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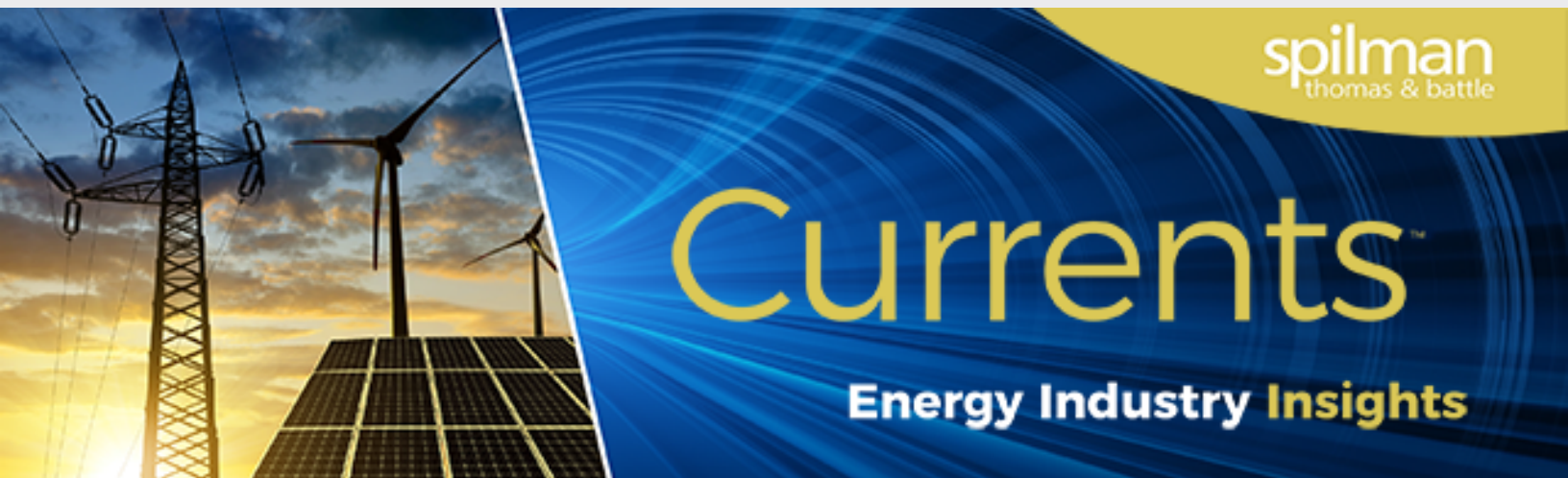
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## Volume 6, Issue 11

### ● Welcome

Welcome to the 11th issue of *Currents* for 2022.

We would like to introduce you to one of our new colleagues in Spilman's Pittsburgh office: [Shane P. Riley](#), an intellectual property and patent lawyer. His primary areas of practice are corporate law, patent law and intellectual property law. Shane assists clients in the areas of technology and data privacy law. He has extensive experience advising on data privacy issues, including compliance with HIPAA/HITECH, FERPA, GDPR, CCPA, and CPRA, along with other institutional concerns, such as confidentiality, export control, risk management, and conflict of interest. Shane also has extensive experience advising clients on intellectual property ownership, protection, and licensing issues across a broad range of disciplines. Prior to joining Spilman, he served as Assistant Director for Clinical/Corporate Contracts at the University of Pittsburgh. He earned his undergraduate degree in biological sciences and his law degree from the University of Pittsburgh as well.

Please join us in welcoming Shane to the firm!

As always, thank you for reading.



**[Nicholas S. Preservati](#)**

**Co-Editor, *Currents***

**Co-Chair, Energy Practice Group**



**[Joseph C. Unger](#)**

**Co-Editor, *Currents***

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## ● **[West Virginia's Water and Land Rights EPA Case in U.S. Supreme Court](#)**

*"West Virginia Attorney General Patrick Morrisey, who led a 26-state coalition in filing a brief in the case, said the High Court heard arguments in a case that could determine how far the federal government's regulatory reach extends over rivers, lakes, streams, pools of water, wetlands and more."*

**Why this is important:** The U.S. Supreme Court's review of the Clean Water Act ("CWA") in *Sackett v. EPA* is limited to the following question: whether the U.S. Court of Appeals for the 9th Circuit "set forth the proper test for determining whether wetlands are 'waters of the United States'" ("WOTUS") under the CWA. The 9th Circuit looked to Justice Anthony Kennedy's significant nexus test in his concurring opinion in *Rapanos v. U.S.* to uphold the trial court's determination that the wetland on the Sackett property was regulated under the CWA.

The definition of WOTUS was promulgated by EPA and the Department of Army in the 1980s, and the question of what is considered WOTUS has been litigated ever since. In *Sackett*, the Supreme Court is likely to find a "middle ground" approach to the WOTUS issue that satisfies no one and the fight will continue. At the same time *Sackett* is being argued, EPA and Army are preparing a revision of the definition of WOTUS, but a revised definition is also unlikely to settle the issue. That leaves it to Congress to establish a settled definition of WOTUS, which is the most unlikely outcome of all. At this rate, maybe we will know what "waters of the U.S." means by 2080. --- [Joseph C. Unger](#)

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## ● **[Hanshaw Joins Virginia Counterpart in Exploring Small Nuclear-Powered Energy Sources](#)**

*"Hanshaw said the two state leaders are eager to develop an East Coast hub for the development and deployment of small nuclear reactors, affirming that no region in the country will be more welcoming to*

*the innovation, the jobs and the investment that small modular nuclear reactors provide.”*

**Why this is important:** The article details a “partnership” between West Virginia and Virginia legislators to actively pursue the development of small modular nuclear reactors for the generation of electricity. For West Virginia, this follows on the Legislature’s removal of the ban on nuclear power in the 2022 Regular Session. Together, the two states hope to lead the region in the deployment of small nuclear power reactors with a focus on the benefits of innovation, jobs, and investment. It will be important, however, to ensure that such development is a product of free market competition and not government edict or regulation, as the former will most benefit the consumers of electricity and all West Virginia economic interests. --- [Derrick Price Williamson](#)

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## ● [NREL Deems Natural Gas the Most Viable Option to Fill the Gaps Left by Renewables](#)

*“In its recent study, NREL deemed natural gas the most reliable and cost-effective method to fill the gaps left behind by intermittent wind and solar.”*

**Why this is important:** This article discusses a recent report produced by the National Renewable Energy Laboratory (“NREL”), an entity funded and overseen by the Department of Energy, concerning reliability and affordability as much of the United States (and the world) transitions to greater reliance on renewable sources of energy, e.g., solar and wind. The article notes that the NREL report found that natural gas was the most cost effective and reliable method to fill the gaps needed to meet energy needs due to the intermittent nature of renewable resources. In essence, sufficient resources – whether battery storage or other types of firm resources – are needed to support energy needs when intermittent resources are not able to produce energy (the sun is not shining or the wind is not blowing). As many states and utilities seek to transition their energy to more renewable energy, the NREL report suggests that a mix of resources will be needed to meet net zero carbon goals while ensuring affordability and reliability of the energy grid, but undoubtedly both cost and reliability concerns will be paramount as this transition continues. --- [Carrie H. Grundmann](#)

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## ● [China is Doubling Down on Coal Despite Its Green Ambitions](#)

*“China is building a vast array of new coal-fired power stations, potentially more than the operating capacity of the US, even though it knows the plants will probably never be fully used.”*

**Why this is important:** China is rapidly adding renewables while still building coal-fired electrical generation plants. China is spending \$98 billion on renewables compared to the U.S.’s renewable spending of \$12 billion. At the same time, China is building 275 GWs of new coal-fired electrical generation, but states it may not use all of the new plants. China wants to build the new before

discarding the old, so it is building both. By contrast, the rest of the world is adding 121 GW of coal-fired generation in the same time period as countries turn to other fuels for electrical generation. --- [Mark E. Heath](#)

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## ● [Manchin Presses for Increasing Energy Production, Permitting Changes Following OPEC+ Announcement](#)

*"The Biden administration attempted to persuade other countries to produce more oil amid the ongoing military conflict."*

**Why this is important:** It is necessary for our President to plead with foreign countries to increase their production of oil and gas because the prolonged and duplicative permitting processes of federal and state governments block expanded domestic production. The federal government should create a centralized and more efficient environmental review process for new domestic production in order to achieve energy independence and security in the United States where operations are conducted in a more environmentally responsible way than other countries. It makes no sense to impose overly restrictive permitting requirements on domestic oil and gas production that force our country to rely on foreign exports by countries that have no interest in our economic welfare or security. --- [William M. Herlihy](#)

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## ● [ISO-NE, ERCOT, MISO Face Possible Capacity Shortfalls in Extreme Winter Weather: FERC](#)

*"Reviving retired coal plants is 'fantasyland,' FERC Chairman Richard Glick said."*

**Why this is important:** The article notes that most of the United States is more than adequately prepared to provide power during periods of typical winter weather. Issues will arise, if at all, in cases of extreme weather, when customer demand increases, placing stress on the grid. Potentially exacerbating this problem have been supply chain issues and increased international demand for domestic natural gas supply, which has resulted in increased market prices for natural gas. The article further notes that efforts by the Federal Energy Regulatory Commission to approve additional natural gas infrastructure has been slowed by legal challenges. While the article notes that many areas of the United States have taken steps to prepare for winter, customers around much of the country could see increased energy prices if an extreme weather event occurs. --- [Carrie H. Grundmann](#)

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## ● [Shuttered Coalfield Development in West Virginia will be Transformed into Renewable Energy Enterprise](#)

*"Among these projects is Black Diamond, a shuttered coalfield development in Wayne County, in the far west of West Virginia, that will be transformed into a regional hub for solar and renewable energy operations complete with a shipping warehouse, job training center, and dedicated space for growing solar, recycling, and bio-based manufacturers to do business."*

**Why this is important:** A West Virginia non-profit, Coalfield Development, has a \$63 million grant to help with eight projects funded by the Build Back Better Regional Challenge. In Wayne County, a hub for solar and renewables is being developed and includes Shepherdstown's Solar Holler along with recycling and reuse businesses and bio-based manufacturing. Other state projects include converting mines into renewable energy hubs and increasing solar use across West Virginia. --- [Mark E. Heath](#)

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## ● [Duke Energy to Pass First \\$56 Million Wave of Inflation Reduction Act Tax Credits to Customers](#)

*"Five Duke Energy solar sites in Florida will qualify for tax credits under a provision of the IRA that allows refunds on certain renewable energy projects placed into service after Dec. 31, 2021."*

**Why this is important:** The Inflation Reduction Act ("IRA") contains numerous incentives for investment in renewable energy and related resources. Due to the regulated nature of electric utilities, any benefits received by a utility under the IRA should be passed along to customers. This article is an example of the substantial customer benefits that can flow from a utility's investment in such resources. --- [Carrie H. Grundmann](#)

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## ● [Wind Farm Set to be Destroyed and Converted Into Coal Mine](#)

*"German energy company RWE is defending its decision to expand its Garzweiler coal mine in and around the small town of Lutzerath, despite it appearing to be 'paradoxical.'"*

**Why this is important:** In a somewhat ironic moment, the energy crisis throughout Europe due to the Russian invasion of Ukraine has resulted in removal of wind turbines to expand a lignite coal mine in Germany. The moving of the turbines allows continued production from the mine and ability to meet electrical generation targets for eight years. --- [Mark E. Heath](#)

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## ● [W.Va. Creates Special Districts that Open Way for Renewable Microgrids in Coal Country](#)

*"Under existing state law, independent power producers must form public utilities regulated by the PSC to serve more than one customer."*

**Why this is important:** For industrial and manufacturing entities in West Virginia, electric rates from the state's fully regulated utilities have precipitously declined over the past decade or more from some of the most affordable in the country to middle-of-the-pack or lower, leading to an uncompetitive landscape for continued business operations. If accessible to all market participants and neither confined to nor constrained by regulated utility investments, the state's new resource-neutral "microgrid" districts may open the way for West Virginia industry and manufacturing to obtain more competitive electric supply and maintain or increase economic presence in West Virginia through dedicated investments in their own, or third-party, electric generation resources. --- [Barry A. Naum](#)

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## ● [U.S. Coal-Fired Generation Declining After Brief Rise Last Year](#)

*"We expect 6% less U.S. coal-fired generation in 2022 than in 2021, according to our latest Short-Term Energy Outlook."*

**Why this is important:** Coal-fired electrical generation dropped in 2022 despite record rises in 2021 for the first time in many years. Coal-fired generation rose 3 percent to 23 percent in 2021, but will drop by 6 percent in 2022. From 2014 to 2020, coal had declined by 16 percent. The 2022 coal-fired electrical generation drop is occurring as gas climbs back to 38 percent. --- [Mark E. Heath](#)

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## ● [Apple Calls on Suppliers to Decarbonize Operations by 2030](#)

*"Apple will track progress through yearly audits."*

**Why this is important:** This article offers an example of market pressure (by Apple) on manufacturing and industry to address carbon use in their operations. While some companies have voluntarily undertaken decarbonization efforts, others have not. Steps like these by Apple to require its suppliers to decarbonize is yet another way that businesses are being leveraged to address the use of carbon dioxide in their operations. Efforts to reduce carbon are taking place across the country; in addition to voluntary ESG goals set by many companies, state legislatures are passing carbon reduction legislation. The federal government also recently passed transformative legislation in the form of the Inflation Reduction Act, and many utilities are moving towards increased reliance on renewable energy. Whether by choice or by requirement, the trend is towards reducing carbon in operations sooner rather than later, which could have significant impacts on the cost and reliability of electricity. --- [Carrie H. Grundmann](#)

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## ● [Utility Explores Converting Coal Plants into Nuclear Power](#)

*"The large utility PacifiCorp is studying the viability of turning five fossil-fuel plants into nuclear-energy-and-storage facilities."*

**Why this is important:** This article discusses a pilot project undertaken by utility PacifiCorp and TerraPower, a nuclear developer, to convert a coal plant to nuclear. The project is still under development, and the project design has yet to be approved by the Nuclear Regulatory Commission. If it proves successful, however, it could potentially address the desire by many for more carbon-free power while also addressing those places and jobs that depend on coal. Moreover, nuclear, unlike wind or solar, is a dispatchable resource, which would help ensure a diverse mix of resources. At present, these benefits are purely hypothetical. As the article notes, much remains to be done to see if this project can be commercially and financially viable. --- [Carrie H. Grundmann](#)

## ● [EIA Energy Statistics](#)

*Here is a round-up of the latest statistics concerning the energy industry.*

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