INSTITUTE OF MAKERS OF EXPLOSIVES

SAFETY. SECURITY. STEWARDSHIP.

ENVIRONMENTAL SAFETY & HEALTH UPDATE

Annual Meeting 2024

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Recent US Supreme Court Decisions

- *Loper Bright Enterprises v. Raimondo* (June 28, 2024) – Chevron Deference
- *Corner Post, Inc. v. Board of Governors of the Federal Reserve System* (July 1, 2024) – Administrative Procedure Act; Statute of Limitations
- *Securities & Exchange Commission v. Jarkesy* (June 27, 2024) – Jury Trials

Loper Bright v. Raimondo

- Case decided – **June 28, 2024**
- Agency interpretation of statutory language or statutory silence

- Established in *Chevron USA v. NRDC* (1984)

  - **Step one:** The court asks whether Congress has "unambiguously expressed," its intent in the statute. If yes, then "that is the end of the matter" because the agency and court must adhere to the statute

  - **Step two:** "[I]f the statute is silent or ambiguous with respect to the specific issue," the court then asks "whether the agency's answer is based on a permissible construction of the statute." Is it reasonable?

- Step two became known as **"Chevron deference,"** – calls for courts to resist "simply impos[ing] their own construction of the statute" and instead to defer to an agency's *reasonable* interpretation when the statute failed to clearly express Congress's intent.
- Applied in tens of thousands of cases since 1984

Loper Bright v. Raimondo

THE CASE

- National Marine Fisheries Service interpreted a statute to require fishing vessel owners to pay for an onboard observer to monitor compliance with federal fisheries regulations
- The issue was framed to directly consider Chevron deference: "Whether the Court should overrule *Chevron* or . . . clarify that statutory silence . . . does not constitute an ambiguity requiring deference to the agency."

THE DECISION

- "*Chevron* is overruled." The Administrative Procedure Act requires that courts decide "all relevant questions of law" when reviewing agency action. *Chevron* was an erroneous judicial invention and the "best reading" of a statute is "the one the court . . . concludes is best."

Loper Bright v. Raimondo

THE OUTCOME

- Courts will interpret ambiguous statutory provisions, even where technical & scientific expertise may be implicated;
- Increases likelihood of success of those challenging federal regulations;
- Limits agencies' ability to fill gaps in laws or address situations not expressly anticipated by Congress, and may cause agencies to proceed more cautiously and narrowly in adopting regulations; and
- Places pressure on Congress to legislate with greater specificity (or at least make express delegations of interpretive authority to agencies)

Corner Post v. Board of Governors of the Federal Reserve System

- North Dakota truck stop "Corner Post" challenged a regulation re "interchange fees" that banks can charge merchants for debit card transactions
- The Board promulgated the regulation in 2011, but the truck stop didn't open until 2018 and didn't sue until 2021
- Lower courts ruled that the 6-year statute of limitations under the Administrative Procedure Act (APA) began to run when the regulation was published (2011) – not when the plaintiff was injured (2018)
- Supreme Ct. found that under the APA a plaintiff cannot sue until "she suffers an injury" from agency action. **However**, "the statute of limitations does not begin to run until she is injured."
- *Accordingly*, even though the regulation was published in 2011, Corner Post wasn't harmed until 2018, so the 2021 suit was timely
- ***Decision significantly expands opportunities to challenge regulations, allowing entities formed within the last 6 years to challenge decades old regulations***

Securities & Exchange Commission v. Jarkesy

- Defendants claimed that in bringing a civil enforcement action against them for securities fraud & forcing them into an in-house SEC tribunal, the SEC violated their 7th Amendment right to trial by jury

- Supreme Ct. decided that where a civil sanction does not serve a purely remedial purpose (e.g., stopping an activity, or reimbursing a loss), but is retributive or is punishing in its nature, the case must go to a court of law

- Effectively ends SEC's use of administrative law judges (ALJs) to decide certain cases

- *Could have implications for other agencies that use ALJs in in-house proceedings, including Department of Justice/ATF, Environmental Protection Agency*

- **UPDATE:** *Kenric Steel v. OSHA* (?) -- Plaintiff maintains that *SEC v. Jarkesy* decision renders Occupational Safety & Health Review Commission (OSHRC) unconstitutional

What These Cases Mean

- Slower/more careful drafting & lawmaking in Congress
- Slower agency rulemaking
- More litigation over new and old agency rules
- More regulatory enforcement actions in the courts & less use of in-house agency tribunals

ENVIRONMENTAL

AIR

- Winter 2023/Spring 2024 – EPA announced a suite of **4 rules** for fossil fuel-fired power plants, particularly those that use coal:

1. *Revised standards for existing coal-fired electric generating units (EGUs) and for new, modified, and reconstructed natural gas-fired EGUs to achieve up to a 90% reduction in **greenhouse gas (GHG)** emissions **(Powerplant/GHG Rule)**
2. *Revised **mercury and air toxics** standards for coal- and oil-fired EGUs **(MATS Rule)**
3. Revised **effluent limitation guidelines** and standards for water pollutants discharged from coal-fired power plants (ELG Rule)
4. Extension of **coal combustion residual** (CCR) regulations to cover certain "legacy" CCR, including at inactive power plants (Legacy CCR Rule)

- If sustained by the courts, the new rules will alter the financial and regulatory landscape for power generation. EPA compliance cost prediction > over $1 billion per year.

AIR

Powerplant Rule (a/k/a GHG rule)

- May 9, 2024
- Intended to reduce pollution from existing (i) coal-fired power plants & (ii) new gas combustion turbines. Use of carbon capture and sequestration (CCS) is anticipated for both.
- Divides **coal-fired power plants** into three categories by retirement date:
  - Those that will cease operation by 2032 are exempt from the rule
  - Those operating between 2032 and 2039 will be required to achieve emissions reductions equivalent to co-firing 40 percent natural gas
  - Those intending to operate after 2039 will be required to achieve emissions reductions equivalent to 90 percent capture of CO2 through CCS
- Divides **new gas turbines** by type of unit

AIR - Powerplant Rule

Coal-Fired Power Plants

Subcategory	Standards
Retired by 2032	Exempt
Medium-term (shut down by 2039)	Co-firing 40 percent natural gas (on a heat input basis)
Long-term (operating past 2039)	CCS with 90 percent capture with an associated degree of emission limitation of an 88.4 percent reduction in emission rate (lb. CO2/MWh-gross basis)

AIR - Powerplant Rule

New Natural Gas Powerplants

Subcategory	Standards
Low load plants	< 160 lb. CO2/MMBtu
Intermediate load plants	1,170 lb. CO2/MWh-gross
Base load plants	**Phase 1:** 800 lb. CO2/MWh-gross for plants with ≥ 2,000 MMBtu/h and 800-900 lb. CO2/MWh-gross for plants with < 2,000 MMBtu/h **Phase 2:** CCS Pathway **By 2032:** 100 lb. CO2/MWh-gross

AIR - Powerplant Rule

Rule has been challenged:

- Rule is in excess of the EPA's authority and reliant on unproven and expensive technology (i.e., CCS)
- Likely to compel a fuel switch (from 100% coal-firing to co-firing natural gas) and require contracts with third parties for the sequestration of carbon
- Rule should be stayed because, *"[a]lthough plants may not go offline tomorrow, the decisions leading there have begun and will not be unwindable.“*
- Litigation is ongoing

Today's News

- OMB regulatory office has begun reviewing EPA's draft proposal to limit GHGs from existing gas-fired power plants
- EPA's second attempt to write such standards after they were omitted its final Powerplant rule (existing coal and new gas plants).

- (OMB) began reviewing the draft proposed rule on Oct. 7. The agency in its most recent Unified Regulatory Agenda said it plans to propose the GHG rule in December 2024.

AIR – MATS Rule

- **April 25, 2024** Final Rule lowering Mercury & Air Toxics Standards (**MATS**) (Last revised in 2020)

- Tightens the filterable particulate matter (fPM) limit from 0.030 pounds per million British thermal units (lb/MMBtu) down to 0.010 lb/MMBtu *level already achieved by a majority of coal-fired plants (as high as 99.9% controlled), but smaller units lag well behind*.

- Also requires coal plants to use continuous emissions monitoring systems (CEMS) to monitor for toxic air pollutants.

- Aligns mercury limit for lignite plants to the standard for plants burning other types of coal (leveling the playing field).

- Litigation is ongoing. *Negative impacts to power grid* & *No appreciable health benefits*

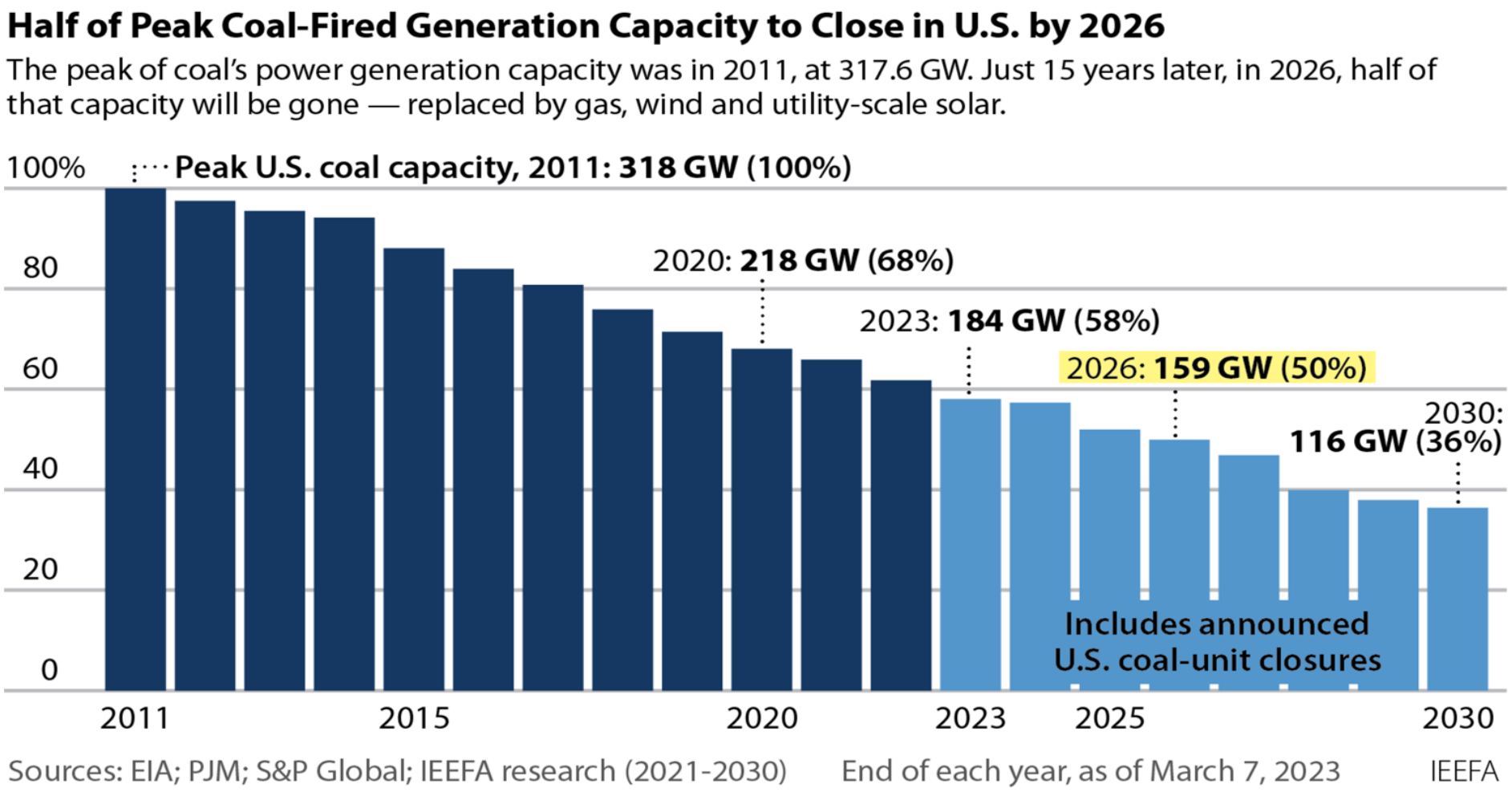
Update:** **Oct. 4, 2024 > US Supreme Ct. denies industry emergency request to stay implementation of the rule

AIR – Good Neighbor Plan (GNP)

- **GNP** – Designed to help downwind states comply w/2015 National Ambient Air Quality Standards (NAAQS) for ozone
- Effective Aug. 4, 2023
- Jan. 23, 2024 supplemental proposal to add 5 additional states
- Currently covers 23 states (final rule would add AZ, IA, KS, NM, & TN)
- **July 2024 – US Supreme Ct. stayed GNP**
  - *Since lower courts had already stayed rule in 12 states, plaintiffs argued that rule was unworkable*
  - *EPA also acting administratively to stay the rule*
  - ***However, Court remanded the GNP to EPA rather than vacate it – gives EPA another opportunity to correct the rule & reissue***

Why We Care: *Stays of the rule will likely result in delays in attaining the 2015 standards in downwind states. Non-attainment w/NAAQS restricts states' ability to approve new industry, construction, mining, etc.*

AIR – The State of Coal



AIR – Methane Rules

Trio of Methane Rules

- EPA estimates the rules will cut methane emissions from oil & gas operations by nearly 80% through 2038

  - **Methane Control Rule**
  - **Methane Reporting Rule**
  - **Methane Fee Rule**

AIR – Methane Rules

- December 2, 2023 final **Methane Control Rule** announced
- Regulates new sources, and existing sources for the first time
- Establishes BSER (best management practices) for methane reductions
- Key Provisions:
  - Fugitive Emissions Monitoring - (well sites & compressor stations). BSER is work practice standards & repair of fugitive emission sources using ground based surveys & "advanced technologies"
  - Process (Pneumatic) Controllers – BSER is powering w/electricity (replacing gas), capturing emissions, and routing emissions to a process, or use of self-contained gas controllers
  - Limits to flaring (requirements differ b/w new and existing sources)
  - Response Requirements for Fugitives, Covers & Vent Systems, & Control Devices
  - Super-Emitter Events - 3d parties using EPA-approved remote sensing technologies

- Litigation filed immediately – EPA exceeding powers under CAA, too prescriptive to the states in how to achieve methane emissions cuts

- ***Update:** Oct. 4, 2024 > US Supreme Ct. denies plaintiffs' emergency request to stay the rule*

AIR – Methane Rules

- **Methane Reporting Final Rule** (May 6, 2024)
  - Part of GHG Reporting Program - strengthens and updates methane emissions reporting requirements for oil & gas facilities
  - *Inflation Reduction Act of 2022* (IRA) required EPA to develop standards to collect payment on methane from facilities that exceed specific thresholds
  - Industry is calling for more use of advanced monitoring technologies
  - Litigation – rule fails to meet IRA requirements to use empirical data + excessive burden on low-producing well operators
  - **Sept. 26, 2024** > parties agreed to pause litigation for 100 days

- **Methane Fee Rule**
  - Owners & operators must pay a fee for methane emissions based on specified thresholds. The Waste Emissions Charge (WEC) starts at $900 per metric ton for 2024 reported methane emissions
  - Draft final rule is at Office of Management & Budget (as of 9/3/24)
  - Already legal action & Congressional efforts to eliminate the fee rule

AIR – National Ambient Air Quality Standards

Ozone NAAQS

- EPA announced on August 18, 2023 that the agency was terminating its reconsideration of the 2020 determination to leave the ozone NAAQS unchanged, and was beginning a new statutory review.

PM 2.5 NAAQS

- **February 7, 2024** final rule – Strengthens annual health-based standard for fine particles (PM2.5). Final rule lowers the primary PM 2.5 annual NAAQS from 12.0 micrograms per cubic meter (µg/m3) to 9.0 µg/m3 but retains the 24-hour standard. Legal challenges to the standards have been filed by multiple groups.

NOx NAAQS

- Consent decree requires update by 2028
- 1-hour limit (100ppb) of NO2 averaged over 1-hour – set in 2010
- Annual limit (53ppb) of NO2 averaged over 1-year – set in 1971

NAAQS are always critical – lowering NAAQS can directly influence emission rates for existing facilities through permitting, and impact the ability of industry to build and/or expand (manufacturing, mining, construction, etc.)

WATER – WATERS OF THE UNITED STATES

- Definition of **WOTUS** determines what waters are/are not under the authority of EPA & US Army Corps of Engineers (USACE)

- May 25, 2023 – US Supreme Ct. defined WOTUS in *Sackett v. EPA*:
  - "[A] ***relatively permanent*** body of water connected to traditional interstate navigable waters."
  - "[T]he CWA extends only to wetlands that are as a practical matter ***indistinguishable*** from waters of the US."

- Sept. 8, 2023 – EPA/USACE publish "Conforming WOTUS Rule"
  - *Litigation was immediate & is ongoing*
- Agencies have not provided guidance
- Some pressure on Congress to open up Clean Water Act & define WOTUS once & for all

WATER – Perchlorate

- A 2023 court ruling overturned prior administration's determination that a national primary drinking water standard (maximum contaminant limit – MCL) is unnecessary
- EPA is required to issue proposed rule by **Nov. 21, 2025** & final rule by **May 21, 2027**
- Currently preparing for the required Small Business Advocacy Review (SBAR) panel – small public water systems

Why We Care: *MCLs & MCLGs are used to determine clean-up levels for soil & groundwater under RCRA, CERCLA remediation programs*

NEPA - Uinta Basin Project

- **National Environmental Protection Act (NEPA)** sets out requirements for federal agencies to evaluate environmental impacts of projects that are "major federal actions"
- NEPA's "causation standard" determines when agencies must study "reasonably foreseeable" effects of projects
- *Eagle County, CO v. Surface Transportation Board* (STB) – concerns environmental impact statement (EIS) for rail transport of crude oil from Uinta Basin to Gulf refineries
- DC Circuit vacated EIS finding that STB failed to consider environmental/climate impacts of upstream oil production & downstream impacts to communities. Impacts are "reasonably foreseeable"
- US Supreme Ct has agreed to review
- DOJ agrees w/STB & project developers that DC Circuit decision is incorrect

NEPA - Uinta Basin Project

- DOJ's argument:
- STB reasonably concluded that the effects "were too attenuated, speculative, and otherwise insufficiently material to STB's decisionmaking to require additional consideration under NEPA"
- NEPA allows agencies to draw a "manageable causal line" given that the agency "has the discretion to make context-specific determinations regarding the scope of its [EIS]."

- **Why We Care** – *If unaltered by the Supreme Ct., the DC Circuit opinion would expand the scope of analysis required to prepare even the most basic NEPA documents related to rail (and other) infrastructure projects.*

SAFETY & HEALTH

OSHA - *Heat Standard* Proposal

- August 30, 2024 – OSHA proposed rule
  - written heat injury and illness prevention plan,
  - substantial heat injury–related precautions (emergency response),
  - training, and
  - regular, comprehensive program reviews and updates

- Standard is broad and would cover all employers with employees working indoors or outdoors when the heat index is 80°F or higher (exposures >15 minutes in any 60-minute period). Additional provisions w/high heat trigger of 90°F
- Employers w/outdoor work sites would be required to monitor the temperature with “sufficient frequency to determine with reasonable accuracy employees’ exposure to heat.”
- For indoor work sites, employers would identify areas where the heat index could be 80°F or more and include a temperature “monitoring plan”
- All would be included in a written heat injury & illness prevention plan (HIIPP)

OSHA - *Heat Standard* Proposal

HIIPP Requirements:

- A “comprehensive list of the types of work activities covered by the [HIIPP]”;
- A description of how the employer complies with the OSHA standard;
- The means the employer will use to monitor temperatures (e.g., heat index or wet bulb globe temperature);
- Emergency phone numbers and procedures employees must follow when an employee experiences signs and symptoms of a heat-related illness; and
- A list of the “heat safety coordinators” with “authority to ensure compliance with all aspects of the HIIPP.”

OSHA - *Heat Standard* Proposal

Heat Injury Prevention Measures:

- Readily accessible “cool” drinking water in an amount greater than one quart per hour per employee;
- Break areas for outdoor work sites that are artificially or naturally shaded (shade from equipment is not sufficient) or enclosed spaces with air conditioning;
- Break areas for indoor work sites that are air-conditioned or have “increased air movement” from fans or natural ventilation; dehumidification would be required “if appropriate”;
- “Allow[ing] and encourag[ing] employees to take paid rest breaks” as “needed to prevent overheating”; and
- Two-way communication with employees

OSHA - *Heat Standard* Proposal

Additional Protective Measures (90°F) :

- A “hazard alert” issued by the employer to notify employees of the importance of staying hydrated and taking the mandatory rest breaks (as well as additional breaks as needed) and the procedures to follow in an emergency
- One of the following methods of monitoring employees for signs and symptoms of heat-related illness:
    - a buddy system where coworkers observe each other, or
    - observation by a supervisor or heat safety coordinator
- Paid fifteen-minute rest breaks every two hours

**No definition of “break,” e.g., Time driving? Sedentary time?*

OSHA - *Heat Standard* Proposal

Acclimatization:

- For new employees + workers absent 14 days or more, employers may implement a ramp-up system modeled on NIOSH recommendations, or
- Employers may apply the provisions applicable to the high-heat trigger to new employees. In other words, an employer could choose to provide fifteen-minute breaks every two hours, monitor, and provide the hazard alert information to new employees even when the temperature is below the high heat trigger of 90ºF

NIOSH recommends: (1) new workers work no more than 20 percent of their shift in the heat on day one, 40 percent on day two, etc.; and (2) workers who have been absent from work for seven or more days spend no more than 50 percent of their time working in the heat on day one, 60 percent on day two, 80 percent on day three, and 100 percent on day four.

OSHA – Miscellaneous

- **GHS/HCS**
  - **May 17, 2024** – OSHA final rule updating Hazard Communication Standard (HCS) to conform to Revision 7 of UN Globally Harmonized System of Classification & Labeling of Chemicals (GHS)
  - Amended HCS introduces several updates:
    - Revised Definitions and Classifications
    - Updated Labels and Safety Data Sheets
    - Refining Precautionary Statements

- **Worker Walkaround Rule**
  - Effective **May 31, 2024**

MSHA – Dispute with MSHRC

- **Sept. 10, 2024** – MSHA filed petitions for review w/DC Circuit to review 2 decisions by administrative law judges (ALJs)
- In both cases the ALJs essentially ruled that MSHA cannot drop issued citations in favor of settlement agreements w/o the permission of the Mine Safety & Health Review Commission (MSHRC)
- MSHA argues that it has "unfettered prosecutorial discretion" to withdraw or modify citations as part of settlement agreements with mine operators
- MSHRC cites the Mine Act – "no proposed penalty which has been contested before the Commission . . . shall be . . . mitigated or settled except with approval of the Commission."
- ***Why We Care***: *Could compromise MSHA's ability to negotiate w/mine operators to achieve equitable settlements and make policy decisions based on facts of the case(s)*

MSHA – Dispute with MSHRC

- In the meantime . . .
- Remember Kenric Steel (NJ) suit claiming that OSHA's Occupational Safety & Health Review Commission (OSHRC) is unconstitutional under *SEC v. Jarkesy?*
- *If successful, could this be extended to MSHRC??*

Office of Surface Mining (OSMRE)

- **April 2024** > Changes to OSMRE Ten-Day Notice Rule (TDN)
- Initiated when OSMRE receives info about a possible violation (e.g., excessive dust, water pollution, or excessive noise)
- OSMRE evaluates & if there is a reason to believe a violation exists it gives notice to the state regulatory authority. The state has 10 days to investigate & respond
- Process was changed by former administration to require an initial review before complaint could be determined a violation, and limited types of violations.
- New rule eliminates initial review & requires all complaints be considered requests for federal inspections
- Also allows OSMRE to issue a single TDN for similar possible violations on multiple permits
- Requires the state to respond to the TDN with actions to fix the violation, instead of submitting a "plan" to fix the violation
- Ensures that communities can seek "rapid review of ongoing violations that are not being addressed by a state regulator"
- ***Litigation filed in June 2024***

US Chemical Safety Board

US CHEMICAL SAFETY BOARD

December 2023 > Final report issued

Recommendations to OSHA:

OPTION 1: Apply PSM to drilling of oil & gas wells; or

OPTION 2: Apply PSM to the drilling of oil & gas wells as in OPTION 1, and make necessary modifications to customize it to oil & gas drilling operations; or

OPTION 3: Develop a new standard with a safety management system framework similar to PSM that applies only to the drilling of onshore oil & gas wells that includes certain PSM elements

https://www.csb.gov/assets/1/6/wendland_final_report_2023-12-22.pdf

QUESTIONS?