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Supreme Court Preview of 2020-2021 Environmental and Energy Law Cases and Review of 2019-2020 Rulings

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SUMMARY

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Supreme Court Preview of 2020-2021 Environmental and Energy Law Cases and Review of 2019-2020 Rulings

The Supreme Court 2019-2020 term, which started on October 1, 2019, was historic in unexpected ways. The Coronavirus Disease 2019 (COVID-19) pandemic resulted in the Court indefinitely closing its building to the public, postponing oral arguments, and conducting telephonic oral arguments for the first time in history.

Beyond the effects of the pandemic, the 2019-2020 Term was notable for the substantive opinions that the Supreme Court issued on environmental, energy, and natural resources (EENR) law issues. Of particular note for Congress's work, the Court's term included these opinions:

- ***County of Maui v. Hawaii Wildlife Fund***, holding that the Clean Water Act requires a permit when there is a direct discharge from a pollution source into navigable waters or when there is the functional equivalent of a direct discharge;
- ***Atlantic Richfield Co. v. Christian***, holding that the Montana state courts had jurisdiction over the landowners' restoration damages claim, and that EPA must approve the restoration plans because the landowners were potentially responsible parties under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA); and
- ***United States Forest Service v. Cowpasture River Preservation Association***, holding that the U.S. Forest Service had authority under the Mineral Leasing Act to grant a natural-gas pipeline right-of-way through lands in the George Washington National Forest traversed by the Appalachian Trail.

The Supreme Court's 2020-2021 term, which began on October 5, 2020, features cases relating to states' competing claims to several interstate rivers, disclosure of agency documents produced during an Endangered Species Act consultation, the appropriate court to decide climate change liability suits, the small refinery exemptions under the Clean Air Act's renewable fuel standard, the relationship between separate CERCLA provisions for recouping cleanup costs, and other areas of EENR law. The Court is also reviewing petitions for a writ of certiorari and complaints related to the scope of the President's authority to declare national monuments under the Antiquities Act, a state's denial of a water quality certification under Section 401 of the Clean Water Act, eminent domain authority under the Natural Gas Act, and other petitions that may implicate EENR issues. The Biden Administration could change executive branch policy on certain matters and its litigation strategies in pending cases.

In the 2020-2021 term, Justice Amy Coney Barrett began serving as the 103rd Associate Justice of the Supreme Court, filling the vacancy left by the death of Justice Ginsburg at the end of the 2019-2020 term. Legal commentators anticipate that Justice Barrett's judicial philosophies may affect the Court's majority views on agency deference, the scope of the federal agency's authority to implement EENR statutes, and the justiciability of environmental claims.

This report reviews some the major EENR decisions from the Supreme Court's 2019-2020 term and previews the legal disputes and arguments in selected EENR cases and petitions for certiorari in the 2020-2021 term. The report also highlights the broader implications of these decisions and cases for Congress.

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The Supreme Court 2019-2020 term, which started on October 1, 2019, was historic in unexpected ways. The Coronavirus Disease 2019 (COVID-19) pandemic resulted in the Court indefinitely closing its building to the public, postponing oral arguments, and conducting telephonic oral arguments for the first time in history.[1] Near the end of the term, on September 18, 2020, Justice Ruth Bader Ginsburg passed away after serving on the Court for 27 years.[2]

Beyond the effects of the pandemic and Justice Ginsburg's passing, the 2019-2020 term was notable for the substantive opinions that the Court issued on environmental, energy, and natural resources (EENR) law issues. These decisions addressed the scope of the Clean Water Act's (CWA's) permitting program, limits on challenges to the government's plan to remediate hazardous waste contamination, and which federal agency has the authority to issue a permit for an infrastructure project to cross the Appalachian National Scenic Trail.[3]

The Supreme Court's 2020-2021 term, which began on October 5, 2020, features cases relating to states' competing claims to several interstate rivers, disclosure of agency documents produced during an Endangered Species Act consultation, the appropriate court to decide climate change liability suits, the Clean Air Act's (CAA's) renewable fuel standard, the relationship between separate CERCLA provisions for recouping cleanup costs, and other areas of EENR law.[4] The Court is also reviewing petitions for a writ of certiorari and complaints[5] related to national monuments, water quality certification under Section 401 of the CWA, and other petitions that implicate EENR issues.[6] The Biden Administration could change executive branch policy on certain matters and its litigation strategies in pending cases.[7]

In the 2020-2021 term, Justice Amy Coney Barrett began serving as the 103rd Associate Justice of the Supreme Court, filling the vacancy left by the death of Justice Ginsburg.[8] Legal commentators anticipate that Justice Barrett's judicial philosophy on agency deference, congressional delegation of rulemaking authority to the executive branch, and federal court jurisdiction will likely align

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[1] For further background on the Supreme Court's 2019-2020, see CRS Report R46515, *Supreme Court October Term 2019: A Review of Selected Major Rulings*, coordinated by Valerie C. Brannon.

[2] *See* CRS Legal Sidebar LSB10537, *The Death of Justice Ruth Bader Ginsburg: Initial Considerations for Congress*, by Valerie C. Brannon, Michael John Garcia, and Caitlain Devereaux Lewis.

[3] *See infra* "Supreme Court 2019-2020 Term Review of the EENR Decisions."

[4] *See infra* "Supreme Court 2020-2021 Term Preview of EENR Cases."

[5] The primary means of petitioning the Supreme Court for review of a lower court decision is seeking a writ of certiorari. *Supreme Court Procedures: Writs of Certiorari*, ADMIN. OFF. OF THE U.S. COURTS, https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/supreme-1 (last visited Feb. 2, 2021). The Supreme Court has exclusive original jurisdiction over disputes between state governments, which are brought to the Court through a bill of complaint. U.S. CONST. art. III, § 2, cl. 2; 28 U.S.C. § 1251(a).

[6] *See infra*.

[7] *See* Jeremy P. Jacobs and Pamela King, *How the Supreme Court Could Upend Biden's Green Agenda*, GREENWIRE (Jan. 12, 2021), https://www.eenews.net/greenwire/2021/01/12/stories/1063722333; Ellen M. Gilmer, *Trump Leaves Unfinished Business in Environmental Litigation*, BLOOMBERG LAW (Nov. 7, 2020), https://news.bloomberglaw.com/environment-and-energy/trump-leaves-unfinished-business-in-environmental-litigation.

[8] The Senate confirmed former Seventh Circuit Judge Barrett on October 26, 2020. PN2252, Amy Coney Barrett—Supreme Court of the United States, 116th Cong. (Oct. 26, 2020) (confirmed by the Senate by 52 – 48), https://www.congress.gov/nomination/116th-congress/2252. Justice Barrett took the judicial oath on October 27, 2020. Press Release, Supreme Court of the United States, *Judicial Oath Ceremony: The Honorable Amy Coney Barrett* (Oct. 27, 2020), https://www.supremecourt.gov/publicinfo/press/oath/oath_barrett.aspx.

with the conservative Justices on the Supreme Court when reviewing cases involving EENR-related issues.[9]

This report reviews some of the major EENR decisions[10] from the Supreme Court's 2019-2020 term and previews the legal disputes and arguments in EENR cases and petitions for certiorari in the 2020-2021 term. The report also highlights the broader implications of these decisions and cases for Congress.

Supreme Court 2019-2020 Term Review of the EENR Decisions

Clean Water Act: *County of Maui v. Hawaii Wildlife Fund*[11]

In one of its major environmental rulings of the 2019-2020 term, the Supreme Court addressed the scope of the CWA's applicability to pollutant discharges that migrate through groundwater to regulated navigable surface waters.[12] In *County of Maui v. Hawaii Wildlife Fund*, the Court held that the CWA requires a permit for a direct discharge or the "functional equivalent of a direct discharge" of pollutants from a point source into navigable waters.[13] The 6-3 majority in *Maui* introduced a new multi-factor test for determining whether indirect discharges are the "functional equivalent" of a direct discharge.[14]

Background: The CWA prohibits any "discharge" or "addition" "of any pollutant" "to navigable waters" "from any point source" without a permit.[15] The CWA defines "pollutant" broadly to include toxins such as "sewage" and "radioactive waste," as well as more common elements such

[9] *See, e.g.*, Beth Gardiner, *With Justice Barrett, a Tectonic Court Shift on the Environment*, YALE ENV'T 360 (Oct. 26, 2020), https://e360.yale.edu/features/with-justice-barrett-a-tectonic-court-shift-on-the-environment; Ann Carlson et al., *Climate Policymaking in the Shadow of the Supreme Court*, LEGAL PLANET (Oct. 27, 2020), https://legal-planet.org/2020/10/27/climate-policymaking-in-the-shadow-of-the-supreme-court/; Jody Freeman, *What Amy Coney Barrett's Confirmation Will Mean for Joe Biden's Climate Plan*, VOX (Oct. 26, 2020); David LaRoss, *Attorneys See Supreme Court Losses Looming for Environmentalists*, INSIDEEPA.COM (Oct. 20, 2020), https://insideepa.com/daily-news/attorneys-see-supreme-court-losses-looming-environmentalists; Jennifer Hijazi et al., *Carbon Regulations Could Face Era of Scrutiny Under Barrett*, E&E NEWS (Sept. 28, 2020), https://www.eenews.net/climatewire/stories/1063714841/. For an in-depth discussion of Justice Barrett's jurisprudence, see CRS Report R46562, *Judge Amy Coney Barrett: Her Jurisprudence and Potential Impact on the Supreme Court*, coordinated by Valerie C. Brannon, Michael John Garcia, and Caitlain Devereaux Lewis.

[10] In the 2019-2020 term, the Supreme Court issued rulings related to administrative law that implicated issues associated with judicial review of agency action that may arise in future challenges to environmental regulation. For example, the Court held in *Department of Homeland Security [DHS] v. Regents of the University of California* that DHS's rescission of the Deferred Action for Childhood Arrivals (DACA) program violated the Administrative Procedure Act in part because the agency failed to consider how DACA recipients and those connected to them relied on the program. Dep't of Homeland Security v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1913-15 (2020). This ruling suggests that the Court may apply closer scrutiny to agency decisions that affect reliance on environmental regulations and guidance. For a more in-depth discussion of the *Regents* decision, see CRS Legal Sidebar LSB10497, *Supreme Court: DACA Rescission Violated the APA*, by Ben Harrington.

[11] Linda Tsang, CRS Legislative Attorney, authored this section of the report.

[12] Cnty. of Maui v. Haw. Wildlife Fund, 140 S. Ct. 1462 (2020).

[13] *Id.* at 1477.

[14] *Id.* at 1476-77.

[15] 33 U.S.C. §§ 1311(a); 1362(12).

as "rock, sand, cellar dirt," and "heat."[16] The act defines navigable waters as "waters of the United States"[17] and a "point source" as ''any discernible, confined and discrete conveyance, including ... any pipe, ditch, channel, [or] tunnel."[18]

The CWA allows certain pollutant discharges if authorized by a CWA permit issued under the National Pollutant Discharge Elimination System (NPDES).[19] CWA Section 402 requires *point source* dischargers to obtain NPDES permits, which set pollution limits—known as effluent limits—on the type and quantity of pollutants that dischargers can release into navigable waters.[20] The CWA does not require NPDES permits for *nonpoint source* discharges. Nonpoint source pollution is regulated through state programs under CWA Section 319 and other state and federal laws.[21]

Maui and other citizen suits[22] have sought to apply NPDES permitting requirements to point source pollutant discharges that migrate through groundwater to navigable waters. In *Maui*, the County of Maui's (County's) Lahaina Wastewater Reclamation Facility discharged treated sewage into underground injection wells.[23] EPA, the Hawaii Department of Health, and others conducted a tracer dye study in which they injected a dye into the wells to see if and when the dye would appear in the ocean.[24] The study concluded that 64% of the wells' treated sewage effluent migrated through groundwater to the Pacific Ocean.[25] While conceding that the wells were point sources, the County argued that the point source must "convey the pollutants directly into the navigable water" to be regulated under the CWA.[26] Because the wells discharged to the Pacific Ocean via groundwater, the County contended that it was not a point source discharger required to obtain an NPDES permit under Section 402 the CWA.[27]

The U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit) disagreed, affirming the district court's decision that the County had violated the CWA by discharging pollutants without an NPDES permit.[28] The Ninth Circuit concluded that the pollutants were "fairly traceable" from the point source (wells) to navigable waters such that the discharge through groundwater was the

[16] *Id.* § 1362(6).

[17] Id. § 1362(7). For more information regarding the definition of "waters of the United States," see CRS Report R44585, *Evolution of the Meaning of "Waters of the United States" in the Clean Water Act*, by Stephen P. Mulligan.

[18] 33 U.S.C. § 1362(14).

[19] *Id.* § 1342.

[20] *Id.*

[21] *Id.* § 1329. Other federal statutes that address nonpoint source pollution include the Safe Drinking Water Act, which requires EPA to develop minimum requirements to prevent injection wells from contaminating underground sources of drinking water, 42 U.S.C. § 300h-1; the Coastal Zone Act Reauthorization Amendments of 1990, which addresses coastal nonpoint source pollution, 16 U.S.C. § 1455b; the Resource Conservation and Recovery Act (RCRA), which addresses releases into groundwater from solid waste units, 42 U.S.C. § 6903(3) (regulating the "disposal," including discharge "into any waters, including ground waters"); and CERCLA, which governs the control and remediation of groundwater pollution, *id.* § 9601(8) (regulating discharge into the "environment," including discharges into "ground water").

[22] CWA Section 505 grants "citizens" the right to bring civil actions against any person that allegedly violates effluent standards or limitations. 33 U.S.C. § 1365.

[23] Haw. Wildlife Fund v. Cnty. of Maui, 886 F.3d 737, 758 (9th Cir. 2018), *vacated*, 140 S. Ct. 1462 (2020).

[24] *Id.* at 737-38

[25] *Id.*

[26] *Id.* at 762.

[27] *Id.*

[28] *Id.* at 763.

"functional equivalent of a discharge into navigable waters."[29] In 2019, the Supreme Court granted review of the Ninth Circuit's decision to determine "whether the CWA requires a permit when pollutants originate from a point source but are conveyed to navigable waters by a nonpoint source, such as groundwater."[30]

Supreme Court's Decision: In a 6-3 ruling, the Supreme Court vacated the Ninth Circuit decision, rejecting the "fairly traceable" permitting test as well as other tests proposed by litigants and the government to determine whether an indirect discharge to navigable waters requires a NPDES permit.[31] Justice Breyer delivered the opinion of the Court, joined by Chief Justice Roberts and Justices Ginsburg, Sotomayor, Kagan, and Kavanaugh. In his majority opinion, Justice Breyer relied on the CWA's statutory context and purpose of the statutory phrase "from any point source" to strike a middle ground between the Ninth Circuit's "fairly traceable" interpretation and the total exclusion of all discharges through groundwater proposed by the County, the federal government, and dissents from Justices Thomas and Alito.[32]

The majority concluded that the various interpretations of the CWA's permitting applicability were inconsistent with Congress's intent to provide sufficient federal authority to regulate discharges of "identifiable sources" of pollutants into navigable waters while preserving the states' authority over groundwater discharges.[33] The majority rejected the Ninth Circuit's and the environmental groups' "fairly traceable" and "proximate cause" standards, reasoning that such a broad interpretation would require a NPDES permit for highly diluted discharges that reach navigable waters many years after their release from the point source.[34] At the same time, the majority refused to adopt the County's and the federal government's narrow interpretation that would have categorically precluded jurisdiction over discharges to groundwater.[35] That interpretation, the majority reasoned, would open a "massive loophole in the permitting scheme" by allowing point sources to discharge pollutants into groundwater a short distance from navigable waters without a permit.[36]

To bridge these "extreme" interpretations, the majority created a new test for determining, on a case-by-case basis, when a discharge requires a NPDES permit and outlined various factors to consider in making such decisions.[37] The majority held that the CWA requires a NPDES permit for a direct discharge of pollutants or the "*functional equivalent of a direct discharge*" from a point source of pollution into navigable waters.[38] The majority explained that "[w]hether pollutants that arrive at navigable waters after traveling through groundwater are 'from' a point source depends upon how similar to (or different from) the particular discharge is to a direct

[29] *Id.* at 765.

[30] Haw. Wildlife Fund v. Cnty. of Maui, 886 F.3d 737 (9th Cir. 2018), *cert. granted*, 139 S. Ct. 1164 (U.S. Feb. 19, 2019) (No. 18-260).

[31] Cnty. of Maui v. Haw. Wildlife Fund, 140 S. Ct. 1462, 1477-78 (2020).

[32] *Id.* at 1469-70.

[33] *Id.* at 1470-77.

[34] *Id.* at 1470-73.

[35] *Id.* at 1473-75.

[36] *Id.* at 1473-76.

[37] *Id.* at 1476-77.

[38] *Id.* at 1476.

discharge."[39] While rejecting the Ninth Circuit's "fairly traceable" standard,[40] the majority appeared to echo the Ninth Circuit's view that such discharges must be "the functional equivalent" of a discharge directly into navigable waters.

The majority acknowledged that "a more absolute position ... may be easier to administer" than the "functional equivalent" test but noted that "there are too many potentially relevant factors applicable to factually different cases ... to use more specific language."[41] The majority highlighted that the two "most important factors" in making a functional equivalent determination will likely be (1) the distance pollution must travel to reach navigable waters, and (2) pollutant transit time to navigable waters.[42] However, the Court noted that, depending on the circumstances, other factors may need to be considered, including the material the pollutant travels through, dilution or chemical changes to the pollutant as it travels, the amount of the pollutant entering the navigable waters, how and where the pollutant enters the navigable waters, and the degree to which the pollution has "maintained its specific identity" at the point it enters navigable waters.[43]

For further guidance in administering the new test, the majority pointed to the courts and EPA. The majority noted that the courts can "provide guidance through decisions in individual cases," and EPA can "provide administrative guidance (within statutory boundaries)," through permits or "general rules."[44] To address concerns that such a test could greatly expand permitting requirements, the majority noted that EPA has been administering this permitting provision "for over 30 years ... [and] we have seen no evidence of unmanageable expansion" and that various permitting techniques (e.g., issuing a NPDES general permit for a category of dischargers) and the courts' discretion in applying the CWA's penalty provisions can be used to assuage such concerns.[45] The Court vacated and remanded the Ninth Circuit decision to determine whether the Lahaina Wastewater Reclamation Facility needs a NPDES permit under the new "functional equivalent" test.[46]

Concurring and Dissenting Opinions: Justice Kavanaugh joined Justice Breyer's opinion "in full," emphasizing in his concurrence that the majority's interpretation "adheres" to Justice Scalia's plurality opinion in *Rapanos v. United States*.[47] In *Rapanos*, Justice Scalia stated that the CWA "does not forbid the 'addition of any pollutant *directly* to navigable waters from any point source,' but rather the 'addition of any pollutant *to* navigable waters.'"[48] Justice Kavanaugh noted that the CWA "does not establish a bright-line test regarding when a pollutant may be considered to have come 'from' a point source. The source of the vagueness is Congress' statutory text, not

[39] *See id.* (concluding that "an addition [of a pollutant to navigable waters] falls within the statutory requirement that it be 'from any point source' when a point source directly deposits pollutants into navigable waters, or when the discharge reaches the same result through roughly similar means.")

[40] *Id.* at 1473.

[41] *Id.* at 1476-77.

[42] *Id.*

[43] *Id.*

[44] *Id.* at 1477.

[45] *Id.*

[46] *Id.* at 1478.

[47] *Id.* at 1478-79 (Kavanaugh, J., concurring).

[48] Rapanos v. United States, 547 U.S. 715, 743 (2006) (quoting 33 U.S.C. § 1362(12)(A) (alteration in original)).

the Court's opinion. The Court's opinion seeks to translate the vague statutory text into more concrete guidance."[49]

Justice Thomas dissented, joined by Justice Gorsuch, and Justice Alito issued his own dissent. Both dissents would require a permit only when a point source discharges pollutants directly into navigable waters."[50] Justice Thomas noted that the majority "focuses on the word 'from,' but the most helpful word is 'addition.' That word, together with 'to' and 'from,' limits the meaning of 'discharge' to the augmentation of navigable waters." Justice Alito argued that limiting the CWA to direct discharges is "consistent with the statutory language and better fits the overall scheme of the Clean Water Act."[51] He explained that Congress decided to treat "readily identifiable" point source pollution, which are managed by uniform federal regulation, differently from nonpoint pollution (such as pollution conveyed by groundwater), which is "better suited to individualized local solutions."[52]

Both dissents identified the "practical problems" in implementing the majority's "functional equivalent" test.[53] Justice Alito criticized the majority's test as "a rule that provides no clear guidance and invites arbitrary and inconsistent application."[54]

Considerations for Congress: In the aftermath of *Maui*, EPA, states, regulated entities, and the courts are faced with interpreting, implementing, and enforcing the "functional equivalent" test for indirect point source discharges. At a congressional oversight hearing in May 2020, the EPA Administrator testified that the test may be "difficult" to implement.[55]

On December 10, 2020, EPA released for public comment a draft guidance on applying the *Maui* decision and its "functional equivalent" test for pollutant discharges that travel through groundwater before reaching navigable waters.[56] The draft guidance emphasizes that a "functional equivalent" analysis is required only if the facility owner or operator or NPDES permitting authority determines that there is or will be "an actual discharge of a pollutant to a water of the United States ... from a point source."[57] For such discharges, EPA explains that a "functional equivalent" evaluation would examine the factors set forth in the *Maui* decision, as well as an

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[49] *Maui*, 140 S. Ct. at 1478 (Kavanaugh, J., concurring).

[50] *Id.* at 1479 (Thomas, J., dissenting) (noting that the majority "ultimately does little to explain how functionally equivalent an indirect discharge must be to require a permit"); *id.* at 1486 (Alito, J., dissenting) (interpreting the CWA to require a permit "when a pollutant is discharged directly from a point source to navigable waters").

[51] *Id.* at 1488 (Alito, J., dissenting).

[52] *Id.* at 1488-89.

[53] *See, e.g.*, *id.* at 1481 (Thomas, J., dissenting) (holding that a CWA permit "is required only when a point source discharges pollutants directly into navigable waters"); *id.* at 1486 (Alito, J., dissenting) (interpreting the CWA to require a permit "when a pollutant is discharged directly from a point source to navigable waters").

[54] *Id.* at 1483 (Alito, J., dissenting) ("Entities like water treatment authorities that need to know whether they must get a permit are left to guess how this nebulous standard will be applied. Regulators are given the discretion, at least in the first instance, to make of this standard what they will. And the lower courts? The Court's advice, in essence, is: 'That's your problem. Muddle through as best you can.'").

[55] *Oversight of the Environmental Protection Agency Before the S. Comm. on Env't & Pub. Works*, 116th Cong. (2020), https://www.epw.senate.gov/public/index.cfm/2020/5/oversight-of-the-environmental-protection-agency.

[56] Applying the Supreme Court's County of Maui v. Hawaii Wildlife Fund Decision in the Clean Water Act Section 402 National Pollutant Discharge Elimination System Permit Program, 85 Fed. Reg. 79,489 (Dec. 10, 2020).

[57] Draft Guidance Memorandum from David P. Ross, Asst. Admin. EPA Office of Water on Applying the Supreme Court's *County of Maui v. Hawaii Wildlife Fund* Decision in the Clean Water Act Section 402 National Pollutant Discharge Elimination System Permit Program 3-6 (Dec. 4, 2020), https://www.epa.gov/sites/production/files/2020-12/documents/draft_ow_maui_guidance_document_-_12.2020_-_epa-hq-ow-2020-0673.pdf [hereinafter *Draft* Maui *Guidance*].

additional factor—the system design and performance of the facility that releases the pollutant.[58] The draft guidance notes that if the pollutant composition or concentration that ultimately reaches navigable waters is "different" from its initial discharge, it might not be the "functional equivalent" of a direct discharge, thus not requiring an NPDES permit.[59] The Biden Administration may consider changes to the draft guidance prior to releasing it to the regulated community and permitting authorities.

Various commentators agree that the "functional equivalent" test will likely increase litigation and may result in a patchwork of conflicting judicial decisions that fail to provide consistent guidance to the states or regulated entities.[60] Ongoing litigation, including the remanded *Maui* case, will need to address how to apply the "functional equivalent" test to unforeseeable discharges from point sources such as pipeline ruptures and leaking underground wells and coal ash storage ponds.[61] Despite the Supreme Court's reassurance that EPA and the courts can prevent a significant expansion of the NPDES permitting requirements, some stakeholders are concerned that previously unpermitted activities, including recycled water, groundwater recharge, manure management, and wetland projects, would require CWA permits under the new test.[62] In its draft guidance, EPA anticipates that the need for NSPS permits for point source discharges of pollutants that reach navigable waters via groundwater "will continue to be a small percentage of the overall number of NPDES permits."[63]

Other commentators fear that the new test will lead to years of litigation over the meaning and scope of a "functional equivalent" discharge similar to the prolonged litigation and uncertainty that resulted from the Supreme Court's 2006 case, *Rapanos v. United States*.[64] In *Rapanos*, the justices split 4-4-1 on the proper test for determining which surface waters qualify as "waters of the United States" subject to the CWA.[65] Fourteen years after *Rapanos*, EPA and stakeholders continue to litigate and debate the scope of "waters of the United States" as used in the CWA.[66]

Congress could consider legislative options to clarify the scope of the CWA over indirect pollutant discharges or the applicability of NPDES permitting requirements for different

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[58] *Id.* at 6-8.

[59] *Id.* at 6.

[60] *See* Alejandro E. Camacho and Melissa Kelly, *The Shape of Water After County of Maui v. Hawaii Wildlife Fund*, THE REGUL. REV. (July 28, 2020) (noting that "in the wake of the [*Maui*] decision, the courts and the U.S. Environmental Protection Agency (EPA) will almost certainly continue their decades-long interpretive tussle"), https://www.theregreview.org/2020/07/28/camacho-kelly-shape-water-after-county-maui/; Pamela King, *Roberts' Court Finds the Middle in High-stakes Enviro Term*, E&E NEWS (July 13, 2020) (noting that "lower courts are going to be wrestling with this for quite some time").

[61] *See, e.g.*, Order, Prairie Rivers Network v. Dynegy Midwest Generation at 1-2, No. 18-3644 (7th Cir. Oct. 2, 2020) (reviewing a district court decision dismissing the plaintiff's allegations that a retired coal power plant violated the CWA when pollutants from coal ash storage ponds leaked into groundwater and reached navigable waters); Upstate Forever v. Kinder Morgan Energy Partners, L.P., 887 F.3d 637 (4th Cir. 2018) (holding that the gasoline discharges from a ruptured pipeline into groundwater violated the CWA because there was a "direct hydrologic connection" between the polluted groundwater and navigable waters), *vacated*, 140 S. Ct. 2736 (2020).

[62] Davina Pujari & Sean G. Herman, *Groundwater Discharges Under the Clean Water Act*, WATERWORLD (Aug. 13, 2020), https://www.waterworld.com/wastewater/article/14180305/groundwater-discharges-under-the-clean-water-act.

[63] *Draft* Maui *Guidance*, at 6.

[64] Davina Pujari et al., *Breaking Precedent: SCOTUS in the Midst of a Pandemic*, 50 ENV'T L. REP. 10787, 10796-97 (Oct. 2020).

[65] Rapanos v. United States, 547 U.S. 715 (2006).

[66] For discussion of the litigation history of "waters of the United States," see CRS Report R44585, *Evolution of the Meaning of "Waters of the United States" in the Clean Water Act*, by Stephen P. Mulligan.

categories of indirect discharges. Congress could also use its oversight authority[67] to examine EPA's efforts to implement and enforce the "functional equivalent" test or direct EPA to report to Congress on related actions or interpretations as it has done in the past. For example, in March 2018, the House and Senate Appropriations Committees' explanatory statement for the Consolidated Appropriations Act of 2018 "encourage[d] the [EPA] to consider whether it is appropriate to promulgate a rule to clarify that releases of pollutants through groundwater are not subject to regulation as point sources under the CWA."[68] The Committees directed EPA to brief the committees about its findings and any plans for future rulemaking.[69] In April 2019, EPA issued a guidance document providing its interpretation that point source pollutant discharges to groundwater were not subject to the CWA.[70] However, a year later, the Supreme Court in *Maui* did not defer to and ultimately rejected EPA's 2019 interpretive guidance that categorically excluded indirect discharges from the CWA permitting program.

Comprehensive Environmental Response, Compensation, and Liability Act: *Atlantic Richfield Co. v. Christian*[71]

In *Atlantic Richfield v. Christian*, the Supreme Court addressed a complex question regarding the CERCLA limitations on how parties may challenge the scope of a plan to remediate hazardous waste contamination.[72] The Court held that owners of property located within a Superfund site may not pursue restoration of their property in a manner that conflicts with a plan approved by the U.S. Environmental Protection Agency (EPA) without EPA's approval. The Court also held that litigants can, subject to certain limitations, assert state-law claims that challenge an EPA-approved CERCLA cleanup plan in state courts.

Background: Congress enacted CERCLA to clean up sites contaminated with hazardous substances, pollutants, or contaminants across the United States and to hold the parties connected to those sites responsible for cleanup costs.[73] EPA administers the Superfund program and maintains the National Priorities List (NPL), a prioritized list of some of the most hazardous sites.[74] EPA may compel certain entities, which the statute refers to as both "potentially responsible parties" (PRPs) and "covered persons," to perform or pay for the cleanup of contaminated sites.[75] Section 107 of CERCLA identifies four categories of PRPs that could be

[67] For example, on April 18, 2018, the Senate Committee on Environment and Public Works held an oversight hearing that examined whether pollutant releases through groundwater should be regulated under CWA or states' jurisdiction. *The Appropriate Role of States and the Federal Government in Protecting Groundwater: Hearing Before the S. Comm. on Env't & Pub. Works*, 115 Cong. 1-2 (2018) (statement of Sen. John Barrasso, Chairman, S. Comm. on Env't & Pub. Works).

[68] H. Comm. on Approps., 115th Cong., Rep. on H.R. 1625/Public Law 115–141, Consolidated Appropriations Act, 2018 1,167 (Comm. Print 2018).

[69] *Id.*

[70] Interpretive Statement on Application of the Clean Water Act National Pollutant Discharge Elimination System Program to Releases of Pollutants From a Point Source to Groundwater, 84 Fed. Reg. 16,810 (Apr. 23, 2019).

[71] Kate R. Bowers, CRS Legislative Attorney, authored this section of the report.

[72] Atlantic Richfield v. Christian, 140 S. Ct. 1335 (2020). CERCLA is also referred to as the Superfund program. Superfund: *CERCLA Overview*, EPA, https://www.epa.gov/superfund/superfund-cercla-overview (last visited Feb. 2, 2021).

[73] 42 U.S.C. §§ 9601-75.

[74] *Superfund: National Priorities List (NPL)*, U.S. ENV'T PROT. AGENCY, https://www.epa.gov/superfund/superfund-national-priorities-list-npl (last visited Feb. 2, 2021).

[75] 42 U.S.C. § 9607(a).

liable for the costs of response actions.[76] One such category includes the owner of a "facility," which is defined to include "any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located."[77]

Under CERCLA's process for developing a cleanup plan, EPA conducts a remedial investigation and feasibility study (RI/FS), or orders a PRP to conduct one, to evaluate site conditions and remedy options before the agency selects a plan.[78] CERCLA also provides several avenues for stakeholder involvement in developing cleanup plans,[79] and generally requires that the remedial action comply with "legally applicable or relevant and appropriate" standards under state law.[80]

Atlantic Richfield involved the cleanup of a Superfund site at the former Anaconda copper smelter in Butte, Montana. In 1983, a 300-square-mile area around the smelter was among the first sites to be designated a Superfund NPL site.[81] Over the past 35 years, EPA has managed an extensive and ongoing cleanup at the site, which is being carried out by Atlantic Richfield, the site's current owner.[82] In 2008, a group of 98 property owners within the Anaconda Superfund site sued Atlantic Richfield in Montana state court, asserting state common-law claims for trespass, nuisance, and strict liability.[83] Among the forms of relief sought by the landowners were "restoration damages," which, under Montana law, would have to be used for restoration of the property.[84] To support their claim for restoration damages, the landowners proposed a plan that included removing a greater depth of soil from residential yards, setting a more stringent arsenic soil cleanup threshold level, installing an underground permeable barrier, and other remedies beyond those selected by EPA.[85]

Atlantic Richfield argued that CERCLA Sections 113(b) and 113(h) barred the landowners' claim for restoration damages. Section 113(b) of the statute gives federal district courts "exclusive original jurisdiction over all controversies arising under [CERCLA]."[86] Section 113(h) provides that "[n]o Federal court shall have jurisdiction under Federal law ... to review any challenges to removal or remedial action" except in several limited circumstances.[87] The company also alleged that the landowners were barred by CERCLA Section 122(e)(6) from implementing their proposed cleanup plan. Section 122(e)(6) provides that, once the remedial investigation and feasibility study has begun for an NPL-listed site, "no potentially responsible party may undertake any remedial action" at the site without EPA's approval.[88]

The Montana trial court granted judgment for the landowners on the restoration damages issue, and the Montana Supreme Court affirmed.[89] The Supreme Court granted review to consider three

[76] *Id.* § 9607.

[77] *Id.* § 9601(9).

[78] 40 C.F.R. § 300.430.

[79] 42 U.S.C. §§ 9613(k), 9621(f).

[80] *Id.* § 9621(d)(2)(A).

[81] Atlantic Richfield v. Christian, 140 S. Ct. 1335, 1347 (2020).

[82] *Id.*

[83] *Id.*

[84] *Id.*

[85] *Id.* at 1347-48.

[86] 42 U.S.C. § 9613(b).

[87] *Id.* § 9613(h).

[88] *Id.* § 9622(e)(6).

[89] Atlantic Richfield Co. v. Mt. Second Judicial Dist. Ct., 408 P.3d 515 (Mt. 2017).

questions: (1) whether CERCLA Section 113 "strips the Montana courts of jurisdiction over the landowners' claim for restoration damages"; (2) whether Section 122(e)(6) barred the landowners' claim because the landowners are PRPs who cannot implement restoration plans without EPA's consent; and (3) whether CERCLA preempted the landowners' restoration remedy.[90]

Supreme Court's Decision: In an opinion authored by Chief Justice Roberts, the Court affirmed in part and vacated in part the Montana Supreme Court's judgment, and remanded for further proceedings.[91] Five additional justices joined the majority opinion in its entirety, which held that the Montana state courts had jurisdiction over the landowners' restoration damages claim, but that restoration could not take place without EPA's approval because the landowners were PRPs and therefore subject to the requirements of Section 122(e)(6). The Court declined to reach the issue of whether CERCLA otherwise preempts the landowners' proposed cleanup plan.[92]

In a portion of the opinion joined by the entire Court except for Justice Alito, the majority ruled that Section 113 of CERCLA did not strip the Montana state courts of jurisdiction over the landowners' claim.[93] Rejecting Atlantic Richfield's arguments as well as those raised in the United States' amicus brief, the Court held that the landowners' claim for restoration damages arose under Montana law and not CERCLA, and therefore those claims did not constitute "controversies arising under" CERCLA for purposes of Section 113(b).[94] The Court also concluded that "[t]here is no textual basis for Atlantic Richfield's argument that Congress precluded *state* courts from hearing a category of cases in § 113(b) by stripping *federal* courts of jurisdiction over those cases in § 113(h)."[95] As a result, the Court held that the state courts retained jurisdiction over the landowners' claim for restoration damages.

As to the Section 122(e)(6) bar to remedial actions not approved by EPA, the Supreme Court reversed the Montana Supreme Court's holding.[96] Looking to the list of "covered persons" in Section 107 of CERCLA, the Court ruled that the landowners were PRPs and therefore needed EPA's approval for their restoration plan.[97] Specifically, the landowners were the "owners" of "a facility," which under CERCLA is "any site or area where a hazardous substance [here, arsenic and lead] ... has come to be located."[98] According to the Court, landowners retain their PRP status even if they are not liable for the payment of response costs.[99] Otherwise, EPA would be forced to monitor every property on a Superfund site and even preemptively file lawsuits to ensure that landowners do not interfere with a cleanup by, for instance, digging up contaminated soil without notifying EPA.

Concurring and Dissenting Opinions: Justice Alito concurred in part and dissented in part.[100] Justice Alito agreed that the landowners could not bring their restoration damages claim without

[90] *Atlantic Richfield*, 140 S. Ct. at 1345, 1357.

[91] *Id.* at 1357.

[92] *Id.*

[93] *Id.* at 1349-52.

[94] *Id.* at 1349-50.

[95] *Id.* at 1350.

[96] *Id.* at 1352.

[97] *Id.*

[98] *Id.*

[99] *Id.* at 1353.

[100] *Id.* at 1357 (Alito, J., concurring in part and dissenting in part).

EPA's consent, but did not believe it was necessary to reach the issue of whether state courts have jurisdiction to hear challenges to EPA-approved cleanup plans.[101] He further cautioned that neither he, nor the parties, nor the majority had succeeded in clearing up the issues surrounding the relationship between CERCLA Sections 113(b) and (h).[102]

Justice Gorsuch also wrote a partial concurrence and partial dissent, in which Justice Thomas joined, agreeing with the majority's ruling on jurisdiction but disagreeing with its ruling on Section 122(e)(6).[103] Justice Gorsuch would have held that the landowners are not PRPs because EPA never notified them of their PRP status as required by Section 122(e)(1) and because CERCLA's statute of limitations for holding them responsible for cost-recovery actions "has long since passed."[104] He also expressed concern that an expansive view of federal authority to regulate landowners' activity on their own property "would sorely test the reaches of Congress's power under the Commerce Clause."[105]

Implications for Congress: When Congress amended CERCLA to add Section 113(h), it made note of the concern that pre-enforcement judicial review of EPA response actions "would lead to considerable delay in providing cleanups, would increase response costs, and would discourage settlements and voluntary cleanups."[106] The Supreme Court's interpretation of Section 113 in *Atlantic Richfield* opens the door to some state-law claims that target the scope of an already agreed-upon cleanup plan. This may result in additional litigation, and litigation at earlier stages of the cleanup process. The prospect of additional litigation may also affect the substance and complexity of future settlement negotiations between EPA and PRPs.

Congress has expressed concerns regarding the lengthy timeline for CERCLA cleanups.[107] To limit further delays associated with protracted litigation and settlement negotiations, Congress could amend CERCLA to clarify the relationship between CERCLA Sections 113(b) and (h) and specify the scope of federal and state jurisdiction under each subsection. Congress could also amend Section 122(e)(6) to alter the timeframe during which PRPs are barred from undertaking remedial actions, or expand the Section 122(e)(6) bar to apply to both NPL-listed and non-NPL sites.

Justice Gorsuch's dissent in *Atlantic Richfield* deserves special mention in light of the changing composition of the Court. In particular, his narrower reading of CERCLA suggests that he could be sympathetic in future cases toward states that attempt to impose more stringent environmental regulations than what is strictly required under federal law. While the Court has not granted certiorari in any cases that directly present such a discrepancy in federal and state environmental regulation, there is one pending bill of complaint that implicates a federal-state tension in Section

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[101] *Id.*

[102] *Id.* at 1361. Writing for the majority, Chief Justice Roberts responded that it was necessary to decide the jurisdictional question in order to resolve uncertainty about the forum in which the litigation should continue. *Id.* at 1349 n.3.

[103] *Id.* at 1361 (Gorsuch, J., concurring in part and dissenting in part).

[104] *Id.* at 1364. The majority, however, concluded that landowners can be PRPs even if they can no longer be held liable for cleanup costs. *Id.* at 1352-53.

[105] *Id.* at 1365.

[106] S. REP. NO. 99-11, at 58 (1985).

[107] *See Modernizing the Superfund Cleanup Program: Hearing Before the Subcomm. on Env't of the H. Comm. on Energy & Commerce*, 115th Cong. 2, 7 (2018) (statements of Rep. Shimkus, Rep. Blackburn); *Oversight of the U.S. Environmental Protection Agency's Superfund Program: Hearing Before the Subcomm. on Superfund, Waste Mgmt., & Reg. Oversight of the S. Comm. on Env't & Pub. Works*, 115th Cong. 2 (2017) (statement of Sen. Rounds).

401 of the CWA,[108] and a pending case in the U.S. Court of Appeals for the D.C. Circuit (D.C. Circuit) regarding California's ability to set its own limits on tailpipe greenhouse gas (GHG) emissions.[109] Additionally, Justice Gorsuch's concern about the Commerce Clause's limitations on Congress's power to regulate landowner activities on their own property[110] suggests that the Court could take a greater interest in the intersection of the Commerce Clause and federal environmental law in future cases.

Finally, plaintiffs in several climate change-related lawsuits against fossil-fuel energy companies argued that the Court's rejection of federal jurisdiction under CERCLA in *Atlantic Richfield* supports their position that their state-law nuisance claims do not arise under federal law, and therefore may proceed in state court.[111] In October 2020, the Supreme Court granted certiorari in another climate change nuisance suit to address a question regarding the scope of an appellate court's review of a district court's order removing a case to state court.[112] While the question before the Court in that case is jurisdictional and unrelated to CERCLA, a decision broadening the scope of review of removal orders may affect which courts—federal or state—adjudicate climate change liability suits. And ultimately, these suits may present similar questions posed in *Atlantic Richfield* regarding the relationship between federal environmental statutes and state common law.

Mineral Leasing Act: *United States Forest Service v. Cowpasture River Preservation Association*[113]

In *United States Forest Service v. Cowpasture River Preservation Association* (*Cowpasture*),[114] the Supreme Court tackled a complex web of federal legislation and regulations that ultimately boiled down to which federal agency has the authority to issue a permit for an infrastructure project to cross the Appalachian National Scenic Trail (Appalachian Trail or Trail). The Court found that the U.S. Forest Service (Forest Service) had acted properly when it issued a "special use" permit for the construction and operation of a subsurface pipeline segment passing under the Trail. The Court reversed a decision by the U.S. Court of Appeals for the Fourth Circuit (Fourth Circuit), which had held that the Forest Service lacked statutory authority to issue the permit.

Background: In 2017, the developers of the Atlantic Coast Pipeline—a proposed 604-mile interstate natural gas pipeline that would run from West Virginia though Virginia to Robeson

[108] Montana v. Washington, *motion for leave to file a bill of complaint filed* (U.S. Jan. 21, 2020) (No. 22O152). *See infra* at "Clean Water Act Section 401 Water Quality Certification: Montana v. Washington."

[109] *See* Union of Concerned Scientists v. Nat'l Hwy. Traffic Safety Admin. No. 19-1230 (D.C. Cir.).

[110] *See* Atlantic Richfield, 140 S. Ct. at 1365 (Gorsuch, J.) ("If [CERCLA] really did grant the federal government the power to regulate virtually each shovelful of dirt homeowners may dig on their own properties, it would sorely test the reaches of Congress's power under the Commerce Clause.").

[111] Plaintiff-Appellee's Citation of Supplemental Authorities, Rhode Island v. Shell Oil Prods. Co., No. 19-1818, Doc. No. 00117581373 (1st Cir. Apr. 24, 2020); Plaintiffs-Appellees' Citation of Supplemental Authorities, Cnty. of San Mateo v. Chevron Corp., No. 18-15499 , Doc. No. 195 (9th Cir. Apr. 27, 2020); Plaintiffs-Appellants' Citation of Supplemental Authorities, City of Oakland v. BP P.L.C., No. 18-16663, Doc. No. 167 (9th Cir. Apr. 24, 2020). The First and Ninth Circuits upheld state-court jurisdiction, but did not expressly address *Atlantic Richfield*. Rhode Island v. Shell Oil Prods. Co., No. 19-1818, 2020 WL 6336000 (1st Cir. Oct. 29, 2020); City of Oakland v. BP PLC, 969 F.3d 895 (9th Cir. 2020); Cnty. of San Mateo v. Chevron Corp., 960 F.3d 586 (9th Cir. 2020).

[112] BP p.l.c. v. Mayor & City Council of Baltimore, *cert. granted*, 220 WL 5847132 (U.S. Oct. 7, 2020) (No. 19-1189). *See also infra* at "Climate Change Liability Suits: BP p.l.c. v. Mayor and City Council of Baltimore".

[113] Adam Vann, CRS Legislative Attorney, authored this section of the report.

[114] 140 S. Ct. 1837 (2020).

County, North Carolina, near the South Carolina border[115]—obtained a certificate of public convenience and necessity from the Federal Energy Regulatory Commission for the project under Section 7 of the Natural Gas Act.[116] The pipeline's developers also needed other federal and state authorizations for various project segments and characteristics, including permission to construct and operate a segment of the pipeline that runs approximately 600 feet below the Appalachian Trail within the federally controlled and managed George Washington National Forest. On January 23, 2018, the Forest Service granted the pipeline operators a "special use permit" and a right-of-way to cross the Trail.[117] The Cowpasture River Conservation Association and other conservation organizations filed a legal challenge to the Forest Service's actions in the Fourth Circuit shortly thereafter, claiming that the Forest Service's actions violated the National Forest Management Act (NMFA), the National Environmental Policy Act (NEPA), and the Administrative Procedure Act (APA).[118]

The Fourth Circuit agreed with the conservation organizations, finding that the Forest Service had failed to consider adequately certain factors as required by the NFMA, NEPA and the APA when determining whether to issue the special use permit.[119] Notably, the court further determined that the Trail was part of the "National Park System."[120] As a result of that determination, the court held that the Forest Service lacked authority to grant the special use permit and right-of-way, because the relevant text of the Mineral Leasing Act of 1920 (MLA) explicitly excludes "lands of the National Park System" from the definition of "federal lands" through which the Forest Service may grant a right-of-way.[121]

Supreme Court's Decision: The Supreme Court disagreed with the Fourth Circuit's interpretation of the MLA as applied to the Trail.[122] In a 7-2 opinion authored by Justice Thomas, the Court evaluated what it referred to as "the interaction of multiple federal laws."[123] The Court first evaluated the Weeks Act of 1911,[124] the authority under which the Hoover Administration established the Shenandoah National Forest in 1927 and changed its name to the George Washington National Forest in 1932.[125] Congress later established the Appalachian Trail through the passage of the National Trails System Act (Trails Act) in 1968.[126] That statute dictates that the Appalachian Trail is to be "administered primarily as a footpath by the Secretary of the Interior, in consultation with the Secretary of Agriculture."[127] The act also empowers the Secretary of the Interior to establish the location and width of the trails via "rights-of-way" agreements with

[115] Atlantic Coast Pipeline Fact Sheet, June 2020, https://atlanticcoastpipeline.com/resources/docs/updated%20one-pagers/domb003488%20acp%20construction%20fact%20sheet%20v6_06.2020.pdf.

[116] 15 U.S.C. § 717f.

[117] Cowpasture River Preservation Association v. U.S. Forest Service, 911 F.3d 150, 160 (4th Cir. 2018).

[118] *Id.*

[119] *Id.* at 154.

[120] *Id.* at 179.

[121] *Id*. at 181.

[122] The Supreme Court's decision did not address Forest Service compliance with the NMFA, NEPA and the APA during the decisionmaking process.

[123] *Cowpasture*, 130 S. Ct. at 1842.

[124] Pub. L. 61–435, 36 Stat. 961.

[125] Executive Order 5867, *George Washington National Forest, Virginia and West Virginia* (June 28, 1932).

[126] Pub. L. 90-453, 16 U.S.C. § 1241 *et seq*.

[127] *Id*. at § 1244(a)(1).

federal, state, and local agencies, as well as private landowners.[128] The Secretary of the Interior has delegated authority over National Trails to either the National Park Service or the Bureau of Land Management; the Park Service has primary administrative responsibility for the Appalachian Trail.[129]

With this framework in mind, the Supreme Court turned to the MLA, which the Forest Service relied on to grant the Atlantic Coast Pipeline a right-of-way to cross under the Appalachian Trail. The MLA provides that, among other things, "[r]ights-of-way through any Federal lands may be granted by the Secretary of the Interior or appropriate agency head for pipeline purposes for the transportation of oil, natural gas, synthetic liquid or gaseous fuels, or any refined product produced therefrom."[130] However, the statutory language explicitly excludes "lands in the National Park System" from the definition of "Federal lands,"[131] meaning that the MLA does not authorize agency heads to grant pipeline rights-of-way across "lands in the National Park System." The Forest Service relied on the authority granted by this section of the MLA in authorizing Atlantic Coast Pipeline's right-of-way underneath the Appalachian Trail, meaning that the Service concluded that the right-of-way did run through "lands in the National Park System."

The Supreme Court focused "on the distinction between the *lands* that the Trail traverses and the Trail itself, because the lands (not the Trail) are the object of the relevant statutes."[132] The Court noted that there was no dispute regarding Forest Service jurisdiction over the lands within the George Washington National Forest at the center of the case.[133] The question for the Court, therefore, was whether the lands associated with the Trail were still subject to Forest Service jurisdiction. If so, the Forest Service had the authority to issue a right-of-way permit under the MLA. If, however, the designation of the Trail under the Trails Act and the Secretary of the Interior's delegation of administrative authority over the Trail to the National Park Service rendered the Appalachian Trail "land[] in the National Park System," the MLA would not confer the authority to grant a right-of-way across the Trail.

The Court held that the Trails Act did not transfer jurisdiction over the land in which the Appalachian Trail is located.[134] According to the Court, the Trails Act directed the Secretary of the Interior to enter into "right-of-way agreements," not land transfers, and these right-of-way agreements do not convert the underlying lands to "lands within the National Park System."[135] The decision explored the legal nature of rights-of-way and easements, pointing out that these designations generally "grant a nonowner a limited privilege to 'use the lands of another'" but that "the grantor of the easement retains ownership over *the land itself*."[136] The Court acknowledged that the circumstances were somewhat different in this case, where the federal government was the owner of both the George Washington National Forest and the Appalachian Trail, but it found that "the same general principles apply" with respect to different federal

[128] *Id*. at § 1246.

[129] *See* CRS Report R43868, *The National Trails System: A Brief Overview*, by Mark K. DeSantis and Sandra L. Johnson, at Table 1.

[130] 30 U.S.C. § 185.

[131] *Id.*

[132] *Cowpasture*, 130 S. Ct. at 1844.

[133] *Id*. at 1843.

[134] *Id*. at 1844.

[135] *Id.*

[136] *Id*. at 1844-45.

agencies.[137] The Court interpreted the Trails Act's reference to the granted land interests as "rights-of-way" as a deliberate choice by the legislature to limit the nature of those property interests.[138] The Court noted that "[t]he fact that Congress chose to speak in terms of rights-of-way in the Trails Act, rather than in terms of land transfers, reinforces the conclusion that the Park Service has a limited role over only the Trail, not the lands that the Trail crosses."[139] As a result, the Court concluded that the authorization did not make the land in question part of the "National Park System" in which issuance of pipeline rights-of-way is not authorized under the MLA, but rather "Federal lands" under the jurisdiction of the Forest Service across which a right-of-way could be granted under the MLA.[140]

Dissenting Opinion: Justice Sotomayor wrote a dissenting opinion, which was joined by Justice Kagan. In the dissent, Justice Sotomayor argued that the majority was mistaken in analogizing the status of the Appalachian Trail as set forth in the Trails Act with easements as they are generally understood under state law. Instead, after a brief review of the relevant language in the MLA and the Trails Act discussed *supra*, Sotomayor wrote that

> the only question here is whether parts of the Appalachian Trail are 'lands' within the meaning of those statutes . . . . Those laws, a half century of agency understanding, and common sense confirm that the Trail is land, land on which generations of people have walked. Indeed, for 50 years the Federal Government has referred to the Trail as a 'unit' of the National Park System.[141]

Sotomayor also pointed out that easements are generally land rights conferred by the owner of real property to a nonowner, but in this case the federal government is the "owner" of both the National Forest and the Appalachian Trail.[142] The dissent took issue with the Court's effort to distinguish the Trail from the land it occupies, noting that "the Court does not disclose how the Park Service could administer the Trail without administering the land that forms it."[143]

Implications for Congress: As a result of this decision, the permit issued by the Forest Service to the Atlantic Coast Pipeline for crossing underneath the Appalachian Trail is valid. Legislators who oppose the pipeline or others like it could halt progress through new legislation, although it is worth noting that the Atlantic Coast Pipeline project was cancelled in July 2020.[144] In addition, Congress could amend the statutory framework for authorizing crossings of the Appalachian Trail and other properties administered by the National Park Service or other aspects of the interstate pipeline permitting process to clarify whether and by whom such crossings should be permitted in the future.

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[137] *Id*. at 1845.

[138] *Id.*

[139] *Id*. at 1847.

[140] *Id*. at 1850.

[141] *Id.* at 1851.

[142] *Id.* at 1856.

[143] *Id.*

[144] Ivan Penn, *Atlantic Coast Pipeline Canceled as Delays and Costs Mount*, N.Y. TIMES, July 5, 2020.

Supreme Court 2020-2021 Term Preview of EENR Cases

The Supreme Court may experience an "ideological" shift in its 2020-2021 term with the passing of Justice Ginsburg and the beginning of Justice Barrett's first term sitting on the Court.[145] Legal commentators have noted differences between Justice Barrett's and Justice Ginsburg's judicial philosophies that may affect the Court's majority views on agency deference, the scope of federal agencies' authority to implement EENR statutes, and the justiciability of environmental claims.[146]

Justice Ginsburg authored or joined several consequential opinions in EENR law cases during her time on the High Court.[147] In *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*, Justice Ginsburg held that environmental groups met the constitutional standing requirements in part because they raised "reasonable concerns" that the defendant's pollutant discharges over the permitted limits "directly affected" their "recreational, aesthetic, and economic interests."[148] Commentators have noted that while serving on the U.S. Court of Appeals for the Seventh Circuit (Seventh Circuit), then-Judge Barrett took a narrower view on types of alleged injuries that would meet standing requirements.[149] A stricter view of standing may limit stakeholder lawsuits that challenge agency actions or seek to enforce pollution limits.[150]

During her tenure on the Court, Justice Ginsburg also authored or joined opinions related to EPA's authority to regulate GHG emissions under the CAA to address climate change-related claims. In the 2007 landmark environmental case, *Massachusetts v. EPA*, Justice Ginsburg was part of a five-Justice majority ruling that EPA has the authority to regulate GHGs from new motor vehicles as "air pollutants" under the CAA and therefore states could challenge the EPA's failure to regulate those emissions adequately.[151] In *American Electric Power Co. v. Connecticut*, Justice Ginsburg wrote for a unanimous Court that held that EPA had authority to regulate GHGs from stationary sources such as power plants under the CAA, which displaced any federal common law

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[145] *See* Leah Litman & Melissa Murray, *Shifting from a 5-4 to a 6-3 Supreme Court Majority Could Be Seismic*, WASH. POST (Sept. 25, 2020) (noting that "[w]ith six justices cementing a conservative majority, liberal[] [justices] who hope to prevail on issues that divide along ideological lines will have to persuade Roberts and another of the court's conservatives.... "), https://www.washingtonpost.com/outlook/trump-ginsburg-conservative-supreme-court-majority/2020/09/25/17920cd4-fe85-11ea-b555-4d71a9254f4b_story.html.

[146] *See. e.g.*, Beth Gardiner, *With Justice Barrett, a Tectonic Court Shift on the Environment*, YALE ENV'T 360 (Oct. 26, 2020), https://e360.yale.edu/features/with-justice-barrett-a-tectonic-court-shift-on-the-environment; Ann Carlson et al., *Climate Policymaking in the Shadow of the Supreme Court*, LEGAL PLANET (Oct. 27, 2020), https://legal-planet.org/2020/10/27/climate-policymaking-in-the-shadow-of-the-supreme-court/; Jody Freeman, *What Amy Coney Barrett's Confirmation Will Mean for Joe Biden's Climate Plan*, VOX (Oct. 26, 2020). For an in-depth discussion of Justice Barrett's jurisprudence, see CRS Report R46562, *Judge Amy Coney Barrett: Her Jurisprudence and Potential Impact on the Supreme Court*, coordinated by Valerie C. Brannon, Michael John Garcia, and Caitlain Devereaux Lewis.

[147] *See* CRS Legal Sidebar LSB10537, *The Death of Justice Ruth Bader Ginsburg: Initial Considerations for Congress*, by Valerie C. Brannon, Michael John Garcia, and Caitlain Devereaux Lewis.

[148] Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc., 528 U.S. 167, 183-85 (2000).

[149] *See* CRS Report R46562, *Judge Amy Coney Barrett: Her Jurisprudence and Potential Impact on the Supreme Court*, coordinated by Valerie C. Brannon, Michael John Garcia, and Caitlain Devereaux Lewis, at 33-34 (noting that then-Judge Barrett's opinions on the Seventh Circuit indicate an "approach to assessing whether risks of harm accompany violations of procedural requirements that is more stringent than the approach that other judges have applied or would have applied.").

[150] *See, e.g.*, Gardiner, *supra* note 146 (noting that "[l]itigants on issues from water pollution to climate change could find it harder to get through courtroom doors[]" if the Supreme Court takes a narrow view of standing).

[151] Massachusetts v. EPA, 549 U.S. 497, 528-32 (2007).

public nuisance claims seeking carbon dioxide emissions limits for fossil fuel-fired power plants.[152] While noting during her Supreme Court confirmation process that she does not have "firm views"[153] on climate change, Justice Barrett's judicial philosophy regarding EENR issues more broadly is unclear. However, her views on the limits of executive agency authority and the amount of deference given to an agency's actions could align with other Justices and potentially narrow an agency's ability to address climate change and other EENR issues.[154]

The Court's 2020-2021 term, which began on October 5, 2020, features several EENR cases relating to, among other things, the appropriate court to decide climate change liability suits, states' competing claims to several interstate rivers, the small refinery exemptions under the CAA's renewable fuel standard, the relationship between separate CERCLA provisions for recouping cleanup costs, and disclosure of agency documents produced during an Endangered Species Act consultation.[155] The Court is also considering whether to review other EENR-related cases.[156]

The following sections preview the legal disputes and arguments in several EENR cases of potential importance and analyzes the potential implications for Congress.

Original Jurisdiction Interstate Water Cases[157]

In its 2020-2021 term, the Supreme Court has two original jurisdiction cases on its docket involving states' competing claims to several interstate rivers.[158] In *Texas v. New Mexico*, the Court is expected to address the latest dispute in a decades-old case about how to divide the Pecos River.[159] In *Florida v. Georgia*, the Court is scheduled to hear Florida's argument that Georgia is depleting too great a portion of the waters of the Apalachicola-Chattahoochee-Flint (ACF) Rivers system.[160]

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[152] American Electric Power Co. v. Connecticut, 564 U.S. 410, 424-26 (2011) [hereinafter *AEP*]. For further discussion of the *AEP* and *Massachusetts v. EPA* decisions, see CRS Report R44807, *U.S. Climate Change Regulation and Litigation: Selected Legal Issues*, by Linda Tsang.

[153] Nomination of Amy Coney Barrett to the U.S. Supreme Court Questions for the Record, *Questions from Sen. Booker* at 12 (Oct. 16, 2020), https://www.judiciary.senate.gov/imo/media/doc/Barrett%20Responses%20to%20QFRs.pdf.

[154] *See* Ann Carlson et al., *Climate Policymaking in the Shadow of the Supreme Court*, Legal Planet (Oct. 27, 2020), https://legal-planet.org/2020/10/27/climate-policymaking-in-the-shadow-of-the-supreme-court/ (discussing how the nondelegation doctrine, which limits Congress's ability to delegate legislative power, and the major questions doctrine, which courts have used to limit deference to agency statutory interpretations concerning major political or economic significance, could limit an agency's regulatory authority).

[155] *See infra*.

[156] *See infra*.

[157] Stephen P. Mulligan, CRS Legislative Attorney, authored this section of the report.

[158] While the Supreme Court normally is a court of appellate jurisdiction, the Constitution and a federal statute, 28 U.S.C. § 1251(a), provide the Court with original and exclusive jurisdiction over cases between two or more states. U.S. CONST. art. III, § 2 cl. 2 ("In all Cases ... in which a State shall be Party, the Supreme Court shall have original Jurisdiction.").

[159] *See* Texas v. New Mexico, No. 22O65 (U.S. 2018).

[160] *See* Florida v. Georgia, No. 142, Orig. (U.S. 2019).

Texas v. New Mexico

In its first oral argument of the 2020-2021 term, the Supreme Court heard *Texas v. New Mexico*, a long-running case that has been before the Court since 1974.[161] The litigation concerns how to share the waters of the Pecos River—a notoriously unpredictable waterbody that is frequently dry and derives much of its annual flow from flash floods.[162] The Pecos River originates in north-central New Mexico and flows south into Texas, where it joins the Rio Grande[163] (**Figure 1**).

Figure 1. Pecos River

Source: Texas's Mot. for Review of River Master's Final Determination, Texas v. New Mexico, No. 22O65 (U.S. Dec. 17, 2018).

Background: In 1948, Texas and New Mexico signed an interstate compact, the Pecos River Compact, intended to equitably divide the river's waters.[164] Congress, which has constitutional authority over interstate compacts,[165] approved the compact the next year.[166] Article III of the Pecos River Compact provides that New Mexico may "not deplete by man's activities[167] the flow

[161] *See* Texas v. New Mexico, 421 U.S. 927 (1975) (granting leave to file bill of complaint). Texas and New Mexico are also engaged in another original jurisdiction case before the Supreme Court, which concerns competing water rights to a portion of the Rio Grande in New Mexico. *See* Texas v. New Mexico & Colorado, No. 141, Original (U.S. Jan. 8, 2013). Colorado is also a party to the Rio Grande case.

[162] *See* Texas v. New Mexico, 462 U.S. 554, 557 n.2 (1983) [hereinafter *1983 Texas*].

[163] *Id.* at 556-57.

[164] 63 Stat. 159 (1949) [hereinafter Pecos River Compact].

[165] U.S CONST. art. I, § 10, cl. 3 ("No State shall, without the Consent of Congress ... enter into any Agreement or Compact with another State.... ").

[166] Pecos River Compact, Act of June 9, 1949, 63 Stat. 159.

[167] The compact defines "deplete by man's activities" to mean "to diminish the stream flow of the Pecos River at any

of the Pecos River at the [New Mexico-Texas] state line below an amount which will give to Texas a quantity of water equivalent to that available to Texas under the 1947 condition."[168] The Pecos River Compact defines the provision's key phrase—*1947 condition*—by incorporating the conditions described in an engineering advisory committee's report.[169] But New Mexico and Texas soon realized that the hydrological data used in that report were faulty.[170] When the two states could not agree on how to fix the errors, Texas sued New Mexico in 1974, arguing that New Mexico was over-depleting the Pecos.[171]

In a series of decisions in the 1980s, the Supreme Court held that New Mexico had overconsumed the Pecos River and that it must deliver additional water annually to make up for prior shortfalls.[172] The Court also appointed a River Master[173] to calculate future water deliveries and determine whether there were shortfalls or surpluses.[174] In a 1988 amended decree, the Court defined the procedures for the River Master to make calculations and decisions.[175]

Although the Supreme Court maintained jurisdiction over the case in the decades that followed, the litigation was largely dormant until 2014, when Tropical Storm Odile brought heavy rainfall to the region.[176] After stormwater filled Texas's main reservoir on the Pecos River,[177] Texas asked New Mexico to store Texas' portion of the river's flows until it regained reservoir capacity.[178] New Mexico agreed to store water at an upstream project within its borders, Brantley Reservoir.[179] The U.S. Bureau of Reclamation (Reclamation) owns and operates Brantley Reservoir.[180] Reclamation first stored the excess water to prevent flooding, but it later informed the states that, once flood concerns abated, it could not store water for Texas without a contract.[181]

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given point as the result of beneficial consumptive uses of water within the Pecos River Basin above such point. For the purposes of this Compact it does not include the diminution of such flow by encroachment of salt cedars or other like growth, or by deterioration of the channel of the stream." Pecos River Compact, *supra* note 164, art. II(e).

[168] *Id.* art. III(a).

[169] *Id.* art. II(g).

[170] Texas v. New Mexico, 446 U.S. 540, 541 (1980) [hereinafter *1980 Texas*].

[171] *See 1983 Texas*, 462 U.S. at 562 (describing Texas's allegations in its Bill of Complaint).

[172] Texas v. New Mexico, 482 U.S. 124, 128 & n.5 (1987) [hereinafter *1987 Texas*]. *See also 1980 Texas*, 446 U.S. at 540 (adopting the Special Master's report on the meaning of the "1947 condition"); *1983 Texas*, 462 U.S. at 571 (declining to reform the Pecos Rivers Commission created by the Pecos River Compact and continuing to exercise ongoing jurisdiction over the dispute between Texas and New Mexico).

[173] A river master is an official appointed by the Supreme Court to oversee enforcement of interstate water decrees and aid in resolution of disputes. *See, e.g.*, Kansas v. Colorado, 543 U.S. 86, 92 (2004) (discussing circumstances in which appointments of a river master are appropriate); New Jersey v. New York, 347 U.S. 995, 1001 (1954) (appointing Delaware River Master).

[174] *1987 Texas*, 482 U.S. at 134-35.

[175] *See* Texas v. New Mexico, 485 U.S. 388 (1988) [hereinafter *1988 Texas*].

[176] Texas's Motion for Review of River Master's Final Determination at 7, Texas v. New Mexico, No. 22O65 (U.S. Dec. 17, 2018) [hereinafter Texas Motion for Review].

[177] *Id.*; Brief for the United States as Amicus Curiae at 7, Texas v. New Mexico, No. 22O65 (U.S. Dec. 23, 2019) [hereinafter U.S. Amicus Brief, *Texas v. New Mexico*].

[178] U.S. Amicus Brief, *Texas v. New Mexico*, *supra* note 177, at 8.

[179] *See id*.

[180] *See id. See also Brantley Dam*, U.S. BUREAU OF RECLAMATION (last visited Feb. 2, 2021), https://www.usbr.gov/projects/index.php?id=28.

[181] *See* U.S. Amicus Brief, *Texas v. New Mexico*, *supra* note 177, at 10-11. *See also* 43 U.S.C. § 523 (authorizing the Secretary of the Interior to contract for storage and delivery of surplus water conserved by a Reclamation project beyond the project's requirements).

Texas did not sign a water storage contract, and Reclamation began releasing water in the summer of 2015.[182]

During the total time Reclamation stored excess water at Brantley Reservoir, more than 21,000 acre-feet of water evaporated before being released downstream.[183] The dispute at the Supreme Court concerns which state should be deemed to have used the water lost to evaporation for purposes of the Pecos River Compact's water-sharing formula. The River Master concluded that New Mexico and Texas should split responsibility for evaporation losses evenly during the initial period when Reclamation impounded water because of flooding concerns.[184] But after the public safety risk abated, all responsibility for evaporation shifted to Texas because, according to the River Master, Reclamation was holding water solely for Texas's benefit.[185] The River Master thus charged Texas with a greater portion of the evaporation losses, and New Mexico received a retroactive credit of 16,627 acre-feet of water.[186]

Arguments Before the Supreme Court: Texas has challenged whether the River Master had legal authority to award New Mexico the retroactive credit.[187] Texas argues that the River Master has a purely "technical" role in calculating water delivery obligations, and that he departed from the accounting procedures and deadlines defined in the Supreme Court's 1998 amended decree.[188] New Mexico responds that the equities of the case weigh in its favor, and that the River Master acted within the scope of his powers.[189] The United States, which filed an amicus curiae brief, supports New Mexico.[190]

Considerations for Congress: Because the current *Texas v. New Mexico* matter concerns only one particular flooding event, some commentators view it as unlikely to set major legal precedent in other interstate water disputes.[191] That said, the case may be significant for water users in New Mexico and Texas that depend on the Pecos River for irrigation and other uses.[192]

Florida v. Georgia

In its second interstate water case this term, *Florida v. Georgia*, the Supreme Court will consider whether to apportion the waters of the ACF Basin.[193] Unlike in *Texas v. New Mexico*, Florida and

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[182] *See* U.S. Amicus Brief, *Texas v. New Mexico*, *supra* note 177, at 10-11.

[183] *Id.* at 11; Texas Motion for Review, *supra* note 176, at 7; N.M. Response to Texas's Motion for Review of River Master's Final Determination at 7, No. 22O65 (U.S. Feb. 15, 2019) [hereinafter New Mexico Response].

[184] U.S. Amicus Brief, *Texas v. New Mexico*, *supra* note 177, at 10-11.

[185] Texas Motion for Review, *supra* note 176, at 29.

[186] *Id.* at 30; U.S. Amicus Brief, *Texas v. New Mexico*, *supra* note 177, at 14.

[187] *See* Texas Motion for Review, *supra* note 176, at 14-17.

[188] *Id.* at 18.

[189] *See* New Mexico Response, *supra* note 183, at 15-37.

[190] U.S. Amicus Brief, *Texas v. New Mexico*, *supra* note 177, at 14-21.

[191] *See, e.g.*, Reed Benson, *Case Preview: In Newest Chapter in Long-Running Water Dispute, Court Will Hear First-Ever Challenge to Ruling by Interstate River Master*, SCOTUSBLOG (Sep. 29, 2020), https://www.scotusblog.com/2020/09/case-preview-in-newest-chapter-in-long-running-water-dispute-court-will-hear-first-ever-challenge-to-ruling-by-interstate-river-master/.

[192] *See, e.g.*, Transcript of Oral Argument at 3, Texas v. New Mexico, No. 22O65 (U.S. Oct. 5, 2020) (Solicitor General of Texas arguing that the River Master's decision "threatens incalculable economic harm" and "effectively deprives farmers and business of west Texas of a year's worth of irrigation.... ").

[193] The Supreme Court issued an order on October 5, 2020 stating that it will schedule oral argument in *Florida v. Georgia* in "due course." Order List: 592 U.S., Case 142, Orig., Florida v. Georgia (U.S. Oct. 5, 2020).

Georgia do not have an interstate compact that dictates how to share the ACF waters. In 1997, Florida, Georgia, and Alabama signed, and Congress approved, an interstate compact in which the three states pledged to "develop an allocation formula for equitably apportioning the surface waters of the ACF Basin." [194] But the states never agreed on a formula, and their compact expired in 2003.[195] With no agreement in place, Florida petitioned the Supreme Court to equitably apportion ACF waters.[196] The case is now before the Court for the second time: the High Court previously rejected a Special Master's recommendation[197] to dismiss Florida's petition,[198] and the case is now before the Court on whether to adopt a second Special Master's recommendation to dismiss the case.

Background: The three major rivers of the ACF Basin—the Apalachicola, Chattahoochee, and Flint—form a "Y"-shaped river system[199] (**Figure 2**). The Chattahoochee and Flint Rivers flow southward from Georgia, forming the top arms of the Y.[200] At the Florida border, the rivers combine and travel through Jim Woodruff Dam, a U.S. Army Corps of Engineers (Corps) project.[201] South of the dam, the combined waters form the stem of the Y and change their name to the Apalachicola River, which flows into Apalachicola Bay on the Gulf of Mexico.[202] The Corps can control the amount of water flowing into Apalachicola River through the Woodruff Dam and four additional Corps-operated dams along the Chattahoochee River.[203]

[194] Apalachicola-Chattahoochee-Flint River Basin Compact, P.L. 105-104, art. I, 111 Stat. 2219, 2222-23 (1997).

[195] Florida v. Georgia, 138 S. Ct. 2502, 2510 (2018).

[196] *See* Complaint for Equitable Apportionment and Injunctive Relief ¶¶ 5-7, Florida v. Georgia, No. 22O142 (U.S. Oct. 1, 2013) [hereinafter *Florida v. Georgia* Complaint].

[197] In original jurisdiction cases, the Supreme Court often appoints a special master to develop the record and preside over preliminary legal arguments, but the Court retains authority to approve, revise, or reject a special master's findings, conclusions, and recommendations. *E.g.*, Washington v. Oregon, 288 U.S. 592 (1933).

[198] Florida v. Georgia, 138 S. Ct. 2502, 2516 (2018).

[199] *See id*. at 2508.

[200] *See id.* at 2508-09.

[201] *Id.*

[202] *Id.*

[203] *See* Brief for the United States as Amicus Curiae in Support of Overruling Florida's Exception 2C to the Report of the Special Master at 4, Florida v. Georgia, No. 22O142 (U.S. July 6, 2020) [hereinafter 2020 U.S. Amicus Brief, *Florida v. Georgia*]. The Corps operates Woodruff Dam and other dams in the ACF Basin under "a Master Water Control Manual (Master Manual) governing all federal projects in the ACF Basin and separate reservoir regulation manuals for each individual project." *Id.* at 4-5.

Figure 2. Apalachicola-Chattahoochee-Flint (ACF) River Basin

Source: Pamela King, *Justices Tee Up Arguments in Southeast Water War*, E&E NEWS (Oct. 5, 2020), https://www.eenews.net/greenwire/2020/10/05/stories/1063715483.

In 2013, Florida filed a complaint in the Supreme Court alleging that Georgia's consumption of the Flint River reduced the amount of water that reaches the Apalachicola River, harming Florida's ecosystems and leading to the collapse of the local oyster industry.[204] The Court appointed a Special Master to develop the factual record and make preliminary legal recommendations, subject to the Court's approval.[205]

After a five-week trial in 2017 in which Florida sought a judicial decree limiting Georgia's consumptive use of the Flint River, the Special Master recommended dismissing the case because the relief Florida sought would not redress its alleged injury.[206] The Special Master concluded that the requested remedy would be ineffective without requiring the Corps to change its dam operations,[207] but the Corps was not a party to the case because it was protected by sovereign immunity and therefore would not be bound by the Supreme Court's decree.[208] The Special

[204] *See Florida v. Georgia* Complaint, *supra* note 196, at ¶¶ 5-7.

[205] Order in Pending Case, Florida v. Georgia, No. 22O142 (U.S. Nov. 19, 2014).

[206] Report of the Special Master at 30, Florida v. Georgia, No. 22O142 (U.S. Feb. 14, 2017) [hereinafter First Special Master Report, *Florida v. Georgia*].

[207] *Id.*

[208] Florida v. Georgia, 138 S. Ct. 2502, 2511 (2018).

Master concluded that, without a decree binding the Corps, Florida had not met its burden to show "by clear and convincing evidence that its injury can be redressed by an order equitably apportioning the waters of the Basin."[209]

In a 5-4 opinion, the Supreme Court in 2018 declined to adopt the Special Master's conclusion.[210] The Court held that "clear and convincing evidence" was too strict a standard for the question of whether an equitable apportionment decree could adequately redress Florida's alleged injuries.[211] Instead, the Court held that Florida must only show "it is likely to prove possible" to fashion a decree that "ameliorates [its] harm significantly.... "[212] The High Court remanded the case to the Special Master with instructions to address more questions about whether Florida met this burden and satisfied the Court's other standards to apportion interstate waters equitably.[213]

On remand, a newly appointed Special Master[214] found nearly uniformly in Georgia's favor and recommended that the Supreme Court deny Florida's request for apportionment.[215] The Special Master found that "Florida has not suffered any harm from Georgia's consumption" of Flint River waters.[216] To the contrary, he concluded that drought and Florida's mismanagement of its resources were the predominate causes of the oyster industry collapse, and that there was no evidence of harm to the ecosystem.[217] The Special Master concluded that Georgia did not take an inequitable amount of ACF waters given Georgia's conservation efforts and its greater share of the population, employment, and economic output of the ACF Basin.[218] And because the Corps impounds water during drought periods, the Special Master determined that "very little of the additional streamflow generated by a decree would result in increased Apalachicola flows at the time when Florida needs them."[219] Therefore, the Special Master concluded, "Florida would receive no appreciable benefit from [an equitable apportionment] decree."[220]

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[209] First Special Master Report, *Florida v. Georgia*, *supra* note 206, at 3.

[210] *Florida*, 138 S. Ct. at 2516.

[211] *Id.*

[212] *Id.*

[213] The Supreme Court instructed the Special Master to address whether (1) decreased water flow into the Apalachicola River caused Florida harm; (2) Georgia took too much water from the Flint River in contravention of equitable principles; (3) Georgia's inequitable use of ACF Basin waters, if proven, injured Florida; (4) "an equity-based cap on Georgia's use of the Flint River [would] lead to a significant increase in streamflow from the Flint River into Florida's Apalachicola River.... "; and (5) the amount of extra water that flows into the Apalachicola River would "significantly redress [Florida's] economic and ecological harm ... [.]" *Id.* at 2518. The Supreme Court also stated that the Special Master must determine whether Florida proved that the benefits of apportionment "substantially outweigh the harm that might result." *Id.* at 2528 (quoting Colorado v. New Mexico, 459 U.S. 176, 187 (1982)).

[214] The Supreme Court first appointed Ralph I. Lancaster, a private practitioner in Portland, Maine, as Special Master. Florida v. Georgia, 574 U.S. 1021 (2014). Following its 2018 decision, the Court discharged Special Master Lancaster "with the thanks of the Court," and appointed the Honorable Paul J. Kelly, Jr., a federal judge on the United States Court of Appeals for the Tenth Circuit. Order Appointing Judge Paul J. Kelly, Jr. as Special Master, 140 S. Ct. 2626 (Aug. 9, 2018), *amended* 139 S. Ct. 57 (Sept. 25, 2018) (mem.).

[215] Report of the Special Master at 7, Florida v. Georgia, No. 142, Orig. (U.S. Dec. 11, 2019) [hereinafter Second Special Master Report, *Florida v. Georgia*].

[216] *Id.* at 25.

[217] *Id.* at 8-23, 78.

[218] *Id.* at 45-48. The special master found that Georgia's portion of the ACF Basin "contains 92% of the population, 96% of employment, and contributes more than 99% of the gross regional product of the whole ACF Basin." *Id.* at 46.

[219] *Id.* at 62.

[220] *Id.*

Arguments Before the Supreme Court: Florida has filed exceptions (i.e., challenges) to all elements of the Special Master's conclusions, and it argues that the Special Master should have allowed the states to present additional evidence.[221] The United States has not taken a position on the merits of the case. However, it did file an amicus curiae brief opposing Florida's contention that the Special Master overstated the possibility that, if the Supreme Court were to cap Georgia's consumption, the Corps could "offset" gains by impounding newly available water in its dams.[222] The United States does not state whether the Corps would offset gains in ACF flows. Instead, it asserts that a Supreme Court decree would not bind the Corps because it is not a party, and that the Corps' primary objective when releasing flows will be to advance its projects' statutorily authorized purposes rather than to address the apportionment problems at issue in the litigation.[223]

Considerations for Congress: With a growing demand for ACF Basin waters, particularly for municipal and industrial uses in the Atlanta metropolitan area, and downstream flows that can affect riverine and bay ecosystems in Florida, the *Florida v. Georgia* litigation has the potential to affect millions of water users in the region[224]—an issue of interest to some in Congress.[225] And because the case concerns equitable apportionment rather than the specific terms of an interstate compact, it may set precedent in future interstate water disputes that arise in the absence of a compact.[226] Changes in the Supreme Court's composition may influence its ultimate decision as Justices Kennedy and Ginsburg, who are no longer on the Court, were part of the five-Justice majority that ruled in Florida's favor in 2018.[227] On the other hand, the four dissenting Justices who would have adopted the first Special Master's recommendation to decline Florida's apportionment request—Justices Thomas, Alito, Kagan, and Gorsuch—remain on the Court.[228]

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[221] Exceptions to Report of the Special Master by Plaintiff State of Florida and Brief in Support of Exceptions at i-ii, Florida v. Georgia, No. 142, Orig. (U.S. Apr. 13, 2020) [hereinafter Florida's Exceptions to Second Special Master Report].

[222] *See* 2020 U.S. Amicus Brief, *Florida v. Georgia*, *supra* note 203, at 22-44.

[223] *Id.*

[224] For additional background on the demand for ACF waters, see STEPHEN J. LAWRENCE, U.S. GEOLOGICAL SERV., WATER USE IN THE APALACHICOLA-CHATTAHOOCHEE-FLINT RIVER BASIN, ALABAMA, FLORIDA, AND GEORGIA, 2010, AND WATER-USE TRENDS, 1985-2010 (2016).

[225] *See, e.g.*, 162 CONG. REC. H3060 (daily ed. May 24, 2016) (statement of Rep. Gwen Graham) ("The Apalachicola, Chattahoochee, and Flint River system is a critically important asset to the Southeastern United States' ecology, economy, and heritage. Unfortunately, it has also become a point of intense political friction and lengthy, ongoing, and extremely costly litigation.").

[226] For example, the Supreme Court's 2018 decision in *Florida v. Georgia* articulated a new "likely to prove possible" standard for redressability in equitable apportionment cases, discussed above. *See* Florida v. Georgia, 138 S. Ct. 2502, 2516 (2018). Some commentators view both *Florida v. Georgia* and *Texas v. New Mexico* as part of a broader trend of interstate water disputes related to extreme weather events and climate change. *See, e.g.*, Pamela King, *Climate Change Unleashes Interstate Water Wars*, E&E NEWS (May 6, 2020), https://www.eenews.net/stories/1063047595; Jerome C. Muys Jr. and George William Sherk, *The Dogmas of the Quiet Past: Potential Climate Change Impacts on Interstate Compact Water Allocation*. 34 VA. ENV'T. L.J. 297, 299-303 (2016).

[227] Florida v. Georgia, 138 S. Ct. 2502 (2018).

[228] *Id.* at 2528 (Thomas, J., dissenting). Justice Thomas, joined by Justices Alito, Kagan, and Gorsuch, argued that the Special Master reached his decision after balancing the harms and benefits of an equitable apportionment decree rather than applying a "'threshold' redressability requirement.... " *Id.* at 2536.

Endangered Species Act and the Freedom of Information Act: *U.S. Fish and Wildlife Service v. Sierra Club*[229]

On November 2, 2020, the Supreme Court held oral argument in *U.S. Fish and Wildlife Service v. Sierra Club*, considering the limits of the deliberative process privilege under the Freedom of Information Act (FOIA) as it applies to Section 7 consultations under the Endangered Species Act (ESA). The Court granted review of a Ninth Circuit decision requiring disclosure of certain agency documents produced during the ESA consultation process for an EPA rule on cooling water intake structures.

Background: In April 2011, EPA proposed new regulations for cooling water intake structures under the CWA.[230] In connection with the proposed regulations, EPA initiated an ESA Section 7 consultation with the U.S. Fish and Wildlife Service and the National Marine Fisheries Service (together, the Services).[231]

Section 7 of the ESA generally requires federal agencies to consult with one or both of the Services when their actions may affect species listed as endangered or threatened under the ESA or their designated critical habitat.[232] This process is used to ensure that federal agencies comply with the ESA mandate that federal agency actions not "jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat."[233] At the end of a Section 7 consultation, the Services generally provide a biological opinion (BiOp) as to whether the action is likely to jeopardize the continued existence of the listed species or adversely modify critical habitat.[234] If the Services determine that the action is likely to jeopardize listed species or adversely modify critical habitat, they must suggest reasonable and prudent alternatives (RPAs) to the action that would not violate the statute, to the extent RPAs are available.[235] The federal agency may request that the Services provide a draft

[229] Erin H. Ward, CRS Legislative Attorney, authored this section of the report.

[230] 76 Fed. Reg. 22,174 (Apr. 20, 2011).

[231] For a brief overview of the ESA, *see* CRS In Focus IF11241, *The Legal Framework of the Endangered Species Act (ESA)*, by Erin H. Ward.

[232] 16 U.S.C. § 1536(a)(2). Endangered species, threatened species, and critical habitat are all defined terms under the ESA. The ESA defines *endangered species* as "any species which is in danger of extinction throughout all or a significant portion of its range," other than certain insects considered pests. *Id.* § 1532(6). It defines *threatened species* to mean "any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." *Id.* § 1532(20). Finally, the ESA defines *critical habitat* for an endangered or threatened species as

> (i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 of this title, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and
>
> (ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 1533 of this title, upon a determination by the Secretary that such areas are essential for the conservation of the species.

Id. § 1532(5). The act does not define *habitat*.

[233] *Id.*

[234] *Id.* § 1536(b).

[235] *Id.* § 1536(b)(3)(A).

BiOp to analyze the RPAs if the Services conclude that the action is likely to jeopardize listed species or adversely modify critical habitat.[236]

In this case, after reviewing EPA's proposed rule, the Services in December 2013 initially concluded in separate draft BiOps that EPA's proposed cooling water intake structure rule would jeopardize listed species and suggested RPAs.[237] EPA subsequently modified the proposed action in March 2014.[238] NMFS circulated a draft jeopardy BiOp internally in April 2014, and in May 2014 the Services issued a joint final BiOp finding no jeopardy.[239]

The Sierra Club filed a FOIA request seeking, among other things, the Services' December 2013 draft BiOps finding jeopardy, the associated RPAs, the April 2014 draft BiOp, and other documents the Services prepared during the consultation process to assess EPA's proposed cooling water intake structures rule.[240] FOIA requires federal agencies to provide certain agency records to the public, either automatically or upon request by any person provided the records are "reasonably describe[d]."[241] But the statute allows federal agencies to withhold records (or portions of records) that fall within nine exemptions.[242] At issue in this case is FOIA Exemption 5:

> [The requirement to release agency records] does not apply to matters that are—
>
> . . . (5) inter-agency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency, provided that the deliberative process privilege shall not apply to records created 25 years or more before the date on which the records were requested[.][243]

The Services relied on this exemption to withhold records related to the consultation process, including the draft BiOps that found that the proposed rule would jeopardize listed species and documents identifying RPAs to the action. Sierra Club challenged the records being withheld as not properly within the FOIA Exemption 5. The district court identified 12 documents that had been improperly withheld in part or in full.[244] The 12 documents included three draft BiOps, three documents identifying RPAs, and six documents with other terms and conditions or analyses.[245]

Ninth Circuit Decision: The Ninth Circuit affirmed the district court's order except with respect to three documents: two of the RPAs and one of the draft BiOps.[246] The court noted that Exemption 5 "has been interpreted as coextensive with all civil discovery privileges" and that in this case, the Services were claiming the "deliberative process privilege," which protects "'the quality of agency decisions by ensuring that the frank discussion of legal or policy matters in writing, within the agency, is not inhibited by public disclosure.'"[247] However, the court also

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[236] 50 C.F.R. § 402.14(g)(5).

[237] Sierra Club v. U.S. Fish and Wildlife Serv., 925 F.3d 1000, 1007-08 (9th Cir. 2019).

[238] *Id.* at 1008.

[239] *Id*.

[240] *Id.* at 1008-10.

[241] 5 U.S.C. § 552(a). For more information on FOIA, *see* CRS Report R46238, *The Freedom of Information Act (FOIA): A Legal Overview*, by Daniel J. Sheffner.

[242] *Id.* § 552(b).

[243] *Id.* § 552(b)(5).

[244] Sierra Club v. U.S. Fish & Wildlife Serv., 925 F.3d 1000, 1009 (9th Cir. 2019).

[245] *Id.* at 1009-10.

[246] *Id.* at 1018.

[247] *Id.* at 1011 (quoting Maricopa Audubon Soc'y v. U.S. Forest Serv., 108 F.3d 1089, 1092 (9th Cir. 1997)).

observed that "FOIA is meant to promote disclosure" and accordingly "its exemptions are interpreted narrowly."[248]

To determine whether the documents should be exempt from disclosure pursuant to the deliberative process privilege, the Ninth Circuit assessed whether the documents were (1) pre-decisional and (2) deliberative.[249] To classify a document as pre-decisional under Ninth Circuit precedent, the agency must identify the decision to which the document is "pre-decisional" and show that the document was "'prepared in order to assist an agency decisionmaker in arriving at his decision, and may include recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency.'"[250] In applying this standard to the Services' documents, the court focused on whether each document was pre-decisional to the BiOps rather than to the EPA rulemaking.[251]

To assess the second deliberativeness prong, the Ninth Circuit applied a "'functional approach'" that "considers whether the contents of the documents 'reveal the mental processes of the decisionmakers' and would 'expose [the Services'] decision-making process in such a way as to discourage candid discussion within the agency and thereby undermine [their] ability to perform [their] functions.'"[252] In making this assessment, the court explained that the Ninth Circuit and other circuits understand "deliberative" to mean "reflecting the opinions of individuals or groups of employees rather than the position of an entire agency."[253]

The court concluded that the two December 2013 draft BiOps finding jeopardy were neither pre-decisional nor deliberative because they were the Services' final opinions on the EPA rule as proposed in November 2013.[254] The court found similarly for the other documents containing terms, conditions, and other analyses.[255] The court held that two of the RPAs from December 2013 were successive drafts of the Services' recommendations that could shed light on the internal vetting process and were accordingly deliberative, but that the March 2014 RPA appeared to be a final version that was not deliberative.[256] Finally, the court held that the April 2014 draft jeopardy BiOp that addressed EPA's revised rule as proposed in March 2014 was both pre-decisional and deliberative because there were later versions of the BiOp and some of the internal agency deliberations might be reconstructed if the April 2014 draft and May 2014 final BiOps were compared.[257]

Arguments Before the Supreme Court: The Services argue to the Supreme Court that requiring disclosure of the draft BiOps is contrary to Congress's intent that Exemption 5 of FOIA protect "frank discussion of legal or policy matters" in agency decisionmaking.[258] The Services observe that the Supreme Court has described Exemption 5 as distinguishing "between predecisional memoranda prepared in order to assist an agency decisionmaker in arriving at his decision, which

[248] *Id.*

[249] *Id.*

[250] *Id.* at 1012 (quoting Assembly of Cal. v. U.S. Dep't of Commerce, 968 F.2d 916, 920 (9th Cir. 1992)).

[251] *Id.* at 1013.

[252] *Id.* at 1015 (quoting *Assembly of Cal.*, 968 F.2d at 920-21).

[253] *Id.* at 1016.

[254] *Id.* at 1012-15.

[255] *Id.*

[256] *Id.* at 1018.

[257] *Id.*

[258] Brief for Petitioners, U.S. Fish and Wildlife Serv. v. Sierra Club, No. 19-547, at 18 (2020).

are exempt from disclosure, and postdecisional memoranda setting forth the reasons for an agency decision already made, which are not."[259] The Services point out that the draft December 2013 BiOps were not final BiOps and were not circulated in full to EPA "because they decided more work was needed."[260] They note that under Supreme Court and D.C. Circuit precedent, a draft does not become a final document if the agency abandons a particular course.[261] The Services contend that requiring disclosure of draft BiOps that are not adopted as the agency's final position "would severely undermine Congress's purposes in incorporating the deliberative process privilege into FOIA."[262]

In response, the Sierra Club contends that the Services rely on principles governing judicial review of final agency action, and that the FOIA statutory provisions do not limit disclosures to final agency action but instead "mandate[] disclosure of the reasoning for intermediate decisions that shape later outcomes."[263] Sierra Club further argues that whether a decision is final depends not on the agency's designation but rather on "whether the record demonstrates that the document contains the basis of a policy the agencies 'actually adopted,' rather than conveying 'advisory opinions, recommendations and deliberations."[264] Finally, Sierra Club observes that a draft jeopardy BiOp may contain a tentative jeopardy determination for further discussion or may contain a "conclusive jeopardy opinion" with only the RPA component for further discussion.[265]

Considerations for Congress: The Supreme Court's decision in this case could determine whether parties seeking to challenge BiOps and related federal agency actions through judicial review may obtain copies of draft BiOps and other agency documents created during the consultation process. Final BiOps—unlike draft BiOps—are final agency actions subject to judicial review under the APA.[266] The APA allows affected individuals to seek review by the courts of final agency actions to determine whether the actions are within the agency's statutory authority and comply with legal requirements.[267] The APA requires courts to "hold unlawful and set aside agency action, findings, and conclusions found to be," among other things, "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[268] When a court reviews a final BiOp issued by the Services, any interim agency records that are not ultimately adopted would likely only affect the outcome of the litigation to the extent they showed the final BiOp was arbitrary and capricious. For example, if a draft BiOp includes data that are not addressed in the final BiOp or that contradict the Services' analysis in the final BiOp, the court might conclude that the final BiOp is arbitrary and capricious because the Services had "entirely failed to consider an important aspect of the problem" or "offered an explanation for [their] decision that runs counter to the evidence before the agency."[269] That the agency modified its

[259] *Id.* (quoting Renegotiation Bd. v. Grumman Aircraft Eng'g Corp., 421 U.S. 168, 184 (1975)).

[260] *Id.* at 19.

[261] *Id.* at 20.

[262] *Id.* at 21.

[263] Brief for Respondent, U.S. Fish and Wildlife Serv. v. Sierra Club, No. 19-547, at 20 (2020).

[264] *Id.* at 20-21.

[265] *Id.* at 21.

[266] Bennett v. Spear, 520 U.S. 154, 177-78 (1997) (finding biological opinions are final agency action subject to judicial review); Ctr. for Marine Conservation v. Brown, 917 F. Supp. 1128, 1151-52 (S.D. Tex. 1996) (concluding that biological opinions are not substantive rules but rather policy statements).

[267] 5 U.S.C. §§ 701-706.

[268] *Id.* § 706(2).

[269] Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

analysis or changed its conclusion between the draft BiOp and final BiOp, however, would not on its own be sufficient to vacate a final BiOp.

Release of such documents would provide more transparency into the agency decisionmaking process as agencies assess the effects on listed species and critical habitat. While such transparency could increase third parties' ability to hold federal agencies accountable for their assessments and for changes they make to planned actions, the government contends that it could also chill agencies' "frank discussion" of legal and policy issues when they assess such effects and decide how to proceed. If Congress is unsatisfied with how the Supreme Court's opinion balances transparency with protecting agency deliberations, Congress may amend FOIA exemptions to clarify which agency documents are protected from disclosure by Exemption 5.

Climate Change Liability Suits: *BP p.l.c. v. Mayor and City Council of Baltimore*[270]

In *BP p.l.c. v. Mayor and City Council of Baltimore*, the Supreme Court granted review of a Fourth Circuit ruling affirming a district court's remand from federal to state court of a lawsuit seeking damages for climate change-related injuries resulting from the sale and promotion of fossil fuel products.[271] Because previous attempts to hold GHG emitters liable for climate change-related injuries have failed in federal courts, state and local governments, including Baltimore, have pursued nuisance and other tort claims against fossil fuel producers in state court.[272] The Court's ruling in *Baltimore* could affect whether climate liability suits[273] against fossil fuel producers belong in federal or state court.

Background: The *Baltimore* case arose from lower court decisions related to whether climate liability suits belong in federal court. Federal courts have limited jurisdiction over cases relating to certain types of subject matter and "possess only that power authorized by Constitution and statute."[274] In general, federal courts have such subject matter jurisdiction over any case arising under federal statutes, the Constitution, or treaties.[275] If the plaintiff brings a suit in state court over which the federal district courts have jurisdiction, the defendant may choose to "remove" the suit to federal court based on statutory or constitutional grounds.[276]

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[270] Linda Tsang, CRS Legislative Attorney, authored this section of the report.

[271] Mayor & City Council of Balt. v. BP P.L.C., 952 F.3d 452 (4th Cir. 2020), *cert. granted sub nom.* BP p.l.c. v. Mayor & City Council of Balt., 207 L. Ed. 2d 1165 (No. 19-1189) (U.S. Oct. 2, 2020).

[272] *See infra*, "Considerations for Congress" for relevant federal and state cases.

[273] Legal scholars and commentators have used various terms to refer to lawsuits seeking to hold GHG emitters or fossil fuel producers liable for climate change-related damages, including climate liability suits, climate change nuisance suits, climate tort suits, and climate change suits. *See, e.g.*, Myanna Dellinger, *See You in Court: Around the World in Eight Climate Change Lawsuits*, 42 WM. & MARY ENV'T L. & POL'Y REV. 525 (2018); Tracy Hester, *Climate Tort Federalism*, 13 FIU L. REV. 79 (2018); Carol Wood et al., *Do Climate Change Nuisance Suits Belong In Federal Court?*, LAW360 (June 16, 2020), https://www.law360.com/articles/1282676; Karen Savage, *What's Next for Each Climate Liability Suit*, THE CLIMATE DOCKET (May 31, 2020), https://www.climatedocket.com/2020/05/31/climate-suits-colorado-baltimore-california. This report will refer to these cases as "climate liability" lawsuits unless the suit focuses on a specific claim, such as a state nuisance law.

[274] U.S. CONST. art. III, § 2; Kokkonen v. Guardian Life Ins. Co., 511 U.S. 375, 377 (1994).

[275] U.S. CONST. art. III, § 2.

[276] 28 U.S.C. § 1441. In addition, a civil action filed in state court may be removed to federal court if a specialized removal provision applies, such as the federal-officer removal statute. *Id.* § 1442.

In July 2018, the Mayor and City of Baltimore (Baltimore) filed suit in Maryland state court against twenty-six fossil fuel producers, alleging that they violated state nuisance, negligence, strict liability, and consumer fraud laws by producing, promoting, and marketing fossil fuel products that contribute to climate change.[277] Baltimore claims that it suffered various "climate change-related injuries" as a result of these companies' actions, including infrastructure repair and planning and response costs associated with increases in sea levels, storms, floods, heatwaves, droughts, and extreme precipitation.[278] Baltimore seeks compensatory damages, civil penalties, punitive damages, and other relief.[279]

Two of the defendants, Chevron Corporation and Chevron U.S.A. Inc., removed the case to the U.S. District Court for the District of Maryland, asserting eight separate grounds to support removal.[280] One of those eight grounds was that removal was authorized under the federal-officer removal statute, 28 U.S.C. § 1442, because Baltimore "bases liability on activities undertaken at the direction of the federal government."[281] The defendants also argued that the case should be removed because Baltimore's claims are governed by federal common law and preempted by the CAA, other federal statutes, and the Constitution.[282] Baltimore then filed a motion to send the case back to state court, asserting that the federal court lacked subject matter jurisdiction over the state law claims.[283] The Maryland federal district court granted the remand to state court, rejecting all eight removal grounds asserted by the defendants.[284] The defendants appealed the remand order to the Fourth Circuit.[285]

On appeal, the Fourth Circuit concluded that it could review only the lower court's ruling pursuant to the federal-officer removal statute, 28 U.S.C. § 1442, because 28 U.S.C. § 1447(d) bars appellate review of removal orders unless the case was removed pursuant to (1) the federal-officer removal statute, 28 U.S.C. § 1442, or (2) the civil-rights removal statute, 28 U.S.C. § 1443.[286] Relying on Fourth Circuit precedent, the court then determined that it lacked jurisdiction because Section 1447(d) does not extend appellate jurisdiction to the seven other grounds for removal that the district court rejected in its order.[287] In so holding, the court acknowledged conflicting rulings from federal appellate courts on the scope of appellate review

[277] Plaintiff's Complaint at 1-5, Mayor & City Council of Balt. v. BP P.L.C., No. 24-C-18-004219 (Balt. City Cir. Ct. Jul. 20, 2018).

[278] *Id.* at 106.

[279] *Id.* at 130.

[280] Mayor & City Council of Balt. v. BP P.L.C., 388 F. Supp. 3d 538, 548-49 (D. Md. 2019).

[281] *Id*. at 567. The federal-officer removal statute authorizes the removal of state-court actions filed against "any officer (or any person acting under that officer) of the United States or of any agency thereof, in an official or individual capacity, for or relating to any act under color of such office" ... "to the district court of the United States for the district and division embracing the place wherein it is pending." 28 U.S.C. § 1442(a).

[282] *Mayor & City Council of Balt.*, 388 F. Supp. at 548-49.

[283] *Id*. at 549. Baltimore filed its motion to remand under 28 U.S.C. § 1447(c), which states that "[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded."

[284] *Mayor & City Council of Balt.*, 388 F. Supp. at 549.

[285] Mayor & City Council of Balt. v. BP P.L.C., 952 F.3d 452, 458 (4th Cir. 2020), *cert. granted sub nom.* BP p.l.c. v. Mayor & City Council of Balt., 207 L. Ed. 2d 1165 (No. 19-1189) (U.S. Oct. 2, 2020).

[286] *Id*. at 459-61. 28 U.S.C. § 1447(d) states that "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1442 [federal-officer removal statute] or 1443 [civil-rights removal statute] of this title shall be reviewable by appeal or otherwise."

[287] *Mayor & City Council of Balt.*, 952 F.3d at 460-61.

of removal orders under Section 1447(d).[288] The Fourth Circuit affirmed the district court's ruling that removal to federal court was improper under the federal-officer removal statute.[289]

Arguments Before the Supreme Court: The Supreme Court granted the fossil fuel producers' petition for a writ of certiorari on whether Section 1447(d) permits appellate review of any removal grounds addressed in a district court's remand order where removal to federal court was based in part on the federal-officer or civil-rights removal statutes.[290] In their petition, the fossil fuel producers argued that the Fourth Circuit erred in its narrow interpretation that Section 1447(d) limits the scope of appellate review to whether removal was appropriate under the federal-officer or civil-rights removal statute.[291]

To support their more expansive view of Section 1447(d), the petitioners cited decisions from the U.S. Courts of Appeals for the Fifth, Sixth, and Seventh Circuits that held that any issue encompassed in the remand order is subject to appellate review.[292] They argued that these appellate rulings followed the Supreme Court's decision in *Yamaha Motor Corp., U.S.A. v. Calhoun*, where the Court held that a court of appeals may review "any issue fairly included within a certified order" for an interlocutory (i.e., interim) appeal of a pending question of law in a lower court case.[293] The petitioners also noted that in decisions prior to the *Baltimore* suit, other courts of appeal had reached conflicting conclusions. Specifically, the Second, Third, Fourth, Eighth, Ninth, and Eleventh Circuits held that only the federal-officer or civil-rights statutory ground for removal in a district court's remand order is subject to appellate review in suits.[294] Baltimore asserted that the Fourth Circuit's narrow interpretation is "consistent with the [Section 1447(d)] statutory text and strict limitations Congress has historically placed on appellate review of remand orders."[295] The Court held oral argument on January 19, 2021.

Considerations for Congress: Baltimore's lawsuit is one of over twenty similar suits that state and local governments have filed since 2017, seeking to hold fossil fuel producers liable for climate change-related damages under state nuisance, negligence, or consumer fraud laws.[296] Several of these suits are facing similar issues related to which court is the appropriate venue. Much like the plaintiffs in *Baltimore*, other state and local governments have had their cases returned to state courts after securing remand orders under Section 1447(d) from the First, Ninth, and Tenth Circuit Courts of Appeals.[297] Fossil fuel producers in these cases have filed petitions

[288] *Id*. at 460-61.

[289] *Id*. at 471.

[290] Mayor & City Council of Balt. v. BP P.L.C., 952 F.3d 452 (4th Cir. 2020), *cert. granted sub nom.* BP p.l.c. v. Mayor & City Council of Balt., 207 L. Ed. 2d 1165 (No. 19-1189) (U.S. Oct. 2, 2020).

[291] Petition for Writ of Certiorari at 17, BP p.l.c. v. Mayor & City Council of Balt., No. 19-1189 (U.S. Mar. 31, 2020).

[292] *Id*.

[293] *Id*. at 11-14 (citing Yamaha Motor Corp., U.S.A. v. Calhoun, 516 U.S. 199, 206 (1996)).

[294] *Id*. at 17.

[295] Brief of Respondent Mayor & City Council of Balt. in Opposition at 3-5, BP p.l.c. v. Mayor & City Council of Balt., No. 19-1189 (S. Ct. Mar. 31, 2020).

[296] Keith Goldberg, *Big Oil Faces Rising Tide of Gov't Climate Change Suits*, LAW360 (Sept. 18, 2020), https://www.law360.com/articles/1311199.

[297] *See* Rhode Island v. Shell Oil Prod. Co., No. 19-1818, 2020 WL 6336000, *6-7 (1st Cir. Oct. 29, 2020) (concluding that 28 U.S.C § 1447(d) allows review of only the district court's decision regarding removal under federal-officer removal statute, 28 U.S.C. § 1442(a)(1), and the fossil fuel producers failed to establish proper grounds for federal officer removal); Bd. of Cnty. Comm'rs v. Suncor Energy (U.S.A.) Inc., 965 F.3d 792, 827 (10th Cir. 2020) (same); Cnty. of San Mateo v. Chevron Corp., 960 F.3d 586, 603 (9th Cir. 2020) (same). These appellate decisions affected climate liability suits brought by the State of Rhode Island, the Board of County Commissioners of Boulder County, and the separate suits by the California counties of San Mateo, Imperial Beach, Marin, and Santa Cruz.

for a writ of certiorari to the Supreme Court on the same Section 1447(d) issue raised in the *Baltimore* suit.[298]

In addition to court venue issues, challenges to personal jurisdiction over fossil fuel producers have halted various climate liability suits. For example, the Maryland state circuit court has paused the *Baltimore* suit pending the outcome of the Supreme Court's review of the Section 1447(d) issue and a pair of Supreme Court cases related to whether a state court has personal jurisdiction over corporate defendants that are not incorporated or headquartered in-state.[299] A federal district court in Washington State reviewing similar personal jurisdiction issues has paused a King County climate liability suit to await the Supreme Court's decision in the personal jurisdiction cases.[300] Other courts may follow suit in staying pending climate liability litigation that raise related venue and personal jurisdiction challenges.[301]

Although resolution of the removal issues in *Baltimore* will not address the merits of the climate liability suits, the court venue may affect the law and precedent that is applied in these cases. Fossil fuel producers have sought to remove the state climate liability cases to federal court,[302] where previous attempts to hold major sources of GHG emissions liable for climate change-related injuries have failed. In 2011, the Supreme Court held in *American Electric Power Co. v. Connecticut* (*AEP*) that the federal common law interstate nuisance claim[303] seeking an injunction limiting GHG emissions from fossil fuel-fired power plants, was displaced by the CAA.[304] The *AEP* decision affirmed the Court's 2007 ruling in *Massachusetts v. EPA,* which held that the CAA authorizes EPA to regulate GHG emissions from power plants.[305] The Court explained that a federal statute displaces federal common law if the statute "'speak[s] directly to [the] question' at issue."[306] In 2012, the Ninth Circuit held in *Native Village of Kivalina v. ExxonMobil Corp*. that the Supreme Court's reasoning in *AEP* also precludes federal common law claims seeking monetary damages, rather than injunctive relief.[307] Other federal common law nuisance suits

[298] Petition for Writ of Certiorari, Shell Oil Prods. Co., L.L.C. v. Rhode Island, No. 20-900 (U.S. Jan. 5, 2021); Petition for Writ of Certiorari, Chevron Corp. v. Cnty. of San Mateo, No. 20-884 (U.S. Jan. 4, 2021); Petition for Writ of Certiorari, Suncor Energy (USA) v. Bd. of Cnty. Comm'ns of Boulder Cnty. No. 20-783 (U.S. Dec. 8, 2020).

[299] Docket Order, Mayor & City Council of Balt. v. BP P.L.C., No. 24-C-18-004219 (Md. Cir. Aug. 6, 2020). *See* Ford Motor Co. v. Mont. Eighth Judicial Dist. Court, No. 19-368, consolidated with Ford Motor Co. v. Bandemer, No. 19-369, *cert. granted* (U.S. Jan. 17, 2020) (reviewing decisions by the Montana and Minnesota high courts in cases concerning specific personal jurisdiction over auto manufacturers in wrongful death and products liability cases).

[300] *See, e.g*., Order Continuing Stay, King Cnty. v. BP PLC, No. 2:18-cv-00758 (W.D. Wash. Sept. 10, 2020).

[301] *See, e.g*., Joint Motion to Stay, City of Charleston v. Brabham Oil Co. Inc., No. 2:20cv03579 (D.S.C. Nov. 13, 2020) (requesting a stay pending the Supreme Court's decision in the *Baltimore* suit).

[302] *See, e.g., supra* note 297.

[303] Generally, federal common laws are applied by federal courts absent any controlling federal statute. *See* Rodriguez v. Fed. Deposit Ins. Corp., 140 S. Ct. 713, 717 (2020) ("[O]nly limited areas exist in which federal judges may appropriately craft the rule of decision."). The Supreme Court recognized the federal common law of public nuisance in its 1972 decision *Illinois v. City of Milwaukee*, which extended federal common law to include public nuisances caused by the pollution of either interstate or navigable waters. 406 U.S. 91, 99 (1972).

[304] *See AEP*, 564 U.S. 410, 415 (2011) ("[T]he Clean Air Act and the EPA actions it authorizes displace any federal common-law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired power plants.").

[305] *See id.* at 424 ("*Massachusetts* made plain that emissions of carbon dioxide qualify as air pollution subject to regulation under the [Clean Air] Act.") (citing Massachusetts v. EPA, 549 U.S. 497, 528-29 (2007)).

[306] *Id.* at 424 (quoting Mobil Oil Co v. Higginbotham, 436 U.S. 618, 625 (1978)). *See also* Milwaukee v. Illinois, 451 U.S. 304, 314 (1981) ("[W]hen Congress addresses a question previously governed by a decision rested on federal common law the need for such an unusual exercise of lawmaking by federal courts disappears.").

[307] Native Vill. of Kivalina v. ExxonMobil Corp., 696 F.3d 849, 858 (9th Cir. 2012). The Alaskan native village sought monetary damages from energy companies and electric utilities for coastal erosion, alleging that GHG emissions from

seeking climate change-related damages have also been dismissed by federal district courts because the courts found that the claims were displaced by the CAA or raised nonjusticiable questions that only the political branches can resolve.[308]

It is unclear how *AEP*, *Native Village of Kivalina*, and similar rulings would apply in ongoing state climate liability suits because those decisions neither involved fossil fuel producers nor addressed whether federal law preempts state law claims. As the Supreme Court noted in *AEP*, the "availability *vel non* of a state lawsuit depends, *inter alia*, on the preemptive effect of the federal Act."[309] Unlike *displacement*, which occurs when "federal statutory law governs a question previously the subject of federal common law,"[310] *preemption* occurs when a federal statute supersedes a state law.[311] The Court in *AEP* noted that "[l]egislative displacement of federal common law does not require the 'same sort of evidence of a clear and manifest [congressional] purpose' demanded for preemption of state law."[312]

In May 2020, the Ninth Circuit directly addressed whether the CAA preempts the City and County of San Francisco and the City of Oakland's climate nuisance suits against fossil fuel producers.[313] In *City of Oakland v. BP PLC*, the court vacated and remanded the federal district court's denial of the plaintiffs' motions to remand to state court, holding that the lower court did not have jurisdiction over the state-law public nuisance claim because it did not raise a substantial question of federal law.[314] The court concluded, among other things, that the CAA does not "completely preempt" state-law causes of action because "the statutory language does not indicate that Congress intended to preempt 'every state law cause of action within the scope' of the Clean Air Act" and that the CAA does not include a "substitute" federal claim for "nuisance caused by global warming."[315] The Ninth Circuit instructed that the state-law nuisance claims must proceed in state court if the lower court determines that there is no alternative basis for federal jurisdiction.[316] On the same day, the Ninth Circuit remanded separate climate nuisance suits by several California counties to state court based on defendant's failure to establish proper grounds for federal-officer removal.[317] If these climate nuisance suits survive other jurisdictional

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their operations contribute to climate change, and thus to the village's erosion problem. *Id.* at 853-54.

[308] The City of New York is appealing to the Second Circuit a federal district court dismissal of its climate liability suit against fossil fuel producers, which ruled that the nuisance and trespass claims involve interstate GHG emissions and are displaced by the CAA. City of New York v. BP P.L.C., 325 F. Supp. 3d 466, 474-75 (S.D.N.Y. 2018), *appeal pending*, No. 18-2188 (2d Cir.). Also, in *Comer v. Murphy Oil USA*, property owners sought money damages, claiming that GHG emissions from oil and energy companies were a "nuisance" that added to the severity of Hurricane Katrina, which damaged their property. 839 F. Supp. 2d 849, 862-865 (S.D. Miss. 2012), *aff'd on other grounds*, 718 F. 3d 460 (5th Cir. 2013). The court held that the CAA displaced federal claims and preempted the state claims, and that "the claims presented by the plaintiffs constitute non-justiciable political questions, because there are no judicially discoverable and manageable standards for resolving the issues presented, and because the case would require the Court to make initial policy determinations that have been entrusted to the EPA by Congress." *Id.* at 865.

[309] *AEP*, 564 U.S. at 429.

[310] City of Milwaukee v. Illinois, 451 U.S. 304, 316 (1981).

[311] *Id.* at 316-17.

[312] *AEP*, 564 U.S. at 423, quoting *Milwaukee*, 451 U.S. at 317.

[313] City of Oakland v. BP PLC, 960 F.3d 570, 581-82 (9th Cir. 2020).

[314] *Id*. at 581-82.

[315] *Id*.

[316] *Id*. at 585-86.

[317] Cnty. of San Mateo v. Chevron Corp., 960 F.3d 586 (9th Cir. 2020) (concluding that 28 U.S.C § 1447(d) allows review only of the district court's decision regarding removal under federal-officer removal statute, 28 U.S.C. § 1442(a)(1), and the fossil fuel producers failed to establish proper grounds for federal officer removal).

challenges and remain in state court, they would not be bound by *AEP*, *Native Village of Kivalina* and other federal precedents involving *federal* nuisance common law.

The Supreme Court has not agreed to address the question of whether federal or state common law would apply to climate change liability suits in the *Baltimore* case. However, in an effort to resolve the federal versus state law question, the fossil fuel producers have asked the Court to expand the scope of its review in *Baltimore* to "confirm that this case and others like it were properly removed to federal court on the ground that federal common law necessarily governs claims alleging injury based on the contribution of interstate and international emissions to global climate change."[318]

The scope of appellate review of remand orders is among various procedural and jurisdictional issues that arise in climate change liability suits that implicate the interaction between federal and state law. These issues will likely contribute to Congress's ongoing debate over climate change regulation and policy. Without legislative clarification or direction on these issues, the courts will continue to draw the lines with respect to the scope of appellate review, the appropriate venue for climate liability, and the applicability of federal versus state law.

Renewable Fuel Standard: *HollyFrontier Cheyenne Refining LLC v. Renewable Fuels Association*[319]

In *HollyFrontier Cheyenne Refining LLC v. Renewable Fuels Association,* the Supreme Court granted review on January 8, 2021 of a Tenth Circuit decision vacating small refinery exemptions that the EPA had granted under the CAA's renewable fuel standard (RFS).[320] The RFS requires refineries and importers of nonrenewable fuels to account for a certain amount of renewable fuel that is blended into transportation fuel (i.e., an annual renewable volume obligation). The RFS allows small refineries to petition EPA "at any time" for "an extension of the exemption" "for the reason of disproportionate economic hardship."[321]

Background: The RFS generally requires EPA to ensure that increasing specified volumes of categories of renewable fuels are blended into transportation fuel in the United States each year.[322] In turn, EPA requires refineries and importers of nonrenewable fuels (obligated parties) to meet annual renewable volume obligations (RVOs) by either blending renewable fuels into transportation fuel themselves or obtaining credits, called renewable identification numbers (RINs) from other entities that blended renewable fuels.[323] Each obligated party's individual RVO is based on its gasoline and diesel production or imports and an annual percentage standard that EPA promulgates every year.[324] The annual percentage standards for each renewable fuel category are based on projected gasoline and diesel consumption in the United States and the statutory volume requirements.[325]

[318] Brief for the Petitioners at 45, BP p.l.c. v. Mayor & City Council of Balt., No. 19-1189 (U.S. Nov. 16, 2020).

[319] Erin H. Ward, CRS Legislative Attorney, authored this section of the report.

[320] Renewable Fuels Ass'n v. EPA, 948 F.3d 1206 (10th Cir. 2020), *cert. granted sub nom.* HollyFrontier Cheyenne Refining, LLC, v. Renewable Fuels Ass'n, No. 20-472 (U.S. Jan. 8, 2021).

[321] 42 U.S.C. § 7545(o)(9)(B).

[322] *Id.* § 7545(o).

[323] *Id.* § 7545(o)(2).

[324] *Id.* § 7545(o)(3).

[325] 40 C.F.R. § 80.1405.

When the RFS was enacted in 2005, Congress included an exemption for small refineries.[326] The RFS automatically exempted all small refineries from RFS compliance through the 2010 compliance year.[327] Congress required EPA to extend this exemption for two additional years if a study conducted by the Secretary of Energy determined that compliance with the RFS would subject small refineries to a "disproportionate economic hardship."[328] In addition—and of relevance to the Tenth Circuit decision—the RFS allows small refineries to petition EPA "at any time" "for an extension of the exemption" "for the reason of disproportionate economic hardship."[329] Small refineries must demonstrate disproportionate economic hardship due to RFS compliance for each year petitioned for.[330] If granted, the exemption is only valid for the compliance year(s) petitioned for.[331]

Tenth Circuit Opinion: In *Renewable Fuels Association v. EPA*, renewable fuels producers challenged EPA's decision to grant petitions to exempt three small refineries from the RFS for specific compliance years: HollyFrontier Cheyenne Refining LLC for 2016, HollyFrontier Woods Cross Refining LLC for 2016, and Wynnewood Refining Company, LLC for 2017.[332] The refineries intervened in the case as respondents. The Tenth Circuit agreed with the challengers with respect to two central legal issues—that the EPA improperly interpreted the RFS regarding (1) which refineries are eligible to receive exemptions and (2) how to evaluate "disproportionate economic hardship."

The Tenth Circuit first held that small refineries are eligible to receive a small refinery exemption only if they have previously received an exemption for every compliance year up to the compliance year for which they seek an exemption.[333] The court's holding hinged on language in the statute allowing small refineries to petition EPA for "an *extension* of the exemption."[334] To interpret this phrase, the court considered the plain meaning of the term "extension" as defined by various dictionaries.[335] These definitions, the court determined, generally involved something being increased or added to, such as a period of time. The court reasoned, based on these definitions and "common sense," "that the subject of an extension must be in existence before it can be extended."[336] In other words, a small refinery could only *extend* an exemption it had

[326] 42 U.S.C. § 7545(o)(9). A refinery is considered a small refinery under the RFS if it does not process more than 75,000 barrels a day of crude oil on average in a calendar year. *Id.* § 7545(o)(1)(K).

[327] *Id.* § 7545(o)(9)(A)(i).

[328] *Id.* § 7545(o)(9)(A)(ii).

[329] *Id.* § 7545(o)(9)(B). The statute requires EPA to consult with the Department of Energy regarding any such petitions and to act on the petitions within 90 days of receiving them. *Id.* EPA considers the information in small refinery exemption petitions (including the petitioners' names) and its decisions to grant or deny them as confidential business information. *See, e.g.*, Adv. Biofuels Ass'n v. EPA, 792 F. App'x 1, 3 (D.C. Cir. 2019).

[330] *See* 40 C.F.R. § 80.1441(e)(2); *RFS Small Refinery Exemptions*, U.S. ENV'T PROT. AGENCY, https://www.epa.gov/fuels-registration-reporting-and-compliance-help/rfs-small-refinery-exemptions (last visited Feb. 2, 2021).

[331] *Id.*

[332] Renewable Fuels Ass'n v. EPA, 948 F.3d 1206 (10th Cir. 2020).

[333] *Id.* at 1243-49.

[334] 42 U.S.C. § 7545(o)(9)(B) (emphasis added).

[335] *Renewable Fuels Ass'n*, 948 F.3d at 1244-45. Because the Tenth Circuit had previously determined that small refinery exemption petitions were informal adjudications not subject to deference under the *Chevron* framework, the court did not defer to EPA's interpretation of the statutory text. *Id.* at 1244 (citing Sinclair Wyo. Refin. Co. v. EPA, 887 F.3d 986, 992-93 (10th Cir. 2017)).

[336] *Id.*

received already. In reaching this conclusion, the court distinguished extending an exemption from renewing or restarting it.[337]

Based on this understanding, the court held that "a small refinery which did not seek or receive an exemption in prior years is ineligible for an extension, because at that point there is nothing to prolong, enlarge, or add to."[338] The court determined that this interpretation comports with the legislative intent by "funnel[ing] small refineries towards compliance over time" to achieve the statute's "aggressive and 'market forcing'" renewable fuels targets.[339] Finding that none of the three small refineries at issue had received an exemption every year prior to the compliance years at issue in the petitions, the court held that the petitions were improperly granted.[340]

The Tenth Circuit also vacated EPA's decisions based on two flaws it identified in how EPA evaluated the hardship that the refineries would incur from compliance. First, the court determined that the statute only allows EPA to consider "disproportionate economic hardship" caused by RFS compliance—not by other economic factors.[341] The court held that EPA had improperly considered other factors, such as an industry-wide downward trend of lower net refining margins, in its analysis of the petitions at issue. Second, the court held that when EPA assesses the hardship from RFS compliance, the agency must account for its pre-existing position that RIN costs are "passed through" to consumers when it analyzes whether RIN costs generate a "disproportionate economic hardship."[342] EPA has generally taken the position that refiners that demonstrate compliance by purchasing RINs rather than blending renewable fuel recoup those costs in the price of their petroleum blendstocks.[343] The court observed that EPA did not address this RIN cost recoupment theory when analyzing whether RIN costs imposed a disproportionate economic hardship on the refineries.[344] The court concluded that EPA had "failed to consider an important aspect of the problem" by declining to explain either its changed position or why the RIN cost recoupment theory did not apply to the circumstances of these specific small refineries petitions.[345]

Arguments Before the Supreme Court: In their petition for a writ of certiorari, HollyFrontier Cheyenne Refining LLC and the other small refineries assert that the Tenth Circuit "interpreted a term in the RFS so restrictively that it 'transform[s]' the RFS 'into something far beyond what Congress plausibly intended.'"[346] The petitioners argue that the Tenth Circuit's interpretation of the small refinery exemption as a temporary measure is contrary to congressional intent to provide a "safety valve" for small refineries "at any time" and to principles of statutory

[337] *Id.* at 1245.

[338] *Id.*

[339] *Id.* at 1246.

[340] *Id.* at 1249.

[341] *Id.* at 1252-54.

[342] *Id.* at 1255-57.

[343] Modifications to Fuel Regulations to Provide Flexibility for E15; Modifications to RFS RIN Market Regulations, 84 Fed. Reg. 10,584, 10,607 (Mar. 21, 2019).

[344] *Renewable Fuels Ass'n*, 948 F.3d at 1257.

[345] *Id.*

[346] Petition for Writ of Certiorari at 12, HollyFrontier Cheyenne Refin., LLC v. Renewable Fuels Ass'n, No. 20-472 (Sept. 4, 2020). (quoting Sinclair Wyo. Refin. Co. v. EPA, 887 F.3d 986, 996-97 (10th Cir. 2017)). EPA, the defendant in the underlying case, did not file a petition for certiorari.

interpretation.[347] The petition notes that several small refineries had already announced they would change or halt operations after failing to obtain an exemption.[348]

The biofuels coalition's brief in opposition to certiorari, filed on December 9, 2020, argues that the Tenth Circuit correctly decided the case on the merits.[349] Furthermore, even if the judgment could be reversed on the grounds raised by the petitioners, the biofuels coalition claim that the economic harm anticipated by the petitioners is overstated and in any event that EPA has alternative means under the statute of addressing any such harm.[350]

Considerations for Congress: Small refinery exemptions have garnered attention from stakeholders and Congress as the number of exemptions sought and granted has increased significantly in the last few years.[351] On September 14, 2020, EPA announced that it was denying a number of small refinery exemption petitions that had been submitted for past compliance years in response to the Tenth Circuit's decision.[352] If the Supreme Court affirms the Tenth Circuit decision, the number of small refinery exemptions granted could be significantly reduced from recent years and small refinery operations may be affected. If the Supreme Court reverses the Tenth Circuit decision, EPA may continue to grant increasing numbers of small refinery exemptions, which could affect the amount of renewable fuel blended into transportation fuel. Congress could address the small refinery exemption to clarify how it should work or choose to revise the RFS more broadly to address the underlying issues that may be driving an increase in petitions for small refinery exemptions.

Comprehensive Environmental Response, Compensation, and Liability Act: *Guam v. United States*[353]

On January 8, 2021, the Supreme Court granted review of *Guam v. United States*, a D.C. Circuit ruling regarding when a lawsuit to recoup cleanup costs under CERCLA must proceed as a "contribution action" under Section 113(f) as opposed to a "cost recovery action" under Section 107(a).[354] Because the two causes of action have different statutes of limitations, determining which section (if any) applies, the type of action can sometimes affect whether a lawsuit to recoup cleanup costs may proceed at all. Joining three of the four other federal courts of appeals to have reached the issue, the D.C. Circuit held that a prior settlement under a different statute was sufficient to trigger CERCLA's contribution provision, thus barring Guam from proceeding with a cost recovery action, and rendering its claim untimely.

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[347] *Id.* at 13-21.

[348] *Id.* at 30.

[349] Brief in Opposition to Petition for Certiorari at 24-28, HollyFrontier Cheyenne Refining, LLC v. Renewable Fuels Ass'n, No. 20-472 (U.S. 2020).

[350] Brief in Opposition to Petition for Certiorari at 19-22, *HollyFrontier Cheyenne Refining, LLC*, No. 20-472.

[351] *See, e.g.*, *Hearing on "Protecting the RFS: The Trump Administration's Abuse of Secret Waivers" Before the H. Comm. on Energy & Comm.*, 116th Cong. (2019); Adv. Biofuels Ass'n v. EPA, 792 F. App'x 1 (D.C. Cir. 2019); RFS Small Refinery Exemptions, U.S. ENV'T PROT. AGENCY, https://www.epa.gov/fuels-registration-reporting-and-compliance-help/rfs-small-refinery-exemptions (last updated Sept. 17, 2020).

[352] EPA Takes Action to Protect Integrity of the Renewable Fuel Standard Program, Support American Farmers, U.S. ENV'T PROT. AGENCY (Sept. 14, 2020), http://www.epa.gov/newsreleases/epa-takes-action-protect-integrity-renewable-fuel-standard-program-support-american-1.

[353] Kate R. Bowers, CRS Legislative Attorney, authored this section of the report.

[354] Guam v. United States, 950 F.3d 104 (D.C. Cir. 2020), *cert. granted*2021 WL 77250 (No. 20-382) (U.S. Jan. 8, 2021).

Background: CERCLA provides that "potentially responsible parties" (PRPs) may be compelled to perform or pay for the cleanup of contaminated sites.[355] The statute includes two provisions that allow parties that incur cleanup costs to recoup all or part of their costs from PRPs.

First, Section 107(a)(4)(B) allows any person to sue a PRP to recover "any other necessary costs of response" that that person has incurred."[356] These lawsuits are known as "cost recovery" actions. Cost recovery actions under Section 107(a) are subject to a six-year statute of limitations, which, for remedial actions, begins upon the initiation of the remedial action.[357]

Second, Section 113(f) allows a person to assert a contribution claim against other PRPs in court so that those PRPs would bear an equitable share of response costs under certain circumstances. As relevant to this case, Section 113(f)(3)(B) provides that a party

> that has resolved its liability to the United States or a State for some or all of a response action or for some or all of the costs of such action in an administrative or judicially approved settlement may seek contribution from any person who is not party to a settlement.[358]

Contribution actions under Section 113(f) are subject to a three-year statute of limitations, which begins on "the date of judgment in any action under [CERCLA] for recovery of [response] costs" or the "entry of a judicially approved settlement with respect to such costs."[359]

A party that *may* bring a Section 113(f) contribution action *must* proceed under Section 113(f), and is precluded from proceeding with a cost recovery action under Section 107(a).[360] For this reason, and because of the differing statutes of limitations, determining whether a party's claims are timely and thus may go forward sometimes hinges on how prior settlements to address contamination at the site are characterized.[361]

Guam v. United States concerns the cleanup of a site known as the Ordot Dump, which was the only public landfill on the island of Guam until it closed in 2011. The U.S. Navy, which had jurisdiction over the island from 1898 until it relinquished sovereignty in 1950, continued to deposit waste at the site even after 1950.[362] After assuming ownership and operation of the Ordot Dump in 1950, the newly formed civilian government of Guam accepted waste and stored it in

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[355] 42 U.S.C. § 9607(a).

[356] *Id.* § 9607(a)(4)(B). Section 107(a)(4)(A) also allows the United States, states, and tribes to obtain "all costs of removal or remedial action" from PRPs. *Id.* § 9607(a)(4)(A).

[357] *Id.* § 9613(g)(2)(A)-(B).

[358] *Id.* § 9613(f)(3)(B).

[359] *Id.* § 9613(g)(3)(B).

[360] *See* Whittaker Corp. v. United States, 825 F.3d 1002, 1007 (9th Cir. 2016) ("[E]very federal court of appeals to consider the question ... has said that a party who *may* bring a contribution action for certain expenses *must* use the contribution action, even if a cost recovery action would otherwise be available.").

In 2007, the Supreme Court clarified in *United States v. Atlantic Research Corp.* that CERCLA does not bar PRPs from recovering costs under Section 107(a). 551 U.S. 128, 141 (2007). The Court acknowledged that Sections 107(a) and 113(f) "complement each other by providing causes of action 'to persons in different circumstances,'" and cautioned that a PRP "cannot simultaneously seek to recover the same expenses" under both causes of action, thereby "[choosing] the 6-year statute of limitations for cost-recovery actions over the shorter limitations period for § 113(f) contribution claims." *Id.* at 139 (quoting Consol. Edison Co. of N.Y., Inc. v. UGI Utils., Inc., 423 F.3d 90, 99 (2d Cir. 2005)).

[361] *See* Guam v. United States, 950 F.3d 104, 115 (D.C. Cir. 2020) ("'Whether or not liability is resolved through a settlement' is unanswerable by a 'universal rule;' it instead requires examination of 'the terms of the settlement on a case-by-case basis.'") (quoting Bernstein v. Bankert, 733 F.3d 190, 213 (7th Cir. 2013)).

[362] Petition for Writ of Certiorari at 7, Guam v. United States, No. 20-382 (U.S. Sept. 16, 2020); Guam v. United States, 950 F.3d 104, 108-09 (D.C. Cir. 2020).

open ravines there.[363] Contaminants from the Ordot Dump leached into a nearby river and its tributaries, which ultimately flow into the Pacific Ocean.[364]

EPA sued Guam in 2002, alleging that the discharge of untreated leachate from the Ordot Dump violated the CWA.[365] Guam and EPA resolved that litigation by entering into a consent decree in 2004 that required Guam to pay a civil penalty and close the Ordot Dump.[366] The consent decree reserved the United States' rights with respect to claims outside the 2002 complaint.[367]

In 2017, Guam sued the United States, alleging that the Navy was responsible for the contamination at the Ordot Dump.[368] Guam asserted a CERCLA Section 107(a) cost-recovery claim seeking "removal and remediation costs" related to the landfill, and, in the alternative, a contribution action pursuant to Section 113(f).[369] The United States moved to dismiss Guam's complaint, arguing that the 2004 consent decree resolved Guam's liability for a response action, thus barring Guam from proceeding with a Section 107(a) cost-recovery action.[370] The United States further argued that Guam could not proceed with a contribution action under Section 113(f) because that section's three-year statute of limitations period began with the entry of the 2004 consent decree and thus had already run.[371]

The U.S. District Court for the District of Columbia denied the United States' motion to dismiss.[372] The court held that the 2004 consent decree "did not resolve Guam's liability for the Ordot Landfill cleanup," and that Guam therefore could proceed under Section 107(a) because its claim was outside the scope of Section 113(f)(3)(B).[373]

On interlocutory review,[374] the D.C. Circuit reversed and remanded.[375] Joining the Third, Seventh, and Ninth Circuits,[376] and rejecting the Second Circuit,[377] the D.C. Circuit held that Section 113(f)(3)(B) "does not require a CERCLA-specific settlement" before a party may pursue a contribution claim (and therefore may not pursue a cost recovery claim).[378] Analyzing the terms of the 2004 consent decree, the court held that the settlement required Guam to take action that qualified as a "response action" under CERCLA and "released Guam from legal exposure" for the

[363] Brief for the United States in Opposition at 4, Guam v. United States, No. 20-382 (U.S. Dec. 7, 2020).

[364] Guam v. United States, 950 F.3d 104, 109 (D.C. Cir. 2020).

[365] Complaint for Injunctive Relief, United States v. Guam ¶ 26, No. 02-00022, Doc. No. 1 (D. Guam Aug. 7, 2002).

[366] Consent Decree, United States v. Guam, No. 02-00022, Doc. No. 55 (D. Guam Feb. 11, 2004).

[367] Petition for Writ of Certiorari at 10, Guam v. United States, No. 20-382 (U.S. Sept. 16, 2020).

[368] Complaint, Guam v. United States, No. 1:17-cv-02487, Doc. No. 1 (D.D.C. Mar. 2, 2017).

[369] Am. Complaint, Guam v. United States ¶¶ 25, 31, No. 1:17-cv-02487, Doc. No. 7 (D.D.C. May 19, 2017).

[370] *See* Guam v. United States, 950 F.3d 104, 110 (D.C. Cir. 2020).

[371] *Id.*

[372] Guam v. United States, 341 F. Supp. 3d 74 (D.D.C. 2018).

[373] *Id.* at 84.

[374] *See* 28 U.S.C. § 1292(b) (setting forth procedures for district courts to certify for interlocutory review an order that is not otherwise appealable); Guam v. United States, No. 1:17-cv-2487, 2019 WL 1003606, at *1 (D.D.C. Feb. 28, 2019) (certifying interlocutory appeal of the order denying the United States' motion to dismiss).

[375] Guam v. United States, 950 F.3d 104 (D.C. Cir. 2020).

[376] *See* Trinity Indus., Inc. v. Chicago Bridge & Iron Co., 735 F.3d 131, 136 (3d Cir. 2013); Refined Metals Corp. v. NL Indus. Inc., 937 F.3d 928, 932 (7th Cir. 2019); Asarco LLC v. Atl. Richfield Co., 866 F.3d 1108, 1120-21 (9th Cir. 2017).

[377] *See* Consol. Edison Co. of N.Y., Inc. v. UGI Utils., Inc., 423 F.3d 90, 95 (2d Cir. 2005).

[378] Guam v. United States, 950 F.3d at 114.

CWA claim.[379] The consent decree thus resolved Guam's liability to the United States, triggering Guam's right to pursue a contribution claim and barring a cost-recovery claim.[380] Because Guam's cause of action for contribution expired in 2007, the D.C. Circuit concluded that Guam "cannot now seek recoupment from the United States" for the contamination at the Ordot Dump.[381]

Arguments Before the Supreme Court: The Supreme Court has agreed to review two questions, which Guam contends are the subject of "acknowledged and long-standing circuit splits": (1) whether a non-CERCLA settlement can trigger a Section 113(f)(3)(B) contribution claim, thereby precluding a cost recovery claim; and (2) whether a settlement that includes liability disclaimers and reservations of rights can trigger a Section 113(f)(3)(B) contribution claim.[382] Guam argues that the Court should read Section 113(f)(3)(B) as requiring a party to have resolved its liability "for response actions required or costs imposed *under CERCLA*."[383] Guam further argues that only a final, conclusive liability determination triggers Section 113(f)(3)(B), and that the 2004 consent decree is not such a determination because it explicitly disclaimed any finding or admission of liability and reserved to the United States rights to pursue additional claims against Guam.[384]

The United States opposed certiorari.[385] The United States argues that CERCLA's broad definition of "response" "to encompass any action to 'remove' or 'remedy' releases of substances" means that a settlement need not be pursuant to CERCLA to trigger Section 113(f)(3)(B).[386] The United States further argues that whether the 2004 consent decree resolved Guam's liability for purposes of Section 113(f)(3)(B) is a question of contract law rather than statutory interpretation, and is not the subject of a circuit split.[387] Reading Section 113(f)(3)(B) as authorizing a suit where a settlement "determines a party's legal obligation to undertake conduct that fits within CERCLA's definition of 'response action,'" the United States contends that the D.C. Circuit correctly held that the consent decree satisfied those elements.[388]

Considerations for Congress: Congress added Section 113 to CERCLA in the Superfund Amendments and Reauthorization Act of 1986 to clarify that parties that are "liable under CERCLA [can] seek contribution from other potentially liable parties."[389] Since then, courts have struggled with the intersection of CERCLA's cost recovery and contribution provisions.[390] While courts have recognized that Sections 107 and 113 are mutually exclusive, they have also

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[379] *Id.* at 116.

[380] *Id.* at 116-18.

[381] *Id.* at 118.

[382] Petition for Writ of Certiorari at ii, 2, Guam v. United States, No. 20-382 (U.S. Sept. 16, 2020).

[383] *Id.* at 26.

[384] *Id*. at 30-34.

[385] Brief for the United States in Opposition, Guam v. United States, No. 20-382 (U.S. Dec. 7, 2020).

[386] *Id.* at 10-11. The United States disputes the extent of the circuit split over whether Section 113(f)(3)(B) permits contribution actions based on the resolution of non-CERCLA claims, arguing that the one court to hold to the contrary did so based on a misreading of the legislative history and subsequently questioned the validity of its own holding. *Id.* at 14-15 (discussing Consol. Edison Co. of N.Y., Inc. v. UGI Utils., Inc., 423 F.3d 90, (2d Cir. 2005)).

[387] *Id.* at 18-20.

[388] *Id.* at 15-16.

[389] P.L. 99-499, 100 Stat. 1613; H.R. Rep. No. 99-253, pt. 1, at 79 (1985).

[390] *See* United States v. Atl. Research Corp., 551 U.S. 128, 131 (2007) (noting that "[c]ourts have frequently grappled with whether and how PRPs may recoup CERCLA-related costs from other PRPs").

acknowledged that "the supposedly sharp distinction between cost-recovery and contribution does not always play out in practice."[391]

Guam v. United States presents an opportunity for the Supreme Court to clarify further when a PRP must recoup its expenses through a Section 107(a) cost recovery action as opposed to a Section 113(f) contribution claim. Separate from any action taken by the Court, Congress could amend CERCLA to specify whether a "response action" must be pursuant to CERCLA in order to trigger Section 113(f)(3)(B), and whether a settlement that disclaims liability or reserves a party's rights can resolve liability sufficient to trigger Section 113(f)(3)(B).

Supreme Court 2020-2021 Term Preview: Potential EENR Cases

The Supreme Court is reviewing various petitions for a writ of certiorari related to EENR issues for the 2020-2021 term. Four of the nine Justices must vote to grant certiorari for the Court to take up review.[392] The Court's rules state that a writ will be granted only for "compelling reasons," and explains that a grant is more likely when the petition concerns, among other things, a split between circuit courts, a departure from previous Supreme Court case law, or an undecided issue of federal law.[393]

This section reviews selected petitions for a writ of certiorari or complaints in cases related to reoccurring or novel EENR issues that have been of congressional interest.[394] These petitions include the scope of the President's authority to declare national monuments under the Antiquities Act, a state's denial of a water quality certification under Section 401 under the CWA, and eminent domain authority under the Natural Gas Act.

Antiquities Act: *Massachusetts Lobstermen's Association v. Ross*[395]

The Massachusetts Lobstermen's Association and other fishermen's associations have asked the Supreme Court to review the D.C. Circuit's dismissal of their challenge to President Obama's declaration of the Northeast Canyons and Seamounts Marine National Monument under the Antiquities Act. The fishermen's associations challenge the proclamation as legally invalid on two grounds: (1) the Antiquities Act does not extend to the Exclusive Economic Zone (EEZ) because the EEZ is not "land owned or controlled by the Federal Government," and (2) the land reserved for the monument is not the "smallest area compatible" with protecting and managing the objects protected by the monument.

[391] Guam v. United States, 950 F.3d 104, 111 (D.C. Cir. 2020).

[392] S. CT. R. 10; *Supreme Court Procedures*, ADMIN. OFF. OF THE U.S. COURTS, https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/supreme-1 (last visited Feb. 2, 2021).

[393] S. CT. R. 10.

[394] The Supreme Court is also reviewing petitions related to civil procedure that could implicate EENR suits. *See, e.g.*, Petitions for Writ of Certiorari, United States v. Kane Cnty., Nos. 20-96 and 20-82 (U.S. July 24, 2020) (seeking review of "whether an advocacy organization's environmental concerns qualify as an "interest" required by Rule 24(a)(2) of the Federal Rules of Civil Procedure for the organization to intervene as of right as a party defendant in a pending civil action, where no judicial relief could be granted against that organization in the action and its environmental concerns are unrelated to any claim or defense that the organization could itself assert in the action.").

[395] Erin H. Ward, CRS Legislative Attorney, authored this section of the report.

Background: The Antiquities Act, enacted in 1906, allows the President to declare "historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated on *land owned or controlled by the Federal Government* to be national monuments."[396] The President may also reserve land as part of a national monument, which must be limited to "the *smallest area compatible* with the proper care and management of the objects to be protected."[397] Presidents have used this authority to designate over 150 national monuments.[398]

On September 15, 2016, President Obama declared 3.2 million acres of the Atlantic Ocean 100 miles off the coast of New England to be the Northeast Canyons and Seamounts Marine National Monument.[399] The monument is composed of two units—the Canyons Unit and the Seamounts Unit—and protects three underwater canyons, four seamounts,[400] and the surrounding resources and ecosystems.[401] The monument lies in the U.S. Exclusive Economic Zone (EEZ), which is the area of ocean from 12 to 200 miles off the U.S. coast that President Reagan proclaimed in 1983 to be subject to the sovereign rights and jurisdiction of the United States under international law.[402] The 2016 proclamation prohibited commercial fishing in the monument beginning November 14, 2016, with lobster and red crab fishing to be prohibited seven years later. However, President Trump removed these prohibitions by proclamation on June 5, 2020.[403]

The Lower Courts: The Massachusetts Lobstermen's Association and other fishermen's associations challenged the 2016 proclamation in federal court. They alleged that the monument exceeds the President's authority (i.e., is *ultra vires*) because the EEZ is not "land owned or controlled by the Federal Government" and fails to comply with the statute's requirement that the land reserved be the "smallest area compatible" with managing and protecting the objects. The district court for the District of Columbia dismissed the complaint.[404]

On appeal, the D.C. Circuit affirmed.[405] The court held that areas within the EEZ qualify as "land owned or controlled by the Federal Government." First, the court determined that ocean is "land"

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[396] 54 U.S.C. § 320301(a) (emphasis added). For more information on the Antiquities Act, *see* CRS Report R45718, *The Antiquities Act: History, Current Litigation, and Considerations for the 116th Congress*, coordinated by Erin H. Ward.

[397] 54 U.S.C. § 320301(b) (emphasis added).

[398] *Archeology Program*, NAT'L PARK SERV., https://www.nps.gov/archeology/sites/antiquities/monumentslist.htm (last visited Feb. 2, 2021).

[399] Proclamation 9496, 81 Fed. Reg. 65,159 (Sept. 21, 2016).

[400] According to the National Oceanic and Atmospheric Administration, a seamount is "an underwater mountain formed by volcanic activity." What Is A Seamount?, NAT'L OCEANIC & ATMOSPHERIC ADMIN., U.S. DEP'T OF COMM., https://oceanservice.noaa.gov/facts/seamounts.html (last updated Apr. 9, 2020).

[401] 81 Fed. Reg. at 65,161-63.

[402] Proclamation 5030, 48 Fed. Reg. 10,605 (Mar. 10, 1983). A 2000 Office of Legal Counsel (OLC) memorandum concluded that the President's authority to establish national monuments under the Antiquities Act extended to the EEZ. Office of Legal Counsel, Dep't of Justice, Administration of Coral Reef Resources in the Northwest Hawaiian Islands (Sept. 15, 2000), https://www.justice.gov/file/19366/download. President George W. Bush subsequently relied on this interpretation to establish the first national monument in the EEZ off the coast of Hawaii in 2006: the Northwestern Hawaiian Islands Marine National Monument. Proclamation 8031, Establishment of the Northwestern Hawaiian Islands Marine National Monument, 71 Fed. Reg. 36,443 (June 15, 2006). The proclamation was later amended to change the name to the Papahānaumokuākea Marine National Monument. Amending Proclamation 8031 of June 15, 2006, to Read, "Establishment of the Papahānaumokuākea Marine National Monument", White House (Mar. 2, 2007), https://www.doi.gov/sites/doi.gov/files/archive/news/archive/07_News_Releases/Proc3207.pdf.

[403] Modifying the Northeast Canyons and Seamounts Marine National Monument, 85 Fed. Reg. 35,793, 35,794-95 (June 5, 2020).

[404] Mass. Lobstermen's Ass'n v. Ross, 349 F. Supp. 3d 48 (D.D.C. 2018).

[405] Mass. Lobstermen's Ass'n v. Ross, 945 F.3d 535 (D.C. Cir. 2019). The D.C. Circuit affirmed with one "minor

pursuant to the Supreme Court's opinion in *Alaska v. United States* concerning the Glacier Bay National Monument.[406] The court noted that in *Alaska*, the Supreme Court "made clear that 'the Antiquities Act empowers the President to reserve submerged lands.'"[407] Second, the court held that interpreting the Antiquities Act to extend to the ocean does not render the National Marine Sanctuaries Act, which allows for the designation of marine sanctuaries, a nullity.[408] The court observed that marine sanctuaries can protect larger areas than national monuments, protect areas based on a wider array of values, and designate areas directly rather than designating objects and reserving land in connection with those objects.[409] Finally, the court determined that the federal government controls the EEZ for purposes of the Antiquities Act based on three factors: (1) "significant authority" over the EEZ under international law, (2) "substantial authority" over the EEZ under domestic law, and (3) "unrivaled" authority over the EEZ (i.e., no other governmental entity has authority over the area).[410]

In addition, the court held that the fishermen's associations had not sufficiently alleged facts to challenge the monument as not being the "smallest area compatible" with protecting and managing the monument.[411] The court reasoned that the proclamation included the "resources and ecosystems" as part of the objects protected in the national monument, and the complaint did not allege any facts showing that areas were included beyond those resources and ecosystems.[412]

Supreme Court Petition: The fishermen's associations filed a petition for a writ of certiorari on July 27, 2020.[413] The fishermen's associations argue that the Court should hear the case because it presents important federal questions on separation of powers—specifically, how much authority Congress has delegated to the executive branch—and because the D.C. Circuit holding that the Antiquities Act extends to the ocean conflicts with holdings by the Fifth and Eleventh Circuits.[414]

The petitioners also raise substantive considerations.[415] They characterize the D.C. Circuit's analysis of whether the federal government "controls" the EEZ as a "vague three-factor test" that does not provide adequate guidance for future courts to apply and is "unadministrable" because the same logic could be used to extend the Antiquities Act to state and private land.[416] The petition also notes that questions about what constitutes the "smallest area compatible" under the

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alteration": The district court found that that it lacked subject-matter jurisdiction to hear the case, and therefore dismissed the complaint under Federal Rule of Civil Procedure 12(b)(1). Mass. Lobstermen's Ass'n, 349 F. Supp. 3d at 55. The D.C. Circuit clarified that the complaint should instead be dismissed pursuant to Rule 12(b)(6) for failure to state a claim. Mass. Lobstermen's Ass'n, 945 F.3d at 544-45.

[406] Mass. Lobstermen's Ass'n, 945 F.3d at 541 (citing Alaska v. United States, 545 U.S. 75 (2005)).

[407] *Id.* (quoting Alaska v. United States, 545 U.S. 75, 103 (2005)). The district court had also examined the ordinary meaning of the term "ocean" and past practice, but the D.C. Circuit found it unnecessary to do so because "[o]n-point Supreme Court precedent resolves this claim." *Id.*

[408] *Id.* at 541-42.

[409] *Id.*

[410] *Id.* at 542-43.

[411] *Id.*

[412] *Id.*

[413] Petition for Writ of Certiorari, Mass. Lobstermen's Ass'n v. Ross, No. 20-97 (2020).

[414] *Id.* at 14-26. The petitioners cite to *Treasure Salvors, Inc. v. Unidentified Wrecked & Abandoned Sailing Vessel*, 569 F.2d 330, 222 & n.1, 337-38 (5th Cir. 1978) and *Odyssey Marine Exploration, Inc. v. Unidentified Shipwrecked Vessel or Vessels*, 636 F.3d 1338, 1341 (11th Cir. 2011) as cases from other circuits that conflict with the D.C. Circuit's holding. Petition for Writ of Certiorari, *Mass. Lobstermen's Ass'n*, No. 20-97, at 23.

[415] Petition for Writ of Certiorari, *Mass. Lobstermen's Ass'n*, No. 20-97, at 26-36.

[416] *Id.* at 26-32.

Antiquities Act has been a frequent source of litigation that would benefit from Supreme Court clarification.[417]

Finally, the petitioners argue that the proclamation removing prohibitions on commercial fishing and lobster and red crab fishing does not moot the case or diminish the need for judicial review.[418] To the extent the case is now moot, the petitioners argue that, in accordance with the Court's 1950 decision in *United States v. Munsingwear*,[419] the D.C. Circuit opinion should be vacated because the party that prevailed below would be responsible for mooting the case and thereby precluding further review.[420]

The United States filed its brief in opposition to certiorari on December 4, 2020.[421] The government contends that the court of appeals reasonably determined that the EEZ is under the "control" of the federal government for purposes of the Antiquities Act.[422] To that end, the government argues that the petitioners mischaracterized the three factors used by the court of appeals to assess government control as a "three-part test."[423] The government disagrees with petitioners that the case raises constitutional separation of power issues because the question is whether the President exceeded the statutory authority of the Antiquities Act, not constitutional authority.[424] In addition, the government distinguishes the cases that the petitioners claim conflict with the D.C. Circuit's holding that the EEZ is controlled by the federal government by noting that the Fifth Circuit opinion predated the EEZ and the Eleventh Circuit opinion addressed admiralty jurisdiction rather than interpreting the Antiquities Act.[425] With respect to the petitioner's mootness arguments, the government asserts that the case may not necessarily be moot due to the potential for future injury and that, even if it were, the "extraordinary remedy" of vacatur is not appropriate because the case would not otherwise merit review.[426]

Considerations for Congress: *Massachusetts Lobstermen's Association v. Ross* is one of several ongoing cases raising questions about the limits of the President's authority under the Antiquities Act.[427] The state of U.S. public lands and the associated law has changed significantly since the Antiquities Act was enacted in 1906, including through the enactment of the Federal Land Policy and Management Act of 1976 (FLPMA) and the declaration of U.S. sovereignty over the EEZ. Conservation policies and goals have also changed in that time. In light of the multiple lawsuits

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[417] *Id.* at 34-35.

[418] *Id.* at 37-38.

[419] 340 U.S. 36 (1950).

[420] Petition for Writ of Certiorari, *Mass. Lobstermen's Ass'n*, No. 20-97, at 38-39.

[421] Brief for the Federal Respondents in Opposition, Mass. Lobstermen's Ass'n v. Ross, No. 20-97 (2020). The National Resources Defense Council also filed a brief in opposition to granting certiorari as intervenor defendants. Brief in Opposition for Intervenor Defendants, Mass. Lobstermen's Association v. Ross, No. 20-97 (2020).

[422] Brief for the Federal Defendants in Opposition, *Mass. Lobstermen's Ass'n*, No. 20-97, at 10.

[423] *Id.* at 10-11.

[424] *Id.* at 14-15.

[425] *Id.* at 19-20.

[426] *Id.* at 22-23.

[427] *See, e.g.*, League of Conservation Voters v. Trump, 363 F. Supp. 3d. 1013 (D. Alaska 2019) (vacating President Trump's revocation of previous administration's withdrawal of portions of the Outer Continental Shelf from oil and gas leasing); Amended and Supplemental Complaint, Hopi Tribe v. Trump, Nos. 17-cv-2590, 17-cv-2605, 17-cv-2606 (D.D.C. Nov. 7, 2019) (challenging President Trump's proclamation reducing the size of Bears Ears National Monument); Amended and Supplemental Complaint, The Wilderness Soc'y v. Trump, Nos. 1:17-cv-02587, 1:17-cv-02591 (D.D.C. Nov. 7, 2019) (challenging President Trump's proclamation reducing the size of Grand Staircase Escalante National Monument).

over the President's Antiquities Act authority, Congress could choose to amend the act to clarify the purpose and limits of that power or to modify or remove the authority itself. Specifically, Congress could clarify which areas are intended to be available for designation and whether the "smallest area compatible" requirement is judicially reviewable under a factual inquiry.

Natural Gas Act and Eminent Domain: *PennEast Pipeline Co. v. New Jersey*[428]

In *PennEast Pipeline Co. v. New Jersey*, the Court has been asked to consider whether Section 7 of the Natural Gas Act[429] allows a private company "to exercise the federal government's eminent domain power to condemn" state-owned land to construct an interstate pipeline project authorized by the Federal Energy Regulatory Commission (FERC).[430] The federal government's eminent domain power is implied by the Takings Clause of the Fifth Amendment, which provides that "private property [may not] be taken for public use, without just compensation."[431] Section 7 of the Natural Gas Act permits FERC to authorize construction of a natural gas transportation facility by issuing a "certificate of public convenience and necessity."[432] Under Section 7, a certificate-holder may exercise the power of eminent domain to secure any rights-of-way necessary for construction and operation of the facility that the certificate-holder cannot acquire through contract or negotiation.

Background: *PennEast* involves a pipeline construction company, the PennEast Pipeline Company, seeking to exercise eminent domain power under Section 7 to condemn lands in which the State of New Jersey holds possessory and non-possessory interests. In condemnation proceedings for these properties before the U.S. District Court for the District of New Jersey, the State of New Jersey argued that Section 7's eminent domain power may not be exercised against state lands because of the state's sovereign immunity from lawsuits brought by private citizens in federal court.[433] The district court reasoned that because Section 7 delegates the federal government power of eminent domain to private entities, and because the United States has the power to sue states, certificate-holders "stand[] in the shoes of the sovereign" and may therefore exercise eminent domain power against states.[434]

Third Circuit Opinion: On appeal, the U.S. Court of Appeals for the Third Circuit reversed the district court decision. Writing for a unanimous panel, Judge Jordan noted that Section 7 lacks any language suggesting an intent to delegate the United States' power to sue states to certificate-holders, and no case law supported the theory that the United States may delegate this power at all.[435]

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[428] Eric N. Holmes, CRS Legislative Attorney, authored this section of the report.

[429] 15 U.S.C. § 716f.

[430] Petition for Writ of Certiorari, PennEast Pipeline Co. v. New Jersey, No. 19-1039 (U.S. Feb. 18, 2020). While the power of eminent domain rests with the federal government, the United States may legislatively delegate the power to private entities. *See, e.g.*, Noble v. Oklahoma City, 297 U.S. 481 (1936).

[431] U.S. CONST. AMEND. V; Kohl v. United States, 91 U.S. 367 (1876).

[432] 15 U.S.C. § 716f.

[433] *In re* PennEast Pipeline Co., No. 3:18-cv-01585, 2018 WL 6584893, *8 (D.N.J. Dec. 14, 2018); *see* U.S. CONST. AMEND. XI; Hans v. Louisiana, 134 U.S. 1 (1890) (holding that a state may not be sued in federal court by its own citizens).

[434] *In re* PennEast Pipeline Co., 2018 WL 6584893, at *12.

[435] *In re* PennEast Pipeline Co., 938 F.3d 96 (3d Cir. 2019). For more discussion of the Third Circuit decision, *see* CRS Legal Sidebar LSB10359, *This Land Is Your Land? Eminent Domain Under the Natural Gas Act and State Sovereign*

Supreme Court Petition: PennEast petitioned for a writ of certiorari in early 2020.[436] The question presented to the Court—whether Section 7 delegates eminent domain authority that may be exercised against a state—appears at first to be a matter of pure statutory interpretation. But because states enjoy immunity from legal challenge by private citizens pursuant to the Eleventh Amendment of the Constitution, this question also turns on whether the Constitution permits Congress to grant private parties the power to sue states. While Congress may not abrogate states' sovereign immunity through exercise of its powers under the Commerce Clause,[437] the Supreme Court has long recognized the federal government's power to sue states.[438] Applying the doctrine of constitutional avoidance, the Third Circuit declined to read a delegation of this power in Section 7 of the Natural Gas Act "[i]n the absence of any indication in the text of the statute" that Congress intended to make such a delegation.[439] Even so, the court opined that Supreme Court and circuit court precedent cast doubt on whether Congress could delegate this power at all.[440]

PennEast does not present an issue on which there is a circuit split. However, the Supreme Court's request for briefing from the Solicitor General may suggest that the Court is interested in the case.[441] Additionally, a divided FERC panel issued a declaratory order in January saying that Section 7 permits certificate-holders to exercise eminent domain authority over state-owned lands, contradicting the Third Circuit's decision.[442] FERC's order is being challenged in the D.C. Circuit, where FERC has asked the court to hold the case in abeyance pending final resolution of *PennEast*.[443]

Considerations for Congress: The effect of Justice Ginsburg's absence from the Court on *PennEast* is difficult to predict. While Justice Ginsburg's record on environmental issues will likely draw attention,[444] also relevant in the *PennEast* case is her record on issues of federalism. While she was on the court, Justice Ginsburg joined several dissents authored by Justice Souter

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Immunity, by Eric N. Holmes.

[436] Petition for Writ of Certiorari, PennEast Pipeline Co. v. New Jersey, No. 19-1039 (U.S. Feb. 18, 2020). On June 29, 2020, the Court invited the United States Solicitor General to file a brief with the Court expressing the views of the United States as to whether the Court should grant PennEast's petition. Order, PennEast Pipeline Co. v. New Jersey, No. 19-1039 (U.S. June 29, 2020).

[437] Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996).

[438] *See, e.g.*, Port Auth. Trans-Hudson Corp. v. Feeney, 495 U.S. 299, 310 (1990) (nothing that states "surrendered [sovereign] immunity, insofar as challenges under federal statutes are concerned, 'in the plan of the Convention' when they agreed to form a union and granted Congress specifically enumerated powers" (quoting THE FEDERALIST NO. 81, at 567 (Alexander Hamilton) (H. Dawson ed., 1876)).

[439] *In re* PennEast Pipeline Co., 938 F.3d at 112.

[440] *Id.* at 108-109; *see* Blatchford v. Native Vill. of Noatak, 501 U.S. 775 (1991) (expressing doubt that the United States may delegate its power to sue states); United States *ex rel.* Long v. SCS Bus. & Tech. Inst., 173 F.3d 870, 882-83 (D.C. Cir. 1999) (averring that permitting a *qui tam* relator to sue states would contradict *Blatchford*).

[441] *Cf.* Adam Feldman & Alexander Kappner, *Finding Certainty in Cert: An Empirical Analysis of the Factors Involved in Supreme Court Certiorari Decisions from 2001-2015*, 61 VILL. L. REV. 795, 807-08 (2017) (noting that "the SG's presence is generally one of the strongest indicators of a case's importance" and estimating that a Solicitor General brief in support of the petitioner causes a "large increase" in the likelihood that the petition will be granted).

[442] PennEast Pipeline Co., 170 FERC 61,064 (Jan. 30, 2020). The panel noted that it lacked authority to address whether such a delegation was constitutional. *Id.* at 61,499, para. 55.

[443] Motion to Hold Case in Abeyance, Del. Riverkeeper Network v. FERC, No. 20-1264, ECF No. 8 (D.C. Cir. Aug. 25, 2020).

[444] *E.g.*, Susan Phillips, *Known for Her Record on Women's and Civil Rights, Justice Ginsburg Also Leaves an Environmental Legacy on the Supreme Court*, STATEIMPACT PA. (Sept. 24, 2020), https://stateimpact.npr.org/pennsylvania/2020/09/24/known-for-her-record-on-womens-and-civil-rights-justice-ginsburg-also-leaves-an-environmental-legacy-on-the-supreme-court/.

that support a narrow reading of the Eleventh Amendment and state sovereign immunity. In *Seminole Tribe of Florida v. Florida*, Justice Souter wrote a detailed dissent joined by Justices Ginsburg and Breyer explaining his view that the Eleventh Amendment was not meant to bar federal causes of action brought against the states.[445] Justice Souter echoed this reasoning in several later decisions on the authority of private actors to sue states.[446] Justice Ginsburg joined these dissents and, in 2014, wrote in a dissent that the Supreme Court "has carried beyond the pale the immunity possessed by the States of the United States."[447] No other members of the Court joined this dissent. The only current member of the Court to have joined Justice Souter's earlier dissents is Justice Breyer, who in a 2020 concurrence joined only by Justice Ginsburg reiterated his "consistently maintained" view that the Supreme Court's Eleventh Amendment jurisprudence "went astray" with the Court's decision in *Seminole Tribe*.[448]

If the Court denies PennEast's petition for certiorari, or grants the petition and affirms the Third Circuit's decision, the Court would preserve a ruling that prevents private entities from exercising the Natural Gas Act's eminent domain power against states. The Third Circuit's emphasis on the "absence of any indication in the text of the statute that Congress intended to delegate" this power suggests that Congress could potentially amend the Natural Gas Act to permit such an exercise.[449] However, a Supreme Court decision holding that this power is nondelegable, as suggested by *Blatchford*, would leave Congress without such recourse.[450]

Clean Water Act Section 401 Water Quality Certification: *Montana v. Washington*[451]

On January 21, 2020, Montana and Wyoming filed a motion requesting that the Supreme Court review the Washington Department of Ecology's denial of a CWA certification for a proposed coal export terminal along the Columbia River. Montana and Wyoming allege that Washington's denial of a water quality certification under Section 401 of the CWA was the product of protectionism and anti-coal bias, and violated the dormant Commerce Clause and the Foreign Commerce Clause. The Supreme Court has exclusive original jurisdiction over disputes between states, but has not yet decided whether to hear the case.

Background on CWA Section 401: Under Section 401 of the CWA, any applicant for a federal license or permit to conduct any activity that may result in any discharge into navigable waters shall provide the federal licensing or permitting agency with a Section 401 certification.[452] The certification, issued by the state (or other certifying authority) in which the discharge originates, attests that the discharge will comply with applicable provisions of certain enumerated sections of the CWA.[453] Section 401 provides states, certain tribes, and, in certain circumstances, EPA

[445] Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 100 (1996) (Souter, J., dissenting).

[446] *See* Idaho v. Coeur D'Alene Tribe of Idaho, 521 U.S. 261, 297 (1997) (Souter, J., dissenting); Alden v. Maine, 527 U.S. 706, 760 (1999) (Souter, J., dissenting).

[447] Michigan v. Bay Hills Indian Cmty., 572 U.S. 782, 831 (2014) (Ginsburg, J., dissenting).

[448] Allen v. Cooper, 140 S. Ct. 994, 1008-09 (2020) (Breyer, J., concurring).

[449] *In re* PennEast Pipeline Co., 938 F.3d 96, 112 (3d Cir. 2019).

[450] *See* Blatchford v. Native Vill. of Noatak, 501 U.S. 775, 785 (1991).

[451] Kate A. Bowers, CRS Legislative Attorney, authored this section of the report.

[452] 33 U.S.C. § 1341.

[453] *Id.* The applicable provisions include effluent (i.e., discharge) limitations and standards of performance for new and existing discharge sources, *id.* §§ 1311, 1312, 1316; water quality standards and implementation plans, *id.* § 1313; and toxic pretreatment effluent standards, *id.* § 1317.

(hereinafter referred to collectively as "certifying authorities") the authority to grant, grant with conditions, deny, or waive certification of proposed federal licenses or permits that may result in a discharge into waters of the United States.[454] If a certifying authority denies certification, the federal licensing or permitting agency cannot issue the license or permit.[455]

The Proposed Project: Lighthouse Resources Inc. and its subsidiary, Millennium Bulk Terminals-Longview, LLC, sought a Section 401 certification to construct the Millennium Bulk Terminal, a coal export terminal on the Columbia River in Longview, Washington.[456] The terminal would have the capacity to ship 44 million metric tons of coal each year to foreign markets, which would mostly come by rail from the Powder River Basin in Montana and Wyoming.[457] In 2017, the Washington Department of Ecology denied the certification application.[458] In addition to finding that the applicant did not provide "reasonable assurance" that the project would meet applicable water quality standards, the state concluded that construction and operation of the terminal would result in significant and unavoidable adverse environmental impacts to social and community resources, cultural resources, tribal resources, rail transportation, rail safety, vehicle transportation, vessel transportation, noise and vibration, and air quality.[459]

The Supreme Court Litigation: On January 21, 2020, Montana and Wyoming filed a motion for leave to file a bill of complaint in the Supreme Court.[460] Montana and Wyoming contend that Washington's denial of the Section 401 certification resulted in a discriminatory closure of Washington's ports to coal from Montana and Wyoming, in violation of the dormant Commerce

[454] *Id.* § 1341(a), (d).

[455] *Id.* § 1341(a)(1).

[456] Brief in Support of Motion for Leave to File Bill of Complaint, Montana & Wyoming v. Washington, No. 22O152, at 8 (U.S. Jan. 21, 2020).

[457] *Id.*

[458] Letter from Maia D. Bellon, Director, Washington Department of Ecology, to Kristin Gaines, Millennium Bulk Terminals-Longview, LLC (Sept. 26, 2017), https://ecology.wa.gov/DOE/files/83/8349469b-a94f-492b-acca-d8277e1ad237.pdf.

[459] *Id. See also* Millennium Bulk Terminals – Longview Final SEPA Environmental Impact Statement S.6 (Apr. 2017), available at https://www.millenniumbulkeiswa.gov/assets/introduction5.17.pdf. Additionally, other state and county agencies denied consent to sublease state-owned aquatic lands comprising a portion of the site and an application for shoreline use permits under state law. Nw. Alloys, Inc. v. Wash. Dep't of Nat. Res., 447 P.3d 620, 626-27 (Wash. Ct. App. 2019); Millennium Bulk Terminals-Longview, LLC v. Washington, No. 52215-2-II, 2020 WL 1651475 (Wash. Ct. App. Mar. 17, 2020).

[460] Bill of Complaint, Montana & Wyoming v. Washington, No. 22O152, ¶ 44 (U.S. Jan. 21, 2020). *See supra* note 5. Prior to Montana and Wyoming's Supreme Court filing, the Section 401 certification denial had already generated several lawsuits in federal and state court. The U.S. District Court for the Western District of Washington dismissed part of Lighthouse's suit challenging the certification denial, and stayed the remaining part to allow state court litigation to proceed. Lighthouse Res. Inc. v. Inslee, 429 F. Supp. 3d 736 (W.D. Wash. 2019); Order Staying Case, Lighthouse Res. Inc. v. Inslee, No. 3:18-cv-05005-RJB, 2019 WL 1572605, at *1-2 (W.D. Wash. Apr. 11, 2019). Lighthouse also challenged the denial of consent to the sublease of state-owned aquatic lands and the denial of the shoreline use permit. The Washington Court of Appeals upheld both denials. Nw. Alloys, Inc. v. Wash. Dep't of Nat. Res., 447 P.3d 620, 626-27 (Wash. Ct. App. 2019), *pet. for review denied*, 194 Wash.2d 1019, 455 P.3d 138 (Table) (Wash. 2020); Millennium Bulk Terminals-Longview, LLC v. Washington, No. 52215-2-II, 2020 WL 1651475 (Wash. Ct. App. Mar. 17, 2020), *pet. for review denied*, 195 Wash. 2d 1032, 468 P.3d 615 (Table) (Wash. 2020). The U.S. District Court for the Western District of Washington also dismissed Lighthouse's challenge to the sublease denial. Order on Defendant Hilary Franz's Motion for Summary Judgment, Lighthouse Res. Inc. v. Inslee, No. 3:18-cv-05005-RJB, 2018 WL 5264334 (W.D. Wash. Oct. 23, 2018). Lighthouse has appealed the district court's stay order in the U.S. Court of Appeals for the Ninth Circuit. Lighthouse Res., Inc. v. Inslee, No. 19-35415 (9th Cir. filed May 10, 2019).

Clause and the Foreign Commerce Clause.[461] They allege that by denying Section 401 certification, Washington blocked the construction of the port based on a desire to protect exports of Washington agricultural products over out-of-state coal, a bias against coal, and an unjustified concern about the extraterritorial effect on GHG emissions of shipping coal to overseas markets.[462] According to Montana and Wyoming, Washington's denial of a Section 401 water quality certification for those reasons imposes a burden on interstate commerce and constitutes an impermissible attempt to regulate conduct outside its borders in violation of the dormant Commerce Clause.[463] They also allege that the denial impedes their ability to engage in foreign commerce and infringes on the federal government's exclusive authority to regulate foreign commerce, in violation of the Foreign Commerce Clause.[464]

In response, Washington argues that Congress expressly authorized states to deny certification under CWA Section 401, and so Montana and Wyoming may not challenge the denial under the dormant Commerce Clause.[465] Washington further argues that the Section 401 denial does not amount to an embargo against coal from Montana and Wyoming because millions of tons of coal already move through Washington, including at the site of the proposed project.[466] Washington also disputes Montana and Wyoming's allegation that the certification denial was protectionist and discriminatory.[467] Finally, Washington contends that the certification denial does not violate the Foreign Commerce Clause for the same reasons it does not violate the dormant Commerce Clause, and also because it does not affect the federal government's ability to speak with one voice when regulating foreign commerce.[468]

Considerations for Congress: The Supreme Court has not yet decided whether to hear the case. On October 5, 2020, the Court issued an order seeking the Solicitor General's views.[469] The potential participation of the United States is significant because the litigation over the Millennium Bulk Terminal is unfolding against a backdrop of extensive changes to EPA's interpretation of CWA Section 401. On July 13, 2020 EPA published a new rule (the Section 401 Rule) to replace the agency's implementing regulations for Section 401, which were promulgated

[461] Bill of Complaint, Montana & Wyoming v. Washington, No. 22O152, ¶ 1 (U.S. Jan. 21, 2020).

[462] *Id.* ¶¶ 39, 44, 49.

[463] *Id.* ¶¶ 48-57. The Commerce Clause of the Constitution vests Congress with the authority "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes[.]" U.S. CONST. art. I, § 8, cl. 3. Although the Commerce Clause does not expressly restrain states, courts have interpreted it as prohibiting states from discriminating against interstate commerce unless Congress authorizes such discrimination. *See* Dep't of Revenue of Ky. v. Davis, 553 U.S. 328, 337-38 (2008). The implicit restraint on state authority is described as the dormant Commerce Clause. *See* Cong. Research Serv., *Dormant Commerce Power: Overview*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/artI-S8-C3-1-4-1/ALDE_00001060/ (last visited Feb. 2, 2021).

[464] Bill of Complaint, Montana & Wyoming v. Washington, No. 22O152, ¶¶ 59-65 (U.S. Jan. 21, 2020).

[465] Brief in Opposition for Motion for Leave to File Complaint, Montana & Wyoming v. Washington, No. 22O152, at 20-21 (U.S. Jan. 21, 2020) (quoting Maine v. Taylor, 477 U.S. 131, 138 (1986), and Ne. Bancorp, Inc. v. Bd. of Governors of Fed. Reserve Sys., 472 U.S. 159, 174 (1985)).

[466] *Id.* at 23-27.

[467] *Id.* at 27-33.

[468] *Id.* at 34. Washington also argues that the case is not appropriate for Supreme Court review because the denial of a Section 401 certification "does not directly implicate any other State's sovereign or quasi-sovereign interests" but instead is "at its core ... a challenge to the denial of a private company's permit application to build a privately owned project." Brief in Opposition for Motion for Leave to File Complaint, Montana & Wyoming v. Washington, No. 22O152, at 13 (U.S. Jan. 21, 2020). Washington further argues that Montana and Wyoming's claims are already the subject of litigation in federal district court, *id.* at 14-15, and that Montana and Wyoming lack standing to challenge the certification denial, *id.* at 16-19.

[469] Order, Montana & Wyoming v. Washington, No. 22O152 (U.S. Oct. 5, 2020).

in 1971.[470] The Section 401 Rule includes numerous changes to existing regulations and practice to narrow the role of certifying authorities and the scope of their review when acting on Section 401 certification requests.[471]

Some project proponents have expressed frustration with how some states have implemented their Section 401 certification authority, have accused states of misusing Section 401 to block certain projects, and have advocated for changes to the CWA or implementing regulations and guidance to limit states' authority under Section 401.[472] The Trump Administration had also been critical of some states' denials of Section 401 certifications.[473] At the same time, many states assert that Section 401 certification allows them to manage and protect the quality of waters within their states, and that efforts to limit state authority under Section 401 are contrary to the principles of cooperative federalism upon which the CWA is based.[474]

The Section 401 Rule is the subject of lawsuits in three federal district courts.[475] Depending on how long it takes for courts to decide those lawsuits and any appeals, the Supreme Court may have decided whether to take Montana and Wyoming's case and may even have issued a ruling before the federal district courts have resolved the Section 401 lawsuits. A ruling in favor of Montana and Wyoming could support EPA's contention that the scope of certification is narrow, and thus would strengthen EPA's position in the cases challenging the Section 401 Rule. Furthermore, while Washington denied Lighthouse's water quality certification application and Montana and Wyoming filed their complaint before EPA issued the Section 401 Rule, EPA's recent criticism of broader-based certification denials[476] may encourage the Court to scrutinize more closely the basis for Washington's denial of the Millennium coal terminal certification. On

[470] Clean Water Act Section 401 Certification Rule, 85 Fed. Reg. 42,210 (July 13, 2020). EPA also issued updated Section 401 guidance on June 7, 2019. EPA, Clean Water Act Section 401 Guidance for Federal Agencies, States and Authorized Tribes (June 7, 2019), https://www.epa.gov/cwa-401/clean-water-act-section-401-guidance-federal-agencies-states-and-authorized-tribes. EPA concluded that retaining the guidance after issuing the Section 401 Rule could cause confusion, and rescinded the guidance coincident with the Section 401 Rule's effective date. 85 Fed. Reg. at 42,214.

[471] For further discussion of Section 401 and the Section 401 Rule, see CRS Report R46615, *Clean Water Act Section 401: Overview and Recent Developments*, by Laura Gatz and Kate R. Bowers.

[472] *See, e.g.*, Comments of the Association of American Railroads (May 24, 2019); Comments of the Interstate Natural Gas Association of America (May 24, 2019). Both letters are available at EPA Clean Water Act Section 401 Water Quality Certification Pre-Proposal Recommendations, Docket No. EPA-HQ-OW-2018-0855. *See also* Press Release, American Petroleum Institute, API-NY Applauds Second Circuit Court Decision, Says It's Good News for Pipelines Across New York (Feb. 5, 2019), https://www.api.org/news-policy-and-issues/news/2019/02/05/apiny-applauds-second-circuit-court-decision-says-its-good-news-for-pipelines-ac; Press Release, American Gas Association, EPA Proposes Updates to Certification Process for Natural Gas Infrastructure (Aug. 9, 2019), https://www.aga.org/news/news-releases/epa-proposes-updates-to-certification-process-for-natural-gas-infrastructure/.

[473] Press Release, EPA, EPA Issues Final Rule that Helps Ensure U.S. Energy Security and Limits Misuse of the Clean Water Act (June 1, 2020), https://www.epa.gov/newsreleases/epa-issues-final-rule-helps-ensure-us-energy-security-and-limits-misuse-clean-water-0.

[474] *See, e.g.*, Letter from Western Governors' Association et al. to Honorable John Barrasso and Honorable Tom Carper, November 18, 2019, https://www.acwa-us.org/wp-content/uploads/2019/11/Coalition-Letter-Clean-Water-Act-Section-401-Legislation-11-18-19.pdf.

[475] *In re* Clean Water Act Rulemaking, No. 3:20-cv-04636 (N.D. Cal.) (consolidating Am. Rivers v. Wheeler, No. 3:20-cv-04636 (N.D. Cal. filed July 13, 2020); California v. Wheeler, No. 4:20-cv-04869 (N.D. Cal. filed July 21, 2020); and Suquamish Tribe v. Wheeler, No. 3:20-cv-06137 (N.D. Cal. filed Aug. 31, 2020)); Del. Riverkeeper Network v. EPA, No. 2:20-cv-03412 (E.D. Pa. filed July 13, 2020); S.C. Coastal Conservation League v. Wheeler, No. 2:20-cv-03062 (D.S.C. filed Aug. 26, 2020).

[476] Clean Water Act Section 401 Certification Rule, 85 Fed. Reg. 42,210, 42,256 (July 13, 2020).

the other hand, a ruling in favor of Washington may, if it addresses the appropriate scope of certification review, lead district courts to view the Section 401 Rule with greater skepticism.

Congress has recently shown interest in the implementation of Section 401. On November 19, 2019, the Senate Committee on Environment and Public Works held a legislative hearing on potential reforms to Section 401, including legislation introduced by the Committee Chairman (S. 1087).[477] S. 1087 and H.R. 2205, identical bills titled the Water Quality Certification Improvement Act of 2019, would amend Section 401 to narrow the scope of water quality impacts that certifying authorities may consider in their certification review, as well as the scope of conditions they may impose.

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[477] Hearing on S. 1087, the Water Quality Certification Improvement Act of 2019, and Other Potential Reforms to Improve Implementation of Section 401 of the Clean Water Act: State Perspectives Before the S. Comm. on Env't & Pub. Works, 116th Cong. 145 (2019).