

PUBLICATION UPDATE

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ENVIRONMENTAL LAW PRACTICE GUIDE

Publication 793

Release 91

November 2023

HIGHLIGHTS

Environmental Impact Statements

- Features significant amendments to the National Environmental Policy Act made by the Fiscal Responsibility Act of 2023.

Wetlands

- Discusses the U.S. Supreme Court's decision in *Sackett v. EPA*, which narrowed the definition of navigable waters to apply only to those wetlands that are relatively permanent and have a continuous connection to interstate navigable waters.

New Jersey

- Reports on environmental justice regulations finalized by the New Jersey Department of Environmental Justice.

Additional Updates

- Added throughout the publication are the latest statutory, regulatory, and case law developments.

Chapter 1 on Environmental Impact Statements incorporates substantial amendments to the National Environmental Policy Act (NEPA) made by the Fiscal Responsibility Act of 2023 (i.e., the debt ceiling legislation). A number of the provisions are intended to streamline environmental reviews and permitting processes. Many other amendments codify existing practices and reflect, with some modification, the current Council on Environmental Quality regulations. The chapter also discusses the Biden administration's July 2023 proposed revisions to the NEPA regulations.

Chapter 2 on Historic Preserva-

tion adds citations to new Ninth Circuit and D.C. Circuit decisions upholding presidential proclamations that expanded the Cascade-Siskiyou National Monument, finding that these actions pursuant to the Antiquities Act were consistent with a separate law—the Oregon and California Railroad and Coos Bay Wagon Road Grant Lands Act—that addressed management of timberlands in southwest Oregon.

Chapter 17 on the Clean Air Act includes recent federal circuit courts of appeal decisions on the U.S. Environmental Protection Agency’s (EPA’s) designation of attainment areas, EPA’s consideration of state implementation plans (SIPs) and SIP revisions, and the application of the Prevention of Significant Determination permitting scheme to facilities that have been reactivated after having been shut down.

Chapter 17C on Global Climate Change reports on EPA’s proposed regulations targeting greenhouse gas emissions from new, reconstructed, modified, and existing power plants. The chapter also includes updates regarding EPA’s proposed carbon dioxide emission standards for heavy-duty vehicles and the National Highway Traffic Safety Administration proposal for fuel efficiency standards for passenger cars, light trucks, commercial pickup trucks, and work vans. In addition, the chapter covers the Biden administration’s initiative to incentivize development of sustainable aviation fuel, as well as a number of litigation developments,

including the D.C. Circuit’s decision upholding EPA’s “technology-following” greenhouse gas emissions standards for aircraft.

Chapter 19 on Wetlands features the U.S. Supreme Court’s decision in *Sackett v. EPA* limiting Clean Water Act jurisdiction over wetlands to wetlands “that are ‘as a practical matter indistinguishable from waters of the United States.’” This requires a demonstration that the adjacent body of water constitutes a “water of the United States” in its own right (i.e., a relatively permanent body of water connected to traditional interstate navigable waters). Second, the wetland must have a “continuous surface connection with that water, making it difficult to determine where the ‘water’ ends and the ‘wetland’ begins.”

Chapter 20 on the Safe Drinking Water Act discusses the D.C. Circuit’s decision vacating EPA’s 2020 withdrawal of the regulatory determination for perchlorate. The court held that the Safe Drinking Water Act did not permit EPA to withdraw regulatory determinations. The chapter also reports on EPA’s proposed national primary drinking water regulations (NPDWRs) for perfluorooctanoic acid (PFOA) and perfluorooctane sulfonic acid (PFOS), as well preliminary regulatory determinations and proposed NPDWRs for four other per- and polyfluoroalkyl substances (PFAS) and their mixtures.

Chapter 24 on Wildlife and Habitat Protection reports on Endangered Species Act regulatory updates, including proposals to amend

some changes made during the Trump administration to the criteria for designating unoccupied critical habitat, the definition of “foreseeable future,” and provisions regarding protections for threatened species, among other proposed changes. The U.S. Fish and Wildlife Service and National Marine Fisheries Service also finalized amendments that remove language that had restricted the introduction of experimental populations to only a species’ “historical range.”

Chapter 72 on New Jersey adds coverage of environmental justice regulations finalized by the New Jersey Department of Environmental Justice in April 2023. The regulations establish the requirements for a six-

step process that permit applicants must follow for certain proposed facilities in overburdened communities.

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Publication 793 Release 91

November 2023

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