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ARTICLES

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It is the goal of the *Southern Illinois University Law Journal* to produce scholarly publications of the highest quality attainable. It is the belief of this Journal that all members of society hold the potential for contributing to this goal. In recognition of the value of such contributions, the Journal considers all articles submitted for publication without regard to the author's race, color, gender, religion, sexual orientation, age, disability, marital status, or national origin. Furthermore, it is the belief of this Journal that open dialogue and rigorous debate is essential to the development of American law. Thus, the Journal selects an article for publication based on the quality of its content, the thoroughness of its research, and the power of its rhetoric without regard to political orientation. This policy is in effect for all Journal activities, and it is the hope of this Journal that the policy expressed herein should prevail in all human endeavors.

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FOREWARD

It is with great pride and enthusiasm that I present the forty-eighth edition of the Hiram H. Lesar Survey of Illinois Law, brought to you by the Southern Illinois University Simmons School of Law. Since its inception in 1987, the SIU Law Journal's Survey of Illinois Law has been a trusted source for legal practitioners, offering the latest updates, practical advice, and insightful critiques on Illinois law. We aim for the 2024 edition to continue this tradition and to expand on national legal updates that may impact Illinois law, serving as a valuable resource on the most recent changes.

I am incredibly proud of our dedicated editors and staff who have worked tirelessly to produce this year's issue. Their commitment and hard work have resulted in well-written articles that provide thorough legal analysis on current issues in Illinois law.

A heartfelt thank you goes out to everyone who made this issue possible:

- Our authors, whose dedication and effort shine through each article. Balancing professional and personal responsibilities, they have gone above and beyond to contribute to this Survey.
- The article editors and staff, who have spent countless hours developing and refining the articles.
- Our Faculty Advisor, Professor Zvi Rosen, whose guidance and support has been invaluable throughout the academic year.
- Cynthis Heisner, for her indispensable logistical support and problem-solving over the past year.
- Alexis Hulfachor, Mallory Maag, Emily Smoot, Allison Cozart, Madelyn Howard, and Trevor Johnson for their assistance, flexibility, and guidance.
- Lastly, my successor, Emily Buikema, for her help with third-round edits and helping complete the final production steps.

Thank you all for your hard work and dedication. We hope you find the 2024 Survey of Illinois Law both informative and useful.

Taylor Ingram
Editor-in-Chief
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Medical negligence lawsuits are fairly considered occupational hazards. Illinois is not a tort reform state; therefore, physicians and hospitals here are rather routinely confronted with this litigation. During the pre-trial discovery process, defendant physicians and hospitals (and non-party discovery respondents) are required to respond to discovery requests seeking information that the respondents may believe is confidential, pursuant to the Illinois Medical Studies Act (MSA). This Article endeavors to explore the legislative history of the MSA and its jurisprudence. The Article also cautions the reader that the MSA is subject to contradictory interpretations by Illinois courts insofar as Illinois does not recognize horizontal stare decisis. The Article concludes with a discussion of the process to invoke the MSA and closing comments regarding the scope of MSA coverage.

In recent years, the landscape of environmental law has been reshaped by a series of landmark federal court decisions. This Article explores the transformative impact of three pivotal environmental decisions—*Juliana v. United States*, *Board of County Commissioners of Boulder County v. Suncor Energy*, Inc., and *Sackett v. Environmental Protection Agency*—on the environmental legal landscape in Illinois. These cases collectively challenge boundaries and raise critical questions about federal government accountability for climate change, corporate environmental liability, and the delicate balance between federal and state governance over environmental issues. First, this Article will examine the important rulings from each case dissecting the legal arguments, decisions, and broader environmental implications. This Article, then, aims to explore the collective impact of these federal precedents on Illinois state law and policy. Finally, by examining these federal decisions and their implications for Illinois, this Article seeks to offer a forward-looking perspective and comprehensive analysis on the current trends and future directions of Illinois environmental law.

Siting of renewable energy production facilities on agricultural land often engenders conflict at the community level. The desire to preserve productive farmland and protect aesthetic connections to the rural landscape can be a significant impediment to renewable energy development. With respect to solar energy production, agrivoltaics—

THE ILLINOIS MEDICAL STUDIES ACT: A PRACTICAL GUIDE TO ITS UNDERSTANDING AND APPLICATION

Marc D. Ginsberg[1]

Table of Contents

[1] Professor of Law, University of Illinois-Chicago School of Law. The author thanks his wife, Janice, for her inspiration and support; thanks his son, Brian, a brilliant appellate lawyer, for his inspiration; and his grandson, Dave (Dooley), for his inspiration. The author also thanks Robert Leander, his former research assistant, for his research, citation checking and proofreading.

I. INTRODUCTION

> [A] statute suffers from dubieties. It is not an equation or a formula representing a clearly marked process, nor is it an expression of individual thought to which is imparted the definiteness a single authorship can give. A statute is an instrument of government partaking of its practical purposes but also of its infirmities and limitations, of its awkward and grouping efforts.[2]

Scholarship, both historically and recently, has revealed that medical negligence lawsuits were, and are, occupational hazards for physicians.[3] In 2017, the American Medical Association reported that thirty-four percent of physicians had been subject to a medical negligence claim.[4] In 2021, *Physicians Practice* reported that Illinois was one of the ten most litigious states for physicians.[5] Irrespective of these statistics, Illinois is not a tort reform state, and the Supreme Court of Illinois (Supreme Court) has rejected legislative efforts at tort reform on three occasions.[6] Therefore, medical and hospital negligence occupies an important place in Illinois tort law.[7]

Predictably, the reach of the pre-trial discovery process in Illinois is quite extensive.[8] This process is largely governed by Illinois Supreme Court Rules 202, 213, and 214.[9] These rules cover depositions, interrogatories, and

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2 Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 528 (1947).

3 *See, e.g.*, Frank J. Knapp, *Malpractice Litigation*, 31 INS. COUNS. J. 55 (1964); Ina Y. Soh et al., *Malpractice Allegations Against Vascular Surgeons: Prevalence, Risk Factors, and Impact on Surgeon Wellness*, 75 J. VASCULAR SURGERY 680 (2022).

4 José R. Guardado, *Policy Research Perspectives—Medical Liability Claim Frequency Among U.S. Physicians*, 5 AMA ECON. & HEALTH POL'Y RSCH. 1, 1 (2017), available at https://www.ama-assn.org/sites/ama-assn.org/files/corp/media-browser/public/government/advocacy/policy-research-perspective-medical-liability-claim-frequency.pdf.

5 Ike Devji, *Medical Malpractice and Asset Protection Series Part 1: Malpractice Risk by the Numbers*, PHYSICIANS PRAC. (June 8, 2021), https://www.physicianspractice.com/view/asset-protection-malpractice-risk-by-the-numbers.

6 Lebron v. Gottlieb Mem'l Hosp., 930 N.E. 2d 895, 914 (Ill. 2010); Best v. Taylor Mach. Works, 689 N.E. 2d 1057, 1105-06 (Ill. 1997); Wright v. Cent. DuPage Hosp. Ass'n, 347 N.E. 2d 736, 743 (Ill. 1976).

7 *See generally Lebron*, 930 N.E. 2d at 914 (showing the court's resistance to adopting the reform approach from other circuits); *Wright*, 347 N.E. 2d at 743 (rejecting reform approach by stating that limiting medical malpractice actions to $500,000 violates the Illinois Constitution).

8 *See* Pemberton v. Tieman, 453 N.E. 2d 802, 804 (Ill. App. Ct. 1983) ("[G]reat latitude is allowed in the scope of discovery . . .").

9 Ill. Sup. Ct. Rs. 202, 213, 214.

production requests to parties.[10] Rule 213 mandates that interrogatories must be restricted "to the subject matter of the particular case."[11] For medical and hospital liability claims, the appendix to Rule 213 contains examples of standard interrogatories to defendant physicians and defendant hospitals.[12] Among other matters, these interrogatories seek information relating to meetings of medical committees, conversations with persons at any time regarding the subject care and treatment, morbidity or mortality hearings, and information claimed to be subject to a statutory privilege.[13] Depositions of parties and witnesses, governed by Rule 202, and production requests under Rule 214 may seek similar information if "relevant to the subject matter of the action."[14]

The invocation of the Illinois Medical Studies Act (MSA)[15] is a ubiquitous response by healthcare providers attempting to combat these discovery requests.[16] The Supreme Court has explained the purpose of the MSA as follows:

> [T]he purpose of this legislation is not to facilitate the prosecution of malpractice cases. Rather, its purpose is to ensure the effectiveness of professional self-evaluation, by members of the medical profession, in the interest of improving the quality of health care. . . . [A]bsent the statutory peer-review privilege, the physicians would be reluctant to sit on peer-review committees and engage in frank evaluations of their colleagues.[17]

Therefore, as the MSA may have significant application to the peer review process, morbidity and mortality conferences, incident reporting, and other investigations, this Article is intended to provide a comprehensive historical and legal analysis of the MSA.

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10 *Id*.

11 *Id*. at 213(b).

12 *Id*. at 213(j) app.

13 *Id*.

14 *See id*.; *id.* at 202, 214.

15 735 ILL. COMP. STAT. §§ 5/8-2101—5/8-2105.

16 *See* Jenkins v. Wu, 468 N.E. 2d 1162, 1166 (Ill. 1984) ("[A]s a result of this legislation, medical malpractice plaintiffs are denied access to information that would be available to physicians whose staff privileges were either limited or revoked.").

17 *Id*. at 1168; *see also* Niven v. Siqueira, 487 N.E. 2d 937, 942 (Ill. 1985) ("The purpose of the Act is to encourage candid and voluntary studies and programs used to improve hospital conditions and patient care or to reduce the rates of death and disease.").

II. HISTORY

The MSA is a venerable statute dating back to 1961.[18] In its original version, the MSA provided as follows:

> MEDICAL STUDIES
>
> AN ACT providing for the confidential character of medical studies conducted by the Illinois Department of Public Health, Illinois State Medical Society, allied medical societies and in-hospital staff committees of accredited hospitals, and providing a penalty for the violation thereof. Approved Aug. 21, 1961. L.1961, p. 3721.
>
> *Be it enacted by the People of the State of Illinois, represented in the General Assembly:*
>
> 101. Information obtained—Confidential Nature.] § 1. All information, interviews, reports, statements, memoranda or other data of the Illinois Department of Public Health, Illinois State Medical Society, allied medical societies, or in-hospital staff committees of accredited hospitals, but not the original medical records pertaining to the patient, used in the course of medical study for the purpose of reducing morbidity or mortality shall be strictly confidential and shall be used only for medical research.
>
> 102. Admissibility as evidence—Prohibition.] § 2. Such information, records, reports, statements, notes, memoranda, or other data, shall not be admissible as evidence in any action of any kind in any court or before any tribunal, board, agency or person.
>
> 103. Furnishing information in course of research project—Immunity from liability.] § 3. The furnishing of such information in the course of a research project to the Illinois Department of Public Health, Illinois State Medical Society, allied medical societies or to in-hospital staff committees or their authorized representatives, shall not subject any person, hospital, sanitarium, nursing or rest home or any such agency to any action for damages or other relief.

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[18] ILL. REV. STAT. ch. 51, ¶¶ 101–105 (1961) (current version at 735 ILL. COMP. STAT. §§ 5/8-2101—5/8-2105).

> 104. Interviews—Consent of physician.] § 4. No patient, patient's relatives, or patient's friends named in any medical study, shall be interviewed for the purpose of such study unless consent of the attending physician and surgeon is first obtained.
>
> 105. Improper disclosure of information—Penalty.] §5. The disclosure of any information, records, reports, statements, notes, memoranda or other data obtained in any such medical study except that necessary for the purpose of the specific study is unlawful, and any person convicted of violating any of the provision of this Act is guilty of a misdemeanor.[19]

There was no mandate to provide legislative history until the creation of the Illinois Constitution in 1970, so none is available for the original MSA.[20]

The original version of the MSA identified specific information owned by various entities that was considered "confidential"[21] and "inadmissible as evidence."[22] Significantly, the MSA did not classify this information as "privileged."[23] The distinction is important.[24] "[C]onfidentiality addresses the obligation to refrain from disclosing information to third parties . . . ."[25] On the other hand, "[p]rivilege addresses a person's right not to have another testify as to certain matters as part of a judicial process."[26]

The MSA was subsequently amended on sixteen occasions from 1972 to 2002.[27] The highlights of these amendments are as follows: the misdemeanor classification in paragraph 105 included a reference to Part 21 of Article VIII of the Act;[28] additions to covered committees and expansion of the type and use of information referred to in paragraph 101;[29] the addition

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19 *Id*.

20 *See* Miles J. Zaremski, *The Medical Studies Act and Allied Medical Societies: Looking Back at Niven v. Siqueira Twenty-Five Years Later*, 19 ANNALS HEALTH L. 183, 184-85 (2010) ("The reason no legislative history exists is because there was no mandate to do so until the creation of the 1970 Illinois Constitution.").

21 ILL. REV. STAT. ch. 51, ¶ 101(1961) (current version at 735 ILL. COMP. STAT. § 5/8-2101).

22 *Id*. at ¶ 102 (current version at 735 ILL. COMP. STAT. § 5/8-2102).

23 *Id*.

24 Susan O. Scheutzow & Sylvia Lynn Gillis, *Confidentiality and Privilege of Peer Review Information: More Imagined Than Real*, 7 J. L. & HEALTH 169, 192 (1993).

25 *Id*.

26 *Id*.

27 *See generally* Beth C. Boggs, *Understanding the Illinois Medical Studies Act*, 82 ILL. BAR J. 422 (Aug. 1994).

28 Pub. Act 77-2830, sec. 5, § 8-2105, 1972 Ill. Laws 2514, 2553 (current version at 735 IL. COMP. STAT. § 5/8-2105).

29 Pub. Act 79-1434, ch. 51, sec. 4, § 8-2101, 1976 Ill. Laws 1349, 1350 (current version at 735 IL. COMP. STAT. § 5/8-2101).

of "physician-owned inter-insurance exchanges and their agents," and expansion of references to confidentiality in paragraph 101;[30] incorporation of the MSA in the Illinois Code of Civil Procedure in 1981;[31] information covered in (§ 8-2101) is now privileged, strictly confidential, and is not discoverable;[32] further covered entity expansion in § 8-2101;[33] and a 1987 amendment to § 8-2102, noting that "[t]he disclosure of any such information or data, whether proper, or improper, shall not waive or have any effect upon its confidentiality, nondiscoverability [sic], or nonadmissability [sic]."[34] The compilation of these amendments formed the current version of the MSA.[35] Despite the expansion of statutorily covered entities and the provisions regarding non-discoverability, inadmissibility, and confidentiality of covered materials and information, the amendments did not explain available procedures to invoke the MSA.[36]

The MSA does not contain sections providing definitions or otherwise explaining what specific information is subject to the provisions governing privilege, non-discoverable evidence, and inadmissibility.[37] Therefore, examining the Illinois case law that analyzes these matters is necessary. Thirty years ago, a paper published in the Illinois Bar Journal (IBJ) identified the following information within the discovery and evidentiary protections of the MSA:

> (1) documents of complaints relating to a particular doctor and reports of review committees about the care provided by that doctor;
> (2) hospital documentation about granting and extending staff privileges, including all material about granting privileges to "all defendant doctors;"
> (3) documents relating to Joint Commission on Accreditation of Hospitals' investigation or accreditation;

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30 Pub. Act 81-476, ch. 51, sec. 1, § 8-2101, 1979 Ill. Laws 2040, 2041 (current version at 735 IL. COMP. STAT. § 5/8-2101).

31 Id. (adding the MSA to the Illinois Code of Civil Procedure); Code of Civil Procedure, Pub. Act 82-280, 1981 Ill. Laws 1381, 1381-1632 (current version at 735 IL. COMP. STAT. § 5/1-101 to 22-105) (codifying the Illinois Code of Civil Procedure).

32 Pub. Act 82-783, ch. 110 sec. 1, § 8-2102, 1982 Ill. Laws 38, 381 (current version at 735 IL. COMP. STAT. § 5/8-2102).

33 Pub. Act 84-544, ch. 110 sec. 1, § 8-2101, 1985 Ill. Laws 3408, 3408 (current version at 735 IL. COMP. STAT. § 5/8-2101).

34 Pub. Act 85-907, ch. 110 sec. 1, § 8-2102, 1987 Ill. Laws 3802, 3431 (current version at 735 IL. COMP. STAT. § 5/8-2102).

35 735 ILL. COMP. STAT. §§ 5/8-2101—5/8-2105. The full text of the current MSA is included at the end of this article. *See infra* Section VI.

36 *See generally* 735 ILL. COMP. STAT. §§ 5/8-2101—5/8-2105.

37 *See generally id*.

(4) information about measures that a hospital took to supervise a doctor following the conclusion of his suspension;
(5) information about either medical or psychiatric examinations which a doctor was required to submit to before reappointment to medical staff;
(6) evidence relating to a hospital's review procedures;
(7) statements made by hospital staff physicians at a hearing before hospital credentials committee;
(8) a report on the surgical procedures of a hospital's physicians;
(9) plaintiff's "Code Blue" evaluation report which was prepared for internal hospital use at the time of an infant's admission;
(10) pathology report of testing requested by a hospital's environmental services committee.[38]

To provide a more determinative analysis of the protective scope of the MSA, a combination of the case law referred to in the above listing and case law in the succeeding years will be examined.[39] Additionally, the MSA does not define the process by which parties and non-party subpoena respondents may invoke the protection of the MSA.[40] This Article will address this topic, as well.

III. EFFORTS TO REPEAL THE MEDICAL STUDIES ACT

A review of Illinois General Assembly bill status information for 2015, 2016, and 2017 reveals an effort to repeal the MSA.[41] Illinois Senate Bills 1700 (S.B. 1700) and 2744 (S.B. 2744) were introduced to repeal the MSA from the Illinois Code of Civil Procedure.[42] The Illinois State Medical Society (ISMS) and Illinois Hospital Association (IHA) issued a position

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38 Boggs, *supra* note 27, at 424-26. *See generally* Jenkins v. Wu, 468 N.E. 2d 1162 (Ill. 1984); Mennes v. S. Chi. Cmty. Hosp., 427 N.E. 2d 952 (Ill. App. Ct.1981); Niven v. Siqueira, 487 N.E. 2d 937 (Ill. 1985); Pritchard v. Swedish Am. Hosp., 547 N.E. 2d 1279 (Ill. App. Ct. 1989); Zajac v. St. Mary of Nazareth Hosp. Ctr., 571 N.E. 2d 840 (Ill. App. Ct. 1991); Green v. Silver Cross Hosp., 606 F. Supp. 87 (N.D. Ill. 1984); Salaymeh v. St. Vincent Mem'l Hosp. Corp., 706 F. Supp. 643 (C.D. Ill. 1989); Flannery v. Lin, 531 N.E. 2d 403 (Ill. App. Ct. 1988); Sakosko v. Mem'l Hosp., 522 N.E. 2d 273 (Ill. App. Ct. 1988).

39 *See* analysis *infra* Section IV.

40 *See generally* 735 ILL. COMP. STAT. §§ 5/8-2101—5/8-2105.

41 *See* S.B. 1700, 99th Gen. Assemb., Reg. Sess. (Ill. 2015); *see also* S.B. 2744, 99th Gen. Assemb., Reg. Sess. (Ill. 2016).

42 *Id*.

paper opposing S.B. 1700.[43] It characterized S.B. 1700 as "a bill that remove[d] all protections long-afforded to physicians and hospitals engaging in peer review, research, and medical studies."[44] It urged that adoption would decrease healthcare quality and negatively impact patients' safety.[45] ISMS firmly objected to another attempted repeal under S.B. 2744.[46] ISMS noted that the Illinois Trial Lawyers Association (ITLA) wanted peer review meetings and related documents by individual hospitals to be admissible in court.[47] Efforts to repeal the MSA have been unsuccessful.[48]

IV. MEDICAL STUDIES ACT JURISPRUDENCE[49]

This Article will now analyze case law that has focused on, alluded to, or interpreted the MSA, beginning with state court decisions.

A. Illinois State Court

1. Supreme Court of Illinois

Since the birth of the MSA, the Supreme Court has either interpreted or referred to the statute on seven occasions.[50]

a. Jenkins v. Wu

In *Jenkins*, the Supreme Court considered a medical negligence claim against "physicians, nurses, and hospital support personnel connected with the University[] [of Illinois] Medical Center" (UIMC).[51] During the

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43 ILL. HOSP. ASS'N & ILL. ST. MED. SOC'Y, POSITION PAPER IN OPPOSITION TO SB 1700 REPEAL OF THE MEDICAL STUDIES ACT [hereinafter "ISMS Position Paper"]; *see* S.B. 1700, 99th Gen. Assemb., Reg. Sess (Ill. 2015). ISMS's mission is to "educate, advocate for, and support the health and wellbeing of the people of Illinois and the physicians who care for them." *About ISMS*, ISMS, https://www.isms.org/about-isms/about-isms (last visited May 31, 2024).

44 ISMS Position Paper, *supra* note 43; *see* S.B. 1700.

45 *Id*.

46 ISMS, 2016 UPDATE ON ISMS LEGISLATIVE ACTIVITY IN THE ILLINOIS GENERAL ASSEMBLY 14 (2016).

47 *Id*.

48 *See generally* S.B. 1700; *see also* S.B. 2744, 99th Gen. Assemb., Reg. Sess. (Ill. 2016).

49 Here, the term "jurisprudence" is used as a synonym for "the law developed by the courts." R.H.S. Tur, *What Is Jurisprudence?*, 28 PHIL. Q. 149, 149 (April 1978); *see also* GEORGE WHITECROSS PATON, A TEXTBOOK OF JURISPRUDENCE 2 (1946) ("Jurisprudence is sometimes used merely as an imposing synonym for law . . . .").

50 *See generally* Jenkins v. Wu, 468 N.E. 2d 1162 (Ill. 1984); Niven v. Siqueria, 487 N.E. 2d 937 (Ill. 1985); Richter v. Diamond, 483 N.E. 2d 1256 (Ill. 1985); Roach v. Springfield Clinic, 623 N.E. 2d 246 (Ill. 1993); S. Illinoisan v. Ill. Dep't of Pub. Health, 844 N.E. 2d 1 (Ill. 2006); Harris v. One Hope United, 2015 IL 117200; Klaine v. S. Ill. Hosp. Servs., 2016 IL 118217.

51 *Jenkins*, 468 N.E. 2d at 1164.

discovery process, the plaintiffs sought to depose the board of trustees of UIMC and the Executive Director, Lester Rudy (collectively "UI Health").[52] In the plaintiffs' subpoena, they sought production of the following:

- hospital accreditation records;[53]
- the personnel file of a defendant physician;[54]
- documents providing "all reports of medical review panels . . . regarding patient care provided by [the defendant physician];"[55]
- "all reports or other evidence of complaints or commendations relative to the quality of health care provided by [the defendant physician];"[56]
- "all reports of medical review panels, notes of all lectures given in which plaintiff's case was discussed, . . . all photographs, slides, or movies taken of plaintiff;"[57] and
- "a general search of all hospital files, including medical review committee files."[58]

In response, UI Health, though not a party to the plaintiffs' malpractice action, invoked the privilege in section 8-2101 of the MSA.[59] Following an in camera inspection,[60] the trial court held the requested documents "discoverable absent the statutory privilege."[61] Further, it "declared the [MSA] invalid" because it violated equal protection by preventing medical malpractice plaintiffs from accessing documents that physicians could use in non-medical malpractice proceedings.[62] Counsel for UI Health refused to produce the documents and "was held in contempt of court and fined one dollar,"[63] essentially a friendly contempt.[64]

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52 *Id.*

53 *Id.* at 1165.

54 *Id.*

55 *Id.*

56 *Id.*

57 *Id.*

58 *Id.*

59 *Id.*; 735 ILL. COMP. STAT. 5/8-2101.

60 *See* Scott R. White, *Discovery of Non-Parties' Medical Records in the Face of the Physician-Patient Privilege*, 36 CAL. W.L. REV. 523, 526 (2000) ("An in camera inspection allows the judge to privately view documents before ruling on their admissibility.").

61 *Jenkins*, 468 N.E. 2d at 1165.

62 *Id.*

63 *Id.*

64 *See* Richard Lee Stavins, *Contempt of Court: Distinguishing the Six Types*, 31 CHI. BAR ASS'N REC. 26, 27 (2017) ("Friendly contempt orders are often entered where the order involved is not appealable but raises a good faith dispute on either a legal question of first impression or a discovery issue.").

The Supreme Court allowed a direct appeal of the trial court's rulings that the MSA was unconstitutional and holding UI Health's counsel in contempt of court.[65] It identified the issues on appeal as follows:

> (1) [W]hether section 8-2101 violates the equal protection clauses of both the United States and Illinois constitutions, and (2) whether section 8-2101 constitutes special legislation in violation of article IV, section 13, of the Illinois Constitution.[66]

The Supreme Court reversed the trial court's judgment, finding that the "fourteenth amendment to the Federal Constitution . . . does not deny a state the power to treat different classes of persons differently."[67] Specifically, medical negligence plaintiffs and "physicians seeking to defend their staff privileges" are not similarly actuated.[68] As stated previously, the Supreme Court noted that the purpose of the MSA was "not to facilitate the prosecution of malpractice cases" but "to ensure the effectiveness of professional self-evaluation, by members of the medical profession, in the interest of improving the quality of health care."[69] It further stated that the MSA was an "attempt by the legislature to promote quality health care by encouraging physicians to police themselves."[70] Therefore, it is fair to state that the Supreme Court concluded the MSA was constitutional.[71]

b. Richter v. Diamond

In *Richter*, the Supreme Court affirmed the civil contempt of a defendant hospital for its refusal to answer the plaintiff's supplemental interrogatories.[72] These interrogatories focused on a co-defendant surgeon and requested information pertaining to restrictions of his hospital staff privileges, including "the specific conditions imposed upon [his] privileges by the restrictions."[73] The hospital claimed that this information was protected under the MSA.[74]

The Supreme Court noted that "the plaintiff s[ought] only a statement of the nature and extent of restrictions imposed on [the defendant-surgeon]

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65 *Jenkins*, 468 N.E. 2d at 1166.
66 *Id*.
67 *Id*.
68 *Id*. at 1167.
69 *Id*. at 1168; *see* Ill. Sup. Ct. R. 213(j) app.
70 *Jenkins*, 468 N.E. 2d at 1169.
71 *See id*. at 1162.
72 Richter v. Diamond, 483 N.E. 2d 1256, 1257 (Ill.1985).
73 *Id*.
74 *Id*.

at the hospital over a period of time."[75] As such, the plaintiff's interrogatories did not seek to uncover the deliberative process protected by the MSA, only the factual results of the deliberative process.[76] Thus, that information was "outside the scope of section 8-2101 and therefore [was] not privileged."[77]

c. Niven v. Siqueira

In *Niven*, the Supreme Court analyzed whether documents in the hands of a third party related to the accreditation of a defendant hospital were protected by sections 8-2101 and 8-2102.[78] After undergoing multiple operations by the defendant surgeon on the plaintiff's brain, the plaintiff filed a negligence action asserting injury caused by the defendant surgeon's utilization of a "procedure known as stereotactic brain surgery."[79] It further alleged that the defendant hospital, Northwestern Memorial Hospital (Northwestern), negligently authorized the defendant surgeon's use of this procedure.[80] Plaintiffs asserted that the hospital violated the Joint Commission on Accreditation of Hospitals' (JCAH) standards when it "failed to adequately review [the surgeon's] clinical privileges."[81] Plaintiffs sought, and the trial court issued, a subpoena to JCAH seeking documents "relating to Northwestern's accreditation."[82] Specifically, the subpoena requested:

> a) Any and all applications for survey hospital [sic], survey profiles, all annual surveys for each service category[,] all survey reports [,] recommendations and reports, all reports of [the] Joint Commission and all hospital surveyor reports and records.
> b) Any and all documents reflecting or regarding accreditation history of Northwestern Memorial Hospital.
> c) All information given and presented to on site surveyors and field representatives and all summations [sic] conferences, public hearings and public information hearings.

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75 *Id*.
76 *Id*. at 1258.
77 *Id.*
78 Niven v. Siqueira, 487 N.E. 2d 937, 939 (Ill. 1985) ("Does the Act protect from discovery surveys, accreditation evaluations, and other records in the hands of the Joint Commission?").
79 *Id*. at 940.
80 *Id*.
81 *Id*.
82 *Id*.

> d) All self surveys and reports given by Northwestern Memorial during the interim years.
> e) All official records and reports of publically [sic] recognized licensing [,] examining[,] review and planning bodies obtained by Joint Commission or [sic] Accreditation of Hospitals regarding Northwestern Memorial Hospital.
> f) Any and all other documents, records and other papers and instruments of writing regarding or relating to Northwestern Memorial Hospital, Chicago, Illinois.[83]

JCAH and the hospital "moved to quash the subpoena, arguing that the [] documents were confidential and not discoverable pursuant to section 8-2101."[84] However, both motions were denied.[85]

After unsuccessful efforts seeking review in the appellate and Supreme Court, the plaintiffs moved to compel document production.[86] JCAH refused to comply, resulting in a civil contempt order that it appealed to the Supreme Court.[87] The appellate issue raised by JCAH and intervenor hospital was whether "the [MSA] protect[ed] discovery surveys, accreditation evaluations, and other records in the hands of the [JCAH]?"[88] The plaintiffs cross-appealed, raising procedural and constitutional issues.[89]

First, the Supreme Court determined whether the MSA applied to JCAH.[90] The plaintiffs insisted that because JCAH was not identified in the statute, the MSA did not apply, therefore any documents possessed by it were discoverable.[91] The MSA provides an overarching, undefined category of covered entities titled "allied medical societies" (AMS).[92] The Supreme Court stated that only those medical societies with purposes aligned with those of the MSA were included in the AMS category.[93] The record included JCAH's *Accreditation Manual for Hospitals* (*Manual*), which was entered

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83 *Id.*
84 *Id*. at 939.
85 *Id*.
86 *Id*.
87 *Id*.
88 *Id*.
89 *Id*.
90 *Id*. at 942.
91 *Id*.
92 *Id*. (first citing County of Winnebago v. Industrial Com., 34 Ill.2d 332, 335 (1966); then citing Peacock v. Judges Ret. Sys., 10 Ill.2d 498, 501 (1957)) ("Statutes should, if possible, be construed so that no term is rendered superfluous or meaningless[,] . . . and therefore it is presumed that the legislature intended that at least some entities not specifically named in the statute would come under its purview as 'allied medical societies.").
93 *Id.* The Supreme Court specified that the purpose of the MSA is to "encourage candid and voluntary studies and programs used to improve hospital conditions and patient care or to reduce the rates of death and disease."

by the defendants without any objection by the plaintiffs.[94] It stated that the organization's purpose was to establish standards of "operation [for] health care facilities" and enforce those standards through accreditation procedures.[95] The Court determined that it was obvious that JCAH's purpose aligned with the MSA and, therefore, it was intended to be included within the MSA.[96]

The Supreme Court then turned to whether the subpoenaed documents were protected.[97] The plaintiffs sought documents owned by JCAH related to Northwestern's accreditation.[98] Per the *Manual,* JCAH performed surveys, interviews, and examinations of hospital records to determine Northwestern's accreditation eligibility.[99] This culminated in a report that "include[d] recommendations for improvements."[100] Materials used by an AMS as a component of a "study or program designed to improve quality control or patient care, or reduce morbidity or mortality" qualify for protection.[101] After reviewing the documents at issue, the Supreme Court concluded that they "were gathered as part of a program designed to improve quality control and patient care," deserving protection under the MSA.[102]

d. Roach v. Springfield Clinic

Keeping in mind the Felix Frankfurter quote noted at the outset of this Article,[103] a curiosity, or shortcoming, of the MSA is that it lacks a defined process or approach for determining protected material.[104] In *Roach,* based on legislative history (many years after the MSA was enacted) rather than statutory language, the Supreme Court held that information generated from outside a statutorily covered committee and later reported to a covered committee was not protected by the MSA.[105]

After their daughter was "born with cerebral palsy and irreversible brain damage," plaintiffs filed a medical negligence claim against the doctors who participated in the delivery, the clinic the doctors practiced out of, and the hospital where she was born.[106] The plaintiffs were admitted to the hospital

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94 *Id*. at 943.
95 *Id*. at 940-41.
96 *Id*. at 942.
97 *Id*.
98 *See id.* at 942-43.
99 *Id*. at 941.
100 *Id.* A hospital's accreditation requires it to remedy any issues identified by JCAH. *Id.*
101 *Id*. at 942 (quoting ILL. REV. STAT. 984 Supp., ch. 110, ¶ 8-2101) (current version at 735 ILL. COMP. STAT. § 5/8-2101)).
102 *Id.* at 942.
103 Frankfurter, *supra* note 2, at 528.
104 735 ILL. COMP. STAT. §§ 5/8-2101—5/8-2105.
105 Roach v. Springfield Clinic, 623 N.E. 2d 246, 250-55 (Ill. 1993).
106 *Id*. at 247.

on January 10, 1987, based on examination results indicating the "potential for fetal distress" requiring inducement.[107] The plaintiff-mother was put on Pitocin and examined periodically by residents and the defendant doctors.[108] Both defendant doctors notified the defendant hospital staff that there was the "potential for fetal distress and the possible need for an emergency [C-section]."[109] At approximately 8 p.m. on January 10, Pitocin was discontinued so the plaintiff mother could have dinner and sleep.[110] Before one of the defendant doctors left the hospital on January 11, he "personally instructed [the defendant hospital's] nurses to prepare for a C-section and to alert the anesthesia department in the event . . . it w[as] needed in an emergency . . . ."[111]

Around 11:30 a.m. on January 11, the resident on duty observed that the baby's heart rate became dangerously low.[112] Noting that brain damage could occur within ten minutes at the baby's current heart rate, he took the plaintiff-mother to the operating room, arriving at 11:38 a.m.[113] One of the defendant doctors, who was paged immediately upon fetal distress, made it to the operating room at 11:44 a.m.[114] Although the defendant hospital's staff allegedly attempted to contact anesthesiology immediately upon fetal distress, the anesthesiologist and nurse anesthetist (N.A.) did arrived three minutes after the procedure began.[115] The C-section was successful; however, the umbilical cord was tightly wrapped around the baby's neck, and she had to be resuscitated.[116] "A normal heart rate was not reached until [the baby] was 10 minutes of age."[117]

The plaintiffs alleged injury arising from the prolonged administration of Pitocin, failure to timely perform the C-section, improper monitoring by the defendant hospital's staff on the morning of delivery, and failure to timely administer anesthesia.[118] There was a dispute concerning the time the defendant hospital's staff alerted the anesthesiology department to the emergency C-section.[119] The defendant hospital's records indicated a call was made by 11:35 a.m., but the N.A. testified he was not alerted until 11:47 a.m. and the anesthesiologist at 11:48 a.m.[120]

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107 *Id*.
108 *Id*. at 247-48.
109 *Id*.
110 *Id*. at 248.
111 *Id*.
112 *Id*.
113 *Id*.
114 *Id*.
115 *Id*.
116 *Id*.
117 *Id*.
118 *Id*. at 249.
119 *Id*.
120 *Id*.

The plaintiffs attempted to question the N.A. about a post-delivery conversation with the defendant hospital's chief of anesthesiology (the "Chief") regarding the delay in communication.[121] The Chief mentioned that the delay was due to recently hired obstetrics department secretaries who "did not know the proper or most effective way of paging the anesthesia team."[122] This conclusion was reached after the Chief spoke with a nursing supervisor in the obstetric department.[123]

The Supreme Court's review of MSA section 5/8-2101 led it to conclude that: "What the [MSA] actually protects is not information of a hospital's medical staff, but information of '*committees* of licensed or accredited hospitals or their medical staffs, including Patient Care Audit Committees, Medical Care Evaluation Committees, Utilization Review Committees, Credential Committees and Executive Committees . . . .'"[124] Significantly, it referred to legislative history from a 1981 amendment, indicating that entities contemplated by the MSA's confidentiality protection were "data generating entities."[125] Furthermore, the Court opined that as far as the MSA was concerned, any committee "comprised of the hospital's medical staff . . . must be involved in the peer-review process before the privilege will attach."[126] Therefore, the conversations and reports were discoverable because they did not constitute information generated by an MSA-covered committee.[127]

Roach is, arguably, the most significant Supreme Court case addressing the MSA, as it identifies important limitations to the confidentiality, privilege, and non-discoverability protections provided by the Act.[128] It should be noted that not all courts of last resort agree with the Supreme Court's position that protected information must be *generated* by a covered entity.[129] For example, in *Mat-Su Valley Medical Center v. Bolinder*, the Supreme Court of Alaska noted that:

> [T]his acquisition [of information not generated by a covered committee] was "in the exercise of [the committees'] duties and functions." One statutorily defined duty and function of a review organization is "evaluating and improving the quality of health care rendered" in the hospital. . . . A contrary interpretation allowing a peer review

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121 *Id*. at 249-50.
122 *Id*. at 249.
123 *Id.*
124 *Id*. at 250.
125 *Id*.
126 *Id*. at 251.
127 *Id*.
128 *See id.*
129 *See, e.g.*, Mat-Su Valley Med. Ctr. v. Bolinder, 427 P.3d 754 (Alaska 2018).

> committee or a committee member to be compelled to disclose such original source information would eviscerate the peer review privilege's protection for all data and information acquired by the committee and for the committee's deliberations.[130]

Even though the "acquired by" language contained in the Alaska statute, providing a peer review privilege,[131] is not contained in section 5/8-2101 of the MSA, this comment is equally applicable to the promotion of quality health care in Illinois.[132]

In *McGee v. Bruce Hospital System*, the Supreme Court of South Carolina, in consideration of the state statute also containing "acquired by" language,[133] interpreted "the legislative intent to protect not only documents generated by the [covered] committee, but also documents acquired by the committee in the course of its proceedings."[134] Again, in South Carolina, "[t]he overriding public policy of the confidentiality statute is to encourage health care professionals to monitor the competency and professional conduct of their peers to safeguard and improve the quality of patient care."[135]

e. Southern Illinoisan v. Illinois Department of Public Health

In *Southern Illinoisan*, the Supreme Court considered a matter arising under the Illinois Freedom of Information Act,[136] where the Illinois Department of Public Health refused to provide information pursuant to the MSA.[137] However, the Supreme Court resolved this matter without reference to the MSA.[138]

f. Harris v. One Hope United

In *Harris*, the Supreme Court declined to recognize a self-critical analysis privilege, which would have been a new privilege in Illinois. [139] Although the only acknowledgment of the MSA is in a footnote,[140] the Court

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130 *Id*. at 765-67.
131 ALASKA STAT. § 18.23.030(a) (2023).
132 *Mat-Su Valley Med. Ctr*., 427 P.3d at 766-67.
133 S.C. CODE ANN. § 40-71-20 (2023).
134 McGee v. Bruce Hosp. Sys., 439 S.E.2d 257, 260 (S.C. 1993).
135 *Id*. at 259.
136 5 ILL. COMP. STAT. 140/1-11.6 (2010).
137 *S. Illinoisan v. Ill. Dep't Pub. Health*, 844 N.E. 2d 1, 3 (Ill. 2006).
138 *Id*. at 21.
139 Harris v. One Hope United, 2015 IL 117200, ¶ 1. The purpose of which "is to protect from disclosure documents that contain candid and potentially damaging self-criticism, where disclosure of those documents would harm a significant public interest." *Id*. at ¶ 9.
140 *Id*. ¶ 8 n.2.

did state that "privileges are strongly disfavored because they operate to 'exclude relevant evidence and thus work against the truthseeking [sic] function of legal proceedings.'"[141] Essentially, the Supreme Court's preference is to defer the recognition of privileges to the legislative process.[142]

g. Klaine v. Southern Illinois Hospital Services

In *Klaine*, the Supreme Court considered an appeal from a friendly contempt issued against hospital counsel for refusing to produce documents sought by plaintiffs' discovery requests.[143] The production refusal was based on the invocation of the MSA and the Health Care Professional Credentials Collection Act (Credentials Act).[144] For purposes of the appeal to the Supreme Court, the hospital "limited its challenge to the discovery order . . . pursuant to section 15(h) of the Credentials Act . . . ."[145] The Supreme Court opinion does refer to Illinois appellate case law concerning the purpose of the MSA[146]; however, the Supreme Court disposed of the appeal[147] pursuant to the Credentials Act,[148] Health Care Quality Improvement Act,[149] Health Insurance Portability and Accountability Act,[150] and Illinois physician-patient privilege.[151]

Other than the Supreme Court's reference to the purpose of the MSA,[152] its limitation of the MSA's protection to information generated by an MSA-covered committee or entity may be the Court's most significant interpretation of the MSA.[153] The Supreme Court clearly favors a liberal discovery process and has a history of limiting the reach of evidentiary privileges.[154]

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141 *Id*. ¶ 26 (quoting People *ex rel*. Birkett v. City of Chi., 705 N.E. 2d 48, 51 (Ill. 1998)).
142 *Id*.
143 Klaine v. S. Ill. Hosp. Servs., 2016 IL 118217, ¶¶ 1-6.
144 *Id*. ¶ 4.
145 *Id*. ¶ 10.
146 *Id*. ¶ 30.
147 *Id*. ¶ 44.
148 410 ILL. COMP. STAT. 517/5, 10, 15 (2012).
149 42 U.S.C. § 11137(b)(1) (2012).
150 *Id*. § 1320d-1-9.
151 735 ILL. COMP. STAT. 5/8-802 (2019).
152 *Jenkins* v. Wu, 468 N.E. 2d 1162, 1168 (Ill. 1984).
153 *Roach* v Springfield Clinic, 623 N.E. 2d 246, 251 (Ill. 1993).
154 *See, e.g.*, Consolidation Coal Co. v. Bucyrus-Erie Co., 432 N.E. 2d 250, 257 (1982) (limiting the application of the attorney-client privilege in the corporate context to the "control group").

2. Appellate Courts of Illinois

First, it is important to recognize an idiosyncrasy of Illinois law. There are five appellate districts in Illinois.[155] An appellate court within a given district is "not bound to follow appellate court decisions outside of [the] district."[156] This describes what has been well characterized as the absence of horizontal *stare decisis*.[157] Of course, this may lead to inconsistent outcomes between or among appellate districts (or divisions of districts) in Illinois, creating difficulty in predicting the interpretation of a statute, such as the MSA.[158]

Illinois appellate courts have opined on the MSA since 1979.[159] A detailed description of each is impractical because there are simply too many. Therefore, this Article will endeavor to categorize these opinions to clarify which information and materials are protected or unprotected from discovery and admissibility under the MSA.

a. General Principles Regarding Application of the MSA

1) The MSA does not protect documents that are generated before a peer review committee or its designee is authorized to investigate a specific incident.[160]
2) A covered committee must be involved in the peer review or quality control process regarding an incident before information is generated.[161]
3) The MSA protects more than peer review.[162]

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155 *Appellate Court*, ILL. CTS., https://www.illinoiscourts.gov/courts/appellate-court/ (last visited June 7, 2024).

156 Davis v. Kewanee Hosp., 2014 IL App (2d) 130304, ¶ 40; *see also* Hughes v. Bandy, 84 N.E. 2d 664, 666 (Ill. App. Ct. 1949). It should also be noted that the first district appellate court is comprised of divisions, and *stare decisis* does not require a division of the first district to be bound by an opinion of another division of the first district. *See* Schiffner v. Motorola, Inc., 697 N.E. 2d 868, 871 (Ill. App. Ct. 1998).

157 Taylor Mattis & Kenneth G. Yalowitz, *Stare Decisis Among [Sic] the Appellate Court of Illinois*, 28 DEPAUL L. REV. 571, 573 (1979).

158 *See, e.g.*, Nielson v. Swedish Am. Hosp., 2017 IL App (2d) 160743, ¶ 75 (finding that dual purpose materials – quality assurance and risk management – are not protected via MSA privilege); Sakosko v. Mem'l Hosp., 522 N.E. 2d 273, 277 (Ill. App. Ct. 1988) (holding that quality control information remains privileged under the MSA even though it is shared with the risk management committee).

159 *See* Matviuw v. Johnson, 388 N.E. 2d 795 (Ill. App. Ct. 1979) ("The issue of whether sections 1, 2, and 3 of the Medical Studies Act confer an absolute privilege upon statements made before an executive committee of a hospital is one of first impression in this state.").

160 *See* Grosshuesch v. Edward Hosp., 2017 IL App (2d) 160972, ¶ 28; Lindsey v. Butterfield Health Care II, Inc., 2017 IL App (2d) 160042, ¶ 12; Chi. Tr. Co. v. Cook Cnty. Hosp., 698 N.E. 2d 641, 647 (Ill. App. Ct. 1998).

161 *See* Kopolovic v. Shah, 2012 IL App (2d) 110383, ¶ 19.

162 *See* Doe v. Ill. Masonic Med. Ctr., 696 N.E. 2d 707, 710 (Ill. App. Ct. 1998).

4) The MSA protects documents specifically for the use of a peer review committee.[163]
5) The MSA protects dual-purpose or multi-purpose documents.[164]
6) The MSA does not protect dual-purpose documents.[165]
7) The MSA does not include an assisted living facility as a covered entity.[166]
8) The MSA does not include a pharmacy as a covered entity.[167]

b. MSA Protected Information

1) Annual evaluations by Department of Surgery chairpersons.[168]
2) Memorandums to Credentials Committee chairpersons from Department of Surgery chairpersons.[169]
3) Confidential physician evaluation forms.[170]
4) Statements of hospital medical directors during Board of Directors meetings regarding the competence of a physician,[171] comments forwarded to the Medical Executive Committee,[172] and recommendations that a physician's privileges be terminated.[173]
5) Letters of reference from outside physicians to hospital credentialing committees, at the request of the credentialing committee, regarding a physician's professional competence.[174]
6) Medical journal articles as they reflect a committee's internal review process, including information gathering and deliberations that were located as the result of research conducted by members of the Sentinel Event Analysis Committee.[175]

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163 *See Chi. Tr. Co*., 698 N.E. 2d at 646.
164 *See Sakosko*, 522 N.E. 2d at 277.
165 *See* Nielson v. Swedish Am. Hosp., 2017 IL App (2d) 160743, ¶ 75.
166 *See* Pietro v. Marriott Senior Living Servs., 810 N.E. 2d 217, 224 (Ill. App. Ct. 2004).
167 *See* Dep't of Fin. & Pro. Regul. v. Walgreen Co., 2012 IL App (2d) 110452, ¶ 24.
168 *See* Toth v. Jensen, 649 N.E. 2d 484, 487 (Ill. App. Ct. 1995).
169 *See id*.
170 *See id*.
171 *See* Tabora v. Gottlieb Mem'l Hosp., 664 N.E. 2d 268, 274 (Ill. App. Ct. 1996).
172 *See id*.
173 *See id*.
174 *See* Stricklin v. Becan, 689 N.E. 2d 328, 330 (Ill. App. Ct. 1997).
175 *See* Anderson v. Rush-Copley Med. Ctr., Inc., 894 N.E. 2d 827, 838 (Ill. App. Ct. 2008).

7) Recommendations made and internal conclusions reached by a peer review committee.[176]
8) Minutes of meetings of the hospital Infection Control Committee.[177]
9) Information of the hospital Institutional Review Board regarding experimental research studies.[178]
10) Minutes from the Surgical Audit Committee and general surgical Quality, Measurement & Improvement Department.[179]
11) Quality, Measurement & Improvement worksheets.[180]
12) Literature researched at the request of the Internal Quality Control Committee for Root Cause Analysis.[181]
13) Hospital policies and medical records used in Root Cause Analysis deliberations.[182]
14) Information utilized by the Evaluation & Analysis Committee for investigation of a child's death at the hospital.[183]
15) Information generated by the designee of a peer review committee for the use of a peer review committee in the course of internal quality control.[184]
16) Quality management worksheets authored for use by peer review committees.[185]
17) Root cause analysis documents generated by a designee of the Quality & Patient Safety Committee in the course of internal quality control.[186]
18) Report of a sentinel event to the Joint Commission to prevent similar patient safety events.[187]
19) Outcome study protocol documents submitted to the Institutional Review Board of the hospital.[188]
20) Documents in a surgeon's credentialing file, including response to requests to physicians for letters of reference or

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176 See *id.* at 845.
177 *See* Ekstrom v. Temple, 553 N.E. 2d 424, 430 (Ill. App. Ct. 1990).
178 *See* Doe v. Ill. Masonic Med. Ctr., 696 N.E. 2d 707, 708 (Ill. App. Ct. 1998).
179 *See* Ardisana v. Nw. Cmty. Hosp., Inc., 795 N.E. 2d 964, 970 (Ill. App. Ct. 2003).
180 *See id.* at 971.
181 *See* Purpura v. Advocate Health & Hosps. Corp., 2017 IL App. (1st) 160109-U, at *13.
182 *See id.* at *20.
183 *See* Eid v. Loyola Univ. Med. Ctr., 2017 IL App (1st) 143967, ¶¶ 34-43.
184 *See id.*
185 *See* Mnookin v. Nw. Cmty. Hosp., 2018 IL App (1st) 171107, ¶¶ 26-30.
186 *See id.* at ¶¶ 37-39.
187 *See id.*
188 *See* Obermeier v. Nw. Mem'l Hosp., 2019 IL App (1st) 170553, ¶ 93.

peer evaluations, regarding application for appointment/privileges at the hospital.[189]

c. Information Not Protected by the MSA

1) Documents prepared for legal opinions, to weigh liability risk.[190]
2) Forms reflecting a nurse's suspension from hospital staff.[191]
3) Hospital regulations, hospital by-laws, and JCAH standards.[192]
4) Actual changes adopted from committee recommendations.[193]
5) Number of MRSA infections.[194]
6) Applications, privilege changes, letters of resignation/withdrawal, or written criteria of standards for privileges.[195]
7) Information regarding steps taken to supervise or prohibit a physician, OR names of those providing information about the physician before he joined hospital staff.[196]
8) Applications for staff privileges.[197]
9) Identification of members of the hospital Infection Control Committee.[198]
10) Nature and extent of restrictions to hospital privileges.[199]
11) Records of Illinois Cancer Registry.[200]
12) Results of a peer committee.[201]
13) Letters from a staff physician to the department chair that are not initiated, generated, or created by a peer review committee.[202]
14) Incident reports.[203]

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189 *See* Willis v. Highland Med. Ctr., 2019 IL App. (1st) 181541-U, ¶ 22.
190 *See* Webb v. Mt. Sinai Hosp. & Med. Ctr. of Chi., Inc., 807 N.E. 2d 1026, 1033 (Ill. App. Ct. 2004).
191 *See* Green v. Lake Forest Hosp., 781 N.E. 2d 658, 661-63 (Ill. App. Ct. 2002).
192 *See* Frigo v. Silver Cross Hosp. & Med. Ctr., 876 N.E. 2d 697, 718 (Ill. App. Ct. 2007).
193 *See* Anderson v. Rush-Copley Med. Ctr., Inc., 894 N.E. 2d 827, 839-41 (Ill. App. Ct. 2008).
194 *See* Zangara v. Advocate Christ Med. Ctr., 951 N.E. 2d 1143, 1151-52 (Ill. App. Ct. 2011).
195 *See* Willing v. St. Joseph Hosp., 531 N.E. 2d 824, 828-29 (Ill. App. Ct. 1988).
196 *See* Gleason v. St. Elizabeth Med. Ctr., 481 N.E. 2d 780, 781 (Ill. App. Ct. 1985).
197 *See* Ekstrom v. Temple, 553 N.E. 2d 424, 427-28 (Ill. App. Ct. 1990).
198 *See id*. at 429.
199 *See* May v. Wood River Twp. Hosp., 629 N.E. 2d 170, 172-73 (Ill. App. Ct. 1994).
200 *See id*. at 102.
201 *See* Ardisana v. Nw. Cmty. Hosp., Inc., 795 N.E. 2d 964, 970 (Ill. App. Ct. 2003).
202 *See* Berry v. W. Suburban Hosp. Med. Ctr., 788 N.E. 2d 75, 79-81 (Ill. App. Ct. 2003).
203 *See* Nielson v. SwedishAmerican Hosp., 2017 IL App (2d) 160743, ¶ 74.

15) Adverse event reports, created in the ordinary course of business, describing an accident (fall down), not pertaining to the quality of health care.[204]
16) Investigator's reports assessing whether safety improvements are needed at the hospital.[205]

B. Federal Court

1. Seventh Circuit Court of Appeals

a. Memorial Hospital for McHenry County v. Shadur

In *Memorial Hospital*, the Seventh Circuit analyzed whether the MSA's privilege could be invoked and applied to a claim based on federal law filed in federal court.[206] *Memorial Hospital* concerned a civil antitrust action alleging the use of a hospital committee structure to exclude a physician from the hospital staff.[207] The plaintiff-physician "requested production of all documents relating to proceedings instituted by the Hospital against physicians who had applied for or were granted admission to its medical staff."[208] The court noted that these proceedings were MSA privileged.[209]

As to the potential application of the MSA privilege, the court referred to Federal Rule of Evidence (FRE) 501,[210] noting that the recognition of a privilege in the federal, civil anti-trust action was "governed by the principles of the common law as they may have been interpreted by the courts of the United States in the light of reason and experience."[211] However, FRE 501 does not require that a federal court ignore a state law privilege.[212] A state law privilege can be applied as a "strong policy of comity between state and federal sovereignties impels federal courts to recognize state privileges where this can be accomplished at no substantial cost to federal substantive and procedural policy."[213] Ultimately, the Seventh Circuit held that the MSA privilege could not apply as its application would likely undermine the plaintiff's antitrust claim.[214]

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204 *See* Beccava v. Dialysis Ctrs. of Am-Ill., Inc., 2020 IL App. (1st) 190099-U, ¶ 31.
205 *See* Less v. Mercy Hosp. & Med. Ctr., 2022 IL App. (1st) 220247, ¶¶ 35-36.
206 *See* Mem'l Hosp. for McHenry Cnty. v. Shadur, 664 F.2d 1058 (7th Cir. 1981).
207 *Id*. at 1059-60.
208 *Id*. at 1060.
209 *Id*.
210 FED. R. EVID. 501.
211 *Mem'l Hosp.*, 664 F.2d at 1061 (citing *id*.).
212 *See* FED. R. EVID. 501.
213 Mem'l Hosp., 664 F.2d at 1061 (quoting United States v. King, F.R.D. 103, 105 (E.D.N.Y. 1976)).
214 *Id*. at 1063 ("The public interest in private enforcement of federal antitrust law in this context is simply too strong to permit the exclusion of relevant and possibly crucial evidence by application of the Hospital's privilege.").

b. Botvinick v. Rush University Medical Center

In *Botvinick*,[215] the Seventh Circuit considered an appeal of summary judgment entered for the defendants in a tortious interference with expectation of employment claim.[216] In affirming summary judgment, the Seventh Circuit noted that communications between Rush physicians and another healthcare provider's credentials committee would be MSA protected, stating:

> Still, a hospital has a legitimate interest in information about a prospective doctor's ability to conduct himself honestly and professionally and to refrain from offensive behavior. Interpreting the IMSA privilege to include such information seems consistent with the Act's purpose of encouraging physicians to provide "frank evaluations of their colleagues."[217]

2. United States District Courts

a. MSA Protected Information

1) Morbidity and Mortality Conference report regarding an inmate who died in the custody of Cook County jail.[218]
2) Emergency Department Performance Improvement Summary authored by the emergency room physician-director and member of the ER Committee.[219]
3) Mortality Review Report for Patient Safety and Quality Improvement regarding the investigation of a detainee's death.[220]
4) Peer Review Case Report from peer review meeting held at a health network.[221]
5) Assignment Despite Objection form, filed by staff nurses, used by Patient Care Committee (retaliatory discharge claim by nurse).[222]

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215 Botvinick v. Rush Univ. Med. Ctr., 574 F.3d 414 (7th Cir. 2009).
216 *Id*. at 415.
217 *Id*. at 419 (quoting Anderson v. Rush-Copley Med. Ctr., Inc., 894 N.E. 2d 827, 834 (Ill. App. Ct. 2008)).
218 *See* Freeman v. Fairman, 917 F. Supp. 586, 587 (N.D. Ill. 1996).
219 *See* Lash v. Motwani, No. 3:18-CV-1466-MAB, 2019 U.S. Dist. LEXIS 242088 (S.D. Ill. Dec. 20, 2019).
220 *See* Warren v. Dart, No. 09 CV 3512, 2013 U.S. Dist. LEXIS 155445 (N.D. Ill. Oct. 30, 2013).
221 *See* Sevilla v. United States, 852 F. Supp. 2d 1057, 1060 (N.D. Ill. 2012).
222 *See* Robbins v. Provena St. Joseph Med. Ctr., No. 03 C 1371, 2004 U.S. Dist. LEXIS 3878 (N.D. Ill. Mar. 10, 2004).

b. Information Not Protected by the MSA

1) Mortality & Morbidity Report following the death of a jail detainee in §1983 claim alleging systemic failure in the jail's medical screening process (unrelated to physician individual performance).[223]
2) Resident physician examination results and evaluation forms.[224]
3) HMO Utilization Review Sheet, not authorizing a hospitalization (appears to be a claim processing document).[225]
4) Nurse's personnel file used for reporting behavior of employee. Labeling this document "Quality Assurance" does not cause it to become privileged.[226]
5) Mortality Review documents in civil rights claim alleging deliberate indifference to serious medical need in violation of the Fourteenth Amendment.[227]

C. Defamation Claims

In *Matviuw v. Johnson*, the Illinois Appellate Court held that the original version of the MSA did not bar a physician's defamation claim against another physician based on statements made before a hospital committee.[228] In *La Marca v. Lakefield Municipal Hospital*, the United States District Court noted that the MSA was amended in 1979 and 1981, "apparently in response to the decision in *Matviuw I*," adding the "privileged" designation to the protection of the MSA.[229] These amendments limited physician access to committee records to challenges, in court or at the physician's hospital, to staff privileges denials.[230]Accordingly, the MSA-privileged information could not be used by a physician to support a defamation claim.[231] The Illinois Appellate Court confirmed this in *Matviuw II*.[232]

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223 *See* Johnson v. Cook Cnty., No. 15 C 741, 2015 U.S. Dist. LEXIS 115868 (N.D. Ill. Aug. 31, 2015).
224 *See* First Midwest Bank v. Rush Univ. Med. Ctr., No. 18 C 2382, 2018 U.S. Dist. LEXIS 240650 (N.D. Ill. Dec. 7, 2018).
225 *See* Lancaster v. Loyola Univ. Med. Ctr., No. 92 C 3626, 1992 U.S. Dist. LEXIS 16643 (N.D. Ill. Oct. 29, 1992).
226 *See* Bandur v. Lemak, No. 95 C 5081, 1995 U.S. Dist. LEXIS 18703 (N.D. Ill. Dec. 14, 1995).
227 *See* Johnson v. Dart, 309 F. Supp. 3d 579, 580 (N.D. Ill.2018).
228 Matviuw v. Johnson, 388 N.E. 2d 795, 799 (Ill. App. Ct. 1979).
229 La Marca v. Lakefield Mun. Hosp., No. 82 C 5778, 1985 WL 1874, at *2 (N.D. Ill. June 25, 1985).
230 *Id*.
231 *Id*.
232 Matviuw v. Johnson, 444 N.E. 2d 606, 633 (Ill. App. Ct. 1982).

D. Private Right of Action

In *Tunca v. Painter*, the appellate court considered a physician's claim that the comments of a defendant physician "constituted disclosure of privileged information in violation of the [MSA]."[233] The appellate court stated that the MSA did not contain language providing private rights of action to physicians claiming violations of confidentiality after being peer reviewed.[234] Furthermore, the appellate court noted that the "class of persons that the [MSA] was enacted to benefit is the general public, who stand to gain from higher quality health care, not physicians whose performance is under review."[235] Therefore, the appellate court affirmed summary judgment in favor of the defendant.[236]

E. Invoking the MSA

The MSA does not describe a method for invoking its privilege, non-discoverability, and inadmissibility protections.[237] These protections may be sought by parties and non-parties from whom discovery is sought via interrogatories, production requests, subpoenas, and depositions.[238] The MSA is typically invoked as a response to written discovery requests (including subpoenas for records, documents, and information).

Daley v. Teruel reveals the process a party may utilize to invoke MSA protections in response to written interrogatories and production requests.[239] After a defendant asserts privilege to these requests, a plaintiff could file a motion to compel answers to interrogatories and a production response.[240] The defendant could prepare a privilege log, identifying the information allegedly subject to MSA protection.[241] The defendant might also submit an affidavit regarding the withheld information.[242] An *in camera* review[243] in chambers[244] may occur, and the court may order the production of information by the defendant despite invocation of the MSA.[245] The

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233 Tunca v. Painter, 2012 IL App (1st) 110930, ¶ 4.
234 *Id*. ¶ 19.
235 *Id*. ¶ 21.
236 *Id*. ¶ 23-24.
237 735 ILL. COMP. STAT. 5/8-2101 (2003).
238 *Id*.
239 Daley v. Teruel, 2018 IL App (1st) 170891, ¶¶ 9-14.
240 *Id*. ¶ 11.
241 *Id*.
242 *Id*. ¶ 14.
243 *See* MaryLynne Filaccio, *Discovery, Confidentiality, and In Camera Review: Is it Possible to Serve Two Masters?*, 13 FAM. J. 68, 69 (2005) (writing that "The purpose of such a review is to allow an impartial party to review the records . . . .").
244 *See* Sakosko v. Mem'l Hosp., 522 N.E. 2d 273, 274 (Ill. App. Ct. 1988).
245 *Daley*, ¶ 16.

defendant may refuse to comply with the court ordered production and can be held in contempt of court.[246] The contempt order can then be appealed.[247]

In *Webb v. Mt. Sinai Hospital*, the appellate court determined the standards of review for appeals on MSA privilege.[248] The appellate court stated proper application of the MSA privilege was a question of law, requiring de novo review.[249] However, determinations on what materials, if any, had been generated for internal quality control was factual.[250] In factual determinations, the movant bears the burden to prove the material was generated for internal quality control and for "any failure to make a more complete record."[251] The appellate court noted that reversal of the trial court's factual determinations would not be warranted absent a showing that it was against the manifest weight of the evidence.[252] Of course, the *de novo* review standard as to whether the MSA's privilege applies gave the appellate court wide latitude in reviewing the invocation of MSA protection.[253]

V. CONCLUSION

The MSA addresses privilege, confidentiality, non-discoverability, and inadmissibility, all of which are distinct concepts in law.[254] The protections of the MSA have been asserted in a variety of litigation, as this Article has demonstrated, but they are most frequently invoked to protect peer review related materials.

In this regard, MSA protection of peer review related information can be problematic. Illinois courts have held that peer review information generated by a peer review committee, or its designee, merits MSA protection;[255] however, materials generated outside the formal peer review process and acquired by a peer review committee do not.[256] Perhaps this can be explained as a legislative oversight—perhaps not. It is reasonable to urge that materials routinely considered by peer review related committees should be MSA protected, regardless of if they are generated by the committee. An amendment to the MSA would be required to achieve this result.

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246 *Id*. ¶ 18.

247 Ill. Sup. Ct. R. 304(b)(5).

248 Webb v. Mount Sinai Hosp. & Med. Ctr. Chi., Inc., 807 N.E. 2d 1026, 1029 (Ill. App. Ct. 2004).

249 *Id*. at 1034.

250 *Id*.

251 *Id*.

252 *Id*.

253 *Id*.

254 *See* Susan O. Scheutzow, *State Medical Peer Review: High Cost but no Benefit—Is it Time for a Change?*, 25 AM. J. L. & MED. 7, 33-36 (1999) (discussing privilege and confidentiality).

255 *See* Kopolovic v. Shah, 2012 IL App (2d) 110383, ¶ 19; Chi. Tr. Co. v. Cook Cnty. Hosp., 698 N.E. 2d 641, 646 (Ill. App. Ct. 1998); Eid v. Loyola Univ. Med. Ctr., 2017 IL App (1st) 143967.

256 *See* Grosshuesch v. Edward Hosp., 2017 IL App (2d) 160972, ¶ 28; Lindsey v. Butterfield Health Care II, Inc., 2017 IL App (2d) 160042, ¶ 12; *Chi. Tr. Co*., 698 N.E. 2d at 647.

VI. APPENDIX: MEDICAL STUDIES ACT

> Sec. 8-2101. Information obtained. All information, interviews, reports, statements, memoranda, recommendations, letters of reference or other third party confidential assessments of a health care practitioner's professional competence, or other data of the Illinois Department of Public Health, local health departments, the Department of Human Services (as successor to the Department of Mental Health and Developmental Disabilities), the Mental Health and Developmental Disabilities Medical Review Board, Illinois State Medical Society, allied medical societies, health maintenance organizations, medical organizations under contract with health maintenance organizations or with insurance or other health care delivery entities or facilities, tissue banks, organ procurement agencies, physician-owned insurance companies and their agents, committees of ambulatory surgical treatment centers or post-surgical recovery centers or their medical staffs, or committees of licensed or accredited hospitals or their medical staffs, including Patient Care Audit Committees, Medical Care Evaluation Committees, Utilization Review Committees, Credential Committees and Executive Committees, or their designees (but not the medical records pertaining to the patient), used in the course of internal quality control or of medical study for the purpose of reducing morbidity or mortality, or for improving patient care or increasing organ and tissue donation, shall be privileged, strictly confidential and shall be used only for medical research, increasing organ and tissue donation, the evaluation and improvement of quality care, or granting, limiting or revoking staff privileges or agreements for services, except that in any health maintenance organization proceeding to decide upon a physician's services or any hospital or ambulatory surgical treatment center proceeding to decide upon a physician's staff privileges, or in any judicial review of either, the claim of confidentiality shall not be invoked to deny such physician access to or use of data upon which such a decision was based.[257]

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[257] 735 ILL. COMP. STAT. 5/8-2101 (2023).

> Sec. 8-2102. Admissibility as evidence. Such information, records, reports, statements, notes, memoranda, or other data, shall not be admissible as evidence, nor discoverable in any action of any kind in any court or before any tribunal, board, agency or person. The disclosure of any such information or data, whether proper, or improper, shall not waive or have any effect upon its confidentiality, nondiscoverability, or nonadmissability.[258]
>
> Sec. 8-2103. Furnishing information. The furnishing of such information in the course of a research project to the Illinois Department of Public Health, Illinois State Medical Society, allied medical societies or to in-hospital staff committees or their authorized representatives, shall not subject any person, hospital, sanitarium, nursing or rest home or any such agency to any action for damages or other relief.[259]
>
> Sec. 8-2104. Interviews. No patient, patient's relatives, or patient's friends named in any medical study, shall be interviewed for the purpose of such study unless consent of the attending physician and surgeon is first obtained.[260]
>
> Sec. 8-2105. Improper disclosure. The disclosure of any information, records, reports, statements, notes, memoranda or other data obtained in any such medical study except that necessary for the purpose of the specific study is unlawful, and any person convicted of violating any of the provisions of Part 21 of Article VIII of this Act is guilty of a Class A misdemeanor.[261]

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258 *Id*. § 5/8-2102.
259 *Id*. § 5/8-2103.
260 *Id*. § 5/8-2104.
261 *Id*. § 5/8-2105.

FEDERAL PRECEDENTS AND STATE CONSEQUENCES: TRACING THE IMPACT OF RECENT FEDERAL ENVIRONMENTAL DECISIONS ON ILLINOIS LAW

Arielle McPherson[1]

I. INTRODUCTION

In recent years, the landscape of environmental law has been reshaped by a series of landmark federal court decisions.[2] With environmental law at a pivotal juncture, this Article examines the influence of significant federal environmental decisions such as *Juliana v. United States*,[3] *Board of County Commissioners of Boulder County v. Suncor Energy, Inc.*,[4] and *Sackett v. Environmental Protection Agency*,[5] specifically focusing on the implications these decisions have on environmental law in Illinois. These cases collectively challenge boundaries and raise critical questions about federal government accountability for climate change, corporate environmental liability, and the delicate balance between federal and state governance over environmental issues.[6] This Article first examines the important rulings from each case, dissecting the legal arguments, decisions, and broader environmental implications. Next, this Article explores the collective impact of these federal precedents on Illinois state law and policy, contemplating the potential influence on Illinois' environmental legal landscape. Finally, by examining these federal decisions and their implications for Illinois, this Article offers a forward-looking perspective and comprehensive analysis of the current trends and future directions of Illinois environmental law.

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[2] *See* Juliana v. United States, 947 F.3d 1159 (9th Cir. 2020)*;* Bd. of Cnty. Comm'rs of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc., 25 F.4th 1238, 1271-72 (10th Cir. 2022); Sackett v. EPA, 566 U.S. 120, 121 (2012) [hereinafter Sackett I]; Sackett v. EPA 598 U.S. 651, 662 (2023) [hereinafter Sackett II].

[3] *Juliana*, 947 F.3d 1159.

[4] *Bd. of Cnty. Comm'rs of Boulder Cnty*., 25 F.4th at 1271-72.

[5] *Sackett I*, 566 U.S. at 124.

[6] *See Juliana*, 947 F.3d at 1159; *Bd. of Cnty. Comm'rs of Boulder Cnty*., 25 F.4th at 1271-72; *id*. at 124; *Sackett II*, 598 U.S. at 662.

II. CASE ANALYSES OF SIGNIFICANT ENVIRONMENTAL DECISIONS

A. *Juliana v. United States*

1. Factual Background

In 2015, the plaintiffs, "twenty-one young citizens, an environmental organization, and a 'representative of future generations'" filed their complaint in the United States District Court for the District of Oregon, naming the United States, the Office of the President of the United States, and the heads of numerous executive agencies (collectively, "federal defendants") as defendants.[7] Twenty-one plaintiffs asserted that the United States government had violated their constitutional rights and breached constitutional public trust obligations by promoting the production of fossil fuels, destabilizing the climate.[8] "Some plaintiffs claim psychological harm, others impairment to recreational interests, others exacerbated medical conditions, and others damage to property."[9]

Specifically, the plaintiffs alleged that the federal defendants knew for more than fifty years that carbon dioxide produced by the industrial-scale burning of fossil fuels was "causing global warming and dangerous climate change."[10] They further alleged that the federal defendants knew that destabilization would occur with the continued burning, depriving current and future citizens of the "climate system . . . [they] depend on for their wellbeing and survival."[11] The plaintiffs contended that the federal defendants' policy on fossil fuels deprived the plaintiffs of life, liberty, and property without due process of law and impermissibly discriminated against "young citizens, who will disproportionately experience the destabilized climate system . . . ."[12] The plaintiffs' second amended complaint asserted violations of (1) their substantive rights under the Due Process Clause of the Fifth Amendment;[13] (2) their rights under the Fifth Amendment to equal protection of the law;[14] (3) their rights under the Ninth Amendment;[15] and (4) the public trust doctrine.[16] "The plaintiffs [sought] declaratory relief and an

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7 *Id*. at 1165.
8 *Id*.
9 *Id*.
10 Second Amended Complaint at 5, Juliana v. United States, No. 6:15-CV-01517 (D. Or. June 8, 2023), ECF No. 542.
11 *Id*.
12 *Id*. at 7.
13 *Id*. at 137.
14 *Id*. at 141.
15 *Id*. at 144.
16 *Id*. at 145.

injunction ordering the government to implement a plan to 'phase out fossil fuel emissions and draw down excess atmospheric [carbon dioxide].'"[17]

2. Whether climate-change-related injuries afford standing?

After months of procedural wrangling, on January 17, 2020, a divided panel of the Ninth Circuit dismissed the case on standing grounds.[18] Writing for the panel, Judge Andrew Hurwitz began with the basics: "To have standing under Article III, a plaintiff must have (1) a concrete and particularized injury that (2) is caused by the challenged conduct and (3) is likely redressable by a favorable judicial decision."[19] Agreeing with the district court, the panel of judges found that at least some plaintiffs had particularized injuries since climate change threatened to harm certain plaintiffs in concrete and personal ways if left unchecked.[20] In addition, some plaintiffs had established causation since there was a dispute on whether U.S. climate policy was a "substantial factor" in exacerbating the plaintiffs' climate change-related injuries.[21] Ultimately, the court struggled to determine whether it could redress the alleged injuries.[22]

To establish redressability, it explained, the plaintiffs needed to identify relief that was both "(1) substantially likely to redress [its] injuries" and "(2) within the district court's power to award."[23] On the first prong, "the crux of [the] plaintiffs' requested remedy [was] an injunction requiring the government to . . . cease permitting, authorizing, and subsidizing fossil fuel use . . . ."[24] The plaintiffs' experts had established that only a comprehensive, government-led plan to reduce U.S. greenhouse gas emissions could mitigate the effect on the climate and thereby bring the plaintiffs redress.[25] Turning to the second prong, the court noted that supervising such a plan would compel judges to decide many difficult policy issues.[26] Further, it held that ordering the federal government to adopt "a comprehensive scheme to decrease fossil fuel emissions and combat climate change" under the public trust doctrine would exceed any federal court's remedial authority.[27]

In requesting such relief, the plaintiffs sought an extensive remedy outside the scope of judicial supervision; these complex policy decisions are

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17 Juliana v. United States, 947 F.3d 1159, 1165 (9th Cir. 2020).
18 *Id*. at 1175.
19 *Id*. at 1168.
20 *Id*.
21 *Id*. at 1169.
22 *Id*.
23 *Id*. at 1170.
24 *Id*.
25 *Id*. at 1170-71.
26 *Id*. at 1171.
27 *Id*.

reserved for the executive and legislative branches.[28] Accordingly, the Ninth Circuit found the requested relief outside the scope of its power and dismissed the case.[29] In response, the plaintiffs filed a motion to amend their complaint, seeking a declaration that the U.S. "energy system" violated the U.S. Constitution and the public trust doctrine.[30] The plaintiffs' amended complaint removed previously proposed remedies that exceeded the judiciary's power.[31] On June 1, 2023, their motion to amend was granted.[32]

3. Renewed Attempt to Dismiss on Standing Grounds

Shortly after that, the federal defendants moved to dismiss, asserting that the plaintiffs lacked standing.[33] They insisted that the plaintiffs again asked the court to exercise authority that exceeded the scope of its power under Article III of the Constitution, and that all of the plaintiffs' claims lacked merit.[34] On December 29, 2023, the district court denied the motion in part.[35] In addressing the plaintiffs' standing, the district court noted that, although the plaintiffs had "scaled back" their request for injunctive relief by removing their request requiring the federal defendants to "prepare a remedial plan;" they now sought to restrain the federal defendants "from carrying out policies, practices, and affirmative actions" that rendered the energy system unconstitutional in a manner that harmed the plaintiffs.[36] The court found that even the narrower request for injunctive relief "tread[ed] on ground over which [the] Ninth Circuit cautioned the [c]ourt not to step" because the relief "would be more expansive than any case of which the [c]ourt [wa]s aware."[37] While the court dismissed the plaintiffs' claim for injunctive relief,[38] the court found that the plaintiffs' requested declaratory relief "[might have been] enough to bring about relief by changed conduct"[39] and that the defendants failed to show that such relief was outside the court's authority.[40] The court also found that the plaintiffs stated a claim for due process, finding "that the right to a climate system that can sustain human

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28 *Id*. at 1171-72.
29 *Id*. at 1165.
30 Second Amended Complaint, *supra* note 10, at 6.
31 *Id*.
32 *Id*. at 1, Juliana v. United States, No. 6:15-CV-01517, 2023 WL 3750334, at *9 (D. Or. June 1, 2023).
33 *Juliana*, 947 F.3d at 1166.
34 Juliana v. United States, No. 6:15-CV-01517-AA, 2023 WL 9023339, at *6 (D. Or. Dec. 29, 2023).
35 *Id*. at *1.
36 *Id*. at *9.
37 *Id*. at *12.
38 *Id*.
39 *Id*. at *13.
40 *Id*. at *15.

life is fundamental to a free and ordered society."[41] Accordingly, the court permitted the plaintiffs to proceed with their claims for violating the public trust doctrine and those related to the plaintiffs' due process rights.[42]

Overall, Judge Ann Aiken's opinion represents judicial recognition of the court's roles in addressing climate change and supporting the involvement of younger generations, who are too young to vote or effect change through political processes, in using legal avenues to urge the government to take action on climate change.[43]

B. *Board of County Commissioners of Boulder County. v. Suncor Energy (U.S.A.) Inc.*

1. Factual Background

The Board of County Commissioners of Boulder County, the Board of County Commissioners of San Miguel County, and the City of Boulder (collectively, the "Municipalities") filed common law and statutory claims in Colorado state court, claiming that the consequences of climate change were to blame for harm to their property and persons living in their jurisdictions.[44] The Municipalities contended that Suncor Energy Sales, Inc., Suncor Energy, Inc., and Exxon Mobil (collectively, the "Energy Companies") had contributed significantly to the changing climate in Colorado by producing, marketing, and selling fossil fuels while misleading the public and concealing their knowledge that these products would contribute to global warming.[45] Specifically, the plaintiffs asserted six state law claims: (1) public nuisance, (2) private nuisance, (3) trespass, (4) unjust enrichment, (5) violation of the Colorado Consumer Protection Act, and (5) civil conspiracy.[46] The Municipalities did not allege any federal claims.[47] The plaintiffs sought past and future compensatory damages, as well as remediation or abatement of climate-related harms in their communities.[48]

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41 *Id*. at *17.
42 *Id*. at *17, 21.
43 *Id*. at *1.
44 Bd. of Cnty. Comm'rs of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc., 405 F. Supp. 3d 947, 954 (D. Colo. 2019).
45 Bd. of Cnty. Comm'rs of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc., 25 F. 4th 1238, 1247 (10th Cir. 2022).
46 *Id*. at 1248.
47 *Id*.
48 *Id*.

2. What is the Proper Jurisdiction for Injuries Allegedly Caused by the Effect of Greenhouse-Gas Emissions on the Global Climate?

Following the Municipalities' filing of their amended complaint in Colorado state court, the Energy Companies filed to remove the case to federal court.[49] The Energy Companies specifically argued that original jurisdiction was granted by 28 U.S.C. § 1331 because "(1) the Municipalities' claims arose only under federal common law; (2) the Clean Air Act ('CAA') completely preempted the state-law claims; (3) the claims implicated disputed and substantial 'federal issues' under *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*;[50] (4) the claims arose from incidents that occurred in federal enclaves within the Municipalities' borders; and (5) original federal jurisdiction exists under the Outer Continental Shelf Lands Act ('OCSLA')."[51] The Municipalities moved to remand.[52] In its opinion, the district court rejected all asserted grounds for removal and remanded the action back to state court.[53]

The Energy Companies appealed the district court's remand order to the United States Court of Appeals for the Tenth Circuit on six grounds, including the federal officer removal statute, 28 U.S.C. § 1142, pursuant to 28 U.S.C. § 1447(d).[54] While such remands are generally unreviewable by higher courts, there was a statutory exception for one claim: federal officer jurisdiction.[55] The Energy Companies claimed that the oil companies' long-term government leases to mine the Outer Continental Shelf (OCS) for fossil fuels made them federal officers for the purpose of federal court jurisdiction.[56] On plenary review, the Tenth Circuit disagreed with the Energy Companies' argument that it could consider all grounds for removal, holding instead that its jurisdiction was limited to the federal officer removal question.[57] After concluding that the conditions for the removal of a federal officer had not been met, the Tenth Circuit upheld the district court's remand decision, disregarding the other grounds for removal.[58]

The Supreme Court then granted certiorari, vacated the Tenth Circuit's opinion, and remanded to the Tenth Circuit for reconsideration.[59] Upon reconsideration, the Tenth Circuit ruled that none of the six grounds asserted

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49 *Id*.
50 Grable & Sons Metal Prod, Inc. v. Darue Eng'g & Mfg., 545 U.S. 308 (2005).
51 Bd. of Cnty. Comm'rs of Boulder County, 25 F.4th 1248-49 (10th Cir. 2022).
52 *Id*. at 1249.
53 *Id*.
54 *Id*.
55 Bd. of Cnty. Comm'rs of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc., 965 F.3d 792, 799 (10th Cir. 2020), *vacated*, 141 S. Ct. 2667, (2021).
56 *Id*. at 820-21.
57 *Id*. at 819.
58 *Id*. at 827.
59 Suncor Energy (U.S.A.) Inc. v. Bd. of Cnty. Comm'rs of Boulder Cnty., 141 S. Ct. 2667 (2021).

supported federal removal jurisdiction and affirmed the district court's order remanding the action to the state court.[60] The Tenth Circuit again reconsidered and rejected federal officer removal as a basis for federal jurisdiction, concluding that the Energy Companies did not establish that one of the defendants, ExxonMobil Corporation, acted under a federal officer pursuit to its OCS leases.[61]

Second, the Energy Companies asserted that under 28 U.S.C. §1441, there was original federal jurisdiction over the Municipalities' claims because the claims arose under federal common law.[62] The district court concluded federal common law did not create the cause of action because a federal common law claim was not alleged on the face of the complaint.[63] The Tenth Circuit affirmed.[64]

Additionally, the district court considered whether the Clean Air Act (CAA) preempted the Municipalities' state law claims.[65] The district court held that it did not, reasoning that the CAA does not govern the sale of fossil fuels, and it "expressly preserves many state common law causes of action."[66] Based on this, the district court determined that "Congress did not intend the CAA to provide exclusive remedies in these circumstances, or to be a basis for removal under the complete preemption doctrine."[67] The Tenth Circuit affirmed and held that the CAA was "designed to provide a floor upon which state law [could] build, not a ceiling to stunt complementary state-law actions,"[68] and the CAA expressly did not vindicate the same basic right or interest as the Municipalities' state law claims.[69] As such, the Tenth Circuit concluded that the CAA could not completely preempt the state law claims.[70]

Next, the Energy Companies argued that the claims raised substantial federal issues suitable for federal court resolution—"both because the claims relate to the federal government's conduct of foreign affairs and because they 'amount to a collateral attack on cost-benefit analyses committed to, and already performed by, the federal government.'"[71] The Tenth Circuit concluded that the "federal issues asserted [were] neither necessary to the Municipalities' claims nor substantial to the federal system."[72] As a result,

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60 Bd. of Cnty. Comm'rs of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc., 25 F.4th 1238, 1275 (10th Cir. 2022).
61 *Id*. at 1250, 1254.
62 *Id*. at 1254.
63 *Id*. at 1257-58.
64 *Id*. at 1262.
65 *Id*. at 1263.
66 *Id*. at 1263.
67 *Id*.
68 *Id*.
69 *Id*. at 1264.
70 *Id*.
71 *Id*. at 1265.
72 *Id*. at 1265-66.

the case did not fall within the "slim category" of state-law disputes meriting removal because of a substantial federal question.[73]

In addition, the Tenth Circuit rejected the Energy Companies' contention that there was federal enclave jurisdiction.[74] Specifically, the Energy Companies attempted to point to allegations in the complaint of an insect infestation across Rocky Mountain National Park, increased flood risk to San Miguel River in Uncompahgre National Forest, and "heat waves, wildfires, droughts, and floods" in both locations.[75] Finally, the Tenth Circuit found that the OCSLA was not grounds for federal jurisdiction because there was not a sufficient connection between the Municipalities' claims and Exxon's operations on the OCS to provide a basis for jurisdiction under the OCLSA.[76]

On June 8, 2022, the Energy Companies filed another petition for writ of certiorari seeking the Supreme Court's review of the Tenth Circuit's decision affirming the remand to state court of climate change cases brought against the companies by Colorado local governments.[77] The petition presented two questions: (1) "whether federal common law necessarily and exclusively governs claims seeking redress for injuries allegedly caused by the effect of interstate greenhouse-gas emissions on the global climate; and (2) whether a federal district court has jurisdiction under 28 U.S.C. 1331 over claims necessarily and exclusively governed by federal common law but labeled as arising under state law."[78] On April 24, 2023, the petition for writ of certiorari was denied.[79]

While there are no dispositive cases from the Supreme Court, the Tenth Circuit, or other United States Courts of Appeal, federal district courts throughout the country are divided on whether federal courts have jurisdiction over state law claims related to climate change, such as raised in this case.[80] The decision in *Board of County Commissioners of Boulder County* underscores that state courts can be appropriate venues for

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73 *Id*.

74 *Id*. at 1271-72.

75 *Id*.

76 *Id*. at 1274-75; *see also id.* at 1272 (quoting 43 U.S.C. § 1349(b)(1) (The OCSLA provides that federal courts "shall have jurisdiction of cases and controversies arising out of, or in connection with . . . any operation conducted on the [OCS] which involves exploration, development, or production of [OCS] minerals.").

77 Petition for Writ of Certiorari, Bd. of Cnty. Comm'r of Boulder Cnty v. Suncor Energy (U.S.A.) Inc., 25 F.4th 1238 (2022) (No. 21-1550).

78 *Id*.

79 Suncor Energy (U.S.A.) Inc. v. Bd. of Cnty. Comm'r of Boulder Cnty., 143 S. Ct. 1795 (2023).

80 *Compare* City of Oakland v. BP PLC, 969 F.3d 895, 912-13 (9th Cir. 2020); City of N.Y. v. Chevron Corp., 993 F.3d 81 (2d Cir. 2021) *with* State of Rhode Island v. Chevron Corp., 393 F.Supp.3d 142 (D. R.I. 2019); Shell Oil Products Co., LLC v. Rhode Island, 141 S. Ct 2666 (2021); Mayor & City Council of Baltimore v. BP P.L.C., 31 F.4th 178 (4th Cir. 2022); *and* Cnty. of San Mateo v. Chevron Corp., 32 F.4th 733 (9th Cir. 2022); City of Hoboken v. Chevron Corp., 45 F.4th 699 (3d Cir. 2022).

environmental lawsuits, even those with broader implications for climate change.[81] This could influence how similar cases against "Big Oil" companies are approached and similarly litigated in Illinois.

C. *Sackett v. Environmental Protection Agency*

1. Factual Background and Procedural History

Plaintiffs Michael and Chantall Sackett bought a residential lot north of Priest Lake in Bonner County, Idaho, and began backfilling the lot with dirt and rock in preparation for building a home.[82] The federal Environmental Protection Agency (EPA) sent the Sacketts a compliance order informing them that their property contained wetlands and their backfilling violated the Clean Water Act (CWA),[83] which prohibits the discharge of pollutants into "waters of the United States" (WOTUS) without a permit.[84] According to the EPA, the Sacketts' property contained wetlands that qualified as "navigable waters" regulated by the CWA.[85] The EPA's compliance order demanded the Sacketts remove the dirt and restore the property to its natural state.[86] The order threatened the Sacketts with civil penalties of more than $40,000 per day if they did not comply.[87]

In 2008, the Sacketts sued the EPA in the United States District Court for the District of Idaho, arguing that the wetlands should not qualify as WOTUS,[88] but the case was dismissed for a lack of subject matter jurisdiction.[89] The Sacketts appealed to the Ninth Circuit,[90] then the Supreme Court.[91] In the first case before the Supreme Court (*Sackett I*), the court held that the Sacketts could bring a civil action under the Administrative Procedures Act (APA) because the EPA's action constituted a final agency action, for which there was no other adequate remedy in a state court.[92] Thus, the court remanded the case, allowing it to proceed on its merits.[93] On remand, the district court upheld EPA's determination that the wetlands on the Sacketts' property were WOTUS because the wetlands were adjacent to navigable water, and their property was connected by jurisdictional water

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81 Bd. of Cnty. Comm'rs 25 F.4th 1266.2).
82 Sackett v. EPA, 566 U.S. 120, 124 (2012) [hereinafter *Sackett I*].
83 Sackett v. EPA, 598 U.S. 651, 662 (2023) [hereinafter *Sackett II*].
84 33 U.S.C. § 1362(7), 1311.
85 *Sackett II*, 598 U.S. at 662.
86 *Id*.
87 *Id*.
88 *Id*. at 663.
89 Sackett v. EPA, No. 08-cv-185-N-EJL, 2008 WL 3286801 (D. Idaho Aug. 7, 2008).
90 Sackett v. EPA, 622 F.3d 1139 (9th Cir. 2010).
91 *See Sackett I*, 566 U.S. 120 (2012).
92 *Id*. at 127.
93 *Id*. at 131.

that flowed into an adjacent lake.[94] The Ninth Circuit affirmed the district court's opinion.[95]

In *Sackett II*, recently decided by the Supreme Court, the issue presented was whether the Ninth Circuit set forth the proper test for determining whether wetlands were WOTUS under the CWA.[96]

2. Definition and History of WOTUS

The CWA was enacted in 1972 to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[97] The CWA regulates discharges of pollutants from point sources to "navigable waters," with "navigable waters" defined as WOTUS, including territorial seas."[98] The CWA does not define WOTUS.[99] As such, the meaning of WOTUS has long been the subject of controversy.[100] The task of defining WOTUS has been undertaken by the Obama administration,[101] the Trump administration,[102] and now the Biden administration is working to clarify which waters are protected under the CWA.[103] Despite these repeated efforts to clarify the definition of WOTUS, each successive definition has led to a geographic patchwork of applicability that has only increased uncertainty and confusion over the proper test for determining whether wetlands are WOTUS under the CWA.[104]

Against this backdrop, it is important to understand the tension between two past opinions authored by Supreme Court Justices Antonin Scalia and Anthony Kennedy in an earlier 2006 opinion, *Rapanos v. United States*.[105] Like *Sackett*, *Rapanos* involved someone filling wetlands without a permit.[106] In their individual opinions, Justices Scalia and Kennedy defined two contrasting methods of recognizing which waters warranted protection under the CWA.[107] For Justice Scalia, WOTUS encompassed permanent, standing, or continuously flowing bodies of water (i.e., streams, oceans,

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94 *See* Sackett v. EPA, No. 2:08-cv-00185-EJL, 2019 WL 13026870 (D. Idaho Mar. 31, 2019).
95 Sackett v. EPA, 8 F.4th 1075, 1079 (9th Cir. 2021).
96 *Sackett II*, 598 U.S. 651, 663 (2023).
97 33 U.S.C. § 1251(a).
98 *Id*. at §§ 1311(a), 1362(7), 1362(12).
99 *Sackett I*, 566 U.S. 120, 133 (2012).
100 *Id*.
101 Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37, 053 (Jun. 29, 2015).
102 The Navigable Waters Protection Rule: Definition of "Waters of the United States," 85 Fed. Reg. 22, 250 (Apr. 21, 2020).
103 Revised Definition of "Waters of the United States," 88 Fed. Reg. 61, 964 (Sept. 8, 2023).
104 Rapanos v. United States, 547 U.S. 715, 725-29 (2006).
105 *See generally id*. at 715.
106 *Id*. at 719-20.
107 *See generally id*. at 715.

rivers, lakes) or wetlands—so long as those wetlands had a continuous surface connection to a body of water that already enjoyed federal protection.[108] Conversely, Justice Kennedy found that wetlands constituted "navigable waters" under the CWA if there was a "significant nexus between the wetlands" and traditionally navigable waters such that the "wetlands, either alone or in combination with similarly situated lands in the region, significantly affect[ed] the chemical, physical, and biological integrity" of traditionally navigable waters.[109]

3. Sackett's Refined Definition of WOTUS

On May 25, 2023, the Supreme Court issued its decision in *Sackett II*, clarifying and narrowing the reach of the proper test for WOTUS.[110] The *Sackett II* majority opinion immediately acknowledged that the "uncertain" meaning of the definition of WOTUS has been a persistent problem, sparking decades of agency action and litigation.[111]

Writing for the majority, Justice Samuel Alito asserted that Justice Scalia's definition of WOTUS from *Rapanos* was the proper one.[112] The Court held that to establish CWA jurisdiction over a wetland, a party must first establish that the adjacent body of water constitutes a WOTUS and, second, that the wetland has a continuous surface connection with that water, making it difficult to determine where the "water ends" and the "wetlands" begin.[113] The majority clarified two critical aspects of the jurisdictional scope of the CWA.[114] First, the term WOTUS encompasses "only those relatively permanent, standing or continuously flowing bodies of water 'forming geographic[al] features'" like "streams, oceans, rivers, and lakes."[115] Second, some wetlands qualify as WOTUS,[116] but only those wetlands that have a "continuous surface connection"[117] with one of the relatively permanent bodies of water, such that the wetland is "indistinguishably part of a body of water that itself constitutes 'waters' under the [Clean Water Act]."[118]

The court's decision first established that "waters," as used in the CWA, pertain to geographical features commonly referred to as "streams, oceans,

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108 *Id*. at 742 (Scalia, J., plurality).
109 *Id*. at 779-80 (Kennedy, J., concurring).
110 *Sackett II*, 598 U.S. 651, 663 (2023).
111 *Id*. at 658.
112 *Id*. at 671.
113 *Id*. at 678.
114 *Id*. at 671-78.
115 *Id*. at 671.
116 *Id*. at 678.
117 *Id*.
118 *Id*. at 676.

rivers, and lakes."[119] This interpretation aligns with the plurality in *Rapanos*, which relied on dictionary definitions to understand "waters" in its ordinary meaning.[120] The court also reconciled the CWA's meaning of "navigable" waters, emphasizing that "waters" pertain to navigable bodies of water like rivers, lakes, and oceans.[121]

Concerning wetlands, the court focused on another section of the CWA, "which authorizes [s]tates to apply to the EPA for permission to administer programs to issue permits for the discharge of dredged or fill material into some bodies of water."[122] This provision acknowledges that states can regulate discharges into "waters of the United States," but excludes traditional navigable waters and adjacent wetlands.[123] The court concluded that since § 1344(g)(1) includes "wetlands" within WOTUS, the wetlands covered "must qualify as WOTUS in their own right."[124] Therefore, only wetlands with a continuous surface connection to these navigable waters are considered part of the WOTUS under the CWA.[125]

In reaching these holdings, the majority rejected the EPA's contention that the "significant nexus" test was sufficient to establish jurisdiction over adjacent wetlands.[126] The Court concluded the EPA's interpretation was inconsistent with the text and structure of the CWA.[127] In disposing of the significant nexus test, the *Sackett II* majority held that Congress must use "exceedingly clear language" for the EPA to exercise authority over private property.[128] Additionally, the court noted that the EPA's interpretation of WOTUS gave rise to serious vagueness concerns in light of the CWA's criminal penalties.[129]

Finally, the court rejected EPA's argument that Congress "implicitly ratified" its interpretation of "adjacent" wetlands when it adopted § 1344(g)(1).[130] The EPA attempted to argue that WOTUS covers any wetlands that are "bordering, contiguous, or neighboring" to covered waters.[131] The majority concluded that an "adjacent" wetland has to be a part of the

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119 *Id*. at 671.

120 Rapanos v. United States, 547 U.S. 715, 739 (2006) (plurality opinion) (quoting WEBSTER'S NEW INTERNATIONAL DICTIONARY 2882 (2d ed. 1954)).

121 *Sackett II*, 598 U.S. 671-75.

122 *Id*. at 675 (citing to 33 U.S.C. § 1344(g)(1)).

123 *Id*. (quoting 33 U.S.C. § 1344(g)(1)).

124 *Id*. (quoting 33 U.S.C. § 1362(7)).

125 *Id*.

126 *Id*. at 679.

127 *Id*.

128 *Id*.

129 *Id*. at 680-81.

130 *Id*. at 682.

131 *Id*.

"covered" waters, which means that a continuous surface connection is required.[132]

The *Sackett II* decision's narrow interpretation of what constitutes WOTUS constrains the types of waterways that administrative agencies, like the EPA, have the authority to regulate.[133] While *Sackett*[134] provides further clarity on the scope of CWA jurisdiction, some areas of disagreement and uncertainty are likely to persist.

III. IMPLICATIONS FOR ILLINOIS STATE COURTS

As noted above, the decisions in *Juliana v. United States*,[135] *Board of County Commissioners of Boulder County v. Suncor Energy, Inc.*,[136] and *Sackett v. EPA*[137] represent significant milestones in environmental law, highlighting the evolving landscape. These cases, while distinct in their legal contexts and implications, collectively signal a pivotal shift in how environmental issues will be approached in Illinois.[138]

A. Implications of *Juliana*

Juliana emphasized how individuals may initiate lawsuits as a tool for environmental activism.[139] At the heart of *Juliana* lies a compelling narrative: a group of young plaintiffs challenging the federal government for its alleged failure to prevent fossil fuel emissions and, thus, safeguard their constitutional right to a "climate system capable of sustaining human life."[140] *Juliana*'s potential implications are multifaceted and profound.

First, the case reinforces the concept of judicial review in environmental policy, a role traditionally perceived as reserved for the executive and legislative branches.[141] For instance, the decision states that "as part of a coequal branch of government, the court cannot shrink from its role to decide on the rights of the individuals duly presenting their case and controversy."[142] Illinois courts may find themselves increasingly called upon to decide

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132 *Id*.

133 *See id* (rejecting EPA's policy arguments about the ecological consequences of defining adjacent wetlands narrowly because the Clean Water Act did not define the EPA's jurisdiction based on ecological importance).

134 *Id*. at 651.

135 Juliana v. United States, 947 F.3d 1159 (9th Cir. 2020).

136 Bd. of Cnty. Comm'rs of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc., 25 F.4th 1238 (10th Cir. 2022).

137 *Sackett II*, 598 U.S. 651 (2023).

138 *See Juliana*, 947 F.3d 1159; *Bd. of Cnty. Comm'rs of Boulder Cnty*., 25 F.4th 1238; *id*.

139 *See Juliana*, 947 F.3d 1159.

140 *Id* at 1164.

141 Juliana v. United States, No 6:15-CV-01517, 2023 WL 9023339, at *2 (D. Or. 2023).

142 *Id*.

environmental or climate change-related cases that are scrutinized through the lens of constitutional rights.

Second, this could inspire similar actions in Illinois,[143] especially among younger generations who are too young to vote or ignite change through political processes.[144] The Ninth Circuit has not yet decided whether private plaintiffs have a constitutional right to a "climate system capable of sustaining human life," which may spur additional litigation by plaintiffs attempting to assert such a right.[145] As such, individuals and advocacy groups might be more inclined to pursue judicial remedies for perceived environmental injustices or to ensure governmental accountability on climate change.[146]

Moreover, *Juliana*'s focus on the rights of younger generations introduces a new dimension to environmental litigation.[147] This decision highlights the state's responsibility to consider future generations in its environmental policymaking.[148] For instance, the young plaintiffs' allegations highlight that "collective resolve at every level and in every branch of government is critical to reducing fossil fuel emissions and vital to combating climate change."[149] With this perspective in mind, this could lead to a more forward-thinking environmental legal philosophy, ensuring that today's decisions do not compromise the health and safety of future generations.

In conclusion, *Juliana* is poised to have a substantial impact on the Illinois environmental legal landscape.[150] Elevating climate change to a constitutional issue challenges Illinois courts to rethink traditional boundaries of environmental law, where once these issues were deferred to other political branches of government.[151]

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143 *See generally* Jeffrey Kluger, *Climate Get its Day in Court*, TIME (Jan. 4, 2024, 2:52 PM), https://time.com/6552129/juliana-vs-us-climate-case (highlighting the uptick in climate change lawsuits domestically and internationally).

144 *Juliana*, 2023 WL 9023339, at *1.

145 *Juliana*, 947 F.3d at 1164.

146 *See id*.

147 *Juliana*, 2023 WL 9023339, at *1. ("While facts remain to be proved, lawsuits like this highlight young people's despair with the drawn-out pace of the unhurried, inchmeal, bureaucratic response to our most dire emergency.").

148 *See id*. at *17 ("In this opinion, this Court simply holds that where a complaint alleges governmental action is affirmatively and substantially damaging the climate system in a way that will cause human deaths, shorten human lifespans, damage property, threaten human food sources, and dramatically alter the planets ecosystem, it states a claim for a due process violation. To hold otherwise would be to say that the Constitution affords no protection against a government's knowing decision to poison the air its citizens breathe or the water its citizens drink.").

149 *Id*. at *2.

150 *See generally* Kluger, *supra* note 14#.

151 *See* Juliana, 2023 WL 9023339, at *1.

B. Implications of *Board of County Commissioners of Boulder County*

As noted above, the judiciary has historically been reluctant to act on climate change for a multitude of reasons due to the speculative nature of injuries, the numerous potentially responsible parties, and the complexities that courts face when fashioning a remedy.[152] *Board of County Commissioners of Boulder County* could have major implications for how state and federal courts may allow climate-change-related cases to proceed.[153] This case focused on the jurisdictional question of whether state or federal courts should decide environmental lawsuits against major oil companies.[154] However, given that the Supreme Court declined to determine whether federal courts have jurisdiction over claims governed by federal common law framed as state law claims, this created ambiguity as to the proper jurisdictional forum for these cases.[155] The Tenth Circuit's decision in *Board of County Commissioners of Boulder County* underscored that state-level environmental claims, even those intertwined with global issues like climate change, are within the jurisdiction of state courts.[156] This has significant implications for Illinois, where state courts may increasingly find themselves as the primary venues for this type of litigation.[157] This shift will require Illinois courts to be adept in navigating the legal complexities between state and environmental laws, ensuring that their interpretations of the law do not conflict with either federal or state authority.[158]

Furthermore, the decision will require a potential reevaluation of state jurisdiction in environmental lawsuits, suggesting that state courts may become more involved in addressing environmental wrongs and policy failures.[159] This could signal a trajectory for Illinois courts to impact global climate change and environmental litigation greatly. While courts typically refrain from policy making, their decisions inevitably influence policy direction.[160] In Illinois, rulings in cases similar to *Board of County Commissioners of Boulder County* could guide state legislators and

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152 *See id.*

153 *See* Bd. of Cnty. Comm'rs of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc., 25 F.4th 1238 (10th Cir. 2022).

154 Petition for Writ of Certiorari, Suncor Energy (U.S.A.) Inc., v. Bd. of Cnty. Comm'rs of Boulder Cnty, No. 21-1550, 2022 WL 2119473 at *3.

155 *See* Suncor Energy (U.S.A.) Inc. v. Bd. of Cnty. Comm'rs of Boulder Cnty., 143 S. Ct. 1795 (2023).

156 *See Bd. of Cnty. Comm'rs of Boulder Cnty*., 25 F.4th at 1249-75.

157 *See id*. at 1275.

158 *See id*. at 1238.

159 *See id*. at 1249-75 (analyzing why the federal court lacked subject matter jurisdiction for removal).

160 *See* Irem B. A. Orsel, *How Does the Supreme Court Impact US Laws Without Changing Them?*, POL. SCI. NOW (Dec. 4, 2023), https://politicalsciencenow.com/how-does-the-supreme-court-impact-us-laws-without-changing-them/ ("[T]he highest court, through its decisions, can subtly but crucially change existing policies without altering their wording.").

regulators in shaping environmental policies that concern corporate accountability and environmental protection standards.[161]

As such, *Board of County Commissioners of Boulder County* redefines the role of Illinois courts in global climate-change-related issues and places the court in a position to influence environmental policy.[162]

C. The Consequences and Implications of *Sackett*

With its redefinition of WOTUS under the CWA, *Sackett* initiates the pivotal shift in how environmental issues will be approached in Illinois.[163] The decision effectively shrinks federal oversight, specifically over wetlands, by narrowing the scope to include only those bodies of water with a continuous surface connection to navigable water.[164] For instance, the *Sackett* decision "effectively reduced the CWA's coverage of the nation's streams by as much as 80%, and of the nation's wetlands by at least 50%."[165] This regulatory reduction places a substantial burden on Illinois, which may find itself compelled to enhance its environmental regulatory framework.[166] Illinois, having lost a significant portion of its wetlands since the early 1800s, does not have state-level protections for wetlands on private property.[167] Prior to this decision, Illinois depended on federal regulations to protect wetlands.[168] With the upending of federal protections, Illinois will have to consider enacting new state-level regulations and legislation to protect wetlands and water quality.[169] The Illinois Environmental Council has already called on Illinois Governor J.B. Pritzker to issue an executive order protecting as many wetlands as possible.[170]

While Illinois does have wetland laws, these protections only protect some of its wetlands from adverse impacts caused by state-funded

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161 *See generally* M. Logan Campbell, *BOARD OF COUNTY COMMISSIONERS OF BOULDER COUNTY V. SUNCOR ENERGY (U.S.A.) INC: A FUTURE FOR CLIMATE CHANGE LITIGATION?*, 47 HARV. ENV'T L. REV. 605, 619 (2023) ("State and local governments are the most knowledgeable and best equipped to tailor local solutions to their local problems.").

162 *See generally id*. at 619-21 ("In the absence of federal action on climate change, leaving these decisions to states empowers them to innovate ideas on how best to combat climate change.").

163 *See Sackett II*, 598 U.S. 651, 684 (2023).

164 *See id*.

165 Richard J. Lazarus, *Judicial Destruction of the Clean Water Act: Sackett v. EPA*, U. Chi. L. Rev., https://lawreview.uchicago.edu/judicial-destruction-clean-water-act-sackett-v-epa#heading-0 (last visited July 4, 2024).

166 Karina Atkins, *Illinois environmentalists push for state action to protect wetlands after Supreme Court ruling rolls back federal rules*, PHYS ORG (June 6, 2023), https://phys.org/news/2023-06-illinois-environmentalists-state-action-wetlands.html.

167 *Id*.

168 *Id*.

169 *Id*.

170 *Id*.

activities.[171] For instance, the Illinois Interagency Wetland Policy Act of 1989 requires "that there be no overall net loss of the State's existing wetland acres or their functional value due to State supported activities" but imposed an affirmative duty that "State agencies shall preserve, enhance and create wetlands where necessary in order to increase the quality and quantity of the State's wetland resource base."[172] As such, Illinois does not have a comprehensive law affording protection to wetlands and instead relies primarily on Section 401 of the CWA.[173] Unless Illinois expands its protections of wetlands, the *Sackett* decision leaves wetlands even more vulnerable, especially those without a continuous surface connection to navigable waters.[174]

Illinois courts and policymakers will also need to navigate the legal complexities of determining the extent of state versus federal authority in environmental protection.[175] For instance, a critical aspect will be understanding the interplay between state and federal law post-*Sackett*.[176] Illinois lawmakers must ensure that state laws complement rather than contradict federal environmental laws to avoid jurisdictional conflicts.[177] Even so, Illinois may see an increase in litigation, particularly water and wetland management cases.[178] To avoid increased litigation and uncertainty regarding jurisdictional authority, Illinois will be pushed to adopt a more proactive role in regulating wetlands not covered under the CWA.[179]

IV. CONCLUSION

The trio of cases, *Sackett v. EPA*,[180] *Juliana v. US*,[181] and *Board of County Commissioners of Boulder County v. Suncor Energy*,[182] collectively underscore the evolving dynamics of environmental law. These decisions highlight a shift toward more state-level responsibility in environmental protection, the capability of states to address complex environmental

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171 20 ILL. COMP. STAT. 830/1-4 (1993).

172 Robert E. Beck, *The Movement in the United States to Restoration and Creation of Wetlands*, 34 NAT. RESOURCES J.781, 802 (1994) (citing 20 ILL. COMP. STAT. 830/1-4 (1993)).

173 *401 Water Quality Certification*, ILLINOIS GOV, https://epa.illinois.gov/topics/forms/water-permits/401-water-quality-certification.html (last visited Mar. 2, 2024); *see also* 20 ILL. COMP. STAT. 830/1-6 (the Interagency Wetland Policy Act adopting the federal definition of wetlands).

174 *See generally Sackett II*, 598 U.S. 651 (2023).

175 *See generally* Atkins, *supra* note 16#.

176 *Id*.

177 *See generally id*.

178 *See generally id*.

179 *See id*.

180 *See generally Sackett II*, 598 U.S. 651 (2023).

181 *See generally* Juliana v. United States, 947 F.3d 1159 (9th Cir. 2020).

182 *See generally* Bd. of Cnty. Comm'rs of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc., 25 F.4th 1238 (10th Cir. 2022).

litigation, and the growing recognition of climate change as a policy issue.[183] *Sackett* will challenge Illinois to expand its regulatory horizons to protect wetlands that have lost federal protections under the CWA.[184] *Boulder County* endorses that state courts may have to handle complex environmental litigation with broader policy impacts.[185] *Juliana* further cements the judiciary's role in examining the constitutional implications of climate change in its rulings.[186] This evolving landscape suggests that Illinois will have to adapt its legal and regulatory frameworks to balance state and federal guidelines.[187] The implications of these decisions will undoubtedly shape and influence the state's legal responses to environmental challenges.

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183 *See Sacket II*, 598 U.S. 651; *Juliana*, 947 F.3d 1159; *Bd. of Cnty. Comm'rs of Boulder Cnty.,* 25 F.4th 1238.

184 *See generally Sacket II*, 598 U.S. 651.

185 *See generally Bd. of Cnty. Comm'rs of Boulder Cnty*., 25 F.4th 1238.

186 *Juliana*, 947 F.3d 1159.

187 *See generally id.* at 1159.

RENEWABLE ENERGY IN ILLINOIS: THE AGRIVOLTAICS CONTRIBUTION

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I. INTRODUCTION

Endowed with rich soil, abundant sunlight, and consistent precipitation, Illinois has long been one of the leading corn and soybean-producing states.[1] With its abundant crop production, it is no surprise that the state's primary renewable energy is biofuels, with an annual production capacity of 192 million gallons of biodiesel and 1.7 billion gallons of ethanol.[2] It also generates significant quantities of wind, solar, and nuclear energy.[3] Looking toward the future, Illinois' renewable portfolio standards (RPS) have set goals for 100% clean energy by the year 2050.[4] The RPS goals raise questions of where future renewable energy facilities will be built. With almost 75% of the land area in Illinois consisting of farmland,[5] the push for expanded renewable energy production introduces some important considerations

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[1] *Illinois Farmland is the Envy of the World—We Had Better Protect It*, CHI. SUN-TIMES (Aug. 8, 2019, 6:08 PM), https://chicago.suntimes.com/2019/8/8/20759238/illinois-farmland-envy-world-protect-it-soil; *Feed Grains Sector at a Glance*, USDA, https://www.ers.usda.gov/topics/crops/corn-and-other-feed-grains/feed-grains-sector-at-a-glance/#:~:text=Iowa%20and%20Illinois%2C%20the%20top,third%20of%20the%20U.S.%20crop (last updated Dec. 21, 2023); Joanie Stiers, *Illinois Corn Facts and Stats*, ILL. FARM BUREAU PARTNERS (May 17, 2022), https://ilfbpartners.com/farm/illinois-corn-facts-and-stats/; *The Crops We Grow*, ILL. FARM BUREAU, http://ilfb.org/resources/learn-about-il-agriculture/what-we-grow-and-raise-the-illinois-supply-chain/the-crops-we-grow/ (last visited Mar. 26, 2024).

[2] *Illinois State Profile and Energy Estimates*, U.S. ENERGY INFO. ADMIN. (Aug. 17, 2023), https://www.eia.gov/state/analysis.php?sid=IL.

[3] *Id.* In 2022, Illinois was ranked fifth in the U.S. for utility-scale wind power capacity. *Id.* Illinois is also ranked fifteenth in the nation for total installed solar capacity. *Illinois Solar*, SEIA, https://www.seia.org/state-solar-policy/illinois-solar (last visited Mar. 11, 2024).

[4] 220 ILL. COMP. STAT. 5/8-512 (a)(6) (2021).

[5] *Facts About Illinois Agriculture*, ILL. DEP'T AGRIC., https://agr.illinois.gov/about/facts-about-illinois-agriculture.html (last visited Mar. 26, 2024).

regarding the potential conversion of the state's highly productive land resources.

The transition of farmland away from food production is hardly a new concern.[6] The growth of suburban areas has the potential to convert 363,400 acres of farmland to housing and other built infrastructure in Illinois.[7] Similarly, the food commodity price spikes that struck the world in the early and mid-2000s[8] generated significant opposition to policies that incentivized biofuels and the diversion of substantial quantities of corn from animal feed to ethanol production.[9] After a period of relative calm, the invasion of Ukraine by Russia and the resulting price instability in the grain markets rekindled the "Food vs. Fuel" debate.[10]

Widespread development of wind energy projects experienced similar public perception challenges when sited on productive farmland.[11] Initial concerns regarding the colocation of wind energy and agriculture have faded as farmers adapted production methods and realized a financial safety net through long-term energy production contracts.[12] Nonetheless, many local

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6 *See* Sarah Mock, *Chapter 1: Is the U.S. Running Out of Farmland?*, AMBROOK RSCH. (Jan. 31, 2024), https://ambrook.com/research/podcast/chapter-1-the-only-thing-that-lasts-farmland-disappearing.

7 Mitch Hunter et al., *Farms Under Threat 2040 Choosing an Abundant Future*, AM. FARMLAND TR. 1, 56 (2022), available at https://farmlandinfo.org/wp-content/uploads/sites/2/2022/08/AFTFUT_Abundant-Future-7_29_22-WEB.pdf; *Farms Under Threat 2040*, AM. FARMLAND TR., https://development2040.farmland.org/ (last visited Mar. 26, 2024).

8 Ronald Trostle, *Why Another Food Commodity Price Spike?*, USDA (Sept. 1, 2011), https://www.ers.usda.gov/amber-waves/2011/september/commodity-price-spike/.

9 Joseph Glauber & Charlotte Hebebrand, *Food versus Fuel v2.0: Biofuel policies and the current food crisis*, INT'L FOOD POL'Y RSCH. INST. (Apr. 11, 2023), https://www.ifpri.org/blog/food-versus-fuel-v20-biofuel-policies-and-current-food-crisis.

10 *Id*. The U.S. public has a generally positive opinion of biofuel production. Qiankun Zhao et al., *How do the research and public communities view biofuel development?*, 133 RENEWABLE & SUSTAINABLE ENERGY REV. 110265 (2020) (manuscript at 25) (on file with Elsevier), available at https://doi.org/10.1016/j.rser.2020.110265. A study showed negative sentiments, however, focused on fraud in biofuel tax credit programs and unintended impacts on production, like changes in crop prices. *Id.* (manuscript at 26). The unintended consequences of diverting land out of traditional agriculture production is a common concern with land use change. *Id.*

11 *See, e.g.*, Jackie Smith & Patricia Alvord, *Whitmer wants to make Michigan a clean energy haven. But rural communities are pushing back*, PORT HURON TIMES HERALD (June 4, 2023, 5:05 AM), https://www.thetimesherald.com/story/money/business/2023/06/04/rise-of-wind-solar-farms-prompts-major-rule-changes-for-michigan-townships/70277865007/. For example, Michigan Citizens for Protection of Farmland was working on a ballot proposal to "ban large-scale solar farms in rural areas across the state" to "prevent future developments and protect farmland." *Id.* This comes at a time when townships in Livingston County, Michigan, are imposing moratoriums on solar and wind development. *Id.*

12 Elizabeth Weise, *Wind energy gives American farmers a new crop to sell in tough times*, USA TODAY (Feb. 20, 2020, 12:08 PM), https://www.usatoday.com/story/news/nation/2020/02/16/wind-energy-can-help-american-farmers-earn-money-avoid-bankruptcy/4695670002/. In addition to farm income, wind energy can create jobs and provide extra revenue to communities with installed wind power. *Advantages and Challenges of Wing Energy*, OFF. ENERGY EFFICIENCY & RENEWABLE ENERGY, https://www.energy.gov/eere/wind/advantages-and-challenges-wind-energy (last visited Mar. 26, 2024).

governments have enacted community bans on wind energy under the rationale of preserving agricultural land.[13] Some ordinances limit the size of projects, require a special permit, or have broader limitations, such as setback distances.[14] Interestingly, Bessette and Mills found wind contention to decrease in communities with "higher proportions of production-focused landowners."[15]

On the other hand, the study found communities with higher natural amenities, using the USDA Natural Amenity Index, take a more contentious stance on wind farm proposals.[16] The Bessette and Mills study seems to contradict stated concerns over farmland productivity loss and demonstrates the importance of addressing community connections to the rural landscape and considering aesthetic values in energy development projects.[17] A California case study found similar contrasts between community concerns and farmer support in the solar energy context.[18] Through stakeholder interviews, researchers identified concerns related to visual and ecological landscape impacts, the difficulty of reverting land back to agriculture after solar development, and financial risks.[19] Consistent with the Bessette and Mills research, farmers and ranchers with agriculture as a primary income source expressed more support for hosting utility-scale solar than their counterparts who were not dependent on agriculture.[20]

In Illinois, an aggressive RPS, coupled with robust incentives for expanding solar energy development,[21] has elevated public concern about the

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13 *See* MATTHEW EISENSON, SABIN CTR. CLIMATE CHANGE L., OPPOSITION TO RENEWABLE ENERGY FACILITIES IN THE UNITED STATES: MAY 2023 EDITION 1 (2023). For example, in Vermillion County, Indiana, there was a 2021 ordinance that limited the size of wind projects in agriculturally zoned districts. *Id.* at 40. In Hamilton County, Indiana, "commercial solar projects are prohibited on prime agricultural soils." *Id.* at 42. In the Canovia Township (Muskegon County) and Almer Township (Tuscola County) of Michigan, an ordinance adopted in 2019 and 2020 respectively, restricted wind turbines with property line setbacks and limits to noise and flickering which "explicitly references agricultural preservation as well as health and safety concerns as the basis for the restrictions." *Id.* at 88-90.

14 *Id*. at 1.

15 Douglas L. Bessette & Sarah B. Mills, *Farmers v. lakers: Agriculture, amenity, and community in predicting opposition to United States wind energy development*, 72 ENERGY RSCH. & SOC. SCI. 9, 12 (2021).

16 *Id*.

17 *See* Theresa M. Groth & Christine A. Vogt, *Rural wind farm development: Social, environmental, and economic features important to local residents*, 63 RENEWABLE ENERGY 1 (Mar. 2014). One study revealed "visual aesthetics play a role in determining the success of a wind development" and that "social beliefs were the strongest predictor of support for wind development." *Id.* at 7.

18 Nicole Buckley Biggs et al., *Landowner decisions regarding utility-scale solar energy on working lands: a qualitative case study in California*, 4 ENV'T RSCH. COMMC'N 1, 6, 9 (2022), available at https://iopscience.iop.org/article/10.1088/2515-7620/ac6fbf/pdf.

19 *Id*.

20 *Id*. at 7.

21 Jessica Wimmer, *Illinois Solar Incentives and Tax Credits*, ARCHITECTURAL DIG. *(*Feb. 6, 2024), https://www.architecturaldigest.com/reviews/solar/solar-incentives-illinois#:~:text=Yes.%20

potential loss of farmland.[22] In 2023, Illinois ranked 15th nationally for solar energy production.[23] Despite this relatively high national ranking, solar accounted for only 1.71% of the state's electricity.[24] The Solar Energy Industries Association (SEIA) projects solar growth in Illinois over the next five years at more than 1,700%.[25] In anticipation of this growth, opposition to new renewable energy facilities may follow. For example, Oregon has restricted solar development on farmland; solar cannot occupy "more than 12 acres of prime farmland or 20 acres of other farmland unless an exception applies."[26] In Ohio, counties have the authority to designate restricted areas for large-scale renewable energy development.[27]

A key question for renewable energy policy is how to promote renewable energy in a way that simultaneously preserves both agricultural production and community connections to the agricultural landscape. This requires moving beyond a food versus fuel dichotomy and exploring how to generate food and energy while preserving an aesthetically satisfying rural landscape. As described below, agrivoltaics, if positioned within a supportive policy environment, may provide a path forward for Illinois.

II. AGRIVOLTAICS: DUAL-USE SOLAR

Agrivoltaics, also known as dual-use solar, is the combination of solar energy production and agriculture on the same plot of land.[28] Different subsets of agrivoltaics include crop production, animal grazing, and pollinator habitats co-located with solar panels.[29] Before a significant

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Illinois%20gets%20adequate%20sun%20exposure%20for%20most,solar%20costs%20also%20make%20it%20a%20worthwhile%20option.

22 *See generally* Tammie Sloup, *Farmers highlight clean energy project pressures on farmland*, FARMWEEK (Jan. 19, 2024), https://www.farmweeknow.com/policy/national/farmers-highlight-clean-energy-project-pressures-on-farmland/article_5e1204fc-b499-11ee-9a55-33fa0238341c.html.

23 *Illinois Solar*, *supra* note 3.

24 *Id*.

25 *See id*.

26 EISENSON, *supra* note 13, at 161.

27 *Id*. at 149.

28 *Agrivoltaics: Solar and Agriculture Co-Location*, OFF. ENERGY EFFICIENCY & RENEWABLE ENERGY, https://www.energy.gov/eere/solar/agrivoltaics-solar-and-agriculture-co-location (last visited Mar. 27, 2024).

29 *Id*. There have also been developments for floatovoltaics, or solar panels on water. Joseph Guzman, *Why put solar panels on the surface of water?*, THE HILL (July 19, 2022), https://thehill.com/changing-america/sustainability/energy/3564585-why-put-solar-panels-on-the-surface-of-water/. Greenhouse production may also be able to utilize solar panels. *See* ERIK DOHLMAN ET AL., ECON. RSCH. SERV., USDA, REP. NO. EIB-264, TRENDS, INSIGHTS, AND FUTURE PROSPECTS FOR PRODUCTION IN CONTROLLED ENVIRONMENT AGRICULTURE AND AGRIVOLTAICS SYSTEMS 23 (2024), available at https://www.ers.usda.gov/webdocs/publications/108221/eib-264.pdf?v=6749.4.

transition to agrivoltaic production will occur—to borrow from the Missouri state slogan—you have to "Show-Me"[30] that it will work.[31]

Initial research has shown positive effects for solar panels and crop production in agrivoltaic systems.[32] For example, one study found that a "dryland agrivoltaic system may be a resilient energy and food system that has reduced vulnerabilities to future climate variability" based on success growing chiltepin peppers, jalapeños, and cherry tomatoes.[33] However, the study placed an emphasis on considering the potential added costs from raised solar panels.[34] Other research projects have focused on different types of fruit and vegetables; root crops and leafy greens have shown promise,[35] while berries[36] and taller crops may not be as efficient.[37] The compatibility

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30 Ben Zimmer, *'Show Me': New Evidence Arises for the Origin of a Slogan About Proof,* THE WALL ST. J. (Sept. 7, 2023, 5:32 PM), https://www.wsj.com/arts-culture/history/show-me-new-evidence-arises-for-the-origin-of-a-slogan-about-proof-d6cd5876 (explaining the origin of the "show me" phrase in Missouri).

31 *Agrivoltaics Map*, OPENEI, https://openei.org/wiki/InSPIRE/Agrivoltaics_Map (last visited Mar. 27, 2024). Different types of agrivoltaics are more popular than others; crop production is one of the least utilized. *Id.*

32 *See generally* Greg A. Barron-Gafford et al., *Agrivoltaics provide mutual benefits across the food-energy-water nexus in drylands*, 2 NATURE SUSTAINABILITY 848 (2019), available at https://doi.org/10.1038/s41893-019-0364-5.

33 *Id*. at 853.

34 *Id*. ("Our results from a dryland system indicate a reduction in daytime temperatures of the solar panels (energy) and microclimate under the panels (food), and a dampening in the diurnal fluctuations of each and day-to-day fluctuations in soil moisture in irrigated agriculture (water)… However, there are probable barriers to wider adoption, which include challenges associated with some forms of mechanized farming and harvest and the additional costs associated with elevating PV arrays to allow for food production in the understorey.").

35 Emiliano Bellini, *Agrivoltaics works better with leafy greens, root crops*, PV MAG. (June 8, 2020), https://www.pv-magazine.com/2020/06/08/agrivoltaics-works-better-with-leafy-greens-root-crops/.

36 Kari Lydersen, *Maine farmer pairs solar panels with wild blueberries. Will the effort bear fruit?*, ME. MONITOR (Sept. 4, 2022), https://themainemonitor.org/maine-farmer-pairs-solar-panels-with-wild-blueberries-will-the-effort-bear-fruit/ ("Blueberry fields and other parcels of rural Maine are being increasingly eyed for housing development, and farmer Paul Sweetland feels the wild blueberry sector is under pressure, especially when market prices drop. But he hopes that a new 'crop' growing in tandem with berries could help boost the local industry and preserve farmland. That would be solar panels that have been installed across 11 acres of the land where Sweetland farms blueberries in Rockport.").

37 Bellini, *supra* note 35 (U.S. scientist Chad Higgins from the Department of Biological and Ecological Engineering at Oregon State University was cited as saying that "[h]e believes that a combination such as strawberries, blueberries, raspberries and lingonberries could also provide for strong power and crop yields. 'But we haven't checked this yet,' Higgins said. 'On the likely not a good idea side are tall crops that may interfere more with the panels like corn or orchard crops.'"). One article explained two types of panel construction for agrivoltaics. Jordan Farrell & Bo Mahr, *Common Ground: Agrivoltaics Provide Mutual Benefits to Developers and Farmers*, HUSCH BLACKWELL (Dec. 20, 2023), https://www.climatesolutionslaw.com/2023/12/common-ground-agrivoltaics-provides-mutual-benefits-for-solar-developers-and-agricultural-production/ ("Elevated panels have been successfully paired with high-value crops, like delicate vegetables and berries, which benefit from the shade and protection provided by the panels. Elevated panels can also be installed over existing cropland. However, elevated configurations come with increased

of crops traditionally grown in the Midwest, such as soybeans and corn, is uncertain,[38] but some studies have started to research this topic.[39] Crop production appears to vary widely depending on location in the U.S., but further research may expand on what crops might successfully grow underneath solar panels.[40]

Solar grazing, the combination of solar energy and animal grazing, along with pollinator-friendly solar, tends to be a more widely used practice.[41] This may be in part due to experience with using livestock as a means of vegetation management, including fire risk reduction[42] and invasive species control.[43] Solar grazing often includes sheep,[44] but studies are looking into the possibility of larger animals.[45] Research has shown that the practice

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installation and maintenance costs, and additional vulnerability to high winds and snow.... Inter-row agrivoltaic configurations, on the other hand, use more traditional panel heights, which are more resilient and can be paired with plants requiring full sun. The spacing between the panels reduces the effect on the surrounding microclimate, benefiting the growing environment and making inter-row agrivoltaics more appealing to farmers. Studies pairing solar panels with typical rotation crops, such as corn and soybeans, are in the early stages, and research is ongoing to determine ideal panel design, crop pairings, and spacing.").

38 *See* DOHLMAN ET AL., *supra* note 29 (According to the USDA, "[t]o date, AV systems with commodity crop (e.g., wheat, corn, soybeans) production have been infeasible, although research is ongoing.").

39 Steve Martin, *Purdue agrivoltaic farming structures and software harvest solar power at lower cost and with minimal impact on crop yield*, PURDUE (May 24, 2023), https://www.purdue.edu/newsroom/releases/2023/Q2/purdue-agrivoltaic-farming-structures-and-software-harvest-solar-power-at-lower-cost-and-with-minimal-impact-on-crop-yield.html.

40 Mark Uchanski et al., *Characterization of Agrivoltaic Crop Environment Conditions Using Opaque and Thin-Film Semi-Transparent Modules*, 16 ENERGIES 1, 9 (2023), available at https://www.mdpi.com/1996-1073/16/7/3012 ("Semi-transparent PV panels offer a solution that caters to specific agricultural applications depending on the crop type and climate.").

41 Farrell & Mahr, *supra* note 37 (describing pollinator-friendly solar as a "system [that] is both simple and flexible: it often only involves the developer installing solar arrays and seeding pollinator-friendly plants around and/or beneath the panels. While the plants may take several seasons to become established, their presence will ultimately benefit the surrounding agriculture, which depends on pollinators for crop yield. As a secondary benefit, these plants keep the solar panels cooler, increasing performance and longevity while reducing mowing and maintenance cost for developers."); Katie Siegner et al., *Maximizing Land Use Benefits from Utility-Scale Solar*, CBEY (Nov. 4, 2021), https://cbey.yale.edu/research/maximizing-land-use-benefits-from-utility-scale-solar ("Pollinator-friendly solar also results in more groundwater recharge and a greater reduction in soil erosion than either conventional solar or farming — two additional ecosystem benefits. Lastly, pollinator-friendly solar contributes another sizable social benefit in the form of increased crop yields when projects are sited near pollinator-dependent farmland.").

42 Charles A. Taylor, Jr., *Targeted Grazing to Manage Fire Risk*, *in* TARGETED GRAZING HANDBOOK 108 (2006), available at https://bof.fire.ca.gov/media/8861/2-d-i-targeted-grazing-handbook_chpt12.pdf.

43 Garin Groff, *Grazing Arizona: Goats vs. Mesa weeds*, E. VALLEY TRIB. (Dec. 12, 2017), https://www.eastvalleytribune.com/local/mesa/grazing-arizona-goats-vs-mesa-weeds-round-2/article_fb00dcf0-2354-11e0-b3e1-001cc4c03286.htm.

44 *What is solar grazing?*, AM. SOLAR GRAZING ASS'N, https://solargrazing.org/what-is-solar-grazing/ (last visited May 23, 2024).

45 Bradley J. Heins et al., *Agrivoltaics to shade cows in a pasture-based dairy system*, 2635 AIP CONF. PROC. 060001-1, 060001-5 (2022), https://pubs.aip.org/aip/acp/article/2635/1/060001/2830634/

of grazing sheep underneath solar panels can increase animal welfare and land productivity.[46] However, effective management of pasture mixes in agrivoltaic operations is essential to achieve the best results.[47] Solar grazing also has the ability to provide additional income to sheep farmers; one study found net grazing incomes at $262 (directly contracted) per acre and $244 (subcontracted) per acre in the Eastern U.S.[48]

Agrivoltaics have been met with mixed reviews from various stakeholders.[49] For solar developers, agrivoltaics adds complexity to system design and community communication.[50] On the other hand, agrivoltaics may facilitate the development process.[51] One study found that individuals view agrivoltaics more positively than conventional solar, with 81.8% of the survey respondents indicating "they would be *more likely* to support a solar project in their community that combines both energy and food

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Agrivoltaics-to-shade-cows-in-a-pasture-based?searchresult=1 ("Based on the results of this study, cows may have sacrificed grazing time to stand in the protection of the shade. Our study indicates that agrivoltaics may provide an acceptable method of heat abatement to pastured dairy cows, as well as generating electrical energy for farmers, thus reducing the carbon footprint of the dairy operation.").

46 *See* Alyssa Andrew et al., *Herbage Yield, Lamb Growth and Foraging Behavior in Agrivoltaic Production System*, 5 FRONTIERS SUSTAINABLE FOOD SYS. 1, 10 (2021), available at https://www.frontiersin.org/articles/10.3389/fsufs.2021.659175/full ("In addition to the increased land productivity and improved animal welfare, the results from [the] study support the benefits of agrivoltaics as a sustainable agricultural system. Overall, lower pasture yields under in fully shaded areas under the solar panels were the main cause of inferior pasture production in agrivoltaic sites in the current study. When designing pasture mixtures for agrivoltaic systems, a selection of pasture species that are not only tolerant to shade but also persistent under heavy traffic should be considered."); *see also* Matthew A. Sturchio et al., *Agrivoltaic arrays can maintain semi-arid grassland productivity and extend the seasonality of forage quality*, 356 APPLIED ENERGY 122418 (2023), available at https://www.sciencedirect.com/science/article/abs/pii/S0306261923017828.

47 *See id*.

48 NIKOLA KOCHENDOERFER ET AL., DAVID R. ATKINSON CTR. SUSTAINABLE FUTURE, THE AGRICULTURAL, ECONOMIC AND ENVIRONMENTAL POTENTIAL OF CO-LOCATING UTILITY SCALE SOLAR WITH GRAZING SHEEP 4, available at https://solargrazing.org/wp-content/uploads/2021/02/Atkinson-Center-Full-Report.pdf.

49 Gabriele Torma & Jessica Aschemann-Witzel, *Social acceptance of dual land use approaches: Stakeholders' perceptions of the drivers and barriers confronting agrivoltaics diffusion,* 97 J. RURAL STUD. 610, 621 (2023) (analyzing the differences between how different stakeholders value different aspects of agrivoltaics).

50 Alexis S. Pascaris et al., *Integrating solar energy with agriculture: Industry perspectives on the market, community, and socio-political dimensions of agrivoltaics*, 75 ENERGY & SOC. SCI. 1, 7 (2021). "Solar industry professionals in this study view agrivoltaic projects as complex and requiring extra effort to actualize, including added layers of intricacy in system design and increased coordination with stakeholders…. Some participants expressed doubts that investors would finance an agrivoltaic project because dual use has the potential to compound risks and uncertainties." *Id.* "Relative to conventional solar development, study participants explained how agrivoltaics have the potential to deliver multiple technical, environmental, and social benefits, which is attracting buy-in from early innovators.... Early adopters explained their logic behind trade-off analysis, highlighting that soft benefits in the short-term are considered just as long-term hard costs are." *Id*. at 5.

51 *Id*. ("Agrivoltaics, however, was regarded as a development strategy that could inspire greater community acceptance of a project" for some solar developers.").

production."[52] It remains unclear what the value of agrivoltaic development is to general electricity consumers.[53] Another article revealed that people viewed agrivoltaics as highly expensive, a practice that will promote unsustainable farming practices, and a practice that may increase land use conflict between crop and energy production.[54] In the same survey, some participants saw agrivoltaics as an "emergency exit for farmers not to lose agricultural land for total crop production" and placed importance on effective regulations.[55] As solar development continues to expand onto existing farmland, it will be important to understand the community outlook on agrivoltaics and implications for local land use siting.

For farmers, solar development can be a potentially environmentally friendly alternative compared to other land conversion options.[56] Some have argued for the use of land-specific conservation agriculture management practices for dual-use solar practices to further strengthen agrivoltaics' sustainability as a system.[57] Aside from sustainability concerns, farm and rural values can affect solar siting more broadly as "farming [can be seen] as an identity rather than an occupation alone."[58] One study found "that agricultural and pollinator interviewees typically did not understand energy systems, and energy sector interviewees did not understand agricultural systems," showing a disconnect between two major stakeholders in agrivoltaics.[59] As it will be important to understand community response to agrivoltaic projects, it will be equally important to meet the needs of farmers and solar developers and to have communication between them.

The coexistence of solar energy production and agriculture complicates an already difficult solar development process.[60] Solar development rules, such as zoning and setback requirements, must be integrated with traditional

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52 *Id*. at 6.

53 DOHLMAN ET AL., *supra* note 38, at 23 ("Although consumers have been willing to pay a premium for electricity from renewable energy (including solar), it is not well-established if consumers will pay a premium for solar-generated electricity because the electricity was generated at an AV site.").

54 Torma & Aschemann-Witzel, *supra* note 50, at 615-17.

55 *Id*. at 616-17.

56 ANUJ KRISHNAMURTHY & OSCAR SERPELL, KLEINMAN CTR. ENERGY POL'Y, HARVESTING THE SUN: ON-FARM OPPORTUNITIES AND CHALLENGES FOR SOLAR DEVELOPMENT 3 (2021), available at https://kleinmanenergy.upenn.edu/research/publications/harvesting-the-sun-on-farm-opportunities-and-challenges-for-solar-development/ ("[S]olar panels produce no additional toxic waste, and aside from soil disturbance during installation or removal, they have little long-term impact on the productivity of the land on which they are sited…. Onfarm solar (or agrivoltaics) can offer farmers and rural landowners a smaller environmental footprint and fewer economic risks than oil and gas development.").

57 Alson Time et al., *Conservation agrivoltaics for sustainable food-energy production*, 6 PLANTS, PEOPLE, PLANET, 558, 559-65 (2024).

58 Sharlissa Moore et al., *Can we have clean energy and grow our crops too? Solar siting on agricultural land in the United States*, 91 ENERGY RSCH. & SOC. SCI. 1, 4 (2022).

59 *Id*. at 10.

60 Max Trommsdorff, *Agrivoltaics: Where are we heading?*, PV MAG. (Mar. 9, 2021), https://www.pv-magazine.com/magazine-archive/agrivoltaics-where-are-we-heading/.

farm regulatory structures and production risks. Despite these challenges, agrivoltaics has shown promise both domestically and internationally.[61] One study estimated that the global energy demand "could be offset by solar production if <1% of agricultural land at the median power potential of 28 W/m^2 were suitable candidates for agrivoltaic systems and converted to dual use."[62] Meeting energy production potential, however, is dependent upon a policy environment that could either promote or hinder further development.[63] The following section describes the national policy landscape, reviews initiatives in states with active agrivoltaic facilities, and closes with an analysis of Illinois initiatives.

III. THE POLICY LANDSCAPE FOR AGRIVOLTAICS

A. National Perspectives

Agrivoltaics receives federal support through funding for the research and development of dual-use projects.[64] The U.S. Department of Energy (DOE) has funded agrivoltaics research since 2015.[65] The DOE's Solar Energy Technologies Office (SETO) administers the Foundational Agrivoltaic Research for Megawatt Scale (FARMS) program[66] and maintains a cooperative agreement with the National Center for Appropriate Technology to connect stakeholders and "enhance[e] the long-term performance" of agrivoltaics.[67] The DOE also funds the Innovative Solar Practices Integrated with Rural Economies and Ecosystems (InSPIRE)

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61 *Id*.

62 Elnaz H. Adeh et al., *Solar PV Power Potential is Greatest Over Croplands*, 9 SCI. REPS. 1, 4 (2019).

63 *See generally* Alison F. Takemura, *Agrivoltaics finds new fans in US Senate*, CANARY MEDIA (June 20, 2023), https://www.canarymedia.com/articles/solar/agrivoltaics-finds-new-fans-in-us-senate (explaining how a passage of just one act can vastly increase developments in the agrivoltaics industry).

64 DOHLMAN ET AL., *supra* note 38, at 18.

65 *Id*. ("DOE-SETO has been funding research on agrivoltaics since 2015, and funding has expanded significantly since then. In fiscal year 2020, DOE-SETO provided $130 million in funding for solar projects, and $7 million of that funded four AV projects (Davis & Macknick, 2022; DOE-SETO, 2020).").

66 *Foundational Agrivoltaics Research for Megawatt Scale (FARMS) Funding Program*, OFF. ENERGY EFFICIENCY & RENEWABLE ENERGY, https://www.energy.gov/eere/solar/foundational-agrivoltaic-research-megawatt-scale-farms-funding-program (last visited Mar. 27, 2024).

67 *About*, AGRISOLAR CLEARINGHOUSE, https://www.agrisolarclearinghouse.org/about/ (last visited Mar. 27, 2024); *see also* Alexis S. Pascaris et al., *From niche-innovation to mainstream markets: Drivers and challenges of industry adoption of agrivoltaics in the U.S.*, 181 ENERGY POL'Y 1, 9 (2023) ("Appropriations for the maintenance of the AgriSolar Clearinghouse (NCAT, 2023), a critical hub that facilitates circulation and aggregation of agrivoltaic knowledge, could also be regarded as key to enhancing the long-term performance of the technology.").

project,[68] which administers the Agriculture and Solar Together: Research Opportunities (ASTRO) Seed Grants for small funding opportunities for further agrivoltaics research.[69]

The U.S. Department of Agriculture (USDA) has also funded various agrivoltaics-focused projects.[70] The USDA's National Institute of Food and Agriculture (NIFA) Sustainable Agriculture Systems program awarded funding support to the Sustainability Co-locating Agricultural and Photovoltaic Electricity System (SCAPES) project,[71] and the USDA's Climate-Smart Commodities Project has provided support for other research activities.[72] NIFA has also sponsored agrivoltaic projects through its small business grant program.[73] Other potential agrivoltaic funding sources include the Business Energy Investment Tax Credit (ITC) through the Internal Revenue Service (IRS) and the USDA's Rural Energy for America Program (REAP).[74] Other federal government policies or funding opportunities may be synergistic with agrivoltaics, especially in the context of agricultural and solar energy, but they lack explicit programmatic connections.[75]

From a legislative perspective, a few Congressional proposals have signaled initial interest in the agrivoltaics field.[76] Proposed bipartisan bills such as the Agrivoltaics Research and Demonstration Act of 2023[77] and the

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68 *Innovative Solar Practices Integrated with Rural Economies and Ecosystems*, OPENEI, https://openei.org/wiki/InSPIRE (last visited Mar. 27, 2024).

69 *Agriculture and Solar Together: Research Opportunities*, OPENEI, https://openei.org/wiki/InSPIRE/ASTRO (last visited Mar. 27, 2024).

70 DOHLMAN ET AL., *supra* note 38, at 23 ("Understanding the potential benefits of agrivoltaics for generating renewable electricity and addressing climate change is a USDA research priority.").

71 Paul Hollis, *"Agrivoltaic" research combines solar energy, food production*, AUBURN AGRIC. (Oct. 6, 2021), https://agriculture.auburn.edu/feature/agrivoltaic-research-combines-solar-energy-food-production/.

72 DOHLMAN ET AL., *supra* note 38, at 23.

73 *See* NIFA, *Integrating Agrivoltaics: Studying the Synergistic Relationship Between Transparent Solar Panels and Horticulture*, USDA, https://portal.nifa.usda.gov/web/crisprojectpages/1019484-integrating-agrivoltaics-studying-the-synergistic-relationship-between-transparent-solar-panels-and-horticulture.html (last visited May 24, 2024).

74 Alexis S. Pascaris, *Examining existing policy to inform a comprehensive legal framework for agrivoltaics in the U.S.*, 159 ENERGY POL'Y 1, 4 (2021).

75 *Id*. at 1.

76 *See generally* Press Release, U.S. Senators Martin Heinrich & Mike Braun, Heinrich, Bruan Introduce Bipartisan Bill to Support Agrivoltacis Research and Demonstration (May 31, 2023), available at https://www.heinrich.senate.gov/newsroom/press-releases/heinrich-braun-introduce-bipartisan-bill-to-support-agrivoltaics-research-and-demonstration (showing the low amount of proposed bills introduced to Congress); *see generally* Press Release, U.S. Senators Tammy Baldwin & Chuck Grassley, Baldwin, Grassley Introduce Bill to Protect and Invest in Farmland Used for Renewable Energy Developments (Sept. 25, 2023), available at https://www.baldwin.senate.gov/news/press-releases/baldwin-grassley-introduce-bill-to-protect-and-invest-in-farmland-used-for-renewable-energy-developments (showing the low amount of proposed bills introduced to Congress).

77 *See* Press Release, U.S. Senators Heinrich & Braun, *supra* note 76.

Protecting Future Farmland Act[78] have called for a clear regulatory definition of agrivoltaics and directed the USDA to expand research projects. The Protecting Future Farmland Act, proposed in September of 2023, called for prioritizing funding through REAP for projects that have conservation and vegetation management plans, including those with agrivoltaic installations.[79] As federal interest in agrivoltaics evolves, its intersection with state and local government initiatives, both in support and opposition to solar development, warrants close attention.[80]

B. State Agrivoltaic Policy Initiatives

At the state level, a mix of incentives to meet renewable energy mandates and policy initiatives to solve land-use conflicts present a more complex regulatory environment for agrivoltaics, as distinguished from traditional single-purpose solar installations.[81] A general lack of agrivoltaic-specific policy recommendations or requirements likely can be attributed to the novelty and economic uncertainty of the practice.[82] However, as described below, a few states have developed regulatory programs that expressly define agrivoltaics or, in some cases, even incentivize development to advance the state's renewable energy or conservation goals.[83] For example, some states have enacted policies that allow the land underneath solar panels to retain classification as agricultural land for property taxes.[84] Other states

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78 *See* Press Release, U.S. Senators Baldwin & Grassley, *supra* note 76.

79 Protecting Future Farmland Act of 2023, S. 2931, 118th Cong. § 3 (2023).

80 *See* Takemura, supra note 63 (noting how interest in agrivoltaics has, according to the energy program director of the National Center for Appropriate Technology, been "greatly expanding").

81 *See, e.g.*, Jessica Guarino & Tyler Swanson, *The Illinois Agrivoltaics Regulatory and Policy Guide Analyzes State and Local Laws*, AGRISOLAR CLEARINGHOUSE (Feb. 1, 2023), https://www.agrisolarclearinghouse.org/the-illinois-agrivoltaics-regulatory-and-policy-guide-analyzes-state-and-local-laws/ ("[W]hile the excitement around agrivoltaics in all its forms blazes a new trail for what solar energy land use can look like, eager landowners and developers face a daunting challenge: state laws and local zoning ordinances that have not considered the possibility that agricultural and solar energy production could feasibly be located on the same tract of land.").

82 *See* Sarah Brunswick & Danika Marzillier, *The New Solar Farms: Growing a Fertile Policy Environment for Agrivoltaics*, 24 MINN. J.L. SCI. & TECH. 123, 152 (2023) ("[I]nformation gaps, externality problems, and localized resistance in many rural communities plague the nation's fledgling agrivoltaics industry.").

83 DOHLMAN ET AL., *supra* note 29, at 23 ("AV sites are commonly incentivized by State and local programs because of the sites' potential to provide local agri-environmental benefits and mitigate concerns regarding land use competition.").

84 *See* HEIDI KOLBECK-URLACHER, CTR. RURAL AFFS., POLICY APPROACHES FOR DUAL-USE AND AGRISOLAR PRACTICES 7–8 (2023), available at https://www.agrisolarclearinghouse.org/wp-content/uploads/2023/04/AgriSolar_Dual-use-solar_041123v2.pdf ("Rhode Island has amended its Farm, Forest, and Open Space Land law to exempt landowners from a land-use change tax if they are integrating a dual-use renewable energy generation system, which is defined as a wind or solar system that allows agricultural practices to continue around it under normal practices.").

have taken a soft law approach by developing factsheets or supporting university extension programs.[85]

In the agrivoltaics industry, the Solar Massachusetts Renewable Target (SMART)[86] program, accompanied by the Agricultural Solar Tariff Generation Unit (ASTGU), is often recognized as a model program.[87] An ASTGU is a "Solar Tariff Generation Unit located on Land in Agricultural Use or Important Agricultural Farmland that allows the continued use of the land for agriculture."[88] Program provisions require minimal soil impact, addressing water conservation and quality concerns, and maintaining a vegetative cover.[89] In addition, solar panels comprising an ASTGU may not "interfere with the continued use of the land beneath the canopy for agricultural purposes" to optimize the balance between agricultural and energy production.[90] Annual reporting is required to demonstrate that the site "continues to engage in commercial agricultural[sic] to retain and use the land primarily and directly for agricultural purposes pursuant to M.G.L. c. 61A §§1 and 2."[91] There is a waiver available to explain decreased agricultural yield due to unforeseen circumstances,[92] but consequences may remain unclear if the waiver is not accepted.[93] Reporting may be an

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85 *See, e.g.*, Conn. Dep't Energy & Env't Prot., *STEPS is Sustainable, Transparent and Efficient Practices for Solar Development*, CT.GOV (Aug. 2023), https://portal.ct.gov/DEEP/Planning/Steps-for-Solar-Development (indicating that Connecticut's Department of Energy & Environmental Protection drafted guidance for siting solar on agricultural land, suggesting agrivoltaic development); *see also* CONN. DEP'T ENERGY & ENV'T PROT. & CONN. DEP'T AGRIC., DRAFT GUIDANCE FOR SITING SOLAR ON AGRICULTURAL LAND 2 (2023), available at https://portal.ct.gov/-/media/DEEP/Permits_and_Licenses/Client-Concierge/DRAFT-Guidance-for-Siting-Solar-on-Agricultural-Land.pdf (recommending "dual use systems that maximize crop production and minimize changes to existing vegetation management, while also incorporating solar energy production"). Furthermore, New York has just passed a bill establishing agrivoltaics research and development in Cornell University's College of Agricultural and Life Sciences. *See* S. 7081, 2023 Leg., Reg. Sess. (N.Y. 2023).

86 225 MASS. CODE REGS. § 20.00 (2024).

87 *See* Jessica Guarino & Tyler Swanson, *Emerging Agrivoltaic Regulatory Systems: A Review of Solar Grazing*, 12 CHI. KENT J. ENV'T ENERGY L. 1, 23 (2022) (noting that the Massachusetts Solar Renewable Target (SMART) Program is the most prominent policy that actively promotes dual land use).

88 225 MASS. CODE REGS. § 20.02 (2024).

89 *See id.* at § 20.05(5)(e) (providing several performance standards).

90 *Id*. at § 20.06(1)(d).

91 MASS. DEP'T ENERGY RES. & DEP'T AGRIC. RES., GUIDELINE REGARDING THE DEFINITION OF AGRICULTURAL SOLAR TARIFF GENERATION UNITS 6 (2022), available at https://www.mass.gov/doc/guideline-regarding-the-definition-of-agricultural-solar-tariff-generation/download.

92 *See id.* at 6-7 ("Due to unforeseen circumstances, such as but not limited to weather events, pests, or change in crops, the projected agricultural yield for any given year may be lower than stated in the agricultural plan or previous year's annual report. In these instances, an applicant can request a waiver to the Department for the decreased yields. The applicant must demonstrate to the satisfaction of the Department, and in consultation with MDAR, that a waiver is warranted for good cause.").

93 *See* Jonathan Klavens et al., *Solar Project Development: the Special Case of Agrivoltaic Projects*, BOS. BAR ASS'N (Nov. 18, 2020), https://bostonbar.org/journal/solar-project-development-the-

opportunity for furthering technological advances and economic knowledge to inform future agrivoltaic projects,[94] but importance should be placed on incentivizing the practice.[95] As an incentive, an ASTGU will receive a compensation rate Adder Value of $0.06 ($/kWh) in addition to the Generation Unit Capacity Base Compensation Rate Factor.[96] Although the regulatory complexity and mandatory design elements of an ASTGU may hinder a developer's energy production goals and impose unnecessary requirements for certain agricultural practices,[97] many have praised the program as a strong first step for incentivizing agrivoltaic development.[98]

New Jersey has proposed a Dual-Use Solar Energy Pilot Program informed by research through pilot projects over the next few years involving farms with previous agricultural or horticultural use across diverse land types and crop production.[99] Proposed requirements stipulate that "land below and

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special-case-of-agrivoltaic-projects/ ("While it is important to ensure that there are not significant detrimental effects on agriculture from an ASTGU, there could be many appropriate reasons for reduced productivity, such as a drought year or appropriate crop rotation. The approval process thus far has raised questions about the appropriate baseline for measuring impacts, determining which impacts to attribute to the solar facility or to other causes, what type or magnitude of impact would result in disqualification of an ASTGU or removal of its adder.").

94 *Cf.* Brunswick & Marzillier, *supra* note 83, at 154 ("Farmers' limited knowledge about agrivoltaics and their practical and economic benefits further constrains agrivoltaics growth."). This type of knowledge will be important as "[f]arm operators and rural communities need to be empowered with the information to make financially and environmentally sound decisions regarding on-farm energy development." Anuj Krishnamurthy & Oscar Serpell, *Harvesting the Sun: On-Farm Opportunities and Challenges for Solar Development*, KLEINMAN CTR. ENERGY POL'Y (July 12, 2021), https://kleinmanenergy.upenn.edu/research/publications/harvesting-the-sun-on-farm-opportunities-and-challenges-for-solar-development/. Accordingly, "[o]ne of the central goals of policymakers interested in facilitating on-farm solar development should be to help clarify the full financial picture of a proposed project." *Id.*

95 *See, e.g.*, Brunswick & Marzillier, *supra* note 82, at 173 ("[S]tates should ensure that their tax code does not impose burdens that disincentivize agrivoltaics development.").

96 *See* 225 MASS. CODE REGS. § 20.07(4)(a), (f) (2024). The adder value "increase the per-kWh incentive amount" for developing different types of solar projects. Siena Hacker, *Massachusetts SMART Solar Program: 2024 Overview*, SOLAR.COM (Dec. 29, 2023), https://www.solar.com/learn/massachusetts-smart-solar-program-complete-overview/.

97 *See* Pascaris, *supra* note 74, at 5 ("Despite the ASTGU's intention to stimulate agrivoltaic development, the program itself is marked by system design requirements and regulatory hurdles that may discourage interested parties."); *see also* Jonathan Klavens et al., *supra* note 93 ("There may well be many more types of symbiotic solar and agricultural uses that do not fit within the current requirements for ASTGUs. For example, mushroom cultivation, beekeeping and animal husbandry are all farming activities that might benefit from shade reduction greater than 50%. The state's Department of Energy Resources ("DOER") has a process for seeking waivers for unique and worthwhile alternatives but obtaining an exception is not easy, quick or predictable."); KOLBECK-URLACHER, *supra* note 84, at 12 ("Siting regulations should be carefully crafted to ensure they don't restrict dual-use. For example, setting restrictions on panel height or developing overly prescriptive vegetation management requirements can limit dual-use opportunities.").

98 *See* Brunswick & Marzillier, *supra* note 82, at 151; *see also* Pascaris, *supra* note 74, at 5.

99 *See* N.J. BD. OF PUB. UTILS., NOTICE, IN THE MATTER OF THE DUAL-USE SOLAR ENERGY PILOT PROGRAM 5 (2023), available at https://www.nj.gov/bpu/library/Dual%20Use%20Solar%20Energy%20Pilot%20Straw%20Proposal.pdf.

adjacent to the solar panels in dual-use projects is to remain in continued, simultaneous, and active agricultural or horticultural use."[100] A 10-megawatt capacity limit would be established for each project, and development on prime agricultural soil and coastal or freshwater wetlands would be barred with few exceptions.[101] Regulators have acknowledged a need for flexibility in the agrivoltaic design processes, along with an emphasis on agricultural quality monitoring, decommissioning, environmental justice,[102] and water management, with the goal of minimizing impacts on farmland.[103]

The New Jersey proposal further recommends that agricultural land used for agrivoltaic development maintains eligibility for property tax assessment as farmland.[104] From a land use perspective, approved dual-use solar energy projects would be considered a permitted use within every municipality,[105] and local governments would not be required to update ordinances or issue variances.[106] Furthermore, agrivoltaic sites would be eligible for Right to Farm Act protection.[107]

New Jersey's Dual-Use Solar Energy Pilot Program holds promise for informing a more permanent dual-use incentive program.[108] With minimal solar panel construction requirements and a flexible adder, the program may alleviate concerns with Massachusetts' SMART program, such as overly restrictive design requirements.[109] The flexible adder may also allow for various projects, whereas a standard rate adder for every agrivoltaic design may not cover the costs of new research developments.[110] In addition, the pilot program's permitted use designation of agrivoltaics for all municipalities may alleviate regulatory barriers that otherwise complicate development projects, such as specialized zoning rules and property tax considerations.[111] On the other hand, stripping local authorities of power to

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100 *Id*.

101 *Id*. at 6-7 (citing N.J. STAT. § 48:3-87.13(b)(1), (5) (2023)).

102 *See id*. at 5 ("E.O. 23" all agencies, departments, boards, etc. encompassing the Executive Branch of the State Government in New Jersey have been required to consider environmental justice in the implementation of their mandatory and regulatory responsibilities."); *see also* Exec. Order No. 23 (Apr. 20, 2018), 50 N.J. Reg. 1241(b) (May 21, 2018).

103 *See* N.J. BD. PUB. UTILS., *supra* note 99, at 21.

104 *See id*. at 15 ("Staff recommends mandating as a minimum requirement that the farm parcel maintain its eligibility for state farmland assessment taxation after construction of the solar facility.").

105 *Id*. at 12 (citing N.J. STAT. § 48:3-87.13(f) (2021)).

106 *Id*. at 26.

107 *Id*. at 41.

108 *Id*. at 10.

109 Brunswick & Marzillier, *supra* note 82, at 149.

110 *Id*. at 150 ("Moreover, SMART's incentives may not sufficiently offset the financial cost of agrivoltaics or adequately reward farmers for the positive social benefits of these projects.").

111 *Id*. at 172 ("To avoid unintended property tax impacts in the context of agrivoltaics, states could develop an agrivoltaics-specific tax policy that resolves the conflicts between agricultural and solar interests. Because of the value that agrivoltaic infrastructure brings to a property, states should incorporate an agrivoltaic-specific provision that addresses valuation of agrivoltaic-developed

regulate project design and placement may implicate justice considerations, especially in small communities.[112] Tailoring the role of local government oversight, as with many land use rules, will likely require multiple iterations as this technology matures and diffuses.[113]

Maine presents a third case study from the Northeastern U.S. in agrivoltaic policy development.[114] The Governor's Energy Office and the Maine Department of Agriculture, Conservation, and Forestry established an Agricultural Solar Stakeholder Group tasked to develop policy recommendations for protecting farmland from solar energy development.[115] The group recommended creating a dual-use pilot program and specifically noted the importance of considering current use taxation.[116]

Two states, Colorado and Maryland, have implemented tax provisions to promote agrivoltaic development.[117] Agrivoltaic projects in Colorado that follow certain design specifications are exempt from personal property taxes.[118] The state also allocated $500,000 to study agrivoltaics' ability to mitigate agricultural production impacts from climate change, lessen energy costs, increase economic resilience, minimize environmental impacts of solar, and compare project costs with traditional solar development.[119] Maryland amended its Community Solar Energy Generating Systems Program and accompanying property tax rules to include agrivoltaic development.[120]

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land."); *see also* M. Taylor et al., *Justice-driven agrivoltaics: Facilitating agrivoltaics embedded in energy justice*, 188 RENEWABLE & SUSTAINABLE ENERGY REV. 1, 5 (2023) ("Specifically, the Clean Energy Act provides clarity that an agrivoltaics project is treated as an agricultural use and therefore the land remains as agricultural land for property tax purposes. The Clean Energy Act provides the additional impetus for a new commission to identify obstacles to agrivoltaics projects and formulate strategies to address these challenges in Massachusetts.").

112 Pascaris, *supra* note 74, at 6; *see also* Taylor et al., *supra* note 111, at 6-7 ("Like other large-scale renewable energy projects, agrivoltaics design must incorporate community interests to achieve procedural justice…. Recognition justice also aligns with policy measures to empower farmers to actively participate in agrivoltaics projects enhancing incentivization functions.").

113 *See* Pascaris, *supra* note 74, at 1.

114 *Agricultural Solar Stakeholder Group*, ME. GOVERNOR'S ENERGY OFF., https://www.maine.gov/energy/studies-reports-working-groups/current-studies-working-groups/agricultural-solar-stakeholder-group (last visited May 24, 2024).

115 *Id*.

116 *Id*.

117 COLO. REV. STAT. § 39-3-122 (2023); Community Solar Energy Generating Systems Program and Property Taxes, H.B. 908, 2023 Leg., Reg. Sess. (Md. 2023).

118 *See* COLO. REV. STAT. § 39-3-122 (2023).

119 *Id*.

120 Community Solar Energy Generating Systems Program and Property Taxes, H.B. 908, 2023 Leg., Reg. Sess. (Md. 2023).

C. Policy Observations and Critiques

In 2023, the American Farmland Trust (AFT) recommended that state support for agrivoltaic installations be farm-centered.[121] Moreover, states should specifically define the terms of an agrivoltaic installation, provide for periodic location checks to ensure converted land remains agricultural, impose financial penalties for non-compliance, and implement plans to report agrivoltaics data to promote collaboration.[122] As a relatively new technology, agrivoltaic systems take a variety of shapes, sizes, and productive output—both in terms of solar energy and agricultural production.[123] A harmonized definition may facilitate diffusion by reducing cross-jurisdictional barriers and calibrating community and stakeholder expectations.[124] A one-size-fits-all approach, however, may not be an optimal path given the infancy of the industry and ongoing research efforts designed to maximize dual-use productivity.[125] Nonetheless, some common principles should be incorporated into state-level definitions. Designating a minimum percentage of land in active agricultural production per solar installation site could be a first step. That percentage would need to vary based on agronomic factors such as weather, soil quality, stocking densities (if grazing), and perhaps prior agricultural use.[126] However, to qualify as agrivoltaic, there should be some significant level of dual-use.[127] Currently, New Jersey's straw proposal for the Dual-Use Solar Energy Pilot Program seeks input regarding a definition of land "actively devoted to agricultural and horticultural use."[128] Similar concerns have been raised in Maine regarding the need for the Department of Agriculture, Conservation, and Forestry to develop a definition of "dual-use agricultural and solar production."[129]

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121 Samantha Levy, *American Farmland Trust Releases Smart Solar Recommendations to Help Policymakers Advance Solar and Strengthen Farm Viability*, AM. FARMLAND TR. (Dec. 13, 2023), https://farmland.org/aft-releases-smart-solar-recommendations-to-help-policymakers-advance-solar-and-strengthen-farm-viability/; AM. FARMLAND TR., RECOMMENDATIONS FOR STATE AND LOCAL GOVERNMENTS TO ADVANCE SMART SOLAR POLICY (2023), available at https://farmland.org/wp-content/uploads/2023/12/AFT-Recommendations_for_State_and_Local_Governments_to_Advance_Smart_Solar_Policy.pdf.

122 *Id*.

123 *Agrivoltaics: Solar and Agriculture Co-Location*, *supra* note 28.

124 M. Taylor et al., *supra* note 28, at 4 ("Without a harmonized definition for agrivoltaics systems, there is a real possibility of ad hoc policy and legal approaches creating barriers to industry entry across various jurisdictions and planning controls.").

125 *Id*. at 4-5.

126 *Id*. at 9.

127 Brunswick & Marzillier, *supra* note 82, at 144.

128 N.J. BD. PUB. UTIL., *supra* note 100, at 8.

129 *Solar Energy Development and High-Value Agricultural Land: Request for Stakeholder Input*, ME. DEP'T AGRIC, CONSERVATION & FORESTRY (Oct. 6, 2023), https://www.maine.gov/dacf/about/news/news.shtml?id=11972311 (Maine has granted the Department permitting authority for some solar energy projects, which has led to calls for a qualifying definition.).

Potential zoning and property tax issues could be resolved by defining agrivoltaics.[130] For example, various current use programs may tax agricultural or forest land at less than its market value to disincentivize land conversion for other uses.[131] Regulatory silence with respect to how agrivoltaic development may alter zoning or tax classifications could result in converted agrivoltaic land falling out of compliance and facing potential tax penalties.[132] The North Carolina Department of Revenue Present-Use Valuation Program Guide provides an instructive example of the potential complexity.[133] The Department noted, "there are situations where grazing sheep mesh well with solar array systems which are sufficiently elevated to permit the sheep to graze more or less freely beneath the panels and framework."[134] In those situations, "the affected acreage could be considered as being in production" and quality for preferential property tax treatment because the entirety of the land is capable of being grazed.[135] Importantly, agrivoltaic installations should be considered on a case-by-case basis.[136]

Although lacking certainty unless a pre-determination could be made early in the project development stage, a case-by-case basis for determining exemptions to property taxes and zoning restrictions may be an attractive option for states seeking to promote agrivoltaics as a renewable energy source and prevent further conversion of productive farmland to other uses.[137] Taxation rates for farmland are usually far better for developers than for commercial or industrial zones.[138] For example, Massachusetts recently updated its law to ensure land used for agrivoltaics would remain taxed as agricultural land, an important step in clearing legal confusion that otherwise

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130 Brunswick & Marzillier, *supra* note 82 at 165.

131 *Understanding Current Use Taxation Policies*, FARM & ENERGY INITIATIVE, https://farmandenergyinitiative.org/projects/farmland-solar-policy/policy-design-toolkit/current-use-taxation/ (last visited Apr. 4, 2024) ("Current Use Taxation policies are state beneficial taxation programs in which agricultural land is assessed and taxed at its agricultural value, rather than market value, so long as the land continues to be used or available for agricultural purposes…. They create an incentive for private landowners to keep their land undeveloped by providing some relief from market pressure to convert agricultural, open space, and forest land to economically "best uses" through development.").

132 *See* Klavens et al., *supra* note 93.

133 N.C. DEP'T REV., PRESENT-USE VALUATION PROGRAM GUIDE 51 (2023), available at https://www.ncdor.gov/present-use-value-program-guide.

134 *Id*.

135 *Id*.

136 *Id*.

137 Michael Nuckols, *Considerations when Leasing Agricultural Lands to Solar Developers*, CORNELL DEP'T AGRIC. & LIFE SCI. (Apr. 6, 2020), https://smallfarms.cornell.edu/2020/04/considerations-when-leasing-agricultural-lands-to-solar-developers/.

138 *Id*.; *Understanding Current Use Taxation Policies*, *supra* note 131 ("State programs vary on the activities permitted on enrolled land. When a landowner commences a land use not permitted by the state's current use program, this may constitute 'land use conversion,' disqualifying the land from beneficial taxation…. If land enrolled in a current use program no longer meets the criteria for beneficial taxation, the landowner is likely to be assessed a tax penalty.").

may have inhibited agrivoltaic developments.[139] The updated Massachusetts statute may prevent municipalities from implementing special use permits for agrivoltaic installations.[140] Following Massachusetts's lead, explicit statutory provisions could ease uncertainty and minimize potential deterrents in expanding agrivoltaics' footprint.

On the other side of the policy debate, some states have banned agrivoltaics on various farmlands.[141] For example, New Jersey's pilot program has sought to exclude prime farmland and wetlands from agrivoltaic development.[142] Although these restrictions may negatively impact the development of agrivoltaics more broadly, such developments follow a long and sometimes twisted history of state land use control.[143] State and local governments undoubtedly need to protect their interests, including preserving a community's connection to open space.[144] However, categorical

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139 MASS. GEN. LAWS ch. 61A, § 2A (2022); *see also MA Clean Energy Act Eases Path for Agrivoltaic Projects*, KLAVENS L. GRP, https://klavenslawgroup.com/ma-clean-energy-act-eases-path-for-agrivoltaic-projects/ (last visited May 24, 2024) ("Until passage of the Act, most municipalities required developers and farmers planning to install an agrivoltaic project on farmland enrolled in Chapter 61A to remove the farmland from Chapter 61A before installing the solar project. Removal of farmland from Chapter 61A requires a farmer to notify the host municipality of the farmer's intent to remove the land from classification and to pay the municipality so-called 'roll-back taxes' in connection with this removal. In addition, the notification requirement triggers the local municipality's option or right of first refusal to purchase the farmland.... Occasionally local residents wishing to derail development of an agrivoltaic project have persuaded the municipality to exercise its option rights, forcing farmers to withdraw their notices of intent and delaying and sometimes preventing agrivoltaic projects from moving forward."); *id.* ("The creation of a safe harbor for SMART ASTGUs will enable farmland on which agrivoltaic projects will be installed to remain enrolled in Chapter 61A, resulting in a significant cost and time savings for farmers and developers wishing to operate such projects on farmland.... It is important to note that Section 2A does not require that the renewable energy generating source be a SMART ASTGU and could apply to a renewable energy facility (including a facility other than a solar energy facility) that qualifies for some other relevant incentive.").

140 *MA Clean Energy Act Eases Path for Agrivoltaic Projects*, *supra* note 139 ("The Act also adds a new subsection (d) to Section 2A of Chapter 61A to ease the permitting path of agrivoltaic projects on farmland. The added subsection provides that renewable energy generating sources located on land used primarily and directly for agricultural or horticultural purposes pursuant to Chapter 61A shall be subject to the provisions afforded to agricultural uses and structures under MGL c. 40A, § 3 . . .. This means that, among other things, municipalities should not be able to require special permits for agrivoltaic projects, nor can local zoning be used to regulate agrivoltaic projects in ways that would not be allowed for other agricultural uses and structures.").

141 *See generally* Elizabeth Weise & Suhail Bhat, *Across America, clean energy plants are being banned faster than they're being built*, USA TODAY (Feb. 6, 2024, 3:56 PM), https://www.usatoday.com/story/news/investigations/2024/02/04/us-counties-ban-renewable-energy-plants/71841063007/ (showing states' hesitation to adopt wind and solar plants on farmland); *see also* N.J. BD. PUB. UTILS., *supra* note 99, at 7 (highlighting one state that has chosen to ban agrivoltaics development in particular).

142 N.J. BD. PUB. UTILS., *supra* note 99, at 7.

143 *See, e.g.*, George S. Wehrwein, *Public Control of Land Use in the United States*, 21 J. FARM ECON. 74, 74 (1939); Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 390 (1926).

144 KOLBECK-URLACHER, *supra* note 84, at 12 ("It is wise to consider that 100% of land may not be able to be integrated into dual-use. Setting overly strict guidance could deter development if prescriptions are not feasible. Instead, requiring a percentage of land to be used for dual-use

prohibitions and a lack of cohesion among jurisdictions may pose a risk when local governments are unsure how to regulate agrivoltaics.[145] One study that interviewed solar developers found cross-sector regulation especially burdensome on agrivoltaic projects as the practice is new, and government agencies are unequipped to handle newfangled developments.[146] There are many technical and social reasons why an agrivoltaic project may not work for a certain community.[147] Although there can be community contention regarding solar energy broadly and with siting renewable energy on farmland, a suggestion to bypass local siting practices is not a viable solution.[148] Local governments should instead be called upon to create educational materials for agrivoltaics,[149] perhaps in association with university extension programs, to promote the development of dual-use solar. Local governments also have the power to effectively involve stakeholders throughout the process of securing agrivoltaic developments,[150] which may

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purposes introduces a level of flexibility while ensuring that the original intent of the usage policy is preserved.").

145 Moore et al., *supra* note 58, at 5 ("Developer interviewees generally thought state authority would avoid local gridlock, whereas local government interviewees believed states forcing them into land-use decisions would inflame tensions.").

146 Pascaris et al., *supra note 67, at* 7 ("Participants flagged the importance of the regulatory context associated with solar development on farmland and alluded to its implications on the success of agrivoltaics. The challenges of cross-sector regulation that agrivoltaics require is effectively translating to greater burden for industry actors, which is making development politically infeasible.... The uncertainty of action and misalignment of agencies when it comes to regulating agrivoltaics is a key challenge that is complicating industry adoption. From a developer perspective, the increased time and energy allocated to navigating regulatory hurdles is interpreted as increased soft costs, which further reduces the value of agrivoltaics. These findings suggest more attention towards enhanced regulatory capacity to manage this cross-sector innovation is important, which could play an enabling role in industry adoption.").

147 *See generally* JORDAN MACKNICK ET AL., THE 5 CS OF AGRIVOLTAIC SUCCESS FACTORS IN THE UNITED STATES: LESSONS FROM THE INSPIRE RESEARCH STUDY 9 (2022) (highlighting the recommended factors of a successful agrivoltaic project).

148 Moore et al., *supra* note 58, at 5 (Local governments already have much to consider when it comes to solar energy development, one group "surmise[d] that rural local governments' interest in revenue might compete with community members' desires for land to remain in agricultural production."); Pascaris, *supra* note 74, at 8 ("To build upon this initial Legal Framework Analysis, future research needs to consider the potential justice concerns related to states preempting local zoning decisions to advance agrivoltaics. Finding a just solution that advances agrivoltaics without harming or disempowering agricultural communities will be critical. Given the limited technical capacity of local governments, future research could assess if state-level zoning enabling laws are more well-suited to guide agrivoltaic development in comparison to local land use policy. As agrivoltaic development becomes more commonplace, justice implications such as threats to existing agricultural interests or effects on rural electrification must be considered in full.").

149 Brunswick & Marzillier, *supra* note 82, at 177 ("… rural local governments could also use public education initiatives and green marketing to help increase such acceptance within their jurisdictions.").

150 *Id*. at 177-78 ("Local governments have long been integral in regulating and installing distributed renewable generation. This long history of locally-driven zoning makes local governments better situated to address community wants, needs, and priorities. Community-driven renewable energy initiatives have proven to be successful in other contexts, and increasing engagement with local

be especially important for counties with limited solar development experience.[151] Options include modifying zoning codes to openly allow for agrivoltaics[152] or establishing overlay districts as a way for local governments to support the development of agrivoltaics.[153] This approach provides local governments an "opportunity for strategic siting of agrivoltaics in their jurisdiction."[154]

In addition to community needs and taxation concerns, farmer/landowner considerations require similar forethought with respect to contracts and insurance products.[155] For example, a lease versus ownership approach to solar installation involves tradeoffs such as reduced flexibility in farming practices.[156] In the solar grazing context, shepherds may consider the costs and benefits of hosting a solar site on their farmland versus grazing sheep on a rented solar site. If selecting an off-site operation, liability insurance[157] and contract terms[158] with the solar site owner should be established in advance to minimize uncertainty for both parties.

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citizens and earning their support could similarly help to reduce local resistance to agrivoltaics projects.").

151 Salma Elmallah & Joseph Rand, *"After the leases are signed, it's a done deal": Exploring procedural injustices for utility-scale wind energy planning in the United States*, 89 ENERGY RSCH. & SOC. SCI. 1, 9 (2022) (Recommendations for wind development planning to ensure procedural justice at the local level included "[p]rovide additional information and legal resources about project permitting and negotiations for counties or townships without a history of power permitting" and "[c]reate participation opportunities and resources that address resident concerns in relation to livelihood, landscape, and property/ownership types.").

152 Brunswick & Marzillier, *supra* note 82, at 159 ("Local governments also have the power to incentivize agrivoltaics development by modifying their zoning codes to unambiguously allow for agrivoltaics, thereby reducing the soft costs of installation.").

153 *Id*. at 176 (Even local governments could help to encourage agrivoltaics' growth by creating agrivoltaics overlay zones and by removing zoning-related barriers to agrivoltaics development.").

154 Pascaris, *supra* note 74, at 7 ("Even local governments could help to encourage agrivoltaics' growth by creating agrivoltaics overlay zones and by removing zoning-related barriers to agrivoltaics development.").

155 *See generally Legal and Financial Considerations for Solar PV Systems on Farms*, UNIV. MASS. AMHERST (2024), https://ag.umass.edu/sites/ag.umass.edu/files/fact-sheets/pdf/fs_legal_and_financial_considerations_012524_0.pdf (highlighting the need for farmers/landowners to be concerned about the contractual provisions they agree to).

156 *Id*.

157 Guarino & Swanson, *supra* note 87, at 22 ("Another challenge prospective solar grazing farmers must consider is the cost of liability insurance. Because solar sites are such valuable assets, solar developers will generally want to carefully review potential contracts that bring a third party onto the site.").

158 MACKNICK ET AL., *supra* note 147, at 53 ("For grazing sites, roles and responsibilities related to water access, fence maintenance, and other factors should be clear from the beginning. Written agreements can help ensure that roles, responsibilities, and expectations are clear across all partners, which can help each partner fulfill their duties").

IV. AGRIVOLTAIC POLICY DEVELOPMENTS IN ILLINOIS: A MIDWESTERN CORN BELT PERSPECTIVE

The states discussed in section III, except for Colorado, are in the Northeastern region of the U.S. with sharply different agricultural land use profiles than Midwestern corn-belt states.[159] As the introduction notes, Illinois is one of the leading corn and soybean-producing states with a vast agricultural infrastructure.[160] Illinois also has tremendous energy demand, ranking as the 5th largest energy-consuming state in the nation.[161] With a storied coal mining history,[162] the state's rapid transition to an energy supply with increasing shares of renewable sources has been remarkable.[163] As discussed in more detail below, various state programs are in place to facilitate additional solar energy production, including agrivoltaics.[164]

On the research side of agrivoltaics, the University of Illinois leads the USDA-funded Sustainably Co-locating Agricultural and Photovoltaic Electricity Systems (SCAPES) project to explore the potential of agrivoltaics in the Midwest.[165] As the state simultaneously pushes for the expansion of solar energy and the protection of agricultural land, the SCAPES project goals reflect this conflicting policy environment.[166] Findings from the project related to the role of economics and policy may serve as a guide for Midwest-focused agrivoltaic regulatory considerations.

In addition to research, several state agencies and legislative initiatives promote the expansion of agrivoltaics.[167] The Illinois Power Agency's (IPA) Adjustable Block Program administers the development of community solar projects within the state.[168] Community solar is a means for individuals to fund solar installations somewhere within their utility's service area without having to install solar panels on their residence either due to cost, insufficient

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159 Brian Boyce, *5 major regional agricultural belts in the U.S.*, AG DAILY (Apr. 13, 2023), https://www.agdaily.com/insights/major-regional-agricultural-belts-in-us/.

160 *Illinois Farmland is the Envy of the World—We Had Better Protect It*, *supra* note 1; Stiers, *supra* note 1.

161 *Illinois State Energy Profile*, U.S. ENERGY INFO. ADMIN., https://www.eia.gov/state/print.php?sid=ILhttps://www.eia.gov/state/print.php?sid=IL (last visited Apr. 4, 2024).

162 Abigail Bobrow, *Built on Coal*, STORIED (Oct. 4, 2021), https://storied.illinois.edu/built-on-coal/.

163 Courtney Lindwall, *Illinois Shows Us What the Road to Clean Energy Should Look Like*, NAT'L RES. DEF. COUNCIL (Dec. 2, 2021), https://www.nrdc.org/stories/illinois-shows-us-what-road-clean-energy-should-look.

164 *See Research—Agrivoltaics Project*, UNIV. ILL. URBANA-CHAMPAIGN, https://scapes.illinois.edu/research/ (last visited Apr. 4, 2024); *see also Welcome to the Illinois Power Agency (IPA)*, ILL. POWER AGENCY, https://ipa.illinois.gov/ (last visited Apr. 4, 2024).

165 *Research—Agrivoltaics Project*, supra note 164.

166 *Id*.

167 *See Welcome to the Illinois Power Agency (IPA)*, supra note 164; *see also Community Solar in Illinois*, CITIZENS UTIL. BD., https://www.citizensutilityboard.org/community-solar-illinois/ (last visited Apr. 4, 2024).

168 *Welcome to the Illinois Power Agency (IPA)*, supra note 164.

space/sunlight, or because they live in a multi-family dwelling.[169] Proposed community solar projects are scored and placed on a priority waitlist for development as state funds become available.[170] If a proposed community solar project makes a commitment to utilizing agrivoltaics, the project will receive one point in the Built Environment category.[171] A project needs at least five points to be eligible for placement on the development waitlist.[172]

The IPA defines agrivoltaics as "[a] dual-use configuration where solar photovoltaic energy generation and agricultural production (crops, livestock, and livestock products as defined by 505 ILCS 5/3.02) are directly integrated and simultaneously producing within the footprint of the project. At least 50% of the project footprint must feature agricultural production at the time of project energization."[173] Beekeeping is not an option for qualifying as an agrivoltaic development under the program, but there is a separate opportunity for a pollinator-friendly habitat designation, which provides an additional point for project scoring.[174]

Community Solar applications seeking to qualify as an agrivoltaic operation must satisfy several criteria related to the preservation of agricultural productivity and soil health throughout the lifetime of the system, continued agricultural use throughout the growing season, a plan for decommissioning to restore the land, and annual reporting requirements on crop production or animal grazing outcomes. [175]

Although not a direct financial incentive for agrivoltaics like the SMART program or New Jersey's Dual-Use Solar Energy Pilot Program, the added point option for the adoption of agrivoltaics in community solar projects in Illinois is a significant private incentive for the development of dual-use solar. Moreover, the minimal design requirements in Illinois for qualifying as an agrivoltaic installation will allow for the continued research and development of dual-use projects to fit different forms of agriculture—from row crops to specialty products. The IPA additionally permits changes to agrivoltaic and pollinator-friendly plans during two stages of the

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169 *Community Solar in Illinois*, *supra* note 167. The 2016 Future Energy Jobs Act, Illinois Public Act 99-0906, as amended by the 2021 Climate and Equitable Jobs Act, Illinois Public Act 102-0662, created the community solar program in Illinois in which subscribers receive a credit on their electricity bill equal to the output of their share of energy created by the community solar installation. *Id.*

170 ILLINOIS SHINES, PROGRAM GUIDEBOOK (2023).

171 *Id*.

172 *Id*. at 151.

173 ILLINOIS SHINES, *supra* note 170, at 119 ("Sited on Conservation Opportunity Areas as defined by the Illinois Department of Natural Resources. []Subtract 2 points, unless the project received points for 1.d. *and* is sited in an Environmental Justice Community, an R3 area, and/or on a brownfield site, contaminated land, disturbed land, or rooftop or other structure[.]").

174 *Id*. at 167 ("[A] project may receive points for both agrivoltaics as well as pollinator friendly habitat[.]").

175 *Id*. ("[A] project may receive points for both agrivoltaics as well as pollinator friendly habitat[.]").

application process, which may allow for innovation as the technical and economic understanding of agrivoltaics expands.[176]

To adjust for the uncertainty and newness of agrivoltaics as a practice, the IPA established a 50% agricultural production project footprint, reserving the right to increase the footprint in the future.[177] Questions have arisen about applying the 50% footprint to grazing operations; the IPA has stated that grazing is not a constant practice and that it must comply with the submitted agrivoltaics plan.[178] The IPA additionally "decided at this time not to take any steps that would prohibit the conversion of agricultural crop land to

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176 *Id*. at 125 (Permitted Changes Between Part I and Part II Application i. Agrivoltaics 1. Changes to an agrivoltaics plan, such as a change in crop utilization or footprint size (above the required 50% outlined in Appendix A), are permitted. Any changes to an agrivoltaics plan that occur between the Part I and Part II application must be made in writing via an updated plan to the Program Administrator. ii. Pollinator Friendly Habitat 1. Changes to a Pollinator Friendly Habitat plan, such as a change in crop utilization, are permitted. Any changes to a Pollinator Friendly Habitat plan that occur between the Part I and Part II application must be made in writing via an updated plan to the Program Administrator).

177 *Rationale Document—Traditional Community Solar Scoring Approach*, ILL. POWER AGENCY, https://illinoisabp.com/wp-content/uploads/2022/10/TCS-Scoring-Rationale_October72022.pdf (last visited Apr. 4, 2024) ("The Agency received a significant number of comments regarding the project footprint threshold, with a majority of those commentors recommending that the IPA reduce the dual-use threshold from 75% to 50% of the project footprint. The Agency agrees that the novelty of the agrivoltaics industry, coupled with higher construction and maintenance costs for such projects, necessitate a lower footprint to encourage an uptake in participation…. The IPA may elect to increase the footprint in the future if it is determined that the 50% threshold is easily achievable and results in a significant uptake of agrivoltaics.").

178 ILLINOIS SHINES, *supra* note 170, at 166-67 ("How will the IPA require proof that 50% of the footprint of an array is being used for grazing? The Part I application must include a description demonstrating the planned agricultural use of the site, and explanation of the viability of that use, and an accompanying attestation of the intent to utilize agrivoltaics throughout the lifetime of the REC contract. Firm demonstration of active agricultural use (such as grazing) is required at Part II. Documentation at Part II should include proof that agrivoltaics plan was followed, or any updates made to the plan through development of the site for grazing. Agrivoltaics plans submitted in the Part I application should include documentation described in Appendix B of the October 2022 version of the Program Guidebook. Please review details on a permissible agrivoltaics plan, including grazing requirements, in Appendix B of the Program Guidebook. For the purposes of grazing, the Agency understands that round-the-clock grazing is not the norm and animals occasionally must be relocated in order to allow for grazed material to grow. A schedule/plan that outlines the times the herd will/will not be grazing should be outlined within the agrivoltaics plan. Additional aspects of grazing operations that could be included in the agrivoltaics plan are: information on pasture where grazing will occur on the parcel, information on the amount of land available for grazing, size and type of animals for the grazing herd, information on if one or multiple herds will be utilized, future plans for livestock utilization/sale, what resources are available to the herd (or herds) as is relates to soil condition, plant species the herd will graze on, water resources for herd, barn resources (if herd will remain on site), plans for the herd during winter months, additional diet supplementation for herd (if relevant), grazing system to be used (continuous, rotational, etc.). Please note these are suggestions and should not be used to limit what information should be included in an agrivoltaics plan focus on grazing should the Agency have missed any such part of a grazing operation that might be relevant.").

grazing in order to participate in this manner."[179] From an economic perspective, it is unclear whether farmers will have sufficient incentives to convert from traditional crop production to solar grazing, and therefore, prohibiting the conversation through regulation may not be necessary.

Inspections and reporting are two additional program elements. Projects qualifying for the community solar program will be subject to random inspections and annual reporting throughout the life of the project.[180] Annual reporting and performance align with agrivoltaic program requirements in other states and are important considerations as contracts for a state-funded community solar project can extend up to 20 years.[181]

Including agrivoltaics as part of the Traditional Community Solar Project Selection scoring system demonstrated Illinois' broad acceptance of dual-use solar as a practice. The Illinois Climate and Equitable Jobs Act (CEJA)[182] increased state funding for renewable energy development and stimulated new project proposals.[183] Questions remained, however, for farmers and landowners on whether dual-use solar would change property taxes or trigger zoning compliance and other permitting challenges. The lack of certainty concerning land use restrictions presented significant concerns for project developers, and some local communities considered moratoria or bans on additional renewable energy projects.[184]

In response to growing resistance in some parts of the state, the Illinois General Assembly passed HB 4412, which created statewide zoning and permitting standards for renewable energy projects.[185] The statute mandated

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179 *Rationale Document—Traditional Community Solar Scoring Approach*, *supra* note 178 ("It is unclear to the Agency whether such restrictions are necessary at this time and how such restrictions could be enforced.").

180 ILLINOIS SHINES, *supra* note 170, at 125 ("Two commitments that, if applicable, the Program Administrator will seek to monitor throughout the life of the REC Delivery Contract are scoring criterion Built Environment – Agrivoltaics (1.c) and Built Environment – Pollinator Friendly Habitat (1.d). As both of these criteria are commitments that are to be continued throughout the life of the REC contract, the Program Administrator will request updated reporting at the Annual Report each July and will also seek to ensure that projects that have made these commitments are in compliance via random project inspections.").

181 *Traditional Community Solar*, ILL. SHINES, https://illinoisshines.com/traditional-community-solar/#:~:text=The%20Traditional%20Community%20Solar%20category%20will%20generally%20comprise,front-loaded%20payment%20schedule%20previously%20used%20for%20community%20solar (last visited Apr. 4, 2024).

182 Public Act 102-0662 (Ill. 2021).

183 *See* David L. Rieser & Buck B. Endemann, *Renewables Rule! Illinois Law Sets Uniform Standards for Approval of Utility Wind and Solar Facilities*, K&L GATES (Mar. 13, 2023), https://www.klgates.com/Renewables-Rule-Illinois-Law-Sets-Uniform-Standards-for-Approval-of-Utility-Wind-and-Solar-Facilities-3-13-2023 ("CEJA required the state to be at 100% clean energy by 2050 with deadlines for 40% by 2030 and 50% by 2040. To meet those goals, CEJA more than doubled funding for the RPS and provided more than $40 million in funding for renewable initiatives.").

184 *See id*. ("Recently, some Downstate counties and municipalities began to consider moratoria or outright bans on renewable facilities in an attempt to preserve local land use decision making.").

185 H.B. 4412, 102d Gen. Assemb. 2d Sess. (Ill. 2023).

revision of existing county and municipality ordinances[186] and prohibited local governments from precluding solar and wind development projects so long as they were in compliance with the state standards and other relevant regulations.[187] Localities are also restricted in property value considerations as they "may not require a facility owner to pay into a neighboring property devaluation escrow account."[188]

Additionally, the Act bars counties from adopting "zoning regulations that disallow, permanently or temporarily, commercial wind energy facilities or commercial solar energy facilities from being developed or operated in any district zoned to allow agricultural or industrial uses."[189] In contrast to minimizing restrictions to solar development on agricultural land,[190] the Act further requires "a facility owner … [to] enter into an agricultural impact mitigation agreement with the Department of Agriculture,"[191] likely to protect farmland. In 2023, the Act was updated to require farmland drainage plans from solar energy facilities to ensure impacted drainage systems are considered and restored throughout the construction process.[192] The solar facility owner will be required to "repair or pay for the repair of all damage to the subsurface drainage system" from the construction of the solar energy

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186 55 ILL. COMP. STAT. 5/5-12020(d) (2023); *see also* Rieser & Endemann, *supra* note 184 ("The requirements set forth in this subsection (e) may be waived subject to the written consent of the owner of each affected nonparticipating property…. Counties may allow test wind towers or test solar energy systems to be sited without formal approval by the county board.").

187 55 ILL. COMP. STAT. 5/5-12020(g) (2023); *see also* Rieser & Endemann, *supra* note 184 ("The requirements set forth in this subsection (e) may be waived subject to the written consent of the owner of each affected nonparticipating property…. Counties may allow test wind towers or test solar energy systems to be sited without formal approval by the county board.").

188 55 ILL. COMP. STAT. 5/5-12020(k) (2023); *see also* Rieser & Endemann, *supra* note 184 ("A county may not condition approval of a commercial wind energy facility or commercial solar energy facility on a property value guarantee and may not require a facility owner to pay into a neighboring property devaluation escrow account.").

189 55 ILL. COMP. STAT. 5/5-12020(h) (2023); *see also* Rieser & Endemann, *supra* note 184 ("(k) A county may not condition approval of a commercial wind energy facility or commercial solar energy facility on a property value guarantee and may not require a facility owner to pay into a neighboring property devaluation escrow account.").

190 Rieser & Endemann, *supra* note 184 ("… a county shall not require standards for construction, decommissioning, or deconstruction of a commercial wind energy facility or commercial solar energy facility or related financial assurances that are more restrictive than those included in the Department of Agriculture's standard wind farm agricultural impact mitigation agreement, template 81818, or standard solar agricultural impact mitigation agreement, version 8.19.19").

191 55 ILL. COMP. STAT. 5/5-12020(c) (2023); *see also* Rieser & Endemann, *supra* note 184 ("… a county shall not require standards for construction, decommissioning, or deconstruction of a commercial wind energy facility or commercial solar energy facility or related financial assurances that are more restrictive than those included in the Department of Agriculture's standard wind farm agricultural impact mitigation agreement, template 81818, or standard solar agricultural impact mitigation agreement, version 8.19.19").

192 55 ILL. COMP. STAT. 5/5-12020(j-5) (2023); *see also* S.B. 1699, 103rd Ill. Gen. Assemb., Reg. Sess. (Ill. 2023) ("… commercial solar energy facility shall file a farmland drainage plan with the county and impacted drainage districts outlining how surface and subsurface drainage of farmland will be restored during and following construction or deconstruction of the facility.").

facility as in the agriculture impact mitigation agreement requirements and "compensate landowners for crop losses or other agricultural damages."[193] Additionally, a county may require vegetation management plans for solar energy facilities.[194]

Not surprisingly, Public Act 102-1123 has resulted in community backlash regarding renewable energy siting.[195] For example, the Piatt County Board recently approved the construction of a wind farm through a special-use permit in October 2023 with mixed feelings from residents.[196] This decision came after a referendum issued in April 2023 resulted in 1,498 out of 2,121 individuals voting against the county board permitting wind development in the county.[197] Some of the board members were concerned about state overreach into local government affairs.[198] One board member referenced the nuance of the project as it was the first application to arrive at the approval stage after the new law, mentioning concerns of a lawsuit if the wind farm was not approved: "Piatt County can either have a wind farm constructed for free or Piatt County can pay half a million dollars for the wind farm."[199] Another board member thought it "inappropriate that the board was told by lawyers that they could not take into account what their constituents wanted."[200] Not all comments were negative; there were also discussions

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193 55 ILL. COMP. STAT. 5/5-12020(s-5) (2023); *see also* S.B. 1699, 103rd Ill. Gen. Assemb., Reg. Sess. (Ill. 2023) ("The facility owner shall also compensate landowners for crop losses or other agricultural damages resulting from damage to the drainage system caused by the construction of the commercial wind energy facility or the commercial solar energy facility. The commercial wind energy facility owner or commercial solar energy facility owner shall repair or pay for the repair of all damage to the subsurface drainage system caused by the construction of the commercial wind energy facility or the commercial solar energy facility in accordance with the agriculture impact mitigation agreement requirements for repair of drainage. The commercial wind energy facility owner or commercial solar energy facility owner shall repair or pay for the repair and restoration of surface drainage caused by the construction or deconstruction of the commercial wind energy facility or the commercial solar energy facility as soon as reasonably practicable.").

194 55 ILL. COMP. STAT. 5/5-12020(r) (2023) ("… a county may (1) require a commercial solar energy facility owner to plant, establish, and maintain for the life of the facility vegetative ground cover, consistent with the goals of the Pollinator-Friendly Solar Site Act and (2) require the submittal of a vegetation management plan that is in compliance with the agricultural impact mitigation agreement in the application to construct and operate a commercial solar energy facility in the county if the vegetative ground cover and vegetation management plan comply with the requirements of the underlying agreement with the landowner or landowners where the facility will be constructed").

195 EISENSON, *supra* note 13, at 33-34 (showing how the law overturned two county ordinances to date); *see also County Approves Wind Farm*, PLATT CNTY. J. REPUBLICAN (Oct. 19, 2023), https://www.journal-republican.com/news/county-approves-wind-farm/article_711d05a6-6e9e-11ee-9a75- a7b72bea20a6.html?utm_medium=social&utm_source=twitter&utm_campaign=user-share.

196 *County Approves Wind Farm*, *supra* note 197.

197 *Id*.

198 *Id*.

199 *Id*.

200 *Id*.

about the project's benefits, such as the money the county would receive that could better support public services.[201]

Focusing on agrivoltaics, Public Act 102-1123 could have many positive implications by eliminating potential restrictions on the conversion of farmland. This may ease agricultural producers' ability to host dual-use solar without undue restrictions at the local level. However, as seen in Piatt County, possible community unrest indicates the importance of involving local stakeholders in agrivoltaic project plans.[202] Public perception of agrivoltaics will be key in further establishing projects in Illinois and nationally.[203]

Four other Illinois statutes can potentially impact agrivoltaic project development for land use and environmental concerns. The Renewable Energy Facilities Agricultural Mitigation Act was created to protect landowners and agricultural land "during the construction and deconstruction of commercial renewable energy facilities."[204] Focusing more on agriculture, the Illinois Conservation Enhancement Act encourages "marginal agricultural land" to be taken out of production when the land is highly erodible or affects water resources.[205] The land is instead converted to perennial vegetation through conservation easements.[206] Along with these conservation goals, Illinois has instated the Sustainable Agriculture Act, which provides "funding of the developmental research program that serves production agriculture in Illinois" to account for growing competition in the market and a need for protecting the environment.[207] In addition, the Agricultural Areas Conservation and Protection Act allows land to be classified as an Agricultural Area for ten years to protect the land from other uses and restrictions from local governments.[208] The Act defines what

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201 *Id*.

202 *See generally County Approves Wind Farm*, *supra* note 197 (explaining the importance of protecting the welfare of the community's interests at stake).

203 MACKNICK ET AL., *supra* note 147, at 55 ("Early and extensive communication, discussions, and tours with the surrounding community to convey the goals and potential impacts of an agrivoltaic project can improve the likelihood of project success and support…. The role of the public in solar development and agrivoltaic research cannot be understated. As public opposition to new forms of energy and other development increases, the consideration of a 'social license to operate' rises in importance. Smith and Richards define the social license to operate as an 'ongoing social contract with society that allows a project to both start and continue operating in a community. Social license to operate derives from communities' perception of a company and its operations, comprised of a company's ongoing acceptance and approval from stakeholders (Smith and Richards 2015). Without obtaining or maintaining this social license, there can be continued conflict, controversies, or pushback in many communities."); Alexis S. Pascaris et al., *Do agrivoltaics improve public support for solar? A survey on perceptions, preferences, and priorities*, 2 GREEN TECH., RESILIENCE, & SUSTAINABILITY 1, 6 (Oct. 23, 2022).

204 505 ILL. COMP. STAT. 147/5 (2015).

205 *Id*. at 35/1-2 (2016).

206 *Id*.

207 *Id*. at 135/2 (2001).

208 *Id*. at 5/5 (2022).

constitutes agriculture production to remain as an Agricultural Area and cites the loss of farmland and "urban pressure" as concerns. [209]

Looking beyond the provisions of Public Act 102-1123 that specifically address solar development and farmland, Illinois has various agricultural land use policies designed to protect and promote farmland that also implicates agrivoltaics. For example, the Renewable Energy Facilities Agricultural Impact Mitigation Act was not created for dual-use development but could be interpreted as indirectly supporting solar development on farmland. In acknowledging potential impacts in the construction and deconstruction of renewable energy facilities, the statute implies an understanding that farmland may be converted to energy production and, at some point in the future, rededicated to full agricultural production.[210]

The Illinois Conservation Enhancement Act (ICEA)[211] encourages the retirement of marginal or highly erodible land from agricultural production in favor of perennial vegetation to conserve, protect, and enhance water and land resources.[212] Combining perennial vegetation with solar development in areas encompassed by the ICEA may provide landowners with a secondary income stream from solar energy while preserving more productive agricultural land.[213] The perennial vegetation could also support a pollinator-friendly designation under the Pollinator Friendly Solar Site Act[214] or a solar grazing operation in accordance with the Illinois Solar Site Pollinator Establishment and Management Guidelines issued by the Illinois Department of Natural Resources.[215] More scientific research is needed to analyze the possibility and potential considerations for agrivoltaics on marginal or highly erodible land.[216]

Commentators have noted that the Sustainable Agriculture Act[217] could accelerate agrivoltaic development and research if the experimental practice can be deemed an agricultural production technique, thereby making it

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209 *Id*. at 5/2 (2022).

210 505 ILL. COMP. STAT. 147/10 (2015).

211 *Id*. at 35/1-2 (2019).

212 *Id*.

213 Hannah Jacobs Wiseman et al., *Farming Solar on the Margins*, 103 B.U.L. REV. 525, 526 (2022) ("This Article reframes the key obstacles to climate policy and argues for a solution to the current climate policy impasse. We propose that the next Farm Bill should use the billions of dollars in subsidies that keep marginal farmland out of production to support solar energy production on these lands.").

214 525 ILL. COMP. STAT. 55/1 (2019).

215 *Solar Site Pollinator Establishment and Management Guidelines*, ILL. DEP'T NAT. RESOURCES (Apr. 6, 2023), https://dnr.illinois.gov/content/dam/soi/en/web/dnr/conservation/pollinatorscorecard/documents/SolarSitePollinatorEstablishmentManagementGuidelines.7.13.23.pdf.

216 Matteo Cavallito, *Solar farms may encourage soil erosion in U.S.*, RESOIL FOUNDATION (Sept. 7, 2023), https://resoilfoundation.org/en/environment/us-solar-farms-erosion/ (noting that researchers at Virginia Tech will analyze soil erosion risks associated with solar energy installations).

217 505 ILL. COMP. STAT. 135/1 et. seq. (2001).

eligible for state funding.[218] Specifically, agrivoltaics may fall under the Act's mandate to support research that determines "the optimum methods for production agriculture which result in the best return for the farm and best preserves the environment and the farmland of Illinois."[219] Dual-use solar could provide additional income to farmers, and some results suggest that agrivoltaic systems can reduce irrigation needs—a research topic for the aforementioned SCAPES project.[220]

On the other hand, the Agricultural Areas Conservation and Protection Act[221] may restrict the ability of landowners with enrolled property to participate in dual-use practices due to the risk of falling out of the Act's restrictive definition of agricultural production and crops, livestock, and aquatic products.[222] Before agrivoltaics become prevalent, the state should consider enacting a provision permitting dual-use solar. Continuing agricultural production underneath the solar panels with dual-use systems would serve the underlying purpose of the statute, to prevent full-scale conversion to urban sprawl.

Aside from general land use and agricultural production statutes, it is important to consider farmland taxation. According to the Illinois Department of Revenue, "[f]armland is assessed based on its ability to produce income (its agricultural economic value)."[223] To achieve farm designation under the statute, the property must be "used solely for the growing and harvesting of crops; for the feeding . . . of livestock," and other traditional agricultural activities.[224] It is unclear whether agrivoltaic development will prohibit agricultural land from qualifying for farmland assessment. Solar panel construction could fall under the provision that "[i]mprovements, other than farm dwellings, shall be assessed as a part of the farm and in addition to the farm dwellings when such buildings contribute in whole or in part to the operation of the farm."[225] The uncertain treatment of agrivoltaics in the property tax context introduces yet another layer of complexity to solar energy expansion. To the extent Illinois or other states seek to develop an agrivoltaics incentive program, clarifying its status as farmland for tax assessment purposes should be a priority.

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218 JESSICA GUARINO & TYLER SWANSON, INTRODUCTION TO AGRIVOLTAICS IN ILLINOIS: POLICY AND REGULATORY GUIDE 30 (2023).

219 505 ILL. COMP. STAT. 135/2 (2001).

220 *Research: Exploring a Next-Level Ecosystem*, U. ILL. URBANA-CHAMPAIGN, https://scapes.illinois.edu/research/ (last visited Apr. 5, 2024).

221 505 ILL. COMP. STAT. 5/1 (2024).

222 GUARINO & SWANSON, *supra* note 219, at 27.

223 *How is Farmland Assessed for Property Tax?*, ILL. REVENUE, https://tax.illinois.gov/questionsandanswers/answer.319.html (last visited Apr. 5, 2024).

224 35 ILL. COMP. STAT. 200/1-60 (2024).

225 *Id*.

V. CONCLUDING THOUGHTS AND FUTURE OUTLOOK

Illinois, like many states, faces a wide range of policy priorities.[226] As priorities evolve, legislative responses inevitably result in some level of conflicting incentives and regulatory signals.[227] Land use change and entitled perspectives on private property rights add to the complexity of aligning law, implementing regulations, and public acceptance. Conceptually, a policy of protecting its highly productive agricultural land from the encroachment of suburban sprawl aligns with environmental and agricultural interests. However, when a second policy priority—renewable energy—is introduced, the uneasy environmental-agricultural alliance concerning land use is stressed. Agrivoltaics may provide a narrow path forward by rebuilding and strengthening an agro-environmental collation for land use.

A proposed Agricultural Drought and Climate Resilience Office that gives "preference to grant applications that propose using grant money to conduct a new or ongoing demonstration or research project as a means to study the potential, benefits, and tradeoffs of agrivoltaics in the State" is one potential step forward.[228] As a leader in the Midwest region for both agricultural and renewable energy production, Illinois is well positioned for future research to determine from an agronomic perspective what agrivoltaic systems work best for different soil classifications and adaptability for different communities,[229] as well as a policy innovation, to support industry adoption of agrivoltaics.[230] Potential examples include a dedicated RPS

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226 *See generally* Brett Chase & Dan Gearino, *Illinois' Signature Climate Law Has Been Slow to Fulfill Promises for Clean Energy and Jobs*, INSIDE CLIMATE NEWS (Sep. 22, 2023), https://insideclimatenews.org/news/22092023/pritzkers-climate-laaw-behind-on-jobs-renewables/ (showing the issues Illinois faces with implementing clean energy); *see generally* EISENSON, *supra* note 13, at 1.

227 *Compare* Brunswick & Marzillier, *supra* note 82, at 166, *with* EISENSON, *supra* note 13, at 1.

228 H.B. 4155, 103rd Gen. Assemb., Reg. Sess. (Ill. 2023 & 2024).

229 Brunswick & Marzillier, *supra* note 82, at 164 ("One other potentially valuable product of expanded agrivoltaics research is a set of clearer and more scientifically-supported definitions and standards for policymakers to integrate into agrivoltaics-focused government incentive programs…. Ideally, any such definition would also preserve some flexibility for states and localities to make adjustments based on localized variations…. Beyond a basic general definition, federal policymakers armed with greater scientific knowledge about agrivoltaics could ultimately also craft more specific standards and definitions encompassing the many relevant factors impacting the effectiveness of agrivoltaics projects."); *see also* Pascaris et al., *supra* note 67, at 9 ("Industry actors stressed how the "liability of newness" of agrivoltaics is the key barrier to adoption, therefore accelerated R&D is needed to mitigate uncertainty and remove unknowns for industry actors and farmers alike. Programs and policies that increase funding for agrivoltaic research and demonstration could stimulate learning processes and adoption; government funding for more open-source research on crop productivity across geographic regions, optimal design specifications, implications of panel transparency, microclimatic impacts on photovoltaic electricity production, modeling and data validation, soil health, and more, is necessary at this phase in the development of agrivoltaics.").

230 An incentive will be imperative for the development of agrivoltaics projects in the state. Pascaris et al., *supra* note 167, at 6 ("While environmental, social, and political factors do impact project

carve-out for agrivoltaics,[231] an agrivoltaic feed-in-tariff program modeled on Massachusetts's SMART initiative,[232] and a voluntary labeling/green marketing program.[233] An interactive and integrative "task force" for agrivoltaic development could also aid interagency jurisdictional overlaps and coordination problems at the state level, as well as serve as a clearing house to promote localized extension efforts.[234] The development of agrivoltaics may be in the early stages, but this does not mean that governments should not take action to prepare for its arrival, especially in states such as Illinois, that are driving cutting-edge agrivoltaic research at the university level.

At its core, agrivoltaics is about keeping agricultural land in production and developing a greener energy infrastructure.[235] As acceptance of agrivoltaics grows, it will also be imperative to involve communities at the local level to ensure stakeholder involvement and public acceptance. Fortunately, due to its abundance of natural resources consisting of productive soil, sufficient rain, and ample sunlight, Illinois is uniquely

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success and influence agrivoltaic adoption, economic factors are the strongest drivers.... The presence of market mechanisms was identified to have a positive impact on the adoption of agrivoltaics; whereas the absence of market mechanisms was discussed as a critical need that would address the core barrier of adoption: perceived high costs."). In one article, authors "highlight policy as an especially vital driver because it can directly address the challenges to industry adoption identified – policy can help shape markets (through price improvements), and it can stimulate innovation (through learning processes that improve performance)." *Id.*

231 Brunswick & Marzillier, *supra* note 82, at 169 ("State policymakers could promote agrivoltaics development within their jurisdictions by introducing special RPS carve-outs or multipliers for agrivoltaics-generated power.").

232 Pascaris et al., *supra* note 67, at 6 ("The implementation of a feed-in tariff could most effectively reconcile any additional capital costs, which not only enhances the perceived economic feasibility of grivoltaics for solar companies but could also translate to a higher lease payment to farmers.").

233 Brunswick & Marzillier, *supra* note 82, at 179 (Municipal governments can also cultivate community interest in new technologies such as agrivoltaics through green marketing programs designed to raise awareness of and demand for agrivoltaics projects.... Voluntary labeling programs for food products and electricity produced within agrivoltaics projects could similarly help to increase demand for these projects. Labeling produce as agrivoltaics-grown or allowing businesses to advertise that they use agrivoltaics-generated electricity would raise public awareness and demand, creating an incentive for grocery stores and utility companies to supply their customers with these products.").

234 Pascaris et al., *supra* note 67, at 6 ("Regional working groups and task forces appointed to facilitate information exchange, curate best practices, define standards, and provide directionality for regulators could alleviate current interagency struggles to manage agrivoltaic permitting and program administration.... Further, our research demonstrates a need for state funding to establish agrivoltaic task forces and interagency staff positions, and boost University Extension technical assistance capacity.").

235 *See generally* Michele Boyd, *The Potential of Agrivoltaics for the U.S. Solar Industry, Farmers, and Communities*, SOLAR ENERGY TECH. OFF. (Apr. 17, 2023), https://www.energy.gov/eere/solar/articles/potential-agrivoltaics-us-solar-industry-farmers-and-communities (explaining the need for agrivoltaics in order to maintain a better energy infrastructure).

positioned to lead the deployment of this innovative approach to joint agricultural and energy production.[236]

[236] *Illinois is Home to Abundant Natural Resources*, THE CAUCUS BLOG, https://www.thecaucusblog.com/2023/08/illinois-is-home-to-abundant-natural.html (last visited Apr. 21, 2024).

2022 SURVEY OF ILLINOIS LAW: SELECTED ELEMENTARY AND SECONDARY EDUCATION LEGISLATIVE CHANGES

Phil Milsk[1]

I. INTRODUCTION

This survey outlines important changes in Illinois Education Law implemented in 2022. It covers significant legislation impacting students, school staff, local school boards, administrators, and the Illinois State Board of Education.

II. SELECTED LEGISLATIVE CHANGES

A. Legislation Addressing Health and Safety

1. Public Act 102-0791: School Safety Threat Assessment Procedures

Public Act 102-0791 was enacted to address legislators' concerns that specific requirements of the Illinois School Safety Drill Act were not being consistently implemented in Illinois.[2] The legislation specifically addresses the Act's provisions governing the establishment of threat assessment teams and implementation of threat assessment procedures.[3] Public Act 102-0791 amended section 45 of the Act to require each local school board to file its threat assessment procedure with its regional office of education and local law enforcement agency.[4] It further requires each board to file a list of assessment team members in which the school district participates.[5]

For example, Chicago Public Schools must file its procedures and list of team members with the Illinois State Board of Education.[6] This must be filed before the start of each school year.[7] Public Act 102-0791 also made a corresponding change to the Illinois Freedom of Information Act that

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2 105 ILL. COMP. STAT. 128/10 (2005).

3 *Id*. § 128/45 (2023).

4 *Id*.

5 *Id.* § 128/45(b).

6 *See id.*

7 *Id*.

exempts a threat assessment procedure and any information contained within from disclosure.[8] Public Act 102-0791 went into effect on May 13, 2022.[9]

2. Public Act 102-0971: Safety Education-Safe Gun Storage

Section 27-17 of the Illinois School Code allows, but does not require, public school boards and those overseeing educational institutions that receive full or partial support from the State to provide safety education in all grades.[10] Public Act 102-0971 amended the Code to add safe gun storage to the instructions on safety within the home.[11] This amendment went into effect on January 1, 2023.[12]

3. Public Act 102-1095: Bans Use of Latex Gloves in Food Service Establishments

Public Act 102-1095 created the Latex Glove Ban Act to address latex allergies in food service establishments.[13] The Act banned the use of latex by employees of food service establishments, including schools, while preparing or handling food.[14] The Act does provide an exception for instances where latex gloves must be used due to a crisis interrupting a food service establishment's ability to source non-latex gloves.[15] If such circumstances exist, the establishment must prominently place a sign at the point of order or purchase providing notification of the temporary use of latex.[16] The effective date of Public Act 102-1095 was January 1, 2023.[17]

4. Public Act 102-1037: Wellness Checks in Schools Program Act

Public Act 102-1037, as part of the 2022 omnibus Medicaid legislation, created the Wellness Checks in Schools Program Act.[18] This Act allows districts to "implement wellness checks to identify students in grades 7 through 12 who are at risk of mental health conditions, including depression and other mental health issues."[19] The Illinois Department of Healthcare and Family Services (DHFS) is required to collaborate with "school districts that

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8 5 ILL. COMP. STAT. 140/7(1)(ll) (2024).
9 *See* id,; 105 ILL. COMP. STAT. 128/45 (2023).
10 105 ILL. COMP. STAT. 5/27-17 (2023).
11 *Id*.
12 *Id*.
13 410 ILL. COMP. STAT. 180/1 (2023).
14 *Id*. § 180/10.
15 *Id*.
16 *Id*.
17 *Id*.
18 105 ILL. COMP. STAT. 155/1-1 (2022).
19 *Id*. § 155/1-10(a).

have a high percentage of students enrolled in Medicaid and a high number of referrals to the State's Crisis and Referral Entry Services (CARES) hotline."[20] Further, DHFS was charged with establishing the Wellness Checks in Schools Collaborative (the "Collaborative") to identify research-based tools and the staff who will use them to screen students.[21] The Collaborative was also tasked with assisting participating school districts in establishing a referral process for immediate student intervention as required.[22] The establishment of the Collaborative is subject to the appropriation of funds by the General Assembly.[23] The effective date of Public Act 102-1037 was June 2, 2022.[24]

5. Public Act 102-0761: Plant-Based School Lunch Option

Public Act 102-0761 amended the School Breakfast and Lunch Program Act to require school districts to provide a plant-based school lunch option to students who submit a request.[25] This plant-based option must comply with federal nutritional mandates.[26] Public Act 102-0761 was enacted on August 1, 2023.[27]

B. Legislation Affecting Students in General

1. Public Act 102-0727: Unpaid fees-Withholding diploma, grades or transcripts

Public Act 102-0727 amended Section 10-20.9a of the Illinois School Code to prevent public high schools from "withhold[ing] a student's grades, transcripts, or diplomas because of an unpaid balance on the student's school account."[28] Further, each school district must catalog and report the remaining balance of students' school accounts to the Illinois State Board of Education.[29] However, the cataloging and reporting requirements will be inoperative three years after the Act's effective date, May 6, 2022.[30]

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20 *Id*.
21 *Id*.
22 *Id*.
23 *Id*.
24 105 ILL. COMP. STAT. 155/1-10 (2022).
25 *Id*. § 125/5.5 (2023).
26 *Id*.
27 *Id*.
28 *Id*. § 5/10-20.9a (2022).
29 *Id*.
30 *Id.*

2. Public Act 102-0805: School Fee Waivers-Homeless Students

Public Act 102-0805 amended sections 1-3, 10-20.13, 27A-5, 28-19.2, and 34-21.6 of the Illinois School Code.[31] Section 1-3 was amended to define "school fees" or "fees" as:

> any monetary charge collected by a public school, public school district, or charter school from a student or the parents or guardian of a student as a prerequisite for the student's participation in any curricular or extracurricular program of the school or school district as defined under paragraphs (1) and (2) of subsection (a) of Section 1.245 of Title 23 of the Illinois Administrative Code.[32]

In section 10-20.13, the Act added fines for the loss of school property to the costs that must be waived for students eligible for waivers, makes homeless children and youth as defined under the federal McKinney-Vento Homeless Assistance Act eligible for fee waivers, and requires school boards to provide a notice of waiver availability to parents and guardians with every bill issued for fees and fines.[33] The change to section 27A-5 makes the bill's provisions applicable to charter schools.[34] The change to section 34-21.6 makes the bill applicable to the Chicago Public Schools.[35] The effective date of Public Act 102-0805 was January 1, 2023.[36]

3. Public Act 102-1032: School Fee Waivers-Children of Veterans and Active-Duty Military Personnel

Public Act 102-1032 amended section 10-20.13 of the Illinois School Code to make "students whose parents are veterans or active-duty military personnel with income at or below 200% of the federal poverty line" eligible for school fee waivers.[37] The Act also amended section 34-21.6 of the School Code to make the provisions of the Act applicable to the Chicago Public Schools[38] and the Act took effect on May 27, 2022.[39]

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31 *Id*. at 5/1-3, 5/10-20.13, 5/27A-5, 5/28-19.2, 5/34-21.6.
32 *Id*. at 5/1-3 (2023).
33 *Id*. at 5/10-20.13.
34 *Id*. at 5/27A-5(g) (2024).
35 *Id*. at 5/34-21.6 (2023).
36 Act of May 13, 2024, Pub. Act No. 102-805, 2022 Ill. Legis. Serv. 102-805 (West).
37 105 ILL. COMP. STAT. 5/10-20.13(b)(1) (2023).
38 *Id*. § 5/34-21.6.
39 *Id*. § 5/34.

4. Public Act 102-1077: Dual Credit Courses

Public Act 102-1077 made various statutory changes concerning dual credit courses.[40] It amended the Dual Credit Quality Act to require partnership agreements entered into, amended, renewed, or extended after the effective date of Public Act 102-1077 between high schools and community colleges to "allow a high school student who does not otherwise meet the community college district's academic eligibility requirements to enroll in a dual credit course taught at the high school" for high school credit only.[41] It allows instructors, in coordination with their higher education learning partner, to differentiate instruction by credit section.[42] It further requires high schools to "establish procedures, prior to the first day of class," whereby "students enrolled in a mixed enrollment dual credit course that includes students who have and have not met the criteria for dual credit coursework," to notify the enrolled students whether they are or are not "eligible to earn college credit for the course."[43] The legislation also added a "requirement that the school district and community college annually assess disaggregated data pertaining to dual credit course enrollments, completions, and subsequent postsecondary enrollment and performance to the extent feasible."[44] The assessment shall include, if applicable, student characteristics by credit section including gender, race and ethnicity, and low-income status.[45] This legislation also includes provisions governing the standards for dual credit course instructors and took effect on January 1, 2023.[46]

5. Public Act 102-0981: Student Absence for Civic Event

Public Act 102-0981 amended Article 26 of the Illinois School Code concerning compulsory attendance and truancy.[47] It amended section 26-1 to allow any child from a public middle school or high school to be permitted one school day of excused absence per school year for the child to engage in a civic event, subject to guidelines established by the Illinois State Board of Education.[48] A "school board may require … the student [to] provide reasonable advance notice of the intended absence" and "require … the student [to] provide documentation of participation in the civic event" to an

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40 110 ILL. COMP. STAT. 27/16 (2023).
41 *Id*. § 27/16.5(a) (2023).
42 *Id*.
43 *Id*. § 27/16.5(c).
44 *Id*. § 27/16(11).
45 *Id*.
46 *Id*. § 27/20.
47 105 ILL. COMP. STAT. 5/26-2a (2023).
48 *Id*. § 5/26-1(8).

appropriate school administrator.[49] The Act also amended section 26-2a, which defines "truant," to make attendance at a civic event a valid cause for absence and to define "civic event" as "an event sponsored by a non-profit organization or governmental entity that is open to the public" that includes an artistic or cultural performance or educational gathering that supports the mission of the sponsoring non-profit organization.[50] The legislation authorizes the State Board of Education to adopt rules to further define "civic event."[51] Public Act 102-0981 went into effect on January 1, 2023.[52]

C. Legislation Affecting Students with Disabilities

1. Public Act 102-1072: Interpreters at Meetings, Hearings and Mediations

Public Act 102-1072 went into effect on June 10, 2022, which changed sections 14-6.01, 14-8.02, and 14-8.02(a) of the Illinois School Code regarding the entitlement to an interpreter for "[a]ny parent who is deaf or who does not typically communicate using spoken English."[53] The amendment to section 14-6.01 added a requirement that the notification to families about the availability of services and accommodations under Section 504 of the federal Rehabilitation Act of 1973 must include a statement "that any parent who is deaf or does not typically communicate using spoken English and who participates in a section 504 meeting" with a school representative "shall be entitled to" interpreter services.[54] Section 14-8.02 subsection (g) was amended to clarify that the entitlement to interpreter services applies to a parent who attends a multidisciplinary conference convened for their child.[55] Section 14-8.02(a), which governs impartial due process hearings and mediations, was amended by changing subsection (k)(l) to require that, in addition to providing an interpreter for a parent at all stages of a due process hearing, an interpreter must also be provided by the school district for a parent at a special education mediation.[56] Further, an interpreter for a deaf parent at a hearing or mediation must be licensed under the Interpreter for the Deaf Licensure Act of 2007.[57] Note that since the enactment of Public Act 102-1072, the Illinois State Board of Education has

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49 *Id*.
50 *Id*. § 5/26-2a.
51 *Id*.
52 *See id.*
53 *Student Services*, HOMEWOOD SCH. DIST. 153, https://www.hsd153.org/apps/pages/index.jsp?uREC_ID=1135443&type=d&pREC_ID=1402549 (last visited May 13, 2024); 105 ILL. COMP. STAT. 5/14-6.01, 5/14-8.02, 5/14-8.02a (2022).
54 *Id*. § 5/14-6.01 (2023).
55 *Id*. § 5/14-8.02 (g) (2024).
56 *Id*. § 5/14-8.02a (k)(1) (2022).
57 *Id*.

revised its administrative rules governing the provision of interpreter services.[58]

2. Public Act 102-0703: Alternative Placement for a Student with an Individualized Education Program (IEP)

Public Act 102-0703 changed section 14-7.02 of the Illinois School Code, which governs the educational placement of a student when the resident school district's IEP team determines that the district cannot meet the student's needs.[59] This legislation added an important emergency student-specific approval process through the State Board of Education when the student's IEP team recommends placement in a nonpublic special education facility providing educational services that the State Board of Education has not approved.[60] Under the emergency approval procedure, the "State Board of Education shall promptly, within 10 days after the request, approve a request for emergency and student-specific approval" for placement if certain conditions have been met, including:

> (1) the facility demonstrates appropriate licensure of teachers for the student population;
> (2) the facility demonstrates age-appropriate curriculum;
> (3) the facility provides enrollment and attendance data;
> (4) the facility demonstrates the ability to implement the student's IEP; and
> (5) the resident school district demonstrates that it made good faith efforts to place the student in an approved facility, but no approved facility has accepted the student or has availability for immediate residential placement of the student.[61]

The State Board of Education may not unreasonably withhold emergency approval once the resident school district submits satisfactory proof.[62] The new Act also provides that if an impartial due process hearing officer orders the placement of a student with a disability in a facility that has not been approved by the State Board of Education, the "facility shall be deemed approved for placement and school district payments and State reimbursements shall be made accordingly."[63] The emergency placement

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58 ILL. ADMIN. CODE tit. 23, § 226.530 (2024).
59 105 ILL. COMP. STAT. 5/14-7.02 (2024).
60 *Id*.
61 *Id*. § 5/14-7.02(e).
62 *Id*.
63 *Id*. § 5/14-7.02(f).

may be continued so long as the student's IEP team annually determines that it is "appropriate to meet the student's needs."[64] At least every three years following the placement, the IEP team will review appropriate placements that are approved by the State Board of Education to determine if there is a placement that can meet the student's needs, will accept the student, and has the availability for placement of the student.[65] Public Act 102-0703 took effect on April 22, 2022.[66] The State Board of Education has adopted administrative rules governing placements under Public Act 102-0703.[67]

D. Legislation Impacting School Personnel

1. Public Act 102-0861: Mandated Reporters of Child Abuse and Neglect

Public Act 102-0861 amended the Abused and Neglected Child Reporting Act by expanding the list of mandated reporters under the Act to include occupational therapists and assistants, as well as physical therapists and assistants.[68] The Public Act took effect on January 1, 2023.[69]

2. Public Act 102-0710: Retired Teachers Returning to Teaching Position

To address a shortage of teachers, Public Act 102-0710 reduces the fee paid to the State Board of Education to reinstate a lapsed educator license from $500 to $50 and waives the registration fee for a retired teacher who returns to a position requiring a professional educator license.[70] The Public Act took effect on April 27, 2022.[71]

3. Public Act 102-0711: Substitute Teaching Licensure

Another piece of legislation addressing teacher shortage is Public Act 102-0711, which amended the Educator Licensure Article of the School Code to change the requirements for a Substitute Teaching License.[72] The Act removes the requirement that an applicant "hold a bachelor's degree or higher from a regionally accredited institution of higher education."[73]

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64 *Id*. § 5/14-7.02(g).
65 105 ILL. COMP. STAT. 5/14-7.02(g) (2024).
66 *Id*. § 5/14-7.02.
67 ILL. ADMIN. CODE tit. 26, § 226.330(g)-(j) (2024).
68 325 ILL. COMP. STAT. 5/4(a)(1) (2024); 2021 Ill. Laws 861.
69 2021 Ill. Laws 861.
70 105 ILL. COMP. STAT. 5/21B-45(b), (e)(6) (2024).
71 *See id.* § 5/21B-45; *see also* 2021 Ill. Laws 710.
72 *See* 105 ILL. COMP. STAT. 5/21B-20(3) (2024).
73 *Id*.

Instead, it allows an applicant to be enrolled in an approved educator preparation program in Illinois and have at least 90 credit hours earned.[74]

4. Public Act 102-0866: Mental Health or Behavioral Health Days

Public Act 102-0866 amended section 24-6 of the Illinois School Code, which defines "sick leave," by including mental or behavioral health complications as part of sick leave for school personnel.[75] The legislation also provides that the school board may require a mental health professional licensed in Illinois to certify providing ongoing care or treatment to the teacher or employee.[76] The legislation also contains provisions governing mental or behavioral health leave for employees of the Chicago Public Schools, providing that inclusion of mental or behavioral health complications as sick leave is in "addition to any interpretation or definition included in a collective bargaining agreement."[77] The legislation further states that the certification of a licensed mental health professional may be required unless contrary to a collective bargaining agreement or board of education or district policy.[78] Public Act 102-0866 was enacted on May 13, 2022.[79]

5. Public Act 102-0702: Sexual Misconduct in Schools

Public Act 102-0702 built on Public Act 102-0676, effective December 3, 2021, although some of its provisions had later effective dates.[80] Both Acts focus on preventing educator sexual misconduct and are collectively known as Faith's Law.[81] Public Act 102-0676 requires the State Board of Education to develop a resource guide for students, "parents or guardians, and teachers about sexual abuse response and prevention resources."[82] It also added a definition of "sexual misconduct" in the Illinois School Code[83] and incorporated it into the School Code by referencing the definition of "grooming" found in section 11-25 of the Criminal Code of 2012.[84]

Public Act 102-0702, effective July 1, 2023, requires reviews of employment history in the process of hiring any applicant to work directly

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74 *Id*.
75 *Id*. § 5/24-6.
76 *Id*.
77 *Id*. § 5/34-18.79.
78 105 ILL. COMP. STAT. 5/34-18.79 (2024).
79 *Id*. § 5/24-6.
80 *Id*. § 5/22-94 (2024); *id*. at 5/2-3.188 (2021).
81 *Id*.
82 105 ILL. COMP. STAT. 5/2-3.188 (2021).
83 *Id*. § 5/22-85.5.
84 720 ILL. COMP. STAT. 5/11-25 (2021).

with children or students and describes the vetting process for hiring.[85] Further, it provides that if a school district superintendent has reasonable cause to believe that an educator license holder has committed an act of sexual misconduct, the district superintendent must report this to the State Superintendent of Education and the regional superintendent of schools.[86] It authorizes the State Superintendent to initiate license or endorsement revocation or suspension for sexual misconduct.[87] It requires:

> The governing body of each school district, charter school, or nonpublic school to implement a procedure under which notice is provided to the parents or guardians of an enrolled student, unless the student is at least 18 years of age or emancipated, with whom an employee, agent of the school, or a contractor of the school is alleged to have engaged in sexual misconduct.[88]

The notice "must be first provided to the student in a developmentally appropriate manner and include" certain elements set forth in the Act.[89] The notice may not conflict with the student's IEP, 504 plan, or requirements under State or federal law.[90] Information and resources on Faith's Law are available on the State Board of Education's website.[91]

III. CONCLUSION

The 2022 Spring session of the General Assembly produced several significant new laws governing elementary and secondary education in Illinois.[92] Of the new Public Acts summarized in this survey, the changes to Faith's Law[93] and the establishment of an emergency student-specific placement procedure for students with disabilities whose needs require placement in a non-approved special education facility stand out as measures that address serious public policy issues impacting students, families, and schools.[94]

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85 105 ILL COMP. STAT. 5/22-94 (2024).
86 *Id*.
87 *Id*. § 5/21B-75.
88 *Id*. § 5/22-85.10(a).
89 *Id* § 5/22-85.10(a)(2).
90 *Id*.
91 *Faith's Law*, ISBE, https://www.isbe.net/faithslaw (last visited Apr. 3, 2024).
92 *See* IASB, DIGEST OF BILLS: 2022 SPRING SESSION OF THE ILLINOIS GENERAL ASSEMBLY (2022).
93 *See* ISBE, FAITH'S LAW GUIDANCE & FAQ (2023).
94 105 ILL. COMP. STAT. 5/14-7.02 (2024).

ENVIRONMENTAL LAW UPDATE

William J. Anaya, Eric Berry, Koplan Nwabuoku, Nathan Quaglia, and Lisle Stalter[1]

I. INTRODUCTION

Environmental law has always been at the confluence of flux and disagreement, and 2023 was no different. In 2023, we witnessed much attention and controversy in the regulatory, judicial, administrative, and enforcement areas related to environmental law. This review aims to identify various trends impacting clients and practitioners in Illinois. The following is a scattershot of current issues, concerns, and commentary on other emerging controversies.

We start as we conclude: 2024 will be another active year for environmental practitioners helping clients navigate the ever-changing regulations, opportunities, and challenges. In Illinois, there will be opportunities in clean energy—wind, solar, and nuclear—along with associated project siting requirements. We can also expect significant and exciting opportunities involving carbon sequestration. And, no matter who wins the election, we can anticipate litigation and spirited enforcement from state, federal, and local authorities on issues related to microplastics. These emerging contaminants are especially concerning when associated with Per- and Polyfluoroalkyl Substances (PFAS). Environmental laws, rules, regulations, and opportunities are not diminishing and require continued vigilance for the benefit of our clients. First, look at 2023 beginning with the U.S. Supreme Court.

II. UNITED STATES SUPREME COURT

A. Waters of the United States

1. Sackett v. EPA

On January 18, 2023, the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (COE) published what those agencies considered a final rule revising the definition of "waters of the United States"

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(WOTUS).[2] That rule became effective on March 20, 2023 (the "March 2023 Rule"). [3] On May 25, 2023, the U.S. Supreme Court (SCOTUS) decided *Sackett v. Environmental Protection Agency*.[4] Although SCOTUS did not specifically address the EPA's definition of WOTUS, it certainly called the March 2023 Rule into question.[5]

In *Sackett*, Mr. and Mrs. Sackett purchased property near Priest Lake, Idaho, and began backfilling the lot in order to build a residence.[6] The EPA informed the Sacketts that their property contained wetlands and that the backfilling of those wetlands violated the Clean Water Act's (CWA) prohibition against discharging pollutants—including backfill—into WOTUS.[7] The EPA ordered the Sacketts to restore the site, threatening penalties of over $40,000 per day.[8] According to the EPA, the wetlands on the Sacketts' lot were WOTUS because those wetlands were located near a ditch on the other side of a road, which fed into a non-navigable creek connected to Priest Lake, a navigable intrastate lake.[9] The Sacketts challenged the EPA, but the district court entered summary judgment in favor of the EPA.[10] On appeal, the Ninth Circuit Court of Appeals affirmed the district court, holding that the CWA covered wetlands with an ecologically significant nexus to traditional navigable waters.[11] According to the circuit court, the Sacketts' wetlands satisfied that standard.[12] Note that there was no question the area was indeed a wetland; everyone conceded that the area contained hydrophilic vegetation, hydric soils, and adequate inundation.[13] The contested question was whether or not the wetland was a jurisdictional wetland regulated by the CWA.[14]

After many years of administrative and legal proceedings, including one prior trip to address what constituted "final agency action," the case returned to SCOTUS—this time to determine the proper test for establishing the CWA's jurisdiction over wetlands.[15] Citing its earlier decision in *Rapanos v. United States*, SCOTUS concluded that the CWA's use of "waters" in § 1362(7) referred only to "streams, oceans, rivers, and lakes"

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2 *See* Revised Definition of "Waters of the United States," 88 Fed. Reg. 3004, 3142–43 (Jan. 18, 2023) (to be codified at 33 C.F.R. § 328; 40 C.F.R. § 120).
3 *See id.*
4 Sackett v. EPA, 143 S. Ct. 1322 (2023).
5 *See id.* at 1341–42.
6 *Id*. at 1331.
7 *Id*. (quoting 33 U.S.C. § 1362(7)).
8 *Id*.
9 *Id*. at 1331–32.
10 *Id*. at 1332.
11 *Id*.
12 *Id*.
13 *See id.* at 1332–33.
14 *See id.* at 1332.
15 *Id*.

and to adjacent wetlands "indistinguishable" from those bodies of water due to a continuous surface connection.[16] To assert jurisdiction over an adjacent wetland under the CWA, the EPA was required to establish that the adjacent water constituted WOTUS and that it had a "continuous surface connection with that water, making it difficult to determine where the 'water' end[ed] and the 'wetland' beg[an]."[17]

According to SCOTUS, the uncertain meaning of WOTUS had been a persistent problem, sparking decades of agency action and litigation.[18] SCOTUS noted that, during the relevant period, the "two federal agencies charged with enforcement of the CWA—the EPA and the COE—similarly defined WOTUS broadly to encompass "[a]ll ... waters" that "could affect interstate or foreign commerce."[19] The agencies likewise gave an expansive interpretation of wetlands adjacent to those waters, defining "adjacent" to mean "bordering, contiguous, or neighboring."[20]

In *United States v. Riverside Bayview Homes, Inc.*, SCOTUS confronted the COE's assertion of authority under the CWA over wetlands that "actually abut[ted] on a navigable waterway."[21] Although concerned that the wetlands fell outside "traditional notions of 'waters,'" SCOTUS deferred to the COE, reasoning that the "transition from water to solid ground is not necessarily or even typically an abrupt one."[22]

Following *Riverside Bayview*, the agencies issued the "migratory bird rule," extending CWA jurisdiction to any waters or wetlands that "are or would be used as [a] habitat" by migratory birds or endangered species.[23] SCOTUS rejected that rule after the COE sought to apply it to several isolated ponds located wholly within Illinois.[24] In *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers*, SCOTUS ruled that the CWA did not "exten[d] to ponds that are *not* adjacent to open water."[25] Although acknowledging there was a non-jurisdictional wetland, the Court could not describe it.[26]

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16 *Id.* at 1336, 1340–41 (quoting Rapanos v. United States, 547 U.S. 715, 739, 755 (2006) (plurality opinion)).

17 *Id.* at 1341 "(quoting Rapanos, 547 U.S. at 742 (plurality opinion))."

18 *See id.* at 1336 ("This frustrating drafting choice has led to decades of litigation, but we must try to make sense of the terms Congress chose to adopt.").

19 *Id.* at 1332 (alterations in original) (quoting 40 C.F.R. § 230.3(s)(3) (2008)).

20 *Id.* (quoting 40 C.F.R. § 230.3(b) (2008)).

21 United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 135 (1985).

22 *Id.* at 132–33.

23 Final Rule: Clean Water Act Section 404 Program Definitions and Permit Exemptions, 53 Fed. Reg. 20764, 20765 (June 6, 1988) (to be codified at 40 C.F.R. pts. 232, 233).

24 *See* Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 174 (2001).

25 *Id.* at 168.

26 *See id.* at 168–74 (providing no detailed description of when, under the CWA, there is no longer jurisdiction over a particular wetland).

In response, the agencies instructed their field agents to determine the scope of the CWA's jurisdiction on a case-by-case basis.[27] Within a few years, the agencies had "interpreted their jurisdiction over 'the waters of the United States' to cover 270-to-300 million acres" of wetlands and "virtually any parcel of land containing a channel or conduit . . . through which rainwater or drainage may occasionally or intermittently flow."[28]

In *Rapanos*, SCOTUS vacated a lower court decision that had held that the CWA covered wetlands near ditches and drains that emptied into navigable waters several miles away.[29] However, no position in *Rapanos* commanded a majority of SCOTUS.[30] Four Justices concluded that the CWA's coverage was limited to certain relatively permanent bodies of water connected to traditional interstate navigable waters and to wetlands that were "as a practical matter indistinguishable" from those waters.[31] Justice Kennedy, concurring only in the judgment, wrote that CWA jurisdiction over adjacent wetlands required a "significant nexus" between the wetland and its adjacent navigable waters. [32] He explained that a "significant nexus" existed when the "wetlands, either alone or in combination with similarly situated lands in the region, significantly affect[ed] the chemical, physical, and biological integrity" of those waters.[33] According to SCOTUS, following *Rapanos*, field agents brought nearly all waters and wetlands under CWA jurisdiction by engaging in fact-intensive "significant-nexus" determinations that turned on a lengthy list of hydrological and ecological factors.[34] According to SCOTUS, nearly all waters and wetlands are potentially susceptible to regulation under this test, putting a staggering array of landowners at risk of criminal prosecution for such mundane activities as moving dirt.[35]

However, according to *Sackett*, to make sense of Congress's choice to define "navigable waters" as WOTUS in the CWA, SCOTUS concluded that the CWA's use of "waters" encompassed "only those relatively permanent, standing or continuously flowing bodies of water 'forming geographic[al] features' that are described in ordinary parlance as 'streams, oceans, rivers, [and] lakes.'"[36] To determine when a wetland is part of adjacent WOTUS, SCOTUS agreed with the *Rapanos* plurality that the use of "waters" in § 1362(7) may be reasonably read to include only wetlands that are

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27 *See* Rapanos v. United States, 547 U.S. 715, 722 (2006) (plurality opinion).
28 *Id.* at 722.
29 *Id.* at 757.
30 *Id.*
31 *Id.* at 755.
32 *Id.* at 779-80 (Stevens, J., dissenting).
33 *Id.* at 779-80.
34 *See id.* at 755 (plurality opinion).
35 *See id.*
36 *Id.* at 739.

"indistinguishable from waters of the United States."[37] This occurs only when wetlands have "a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between 'waters' and wetlands."[38]

In sum, CWA wetlands jurisdiction extends only to wetlands that are "as a practical matter indistinguishable from waters of the United States."[39] This requires the party asserting jurisdiction to establish "first, that the adjacent [body of water constitutes] . . . 'water[s] of the United States,' (*i.e.*, a relatively permanent body of water connected to traditional interstate navigable waters); and second, that the wetland has a continuous surface connection with that water, making it difficult to determine where the 'water' ends and the 'wetland' begins."[40]

With regard to administrative deference accorded agencies charged with administering a statute under *Chevron, USA, Inc. v. National Resource Defense Council, Inc.*, the EPA argued that SCOTUS should properly defer to the EPA's interpretation of WOTUS.[41] SCOTUS refused, holding that the EPA's interpretation was inconsistent with the CWA's text and structure, and clashed with "background principles of construction" that apply to the interpretation of the relevant provisions.[42] For years, these agencies' interpretations of WOTUS have been accorded deference based on guidance provided by SCOTUS in *Chevron*.[43] Today, however, *Chevron* and 1984 seem so long ago, especially in light of SCOTUS's analysis in *Sackett*[44]—more on new federalism below.[45]

According to the Court in *Sackett*, the EPA's interpretation gives rise to serious vagueness concerns in light of the CWA's criminal penalties, thus implicating the due process requirement that penal statutes be defined "with sufficient definiteness that ordinary people can understand what conduct is prohibited."[46] Finally, SCOTUS rejected the EPA's argument that Congress had somehow ratified the EPA's regulatory definition of "adjacent" when it amended the CWA to include the reference to adjacent wetlands.[47] According to SCOTUS, the plain text of §§ 1362(7) and 1344(g) show that "adjacent" cannot include wetlands that are merely nearby otherwise covered waters.[48]

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37 *Id*. at 755.
38 *Id*. at 742.
39 *Id*.
40 *Id*.
41 Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 863 (1984).
42 *See* Bond v. United States, 572 U.S. 844, 857 (2014).
43 *See Chevron*, 467 U.S. at 863.
44 *Id*.
45 *See* discussion *infra* at Section II.B.
46 McDonnell v. United States, 579 U.S. 550, 576 (2016).
47 Rapanos v. United States, 547 U.S. 715, 749 (2006) (plurality opinion).
48 *Id*.

Moreover, the EPA's argument could not be reconciled with the Court's repeated recognition that § 1344(g)(1) "does not conclusively determine the construction to be placed on . . . the relevant definition of 'navigable waters.'"[49] Finally, according to SCOTUS, the EPA's interpretation falls short of establishing the sort of "overwhelming evidence of acquiescence" necessary to support its argument in the face of Congress's failure to amend § 1362(7).[50] In short, SCOTUS rejected the EPA's various policy arguments about the ecological consequences of a narrower definition of "adjacent."[51] SCOTUS now requires that Congress provide "exceedingly clear language" if it wishes to alter the federal/state balance or the Government's power over private property.[52]

SCOTUS would not defer to the EPA's interpretation of the rule defining WOTUS to include wetlands adjacent to covered waters if those wetlands possessed only a significant nexus to traditional navigable waters.[53] SCOTUS held for wetlands to qualify as WOTUS and be considered subject to the CWA, the wetlands must be indistinguishably part of a body of water that itself constitutes "waters" under the CWA.[54] Finally, SCOTUS determined wetlands located on residential lots are isolated wetlands and do not constitute WOTUS.[55]

3. The EPA's Response to Sackett

On August 29, 2023, the EPA and the COE acquiesced to SCOTUS's ruling in *Sackett* and announced a new final rule (the "August 2023 Rule") amending the March 2023 Rule's definition of WOTUS.[56] According to the agencies, the new rule provides clarity necessary to advance the goals of protecting the nation's waters from pollution and degradation while moving forward with infrastructure projects, economic opportunities, and agricultural activities.[57]

In the agencies' press release on August 29, 2023, the EPA's Administrator, Michael S. Regan, noted: "While I am disappointed by the Supreme Court's decision in the *Sackett* case, EPA and the Army have an

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49 Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 171 (2001).

50 *Id*.

51 *Id*. at 169-70.

52 United States Forest Serv. v. Cowpasture River Pres. Ass'n, 590 U.S. 604, 642 (2020) (Sotomayor, J., dissenting).

53 Sackett v. EPA, 598 U.S. 651, 684 (2023).

54 *Id*.

55 *Id*.

56 Press Release, EPA, To Conform with Recent Supreme Court Decision, EPA and Army Amend "Waters of the United States" Rule (Aug. 29, 2023), available at https://www.epa.gov/newsreleases/conform-recent-supreme-court-decision-epa-and-army-amend-waters-united-states-rule.

57 *Id*.

obligation to apply this decision alongside our state co-regulators, Tribes, and partners."[58] Furthermore, according to Mr. Regan:

> We've moved quickly to finalize amendments to the definition of 'waters of the United States' to provide a clear path forward that adheres to the Supreme Court's ruling. EPA will never waiver from our responsibility to ensure clean water for all. Moving forward, we will do everything we can with our existing authorities and resources to help communities, states, and Tribes protect the clean water upon which we all depend.[59]

According to Michael L. Connor, Assistant Secretary of the Army for Civil Works, "We have worked with EPA to expeditiously develop a rule to incorporate changes required as a result of the Supreme Court's decision in *Sackett*."[60] According to Connor: "With this final rule, the Corps can resume issuing approved jurisdictional determinations that were paused in light of the *Sackett* decision. Moving forward, the Corps will continue to protect and restore the nation's waters in support of jobs and healthy communities."[61]

Again, the agencies' March 2023 Rule defining WOTUS was not "directly before the Supreme Court;"[62] however, the more or less unanimous "decision in *Sackett* made clear that certain aspects of the [March 2023 Rule] [we]re invalid."[63] The EPA and the COE stressed that their August 2023 Rule was limited and changed only parts of the March 2023 Rule.[64] For example, the August 2023 Rule "remove[d] the significant nexus test [found in *Rapanos*[65]] from consideration in identifying tributaries and other waters as federally protected."[66]

3. Various Reactions to the EPA's August 2023 Rule Following Sackett

As far as the EPA and the COE are concerned, things are settled, but there are rumblings that the agencies' August 2023 Rule violates *Sackett.*[67] That may be so given that the unanimity of the decision is found only after cobbling together four separate opinions.[68] So far, the EPA's post-*Sackett*

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58 *Id.*
59 *Id.*
60 *Id.*
61 *Id.*
62 *Id.*
63 *Id.*; *see also* Sackett v. EPA, 598 U.S. 651, 679-84 (2023).
64 EPA, *supra* note 73.
65 Rapanos v. United States, 547 U.S. 715, 755-57 (2006).
66 EPA, *supra* note 73.
67 *Definition of "Waters of the United States": Rule Status and Litigation Update*, EPA, https://www.epa.gov/wotus/definition-waters-united-states-rule-status-and-litigation-update (last visited Mar. 15, 2024).
68 *See generally Sackett*, 698 U.S. 651.

interpretation is followed only in twenty-three states, with twenty-seven operating under the pre-2015 rule.[69] At least two states have filed suits in the district courts in North Dakota and Texas.[70] Both cases challenge the EPA's interpretation of the post-*Sackett* rule.[71] The American Farm Bureau Federation and the American Petroleum Institute joined the Texas lawsuit, and the Cass County Farm Bureau and the North Dakota Farm Bureau joined the North Dakota lawsuit.[72] Every indication is that there are choppy waters ahead, yet Congress is silent. In any event, from *Sackett*, we now understand that CWA jurisdiction requires a continuous surface water connection and not mere adjacency as previously interpreted by the federal agencies charged with administering the CWA.[73]

Nearly one year later, as predicted, *Sackett* has opened the door for renewed scrutiny of federal jurisdiction under the CWA.[74] If the Supreme Court's goal in Sackett had been to clear the water on CWA jurisdiction, recent decisions appear murkier.

In *United States v. Andrews*, the United States accused a landowner of filling 13.3 acres of a 16.3-acre wetland.[75] Andrews claimed that he was permitted to build on wetlands located on his private property.[76] The court followed *Sackett's* narrow definition of WOTUS, and found that the wetlands on Andrews' property fit the definition and held that Andrews had violated the CWA by filling in wetlands on his property without a permit.[77]

United States v. Bobby Wolford Trucking & Salvage, Inc., was decided before the *Sackett* decision and resulted in a Consent Decree on December 8, 2020.[78] After *Sackett*, Wolford sought to modify the Consent Decree.[79] The court found that the defendant had unlawfully created a barrier between the

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69 EPA, *supra* note 86.

70 W. Va. v. EPA, 597 U.S. 697 (2022); Texas v. U.S. EPA, 662 F.Supp.3d 739 (S.D. Tex. 2023).

71 *Id.*

72 *Id.*

73 *Sackett*, 598 U.S. at 651.

74 *See e.g.*, United States v. Andrews, 677 F. Supp. 3d 74 (D. Conn. 2023); United States v. Bobby Wolford Trucking & Salvage, Inc., No. C18-0747, 2023 WL 8529643 (W.D. Wash. December 8, 2023); San Francisco Baykeeper v. City of Sunnyvale, No. 20-cv-00824, 2023 WL 8587610 (N.D. Cal. Dec. 11, 2023); Reyes v. Dorchester County of South Carolina, No. 21-cv-00520, 2023 WL 5345549 (D.S.C. Aug. 21, 2023); Kohler Co. v. Wisconsin Department of Natural Resources, 2024 WI App 2, ¶ 1, 410 Wis. 2d 433, 438, 3 N.W. 3d 172 ; Lewis v. United States, 88 F.4th 1073 (5th Cir. 2023); Glynn Environmental Coalition, Inc. et al. v. Sea Island Acquisition, LLC, No. CV 219-050, 2024 WL 1088585 (S.D. Ga. Mar. 1, 2024); United States v. Bayley, No. 20-cv-05867, 2023 WL 9689569 (W.D. Wash. Oct. 23, 2023), *appeal docketed*, No. 24-901 (9th Cir. Feb. 21, 2024).

75 United States v. Andrews, 677 F. Supp. 3d 74, 76-77 (D. Conn. 2023).

76 *Id.* at 89.

77 *Id.* at 87-90.

78 United States v. Bobby Wolford Trucking & Salvage, Inc., No. C18-0747, 2023 WL 8529643, at *1 (W.D. Wash. Dec. 8, 2023).

79 *Id.* at *1.

wetlands and the navigable waterway that did not qualify as an interruption of the surface water described in *Sackett*.[80]

In *San Francisco Baykeeper v. City of Sunnyvale*, the court noted that *Sackett* did not alter the conclusion that seasonally intermittent waters are "relatively permanent" and therefore are within the jurisdiction of CWA.[81] Additionally, tidal waters remain within the definition of WOTUS.[82] Finally, the court noted that *Sackett* did not eliminate the "long-standing rule that manmade waters can qualify as WOTUS."[83] Thus, a channel that had a continuous flow of water during certain times of the year qualified as WOTUS under the "relatively permanent" standard.[84]

Reyes v. Dorchester County of South Carolina, involved a residential stormwater ditch.[85] After experiencing flooding, the Reyes contacted the county and asked them to install a drainage pipe.[86] The county refused, so Reyes hired a contractor to stem the flooding without the permit required by the County's stormwater ordinance.[87] The county issued a violation notice for filling a stormwater pond without a permit.[88] The Reyes challenged the county's determination of violation but were not successful.[89] Thereafter, they filed a complaint seeking relief for a regulatory taking—arguing that, after *Sackett*, the county did not have regulation authority over stormwater facilities.[90] The district court held that *Sackett* addressed federal CWA jurisdiction and specifically noted that "[s]tates will continue to exercise their . . . authority to combat water pollution by regulating land and water use."[91]

In *Kohler Co. v. Wisconsin Department of Natural Resources*, the Kohler Company was developing a new golf course.[92] Initially, the Wisconsin Department of Natural Resources issued a permit to discharge dredge or fill material into 3.69 acres of wetlands on the property.[93] The decision was challenged by an interested environmental group.[94] In the administrative review process the permit was reversed, and Kohler appealed,

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80 *Id.*

81 San Francisco Baykeeper v. City of Sunnyvale, No. 20-cv-00824, 2023 WL 8587610, at *4 (N.D. Cal. Dec. 11, 2023).

82 *Id.*

83 *Id.* at *5.

84 *Id.*

85 Reyes v. Dorchester County of South Carolina, No. 21-cv-00520, 2023 WL 5345549, at *1 (D.S.C. Aug. 21, 2023).

86 *Id.*

87 *Id.*

88 *Id.*

89 *Id.* at *2.

90 *Id.* at *8.

91 *Id.* (quoting Sackett v. EPA, 598 U.S. 651, 683 (2023)).

92 Kohler Co. v. Wisconsin Department of Natural Resources, 2024 WI App 2, ¶ 1, 410 Wis. 2d 433, 438, 3 N.W. 3d 172, 174.

93 *Id.*

94 *Id.*

asserting that, under *Sackett*, if wetlands on the property were not subject to federal CWA jurisdiction, the state of Wisconsin was also barred from regulating them.[95] The court rejected Kohler's argument and noted that the state had "general supervisory control over waters of the state"—which included authority over wetlands.[96] The court held that *Sackett* did not apply to states' authority to regulate wetlands otherwise not found to be jurisdictional WOTUS and not regulated under federal CWA jurisdiction.[97]

Lewis v. United States concerned two 20-acre tracts used for pine timber operations.[98] There had been three approved jurisdictional determinations in 2016, 2017, and 2020—each administratively challenged then contested in court.[99] Ultimately, the appeals were consolidated in the Fifth Circuit Court of Appeals.[100] While the consolidated appeals were pending, SCOTUS decided *Sackett.*[101] Accordingly, the Fifth Circuit took additional briefing and heard oral argument.[102] Ultimately, the Fifth Circuit held that the property did not have wetlands with a continuous surface connection to traditional WOTUS.[103] The court noted that the nearest relatively permanent body of traditional WOTUS was connected through culverts, non-relatively permanent tributary, and roadside ditches.[104] Accordingly, the court found that there was no federal CWA jurisdiction.[105]

Glynn Environmental Coalition, Inc. v. Sea Island Acquisition, LLC, involved a private cause of action seeking to enforce the CWA.[106] The COE had issued a permit to Sea Island authorizing it to fill a wetland.[107] The plaintiffs brought a citizen suit alleging Sea Island had conducted unpermitted filling, and that the permit determination had expired.[108] The defendant filed a motion to dismiss which was granted by the district court but later reversed and remanded upon appeal by the circuit court.[109] After the district court reopened the case, it allowed the defendant to file supplemental briefing on *Sackett*—decided after the plaintiffs had filed their complaint.[110] The court held that *Sackett* applied not only prospectively but retroactively

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95 *Id.* at ¶ 18 n.8, 410 Wis. 2d at 447 n.8, 3 N.W. 3d at 179 n.8.
96 *Id.* at ¶¶ 1-2, 410 Wis. 2d at 438-39, at 174-75.
97 *Id.*
98 Lewis v. United States, 88 F.4th 1073, 1076 (5th Cir. 2023).
99 *Id.* at 1076-77.
100 *Id.* at 1077.
101 *Id.*
102 *Id.*
103 *Id.* at 1078-80.
104 *Id.* at 1078.
105 *Id.*
106 Glynn Environmental Coalition, Inc. et al. v. Sea Island Acquisition, LLC, No. CV 219-050, 2024 WL 1088585, at *1 (S.D. Ga. Mar. 1, 2024).
107 *Id.*
108 *Id.*
109 *Id.*
110 *Id.* at *1-2.

so the complaint did not support a federal CWA claim.[111] Specifically, the allegations did not allege a continuous surface connection between the purported wetland and a recognized WOTUS.[112] According to the court, there was a "clear demarcation" between the creek and the subject property, and as such, there was no continuous surface connection therefore no federal jurisdiction.[113]

Finally, in *United States v. Bayley*, the parties disagreed on whether *Sackett* applied when the area at issue was a "bulkhead."[114] The district court explained that Sackett applied when determining whether a wetland was considered WOTUS under the CWA.[115] The district court ruled that *Sackett* was inapplicable where a question of federal CWA jurisdiction did not involve a wetland. [116] Therefore, Sackett was not triggered because the land at issue was a "bulkhead" not a wetland.[117] There may be more to come on this issue as a notice of appeal was filed with the Ninth Circuit on February 21, 2024.[118]

4. Reconciling County of Maui v. Hawaii Wildlife Fund

Compare SCOTUS's holding in *Sackett* with its earlier holding in *County of Maui v. Hawaii Wildlife Fund*.[119] The Hawaii Wildlife Fund (HWF) sued the County of Maui (the "County"), alleging that the County had violated the CWA by discharging effluent into WOTUS without a National Pollutant Discharge Elimination System (NPDES)[120] permit at four injection wells.[121] The County argued that only point sources required an NPDEA permit.[122] The County claimed that the effluent was discharged into groundwater, considered a nonpoint source, so it was not required to obtain

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111 *Id.* at *3-5.

112 *Id.* at *4-5.

113 *Id.* at *5.

114 United States v. Bayley, No. 20-cv-05867, 2023 WL 9689569, at *5 (W.D. Wash. Oct. 23, 2023), *appeal docketed*, No. 24-901 (9th Cir. Feb. 21, 2024).

115 *Id.*

116 *Id.*

117 *Id.*

118 United States v. Bayley, No. 24-901 (9th Cir. docketed Feb. 21, 2024).

119 County of Maui v. Haw. Wildlife Fund, 590 U.S. 165, 183-86 (2020), *abrogating*, Upstate Forever v. Kinder Morgan Energy Partners, L.P., 887 F. 3d 637 (4th Cir. 2018); Kentucky Waterways Alliance v. Ky. Utils. Co., 905 F. 3d 925 (6th Cir. 2018).

120 *County of Maui*, 590 U.S. at 196 (Alito, J., dissenting).

121 *Id.* at 171.

122 *Id.* at 173 ("A point source or series of point sources must be 'the *means of delivering* pollutants to navigable waters.' . . . A pollutant is 'from' a point source only if a point source is the last 'conveyance' that conducted the pollutant to navigable waters.").

an NPDEA permit.[123] The district court entered summary judgment in favor of HWF because the effluent had an easily ascertainable trajectory into the ocean, making the groundwater the functional quivalent to a "navigable water."[124] The district court denied the County's motions for certification for interlocutory appeal and for a stay of further proceedings during the pendency of the appeal.[125] The County appealed to the Ninth Circuit, which affirmed the lower court's decision albeit explaining the appropriate standard differently.[126] The Ninth Circuit dictated that a "permit is required when 'the pollutants are *fairly traceable* from the point source to a navigable water such that the discharge is the functional equivalent of a discharge into the navigable water.'"[127] On appeal, SCOTUS "held that the [CWA] requires a permit when there is a direct discharge [of pollutants] from a point source into navigable waters or when there is the *functional equivalent of a direct discharge*."[128]

Between *County of Maui* and *Sackett*, SCOTUS has created two separate standards for federal jurisdiction: (1) a functional equivalent standard;[129] and, (2) a continuous surface water connection standard.[130] That is, for purposes of Section 401 of the CWA, federal jurisdiction is established if there is a "*functional equivalent of a direct discharge*."[131] However, for wetlands jurisdiction involving Section 404 of the CWA, federal jurisdiction requires a continuous surface water connection.[132]

In a concurring opinion in *Sackett*, Justice Kagan wrote:

> [T]he majority's non-textualism barred the EPA from addressing climate change by curbing power plant emissions in the most effective way. Here, that method prevents the EPA from keeping our country's waters clean by regulating adjacent wetlands. The vice in both instances is the same: the

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123 *Id.* ("They add that, if 'at least one nonpoint source (e.g., unconfined rainwater runoff or groundwater)' lies 'between the point source and the navigable water,' then the permit requirement 'does not apply.'").

124 *Id.* at 171-72. The Illinois Supreme Court has determined "navigable waters" to be those that are "naturally, by customary modes of transportation, . . . 'of sufficient depth to afford a channel for use [in] commerce.'" *See* Holm v. Kodat, 2022 IL 127511, ¶ 29 (quoting Du Pont v. Miller, 141 N.E. 423, 425 (Ill. 1923)).

125 Haw. Wildlife Fund v. County of Maui, No. 12-00198, 2015 WL 328227 (D. Haw. Jan. 23, 2015), *aff'd*, 886 F. 3d 737 (2018), *vacated*, 590 U.S. 165, 171-72 (2020).

126 *County of Maui* ,590 U.S. at 172.

127 *Id.* at 183.

128 *Id.*

129 *Id.*

130 Sackett v. EPA, 598 U.S. 651, 678 (2023).

131 *County of Maui*, 590 U.S. at 183.

132 *Sackett*, 598 U.S. at 678.

> court's appointment of itself as the national decision-maker on environmental policy.[133]

Again, federalism will be addressed below.[134]

5. Status of Jurisdictional Determinations by the COE

From this point on, the COE "will resume issuing . . . jurisdictional determinations" under the August 2023 Rule.[135] According to the COE, because the sole purpose of the August 2023 Rule was to amend specific provisions of the March 2023 Rule considered invalid under *Sackett*, the August 2023 Rule took effect immediately without soliciting public comment.[136]

Following the recent decisions, the Chicago District of the Corps of Engineers announced that it is refining its workload priorities with regard to stand-alone jurisdictional determination (JD) align with the Corps HQ priorities.[137] Stand-alone JDs are those that are not associated with a Department of the Army permit action and may be necessitated by state and local government requirements for Corps-verified delineations and JDs for activities and transactions unrelated to Department of the Army permit applications.[138] According to the Corps, preliminary Jurisdictional Determinations (PJD), Approved JDs (AJD) and Delineation Concurrences are not prerequisites for submitting a Department of the Army permit application.[139]

At this point, for pending stand-alone JD requests that have already been assigned to a Project Manager, the Corps will finish those that are currently in coordination with EPA.[140] For JDs contemplated for future developments, the Corps encourages submission of permit applications/PCNs or no permit required (NPR) requests even if the projects are in the early planning stages.[141] According to the Corps, these requests may be incomplete due to the limited availability of details during a project's early planning stages.[142] Upon receipt of a request, the Corps will work closely with the applicant to outline requirements and next steps, including a

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133 *Id.* at 714-15 (Kagan, J., concurring).
134 *See* discussion *infra* Section II.B.
135 EPA, *supra* note 73.
136 *Id.*
137 E-mail from Soren Hall, U.S. Army Corps of Engineers, to William Anaya, Partner, UB Greensfelder LLP, (Apr. 22, 2024, 3:03 PM) (on file with author).
138 *Id.*
139 *Id.*
140 *Id.*
141 *Id.*
142 *Id.*

pre-application consultation-level discussion and the completion of a JD when necessary.[143]

According to the Corp, its mission is to regulate activities in the nation's waters and wetlands and provide the public with timely service when reviewing Department of the Army permit applications for projects that propose impacts to waters of the United States.[144] The growing volume of stand-alone JD requests is delaying the Corps' ability to provide efficient reviews of Department of the Army permit applications[145]. The Corps' Regulatory Branch will also continue to work with state and local government entities to further inform them of the unintended consequences of local requirements for Corps JDs that are unrelated to Department of the Army permit applications.[146]

B. SCOTUS AND FEDERALISM 2023

1. The Dormant Commerce Clause

The Commerce Clause within the U.S. Constitution vests in Congress the power "to 'regulate commerce . . . among the several states.'"[147] The dormant commerce clause, a court-created doctrine, prohibits states from discriminating against, or unduly burdening interstate commerce.[148] Generally, it is used to strike down state laws seeking to discriminate in favor of domestic, in-state commerce at the expense of interstate commerce by increasing burdens upon out-of-state industries and businesses.[149]

In May 2023, SCOTUS decided *National Pork Producers Council v. Ross*, denying a challenge to California's Proposition 12.[150] Through Proposition 12, California sought to bar sales of "whole pork meat from animals confined in a manner inconsistent with California standards . . . ."[151] National Pork Producers challenged this ban as a violation of the dormant commerce clause, arguing that the restrictions negatively impacted pork producers outside of California.[152] SCOTUS disagreed, upholding the California initiative.[153] SCOTUS held that state initiatives regulating standards of meat production do not violate the dormant commerce clause if

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143 *Id.*
144 *Id.*
145 *Id.*
146 *Id.*
147 Nat'l Pork Producers Council v. Ross, 598 U.S. 356, 368 (2023) (citing U.S. CONST. art. I, § 8, cl. 3).
148 *Id.* at 369-70.
149 *Id.*
150 *Id.* at 356.
151 *Id.*
152 *Id.* at 368.
153 *Id.* at 390-91.

they do not "purposely discriminate against out-of-state economic interests."[154] It stated this is true even if the initiative had the "practical effect of controlling commerce outside the State."[155]

Critics argue SCOTUS's analysis could block the importation of goods, although compliant with the manufacturing state's labor laws, not made in compliance with the receiving states' labor laws.[156] Similarly, the dormant commerce clause could apply to goods imported into California that create water pollution in the state of manufacture, even though the goods do not create water pollution in California.[157] Other critics describe *National Pork Producers* as experimental federalism, creating a multitude of legal roadblocks to agricultural products that must be negotiated through various state laws.[158] Experimental federalism or not, this case represents the expanding view of state's rights as articulated by SCOTUS. [159]

2. The Major Question Doctrine

Earlier, on June 30, 2022, SCOTUS decided *West Virginia v. Environmental Protection Agency*—adopting the "major question doctrine" of review to determine the EPA's authority under the Clean Air Act (CAA).[160] According to the major question doctrine, in certain extraordinary cases involving statutes that confer authority upon an administrative agency, "the agency must point to clear congressional authorization for the [authority] it claims."[161]

In *West Virginia*, the EPA had promulgated the Affordable Clean Energy (ACE) regulation under the CAA.[162] According to the ACE rule, existing coal-fired power plants were required to control emissions using a "best system of emission reduction standard" established by the EPA to reduce greenhouse gas emissions.[163] The ACE rule was implemented in lieu of the "generation shifting" approach under the previous administration.[164]

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154 *Id.* at 371.

155 *Id.*

156 *Id.* at 397-98 (Roberts, J., concurring in part and dissenting in part).

157 *See Dormant Commerce Clause—Interstate Commerce—State Law—Extraterritoriality*—National Pork Producers Council v. Ross, 137 HARV. L. REV. 330, 332 (2023) [hereinafter *Dormant Commerce Clause*] (stating that Proposition 12 prohibited the sale of pigs that were cruelly confined and applied to all pork sold in California, regardless of where the pigs were bred).

158 *See, e.g.*, *id.* at 334 (analyzing Justice Gorsuch's concern that the opinions of some of his colleagues would "undermine[] the promises of federalism).

159 *See Nat'l Pork Producers Council*, 598 U.S. at 356.

160 W. Va. v. EPA, 597 U.S. 697, 700 (2022).

161 *Id.*

162 *Id.* at 699.

163 *Id.* at 697.

164 *Id.*

The EPA unsuccessfully argued that Congress had provided the EPA the authority to implement the rule in the section of the CAA establishing the New Source Performance Standards.[165] SCOTUS disagreed and found that the EPA could not identify any clear Congressional authorization for the ACE rule and declared the rule void.[166] Unless and until a "major question" is specifically addressed by Congress, agencies are prohibited from implementing rules addressing major questions under the rubric of deference.[167]

C. SCOTUS's 2024 Docket

Although currently on the SCOTUS docket is a challenge to the EPA's Good Neighbor Plan from the states of Ohio, Indiana, and West Virginia,[168] front and center of SCOTUS's 2024 docket is *Chevron, USA, Inc. v. National Resource Defense Council*.[169] This past year, SCOTUS agreed to hear appeals in *Loper Bright Enterprises v. Raimondo*[170] and *Relentless, Inc. v. Department of Commerce*.[171] These two cases will allow SCOTUS to reconsider the seminal case of *Chevron*.[172] According to *Chevron*, when Congress enacted an ambiguous statute, courts were to defer to the interpretation of the agency charged with administering that statute, even if the courts disagreed, so long as the agency's interpretation was not arbitrary, capricious, or unlawful.[173] Since 1984, *Chevron* has been cited in hundreds of cases by SCOTUS and countless opinions in the district and circuit courts.[174]

The litigants in *Loper*[175] and *Relentless*[176] challenge the National Marine Fisheries Service's interpretation of a commercial fishing regulation.[177] Specifically, SCOTUS will be charged with deciding whether to reverse *Chevron* or find that the regulation at issue is not ambiguous, making the interpretation of the regulation by the agency irrelevant.[178] The

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165 *Id.*
166 *Id.* at 700.
167 *Id.* at 721-23.
168 Jackson Coates, *Supreme Court Hears Challenge to the EPA's 'Good Neighbor' Plan*, NAT'L CONF. STATE LEGISLATURES (Mar. 6, 2024), https://www.ncsl.org/state-legislatures-news/details/supreme-court-hears-challenge-to-the-epas-good-neighbor-plan#:~:text=The%20U.S.%20Supreme%20Court%20recently,reduce%20their%20downwind%20ozone%20pollution.
169 Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).
170 Loper Bright Enters. v. Raimondo, No. 22-451 (U.S. argued Jan. 17, 2024).
171 Relentless, Inc. v. Dept. Com., No. 22-1219 (U.S. argued Jan. 17, 2024).
172 *Chevron*, 467 U.S. at 837.
173 *Id.* at 843-44.
174 *Id.* at 837.
175 *Loper*, No. 22-451.
176 *Relentless*, No. 22-1219.
177 *Loper*, No. 22-451; *Relentless*, No. 22-1219.
178 *Id.*

appellants argue that *Chevron*'s analysis violates the separation of powers doctrine by transferring Article I's legislative power to an Article II agency.[179]

After *West Virginia*, it seems clear that *Chevron* will be modified at least.[180] If *Chevron* is modified significantly, the impact on stare decisis will be significant.[181] As this piece was being written, SCOTUS had heard an oral argument in *Loper*[182] and *Relentless*[183] and is expected to offer an opinion as to whether it will modify or reverse *Chevron*.[184] SCOTUS is advised to tread lightly less the cure be more destructive than the perceived disease.[185]

III. OTHER NOTEWORTHY CASES

A. Spent Nuclear Waste

Spent nuclear fuel is generated at civilian nuclear reactors once the nuclear fuel is no longer capable of producing energy.[186] It is "'intensely radioactive' and 'must be carefully stored.'"[187] Interim Storage Partners, LLC, a private company, sought and obtained a license from the U.S. Nuclear Regulatory Commission (NRC) to operate a temporary spent nuclear fuel waste storage facility in western Texas.[188]

The NRC issued the license over objections from the State of Texas; a for-profit oil and gas extraction organization named Fasken Land and Minerals Ltd.; and, Permian Basin Land and Royalty Owners, an association purporting to protect the interests of the Permian Basin.[189] These three parties petitioned for judicial review of the issued permit.[190] The Fifth Circuit granted the petition and vacated the license, holding that the NRC lacked statutory authority to issue it.[191]

In the early years of civilian commercial nuclear energy production, it was assumed that spent nuclear fuel would be reprocessed; however, no such

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179 *Id.*
180 *See* W. Va. v. EPA, 597 U.S. 697 (2022).
181 *See generally* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).
182 *Loper*, No. 22-451.
183 Relentless, Inc. v. Dept. Com., No. 22-1219 (U.S. argued Jan. 17, 2024).
184 *Loper*, No. 22-451; *Relentless*, No. 22-1219.
185 *See generally Chevron*, 467 U.S. at 837.
186 Texas v. Nuclear Regul. Comm'n, 78 F.4th 827, 831, 832 (5th Cir. 2023).
187 *Id.* at 832 (quoting Pac. Gas & Elec. Co. v. State Energy Conservation & Dev. Comm'n, 461 U.S. 190, 195 (1983)).
188 *Id.* at 831.
189 *Id.* at 833. The Permian Basin is a geologic formation in western Texas and eastern New Mexico rich in oil reserves. It is a top global oil producing region. *Id.*
190 *Id.* at 831.
191 *Id.* at 844.

industry has materialized.[192] Commercial energy reactors generate between an estimated 2,000 and 2,400 metric tons of spent nuclear fuel annually, with projections indicating over 200,000 metric tons could exist in the United States by 2050.[193] Following the passage of the Nuclear Waste Policy Act in 1982, the U.S. Department of Energy proposed a permanent storage solution deep underground at Yucca Mountain in Nevada.[194] Decades later, that plan has been abandoned and no permanent storage location for this nuclear waste has been identified—much less paid for and implemented.[195] Currently, it is stored onsite at reactor locations, including some that are no longer operational.[196] However, Interim Storage Partner's facility would have been a private away-from-reactor temporary storage location.[197]

The Fifth Circuit found that the plaintiffs each had individual constitutional standing to oppose the issuance of the NRC license.[198] Texas had standing because issuance of the license preempted state statute, meeting the "injury-in-fact" requirement.[199] Fasken Land and Minerals Ltd. had standing because its members owned land within four miles of, drew water from wells beneath, and drove within one mile of the facility.[200] Finally, as an association, Permian Basin Land and Royalty Owners had associational standing because (1) its members would independently meet Article III standing requirements due to where they lived, worked, and drove, (2) the interests of the association were germane to the purpose of the organization, and (3) the association was able to represent its members' interests without their individual participation.[201]

The NRC and Interim Storage Partners cited two circuit court cases to support the NRC's authority to issue a permit like the one here—*Bullcreek v. Nuclear Regulatory Commission*[202] and *Skull Valley Band of Goshute Indians v. Nielson*.[203] The court distinguished them, stating that both had merely assumed that the NRC had authority without analyzing the statute.[204]

The NRC asserted that it had the authority to issue a license to a temporary "away-from-reactor" storage facility for spent nuclear fuel

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192 *Id.* at 832.
193 *Id.* at 833.
194 *Id.* at 832-33.
195 *Id.* at 833.
196 *Id.*
197 *Id.* Andrews County, Texas, the proposed location of the spent nuclear fuel interim storage facility at issue, passed a resolution in support of such a storage facility being located there. *Id.*
198 *Id.* at 835-36.
199 *Id.* at 836 (albeit a "non-binding, declaratory" statute).
200 *Id.* at 836.
201 *Id.* at 836-37.
202 *Id.* at 841-42 (citing Bullcreek v. NRC, 359 F.3d 536 (D.C. Cir. 2004)).
203 *Id.* (citing Skull Valley Band Goshute Indians v. Nielson, 376 F.3d 1223 (10th Cir. 2004)).
204 *Id.* at 842.

pursuant to the Atomic Energy Act (AEA).[205] The AEA authorizes the NRC to issue licenses regarding "special nuclear material, source material, and byproduct material."[206] The agency asserted that it had broad authority to issue licenses to storage facilities of spent nuclear fuel because those three materials were constituents of spent nuclear fuel.[207] The court disagreed, noting that the AEA authorized the NRC to issue licenses "only for certain enumerated purposes—none of which encompass[ed] storage or disposal of material as radioactive as spent nuclear fuel."[208]

The court said that issuing the license also violated the Nuclear Waste Policy Act (NWPA), which "provides a comprehensive scheme to address the accumulation of nuclear waste."[209] The NWPA made the federal government responsible for permanently disposing of spent nuclear fuel.[210] Interim storage, meanwhile, was the responsibility of the owners and operators of commercial nuclear reactors at their sites.[211] The NWPA created "a comprehensive statutory scheme" for spent nuclear fuel, "prioritiz[ing] construction of [a] permanent repository," and until then, requiring storage "onsite at-the-reactor or in a federal facility."[212] Interim Storage Partners' proposed facility was neither.[213] Therefore, its issuance of the permit flouted Congressional policy as expressed in the NWPA.[214] The court held that the AEA and NWPA were unambiguous regarding the NRC's ability to issue such a license.[215]

The Fifth Circuit could have stopped there, having fully resolved the case on straight statutory interpretation.[216] However, it gratuitously added that, even if the statutes were ambiguous, the NRC's "interpretation wouldn't be entitled to deference."[217] In *dicta*, the court referred to SCOTUS's adoption of the major questions doctrine in *West Virginia v. Environmental Protection Agency*.[218] The court said that nuclear waste disposal's economic and political significance and its "hotly politically contested" history made it a "major subject[] of public concern" requiring either Congressional decision "or an agency acting pursuant to *clear* delegation" from Congress.[219] Such a

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205 *Id.* at 831 (citing 42 U.S.C. § 2011).
206 *Id.* at 840 (first citing 42 U.S.C. § 2073; then citing 42 U.S.C. § 2093; then citing 42 U.S.C. § 2111).
207 *Id.*
208 *Id.*
209 *Id.* at 842.
210 *Id.*
211 *Id.* at 843.
212 *Id.* at 844.
213 *Id.*
214 *Id.* at 840 (citing 42 U.S.C. § 10101).
215 *Id.* at 844.
216 *See generally id.*
217 *Id.*
218 *Id.* (citing W. Va. v. EPA, 597 U.S. 697 (2022)).
219 *Id.*

clear delegation was absent here.[220] Although the Fifth Circuit may not see it this way, some suggest that this decision creates a circuit split.[221]

Alternative energy sources are necessary with calls for decreasing the usage of petroleum-based energy sources due to climate change.[222] Nuclear energy is certainly one such source, but, while it may not contribute to climate change, it has its own problems.[223] Illinois' Public Act 103-569 is one example of legislation allowing for limited development of nuclear power generation.[224] The statute does not allow for new, large-scale power generation at facilities similar to six existing plants in Illinois.[225] This statute provides a regulatory structure for constructing Small Nuclear Reactors (SNRs), meaning those with a capacity of up to 300 megawatts.[226]

B. Individuals' Constitutional Rights and Claims to a Clean Environment & Climate Change

On August 14, 2023, following a seven-day trial, a state court in Montana issued a 103-page opinion and order in favor of sixteen plaintiffs, Montana youths who had sued the state for violating their rights to a clean and healthful environment under the Montana Constitution.[227] The plaintiffs argued that the state had violated their rights through its "fossil fuel-based state energy system," which was linked to climate change.[228] Climate change, in turn, harmed the youths through flooding, severe storms, wildfire, and drought upon family ranches;[229] wildfire smoke that made breathing difficult, inhibited the ability to hunt,[230] and caused feelings of despair and hopelessness;[231] and economic harm to one working as a ski instructor due to decreased snowpack and number of days available for work.[232]

The Montana Constitution grants all Montanans the inalienable "right to a clean and healthful environment and the rights of pursuing life's basic

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220 *Id.*

221 *See, e.g.*, Brief for Nuclear Energy Inst., Inc. as Amicus Curiae Supporting Rehearing *En Banc*, Texas v. NRC, No. 21-60743 (5th Cir. Nov. 3, 2023). At the time of this writing, Nuclear Energy Institute, Inc.has filed a Petition for Rehearing *En Banc*, citing, *inter alia*, the panel's departure from the D.C. and Tenth Circuit opinions. *Id.*

222 *See generally Nuclear Regul. Comm'n*, 78 F.4th at 827.

223 *Id.* at 844.

224 2023 Ill. Legis. Serv. 103-569 (West) (to be codified as amended 20 ILL. COMP. STAT. ANN. 3310/5).

225 *Id.*

226 *Id.*

227 Held v. Montana, No. CDV-2020-307, 2023 Mont. Dist. LEXIS 2, at *129-30 (Mont. Dist. Ct. Aug. 14, 2023).

228 *Id.*at *1.

229 *Id.*at *43.

230 *Id.*at *40, *61-62, *68, *70, *78.

231 *Id.*at *36, *60, *65, *68.

232 *Id* at *68.

necessities, enjoying and defending their lives and liberties, acquiring, possessing and protecting property, and seeking their safety, health and happiness in all lawful ways."[233] Specifically placing duties upon the state, it provides:

> (1) The state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations.
> (2) The legislature shall provide for the administration and enforcement of this duty.
> (3) The legislature shall provide adequate remedies for the protection of the environmental life support system from degradation and provide adequate remedies to prevent unreasonable depletion and degradation of natural resources.[234]

Under the Montana Environmental Policy Act (MEPA), the Department of Environmental Quality (DEQ) prepares environmental review documents for permits, licenses, and leases, including for coal mines and pipelines.[235] Some permits, licenses, and leases result in Greenhouse Gas (GHG) emissions.[236] A portion of the MEPA, known as the MEPA Limitation, forbade the DEQ, in its environmental reviews, from considering "actual or potential impacts beyond Montana's borders" and "actual or potential impacts that are regional, national, or global in nature."[237] During the pendency of the case, on May 19, 2023, an amendment was made to the MEPA Limitation that specifically prohibited consideration of GHG emissions and corresponding impacts upon climate change.[238] Thus, the state "authorizes energy projects and facilities within Montana that emit substantial levels of GHG pollution . . . without considering how the additional GHG emissions will contribute to climate change or be consistent with the standards the Montana Constitution imposes on the state to protect people's rights."[239]

The youth constitutionally challenged the MEPA Limitation.[240] Over seven days of trial, the court heard live testimony from twenty-seven witnesses: twenty-four supporting the plaintiffs and three supporting the defendants.[241] It also admitted 168 plaintiffs' exhibits and four defendants' exhibits.[242] The plaintiffs called ten expert witnesses, including a Nobel

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233 MONT. CONST. art. II, § 3.
234 MONT. CONST. art. IX, § 1.
235 MONT. CODE ANN. § 75-1-201.
236 *Held*, 2023 Mont. Dist. LEXIS 2, at *95-96.
237 *Id.* at *19.
238 *Id.* at *8.
239 *Id.* at *95-96.
240 *Id.* at *2.
241 *Id.* at *11.
242 *Id.*

Prize-winning climate scientist, a renewable energy specialist, and a state environmental policy expert.[243] Among other things, these experts explained how easily Montana could move away from fossil fuels and toward more renewable resources.[244] The defendants produced one expert witness whose "testimony was not well-supported, contained errors, and was not given weight by the Court."[245] The fact that "climate change is a critical threat to public health" was not refuted by the defendants at trial,[246] nor was the fact that the plaintiffs had been, and were continuing to be, "harmed by the State's disregard of GHG pollution and climate change" because of the MEPA Limitation.[247]

The court made numerous conclusions based on the record, including that the "[s]cience [wa]s unequivocal that dangerous impacts to the climate are occurring due to human activities, primarily from the extraction and burning of fossil fuels."[248] It further concluded that there was "overwhelming scientific consensus that Earth is warming as a direct result of human GHG emissions, primarily from the burning of fossil fuels."[249] Findings such as these continued for over 60 pages, including the note that, "of the approximately 146 glaciers in Glacier National Park in 1850, only 26 remained in 2015 that were larger than 25 acres, meaning that 82% of the park's glaciers are gone and there has been a 70% loss of area of all glaciers."[250] The court found the MEPA Limitation unconstitutional.[251] "Montana's climate, environment, and natural resources [were found to be] unconstitutionally degraded and depleted due to . . . GHGs and climate change."[252] The "MEPA Limitation conflict[ed] with the very purpose of MEPA,"[253] and the court "permanently enjoined" it.[254]

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243 Blair Miller, *Judge sides with youth in Montana climate change trial, finds two laws unconstitutional*, PENN CAPITAL-STAR (Aug. 15, 2023, 2:49 PM), https://penncapital-star.com/energy-environment/judge-sides-with-youth-in-montana-climate-change-trial-finds-two-laws-unconstitutional/#:~:text=The%20plaintiffs%20called%2010%20expert,climate%20was%20warming%2C%20Montana's%20outsized.

244 *Id*.

245 *Held*, 2023 Mont. Dist. LEXIS 2, at *83.

246 *Id*. at *43.

247 *Id*. at *58.

248 *Id*. at *23.

249 *Id*. at *22-23.

250 *Id*. at *46-47.

251 *Id*. at *94.

252 *Id*. at *124.

253 *Id*. at *126.

254 *Id*. at *129.

In October 2023, the defendants filed a motion for clarification and for stay of judgment pending appeal,[255] which was denied in November.[256] On December 1, the state agencies and Governor filed a motion for stay of order pending appeal with the Montana Supreme Court.[257] That court denied the motion and ordered the appeal to proceed.[258]

It is unclear what the ultimate result in Montana will be, but it marks a first success where many similar lawsuits elsewhere have failed.[259] Only a few other state constitutions have provisions like Montana,[260] which limits the reach of the ruling. Surely more such lawsuits will follow, most likely in those states already having environmental protections in their constitutions. For example, Article XI of the Illinois Constitution provides that each person in Illinois has a "right to a healthful environment."[261] For many years, however, some communities within Illinois—particularly communities of color—have borne higher rates of pollution and its devastating effects.[262] *Held* may provide guidance to those seeking similar relief in Illinois.[263] One could easily see state constitutions becoming a similar battleground over environmental rights.

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255 *See* Defendants' Motion for Clarification and for Stay of Judgment Pending Appeal, Held v. Montana, CDV-2020-307 (Mont. Dist. Ct. filed Oct. 16, 2023).

256 Order Denying Defendants' Motion for Clarification and for Stay of Judgment Pending Appeal, Held v. Montana., CDV-2020-307 (Mont. Dist. Ct. ordered Nov. 21, 2023).

257 Appellant State Agencies' and Governor's Rule 22 Motion for Stay of Order Pending Appeal, Held v. Montana, DA 23-0575 (Mont. filed Dec. 1, 2023).

258 Order, Held v. Montana, DA 23-0575 (Mont. filed Jan. 16, 2024).

259 *See* Scott W. Stern, *Standing for Everyone: Sierra Club v. Morton, Supreme Court Deliberations, and a Solution to the Problem of Environmental Standing*, 30 Fordham Env't L. Rev. 21 (2018).

260 *See* N.Y. CONST. art 1, § 19 ("Each person shall have a right to clean air and water, and a healthful environment."); PA. CONST. art. 1, § 27 ("The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment."); ILL. CONST. art. XI, § 2 ("Each person has the right to a healthful environment."); MASS. CONST. art XLIX ("The people shall have the right to clean air and water, freedom from excessive and unnecessary noise, and the natural, scenic, historic, and esthetic qualities of their environment."); HAW. CONST. art. XI, § 9 ("Each person has the right to a clean and healthful environment, as defined by laws relating to environmental quality, including control of pollution and conservation, protection and enhancement of natural resources.").

261 ILL. CONST. art. XI, § 2.

262 *See* Brett Chase & Patrick Judge, *Pollution Hits Chicago's West, South Sides Hardest*, ILL. ANSWERS PROJECT (Oct. 25, 2018), https://illinoisanswers.org/2018/10/25/interactive-map-pollution-hits-chicagos-west-south-sides-hardest/.

263 *See* Amber Polk, *What Montana Youths' Climate Victory Could Mean for Other States*, US NEWS (Aug. 15, 2023), https://www.usnews.com/news/best-states/articles/2023-08-15/montana-climate-lawsuit-could-set-a-precedent-for-other-states.

C. The Resource Conservation & Recovery Act: Manufacturing Process Unit Exemption

Five years after an EPA environmental scientist conducted a Resource Conservation and Recovery Act (RCRA)[264] compliance inspection at a batch chemical manufacturing facility in Massachusetts, a key ruling rejecting the EPA's limited interpretation of an important exemption became final.[265] Where the point of generation is located holds fundamental importance because RCRA's hazardous waste regulations begin at the point where hazardous waste is generated.[266] It signals the beginning of comprehensive "cradle to grave" enforceable requirements.[267]

In promulgating RCRA regulations, the EPA recognized the need for an exemption commonly known as the Manufacturing Process Unit (MPU) exemption, which provides:

> A hazardous waste which is generated in a product or raw material storage tank, a product or raw material transport vehicle or vessel, a product or raw material pipeline, or in a manufacturing process unit or an associated non-waste-treatment-manufacturing unit, is not subject to regulation under parts 262 through 265, 268, 270, 271 and 124 of this chapter or to the notification requirements of section 3010 of RCRA until it exits the unit in which it was generated, unless the unit is a surface impoundment, or unless the hazardous waste remains in the unit more than 90 days after the unit ceases to be operated for manufacturing, or for storage or transportation of product or raw materials.[268]

By its terms, hazardous waste generated in certain tanks, vessels, and units does not become regulated as hazardous waste until it is removed or ninety days after the unit ceases operation.[269] The purpose of the exemption was "to address the incidental hazardous waste generation during product or raw material storage, transport or manufacturing" where those wastes would be "adequately contained during such activities."[270] In the preamble to the rule promulgating the exemption, the EPA explained that "most of these units

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264 42 U.S.C. §§ 6901–6992.

265 *In re* ISP Freetown Fine Chemicals, Inc., RCRA-01-2018-0062, EPA ALJ (EPA filed Aug. 15, 2022) (granting respondent's motion for accelerated decision and denying complainant's motion for accelerated decision/initial decision); ISP Freetown Fine Chemicals, Inc., RCRA (3008) No. 22-01 (EAB filed Sep. 22, 2022) (declining to exercise *sua sponte* review).

266 *See, e.g.*, *Frequent Questions About Hazardous Waste Generation*, EPA, https://www.epa.gov/hwgenerators/frequent-questions-about-hazardous-waste-generation (June 24,2024).

267 City of Chicago v. Env't Def. Fund, 511 U.S. 328, 331 (1994).

268 40 C.F.R. § 261.4(c).

269 40 C.F.R. § 261.4(c).

270 Memorandum from Barnes Johnson, Director, Off. Res. Conservation & Recovery, EPA, to RCRA Division Directors, EPA Regions I-X (Oct. 3, 2016) (on file with EPA), available at chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://rcrapublic.epa.gov/files/14884.pdf.

are tanks or tank-like units (*e.g.*, distillation units) which are designed and operated to hold valuable products or raw materials in storage or transportation or during manufacturing."[271]

This MPU exemption, which effectively shifts the line regarding point of generation, was at issue in *In re ISP Freetown Fine Chemicals, Inc.*[272] The EPA alleged that ISP Freetown's "distillate receiver tanks" were hazardous waste tanks.[273] The company argued that the distillate receiver tanks were exempt from RCRA regulation under the MPU exemption because they were connected to and part of a distillation unit.[274]

Critically, however, none of the following are defined in the regulations: "manufacturing process unit,"[275] "manufacturing,"[276] "unit,"[277] and "distillation unit."[278] Merriam-Webster defines "distillation" as "the process of purifying a liquid by successive evaporation and condensation."[279] To separate two mixed liquids through distillation, the liquid is heated (and/or the pressure reduced) until the liquid with the lower boiling point (the more volatile one) evaporates into vapor form, leaving the other liquid in its liquid state.[280] The vaporized component is drawn off into a condenser, where it is cooled to the point that it returns to a liquid state.[281] This liquid is then directed to a distillate receiver tank.[282] ISP Freetown used a distillation process conducted in batches to make the relevant products.[283] ISP Freetown's

> Products are produced by "first dissolving raw materials in a solvent, such as alcohol, inside a reactor vessel and then allowing them to react chemically." . . . "once the reaction is complete, some or all of the solvent must be removed from the contents of the reactor to produce a final product[.]" To remove the solvent, the reactor vessel is "heated and/or subjected to reduced pressure so the liquid turns into vapor." The solvent vapor is then piped into a condenser, in which the vapor is cooled "by routing it through narrow tubes surrounded by a liquid coolant, causing it

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271 *Id.* (citing 45 C.F.R. 72025).
272 *In re* ISP Freetown Fine Chems., Inc., No. RCRA-01-2018-0062, 2022 WL 3574416 (EPA A.L.J. Aug. 15, 2022).
273 *Id*. at *7.
274 *Id*. at *10.
275 *Id*. at *18.
276 *Id*. at *16, *24.
277 *Id*. at *16, *31-32.
278 *Id*. at *13, *22.
279 *Distillation*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (10th ed. 1994).
280 *ISP Freetown*, 2022 WL 3574416, at *2.
281 *Id*.
282 *Id*.
283 *Id*.

> to turn back into liquid distillate." The liquid distillate is then piped into a receiver tank.[284]

ISP Freetown's position was that distillation units, "as a matter of engineering and basic logic," consist of "three irreducible components'— the reactor, condenser, and one or more receiving tanks."[285] Each part is necessary, connected, and together used to make a product.[286] Therefore, ISP Freetown maintained the distillate receiver tanks were exempt under the MPU exemption.[287]

The EPA argued the distillate receiver tanks did not qualify for the MPU Exemption because, "it d[id] not apply to distillation units, in general."[288] The EPA also maintained that the distillation process was "the process that happen[ed] exclusively in the reactor tanks[,]" not the receiver tanks.[289] The receiver tanks were not part of the "production process" because products were not "produced in the Receiver Tanks," which were "part of [a] waste management system."[290]

The Administrative Law Judge (ALJ) concluded that the EPA's argument held "little merit . . . , as the preamble plainly list[ed] 'distillation units' as an example of a 'tank-like unit' that temporarily holds hazardous waste during manufacturing."[291] Further, the ALJ determined that "when distillation units [we]re operated to hold incidental wastes during the manufacturing process, such distillation units c[ould] be categorized as 'manufacturing process units.'"[292]

The ALJ then had to determine whether the distillate receiver tanks were *part of* the "distillation unit."[293] She found that under an RCRA Subpart AA definition, a "distillation operation is comprised of not just the vessel in which distillation begins, but of the components in which liquid solvents settle after . . . exiting the reactor."[294] Therefore, ISP Freetown's distillate receiver tanks were part of the distillation unit.[295]

In the final necessary step of the analysis, the ALJ had to decide whether the distillate receiver tanks were "part of the 'manufacturing process.'"[296] The EPA said that "manufacturing" required chemical or

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284 *Id.* (alteration in original) (citation omitted).
285 *Id.* at *11.
286 *Id.* at *15, *29.
287 *Id.* at *9-12, *15, *17.
288 *Id.* at *13.
289 *Id.* at *13.
290 *Id.*
291 *Id.* at *19.
292 *Id.* at *20.
293 *Id.* at *20-23.
294 *Id.* at *23.
295 *Id.*
296 *Id.* at *23-34.

physical reactions where "raw materials are being transformed into products within the exempted unit."[297] The distillate receiver tanks "clearly" did not produce a product but only served "to collect used liquid solvents that ha[d] been separated through distillation."[298] ISP Freetown countered that the receiver tanks were "integral" to the production process and that manufacturing "must be evaluated at the level of the *process*—the system—not in each individual manufacturing component."[299] The ALJ found that it was not required "that there be a 'transformation of materials' or an 'intentional physical or chemical reaction' directly within the component."[300] Here, the "distillate receiver tanks serve[d] a distinct role *during* manufacturing, not solely after the production process end[ed]," and their "primary purpose . . . [wa]s not to store hazardous waste, but rather to allow for the batch distillation process to continue."[301] Accordingly, the distillate receiver tanks were part of a closed manufacturing system and were exempt under the MPU Exemption.[302]

In conclusion, the distillate receiver tanks met the MPU exemption, but that does not mean that the distillate they contain is not waste.[303] The exemption means that the tanks are not regulated as RCRA hazardous waste tanks, and the contents are not regulated as hazardous waste until removed from the tanks.[304] However, this distinction is important to the regulated community because the RCRA regulations are substantial and noncompliance costly.[305] Each situation is fact-intensive and requires close analysis, but the EPA's overly narrow interpretation of this exemption was relaxed through this decision.[306]

D. No Insurance Coverage for Failing to Obtain a Permit

In *Continental Casualty Company v. 401 North Wabash Venture, LLC*, an Illinois appellate court held that failing to be in possession of a valid Clean Water Permit issued pursuant to the NPDES is not covered by a Commercial General Liability Insurance Policy.[307]

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297 *Id.* at *27.
298 *Id.*
299 *Id.*
300 *Id.* at *28.
301 *Id.*
302 *Id.* at *30.
303 *Id.* at *2. Some distillate is able to be reused, some is largely water and sent to a wastewater treatment plant, and approximately 39% constitutes hazardous waste. *Id.*
304 40 C.F.R. § 261.4(c) ("Until it exits the unit in which it was generated" or "more than 90 days after the unit ceases to be operated.").
305 *The Cost of Non-Compliance*, CLEANEARTH (June 15, 2016), https://www.cleanearthinc.com/news/cost-non-compliance.
306 *See generally ISP Freetown*, 2022 WL 3574416.
307 Cont'l Cas. Co. v. 401 N. Wabash Venture, LLC, 2023 IL App (1st) 221625, ¶ 34.

E. No Private Cause of Action to Enforce Illinois Environmental Protection Act, Leaking Underground Storage Tank Program Rules, or State Fire Marshal Rules

In *Rice v. Marathon Petroleum Corporation*, the plaintiff, Margaret Rice, brought suit against the defendants, Marathon Petroleum Corporation, Speedway, LLC, and certain individual defendants after she suffered burns and other injuries due to a clothes dryer exploding in her apartment building.[308] This explosion occurred because gasoline was present in the wastewater system because the defendants filled a corroded underground storage tank with nearly 10,000 gallons of fuel, allowing groundwater to displace the fuel into the surrounding environment.[309]

The plaintiff brought negligence claims and Leaking Underground Storage Tank Program (LUST) claims[310] under the Illinois Environmental Protection Act, along with some other claims under the Act alleging that the defendants had filled the tank contrary to Office of the State Fire Marshal (OSFM) regulations.[311] The defendants moved to dismiss the LUST claims, alleging that there was no private right of action under LUST or the Illinois Environmental Protection Act.[312] The circuit court agreed and found no express or private right of action under LUST or the Illinois Environmental Protection Act.[313] The plaintiff appealed to the appellate court, which reviewed the record *de novo* and held that there was no express or implied private right of action for the claims provided by LUST, the Illinois Environmental Protection Act, or OSFM regulation.[314] In reaching its holding, the appellate court noted that there was no implied right of action because, when considering the *Abassi v. Paraskevoulakos*[315] factors, there was no private right of action when there was an adequate common law remedy, a negligence action.[316]

F. Final Agency Action is Required Before an Appeal

In *Driftless Area Land Conservancy v. Rural Utilities Service*, various environmental advocacy organizations filed suit challenging actions of various federal agencies in permitting an electricity transmission line project that would cross through Driftless Area National Wildlife Refuge, allegedly

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308 Rice v. Marathon Petroleum Corp. ,2022 IL App (1st) 220155-U, ¶ 3.
309 *Id.* ¶ 4.
310 415 ILL. COMP. STAT. ANN. 5/57 *et seq*. (West 2016).
311 *Rice*, 2022 IL App (1st) 220155-U, ¶ 4.
312 *Id.*
313 *Id.*
314 *Id.*
315 Abbasi *ex rel.* Abbasi v. Paraskevoulakos, 187 Ill. 2d 386, 393 (1999).
316 *Rice*, 2022 IL App (1st) 220155-U, ¶ 1.

in violation of the National Wildlife Refuge System Improvement Act (the "Refuge Act") and the National Environmental Protection Act (NEPA).[317] Following intervention by the electricity utilities, as intervenor-defendants, the parties cross-moved for summary judgment, and the organizations moved for a permanent injunction.[318] The district court granted summary judgment in part, entering a declaratory judgment that, under the Refuge Act, the agency's compatibility determination could not support a crossing either by right of way (the rescinded decision) or land transfer (the pending proposal), and denied them in part. [319] It also denied the motion for a permanent injunction.[320]

The agencies appealed the summary judgment decision and the organizations cross-appealed the denial of permanent injunctions.[321] The appellate court upheld the denial of a permanent injunction and reversed the district court's summary judgment holdings.[322] The appellate court reasoned that, although an agency's decision to change course does not moot a lawsuit against an agency when the change is not final, jurisdiction alone is not the only factor to be considered by the court; rather, a final agency action is necessary.[323]

The court noted that the matter was not moot because, "although the Fish and Wildlife Service ha[d] revoked the original compatibility determination, it ha[d] not promised never to issue a new permit for the crossing."[324] However, this was not a final agency action under the Administrative Procedure Act (APA), a requirement for judicial review.[325] To be reviewable, the final action must consummate the agency's decision-making process and must determine rights and obligations; it must be a terminal event.[326] The court held this had not happened because the compatibility determination by the Fish and Wildlife Service was not a final decision, just a prerequisite to a permit rather than the end of the agency's process. [327] Therefore, the district court's declaratory judgment was wrong and needed reversed.[328]

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317 Driftless Area Land Conservancy v. Rural Utils. Serv., 74 F.4th 489, 492 (7th Cir. 2023).
318 *Id.*
319 *Id.*
320 *Id.*
321 *Id.*
322 *Id.*
323 *Id.*
324 *Id.* at 493.
325 *Id.* at 492 (citing 5 U.S.C § 704).
326 *Id.* at 493.
327 *Id.* at 495.
328 *Id.*

G. Chevron Analysis Followed in the Seventh Circuit Court of Appeals

In *National Wildlife Federation v. United States Army Corps of Engineers***,** *Chevron* is still good law in the Seventh Circuit Court of Appeals.[329] Various environmental organizations brought an action alleging that the 2017 final Supplemental Environmental Impact Statement (SEIS) prepared by the COE in support of its decision to continue the program of building river training structures to maintain navigable channel in Middle Mississippi River did not comply with the Water Resources Development Act (WRDA) or NEPA.[330] The district court granted summary judgment for the defendants, and the plaintiffs appealed.[331] The appellate court upheld the district court's finding that the defendants' actions were not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" based on the APA.[332]

The plaintiffs had alleged several reasons why they believed the defendants ran afoul of congressional requirements.[333] First, they contended that the defendants violated a provision in the WRDA that required reports and proposals submitted by the secretary to include detailed plans to mitigate ecological damage.[334] The appellate court agreed with the defendants' interpretation of the statute, concluding that the requirement for mitigation plans applied solely to reports submitted to Congress.[335] Consequently, because the SEIS was not submitted to Congress, it did not violate the WRDA.[336]

Second, the plaintiffs alleged that the defendants' SEIS purpose and needs statement violated NEPA because the defendants failed to explore reasonable alternatives.[337] The appellate court found there was no such violation because the defendants' SEIS purpose and need statement reflected the instructions of Congress and was not arbitrary or capricious in defining such, which tasked the defendants with maintaining the channel by using permanent structures and supplemental dredging, but no more than necessary and economical.[338] Finally, the plaintiffs alleged that the defendants did not consider reasonable alternatives not within the jurisdiction of the lead agency pursuant to 40 C.F.R § 1502.[339] Here, the court also disagreed, noting the

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329 Nat'l Wildlife Fed'n v. United States Army Corps of Eng'rs**,** 75 F.4th 743, 748 (7th Cir. 2023).
330 *Id.* at 747.
331 *Id.*
332 *Id.* at 755 (citing 5 U.S.C § 704).
333 *Id.* at 753.
334 *Id.* at 755.
335 *Id.*
336 *Id.* at 753.
337 *Id.* at 754.
338 *Id.* at 755.
339 *Id.*

defendants considered several options and selected reasonable alternatives to study further.[340]

Ultimately, the court held that the defendants' final SEIS satisfied NEPA.[341] The defendants reasonably articulated the purpose and need for the project, identified reasonable alternatives that warranted detailed study, and provided meaningful consideration of those alternatives, given the programmatic nature of the supplemental statement.[342]

IV. NOTEWORTHY REGULATORY ACTIONS

A. Federal Regulatory Actions

1. On December 21, 2022, the EPA reconsidered the Ethylene Oxide Rule.[343] In this final rule, the EPA adopted the IRIS value for risk assessments of ethylene oxide.[344]
2. On December 22, 2022, the EPA issued its guidance on *Principles for Addressing Environmental Justice in Air Permitting*.[345]
3. On February 13, 2023, the EPA issued its final rule disapproving twenty-one states' interstate transport State Implementation Plans (SIPs).[346] These plans are required by the "interstate transport" provision of the Clean Air Act, otherwise known as the "good neighbor" provision.[347]
4. On July 31, 2023, the EPA released its *Draft National Strategy to Prevent Plastic Pollution*.[348] This will likely affect the regulated

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340 *Id*.

341 *Id.* at 760.

342 *Id.*

343 Reconsideration of the 2020 National Emission Standards for Hazardous Air Pollutants: Miscellaneous Organic Chemical Manufacturing Residual Risk and Technology Review, 88 Fed. Reg. 77985 (Dec. 21, 2022) (to be codified at 40 C.F.R. 63).

344 *Id.*

345 EPA, EJ IN AIR PERMITTING: PRINCIPLES FOR ADDRESSING ENVIRONMENTAL JUSTICE CONCERNS IN AIR PERMITTING (2022), available https://www.epa.gov/system/files/documents/2022-12/Attachment%20-%20EJ%20in%20Air%20Permitting%20Principles%20.pdf; *see also* Madeleine Boyer et al., *EPA Issues Environmental Justice Guidance for Clean Air Act Permits*, NAT'L L. R. (Jan. 5, 2023), https://www.natlawreview.com/article/epa-issues-environmental-justice-guidance-clean-air-act-permits.

346 Air Plan Disapprovals; Interstate Transport of Air Pollution for the 2015 8-Hour Ozone National Ambient Air Quality Standards, 88 Fed. Reg. 9336 (Mar. 15, 2023) (to be codified at 40 C.F.R. 52).

347 Air Plan Disapprovals; Interstate Transport of Air Pollution for the 2015 8-Hour Ozone National Ambient Air Quality Standards, 88 Fed. Reg. 9336 (Mar. 15, 2023) (to be codified at 40 C.F.R. 52) (citing Clean Air Act, 42 U.S.C. § 7410(a)(2)(D)(i)(I)).

348 *See* EPA, DRAFT NATIONAL STRATEGY TO PREVENT PLASTIC POLLUTION (2023). This is a reaction to the micro-plastic concerns identified by the Illinois General Assembly in P.A. 103-93. 415 ILL. COMP. STAT. ANN. 5/13.10 (West 2024).

community—especially those who manufacture plastic, regularly use plastics, and handle plastic waste.[349]

5. On December 2, 2023, the EPA issued a sweeping change in methane emission control requirements for oil and gas infrastructure, which included the first-ever requirements for existing sources.[350] This final rule became effective March 8, 2024.[351]
6. On December 19, 2023, in response to a November 2, 2023, decision by the Eighth Circuit Court of Appeals vacating the EPA's 2021 final rule prohibiting the use of the pesticide chlorpyrifos on food or feed crops,[352] the EPA issued an update on its intended next steps.[353]
7. On January 17, 2024, the EPA updated the residential soil Lead (Pb) guidance for Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and RCRA Corrective Action facilities.[354] Specifically, the EPA Regions were directed to use a residential soil Pb cleanup objective of 200 Parts Per Million (PPM) unless there was another source of Pb identified.[355] According to the EPA, the Regional Screening Level (RSL) of "100 [PPM] considers aggregate [Pb] exposure and increased risk to children living in communities with multiple sources of [Pb] contamination."[356] This revised residential soil rule is clearly designed to address the concept of Environmental Justice in neighborhoods that bear a more significant burden due to environmental contaminants.[357]

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349 *See* EPA, DRAFT NATIONAL STRATEGY TO PREVENT PLASTIC POLLUTION (2023).

350 Standards of Performance for New, Reconstructed, and Modified Sources and Emissions Guidlelines for Existing Sources: Oil and Natural Gas Sector Climate Review, 89 Fed. Reg. 16820 (Mar. 8, 2024) (to be codified at 40 C.F.R. pt. 60); *see also EPA's Final Rule for Oil and Natural Gas Operations Will Sharply Reduce Methane and Other Harmful Pollution,* EPA (Dec. 2, 2023), https://www.epa.gov/controlling-air-pollution-oil-and-natural-gas-operations/epas-final-rule-oil-and-natural-gas.

351 Standards of Performance for New, Reconstructed, and Modified Sources and Emissions Guidlelines for Existing Sources: Oil and Natural Gas Sector Climate Review, 89 Fed. Reg. 16820 (Mar. 8, 2024) (to be codified at 40 C.F.R. pt. 60).

352 *See* Red River Valley Sugarbeet Growers Ass'n v. Regan, 85 F. 4th 881, 881 (8th Cir. 2023) (holding that a "statute governing pesticide tolerances required EPA to consider whether revoking most tolerances would make it safe to retain subset of tolerances.").

353 *EPA's Update on Next Steps for Chlorpyrifos,* EPA (Dec. 19, 2023), https://www.epa.gov/pesticides/epa-update-next-steps-chlorpyrifos.

354 Memorandum from Barry N. Breen, Principal Deputy Assistant Adm'r, Off. Land & Emergency Mgmt., EPA, to Reg'l Adm'rs, Regions 1-10, EPA (Jan. 17, 2024) (on file with EPA), available at https://semspub.epa.gov/work/HQ/100003435.pdf.

355 *Id.*

356 *Id.*

357 *See Equitable Development and Environmental Justice,* U.S. EPA, https://www.epa.gov/environmentaljustice/equitable-development-and-environmental-justice (last visited June 16, 2024).

B. Illinois Regulatory Actions

1. On May 2, 2023, OFSM adopted a series of amendments including:
   a) to the Petroleum Equipment Contractor Licensing Act.[358] The rulemaking updated the schedule of citations and fines for violations of the Act;[359]
   b) to Illinois Administrative Code title 41, section 174, updating the Underground Storage Tank Rules concerning flammable and combustible liquids but retaining the longstanding rule against smoking near fuel dispensers;[360] and
   c) to Illinois Administrative Code title 41, section 176 to streamline the submission of reporting forms and add the requirement for precision testing.[361]
2. On May 19, 2023, the Illinois Pollution Control Board adopted amendments to Radiation Hazards,[362] implementing Executive Order 2016-13 which required agencies to identify outdated, repetitive, confusing, or unnecessary rules.[363]

C. Illinois Legislature

1. Public Act 102-1123 created a statewide siting law for solar and wind energy facilities.[364] The law became effective on January 27, 2023.[365] It does not apply to municipalities—only counties in Illinois are affected.[366] Counties were required to amend their ordinances to comply within 120 days after January 2, 2023.[367] Solar projects must obtain executed Agricultural Impact Mitigation Agreements (AIMA) with the Illinois Department of Agriculture.[368] Finally, counties have a deadline to process applications and county regulations cannot conflict with or exceed state-imposed regulations.[369]
2. Public Act 103-383 created the Statewide Recycling Needs Assessment Advisory Council charged with performing a needs

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358 ILL. ADMIN. CODE tit. 41, §§ 172.40, 172.50.
359 ILL. ADMIN. CODE tit. 41, §§ 172.40, 172.50.
360 ILL. ADMIN. CODE tit. 41, § 174.
361 ILL. ADMIN. CODE tit. 41, § 176.
362 ILL. ADMIN. CODE tit. 35, § 1000.
363 *Executive Order 16-13*, ILLINOIS.GOV (Oct. 17, 2016), https://www.illinois.gov/government/executive-orders/executive-order.executive-order-number-13.2016.html.
364 *See* 55 ILL. COMP. STAT. 5/5-12020 (2023).
365 *See id.*
366 *Id.* § 5-12020(b).
367 *Id.* § 5-12020(d).
368 *Id.* § 5-12020(c).
369 *Id.* § 5-12020(d).

assessment of packaging materials.[370] This advisory council will have several producers of packaging products as voting members.[371]

3. Public Act 103-28 expanded the state's ability to authorize the creation of environmental covenants and establish land use restrictions aimed at protecting human health and the environment.[372]
4. Public Act 103-62 amended the Illinois Pesticides Act to provide that any person applying for a pesticide permit that results in human exposure to the pesticide shall be subject to a fine of $2,500, with an additional penalty of $1,000 for each individual exposed to such pesticide.[373]
5. Public Act 103-327 added the removal, hauling, and transportation of bio-solids, lime sludge, and lime residue from a water treatment plant or facility and the disposal of bio-solids, lime sludge, and lime residue removed from a water treatment plant or facility at the landfill to the definition of public works for which prevailing wage provisions would apply.[374]
6. Public Act 103-172 amended sections 58.2 and 58.7 of the Illinois Environmental Protection Act by streamlining the application and review process for the Illinois Environmental Protection Agency's (IEPA) services administered pursuant to the Site Remediation Program (SRP) by requiring $2,500 as the initial partial payment.[375]
7. Public Act 103-306 amended the Central Midwest Radioactive Waste Compact, the Radioactive Waste Compact Control Act, and the Radioactive Waste Tracking and Permitting Act, modifying the definitions of "low-level radioactive waste" or "waste" to expand the referenced definition of by-product material.[376]
8. Public Act 103-441 increased the fees for various licenses and permits under the Illinois Pesticide Act and the Lawn Care Products Application and Notice Act.[377]
9. Public Act 103-93, concerning microplastics, required the IEPA to start a public webpage with information regarding microplastics including (1) describing micro-plastics and their effects on aquatic and human health; (2) any federal or state regulatory action taken to address micro-plastics and their effects on aquatic and human health; (3) contact information for an employee of IEPA who can respond to questions from the public on micro-plastics; and (4) additional

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370 415 ILL. COMP. STAT. 5/22.15(e) (2023).
371 *Id.* § 22.15.
372 765 ILL. COMP. STAT. 122/2 (2024).
373 415 ILL. COMP. STAT. 60/24.1(3) (2023).
374 820 ILL. COMP. STAT. 130/2 (2024).
375 415 ILL. COMP. STAT. 5/58.2, 58.7 (2024).
376 45 ILL. COMP. STAT. 140/1 (2023).
377 415 ILL. COMP. STAT. 60/6, 10-13, 19 (2024).

resources.[378] The IEPA is also required to submit a report to the General Assembly and Governor regarding microplastics, including what other states are doing to address them.[379]

10. Public Act 103-230 amended the Illinois Environmental Protection Act to provide that, notwithstanding any other provision of law, the use of a refrigerant is not prohibited or otherwise limited if the refrigerant is identified as a safe alternative under federal law.[380]
11. Public Act 103-333 amended the Illinois Environmental Protection Act by creating a framework for the IEPA to approve the use of limestone residual for additional means beyond what is currently permitted and excludes limestone residual generated from the treatment of drinking water at a publicly owned drinking water treatment plant from regulation as a waste—so long as it is used for specific beneficial purposes.[381]
12. Public Act 103-380 required the Illinois Power Agency to procure renewable energy credits from hydropower dams while barring incentives for constructing new dams.[382]
13. Public Act 103-342 amended the Illinois Environmental Protection Act and provides that incidental sales of finished compost do not need to be applied to agronomic rates in determining whether a person needs a permit to conduct a landscape waste composting operation at specific sites.[383]
14. Public Act 103-346 expanded the Prevailing Wage Act to include power washing projects in which steam or pressurized water is used to remove paint or other coatings, oils or grease, corrosion, or debris from a surface or to prepare a surface for a coating.[384]
15. Public Act 103-372 created the Paint Stewardship Act to provide for an Extended Producer Responsibility (EPR) plan for the collection and recycling of post-consumer household paint.[385] The law requires each paint producer of household paint to join PaintCare and submit a plan to the IEPA to establish a program that includes the agency's oversight and an assessment of paint manufacturers to fund the program.[386] In essence, leftover paint is collected at collection sites and then recycled.[387]

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378 415 ILL. COMP. STAT. 5/13.10 (2024).
379 *Id.* § 13.10(4).
380 *Id.* § 9.19 (2023).
381 *Id.* § 3.330(a)(26) (2024).
382 20 ILL. COMP. STAT. 3855/1-75(C)(1)(c)(i) (2024).
383 415 ILL. COMP. STAT. 5/21 (2024).
384 820 ILL. COMP. STAT. 130/2 (2024).
385 415 ILL. COMP. STAT. 175/5 (2024).
386 *Id.* § 5(7).
387 *Id.* § 5(4).

16. Public Act 103-470 required that "compostable food ware containers" be used by state agencies.[388]
17. Public Act 103-351 amended the PFAS Reduction Act and required IEPA to create a take-back program for fire departments that use and store firefighting foam with PFAS.[389]
18. Public Act 103-168 amended Section 31 of the Illinois Environmental Protection Act concerning Compliance Commitment Agreements by allowing the IEPA and the respondent involved with a Violation Notice to agree to an extended time to (i) submit a written response to the allegations described in a Violation Note; and (ii) hold a requested meeting without a representative of the Office of the Attorney General or State's Attorney.[390] Also, the IEPA and the recipient of the Violation Notice can agree to an extended time, not to exceed thirty days, for the recipient to accept or reject the agency's proposed Compliance Commitment Agreement.[391]
19. Public Act 103-28 amended the Uniform Environmental Covenants Act by removing the requirement that an "environmental response project" include work performed for environmental remediation in response to contamination.[392] Rather, an "environmental response project" includes work performed to clean up, remediate, eliminate, investigate, minimize, mitigate, or prevent the release or threatened release of contamination that affects real property and is performed to protect health or the environment.[393]
20. Public Act 103-67 amended the Administrative Review Article of the Code of Civil Procedure[394] regarding actions reviewing the final decision of an administrative agency involved with historic properties or exterior design of buildings and structures.[395]
21. Public Act 103-172 provided that the IEPA may require a Remediation Applicant (RA) to provide an advance partial payment of $2,500 (rather than an advance payment not exceeding $5,000 or one-half of the total anticipated costs to be incurred by the IEPA (whichever is less).[396] Also, reviews by the IEPA or a Licensed Professional Engineer or Geologist (RELPEG) are to be completed and communicated to the RA within 90 days after the request for review or approval if two or more plans or reports are submitted

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388 415 ILL. COMP. STAT. 80/6 (2024).
389 415 ILL. COMP. STAT. 170/40 (2023).
390 415 ILL. COMP. STAT. 5/31 (2023).
391 *Id.* § 31(a)(7.5).
392 765 ILL. COMP. STAT. 122/2 (2024).
393 *Id.*
394 735 ILL. COMP. STAT. 5/3-107(b-1) (2024).
395 *Id.*
396 415 ILL. COMP. STAT. 5/58.7(b) (2024).

simultaneously.[397] The IEPA is not required to take action on any submission from the RA if the RA has failed to pay all fees due.[398] The amendment also provides that any agency deadline is tolled until all fees are paid in full.[399]

22. Public Act 102-1123 provided Solar and Wind Siting Standards**,** prohibiting counties from enacting local ordinances that disallowed commercial solar and wind generating facilities in selected districts.[400] It also recognized county authority over certain siting and zoning standards while restricting many county standards that effectively prohibit development of such facilities.[401] Finally, it provided certain procedural processes and timelines for siting and zoning review of those facilities and prohibited unreasonable fees for local review of such projects.[402]
23. Public Act 103-569 allowed for the limited development of nuclear power generation.[403] It did not allow for new, large-scale power generation at facilities similar to the six, currently existing plants in Illinois.[404] The State of Illinois has had a moratorium on new nuclear power contrition since 1987.[405] This statute provided a regulatory structure for constructing SMRs—that is, those with capacity up to 300 megawatts.[406]
24. While Public Act 97-534, the Carbon Dioxide Transportation and Sequestration Act, has been law since 2011, there has been increased activity by companies looking to store carbon emissions in Illinois Geology, there has been a lot of local resistance too.[407]
25. The Illinois Radon Awareness Act was amended to require landlords to provide a prospective tenant or current tenant of a dwelling unit with the Illinois Emergency Management Agency's pamphlet entitled *Radon Guide For Tenants*, together with any records or reports pertaining to the presence of radon within the dwelling unit that indicate a radon hazard.[408] In addition, the landlord is to provide

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397 *Id.* at § 58.7(d)(5).

398 *Id.* at § 58.7(b).

399 *Id.* at § 58.7(i).

400 20 ILL. COMP. STAT. 5/5-222 (2023).

401 *Id.*

402 *Id.*

403 20 ILL. COMP. STAT. 3310/75 (2024).

404 *See generally id.*; *see also* Jerry Nowicki & Andrew Adams, *Pritzker signs measure allowing new small-scale nuclear technology in Illinois*, ST. LOUIS BUS. J. (Dec. 11, 2023), https://www.bizjournals.com/stlouis/news/2023/12/11/pritzker-signs-measure-small-scale-nuclear-tech.html.

405 *Illinois to lift moratorium on nuclear construction*, WORLD NUCLEAR NEWS (Nov. 13, 2023), https://www.world-nuclear-news.org/Articles/Illinois-to-lift-moratorium-on-nuclear-constructio.

406 20 ILL. COMP. STAT. 3310/90 (2024).

407 220 ILL. COMP. STAT. 75/1 (2024).

408 420 ILL. COMP. STAT. 46/26(a)(1) (2024).

the tenant with the new Statutory Disclosure form on Radon Hazards to Tenants form.[409] These documents must be provided at the time of the prospective tenant's application and before a lease is entered.[410] The amendment also provided that at the commencement of the lease, a tenant shall have ninety days to conduct a radon test, and if radon mitigation is implemented by the tenant, the implementation must be approved by the landlord.[411]

In 2024, look for proposed legislation in the name of Environmental Justice. This past year, there was a proposal to amend the Illinois Environmental Protection Act requiring the IEPA to annually review communities for inclusion in a database requiring environmental justice.[412] If a new source of "pollution" is identified in one of those communities, the proposal was to charge $100,000 for an application for a permit and allowing public participation in the permit approval process.[413] The measure has not passed yet, but it is not going away, either.[414]

D. Illinois Pollution Control Board

1. Rulemakings

a. Board Adopts Dry Cleaning Facility Rules

On January 5, 2023, the Board issued a final order adopting rules that address licensing dry cleaning facilities, overseeing their environmental insurance coverage, and administering state fund reimbursement for the costs of cleaning up dry-cleaning solvent releases.[415] This rulemaking was initiated by the IEPA to address amendments to the Drycleaner Environmental Response Trust (DERT) Fund Act.[416] These statutory amendments transferred oversight and implementation of the DERT Fund from the DERT Fund Council to IEPA.[417]

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409 *Id.* § 26(f).
410 *Id.* § 26(a).
411 *Id.* § 26(b).
412 H.B. 4197, 103rd Gen. Assemb., Reg. Sess. (Ill. 2023).
413 *Id.*
414 *Id.*
415 ILL. POLLUTION CONTROL BD., BOARD ADOPTS DRYCLEANING FACILITY RULES (2023), available at https://pcb.illinois.gov/documents/dsweb/Get/Document-107516/Board%20Adopts%20Drycleaning%20Facility%20Rules.pdf.
416 *Id.*
417 *Id.*

b. Board Proposed "Identical-in-Substance" Amendments to Ambient Air Quality Standards

On July 6, 2023, the Board proposed amendments to keep Illinois' ambient air quality standards identical in substance to the National Ambient Air Quality Standards (NAAQS).[418] The amendments reflect action taken by the EPA during the second half of 2022.[419] Specifically, the EPA updated its *List of Designated Reference and Equivalent Methods* to modify existing method designations and designated a new Federal Equivalent Method (FEM) for Fine Particulate Matter (PM2.5) in ambient air.[420] In addition, although it requires no Board action, the Board noted that on October 7, 2022, the EPA re-designated the Chicago area as moderate nonattainment under the 2015 eight-hour ozone NAAQS.[421]

c. Board Agreed to Expedited Review of Alternative Standards During SSM Events

On June 12, 2023, the American Petroleum Institute (API) filed a motion requesting that the Board (1) delay, until the R23-18(A) sub-docket rulemaking concluded, the effective date of the air pollution control amendments being considered in the main docket R23-18 rulemaking for those seeking alternative standards in the sub-docket;[422] (2) clarify that the effective date of the R23-18 final amendments would be stayed for anyone filing for an adjusted standard within 20 days after their effective date;[423] (3) clarify that the effective date of the R23-18 final amendments would be stayed for anyone filing for a variance within 20 days after their effective date;[424] and (4) expeditiously review, in the sub-docket, proposed alternative standards for Startup, Shutdown, and Malfunction (SSM) events so that any sub-docket final rules would have the same effective date as the R23-18 final amendments.[425]

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418 ILL. POLLUTION CONTROL BD., BOARD ADOPTS 'IDENTICAL-IN-SUBSTANCE' AMENDMENTS TO AMBIENT AIR QUALITY STANDARDS (2023), available at https://pcb.illinois.gov/documents/dsweb/Get/Document-105897/NewsBlurbR22-8May12.2022.pdf.

419 *Id.*

420 *Id.*

421 *Id.*

422 ILL. POLLUTION CONTROL BD., BOARD AGREES TO EXPEDITED REVIEW OF ALTERNATIVE STANDARDS DURING SSM EVENTS (2023), available at https://pcb.illinois.gov/documents/dsweb/Get/Document-108693/Board%20Agrees%20to%20Expedited%20Review%20of%20Alternative%20Standards%20During%20SSM%20Events.pdf.

423 *Id.*

424 *Id.*

425 *Id.*

d. Board Adopted GCDD Recovery Facility Rules

On July 6, 2023, the Board adopted final rules for permitting, operating, and closing General Construction or Demolition Debris (GCDD) recovery facilities.[426] The rules create a new Part of the Board's waste disposal rules i.e., Part 820 of the Illinois Administrative Code.[427]

e. Board Adopts Clean Air Act "Fast-Track" Amendments

On July 20, 2023, the Board adopted final amendments to its air pollution control rules.[428] The amendments removed provisions that had allowed the IEPA to grant emission sources advance permission to continue operating during a malfunction or breakdown or violate emission standards during startup.[429] Under those provisions, compliance with the IEPA's advance permission gave the source a "prima facie" defense to an enforcement action resulting from exceeding emission limits during a startup, malfunction, or breakdown.[430] The EPA found the provisions inconsistent with the CAA.[431]

f. Board Adopts "Identical-in-Substance" Amendments to Drinking Water Rules

On October 19, 2023, the Board adopted amendments to Illinois' primary drinking water regulations.[432] The amendments were "identical in substance" to amendments adopted by the EPA under the federal Safe Drinking Water Act (SDWA) during the second half of 2020 and the first half of 2021.[433] Among its amendments, the EPA revised standards for lead in plumbing fixtures and plumbing materials, adopted the Lead and Copper Rule Revisions (PbCRR), and approved new Alternative Test Procedures

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426 ILL. POLLUTION CONTROL BD., BOARD ADOPTS GCDD RECOVERY FACILITY RULES (2023), available at https://pcb.illinois.gov/documents/dsweb/Get/Document-108694/Board%20Adopts%20GCDD%20Recovery%20Facility%20Rules.pdf.

427 *Id.*

428 ILL. POLLUTION CONTROL BD., BOARD ADOPTS CLEAN AIR ACT 'FAST-TRACK' AMENDMENTS (2023), available at https://pcb.illinois.gov/documents/dsweb/Get/Document-108692/Board%20Adopts%20Clean%20Air%20Act%20%E2%80%9CFast-Track%E2%80%9D%20Amendments.pdf.

429 *Id.*

430 *Id.*

431 *Id.*

432 ILL. POLLUTION CONTROL BD., BOARD ADOPTS 'IDENTICAL-IN-SUBSTANCE' AMENDMENTS TO DRINKING WATER RULES (2023), available at https://pcb.illinois.gov/documents/dsweb/Get/Document-109870/Board%20Proposes%20%e2%80%9cIdentical-in-Substance%e2%80%9d%20Amendments%20to%20Ambient%20Air%20Quality%20Standards372024.pdf.

433 *Id.*

(ATPs) for demonstrating compliance with the National Primary Drinking Water Regulations.[434]

2. Board Decisions

a. People v. IronHustler*, PCB 20-16.*

At the end of 2022, the Third District affirmed the Board's summary judgment ruling that IronHustler had violated the Illinois Environmental Protection Act by dumping waste along and within the Mackinaw River.[435] The court also affirmed the Board's decision to impose a civil penalty on IronHustler of $80,000.[436] In addition, the court reiterated that River City failed to timely appeal the Board's decision and held that IronHustler lacked standing to argue on River City's behalf.[437]

b. Johns Manville v. IDOT*, PCB 2014-03.*

In August of 2023, the Board issued a final order finding that the Illinois Department of Transportation had violated the Illinois Environmental Protection Act and was liable for $620,203 of Johns Manville's asbestos cleanup costs.[438] Both parties appealed and the matter is currently before the Illinois Appellate Court, 4th District.[439]

c. Protect West Chicago v. City of West Chicago, Lakeshore Recycling Systems, *PCB 23-107;* People Opposing DuPage Environmental Racism v. City of West Chicago and Lakeshore Recycling Systems, *PCB 23-109 (consolidated)*

This is a siting case involving a waste transfer station.[440] A contested hearing was held in West Chicago, Illinois, and the Board is expected to rule shortly.[441]

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434 *Id.*

435 People v. IronHustler Excavating, Inc., 2022 IL App (3d) 210518-U, ¶ 1.

436 *Id.*

437 *Id.*

438 Opinion and Order of the Board at 1, Johns Manville v. Ill. Dep't Transp., PCB 14-3 (2023).

439 *Id.*

440 Opinion And Order of the Board at 1, Protect West Chicago v. City of West Chicago, West Chicago City Council & Lakeshore Recycling Sys. LLC, PCB 23-107 (2024).

441 *Id.*

V. STATUS OF PFAS—THE EMERGING CONTAMINANT OF CONCERN IN 2023

PFAS have received much attention for several years as emerging contaminants of concern.[442] Each year more has been learned about their potential health effects and their presence in environmental media.[443] These "forever chemicals"—so-called due to their persistence and resistance to degradation—have garnered intense regulatory focus on the state and federal level.[444]

Here, we focus primarily on recent developments at the federal level, while giving some attention to state-level regulation, including in Illinois. PFAS are a large class of specialized synthetic chemicals that have been in use since the 1940s.[445] PFAS exposure may occur through the following:

> [d]rinking water from PFAS-contaminated municipal sources or private wells[;] eating fish caught from water contaminated by PFAS[;] . . . accidentally swallowing or breathing contaminated soil or dust[;] . . . eating food . . . produced near places where PFAS were used or made[;] . . . eating food packaged in material that contains PFAS[; or] . . . from consumer products containing PFAS such as stain resistant carpeting and water repellent clothing.[446]

"Due to their widespread use, physicochemical properties, and prolonged persistence, many PFAS co-occur in exposure media (*e.g.*, air, water, ice, sediment), and bio-accumulate in tissues and blood of aquatic as well as terrestrial organisms, including humans."[447] PFAS are so widespread that the Centers for Disease Control and Prevention (CDC) and the Agency for Toxic Substances and Disease Registry (ATSDR) (collectively "CDC/ATSDR"), which have been sampling Americans' blood for PFAS since 1999-2000,

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442 *See generally* Marina G. Evich *et al.*, *Per- and polyfluoroalkyl substances in the environment*, 375 SCI. 512 (2022).

443 *See generally id.*

444 *See generally id.*

445 EPA, EPA'S PER- AND POLYFLUOROALKYL SUBSTANCES (PFAS) ACTION PLAN 1 (2019).

446 *Per- and Polyfluoroalkyl Substances (PFAS) and Your Health*, CTR. DISEASE CONTROL AND PREVENTION, https://www.atsdr.cdc.gov/pfas/health-effects/exposure.html#print (last visited June 16, 2024).

447 "PFAS National Primary Drinking Water Regulation Rulemaking" (USEPA), 88 Fed. Reg. 18,638, 18,642 (March 14, 2023) (internal citations omitted). According to the IEPA, PFAS "are a group of approximately 5,000 human-made chemicals that are manufactured for their oil and water-resistant properties. Since the 1940s, PFAS have been used in a wide range of consumer products, industrial processes, and in some fire-fighting foams (called aqueous film-forming foam or AFFF). This has resulted in PFAS being released into the air, water and soil." *Per- and Polyfluoroalkyl Substances (PFAS)*, ILLINOIS.GOV, https://epa.illinois.gov/topics/water-quality/pfas.html#:~:text=The%20PFAS%20Reduction%20Act%20(Public,PFAS%20releases%20to%20the%20environment (last visited June 17, 2024).

state that most people in the United States have been exposed to PFAS and have PFAS in their blood.[448]

On October 18, 2021, the EPA revealed its formal, overall plans for approaching PFAS, utilizing what it termed as a "whole-of-agency approach," when it published its *PFAS Strategic Roadmap: EPA's Commitments to Action 2021-2024*.[449] In this document, the EPA announced its intention to, among many other things, hold polluters accountable; ensure science-based decision-making; enhance PFAS reporting; undertake nationwide monitoring for PFAS in drinking water and establish a national primary drinking water regulation for two PFAS chemicals—PFOA and PFOS; reduce PFAS discharges to waterways; propose designating certain PFAS as hazardous substances under the CERCLA; and update guidance on destroying and disposing of PFAS and PFAS-containing materials.[450] The EPA has made substantial progress on these announced intentions.

A. EPA Regulatory Actions Related to PFAS

1. CERCLA

In September 2022, the EPA proposed the designation[451] of Perfluorooctanoic Acid (PFOA) and Perfluorooctane Sulfonate (PFOS), two of the most widely used and studied chemicals amongst the thousands of PFAS in the United States,[452] as CERCLA hazardous substances.[453] Among the anticipated benefits of doing this are increased speed of response activities, increased number of response actions taken, health benefits from avoided risks, and improved ability of the EPA to transfer response costs from the public to PFAS polluters.[454] Being listed as CERCLA hazardous substances also results in a default Reportable Quantity (RQ) of one pound for each chemical.[455] The EPA expects to finalize this process in "early

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448 *PFAS in the U.S. Population*, CTR. DISEASE CONTROL & PREVENTION (June 29, 2023), https://www.atsdr.cdc.gov/pfas/docs/PFAS-and-the-US-Population-FS-H.pdf.

449 EPA, PFAS STRATEGIES ROADMAP: EPA'S COMMITMENTS TO ACTION 2021-2024 at 5 (2021), available at https://www.epa.gov/system/files/documents/2021-10/pfas-roadmap_final-508.pdf.

450 *Id*. at 5-12.

451 Designation of Perfluorooctanoic Acid (PFOA) and Perfluorooctanesulfonic Acid (PFOS) as CERCLA Hazardous Substances, 87 Fed. Reg. 54,415 (Sept. 6, 2022).

452 *Our Current Understanding of the Human Health and Environmental Risks of PFAS*, EPA (June 7, 2023), https://www.epa.gov/pfas/our-current-understanding-human-health-and-environmental-risks-pfas#:~:text=There%20are%20thousands%20of%20different,chemicals%20in%20the%20PFAS%20group.

453 Designation of Perfluorooctanoic Acid (PFOA) and Perfluorooctanesulfonic Acid (PFOS) as CERCLA Hazardous Substances, 87 Fed. Reg. 54,415 (Sept. 6, 2022) (to be codified at 40 C.F.R. § 302).

454 *Id*. at 54,439.

455 *Id*. at 54,419.

2024."[456] On this same timeline, the EPA is also developing a CERCLA enforcement discretion policy on PFAS,[457] proposing the designation of certain PFAS as hazardous constituents under the RCRA, issuing guidance on destruction and disposal of PFAS, and finalizing methods to monitor for PFAS in a wide range of media.[458]

Seven months later, the EPA issued an Advance Notice of Proposed Rulemaking (ANPR) seeking input on its consideration of developing regulations that would list seven more PFAS chemicals as CERCLA hazardous substances.[459] The EPA noted that:

> Fire extinguishing foam—aqueous film forming foam . . . is used for fighting certain types of fires, including burning petroleum [and] [s]ome . . . contain multiple PFAS. PFAS can be found in groundwater and surface water at airports, military bases and other facilities where PFAS containing firefighting extinguishing foam was or is used for training and incident response; . . . these seven compounds were identified based on the availability of toxicity information previously reviewed by US EPA and other Federal agencies.[460]

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456 EPA, EPA'S PFAS STRATEGIC ROADMAP: SECOND ANNUAL PROGRESS REPORT 3 (2023), https://www.epa.gov/system/files/documents/2023-12/epas-pfas-strategic-roadmap-dec-2023508v2.pdf. The EPA announced the finalization of this designation as CERCLA hazardous substances on April 19, 2024. *Biden-Harris Administration Finalizes Critical Rule to Clean up PFAS Contamination to Protect Public Health*, https://www.epa.gov/newsreleases/biden-harris-administration-finalizes-critical-rule-clean-pfas-contamination-protect.

457 EPA, *supra* note 563 at 3. Presumably this policy will reflect the statements of David Uhlmann, Assistant Administrator for Enforcement and Compliance Assurance at the EPA, who stated: "We intend to focus our enforcement efforts on companies that manufactured PFAS and companies who profited from the use of PFAS in their products. We do not intend to pursue farmers who spread bio solids on their fields, municipal airports that used aqueous film forming foam (AFFF) as a flame retardant, and municipal wastewater treatment plants and municipal landfills that handled waste containing PFAS, if their conduct does not endanger others, and they meet any regulatory requirements." David M. Uhlmann, *21st-century environmental challenges and revitalizing EPA enforcement*, ABA: TRENDS (Jan. 2, 2024), https://www.americanbar.org/groups/environment_energy_resources/resources/trends/2024-january-february/21st-century-environmental-challenges-revitalizing-epa-enforcement/. The EPA issued this policy on April 19, 2024. Memorandum from David Uhlmann, Assistant Adm'r, Off. Enforcement & Compliance Assurance, EPA, to Regional Administrators and Deputy Regional Administrators, Regional Counsels, and Deputy Regional Counsels, EPA (Apr. 19, 2024) (on file with EPA), available at https://www.epa.gov/system/files/documents/2024-04/pfas-enforcement-discretion-settlement-policy-cercla.pdf.

458 EPA, *supra* note 563 at 4.

459 Addressing PFAS in the Environment, 88 Fed. Reg. 22,399 (proposed Apr. 13, 2023) (to be codified at 40 C.F.R. § 302) (Perfluorobutanesulfonic acid (PFBS); Perfluorohexanesulfonic acid (PFHxS); Perfluorononanoic acid (PFNA); Hexafluoropropylene oxide dimer acid (HFPO–DA) (sometimes called "GenX"); Perfluorobutanoic acid (PFBA); Perfluorohexanoic acid (PFHxA); and Perfluorodecanoic acid (PFDA)).

460 *Id.* at 22,401.

The EPA requested information from published scientific literature containing data regarding environmental transport; environmental fate; other PFAS that should be designated as hazardous substances; and the possible benefits, indirect costs, and direct costs that would be associated with adding those suggested PFAS.[461]

2. Clean Water Act

In December 2022, the EPA issued guidance concerning CWA discharge permits, including specific recommendations for Industrial Direct Discharge.[462] These recommendations included: (1) monitoring for the forty PFAS parameters that are discernible by draft analytical method 1633, (2) perfmoring monitoring on at least a quarterly basis, and (3) reporting monitoring results in Discharge Monitoring Reports.[463] This would require companies to pay for laboratory tests for forty additional constituents on a routine basis.[464]

3. Safe Drinking Water Act

In a highly impactful step, the EPA has addressed PFAS in drinking water.[465] On March 29, 2023, the EPA issued its *Proposed Rule for National Drinking Water Standards* for six PFAS, including PFOA and PFOS.[466] For PFOA and PFOS, the Maximum Contaminant Level (MCL) was set at a very low 4.0 parts per trillion (PPT)—the "lowest feasible quantitation level."[467] That is to say, the EPA set the drinking water standard at the very edge of detectability. The EPA stated that "any exceedance of this limit require[d] action to protect public health."[468] As further indication of the EPA's resolve

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461 *Id.* at 22,402.

462 Memorandum from Radhika Fox, Asst. Adm'r, Office of Water, EPA, to Regional Water Div. Dirs., Regions 1-10, EPA, at 2 (Dec. 5, 2022) (on file with EPA), available at https://www.epa.gov/system/files/documents/2022-12/NPDES_PFAS_State%20Memo_December_2022.pdf.

463 *Id.* at 2 (citing 40 C.F.R. 122.21(e)(3)(ii), 122.41(l)(4)(i), 122.44(i)(1)(iv)(B)).

464 *Id.*

465 PFAS National Primary Drinking Water Regulation Rulemaking, 88 Fed. Reg. 18,638 (proposed Mar. 29, 2023) (to be codified at 40 C.F.R. §§ 141, 142); *Per- and Polyfluoroalkyl Substances (PFAS): Proposed PFAS National Primary Drinking Water Regulation*, EPA, https://www.epa.gov/sdwa/and-polyfluoroalkyl-substances-pfas (Sept. 22, 2023). The EPA issued its final rule on April 26, 2024. *See* PFAS National Primary Drinking Water Regulation, 89 Fed. Reg. 32,532 (Apr. 26, 2024) (to be codified at 40 C.F.R. §§ 141, 142).

466 *Id.*

467 *Id.*

468 PFAS National Primary Drinking Water Regulation Rulemaking, 88 Fed. Reg. 18,638, 18,639 (proposed Mar. 29, 2023) (to be codified at 40 C.F.R. § 141).

on the matter, health-based Maximum Contaminant Level Goals (MCLGs), though non-enforceable, were set at zero.[469]

For some perspective, six months earlier, in its Federal Register notice proposing designating PFOA and PFOS as CERCLA Hazardous Substances, the EPA reported that the below states were using the following active or proposed maximum drinking water PPT level standards:[470]

State	**PFOA (PPT)**	**PFOS (PPT)**
Alaska[471]	70	70
California[472]	10	40
Connecticut[473]	70	70
Hawaii[474]	40	40
Illinois[475]	2	14
Maine[476]	20	20
Massachusetts[477]	20	20
Michigan[478]	8	16
Minnesota[479]	35	15
New Hampshire[480]	12	15
New Jersey[481]	14	13
New Mexico[482]	70	70
New York[483]	10	10
Ohio[484]	70	70
Washington[485]	10	15

469 *Id.*

470 Designation of Perfluorooctanoic Acid (PFOA) and Perfluorooctanesulfonic Acid (PFOS) as CERCLA Hazardous Substances, 87 Fed. Reg. 54,415, 54,432—54,436 (proposed Sept. 6, 2022) (to be codified at 40 C.F.R. § 302). State terminology varied. In addition to using the term "maximum contaminant level (MCL)" used by EPA and many states, states also used "health-based action level" (Alaska, Connecticut, Ohio), "response level" (California), "environmental action level" (Hawaii), "health-based guidance level" (Illinois), "guidance value" (Minnesota), "preliminary screening level" (New Mexico), and "state action levels" (Washington). *Id.*

471 *Id.* at 54,432. The standard applies to PFOA and PFOS individually or combined. *Id.*

472 *Id.* at 54,433.

473 *Id.* The standard applies to PFOA and PFOS individually or combined. *Id.*

474 *Id.*

475 *Id.* at 54,434.

476 *Id.*

477 *Id.*

478 *Id.*

479 *Id.*

480 *Id.* at 54,435.

481 *Id.*

482 *Id.* The 70 PPT standard applies to PFOA and PFOS individually or combined. *Id.*

483 *Id.*

484 *Id.* The 70 PPT standard applies to PFOA and PFOS individually or combined. *Id.*

485 *Id.* at 54,436.

For further perspective, consider that the CDC/ATSDR publication reports that the "General U.S. Population" blood levels in 2017-2018 for PFOA was 1.4 µg/l (PPB), and for PFOS was 4.3 µg/l (PPB), which equal 1,400 PPT and 4,300 PPT, respectively.[486]

What happens if levels of PFOA or PFOS exceed 4.0 ppt? The EPA stated, "Water systems with PFAS levels that exceed the proposed MCLs would need to take action to provide safe and reliable drinking water. These systems may install water treatment or consider other options such as using a new uncontaminated source water or connecting to an uncontaminated water system."[487] Each of these options is expensive, if even available.[488] The EPA has recognized that many communities "will need to install new infrastructure and treatment facilities to address PFAS in drinking water and wastewater."[489] Through the Bipartisan Infrastructure Law, the EPA is providing ten billion dollars to remove PFAS and other emerging contaminants, distributed nearly one billion dollars to States in 2023.[490] The EPA issued its final rule on April 26, 2024.[491]

4. Toxic Substances Control Act

The EPA has also made advances pursuant to the Toxic Substances Control Act (TSCA).[492] Pursuant to Section 5(a)(1) of the TSCA, the EPA is required to review all notices submitted by manufacturers of a new chemical substance for a "significant new use."[493] Under proposed amendments, new PFAS would be "categorically ineligible" for the "low volume exemption" and "low release and exposure exemption," meaning all new PFAS chemicals will be required to go through a full, robust safety review process prior to entering commerce.[494]

The EPA also finalized a TSCA reporting and recordkeeping rule for PFAS, which became effective November 13, 2023.[495] This final rule under

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486 *PFAS in the U.S. Population*, *supra* note 555.

487 PFAS National Primary Drinking Water Regulation Rulemaking, 88 Fed. Reg. 18,638, 18,639-40 (proposed Mar. 29, 2023) (to be codified at 40 C.F.R. § 141).

488 *See, e.g.*, EPA, FACT SHEET: BENEFITS AND COSTS OF REDUCING PFAS IN DRINKING WATER 1 (2024), available at https://www.epa.gov/system/files/documents/2024-04/pfas-npdwr_fact-sheet_cost-and-benefits_4.8.24.pdf.

489 EPA, *supra* note 563, at 3.

490 *Id.*

491 *See* PFAS National Primary Drinking Water Regulation, 89 Fed. Reg. 32,532 (Apr. 26, 2024) (to be codified at 40 C.F.R. §§ 141, 142).

492 Updates to New Chemicals Regulations Under the Toxic Substances Control Act (TSCA), 88 Fed. Reg. 34,100, 34,102 (proposed on May 26, 2023)(to be codified as 40 C.F.R. §§ 720, 721, 723, 725).

493 *Id.*

494 *Id.* at 34,101.

495 Toxic Substances Control Act Reporting and Recordkeeping Requirements for Perfluoroalkyl and Polyfluoroalkyl Substances, Final Rule (USEPA), 88 Fed. Reg. 70,516 (Oct. 11, 2023).

TSCA Section 8(a)(7) requires all those who manufactured or imported PFAS or a mixture containing PFAS for a commercial purpose in any year since January 1, 2011, to electronically submit information to the EPA regarding the PFAS uses, production volumes, byproducts, disposal, exposures, and existing information on environmental or health effects.[496]

5. Community Right-to-Know Act

PFAS were already included in Toxic Release Inventory (TRI) reporting requirements at a 100-pound threshold.[497] With a new final rule, the EPA added PFAS to the list of "Lower Thresholds for Chemicals of Special Concern," which eliminated the *de minimis* reporting exemption and limited the use of range reporting for PFAS.[498] It also eliminated the *de minimis* exemption under the Supplier Notification Requirements at 40 CFR § 372.45(d)(1).[499] Previously, concentrations of < 1% of a "special concern" chemical in a mixture were not required to be reported by a supplier to a purchaser.[500] This elimination applies to all Chemicals of Special Concern, not only PFAS.[501] The rule became effective on November 30, 2023, applying to the reporting year beginning January 1, 2024.[502]

6. National Enforcement and Compliance Initiatives for 2024-2027

On August 17, 2023, the EPA released its list of National Enforcement and Compliance Initiatives (NECI) for the coming years.[503] These are areas in which the EPA intends to focus its resources.[504] There are six areas, one of which is "Addressing Exposure to PFAS."[505] The other areas are "Mitigating Climate Change," "Protecting Communities from Coal Ash

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496 *Id.*

497 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).

498 *Id.*

499 *Id.*

500 *Id.* An example EPA provided for why this rule was needed was a mixture containing 0.9% PFAS and the purchase of 100,000 pounds of the product. A supplier *not* providing notice to a customer in this example would result in 900 pounds of PFAS not being reported to the purchaser, who would not be aware of the presence of PFAS at all. *Id.*

501 *Id.*

502 *Id.*

503 Memorandum from David Uhlmann, Assistant Adm'r, Off. Enforcement & Compliance Assurance, EPA, to Regional Adm'rs, Enforcement & Compliance Assurance Div. Dirs. & Deputies, Superfund & Emergency Mgmt. Div. Dirs. & Deputies, Regional Couns. & Deputies, EPA (Aug. 17, 2023) (on file with EPA), available at https://www.epa.gov/system/files/documents/2023-08/fy2024-27necis.pdf.

504 *Id.*

505 *Id.*

Contamination," "Reducing Air Toxics in Overburdened Communities," "Increasing Compliance with Drinking Water Standards," and "Chemical Accident Risk Reduction."[506] Elevation of a topic to a NECI is a demonstration of the agency's commitment to addressing it.[507] The key announced goals regarding PFAS are to "achieve site characterization, control ongoing releases that pose a threat to human health and the environment, ensure compliance with permits and other agreements . . . to prevent and address PFAS contamination, and address endangerment issues as they arise."[508]

7. Enforcement

On April 26, 2023, the EPA took its first-ever CWA enforcement action to address PFAS discharges at the Chemours Company's Washington Works facility near Parkersburg, West Virginia.[509] The EPA determined that the company exceeded PFAS effluent limits on various dates between September 2018 and March 2023.[510] Ultimately, an agreement was reached between the EPA and Chemours Company and was embodied in an Administrative Order on Consent (AOC).[511] Pursuant to the AOC, the company was required to implement an EPA-approved sampling plan to characterize storm water runoff and effluent leaving the facility.[512] This required Chemours Company to submit and implement a plan to treat or minimize discharges of PFOA and HFPO Dimer Acid (also known as "GenX") to ensure compliance.[513] Chemours Company was also required to submit its Storm Water Pollution Prevention Plan (SWPPP) for review and comment by the EPA, and then implement an updated SWPPP within thirty days.[514]

The EPA has also issued enforcement orders under the TSCA regarding PFAS.[515] Specifically, it has prohibited Inhance Technologies, L.L.C., from

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506 *Id.*

507 *Id.*

508 *Id.*

509 *EPA takes first-ever federal Clean Water Act enforcement action to address PFAS discharges at Washington Works facility near Parkersburg, W. Va.*, EPA (Apr. 26, 2023), https://www.epa.gov/newsreleases/epa-takes-first-ever-federal-clean-water-act-enforcement-action-address-pfas.

510 *In re: The Chemours Co. FC, LLC*, Administrative Order on Consent, EPA Docket No. CWA-03-2023-0025DN, (Apr. 26, 2023).

511 *Id.*

512 *Id.* at 44.

513 *Id.* at 46.

514 *Id.* at 48.

515 *See* Inhance Technologies, LLC, v. EPA, 96 F. 4th 888 (5th Circ. 2024); *see also EPA Orders Issued to Inhance Technologies Related to Long-Chain PFAS Significant New Use Notices*, EPA, https://www.epa.gov/reviewing-new-chemicals-under-toxic-substances-control-act-tsca/epa-orders-issued-inhance#:~:text=On%20December%201%2C%202023%2C%20EPA, density%20polyethylene%20HDPE%20plastic%20containers (last visited Mar. 24, 2024).

producing PFAS in the production of its fluorinated High-Density Polyethylene (HDPE) plastic containers.[516] These containers were used for a variety of household consumer, pesticide, fuel, automotive, and other industrial products.[517]

In December 2022, Inhance Technologies filed significant new use notices for nine long-chain PFAS.[518] The EPA's review determined that three of them (PFOA, PFNA, and PFDA) were "highly toxic and present[ed] unreasonable risks that [could not] be prevented other than through prohibition of manufacture."[519] So, the EPA prohibited Inhance Technologies from manufacturing them under section 5(f) of the TSCA.[520] The EPA determined the other six PFAS could "present an unreasonable risk of injury to health or the environment."[521] It ordered the company to cease manufacturing them under section 5(e) of the and to conduct additional testing if it wanted to restart manufacturing.[522] However, the fluorination process it used produces all nine PFAS, and thus manufacturing could not restart unless a different process was used that did not generate the first three PFAS—PFOA, PFNA, and PFDA.[523] Inhance Technologies has challenged both Orders.[524]

B. PFAS-Specific Regulatory Action in Illinois

1. IEPA

On September 14, 2020, the IEPA announced its plan to begin testing all Community Water Supplies (CWS) for PFAS.[525] On January 28, 2021, the IEPA issued a non-enforceable *Health Advisory for Perfluorooctanoic*

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516 *EPA Orders Issued to Inhance Technologies Related to Long-Chain PFAS Significant New Use Notices*, *supra* note 640.

517 *Id.*

518 *EPA Takes Action to Protect People from PFAS that Leach from Plastic Containers into Pesticides and Other Products*, EPA (Dec. 1, 2023), https://www.epa.gov/newsreleases/epa-takes-action-protect-people-pfas-leach-plastic-containers-pesticides-and-other#:~:text=Upon%20review%20of%20the%20SNUNs,be%20prevented%20other%20than%20through.

519 *Id. See also* DENISE KEEHNER, OFF. POLLUTION PREVENTION & TOXICS, EPA, TSCA SECTION 5 ORDER FOR A SIGNIFICANT NEW USE OF CERTAIN CHEMICAL SUBSTANCES (PFOA, PFDA, PFNA) (2023), available at https://www.epa.gov/system/files/documents/2023-12/sn-23-0002-0004-0005_order-signature-copy_12-01-2023_marked_redacted.pdf.

520 *Id.*

521 *Id.*

522 *Id.*

523 *EPA Takes Action to Protect People from PFAS that Leach from Plastic Containers into Pesticides and Other Products*, *supra* note 646.

524 Inhance Tech., L.L.C. v. EPA, 96 F. 4th 888 (5th Cir. 2024). On March 21, 2024, the Fifth Circuit Court of Appeals vacated the Orders, finding that the EPA had exceeded its statutory authority in issuing them. *Id.* at 895.

525 News Release, Ill. EPA, Ill. EPA to Begin Testing all Ill. Community Water Supplies for Per- and PolyFluoroalkyl Substances (PFAS) (Sept. 14, 2020).

Acid (PFOA) setting a guidance level of 2 PPT for drinking water.[526] The actual calculated health-based guidance level was 0.6 PPT, but because laboratories' Minimum Reporting Level (MRL) was 2 PPT, the higher number was used for the advisory.[527]

On the same date, the IEPA issued Health Advisories for PFHxS at 140 PPT,[528] PFHxA at 560,000 PPT (updated on April 26, 2023, to 3,500 PPT),[529] and PFBS at 140,000 PPT (updated on April 16, 2021, to 2,100 PPT).[530] On April 16, 2021, the IEPA issued its Health Advisory for PFOS with a guidance level of 14 PPT,[531] and on July 27, 2021, for PFNA at 21 PPT.[532] A Health Advisory is issued when there is a confirmed detection in a CWS well of a chemical substance for which no numeric groundwater standard exists.[533] Illinois' statewide CWS testing effort was concluded in 2021, covering 1,428 entry points to the distribution systems of 1,749 CWS.[534] Confirmed PFAS detections were found at 149 sites,[535] of which sixty-eight were higher than the health-based guidance levels discussed in this paragraph.[536] Several southern Illinois systems were included in the sixty-eight: Cairo, Collinsville,

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526 *Health Advisory for Perfluorooctanoic Acid (PFOA) Chemical Abstract Services Registry Number (CASRN) 335-67-1*, ILL. EPA, 1 (Jan. 28, 2021), https://epa.illinois.gov/content/dam/soi/en/web/epa/topics/water-quality/pfas/documents/ha-pfoa.pdf.

527 *Id.* This means that the guidance level is set higher than the "real" (calculated) safe level.

528 *Health Advisory for Perfluorohexanesulfonic Acid (PFHxS) Chemical Abstract Services Registry Number (CASRN) 335-46-4*, ILL. EPA (Jan. 28, 2021), https://epa.illinois.gov/content/dam/soi/en/web/epa/topics/water-quality/pfas/documents/ha-pfhxs.pdf.

529 *Health Advisory Update for Perfluorohexanoic Acid (PFHxA) Chemical Abstract Services Registry Number (CASRN) 307-24-4*, ILL. EPA (Apr. 26, 2023), https://epa.illinois.gov/content/dam/soi/en/web/epa/topics/water-quality/pfas/documents/2023-04-26%20FINAL%20PFHxA%20HEALTH%20ADIVSORY%20UPDATE%20FOR%20PERFLUOROHEXANOIC%20ACID.pdf.

530 *Health Advisory Update for Perfluorobutanesulfonic Acid (PFBS) Chemical Abstract Services Registry Number (CASRN) 375-73-5*, ILL. EPA (Apr. 16, 2021), https://epa.illinois.gov/content/dam/soi/en/web/epa/topics/water-quality/pfas/documents/ha-pfbs.pdf.

531 *Health Advisory for Perfluorooctanesulfonic Acid (PFOS) Chemical Abstract Services Registry Number (CASRN_ 1763-23-1*, ILL. EPA (Apr. 16, 2021), https://epa.illinois.gov/content/dam/soi/en/web/epa/topics/water-quality/pfas/documents/Health%20Advisory%20-%20Perfluorooctanesulfonic%20Acid%20(PFOS).pdf.

532 *Health Advisory for Perfluorononanoic Acid (PFNA) Chemical Abstract Services Registry Number (CASRN) 375-95-1*, ILL. EPA (July 27, 2021), https://epa.illinois.gov/content/dam/soi/en/web/epa/topics/water-quality/pfas/documents/ha-pfna.pdf.

533 Press Release, Ill. Gov., Ill. EPA Completes Statewide Sampling for Investigation into the Prevalence of PFAS in Drinking Water (Mar. 16, 2022) (on file with IEPA), available at https://www.illinois.gov/news/press-release.24635.html#:~:text=Illinois%20EPA%20began%20the%20investigation,CWS%2C%20at%201%2C428%20sample%20locations.

534 *PFAS Statewide Investigation Network: Community Water Supply Sampling*, ILL. GOV, https://epa.illinois.gov/topics/water-quality/pfas/pfas-statewide-investigation-network.html (last visited Mar. 22, 2024).

535 *Illinois EPA PFAS Sampling Network (2020-2021)*, ILL. EPA, https://illinois-epa.maps.arcgis.com/apps/dashboards/bd611162a7f74cfe88b6928c926416c3 (last visited June 17, 2024).

536 *Id.*

East Alton, Eldred, Hardin, Quincy, Rosiclare, West Union/York, and Wood River.[537]

The IEPA has published the process it intends to follow to establish formal, *enforceable* MCLs for PFAS.[538] To assist the state and communities grappling with the high potential costs of removing PFAS from drinking water or connecting to new sources, EPA Region 5, on February 13, 2023, announced the availability of over $40 million in grants from the Bipartisan Infrastructure Law for Illinois.[539]

In addition, on December 8, 2021, the IEPA proposed to the Illinois Pollution Control Board (IPCB) many changes to the state groundwater standards, including six PFAS (PFOA, PFOS, PFNA, PFBS, PFHxS, and HFPO-DA).[540]

2. Illinois Legislature

Illinois has been active on the legislative front. The PFAS Reduction Act was signed in August of 2021, effective January 1, 2022, and created new requirements specific to Class B firefighting foam.[541] The PFAS Reduction Act requires fire departments in the state to notify the Illinois Emergency Management Agency within forty-eight hours of the discharge or release of Class B firefighting foam containing intentionally added PFAS (AFFF), prevents use of AFFF for training purposes unless certain requirements are met, requires that manufacturers and distributors of AFFF notify fire departments before their purchase clearly indicating the presence of PFAS and advising of other Class B firefighting foams that may be available, and the IEPA must post information on its website about the proper methods for disposing of PFAS-containing firefighting foams.[542] An amendment, effective July 28, 2023, requires the IEPA to establish a take-back program for fire departments that use and store firefighting foam containing PFAS.[543]

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537 *Id.*

538 *Process to Establish Maximum Contaminant Levels for PFAS in Illinois*, ILL. GOV., https://epa.illinois.gov/topics/water-quality/pfas/pfas-mcl.html (last visited Mar. 2, 2024).

539 *Biden-Harris Administration Announces over $40 Million in Bipartisan Infrastructure Law Funding to Address Emerging Contaminants like PFAS in Drinking Water in Illinois*, EPA (Feb. 13, 2023), https://www.epa.gov/newsreleases/biden-harris-administration-announces-over-40-million-bipartisan-infrastructure-law.

540 *620 Groundwater Quality*, ILL. GOV, https://epa.illinois.gov/topics/water-quality/groundwater/620-groundwater-quality.html (last visited Mar. 2, 2024). These standards are located in the Illinois Adminitrative Code. *See* ILL. ADMIN. CODE tit. 35, § 620 (2024).

541 ILL. OFF. STATE FIRE MARSHAL, FACT SHEET: FIREFIGHTING FOAM AND PFAS (2022), available at https://epa.illinois.gov/content/dam/soi/en/web/epa/topics/water-quality/pfas/documents/firefightingfoamandpfas-final.pdf; *Per- and Polyfluoroalkyl Substances (PFAS)*, *supra* note 554.

542 *Id.*

543 415 ILL. COMP. STAT. ANN. 170/40 (LexisNexis 2024).

On January 10, 2024, SB 2705 was introduced that would further amend the PFAS Reduction Act and change its nature from a firefighting foam-related PFAS law to a much more broadly applicable one.[544] Under the proposed amendments, starting January 1, 2025, certain listed products (including carpets and rugs, cleaning products, cookware, cosmetics, food packaging, upholstered furniture, and juvenile products) would be prohibited from being sold, offered, or distributed for sale in Illinois if they contain intentionally-added PFAS.[545] `Manufacturers of other products sold or distributed in Illinois that contain intentionally-added PFAS must, no later than January 1, 2026, submit to the IEPA a description of the product, its purpose, the amount of each PFAS, and any additional information requested.[546] The products may not be sold or distributed in Illinois if such information has not been provided.[547] If the IPCB has reason to believe a product contains intentionally-added PFAS, it may order the manufacturer to submit testing results showing levels of PFAS in the product.[548] Finally, beginning January 1, 2032, no products containing intentionally-added PFAS may be sold or distributed for sale in Illinois unless the IPCB has determined that the use of PFAS is an unavoidable use.[549] Another law, the first in the country, was signed in 2022 that prohibits the disposal of PFAS by incineration.[550]

3. Illinois Office of the Attorney General

Meanwhile, the Illinois Office of the Attorney General (IAG) has been very active. In March of 2022, the IAG brought suit in Rock Island County against 3M Company (3M) regarding PFAS releases from the company's Cordova, Illinois, manufacturing facility.[551] This facility is located across the

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544 S.B. 2705, 103rd Gen Assemb., Reg. Sess. (Ill. 2024).

545 *Id.*

546 *Id.*

547 *Id.*

548 *Id.*

549 *Id.*

550 *Illinois Governor Signs into Law First-Ever Statewide Ban of PFAS Incineration*, SAFER STATES (June 30, 2022), https://www.saferstates.org/press-room/new-blog-entry-illinois-governor-signs-into-law-first-ever-statewide-ban-of-pfas-incineration/#:~:text=PORTLAND%2C%20OR%E2%B8%BAOn%20Wednesday,Protection%20Agency's%20Toxic%20Release%20Inventory. PFAS incineration ban: "On Wednesday, June 8, Illinois Governor JB Pritzker signed into law a first-in-the-nation policy that prohibits the disposal by incineration of PFAS (perfluoroalkyl and polyfluoroalkyl substances) that are listed in the EPA's Toxic Release Inventory. This includes, but is not strictly limited to, PFAS substances that are often found in aqueous film-forming foam, otherwise known as firefighting foam." *Id.*

551 *Attorney General Raoul Files Latest Lawsuit Over Contamination by Toxic "Forever Chemicals,"* OFF. ILL. ATT'Y GEN. KWAME RAOUL (Apr. 6, 2023), https://illinoisattorneygeneral.gov/news/story/attorney-general-raoul-files-latest-lawsuit-over-contamination-by-toxic-forever-chemicals.

Mississippi River from Iowa and has been in operation since 1970.[552] The complaint alleged that 3M has known of the dangers of PFAS for many decades, yet has downplayed those risks and continued to manufacture them, anyway.[553] The state seeks monetary damages for monitoring and remediating PFAS contamination, injunctive relief requiring 3M to take action to prevent further contamination, and to remediate contaminated areas, plus civil penalties for violations of Illinois laws and regulations.[554] The state alleged that 3M's groundwater levels in 2020 significantly surpassed the IEPA's proposed groundwater standards to the IPCB.[555] These proposed standards were: PFOA—2 PPT, PFOS—7.7 PPT, PFNA—12 PPT, PFBS—1,200 PPT, PFHxS—77 PPT, and HFPO-DA—12 PPT.[556] The state alleged that 3M's Cordova plant's groundwater in 2020 had levels as high as the following: PFOA—5,570 PPT, PFOS—80,800 PPT, and PFBS—353,000 PPT, and wastewater discharges of PFNA of 946 PPT to the Mississippi River.[557] The state further alleged that the EPA found discharges to the Mississippi River from the plant at the following levels in December 2019: PFOA—907 PPT, PFOS—24,400 PPT, PFNA—1,210 PPT, and PFHxS—1,610 PPT.[558] 3M attempted to remove the suit to federal court in the Central District of Illinois, but it was remanded to Rock Island County on September 21, 2023.[559]

3M's Cordova plant had also drawn the EPA's attention in November 2022, which announced a settlement in an AOC, finding an imminent and substantial endangerment to the health of persons.[560] The EPA said that there was a "widespread presence of a mixture of at least 19 different PFAS chemicals in drinking water within a 3-mile radius of the" facility.[561] 3M was required to offer treatment to all private well owners within that radius and to the Comanche Water Supply, sampling to private well owners out to four miles from the facility, and sampling to public water systems out to ten miles

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552 Illinois ex rel. Raoul v. 3M Co., No. 4:22-cv-04075-SLD-JEH, 2023 U.S. Dist. LEXIS 168231 (C.D. Ill. Sept. 21, 2023).

553 Complaint, Illinois ex rel. Raoul v. 3M Co., No. 4:22-cv-04075-SLD-JEH (Ill. Cir. Ct. 2022).

554 *Id.* ¶ 1.

555 *Id.* ¶¶ 72, 109-112.

556 *Id.* ¶ 72.

557 *Id.* ¶¶ 109-112.

558 *Id.* ¶ 130.

559 Illinois ex rel. Raoul v. 3M Co., No. 4:22-cv-04075-SLD-JEH, 2023 U.S. Dist. LEXIS 168231 (C.D. Ill. Sept. 21, 2023).

560 Administrative Order on Consent at ¶ 70, *In re* 3M Company, Docket No. SDWA-HQ-2023—0001-EO (Nov. 2, 2022).

561 *3M Cordova*, EPA, https://www.epa.gov/il/3m-cordova#nextsteps (Aug. 4, 2023).

and to the Quad Cities public water system.[562] 3M was also required to submit annual Progress Reports.[563]

The IAG's next PFAS lawsuit was brought in January 2023 in Cook County against fifteen companies.[564] This lawsuit specifically excluded any claims against PFAS that were AFFFs.[565] The complaint alleged that the companies knew of the hazards associated with PFAS, yet continued to use them, including in consumer goods and products.[566] The IAG sought compensatory damages from PFAS contamination; remedial action; injunctive relief to address past, present, and future PFAS contamination; as well as, penalties and fines under the Illinois Consumer Fraud and Deceptive Business Practices Act.[567]

The IAG sued again in April 2023, this time against over thirty companies, specifically manufacturers of AFFF PFAS used in fire-suppressing foam.[568] The claims again alleged that, despite knowledge of the toxicity of the products, the manufacturers continued to produce them, and misled their customers, the government, and the public.[569] The IAG sought compensation for natural resource damages; past and future response activity costs; costs of installing and maintaining approved drinking water systems; and injunctive relief to implement ongoing public outreach information-sharing and instituting protective measures to prevent endangerment to human health and the environment.[570]

Without admitting liability, and subject to court approval, 3M announced in June 2023 that it had agreed to commit up to $10.3 billion over thirteen years to provide funding for public water suppliers nationwide that had detected PFAS in drinking water or that may do so in the future.[571] 3M

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562 *EPA Settlement Reached for 3M to Sample and Treat Drinking Water*, EPA (Nov. 2022), https://www.epa.gov/system/files/documents/2022-11/3M%20Cordova%20Settlement%20Fact%20Sheet.pdf.

563 Administrative Order on Consent at ¶ 72, *In re* 3M Company, Docket No. SDWA-HQ-2023—0001-EO (Nov. 2, 2022).

564 *Attorney General Raoul Files Lawsuit Against Multiple Manufacturers Over Contamination by Toxic "Forever Chemicals,"* OFF. ILL. ATT'Y GEN. KWAME RAOUL (Feb. 1, 2023), https://www.illinoisattorneygeneral.gov/news/story/attorney-general-raoul-files-lawsuit-against-multiple-manufacturers-over-contamination-by-toxic-forever-chemicals.

565 Complaint at ¶ 17, Illinois ex rel. Raoul v. 3M Co., No. 2023L000996 (Ill. Cir. Ct. filed Jan. 31, 2023).

566 *Id.* ¶ 21.

567 *Id.* ¶¶ 114-117.

568 *Attorney General Raoul Files Latest Lawsuit Over Contamination by Toxic "Forever Chemicals," supra* note 683.

569 *Attorney General Raoul Files Latest Lawsuit Over Contamination by Toxic "Forever Chemicals," supra* note 683.

570 Complaint at ¶¶ 114-17, Illinois ex rel. Raoul v. 3M Co., No. 2023L000996 (Ill. Cir. Ct. filed Jan. 31, 2023).

571 *3M Resolves Claims by Public Water Suppliers, Supports Drinking Water Solutions for Vast Majority of Americans*, 3M (June 22, 2023), https://news.3m.com/2023-06-22-3M-Resolves-

also announced that it will exit all PFAS manufacturing by the end of 2025.[572] Similarly, earlier the same month, the Chemours Company, DuPont de Nemours, Inc., and Corteva, Inc., announced a $1.2 billion settlement in principle over PFAS-related drinking water claims.[573] In addition, the same three companies settled in November 2023 with the State of Ohio for $110 million to benefit the state's natural resources and citizens.[574]

C. PFAS Litigation, Defenses, and Insurance Coverage

It is not surprising that PFAS have attracted recent attention. Since Wilbur Tennant sued DuPont in 1999 alleging that Du Pont had poisoned Mr. Tennant's family and cattle with PFAS laden effluent from a neighboring factory,[575] there have been thousands of PFAS-related lawsuits.[576] The following are examples of such litigation.

Like discussed above in Illinois, other Attorneys General have sued PFAS chemical manufacturers alleging their products contaminated municipal water supplies with PFAS.[577] All claims have alleged that the defendants knew the health hazards associated with PFAS and failed to warn the plaintiffs.[578] These plaintiffs sought damages related to obtaining alternative water supplies, investigating and remediating PFAS contamination, sampling and monitoring water for PFAS, and updating municipal water treatment facilities to adequately pre-treat existing PFAS contaminated water supplies.[579] Thus far, more than two dozen Attorneys

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Claims-by-Public-Water-Suppliers,-Supports-Drinking-Water-Solutions-for-Vast-Majority-of-Americans.

572 *Id.*

573 Press Release, DuPont, Chemours, DuPont, and Corteva Reach Comprehensive PFAS Settlement with U.S. Water Systems (June 2, 2023) (on file with author), available at https://www.dupont.com/news/chemours-dupont-and-corteva-reach-comprehensive-pfas-settlement-with-us-water-systems.html.

574 *Id.*; *State Secures $110 Million Settlement with DuPont for Environmental Restoration Along Ohio River*, GOVERNOR OHIO (Nov. 29, 2023), https://governor.ohio.gov/media/news-and-media/state-secures-111-million-settlement-with-dupont-for-environmental-restoration-along-ohio-river.

575 Tennant v. E.I. DuPont de Nemours & Co., Inc., No. CA-6:99-048 (S.D.W.Va. 1998).

576 *See e.g.*, *More than half of US State Attorneys General have taken action against PFAS manufacturers and key users*, SAFER STATES (Aug. 24, 2023), https://www.saferstates.org/press-room/more-than-half-of-us-state-attorneys-general-have-taken-action-against-pfas-manufacturers-and-key-users/#:~:text=This%20year%20alone%2C%20a%20bipartisan,%2C%20South%20Carolina%2C%20Tennessee%2C%20and.

577 *See Attorney General Raoul Files Latest Lawsuit Over Contamination by Toxic "Forever Chemicals," supra* note 683.

578 *See Attorney General Raoul Files Latest Lawsuit Over Contamination by Toxic "Forever Chemicals," supra* note 683.

579 *See Attorney General Raoul Files Latest Lawsuit Over Contamination by Toxic "Forever Chemicals," supra* note 683.

General have filed PFAS lawsuits, including 14 in 2023.[580] Two states have reached settlements—New Jersey for $393 million and Ohio for $110 million.[581] More litigation and settlements are expected in 2024—from Attorneys General and individual plaintiffs.[582]

Attorneys General from numerous states have also sued manufacturers, distributors, and suppliers of commercial firefighting foam known as AFFF for contamination of public waterways.[583] Individuals have brought traditional environmental claims against companies that manufactured products with PFAS, claiming the processes contaminate those products and, in turn, the surface and groundwater.[584] Individuals continue to file products liability, negligence and failure to warn claims for alleged injuries due to PFAS exposure, mostly in drinking water.[585] PFAS contamination in humans has been linked to various cancers, thyroid disease, pregnancy complications, and damage to the liver and immune system.[586] These cases seek to link an individual's exposure to a particular set of ailments with numerous alternative potential causes.[587]

Specifically, Firefighters claim injuries due to exposure to PFAS from AFFF products used during firefighting response and training exercises.[588] The suits allege that the defendants manufactured, designed, marketed, and sold AFFF with knowledge that the foam contained PFAS and failed to warn end users of the danger.[589] Not surprisingly, DuPont, its spinoffs Chemours and Corteva, and 3M have borne the brunt of the PFAS litigation to date.[590] Those entities have been labeled the manufacturers of these "forever chemicals," and the lawsuits have followed.[591] The damages claimed and awarded have been substantial and more is expected.[592]

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580 *More than half of US State Attorneys General have taken action against PFAS manufacturers and key users*, *supra* note 723. Maine and Illinois filed lawsuits early in 2023. Tennessee, Arkansas, Pennsylvania, New Mexico, Oregon, Washington, Maryland, Arizona and Rhode Island filed lawsuits between May 25 and June 5, 2023. Other states that have filed suits since 2019 include Alaska, California, Florida, Massachusetts, Michigan, Mississippi, New Jersey, New York, New Hampshire, North Carolina, Ohio and Wisconsin. *Id.*

581 *More than half of US State Attorneys General have taken action against PFAS manufacturers and key users*, *supra* note 723.

582 *Id*.

583 *Id*.

584 *Id*.

585 *Id*.

586 *PFAS Explained*, EPA, https://www.epa.gov/pfas/pfas-explained (Oct. 25, 2023).

587 *Id*.

588 ILL. OFF. STATE FIRE MARSHAL, *supra* note 673.

589 *State Secures $110 Million Settlement with DuPont for Environmental Restoration Along Ohio River*, *supra* note 713.

590 *3M Resolves Claims by Public Water Suppliers, Supports Drinking Water Solutions for Vast Majority of Americans*, *supra* note 708.

591 *Id*.

592 *State Secures $110 Million Settlement with DuPont for Environmental Restoration Along Ohio River*, *supra* note 713.

Courts have sought to manage the wave of PFAS claims by facilitating mediations, encouraging settlements, and forming Multidistrict Litigation (MDL) for claims filed throughout the country—AFFF in particular.[593] The MDL consolidates suits alleging similar damages and identical defendants before a single judge in a single courtroom.[594]

In early June 2023, DuPont, Chemours, and Corteva, in a MDL, reached a $1.185 billion settlement with 300 local water systems that had sued the companies for the costs of cleaning and filtering their wells and aquifers.[595] Three weeks later, 3M reached a $10.3 billion settlement with 300 different water providers.[596] Most of the plaintiffs in both settlements were part of the MDL.[597] The 600 settled cases represent only a small portion of the reported 15,000 claims in the MDL pending in the United States District Court for South Carolina.[598]

DuPont and 3M are not the only defendants.[599] Suits are reportedly pending against local businesses, inlcuding class actions filed against companies that produce clothing,[600] personal hygiene products such as dental floss, and food wrappers that contain PFAS.[601] Consumer brands whose products contain PFAS, and distributors, sellers and shippers of those products are all targets in 2024.[602] Who pays for all this? Can we expect DuPont, 3M or the insurance industry to pay? At this point, deep pockets beyond DuPont's and 3M's are being targeted, and insurers are raising common defenses.[603]

Forum selection is a fairly well-developed area of law in the context of toxic tort and mass tort claims (including historic asbestos litigation) and remains a threshold issue in PFAS related claims.[604] Insurers and policyholder representatives continue to have preferences concerning the forums in which to litigate and in the states whose laws are perceived to be

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593 Miles Scully & Brian Ledger, *PFAS settlements: Future of PFAS litigation landscape to be determined by upcoming decision*, REUTERS (Aug. 31, 2023, 8:50 AM), https://www.reuters.com/legal/legalindustry/pfas-settlements-future-pfas-litigation-landscape-be-determined-by-upcoming-2023-08-31/.

594 *Id.*

595 DuPont, *supra* note 712.

596 Jeffrey Kluger, *3M's Historic $10 Billion 'Forever Chemical' Payout Is Just The Tip of the PFAS* Iceberg, TIME (June 23, 2023, 4:06 PM), https://time.com/6289893/3m-forever-chemical-pfas-settlement/.

597 *Id.*

598 DuPont, *supra* note 712.

599 *See* Admiral Ins. Co. v. Fire-Dex, LLC, No. 22-3992, 2023 U.S. App. LEXIS 14822 (6th Cir. June 13, 2023).

600 *Id.*

601 *Id.*

602 *Id.*

603 *Id.*

604 *Id.*

most favorable.[605] Since PFAS have been produced and used since the 1930s, many claims have and will likely implicate both current and legacy insurance policies, with varying exclusionary language and varying success.[606] Not only do challenges persist in locating those legacy policies, but if found, they may be deemed settled, released, exhausted, or impaired.[607]

Once insurance has been identified, insurers have argued in some PFAS-related coverage cases coverage has not been triggered.[608] In *Crum & Forster Specialty Insurance Co. v. Chemicals, Inc.*, the insurer sought a declaration of coverage with respect to the duty to defend in connection with several hundred personal injury lawsuits consolidated in the multidistrict litigation case.[609] In *In Re Aqueous Fire-fighting Foams Products Liability Litigation*, pending in South Carolina's MDL, the district court denied the insurer's motion for summary judgment, noting the insurer had the burden to demonstrate that the dates of injury could not be determined or that the claims were outside the scope of coverage provided by the policies.[610] If the date of injury "could" potentially be determined in future proceedings and "could" fall within the terms of the policies' coverage, the insurer was obligated to defend.[611] As the plaintiffs in the underlying cases alleged dates of employment during the periods of the insurance policies at issue, the district court ruled that a defense was owed.[612]

Depending on the types of policies involved in a coverage action and the alleged facts, several allocation-related issues may be presented.[613] There may be issues concerning which, if any, lines of coverage respond to a claim, thereby making necessary the coordination and prioritization of coverage issues.[614] Allocation of loss may be significant. In addition to allocation methodology, other issues may be presented and limit (or increase) the insurance contracts impacted and the extent of potential coverage, including

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605 *Id.*

606 *Insurers Face Large PFAS-Related Losses: A Primer on Forever Chemical Regulation, Liabilities, and Insurance Coverage Issues*, HINSHAW (Aug. 30, 2023), https://www.hinshawlaw.com/newsroom-updates-insights-for-insurers-insurers-face-large-pfas-related-losses.html#:~:text=As%20PFAS%20have%20been%20produced,policies%20and%20engaging%20insurance%20archeologists.

607 *Id.*

608 *See generally* Crum & Forster Specialty Ins. Co. v. Chem., Inc., No. H-20-3493, 2021 U.S. Dist. Lexis 146702 (S.D. Tex., Aug 5, 2021).

609 *Id*.

610 In re Aqueous Film-Forming Foams Prods. Liab. Litig., No. 2873, 2021 U.S. Dist. LEXIS 21511 (J.P.M.L., Dec. 7, 2018).

611 *Id.*

612 Crum & Forster Specialty Ins. Co., No. H-20-3493, 2021 U.S. Dist. Lexis 146702 (S.D. Tex., Aug 5, 2021).

613 *Insurers Face Large PFAS-Related Losses: A Primer on Forever Chemical Regulation, Liabilities, and Insurance Coverage Issues*, *supra* note 756.

614 *Id.*

treatment of multi-year policies, stub policies, policy extensions, exhaustion, impact of insurance unavailability, and number of occurrence(s) issues.[615]

Pollution exclusion clauses have been an effective defense to insurance coverage.[616] Various forms of pollution exclusion clauses have been included in insurance policies since the 1970s.[617] The "absolute" pollution exclusion, the "total" pollution exclusion, the "sudden and accidental" pollution exclusion, and other pollution exclusions may serve as a bar in whole or in part to many PFAS-related claims seeking insurance coverage.[618] The application of these exclusions involve familiar issues: Are PFAS "pollutants" as that term is defined in the policy?[619] Was there an insured "discharge or release?"[620] Was the discharge "sudden and accidental" as covered under the policy?[621] Are PFAS a defined "traditional" environmental pollution?[622] And, whether a "hostile fire" exception applies.[623]

Other "occupational disease," "intentional acts," or "owned property" exclusions may bar or limit coverage for particular claims as well, not to mention PFAS-related claims that seek damages or other relief not covered under the particular policy at issue.[624] For example, claims involving matters such as regulatory compliance costs, punitive damages, costs of doing business, or medical monitoring may not be covered under liability policies.[625]

PFAS claims seeking damages will continue in 2024 and are expected to mimic toxic tort and historic asbestos litigation.[626] In addition, environmental coverage litigators can expect PFAS-related insurance claims and are expected to draw from their past experiences in defending insurers.[627]

VI. WHAT TO EXPECT IN 2024

A. Environmental, Social and Governance

Expect a more defined focus on Environmental Justice and ESG by federal and state authorities. ESG refers to a collection of corporate performance evaluation criteria that assess the robustness of a company's

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615 *Id.*
616 *Id.*
617 *Id.*
618 *Id.*
619 *Id.*
620 *Id.*
621 *Id.*
622 *Id.*
623 *Id.*
624 *Id.*
625 *Id.*
626 *Id.*
627 *Id.*

governance mechanisms and its ability to effectively manage its environmental and social impacts.[628] At this point, ESG is better defined and applied in Europe, and is still largely a work in progress in the States, including Illinois.[629] ESG involves environmental considerations, but is largely a concern over corporate representations about its products, and the desire to make accurate— and provable—claims about being "green," in order to avoid "greenwashing" litigation.[630] We can expect much more on the topic this year.

B. Environmental Justice

Environmental Justice (EJ) is a remarkably ambitious concept that is generally being addressed from the top down with regulation rather than from the bottom up through enforcement of current environmental laws.[631] According to the IEPA, EJ is based on the principle that all people should be protected from environmental pollution and have the right to a clean and healthy environment.[632] Remember the constitutional case brought by the young people in Montana discussed above?[633] Those same principles may apply in Illinois. According to the IEPA, EJ is: "protecting the environment of Illinois and the health of its residents;

> equity in the administration of the State's environmental programs; and opportunities for meaningful involvement of all people with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies."[634]

Illinois has a statute known as the Environmental Justice Act, which directs the state government to study the matter,[635] but various state agencies and Non-Governmental Organizations (NGOs) have been actively pursuing EJ with good intentions. Because EJ is being addressed in the regulatory process,[636] expect challenges and related litigation.

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628 *Environmental, Social and Governance (ESG)*, GARTNER, https://www.gartner.com/en/finance/glossary/environmental-social-and-governance-esg- (last visited June 17, 2024).

629 Leah Malone et al., *ESG Battlegrounds: How the States Are Shaping the Regulatory Landscape in the U.S.*, HARVARD L. SCH. F. ON CORP. GOVERNANCE (Mar. 11, 2023), https://corpgov.law.harvard.edu/2023/03/11/esg-battlegrounds-how-the-states-are-shaping-the-regulatory-landscape-in-the-u-s/.

630 *Id.*

631 *Environmental Justice (EJ) Policy*, ILL. EPA, https://epa.illinois.gov/topics/environmental-justice/ej-policy.html (last visited June 17, 2024).

632 *Id.*

633 *Id.*

634 *Id.*

635 Environmental Justice Act, 415 ILL. COMP. STAT. 155/1 (2011).

636 *Environmental Justice (EJ) Policy*, *supra* note 783.

C. Chevron and Deference to the Administrative Agency

Expect a noteworthy decision from SCOTUS on the 40-year-old precedent articulated in *Chevron* concerning statutory interpretation and deference accorded to the agency charged with administering the statute under review.[637] The administrative state is squarely in SCOTUS's sights.[638] A significant deviation from that rule of statutory construction and a lot more litigation following SCOTUS's decision is expected.[639]

D. PFAS—Drinking Water and Cleanup Standards

Expect more on cleanup and drinking water standards for PFAS compounds and other emerging contaminants of concern,[640] as well as continued PFAS tort and insurance litigation.

E. Microplastics

As noted above, Illinois has enacted a new statutory program focused on micro-plastics.[641] Like the material itself, it is not going away.

F. Clean Energy—Permitting and Siting

In Illinois, we can anticipate more siting activity associated with wind and solar, and Illinois' geology is rumored to be ideal for carbon storage and sequestration. [642]

G. Enforcement—Always Enforcement

Finally, we can anticipate a great deal more enforcement action in the coming year, tempered slightly, but not significantly, by 2024 being an election year.

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637 Jeevna Sheth & Devon Ombres, *Supreme Court Appears Poised To Overrule Chevron Deference in Judicial Power Grab*, CAP 20 (Jan. 17, 2024), https://www.americanprogress.org/article/supreme-court-appears-poised-to-overrule-chevron-deference-in-judicial-power-grab/.

638 *Id.*

639 *Id.*

640 *Key EPA Actions to Address PFAS*, EPA, https://www.epa.gov/pfas/key-epa-actions-address-pfas (May 7, 2024).

641 *Microplastics*, ILLINOIS.GOV, https://epa.illinois.gov/topics/water-quality/microplastics.html (last visited June 17, 2024).

642 *Carbon Management*, PRAIRIE RSCH. INST., https://prairie.illinois.edu/research/carbon-management/ (last visited June 17, 2024).

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For the Academic Year 2023-2024

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ASHLEY DORSEY

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MADELYN HAYWARD

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ALLISON COZART & ARIANNE MOODY

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MICHAEL LEE

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CAITLIN TIPPY

BEST BRIEF
JACK LAKENBURGES AND CAITLIN TIPPY

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DAVID DENNING AND MICHAEL LEE

CHAMPION TEAM
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For the Academic Year 2023-2024

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CAITLIN TIPPY, DAVID DENNING, AND MICHAEL LEE

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MICHAEL KEENEY, LOGAN GIESING, AND MALLORY MAAG

National Child and Welfare Adoption Law Competition: Champions

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