

# 2024 ENVIRONMENTAL UPDATE

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GIBSON DUNN

# Today's Presenters



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# 2024 ENVIRONMENTAL UPDATE

- 01 Federal Regulatory
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- 03 Federal Enforcement
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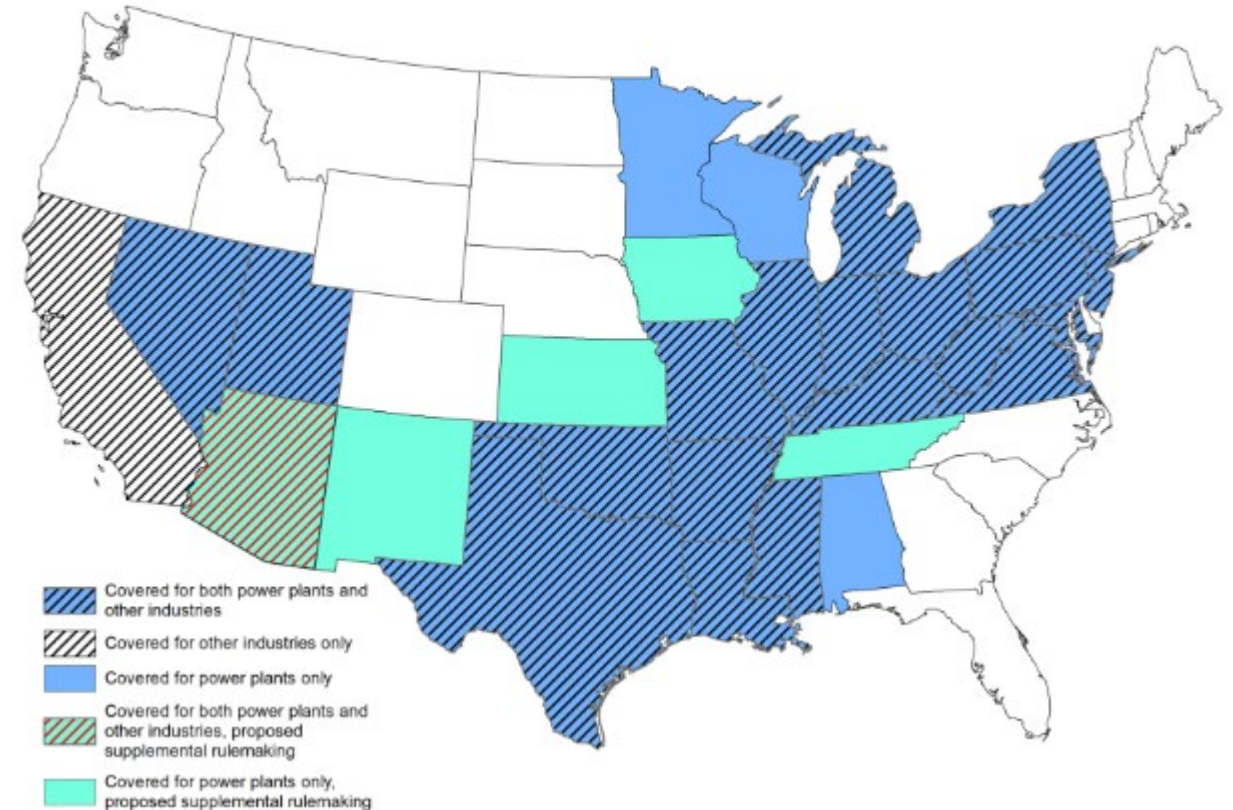
# FEDERAL REGULATORY UPDATE

01

# Federal “Good Neighbor Plan” for the 2015 Ozone NAAQS

- Requires 23 states to reduce emissions that significantly contribute to downwind attainment and maintenance of the 2015 Ozone NAAQS.
- “Group 3” ozone-season NO<sub>x</sub> control program for power plants implemented in **Illinois, Indiana, Maryland, Michigan, New Jersey, New York, Ohio, Pennsylvania, Virginia, and Wisconsin**, all of which are already covered by CSAPR ozone season NO<sub>x</sub> trading programs.
- On Jan. 16, 2024, EPA proposed to partially disapprove SIPs from **Arizona, Iowa, Kansas, and New Mexico** and proposed to include these states in the Good Neighbor Plan in 2025.
- On Feb. 21, 2024, the U.S. Supreme Court heard oral argument on Ohio’s request for stay of the Rule. *Ohio v. EPA*, Case No. 23-A-349.

States Covered Under the Final Good Neighbor Plan and the Proposed Supplemental Rulemaking



# EPA Disapproval of States' SIPs for 2015 Ozone NAAQS

Challenges pending in multiple Circuit Courts of Appeals.

Five Circuit Courts have granted partial stays of SIP disapprovals covering 12 states.

- Order, *Texas v. EPA*, No. 23–60069 (5th Cir. May 1, 2023); Order, *Texas v. EPA*, No. 23–60069 (5th Cir. June 8, 2023) (**Louisiana, Mississippi, and Texas**)
- Order, *Arkansas v. EPA*, No. 23–1320 (8th Cir. May 25, 2023); Order, *Missouri v. EPA*, No. 23–1719 (8th Cir. May 26, 2023) (**Arkansas and Missouri**)
- Order, *Allete, Inc. v. EPA*, No. 23–1776 (8th Cir. July 5, 2023) (**Minnesota**)
- Order, *Nevada Cement Co. v. EPA*, No. 23–682 (9th Cir. July 3, 2023) (**Nevada**)
- Order, *Alabama v. EPA*, No. 23–11173 & *Alabama Power Co. v. EPA*, No. 11196 (11th Cir. August 17, 2023) (**Alabama**)
- Order, *Utah v. EPA*, No. 23–9509 & *Oklahoma v. EPA*, No. 23–9514 (10th Cir. July 27, 2023) (**Utah and Oklahoma**)
- Order, *West Virginia v. EPA*, No. 23–1418 (4th Cir. August 10, 2023) (**West Virginia**)
- Order, *Kentucky v. EPA* (6th Cir. July 25, 2023) (judicial stay order for **Kentucky**)

EPA is not implementing the Good Neighbor Plan “Group 3” ozone-season NO<sub>x</sub> control program for power plants in these 12 states.

# Mercury and Air Toxics Standards Risk and Technology Review (Apr. 24, 2023)

- Proposal to amend the NESHAP for Coal- and Oil-Fired EGUs, commonly known as the MATS rule, in light of EPA's Risk and Technology Review (RTR); reconsiders 2020 RTR that found no residual health risks or new control technologies.
- Proposed rule would amend:
  - the surrogate standard for non-mercury (Hg) metal HAP (filterable particulate matter (fPM)) for existing coal-fired EGUs;
  - the fPM compliance demonstration requirements;
  - the Hg standard for lignite-fired EGUs; and
  - the definition of startup (removes one of two options for defining startup period for MATS-affected EGUs).
- Draft final rule sent to OIRA on Feb. 15, 2024; final rule expected spring 2024.

# NAAQS for Particulate Matter

(Signed Feb. 7,  
2024)

- Final rule to revise the primary (health-based) annual PM<sub>2.5</sub> standard from 12.0 µg/m<sup>3</sup> (set in 2012 and reaffirmed in 2020) to 9.0 µg/m<sup>3</sup>.
- EPA retained the secondary (welfare-based) annual PM<sub>2.5</sub> standard, primary and secondary 24-hour PM<sub>2.5</sub> standards, and primary and secondary PM<sub>10</sub> standards.
- Final rule revised ambient monitoring requirements to focus on “at-risk communities ... with environmental justice concerns” and revised the Air Quality Index.
- Next steps:
  - Major source permit applicants must conduct air quality analysis that considers the revised NAAQS (60 days after publication)
  - Attainment designations (~early 2026)
  - State implementation plans (~late 2027)



# NAAQS for Ozone

- EPA established current standards at 70ppb in 2015 and retained them in 2020.
- EPA reconsidered the 2020 decision and in August 2023 elected to initiate a new review of the ozone NAAQS.
- Schedule and next steps:
  - Spring 2024: EPA convenes public science and policy workshop.
  - Fall 2024: EPA releases Integrated Review Plan, Volume 2 to guide CASAC consideration and development of Integrated Science Assessment.
  - “EPA intends to provide multiple opportunities for public and the Advisory Committee engagement in the new review.”
  - Proposal: 2025?

**NSPS and  
Emission  
Guidelines for  
GHGs from  
New and  
Existing Fossil  
Fuel-Fired  
EGUs  
(May 23, 2023)**

- Replacement for Clean Power Plan and Affordable Clean Energy Rule, in light of Supreme Court's decision in *West Virginia v. EPA*.
- Proposed rule would set limits for new gas-fired combustion turbines, existing coal, oil, and gas-fired steam generating units, and certain existing gas-fired combustion turbines.
- Proposed standards are based on BSER that includes carbon capture and sequestration/storage (CCS), low-GHG hydrogen co-firing, and natural gas co-firing.
- Nov. 15, 2023: EPA released supplemental proposal on Small Business Advocacy Review (SBAR) Panel process and Initial Regulatory Flexibility Analysis.
- EPA projects a final rule in April 2024.

# Emerging Regulatory Focus: PFAS

## Reporting and Significant New Use Rules Under TSCA

- Oct. 11, 2023: EPA finalized PFAS reporting Rule under [TSCA § 8](#).
  - Any entity that has manufactured or imported PFAS between 2011 and 2022 has until May 13, 2025 or Nov. 13, 2025 to submit a report detailing the kind and amount of PFAS used in the manufacturing process, products created from that use, existing information about the health effects of the PFAS, and details about disposal of PFAS.
  - No *de minimis* or small business exceptions.
  - “[E]ntities who solely process, distribute, and/or use PFAS, and do not manufacture (including import) PFAS for a commercial purpose, are not required to report.”
- Jan. 11, 2024, EPA finalized a significant new use rule under [TSCA § 5](#), preventing anyone from resuming manufacture or processing of inactive PFAS without EPA review of the significant new use.

# Emerging Regulatory Focus: PFAS

## Listings Under CERCLA and TRI

- Sept. 6, 2022: proposal to include perfluorooctanoic acid (PFOA) and perfluorooctanesulfonic acid (PFOS) as hazardous substances under CERCLA § 102(a).
  - In April 2023, EPA issued an advanced notice of proposed rulemaking seeking input on designating seven additional PFAS.
  - EPA anticipates finalizing the rule by March 2024.
- PFAS added to the Toxic Release Inventory.
  - For Reporting Year 2023 (reporting forms due by July 1, 2024), the 2020 NDAA added nine PFAS added to the TRI list. EPA codified these additions by rule on June 23, 2023.
  - For Reporting Year 2024 (reporting forms due by July 1, 2025), the 2020 NDAA added seven additional PFAS to the TRI list.
  - As a result, certain facilities that manufacture or use PFAS must notify their customers that the listed chemicals are used in their products and the percentage of PFAS by weight in the product.
  - *De minimis* exemption does not apply.

# Emerging Regulatory

## Focus: PFAS

## Listing Under RCRA and NPDWR Under SDWA

- Feb. 8, 2024: Proposal to add nine PFAS (including PFBS and GenX) as hazardous constituents under 40 C.F.R. part 261 App'x VIII.
  - These PFAS would be identified for consideration in RCRA facility assessments when corrective action requirements are imposed at a facility.
  - Further investigation and cleanup through RCRA corrective action at RCRA treatment, storage, and disposal facilities required where necessary.
  - Would not require the suite of cradle-to-grave management controls that are associated with an RCRA hazardous waste.
  - Comment period closes on April 8, 2024.
- Mar. 29, 2023: Proposed National Primary Drinking Water Regulation for six PFAS under SDWA.
  - MCGL: zero for PFOA and PFOS; hazard index for other four.
  - MCL: 4ppt for PFOA and PFOS; hazard index for other four.
  - Proposed rule requires monitoring, public notification, and steps to reduce levels if exceeded.
  - Final rule pending OIRA review since Dec. 15, 2023; statutory deadline Sept. 2024.

# Clean Water Act

## WOTUS Rule Amendments

(Sept. 8, 2023)

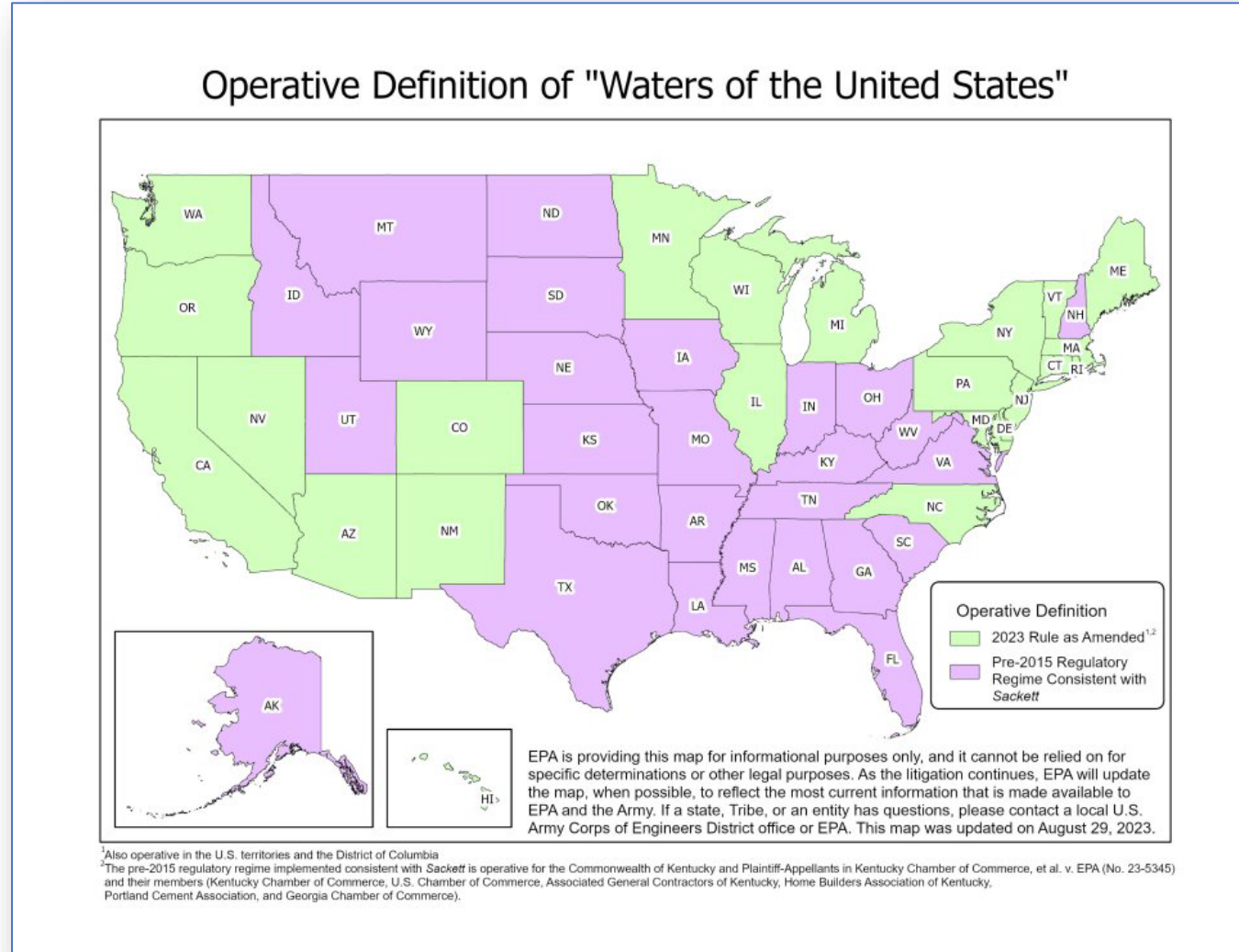
- In light of the Supreme Court’s decision in [Sackett](#), on Sept. 8, 2023, EPA and the Corps published final amendments to the January 2023 rule, designed to conform the rule to the Court’s decision.
- These changes were enacted without a notice and comment period.

After <i>Sackett</i> and the Aug. 2023 Amendments		
What Is Jurisdictional?	What Is <b>Not</b> Jurisdictional?	What is <b>Unclear</b> ?
<ul style="list-style-type: none"><li>• Traditional navigable waters</li><li>• Territorial seas</li><li>• <b><u>Perennial</u></b> tributaries</li><li>• <b><u>Adjacent (adjoining)</u></b> wetlands <b><u>with a continuous surface connection</u></b></li><li>• Certain Lakes, ponds, and impoundments</li></ul>	<ul style="list-style-type: none"><li>• <b><u>Ephemeral</u></b> tributaries</li><li>• Interstate wetlands</li><li>• Tributaries and wetlands that satisfy only the significant nexus test</li></ul>	<ul style="list-style-type: none"><li>• <b><u>Intermittent</u></b> tributaries</li><li>• Tributaries with breaks in flow<ul style="list-style-type: none"><li>○ Does a break in the stream channel also break jurisdiction of all upstream waters?</li></ul></li><li>• Ditches</li><li>• Interstate waters</li><li>• “Relatively permanent”</li></ul>

# Clean Water Act

## WOTUS Rule Amendments (Sept. 8, 2023)

- Several suits have been filed challenging the rule. See, e.g., *Texas v. EPA* (S.D. Tex.); *West Virginia v. EPA* (D.N.D.); *Kentucky v. EPA* (E.D. Ky.).



# Clean Water Act

## Maui Guidance

- Nov. 20, 2023: EPA issued draft guidance interpreting Maui.
- A permit is required for discharge through groundwater that is the “functional equivalent” of a direct discharge into WOTUS; whether this applies to any given discharge is “highly dependent on site-specific features.”
- Some of the most significant considerations in the “functional equivalent” assessment include the transit time to WOTUS, distance traveled, degree of dispersion, and flow characteristics.
- Guidance does not propose additional factors that may be relevant to the functional equivalent analysis beyond those in Court’s opinion.
- Not relevant are the discharger’s intent and the presence or absence of a state groundwater protection program.
- Groundwater is not a point source under the CWA; the draft guidance is not clear about whether EPA is considering groundwater itself as the conveyance.



# Clean Water Act

## Section 401

## Water Quality

## Certification

## Rule

**(Sept. 27, 2023)**

- Under CWA Section 401, a Federal agency cannot issue a license or permit to conduct any activity that would result in discharge into WOTUS unless the state or tribe where the discharge originates issues a certification of CWA compliance or waives certification.
- Final rule expands state and tribal authority, including the discretion to impose additional requirements for certification.
- Reverts to pre-2020 scope of certifying compliance of “activity,” not merely the “discharge” from a point source to a WOTUS.
- Six month default review period; reasonable period of time not to exceed one year; silent on “withdraw and resubmit.”

# EPA Oil and Gas Methane Rule: Framework

(Dec. 2, 2023)

## New Source Performance Standards for Methane and VOCs (NSPS 0000b) & Emissions Guidelines for Existing Sources for Methane (EG 0000c)

**New Source Performance Standards** establish work practice, monitoring, and control standards for new sources.

- Sources constructed or modified after **December 6, 2022** will be considered new sources.

**Existing Source Performance Standards** establish substantively similar standards for existing sources.

- Framed as “presumptive standards” for states to follow as they develop plans that implement and enforce performance standards for methane emissions from existing sources.
- State plans due 24 months after Effective Date.
- State plans generally must require compliance by no later than 36 months after the plans are due to EPA.

Anticipated publication in March 2024.

# EPA Oil and Gas Methane Rule: Key Elements

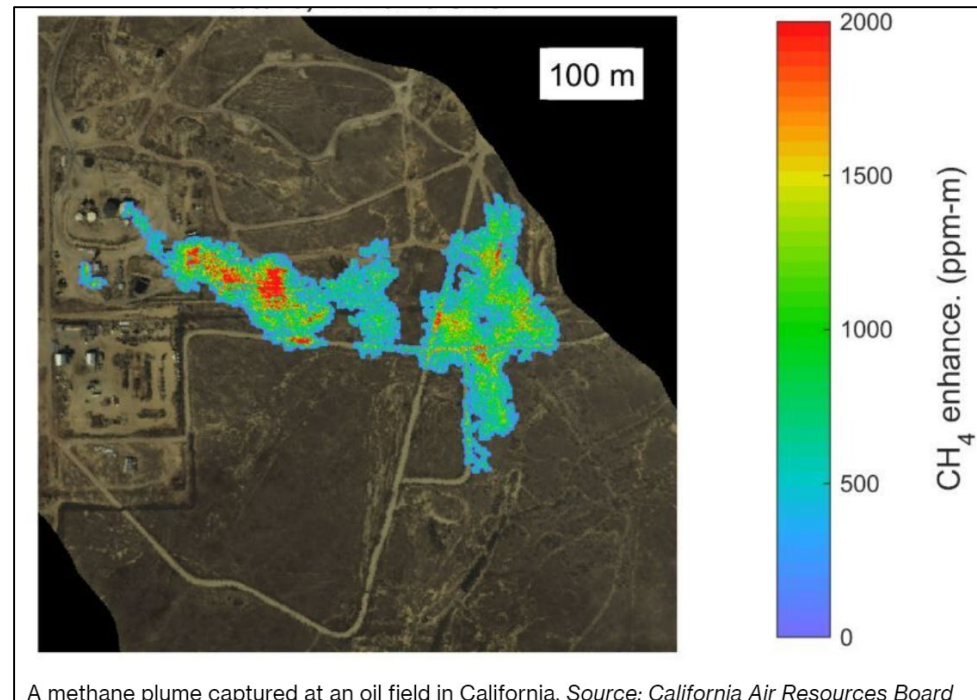
(Dec. 2, 2023)



# EPA Oil and Gas Methane Rule: Super Emitter Program

(Dec. 2, 2023)

- Program for **identifying and addressing significant methane leaks** from production facilities.
- Provides an **avenue for qualified third parties to alert EPA** of owners and operators exceeding emissions standards.
- EPA may **require owners/operators to investigate** such alerts.



# EPA GHG and Criteria Pollutant Rule for Light- and Medium-Duty Vehicles

(Apr. 12, 2023)

## Multi-Pollutant Emissions Standards for MY27+ Light-Duty and Medium-Duty Vehicles

Covers MY2027-2032 light- and medium-duty vehicles with new standards for greenhouse gases and criteria pollutants.

- Aggressive GHG standard to drive market shift to electric vehicles (EVs) but avoids explicit EV mandate.
- New battery durability requirements for EVs.
- Proposed warranty periods for EVs.
- NMOG/NO<sub>x</sub>: reductions in fleet average levels; new cold temp standards to ensure robust emissions control.
- Particulate Matter (PM): 0.5 mg/mi for light- and medium-duty; three test cycles including cold temp.

Anticipated publication in April 2024.



# EPA GHG Rule for Heavy-Duty Trucks

(Apr. 12, 2023)

## Greenhouse Gas Emissions Standards for Heavy-Duty (HD) Vehicles – Phase 3

- New GHG standards for HD vehicles that would begin to apply in MY 2028, with progressively lower standards each model year through 2032.
- Purpose is to accelerate transition from large internal combustion engine (ICE) vehicles to heavy-duty EVs.
- EPA estimates 34% of new heavy-duty day cab tractors will be EVs by 2032 if rule deployed.
- Anticipated publication in April 2024



# California Air Resources Board Rules

## Advanced Clean Cars II

- Implements ICE ban
- Extensive new regulatory requirements for EVs, including battery durability requirements and new warranty requirements
- Subject to pending waiver proceeding

### Current Challenges

- *Two Hundred for Homeownership v. CARB* (E.D. Cal.)
- *Western States Petroleum Association v. CARB*

## Advanced Clean Fleets

- Requires private and government fleet owners to transition fleets to EVs
- Waiver proceeding has not started

### Current Challenges

- *CTA v. CARB* (E.D. Cal.) (CARB agreed to suspend enforcement pending EPA waiver approval)

## Advanced Clean Trucks

- ZEV sales requirement
- Companion rules – Heavy-Duty Low NOx Omnibus and Greenhouse Gas Standards
- All subject to waiver proceedings

# Key Regulatory Challenges for Auto Sector

## ACC I Challenges

### *State of Ohio v. EPA*

- Major Questions Doctrine re sweeping nature of climate change issue & electrification impact on industry
- Equal Sovereignty Doctrine

### *Texas v. EPA*

- Equal Sovereignty Doctrine
- EPCA Preemption

### *Western States Trucking Association v. EPA*

- Challenged EPA reinstatement of ACC I waiver
- D.C. Cir. granted abeyance while other cases proceed



# CALIFORNIA REGULATORY UPDATE

02

# California Emissions Update

## Lawns

- AB 1346: Signed into law in 2021, effective in 2024.
- Targets emissions from “small off-road engines” (“SORE”)—leaf blowers and lawnmowers.
- “Regulations of emissions from SORE have not been as stringent as regulations of other engines, and one hour of operation of a commercial leaf blower can emit as much ROG (reactive organic gases) plus NOx as driving 1,100 miles in a new passenger vehicle.”
- Bottom line: Starting this year, newly manufactured SORE engines must be zero emissions with a few exceptions.

## School Buses

- AB 579: Signed into law in October 2023, effective in 2035.
- All new school buses purchased or leased after 2035 need to be zero emission.
- According to the author of the bill, “electric school buses make up only 2% of school bus fleets.”
- Bill seeks to address concerns that children are being exposed to harmful pollutants.

# California Disclosure Update

## **Senate Bill No. 253, Climate Corporate Data Accountability Act**

Creates new GHG emissions reporting requirements for companies that:

- are organized in the United States,
- have total annual revenues in excess of \$1 billion, and
- do business in California (each, a “Reporting Entity”).
- expected to impact more than 5,300 companies.

## **Senate Bill No. 261, Greenhouse Gases: Climate-Related Financial Risk**

Imposes new reporting requirements on companies that:

- are organized in the United States,
- have total revenues greater than \$500 million, and
- do business in California (each a “Covered Entity”).
- expected to impact more than 10,000 companies.

## **Assembly Bill No. 1305, Voluntary Carbon Market Disclosures**

Imposes website disclosure requirements on:

- business entities that market or sell voluntary carbon offsets within California, and
- entities operating in California that make certain sustainability claims.

# California PFAS Update

Oct. 17, 2023 – CA AG Issues Enforcement Advisory:

“I have made it a priority as Attorney General to protect public health and the environment from the threat of further PFAS exposure, and I consider A.B. 1200 an important tool...”

## AB 1200

- Food Packaging: As of Jan. 1, 2023, “no person shall distribute, sell, or offer for sale in the state” food packaging with PFAS.
- Cookware
  - As of Jan. 1, 2023, required to list all chemicals in the cookware.
  - As of Jan. 1, 2024, cannot claim on packaging that the cookware is free of any PFAS chemical, unless “no individual chemical from that chemical group or class is intentionally added.”
  - As of Jan. 1, 2024, chemicals must be listed on product label.

## VETOES AB 1423, 246, 727

- Artificial turf, menstrual products, and cleaning products.
- “[p]reviously enacted single-product chemical bans, which also lack oversight, are proving challenging to implement, with inconsistent interpretations and confusion among manufacturers about how to comply with the restrictions.”

## Other Existing Bans

- AB 652- Juvenile Products, AB 1817 Textiles.
- Beginning Jan. 1, 2025, AB 2771 mandates that “no person or entity shall manufacture, sell, deliver, hold or offer for sale in commerce any cosmetic product that contains intentionally added perfluoroalkyl and polyfluoroalkyl substances (PFAS).”

# California Waste Update

## Recycling

- SB 343: Signed in 2021, effective Jan. 1, 2024. Manufacturers, distributors, and retailers must now substantiate their recycling claims with empirical evidence and label products accurately.
- Preliminary Findings have been published: After CalRecycle publishes each new study, manufacturers will have 18 months to ensure the updated information supports the use of the chasing arrows recycling symbol on their products.



# California Waste Update

## Recycling

- AB 54 (signed in June 2022). Requires that by 2032:

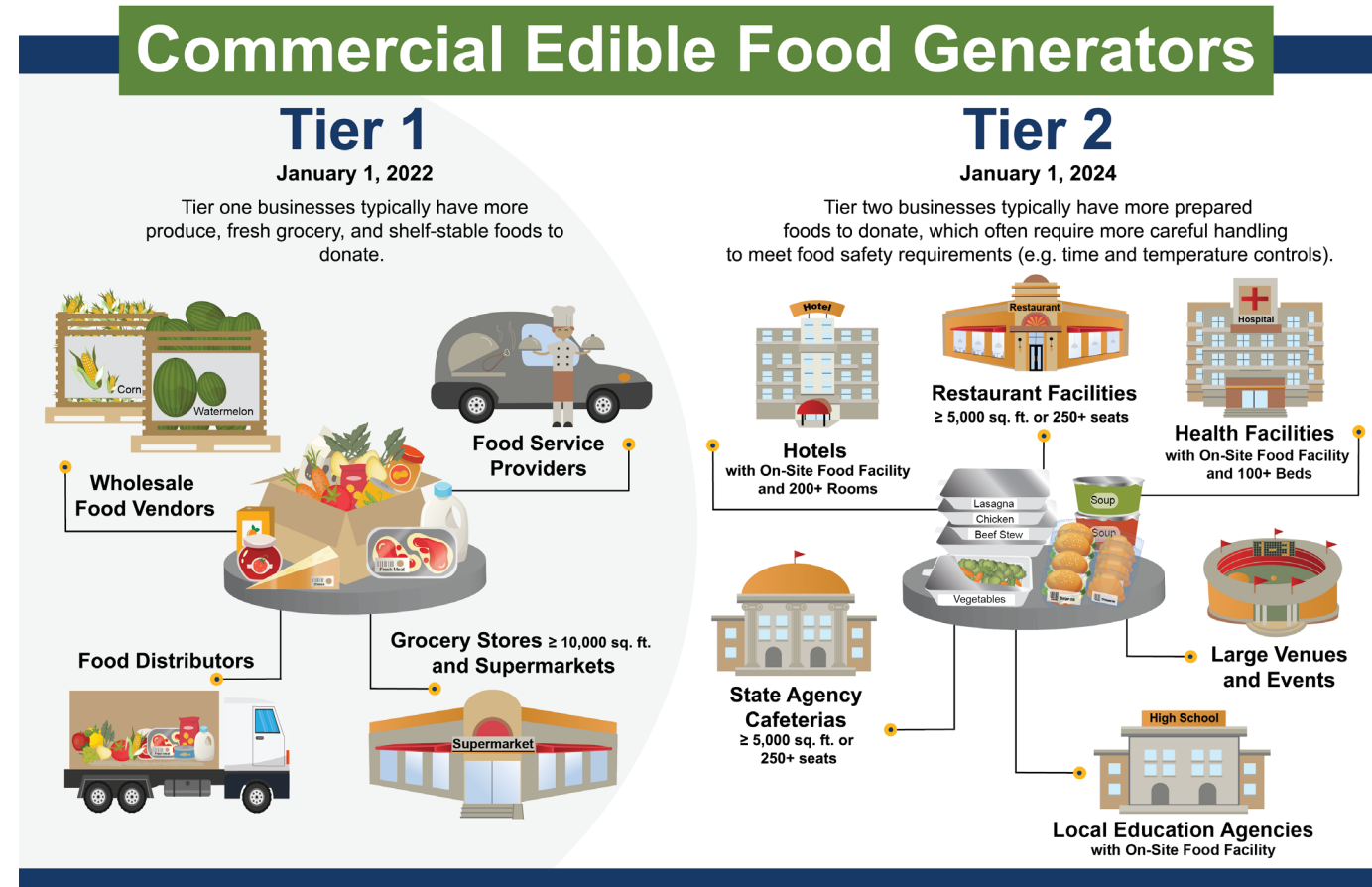


- December 28, 2023:
  - Draft list of covered materials showing what is recyclable and compostable is published.
  - Final list published by July 1, 2024.
  - Extensive draft regulatory text (115 pages).
  - Regs to be adopted in 2025.

# California Waste Update

## Food Waste

- SB 1383 (signed in 2016).
- Reduce organic waste disposal 75% by 2025.
- Rescue for people to eat at least 20% of currently disposed surplus food by 2025.



# FEDERAL ENFORCEMENT UPDATE

03



# Federal Compliance and Enforcement Priorities **FY24–FY27**

EPA has updated the **National Enforcement and Compliance Initiatives** (NECIs) for 2024 to 2027:

Reducing air toxins in overburdened communities

Mitigating climate change  
**(new for FY24)**

Addressing exposure to PFAS  
**(new for FY24)**

Reducing risks of accidental releases at industrial and chemical facilities

Protecting communities from coal ash contamination  
**(new for FY24)**

Reducing drinking water standard non-compliance at community water systems

*“Three cross-cutting goals:  
Goal 1: Tackle the **Climate Crisis**  
Goal 2: Take Decisive Action to Advance **Environmental Justice**  
Goal 3: Enforce Environmental Laws and **Ensure Compliance**”*

# Federal Compliance and Enforcement Priorities **FY24–FY27**

EPA has determined that **three** prior enforcement initiatives will return to the **core enforcement program**:

Stopping aftermarket  
defeat devices

Reducing hazardous air  
emissions from waste  
facilities

Reducing significant  
NPDES program non-  
compliance

*“Initiatives returned to the core enforcement program **remain important areas for enforcement** and compliance efforts, even though they are **no longer national initiatives.**”*

# Defeat Device Enforcement

Despite returning defeat devices to the core enforcement program, **DOJ/EPA are continuing to investigate and pursue enforcement actions** against manufacturers and distributors of defeat devices.

- EPA touts “significant progress” on the defeat device initiative—including the resolution of more than **130 cases**, addressing over **539,000 violations**—since its inception in FY20.
- In September 2023, DOJ filed suit against **eBay** alleging that the marketplace platform unlawfully sold and distributed **aftermarket defeat devices**.
- In January 2024, **Cummins** settled with DOJ, EPA, CARB, and CAAG for the use of software defeat devices in **nearly 1 million vehicles**—the largest penalty in Clean Air Act history.

As the light-duty vehicle market moves towards electric vehicles, we expect that EPA will continue to focus on **combustion engines**, putting a spotlight on **heavy duty trucks** and the **heavy duty industry**.



# Effect of Uhlmann Confirmation


David Uhlmann was confirmed as Assistant Administrator of EPA's Office of Enforcement and Compliance Assurance on July 20, 2023.

- Uhlmann served as a federal prosecutor for 17 years, including as chief of DOJ's **Environmental Crimes Section**, where he led prosecutions of environmental and wildlife crimes.
- Uhlmann's confirmation as EPA's lead enforcement attorney is likely to materially impact EPA's enforcement efforts, as he has promised to **reverse the recent decline in enforcement numbers** and return EPA's enforcement numbers to 2019 levels.
- Uhlmann is requiring that EPA's enforcement and compliance program:
  - Prioritize enforcement and compliance actions to mitigate climate change;
  - Include climate adaptation and resilience in case conclusions whenever appropriate; and
  - Provide technical assistance to achieve climate-related solutions and build climate change capacity.



# Climate Change in Enforcement

- In a September 2023 memo, David Uhlmann directed all EPA enforcement offices to “address climate change, **whenever appropriate**, in **every matter** within their jurisdiction.”
- This climate enforcement strategy is key to fulfilling EPA’s new top priority enforcement initiative, **mitigating climate change**, as it encourages a focus on **curbing emissions of certain GHGs**.
- House Republicans have criticized this policy, arguing that the new policy represents “repeated use of settlement authority to drive a consistent policy end, one which **Congress has not enshrined in statute** and may not be directly related to the violation necessitating enforcement.”
- This new policy is likely to have far-reaching effects for regulated entities, as EPA **increases scrutiny** of known emitters of GHGs.




UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

September 28, 2023

ASSISTANT ADMINISTRATOR  
FOR ENFORCEMENT AND  
COMPLIANCE ASSURANCE

**MEMORANDUM**

**SUBJECT:** EPA’s Climate Enforcement and Compliance Strategy

**FROM:** David M. Uhlmann 

During his first week in office, President Biden issued Executive Order (EO) 14008 calling on all federal agencies to implement a whole of government approach to tackling the climate crisis.<sup>1</sup> EPA Administrator Regan subsequently made addressing the climate crisis the top cross-cutting goal in EPA’s Strategic Plan.<sup>2</sup> With this memorandum, I am directing all EPA enforcement and compliance offices to address climate change, whenever appropriate, in every matter within their jurisdiction.

and local partners. These requirements apply across all EPA enforcement and compliance activities, including criminal, civil, federal facilities, and cleanup enforcement.

<sup>1</sup> Executive Order 14008, Tackling the Climate Crisis at Home and Abroad, Jan. 27, 2021.  
<sup>2</sup> EPA Strategic Plan, 2023-2026.

To meet the urgency of this moment, I am requiring that EPA’s enforcement and compliance program: (1) prioritize enforcement and compliance actions to mitigate climate change; (2) include climate adaptation and resilience in case conclusions whenever appropriate; and (3) provide technical assistance to achieve climate-related solutions and build climate change capacity among EPA staff and our state and local partners. These requirements apply across all EPA enforcement and compliance activities, including criminal, civil, federal facilities, and cleanup enforcement.

# Environmental Justice in Enforcement

Environmental justice has been a key EPA focus during the Biden administration, but recent challenges to EPA's Title VI authority threaten this initiative.

- Environmental justice is a key tenant of EPA's strategic plan, and EPA has committed to “**take decisive action** to advance environmental justice and civil rights” and “**embed environmental justice and civil rights** into EPA's programs, policies, and activities.”
- As part of this initiative, EPA has **expanded the use of Title VI**, which prohibits discrimination on the basis of race, color or national origin by programs that receive federal funding, to investigate whether industrial air permits issued by state environmental authorities subjected residents to discrimination on the basis of race.
- But such efforts are facing headwinds:
  - In May 2023, Louisiana filed suit against EPA, alleging that EPA's Title VI investigations in the state are unlawful and that Title VI “does not provide **any basis** for imposing disparate-impact-based mandates.”
  - Following Louisiana's suit, EPA closed its ongoing Title VI investigations in Louisiana and Texas.
  - Last month, Judge James Cain of the U.S. District Court for the Western District of Louisiana ruled in favor of Louisiana, issuing a **preliminary injunction** against EPA and DOJ to enjoin the agencies from “imposing or enforcing any disparate impact-based requirements against the State or any State agency under Title VI.”

# Supplemental Environmental Projects

The Biden administration has unwound the Trump administration's ban on the use of Supplemental Environmental Projects, but is using SEPs cautiously.

- Guidance from the Department of Justice has imposed new limits on the use of SEPs, including the requirement that the project must have a “**strong connection**” to the underlying violation and be consistent with the underlying statute being enforced.
- Last month, the House passed H.R. 788, the Stop Settlement Slush Funds Act of 2023, which would bar the use of SEPs and similar approaches in settlements. The bill highlights the argument that SEPs, other than those used in diesel emissions cases, are **unlawful** because they violate the Miscellaneous Receipts Act.
- Recently, EPA has determined that it cannot authorize SEPs in **oil and gas consent decrees** due to provisions of the Inflation Reduction Act that separately incentivize the reduction of methane emissions. EPA's SEP policy mandates that the projects may not provide “additional resources to perform a particular activity for which the EPA receives a specific appropriation.”

# Enforcement Predictions: 2024 and Beyond



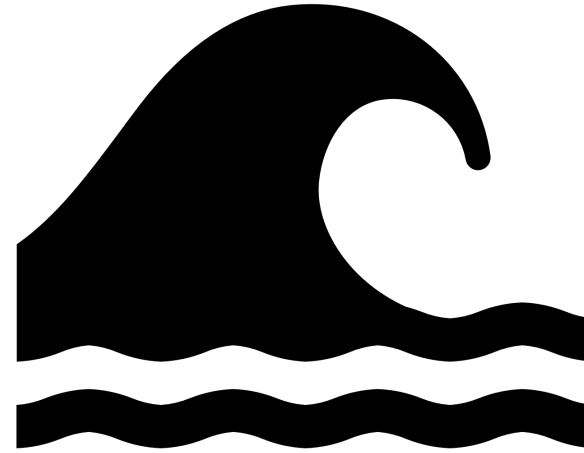
## Air

Shift in focus away from aftermarket defeat devices and toward pollutants, including HFCs, as well as GHGs



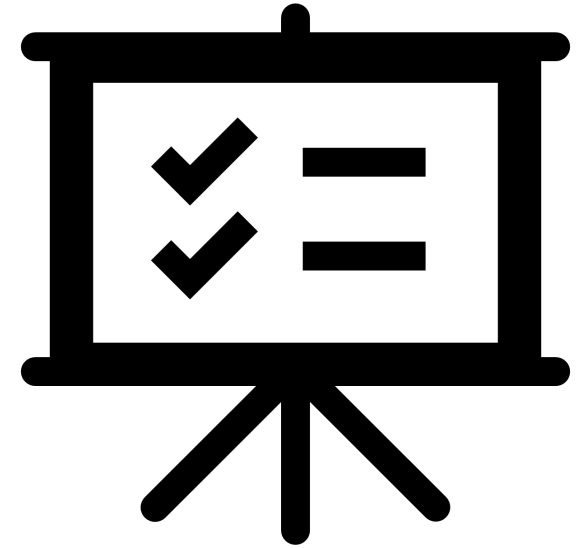
## Hazardous Chemicals

Additional initiatives and potential enforcement actions regarding emerging contaminants, especially PFAS



## Water

Compliance with SDWA, in particular at Community Water Systems with health-based violations



## Other

Reducing exposure to lead



# ENVIRONMENT, SOCIAL, AND GOVERNANCE UPDATE

04

# ESG: Mandatory Climate Disclosures Are Coming

Climate disclosures and sustainability reporting have operated in the realm of the voluntary, and companies have used a variety of reporting schemes.

- TCFD, GRI, SBTi, etc.

Mandatory reporting is coming, and might already be here, so companies need to start preparing, if they have not already.

- Reviewing internal procedures and accounting protocols
- Thinking about third-party verification and assurance levels
- Reviewing older climate goals or targets for accuracy

**U.S. Private and Public Corporations:** California Disclosure Laws, and others proposed in New York, Illinois and Washington (emission reporting), while New York has proposed climate risk-related reporting standards.

**U.S. Public Corporations:** SEC Disclosure Rule

**U.S. Corporations with European Operations:** CSRD

# California

## SB 253 & 261

***Any U.S. Entity  
Annual Rev >  
\$500M/\$1B  
Doing Business  
in CA***

- Applies to public and private entities
- Annual revenue threshold is global (not California-specific)
- No clear exception for U.S. subsidiaries of non-U.S. parents
- No clear guidance on whether and how subsidiaries could be consolidated for thresholds
- “Doing Business” uses Revenue and Tax Code

If you are doing business in California, you are subject to our tax laws.

We consider you to be “doing business” if you meet any of the following:

- Engage in any transaction for the purpose of financial gain within California
- Are organized or commercially domiciled in California
- Your California sales, property or payroll exceed the following amounts:

### California sales, property or payroll

Year	CA sales exceed (either the threshold amount or 25% of total sales)	CA real and tangible personal property exceed (either the threshold amount or 25% of total property)	CA payroll compensation exceeds (either the threshold amount or 25% of total payroll)
2023	\$711,538	\$71,154	\$71,154

# Senate Bill No. 253 Emission Reporting: **The Details**

<b>Scope 1 &amp; 2 Emissions</b>	<ul style="list-style-type: none"><li>• Annual reporting beginning in 2026 for prior fiscal year</li><li>• Limited assurance beginning in 2026; reasonable assurance beginning in 2030</li><li>• Submitted to public government registry</li></ul>
<b>Scope 3 Emissions</b>	<ul style="list-style-type: none"><li>• Annual reporting beginning in 2027 for prior fiscal year</li><li>• Limited assurance beginning in 2030 (subject to CARB)</li><li>• Submitted to public government registry</li></ul>
<b>Penalties</b>	<ul style="list-style-type: none"><li>• Up to \$500,000 for noncompliance (e.g., late or not at all)</li><li>• Safe harbor for Scope 3</li></ul>
<b>Other Relevant Standards</b>	<ul style="list-style-type: none"><li>• Future CARB regulations by January 1, 2025</li><li>• Assurance provider qualifications</li><li>• Compatibility with existing reports</li><li>• Flexibility for standards to change</li></ul>

# Senate Bill No. 261 Financial Risk Reporting: **The Details**

<b>Timing</b>	<ul style="list-style-type: none"><li>• Every other year, with first report on or before January 1, 2026</li><li>• Does not expressly anticipate further CARB regulations</li></ul>
<b>Location</b>	<ul style="list-style-type: none"><li>• Company website</li></ul>
<b>Penalties</b>	<ul style="list-style-type: none"><li>• Up to \$50,000</li></ul>
<b>Other Relevant Standards</b>	<ul style="list-style-type: none"><li>• Compatibility with existing reports</li><li>• Parent-level reporting permitted</li><li>• Recommendations, not mandates, with a financial materiality standard</li></ul>

# Voluntary Carbon Market Disclosures

## Assembly Bill No. 1305

*Requires annually updated website disclosure for three categories of entities making certain sustainability performance claims and/or buying or marketing voluntary offsets*

### Category 1

An entity operating in California and making any of the following claims in California regarding itself, a related or affiliated entity, or a product:

- claims regarding achievement of net zero emissions
- claims it is carbon neutral
- other claims implying it does not add net GHG emissions or net carbon dioxide to the climate
- claims it has made significant reductions to its GHG emissions or carbon dioxide (each a “Sustainability Claim”)

### Additional Context

This does not apply to:

- entities that do not operate in California
- entities that do not make claims in California

### Required Disclosure

Information pertaining to all GHG emissions associated with claims:

- information documenting accuracy or achievement of claim
- how interim progress toward goal is measured
- whether a third party verifies data and claims

Optional disclosure permitted regarding third-party verification, science-based targets, and relevant sector methodology

# Voluntary Carbon Market Disclosures

## Assembly Bill No. 1305

### Category 2

An entity operating in California and making Sustainability Claims that purchases or uses voluntary carbon offsets (“VCOs”) sold in California.

A VCO includes products marketed/sold as:

- a “greenhouse gas emissions offset”
- a “voluntary emissions reduction”
- a “retail offset”
- any like term that connotes that the product represents or corresponds to a reduction in the amount of GHG present in the atmosphere or that prevents the emission of GHG into the atmosphere that would have otherwise been emitted

### Additional Context

This does not apply to:

- entities that do not operate in California
- entities that do not purchase or use VCOs sold in California

Not meant to capture offsets purchased for cap-and-trade compliance obligations

### Required Disclosure

Information pertaining to each project or program, including:

- selling business entity name
- offset registry/program name
- project identification number
- project name as listed in registry/program
- offset project type and site location
- specific protocol used to estimate emissions reductions or removal benefits
- whether there is independent third-party verification of company data and claims

# Voluntary Carbon Market Disclosures

## Assembly Bill No. 1305

### Category 3

A business entity that markets or sells VCOs in California.

### Required Disclosure

Information pertaining to each project or program, including:

- details regarding the applicable carbon offset project
- details regarding the accountability measures to be taken if a project is not completed or does not meet the projected emissions reductions or removal benefits, including what the entity will do (directly or by contractual obligation) if carbon storage projects are reversed and/or future emissions reductions do not materialize
- project identification number
- the data and calculation methods needed to independently reproduce and verify the number of emissions reduction or removal credits issued using the protocol

### Additional Context

The driver for this bill is to require adequate disclosures with voluntary offsets to ensure quality of offset and verification of environmental attributes



# Assembly Bill No. 1305: **The Details**

<b>Effective Date</b>	<ul style="list-style-type: none"><li>• January 1, 2024</li><li>• Seeking clarity for start date of disclosure obligations, but currently viewed as January 1, 2024</li></ul>
<b>Penalties</b>	<ul style="list-style-type: none"><li>• \$2,500 daily, up to \$500,000</li><li>• Enforced by public attorneys</li></ul>
<b>Other Relevant Standards</b>	<ul style="list-style-type: none"><li>• California Environmental Marketing Claims Act and FTC Green Guides</li><li>• Unfair Competition Law and False Advertising Law</li></ul>
<b>Open Questions</b>	<ul style="list-style-type: none"><li>• No future regulations expressly anticipated</li><li>• Many key terms are not defined (“entity” v. “business entity”; “operating” in California; “mak[ing] claims”; “significant” reductions)</li><li>• Subsidiary v. consolidated parent disclosure unclear</li><li>• Scope of VCOs open (e.g., whether includes financial products with offsets or includes renewable energy certificates)</li></ul>

# SEC Proposed Reg. S-K Amendments

On March 21, 2022, the SEC issued The Enhancement and Standardization of Climate-Related Disclosures for Investors (the “Proposed Rule”).

See Release No. 33-11042 / 34-94478.

Under the Proposed Rule, annual reports on Form 10-K and Form 20-F, as well as IPO registration statements on Form S-1 or Form F-1 (each a “Relevant Report”), will require a new, separately captioned “**Climate-Related Disclosure**” section.

This section must address the following topics:

- **Governance/Risk Management** – Processes for identifying, assessing, and managing climate-related risks and board oversight of climate-related risks and risk management processes
- **Goals and Transition Plans** – Information about climate-related targets, goals, and transition plans, if any
- **Risks** – How climate-related risks have had or are reasonably likely to have material impacts on the company’s business or consolidated financial statements
- **Impacts** – How any climate-related risks have affected or are reasonably likely to affect a company’s strategy, business model, and outlook
- **Emissions Metrics** – The company’s greenhouse gas (“GHG”) emissions, by type of gas (seven different kinds), expressed in metric tons of carbon dioxide equivalent
  - Scope 1 and Scope 2 emissions, which would be subject to assurance and require an attestation report from an independent GHG emissions attestation service provider for accelerated and large accelerated filers
  - Scope 3 emissions, only if material or if the company has set a GHG emissions reduction target/goal that includes Scope 3 emissions

# SEC Proposed Reg. S-K Amendments

On March 21, 2022, the SEC issued The Enhancement and Standardization of Climate-Related Disclosures for Investors (the “Proposed Rule”).

See Release No. 33-11042 / 34-94478.

The Proposed Rule would also require a **new financial statement footnote**, which would be subject to audit and internal control over financial reporting

- **Financial Statements:** Certain climate-related financial statement metrics and related disclosures in a separately identified note to the company’s annual audited financial statements, including:
  - **Financial impact metrics** – *subject to a 1% threshold per line item*, disclosure of the financial impacts of severe weather events, other natural conditions, and transition activities *on any relevant line items in the company’s financial statements*
  - **Expenditure/cost metrics** – *subject to a 1% threshold per line item*, expenditures, and capitalized costs to mitigate the risks of severe weather events or other natural conditions and expenditures related to transition activities
  - **Financial estimates and assumptions** – would require companies *to disclose whether estimates and assumptions underlying the amounts reported in the financial statements were impacted by risks and uncertainties* associated with, or known impacts from, severe weather events and other natural conditions, the transition to a lower-carbon economy, and any disclosed climate-related targets. *To the extent there was an impact, qualitative disclosure would be required* as to how the development of any such estimate or assumption was impacted
- **Time Period Covered:** Information must be provided for the most recently completed fiscal year and other historical fiscal years included in the financial statements in the filing

# CSRD: EU Corporate Sustainability Reporting Directive

- CSRD reporting requirements go **well beyond proposed SEC rules or California law**.
  - reporting on **non-climate-related environmental topics** and various **governance** and **social topics**
  - **assurance over all sustainability information**, not only Scope 1 and Scope 2 GHG emissions (SEC's proposed rule).
- **EU subsidiaries of non-EU entities** in most cases will be affected in financial years starting on/after January 1, **2025** (reporting in **2026**); prior to that only if EU subsidiary has securities admitted to EU regulated market or is a regulated entity (bank, insurance).
  - Reporting obligations will primarily apply to EU “**large**” **undertakings** or groups, which meet **two** of the following **criteria**:
    - i. balance sheet total > €20M (increase to > €25M under discussion)
    - ii. net turnover > €40M (increase to > €50M under discussion)
    - iii. average number of employees > 250 during financial year (special rules apply to financial institutions and insurances).
  - As of financial years starting on or after January 1, **2028** (reporting in **2029**), EU subsidiaries or branches are required to provide reporting on **group level** of ultimate **non-EU parents** if the following criteria are met:
    - i. net turnover of parent in EU > €150M in last two consecutive years and
    - ii. EU subsidiary is large undertaking or small/medium-sized public-interest undertaking (securities admitted to EU regulated market or is a regulated entity) or
    - iii. EU branch has net turnover > €40M in the EU the preceding financial year.

*“EU law requires all large companies and all listed companies (except listed micro-enterprises) to disclose information on their **risks and opportunities** arising from social and environmental issues, and on the impacts of their activities on people and the environment.*”

*This helps investors, **civil society organisations, consumers and other stakeholders** to evaluate the sustainability performance of companies, as part of the **European green deal.**”*

# Double Materiality Assessment

Double Materiality covers **two dimensions** of impacts, risks and opportunities (“IROs”) related to sustainability matters:

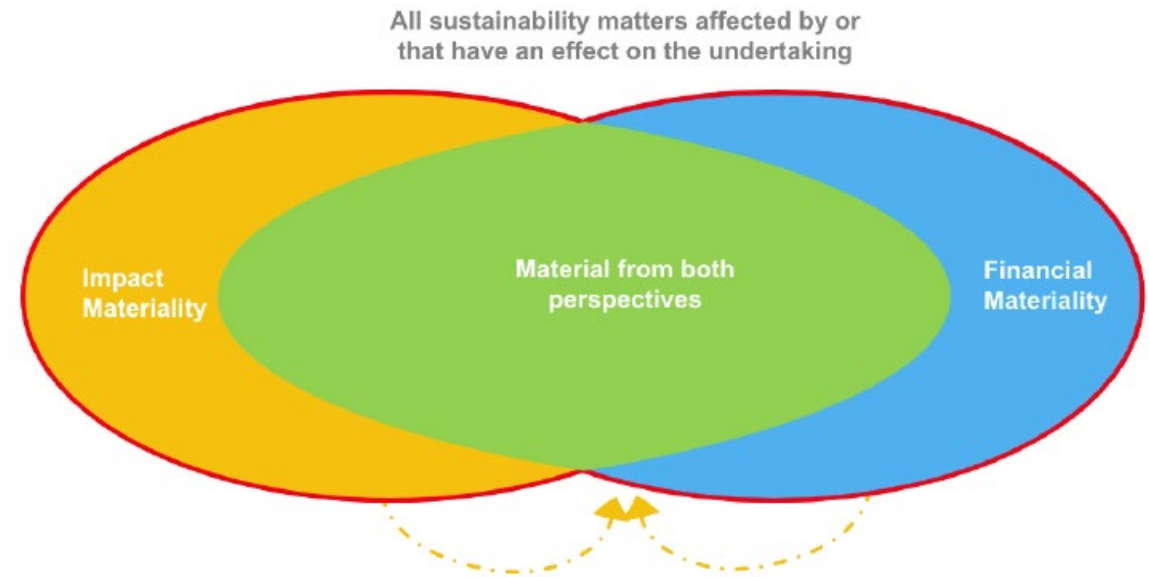
## Impact Materiality (inside-out view)

- Actual or potential, positive or negative impacts on people or the environment over short, medium or long term.
- Assessment is based on severity, including the following criteria:
  - Scale
  - Scope
  - Irremediability (*for negative impacts*)
  - Likelihood (*for potential impacts*).

## Financial Materiality (outside-in view)

- Focus on risks and opportunities to the company from sustainability matters
- Assessment based on:
  - Likelihood of occurrence
  - Potential magnitude of financial effects over short, medium, and long term.

The assessment for both impact and financial materiality, is often done with a scoring concept, which is adjusted in a final review.



# CSRD:

## What Should a U.S. Company Do Now?

- Conduct a scoping analysis to determine **whether and when rules apply** and identify reporting obligations
  - Monitor EU member state national legislation adopted pursuant to the CSRD (deadline June 16, 2024)
- Begin **(double) materiality assessment** on the basis of the ESRS
  - Assessment includes impacts, risks, and opportunities across all matters determined to be material from a financial materiality (outside-in) and an impact materiality (inside-out) perspective
  - Undertake stakeholder engagement, including engagement with key suppliers and customers on reporting expectations
- Decide whether stand-alone CSRD reporting shall be established or whether a global ESG reporting shall be established covering all applicable national regulations (including CSRD)
  - Can be a staggered approach: Establish CSRD reporting first and then integrate other standards globally
- Develop a strategy to implement a **system to collect the necessary data (due diligence)** and process to **continuously update** the necessary data
  - Evaluate governance and compliance processes, and ownership of reporting function

## ISSB: Next Phase of TCFD/SASB & Base for Future Regulations

- The **International Sustainability Standards Board** (ISSB) is an independent, private-sector body that develops and approves IFRS Sustainability Disclosure Standards (IFRS SDS), and is seeking to provide a global sustainability reporting framework
- ISSB has published **IFRS S1 (General Requirements)** and **S2 (Climate-Related Disclosures)**
- **Builds on TCFD** framework and **integrates SASB** standards for industry-specific materiality determinations
- Uses a **financial materiality-type** standard (sustainability-related risks and opportunities useful to users of general purpose financial reports when making decisions related to providing resources to the entity)
- Companies expected to transition from standalone TCFD and SASB reports in 2025 (i.e., use ISSB for reporting periods on or after January 1, 2024)
- Many jurisdictions are proposing new, mandatory disclosure requirements based on ISSB (e.g., Australia, Brazil, Singapore, UK)

# MCLE Certificate Information

## MCLE Certificate Information

- Approved for 1.0 hour General PP credit.
- CLE credit form must be submitted by **March 5th**.
- Form Link: [https://gibsondunn.qualtrics.com/jfe/form/SV\\_2ieXZ6cAQSyvyrY](https://gibsondunn.qualtrics.com/jfe/form/SV_2ieXZ6cAQSyvyrY)
- Most participants should anticipate receiving their certificate of attendance in four to eight weeks following the webcast.
  
- **Please direct all questions regarding MCLE to [CLE@gibsondunn.com](mailto:CLE@gibsondunn.com).**