

Environmental Wrap-Up 2022 and What to Expect in 2023

Alert

01.19.2023

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This alert looks at developments in environmental law that were at the forefront in 2022; the trend is expected to continue into 2023 as the Biden administration continues to act on its regulatory initiatives in the energy and environmental space. We're looking backward and forward to evaluate the Environmental Protection Agency's (EPA) actions taking shape in 2023.

A Look Back at 2022

INFLATION REDUCTION ACT

In August, President Biden signed the [Inflation Reduction Act](#) (IRA) into law. The legislation contains \$369 billion in spending, tax credits, incentives and grants for renewable energy projects, electric vehicles and environmental justice. Following on the heels of the Infrastructure Investment Jobs Act (IIJA), nearly \$2 trillion in federal dollars has been allocated toward the modernization of infrastructure in multiple sectors.

Implementation of the IRA is underway. Earlier this month, EPA [announced](#) availability of \$100 million in grants for environmental justice.

EMERGING CONTAMINANTS

In 2022, EPA continued to implement the actions set forth in its [2021 PFAS Strategic Roadmap](#).

- In June, the agency set [non-binding drinking water health advisories](#) for PFOA and PFOS. The advisory limits—which are significantly lower than the limit initially set in 2016—will likely be used to set

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enforceable regulatory standards. EPA plans to propose a National Drinking Water Regulation for publication in March 2023 for PFOA and PFOS, with the expectation of finalizing the rule by September 2024.

- In August, EPA proposed to designate PFOA and PFOS as “hazardous substances” under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). EPA plans to finalize the proposed rule in August 2023, which would create new reporting obligations and significantly increase the risk of enforcement and litigation related to the cleanup of contaminated sites.
- In December, EPA issued its memo addressing PFAS discharges in NPDES Permits and Through the Pretreatment Program and Monitoring Programs (December 2022 memo), a state-focused follow-up to EPA’s April 2022 memo addressing PFAS Discharges in EPA-Issued NPDES Permits and Expectations when EPA Is the Pretreatment Control Authority. Collectively, the memoranda detail how EPA will address PFAS, and urges states to adopt a similar approach. In the December 2022 memo, EPA urged states to include site-specific technology-based effluent limits in NPDES permits in accordance with 40 CFR § 125.3 while EPA works to develop effluent limitation guidelines and water criteria. EPA also noted that water quality-based effluent limits should be used to meet state standards. The December 2022 memo includes a list of suggested Best Management Practices such as product elimination or substitution when there is a reasonable and available alternative to using PFAS and decontaminating or replacing equipment that has historically been used in PFAS products.
- EPA approved a new standard (ASTM-E1527-21) for completing All Appropriate Inquiries under CERCLA on December 15, 2022, and it becomes effective February 13, 2023. The new standard revises several key definitions for clarity and offers guidance to Environmental Professionals on how to address emerging contaminants, such as PFAS, during environmental diligence.

CLEAN WATER ACT

- In December, the Office of Management and Budget (OMB) began its pre-proposal review of EPA’s supplemental Clean Water Act effluent limitation guidelines (ELG) for coal-fired power plants. EPA has stated it will seek to strengthen a Trump-era ELG, and could require the use of new technologies to limit discharges of toxic metals and other pollutants. A Notice of Proposed Rule Making is scheduled to be issued early this year; this proposal should be monitored as it is almost certain that allowable limits of concentrations in discharged wastewater will be lowered and focus on compounds most closely associated with coal power generation.

ENVIRONMENTAL JUSTICE

Throughout 2022, the Biden administration continued to advance its comprehensive environmental justice (EJ) program. At a high level, EPA’s actions make clear that EJ will be incorporated comprehensively throughout the agency, including via compliance, enforcement and funding opportunities.

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- In May, the Department of Justice (DOJ) [announced](#) a series of EJ initiatives, including a comprehensive EJ enforcement strategy and the formation of a new Office of Environmental Justice within the DOJ. The agency simultaneously issued an interim final rule that will [restore the use](#) of supplemental environmental projects (SEPs) in settlement agreements for violations of federal environmental laws. Before the Trump administration, SEPs were commonly used to provide some redress to the communities most directly impacted by violations. Examples include renewable energy installations, affordable housing, and brownfield development.
- In [September](#), EPA released its final Environmental Justice Action Plan, which outlines the agency's strategy for addressing EJ concerns across a variety of programs, including CERCLA and hazardous waste management, emergency response and brownfields redevelopment grants.
- And in September, the agency also [announced](#) the creation of a new Office of Environmental Justice and External Civil Rights, combining two existing offices within the agency into one. Among other things, the office will be tasked with overseeing the distribution of \$3 billion in EJ and climate grants created by the IRA. It will also be tasked with leading the agency on implementing EJ goals and enforcing Title VI of the Civil Rights Act.

CLEAN AIR ACT

It was a big year in air, but the biggest action was the Supreme Court's decision in [West Virginia v. EPA](#) in July. The Supreme Court held that the "major questions" doctrine limits EPA's power to curtail greenhouse gas emissions by requiring power plants to shift generation to lower emitted fuel sources. Prior to the Supreme Court decision, the Biden EPA indicated that it was preparing a new strategy for regulation of greenhouse gases. Despite the disappointment by the decision, EPA Administrator Michael Regan [committed](#) "to using the full scope of EPA's authorities to protect communities and reduce the pollution that is driving climate change."

Since then, the agency has taken a number of preliminary actions that will continue to be important in 2023 and are currently open for public comment:

- In September, EPA initiated a [pre-proposal docket](#) for public input on how to regulate greenhouse gas emissions from new and existing fuel-fired plants. The docket contains a September 1, 2022, memo announcing the docket and a list of Questions for Consideration. Comments are due March 27, 2023.
- On December 6, EPA published a [proposed rule](#) setting standards for new, reconstructed and modified emissions sources in the oil and natural gas sector. The proposed rule purports to "update, strengthen, and expand" the prior standards and is intended to significantly reduce greenhouse gases from the crude oil and natural gas source category. Comments are due by February 13.
- On December 23, EPA issued a [proposed rule](#) revising the Clean Air Act Section 111(d) process for air pollutant emissions from stationary sources. The proposed rule shortens the timing requirements for

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states to submit their implementation plans and for EPA to promulgate a federal plan. Comments are due February 27.

In addition to climate, EPA continued its review of dozens of Trump-era regulations, promising actions on National Ambient Air Quality Standards (NAAQS), Maximum Achievable Control Technologies (MACTs), and National Emission Standards for Hazardous Air Pollutants (NESHAPs) in 2023.

NATIONAL ENVIRONMENTAL POLICY ACT

In April 2022, the Council on Environmental Quality (CEQ) issued a regulation amending its previous rule implementing the National Environmental Policy Act (NEPA). Taking effect in May 2022, the amendments restored provisions that were modified previously by the Trump administration to reduce delays when approving infrastructure projects. CEQ's revision is the first of two phases with "Phase 1" focusing on:

1. Providing agencies with more flexibility to define the purpose and need of a proposed action;
2. Establishing NEPA procedures as a floor rather than a ceiling; and
3. Restoring and clarifying the definitions of direct, indirect, and cumulative effects to include environmental impacts related to climate change and EJ.

What Expect in 2023

As noted above, we anticipate 2023 will be another busy year for EPA and state regulators. Some of the major actions are identified below, but note that EPA has more than 100 actions identified on its fall 2022 regulatory agenda. While some of these are nationwide rules with broad applicability, many are also local rules (state implementation plan approvals and area designations, as examples) that will have significant impacts on regulated entities. Environmental professionals will have their hands and plates full understanding what is coming down the pike.

CLEAN AIR ACT

According to its latest [regulatory agenda](#), EPA plans to release a number of proposed and final air regulations in 2023. Significant anticipated regulations include:

- **NAAQS:** On January 6, EPA [signed](#) a proposal to tighten NAAQS for particulate matter with a diameter less than 2.5 microns (PM_{2.5}). EPA proposes to revise the primary standard from 12.0 gg/m³ to 9.0-10.0 g g/m³ but is accepting comments on revising the standard down in the range of 8.0 gg/m³ to 11.0 gg/m³. The proposal retains the other PM_{2.5} NAAQS standards (secondary, primary and secondary 24-hour PM_{2.5} standards, and primary and secondary PM₁₀ standards), though EPA is accepting comments on lower thresholds for those standards, as well. The proposed rule has not yet been published in the *Federal Register*, but will have a 60-day comment period upon publication. Per EPA's Regulatory Agenda, the

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agency aims to finalize the standard in August 2023. The regulated community should start evaluating impacts on area designations and future permitting efforts now. PM cuts across most if not all industries.

- **CSAPR FIP:** In March, EPA [plans to release](#) a final rule imposing a federal implementation plan on many states to [expand](#) the Cross-State Air Pollution Rule (CSAPR), the agency's main program to reduce interstate air pollution. The current version of CSAPR uses emissions trading programs to reduce ozone-forming nitrogen oxides (NOx) and PM-forming sulfur oxides (SOx) from power plants. It is expected that the final rule will tighten existing state NOx caps, enlarge CSAPR to include new states in the western half of the country and apply, for the first time, NOx emission rates limits to non-utility industries such as pulp and paper, refining, and cement manufacturing.
- **Ethylene Oxide:** EPA also plans to release a [proposal](#) to limit ethylene oxide emissions from commercial sterilizers in March. The proposed rule was sent to OMB on December 22, beginning a 90-day clock for the Office of Information and Regulatory Affairs' review, after which, the proposal will go back to EPA before being published in the *Federal Register*. According to the Regulatory Agenda, EPA plans to finalize the rule in October 2023.
- **Once In, Always In:** EPA [intends](#) to release a proposed rule in April that is expected to reinstate the agency's policy of requiring "major sources" of toxic air pollution to retain tougher controls through MACT even if they reduce their emissions to below the threshold that qualifies them as a major source. The policy was changed in the Trump administration. Per the regulatory agenda, EPA intends to finalize the rule next spring.
- **Mobile Sources:** EPA is also expected to advance its policies for mobile sources including zero-emission vehicles. It has finalized its rule for new heavy-duty engines and vehicles. The final rule will become effective 60-days after publication in the *Federal Register*. The rule will thereafter begin to apply to vehicles with a model year of 2027 or later. EPA is also expected to propose Phase 3 of its emission standards for the heavy-duty vehicle sector, which is anticipated to apply to heavy-duty engines and vehicles starting in model year 2030.

CLEAN WATER ACT

On January 18, EPA and the Army Corps of Engineers issued their [final rule](#) redefining "waters of the United States" (WOTUS) subject to the Clean Water Act. The rule is effective March 20, 2023.

The determination of which waterbodies are considered WOTUS is critical because it determines which waterbodies are subject to federal permitting requirements and oversight versus state regulatory authority.

The rule generally directs EPA and the Corps to apply pre-2015 WOTUS standards, but with a number of new additions and exclusions, six of which are new waivers for agricultural lands. Of note, the rule aims to apply both competing tests set out by the Supreme Court in the 4-1-4 *Rapanos v. United States* decision. There, the four-justice plurality led by late Justice Antonin Scalia favored a narrow test for jurisdiction

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based on “continuous surface connection” between “relatively permanent waters,” but former Justice Anthony Kennedy wrote a solo concurrence setting out a broader “significant nexus” standard.

The Courts of Appeal have interpreted *Rapanos* in different ways: some circuits follow Justice Kennedy’s “significant nexus” standard while others have concluded a body of water can be considered WOTUS if it meets either of Justice Kennedy’s or Justice Scalia’s tests.

EPA’s final rule comes in advance of the Supreme Court’s much-anticipated ruling in *Sackett v. EPA*, a case that examines whether the Ninth Circuit properly applied the “significant nexus” test in concluding wetlands on the *Sacketts’* property are WOTUS. Commentators expect Chief Justice John Roberts may seek to find a compromise that narrows the current standard somewhat, and EPA and the Corps will be left to figure out how that decision impacts this rule.

The regulated community should closely evaluate the new rule and how it impacts current and future project planning. In addition, regulated parties should monitor the Supreme Court’s ruling in *Sackett* to understand whether or how it will impact the new WOTUS definition.

EMERGING CONTAMINANTS

Per the regulatory agenda, EPA [plans](#) to propose a National Drinking Water Regulation setting enforceable limits for PFOA and PFOS in drinking water in March and finalize it in September. The reach of this rule is expected to impact manufacturers and users of PFAS, downstream distributors and public water systems, to name a few.

EPA also [plans](#) to finalize its proposed rule designating PFOA and PFOS as CERCLA “hazardous substances” in August 2023. Finalizing this rule will be a game-changer. Not only will the rule create new reporting obligations for spills, but it will also result in the addition of more sites to the National Priorities List, increase costs at sites currently being studied and remediated if the parties are required to address PFOA and PFOS, and potentially reopen existing Superfund sites if EPA determines that previously completed remedial actions are no longer protective of human health and the environment. These ramifications will undoubtedly cause a significant increase in expensive and time-consuming CERCLA litigation. EPA is also poised to undertake a [new rulemaking](#) to evaluate expanding the hazardous substance designation to additional PFAS or classes or subclasses of PFAS.

Finally, in 2023, the regulated community will need to determine how to comply with an emerging landscape of PFAS notification rules. Recently, federal and state regulators have proposed or finalized new regulations that require chemical and product manufacturers to disclose the manufacture and use of PFAS. EPA is also [expected](#) to issue a proposed rule making certain PFAS releases reportable under the Emergency Planning and Community Right-to-Know Act. The proposed rule is due in May 2023.

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CLIMATE

EPA will continue to focus on climate in 2023. It has committed to comprehensively evaluate and incorporate climate policies across media. For example, the new WOTUS rule aims to bolster resiliency to the impacts of climate change. EPA is also [expected](#) to finalize its Risk Management Program revisions this fall. The proposed rule incorporates climate-related impacts into hazard evaluation requirements such as by requiring parties to consider how climate change may increase exposure to hazardous materials through extreme weather or natural hazards.

EPA is also expected to address climate change in a new rule for existing electric-fired utilities, though the regulatory agenda's [estimate](#) for a proposal in April seems optimistic given the pre-proposal docket's March 27 deadline. The regulated community should also anticipate New Source Performance Standards (NSPS) for the oil and natural gas sector.

ENVIRONMENTAL JUSTICE

EJ initiatives will remain a priority at the federal level in 2023, and we anticipate more states will impose EJ requirements through new laws and other regulatory requirements.

At the federal level, the next year will show how past efforts will influence permitting, compliance and enforcement decisions. For starters, EPA has indicated that, in 2023, [50% of its compliance inspections will occur in EJ communities](#), up from 30% in 2021 and 45% in 2022. On January 3, EPA's Office of Air & Radiation issued guidance outlining eight principles for including cumulative impacts and other EJ considerations in Clean Air Act permitting decisions.

And on January 11, EPA's Office of General Counsel released a [long-awaited document](#) that provides, for the first time, examples of environmental and other legal authorities that regulators can use to identify and address cumulative impacts in permitting, regulatory and grant-funding decisions. The document, which does not prescribe when and how EPA should undertake certain actions, addresses cumulative impacts on a statute-by-statute and program-by-program basis. Of note, the January 11 document is the first in a series of actions EPA is developing to ensure cumulative impacts are considered. EPA plans to release draft "Guidelines for Cumulative Risk Assessment Planning and Problem Formulation" for public comment soon, as well as a cumulative impact framework for determining civil rights law compliance by September 30.

Going forward, the regulated community should proactively analyze whether they operate in EJ communities and plan for increased scrutiny if they do. Expect more inspections and the use of new technology to gauge compliance at a facility's fence line. Developing strategies to monitor and proactively respond to community concerns should help mitigate risk, and keeping tabs on the data incorporated into EPA's [EJSCREEN](#) will be key for understanding issues facing communities.

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NATIONAL ENVIRONMENTAL POLICY ACT

CEQ will likely propose Phase 2 NEPA revisions this year to provide further guidance on how agencies are to assess climate change and environmental justice in the NEPA process. It has already published [preliminary guidance](#) near the first of the year on how federal agencies should include greenhouse gas emissions in their environmental review process. Based on this early guidance, expect the federal government to scrutinize fossil-fuel projects more than renewal energy installations.

ENFORCEMENT

While many of these actions are in the rulemaking phases, EPA's enforcement remains on the rise. In 2022, EPA's inspections [increased](#) significantly – more than 75% over FY2021. It also conducted 55% of its on-site inspections in EJ areas, exceeding its goal of 45%, and continued to increase its use of desktop inspections, which are accomplished via Information Requests that allow the agency to conduct more inspections without going on-site. As enforcement efforts increased, EPA's new ECHO Notify tool enabled the agency to summarize and publicly distribute multi-media compliance information nationwide as part of its transparency initiative and use of deterrents.

Overall, these actions show the breadth of new and changing requirements facing regulated entities and confirm that EPA intends to enforce these new proposals. Working with counsel as these developments take place and developing strategies for your business is key.

For more information on past and future EPA decisions, please contact [Brittany Barrientos](#), [Aimee Davenport](#), [Andy Davis](#), [Kristen Ellis Johnson](#), [Kyle Foote](#), [Sarah Lintecum Struby](#) or the Stinson LLP contact with whom you regularly work.

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