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Environmental Law 2021

USA: Trends & Developments

Boyd A. Bryan, Alex P. Prochaska,
Meghan E. Smith and Elise Henry
Jones Walker LLP

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Trends and Developments

Contributed by:
Boyd A. Bryan, Alex P. Prochaska, Meghan E. Smith and Elise Henry
Jones Walker LLP see p.9

A Change of Administration

The Trump Administration was focused on rolling back many Obama-era environmental regulations and policies. President Biden is clearly intent on returning the favour. On the day of his inauguration, President Biden signed Executive Order 13990 which, among other things, states that the policy of his Administration includes reducing greenhouse gas emissions and prioritising environmental justice. The Executive Order also directed federal agencies to immediately review and take action to address the promulgation of federal regulations and other actions during the Trump years that conflict with these objectives and "*immediately commence work to confront the climate crisis*". Several of these changes and other developments are discussed below.

Climate Change and Alternative Energy

President Biden has referred to climate change as an "existential threat" and has pledged to remake much of the US economy to address reducing the greenhouse gases introduced into the atmosphere by anthropogenic activities. A narrowly divided Congress continues to squabble over what legislation addressing the President's plans should look like, and – as of publication – no major sea-shifting piece of legislation has been approved.

The pending "Build Back Better" plan includes proposed funding to help reach the country's goal of reducing economy-wide emissions to net-zero by 2050, invest in green infrastructure, and fund investment in historically marginalised communities. Biden has also issued a number of executive actions aimed at curbing the development of fossil fuels and spurring development of alternative energy, including an order that the USA will rejoin the Paris Accords. Some of this agenda is already facing judicial challenges in the courts: Biden's "pause" on new federal oil and gas leases has been enjoined by a federal district court. Louisiana v Biden, 2021 U.S. Dist. LEXIS 112316 (W.D. La. 15 June 2021).

Meanwhile, industry continues to develop mitigated or curative projections that are technology-forcing, such as: geo-engineering (eg, solar radiation modification, stratospheric aerosol injection, carbon capture and storage – CCS); the United Nations' 2018 Intergovernmental Panel on Climate Change; and the push for renewables, green buildings and electric vehicles.

Some states are moving ahead with renewable portfolio standards (RPS), also known as renewable electricity standards. Although there is currently no RPS programmes at the national level, some 29 states and the District of Columbia have such policies in effect. These policies are updated and require or encourage electric producers to supply a minimum share of electricity from renewable resources.

Wind, solar, geothermal, biomass, hydroelectricity, landfill gas, municipal solid waste and tidal energy are among the resources to be utilised. Between mandated standards and voluntary goals, the state programmes have variable structures, CO_2 trading systems, rules and enforcement, sizes, and interim target percentages. They include minimum targets for particular renewables that are locally preferred, along

with "escape clauses" if renewal costs of generators are too high. Meanwhile, some argue that embedded material and energy costs negate anything being 100% renewable.

Environmental Justice

In 1994, President Clinton incorporated the concept of environmental justice into federal policy through Executive Order 12898. The Executive Order required each major federal agencies to make achieving environmental justice part of its mission by identifying and addressing *"disproportionately high and adverse human health and environmental effects of its programs, policies, and activities on minority populations and low-income populations"*. It also directed the agencies to develop their own environmental justice strategies, and created an interagency Federal Working Group on Environmental Justice to, among other things, provide guidance to agencies on criteria for identifying such effects.

Shortly after taking office, President Biden expanded upon President Clinton's actions and made it clear that environmental justice is one of his Administration's highest priorities. His Executive Order 14008 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*". It also states the Administration's policy is "*to secure environmental justice and spur economic opportunity for disadvantaged communities that have been historically marginalized and overburdened by pollution and underinvestment in housing, transportation, water and wastewater infrastructure, and health care*".

As directed, various federal agencies have developed their own guidance and criteria for identifying environmental justice communities and addressing human health and environmental effects on them, and they are not all the same. As a result, it is important to consult the guidance of the particular agency with permitting authority over a proposed project.

At its core, an environmental justice analysis requires consideration of the composition of the area affected by a project. Environmental justice communities can include not only those with minority or low-income populations, but also Native American and perhaps other disadvantaged communities. Under the Biden Administration, a permit applicant will likely need to submit more in-depth information regarding the project's proximity to these communities and its human health, environmental and other impacts; these issues will receive heightened scrutiny by the permitting agency. Recent agency actions have already shown this to be the case.

Regulatory and Enforcement Changes under Biden

Revocation of Keystone XL pipeline permit

In March 2019, President Trump granted the developer of the Keystone XL pipeline a Presidential permit to construct, connect, operate and maintain pipeline facilities at the international border of the USA and Canada. This was a controversial pipeline for the transport of oil from tar sands in Canada to refineries in the USA. On his first day in office, President Biden revoked the Presidential permit, finding that it would be inconsistent with the nation's prioritising of the development of a clean energy economy and would hurt its credibility and influence in urging other countries to take ambitious climate action. The pipeline developer has since abandoned the project.

Navigable Waters Protection Rule

The Trump-era Navigable Waters Protection Rule (NWPR) was published by the EPA and the

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US Army Corps of Engineers (COE) and became effective in 2020. It applied the Clean Water Act (CWA) more narrowly than the 2015 rule promulgated under Obama, which had been previously repealed. In June 2021, the Biden EPA and COE stated that the NWPR has resulted in a significant reduction in the waters protected under the CWA and announced their intent to revise the definition of "waters of the United States". On 30 August 2021, a US district court vacated and remanded the NWPR back to the EPA and the COE for reconsideration; Pasqua Yaqui Tribe v EPA, 2021 U.S. Dist. LEXIS 163921, at *16 (D. Ariz. 30 August 2021). In the meantime, the agencies have halted implementing the NWPR and are interpreting "waters of the United States" consistent with the pre-2015 regulatory regime until further notice.

Water Quality Certification Rule

Section 401 of the CWA prohibits federal agencies from issuing a permit to conduct any activity that may result in any discharge into waters of the USA unless a Section 401 water quality certification is issued, verifying compliance with water quality requirements, or certification is waived. States and authorised tribes where the discharge would originate are generally responsible for issuing water quality certifications.

In June 2020, the Trump EPA finalised the Water Quality Certification Rule (WQC Rule) (84 FR 42210) which restricts the ability of states and tribes to deny water quality certifications for reasons other than water quality concerns, and clarifies the timeline within which states and tribes must make a decision on a water quality certification application. On 2 June 2021, the Biden EPA published its intent to reconsider and revise the WQC Rule consistent with the principles outlined in the EO 13999 (86 FR 29541). It is expected that the upcoming rule revision will reverse many of the changes made in the WQC Rule.

Migratory Bird Treaty Act

On 4 October 2021 the US Fish and Wildlife Service (FWS) published a final rule (86 FR 54642) revoking a 7 January 2021 rule published in the final weeks of President Trump's term that de-criminalised unintentional takings under the Migratory Bird Treaty Act (MBTA). That same day, the FWS also published an advanced notice of proposed rulemaking (86 FR 54667) to authorise incidental taking under certain conditions consistent with the MBTA, and posted Director's Order No 225 wherein it acknowledges pursuing enforcement for all activities where the incidental taking of migratory birds occurs, but states that the FWS will focus its enforcement efforts on activities where incidental takes are both foreseeable and where the proponent fails to implement known beneficial practices to avoid or minimise such incidental takes.

Endangered Species Act

The Trump FWS and the National Marine Fisheries Service (NMFS) finalised several rules under the Endangered Species Act, which focused on:

- when federal agencies are required to consult with FWS and the NMFS (known as a "Section 7 consultation") (84 FR 44976);
- the procedure to follow when agencies are considering excluding areas from critical habitat designation (85 FR 82376);
- the definition of "habitat" (85 FR 81411);
- retracting the blanket default rule that extends the same protections for endangered species to threatened species where the agency has not adopted a specific rule (84 FR 44753); and
- the economic impacts of a listing determination that must be considered by the agency (84 FR 45020).

On 4 June 2021, the Biden FWS and NMFS announced that they would initiate rulemaking

proposing to essentially undo the five rules finalised under Trump.

National Environmental Policy Act

The National Environmental Policy Act (NEPA), 42 USC § 4321, et seq, requires a federal agency to take a "hard look" at the environmental consequences of any federal action – including federal permit decisions – "*significantly affecting the quality of the human environment*".

In July 2020, the Council on Environmental Quality (CEQ) under Trump issued a rule intended to streamline the NEPA process and make it more predictable. Among other things, the rule removed language referring to "indirect" and "cumulative" effects, instead focusing on whether the environmental consequences of a project are causally related and reasonably foreseeable, and limited the length and time period for issuance of environmental assessments and environmental impact statement.

On 7 October 2021, the CEQ under Biden published a proposed rule to modify certain procedural provisions of NEPA and to "*generally restore regulatory provisions that were in effect for decades before being modified in 2020*" (86 FR 55757). The revisions will be made in a two-phase approach. Phase 1 will be to restore the definition of "effects", "purpose and need" and the agency procedures in implementing the NEPA regulations. Phase 2 revisions are to be announced in November 2021.

Until the revisions are in place, there is uncertainty as to how the agencies will implement the 2020 NEPA rule. For example, in April 2021, the Secretary of the Department of the Interior issued Secretarial Order No 3399 which states that "*Bureaus/Offices will not apply the 2020 Rule in a manner that would change the application or level of NEPA that would have been applied to a proposed action before the 2020 Rule went into effect on September 14, 2020*".

Methane Rule

The Trump EPA sought to roll back New Source Performance Standards (NSPSs) that regulated VOC and methane emissions from certain segments of the oil and gas sectors. The so-called Review Rule in the most noteworthy in that it eliminated the transmission and storage segment from regulation under the NSPSs, and therefore removed the VOC and methane emission limitations for new and existing sources under this segment. It also rescinded methane standards for the production and processing segments and required the EPA make a separate finding that the pollutant from the specific source category "significantly" contributes to air pollution which may reasonably be anticipated to endanger public health or welfare before it can regulate a pollutant from a source category under 42 U.S.C. § 7411(b)(1). On 30 June 2021, President Biden signed a Congressional Review Act resolution that revoked the Review Rule. As a result, Obama-era NSPSs for this segment are once again effective.

Supplemental Environmental Projects

The Environmental & Natural Resources Division (ENRD) of the Department of Justice (DOJ) under Trump issued various memoranda eliminating the use of Supplemental Environmental Projects (SEPs) in civil environmental enforcement settlements. SEPs are environmental projects that a defendant in an enforcement action can perform and apply as a credit against the assessed civil penalty. On 4 February 2021, however, the ENRD under Biden issued a memo withdrawing the prior directives of the Trump DOJ. Following suit, in April 2021, the EPA Acting Assistant Administrator Larry Starfield issued a memorandum encouraging the use of SEPs.

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Notable Cases

Affordable Clean Energy Rule litigation

In June 2019, the EPA under President Trump issued the Affordable Clean Energy (ACE) rule which established emission guidelines for states to use in their development of unit-specific standards of performance that address greenhouse gas emissions at existing coal-fired electric utility generating units (84 FR 32520). The ACE rule was finalised along with two related but independent rulemaking actions that repealed the Obama-era Clean Power Plan (CPP Repeal Rule) and revised the implementing regulations for ACE.

On 21 January 2021, the U.S. Court of Appeals for the D.C. Circuit in Am. Lung Ass'n v EPA, 985 F.3d 914 (D.C. Cir. 2021) vacated the CCP Repeal Rule and remanded to the EPA for further proceedings consistent with its opinion. Due to the uncertainty of the impacts of the vacatur, on 12 February 2021, the EPA issued a memorandum indicating that the vacatur did not reinstate, and the states are not expected to develop and submit state plans under the Clean Power Plan.

On 22 February 2021, the court granted the EPA's request for a partial stay of vacatur of the CCP Repeal Rule, which clarified that currently no rules are in place under Section 111(d) of the Clean Air Act (CAA) governing greenhouse gas emissions from existing electric generating units. EPA has yet to propose new regulations under 111(d). However, in the background, there are three writs of certiorari asking the Supreme Court to decide whether EPA can regulate greenhouse gases from existing power plants under 111(d).

Permit requirements for discharges to groundwater

A period of 16 months after the US Supreme Court issued its opinion that discharges that travel through groundwater before reaching navigable waters may require CWA permits if the end result is the "functional equivalent of a discharge" (Cty. of Maui v Haw. Wildlife Fund, 140 S. Ct. 1462, 1476 (23 April 2020)), the litigants that lent their names to the decision received the district court's opinion on remand (Haw. Wildlife Fund et al. v Cty. of Maui, 2021 U.S. Dist. LEXIS 131803 15 July 2021, as amended 26 July 2021)). The Supreme Court case handed down seven factors that should be used in determining when an indirect groundwater discharge should be regulated under a NPDES permit, while acknowledging that the lack of a bright line rule could lead to difficulties in application of the test – namely, "*it does not, on its own, clearly explain how to deal with middle instances*".

The facts involved Maui's underground injection of partially treated waste water located a half a mile from the Pacific Ocean. Many thousands of gallons of their waste water seeped into the ocean. The waste water twisted, migrated, dispersed, diluted, underwent microbial and chemical transformation, and attenuated through one-and-a-half miles of groundwater, subsurface volcanic rock, loam, limestone, lava basalt, and upstream groundwater before entering the ocean.

Plaintiffs traced the waste water to the Maui facility through various dye studies. Maui disputed the amounts, distance and time involved in their groundwater seeps. The district court handled the case through summary judgment, even though there were some disputed facts. The court found these facts were not material and could not be resolved by a trial. It followed the Supreme Court's seven factors in resolving the dispute.

1. Time elapse – plaintiffs and defendants disputed between a few months and over a year before the facility seepage reached the ocean. The court found that, regardless, "many years" were not involved in the discharge, per Supreme

Court dicta. The court in dicta also compared a speedier theoretical time of flow through a pipe and slowly through groundwater but did not use that time differential in its decision.

2. Distance – again relying on Supreme Court dicta, the court found that "many years" were not involved in the discharge, whether it was half a mile or one-and-a-half miles from the Maui water recycling facility in question. A distance of 50 miles, again high court dicta, seemed key as being too far.

3. Nature of subsurface solid material – the court agreed that the waste water materially attenuated through its subsurface voyage to the sea.

4. Dilution – again dilution occurred. The court noted the possibility of irrigation drainage comingling into the facility's waste water, but still found pollutants entered the ocean from the facility.

5. Amount – even if only 2% of pollutants from the facility entered the ocean, the amount was significant because even a small percentage could reach millions of gallons over months. (The court compared it to COVID-19 affecting a small percentage of people, which could still amount to millions in large populations.)

6. Manner or area of entrance – the court found this to be irrelevant.

7. Identity – the court found that dye tests still traced the facility's discharges, despite possible commingling with irrigation water discharges.

The district court did not consider the EPA's eighth factor of facility design. It concluded on balance of the factors with the ecosystem concerns, that factors 1, 2, and 5 strongly favoured comparability with a point source discharge from the facility requiring an NPDES water discharge permit, and held that Maui is required to have such a permit. It is presently unknown if Maui will appeal again or settle with a recycling system to supply irrigation water costing millions of dollars.

The court gave deference to time, distance and volume. It did not consider EPA's facility design factor that could attenuate groundwater pollution in another case that may not be so close to a waterway. The Maui decision may open the door to multiple new permit requirements for landfills, industries, etc, whose groundwater is presently unregulated.

Environmental, Social and Governance Policies

In the past several years, stakeholders have demanded more sustainability from corporations. Environmental, social and governance (ESG) policies have emerged as a way to hold companies accountable for their operations and a way that environmentally and socially conscious investors can screen potential investments. ESG policies had their origins in the UN-supported Principles for Responsible Investment (2006). On the environmental front, climate change is a major focus when it comes to ESG policies.

In September 2021, the US Securities and Exchange Commission (SEC) issued an "illustrative letter" that the Division of Corporation Finance may send to companies to "monitor and enhance" compliance with climate-related disclosure requirements. The letter signals the SEC's growing focus on a company's social responsibility and sustainability policies and climate risk factors. For example, the SEC may request information from companies related to operational or financial impacts from the physical effects of climate change, including increased severe weather.

Companies both large and small should be mindful of these issues and develop ESG policies that take the causes and effects of climate change into consideration.

COVID-19 Impacts on US Environmental Law

The COVID-19 pandemic has had a number of impacts on environmental law. First, the US EPA instituted a temporary enforcement discretion policy for non-compliance due to COVID-19 from March 2020 to August 2020. Generally, under the policy, the EPA would not expect to seek penalties for non-compliance with routine monitoring and reporting obligations that are the result of the COVID-19 pandemic. This policy drew criticism and resulted in uneventful lawsuits from several states and environmental groups.

Second, the EPA instituted a number of enforcement actions in the 2020 financial year based upon violations of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) against companies allegedly making false claims that their disinfectants work against COVID-19. This included 447 civil enforcement stop sale, use or removal orders, import refusals, opening 60 criminal cases and providing compliance information to consumers.

Third, because of the respiratory and other health effects of contracting COVID-19, concerns have been raised that the pandemic has increased the health risks of air pollution, challenging the existing assumptions and risk analyses embedded in laws such as the CAA. Some have asserted that if COVID-19 leaves populations sicker than they were prior to the pandemic, pre-COVID-19 risk assessments and previously "tolerable" levels of air pollution under existing environmental regulations may lead to disproportionate harm.

Finally, during the first several months of the pandemic there was considerable attention paid to the noticeably lower air and water pollution levels resulting from work-from-home policies, reduced travel and reduced industrial activities. It is apparent that these changes will likely not be as long-lasting or quite as impactful as once thought. However, for climate change activists, this experiment demonstrated that serious and urgent lifestyle change to reduce climate change impacts is not impossible.

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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 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 multimedia approaches in administrative, civil, and criminal environmental proceedings and litigation and environmental issues in transactions.

AUTHORS

Boyd A. Bryan is a partner and co-chair of Jones Walker's environmental team. His broad experience includes environmental issues in transactions, regulatory issues from permitting to compliance advice, defence of agency enforcement actions and environmental litigation. Boyd is a former chairman of the Environmental Law Section of the Louisiana State Bar Association and a frequent author and speaker on environmental law issues.

Alex P. Prochaska is a special counsel on the environmental team whose practice focuses on defending clients in enforcement actions brought by state and federal environmental regulatory agencies and counselling buyers and sellers of industrial facilities. Before joining Jones Walker, he spent six years as an attorney with the Louisiana Department of Environmental Quality. Alex is secretary of the Environmental Law Section of the Louisiana State Bar Association and a member of the Environmental & Natural Resources Law Section of the State Bar of Texas.

Contributed by: *Boyd A. Bryan, Alex P. Prochaska, Meghan E. Smith and Elise Henry,* ***Jones Walker LLP***

Meghan E. Smith is a partner and co-chair of Jones Walker's environmental litigation team, focusing her practice on environmental/toxic tort, energy and construction litigation, and arbitration. She also advises clients on regulatory compliance issues. Meghan has worked in defence of numerous major corporations, including oil and gas companies, chemical manufacturers, and engineering/construction firms in state and federal litigation and private arbitration.

Elise Henry is an associate at Jones Walker. She focuses on environmental regulatory compliance and litigation, assisting clients in a variety of industries, including chemical and manufacturing, with environmental and related legal challenges. Elise has experience working with companies and governmental agencies to find practical solutions to enforcement and compliance issues.

Jones Walker LLP

201 St. Charles Ave
New Orleans
LA 70170-5100
USA

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