

Trends and Developments

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Increasing Focus on Environmental Justice in Environmental Permitting

President Biden wasted no time in spotlighting environmental justice – defined as “the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income, with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies” – as a top priority of his administration. Executive Order 14008 was issued one week after his inauguration, and requires federal agencies to “make achieving environmental justice part of their missions by developing programs, policies, and activities to address the disproportionately high and adverse human health, environmental, climate-related and other cumulative impacts on disadvantaged communities, as well as the accompanying economic challenges of such impacts”.

The US Environmental Protection Agency (EPA) has heeded the call.

- In March 2022, EPA issued its Fiscal Year 2022–2026 Strategic Plan, which includes a strategic goal to advance environmental justice and civil rights.
- In April 2022, EPA followed with its Equity Action Plan, which identifies several priorities intended to support meaningful engagement with and deliver tangible benefits to underserved communities and achieve more equitable outcomes, including pollution reductions in communities with environmental justice concerns.
- In May 2022, EPA’s Office of General Counsel presented the EPA Legal Tools to Advance

Environmental Justice document, a review of legal authorities to advance environmental justice and equity in agency decisions, including permitting.

- In August 2022, EPA released its Environmental Justice and Civil Rights in Permitting Frequently Asked Questions document (“FAQs Document”), which provides the agency’s views on how federal, state and local agencies should integrate environmental justice and civil rights in their environmental permitting processes.
- In September 2022, EPA announced the establishment of a new Office of Environmental Justice and External Civil Rights to engage with communities with environmental justice concerns, manage grants and technical assistance, work with other EPA offices to incorporate environmental justice in the agency’s programmes, and ensure states and other EPA funding recipients comply with applicable civil rights laws. The office will be led by a Senate-confirmed Assistant Administrator and served by more than 200 EPA staff in EPA headquarters in Washington, DC and its ten regional offices. It will reportedly oversee a USD3 billion dollar climate and environmental justice block grant programme created as part of the Inflation Reduction Act’s USD60 billion funding of environmental justice priorities.

The FAQs Document is noteworthy in several respects.

- First, the document emphasises that an agency’s full compliance with environmental laws

in carrying out its permitting programmes does not necessarily mean that the agency is complying with civil rights laws – compliance with environmental and civil rights laws is complimentary but independent. This puts permitting agencies on notice that they need to consider compliance with civil rights laws, in addition to environmental laws, when making permitting decisions.

- The FAQs Document also suggests that permitting agencies adopt a routine process of screening for environmental justice and civil rights concerns early in the permitting process – in particular whether the permitting decision will have an adverse and disproportionate (or disparate) impact on others based on race, colour, national origin or income. As best practices, the document states that EPA’s EJScreen and state environmental justice mapping tools can be used as a starting point, together with information on community concerns. If this information suggests a potential for disproportionate impacts, the document identifies a broad list of other information to be considered, including:
 - (a) the potential that the affected population already experiences disproportionate impacts;
 - (b) other permitted facilities in the area;
 - (c) demographic data including race, national origin, age, percentage of non-English speakers, income and education;
 - (d) environmental data that reflects ambient air and water pollutant concentrations in the area;
 - (e) health data such as mortality rates, asthma, unhoused populations, and healthcare access;
 - (f) information in public complaints and media reports; and
 - (g) cumulative impacts from other chemical or non-chemical stressors.

Significantly, the FAQs Document states that if there are no mitigating measures the permitting agency can take to address disparate impacts and there is no legally sufficient justification for the impacts, denial of the permit may be the only way to avoid a civil rights violation (similarly, EPA’s January 2017 External Civil Rights Compliance Office Compliance Toolkit identifies “not renewing the permit” as a less discriminatory alternative to an action that would cause adverse and disproportionate impacts).

Notably, the FAQs Document is not law. It is interim guidance and states on its face that it “does not itself have legal effect” and “does not expressly or implicitly create, expand, or limit any legal rights, obligations, responsibilities, expectations, or benefits to any person”. EPA has acknowledged that guidance is non-binding and does not have the force and effect of law (see, eg, 86 Federal Register (FR) 26842, 26843 (May 18, 2021)). Nevertheless, environmental agencies and permit applicants may take the FAQs Document into account in permitting actions.

Environmental justice is certainly gaining prominence in environmental permitting, and that trend is expected to continue.

The Inflation Reduction Act and Incentives for Clean Energy Development

In August 2022, President Biden signed the Inflation Reduction Act (IRA) into law. The IRA is a landmark event in the history of energy transition as it allocates USD369 billion to clean energy and decarbonisation projects. It provides tax incentives and credits to clean energy technologies that are expected to change the traditional financial structure of clean energy manufacturing processes. It expands the current production and investment tax credit (ITC) framework and provides additional credit increases when spe-

cific criteria are met, such as the taxpayer complying with prevailing wages and apprenticeship requirements. Incorporating labour requirements promotes US workforce development. The tax credit expansion also includes the ability to sell renewable tax credits for cash. The IRA extends the availability of tax credit incentives to a ten-year period.

For offshore wind and the power grid's reliability in general, there is a continuing concern over transmission infrastructure and the ability to deliver wind energy to consumers. The greater need for transmission development results from increased clean energy generation. Transmission development brings complex cross-jurisdictional conversations; while the IRA provides grants, authorities need to reach a final decision on the transmission project within two years to access these grants. The expansion provided by the IRA may not significantly speed up this process but still provides growth opportunities.

The IRA brings green hydrogen (hydrogen generated by renewables or nuclear power) into the forefront of US energy sources by providing up to a USD3 subsidy for each kg of low-carbon hydrogen with the addition of Section 45V of the Internal Revenue Code (the "Code"). Blue hydrogen (hydrogen mainly produced from natural gas where carbon dioxide is captured and stored through a carbon capture, usage and storage process) also benefits from the IRA. The IRA amends Code Section 45Q to enhance the credit amount for carbon capture and sequestration projects, and extends the deadline for the construction of these projects to 1 January 2033.

Incentives for solar energy include maintenance of the existing 30% ITC for solar property, extension of the construction deadline to 1 January 2025, and creation of a production tax credit for manu-

facturing and producing clean energy components within the US. Energy storage technologies connected to solar energy projects will continue to be eligible for ITCs, and standalone energy storage technologies now also qualify for ITCs.

The demand for diversifying energy sources has motivated clean energy development, and the IRA is expected to accelerate this energy transition trend.

Supreme Court Decision Limiting EPA's Regulatory Options in Addressing Greenhouse Gas Emissions

In 2015, the Obama-era EPA adopted the Clean Power Plan (CCP), which established guidelines for states to follow in addressing emissions of carbon dioxide (a greenhouse gas) from existing coal-fired power plants. Pursuant to Section 111(d) of the Clean Air Act (42 USC § 7411(d) – CAA), EPA determined in the CCP that the "best system for emission reduction" (BESR) at such plants is "generation shifting" – ie, requiring existing coal plants to cause a shift away from coal toward wind, solar and natural gas, whether by reducing their own production of electricity, subsidising an increase in production by cleaner sources, or both.

In June 2022, the Supreme Court held that EPA lacked the statutory authority under Section 111(d) of the CAA to require such generation shifting. The Court noted that, historically, EPA had applied a technology-based approach that focuses on improving emissions, such as efficiency improvements, fuel-switching and air pollution controls, and had never looked to a "system" that would reduce pollution simply by shifting polluting activities from dirtier to cleaner sources.

The Court explained that the case implicated the "major questions doctrine", under which courts

expect Congress to speak clearly if it wishes to assign decisions of vast economic and political significance to an agency. It concluded that Congress had not clearly granted such authority to EPA under Section 111(d) of the CAA.

Despite this decision, EPA has other means to address carbon dioxide and other greenhouse gas emissions. For example, it could impose more stringent requirements for controlling emissions at the source or strengthen national ambient air quality standards for ozone or particulate matter, which contribute to greenhouse gas emissions. Congress could also assist by passing new legislation that addresses greenhouse gas emissions or clearly grants broader regulatory authority to EPA. Furthermore, the states could play a part through their laws and policies.

Changes to NEPA Implementing Regulations

The final rule of the Council on Environmental Quality (CEQ) amending its regulations implementing the National Environmental Policy Act (NEPA) became effective on 20 May 2022. The revisions reverse three modifications implemented by the Trump administration in 2020.

- First, 40 CFR 1502.13 addresses the “purpose and need” requirement of an Environmental Impact Statement (EIS). When reviewing an application for authorisation, agencies develop a purpose and need statement based on the proposed action and alternatives. The 2020 rule amendments modified the definition of “reasonable alternatives” and only required the consideration of “alternatives that are technically and economically feasible” based on the applicant’s goals and the agency’s statutory authority. CEQ removed the references to statutory authority and the applicant’s goals to ensure informed decision-making, giving agencies discretion

to consider all relevant factors when developing a purpose and need statement.

- Second, the 2020 rule amendments to 40 CFR 1507.3 included “ceiling provisions” that made CEQ’s NEPA regulations the maximum requirements agencies could include in their NEPA procedures. CEQ removed the ceiling provision and gave agencies the discretion to implement their NEPA regulations beyond the CEQ regulatory requirements.
- Third, 40 CFR 1508.1(g) now provides a single definition of “effects” or “impacts”, which includes direct effects, indirect effects and cumulative effects. This change clarifies and simplifies the language from the 1978 regulations. The 2020 rule amendments limited the analysis to effects that are “reasonably foreseeable and have a reasonably close causal relationship”. CEQ removed the tort law “but for” concept of a causal relationship but kept the phrase “reasonable foreseeability” because it is a longstanding principle of NEPA.

Proposed Revision of Clean Water Act Wetland Regulations

In November 2021, the Biden administration made strides to overturn a Trump-era Clean Water Act (CWA) rule. The Biden EPA announced the signing of a proposed rule that would redefine “waters of the United States” and reverse the Trump EPA’s Navigable Waters Protection Rule.

The proposed rule would hold that waters that meet either the “relatively permanent” standard or the “significant nexus” standard would generally be classified as “waters of the United States” and, as a result, a permit under Section 404 of the CWA would be required for development in such wetlands or other waters. The rule would reportedly extend regulatory jurisdiction to hundreds of thousands of small streams, wetlands and other waterways across the US. Simultane-

ously, the rule would impose stricter limitations on builders, oil and gas developers, farmers and others who complained that previous federal overreach improperly restricted operations in gullies, creeks and ravines on farmland and other private property.

The Supreme Court, at the same time, is wrestling with the issue of the proper scope of “waters of the United States” under the CWA. In *Sackett v EPA* (8 F.4th 1075 – 9th Cir. 16 August 2021), the federal court of appeals held that Idaho landowners need a CWA permit to build a home on their property since the land is wetlands located 30 feet from a tributary of a creek that feeds into Priest Lake. The Supreme Court accepted the appeal of that decision, limited to the question of whether the court of appeals set forth the proper test for determining whether wetlands are “waters of the United States” under the CWA. The Supreme Court heard oral argument in the case on 3 October 2022, and a decision is expected in early 2023.

The Supreme Court’s decision in *Sackett* will hopefully bring some clarity to EPA, the US Army Corps of Engineers (which handles Section 404 permitting) and the regulated community with respect to wetlands and other waters that are subject to CWA jurisdiction and permitting requirements.

Revisions to the American Society for Testing and Materials (ASTM) Standard for Phase I Environmental Site Assessments (ESAs)

In March 2022, EPA issued a proposed and a direct final rule approving the ASTM revised standard for conducting Phase I ESAs (87 FR 14224 and 87 FR 14174, respectively). A Phase I ESA that meets the requisite ASTM standard allows its users (eg, prospective purchasers and tenants) to satisfy the requirements for con-

ducting all appropriate inquiries and potentially qualify for landowner liability protections under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). The new standard – ASTM E1527-21 – was set to go into effect on 13 May 2022 unless EPA received adverse comments. EPA did receive adverse comments and withdrew the direct final rule on 2 May 2022 to allow it to address the comments (87 FR 25572).

The main changes in the 2021 standard include the addition of per- and polyfluoroalkyl substances (PFAS) as substances referred to as “emerging contaminants” that can be included in a Phase I ESA as a “Non-Scope Consideration”. Since Phase I ESAs cover releases of hazardous substances, and PFAS are not yet CERCLA hazardous substances, PFAS are not required to be assessed under the 2021 standard, but can be at the option of the user. The definition of a “recognised environmental condition” was also clarified to apply only to releases of hazardous substances “in, on, or at the subject property” instead of “in, on, or at a property” as defined in the current standard. Also, the revised standard requires that the following standard historical resources be reviewed if they are reasonably ascertainable and likely to be useful, based on the judgment of the environmental professional:

- aerial photographs;
- fire insurance maps;
- local street directories; and
- historical topographic maps.

The final action will not have a second comment period but will address the comments received on whether the current ESA standard (ASTM E1527-13) will terminate upon the adoption of ASTM E1527-21 and whether and exactly which PFAS will be “scope” or “non-scope” items

under a Phase I ESA. At the time of writing, only two specific PFAS are under consideration as CERCLA hazardous substances; under the March 2021 direct final rule, CERCLA hazardous substances are considered to be within the scope of the ASTM E1527-21 standard.

No timetable has been provided for EPA to issue its final rule. Because EPA regulations approving the ASTM E1527-21 standard are not final, the current approved ASTM Standard (ASTM E1527-13) should be the minimum standard used to conduct Phase I ESAs. To cover all bases, until regulations approving the ASTM E1527-21 standard are finalised, a user of the Phase I ESA may want to require that the ESA meet both the ASTM E1527-13 and ASTM E1527-21 standards.

EPA's Proposed Designation of PFOA and PFOS as CERCLA Hazardous Substances

In September 2022, EPA published in the Federal Register a proposed rule designating PFAS as “hazardous substances” under CERCLA (87 FR 54415). The specific chemicals designated in the proposal are perfluorooctanoic acid (PFOA) and perfluorooctanesulfonic acid (PFOS). Up to this point, EPA’s regulation of PFAS chemicals has been somewhat limited. Rather, the states have taken the lead in establishing PFAS standards in their respective states.

Because of historical releases and their resistance to natural degradation, PFOA and PFOS are common contaminants in the environment. They have historically been used in several manufactured goods and industrial applications, such as food packaging and preparation, commercial household products such as stain- and water-repellent fabrics and non-stick products, and in certain firefighting foams. Although the principal manufacturers of PFOA and PFOS phased out

their production in the early 2000s, PFOA and PFOS can still be manufactured domestically for certain uses and can be found in imported products manufactured internationally.

The designation of these PFAS chemicals as CERCLA hazardous substances may have far-reaching implications for manufacturers and users of PFAS products. PFAS are generally referred to as “forever chemicals” and are present at many sites throughout the world. Therefore, it is anticipated that the PFAS designation may significantly increase the number of National Priority List (NPL) sites and the number of potentially responsible parties at such sites, or the reopening of closed NPL sites.

In addition, once these PFAS chemicals are designated as CERCLA hazardous substances, the compliance with release reporting requirements under CERCLA and the Emergency Planning and Community Right-to-Know Act (EPCRA) will be mandated. These requirements provide that any person in charge of a vessel or an offshore or onshore facility must immediately report a release of such hazardous substance at or above the reportable quantity as soon as they have knowledge of such to the federal, state, tribal and local authorities (40 CFR 302.6 and 40 USC 304). The proposed designation lists the reportable quantity for PFOA and PFOS at one pound, but states that EPA may consider issuing a regulation adjusting this reportable quantity “[o]nce EPA has collected more data on the size of releases and the resulting risks to human health and the environment” (87 FR 54415, 54416).

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Jones Walker LLP offers a full range of environmental counselling, litigation, transactional and regulatory services throughout the USA, with its main practice in the south-eastern region of the country, including in Texas, Louisiana, Mississippi, Alabama, Georgia, Florida 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, real estate developers, and other businesses and their employees in environment-related

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USA TRENDS AND DEVELOPMENTS

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