



Biden EPA Challenges: Energy and Environment Policy in Year Four

Presentation to: Midwest Environmental Compliance
Conference (MECC)

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HUNTON
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Topic

Revolution in the Courts

Air and Climate

Chemicals/PFAS

Water

Enforcement/Environmental Justice

Presidential Transition?

Administrative Law Revolution

*Loper Bright, Jarkey, and Corner Post Impact on
Environmental Law*

The Roberts Court & Environmental Law

- *West Virginia v. EPA* (2022) – Overturning the theory behind the EPA Clean Power Plan, generation shifting in the Clean Air Act
- *Sackett v. EPA* (2023) – Settling the longstanding question of the definition of waters of the United States in the Clean Water Act
- *Ohio v. EPA* (2024) – Staying temporarily EPA’s “Good Neighbor Rule” rule from taking effect which would require states to write plans to address cross border to address cross border ozone pollution under the Clean Air Act

Two more environmental cases accepted for this fall

- *City and County of San Francisco v. EPA* (likely 2025) – Potentially addressing the question under the Clean Water Act whether there can be enforceable generic prohibitions in NPDES permits to not violate water quality standards
- *Seven County Infrastructure Coalition v. Eagle County* (likely 2025) – Scope of National Environmental Policy Act (NEPA) review of indirect effects of an agency action, including potential downstream greenhouse gases resulting from a project



3 Administrative Law Decisions Impacting Federal Agencies

- *Loper Bright Enterprises v. Raimondo; Relentless, Inc. v. Department of Commerce* (June 2024)
- *Securities and Exchange Commission v. Jarkesy* (June 2024)
- *Corner Post v. Board of Governors, Federal Reserve System* (July 2024)



Key Takeaways

- Federal agencies no longer have an extra advantage in defending their environmental regulations in court
- Environmental agencies might be less able to rely on administrative resolution of enforcement
- Old environmental decisions and regulations may be able to be challenged under the Administrative Procedure Act (APA) because of new understanding of the statute of limitations

Fifth Circuit

- *Utah v. Su* vacated suit challenging DOL interpretations and remanded in light of *Loper Bright*.

D.C. Circuit

- *U.S. Sugar v. EPA* – Major Decision on Boiler MACT where Loper made a significant difference, rejecting EPA’s interpretation of a “new” boiler
 - Section 112 defines a “new source” as “a stationary source the construction or reconstruction of which is commenced ***after the Administrator first proposes regulations under this section establishing an emission standard*** applicable to such source.” 42 U.S.C. § 7412(a)(4).
- However, *Huntsman Petrochemical LLC v. EPA*, accorded “extreme degree of deference” to EPA’s view of ethylene oxide (EtO) health risks that underlies air toxics rule.
 - **Important distinction** regarding EPA’s technical expertise in evaluating scientific data

Securities and Exchange Commission v. Jarkesy

Implications for EPA Enforcement Actions

- If a company/defendant asserts a right to jury trial in an EPA administrative enforcement investigation, it could have the following effects:
 - It may increase the likelihood that the case is referred to the U.S. Department of Justice for civil judicial enforcement.
 - EPA could reconsider whether to use significant government resources to pursue the violation.
 - EPA may ask for explicit waivers of a right to jury trial.

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

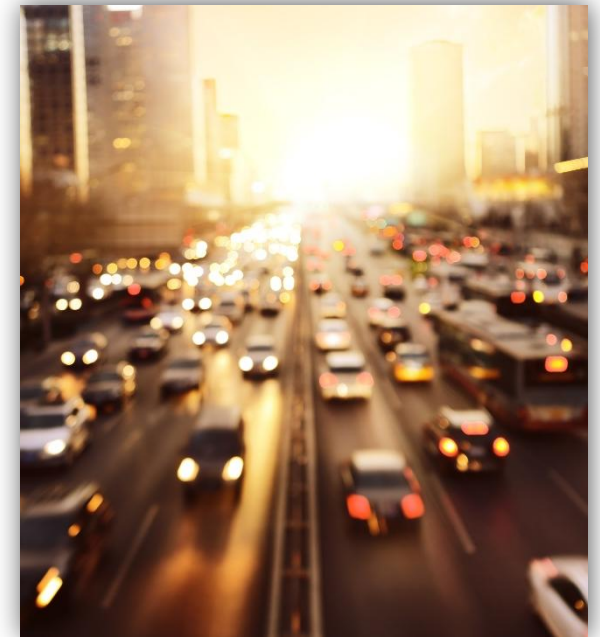
What are the implications for challenging federal agency regulations?

- This only applies to the statute of limitations for the APA.
- If you can bring an APA action against a regulation of other federal agency action, that can be asserted up to 6 years after the injury arose.
- However, if the claim arises under statutes – like the Clean Air Act, Clean Water Act, Toxic Substances Control Act, CERCLA, RCRA, etc. – that clearly specify a time to challenge, those challenge periods.

Air and Climate Regulations

Climate

- Power Plants GHG – Clean Power Plan 2.0 – 111(d) replacement rule (Stay application pending in the Supreme Court)
- Oil & Gas – Methane Rule (Stay application pending in the Supreme Court)
- Auto –Tailpipe emissions model year 2027-32 (litigation in the DC Circuit)
- Auto – California Waiver (Denied by DC Circuit and Cert. Pending)



Other Air Rules

- Power Plants and other – Cross-State Air Pollution Rule (ozone transport rule) (Stayed by the U.S. Supreme Court)
- Power Plants – Revised MATS (mercury) rule (Stay application pending in the Supreme Court)
- Power Plants – Revised PM2.5 standard (being litigated in the DC Circuit)
- Refineries and Chemical Plants – Risk Management Plan Rule (RMP) (Stayed Administratively for 120 days pending reconsideration)



Chemicals/PFAS

- Safe Drinking Water Act (SDWA) Maximum Contaminant Level for PFAS

PFAS	MCLs
<u>PFOA</u>	4 ppt
<u>PFOS</u>	4 ppt
PFNA	10 ppt
PFHxS	10 ppt
PFBS	2,000 ppt
GenX (HFPO-DA)	10 ppt
[PFNA] + [PFHxS] + [PFBS] + [GenX]	1 Unitless

- CERCLA Hazardous Substance Designation – PFOA/PFOS
- Both being litigated in the DC Circuit





Significant Toxic Substances Control Act (TSCA) Rules

- Asbestos, Part 1: Chrysotile Asbestos (5th Cir)
- Methylene Chloride (5th Cir)
- Risk Evaluation Framework Rule (DC Cir)



Federal Insecticide, Fungicide, Rodenticide Act (FIFRA)

- Herbicide Strategy and Insecticide strategies
- ESA Policies that will have major impact on farming nationwide requiring BMPs and set asides for species

Water

Significant EPA Air Rules Pending/Setbacks in the Courts

401 Rule

- Broadens the scope of 401 review from the prior rule that had limited states' oversight to “discharges” associated with federally approved projects, and replaces it with language allowing states to consider issues related to “water quality-related impacts” of the “activity”
- Being litigated in W.D. Louisiana

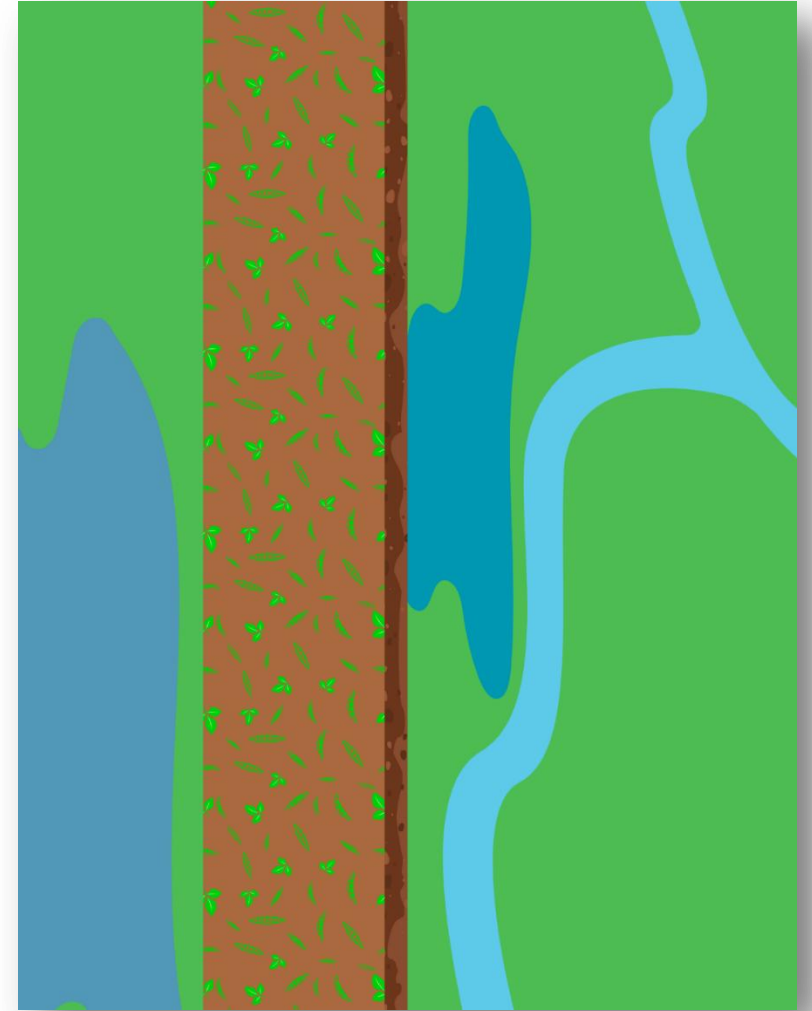
Questions about Adjacent Wetlands Post Sackett

- How does the “indistinguishable” of RPW analysis work?
- How is continuous surface water connection measured?
- Is an adjoining wetland all jurisdictional if only one point is “adjoining”?
- How much temporary interruption is permissible? Seasonal?



Army Corps Omaha District Case Study (Pre-2015 *Post-Sackett* Regime)

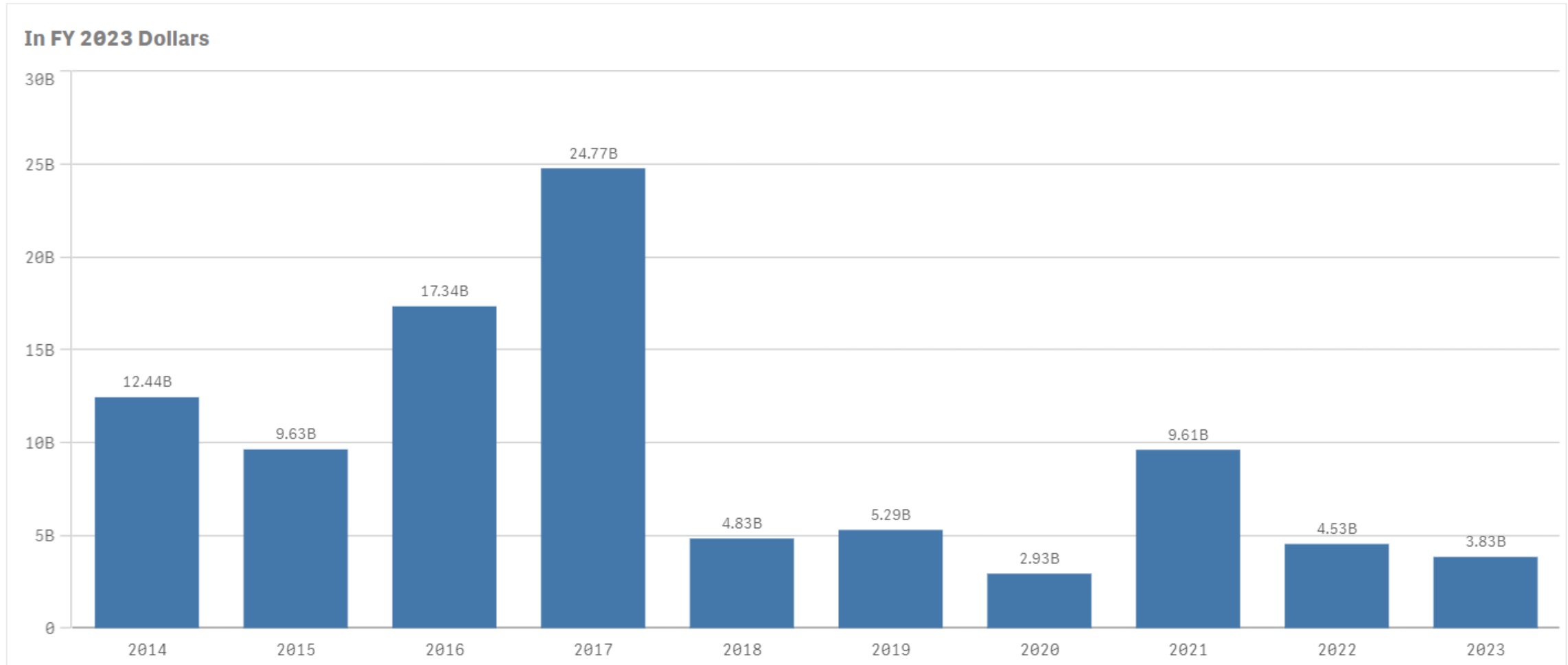
- Wetland 1 has a continuous surface connection to the Red River, a jurisdictional water
- Wetland 2 is separated from Wetland 1 by a dirt road and a seasonally plowed field
- There is no culvert to connect Wetland 2 with Wetland 1 or the Red River
- The Omaha District determined that Wetlands 1 and 2 are separate wetlands, noting the dirt on the track road did not have wetland indicators, and the road lacked culverts
- The District concluded that Wetland 2 was not a jurisdictional water under the CWA



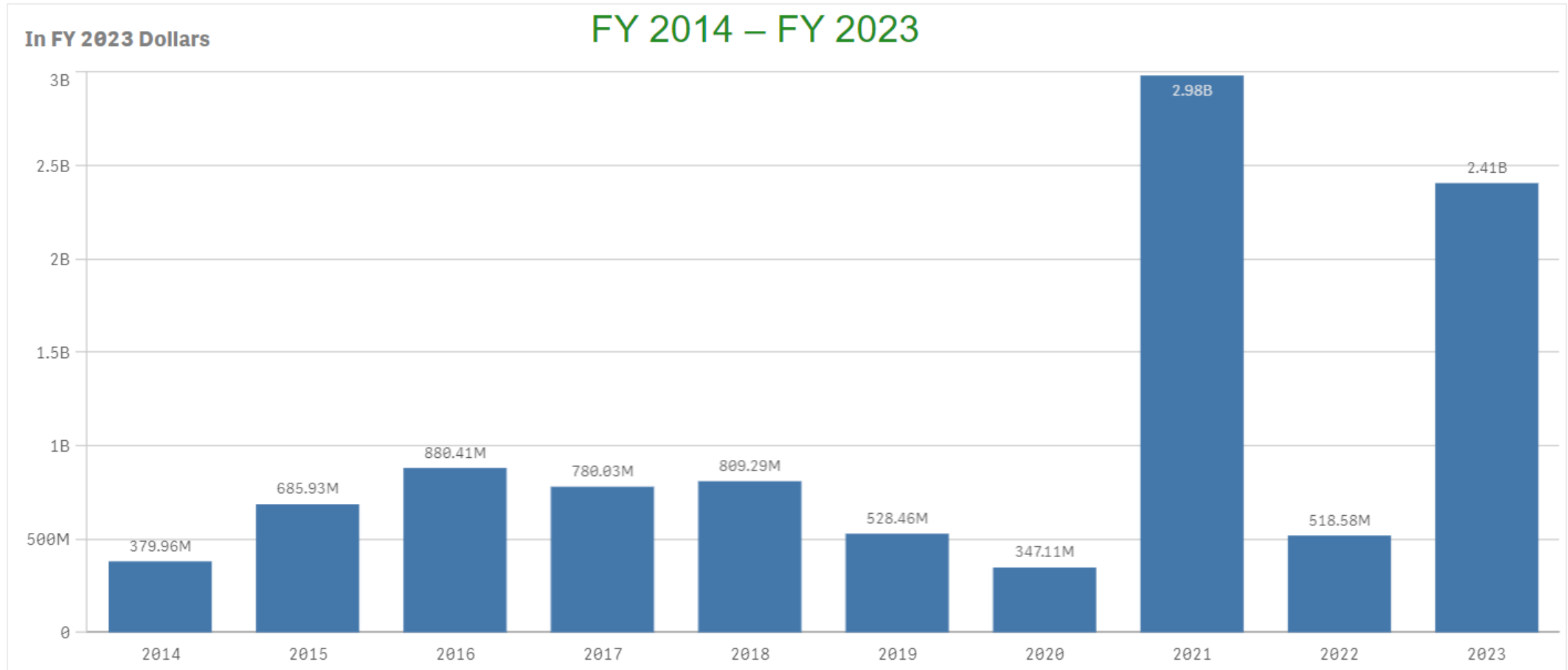
- HQ instructed Omaha District to re-evaluate whether the identified wetlands functioned as a single wetland
- To determine whether two wetlands function as a single wetland, the districts should consider
 - Similarities in plant communities between the divided portions of the wetland
 - Slope and topography
 - Soils which may allow for high transmissivity of subsurface water

Enforcement and EJ

Estimated Value of Administrative and Civil Judicial Complying Actions (Injunctive Relief) FY 2014 – FY 2023



Estimated Value of Administrative and Civil Judicial Complying Actions (Injunctive Relief) in *Areas of Potential Environmental Justice Concern*



Significant Setback on Title VI Enforcement

EPA Title VI Investigation into Louisiana – October 12, 2022

- EPA sent a letter to Louisiana Department of Environmental Quality (LDEQ)
- Alleged that LDEQ was operating their air permitting program in a discriminatory manner
- Louisiana Attorney General sued EPA alleging they lacked statutory authority under Title VI
- EPA dismissed the investigation and DOJ asking the court to find the case moot

Federal District Court Blocks Title VI Disparate Impact Regulations

- August 22, 2024 permanent injunction issued by Judge James Cain of the U.S. District Court for the Western District of Louisiana
- “The court agrees that the unlawful disparate-impact regulations are illegal anywhere in the United States. However, the State’s request is limited to a permanent injunction exclusively within the borders of the State of Louisiana,”
- Louisiana now seeking a nationwide vacatur



Wild Card – Presidential Election



Predictions for a Harris Administration?

Predictions for a Trump Administration?

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