



# **Energy, Environment and Natural Resources Federal Advocacy Committee**

**2024 Congressional City Conference**

Marriott Marquis Hotel  
Washington, D.C.  
Sunday, March 10, 2024  
1:30-4:00 p.m.

## Energy, Environment and Natural Resources (EENR) Federal Advocacy Committee Meeting

Sunday, March 10, 2024, 1:30 – 4:00 p.m.

Room: Independence Salons ABC – M4

1:30 – **WELCOME, INTRODUCTIONS AND MEETING OVERVIEW**

1:40 p.m.

**The Honorable Ruth Grendahl, Chair**

*Councilmember, City of Apple Valley, Minnesota*

Introductions, overview of expected outcomes from the meeting, and Board of Directors report.

1:40 – **TAKING ACTION IN 2024: NLC'S FEDERAL ACTION AGENDA**

2:10 p.m.

**Carolyn Berndt**

*Legislative Director for Sustainability, Federal Advocacy, National League of Cities*

Committee members will hear an update on NLC's Federal Action Agenda, as well as energy and environmental issues before Congress, the Administration and the courts. Committee members will also discuss the EENR Committee 2024 Workplan and advocacy actions they can take to advance local priorities.

2:10 – **NLC SUSTAINABILITY PROGRAM: SUPPORTING CAPACITY AND**

2:30 p.m.

**MOVEMENT BUILDING IN COMMUNITIES**

**Peyton Siler Jones**

*Interim Director, Sustainability and Innovation, Center for Municipal Practice, National League of Cities*

Committee members will hear an update on NLC's sustainability programs, initiatives and research, including Smart Surfaces, SolSmart and Environmental Justice.

2:30 – **EENR TOPIC: IMPROVING WASTE MANAGEMENT AND RECYCLING IN**  
2:45 p.m. **COMMUNITIES**

**Susan Moulton**

*Corporate Director Public Sector Solution, WM*

Committee members will learn about and have the opportunity to provide feedback on a public education campaign from NLC, in partnership with WM, to improve trust in the recycling system and increase the update and efficiency of recycling programs.

2:45 – **EENR TOPIC: SUPPORTING WATER INFRASTRUCTURE SYSTEMS IN**  
3:00 p.m. **COMMUNITIES**

**Brent Fewell, Esq.**  
*Chairman and Partner, Earth and Water Law*

Committee members will hear about proposed administrative and legislative actions to broaden and enhance safe harbor policies that can enable more communities to take advantage of public-private or public-public partnerships.

3:00 – **NLC OFFICER WELCOME**  
3:05 p.m.

**The Honorable David Sander, PhD, NLC President**  
*Mayor, City of Rancho Cordova, California*

3:05 – **EENR TOPIC: ADDRESSING MUNICIPAL LIABILITY PROTECTION IN PFAS**  
3:30 p.m. **LEGISLATION**

**Sean McGinnis**  
*Partner, Coefficient*

Committee members will hear an update on forthcoming regulatory actions on PFAS and Congressional action to provide municipal liability protection for local governments that did not cause or contribute to PFAS contamination in communities.

3:30 – **EENR TOPIC: FINANCING CLEAN ENERGY PROJECTS THROUGH**  
3:55 p.m. **ELECTIVE PAY**

**Mary Burke Baker**  
*Government Affairs Counselor, K&L Gates*

Committee members will learn about the Elective Pay provision under the Inflation Reduction Act, including the tax credits that are available to local governments, the opportunity for bonus credits, and how to get started.

3:55 – **WRAP UP AND ADJOURN**  
4:00 p.m.

## **Enclosures:**

- NLC Policy Development and Advocacy Process
- 2023 City Summit EENR Executive Summary
- 2024 EENR Workplan
- Energy and Environment Legal Update
- Enhancing Public-Private Partnerships in Distressed Communities: Facilitating Assistance for Struggling Community Water Systems, U.S. Chamber of Commerce
- Joint letters to Senate Environment and Public Works Committee Chair and Ranking Member on Municipal Liability Protection Under CERCLA, July 13, 2023 and April 24, 2023
- 2024 Energy, Environment and Natural Resources Committee Roster

## **Next EENR Committee Meeting**

*April/May conference call – TBD*

*Summer Board and Leadership Meeting – June TBD – Rancho Cordova, CA*

## **Recommended Sessions for EENR Committee Members**

### **Water, Brownfields, Recycling, Parks/Open Space, Rural Development**

- Deep Dive Session - Water Infrastructure & Environmental Protection in Urban, Rural & Suburban Communities, Monday, March 11, 4-5:30 pm, Independence Ballroom – M4
- Federal Agency Office Hours – Monday, March 11, 11:30 am – 2:00 pm, Silver Linden – Mezzanine
- *U.S. Department of Agriculture, U.S. Department of the Interior, U.S. Environmental Protection Agency*

### **Climate Change, Clean Energy, Community Resilience**

- Deep Dive Session - Advancing Local Action on Climate Change & Community Resilience, Tuesday, March 12, 8:30 – 10:00 am, Independence Ballroom – M4
- Federal Agency Office Hours – Tuesday, March 12, 2:00 – 5:00 pm, Scarlet Oak – Mezzanine
- *U.S. Department of Energy, U.S. Environmental Protection Agency, Federal Emergency Management Agency, AmeriCorps*

### **IRA Elective Pay Provision and Clean Energy Projects**

- Deep Dive Session - Financing Local Clean Energy Projects through Direct Pay, Tuesday, March 12, 2:15 – 3:45 pm, Liberty Ballroom – M4
- Federal Agency Office Hours – Monday, March 11, 3:30-5:30 pm, Scarlet Oak - Mezzanine
- *U.S. Department of Energy, U.S. Department of the Treasury*
- Office Hours with K&L Gates and World Resources Institute – Tuesday, March 12, 2:00 – 5:00 pm, Tulip Room – Mezzanine

### **Networking**

- **Get the Lead Out with LIUNA and the UA** – Monday, March 11, 5:45 – 7:00 pm, The Centennial Lounge – Mezzanine
- **Climate Happy Hour: Sips for Climate Action**, sponsored by Rewiring America and Climate Cabinet Education – Monday, March 11, 6:00 – 8:00 pm, Busboys and Poets, 450 K Street NW. [RSVP here](#). (*not an official CCC event*)

## **NLC POLICY DEVELOPMENT AND ADVOCACY PROCESS**

As a resource and advocate for more than 19,000 cities, towns and villages, the National League of Cities (NLC) brings municipal officials together to influence federal policy affecting local governments. NLC adopts positions on federal actions, programs and proposals that directly impact municipalities and formalizes those positions in the [National Municipal Policy \(NMP\)](#), which guides NLC's federal advocacy efforts.

NLC divides its advocacy efforts into seven subject areas:

- Community and Economic Development
- Energy, Environment and Natural Resources
- Finance, Administration and Intergovernmental Relations
- Human Development
- Information Technology and Communications
- Public Safety and Crime Prevention
- Transportation and Infrastructure Services

For each of the seven issue areas, a Federal Advocacy Committee advocates in support of NLC's federal policy positions. Members of each Committee serve for one calendar year and are appointed by the NLC President.

### **Federal Advocacy Committees**

Federal Advocacy Committee members are responsible for providing input and advocating on legislative priorities and reviewing and approving policy proposals and resolutions. Additionally, Committee members engage in networking and sharing of best practices throughout the year.

Federal Advocacy Committees are comprised of local elected and appointed city, town and village officials from NLC member cities. NLC members must apply annually for membership to a Federal Advocacy Committee. The NLC President makes appointments for chair, vice chairs, and general membership. In addition to leading the Federal Advocacy Committees, those appointed as Committee chairs will also serve on NLC's Board of Directors during their leadership year.

At the Congressional City Conference, Federal Advocacy Committee members are called upon to advocate for NLC's legislative priorities on Capitol Hill, as well as develop the committee's agenda and work plan for the year. Committee members meet throughout the year to further the plan, hear from guest presenters, discuss advocacy strategies and develop specific policy amendments and resolutions. At the City Summit, Committee members review and approve policy proposals and resolutions. These action items are then forwarded to NLC's Resolutions Committee and are considered at the Annual Business Meeting, also held during the City Summit.

### **Advocacy**

Throughout the year, Committee members participate in advocacy efforts to influence the federal decision-making process, focusing on actions concerning local governments and communities. During the Congressional City Conference, Committee members have an opportunity, and are encouraged, to meet with their congressional representatives on Capitol Hill. When NLC members are involved in the legislative process and share their expertise and experiences with Congress, municipalities have a stronger national voice, affecting the outcomes of federal policy debates that impact cities, towns and villages.

**2023 CITY SUMMIT**  
**EENR EXECUTIVE SUMMARY**

**POLICY**

The following policy sections were amended:

- **2.02 Energy**
  - F. Electricity
    - 1. Infrastructure
- **2.05 Water Quality and Supply**

**RESOLUTIONS**

Eleven resolutions were adopted:

- **NLC RESOLUTION:** Supporting Local PACE Programs
- **NLC RESOLUTION:** Supporting and Advancing Resilient Communities to Prepare for Changing Climate and Extreme Weather Events
- **NLC RESOLUTION:** Supporting Urgent Action to Reduce Carbon Emissions and Mitigate the Effects of Climate Change
- **NLC RESOLUTION:** Addressing Lead Contamination and Calling for Nationwide Federal Support for Water Infrastructure
- **NLC RESOLUTION:** Increase Federal Investment in Water Infrastructure
- **NLC RESOLUTION:** Support for Integrated Planning and New Affordability Consideration for Water
- **NLC RESOLUTION:** Calling on the Federal Government to Take Action to Address PFAS Contamination
- **NLC RESOLUTION:** Improve the Benefit-Cost Analysis for Federally Funded Flood Control Projects and Supporting Beneficial Reuse of Dredged Material
- **NLC RESOLUTION:** Increase Funding for Border Water Infrastructure Projects
- **NLC RESOLUTION:** Supporting Local Control of Water Infrastructure Projects
- **NLC RESOLUTION:** Support for Outdoor Recreation Legacy Partnership Program and the Outdoors for All Act



**ENERGY, ENVIRONMENT AND NATURAL RESOURCES  
FEDERAL ADVOCACY COMMITTEE  
2024 WORK PLAN**

The main purpose of the Energy, Environment and Natural Resources (EENR) Federal Advocacy Committee is to 1) provide input and advocate on legislative priorities, 2) review and approve policy proposals and resolutions, and 3) engage in networking and sharing of best practices.

NLC's [2024 Federal Action Agenda](#) is a biannual agenda mapped to the Congressional cycle to guide local advocacy efforts on Capitol Hill and with the Administration. The agenda for 2024 builds off the success of NLC's advocacy efforts and the passage of the American Rescue Plan Act (ARPA) in 2021, the Infrastructure Investment and Jobs Act (IIJA, also known as the Bipartisan Infrastructure Law or BIL) in 2021, and the Inflation Reduction Act (IRA) in 2022. The 2024 Action Agenda aims to support cities, towns and villages of all sizes in successfully accessing federal grant opportunities and to push Congress and the Administration to action in helping to solve some of the most pressing challenges at the local level.

The charge to each of NLC's federal advocacy committees is to develop a work plan to further the Federal Action Agenda. Core EENR issues fall under several pillars of the 2024 Action Agenda. The committee will meet over the course of the year to engage in advocacy activities and develop policy recommendations, as necessary. Committee members will also share best practices, successes and challenges in utilizing these new federal funding opportunities.

**Summary of Last Year's Activities**

Last year, the EENR Committee supported advocacy efforts on climate change and water infrastructure as the top issues. Specifically, the committee focused on the need for federal financial resources for local governments; building community resilience by strengthening disaster preparedness and investing in mitigation efforts; addressing water affordability and equity; and protecting municipal governments from liability under CERCLA.

**Congressional and Administrative Actions in 2023:**

- **Congress** – During the first session of the 118<sup>th</sup> Congress (2023-2024) a number of bills were introduced that advance local government energy, environment and natural resources priorities, as outlined below. NLC also guarded against legislation that would preempt local governments or claw back already-approved federal funding.
- **Administration** – The Administration continued to stand up federal grant programs under BIL and IRA and release funding opportunities. NLC also weighed in a number of federal rulemakings that would place significant unfunded mandates on local governments, as outlined below.

## EENR PRIORITY AREAS

### Water

What to watch in 2024:

- **Implementation of funding programs for water infrastructure under the Bipartisan Infrastructure Law and use of funds under the American Rescue Plan Act for water infrastructure projects.**
  - For the two-year anniversary of BIL, NLC published a series of blogs highlighting local government winners of federal grant funds, including the [Clean Water and Drinking Water State Revolving Funds](#). NLC will publish a blog series in March highlighting local government uses of ARPA funds for water infrastructure to commemorate the three-year anniversary, as well as examine BIL implementation progress at the three-year anniversary in November.
  - The [Local Infrastructure Hub](#) (LIH) plays an important role in helping communities successfully apply for and receive funding through federal grant programs. Local Infrastructure Hub Bootcamps included the Clean Water and Drinking Water State Revolving Fund programs, and bootcamps will continue through 2024.
  - In April 2024, NLC and NACo will serve as co-hosts for the **2024 National Stormwater Policy Forum**. This hybrid convening co-led by the Water Environment Federation and the National Municipal Stormwater Alliance, is an opportunity to learn about current national policy issues impacting the stormwater sector today. [Learn more and register](#).
  
- **Clean water and drinking water grants** – While the IIJA included significant water infrastructure funding through the state revolving fund program, most of that funding will go from states to local governments in the form of loans. IIJA also authorized, but did not fund, a number of clean water and drinking water grant programs including for lead pipe replacement, low income water assistance, sewer overflows and stormwater reuse, alternative water source projects, individual household decentralized wastewater treatment systems (septic systems). NLC will continue to advocate for funding for these programs through the annual appropriations process.
  - **Appropriations – SRFs. vs. earmarks** – There is growing concern, particularly at the state level, that the return of Congressional Directed Spending (or earmarks) is siphoning funds away from the State Revolving Funds. For the past couple of years, Congress has awarded communities with water infrastructure grants, but these awards have come from the total allocation for the State Revolving Funds. This has resulted in [state winners and losers](#) in terms of net water infrastructure funding. NLC’s position is that any funding for Congressional Directed Spending for water infrastructure should be in addition to the appropriations for State Revolving Funds, rather than off the top.
  
- **Clean water and drinking water policy changes** – NLC supports legislation that would provide additional flexibility for communities.
  - [H.R. 1181](#), sponsored by Reps. Garamendi (D-CA) and Calvert (R-CA), the bill would extend the maximum term for National Pollutant Discharge Elimination



System permits issued under the CWA from five to ten years to better reflect water utility project construction schedules.

- [Financing Lead Out of Water \(FLOW\) Act](#) (H.R. 1407/S. 726), sponsored by Reps. Kildee (D-MI), Tenney (R-NY), Kelly (R-PA), Moore (D-WI) and Pascrell (D-NJ) and Senators Bennet (D-CO), Cardin (D-MD), Brown (D-OH), Feinstein (D-CA), Booker (D-NJ), Klobuchar (D-MN) and Van Hollen (D-MD), the bill would amend the tax code to allow water utilities to use tax-exempt bonds to pay for private-side lead service line replacement without navigating the IRS red tape.
  - **Low Income Home Water Assistance Program** – forthcoming legislation from Senator Padilla (D-CA) will reauthorize the [Low Income Home Water Assistance Program \(LIHWAP\)](#) under the U.S. Department of Health and Human Services. LIHWAP was funded through ARPA and the FY21 appropriations bill. The program provides funds to assist low-income households with water and wastewater bills.
  - [Mississippi River Restoration and Resilience Initiative \(MRRRI\)](#) – (H.R. 7289/S. 3754), sponsored by Rep. McCollum (D-MN) and Sen. Baldwin (D-WI), the bill would establish a non-regulatory initiative that will coordinate restoration and resilience opportunities along the Mississippi River corridor. MRRRI is modeled around the Great Lakes Restoration Initiative.
  - **Accomplishment in 2024:** When lead service lines on private property are replaced at partial or no cost to a homeowner, is that considered taxable income? [NLC successfully advocated](#) to the IRS that under such a scenario it should not be considered income and therefore does not necessitate the local government to issue a 1099 to a homeowner. As local governments are voluntarily undergoing lead service line replacement projects, and soon will be required to do so, questions arose about the ambiguity of tax law in this area and the need for clarity either through IRS guidance or legislation.
  - **Water Conservation Rebate Tax Parity Act** – Legislation will soon be reintroduced by Rep. Huffman (D-CA) that would amend Federal tax law so that homeowners would not need to pay income tax when they receive rebates from water utilities for water conservation and water runoff management improvements. NLC supported this legislation in [2021](#).
  - **Water Resources Development Act (WRDA)** – The [House](#) and [Senate](#) are expected to release draft legislation this spring that would authorize flood control, navigation and ecosystem restoration projects under the U.S. Army Corps of Engineers. Congress has passed this bipartisan legislation on a biennial basis since 2014.
- **Congressional Legislation on PFAS** – A key issue for local governments is around liability – local governments (including municipal airports, fire departments, landfills and water utilities) should not be held liable for PFAS contamination or cleanup costs. With forthcoming regulations from EPA on PFAS (see below and [here](#)), local governments need Congress to act. The Senate Environment and Public Works Committee is working on bipartisan legislation to address PFAS contamination in the environment including remediation, detection, and prevention. The draft language does not include a provision ([similar to legislation introduced by Sen. Lummis \(R-WY\)](#)) that would provide legal and financial liability protection for local governments that did not cause or contribute to the contamination. [Local leaders must weigh in with their Senators](#) about why such a provision is critical to include in any PFAS legislation.

- In December, Reps. Dingell (D-MI), Fitzpatrick (R-PA) and Ryan (R-NY) reintroduced the [PFAS Action Act \(H.R. 6805\)](#), which NLC opposed last Congress. The bill would set mandates and timelines on PFAS regulation for local governments superseding the EPA regulatory process. The bill does not provide liability protection for municipal governments.
- **Forthcoming EPA Regulatory Actions** – EPA is moving at a fast pace in order to finalize a number of regulatory actions by the end of 2024. Many of these regulatory actions will have unfunded mandate implications for local governments.
  - **Lead and Copper Rule** – Currently, all community water systems must [complete](#) a lead pipe inventory by Oct. 2024. EPA’s proposed rule, known as the [Lead and Copper Rule Improvements](#), would require local governments to replace all lead pipes within ten years, among other requirements. EPA expects to release a final rule by Oct. 2024.
  - **National Primary Drinking Water Regulation for PFAS** – In March 2023, EPA released a proposed [National Primary Drinking Water Regulation](#), which would establish legally enforceable levels, called Maximum Contaminant Levels (MCLs), for six PFAS in drinking water. EPA expects to finalize the rule in early 2024.
  - **PFAS Chemicals Designation Under CERCLA** – In Sept. 2022, EPA released a proposed rule to designate two PFAS chemicals as [hazardous substances under CERCLA](#). The proposed rule could have cost and liability concerns for local governments, including drinking water, wastewater and stormwater utilities and municipal airports and landfills. EPA expects to finalize the rule in early 2024. EPA has also begun a rulemaking to regulate [additional PFAS chemicals](#) under CERCLA.
- **Final EPA Actions to Continue Watching** – Although the following items are final actions by EPA, there are pending issues and concerns from local governments that need to be resolved.
  - **Waters of the U.S.** – In December 2022, EPA and the U.S Army Corps of Engineers (Army Corps) released a new final rule on which waterbodies are federally regulated as [“waters of the U.S.” \(WOTUS\)](#) under the Clean Water Act. At the outset of the EPA and Army Corps rulemaking process, the agencies stated they would undertake a two-step process on WOTUS. This final rule represents step one. In October 2022, the U.S. Supreme Court heard oral arguments in the case of *Sackett v. EPA*, asking the court to decide the proper test for determining when wetlands are “waters of the U.S.” [NLC filed an amicus brief](#) in the case arguing that municipal water infrastructure is not a WOTUS. In June 2023, the U.S. Supreme Court reversed a Ninth Circuit decision and disregarded Justice Kennedy’s “significant nexus” test established under the 2006 Rapanos case. Read more [here](#). In Oct. 2023, EPA released updates to the WOTUS rule to conform with the Supreme Court decision in *Sackett v. EPA*. The WOTUS rule continue to face legal challenges and the revised rule is blocked in 26 states.
  - **Cybersecurity at Public Water Systems** – In March 2023, EPA released a [memorandum](#) conveying EPA’s interpretation that states must include

cybersecurity when they conduct periodic audits of water systems (called “sanitary surveys”). NLC and others raised concerns that EPA was not following the proper legal or procedural processes. In Oct. 2023, EPA withdrew the memo. Cyber security remains an important and emerging issue for local governments. NLC calls for a collaborative approach with EPA.

### Climate Change, Clean Energy and Community Resilience

What to watch in 2024:

- **Implementation of funding programs for climate change, clean energy and community resilience under the Bipartisan Infrastructure Law and Inflation Reduction Act. Use of funds under the American Rescue Plan Act for climate resilience projects.**
  - NLC highlighted local successes and examples of BIL funding for climate and clean energy ([here](#) and [here](#)) to commemorate the two-year anniversary in Nov. 2023. Similarly, NLC celebrated the one-year anniversary of IRA with a look at the status of key grant programs available to local governments ([here](#) and [here](#)). NLC will celebrate the two-year anniversary of IRA in Aug. 2024.
  - The [Local Infrastructure Hub](#) (LIH) plays an important role in helping communities successfully apply for and receive funding through federal grant programs. Local Infrastructure Hub Bootcamps included many climate and clean energy programs such as BRIC, EVs, Climate Pollution Reduction Grants and Direct Pay. LIH bootcamps will continue through 2024.
  - This year’s **Municipal Infrastructure Report**, which will be released by NLC in the Spring, examines whether communities are incorporating climate change impacts into their capital improvement plans.
  - NLC is exploring a partnership with the Environmental and Energy Study Institute to host a **series of Congressional briefings** to highlight local government programs and projects that address the impacts of climate change, including those that are using BIL or IRA funding.
  - NLC is engaged in partnership efforts around building the workforce to support a green economy. This includes through the federal American Climate Corps, [EV Workforce Collaborative](#), and [Building Decarbonization](#).
- Bipartisan efforts to [reauthorize](#) the **Energy Efficiency and Conservation Block Grant** (EECBG, H.R. 1520), which [NLC supports](#). The EECBG program is a vital tool that can be used by cities, counties and states throughout the U.S. to promote energy efficiency, increase energy independence and reduce greenhouse gas emissions. Reauthorizing the EECBG program will provide much needed resources to increase and expand state and local sustainability and climate action. Additionally, the EECBG program will become more effective and more efficient as the funding becomes durable and predictable. The stability of funding is almost as important as the funding level, since the predictability of funding enables cities to build capacity and plan for future investments and sustained programs. [Ask your House member to co-sponsor this legislation.](#)
- **House Energy Bill/Clawback of IRA Funding and Programs** – In 2023, House Majority Leaders introduced the Lower Energy Costs Act (H.R. 1), a comprehensive energy package that contains components from the [House Energy and Commerce](#)

[Committee](#), [House Natural Resources Committee](#), and [House Transportation and Infrastructure Committee](#). (See [overview](#) and [section-by-section summary](#).) HR1 passed the House in March 2023. NLC opposes the bill.

- The bill would repeal provisions of the Inflation Reduction Act that benefit cities and residents. The programs and funding level the bill would repeal are:
  - \$27 billion for a [Greenhouse Gas Reduction Fund](#) to support the rapid deployment of low- and zero-emission technologies, with 40 percent for low-income and disadvantaged communities. There is also standalone legislation (HR 1023) to repeal this program, which NLC opposes. Cities are eligible to compete for a \$7B pot from the \$27B overall funding.
  - \$1 billion to update to the latest [building energy code and zero energy/stretch codes](#). Under this program DOE will award grants to states, local governments and other eligible entities. First round applications are due on April 30, 2024.
  - \$4.275 billion for a [high-efficiency electric home rebate program](#). Under this program DOE will provide funding to state energy offices to offer rebates to individuals. Three states have claimed their formula funds to date, and the deadline to do so is the end of 2024.
- **Climate resilience legislation** – Addressing climate change and resilience is a key priority for local government and a broad coalition of stakeholders. NLC is supporting legislation that would strengthen community resilience and federal-state-local pre-disaster mitigation and hazard mitigation, including the following:
  - [Resilient AMERICA Act](#) – would boost pre-disaster mitigation funding from 6% to 15% of post-disaster spending through the FEMA BRIC program. The RAA increases funding and incentives, fosters the adoption and enforcement of stronger building codes, and ensures the resources and support needed to help state and local governments achieve resilience. It passed overwhelmingly with bipartisan support in the House during the last Congress by a vote of 383-41. It has not yet been reintroduced in the 118th Congress. Chairman Graves is on the record saying that he would commit to working with Ranking Member Larsen on a bipartisan reintroduction of the RAA in 2024.
  - [National Coordination on Adaptation and Resilience for Security Act](#) (S. 3261/H.R. 6311) – sponsored by Sens. Coons (D-DE) and Murkowski (R-AK) and Reps. Salazar (R-FL) and Peters (D-CA), would require the development of a whole-of-government National Climate Adaptation and Resilience Strategy and authorize a Chief Resilience Officer in the White House to direct national resilience efforts and lead the development of the U.S. Resilience Strategy.
  - [Safeguarding the Mississippi River Together Act](#) – provides the largest regional resilience and adaptation coordination for America’s most climate-vulnerable communities. The legislation serves as a complement to the Mississippi River Resilience and Restoration bill above. The bill was introduced last Congress but has not been introduced for this Congressional session.
  - [Excess Urban Heat Mitigation Act](#) (H.R. 2945/S. 1379) – sponsored by Reps. Gallego (D-AZ) and Watson Coleman (D-NJ) and Sen. Brown (D-OH), the legislation would create a competitive grant program through the U.S. Department of Housing and Urban Development to provide funding to combat the causes and effects of excess urban heat and heat islands.
  - [Extreme Heat Emergency Act \(H.R. 3965\)](#) – sponsored by Reps. Gallego (D-AZ) and Garcia (D-TX), the bill would amend the Stafford Act to include extreme heat in the definition of a major disaster.

- [Wildfire Response Improvement Act](#) (H.R. 7070) – sponsored by Reps. Stanton (D-AZ) and LaMalfa (R-CA), the bill directs the Federal Emergency Management Agency (FEMA) to update its regulations and guidance for the Fire Management Assistance Grant, Public Assistance, and mitigation programs to better respond to the unique challenges of wildfires and improve wildfire mitigation—including debris removal, emergency protective measures and impacts to drinking water resources. The bill would also improve FEMA’s benefit cost analysis for wildfire mitigation projects to help them be more competitive for federal funding.
  - [Wildfire Resilient Communities Act](#) (H.R. 6525/S. 2749) – sponsored by Reps. Hoyle (D-OR) and Neguse (D-CO) and Sens. Merkley (D-OR), Wyden (D-OR), Padilla (D-CA) and Feinstein (D-CA), the bill would create a \$30 billion fund to allow the U.S. Forest Service, Bureau of Land Management, and other land management agencies to increase catastrophic wildfire reduction projects and reauthorize and triple funding up to \$3 billion for the U.S. Department of Agriculture Community Wildfire Defense Grant program.
  - **Energizing Our Communities Act** – Forthcoming legislation sponsored by Sen. Welsh (D-VT) and Rep. Kuster (D-NH) would create a new Community Economic Development Transmission Fund to provide funding back to communities that host energy transmission infrastructure for community infrastructure improvements and natural resources. The funding would be derived from interest already collected from U.S. Department of Energy loan repayments and deposited into the Treasury. NLC is hoping to tweak the draft legislation to ensure the funds go directly to local governments without going through the states first.
- **EPA Regulations** –
    - EPA will propose a rule to regulation greenhouse gas emissions from new and existing power plants. This rulemaking will replace the Biden Clean Power Plan and the Trump Affordable Clean Energy rule.
    - EPA is accepting comments through March 25 on a proposed rule on [New Source Performance Standards and Emissions Guidelines for large municipal waste combustors](#). This rulemaking will impact waste-to-energy facilities.
  - **Climate litigation** – See legal update.

### Farm Bill Reauthorization

While the Farm Bill expired on Sept. 30, 2023, Congress passed a one-year extension. The Farm Bill has a significant impact on both rural and urban communities. NLC is advocating for Congress’s continued support for programs and policies in the legislation essential to local economic success and quality of life through important titles such as **Rural Development Title, Nutrition Title, and the Conservation Title**. NLC sent a letter to the Senate and House Agriculture Committees outlining top legislative priorities and published [this blog](#) overviewing the significance of the Farm Bill for communities of all sizes.

What to watch in 2024:

- House and Senate Agriculture Committee Leaders have not yet released text for the Farm Bill reauthorization, raising questions about whether it can be passed in 2024.
- The IRA provided nearly \$20 billion to USDA Conservation programs. There are some efforts in Congress to **redirect some or all of this funding**.
- Last Farm Bill, NLC fought back efforts to **prevent states and local governments from implementing pesticide permit programs**. Such language has been put forth again.



[Local leaders should write to the Members of Congress](#) opposing preemption in the Farm Bill:

- **Agricultural Labeling Uniformity Act** (H.R. 4288, sponsored by Reps. Dusty Johnson (R-SD) and Jim Costa (D-CA)) – This bill would prohibit state and local governments from adopting pesticide laws that are more protective than federal rules, including prohibiting supplemental requirements or warnings that are different from federal labels.
- **Ending Agricultural Trade Suppression (EATS) Act** (H.R. 4417, sponsored by Rep. Ashley Hinson (R-IA)/S. 2019, sponsored by Sen. Roger Marshall (R-KS)) – This bill would prohibit state and local governments from imposing standards or conditions on any agricultural products produced in another state and sold in interstate commerce.
- **[Rural Partnership and Prosperity Act](#)** – (S. 3309), sponsored by Sens. Casey (D-PA) and Fischer (R-NE). In September 2023, NLC sent a joint letter to House and Senate Agriculture Committee members urging them to provide funding for a rural capacity building program for rural local governments and our non-governmental partners in the Farm Bill. The Rural Partnership and Prosperity Act is standalone legislation that we hope can be included in the Farm Bill.

### *Brownfields Reauthorization*

In 2018, NLC successfully advocated for a reauthorization of the EPA Brownfields program with key changes to assist with the cleanup and redevelopment of large, complex brownfields sites. Specifically, these changes included:

- Authorizing multipurpose grants up to \$1 million
- Increasing funding for remediation grants to \$500,000, with the ability for EPA to go up to \$650,000 per site
- Allowing up to 5 percent of grant amounts to be used for administrative costs
- Allowing local governments to be eligible to receive brownfield assessment or remediation grants for brownfields properties that were acquired prior to Jan. 11, 2002
- Addressing liability concerns for the “voluntary” acquisition of properties
- Reauthorizing the program through 2023 and maintaining the existing authorization level of \$200 million annually.

What to watch in 2024:

- The Brownfields program authorization expired in 2023. On the House side, the Energy and Commerce Committee and Transportation and Infrastructure Committee share jurisdiction over Brownfields. On the Senate side the issue falls under the Environment and Public Works Committee. In Sept. 2023, NLC [testified](#) before the Energy and Commerce Committee to kick off the reauthorization process. On the same day, the Senate Environment and Public Works Committee [released and passed](#) their brownfields reauthorization bill (S. 2959). The Energy and Commerce Committee has released a [discussion draft](#) of their bill, but there is no legislation from the Transportation and Infrastructure Committee to date. NLC supports the Senate bill and opposes language in the Energy and Commerce bill that would allow private or for-profit entities to be eligible for brownfields grants.
- **[Brownfields Redevelopment Tax Incentive Reauthorization Act](#)** (H.R. 6438), sponsored by Reps. Sherrill (D-NJ) and Turner (R-OH), would allow taxpayers to fully deduct the cleanup costs of contaminated property in the year the costs were incurred. Brownfield Tax Incentive was first passed in 1997 to allow parties who voluntarily investigated and remediated contaminated properties to deduct all cleanup costs on their



federal income tax return in the year the money was spent. By allowing for expensing rather than requiring remediation deductions to be spread out over ten years, the tax incentive was a powerful driver of private investment in the economic revitalization of brownfields. The tax incentive expired in 2012. NLC supports the bill.

### Rethinking and Reimagining our Nation's Recycling Infrastructure and Programs

While solid waste management is a local issue, the federal government is an important partner. Cities, towns and villages across the country urge the federal government to develop a national policy that includes source reduction, volume reduction and resource recovery. Collaborative efforts to reimagine and restructure our nation's waste management and recycling systems are even more critical given the recent impacts on local and national recycling markets.

What to watch in 2024:

- **Congressional legislation** to help local governments improve recycling infrastructure, develop recycling programs, and build community awareness. NLC is watching legislation – the [Break Free From Plastic Pollution Act](#) (H.R. 6053/S. 3127) from Sen. Merkley (D-OR) and Rep. Huffman (D-CA) among others – that would create an extended producer responsibility/product stewardship framework, as well as address source reduction and the phasing-out of single use plastic products.
- [Proposed Food Waste Strategy \(EPA, USDA, FDA\)](#) – **The draft national strategy** includes objectives to prevent the loss and waste of food and increase organic waste recycling through methods like composting. The strategy focuses on increasing waste-to-fuel capabilities, USDA-led research on bio-based food packaging materials and community composting initiatives. The strategy is also meant to help speed up progress on a joint goal EPA and USDA set in 2015 to cut total food waste in half by 2030.
- In February, NLC and WM collaborated on a **Sustainability Forum** which brought together a small group of local officials to discuss the future of waste and recycling in U.S. cities, towns and villages. The local leaders in attendance shared their innovations and challenges around recycling and provided input to NLC and WM around a forthcoming **public education campaign and toolkit**.

### Parks and Open Space

What to watch in 2024:

- **Outdoors for All Act** – The Outdoors for All Act would codify and establish a dedicated funding source for the Outdoor Recreation Legacy Partnership program (ORLP). Established by Congress in 2014 and administered through the National Park Service, ORLP is a competitive grant funded through the Land and Water Conservation Fund that helps communities create and improve parks and other outdoor recreation areas to improve public access, particularly in disadvantaged or low-income communities. In February 2023, Reps. Barragan, Turner (R-OH) and Sens. Padilla (D-CA) and Collins (R-ME) [introduced](#) standalone legislation (H.R. 1065/S. 448), with NLC support.
- NLC also supports the [Expanding Public Lands Outdoor Recreation Experiences \(EXPLORE\) Act](#) (H.R. 6492), sponsored by Reps. Westerman (R-AR) and Grijalva (D-AZ), which includes the Outdoors for All Act as well as codifies the [Every Kid Outdoors program](#) (H.R. 6925, which NLC also supports).

### Permitting Reform

Last Congress proposed permitting reform legislation, which did not come up for a vote, included preemption provisions: 1) around Sec. 401 of the Clean Water Act related to Water

Quality Standards, which NLC opposed during a prior rulemaking process and 2) energy transmission, which NLC has specific policy language opposing.

With clean energy investments supported by the Inflation Reduction Act spending and tax incentives, more renewable energy will be coming online. Last year, the EENR Committee explored this issue and added policy language to ensure the grid can maintain reliability and to improve resilience. The Committee can continue to explore this issue in 2024.

In 2023, Last year was a banner year for clean energy deployment and investments, manufacturing, electric vehicle sales and emissions declines in the U.S., according to the latest [annual sustainable energy factbook](#) from BloombergNEF and the Business Council for Sustainable Energy.

The U.S. added a record 42 gigawatts of renewable power to the grid last year mostly as a result of solar and despite wind additions being their lowest since 2015. Sales of EVs and fuel-cell vehicles rose 50 percent from 2022, while energy storage more than doubled and 104 new manufacturing facilities were planned in response to the Inflation Reduction Act. Emissions also fell 1.8 percent from a year earlier, marking the first year-over-year decline since 2020.

What to watch in 2024:

- Permitting reform will continue to be a topic of discussion among House and Senate Republicans and Democrats. One of the priorities for Democrats is to streamline permitting for clean energy projects to realize the goals of the Inflation Reduction Act. One of the priorities for Republicans is to streamline permitting for oil and gas projects.
- In 2023, some modest NEPA reforms, which NLC supported, passed Congress as part of the [debt ceiling bill](#).
- NLC is watching the following energy-related permitting legislation:
  - [Building Integrated Grids With Inter-Regional Energy Supply \(BIG WIRES Act\)](#) (S. 2827/H.R. 5551) – sponsored by Sen. Hickenlooper (D-CO) and Rep. Peters (D-CA) – Directs the Federal Energy Regulatory Commission (FERC) to undergo a rulemaking process to better coordinate construction of an interregional transmission system to minimize haphazard and patchwork upgrades to the grid. Requires regions to submit plans to FERC outlining how they will meet a new 30% minimum peak demand transfer requirement between each other. If regions fail to submit plans that satisfy the requirement, FERC is empowered to act as a backstop and do so in their stead.
  - [Facilitating America's Siting of Transmission and Electric Reliability \(FASTER\) Act](#) (S. 1804/H.R. 4689) – sponsored by Sen. Heinrich (D-NM) and Rep. Peters (D-CA) – Establishes FERC as the lead agency to coordinate state, local and federal for National Interest Electric Transmission Facilities, giving them authority to site and permit certain high-voltage lines (while maintaining state-led permitting in current law that provides states with one year to issue or deny a permit before FERC can issue a permit). Incentivizes communities and project sponsors to negotiate an enforceable Community Benefits Agreement by streamlining the grant application process for [DOE's Transmission Siting and Economic Development Grant program](#).
- Water-related permit streamlining bills have also been introduced in the House and five standalone bills have been combined into a single bill, which passed the House Transportation and Infrastructure Committee in January.

- [Creating Confidence in Clean Water Permitting Act](#) (H.R. 7023) – While NLC is watching this legislation as a whole, NLC supports one of the five bills that is included in the package. The [Confidence in Clean Water Permits Act](#) (H.R. 7013), sponsored by Reps. Duarte (R-CA) and Rouzer (R-NC) clarifies that permits must include only clear, objective, concrete limits on specific pollutants or waterbody conditions, and that as long as permit holders are adhering to these clear effluent limitations, they are in compliance under the law. Additionally, this bill codifies the longstanding EPA policy that permit holders are shielded from liability if they are following the terms in their NPDES permits and have provided all relevant information to the permit writer during the application process. The legislation responds directly to [legal challenge](#) the San Francisco Public Utilities Commission has taken to the U.S. Supreme Court, with implications for all wastewater utilities.

## ENERGY AND ENVIRONMENT LEGAL UPDATE

**NOTE:** At issue in cases 1-10 below is whether cities and counties may bring state common law claims seeking damages or compensation for climate change impacts. Given the long history of local government reliance on public nuisance and other state common law claims to address widespread social problems affecting the public health and welfare, it is imperative that the courts recognize the viability of this type of claim. Local governments everywhere have an interest in affirming the principles of federalism underlying state common law.

Cities and counties across the United States have brought lawsuits against major oil and gas companies claiming they knew for decades their products caused climate change but denied or downplayed the threat. These lawsuits have been brought under state common law (including public and private nuisance, trespass, negligence, design defect and failure to warn). The suits seek damages or compensation for current and future costs associated with climate change.

Lawsuits have been filed in California (eight separate lawsuits), Colorado, Delaware, Hawaii, Maryland, Minnesota, New Jersey, New York, Rhode Island, Washington and Washington, DC, among others. There are at least 18 similar cases being litigated at various stages, of which NLC is/was participating in 11. (Not listed below is the New York City case.) In all the cases in which the circuit courts have ruled (except the New York City case), the local government position has been upheld.

Before moving forward on the merits, litigation from 2019-2023 focused on which court has the authority to hear the cases. In Spring 2023, the U.S. Supreme Court denied cert petitions for several cases, sending them back to the lower courts to be heard on their merits. This is a win for the local government position. **With the cases now in state court, except for one, NLC will step back from engagement until or unless there is a need based on the argument or the level of the court system.**

The lower courts all consider the following two cases: In *American Electric Power v. Connecticut* (2011) the Supreme Court held a federal common law public nuisance lawsuit seeking an injunction against power companies to reduce greenhouse gas emissions (GHGs), brought by cities and states, was displaced by the Clean Air Act, which delegates authority to regulate GHGs to the U.S. Environmental Protection Agency (EPA). In *Native Village of Kivalina v. ExxonMobil* (2012) the Ninth Circuit held that a federal common law public nuisance lawsuit seeking damages for climate change brought by a Native village in Alaska was also displaced by the Clean Air Act. (Displacement of federal common law by a federal statute is, in essence, the same as preemption of state common law by a federal statute.)

### **1. Mayor and City Council of Baltimore v. BP et al. – Maryland Circuit Court**

**Update since City Summit:** None – After remand from federal court in April 2023, the Maryland Circuit Court is proceeding with the case on its merits.

On June 10, 2019, the U.S. District Court for Maryland granted the City of Baltimore's motion to remand to Maryland state court the City's case against fossil fuel companies for climate change-related damages. In a lengthy and comprehensive opinion, the judge rejected each of defendants' "proverbial 'laundry list' of grounds for removal." The court held that the City's public nuisance claim was not governed by federal common law, and that its claims did not necessarily raise substantial and disputed federal issues and were not completely preempted. The court also held that there was no federal enclave jurisdiction, no jurisdiction under the Outer Continental Shelf Lands Act, no federal officer removal jurisdiction, and no bankruptcy removal jurisdiction. The decision follows a similar order granting remand in the San Mateo County appeal currently pending in the Ninth Circuit.

Federal law allows defendants to "remove" a case brought in state court into federal court if the federal court has jurisdiction over the case. BP claims that the federal court has jurisdiction to hear this case on eight grounds, including the federal officer removal statute. This statute allows federal courts to hear cases involving a private defendant who can show that it "acted under" a federal officer, has a "colorable federal defense," and that the "charged conduct was carried out for [or] in relation to the asserted official authority."

A federal district court rejected all eight grounds BP alleged supported removing this case to federal court. The federal district court remanded the case back to Maryland state court.

28 U.S.C. §1447(d) generally disallows federal courts of appeals to review federal district court orders remanding a case back to state court which was removed to federal court. The statute creates an exception for "an order remanding a case to the State court for which it was removed pursuant to" the federal officer removal statute or the civil-rights removal statute (not at issue in this case).

BP asked the Fourth Circuit to review all eight of its grounds for removing the case to federal court because one of the grounds it alleged--federal officer removal--is an exception allowing federal appellate court review.

The Fourth Circuit refused to review all eight grounds. It cited to a Fourth Circuit case decided in 1976, *Noel v. McCain*, holding that "when a case is removed on several grounds, appellate courts lack jurisdiction to review any ground other than the one specifically exempted from §1447(d)'s bar on review." BP argued that a 1996 Supreme Court case and the Removal Clarification Act of 2011 "effectively abrogated" the 4<sup>th</sup> Circuit decision. The Fourth Circuit disagreed but acknowledged other courts have reached different conclusions.

NLC filed an [amicus brief](#) in this case in the Fourth Circuit. Oral arguments were held in December 2019. In March 2020, the Fourth Circuit upheld the district court's ruling to remand the case to state court, consistent with NLC's amicus brief. Later in March, the defendants filed a certiorari petition in the U.S. Supreme Court.

On July 31, 2020, the judge denied defendants' motion for a stay pending appeal of her remand order. The 4<sup>th</sup> Circuit declined to stay the district court's remand of the case to state court pending the appeal. This then caused the defendants to ask the district court to extend its stay

of the remand, pending a petition for an emergency stay to the U.S. Supreme Court. The district court agreed, but also gave plaintiffs the opportunity to move to rescind the stay. The petition for an emergency stay was denied by the U.S. Supreme Court in October. The only precedent for anything like this would be the Supreme Court's stay of the Clean Power Plan.

In Oct. 2020, the U.S. Supreme Court decided to take up the case. The Court question before the court was whether a federal appellate court may review all the grounds upon which a defendant claims its case should not be sent back to state court when only one of the grounds the defendant alleges is specifically listed in federal statute as a basis for federal appellate court review. The U.S. Supreme Court heard oral argument in this case in January 2021. The State and Local Legal Center filed a [brief](#) in the case, with NLC participating.

In June 2021, the U.S. Supreme Court held that a federal court of appeals may review any grounds the district court considered for trying to remove a case to federal court where one of the grounds was federal officer or civil rights removal. In September 2021, NLC filed an [amicus brief](#) in the remand of the case by the U.S. Supreme Court back to the Fourth Circuit. The Fourth Circuit heard oral argument in this case in January 2022 on the question of jurisdiction. Read more [here](#). In April 2022, the Fourth Circuit remanded the case to state court. In May, the Fourth Circuit denied a petition for rehearing en banc. Defendants subsequently filed a cert petition with the U.S. Supreme Court, which was denied in April 2023.

## **2. City of Oakland v. BP et al.**

**Update since City Summit:** *In June 2021, the U.S. Supreme Court denied cert. The case was remanded to the lower court to act on the original motion. Following the U.S. Supreme Court's other denials for cert petitions, in Nov. 2023, the Ninth Circuit rejected an appeal of the district court's remand order. The case will now proceed in state court on its merits.*

In the case [City of Oakland v BP et al.](#) the district court ruled that cities and counties may not bring state common law claims and dismissed the lawsuit. Similar to New York City case, in this case, the district court concluded that, first, a federal common law public nuisance claim for climate change does exist and, second, that as a result of the existence of a federal nuisance claim cities and counties cannot bring state common law claims for damages for climate change. NLC filed an [amicus brief](#) in this case. In May 2020, the Ninth Circuit reversed the district court's ruling to dismiss the case and remanded it back to the district court for further analysis and action, consistent with NLC's amicus brief. In August 2020, the Ninth Circuit denied a request for a rehearing en banc.

In January 2021, defendants filed a petition for a writ of certiorari with the U.S. Supreme Court. The petition for cert posed the following different questions from the other cases below: "Whether putative state-law tort claims alleging harm from global climate change are removable because they arise under federal law" and "Whether a plaintiff is barred from challenging removal on appeal after curing any jurisdictional defect and litigating the case to final judgment." In June 2021, the Court denied cert on that question, so the case goes back to the district court to act on Oakland's original motion to remand the case to state court. Oakland also filed a motion to amend its complaint to withdraw federal common law public nuisance claims, which



they added only conditionally after the district court originally denied remand so that any trial that took place in federal court considered that issue as well.

### **3. County of San Mateo v. Chevron et al. – San Mateo County Superior Court**

**Update since City Summit:** *None – In April, the U.S. Supreme Court denied the Defendants’ cert petition and will not take up the case. The case will now move forward on its merits.*

In the case [County of San Mateo v. Chevron et al.](#) the district court ruled cities and counties may bring state common law claims and ordered the case remanded to state court. In contrast to the New York City and Oakland cases, the district court concluded that the existence of a federal common law claim does not eliminate the state common law claim, and that the Clean Air Act’s delegation of regulatory authority to EPA doesn’t preempt state law claims. NLC filed an [amicus brief](#) in the case. In May 2020, the Ninth Circuit upheld the district court’s ruling, consistent with NLC’s amicus brief.

The district court stated:

“To the contrary, the Clean Air Act and the Clean Water Act both contain savings clauses that preserve state causes of action and suggest that Congress did not intend the federal causes of action under those statutes “to be exclusive.””

In August 2020, the Ninth Circuit denied a request for a rehearing en banc. In December 2020, defendants filed a petition for a writ of certiorari with the U.S. Supreme Court. The U.S. Supreme Court remanded the case to the lower court to reexamine its decision in light of the Baltimore holding. In April 2022, on remand from the Supreme Court, the Ninth Circuit affirmed the district court’s order remanding global-warming related complaints to state court after they were removed by the energy company defendants. In May 2022, the defendants filed a petition for rehearing en banc, which was denied. Defendants subsequently filed a cert petition with the U.S. Supreme Court, which was denied in April 2023.

### **4. Board of County Commissioners of Boulder County v. Suncor Energy et al.**

**Update since City Summit:** *None – In April, the U.S. Supreme Court denied the Defendants’ cert petition and will not take up the case. The case will now move forward on its merits in state court.*

On Sept. 5, 2019, the U.S. District Court for Colorado granted the City and County of Boulder’s motion to remand to Colorado state court the local governments’ case against fossil fuel companies for climate change-related damages. The decision closely resembles the San Mateo, Baltimore, and Rhode Island decisions. Defendants have filed an appeal in the 10th Circuit Court of Appeals. NLC filed an [amicus brief](#) in this case. Oral argument was heard in May. In July 2020, the Tenth Circuit [ruled](#) in favor of the local government position. In December 2020, defendants filed a petition for a writ of certiorari with the U.S. Supreme Court. The U.S. Supreme Court has remanded the case to the lower court to reexamine its decision in light of the Baltimore holding.

In June 2022, defendants filed a cert petition with the U.S. Supreme Court. The U.S. Supreme Court asked the Solicitor General to weigh in on whether the case belongs in state or federal court. The Solicitor General filed her views in response to the Court's request, arguing that cert should be denied. The basic argument is that there is no federal common law applicable that would displace state law. This is a reversal of the position taken by the Trump administration.

#### **5. *State of Rhode Island v. Chevron et. al – Rhode Island Superior Court***

**Update since City Summit:** *None – After remand from federal court in April 2023, the Rhode Island Superior Court is proceeding with the case on its merits.*

In July 2019, the U.S. District Court for Rhode Island granted the State of Rhode Island's motion to remand to Rhode Island state court the State's case against fossil fuel companies for climate change-related damages. The decision rejected each of defendants' grounds for removal. The court held that the State's public nuisance claim was not governed by federal common law, and that its claims did not necessarily raise substantial and disputed federal issues and were not completely preempted. The court also held that there was no federal enclave jurisdiction, no jurisdiction under the Outer Continental Shelf Lands Act, no federal officer removal jurisdiction, and no bankruptcy removal jurisdiction. The decision follows a similar order granting remand in the San Mateo County appeal currently pending in the Ninth Circuit, and as well as a similar order granting remand in Baltimore's case, currently pending in the Fourth Circuit. The defendants have filed an appeal in the 1st Circuit Court of Appeals. NLC filed an [amicus brief](#) in this case.

Oral argument was heard in the First Circuit in September 2020. In October 2020, the First Circuit issued its [decision](#), holding that federal officer removal only permits interlocutory appeal of that one issue and not other grounds for removal, agreeing with the local government position. In December 2020, defendants filed a petition for a writ of certiorari with the U.S. Supreme Court. NLC filed an [amicus brief](#) in this case in September 2021. The U.S. Supreme Court remanded the case to the lower court to reexamine its decision in light of the Baltimore holding. In May 2022, the First Circuit remanded the case to state court. In July 2022, the First Circuit denied rehearing or rehearing en banc. Defendants subsequently filed a cert petition with the U.S. Supreme Court in December 2022, which was denied in April 2023. The case now moves forward on its merits.

#### **6. *State of Minnesota v. American Petroleum Institute, et al.***

**Update since City Summit:** *The Defendants filed a petition for certiorari with the U.S. Supreme Court in Aug. 2023. In Jan. 2024, the Supreme Court denied the petition. The case is remanded back to the state court for action on its merits.*

The NLC brief focuses on the right of state and local governments to be the masters of their complaints, just as any other plaintiff is, that doing so and choosing to litigate state law issues in state court is not "artful pleading," and that there is no relevant federal cause of action that supplants the state causes of action pleaded.

It is important that each circuit is aware that there are important federalism issues in removal to federal court as articulated by groups that have a stake in federalism concerns.

In August 2021, NLC filed an [amicus brief](#) in this case. The Eighth Circuit heard oral argument on March 15, 2022. In May 2022, the Eighth Circuit denied the motion to stay the mandate

pending the filing and disposition of a cert petition. The Defendants filed a petition for certiorari with the U.S. Supreme Court in Aug. 2023. The petition added a new argument – that the federal government has taken conflicting positions on the question presented, contrasting the Trump and Biden Administration.

### **7. *City and County of Honolulu v. Sonoco LP, et al. – U.S. Supreme Court***

**Update since City Summit:** *After remand from federal court in April 2023, the Hawaii Supreme Court ruled that the state courts had jurisdiction. The defendants filed a cert petition with the U.S. Supreme Court in February.*

While the Ninth Circuit is familiar with the Federalism arguments NLC has made in similar cases, it is possible that *Honolulu* will be heard by a new panel unfamiliar with the arguments. The brief serves as a “raise the flag” effort to make sure the Court understands that local government groups support the right of cities to pursue state law causes of action as plaintiffs like this in state court. NLC filed an [amicus brief](#) in this case in September 2021. The Ninth Circuit heard oral argument in February 2022. Shortly after, the court put the case in abeyance pending the issuance in the San Mateo case. In July 2022, the Ninth Circuit upheld the District Court’s ruling, ordering the case remanded to state court. Defendants subsequently filed a cert petition with the U.S. Supreme Court in December 2022, which was denied in April 2023. The case now moves forward on its merits.

### **8. *City of Hoboken v. Exxon Mobil Corp. et. al. – New Jersey Superior Court***

**Update since City Summit:** *After remand to state court, the defendants filed a motion to dismiss, which was denied.*

This is the first case for NLC to be on record within the Third Circuit. The brief is similar to that for Minnesota and Rhode Island. One key difference, however, is a short section that addresses an argument made by the National Association of Manufacturers that these lawsuits cost other local governments money by causing prices to rise.

NLC filed an [amicus brief](#) in this case in December 2021. The Third Circuit heard oral argument in June 2022. In the [court’s ruling](#), the Court adopted some of the arguments from the local government amicus brief, holding that the statutes the oil companies relied on must be read consistently with the principle of federalism and that federalism counsels in favor of limits on these federal statutes. In August 2022, the Third Circuit issued a consolidated opinion in the Delaware and Hoboken cases, holding that the cases belong in state court. Defendants file a cert petition in this case with the U.S. Supreme Court in December 2022, which was denied in April 2023. The case now moves forward on its merits.

### **9. *State of Delaware v. BP et. al. – Delaware Superior Court***

**Update since City Summit:** *After remand to state court, the defendants filed a motion to dismiss. Oral argument on the motion to dismiss was held in Sept. 2023 and a decision was issued in Jan. dismissing part of the case, but retaining another part as described below. The State of Delaware has asked the court for permission to appeal immediately, rather than try the*

*case on the limited issues that have survived. The defendants have not yet filed their response to that motion.*

NLC filed an [amicus brief](#) in this case in April 2022. The local government brief in this case is similar to that filed in support of the City of Hoboken. The brief includes some updated citations, including to the recent Baltimore decision. The Third Circuit heard oral argument in June 2022. Defendants file a cert petition in this case with the U.S. Supreme Court in December 2022, which was denied in April 2023. The case now moves forward on its merits.

In January 2024, the Delaware Superior Court issued a decision dismissing part of the case but retaining another part. It held that Delaware’s common-law and failure-to-warn claims could proceed. However, it held that the federal Clean Air Act preempted those claims that sought “damages for injuries resulting from out-of-state or global greenhouse emissions and interstate pollution,” just not claims and damages originating from air pollution sources inside Delaware. It also held that the public nuisance and trespass claims were valid only “for land the State owns directly, but not for land the State holds in public trust,” even though it recognized that those claims may be difficult to isolate. The court rejected a challenge to the court’s personal jurisdiction over some of the defendants. It dismissed claims alleging greenwashing and other misrepresentations against certain defendants because the State did not “specifically identify alleged misrepresentations for each individual defendant” but granted Delaware leave to amend the complaint to supply that information. The court dismissed claims under the Delaware Consumer Fraud Act as barred by the statute of limitations, finding that the defendants provided unrefuted evidence that the public had knowledge of or access to information about the defendants’ alleged “campaign of deception” decades before the five-year statute of limitations period expired. The court also dismissed the French energy company TotalEnergies SE for failure to serve with process.

#### **10. District of Columbia v. Exxon Mobil**

**Update since City Summit:** *In April 2023, NLC filed an [amicus brief](#) in this case supporting DC’s position to remand the case to state court. In Dec. 2023, the remand was granted.*

In this case, the City of Washington, DC filed a lawsuit against oil and gas companies for allegedly violating the Consumer Protection Procedures Act by misleading consumers about “the central role their products play in causing climate change.”

#### **11. Union of Concerned Scientists v. National Highway Traffic Safety Administration – DC Circuit – California Waiver**

**Update since City Summit:** *None – This case remains in abeyance. In January 2022, [state and local government petitioners](#) and [respondents](#) requested that the cases remain in abeyance while EPA continues its reconsideration of the challenged rule.*

**Background:** In September 2019, EPA and the National Highway Traffic Safety Administration (NHTSA) issued a withdrawal of waiver it had previously provided to California for that State's greenhouse gas and zero-emissions vehicle programs under section 209 of the Clean Air Act.

Before this withdrawal of waiver, California had adopted emissions standards for passenger cars and light trucks for 60 years that were more rigorous than the federal standard. The federal government had repeatedly granted California and other states who have adopted California's standards waivers under the Clean Air Act.

**Litigation Status:** To date, revocation of this waiver has generated four lawsuits: [California and other states](#); three California air districts; the National Coalition for Advanced Transportation, which represents Tesla and other electric vehicle-aligned companies; and eleven environmental groups. NLC filed an [amicus brief](#) in the *Union of Concerned Scientists* case in July 2020 and the DC Circuit had planned to take briefing on both the California waiver and NHSTA preemption issues.

The waiver lawsuit brought by California and other states has been filed in the D.C. Circuit. The Trump administration asked the court to combine the waiver lawsuit and a related preemption lawsuit against the National Highway Traffic Safety Association ([California vs. Chao](#) above).

Under the new Biden Administration, the U.S. Environmental Protection Agency asked the U.S. Department of Justice (DOJ) to seek a pause on the litigation while the Administration considers rewriting the rule. The DC Circuit has granted DOJ's request, placing the case on hold.

In Jan. 2021, NLC filed an [amicus brief](#) in the case of *California v. Wheeler* before the DC Circuit challenging the rollback of fuel economy standards. *California v. Wheeler* has been consolidated into *Union of Concerned Scientists*.

## **12. Illinois Commerce Commission v. FERC – Seventh Circuit**

**Update since City Summit:** *This case was being held in abeyance until a related case in the Third Circuit is decided or January 5, 2024 if no final order has been issued. The 3<sup>rd</sup> Circuit issued its decision in that case on Dec. 1, 2023.*

Illinois Commerce Commission v. FERC was being held in abeyance pending the outcome of another case before the 3rd Circuit (PJM Power Providers v. FERC). The 3rd Circuit issued its decision in that case on December 1, 2023. On December 15, FERC filed a statement of position in the Illinois Commerce Commission case, in which it requested that the court "maintain the abeyance . . . until the Third Circuit rules on any rehearing petition or, if Supreme Court review is sought, until the Supreme Court decides a petition for writ of certiorari."

It is likely that the Illinois Commerce Commission case will be dismissed as moot. As FERC noted in its December statement, the 3rd Circuit decision "concerned a replacement to the Expanded Minimum Offer Price Rule ("MOPR") (i.e., the Revised MOPR) that took effect on September 29, 2021. . . The now-defunct Expanded MOPR is the subject of *Illinois Commerce*

*Commission*. The Third Circuit's determination that the Revised MOPR is lawful means that the Expanded MOPR will not take effect. However, given that the periods for petitioners in [*PJM Power Providers*] to seek rehearing of the Third Circuit's decision and Supreme Court review have not yet expired, the Commission advises that continued abeyance of *Illinois Commerce Commission* is appropriate."

**Background:** In Dec. 2019, the Federal Energy Regulatory Commission (FERC) [directed](#) PJM, a regional wholesale electricity market covering 13 states in much of the mid-Atlantic and Ohio River Valley, to establish a price floor for state subsidized resources in PJM's capacity market, seeking to ensure grid reliability by auctioning power delivery obligations three years before the electricity is needed. That price floor, called the Minimum Offer Price Rule (MOPR), would block many wind, solar and nuclear plants from clearing those auctions.

The MOPR would increase the price of certain wind, solar, and nuclear power generation that receives subsidies from almost every state in PJM's region, thereby removing the impact of the state's subsidy. Specifically, three states in PJM's territory—Ohio, Illinois and New Jersey—have nuclear subsidies, and eleven have renewable energy mandates that would make new clean energy subject to the MOPR. FERC Chairman Neil Chatterjee did note the MOPR will not apply to existing renewable energy plants, energy storage resources, or power generators that are already under ratepayer-funded "self supply" contracts, like those owned by municipal utilities. This is forecast to exempt about 5,000 MW, a small percentage of the total power usage in the region.

Following the rule's publication, many states that participate in PJM, the nuclear industry and renewable energy groups asked FERC to rehear the subsidy case. In April 2020, FERC declined to review its Dec. 2019 decision to limit participation of state-subsidized renewable and nuclear energy in PJM, setting the stage for a raft of legal challenges and potential state exits from the region's long-term electricity auctions.

FERC's decision to toss out appeal requests allows opponents of the decision to file legal challenges at the D.C. Circuit Court. Illinois utility regulators, environmental groups and municipal utilities are filing suit. The case was initially held in abeyance pending FERC's ruling on several petitions for rehearing that were filed with it. FERC has now resolved those petitions and the abeyance will expire on December 14. The court is expected to issue a scheduling order around that time.

The Illinois filing in the U.S. 7th Circuit Court of Appeals was followed by a challenge from the American Public Power Association and American Municipal Power in the D.C. Circuit Court of Appeals. [New Jersey and Maryland have also filed in the DC Circuit](#). The Sierra Club, Natural Resources Defense Council and Environmental Defense Fund also plan to file at the D.C. Circuit. The National Rural Electric Cooperative Association is also planning to formally file suit against the PJM decision.

**Local government impact:** FERC's decision to deny a rehearing could also push some PJM states with nuclear power subsidies and renewable energy mandates to end their participation in the region's capacity market, while continuing to utilize its shorter-term real-time and day-ahead markets. This could make meeting local or state renewable energy goals or carbon



mitigation goals difficult. PJM has proposed a June deadline for states to leave the market as part of its compliance filing, but some states are concerned that coronavirus complications will make that timeline unworkable.

**Related:** In June, PJM proposed changes to the MOPR that effectively exempt “state-subsidized” renewables from the rule (see [here](#) for a brief overview). PJM requested FERC approval to implement the change but the Commission took no action. As a result, in accordance with section 205 of the Federal Power Act, the changes automatically took effect in September. This would seem to moot the case, but it hasn't been formally dismissed, and actions challenging the revised MOPR are expected. Requests for rehearing have already been filed with FERC.

### **13. California Restaurant Association v. Berkeley – Ninth Circuit – final**

**Update since City Summit:** *In May 2023, the City of Berkeley filed a petition to have the case reviewed en banc. NLC filed an [amicus brief](#) in support of the petition in June. In Jan. 2024, the court denied the request.*

In this case, a restaurant trade group plaintiff brought suit against the city of Berkeley, California, claiming that Berkeley’s 2019 “natural gas ban,” which prohibited or restricted gas connections to many new buildings within the city, was preempted by both the U.S. Energy Policy & Conservation Act (EPCA) and state law. The federal district court dismissed the EPCA preemption claims (i.e., all claims under federal law), holding that EPCA -- which preempts state and local standards relating to the energy efficiency or energy use of many appliances -- did not preempt the Berkeley gas ban. (More information about the case can be found on the Sabin Center [blog](#).)

The Restaurant Association has filed a notice of appeal to the U.S. Court of Appeals for the Ninth Circuit. The *amicus* brief would address the perspective of cities advocating for the less expansive reading of EPCA preemption, consistent with the view of the district court. This less expansive reading would give cities more confidence that many of their policies would not be preempted simply because they have a very tangential relation to the energy efficiency or energy use of an appliance. Read the City of Berkeley’s [amicus](#) brief. NLC filed an [amicus brief](#) in this case in February 2022. Oral argument was heard in May 2022. In April 2023, the Ninth Circuit [invalidated](#) Berkeley’s prohibition on natural gas infrastructure in new buildings.

### **14. Texas v. EPA – Fifth Circuit**

**Update since City Summit:** *None – NLC filed an [amicus brief](#) in this case in March 2023. Oral argument was heard in September 2023. A decision is expected before the end of the term.*

On December 30, 2021, EPA issued a final rule under Section 202(a) of the Clean Air Act, updating the vehicle emissions standards applicable to cars produced in model years 2022-2026. These updated standards reduced the permissible greenhouse gasses (“GHGs”) “tailpipe emissions” from these vehicles. For 40 years, these standards have been set, not by per-vehicle measurements, but by “fleetwide averaging” - that is, by averaging the emissions of all vehicles

produced by a manufacturer. EPA's new thresholds assume that electric vehicle ("EV") use will continue to increase, and for the purpose of averaging EPA treats EVs as though they have no tailpipe emissions. This rule was immediately challenged by a coalition of several Republican-controlled states (the "State Petitioners"), joined by a number of individual plaintiffs, private sector businesses, and nonprofits (together, the "Private Petitioners"). This coalition has broadly attacked EPA's regulatory authority and cost-benefit methodology and argues that the new rule presents a "major question" that requires express Congressional authorization.

### Impact on Local Governments

The local government position in the amicus addresses the familiar climate concerns we have addressed in previous briefs: the impacts climate has on cities nationwide, and the role of cities as climate innovators dependent, to some degree, on federal regulation to provide a predictable and helpful context to reduce GHGs. NLC's *amicus* brief focuses on two narrow legal issues of particular concern to local governments.

First, it addresses Private Petitioners' argument that EPA acted arbitrarily by regulating "tailpipe" emissions rather than considering the full "lifecycle emissions" of EVs (which would include emissions from power plants that charge EVs). This is particularly important to local governments because tailpipe emissions are a major source of air pollution in municipalities across the country. The Clean Air Act prevents state and local governments from regulating tailpipe emissions on their own, and so municipalities have no tools to restrain these emissions except federal regulation. While EPA's rule focuses on GHG emissions, it will also save American communities more than \$12 billion in public health benefits by reducing non-GHG tailpipe emissions that cause asthma, heart attacks, respiratory illnesses and premature death. Private Petitioners ignore these benefits in their brief.

Second, the amicus brief addresses petitioners' proposed expansion of the "Major Questions Doctrine." Petitioners argue that EPA's rule will cause more EVs to be produced, and that more EVs may strain electrical grids, which are largely regulated by states. Petitioners argue that this causal chain means that any EPA action that might encourage EV use must be specifically approved by Congress. However, if the Major Questions Doctrine is expanded in the way that Petitioners ask, it could cause chaos in local governments. Many federal regulations overlap with and affect important areas of state and local policy; barring any federal regulation that would affect an area of state interest ignores the reality of American federalism and would cripple municipalities' ability to rely on and respond to federal regulation.

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