CHAMBERS

Global Practice Guides

Environmental Law

Trends and Developments – USA

Contributed by

Jones Walker LLP

2018

CHAMBERS® AND PARTNERS

USA

The 'Trends & Developments' sections give an overview of current trends and developments in local legal markets. Leading lawyers analyse particular trends or provide a broader discussion of key developments in the jurisdiction.

Contributed by Jones Walker LLP ***Authors:*** Boyd A. Bryan, Michael A. Chernekoff, Robert E. Holden, Stanley A. Millan

Trends and Developments

Contributed by Jones Walker LLP

Jones Walker LLP offers a full range of environmental counselling, litigation, transactional, and regulatory services throughout the United States, with its main practice in the Gulf South including in Texas, Louisiana, Mississippi, Alabama, and the waters of the Gulf of Mexico. For many years, the firm has successfully represented energy companies, property owners, financial institutions, refineries, waste disposal facilities, chemical companies, manufacturing companies, railroads, and other businesses and their employees in environmental-related disputes and transactions. Members of the environmental team have backgrounds in engineering, environmental management systems, and industrial management, and have served as federal prosecutors, agency regulators, military officers, in-house counsel, and law professors. The environmental team has significant experience in negotiating agreements and resolutions to environmental agency enforcement actions, including complex and technical multi-media approaches, in administrative, civil, and criminal environmental proceedings and litigation and environmental issues in transactions.

Authors

Boyd A. Bryan is a partner on Jones Walker LLP's environmental team. His experience covers a wide range of environmental matters, including environmental issues in transactions, regulatory issues from permitting to compliance advice, defence of agency enforcement actions, and environmental litigation. He is a past Chairman of the Louisiana State Bar Association Environmental Law Section and is a frequent author and speaker on environmental law issues.

Michael A. Chernekoff is a partner and leads Jones Walker LLP's environmental team. His practice focuses on environmental litigation, environmental compliance counselling, environmental enforcement defence, remediation counselling, and toxic tort defence.

Robert E. Holden is a partner on Jones Walker LLP's environmental team. His practice focuses on regulatory and transactional environmental work. He led his firm's representation of BP on the Deepwater Horizon oil spill, is lead counsel on two Superfund sites, and has served as lead counsel defending numerous state and federal environmental enforcement actions. He served as adjunct professor on the Clean Air Act at Loyola Law School and has published numerous environmental law-related articles.

Stanley A. Millan is a special counsel on Jones Walker LLP'S environmental team. He has over 40 years of litigation and compliance counselling experience in environmental law, including air, water (including wetlands), waste (RCRA and CERCLA clean-up) and natural resources. He has authored a number of articles related to environmental law. He is a long-time adjunct professor at Tulane Law School and Loyola College of Law teaching environmental and government contracts courses.

This article begins with background information on the US regulatory system and then discusses notable trends and developments and changes under the Trump administration.

Basics of the US Regulatory System

The US Constitution establishes a government based on two key principles: separation of powers and federalism. Separation of powers diffuses power horizontally among the three branches of the federal (US) government: the legislative branch (Congress), which makes the laws by enacting federal statutes; the executive branch (the President and the various departments and agencies), which executes or enforces the laws; and the judicial branch (the Supreme Court and lower federal courts), which interprets and applies the law. Congress may by statute delegate its legislative power to departments and agencies in the executive branch that issue regulations that have the same force and effect as federal statutes. Federalism diffuses power vertically between the federal government and the states.

Contributed by Jones Walker LLP ***Authors:*** Boyd A. Bryan, Michael A. Chernekoff, Robert E. Holden, Stanley A. Millan

The federal government has recognised more than 500 indigenous American Indian and Alaska Native tribes as sovereign entities with the right to self-government within the borders of their reservations. Generally, an Indian reservation is an area of land reserved for a tribe under a federal treaty or law. Tribes have a "government-to-government" relationship with the federal government much the same as states.

The US Environmental Protection Agency (EPA) is responsible for implementing and enforcing most federal environmental statutes and regulations (although other federal departments and agencies play a significant role in environmental regulation). The EPA largely performs its responsibilities through "co-operative federalism." Under this approach, the EPA may delegate to states and tribes the authority to implement and enforce federal environmental laws within their borders. Generally, federal law establishes minimum environmental standards and states and tribes may enact additional or more stringent laws.

States are subdivided into smaller administrative regions referred to as counties (or boroughs in Alaska and parishes in Louisiana) and counties in turn contain municipalities (cities, towns, or villages). Counties and municipalities generally can enact and enforce their own laws (ordinances), commonly referred to as "local laws," that have effect within their borders.

Federal, state and local laws may be invalid for a number of reasons. For example, federal statutes may be invalid or "unconstitutional" if they violate the US Constitution. State statutes may be invalid if they violate the US Constitution or their state's constitution. Federal, state and local regulations and ordinances may be invalid if the governmental body exceeded its statutory authority or failed to follow required procedures in enacting them.

Also, state laws may be "pre-empted" (superseded) by federal law if federal law expressly prevents state law addressing a particular topic, if state law conflicts with federal law, or if federal law is so comprehensive that it leaves no room for state regulation on the subject. Local laws may be pre-empted by state law on the same grounds.

Notable Trends and Developments

Increase In State Environmental Regulation

In recent years, states have increasingly exercised their authority to enact environmental laws that are in addition to or more stringent than the federal requirements. Examples include the California Global Warming Solutions Act of 2006 and a related statute adopted in September 2016 that requires that state-wide greenhouse gas emissions be reduced to 40% below the 1990 level by 2030; state-wide bans on unconventional oil and gas operations by hydraulic fracturing enacted by Vermont in 2012 and New York in 2015, and Pennsylvania's Act 13 of 2012 that imposes stringent requirements on hydraulic fracturing (certain provisions of which have been struck down by Pennsylvania courts); and Colorado regulations adopted in 2014 limiting methane emissions from oil and gas operations. The trend is towards additional or expanded environmental regulation at the state level where states determine it is their interest or that environmental regulation at the federal level is lacking.

Increase In Local Environmental Regulation

Counties and municipalities generally have the authority to regulate the location of activities through zoning and land use ordinances. They also traditionally can regulate matters that affect local quality of life such as traffic, road construction and maintenance, noise, odours, dust, light and other visual impacts, flood control, storm-water management, wetlands and watershed protection, special hazard zones and conservation easements. Local governments are increasingly asserting their authority to regulate activities that may have local impacts. Many municipalities have passed ordinances that ban hydraulic fracturing, limit the activity to certain areas, or regulate how the activity is performed, although several such ordinances have been invalidated by the courts on preemption or other grounds. As another example, in 2007 the City of Houston, Texas, established by ordinance its own air-quality regulatory and compliance programme due to the state's alleged lax air-enforcement efforts. In 2016, the Texas Supreme Court held that certain key provisions of the ordinance are pre-empted by state law, BCCA Appeal Group, Inc v City of Houston, 496 S.W.3d 1 (Tex. 2016). The trend towards increased environmental law-related regulation by local governments, as well as challenges to such regulation in the courts, is expected to continue.

More Assertive Actions By Tribes

Tribal rights under treaties with the federal government, delegated federal programmes or other laws may impact third-party activities not only within, but also outside, the borders of the reservation. Tribes are more actively asserting these rights. Recent examples include a pending suit by the Standing Rock Sioux Tribe in opposition to the proposed Dakota Access oil pipeline that is reportedly located within a half mile of the reservation's border in North Dakota; allegations by the Seminole Tribe of Florida that the state's proposed revised water quality standards do not adequately protect against health impacts to tribal members who consume seafood on a subsistence basis; litigation by the Yurok Tribe and Hoopa Valley Tribe in California aimed at halting the US Bureau of Reclamation's diversion of water from the Klamath River which allegedly harms salmon that are vital to the tribes; and litigation by the Gila River Indian Community in opposition to a highway project near Phoenix, Arizona, that would run near the border of the Community's land.

Contributed by Jones Walker LLP ***Authors:*** Boyd A. Bryan, Michael A. Chernekoff, Robert E. Holden, Stanley A. Millan

Greater Judicial Scrutiny of Federal Regulations and Agency Actions

During the Obama administration, federal courts were frequently asked, in many cases by states' attorneys general, to take action to curb perceived overreach by the federal government in environmental regulation, and the courts have invalidated federal regulations or actions on various grounds. Examples include West Virginia v EPA, 136 S. Ct. 1000 (2016) (stay issued by Supreme Court of the EPA's Clean Power Plan that regulates greenhouse gas emissions from existing fossil fuel-fired power plants pending a decision on the merits that involve the EPA's regulatory authority under the Clean Air Act and federalism and separation of powers issues); Mexichem Flour, Inc v EPA, Nos 15-1328 and 15-1329, 2017 US App. LEXIS 14539 (D.C. Cir. 8 August 2017) (decision by federal appeals court vacating the EPA regulations that required manufacturers to replace hydrofluorocarbons in their products with safe substitutes on grounds that the EPA exceeded its authority under the Clean Air Act in enacting the regulations); Texas v EPA, 829 F.3d 405 (5th Cir. 2016) (stay issued by federal appeals court of the EPA's regulation that disapproved the plans of Texas and Oklahoma for controlling regional haze and improving visibility in national parks and wildlife refuge, and imposed its own plan in their place, based on the strong likelihood that the EPA acted arbitrarily, capriciously and in excess of its statutory authority); in re EPA, 803 F.3d 804 (6th Cir. 2015) (nationwide stay issued by federal appeals court of the EPA and US Army Corps of Engineers regulation intended to clarify the definition of "waters of the United States," finding a substantial likelihood that the regulation conflicts with the Clean Water Act and required procedures for adopting the regulation were not followed); and Wyoming v Dep't of Interior, Nos 15-8126 and 15-8134, 2016 US Dist. LEXIS 82132 (D. Wyo. 21 June 2016), appeal dismissed, 2016 US App. LEXIS 13210 (10th Cir. 13 July 2016) (ruling by federal district court invalidating hydraulic fracturing regulations adopted by the US Department of the Interior, Bureau of Land Management based on the agency's lack of statutory authority to regulate hydraulic fracturing). The courts are expected to continue to scrutinise the validity of federal environmental regulations and actions. At the same time, it is anticipated that under the Trump administration, non-governmental organisations (NGOs) may file suits seeking to protect Obama administration regulations and programmes or to require the Trump administration to take actions allegedly required under current statutes.

More Demanding Analysis of Environmental Impacts Under NEPA

The National Environmental Policy Act (NEPA), 42 USC § 4321, et seq requires a federal agency to prepare an environmental impact statement (EIS) for any federal action "significantly affecting the quality of the human environment." Under NEPA, the agency must take a "hard look" at the environmental consequences before taking a major action. Generally, unless the proposed action is subject to a categorical exclusion, the agency must prepare an environmental assessment (EA) in determining whether to prepare an EIS. If, based on the EA, the agency determines that an EIS is not necessary, it must prepare a finding of no significant impact (FONSI).

In several recent cases, courts have held that the federal agency's analysis failed to satisfy the NEPA requirements. See, for example, Sierra Club v Federal Energy Regulatory Comm'n, Nos 16-1329 and 16-1387, 2017 US App. LEXIS 15911 (D.C. Cir. 22 August 2017) (the Federal Energy Regulatory Commission's EIS in connection with its approval of three new pipelines that would supply natural gas to power plants was deficient because it did not include either a quantitative estimate of the greenhouse gas emissions that would result from burning of the natural gas at the plants or a more specific explanation of why such an estimate could not have been provided); Montana Envtl. Info. Ctr. v United States Office of Surface Mining, No 15-106-M-DWM, 2017 US Dist. LEXIS 129018 (D. Mont. 14 August 2017) (the US Office of Surface Mining and Enforcement's FONSI in connection with its approval of a modified plan for the expansion of a coal mine failed to consider adequately the indirect or cumulative effects of transportation and greenhouse gas emissions from combustion of coal from the expanded mine); and Standing Rock Sioux Tribe v United States Army Corps of Eng'rs, No 16-1534, 2017 US Dist. LEXIS 91297 (D.D.C. 14 June 2017) (the US Army Corps of Engineers' mitigated FONSI in connection with its granting of a permit to construct and operate a crude oil pipeline under a lake near the Tribe's reservation failed to consider adequately the impacts of an oil spill on the Tribe's fishing and hunting rights, environmental justice concerns regarding possible disproportionate harm to the Tribe in the event of such a spill, and the degree to which the project's effects were likely to be "highly controversial" in light of expert critiques of its scientific methods and data). These decisions indicate that permit applicants and federal agencies will need to address NEPA concerns more fully in the permit process.

Clarification of "Arranger" Liability Under CERCLA

Potentially responsible parties (PRPs) that are liable for clean-up and other costs under the federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 USC § 9601, et seq include (i) the current owner or operator of the facility, (ii) a person who owned or operated the facility at the time the disposal of hazardous substances occurred on the property, (iii) an "arranger," ie, a person who arranged for the disposal, treatment, or transport of hazardous substances they owned or possessed at or to the facility, and (iv) a transporter, ie, a person who accepted hazardous substances for transport to a disposal or treatment facility that it selected.

Contributed by Jones Walker LLP ***Authors:*** Boyd A. Bryan, Michael A. Chernekoff, Robert E. Holden, Stanley A. Millan

The courts have struggled to distinguish a legitimate sale of a useful product that contains hazardous substances from a transaction that is an "arrangement for disposal" of hazardous substances under CERCLA. In Northern & Santa Fe Ry. Co v United States, 566 US 599 (2009), the Supreme Court held that an "arranger" must have taken intentional steps to dispose of hazardous substances. The intent analysis is highly fact-driven. See Consolidated Coal Co v Georgia Power Co, 781 F.3d 129 (4th Cir. 2015) (seller of used transformers containing spent oil with polychlorinated biphenyls (PCBs) to transformer refurbisher held not liable as an "arranger" due to lack of evidence that it intended, even in part, to dispose of PCBs through the sale); and United States v General Electric Co, 670 F.3d 377 (1st Cir. 2012) (seller of scrap Pyranol containing PCBs to paint manufacturer for use as paint additive held liable as an "arranger" based on finding that it purposefully entered into the arrangement to be rid of the scrap Pyranol). Also, a party's control over hazardous substances or their disposal may be sufficient to impose "arranger" liability, GenCorp, Inc v Olin Corp., 390 F.3d 433 (6th Cir. 2004). The apparent trend is to narrow the scope of "arranger" liability under CERCLA.

Close Judicial Review of the "Bona Fide Prospective Purchaser" Defence

CERCLA provides defences in favour of, among others, an "innocent landowner" and a "bona fide prospective purchaser" (BFPP). An "innocent landowner" is one who conducts an appropriate environmental site assessment of the property and has no reason to know of existing contamination at the time it purchases the property. A BFPP is one who conducts an appropriate environmental site assessment and purchases the property with knowledge of existing contamination. Under EPA guidance, a tenant may also assert a BFPP defence.

A BFPP must take "reasonable steps" after it purchases (or leases) the property to stop any continuing release and limit any future release, prevent or limit exposure to the contamination and provide all legally required notices regarding the contamination, among other things. Taking "reasonable steps" certainly requires more than "doing nothing" with respect to known contamination, but less than the full assessment or clean-up that a PRP under CERCLA must perform. Whether the "reasonable steps" requirement has been satisfied depends heavily on the facts in each case. See PCS Nitrogen Inc v Ashley II of Charleston, LLC, 714 F.3d 161 (4th Cir 2013) (BFPP status denied, due, in part, to the purchaser's failure to address existing sumps, a debris pile and limestone cover in a timely fashion); and Voggenthaler v Maryland Square LLC, 724 F.3d 1050 (9th Cir. 2013) (BFPP status denied where purchaser demolished a building and took no steps to remove or limit the spread of exposed contaminated soil). The courts appear to be closely scrutinising purchasers' assertions of BFPP status.

Varying Standards For Successor Liability In Asset Sales

The traditional rule is that an entity that purchases the assets (as opposed to the equity, eg stock) of another entity is not responsible for the seller's liabilities, unless (i) it expressly or impliedly assumes the seller's liabilities, (ii) the transaction amounts to a "de facto merger" of the seller and the buyer, (iii) the buyer is a "mere continuation" of the seller, or (iv) the transaction is entered into fraudulently with an intent to escape the seller's liabilities. The law of successor liability, however, varies by jurisdiction. For example, in many states the "de facto merger" and "mere continuation" exceptions require some degree of continuity of ownership (ie, common ownership) between the seller and the buyer. Other states apply a more flexible analysis in which continuity of ownership is a factor but is not determinative. Also, certain courts have applied a "substantial continuity" exception that does not require any continuity of ownership between the seller and the buyer, United States v Carolina Transformer Co, 978 F.2d 832 (4th Cir. 1992). Others have rejected the "substantial continuity" exception and held that successor liability under CERCLA is a matter of uniform federal law and applied "the general doctrine of successor liability in operation in most states" rather than the law of a particular state, United States v General Battery Corp, 423 F.3d 294 (3rd Cir. 2005).

The trend appears to be in favour of applying the traditional successor liability rule and exceptions. Depending on the jurisdiction in which the transaction occurs, however, an asset purchaser's retention of the seller's personnel, continuation of the same general business operations at the same facilities, operation under the same name, holding itself out as a continuation of the seller and knowledge of existing contamination are factors that could make it vulnerable to successor environmental liability, even without continuity of ownership between the entities.

Evaluation of Vapour Intrusion in Site Assessments and Listings

Vapour intrusion generally occurs when vapour-phase contaminants migrate from contaminated groundwater or soil into overlying structures, thereby potentially posing a health or safety risk to occupants. In December 2013, the EPA provided by regulation that an environmental site assessment performed in compliance with ASTM international standard E1527-13 suffices for purposes of the "innocent landowner" and BFPP defences under CERCLA. This standard added a requirement that vapour intrusion be considered as part of the assessment. Also, an EPA regulation that became effective in May 2017 adds a vapour intrusion component to the evaluation of sites for listing on the National Priorities List, which is the list of the nation's highest priority contaminated sites. It is expected that the EPA will carefully assess vapour intrusion on newly reported contaminated sites and perhaps revisit sites assessed or "closed" in the past for va-

Contributed by Jones Walker LLP ***Authors:*** Boyd A. Bryan, Michael A. Chernekoff, Robert E. Holden, Stanley A. Millan

pour intrusion concerns. States are also expected to address vapour intrusion more pointedly under their clean-up and risk-evaluation programmes.

Changes Under the Trump Administration

President Trump's comments during the 2016 presidential campaign and early in his administration suggest that his priorities include promotion of domestic energy – including oil, gas and coal – and movement towards energy independence, investing in domestic infrastructure, streamlining of permitting and approvals for infrastructure and other industrial projects, having the EPA focus on clean air and water with less focus on global priorities, and elevation of the role of states in environmental regulation. Since his inauguration on 20 January 2017, President Trump has taken action on several of these priorities. He has issued Executive Orders regarding expediting environmental reviews and approvals for high-priority infrastructure projects, eliminating duplicative or unnecessary regulations, and promoting energy independence and economic growth, the latter of which outlines a plan to unwind several actions taken under the Obama administration to address global climate change. President Trump has announced that the US will withdraw from the Paris climate accord. He has also proposed to cut the EPA's budget by approximately 30%, although cuts proposed by Congress are far less drastic.

The EPA's actions under newly appointed Administrator Scott Pruitt appear to be consistent with President Trump's priorities. In several instances, the EPA has asked the courts temporarily to hold in abeyance litigation challenging Obama-era regulations, including the Clean Power Plan, to allow the EPA time to reassess whether it will defend those regulations. In May 2017, Administrator Pruitt announced a number of actions aimed at streamlining and improving the Superfund programme which addresses the clean-up of the nation's most contaminated sites, which he has described as a core mission of the EPA. In June 2017, consistent with an earlier Executive Order issued by President Trump, the EPA and the US Army Corps of Engineers jointly proposed to rescind a 2015 rule that arguably expanded the definition of "waters of the United States" that are subject to federal regulation. Administrator Pruitt has also stated that the EPA will not engage in the practice of "sue and settle" which refers to suits typically filed by environmental advocacy groups followed by a settlement agreement in which the EPA agrees to take certain actions by specified deadlines. Critics claim this practice improperly allows EPA decisions on policies and priorities to be made based on negotiations with environment groups without the opportunity for input from states or other affected parties.

These actions by the Trump administration could lead to more aggressive regulation and enforcement by the states and an increase in litigation against the EPA and industry by NGOs, the states and tribes.

Conclusion

The fundamental principles of environmental law in the US are well established and predictable. Some issues, however, are being sorted out by the courts and interested parties such as federal, state and local governments, tribes and NGOs may be adjusting their priorities. Persons doing business in the US would be well advised to consider the trends and developments discussed above in connection with their projects and operations.

Jones Walker LLP
201 St Charles Avenue
New Orleans
Louisiana
USA
LA 70170-5100

Tel: +1 504 582 8000
Fax: +1 504 582 8583
Email: info@joneswalker.com
Web: www.joneswalker.com