



# Baker Botts 38th Annual Environmental, Safety & Incident Response Seminar

Agenda and Seminar Materials | February 20, 2025

**BAKER BOTTS**



# TABLE OF CONTENTS

01

Agenda

02

NGO Perspective on the Future of Energy Transition Incentives

03

Ethics CLE: Identifying and Protecting Privilege in Environmental Matters

04

Breakout Session 1: Key Considerations in Incident Response

05

Breakout Session 2: PFAS Regulatory Developments

06

Breakout Session 3: EPA Enforcement

07

Breakout Session 4: Supreme Court and Appellate Updates

08

Breakout Session 5: Role of the Environmental Lawyer in Energy and Sequestration Tax Credits

09

Breakout Session 6: Water Supply – Challenges and Opportunities

10

Program Evaluation form

11

Speaker Biographies



# 01

## AGENDA

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# Baker Botts' 38<sup>th</sup> Annual Environmental, Safety and Incident Response Seminar Agenda

February 20, 2025 | Marriott Marquis | Houston, TX

## PRE-SEMINAR ETHICS CLE SESSION

7:45 a.m. – 8:15 a.m.	<b>Early Registration for Ethics CLE Session and Breakfast</b>
8:15 a.m. – 9:05 a.m.	<p><b>Ethics CLE Session – Attorney Client Privilege</b></p> <p><b>Speakers:</b> Ben Gonsoulin, Ariel June, Ricardo Pagulayan – Partner and Associates at Baker Botts L.L.P.</p> <p><i>*In-person attendance only</i></p>

## SEMINAR PROGRAM

8:15 a.m. – 9:05 a.m.	<b>General Registration and Networking Breakfast</b>
9:10 a.m. – 9:15 a.m.	<p><b>Welcoming Remarks</b></p> <p>Scott Janoe – Section Chair of Environmental, Safety and Incident Response at Baker Botts L.L.P.</p>
9:15 a.m. – 10:00 a.m.	<p><b>Session #1 – TCEQ Priorities and Updates</b></p> <p><b>Speaker:</b> Brooke Paup – Chairwoman, Texas Commission on Environmental Quality; former Acting Assistant Administrator of EPA Office of Air and Radiation</p> <p><b>Moderator:</b> Stephanie Bergeron Perdue – Partner at Baker Botts L.L.P.</p> <p><i>*CLE credit will not be offered for this session.</i></p>
10:05 a.m. – 10:50 a.m.	<p><b>Session #2 – LDEQ Priorities and Updates</b></p> <p><b>Speaker:</b> Aurelia S. Giacometto – Secretary of the Louisiana Department of Environmental Quality</p> <p><b>Moderator:</b> Jeff Wood – Partner at Baker Botts L.L.P.</p> <p><i>*CLE credit will not be offered for this session.</i></p>

10:50 a.m. – 11:00 a.m.	Break
11:00 a.m. – 11:45 a.m.	<p><b>Session #3 – Perspectives on Change at the Environmental Protection Agency</b></p> <p><b>Speaker:</b> Anne Idsal Austin – Founder and Attorney at Austin Legal &amp; Public Affairs</p> <p><b>Moderator:</b> Matt Kuryla – Partner at Baker Botts L.L.P.</p> <p><i>*CLE credit will not be offered for this session.</i></p>
11:45 a.m. – 12:10 p.m.	<b>Remarks from EPA Region 6 Administrator Scott Mason</b>
12:10 p.m. – 1:05 p.m.	Lunch Break
1:05 p.m. – 1:50 p.m.	<p><b>Session #4 – NGO Perspective on the Future of Energy Transition Incentives</b></p> <p><b>Speaker:</b> John Thompson – Technology and Markets Director at Clean Air Task Force</p> <p><b>Moderator:</b> Shai Sahay – Partner at Baker Botts L.L.P.</p> <p><i>*CLE credit will not be offered for this session.</i></p>
1:50 p.m.– 2:00 p.m.	Break
2:00 p.m.– 2:45 p.m.	<p><b>Session #5 – Key Environmental Policy Priorities in 2025</b></p> <p><b>Speakers:</b></p> <ul style="list-style-type: none"> <li>• Rich Moskowitz – General Counsel at American Fuel &amp; Petrochemical Manufacturers</li> <li>• Julie Cress – Partner at Baker Botts L.L.P.</li> </ul> <p><b>Moderator:</b> George Fibbe – Partner at Baker Botts L.L.P.</p> <p><i>*CLE credit will not be offered for this session.</i></p>
2:45 p.m. – 2:55 p.m.	Break (transition to Breakouts)

## BREAKOUT SESSIONS

*\*In-Person Attendance Only*

### Breakout Session One

<p>2:55 p.m. – 3:45 p.m.</p>	<p><b>Breakout 1:</b>  <b>Key Considerations in Incident Response</b>  <b>Baker Botts Speakers:</b>            Scott Elliott, Ben Gonsoulin, Matt Kuryla, Teresa Jones</p>	<p><b>Breakout 2:</b>  <b>PFAS Regulatory Developments</b>  <b>Baker Botts Speakers:</b>            Martha Thomsen, Jeff Wettengel, Linn Bumpers</p>	<p><b>Breakout 3:</b>  <b>EPA Enforcement</b>  <b>Baker Botts Speakers:</b>            Scott Janoe, Kent Mayo, Jeff Wood, Day Robins</p>
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<p>3:45 p.m. – 3:55 p.m.</p>	<p><b>Break</b></p>		
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### Breakout Session Two

<p>3:55 p.m. – 4:45 p.m.</p>	<p><b>Breakout 4:</b>  <b>Supreme Court and Appellate Update</b>  <b>Baker Botts Speakers:</b>            Mark Little, Joshua Lee, Beau Carter, Scott Novak</p>	<p><b>Breakout 5:</b>  <b>Role of the Environmental Lawyer in Energy and CCS Tax Credits</b>  <b>Baker Botts Speakers:</b>            Barbara de Marigny, Shai Sahay, Ricardo Pagulayan</p>	<p><b>Breakout 6:</b>  <b>Water Supply: Challenges and Opportunities</b>  <b>Baker Botts Speakers:</b>            Paulina Williams, Cole Lempke</p>
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## RECEPTION

<p>4:45 – 5:45 p.m.</p>	<p><b>Reception</b></p>		
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# 02

## NGO PERSPECTIVE ON THE FUTURE OF ENERGY TRANSITION INCENTIVES

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# Perspectives on the Future of Carbon Capture and Clean Hydrogen and the Importance of Incentives

February 20, 2025



CLEAN AIR  
TASK FORCE

# Exports are critical to Louisiana and Texas

## Louisiana

- 43% of Louisiana's GDP is from exports.
  - Highest of any state
- \$122 billion in exports in 2022.
  - Third largest of any state
- **Over 70% of the value of Louisiana's exports come from fossil fuels or industrial chemicals, plastics and fertilizers**

## Texas

- 23% of Texas' GDP is from exports
  - Second highest of any state.
- \$445 billion in exports in 2023
  - Largest of any state.
- **About 68% of the value of Texas exports comes from oil, gas, petroleum, coal, and chemicals**

# Economies of Texas and Louisiana rely on industry

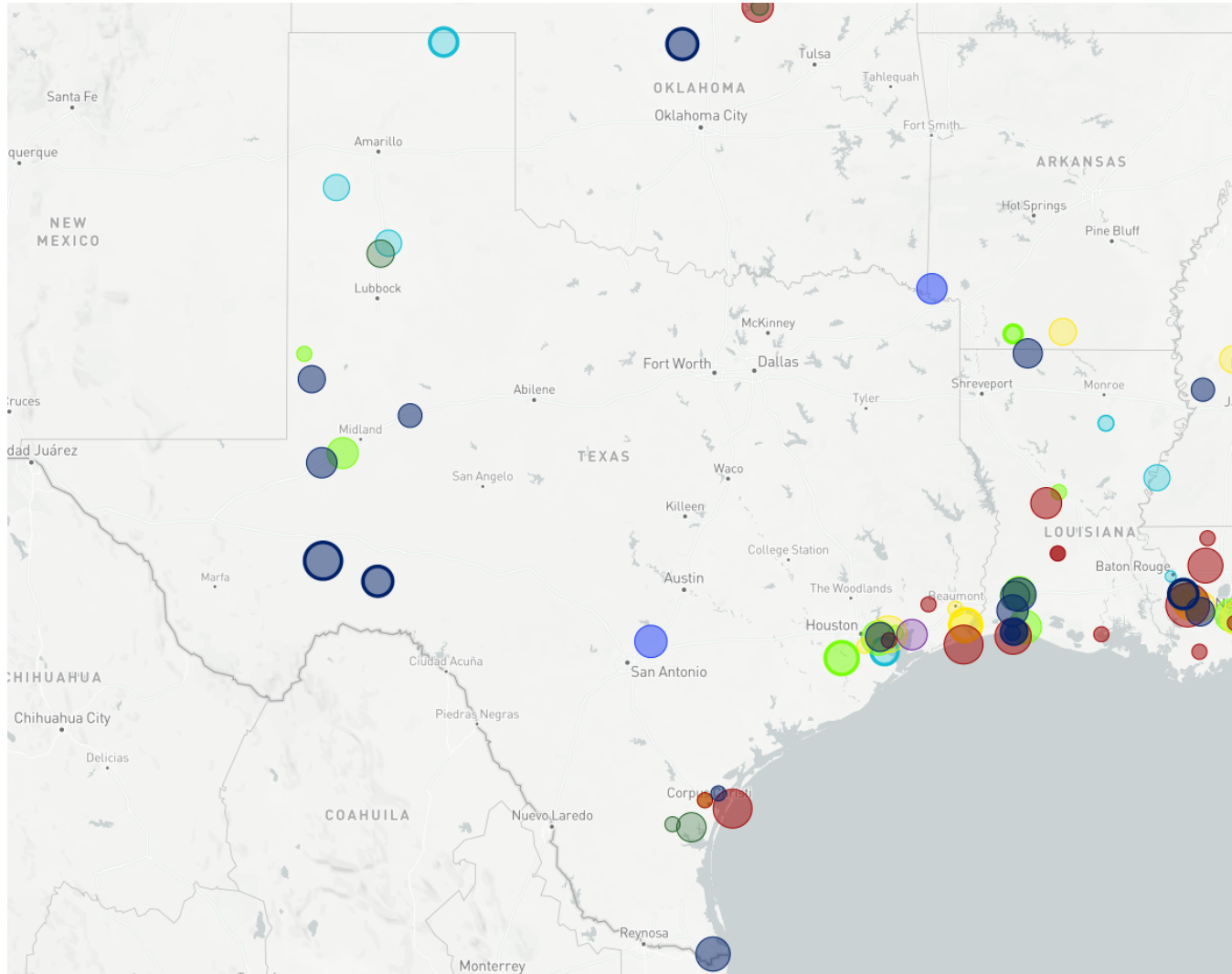
- Many export markets for industrial products have **ambitious low-carbon goals**, including Europe and Japan.
- Texas and Louisiana industrial plants account for about 30% of the United States industrial CO<sub>2</sub>.

*Global demand for low-carbon products is increasing. Expanding carbon capture and clean hydrogen in industry can make industrial products more attractive to those markets while promoting U.S. interest in reducing trade deficits.*

# Announced and operational CCUS Projects in Texas and Louisiana

## Subsector

- Biofuels
- Cement
- Direct Air Capture
- Heat and Power
- Hydrogen
- Industrial Hub
- Storage
- Waste-to-Energy
- Other Subsector



## Legend

Project circles sized by known capture capacity in metric tons of CO<sub>2</sub>/year

- Unavailable
- 200K
- 2MM
- 20MM

Border sizes denote project status

- In Development
- Operational

# **Inflation and Economic Challenges**

# Capture cost increases with dilute CO<sub>2</sub> sources

Source	Range of CO <sub>2</sub> Concentrations	Notes
Ethanol Fermentation	High purity (~99% CO <sub>2</sub> )	
Natural Gas Processing	2%-65% (varies by source)	CO <sub>2</sub> must be removed to meet pipeline standards for natural gas
BOF (Steel)	~20-25%	
Steam Methane Reformer (SMR)	~15-20%	Ammonia production, Hydrogen production
Cement	~20%	
Coal Power Plant	~12-15%	
Fluidized Catalytic Cracker (Refinery)	~10-15%	
Pulp and Paper	8-15%	
Gas-Fired Power Plant	~3-4%	

- Capture Cost also increases if the stack gas has pollutants that must be removed.
- Total cost includes transportation and storage, which depends on volume, distance to source, injection geology.

Increasing cost



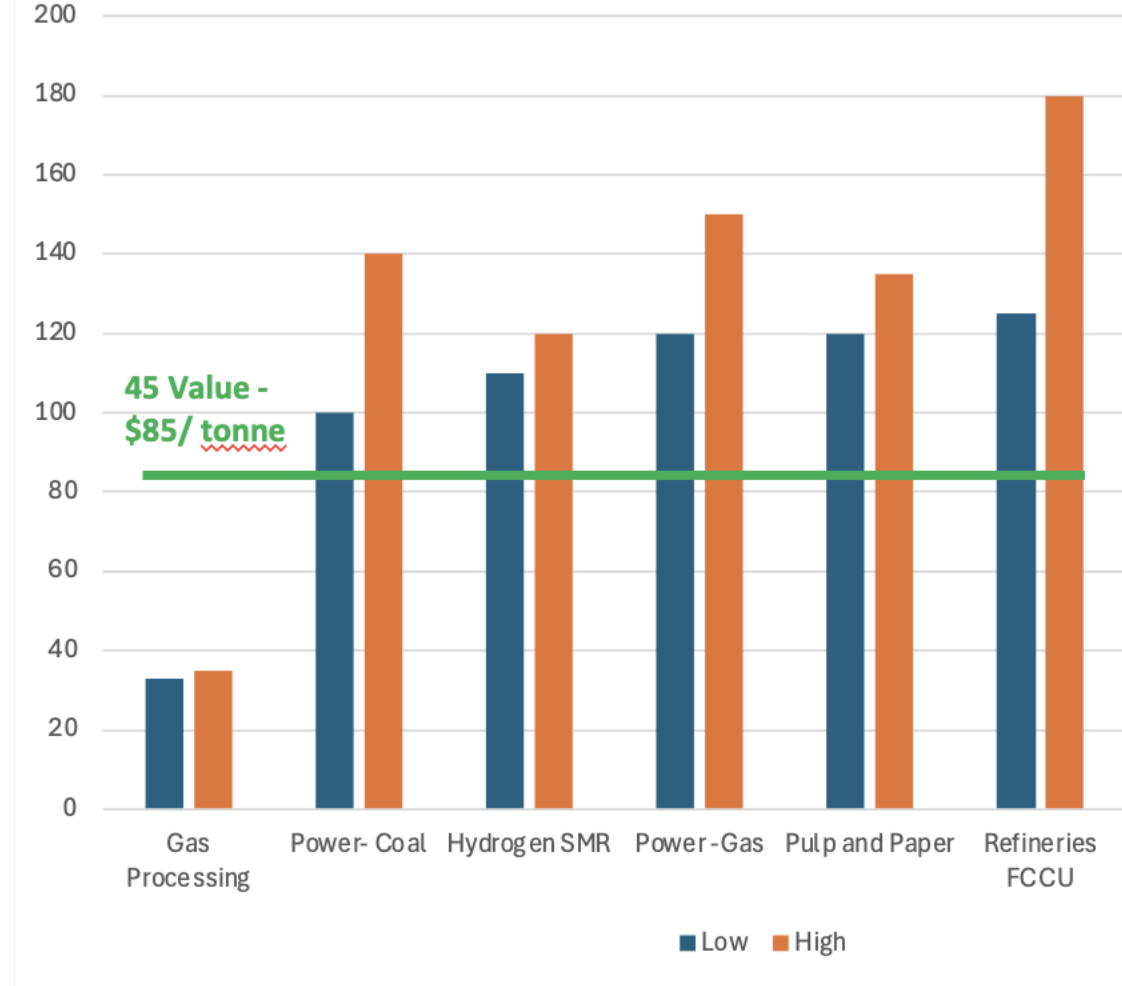
# Current Value of 45Q tax credits is not sufficient for most CCS applications

## CCS costs vary by

- Sector: Concentrated CO<sub>2</sub> sources (ethanol fermentation) are cheaper than dilute sources (gas-fired power plants)
- Storage and transportation costs of CO<sub>2</sub>

**Capital cost inflation in the industrial sector is 30%-40%, higher than consumer goods.**

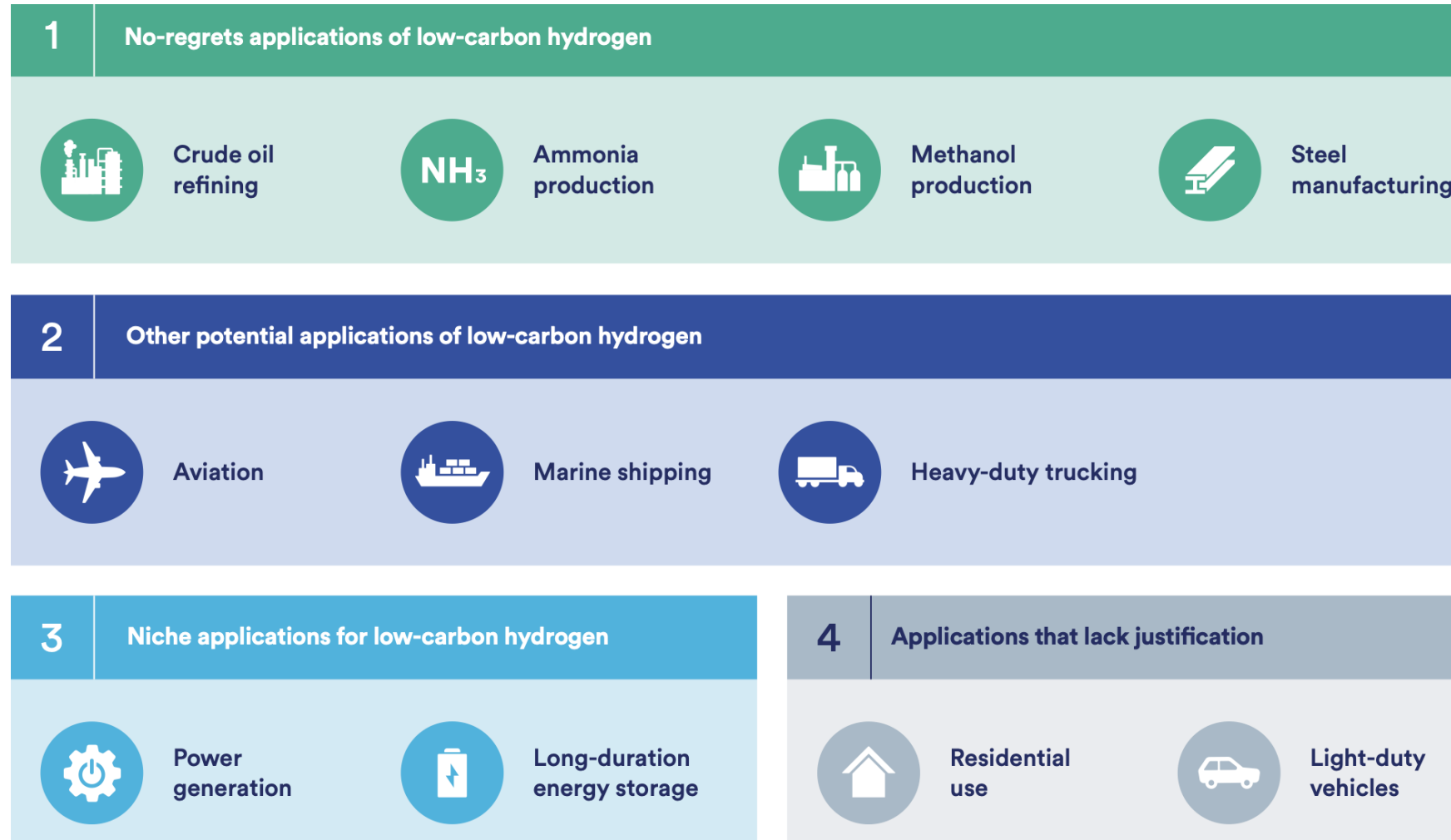
- CCS project costs have risen consistent with other industrial projects during this period
- 45Q credit has not been adjusted for inflation



Low estimate: Blue bar  
High estimate: Orange bar

Source: CATF preliminary analysis Feb 2025

# Prioritize clean hydrogen deployment where it will deliver climate benefits





**Permitting  
&  
Public Concern Challenges**



# 03 ETHICS CLE: IDENTIFYING AND PROTECTING PRIVILEGE IN ENVIRONMENTAL MATTERS

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# Identifying and Protecting Privilege in Environmental Matters

February 20, 2025

Ben Gonsoulin, Ricardo Pagulayan, Ariel June

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# Presenters



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# Topics



ATTORNEY-  
CLIENT PRIVILEGE



WORK PRODUCT  
DOCTRINE



WAIVER



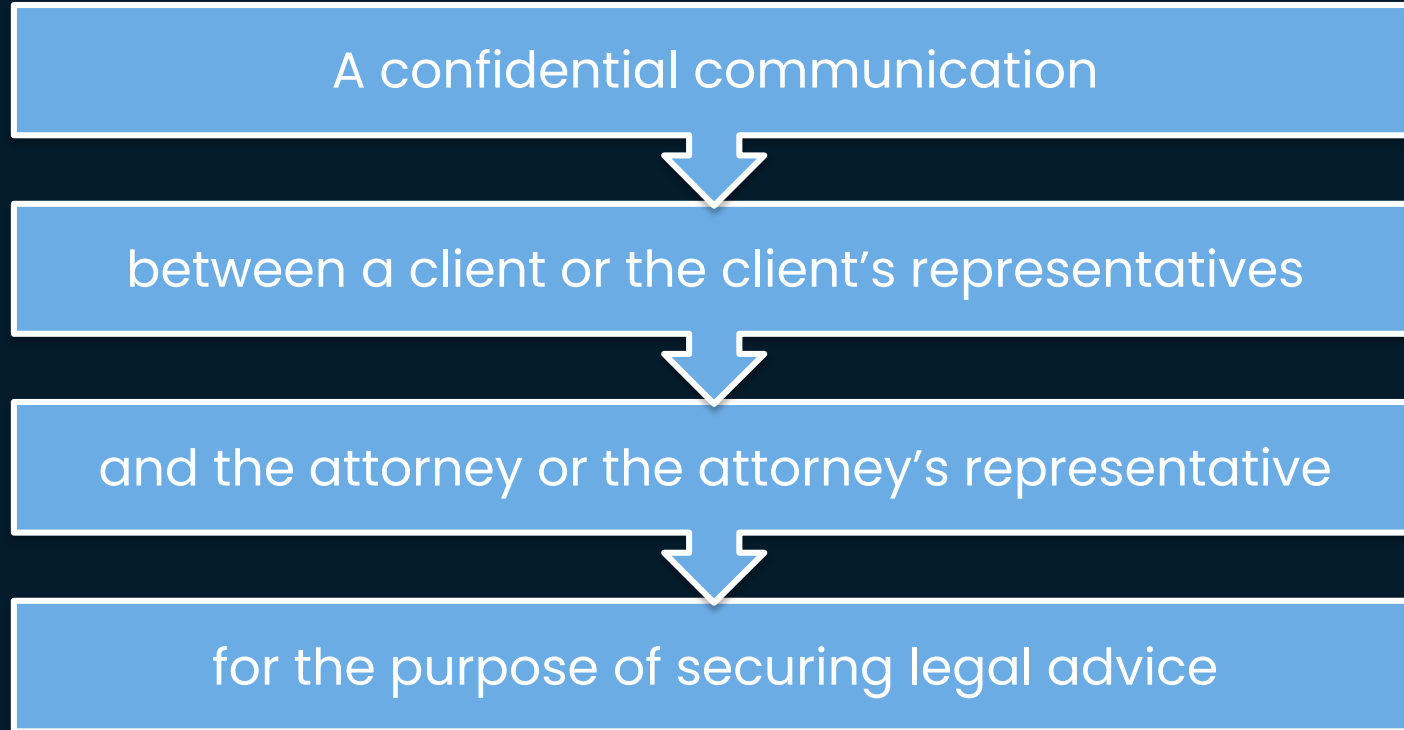
SAMPLE  
SCENARIOS



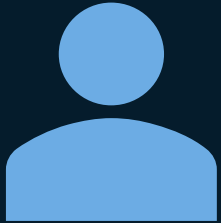
PRACTICE TIPS

# Attorney-Client Privilege Protection

The attorney-client privilege protects:



# Attorney-Client Privilege: Client Representative



## Client

Person or entity who receives legal services or consults a lawyer with a view to obtaining legal services.



## Representative

Person who has authority to obtain professional legal services for the client or to act for the client on the legal advice rendered; OR

Any other person who, to facilitate the rendition of professional legal services to the client, makes or receives a confidential communication while acting in the scope of employment for the client.

# Attorney-Client Privilege: Employee Issues

- Multiple Employee Recipients:
  - Each person must have:
    - Authority to obtain professional legal services;
    - Authority to act on legal advice rendered to the client; or
    - Made or received the communication while acting in the scope of their employment for purposes of effectuating the legal representation.
  - Additional recipients risk breaking privilege



# Attorney-Client Privilege: “For the Purposes of Securing Legal Advice”

- The communications must be for the purpose of obtaining or providing legal advice.
- Non-legal communications—even between an attorney and a client—are NOT protected. This includes:
  - Personal communications
  - Communications giving business advice
- Notable Exceptions
  - Crime fraud
  - Disclosure to third party
  - Client waiver



# Common Misconceptions

## Common misconceptions and issues “clouding” privilege:

- Attorneys’ notes and files are not automatically protected
- Cc’ing legal counsel does not make something privileged
- Documents captioned as privileged are not automatically privileged
- Lawyers attending business meetings do not necessarily shield the meeting
- Communications with in-house lawyers who wear two hats (business and legal) are not always privileged
- Business advice is not privileged
- Contract negotiations are often not privileged
- Including on communications those who don’t “need to know” can jeopardize privilege

# In-House and Outside Counsel

For the purposes of attorney-client privilege, in-house and outside counsel are treated similarly across jurisdictions.

**California:** California does not distinguish between in-house and outside counsel for the purpose of attorney-client privilege. See Edwards Wildman Palmer LLP v. Sup. Ct., 231 Cal. App. 4th 1214 (2014) (attorney-client privilege may exist with regard to in-house counsel).

**District of Columbia:** Attorney-client privilege applies where “legal advice of any kind is sought from a professional legal advisor in his capacity as such.” Adams v. Franklin, 924 A.2d 993, 998 (2007); Jones v. United States, 828 A.2d 169, 175 (2003).

**Texas:** “The attorney-client privilege applies if the client is a corporation; an attorney's status as in-house counsel neither dilutes nor waives the privilege.” FERKO v. NASCAR, 218 F.R.D. 125, 139 n.13 (E.D. Tex. 2003). “It is undisputed that communications between a corporation and its inside counsel are protected in the same manner and to the same degree as communications with outside counsel.” United States v. Mobil Corp., 149 F.R.D. 533, 537 (N.D. Tex. 1993).

# Confidential Communication and Waiver

The privilege belongs to the client.

The client waives the privilege if:

- The client or lawyer discloses the privileged communication to a third party.
  - ✓ Be careful cc'ing or forwarding email strings.
  - ✓ Disclosure of any significant portion may result in waiver as to the whole.

No waiver:

- Retaining accountants or third parties to assist counsel in rendering legal advice.
- Inadvertent disclosure to another litigant that is clawed-back.

Ethical consideration:

- Protecting your client's privilege

# Claw-backs: Jurisdictional Variations

Across jurisdictions, primary considerations are the holder's **intent** to disclose and the **promptness** with which the holder sought return of the inadvertently disclosed material

**Texas:** A party can assert a claim of privilege to material or information produced inadvertently without intending to waive the privilege so long as that party claims the privilege within **ten** days of *actually discovering* the inadvertent disclosure. Tex. R. Civ. P. 193.3(d); In re FEDD Wireless LLC, 567 S.W.3d 470, 476-478 (2019).

**California:** Unlike in Texas, there is no specified time limit for clawing back an inadvertent disclosure. A primary factor is whether the holder intended to disclose the privileged material. *See e.g.*, McDermott Will & Emery LLP v. Sup. Ct., 10 Cal. App. 5th 1083, 1101-1106 (2017) (no waiver where the party did not intend disclosure, despite failure to request return of privileged information).

**District of Columbia:** No specified claw-back period in D.C. but waiting too long can lead to waiver. *See e.g.*, Williams v. District of Columbia, 806 F. Supp. 2d 44 (D.D.C.) (finding waiver where a party waited almost three years before reasserting privilege following inadvertent disclosure).

# Work Product Immunity



## Most common mistake:

Assuming that an attorney's notes and files are protected by the work product privilege!

## Work product is:

- mental impressions or other material prepared
- in anticipation of litigation
- by a party or the party's representatives



# “Prepared in anticipation of litigation..”

Courts decide whether work product protection applies on a case-by-case basis. In particular, determining whether materials were “prepared in anticipation of litigation” is a highly fact-based exercise.

**Texas:** “In anticipation of litigation” can be based on claims that have already arisen, even if no formal notice of a potential lawsuit has been issued. See Nat’l Tank Co. v. Brotherton, 851 S.W.2d 193 (1993). The primary purpose for creating the work product must be in anticipation of litigation; if created for any other purpose, work product protection does not apply. See In re Maher, 143 S.W.3d 907 (2004).

**California:** “In anticipation of litigation” can be based on a reasonable belief that litigation is likely. See S. Cal. Edison Co. v. Sup. Ct. of L.A. Cty., 102 Cal. App. 5th 573, 585 (2024) (party received evidence preservation letters after an incident). Work product protection applies even if materials were created before any litigation has been formally initiated. See id.

**District of Columbia:** D.C. courts do not specifically iterate what constitutes “in anticipation of litigation.” Decisions tend to conclude that materials were prepared in anticipation of litigation without further explanation.

# The Work Product Trap



## Potential trap:

If you are anticipating litigation, are you still (inadvertently) "destroying" documents?



## Solution:

Circulate Legal Hold Notices upon anticipation of arbitration, investigation, or litigation.

Involve IT department immediately to ensure relevant emails, tape recordings, electronic documents, and backup tapes are preserved.



## Ethical Consideration:

Advising client regarding document retention obligations



Scenarios!



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# Scenario 1: Contract Negotiation

In-house environmental counsel emails CFO: “We just wrapped up our first day of negotiations with the target’s counsel. I think we should consider substantially lowering our offer. The target has significant environmental exposure, but wants us to agree to non-standard environmental provisions that I’m not sure would cover certain types of claims that could come up in an environmental audit. The target is also unwilling to give us the broad indemnification protection we need. Even if we could get broader indemnifications, I’m not sure the surviving part of the target’s operations would be sufficient to protect us. I think we are paying too much in this deal given these risks.” Pre-closing dispute arises over environmental schedules, and buyer terminates APA.

**Is counsel’s email protected by the attorney–client privilege?**

# Scenario 1: Contract Negotiation

**Is counsel's email protected by the attorney–client privilege?**

**Answer: Probably not.** As a general rule, courts will not recognize the privilege when the attorney is acting as a business advisor. Documents expressing substantial non-legal concerns and not primarily of a legal character may not be protected.

- Georgia-Pacific Corp. v. GAF Roofing Mfg. Corp., 1996 WL 29392, at \*4 (S.D.N.Y. Jan. 25, 1996) (“Since [counsel] negotiated the environmental terms ..., [target] is entitled to know what environmental matters he determined would not be covered in the proposed agreement, the extent to which they were covered in the provisions he negotiated ..., and whether [he] advised [buyer’s] management of the degree to which his negotiations had left [buyer] protected and unprotected.”).

# Scenario 2: Attorney Notes

In-house environmental counsel's file contains 20 pages of handwritten notes outlining potential strategies, values, transaction risks, and environmental issues. Deal does not close, and target sues.

**Are counsel's notes protected by the attorney–client privilege?**

# Scenario 2: Attorney Notes

**Are counsel's notes protected by the attorney–client privilege?**

**Answer: Probably not.** If an attorney's notes to his or her own files do not reflect (1) a confidential communication from a client or a request for legal advice, or (2) that the contents of the notes were communicated to anyone else for the purpose of obtaining or giving legal advice, then the attorney's notes are not privileged.

- Am. Nat'l Bank & Tr. Co. of Chi. v. AXA Client Sols., LLC, 2002 WL 1058776, at \*2 (N.D. Ill. Mar. 22, 2002) (“The handwritten notes merely reflect in-house counsel’s own uncommunicated thoughts, and such recorded and uncommunicated thoughts fall outside the province of the attorney-client privilege.”).

# Scenario 2: Attorney Notes

In-house environmental counsel's file contains 20 pages of handwritten notes outlining potential strategies, values, transaction risks, and environmental issues. Deal does not close, and target sues.

**Are counsel's notes protected by the attorney work-product doctrine?**

# Scenario 2: Attorney Notes

**Are counsel's notes protected by the attorney work-product doctrine?**

**Answer: No.** Attorney work product protection extends only to notes prepared in reasonable anticipation of litigation.

- Am. Nat'l Bank & Tr. Co. of Chi. v. AXA Client Sols., LLC, 2002 WL 1058776, at \*2 (N.D. Ill. Mar. 22, 2002) (“[T]he draft letters are not protected against discovery under the work-product doctrine because the draft letters were not prepared in anticipation of litigation.”).

# Scenario 3: Meeting Minutes

A scribe for the incident command of a company transcribes everything that was said in the command room in the aftermath of an incident. The transcription reflects that outside counsel was present for the entire meeting and spoke several times throughout the meeting.

**Is the transcription protected by the attorney–client privilege?**



# Scenario 3: Meeting Minutes

## Is the transcription protected by the attorney–client privilege?

**Answer: It depends.** The mere presence of an attorney at a meeting does not shield the minutes. If the minutes reflect statements by the attorney, those statements must qualify as attorney–client communications to be protected. For example, if the outside counsel made statements describing what the company needs to do next to be shielded from liability, that would be protected.

- Giardina v. Ruth U. Fertel, Inc., 2001 WL 1658183, at \*2 (E.D. La. Dec. 21, 2002) (“[T]he Court is not satisfied that [company’s] attorney was acting in his capacity as an attorney during the relevant portions of the meetings. The statements made by [counsel] did not require the skill and expertise of an attorney. In addition, it appears clear ... that the purpose of the conversations was not to render legal advice. Finally, it does not appear that either [company] nor its attorney understood that the purpose of the communications was to review and consider legal issues pertaining to [company].”).

# Scenario 4: Consultant Communications

Company retains a hazardous chemicals consultant to help with an incident investigation. The consultant recommends that company retain outside counsel to represent it during the investigation process. The hazardous chemicals consultant forwards a draft summary of factual findings to company's outside counsel and requests that counsel include language in the incident report. Counsel responds with comments on the language and structure of the draft.

**Are the hazardous chemicals consultant's communications with outside counsel protected by the attorney–client privilege?**

# Scenario 4: Consultant Communications

**Are the hazardous chemicals consultant's communications with outside counsel protected by the attorney–client privilege?**

**Answer: It Depends.** Courts have reached varied results in assessing whether/when communications with third-party consultants result in waiver of attorney–client privilege. When the consultant is hired directly by the client, the privilege's application is more limited and requires clear evidence that the consultant's services are necessary for the legal advice being rendered.

- Univ. of Texas Sys. v. Franklin Ctr. for Gov't & Pub. Integrity, 675 S.W.3d 273, 287 (Tex. 2023), reh'g denied (Oct. 20, 2023) (Declining to find waiver because a risk advisor was retained by counsel to assist counsel in the rendition of legal services and that the risk advisor's communications throughout his investigation were for the purpose of facilitating the rendition of legal services).
- State Farm Fire & Casualty Co. v. Sup. Ct., 54 Cal. App. 4th 625 (finding that privilege extends to communications with a consultant retained by counsel to assist in preparation for litigation).

# But wait, what about PR consultant communications?

In response to incidents, clients might request that attorneys coordinate with PR professionals to mitigate potential negative reactions to “bad” press.

**Answer: It’s an uphill battle.** Courts are generally reluctant to expand protections. Some potential grounds for denying privilege claims:

- The PR consultant merely provided “ordinary” PR advice. Calvin Klein Trademark Tr. v. Wachner, 198 F.R.D. 53, 54 (S.D.N.Y. 2000).
- The PR consultant’s role was limited to advising the client on the type of media engagement it should seek. Universal Standard Inc. v. Target Corp., 331 F.R.D. 80 (S.D.N.Y. 2019).
- The PR consultant’s communications were tenuously connected from/not necessary to counsel’s provision of legal advice or privileged preparations for litigation. Behunin v. Sup. Ct., 9 Cal. App. 5th 833 (2017); U.S. v. Coburn, 2022 WL 357217 (D.N.J. Feb. 1, 2022).

Ensure that engagement letters lay out potential privilege claims and/or clarify that the PR professional is being retained in anticipation of litigation.

# Scenario 5: Internal Investigations

In response to an accidental discharge of hazardous chemicals at Company's facility, Company conducts an internal incident investigation involving both in-house and outside counsel, who advise Company on regulatory requirements during the incident response. Company then submits a summary of its internal investigation to Agency, who is investigating the incident at Company's facility.

**Is the internal investigation privileged?**

# Scenario 5: Internal Investigations

## Is the internal investigation privileged?

**Answer: It depends.** Attorney involvement in the investigation does not itself automatically extend privilege to internal investigations. Factors to consider: (1) nature of attorney involvement, (2) purpose of the investigation, (3) disclosure.

- An attorney must have meaningful involvement in the investigation.
- Establish records demonstrating that the investigation is being conducted at the request or instruction of counsel.
- Disclosure to a regulator → likely that the underlying investigation is not privileged.

# Practice Tips



Use “attorney–client privileged” and “work product” labels thoughtfully



Segregate legal and business advice

Consider sending two emails when communicating business and legal advice



State the purpose of the communication

E.g., “for purpose of giving legal advice”; “you asked for my legal opinion”  
Identify the legal issue



Restrict distribution to those with “need to know”

Does this person need the email?  
Is this person part of the control group on this issue?



Discourage forwarding of emails



Use phone calls, video conference, and in-person meetings

# Ethical Considerations



## Counsel's materials

- Memos to the file
- Attorney notes
- Internal, written communications among outside counsel

## Confidentiality

- Written communications
- Oral communications
- Use of consultants
- Joint defense agreements

## Knowing your jurisdiction



Thank You!

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# 04 BREAKOUT SESSION 1: KEY CONSIDERATIONS IN INCIDENT RESPONSE

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# Key Considerations in Incident Response

February 20, 2025

Scott Elliott, Ben Gonsoulin, Matt Kuryla, Teresa Jones

# Presenters



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01:00

# Format

Fact scenarios

Key legal decision points

Issue goalposts

Discussion

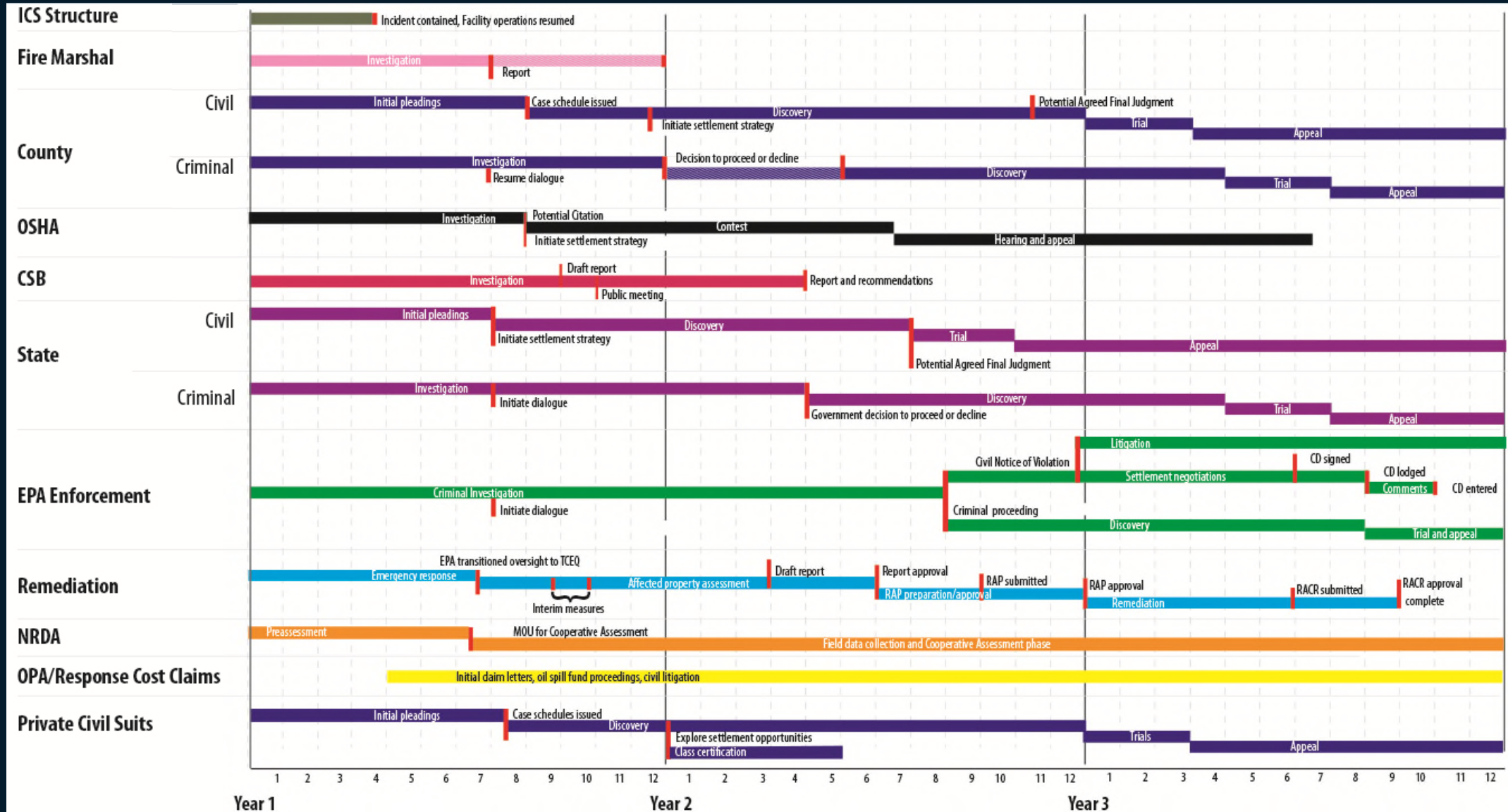
08:00

24:00

72:00



# Major Incidents: The Lawyer's-Eye View



01:00

# Hour 1: Fire

November 27, 2025: TV news interrupts Thanksgiving with fire videos

## BY TELEPHONE FROM SITE LEADER:

Fire at loading rack.  
No injuries reported.  
First responders on scene.  
80% contained and appears under control.

08:00

## BULK STORAGE AREA NEARBY BUT SECURE:

Isobutane, naphtha, pyrolysis gasoline

NO NEAR-NEIGHBOR COMPLAINTS

24:00

72:00





# Outreach to government?



No, no known offsite impacts, no need to draw attention (68033)

0

Make RQ and rule-required reports, await contact (68063)

0

Make RQ reports, call state Emergency Response lead (68072)

0

RQ reports, call state ER lead, call key local electeds (68074)

0

# When do you engage community air monitoring?



At reports of offsite impacts (68084)

0

When requested by an agency (68091)

0

When notification posted of a potential offsite impact (68109)

0

As a precaution in any high visibility situation (68135)

0

# Goalposts: Community Air Monitoring



## Situation

- One-day chemical fire
- Extensive media

## Strategy

- Mobilization of handheld and canister air monitoring
- PhD Tox expert established comparison values
- Daily screen-sharing of report narrative
- Daily reports to agencies and media

## Result

- Minimize/mitigate third-party claims
- No dispersion modeling

# Hour 1 Legal Call Checklist

## Government Reporting

- Federal
- State
- SERC/LEPC
- City/County

## Incident Command

- Legal Officer integration
- Agency integration
- Jurisdictional
  - EPA, USCG
  - OPA/CERCLA

## Contractors

- Air, water monitoring (e.g., CTEH)
- Spill cleanup
- NRDA
- Professional fire support

## Media

- Holding statement
- Point of contact
- PR consultant

## Evidence

- Litigation hold
- Process data/video preservation
- Evidence custodian

## Governance

- Board update planning
- Investor outreach planning



**SUBPOENA**

A FINE MAY BE IMPOSED FOR FAILURE TO OBEY THIS NOTICE



**ORDER  
STOP WORK**

Laurie L. Christensen  
Fire Marshal

01:00

# Hour 8: Fire Spreads

- Isobutane tanker trailer ruptures
- Firefighters injured
- Fire spreads to tank farm
- Pygas offgassing
- County ER monitoring team reports residential benzene

08:00

## Now onsite requesting briefing:

- Local elected official
- EPA On-Scene Coordinator
- State regional manager
- Local news crew

24:00

72:00



# How do we integrate the government responders?

0



EOC liaison takes questions in lobby (68172)

0

Establish and staff a separate room with a staff liaison (68184)

0

Establish liaison room and establish site leader briefings (68212)

0

Establish Unified Command (68243)

0

TEXT ONE OF THE  
FOLLOWING CODES  
TO: 22333

## Hour 8: Polling Question 2

How should the company respond to media requests:

**A**

Respond "no  
comment"

Text Code 69524

**C**

Provide a statement  
of current efforts and  
commitment

Text Code 69608

**B**

Present site leader for  
an on-camera  
briefing

Text Code 69531

**D**

Provide a statement  
of efforts, cause and  
corrective actions

Text Code 69624

01:00

08:00

24:00

72:00

## How should the company respond to media requests:

0

Respond "no comment" (69524)

0

Present site leader for an on-camera briefing (69531)

0

Provide a statement of current efforts and commitment (69608)

0

Provide a statement of efforts, cause and corrective actions (69624)

0





# Media and Elected Officials



# How do you manage firewater discharges?



Don't discharge, hold firewater onsite (69786)

0

Don't raise issue, just discharge (69787)

0

Notify agencies and discharge (69789)

0

Secure plan approval to discharge (69793)

0

# Goalposts: Firewater Discharge



## Situation

- Extensive fire water
- Large rain event
- Agency posture: discharge “not authorized”



## Strategy

- Emergency legal authority
- Unified Command signed plan
- Water quality tracking



## Result

- Discharge maintained
- Agencies respond to media
- Mitigated enforcement

01:00

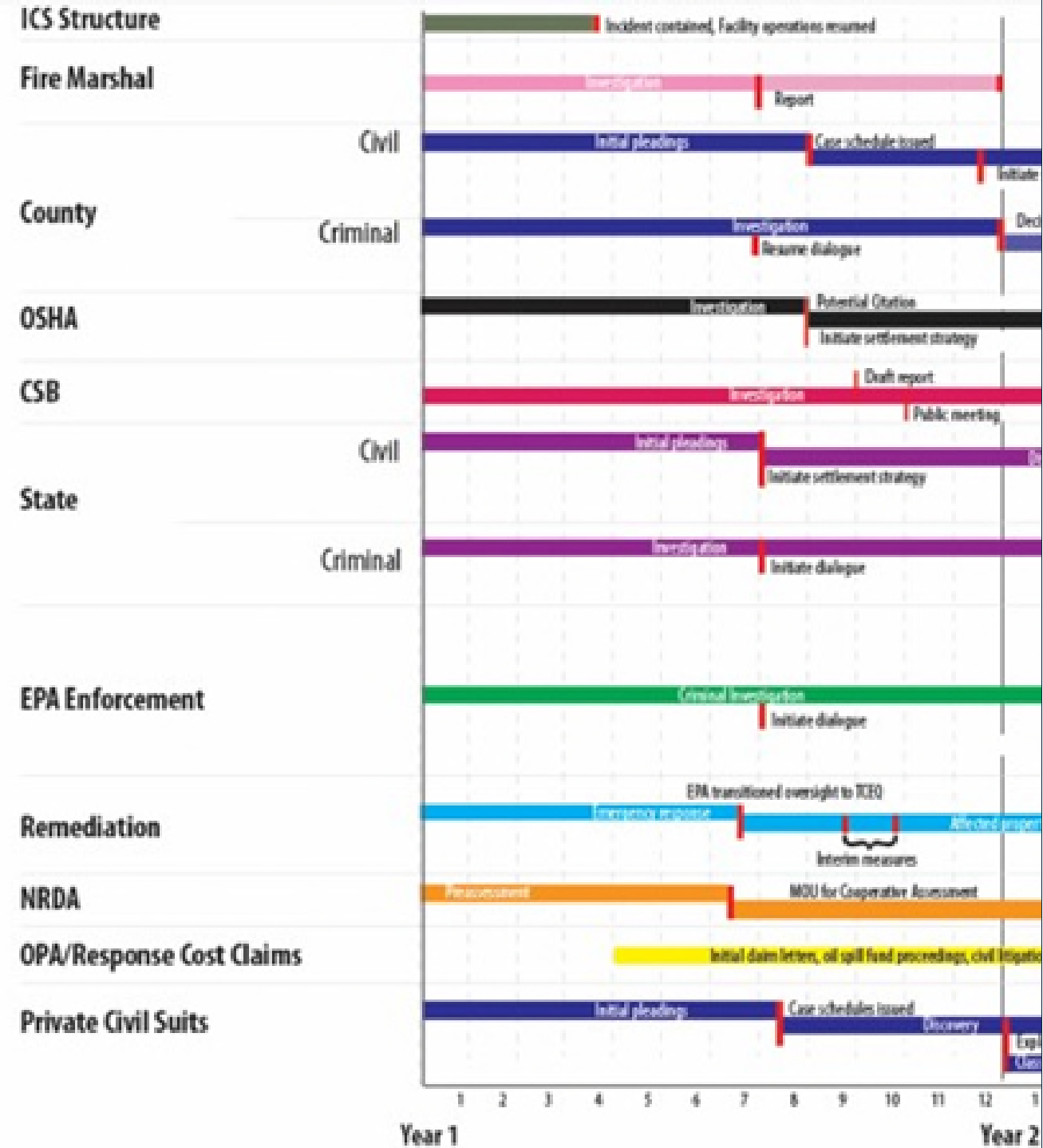
# Hour 24: Litigation and Media Accelerate

08:00

- Fire out
- Benzene in community air monitoring
- Four residential neighbors transported to hospitals
- Contamination suspends navigation near dock
- Lead plaintiffs on file
- CSB and OSHA onsite
- National news on benzene exposures

24:00

72:00



You are notified of a request for a temporary restraining order filed by an injured plaintiff requesting that the court order the facility shut down to preserve evidence pending a site inspection. The hearing is this afternoon. Do you:



Ignore it--the agencies have primacy (69799)

0

Call plaintiffs' counsel to negotiate scope of an agreed order (69809)

0

Attend the TRO hearing and present the court the conflicting ESCA language (70325)

0

Draw in regulatory agencies for support at TRO hearing (70370)

0

# Key steps: evidence preservation

Site control agreements with agencies on physical evidence

In-the-field preservation: evidence custodian

Preserve email, electronic data systems

Check for videos (on-site and off-site)

Preservation demands to third parties



# A local elected official calls on the company to "make things right" for the community. How do you respond?

0

Ignore the request (70390)

0

Acknowledge and request time to investigate (70639)

0

Announce small consideration for all those affected (e.g. car wash, home cleaning vouchers) (71202)

0

Post a claims form online asking community members to identify their losses (71216)

0

# Goalposts: Residential Claims



## Situation

- Significant residential involvement
- Pressure from local leaders



## Strategy

- Developed claims process
  - Scope
  - Exposure
  - Breadth of release
  - Recoverability under law
- Partnered with carrier



## Result

- Release of certain claims that may otherwise be litigated
- Underscores importance of careful structuring



01:00

# Hour 72: Fatality and Ethics Issues

A responder dies in the hospital

Employees report:

- Safety equipment not upgraded
- "Gaps" in government filings
- Operators knew of the gaps "for years" and site leader directed the conduct
- Inflammatory employee texts reach customers

08:00

24:00

72:00



TEXT ONE OF THE  
FOLLOWING CODES  
TO: 22333

# Hour 72: Polling Question 1

How should the company address employees and customers?

A

Focus on progress resolving the incident and defer gaps to investigation

Text Code 71235

C

Suspend Site Leader and introduce an interim

Text Code 72999

B

Email a reminder on communications discipline

Text Code 71713

D

Direct outreach to key customers and townhall meeting with employees

Text Code 73011

01:00

08:00

24:00

72:00

# How should the company address employees and customers?



Focus on progress resolving the incident and defer gaps to investigation (71235)

0

Email a reminder on communications discipline (71713)

0

Suspend Site Leader and introduce an interim (72999)

0

Direct outreach to key customers and townhall meeting with employees (73011)

0

# Role of ethics issues: EPA 2024 Civil/Criminal Policy

- Case Screening
- Ongoing Coordination
- Enhanced Case Management
- Training

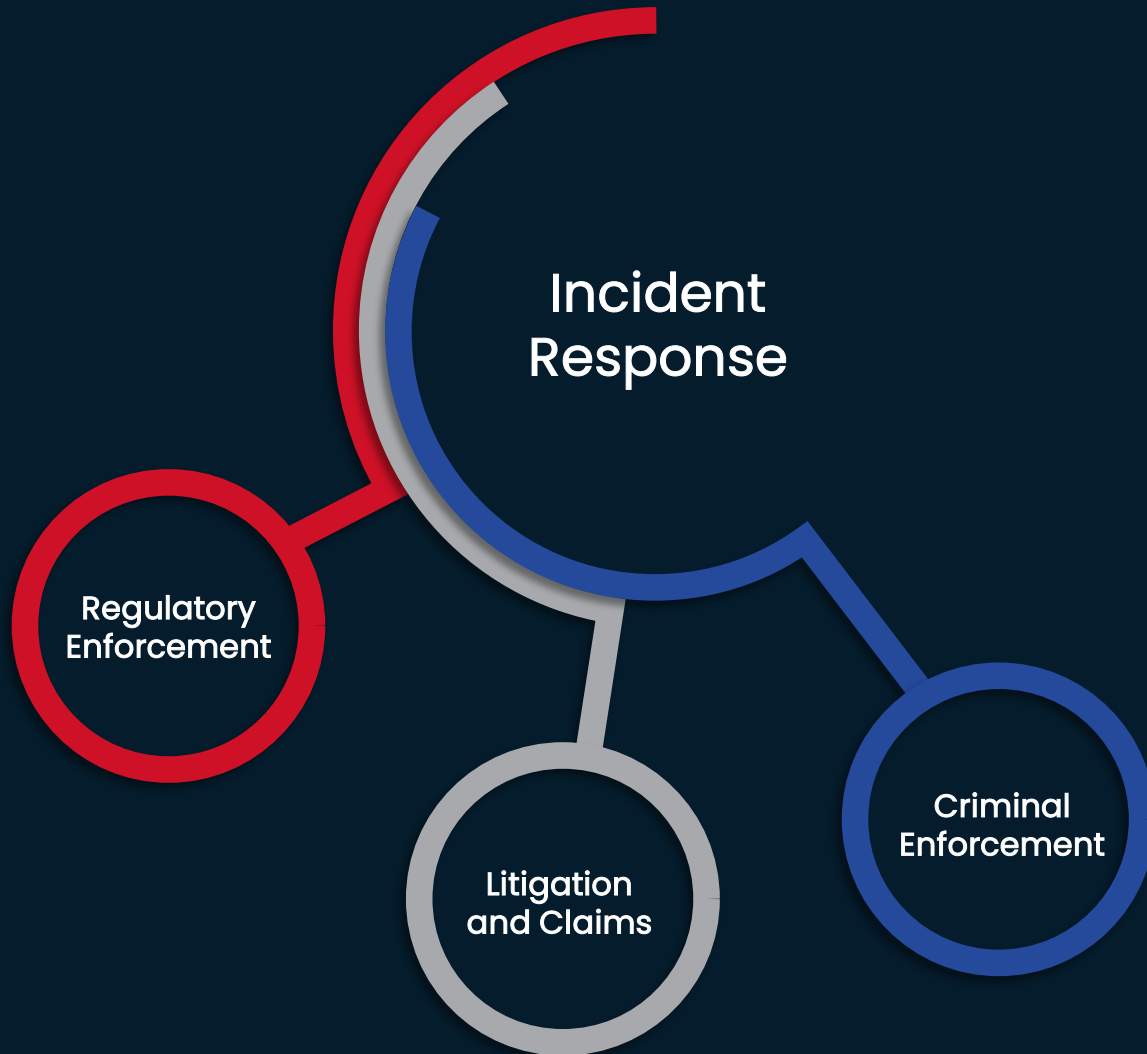
- c. Are there other “red flags” that may suggest criminal conduct?
- i. Conflicting stories
  - ii. Suspicious signatures and dating of forms
  - iii. Unsubstantiated data or no data
  - iv. Data too good to be true
  - v. Conflicting data (e.g., two sets of books)
  - vi. Suspect or demonstrably false claim(s) of ignorance about requirements
  - vii. Poor management/intentional decentralization to avoid knowledge

## Appendix A

### Factors to Consider for Civil-Criminal Enforcement Screening and Engagement

1. How significant are the violation(s)?
  - a. What is the harm/risk of harm? Or potential harm?
    - i. Environmental impacts/risk -- duration of violation, substances involved?
    - ii. Human health impacts/risk -- exposed individuals/population, toxicity, extent of actual harm or potential for harm?
  - b. Is there a possibility of an imminent and substantial endangerment; ongoing discharge, emission, or release, or other acts, such as continued sale of unregistered pesticide, that may cause immediate harm to human health and the environment.
  - c. Where no imminent and substantial endangerment, is the risk or threat of harm plain, such as improper storage of ignitable or reactive waste, an eroding lagoon, or falsification of drinking water data such that remedial measures and/or injunctive relief may be appropriate.
  - d. Was there a requirement to report the violation that was ignored (e.g., CERCLA reporting)?
  - e. Did the conduct involve either a violation of a permit or the failure to obtain a permit?
2. What type of culpability is involved?
  - a. Is there evidence of willful, knowing, or negligent conduct; willful blindness or deliberate ignorance; or negligence that rises to a criminal level?
  - b. Is there evidence of concealment of misconduct or falsification of required records, bypass or tampering with monitoring or control equipment?
  - c. Are there other “red flags” that may suggest criminal conduct?
    - i. Conflicting stories
    - ii. Suspicious signatures and dating of forms
    - iii. Unsubstantiated data or no data
    - iv. Data too good to be true
    - v. Conflicting data (e.g., two sets of books)
    - vi. Suspect or demonstrably false claim(s) of ignorance about requirements
    - vii. Poor management/intentional decentralization to avoid knowledge
3. What is the compliance history for the alleged violator(s)?
  - a. Prior EPA inspections, information requests, compliance orders, penalties, etc.?
  - b. A history of repeated violations? NOVs? Past enforcement actions? Consent decrees or plea agreements at the facility or company or parent company?
  - c. What has been the state(s) involvement?
4. How would you characterize the sophistication and company size of the alleged violator(s)?
  - a. What is the evidence of management involvement?
  - b. What is the economic benefit?
5. Does the matter involve a national or regional strategic priority?
  - a. Part of a national enforcement and compliance initiative?
  - b. Part of regional strategic priority?

# Hallmarks of an Integrated Response



## Disciplined external communications

- Government
- Media
- Third-party plaintiffs
- Other stakeholders

## Consistent legal positions in all “lanes”

## Well-organized

- Integrated document production
- Evidence preservation
- Investigations

# Broader Questions

- Is there a strong crisis plan with clear lines of communication and approval?
  - What event scenarios are integrated into the plan?
  - Where and how does each level of leadership convene?
  - Who communicates with media, government and business partners?
  - What suite of basic messages would the company convey?
  - What external resources are lined up support the scenarios?
- What training does the company give in key crisis roles?
- How does the company drill on the plan?
- What early-warning systems signal risks?



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# 05 BREAKOUT SESSION 2: PFAS REGULATORY DEVELOPMENTS

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# PFAS Regulatory Developments

February 20, 2025

Martha Thomsen, Jeff Wettengel, Linn Bumpers

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# What are PFAS & why are they relevant?

- Long-lasting “forever chemicals” with useful properties like resistance to oil, water, grease, and heat
- Prolific in the environment, difficult to break down
- Increasingly the subject of regulation and litigation
- Significant media coverage and bipartisan interest



Firefighting  
Foam



Plastic  
Packaging



Bearings  
and Gaskets

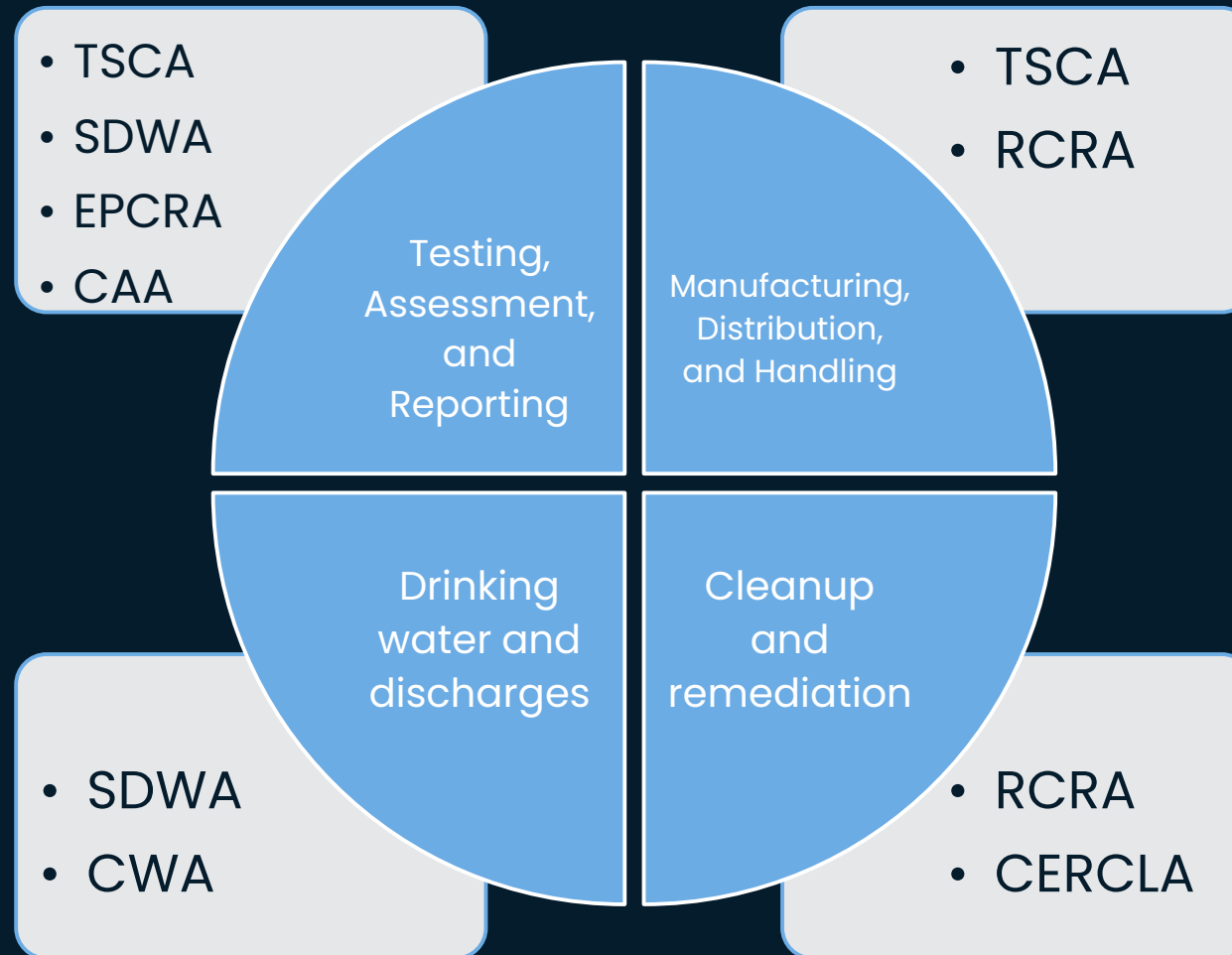


Wiring and  
Electronics



Textiles and  
Sealants

# Potentially Regulated Activities



# What happened in 2024?



# PFAS Under the New Administration

## 2016 to 2020

- 2019 PFAS Action Plan
- Initiated listing process for PFOA and PFOS under CERCLA
- Other initiatives – drinking water recommendation, interim cleanup recommendations, etc.

## 2021 to 2024

- PFAS Strategic Roadmap for 2021-2024 + RCRA proposed designation
- August 2023 – PFAS identified as enforcement priority
- CERCLA hazardous substances designation finalized
- Lower health advisory levels

## 2025 to 2029 – What's Ahead?

# Pending PFAS Rules

Proposed Rule	Summary	Date	Outlook
Human Health Water Quality Criteria for PFAS	Sets unenforceable ambient water quality criteria standards for PFOS, PFOA, & PFBS.	Notice of Availability: Dec. 26, '24	Comments due Feb. 24, '25.
Other CERCLA Haz. Substances Designations	Requests input on designating additional PFAS as CERCLA hazardous substances.	ANPRM: Apr. 13, '23	"TBD" Unlikely to be finalized.
Listing 9 PFAS as RCRA Hazardous Constituents	Adds 9 PFAS to RCRA list of Hazardous Constituents (PFOA, PFOS, PFBS, Gen-X, PFNA, PFHxS, PFDA, PFHxA, and PRBA).	Proposed Rule: Feb. 8, '24	Fall '24 UA suggests Final Rule July '25.
PFAS Req's in NPDES Permit Applications	Adds PFAS certain PFAS requirements to some NPDES permit applications.	Announced in Fall '24 UA.	Proposed Rule: June '25; Final: Dec. '26.
Methods Update Rule 22	Proposes to promulgate two new PFAS analytical methods.	Proposed Rule: Jan. 21, '25	Comments due Feb. 20, '25
Chemical-Sector PFAS ELGs	Set PFAS ELGs in Chemical Manufacturing Sector.	ANPRM: Mar. 17, '21 OMB: Jun. '24	Withdrawn OMB Jan. 21, '25

# TSCA 8(a)(7) Reporting Rule

- Primary impact to users, including power companies: Implements reporting requirements for any company that has manufactured PFAS, imported PFAS, or imported any PFAS-containing articles since 2011.
  - No *de minimis* threshold
- Reporting period runs from July 11, 2025, through January 11, 2026
- Must report\* “reasonably ascertainable” information including:
  - Name of each PFAS and its use
  - Total amount of each substance
  - All information on the environmental and health effects of each PFAS
  - Relevant disposal information



# TSCA 8(a)(7) Reporting Rule Definition

- EPA is utilizing a structural definition rather than providing a discrete list of covered PFAS by CAS#

PFAS is defined as a chemical substance that contains at least one of the following structures:

$R-(CF_2)-CF(R')R''$ , where both the  $CF_2$  and  $CF$  moieties are saturated carbons.

$R-CF_2OCF_2-R'$ , where  $R$  and  $R'$  can either be  $F$ ,  $O$ , or saturated carbons.

$CF_3C(CF_3)R'R''$ , where  $R'$  and  $R''$  can either be  $F$  or saturated carbons.

- This definition is very broad but still narrower than other definitions of PFAS as “one fully fluorinated carbon atom”

# TSCA 8(a)(7) Compliance

- EPA requires only that a company conduct a "reasonable inquiry"



Identify any purchases made outside the U.S. since 2011



Review internal documents in "possession or control" (including parent company) that suggest imports contained PFAS



If there is an indication that imports may have contained PFAS, survey suppliers for additional information



If PFAS confirmed—must report



If PFAS not confirmed (including no response after due diligence—reporting not needed (but should keep records))

# PFAS Litigation & Enforcement

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# Trends in PFAS Lawsuits

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State Enforcement

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CERCLA PFAS Designation and  
related Litigation

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AFFF Multidistrict Litigation

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Citizen Suits

# State Enforcement

Many State lawsuits limited to common law claims (e.g., negligence, trespass, nuisance, product liability) and NRD have been transferred to the AFFF MDL

- E.g., Illinois, California, Wisconsin, North Carolina, New York

Generally, State lawsuits enforcing applicable State statutes proceed on their own

- E.g., New Jersey Dept. of Env'tl. Prot. v. E.I. du Pont de Nemours and Co., Nos. 3:19-cv-14767-MAS-ZNQ and 1:19-cv-14766-RMB-JS (D.N.J. removed July 5, 2019), which involved New Jersey's unique Spill Compensation and Control Act, N.J.S.A. 58:10-23.11, et seq.

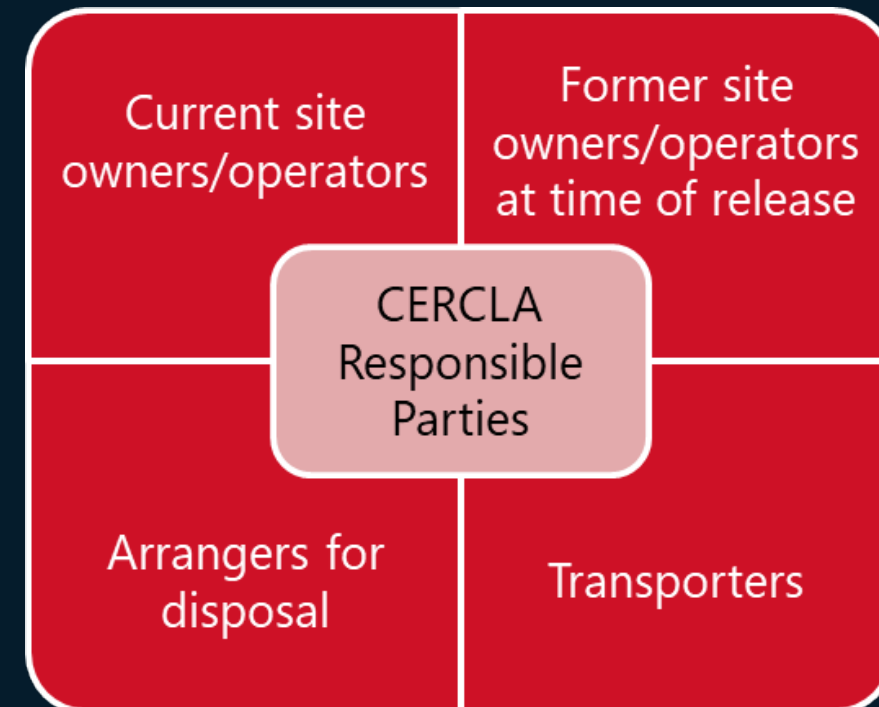
# CERCLA Designation

- EPA published a final rule designating **PFOA and PFOS** (plus salts and structural isomers) as **CERCLA Hazardous Substances** on May 8, 2024. (89 Fed. Reg. 39,124)
  - Final Rule effective July 8, 2024
  - First ever use of CERCLA § 102 to add new substance
    - EPA claims §102 **does not allow exclusions for specific uses (i.e., no exception for AFFF use in emergency)**
    - EPA did not need to determine whether consideration of was authorized under §102 because “designation is warranted” under environmental- and health-based criteria alone

# CERCLA Designation

- **Release reporting requirements** (CERCLA § 103)
  - Report to National Response Center “immediately” if release exceeds “reportable quantity” or “RQ”
  - RQs set at 1 lb. for PFOA and PFOS
- **Potential liability for response actions/costs**
  - Liability is strict (no fault or negligence required), joint and several, and retroactive
  - EPA, state, and other responsible parties can sue for cleanup costs
  - EPA can require cleanup be conducted (through Section 107 suit and/or Section 106 order)

**Important:** CERCLA liability cannot be fully contracted away; private parties can enter into agreements but EPA can still pursue as responsible parties



# CERCLA Rule Challenges

Legal Challenge filed June 10, 2024, by:

Chamber of Commerce of the United States of America,

Associated General Contractors of America, Inc., and

National Waste & Recycling Association



Petitioners' briefs filed November 4, 2024, arguing EPA erred by:

Failing to provide adequate notice and opportunity to comment;

Not considering costs before designating under CERCLA section 102(a)

Erroneously interpreting CERCLA;

Failing to provide an adequate & reasonable explanation for designation

Acting arbitrarily and capriciously in promulgating the Final Rule;

Violating the Constitution by, for example, imposing retroactive liability through the Final Rule.



On February 12, EPA requested a 60-day stay of this litigation, contending that the Trump administration needs time to review the underlying rule.



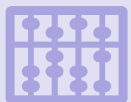
# AFFF Multidistrict Litigation



Consolidation of thousands of cases alleging contamination and personal injury caused by PFAS-containing AFFF



MDL judge entertaining proposal for streamlined procedure for plaintiffs to amend complaints to add CERCLA claims



MDL can present a procedural gambit in some cases

# Spotlight on CERCLA & Contamination Suits

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*Schaap v. 3M*, No. 2:19-cv-00105-KRS-GBW (D.N.M. filed on Feb. 7, 2019) (consolidated into MDL and recently sought to add CERCLA cost recovery claim against the military)

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*State of Maryland v. W.L. Gore & Assocs., Inc.*, No. 1:24-cv-03656-RBD (D. Md. filed on Dec. 18, 2024) (specifically cites PFAS CERCLA designation; states shifting claims to pursue downstream users)

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*Air Force v. New Mexico Env't Dep't*, No. 2:19-cv-00046-KG-SMV (D.N.M. filed Jan. 17, 2019) (Air Force pushing for federal court to determine whether the state exceeded its authority in requiring PFAS corrective action under waste permit)

# Citizen Suits

- Aiming to supplement EPA inspections, penalties, and enforcement actions
  - NGOs have expressed concerns about enforcement under new administration
- Chemours (Washington Works plant, WV)
  - April 2023: EPA CWA enforcement action; EPA approves revised facility NPDES permit issued by WV
  - December 2024: West Virginia Rivers Coalition sues Chemours for violating discharge limits for PFOA/GenX; *group says EPA failed to follow up with enforcement action after violations of 2023 AOC*

# CWA Citizen Suits Currently Focusing on Landfills

- *Lower Susquehanna Riverkeeper Ass'n (LSRA) v. Republic Servs. of Pa.*, No. 1:23-cv-00044 (M.D. Pa. filed Jan. 11, 2023)
  - No PFAS limit in permit
  - PA's narrative water quality standards = prohibit discharges of "substances in concentrations sufficient to be inimical or harmful to the water uses to be protected or to human, animal, plant or aquatic life"
- *Tenn. Riverkeeper v. City of Lebanon, TN*, No. 3:23-cv-01369 (M.D. Tenn. filed Dec. 23, 2023)
  - Landfill allegedly violating CWA by discharging pollutants "in violation of its NPDES permit and/or outside the coverage of its permit"

# Best Practices: Risk Management

Keep track of EPA initiatives and potential practical implications, including impacts of changed administration

Assess current and past usage of PFAS at a site (known or unknown)

- By company
- By former owners/operators/lessees
- Potential for insurance coverage and/or indemnitors?

Current and past usage of PFAS in geographic area

Presence of Superfund or other cleanup sites in the area (whether PFAS or not)

- E.g., an ongoing river cleanup in the area by others could pivot to investigate presence and potential sources of PFAS

# Litigation Considerations

Strategic  
sampling

Navigating  
parallel risks

Identifying  
potential regional  
contributors

Evaluating expert  
needs

MDL?

Class certification  
issues

Who is the judge?

Downstream risks of  
adverse judgment

# Impacts of PFAS Developments



Reporting materials usage and any incidents/spills/releases



Managing PFAS-containing materials and waste, including wastewater discharges



Managing active and legacy sites



Evaluating prior settlements/liabilities/insurance



Responding to state and local regulatory requests for information



Evaluating employee drinking water systems



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# 06 BREAKOUT SESSION 3: EPA ENFORCEMENT

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# EPA Enforcement

February 20, 2025

Scott Janoe, Kent Mayo, Jeff Wood, Day Robins

# Presenters



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# Agenda

01 Trends

02 Key Changes & Leadership

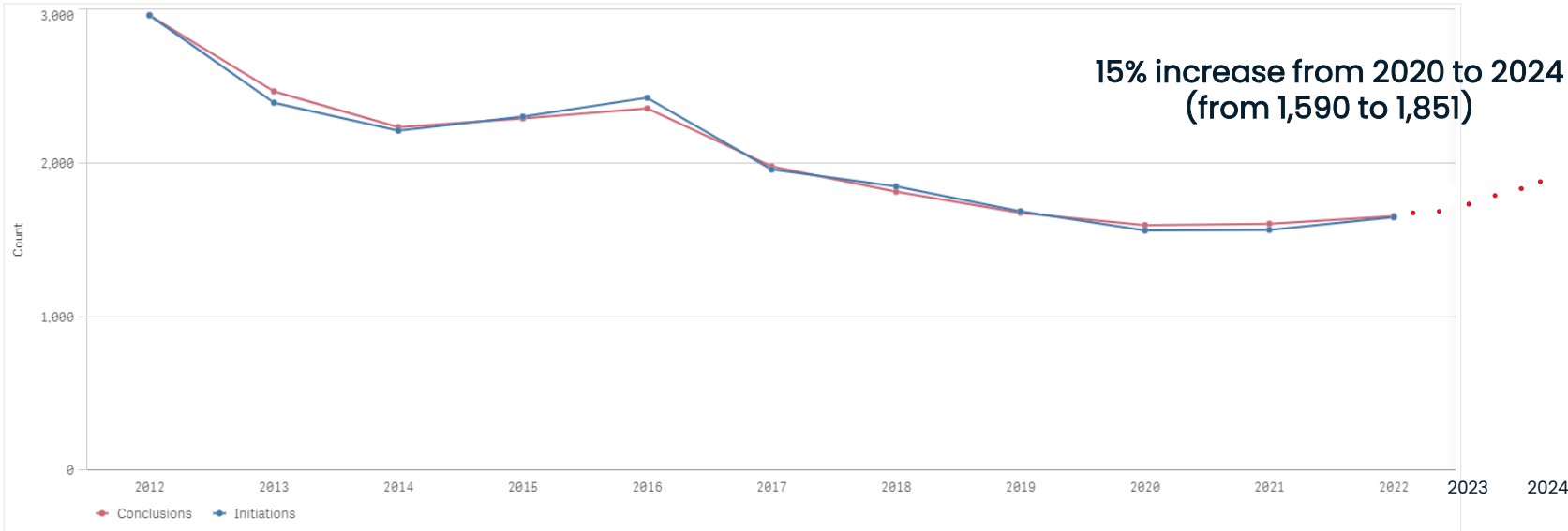
03 Enforcement Topics

04 Judicial Updates

05 Q & A

# EPA Enforcement: Recent Trends

## Total Civil Enforcement Case Conclusions (FY2012 – FY2024)



1. Totals include Initiations and Conclusions of regulatory cases as well as CERCLA cases.

Source: EPA Enforcement Data and Trends (epa.gov)

# What's Changing on Enforcement?

- Major Shift in Priorities

~~Biden-Harris~~ Trump-Vance

~~• Climate Change~~

~~• Environmental Justice~~

• "Back to Basics" / "Zeldin's 5 Pillars"

- Changes in Personnel
- Temporary Pause
- Aligning Enforcement w/ De-Regulatory Agenda
- Consent Decree Reform

# New DOJ Enforcement Policies

Signed by Attorney  
General Pam Bondi on  
February 5, 2025

- [General Policy Regarding Charging, Plea Negotiations, and Sentencing](#)
- [Reinstating the Prohibition on Improper Guidance Documents](#)
- [Reinstating the Prohibition on Improper Third-Party Settlements](#)
- [Rescinding Environmental Justice Memorandum](#)

# Key Senior Enforcement Leaders

(\*subject to change as new appointments are made)

## DOJ ENRD:

- Adam Gustafson, Acting AAG

## EPA OECA:

- Jeff Hall, Acting Assistant Administrator

## BOEM:

- Walter Cruikshank, Acting Director

## BSEE:

- Paul Huang, Acting Director

## PHMSA:

- Paul Roberti – Nominated Administrator (pending)
- Ben Kochman – Acting Administrator







# Key Topics

- 01** Upstream Enforcement
  - Section 114
  - Overflights / Flare Efficiency
  - Permian CAFOs
- 02** BWON / QQQ / Fenceline
- 03** CCR
- 04** Citizen Suits
- 05** Court Update

# Upstream Enforcement

# Upstream Enforcement

(Consent Decrees)

Company	Date	Location	# of Sites with Alleged Violations	# of Sites Covered by Injunctive Relief	Civil Penalty (MM)	Estimated Mitigation and Injunctive Project Cost (MM)
PennEnergy	12/10/2024	Pennsylvania	5	17	\$2	\$3.6
XTO	11/21/2024	Pennsylvania	11	30	\$4	\$4.4
Hillcorp	11/21/2024	Pennsylvania	6	8	\$1.275	\$1.65
Ovintiv	9/30/2024	Utah	22	139	\$5.5	\$10
Marathon	7/11/2024	North Dakota (Reservation)	90	169	\$64.5	\$177
Apache	2/13/2024	New Mexico and Texas	23	422	\$4	\$5.5
Mewbourne	8/8/2023	New Mexico and Texas	104	422	\$5.5	\$4.6
Matador	3/27/2023	New Mexico	25	239	\$2.9	\$3.3
						(\$1.15 MM plus \$1.75 MM in federal and state supplemental environmental projects)

# Permian CAFOs (2024)

Company	Date of Settlement	Number of Sites	Injunctive Relief	Penalty
Earthstone	12/5/2024	10	Yes	\$445,362
Denbury	11/4/2024	1	Yes	\$65,000
Chevron	10/2/2024	3	Yes	\$165,000
Rio Oil and Gas	9/26/2024	8	Yes	\$672,000
Gateway Gathering	9/25/2024	2	Yes	\$122,895
Texian Operating	9/23/2024	1	Yes	\$31,517
ConocoPhillips	8/21/2024	8	Yes	\$490,000
Hilcorp	8/5/2024	1	Yes	\$55,000
Marathon	7/25/2024	6	Yes	\$265,000
PDC	4/9/2024	10	Yes	\$576,000

BWON/QQQ

# BWON Enforcement

EPA adopted emissions standards under CAA Section 112 for refinery benzene waste operations (“BWON”) found at 40 C.F.R. Part 61, Subpart FF.

## Risk-based “find and fix” approach

- Establishes detection levels for benzene “leaks”
- Requires monitoring for these leaks using both visual inspections and instrumentation
- Sets a schedule for repairs of detectable leaks with reporting requirements.

February 2024 – EPA Enforcement Alert



## ENFORCEMENT ALERT

Office of Civil Enforcement  
Office of Enforcement and  
Compliance Assurance

### Violations at Petroleum Refineries and Ethylene Plants Cause Excess Benzene and Other VOC Emissions in Nearby Communities

February 2024

The U.S. Environmental Protection Agency (EPA) and state environmental agencies continue to identify common noncompliance of Clean Air Act regulations that are causing excess emissions of benzene and other volatile organic compounds (VOCs) from petroleum refineries, chemical plants, including ethylene plants, and coke byproduct recovery plants. These facilities are required to comply with longstanding requirements, including the National Emission Standard for Benzene Waste Operations at 40 C.F.R. Part 61, Subpart FF (BWON) and, in addition for refineries, New Source Performance Standards for Volatile Organic Compounds from Petroleum Wastewater Systems at 40 C.F.R. Part 60, Subpart QQQ (NSPS QQQ). The BWON regulation also applies to hazardous waste treatment, storage, and disposal facilities that treat, store, or dispose of hazardous waste generated by these three types of facilities. EPA investigations of petroleum refineries have identified BWON and NSPS QQQ requirements as areas of common noncompliance.

EPA investigations of ethylene plants are also identifying noncompliance with BWON requirements. EPA is publishing this Enforcement Alert to remind owners and operators of these facilities of the importance of compliance with these requirements. Failure to comply could result in excess emissions of benzene and other VOCs and could result in an enforcement action assessing significant penalties for noncompliance.

#### Public Health Concerns

Benzene is a known human carcinogen that EPA has classified as a hazardous air pollutant. Plants including refineries and ethylene plants are often located in densely populated areas and can have an impact on communities overburdened by pollution and with potential environmental justice concerns. In addition to benzene, a known human carcinogen, VOC emissions contain other hazardous air pollutants and contribute to the formation of ground level ozone and can contribute to violations of the National Ambient Air Quality Standards for ozone. Ozone is a respiratory irritant. Long-term exposure to ozone is linked to aggravation of asthma and is likely to be a cause of asthma development.

# BWON – Consent Decrees

## BP Whiting Refinery (Indiana)

- CD lodged in May 2023/entered August 2023
- Alleged NESHAP/BWON and QQQ violations
- Requires \$200M for pollution control projects to achieve just 7 tons per year reduction in overall benzene emissions (\$28M/ton for each ton of benzene reduced)
- Significant civil penalties
- New monitoring and reporting
- Training
- Supplemental environmental projects

Lima Refinery (Ohio) – CD lodged in September 2024; DOJ moved to enter the CD on Dec. 19th; similar requirements to BP Whiting

HF Sinclair (New Mexico) – CD lodged in January 2025; public comment period

# Fenceline Monitoring

EPA Inspector General [Report](#) (Sept. 2023)

*"EPA Should Enhance Oversight to Ensure that All Refineries Comply with the Benzene Fenceline Monitoring Regulations"*

- Identified 25 refineries (including Chevron Pascagoula) that exceeded 9  $\mu\text{g}/\text{m}^3$  action level at least once b/w Jan 2018–Sept 2021
- Identified 18 refineries (including Chevron Pascagoula) that exceeded 29  $\mu\text{g}/\text{m}^3$  minimum risk level b/w Jan 2018–Sept 2021
- Selected 9 refineries for "in-depth review" (including Chevron Pascagoula)

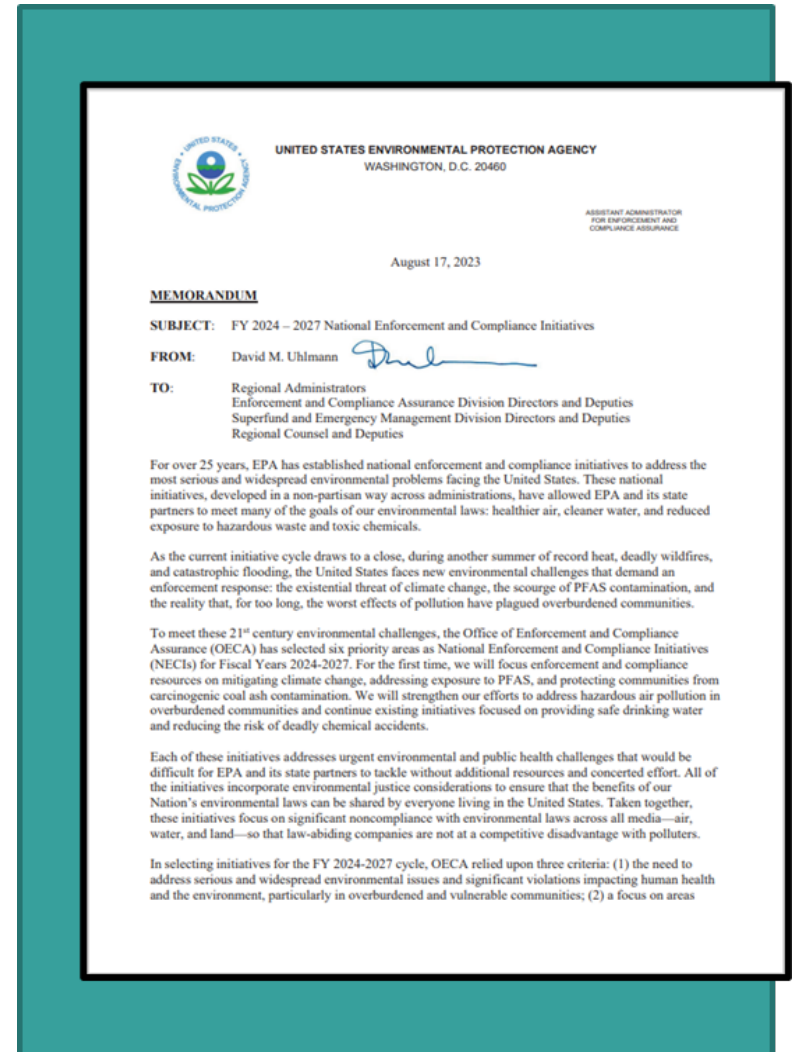


CCR

# FY 2024–2027 NECIs

CCR-focused NECI  
added in August 2023:

"Protecting  
Communities from  
Coal Ash  
Contamination"



# EPA Enforcement Alert on CCR

- **December 2023:** EPA released an enforcement alert on CCR non-compliance and CCR settlements consistent with inclusion of CCR in National Enforcement and Compliance Initiative
- EPA states it has “**detected widespread noncompliance**” with the CCR Rule and states that **groundwater contamination** is a significant concern
- Approximately 150 facilities have “**detected groundwater contamination** from metals and other inorganic compounds” released through CCR disposal

**EPA ENFORCEMENT ALERT** OFFICE OF ENFORCEMENT AND COMPLIANCE ASSURANCE

National Enforcement and Compliance Initiative  
Protecting Communities from Coal Ash Contamination

EPA Document #310F23002 December 2023

## EPA Finds Significant Noncompliance with the RCRA Coal Ash Disposal Regulations

This Enforcement Alert highlights important compliance issues regarding the Coal Combustion Residuals (also referred to as coal ash or CCR) Rule, which was created under the Resource Conservation and Recovery Act. This Alert focuses on several specific regulatory requirements and highlights recently concluded enforcement matters.

### Detected Widespread Noncompliance

EPA initiated numerous facility assessments and inspections to determine compliance with regulatory requirements such as groundwater monitoring, corrective action implementation, and disposal unit closure. These assessments detected widespread noncompliance with important CCR Rule requirements. EPA made coal ash contamination a national priority this year. (See highlight box on this page.) As of November 2023, the Agency has already finalized two settlement agreements to address detected noncompliance, as described later in this document.




Photo 1: Land Placement of Coal Ash  
Credit: Unknown Author licensed under CC BY-ND

### Specific Areas of Concern for Compliance Assessment and Enforcement

The CCR Rule was promulgated to promote the safe management and effective cleanup of coal ash. One of the key programmatic goals of the CCR Rule is to ensure that the manner in which coal ash disposal units are closed will ensure that the long-term (which in most cases means permanent) disposition of the coal ash will not adversely impact human health and the environment, particularly groundwater. Groundwater contamination at coal ash disposal facilities is a significant concern.

### National Enforcement and Compliance Initiative

EPA has been monitoring compliance with the coal ash regulations since Congress provided EPA the authority to do so in 2016. These requirements are currently the subject of a National Enforcement and Compliance Initiative (NECI). Through the NECI, EPA is increasing its compliance and enforcement activities to ensure companies are properly handling coal ash, appropriately addressing releases, and protecting communities from the impact of coal ash contamination. More information is available on the Agency's [NECI web page](#).

Enforcement Alert Page 1

# Practical Enforcement Observations

- **EPA Regional Leads with HQ Coordination**
  - Administrative enforcement approach
  - Resolution by CAFO – no judicial oversight; no DOJ involvement
  - Discussions regarding uniform positions; potentially more flexibility on timing
- **Doubling Down on New Interpretations**
  - Expansion of alleged violations to fit new interpretations
  - Hesitancy to accept QPE determinations
  - Reluctant to accept burden of proof
- **Potential Enhanced Risks Highlighted in Legacy/CCRMU Rule & D.C. Circuit Decision**
  - Broader application of 2015 rule
  - Onsite beneficial use
  - Closed units with potential free liquids

# Citizen Suits

# Citizen Suits – Purpose

- Civil case brought by an individual(s) to enforce environmental statutes
  - CAA, CWA, SDWA, RCRA, CERCLA, ESA, TSCA, SMCRA
- Notice requirement / Action forcing
  - Individuals will first send notice to regulators, and regulator could exercise discretion to enforce or not (supplementary)
- Remedies
  - Injunctive relief
  - Civil penalties
  - Costs – generally for prevailing party, even if they do not prevail on all claims
- Motives vary
  - Environmental protection
  - Financing source

## Citizen Suits – Defenses

- Lack of Constitutional Standing (injury in fact)
- Insufficient Notice
- Res Judicata / Preclusion
- Mootness
- Abstention Doctrine
- Statute of Limitations
- Improper collateral attack on adequacy of permit
- No actual violations of permit

# Court Update



# Court Update

(select cases)

- *Loper Bright / Chevron* (deference)
- *SEC v. Jarkesy* (ALJs)
- *Port of Tacoma* (citizen suits)
- *Env't Tex. Citizen Lobby, Inc. v. ExxonMobil Corp.* (5<sup>th</sup> Cir.)  
(civil penalties / standing)
- *New Mexico, et al. v. Musk, et al.* (constitutional challenge)

Questions?



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07

**BREAKOUT SESSION 4:  
SUPREME COURT AND  
APPELLATE UPDATES**

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# Supreme Court and Appellate Updates

February 20, 2025

Mark Little, Joshua Lee, Beau Carter, Scott Novak

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# Table of Contents

01

Key Environmental Decisions in 2024

02

2025: Looking Ahead

03

Regional Circuits

# Key Environmental Decisions in 2024

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# 01





# “The Administrative Law Trio”

*Loper Bright*. Deference

*Corner Post*. Statute of Limitations

*Jarkesy*. Administrative Law Judges

# *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024)

- Overruled *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984).
  - *Chevron* established the rule that courts should defer to an agency's reasonable interpretation of a statute if it is silent or ambiguous on the issue at hand.
- SCOTUS held 6-3 that APA requires courts to independently judge whether an agency acted within its statutory authority.
  - Courts may not defer to an agency's interpretation just because a statute is ambiguous.

# *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024)

- Held that *Chevron* conflicted with APA requirement that “the reviewing court shall decide all relevant questions of law [and] interpret...statutory provisions.”
- Implications for the Trump Administration?
  - “[T]he statute’s meaning may well be that the agency is authorized to exercise a degree of discretion...to regulate subject to the limits imposed by a term or phrase that ‘leaves agencies with flexibility,’ such as ‘appropriate’ or ‘reasonable.’”

# *Corner Post, Inc. v. Board of Governors*, 603 U.S. 799 (2024)

- A suit against a Federal Reserve Board rule was dismissed as time-barred under APA's 6-year statute of limitations for suits against the U.S.
  - The rule was issued in 2011, and Petitioner was injured when it opened for business in 2018.
- SCOTUS held 6-3 that an APA claim does not accrue for purposes of the statute of limitations until the plaintiff is injured by final agency action.

# *Corner Post, Inc. v. Board of Governors*, 603 U.S. 799 (2024)

- Because Petitioner was not created until 2018, that was the point of injury from action, so statute of limitations ran from that point rather than issuance of the rule.
- Opens the door to lawsuits by newly created entities against old agency regulations that would otherwise be time-barred.

# *SEC v. Jarkesy*, 603 U.S. 109 (2024)

- SEC initiated an enforcement action against Jarkesy before an SEC administrative law judge, not with a jury and an Article III judge.
- SCOTUS held 6–3 that those charged with civil monetary penalties by the SEC implicated the Seventh Amendment with the right to a jury trial.

# *SEC v. Jarkesy*, 603 U.S. 109 (2024)

- Held that the Seventh Amendment’s guarantee of a right to a jury trial applies to “[s]uits at common law,” which includes statutory claims that are legal in nature, such as civil penalties designed to punish and deter.
- Calls into question whether any federal regulatory agency can bring in-house proceedings to enforce civil penalties.

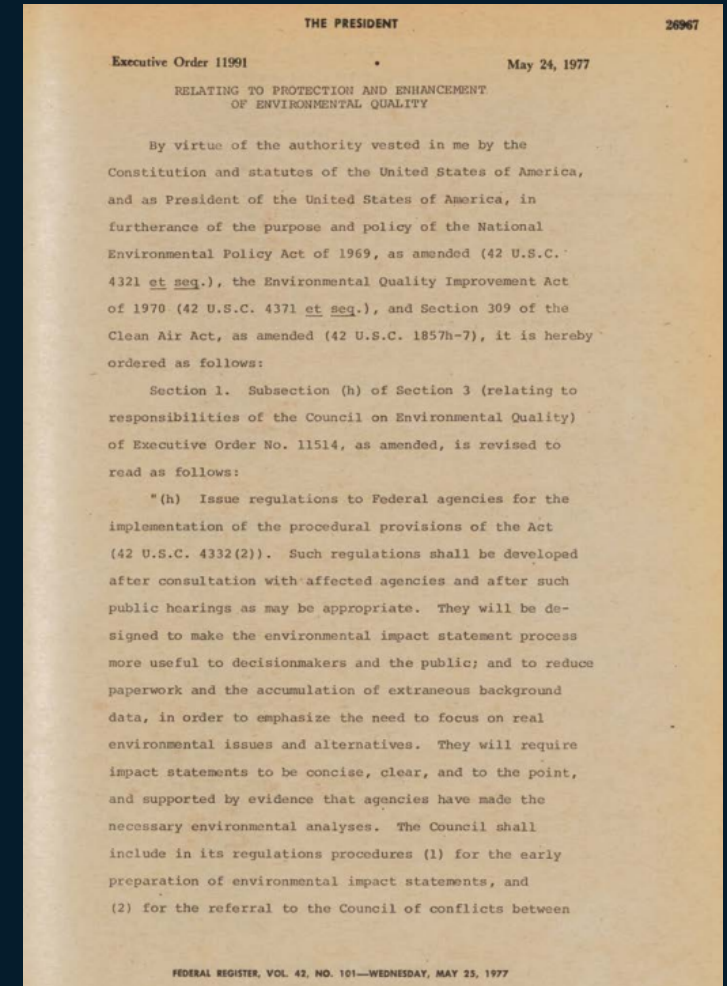
# Standing

*Ohio v. EPA*, 98 F.4th 288 (D.C. Cir. 2024)

- Petitioners sought review of EPA's decision to reinstate the waiver of federal preemption for California's automobile emissions regulations under CAA.
- D.C. Circuit held that the Petitioners lacked standing for statutory claims because they failed to show their economic injuries were redressable.
- Found no basis on the record to conclude that third-party automobile manufacturers would change their vehicle fleets or their prices with respect to the relevant model years if the waiver was vacated.
- Supreme Court granted certiorari on redressability.



# NEPA and CEQ Authority



# NEPA and CEQ Authority

*Marin Audubon Society v. FAA*, 121 F.4th 902 (D.C. Cir. 2024)

- Part I (3-0): (Background: The Air Tour Management Plan's NEPA compliance)
- Part II (2-1): "The CEQ regulations, which purport to govern how all federal agencies must comply with [NEPA], are ultra vires."
  - CEQ lacked rulemaking authority to implement and enforce its NEPA regulations
  - The 1977 E.O. directing agencies to follow CEQ's regulations usurped Congress's lawmaking authority and created private rights not justified by the Take Care Clause.
- Part III (3-0): The Air Tour Management Plan was arbitrary and capricious.
- Part IV (2-1): Vacate the Air Tour Management Plan.
- Chief Judge Srinivasan dissent: Party presentation principle; Remand instead of vacatur

# NEPA and CEQ Authority

*Marin Audubon Society v. FAA*, 121 F.4th 902 (D.C. Cir. 2024)

- En banc review denied (Jan. 31, 2025)
- C.J. Srinivasan concurrence (7-5): Part II “could not independently support the panel’s disposition to set aside the agency’s challenged action”
  - CEQ regulation gives an agency the “option”
  - Challenge concerned FAA’s “choice”
  - The “choice” was arbitrary and capricious 3-0

While all parties have agreed and urged the en banc court to grant review and excise that part of the panel’s opinion, I concur in the denial of en banc rehearing. The panel unanimously ruled in favor of the challenge in this case on an entirely separate ground (one that the parties did raise and brief), *see id.* at 915–18, meaning that the panel majority’s rejection of the CEQ’s authority to issue binding NEPA regulations was unnecessary to the panel’s disposition, *see id.* at 921 (Srinivasan, C.J., dissenting in part). That conclusion in fact could not independently support the panel’s disposition to set aside the agencies’ challenged action: because the relevant CEQ regulation does not require an agency to do anything but instead gives an agency the *option* to rely on a categorical NEPA exclusion, *see id.* at 922 (Srinivasan, C.J., dissenting in part); Gov’t Pet. for Reh’g En Banc at 14, any conclusion that the CEQ lacks authority to issue binding regulations would leave unaffected the agencies’ challenged *choice* here to make use of a categorical exclusion. In these circumstances, there is no cause to grant en banc rehearing. *See Al-Bihani v. Obama*, 619 F.3d 1, 1 (D.C. Cir. 2010) (Sentelle, C.J., and Ginsburg, Henderson, Rogers, Tatel, Garland, & Griffith, JJ., concurring in the denial of rehearing en banc) (“declin[ing] to en banc this

# NEPA and CEQ Authority

*Iowa v. CEQ*, No. 1:24-cv-00089 (D.N.D. Feb. 3, 2025)

- Challenge to CEQ’s “Phase II Rule”
  - Executing the 2023 amendments to NEPA
  - Revisions to key terms (ex: “significant impact”)
  - Climate-change related effects
  - Environmental justice concerns
- NEPA’s enacting statute did not grant CEQ rulemaking authority, so CEQ cannot issue binding NEPA regulations on federal agencies.
- The text of NEPA only authorizes CEQ to make recommendations to the President.

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NORTH DAKOTA

State of Iowa et al.,

Plaintiffs,

vs.

Council on Environmental Quality and  
Brenda Mallory, in her official capacity as  
Chair,

Defendants,

Case No. 1:24-cv-00089

and

Alaska Community Action on Toxics et al.,

Intervenor-Defendants,

and

State of California et al.,

Intervenor-Defendants.

ORDER REGARDING ALL MOTIONS FOR  
SUMMARY JUDGMENT AND PARTIAL SUMMARY JUDGMENT

[¶ 1] THIS MATTER comes before the Court on three Motions for Summary Judgment and one Motion for Partial Summary Judgment. This case has two sets of Intervenor-Defendants. For purposes of this Order, the Court will refer to Alaska Community Action on Toxics et al. as the

# 2025: Looking Ahead

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# 02



# Impoundment

## **PRESIDENT TRUMP WILL RESTORE THE IMPOUNDMENT POWER OF THE EXECUTIVE BRANCH:**

- President Trump will restore the Impoundment Power, reestablishing the balance of power between the Legislative and the Executive branches.
- On Day One, President Trump will direct federal agencies to identify portions of their budgets where massive savings are possible through the Impoundment Power, while maintaining the same level of funding for defense, Social Security, and Medicare.
- President Trump will take action to challenge the constitutionality of limits placed on the Impoundment Power by the **Congressional Budget and Impoundment Control Act of 1974 (CBA)**, the source of Congress's usurpation of Executive Branch powers.

# Impoundment



THE DIRECTOR

EXECUTIVE OFFICE OF THE PRESIDENT  
OFFICE OF MANAGEMENT AND BUDGET  
WASHINGTON, D.C. 20503

January 27, 2025

M-25-13

MEMORANDUM FOR HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

FROM: Matthew J. Vaeth, Acting Director, Office of Management and Budget

A handwritten signature in blue ink, appearing to read "Matthew J. Vaeth", is placed to the right of the "FROM:" line.

SUBJECT: Temporary Pause of Agency Grant, Loan, and Other Financial Assistance Programs

# Impoundment

- Two district courts issued TROs against spending freeze:
  - *New York v. Trump*, No. 25-cv-39-JJM-PAS (D.R.I.)
  - *National Council of Nonprofits v. OMB*, No. 25-239 (D.D.C.)

The States have presented evidence in this motion that the Defendants in some cases have continued to improperly freeze federal funds and refused to resume disbursement of appropriated federal funds. *See* Exhibits A-C of the States' motion, (ECF Nos. 66-1, 66-2, and 66-3). The Defendants now plea that they are just trying to root out fraud. *See* ECF No. 70. But the freezes in effect now were a result of the broad categorical order, not a specific finding of possible fraud. The broad categorical and sweeping freeze of federal funds is, as the Court found, likely unconstitutional and has caused and continues to cause irreparable harm to a vast portion of this country. These pauses in funding violate the plain text of the TRO.<sup>2</sup> In response to



# Impoundment

- Key Supreme Court and appellate decisions:
  - *City of Providence v. Barr*, 954 F.3d 23, 31 (1st Cir. 2020): DOJ lacked authority to impose conditions on state and local grants requiring assistance in enforcing of federal immigration laws because an agency's power to act is "authoritatively prescribed by Congress."
  - *City of Arlington v. FCC*, 569 U.S. 290 (2013): Nuclear Regulatory Commission must resume processing Dept. of Energy's license application under the Nuclear Waste Policy Act, as an agency's policy disagreement is not lawful grounds to decline congressionally mandated licensing process.
  - *Clinton v. City of New York*, 524 U.S. 417 (1998): Line-item veto violated the Presentment Clause by giving the President unilateral power amend or repeal parts of statutes duly passed by Congress.

# Impoundment

## Presidential Authority to Impound Funds Appropriated for Assistance to Federally Impacted Schools

Public Law 81-874 does not provide statutory authority for the Commissioner of Education in the exercise of his discretion to avoid applying the full sum appropriated to the entitlements of local educational agencies for financial assistance to federally impacted schools.

The President does not have the constitutional authority to direct the Commissioner of Education or the Bureau of the Budget to impound or otherwise prevent the expenditure of funds appropriated by Congress to carry out the legislation for financial assistance to federally impacted schools, Public Law 81-874.

December 1, 1969

MEMORANDUM OPINION FOR THE GENERAL COUNSEL  
BUREAU OF THE BUDGET

WILLIAM H. REHNQUIST  
*Assistant Attorney General*  
*Office of Legal Counsel*

Syllabus

TRAIN, ADMINISTRATOR, ENVIRONMENTAL  
PROTECTION AGENCY v. CITY OF NEW  
YORK ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR  
THE DISTRICT OF COLUMBIA CIRCUIT

No. 73-1377. Argued November 12, 1974—  
Decided February 18, 1975

The Federal Water Pollution Control Act Amendments of 1972 provide a comprehensive program for controlling and abating water pollution. Title II of these Amendments makes available federal financial assistance for municipal sewers and sewage treatment works. Section 207 of Title II authorizes the appropriation of “not to exceed” specified amounts for each of three fiscal years, and § 205 (a) provides that the “[s]ums authorized to be appropriated pursuant to [§ 207] . . . shall be allotted by the Administrator” of the Environmental Protection Agency. The President directed the Administrator not to allot among the States § 207’s maximum amounts but instead to allot no more than \$2 billion of the \$5 billion authorized for fiscal year 1973 and no more than \$3 billion of the \$6 billion authorized for fiscal year 1974; and the Administrator complied with this directive. Thereupon respondent city of New York brought this class action seeking a declaratory judgment that the Administrator was obligated to allot to the States the full amounts authorized by § 207 for fiscal years 1973 and 1974, and an order directing him to make those allotments. The District Court granted the respondents’ motion for summary judgment, and the Court of Appeals affirmed, holding that “the Act requires the Administrator to allot the full sums authorized to be appropriated in § 207.” *Held*: The 1972 Amendments do not permit the Administrator to allot to the States under § 205 (a) less than the entire amounts authorized to be appropriated by § 207. Pp. 42-49.

(a) That § 205 (a) directs the allotment of only “sums”—not “all sums” as originally provided when the legislation went to Conference—and that the Conference Committee added the “not to exceed” qualifying language to § 207, which authorized the appropriation of specific amounts for the three fiscal years, show no congressional intention of giving the Executive discretionary con-

# Non-Delegation Doctrine

## CERTIORARI GRANTED

24-354     ) FCC, ET AL. V. CONSUMERS' RESEARCH, ET AL.  
          )  
24-422     ) SHLB COALITION, ET AL. V. CONSUMERS' RESEARCH, ET AL.

The petitions for writs of certiorari are granted. The cases are consolidated, and a total of one hour is allotted for oral argument. In addition to the questions presented by the petitions, the parties are directed to brief and argue the following question: Whether this case is moot in light of the challengers' failure to seek preliminary relief before the Fifth Circuit.

# Non-Delegation Doctrine

*Consumers' Research v. FCC*,  
67 F.4th 773 (6th Cir. 2023)

- FCC's Universal Service Fund, a program promoting universal access to telecommunication services, did not violate the non-delegation doctrine.
- Congress provided FCC an intelligible principle in the enumerated principles that direct what FCC must pursue, how the FCC must fund these efforts, the method the FCC must use, and to whom to direct the programs.

*Consumers' Research v. FCC*,  
109 F.4th 743 (5th Cir. 2024) (en banc)

- The Universal Service Fund's power to levy "contributions" is a power to tax, a legislative power.
- Congress's delegation "may have lacked" an intelligible principle to guide FCC's discretion.
- FCC "may have impermissibly delegated" the taxing power to private entities.
- The combination violated the Constitution.

# State Level Trends:

## *Held v. Montana*, 2024 MT 312 (2024)

- December 18, 2024: Montana Supreme Court held Montana Environmental Policy Act provisions precluding assessment of GHG emissions and climate change impacts in environmental reviews violated Montana Constitution

(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.

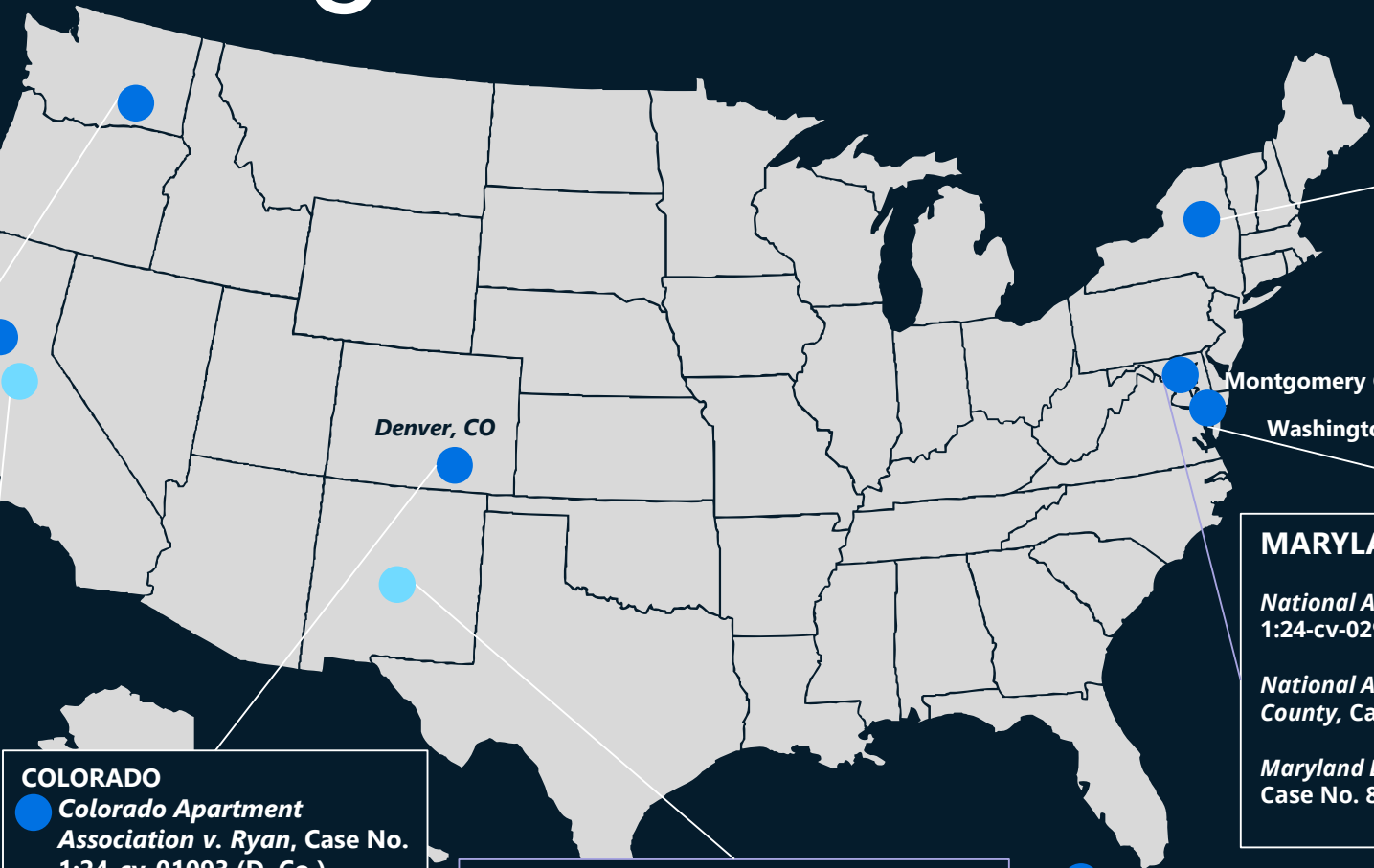
# State Level Trends: Gas Ban Litigation

**WASHINGTON**

- *Rivera v. Washington State Building Code Council*, Case No. 1:23-cv-03070, (E.D. Wash.)
- *Rivera v. Anderson*, Case No. 2:24-cv-00677 (W.D. Wash.)
- *Bldg. Indus. Ass'n of Washington v. Washington State Bldg. Code Council*, 683 F.3d 1144 (9th Cir. 2012)

**CALIFORNIA**

- *California Restaurant Association v. City of Berkeley*, 89 F.4th 1094 (2024)
- *Rinnai America Corp. v. South Coast Air Quality Management District*, Case No. 2:24-cv-10482 (C.D. Cal.)



**COLORADO**

- *Colorado Apartment Association v. Ryan*, Case No. 1:24-cv-01093 (D. Co.)
- *Restaurant Law Center v. City & County of Denver*, Case No. 1:24-cv-01862 (D. Co.)

**NEW MEXICO**

- *Air Conditioning, Heating & Refrigeration Inst. v. City of Albuquerque*, 835 F. Supp. 2d 1133 (D.N.M. 2010)

**NEW YORK**

- *Mulhern Gas Co. v. Rodriguez*, Case No. 1:23-cv-01267, (N.D.N.Y.)
- *Association of Contracting Plumbers of the City of New York v. City of New York*, Case No. 1:23-cv-11292 (S.D.N.Y.)

**MARYLAND/DC**

- *National Association of Home Builders v. DC*, Case No. 1:24-cv-02942-ACR (D.D.C.)
- *National Association of Home Builders v. Montgomery County*, Case No. 8:24-cv-03024-PX (D. Md.)
- *Maryland Building Industry Association v. McIlwain*, Case No. 8:25-cv-00113-DLB (D. Md.)

- Current Building Code Challenge
- Prior Building Code Challenge

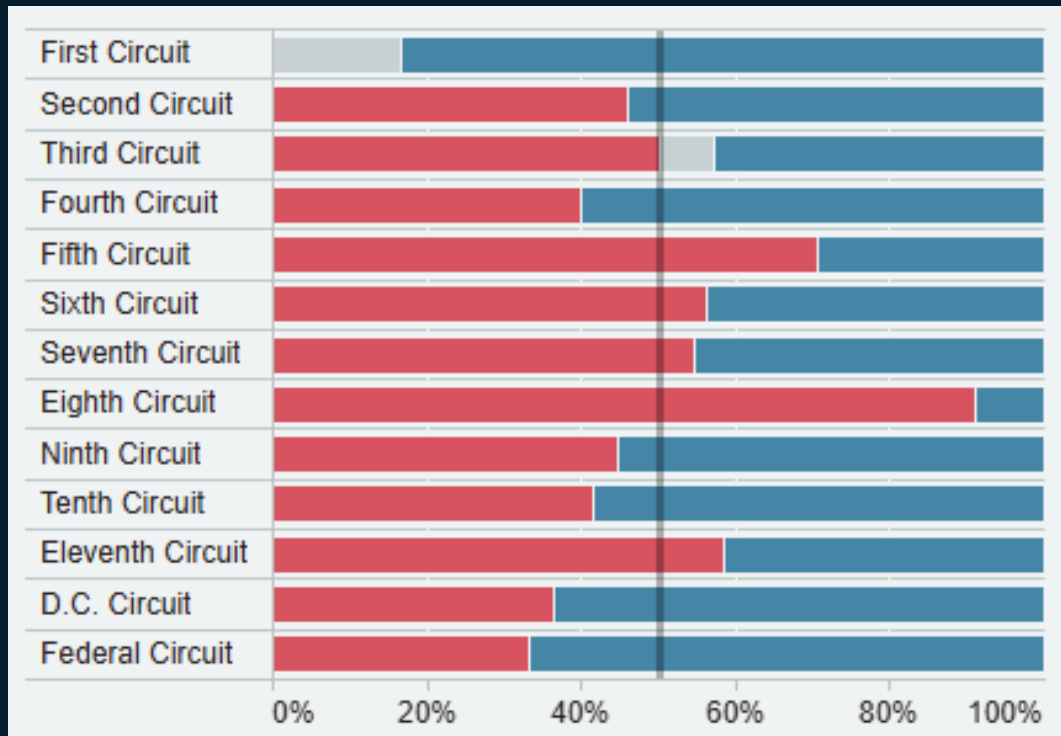
# Regional Circuits

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# 03



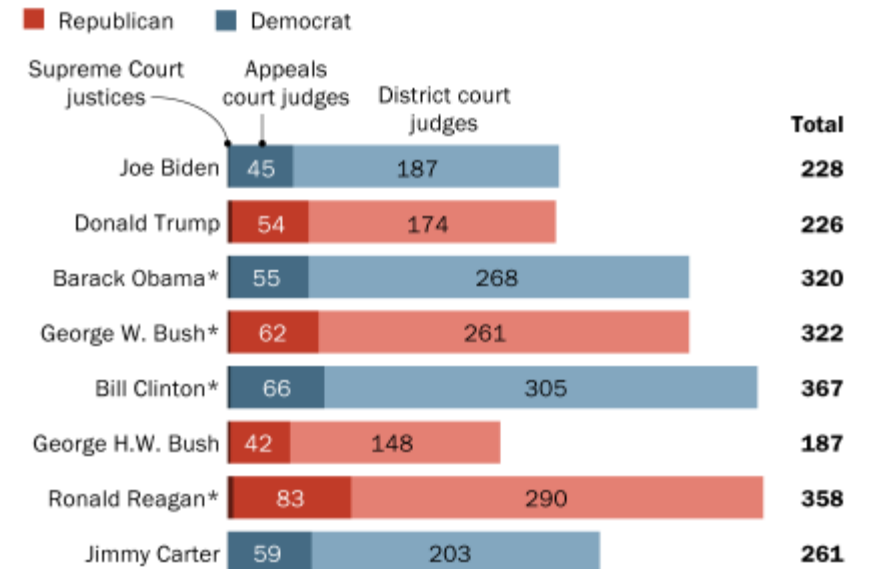
# Circuit Court Makeup



From Law360

## Biden appointed more federal judges than Trump overall but fewer at highest levels of judiciary

Federal judges appointed by each president



\* Served two terms.

Note: Excludes judges confirmed to certain specialized or territorial courts. Judges confirmed to multiple positions, such as those first appointed to a district court and later elevated to an appeals court, are counted separately for each position, but only once in each president's total.

Source: Pew Research Center analysis of Federal Judicial Center data.

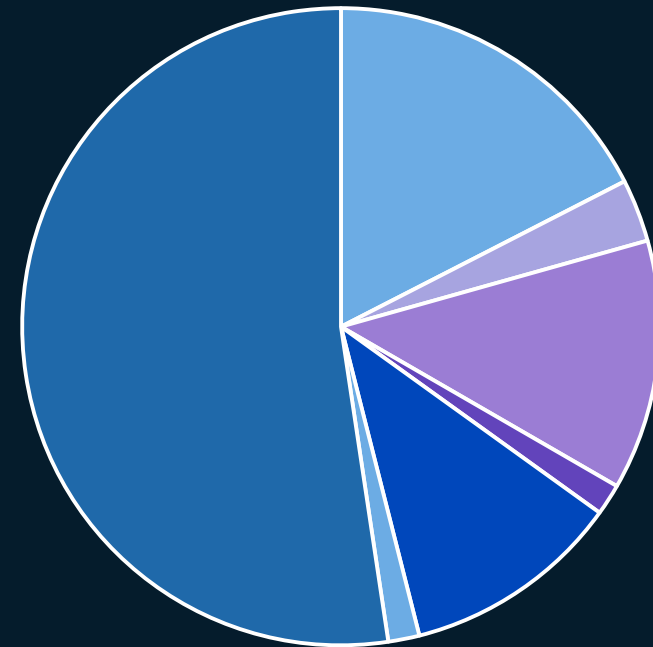
PEW RESEARCH CENTER



# Circuit Court Makeup

- Challenges to the Trump Administration:
  - 11 First Circuit (2 D.N.H., 8 D. Mass, 1 D.R.I.)
  - 2 Second Circuit (2 S.D.N.Y.)
  - 8 Fourth Circuit (7 D. Md., 1 E.D. Va)
  - 1 Seventh Circuit (N.D. Ill.)
  - 7 Ninth Circuit (4 W.D. Wash., 2 N.D. Cal., 1 C.D. Cal.)
  - 1 Tenth Circuit (D.N.M.)
  - 33 D.C. Circuit (D.D.C.)

63 cases (as of Feb. 13, 2025)





■ 1st Circuit ■ 2nd Circuit ■ 4th Circuit ■ 7th Circuit  
■ 9th Circuit ■ 10th Circuit ■ D.C. Circuit

# Circuit Court Makeup

## Judge finds White House violated court order to stop funding freeze

3 days ago

Share  Save 

**Mike Wendling**

BBC News • [@mwending](#)

## Judge declines to block Trump administration's resignation offer to federal employees

UPDATED FEBRUARY 13, 2025 · 11:26 AM ET 

HEARD ON [MORNING EDITION](#)



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# 08 BREAKOUT SESSION 5: ROLE OF THE ENVIRONMENTAL LAWYER IN ENERGY AND SEQUESTRATION TAX CREDITS

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# The Role of the Environmental Lawyer in Energy and Sequestration Tax Credits

February 20, 2025

Barbara de Marigny, Shai Sahay, Ricardo Pagulayan

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# Agenda



Inflation Reduction Act



Tax Credits: 48E and 45Y, 45Q, 45V, 45Z



Other IRA Funding Opportunities



EO Unleashing American Energy



Congressional Review Act



Advocacy Tips

# Inflation Reduction Act

## Overview

Offers funding, programs, and incentives to accelerate the nation's transition to a clean energy economy and reduce renewable energy costs

## Two Types of Tax Credits

- Production Tax Credit (45Q, 45V, 45Y, 45Z)
- Investment Tax Credit (48E)

*Many IRA credit determinations depend upon carbon intensity analysis that will require input from environmental specialists.*

## Monetizing Tax Credits

- Direct Pay
- Transferability





# 48E and 45Y – Clean Electricity Investment and Production Tax Credits



Establishes regulations for implementing tech-neutral tax credits for investment or production of clean electricity under IRA



Credits available to wind, solar, geothermal, marine, nuclear, and waste energy



Also available to combustion and gasification facilities with net zero emissions

# 48E and 45Y – Requirements

- Available to facilities constructed after 2024
- Generate electricity + GHG emissions into the atmosphere in the production of that electricity must be no greater than zero
- Certain technology requirements determined annually by IRS
- Facilities with non-qualifying technologies can petition IRS for a provisional emissions rate by submitting a lifecycle analysis (LCA)

	Base Credit	With Prevailing Wage or Apprenticeship Requirements
45Y	0.3 cents/kWh	1.5 cents/kWh
48E	6% of cost basis	30% of cost basis

(5x multiplier)

# 45Q – Credit for Carbon Oxide Sequestration

- A dollar amount per metric ton of carbon oxide that is captured and:
  1. **Sequestered** in secure geological storage;
  2. Used in **enhanced oil recovery** (“EOR”); OR
  3. **Utilized** in chemical products and other commercial operations.
- Available to facilities that begin construction before 1/1/2033
- Unlimited amount for 12 years from date equipment is placed in service.
- Credit may be subject to recapture in the case of leakage of sequestered carbon

	Placed in service before 2023	Placed in Service after 2022*
Permanent Sequestration	\$50	\$85
EOR or other utilization	\$35	\$60
Direct air capture (“DAC”)	\$85	\$180

\* Assumes compliance with prevailing wage and apprenticeship requirements

# 45Q – Requirements



## Eligible Projects

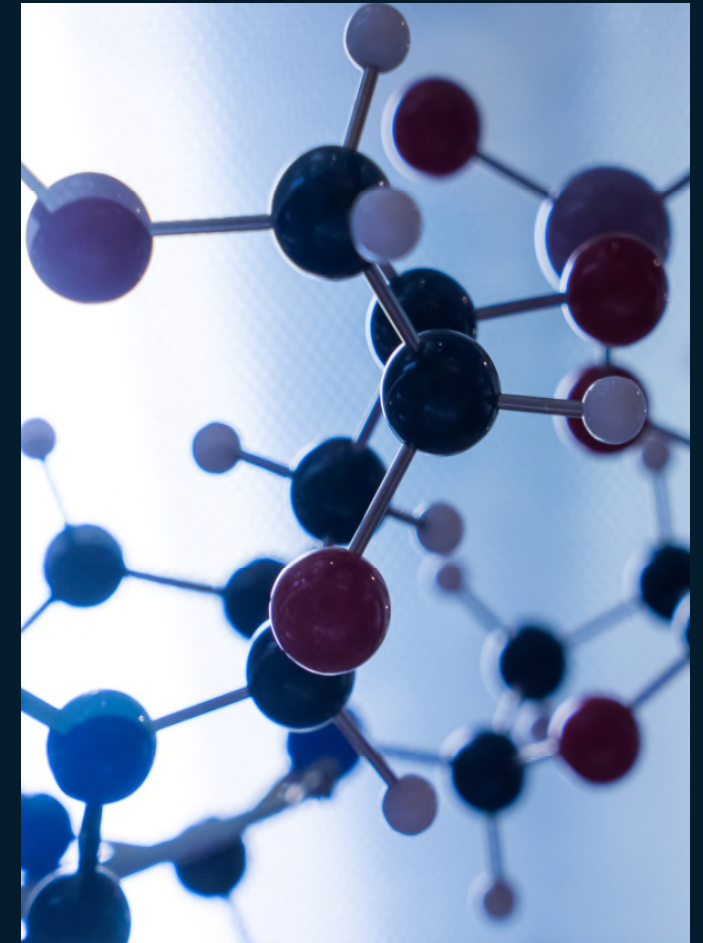
- Power plants
- Ammonia/fertilizer
- Hydrogen plants (“blue hydrogen”)
- Ethanol plants
- Petrochemical plants
- Natural gas processing plants
- LNG trains
- Any industrial production process (cement, steel)
- Lifting some other gas (helium, nitrogen, lithium) and CO<sub>2</sub> comes with it
- Direct Air Capture (“artificial trees”)

## How to Qualify

- Captured from industrial sources or from direct air capture
- Measured and verified at source of capture and at disposal
- Captured at a qualified facility (must meet minimum annual capture amount)
- **Utilization:** Requires preparation of a lifecycle analysis (“LCA”) of GHG emissions from feedstock generation through distribution, delivery, and use by the consumer demonstrating the amount of CO isolated or displaced.

# 45V – Credit for Production of Clean Hydrogen

- Credit varies based on the amount of GHGs released during hydrogen production, including in the generation of electricity used to produce the hydrogen
- Three Pillars – Energy Attribute Certificates (EACs):
  - (1) Additionality/incrementality
  - (2) Temporal matching
  - (3) Geographic matching
- RNG and methane-based hydrogen
  - No first productive use requirement
  - Book-and-claim a possibility for RNG and coal mine methane
- “Technology agnostic”
  - Does not specify technology that must be used to produce clean hydrogen
  - Requires only that lifecycle GHG emissions be measured well-to-gate per GREET
- GREET model basis for carbon intensity calculations
  - Limits feedstock and operational parameters



# 45V Tax Credit – Rates

Credit Value (\$ per kg of H <sub>2</sub> )	Kg of CO <sub>2</sub> e emitted per kg of H <sub>2</sub>	Comment
\$3.00	0 – 0.45 kg CO <sub>2</sub> e	Green hydrogen might satisfy
\$1.00	0.45 – 1.5 kg CO <sub>2</sub> e	Blue hydrogen might satisfy
\$0.75	1.5 – 2.5 kg CO <sub>2</sub> e	
\$0.60	2.5 – 4 kg CO <sub>2</sub> e	

\*If prevailing wage and apprenticeship requirements are met; if not, credit would be 20% of these amounts. Inflation adjustment applies to these amounts starting in 2023.

# 45V GREET

## Background Data

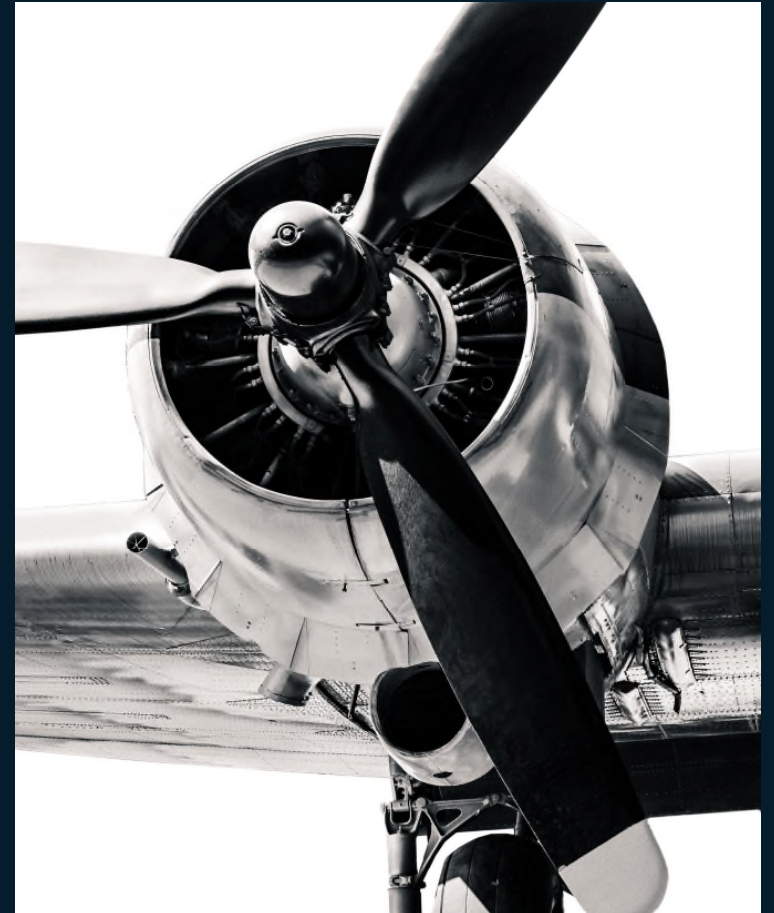
E.g., carbon intensity of grid electricity supplied to hydrogen production process, upstream methane emissions rates for natural gas supply chain

## Modeling for eight hydrogen production pathways

1. Steam methane reforming (SMR) with potential carbon capture and sequestration (CCS)
2. Autothermal reforming (ATR) with potential CCS
3. SMR of landfill gas with potential CCS
4. ATR of landfill gas with potential CCS
5. Coal gasification with potential CCS
6. Biomass gasification with potential CCS
7. Low temperature water electrolysis using electricity
8. High-temperature water electrolysis using electricity and/or heat from nuclear power plants

# 45Z – Clean Fuel Production Credit

- Available to producers of domestically produced SAF and non-SAF clean transportation fuel sold from 2025 to 2027
  - Transportation fuel = fuel which is “suitable for use as a fuel in a highway vehicle or aircraft”
  - Produced by a qualifying facility, sold in a qualifying sale
- Electricity is not considered transportation fuel
  - Clean electricity can be used to lower carbon intensity score of liquid fuels
  - Sale of recreational fuel (RECs)
- Credit amount is calculated by multiplying the applicable amount per gallon of qualifying fuel by the “emissions factor” for the fuel
  - 35 cents/gallon for SAF
  - 20 cents/gallon for non-SAF
  - \$1.00+ /gallon if prevailing wage/apprenticeship requirements are met
  - (Emissions factor is based on carbon intensity)





# 45Z GREET

## Background Data

E.g., crushing facility data for crop-based oil, transport distances for feedstock, farm-based data (fixed as conventional farming practices)

## Options Available

Fuel/Energy	Technology	Feedstock
Ethanol	Fermentation	Corn, sorghum, Brazilian Sugarcane, corn stover
RD/SAF	HEFA	Mixed oils, plant-derived oils
RD/SAF	Alcohol to Jet (ATJ)	Domestic/Brazilian Ethanol
RD/SAF	Gasification, Fischer-Tropsch	Corn stover
Biodiesel	Transesterification	Mixed oils, plant-derived oils
RNG	Anaerobic digestion and biogas upgrading	Landfill gas, animal manure, wastewater sludge

(Hydrogen allowed as a fuel product and process input. Electricity allowed as a process input.)

# Other IRA Funding Opportunities

Climate Pollution Reduction Grants	Funding to Address Community Pollution	Methane Emissions Reduction Program
<p>Expiration: 2026, 2031 (depending on specific grant)</p> <p>Funding: Grants</p> <p>Purpose: Reduce GHG emissions and air pollution</p> <p>Available only to states, local governments, tribes, and territories</p>	<p>Expiration: 2031 (certain applications have closed)</p> <p>Funding: Grants</p> <p>Purpose: Reduce pollution, increase climate resilience, and address climate justice concerns in disadvantaged communities</p> <p>Open to private entities</p>	<p>Expiration: 2028</p> <p>Funding: Grants, rebates, contracts, loans</p> <p>Purpose: Reduce methane emissions from petroleum and natural gas sectors</p> <p>Open to private entities</p>

# EO Unleashing American Energy (Jan. 20, 2025)

## Policy Priorities

- Exploration and production on federal lands and waters, including OCS
- Establish position as leading global producer of non-fuel minerals

## Disbursement Pause

- Immediate pause of disbursements under Inflation Reduction Act and Infrastructure Investment and Jobs Act
  - Specifically, NEVI/EV infrastructure funding
- What are the potential effects?
  - Tax credit direct pay
  - Regional Clean Hydrogen Hubs
  - DOE Loan Programs Office
  - Conditional vs. committed funding



# Congressional Review Act

## Overview

- A tool for facilitating congressional oversight over federal agency rules
- Congress may overturn certain federal agency actions by way of the CRA



## Why does the CRA matter for tax credits?

- Covers 45V, 45Y, and 48E credits
- Uncertainty over long-term reliance on certain tax credits
- Stability/availability of tax credits may change pursuant to congressional priorities

## Time Constrains

- Joint resolutions must be submitted within 60 days of continuous session, starting from when a rule was published in the *Federal Register* and received by Congress
- Failure to disapprove of final agency action within 60 legislative days → rule is generally safe
- 45V is a potential target. No resolution drafted to date, BUT House is developing a bill that would place all 1,400 “midnight rules.”



# Advocating for Cleaner Energy Under the New Administration

- Emphasize compatibility between clean energy (e.g., solar, wind) with new administration's focus on "energy dominance"
  - Not competing with fossil fuel industry
  - Adding to energy security, stability, and independence
  - Respinning the idea: clean energy is energy dominant!
- Deemphasizing DEI in programmatic pitches
  - Maximize likelihood of obtaining government-managed funding
  - Minimize likelihood of losing existing funding

**In the Trump era, renewable energy isn't green — it's 'dominant'**

Clean-energy executives are tailoring their pitches for the president and his political allies.

February 5, 2025 at 5:00 a.m. EST

(Obtained from the Washington Post)

Questions?



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Thank you!

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# 09 BREAKOUT SESSION 6: WATER SUPPLY – CHALLENGES AND OPPORTUNITIES

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# Water Supply: Challenges and Opportunities

February 20, 2025

Paulina Williams & Cole Lempke

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# Who Needs Water?

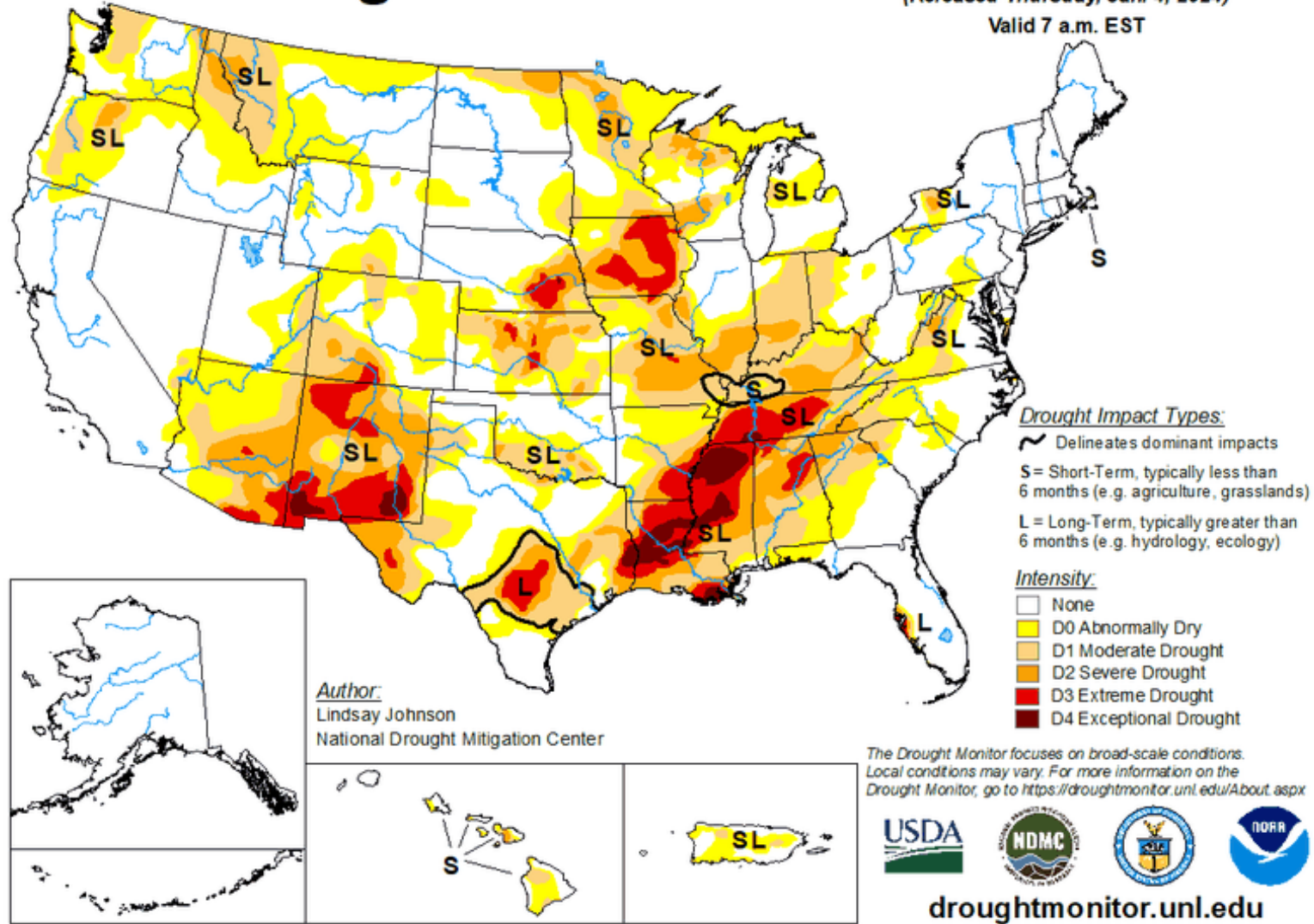
Facility	Water Use	Output
Combined cycle electric generating unit (no CCS)	190 gallons	1 MWh electricity
Combined cycle electric generating unit (with CCS)	290 gallons	1 MWh electricity
Hydrogen production	6.6 – 10.3 gallons	1 kg H <sub>2</sub>
Chat GPT-3	1 gallon	~40 responses

“By 2027, global AI demand is expected to account for 1.1 to 1.7 trillion gallons . . . of water withdrawal, more than 4-6 times the total annual water withdrawal of Denmark.”

- World Economic Forum, 2024

# U.S. Drought Monitor

January 2, 2024  
(Released Thursday, Jan. 4, 2024)  
Valid 7 a.m. EST





# “Water Wars”

## Cross Boundary Disputes

- *Texas v. New Mexico and Colorado*, 602 U.S. 943 (2024)
- *Arizona v. Navajo Nation*, 599 U.S. 555 (2023),
- *Mississippi v. Tennessee*, 595 U.S. 15 (2021)
- *Florida v. Georgia*, 592 U.S. 433 (2021)
- *Texas v. New Mexico*, 592 U.S. 98 (2020)

**A water war is looming between Mexico and the US. Neither side will win**  
By Laura Paddison and Fidel Gutiérrez, CNN

CLIMATE  
**Water wars in the western U.S. could spread to the Midwest, Great Plains**  
OCTOBER 16, 2024 · 3:09 AM ET  
FROM HARVEST PUBLIC MEDIA

**Tri-state water wars: Alabama, Georgia, Florida**

**A Water War Is Brewing Over the Dwindling Colorado River**

# Texas Water Law 101

## Surface Water

- State-owned
- Water rights granted by TCEQ
- First in time, first in right

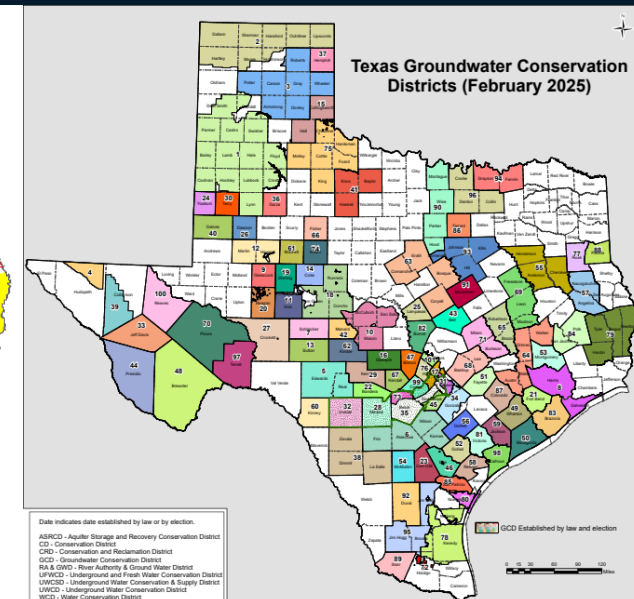
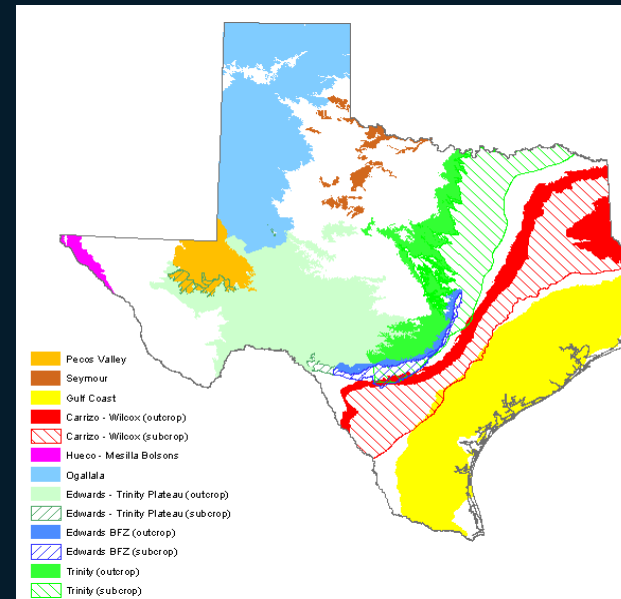
## Groundwater

- Privately owned
- Rule of Capture
- 101 GCDs covering 70% of TX



## Key Governmental Bodies:

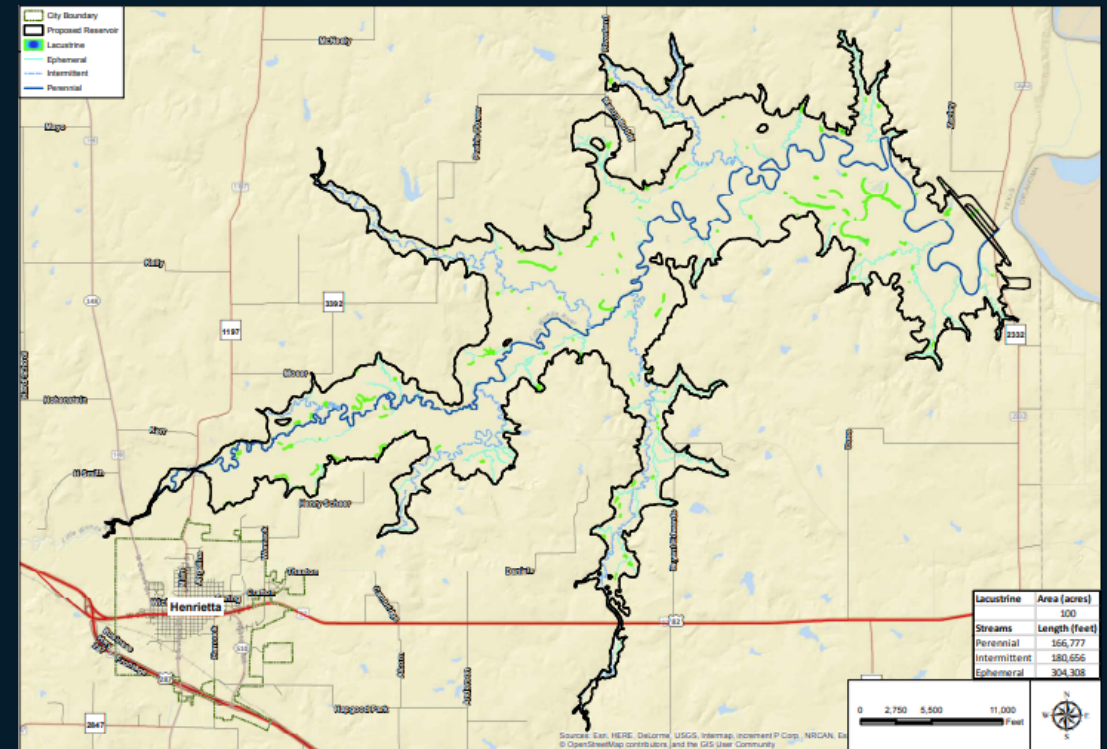
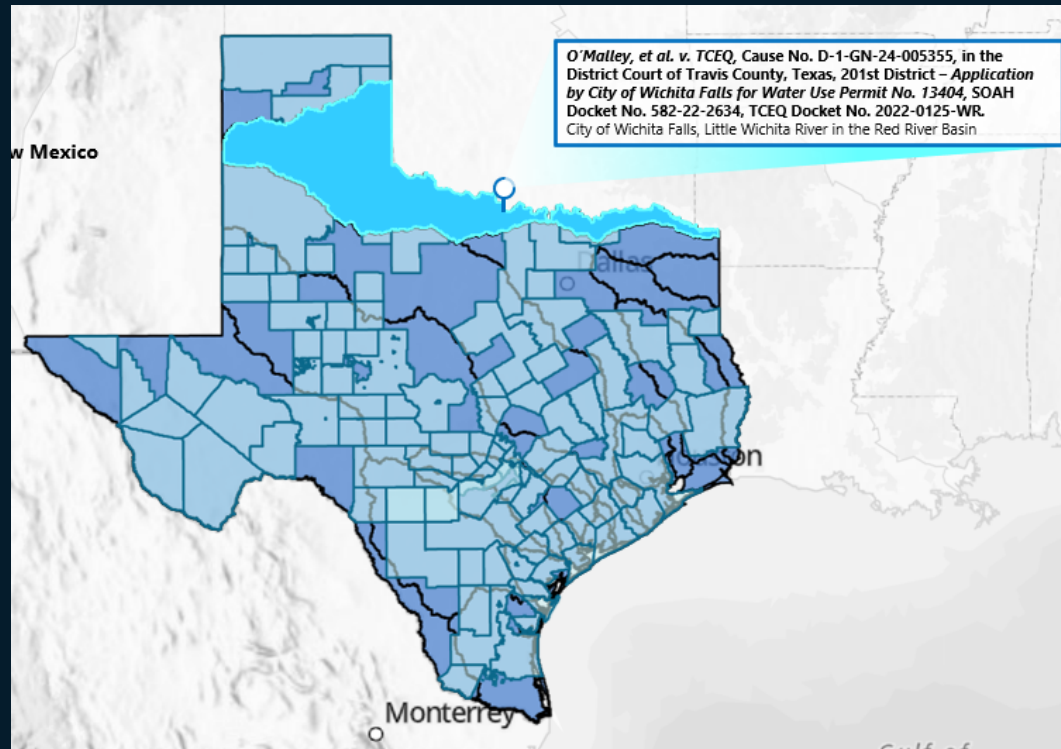
- **Tex. Comm'n on Env't'l Quality**
- **Groundwater Conservation Districts**
- **Tex. Water Dev. Board**
- **Groundwater Management Areas**





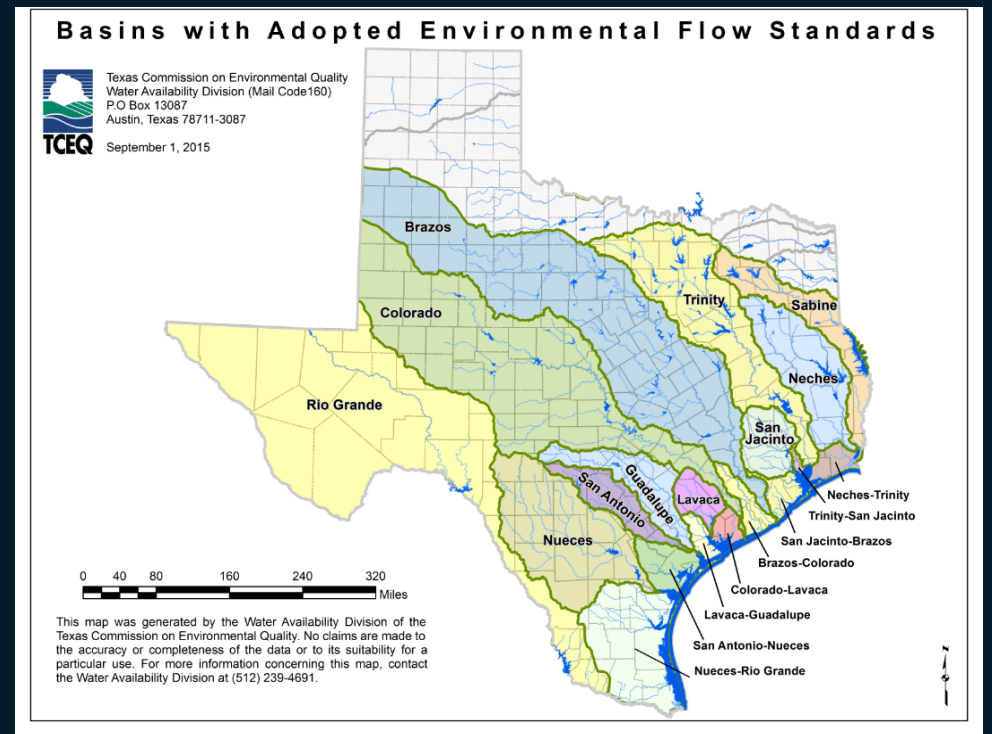
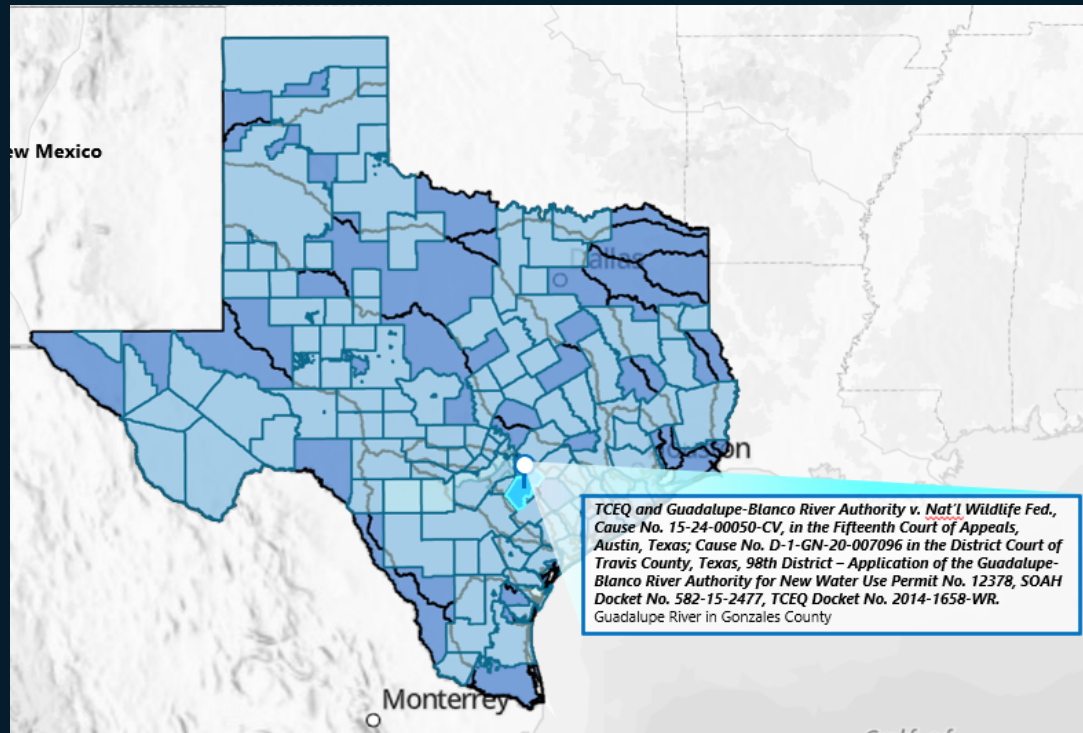
# Surface Water

*O'Malley, et al. v. TCEQ, No. D-1-GN-24-005355 (Trav. Cty. 201st)*



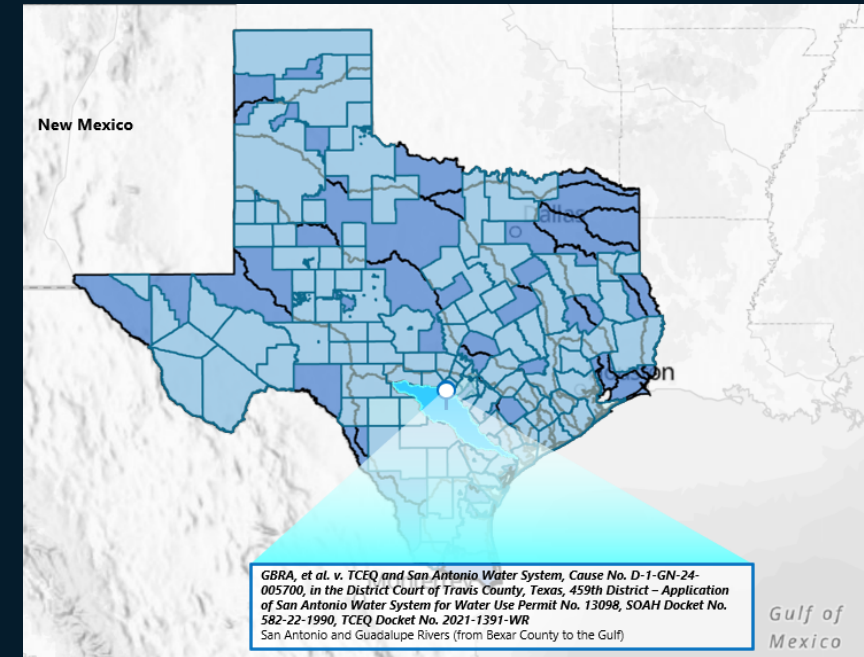
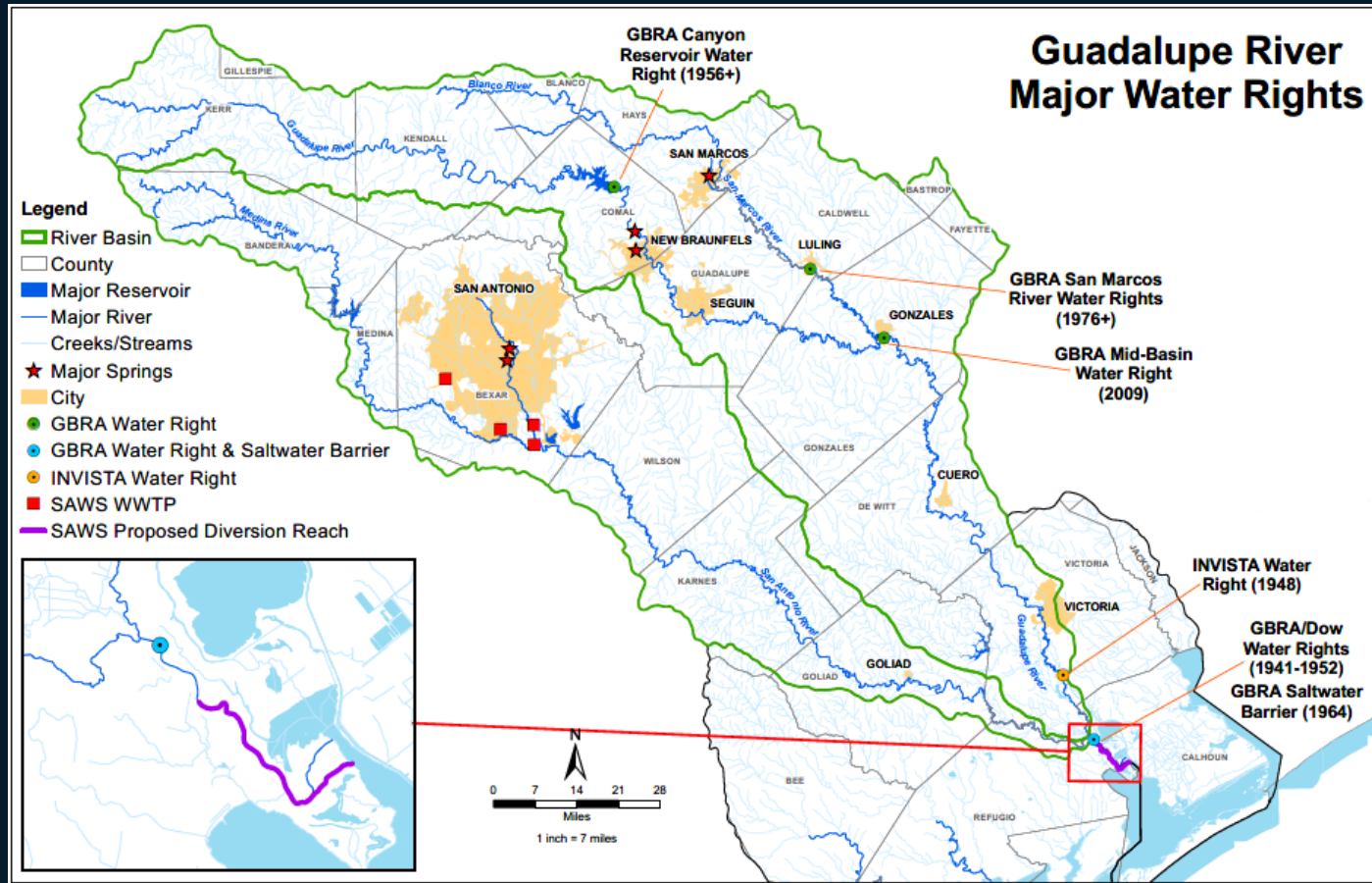
# Surface Water

*TCEQ & GBRA v. Nat'l Wildlife Fed., No. 15-24-00050-CV (Tex. App. 15 Dist.)*



# Reuse

*GBRA, et al. v. TCEQ & San Antonio Water System, No. D-1-GN-24-005700 (Trav. Cty. 459th)*



## Tex. Water Code Section 11.042(b)

A person who wishes to discharge and then subsequently divert and reuse the person's existing return flows derived from privately owned groundwater must obtain prior authorization . . . The authorization may allow for the diversion and reuse by the discharger of existing return flows, less carriage losses, and shall be subject to special conditions if necessary to protect an existing water right that was granted based on the use or availability of these return flows.

# Emerging Water Supplies



Desalination



Produced Water



New Infrastructure



## EMERGENCY ITEM: TEXAS-SIZE INVESTMENT IN WATER

As people and businesses continue to flock to our state, Texas must invest in new, innovative water projects to tap into new water supplies and repair existing pipelines to save billions of gallons of water each year. By investing in sustainable long-term water infrastructure, we can ensure the Texas economic miracle continues and improve the livelihood of Texans for generations.

Working with the Texas Legislature, Governor Greg Abbott made historic investments to improve the reliability of the state's water supply, including:

- Funded over \$13 billion in low or no-interest loans to cities and water supply corporations to invest in water infrastructure through the State Water Infrastructure for Texas (SWIFT)
- Dedicated an additional \$1 billion to maintain existing and build new water infrastructure
- Created the New Water Supply for Texas fund, which funds innovative strategies to increase the state's water supply in addition to managing and developing existing sources

Yet, some of our water supplies are drying up. Many communities have leaking and broken water lines, and agriculture producers in the Rio Grande Valley and West Texas do not have enough water to grow their crops.

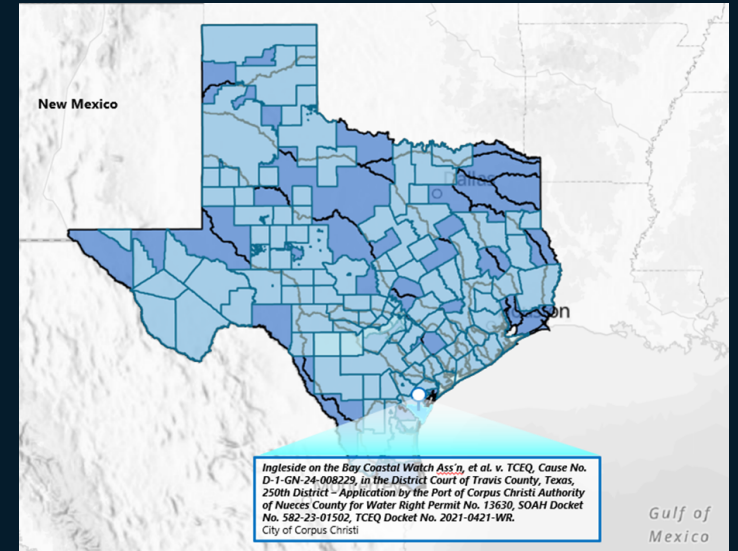
To put Texas on a path to have plenty of water for the next 50 years, Governor Abbott will work with the Texas Legislature to:

- Make the one-time largest investment in water in Texas history, as well as dedicate \$1 billion a year for 10 years to tap into new water supplies and repair existing pipes to save billions of gallons of water each year
- Invest in new water supply strategies that develop resources like desalination and move water from areas of abundance to areas of need
- Invest in existing programs to ensure rural communities throughout Texas have the necessary resources to maintain existing water supply systems
- Create a long-term dedicated funding stream to invest in critical water infrastructure for future generations of Texans to have a reliable water supply

**BUILDING A STRONGER TEXAS**

# Desalination

*Ingleside on the Bay Coastal Watch Ass'n, et al. v. TCEQ, No. D-1-GN-24-008229 (Trav. Cty. 250th)*



- Water right application to divert Corpus Christi Bay water to support desalination facility
- Intake 90.4 MGD seawater, provide 30 MGD fresh water
- July 16, 2024: WR issued

WMS TYPE - SEAWATER DESALINATION

**Recommended Projects related to Water Management Strategy Type**

Total capital cost of recommended projects: **\$2,838,755,822.**

Type to filter project list

Project ▲	Decade Online ⇅	Sponsor ⇅	Capital Cost ⇅
<a href="#">CITY OF CORPUS CHRISTI SEAWATER DESALINATION (INNER HARBOR)</a>	2030	CORPUS CHRISTI	\$236,693,000
<a href="#">CITY OF CORPUS CHRISTI SEAWATER DESALINATION (LA QUINTA)</a>	2030	CORPUS CHRISTI	\$420,372,000
<a href="#">FREEPORT SEAWATER DESALINATION</a>	2040	DOW INC	\$155,877,822
<a href="#">LAGUNA MADRE WATER DISTRICT - SEAWATER DESALINATION PLANT</a>	2050	LAGUNA MADRE WATER DISTRICT	\$40,290,000
<a href="#">PORT OF CORPUS CHRISTI AUTHORITY SEAWATER DESALINATION - HARBOR ISLAND</a>	2030	PORT OF CORPUS CHRISTI AUTHORITY	\$802,807,000
<a href="#">PORT OF CORPUS CHRISTI AUTHORITY SEAWATER DESALINATION - LA QUINTA CHANNEL</a>	2030	PORT OF CORPUS CHRISTI AUTHORITY	\$457,732,000
<a href="#">POSEIDON REGIONAL SEAWATER DESALINATION PROJECT AT INGLESIDE</a>	2030	POSEIDON WATER	\$724,984,000

# Emerging Water Supplies

*Beneficial Use of Produced Water in Texas:  
Challenges, Opportunities and the Path  
Forward*

*Texas Produced Water Consortium Report to the Texas Legislature 2022*



Desalination



Produced Water

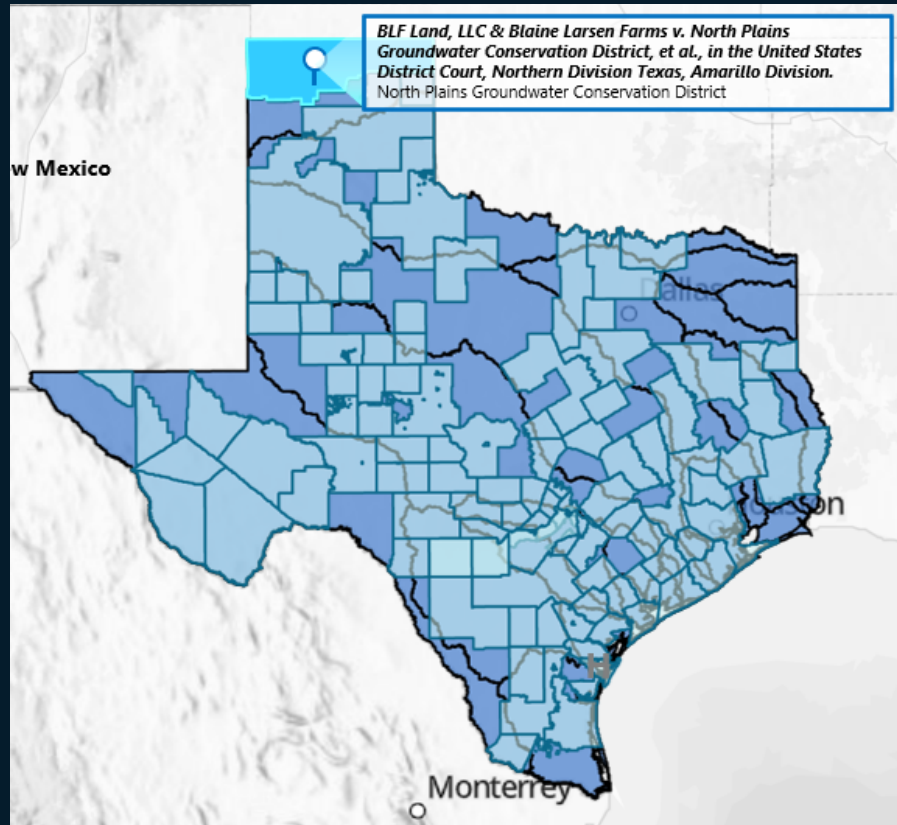


New Infrastructure

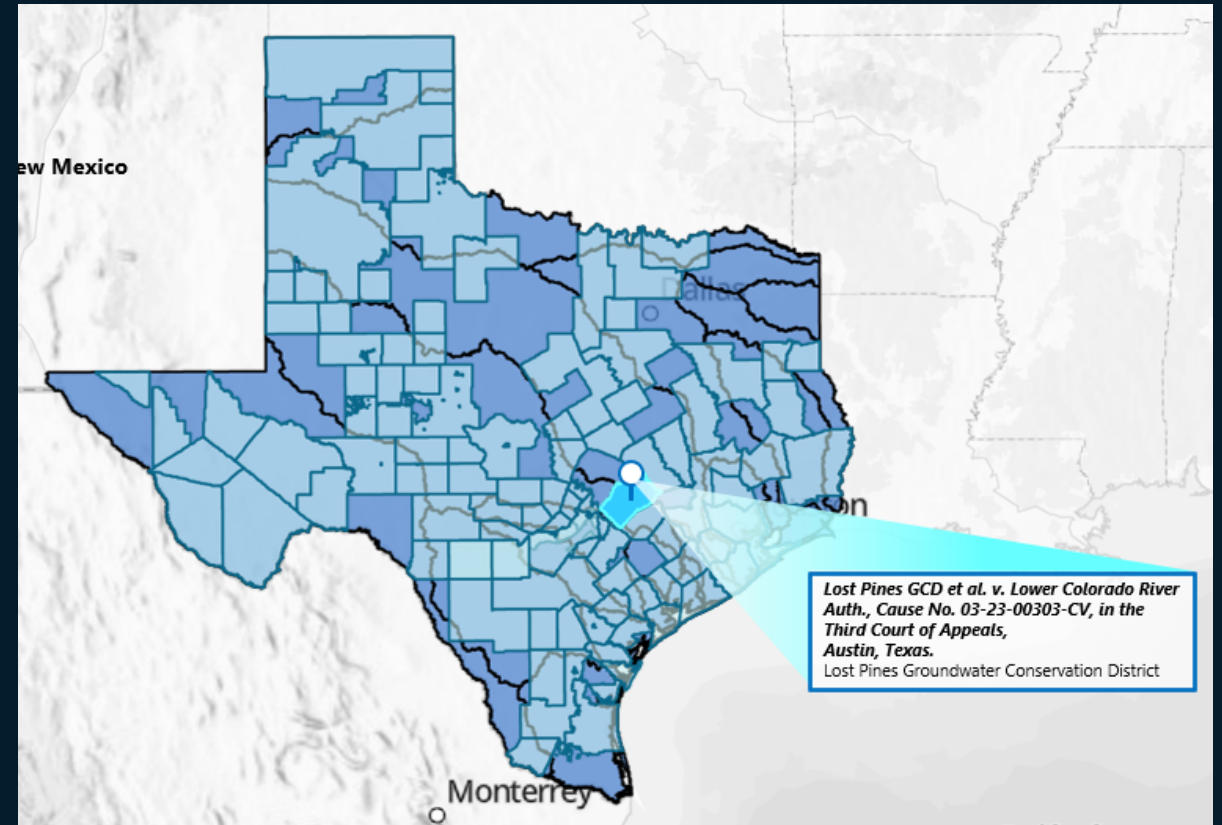


# Groundwater

*BLF Land, LLC v. North Plains GCD,*  
2024 WL 4795379 (N.D. Tex. Nov. 13,  
2024)



*Lost Pines GCD v. LCRA,*  
2024 WL 3207472 (Tex. App.—Austin)

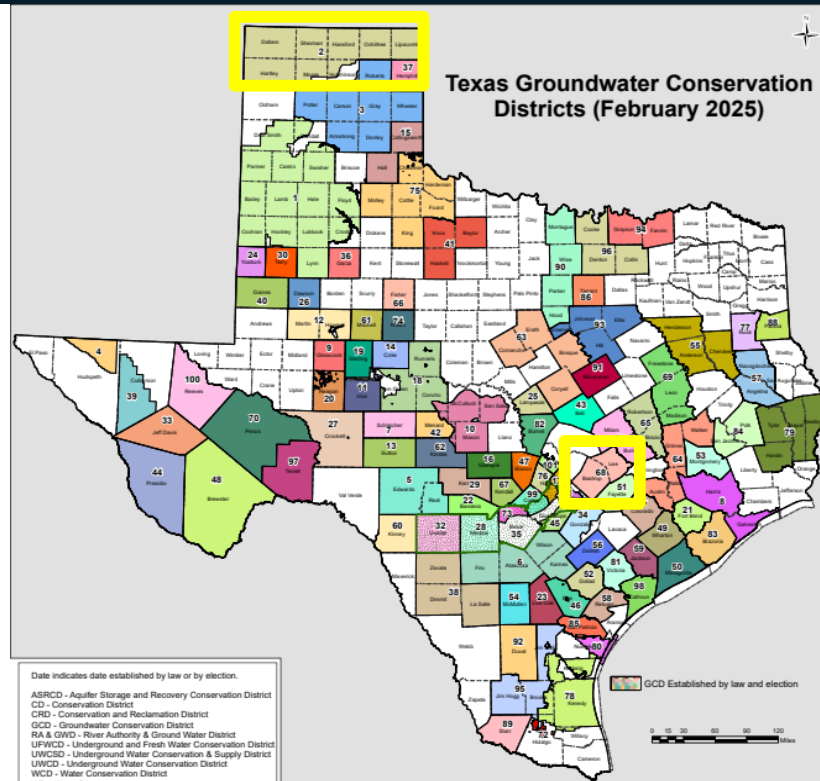
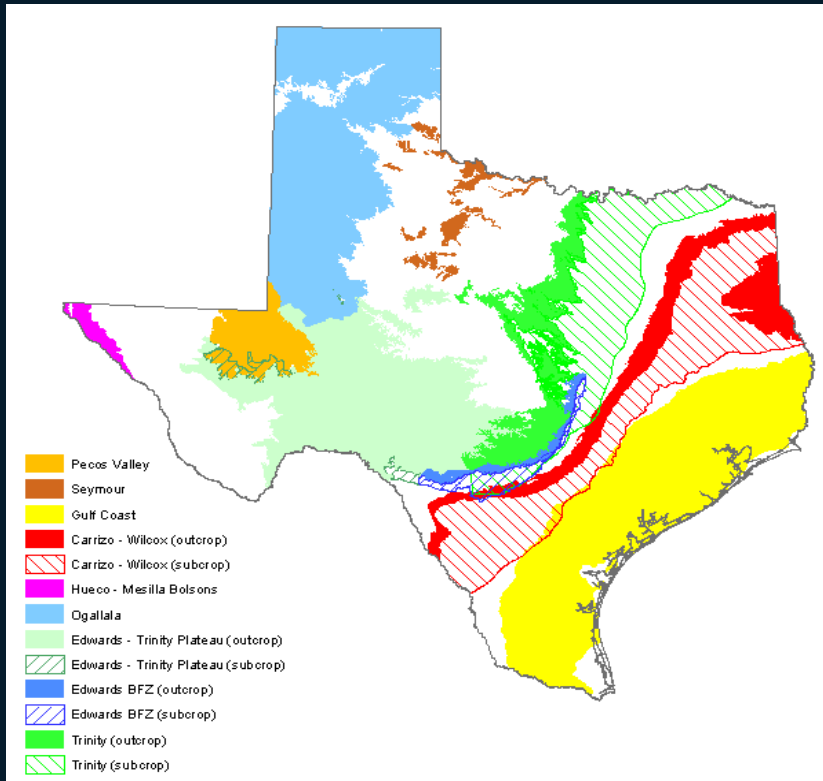


# Groundwater

*BLF Land, LLC v. North Plains GCD,*  
2024 WL 4795379 (N.D. Tex. Nov. 13, 2024)

*Lost Pines GCD v. LCRA,*  
2024 WL 3207472 (Tex. App.—Austin)

- Potatoes
- Constitutional Takings
- Groundwater production
- Procedural confusion



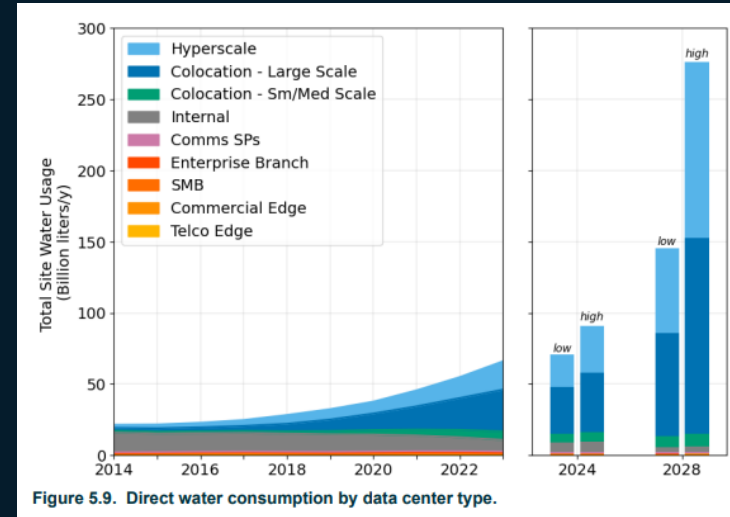


# Water as a Constraint on Growth

## REMOVING BARRIERS TO AMERICAN LEADERSHIP IN ARTIFICIAL INTELLIGENCE

EXECUTIVE ORDER

January 23, 2025



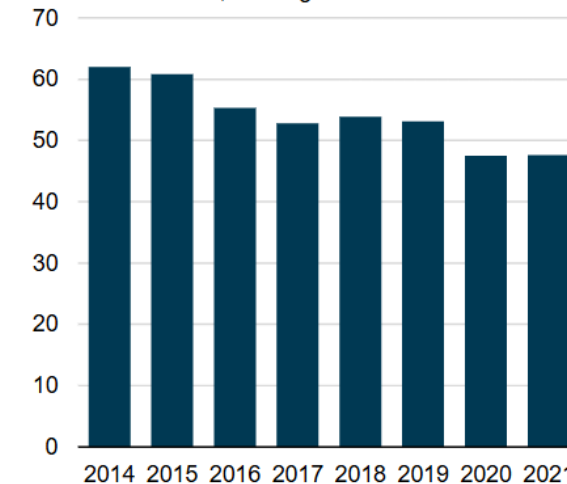
## UNLEASHING AMERICAN ENERGY

EXECUTIVE ORDER

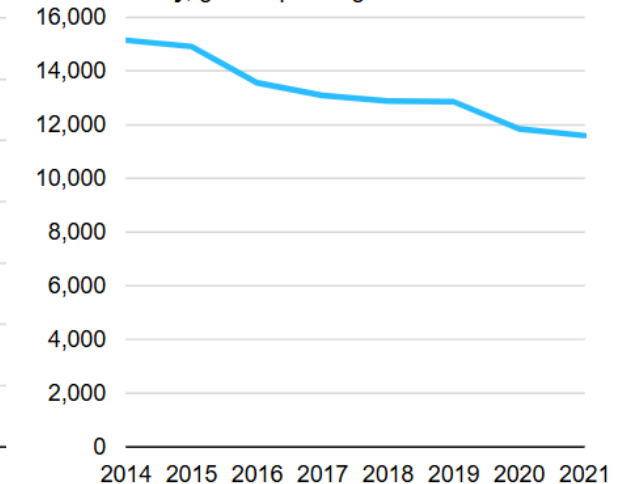
January 20, 2025

### U.S. electric power sector cooling water withdrawals and water intensity (2014–2021)

water withdrawals, trillion gallons



water intensity, gallons per megawatt-hour



Data source: U.S. Energy Information Administration, *Power Plant Operations Report*

# Water as a Bottleneck



- Extended timeline
- Regulatory uncertainty
- Multiple legal frameworks
- Paper water  $\neq$  wet water



# Water as an Opportunity



- Extended timeline
- Regulatory uncertainty
- Multiple legal frameworks
- Paper water  $\neq$  wet water



- Emerging sourcing strategies
- Improving efficiency
- Constant demand
- Water attracts development

# Questions?

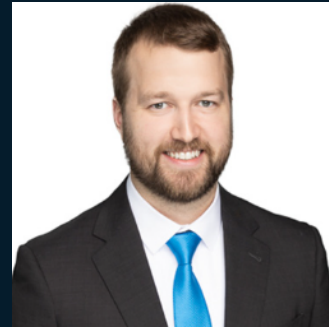


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# 10 PROGRAM EVALUATION FORM

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**Baker Botts L.L.P.  
Program Evaluation Form**

<b>Program Title:</b> 2025 Baker Botts Environmental, Safety and Incident Response Seminar	<b>Presenters:</b> Various (Please see the program materials)
<b>Date:</b> February 20, 2025	<b>Program Location:</b> Houston, TX

**1. Overall Quality - Please rate the overall quality of the program:**

Poor	Fair	Good	Excellent
------	------	------	-----------

**2. Instructor Quality - Please rate the quality of the presenter:**

Poor	Fair	Good	Excellent
------	------	------	-----------

**3. Materials - Please rate the program's materials:**

Poor	Fair	Good	Excellent
------	------	------	-----------

**4. Usefulness of Content - Please rate the program's usefulness to you:**

Poor	Fair	Good	Excellent
------	------	------	-----------

**5. Physical Setting - Please rate the physical setting of the program:**

Poor	Fair	Good	Excellent
------	------	------	-----------

**6. Technology - Please rate the delivery, visual and audio aspects of the program:**

Poor	Fair	Good	Excellent
------	------	------	-----------

**7. Additional Comments:** \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**8. Your Name (optional):** \_\_\_\_\_

*The completion of this evaluation form is appreciated but not required to receive CLE credit. Please submit all completed forms to Gina Capone at [gina.capone@bakerbotts.com](mailto:gina.capone@bakerbotts.com).*



# 11

## SPEAKER BIOGRAPHIES

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# Guest Speaker Bios

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## BROOKE PAUP

[Chairwoman](#) | [Texas Commission on Environmental Quality](#)

Brooke Paup was appointed as chairwoman of the Texas Commission on Environmental Quality on January 7, 2025.

Prior to her appointment to TCEQ, Brooke Paup served on the Texas Water Development Board beginning in 2018. In 2021, Governor Abbott appointed Paup as the first woman chair in the history of the TWDB. She also served as the Director of Legislative Affairs for the Texas Comptroller of Public Accounts, in the Office of the Attorney General, and at the Office of State-Federal Relations in Washington, D.C. Brooke has 19 years of state government experience.

In 2021, Brooke was awarded the Texas Water Foundation's Rainmaker Award, which acknowledges exceptional leaders making lasting impacts in Texas water. She was also recently the recipient of the 2023-2024 Public Official of the Year Award from the Water Environment Association of Texas.

Paup earned a Bachelor of Arts from Texas A&M University and a Juris Doctor from Texas Tech School of Law.

She lives in Austin with her husband, Spivey, and their two wee-Paups, Henry and Heidi.



## AURELIA S. GIACOMETTO

[Secretary](#) | [Louisiana Department of Environmental Quality](#)

Aurelia Skipwith Giacometto is the 14th secretary of the Louisiana Department of Environmental Quality (LDEQ). Governor Jeff Landry appointed her to this cabinet post in January 2024. At LDEQ, Secretary Giacometto has instituted various internal reforms to safeguard the state's second-to-none environment while ensuring that Louisiana is competitive with other states in bringing in new businesses and developing its energy base. She has established LDEQ's "Tiger Teams" approach to address longstanding

environmental hazards that eluded her predecessors; she is modernizing the agency's permitting processes; she has developed a comprehensive environmental internship program for the next generation of stewards; and she has prioritized the agency's legal department tracking down and imposing fines upon business owners who have absconded, leaving behind environmental hazards.

Secretary Giacometto has 20 years of experience in environmental regulation, including agriculture disciplines, fossil fuels, fish, and wildlife. She began her career as a biologist at Monsanto, now Bayer Corporation, developing environmentally sustainable crops for regulatory approvals. She obtained her law degree after seeing the legal and regulatory hindrances to delivering science technologies to African countries. She served as Assistant Corporate Counsel at Alltech's Crop Division, where she guided the business and R&D teams in efforts to increase soil health and regulatory approvals. In 2017, Giacometto entered public service at the Department of the Interior as Deputy Assistant Secretary for U.S. Fish and Wildlife and Parks. From 2019–2021, she served as Director of the U.S. Fish and Wildlife Service after receiving bi-partisan support from the U.S. Senate. She led the nation's top outdoor conservation agency of 8500 employees, managing over 850 million acres of land and water and a \$2.9 billion budget to revolutionize business operations, grant more access to public lands for the American people, all while relying on the best available science to protect our Nation's fish and wildlife populations and their habitats and grant more access for the American people.

Secretary Giacometto is a native of Indianapolis, Indiana, with roots in rural Mississippi. She earned her Bachelor of Science in Biology from Howard University, Master of Science in molecular genetics from Purdue University, and a Juris Doctorate from the University of Kentucky College of Law. Giacometto is a board member of Ramaco Resources, a publicly traded metallurgical coal company, and Steamboat Institute. She serves on the committee of NRA's Hunting and Wildlife Conservation, Colossal Conservation and Advisory Board, and Ducks Unlimited's Conservation Policy Committee. Giacometto enjoys the great outdoors; you can find her fishing, hunting, or running, and she holds a sub-3-hour marathon time.



## ANNE IDSAL AUSTIN

Founder and Attorney | [Austin Legal & Public Affairs](#)

Founder of Austin Legal & Public Affairs, Anne has served in the highest ranks of state and federal government, where she has shaped environmental and energy policy at the most senior levels of public administration.

Focused on state and federal strategic counseling and policy, Anne helps clients navigate the dynamic regulatory and legal waters in an era of energy expansion and transition. She concentrates on the legal and policy shifts challenging clients where finding pragmatic, farsighted solutions to complex regulatory problems is essential to their business imperatives and continued growth.

She is a strategic advisor to manufacturing and industrial companies, regulated entities including oil, gas and utilities, renewable energy firms, and emerging growth companies bringing innovative technologies to market.

Whether securing positive outcomes from regulators or attracting investors, she partners with clients to solve complex environmental issues, ensuring they stay ahead of potential challenges while driving their businesses forward.

Anne served as the Principal Deputy Assistant Administrator for the U.S. Environmental Protection Agency's Office of Air & Radiation (OAR), where she had primary oversight over U.S. clean air policy and regulation.

Before taking the helm at OAR, Anne served as the EPA Regional Administrator for Region 6, overseeing all federal environmental programs in Texas, Louisiana, New Mexico, Oklahoma and Arkansas.

Prior to joining the EPA, Anne held important roles in the Texas state government, shaping environmental and energy policy at the highest levels. She was the Chief Clerk and Deputy Land Commissioner for the Texas General Land Office (GLO), a position to which she was promoted after serving as the agency's general counsel. Before joining the GLO, Anne was the general counsel for the Texas Commission on Environmental Quality, Texas' state environmental regulator.

Prior to founding her own firm, Anne was an environmental partner with an AmLaw 100 firm, where she represented regulated clients to position them for success before state and federal regulatory agencies.

Anne also serves as a senior advisor in Burke Law Group's Environmental, Health & Safety Group.



## SCOTT MASON

[Region 6 Administrator](#) | [Environmental Protection Agency](#)

W. Scott Mason IV is the 14th regional administrator of the U.S. Environmental Protection Agency's South Central Region. This is Mason's second appointment to EPA, having served as the Director of the EPA's American Indian Environmental Office during President Trump's first administration. He and his staff were charged with the protection of human health and the environment in Indian country, which includes all 574 federally recognized tribes and Alaska Native Villages. Additionally, he was a member of The White House Council on Native American Affairs, where he served as co-chair of the Council's Committee on Infrastructure.

Most recently, Mason was the Deputy Secretary of Energy of Oklahoma. He has over 20 years of experience serving at the local, state and federal levels of government in various capacities, including serving as a vice president and the executive director of federal programs at The University of Oklahoma (OU) and on the staff of Oklahoma Governor Mary Fallin.

Mason is a Citizen of the Cherokee Nation and a 5th generation Oklahoman, from Cordell. He earned his Bachelor's and Master's Degrees from The University of Oklahoma.



## JOHN THOMPSON

[Technology and Markets Director](#) | [Clean Air Task Force](#)

John Thompson promotes new technology and policy solutions to address climate change that emphasize carbon capture, utilization, and storage (CCUS).

His current work focuses on policy design to overcome barriers facing carbon capture and sequestration. These include policies to develop new transformational carbon capture technologies and overcoming economic and infrastructure barriers that limit the application of CCUS in industry, power, and zero-carbon fuels markets.

John's past work includes facilitating technology transfer between U.S. and Chinese companies, using economic models to determine the impact of potential federal policies on CCUS deployment, and advocating federal regulatory policies that limit carbon dioxide emissions.

John is a frequent presenter on carbon capture and sequestration at conferences in the United States, China, and Europe. Since 2012, he has served on the National Coal Council, an advisory body to the Secretary of the Department of Energy.

John holds a B. S. in chemical engineering from the University of Illinois, Champaign-Urbana, as well as an M.B.A. from Olin School of Business at Washington University in Saint Louis.



## RICH MOSKOWITZ

[General Counsel](#) | [American Fuel & Petrochemical Manufacturers](#)

Rich Moskowitz serves as AFPM's General Counsel. He has practiced environmental, regulatory and corporate law for more than 25 years. Moskowitz oversees all AFPM legal matters, supports AFPM's Legal Committee and supervises AFPM's broad litigation docket.

Before joining AFPM, Moskowitz served for eleven years as Vice President and Regulatory Affairs Counsel to the American Trucking Associations. He has over twenty years of trade association experience managing litigation, association governance, regulatory affairs, employment, antitrust, intellectual property and contractual issues. He also practiced environmental law at Beveridge & Diamond, P.C., and was Vice President and General Counsel at the Wellesley Group, Inc., and General Counsel of the Environmental Industry Associations and Executive Director of its Medical Waste Institute.

Moskowitz is the past Chairman of the Consumer Energy Alliance and has served on the Board of Directors of the Coalition on the Safe Transportation of Hazardous Articles and the Dangerous Goods Advisory Council.

Moskowitz received his J.D with honors in 1989, from The George Washington University Law School, and a B.A. in 1986 with honors in Economics from Brandeis University. He holds Bar admissions in the District of Columbia and New York.

# Baker Botts Speaker Bios

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**JULIE A. CRESS**

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Julie Cress is a seasoned environmental lawyer with California regulatory experience having spent time working for the Bay Area Air Quality Management District and the California Air Resources Board as well as on the private side managing environmental, health, and safety programs. Julie has over 15 years of experience in California and federal environmental laws with a primary focus on air quality and climate change, assisting clients on regulatory, rulemaking advocacy, incident response, and compliance and enforcement matters. She has represented companies in various sectors including traditional energy and energy transition, auto and auto parts manufacturers, retailers, distributors, and transportation companies.

While primarily focused on California's regulatory structure, including CARB rules such as the Low Carbon Fuel Standard, Cap-and-Trade Regulation, and mobile source regulations impacting transportation fleets, Julie also supports clients complying with federal fuels (traditional and Renewable Fuel Standard) and aftermarket defeat device programs. Julie also counsels clients on various emissions-based credit regimes including compliance and voluntary carbon markets with a specific emphasis on Low Carbon Fuel Standard credit generation opportunities such as CCS, RNG, and hydrogen, registration for compliance and credit trading in the Cap-and-Trade Program, and advising clients on emission credit transaction documents.



**BARBARA DE MARIGNY**

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Barbara focuses her practice on tax structuring for transactions, with a particular emphasis on the taxation of climate and clean energy initiatives, such as the section 45Q federal tax credit for carbon capture, use and

sequestration ("CCUS"), tax incentives for hydrogen energy such as new section 45V, alternative fuel vehicles and carbon pricing proposals. She is a frequent speaker and author on clean energy tax incentive topics, including the provision of comments and testimony to the IRS on the proposed section 45Q regulations and regularly advises clients on credit-maximizing structures. She also works extensively with federal income tax issues arising in partnership, joint venture and alternative investment structures, including the use of partnership structures for strategic acquisitions by corporate groups, in IPOs, securities offerings and for tax equity financing. Her practice has an energy industry concentration, including all aspects of the energy industry, upstream, midstream, and downstream, oil field services, petrochemicals and alternative energy.



## SCOTT ELLIOTT

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Scott Elliott advises a wide range of clients on environmental, health and safety issues. Scott routinely counsels clients in the chemical and energy industries on matters involving major industrial accidents, crisis response, process safety incidents and workplace fatalities. Scott counsels clients with regards to compliance obligations under the U.S. Environmental Protection Agency (EPA)'s Risk Management Program (RMP) regulations issued under the Clean Air Act (CAA), and Process Safety Management (PSM) program regulations by the Occupational Safety & Health Administration (OSHA). He routinely counsels clients on conducting internal investigations. Additionally, Scott also advises clients on enforcement matters involving the Bureau of Safety and Environmental Enforcement (BSEE).

Scott has helped clients respond to investigations by OSHA, the EPA, the Chemical Safety Board (CSB), the Department of Justice (DOJ), the BSEE and state regulatory agencies.



## GEORGE FIBBE

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Drawing on his broad experience in private practice, as a general counsel, and in government service, George Fibbe represents clients in complex commercial disputes and regulatory matters. Mr. Fibbe's practice focuses on high-stakes matters across the energy sector, including upstream and midstream oil and gas, LNG, renewables, nuclear, and the power industry.

Before joining Baker Botts, Mr. Fibbe served as Deputy General Counsel for Litigation, Regulation & Enforcement for the U.S. Department of Energy, where he oversaw a wide range of legal matters arising from the Department's missions of advancing energy security, promoting scientific innovation, ensuring security and environmental cleanup of the nation's nuclear weapons complex, and other energy-related operations. In that role, he worked closely with the Department of Justice, the Office of Management & Budget's Office of Information and Regulatory Affairs (OIRA), and other federal agencies.

At DOE, Mr. Fibbe was responsible for the Department's large-scale complex litigation and pre-litigation matters, including major environmental and nuclear waste related matters, regulatory and administrative claims, contractor disputes, intellectual property and other commercial contracts, employment and whistleblower disputes, and land acquisition.

Mr. Fibbe also was lead counsel for departmental rulemakings and related regulatory and administrative matters, including serving as chair of the Department's deregulatory task force. He was responsible for all civil enforcement matters of the Department and headed the team dedicated to enforcement of energy efficiency standards for manufacturers.



## BEN GONSOULIN

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Ben Gonsoulin is a trial attorney in the firm's Houston office. Ben represents clients in high-stakes, complex litigation and focuses his practice on energy, environmental, mass action, and real estate matters.



Ben has worked with a broad range of clients in the energy, chemical, power, and real estate industries in disputes involving industrial accidents and crises, environmental contamination claims, toxic tort claims, contractual claims, fraud claims, and significant personal injury, property damage, and wrongful death claims. Ben has practiced in venues across the country, representing clients in federal and state court and in arbitration proceedings. He routinely advises clients in all stages of litigation, guiding them through pre-litigation claim assessment and analysis, strategically navigating pre-trial discovery and motion practice, and advocating for his clients at trial and on appeal.



### J. SCOTT JANOE

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Mr. Janoe is "recognized for his oil and gas practice, advising clients on regulatory compliance matters as well as litigation, enforcement defense and crisis management cases. One interviewee highlights his '*very practical and solid advice*'"

*Chambers USA 2019*

Scott Janoe is the firmwide chair of Baker Botts' Environmental, Safety & Incident Response Section. He advises energy, mining, and manufacturing clients on environmental, health, safety, and transportation matters. Mr. Janoe's clients turn to him for the full suite of environmental issues ranging from permitting and compliance counseling to litigation, enforcement defense, bankruptcy matters, and crisis management. Mr. Janoe has assisted energy clients on environmental matters from California to New Jersey, North Dakota to offshore Gulf of Mexico and many points in between.



### MATTHEW L. KURLA

Section Chair - Environmental Safety & Incident Response (Houston) | Houston

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Matt Kuryla has enjoyed over 25 years of environmental law practice, building agency relationships of trust, exercising sound judgment and

supplying creative energy to his clients most challenging environmental issues.

Mr. Kuryla has helped his clients be strategic in pursuing their objectives in several high-profile environmental rulemakings, enforcement initiatives, transactions and permit proceedings. He conducts multi-client litigation and rulemaking through the Texas Industry Project (TIP), the BCCA Appeal Group (BCCA), the Texas MSS Working Group and the 8-Hour Ozone Coalition. Through client groups, Mr. Kuryla applies innovative legal and technical strategies to expand the options for new regulatory initiatives. He applies the same approach to agency enforcement proceedings and citizen suits, utilizing all relevant scientific, policy and legal tools to advance the client's goals. He counsels clients in environmental crises, including criminal investigations, explosions and releases, helping clients build and strengthen agency relationships of trust while managing the challenges of a corporate crisis.



## KENT MAYO

Partner | Washington

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Kent Mayo handles a wide variety of environmental matters, with a focus on environmental litigation and enforcement defense and strategic regulatory compliance. He represents clients in toxic tort and class action litigation arising from environmental issues. His litigation work also includes serving as lead counsel in multiple enforcement actions brought by the United States, states and citizen groups under the Clean Air Act and other statutory programs.

In the regulatory sphere, Kent counsels clients on rulemakings and regulatory compliance and works with clients to develop broad strategies for working with regulators. He assists clients in compliance investigations and audits addressing multiple statutory schemes, including the Clean Air Act, RCRA (coal ash) and the SDWA. Kent also works with clients to prepare for and respond to environmental crisis events, including working with responders and regulators such as EPA, Chemical Safety Board and state agencies to protect the client's interests.

Kent previously worked as a trial lawyer in the Environmental Enforcement Section of the U.S. Department of Justice, where he led teams in complex

environmental litigation, settlement negotiations and mediations across a broad range of civil environmental actions, including cases involving Clean Water Act and Clean Air Act violations and cases arising under CERCLA's remedial, cost recovery and natural resource damages provisions.



## STEPHANIE BERGERON PERDUE

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Stephanie Bergeron Perdue brings two decades of agency experience to her practice from her time spent with the Texas Commission on Environmental Quality (TCEQ), where she served in various capacities including Deputy Executive Director. During her time with the agency, she worked on a wide range of issues including National Ambient Air Quality Standards (NAAQS)/State Implementation Plan (SIP) development, NSR Air Permitting, TPDES water quality permitting, water rights and RCRA hazardous waste issues. She worked extensively with internal agency emergency response staff, as well as the Office of the Attorney General on responses to natural disasters, such as Hurricane Harvey. She also had an active role in the agency's 2001 and 2011 Sunset Review process and implementation. Stephanie interacted with Environmental Protection Agency Region 6 staff throughout her tenure on federal programmatic issues, including TPDES, RCRA and NSR.

More recently in her current practice, Stephanie's work has ranged from contested case hearing affected person analysis to public information requests briefings. She has also been actively involved on environmental justice developments. Stephanie has been extensively engaged in TCEQ-enforcement related regulatory developments as well as represented clients in the favorable resolution of administrative enforcement matters. She is also tracking the current Sunset Review of the TCEQ, which includes Sunset staff recommendations to address affected person analyses. Stephanie continues to maintain positive working relationships with both state and federal government counterparts.



## SHAI SAHAY

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Shailesh Sahay is one of the nation's leading thinkers on energy transition and environmental issues, with experience advising clients in the liquid fuels, climate tech, energy, manufacturing, and agricultural sectors, and beyond. His years of experience as an in-house regulatory and policy lawyer allow him to deeply understand client positions and represent them in front of federal, state, and international agencies at the highest levels. He has built robust coalitions across industrial sectors to pursue common interests. And his scientific background and technical acumen allow him to delve into complex issues and serve as an interface between how industry works and the policies that affect businesses.

Prior to returning to private practice, Shai spent six years serving as in-house counsel at the largest biofuels producer in the world, including a year serving as acting General Counsel of the largest biofuels trade association. As a result, Shai has been involved in nearly every major regulatory and policy issue affecting the biofuels sector for the last decade. His experience, though, spans well beyond biofuels. For example, he has been representing a number of clients developing climate solutions in response to regulatory, tax, and voluntary market incentives in the energy transition, including in the carbon capture and e-fuels sectors. Shai also maintains a robust environmental counseling practice across multiple media, and has engaged in compliance advising, enforcement defense, and regulatory advocacy relating to the Clean Air Act, Toxic Substances Control Act, Clean Water Act, Safe Drinking Water Act, and other statutes. Due to the breadth of his experience, Shai is well positioned to serve as a go-to regulatory compliance and policy advisor to a broad range of industries.



## MARTHA S. THOMSEN

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Martha Thomsen is an experienced environmental litigator and advisor who helps clients navigate complex litigation and evolving regulations.

**Environmental Litigation Work**

Martha has particular experience in highly technical suits involving waste and water issues, including claims arising under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and the Resource Conservation and Recovery Act (RCRA). As part of her litigation and CERCLA work, Martha engages with experts and consultants on cost, allocation, and remediation issues.

### **Regulatory Compliance and Engagement with State and Federal Agencies**

Martha also helps clients navigate compliance with evolving state and federal environmental laws and represents clients before environmental agencies. As part of this work, Martha engages directly with state and federal agencies to advocate on behalf of clients, clarify agency positions, and engage in formal and informal dispute resolution.

This work spans a variety of environmental statutes, including CERCLA and RCRA as well as the Clean Water Act (CWA), wildlife, and state laws. She also works with clients on renewable and clean energy projects.

Particular areas of experience include coal combustion residuals (CCR) liability and regulatory issues, PFAS, and as well as renewable and clean energy projects. With respect to CCR work, Martha helps power companies navigate a constantly shifting regulatory landscape through counseling, risk management, advising on prospective regulation, and agency engagement.



### **PAULINA WILLIAMS**

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Paulina Williams advises clients across industrial and commercial sectors on complex environmental matters. Paulina's experience spans water quality, water rights, waste, air, and natural resources issues. She has worked extensively on environmental permitting, including contested case hearings, cross-agency consultations, and permit defense in state and federal court actions. She advises clients on environmental compliance, including guiding clients under the Texas Environmental, Health, and Safety Audit Privilege Act and helping with enforcement actions. In addition, Paulina litigates environmental claims and provides transactional support in deals involving significant environmental permits, liabilities, or risks.



## JEFFREY H. WOOD

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Drawing from two decades of experience in senior government, in-house corporate, and private law firm roles, Jeff Wood helps clients with federal enforcement, compliance, litigation, permitting, and policy challenges primarily in the energy and environmental fields.

Prior to joining Baker Botts, Mr. Wood served for almost two years as the Acting Assistant Attorney General (AAG) for the Justice Department's Environment and Natural Resources Division (ENRD). In that capacity, Mr. Wood led ENRD and its more than 600 attorneys and staff representing EPA, Departments of the Interior, Energy, and Defense, and other agencies in civil and criminal enforcement and defensive environmental, energy, and natural resources litigation.



## J. MARK LITTLE

[Special Counsel | Houston](#)

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Mark Little represents clients in a broad range of appeals and original proceedings in federal and state courts across the country. He has argued a number of cases in courts ranging from the United States Court of Appeals for the Fifth Circuit to the Texas and Washington Supreme Courts. He also works with trial counsel to formulate pre-trial strategies, write dispositive motions, prepare jury charges, and preserve error at trial.



## JOSHUA LEE

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Joshua Lee represents clients in all aspects of environmental law, including litigation, regulatory counseling and advocacy, and corporate matters. He rejoins the firm after serving as a law clerk to the Honorable Gonzalo P. Curiel of the United States District Court for the Southern District of California, and

the Honorable A. Marvin Quattlebaum Jr. of the United States Court of Appeals for the Fourth Circuit.

Joshua's legal analysis and attention to detail has led to favorable outcomes for a broad range of clients, such as public utilities and chemical companies. His work spans a variety of legal issues, including the Clean Air Act, Endangered Species Act, toxic tort class action lawsuits, and various state and local environmental laws.



### JEFFREY S. WETTENGEL

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Jeffrey Wettengel is a senior associate in the firm's Environmental, Safety and Incident Response ("ESIR") group. His practice focuses on complex litigation arising under federal environmental laws, which often involves navigating highly technical issues and engaging with experts and consultants on a variety of related matters.

Jeff also has experience defending against putative class action lawsuits, representing parties in multi-district litigation, and performing environmental due diligence for transactions involving real estate.



### LINN BUMPERS

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Linn Bumpers' practice in the firm's Environmental, Safety and Incident Response group focuses on litigation, regulatory, and compliance matters at the federal and state levels. Her experience includes addressing air quality, water quality, enforcement, environmental justice, and emerging contaminants - including per- and polyfluoroalkyl substances (PFAS). She advises individual clients and industry coalitions on federal rulemaking proceedings and agency decision-making. Linn also works on renewable and low-carbon energy development, with a focus on carbon offsets generation.



## BEAU CARTER

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Beau represents clients in high-stakes appeals in Texas and across the country, most often in the Fifth Circuit and Supreme Court of Texas. His practice also focuses on challenges to federal agency rulemakings in federal courts of appeals nationwide. He has developed skilled experience in seeking extraordinary relief from appellate courts in emergency situations. Beyond representing parties to the case, Beau has authored numerous amicus briefs in state and federal appellate courts, including in the Supreme Court of the United States and the Supreme Court of Texas.

Before joining Baker Botts, Beau served as a law clerk to the Honorable Jennifer Walker Elrod of the United States Court of Appeals for the Fifth Circuit and to the Honorable Jeffrey S. Boyd of the Supreme Court of Texas. Between those clerkships, he served as a Gregory S. Coleman Fellow in the Office of the Solicitor General of Texas.



## TERESA JONES

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Teresa Jones' practice consists of a wide range of critical environmental issues, including compliance, safety, incident response, litigation, and high-stakes transactional matters. She has experience advising clients on regulatory enforcement actions initiated by state and federal agencies, conducting internal investigations, and general environmental counseling. Teresa also provides guidance in complex transactions, assisting corporate clients with environmental due diligence and advising on litigation and regulatory risks associated with environmental assets.

With nearly a decade of experience across government and the non-profit sectors, Teresa brings a well-rounded perspective to her practice. She has held diverse roles at the White House, U.S. Senate, House of Representatives, the Environmental Protection Agency ("EPA"), and within municipal government.

While in law school, Teresa externed at the EPA's Office of General Counsel and was recognized as a Business Law Fellow and a Thad Cochran Scholar.





## ARIEL A. JUNE

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Ariel June advises clients on a range of critical environmental and safety issues. Her experience includes incident response and regulatory compliance counseling.

Ariel earned her J.D. from Georgetown University Law Center in 2024. At Georgetown, she served as an Executive Online Editor of the Georgetown Law Journal, Vice President of the Black Law Students Association, and a Student Attorney in the Criminal Justice Clinic. Also, she interned with the National Labor Relations Board in the Division of Judges where she assisted NLRB judges with their opinions in a variety of employment law cases.



## COLE LEMPKE

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Cole Lempke works on a range of environmental issues at the state and federal level, including regulatory counseling, permitting, and litigation. His experience includes air quality, water quality, groundwater, waste, and endangered species issues.



## SCOTT NOVAK

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Scott Novak advises clients on litigation, regulatory advocacy, and compliance matters, focusing on climate and sustainability issues in particular. He has prepared dozens of comments on a wide array of environmental rulemakings and utility commission proceedings. Mr. Novak also has first chair litigation experience in both federal and state court.

Prior to joining Baker Botts, Mr. Novak worked as a Fellow at the Georgetown Climate Center to assist states in developing the Transportation and Climate Initiative Program, a regional cap-and-invest policy for on-road transportation fuels



## RICARDO PAGULAYAN

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Ricardo Pagulayan is an associate in Baker Botts' Environmental, Safety and Incident Response group and sits in the firm's Washington, D.C. office. Ricardo's practice focuses on environmental litigation and regulatory compliance.

During law school, Ricardo interned at the main regional office for U.S. EPA Region II in New York, where he worked on various matters involving emerging chemicals and solid waste. Ricardo also served as an executive editor on the *Columbia Journal of Environmental Law* and was selected to be among the first cohort of students to staff the Columbia Environmental and Climate Justice Clinic.



## DAY ROBINS

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As an associate in the firm's San Francisco Environmental, Safety and Incident Response group, Day focuses her practice on regulatory advocacy and litigation for clients facing complex environmental challenges.

During law school, Day served as a judicial extern for U.S. District Judge Tanya S. Chutkan and for U.S. Magistrate Judge Robert M. Illman. Day earned her Bachelor of Arts degree in Political Science in 2017. Prior to law school, Day worked as a structured products analyst in New York, and translated cases for Spanish-only U-Visa clients.

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