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Foresight: 2024 Environmental Year in Preview

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This calendar year promises to bring many changes for businesses as they adjust to a rapidly shifting environmental regulatory and legal landscape. Through this piece, we summarize what we believe will be some of the more significant environmental legal developments likely to attract businesses' attention and resources in the near term. We anticipate material developments concerning the following topics discussed more below:

ESG for Real Estate | **Wildlife Protections** | **Methane/VOC Emissions Regulations** | **Methane Waste Emissions Charges** | **Greenhouse Gas Emission Reporting** | **PFAS**

Environmental, Social, Governance (ESG) Considerations for Real Estate Get Real

Susan M. Rainey

In 2024, we expect to see ESG and responsible business practices become more entrenched for our real estate clients. Collecting efficiency benchmarking data and making efficiency upgrades have already become commonplace for many firms. As lenders and investors prepare for compliance with California SB253, upcoming SEC ESG regulations, and other laws, data collection and disclosure requirements will trickle down to firms that are not themselves subject to these requirements.

In addition, various states and cities have passed laws that will require meaningful upgrades to achieve efficiency standards. These requirements often phase in for larger buildings first, and put pressure on the regulated community to quickly evaluate and implement upgrades. Cities such as Denver and Seattle have requirements starting to phase in by 2030, while in New York, owners can get extra time with the 2024 upgrade deadline by developing a compliance plan. These laws may cause competition for service providers and materials. And as owners begin making upgrades, expect to see green premiums for upgraded facilities – and discounts for properties without them.

Climate risk will be another topic capturing attention. Entities with greater than $500 million and doing business in California will be subject to California SB261 as soon as January 1, 2026. Even for companies not subject to SB261, potential damages from weather events, wildfires, extreme heat and other risks will be a focus for investors and insurance underwriters. Upgrades for resilient buildings may go from a luxury to the norm.

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New Wildlife Protections – Racing the Clock, and Losing?

M. Benjamin Cowan

For much of the past three years under the Biden Administration, the U.S. Fish and Wildlife (USFWS) has been working on major rulemakings and species listings under each of the three major federal wildlife statutes: the Endangered Species Act (ESA), Bald and Golden Eagle Protection Act (BGEPA), and Migratory Bird Treaty Act (MBTA). We expect several of those to be finalized in 2024 in an effort to ensure their implementation prior to a potential change in administrations and accompanying priorities in early 2025. The following is a brief summary of some the proposed actions that would have the most significance for energy and other developers.

Endangered Species Act Listings. The USFWS issued a proposed rule to list the tricolored bat as endangered in September 2022. It was expected that the listing would be finalized in 2023 but a final rule was pushed back from spring to fall, and then to early 2024. It is now listed in the USFWS' unified agenda with a September 2024 target date, although the possibility remains that it could be issued before then. This listing will have significant consequences for the renewable energy and midstream industries as well as other infrastructure developers due to the species' wide distribution, spanning 39 states east of the Rockies. The wind energy industry will be most affected as operating wind turbines will present a risk of take throughout the species' range, but solar project, pipeline, transmission line, and real estate developers who need to clear significant acreage of trees will also be impacted. Indeed, the imminent prospect of a final rule has already been complicating project development for much of 2023. We discussed the implications of the tricolored bat listing in our 2022 QuickStudy on the proposed rule, which can be found here. In addition to the tricolored bat, the USFWS has been conducting a species status assessment of another wide-ranging bat, the little brown bat. The USFWS indicates that a listing decision on that species is also expected in 2024, but likely not before the final tricolored bat listing rule.

Revised Eagle Permit Rule. The USFWS issued a proposed rule to revise its eagle permit regulations under BGEPA in September 2022. The proposed rule would make significant changes to the existing rule, revising the regulations authorizing eagle incidental take and eagle nest take permits with the goal of increasing the efficiency and effectiveness of permitting, facilitating and improving compliance, and increasing the conservation benefit for eagles. It would also create a general permit program for incidental eagle take from wind energy facilities meeting certain requirements, locations and risk thresholds, in addition to the existing project-specific eagle permits already available under current regulations. The public comment period for the proposed rule closed in December 2022 and the rule attracted substantial comment and criticism, in particular for the structure and requirements of the general permit program. A final rule was expected but did not arrive in 2023. USFWS is under a judicially imposed deadline of January 31, 2024 to issue the final rule pursuant to a settlement with the Energy and Wildlife Action Coalition, so the rule may have been issued by the time you read this or shortly thereafter barring any further, unanticipated delays. A significant number of wind energy projects seeking eagle take permits have formally or informally suspended the permit process in anticipation of the final rule revision. Once the final rule is issued we expect the number and pace of applications to pick up substantially, likely resulting in additional lengthy delays in an already cumbersome and protracted process, notwithstanding the increased efficiencies that were the objective of the rulemaking.

UPDATE: The USFWS issued the final eagle rule on February 12. It becomes effective on April 12. The final rule contains significant changes from the proposal including many notable improvements. For more information on the final rule, please see our QuickStudy here.

Petition to List Eastern Golden Eagles under the ESA. On November 15, 2023 the American Bird Conservancy (ABC) petitioned the USFWS to classify the eastern population of golden eagles as a distinct population segment and list it as threatened or endangered under the ESA. The requested listing would subject eastern golden eagles to the ESA in addition to BGEPA, creating additional regulatory burdens for wind energy developers even though the preservation standard under BGEPA is actually more stringent than the recovery standard of the ESA. The petition is based largely on the alleged "growing threat" to eagles posed by wind energy development and ABC's dissatisfaction with both the existing BGEPA eagle permit rule and the proposed rule revision, in particular the inclusion of the migratory corridor of eastern golden eagles within the geographic scope of the proposed general permit program. The wind industry has filed comments with USFWS forcefully opposing ABC's petition. Under the ESA, USFWS has 90 days to publish a finding on whether the petitioned listing "may be warranted." If it finds that it is, USFWS must begin a 12-month status review to determine if the listing is "warranted," "not warranted" or "warranted but precluded" by other priorities (which would trigger additional determinations every 12 months thereafter). The 90-day finding is due on February 15, 2024 and will indicate whether the petition has legs, but if so the 12-month finding would not come until 2025.

MBTA Permit Program. The USFWS has been working to develop a proposed rule that would provide for the issuance of permits for incidental take of migratory birds since at least 2021. The purpose of such a rule would be to provide a regulatory framework and standards of conduct for developers, owners and operators of certain categories of facilities, including wind and solar projects, that inevitably experience incidental take of migratory birds. In December the USFWS indicated that release of the proposed MBTA permit rule would be (further) delayed while the Service works through technical comments received from various federal agencies, and the rule was recently withdrawn from Office of Management and Budget review. At this point it is unclear whether, and if so when, the USFWS will release a proposed rule, but it is highly unlikely that there would be time for USFWS to complete the rulemaking process and issue a final rule of this significance in 2024, meaning the prospects for an MBTA permitting program likely depend on the outcome of the election.

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New Methane/VOC Emissions Regulations Will Present New Challenges to the Upstream and Midstream Sectors

Gerald J. Pels, Elizabeth Corey

Calendar Year 2024 brings significant new air regulation to the upstream and midstream sectors. In November 2023, EPA finalized the new New Source Performance Standards (NSPS) and Emissions Guidelines (EGs), known as Subpart OOOOb (or Quad Ob) and Subpart OOOOc (Quad Oc), respectively, to further reduce methane and Volatile Organic Compound (VOC) emissions from new, modified, reconstructed, and existing sources in the oil and natural gas sector. Quad Ob regulates new, modified, and reconstructed sources, while Quad Oc will establish EGs largely consistent with the NSPS for existing sources. In drafting the rules, which are substantially more detailed than their predecessors Quad Oa and Quad O, EPA incorporated requirements for previously unregulated sources in the oil and natural gas sector. The rules set more stringent standards for a litany of sources including, but not limited to, storage vessels, flares, wells, compressors, pumps, sweetening units, and others. Among the many additional requirements are: (i) the definition of "storage vessels" is revised to include

the entire tank battery, not just a single tank, so that the emissions threshold (i.e., the "potential to emit," which is the highest quantity of certain pollutants that a source could potentially release into the air, even if that source has never actually emitted the highest quantity), set at 6 tons per year (tpy) VOC, will apply to the *entire tank battery*, not just a single tank; (ii) well closure plans and fugitive emissions monitoring required on all wells prior to closure, with an optical gas imaging (OGI) survey required to be submitted to EPA upon closure in certain instances; and (iii) creation of a Super Emitter Program that, among other things, authorizes third parties to remotely monitor regulated facilities and notify EPA when certain emissions events are detected. Subpart OOOOb generally becomes effective within 60 days after the rule is published, with certain exceptions. Subpart OOOOc has a longer implementation timeline, requiring each state to submit a plan to EPA for appropriate emissions reductions within 2 years of the date that the rule is published, and regulated entities are required to comply with state or federal rules within 3 years after the deadline for state plan submittals. The impact of these rules will be far flung. Regulated entities should expect to incur costs associated with not only additional controls for new sources, but also potentially significant costs to upgrade, repair, maintain and control existing sources, the heightened regulation of which will be phased in through Quad Oc. In addition to these obvious costs, regulated communities should contemplate significant increases in monitoring and leak detection and repair, reporting and attendant manpower needs. It will be beneficial to begin a gap analysis of existing facilities and sources to determine needs and costs to comply with these heightened requirements. It is also not uncommon during this type of review process for other compliance issues to come to light. For this reason, regulated entities may want to consider the benefits of undertaking this type of gap review in conjunction with state audit and immunity programs, where available.

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The Oil and Gas Industry Will Need to Closely Monitor Waste Emissions Charge Given Potentially Tight Implementation Timelines

Gerald J. Pels, Elizabeth Corey

The Inflation Reduction Act (IRA) imposed the first-ever direct federal "charge" on methane emissions called the Waste Emissions Charge (WEC), and flagged 2024 as the first year to begin methane emissions quantification for applicable facilities within nine segments of the oil and natural gas industry as described in EPA's Greenhouse Gas Reporting Program (GHGRP). The "charge" for 2024 emissions will be due early 2025. Although the WEC applies to 2024 emissions, EPA did not propose a rule to implement the WEC until January 2024, and the WEC Rule will not be finalized until after the 45-day comment period had concluded and EPA has had time to consider comments and make any revisions to the rule. As EPA's regulatory developments on the subject are ongoing, regulated entities will need to closely monitor the rule and be prepared for implementation on a tight turnaround once the rule is finalized. For context, pursuant to the IRA and the proposed WEC Rule, EPA seeks to impose an annual charge on methane emissions that exceed specified "waste emissions thresholds" from facilities regulated under the rule that report more than 25,000 metric tons of carbon dioxide equivalent of greenhouse gases emitted per year. Applicable "waste emissions thresholds" are based on sub-sectors within the oil and gas industry as described in the GHGRP. The WEC starts at $900 per metric ton of excess emissions in 2024, increasing to $1,200 in 2025, and $1,500 in 2026 and beyond. In August 2023, EPA proposed the WEC Calculation Rule, which among other things, seeks to revise the GHGRP to include new calculation methodologies for WEC

emissions quantification, but EPA did not seek to actually implement the WEC until the January 2024 WEC Rule. EPA has advised that the August 2023 WEC Calculation Rule will not be finalized until August 2024, which is well into the first accounting year per the IRA. The extended timeframe for the WEC Calculation Rule and the WEC Rule make 2024 implementation difficult. Yet, EPA continues to indicate that a charge will be due for 2024 emissions. The regulated community needs to be on the lookout for further EPA guidance regarding functional implementation of the Waste Emissions Charge, and finalization of related rules.

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A "Greenlight" to Greenhouse Gas Emission Reporting Requirements

Gerald D. (Jerry) Higdon

In 2024, two major Federal rule packages and one major California rule package, all related to the collection and reporting of greenhouse gas emissions data, are likely to reverberate throughout the economy, reaching entities that are large and small, public and private, domestic and foreign. Each of the rule packages addresses reporting a covered entity's direct emissions (Scope 1 emissions), indirect emissions from energy, steam, heating, or cooling resources acquired from others (Scope 2 emissions), and an entity's other indirect upstream and downstream greenhouse gas emissions such as those associated with an entity's vendors, business travel, employee commuting and the processing and use of its products and services by others (Scope 3 emissions).

At the Federal level, the Securities and Exchange Commission will likely finalize its Climate Disclosure Rule, which will require publicly traded entities to provide disclosures regarding the quantification of greenhouse gas emissions, climate-related risks that are reasonably likely to be material, and the management of climate-related issues. The rule will place early emphasis upon an entity's Scope 1 and Scope 2 emissions. Disclosures regarding Scope 3 emissions will likely follow approximately a year later, except for smaller reporting companies. Under the proposed rule the largest filers, those having revenues of $100 million or more and $700 million or greater value of their publicly traded securities, will have the earliest reporting deadlines and the more rigorous obligations regarding third-party verification of their emissions data.

A similar Federal rule package, amending the Federal Acquisition Regulation, also will likely be adopted in 2024. As proposed, the amended regulations generally will require Significant Contractors, who received at least $7.5 million in total Federal Contract obligations in the prior year, and Major Contractors, who received at least $50 million in total Federal Contract obligations in the prior year, to complete an inventory of and report their annual Scope 1 and Scope 2 emissions, beginning one year after the rule's finalization. Major Contractors, starting two years after the rule's finalization will have to submit an annual climate disclosure, accessible on the web, which must also cover Scope 3 emissions, and the governance, strategy, risk management and metrics and targets related to greenhouse gas emissions. Exceptions apply to certain entities, and waivers are possible, including for national security, emergency, or other mission essential purposes.

Finally, in 2024 California will adopt regulations that implement California's Climate Corporate Data Accountability Act, passed in 2023. The rules will apply to public or private business organizations, formed in any United States jurisdiction, with revenues exceeding $1 billion, and that do business in California. Based upon existing California

franchise and tax guidelines, the touchstones for doing business in California are relatively modest. California expects approximately 5,300 businesses to be affected. The adopted regulations will require reporting entities, beginning in 2026, to report their Scope 1 and Scope 2 emissions, and, beginning in 2027 to report their Scope 3 emissions to a non-profit emissions reporting organization.

The adoption of all of these and similar greenhouse gas emissions reporting programs will set in motion a flurry of activity in 2024 as covered entities begin investing in the development, training and maintenance of emissions accounting personnel and systems. As related to Scope 3 emissions, the duties of reporting entities will cause data collection and reporting burdens to spread, affecting non-reporting businesses in multiple jurisdictions as the reporting entity attempts to collect the data it needs to meet its reporting obligations regarding Scope 3 emissions. Parties may want to start adjusting their contractual arrangements to account for collecting and providing emission information, and the related costs associated with such activities. Reporting entities with direct emissions, as they review their operations under these programs, should be mindful of potentially uncovering other air emission compliance issues that may raise permitting or compliance concerns.

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Persistent PFAS Pressure

Gerald D. (Jerry) Higdon, M. Benjamin Cowan

Per- and polyfluoroalkyl substances (PFAS) have been in EPA's crosshairs for several years, and 2024 will be no different. In October 2023, EPA finalized two PFAS reporting rules that will impact regulated entities in 2024 and beyond. First, EPA published a final rule under the Toxic Substances Control Act (TSCA) requiring all manufacturers and importers of PFAS chemicals to submit a one-time report on all PFAS materials manufactured or imported from January 1, 2011, to December 31, 2022. Due to the expansive nature of the reporting requirements, the rule may affect entities that have not traditionally been subject to TSCA. And while final reports are not due until May 2025, companies should begin preparing and collecting the necessary information in 2024 to ensure there is sufficient time to compile and report. Second, EPA published a final rule modifying the reporting requirements for PFAS in the Toxic Release Inventory (TRI) under Section 313 of the Emergency Planning and Community Right-to-Know Act. Specifically, EPA proposed that PFAS compounds in the TRI should be classified as "chemicals of special concern", which would eliminate the availability of the *de minimis* exemption to TRI reporting for both manufacturers and suppliers.

According to its most recent Regulatory Agenda and Plan, EPA expects to publish several proposed or final rules concerning PFAS in 2024. For starters, a final version of EPA's proposal designating perfluorooctanoic acid (PFOA) and perfluorooctane sulfonic acid (PFOS) as hazardous substances under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) is expected in early 2024. If finalized, the rule would require entities to report releases of the two PFAS above certain thresholds. The rule also would give the EPA discretion to order cleanups and recover cleanup costs from responsible parties under CERCLA. In addition, a proposal to add PFOA, PFOS, and perfluorobutane sulfonate (PFBS) and GenX to the Resource Conservation and Recovery Act's (RCRA) list of hazardous constituents is currently scheduled for August 2024. Finally, EPA plans to finalize its PFAS National Primary Drinking Water Regulation rulemaking. The proposed

rule, if finalized, would set a maximum contaminant level for PFOA and PFOS at 4 parts per trillion, while regulating four other PFAS as a mixture using a “hazard index” approach.

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