Clean Air Act Section 111 to regulate greenhouse gas emissions.[220] The EPA indicated that it was considering the scope of such a rule and would solicit comments on that subject following the issuance of any such rule.[221]

In summary, Clean Air Act Section 111(d) requires the EPA to promulgate emission guidelines for existing sources that reflect the ''best system of emission reduction'' ("BSER") under certain circumstances.[222] The EPA asserted that notwithstanding the CPP, "all of the EPA's other C[lean] A[ir] A[ct] section 111 regulations are based on a BSER consisting of technological measures that can be applied to a single source."[223] In the EPA's view, the CPP "departed from this practice by instead setting carbon dioxide (CO2) emission guidelines for existing power plants that can only realistically be effected by measures that cannot be employed at a particular source."[224] In the course of its review of the CPP, the EPA decided to reconsider the legal interpretation underlying the CPP and proposed interpreting the phrase "best system of emission reduction" in a way that is consistent with the EPA's historical practice of considering only a single source.[225]

218. Repeal of Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, *supra* note 213.
219. *Id.*
220. *Id.*
221. *Id.*
222. *Id.*
223. *Id.*
224. *Id.*
225. *Id.*