



FEDERAL REGULATORY UPDATE

John B. King
Breazeale, Sachse & Wilson, LLP
Baton Rouge, Louisiana

FEDERAL REGULATORY UPDATE

Air

- Oil and Gas NSPS
- Risk Management Program
- Climate
- Policies

Water

- WOTUS
- Section 401 – WQC
- Proposed Spill Rule

Waste

Environmental Justice

Compliance and Enforcement

Questions and Comments

Oil and Gas NSPS

- The 2012 NSPS Rule
 - 77 FR. 49490 (Aug. 16, 2012)
 - 40 CFR 60, Subpart OOOO
 - New facilities as of Aug. 23, 2011
 - Targets VOCs
 - RECs or 'green completions'
 - Storage tanks
 - Equipment leaks
- The 2016 NSPS Rule
 - 81 FR 35824 (June 3, 2016)
 - 40 CFR 60, Subpart OOOOa
 - New facilities as of Sep. 18, 2015
 - Targets methane and VOCs
 - Subpart OOOO applies between Aug. 23, 2011 and Sept. 18, 2015
 - Owners/operators to find and repair leaks
 - Next Generation Enforcement, such as optical gas imaging
 - General duty added at 40 CFR 60.5370a(b) and to Subpart oooo

Sources covered by the 2012 New Source Performance Standards (NSPS) for VOCs and the 2016 NSPS for Methane and VOCs, by site				
Location and Equipment/Process Covered	Required to Reduce Emissions Under EPA Rules	Rules that Apply		
		2012 NSPS for VOCs*	2016 NSPS for methane	2016 NSPS for VOCs
Natural Gas Well Sites				
Completions of hydraulically fractured wells	✓	•	•	
Compressors				
Equipment leaks	✓		•	•
Pneumatic controllers	✓	•	•	
Pneumatic pumps	✓		•	•
Storage tanks	✓	•		
Oil Well Sites				
Completions of hydraulically fractured wells	✓		•	•
Compressors				
Equipment leaks	✓		•	•
Pneumatic controllers	✓	•	•	
Pneumatic pumps	✓		•	•
Storage tanks	✓	•		
Production Gathering and Boosting Stations				
Compressors	✓	•	•	
Equipment leaks	✓		•	•
Pneumatic controllers	✓	•	•	
Pneumatic pumps				
Storage tanks	✓	•		
Natural Gas Processing Plants*				
Compressors	✓	•	•	
Equipment leaks	✓	•	•	
Pneumatic controllers	✓	•	•	
Pneumatic pumps	✓		•	•
Storage tanks	✓	•		
Natural Gas Compressor Stations (Transmission & Storage)				
Compressors	✓		•	•
Equipment leaks	✓		•	•
Pneumatic controllers	✓		•	•
Pneumatic pumps				
Storage tanks	✓	•		
* Note: Types of sources already subject to the 2012 NSPS requirements for VOC reductions that also are covered by the 2016 methane requirements will not have to install additional controls, because the controls to reduce VOCs reduce both pollutants				

Oil and Gas NSPS

Trump Administration

- Attempts to stay, delay, and revise the 2016 Oil and Gas NSPS Rule
Otherwise, Oil and Gas NSPS went into effect
- Policy Rule - 85 Fed. Reg. 57018 (Sep. 14, 2020)
 - Removed the transmission / storage segment from regulation under the NSPS
 - Rescinded methane emissions limits for sources in the production / processing segments
- Technical Rule - 85 Fed. Reg. 57398 (Sep. 15, 2020)
 - Fugitive emission monitoring requirements for well sites/compressor stations
 - Low production: Every other year v. annual
 - Non-low production: Annual v. semi-annual and annual
 - Compressor stations: Semi-annual and annual v. initial and quarterly
 - Certification for technical infeasibility for pumps and closed-vent design
 - PE and in-house engineer with expertise in design/operation of pumps/CVS
 - Expands the technical infeasibility provision to greenfield sites for the pneumatic pump requirements
 - Eliminates distinction between greenfield and non-greenfield sites
 - Alternative means of emission limitation may include existing state programs

Oil and Gas NSPS

Biden Administration

- EO 13990 (Jan. 20, 2021)
 - Required all federal agencies to review all rules issued under Trump Administration
 - Required EPA to consider suspending Trump-era Oil and Gas NSPS
- Congressional Review Act
 - Passed legislation disapproving the Policy Rule
 - Signed by President Biden on June 30, 2021
 - Treated as though the rule “has never taken effect,” 5 USC 801(f)(2)
 - Repealed/revised provisions of 2012 / 2016 Oil & Gas NSPS came back into effect
- Proposal to revise Oil & Gas NSPS - 86 Fed. Reg. 63110 (November 15, 2021)
 - No proposed regulatory text - EPA will issue a supplemental proposal in 2022
 - Would apply to existing sources
 - Add Subpart OOOOb – update requirements for new sources (after 11/15/21)
 - Add Subpart OOOOc - emission guidelines for states as to methane from this source category
 - Sought comments on ...
 - Finding and repair leaks (fugitive emissions) using advanced technologies / Method 21
 - Zero emissions from new and existing pneumatic controllers
 - Eliminate venting of gas from oilwells and require capture / sale
 - Storage tanks to reduce VOC and methane emissions
- Comment period extended until January 31, 2022

Oil and Gas NSPS

**Oil and Natural Gas Sources Covered by EPA's
Proposed New Source Performance Standards (NSPS) and Emissions Guidelines, by Site**

Location and Equipment or Process Covered	Required to <u>or Would Be</u> Required to Reduce Emissions under EPA Rules (if finalized as proposed)	Rules that Apply			
		2012 NSPS for VOCs (0000)	2016 NSPS for Methane & VOCs (0000a)	2021 Proposed NSPS for Methane & VOCs (0000b)	2021 Proposed Emissions Guidelines for Methane (0000c)
Oil and Natural Gas Well Sites					
Completions of hydraulically fractured wells	✓	●	●	●	
Compressors at centralized tank batteries	✓			●	●
Fugitive emissions	✓		●	●	●
Liquids unloading	✓			●	
Pneumatic controllers	✓	●	●	●	●
Pneumatic pumps	✓		●	●	●
Storage vessels	✓	●	● ²	●	●
Sweetening units	✓	● ¹	● ¹	● ¹	● ¹
Associated gas from oil wells	✓			●	●
Natural Gas Gathering and Boosting Compressor Stations					
Compressors	✓	●	●	●	●
Fugitive emissions	✓		●	●	●
Pneumatic controllers	✓	●	●	●	●
Pneumatic pumps	✓			●	●
Storage vessels	✓	●	● ²	●	●
Sweetening units	✓	● ¹	● ¹	● ¹	● ¹
Natural Gas Processing Segment					
Compressors	✓	●	●	●	●
Fugitive emissions	✓	●		●	●
Pneumatic controllers	✓	●	●	●	●
Pneumatic pumps	✓		●	●	●
Storage vessels	✓	●	● ²	●	●
Sweetening units	✓	● ¹	● ¹	● ¹	● ¹
Transmission and Storage Segment					
Compressors	✓		●	●	●
Fugitive emissions	✓		●	●	●
Pneumatic controllers	✓		●	●	●
Pneumatic pumps	✓			●	●
Storage vessels	✓	●	● ²	●	●

¹ Covered for SO₂ only

² Covered for VOCs only

Oil and Gas NSPS

TABLE 4—PROJECTED EMISSIONS REDUCTIONS UNDER THE PROPOSED RULE, 2023–2035 TOTAL

Pollutant	Emissions reductions (2023–2035 total)
Methane (million short tons) ^a	41
VOC (million short tons)	12
Hazardous Air Pollutant (million short tons)	0.48
Methane (million metric tons CO ₂ Eq.) ^b	920

^a To convert from short tons to metric tons, multiply the short tons by 0.907. Alternatively, to convert metric tons to short tons, multiply metric tons by 1.102.

^b CO₂ Eq. calculated using a global warming potential of 25.

TABLE 5—BENEFITS, COSTS, NET BENEFITS, AND EMISSIONS REDUCTIONS OF THE PROPOSED RULE, 2023 THROUGH 2035

[Dollar Estimates in Millions of 2019 Dollars] ^a

	3 percent discount rate		7 percent discount rate	
	Present value	Equivalent annual value	Present value	Equivalent annual value
Climate Benefits ^b	\$55,000	\$5,200
Net Compliance Costs	7,200	680	6,300	760
<i>Compliance Costs</i>	13,000	1,200	10,000	1,200
<i>Product Recovery</i>	5,500	520	3,900	470
Net Benefits	48,000	4,500	49,000	4,500
Non-Monetized Benefits	Climate and ozone health benefits from reducing 41 million short tons of methane from 2023 to 2035. PM _{2.5} and ozone health benefits from reducing 12 million short tons of VOC from 2023 to 2035 ^c . HAP benefits from reducing 480 thousand short tons of HAP from 2023 to 2035. Visibility benefits. Reduced vegetation effects.			

Risk Management Program

- 82 Fed. Reg. 4594 (January 13, 2017)

- Initiated under EO 13650, issued by President Obama, after West Fertilizer explosion/fire
EO required agencies to improve risk management practices

- Major Changes

- Root cause analysis for 'catastrophic release' or a 'near-miss'
 - Creates uniform definition of 'catastrophic release'
 - No definition of 'near-miss' ("could reasonably have resulted in a catastrophic release")

- Independent third-party to perform compliance audit after a reportable release
 - Standards for third-party qualifications, certifications, findings, response to findings

- Adds Safer Technology and Alternatives Analysis (STAA) to PHA
 - Applies to paper, petroleum and coal, and chemical manufacturing

- Require additional coordination with local emergency response agencies
 - Annual notification exercise, annual tabletop exercise, and field exercises every 5 years

- Increase public availability of information
 - Provide information, upon request, to LEPC
 - Provide information to the public, via web-site or similar means
 - Hold public meeting after a reportable accident

- Originally effective March 14, 2017, but multiple attempts to delay

- Effective date delayed until March 21, 2017 under Priebus Memorandum

- Effective date delayed until June 19, 2017, 82 Fed. Reg. 13968 (March 16, 2017)

- Effective date delayed until February 19, 2019, 82 Fed. Reg. 27133 (June 14, 2017)

- Vacated by D.C. Circuit on August 17, 2018

- Effective on December 3, 2018 due to court decision, 83 Fed. Reg. 62268 (Dec. 3, 2018)

Risk Management Program

RMP Reconsideration Rule, 84 Fed. Reg. 69834 (Dec. 19, 2019)

-Rescinds

Independent third-party to perform compliance audit after a reportable release
Safer Technology and Alternatives Analysis (STAA) to PHA
Root cause analysis for a reportable release or a 'near-miss'
Providing information to the public upon request and/or on web-site

-Modifies

Provisions regarding providing certain information to local emergency response
Modified to information necessary for developing local plan
Frequency for field exercises to a more flexible schedule
Modified to require consultation with local official to establish frequency
Requirement to hold public meeting after incident
Modified to only for incident with off-site impacts

-Savings

\$87M per year in total annual cost savings (averted costs)

Risk Management Program

What	Due Date
Public Meetings	Within 90 days of any qualifying accident that occurs after March 15, 2021
Develop Emergency Response Programs	Within three years of owner or operator determining that facility is subject to the provisions
Develop exercise plans and schedules	December 2023
Conduct first notification drill	December 2024
Conduct first tabletop exercise	December 2026
Conduct first field exercise	According to the exercise schedule established by the owner or operator in coordination with local response agencies
Submit RMP with new information elements	The owner or operator would provide new information elements with any initial RMP or RMP resubmission made after December 2024.
Comply with new emergency coordination requirements	Already in effect as of September 21, 2018
Comply with remaining minor accident prevention provisions	Already in effect as of September 21, 2018

Risk Management Program

- EO 13990 (Jan. 20, 2021)
- Required all federal agencies to review all rules issued under Trump Administration
- EPA currently plans to prepare a notice of proposed rulemaking (NPRM)

Timetable:

Action	Date
NPRM	09/00/2022
Final Rule	08/00/2023

Source: from EPA Rule List – Fall 2021

- GAO Report, February 2022
 - Climate change may exacerbate natural hazards (flooding, storm surge, wildfires, sea level rise) which could potentially lead to accidental releases of hazardous chemicals
 - 3,200 facilities are located in areas where natural hazards may be impacted by climate change
 - EPA should ensure that facilities are managing risks from natural hazards / climate change
- EPA – Stated it will provide “maximum protection possible” and will make environmental justice a key focus

Climate

- Paris Agreement – rejoined on Day 1

Paris Climate Agreement

JANUARY 20, 2021 • STATEMENTS AND RELEASES

I, Joseph R. Biden Jr., President of the United States of America, having seen and considered the Paris Agreement, done at Paris on December 12, 2015, do hereby accept the said Agreement and every article and clause thereof on behalf of the United States of America.

- Executive Order 13990, January 20, 2021
 - Revoked the permit for Keystone XL Pipeline
 - Re-established use of the Social Cost of Carbon and the Interagency Working Group (IWG)
- Executive Order 14008, January 27, 2021
 - A “whole-of-government” approach
 - Paused new oil and gas leased on public lands / offshore waters
- Announced climate goals:
 - Reducing greenhouse gas pollution from 2005 levels by 50-52% in 2030 as part of the U.S. Nationally Determined Contribution (NDC) under Paris Agreement
 - Creating a carbon pollution-free power sector by 2035
 - Reaching net-zero emissions economy-wide by no later than 2050

Climate

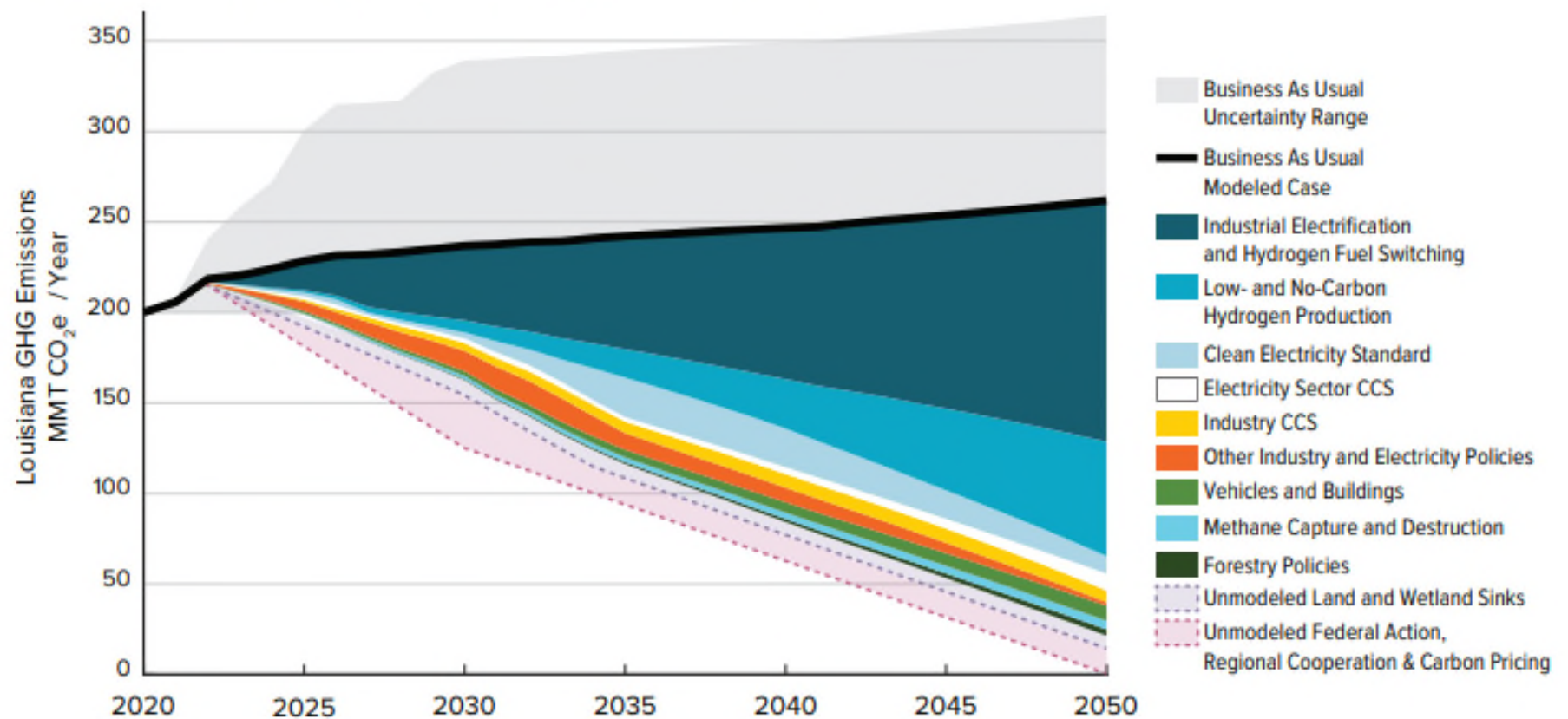
State of Louisiana, et al v. Biden, No. 2:21-cv-01074, U.S. Dist. Court, Western Dist. of Louisiana

- Complaint sought relief based on:
 - SCC estimates violate the procedural requirements of the APA as a substantive rule that did not undergo the requisite notice-and-comment process
 - President Biden, through EO 13990, lacks the authority to enforce the estimates as they are substantively unlawful under the APA
 - The Government Defendants acted beyond any congressional authority by basing regulatory policy upon global considerations
- Preliminary Injunction issued on Feb. 11, 2022 against multiple federal agencies, including EPA
 - Cannot adopt or rely on the IWG's work product
 - Cannot adopt or rely on the SSC
 - Cannot rely on EO 13990, Section 5
- According to OMB, injunction will impact numerous ongoing rule-makings / federal actions
 - DOE – 21 rule-makings
 - EPA – 5 rule-makings
 - DOI – 3 rule-makings and 27 NEPA-mandated analyses
 - DOT – 60 RODs/EIS

Climate

Climate Initiatives Task Force

LOUISIANA'S PATHWAY TO NET ZERO



Climate

Climate Initiatives Task Force



Clean Energy Transition

- 1:** Shift towards a clean, renewable, and resilient power grid.
- 2:** Increase access to and deployment of distributed energy resources.



Industrial Decarbonization

- 3:** Monitor, inventory, certify, and support industrial decarbonization.
- 4:** Improve efficiencies in and modernization of industrial processes and facilities.
- 5:** Accelerate industrial electrification, switching to low- or no-carbon fuels and low- or no-carbon feedstocks.
- 6:** Promote reduced-carbon materials.



Actively Managed Methane Emissions

- 7:** Increase and mobilize resources for decommissioning legacy oil and gas infrastructure.
- 8:** Monitor and regulate methane emissions.



Transportation, Development, and the Built Environment

- 9:** Accelerate adoption and accessibility of low- and zero-emission vehicles and fuels.
- 10:** Reduce vehicle miles traveled and increase transportation efficiencies.
- 11:** Increase urban, rural, and regional public transit service.
- 12:** Coordinate land use planning to reduce sprawl and support healthy and resilient communities.
- 13:** Improve the efficiency and resilience of homes and non-residential buildings.

Climate

Climate Initiatives Task Force



Natural and Working Lands and Wetlands

- 14:** Preserve and expand natural lands and urban green spaces to maximize climate mitigation and adaptation goals.
- 15:** Restore and conserve Louisiana's coastal wetlands to maximize climate mitigation and adaptation goals.
- 16:** Support the sustainable management and conservation of working agricultural and forestry lands.



An Inclusive, Low-Carbon Economy

- 17:** Build a more inclusive and resilient economy for all Louisiana residents.
- 18:** Strengthen climate education, research, and innovation as a focus of Louisiana's energy transition.
- 19:** Prioritize Louisiana workers and businesses in the transition to a low-carbon economy.



Collaboration and Partnership to Ensure Successful Implementation

- 20:** Ensure Louisiana is prepared to maximize potential federal funding opportunities.
- 21:** Position Louisiana as a climate leader by engaging in national and regional dialogues and planning.
- 22:** Align climate action approaches across state government.
- 23:** Coordinate action with local government.
- 24:** Call upon the private sector to align their practices and play a leading role in climate action.
- 25:** Improve engagement with and track progress on outcomes for disadvantaged communities and Indigenous peoples.



Accountability and Adaptability to Ensure Lasting Success

- 26:** Advance an equitable, efficient, and sustainable siting and permitting process for new energy and infrastructure projects.
- 27:** Ensure that Climate Action Plan strategies are effectively and transparently implemented.
- 28:** Track progress in reducing net GHG emissions reductions and adapt the approaches taken as needed.

Climate

Carbon Capture, Use, and Sequestration (CCUS)

- CEQ's CCUS Guidance, 87 Fed. Reg. 880, Feb. 16, 2022
 - US “will likely have to capture, transport, and permanently sequester significant quantities of” CO₂ to reach net zero
 - Federal government has an existing regulatory framework that is capable of safeguarding the environment, public health, and public safety as CCUS projects move forward
 - Provides guidance on ...
 - Facilitating Decision Making on CCUS Projects and Carbon Dioxide Pipelines
 - Public Engagement and Interdisciplinary Research
 - Understanding Environmental Impacts
 - Comment period until March 18, 2022
- Will extend comment period on request of NGOs and members of Congress
 - Common theme in requests to extend...
 - “Novelty” of CCUS
 - Should eliminate fossil fuels so no need for CCUS

Policies - Petitions for Objection Under Title V

- EPA may object to a proposed Title V permit
 - EPA has 45 days from receipt of proposed permit, 40 CFR 70.8(c)
 - Any person may petition EPA within 60 days of expiration of EPA's 45 days, 40 CFR 70.8(d)
 - EPA must object "if petitioner demonstrates ... that the permit is not in compliance with the requirements" of CAA , 42 USCA 7661d(b)(2)
 - Used by NGOs/EPA to 'override' state decisions and review prior preconstruction permit decisions
- *PacifiCorp Energy* Decision, Oct. 16, 2017 - EPA will limit its review to whether the Title V permit:
 - Has accurately incorporated "applicable requirements" and
 - Includes adequate monitoring, recordkeeping, and reporting requirements to assure compliance with the terms and conditions of the preconstruction permit
 - Will not review prior PSD Program decisions that are incorporated into a Title V permit (i.e., will not "second-guess")

Policies - Petitions for Objection Under Title V

- 85 Fed Reg 6431 (Feb. 5, 2020) (signed Jan. 14, 2020)
 - Must object if proposed permit is not in compliance with applicable requirements
 - Definition of AR in 70.2 was unchanged – includes any standard /requirement in implementation plan
- What are applicable requirements?
 - Sierra Club v EPA*, 964 F3d 882 (10th Cir. 2020)
 - Includes all items listed in Section 70.2, and all provisions under implementation plan which broadly requires compliance with CAA
 - “So all of the Act’s requirements constitute ‘applicable requirements’ under the regulation.”
 - Environmental Integrity Project v EPA*, 969 F3d 529 (5th Cir. 2020)
 - EPA’s view that Title V permitting process is not the vehicle for re-examining the substantive validity of prior PSD decisions is entitled to deference
 - PacificCorp’s Hunter Power Plant Petition, filed Jan. 14, 2022
 - Sierra Club filed petition seeking to have EPA review prior PSD decisions

Policies - Once In, Always In

- May 1995 Seitz Memorandum
 - First set out the OIAI Policy
 - Facilities that are major sources on first compliance date of MACT standard must comply permanently with standard
- Wehrum Memorandum, dated January 25, 2018
 - Supersedes the May 1995 Seitz Memorandum, which is withdrawn “effective immediately”
 - Must be withdrawn because “contrary to the plain language of the CAA”
 - OIAI Policy forces area sources to comply with major source requirements
 - Nothing in definition of ‘major source’ or ‘area source’ supports this result
 - Congress placed “no temporal limitations” on the determination of whether a source emits or has PTE
 - EPA had no authority to impose temporal limitation (ie, before the ‘first compliance date’)
- Major source can become an area source when it takes ...
 - An enforceable limit on its PTE HAP, and
 - Measures to bring HAP emissions below the applicable threshold, no matter when measures are taken
- Source will not be subject to major source requirements, including MACT, “so long as the source’s PTE remains below the applicable HAP emission thresholds”

Policies - Once In, Always In

- *California Communities Against Toxics v EPA*, 934 F.3d 627 (D.C. Cir. 2019)

- Petitioners claimed that the Wehrum Memorandum is a rule requiring notice and comment
- DC Circuit held that Wehrum Memorandum was not a final agency action under APA
- Not subject to judicial review

- Reclassification Rule, 85 Fed Reg 73854 (November 19, 2020)

- Amended 40 CFR 63.1 and added 63.1(c)(6)
- Codifies the Wehrum Memorandum
- A major source may become an area source at any time upon reducing its emissions of and potential to emit hazardous air pollutants to below the major source thresholds
 - Subject to major source requirements until reclassification becomes effective
 - Subject to all applicable area source requirements, including notification requirements
 - Reclassification does not absolve source of violations committed during major source status

- EO 13990 (Jan. 20, 2021)

- Required all federal agencies to review all rules issued under Trump Administration
- As per EPA Rule List – Fall 2021, EPA is to review the Reclassification Rule and publish for comment a notice of proposed rulemaking either suspending, revising, or rescinding the rule

Waters of the United States

- *US v. Riverside Bayview Homes*, 474 US 121 (1985)
 - Upheld jurisdiction of wetlands adjacent to traditional navigable waterways
 - Wetlands ‘actually abutted’ the TNW
 - The significant nexus between adjacent wetlands and TNW ‘informed their view’
 - Definition of ‘navigable waters’ as WOTUS shows intent to go beyond traditional definition of navigability-in-fact
- *Solid Waste Agency of Northern Cook County (SWANCC) v. Corps*, 531 US 159 (2001)
 - Jurisdiction of the Corps does not extend to ponds that are not adjacent to open water
 - Non-navigable, intrastate, isolated ponds are not ‘navigable waters’ merely because they serve as habitat for migratory birds
 - To rule otherwise would assume that "the use of the word navigable in the statute ... does not have any independent significance."
- *Rapanos v. US*, 547 US 715 (2006) – Plurality Opinion (Scalia) and Kennedy Concurrence
 - Scalia: WOTUS include only those relatively permanent, standing, or continuously flowing bodies of water, and adjacent means there must be a continuous surface connection such that there is no clear demarcation between waters and wetlands
 - Kennedy: Need a significant nexus to TNW

Waters of the United States

- The Clean Water Rule, 80 Fed. Reg. 37054 (June 29, 2015)
 - Provided expansive definition of ‘waters of the United States’
 - Challenged in numerous district / appellate courts
 - Led to a “patchwork” of regulation
 - 2015 Rule in effect in 22 states
 - Prior rule in effect in the other 28 states
- The Navigable Waters Protection Rule, 85 Fed. Reg. 22250 (April 21, 2020)
 - Patterned after Justice Scalia’s opinion in *Rapanos*
 - WOTUS “encompass relatively permanent flowing and standing waterbodies that are traditional navigable waters in their own right or that have a specific surface water connection to traditional navigable waters, as well as wetlands that abut or are otherwise inseparably bound up with such relatively permanent waters”
 - Four categories of jurisdictional waters
 - The territorial seas and traditional navigable waters
 - Tributaries of such waters
 - Certain lakes, ponds, and impoundments of jurisdictional waters
 - Wetlands adjacent to other jurisdictional waters (other than jurisdictional wetlands)
 - Challenged in numerous district / appellate courts

Waters of the United States

- Executive Order 13990, Jan. 20, 2021
 - Required review all rules issued under Trump Administration
- EPA/Corps announced intention to revise WOTUS definition (June 9, 2021)
 - Two rulemakings contemplated:
 - A foundational rule to restore longstanding protections (i.e., restore the regulations in place for decades until 2015)
 - Anticipated second rule that builds on that regulatory foundation
- NWPR remanded / vacated by federal district court in Arizona (Aug. 30, 2021)
 - Halted implementation of the NWPR nationwide
 - Interpreting WOTUS consistent with the pre-2015 regulations until further notice
 - Using Clean Water Act Jurisdiction Memo (Dec. 2, 2008)
 - Approved jurisdictional determinations
 - Will not be reopened if not associated with a permit action
 - Unless criteria for revision under Regulatory Guidance Letter 05-02 is met
 - Pending JDs – Will be completed under current interpretation
 - Permits and applications
 - Prior permits - Will not be reopened unless Section 325.7 criteria are met
 - Pending permit applications will be completed under current interpretation

Waters of the United States

Summary of Key Points

The agencies will assert jurisdiction over the following waters:

- Traditional navigable waters
- Wetlands adjacent to traditional navigable waters
- Non-navigable tributaries of traditional navigable waters that are relatively permanent where the tributaries typically flow year-round or have continuous flow at least seasonally (e.g., typically three months)
- Wetlands that directly abut such tributaries

The agencies will decide jurisdiction over the following waters based on a fact-specific analysis to determine whether they have a significant nexus with a traditional navigable water:

- Non-navigable tributaries that are not relatively permanent
- Wetlands adjacent to non-navigable tributaries that are not relatively permanent
- Wetlands adjacent to but that do not directly abut a relatively permanent non-navigable tributary

The agencies generally will not assert jurisdiction over the following features:

- Swales or erosional features (e.g., gullies, small washes characterized by low volume, infrequent, or short duration flow)
- Ditches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water

The agencies will apply the significant nexus standard as follows:

- A significant nexus analysis will assess the flow characteristics and functions of the tributary itself and the functions performed by all wetlands adjacent to the tributary to determine if they significantly affect the chemical, physical and biological integrity of downstream traditional navigable waters
- Significant nexus includes consideration of hydrologic and ecologic factors

Waters of the United States

- 86 Fed Reg. 69372, December 7, 2021 - Proposed rule
 - To restore “waters [as] defined by the longstanding 1986 regulations”
 - With amendments to reflect “interpretation of the statutory limits on the scope of” WOTUS as “informed by Supreme Court case law”
- WOTUS includes ...
 - Traditional navigable waters (TNW)
 - All interstate waters including interstate wetlands
 - All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds
 - All impoundments of waters otherwise defined as WOTUS
 - Tributaries
 - The territorial seas
 - Wetlands adjacent to certain waters (other than waters that are themselves wetlands)

Waters of the United States

§ 328.3 Definitions.

For the purpose of this regulation these terms are defined as follows:

(a) The term "waters of the United States" means

(1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(2) All interstate waters including interstate wetlands;

(3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:

(i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or

(ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(iii) Which are used or could be used for industrial purpose by industries in interstate commerce;

(4) All impoundments of waters otherwise defined as waters of the United States under the definition;

(5) Tributaries of waters identified in paragraphs (a) (1)–(4) of this section;

(6) The territorial seas;

(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a) (1)–(6) of this section.

- No. 3 (other waters)
 - Scalia formulation - relatively permanent, standing or continuously flowing bodies of water with a continuous surface connection
 - Kennedy “significant nexus” formulation - either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of TNW, interstate waters, or territorial seas
- No. 5 (tributaries)
 - Scalia formulation - relatively permanent, standing or continuously flowing bodies of water
 - Kennedy “significant nexus” formulation - either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of TNW, interstate waters, or territorial seas
- No. 7 (adjacent wetlands)
 - TNW, interstate waters, or territorial seas, or
 - Scalia formulation - relatively permanent, standing or continuously flowing bodies of water identified as impoundments or relatively permanent tributaries with a continuous surface connection to such waters; or
 - Kennedy “significant nexus” formulation - impoundments or tributaries when the wetlands either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of TNW, interstate waters, or territorial seas

Waters of the United States

- *Sackett v. EPA*, 84th 1075 (9 Cir. 2021)
 - Relates to a residential lot purchased in 2004
 - EPA issued a compliance order
 - Led to Supreme Court ruling that judicial review of the order was available
 - Sackett's argued that Scalia's formulation was correct
 - Applied Kennedy's 'significant nexus' test
- US Supreme Court agreed to review Ninth Circuit decision
 - Whether the U.S. Court of Appeals for the 9th Circuit set forth the proper test for determining whether wetlands are "waters of the United States" under the Clean Water Act, 33 U.S.C. § 1362(7).

Section 401 - Water Quality Certification

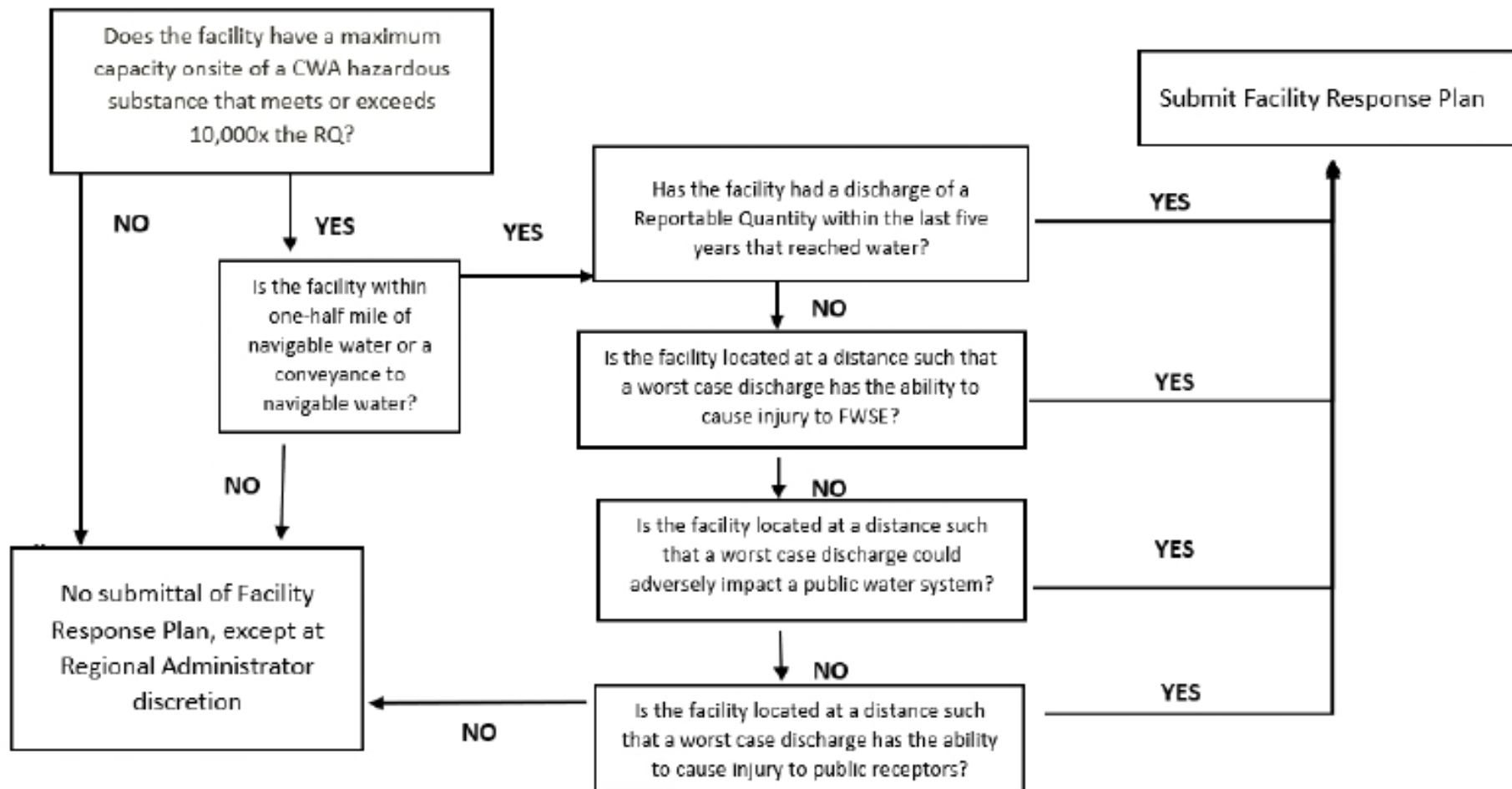
- CWA Section 401 (33 USCA 1341)
 - Applies to applicants for a federal permit that may result in discharge into navigable waters
 - Requires a certification from the state that discharge will comply with CWA
 - State must act “within a reasonable period of time (which shall not exceed one year)”
- EPA’s 2020 Clean Water Act Section 401 Certification Rule
 - Finalized June 1, 2020 (85 Fed. Reg. 42210, July 13, 2020)
 - Effective September 11, 2020
- Executive Order 13990, Jan. 20, 2021
 - Required review all rules issued under Trump Administration
 - Announced intention to reconsider and revise (86 Fer Reg. 29541, June 2, 2021)
- Section 401 Certification Rule vacated on October 21, 2021
 - Back to prior rules (originally published in 1971)
- EPA expects a proposal in Spring 2022

Proposed Hazardous Substance Spill Rule

CWA Hazardous Substance Worst Case Discharge Planning Regulations (March 10, 2022)

- Substance of proposal
 - Applies to a facility, which because of its location, could cause substantial harm to the environment from a worst case discharge into or onto navigable water
 - Would require an owner or operator of a facility to prepare and submit a plan for responding to a discharge / substantial threat of discharge of a CWA hazardous substance
- Two initial screening criteria
 - Does the facility have capacity for a CWA hazardous substance onsite at or above a threshold quantity?
 - If so, is the facility is within one-half mile to navigable water or a conveyance to navigable water?
- If so, and if any of the following substantial harm criteria are met, must then submit a CWA hazardous substance FRP to EPA:
 - the ability to adversely impact a public water system
 - the ability to cause injury to fish, wildlife, and sensitive environments (FWSE)
 - the ability to cause injury to public receptors
 - having had a reportable discharge of a CWA hazardous
- Proposal also allows EPA RA to require CWA hazardous substance FRPs, after consideration of site-specific factors for a facility, regardless of whether a facility meets the above criteria

Hazardous Substance Spill Rule



Waste

- Modernizing Public Notice for RCRA HW Permitting, 86 Fed. Reg. 71482, Dec. 16, 2021
 - Notice and opportunity for comment
 - Seeking to allow modern electronic alternatives for public notice of the intent to issue hazardous waste permits and other actions
 - Newspaper of general circulation = “online newspapers”
 - Refers to any electronic or internet-accessible newspaper
 - Request comment on whether online newsletters or bulletins published by permitting agencies could qualify as newspapers
- Third Rule, (proposed) signed March 1, 2022
 - Amends manifest regulations regarding e-Manifest System
 - Generally relates to exports of hazardous waste
 - Incorporates exporters into fee system
 - Proposing amendments to three manifest-related reports to allow electronic completion
 - Discrepancy, exception, and unmanifested waste reports
 - Requests public comment on changes to the manifest form
 - Comment period is 60 days from publication

Waste

- **PFAS**
 - Granted petition to add PFAS as RCRA hazardous constituents
 - Would support corrective action and/or listing
 - Fifth Unregulated Contaminant Monitoring Rule, 86 Fed. Reg. 73131 (Dec. 27, 2021)
 - Require sample collection for 29 PFAS between 2023 and 2025
 - Issued final regulatory determinations for PFOA / PFOS under SDWA
 - Could lead to national primary drinking water standard
 - National PFAS testing strategy that uses TSCA authorities to require PFAS manufacturers to provide information on PFAS
 - EPA restarted the process to designate PFOA and PFOS as CERCLA hazardous substances
- **PFAS Strategic Roadmap, 2021-2024**
 - Research - Invest in research, development, and innovation to increase understanding of PFAS exposures and toxicities, human health and ecological effects, and effective interventions that incorporate the best available science.
 - Restrict - Pursue a comprehensive approach to proactively prevent PFAS from entering air, land, and water at levels that can adversely impact human health and the environment.
 - Remediate - Broaden and accelerate the cleanup of PFAS contamination to protect human health and ecological systems.

Waste

RESEARCH

Invest in research, development, and innovation to increase understanding of PFAS exposures and toxicities, human health and ecological effects, and effective interventions that incorporate the best available science.

Objectives

- Build the evidence base on individual PFAS and define categories of PFAS to establish toxicity values and methods.
- Increase scientific understanding on the universe of PFAS, sources of environmental contamination, exposure pathways, and human health and ecological effects.
- Expand research on current and emerging PFAS treatment, remediation, destruction, disposal, and control technologies.
- Conduct research to understand how PFAS contribute to the cumulative burden of pollution in communities with environmental justice concerns.

RESTRICT

Pursue a comprehensive approach to proactively prevent PFAS from entering air, land, and water at levels that can adversely impact human health and the environment.

Objectives

- Use and harmonize actions under all available statutory authorities to control and prevent PFAS contamination and minimize exposure to PFAS during consumer and industrial uses.
- Place responsibility for limiting exposures and addressing hazards of PFAS on manufacturers, processors, distributors, importers, industrial and other significant users, dischargers, and treatment and disposal facilities.
- Establish voluntary programs to reduce PFAS use and release.
- Prevent or minimize PFAS discharges and emissions in all communities, regardless of income, race, or language barriers.

REMEDiate

Broaden and accelerate the cleanup of PFAS contamination to protect human health and ecological systems.

Objectives

- Harmonize actions under all available statutory authorities to address PFAS contamination to protect people, communities, and the environment.
- Maximize responsible party performance and funding for investigations and cleanup of PFAS contamination.
- Help ensure that communities impacted by PFAS receive resources and assistance to address contamination, regardless of income, race, or language barriers.
- Accelerate the deployment of treatment, remediation, destruction, disposal, and mitigation technologies for PFAS, and ensure that disposal and destruction activities do not create new pollution problems in communities with environmental justice concerns.

Environmental Justice

EO 13985 - Jan. 20, 2021

- Nation deserves an “ambitious whole-of-government equity agenda”
- The term “equity” means the consistent and systematic fair, just, and impartial treatment of all individuals, including individuals who belong to underserved communities that have been denied such treatment
- Requires
 - An equity assessment in federal agencies
 - Allocation of federal resources to advance fairness
 - Promotion of equitable delivery of government benefits and equitable opportunities



Federal Register / Vol. 86, No. 14 / Monday, January 25, 2021 / Presidential Documents

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Presidential Documents

Executive Order 13985 of January 20, 2021

Advancing Racial Equity and Support for Underserved Communities Through the Federal Government

By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered:

Section 1. Policy. Equal opportunity is the bedrock of American democracy, and our diversity is one of our country's greatest strengths. But for too many, the American Dream remains out of reach. Entrenched disparities in our laws and public policies, and in our public and private institutions, have often denied that equal opportunity to individuals and communities. Our country faces converging economic, health, and climate crises that have exposed and exacerbated inequities, while a historic movement for justice has highlighted the unbearable human costs of systemic racism. Our Nation deserves an ambitious whole-of-government equity agenda that matches the scale of the opportunities and challenges that we face.

It is therefore the policy of my Administration that the Federal Government should pursue a comprehensive approach to advancing equity for all, including people of color and others who have been historically underserved, marginalized, and adversely affected by persistent poverty and inequality. Affirmatively advancing equity, civil rights, racial justice, and equal opportunity is the responsibility of the whole of our Government. Because advancing equity requires a systematic approach to embedding fairness in decision-making processes, executive departments and agencies (agencies) must recognize and work to redress inequities in their policies and programs that serve as barriers to equal opportunity.

By advancing equity across the Federal Government, we can create opportunities for the improvement of communities that have been historically underserved, which benefits everyone. For example, an analysis shows that closing racial gaps in wages, housing credit, lending opportunities, and access to higher education would amount to an additional \$5 trillion in gross domestic product in the American economy over the next 5 years. The Federal Government's goal in advancing equity is to provide everyone with the opportunity to reach their full potential. Consistent with these aims, each agency must assess whether, and to what extent, its programs and policies perpetuate systemic barriers to opportunities and benefits for people of color and other underserved groups. Such assessments will better equip agencies to develop policies and programs that deliver resources and benefits equitably to all.

Sec. 2. Definitions. For purposes of this order: (a) The term “equity” means the consistent and systematic fair, just, and impartial treatment of all individuals, including individuals who belong to underserved communities that have been denied such treatment, such as Black, Latino, and Indigenous and Native American persons, Asian Americans and Pacific Islanders and other persons of color; members of religious minorities; lesbian, gay, bisexual, transgender, and queer (LGBTQ+) persons; persons with disabilities; persons who live in rural areas; and persons otherwise adversely affected by persistent poverty or inequality.

(b) The term “underserved communities” refers to populations sharing a particular characteristic, as well as geographic communities, that have been systematically denied a full opportunity to participate in aspects of economic, social, and civic life, as exemplified by the list in the preceding definition of “equity.”

Environmental Justice

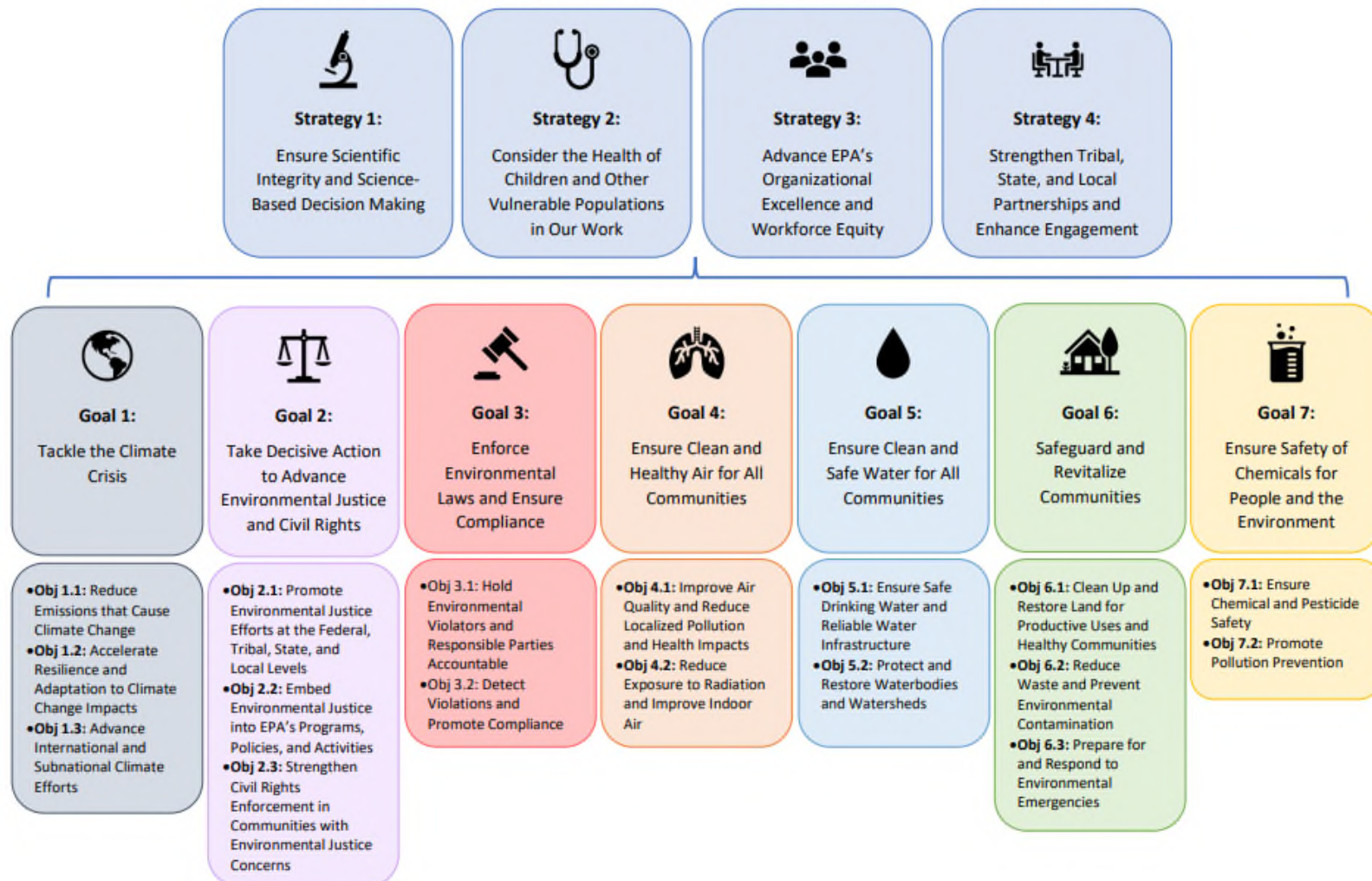
- Executive Order 14008, January 27, 2021
 - Announced policy to secure EJ for disadvantaged communities
 - Communities that are “historically marginalized and overburdened”
 - Required agencies to make EJ “part of their missions”
 - Created White House EJ Interagency Council and White House EJ Advisory Council
 - Order CEQ to create Climate and Economic Justice Screening Tool
- Justice 40 (EO 14008, Section 223)
 - Whole-of-government effort to ensure that agencies work with states and local communities to deliver at least 40 percent of the overall benefits from federal investments in climate and clean energy to disadvantaged communities
 - 21 priority programs to begin enhancing benefits for disadvantaged communities, such as
 - Flood Mitigation Assistance Program
 - Drinking Water State Revolving Fund
 - Lead Hazard Reduction
 - Rural Energy for America Program

Environmental Justice

Draft FY 2022-2026 EPA Strategic Plan Framework

Mission: To Protect Human Health and the Environment

Principles: Follow the Science, Follow the Law, Be Transparent, Advance Justice and Equity



Compliance and Enforcement

OECA's Four Policies Incorporating Environmental Justice

- Using All Appropriate Injunctive Relief Tools in Civil Enforcement Settlements (April 26, 2021)

Resolutions should include advanced monitoring, third-party audits, SEPs

- Strengthening Enforcement in Communities with Environmental Justice Concerns (April 30, 2021)

Increase inspections in overburdened communities

Resolve noncompliance through remedies with tangible benefits to the community

Increase engagement with communities about enforcement

- Strengthening Environmental Justice Through Criminal Enforcement (June 21, 2021)

Enhance coordination between civil-criminal staff regarding inspections in overburdened communities so that criminal staff are apprised of violations that involve potential criminal conduct

Improve outreach to crime victims

Enhance remedies sought in environmental criminal cases

- Strengthening Environmental Justice Through Cleanup Enforcement Actions (July 1, 2021)

Require RPs to take early cleanup actions

Ensure prompt cleanup actions by RPs

Use enhancement enforcement instruments, such as installation of advanced monitoring equipment

Compliance and Enforcement

National Compliance Initiatives FY2020 - FY2023

- Air
 - Creating Cleaner Air for Communities by Reducing Excess Emissions of Harmful Pollutants
 - Address significant sources of VOCs which may contribute to NAAQS exceedances and HAPs
 - Stopping Aftermarket Defeat Devices for Vehicles and Engines
- Hazardous Chemicals
 - Reducing Hazardous Air Emissions from Hazardous Waste Facilities
 - Focus on identifying and addressing violations of LDAR requirements for related hazardous waste treatment equipment
 - Reducing Risks of Accidental Releases at Industrial and Chemical Facilities
- Water
 - Reducing Significant Non-Compliance with NPDES Permits
 - Address significant noncompliance (SNC)
 - Reducing Non-Compliance with Drinking Water Standards at Community Water Systems
 - Help ensure delivery of safe water to communities by improving SDWA compliance

Questions and Comments?

Breazeale, Sachse & Wilson, LLP

John B. King
225/381-8014
John.King@bswllp.com

www.bswenviroblog.com