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TRENDS AND DEVELOPMENTS:

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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.

Trends and Developments

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Jones Walker LLP offers a full range of environmental counselling, litigation, transaction and regulatory services with its main practise in the Gulf South, including in Texas, Louisiana, Mississippi, Alabama and the waters of the Gulf of Mexico. The firm has more than 30 environmental lawyers practising in key markets across its footprint, including Houston, New Orleans, Baton Rouge, Jackson, Birmingham and Mobile. For many years, Jones Walker 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 environment-related

disputes and transactions. Members of the group 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. Jones Walker addresses virtually all environmental aspects of transactions by working with environmental consultants, engineers, lenders, and the federal, state and local regulatory agencies and governmental bodies. Its team, consisting of criminal defence and environmental counsel, has successfully defended clients subject to criminal probes by the US Environmental Protection Agency.

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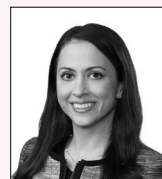
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While the fundamental principles of environmental law in the USA are well established, a number of changes in priorities, policies and regulations have occurred under President Trump's administration. This article discusses some of those changes and related trends and developments.

Developments Under the Trump Administration

The EPA's Strategic Plan

In February 2018, the US Environmental Protection Agency (EPA) released its Strategic Plan for fiscal years 2018-22. The Strategic Plan re-emphasises the EPA's 'Back-to-Basics' agenda, which has three over-arching goals:

- refocusing the EPA back to its core mission of providing Americans with clean air, land and water, and ensuring chemical safety;
- restoring power to the states through co-operative federalism; and
- administering the law as Congress intended and prioritising the agency's fulfilment of its statutory obligations and efficiencies in its processes, to provide consistency and certainty to the regulated community.

Many of the Trump administration's actions relate to these stated goals.

Changes in Federal Enforcement

Several shifts in priorities and practices have taken place in the area of federal enforcement.

In January 2018, the EPA's Office of Enforcement and Compliance Assurance (OECA) issued an interim guidance instructing the EPA's regional administrators to move towards a more collaborative partnership with authorised states. The guidance states that with respect to inspections and enforcement, the EPA will generally defer to authorised states as the primary day-to-day implementer of their authorised or delegated environmental programmes. Exceptional situations, however, may warrant the EPA's involvement, such as where an EPA audit indicates that the state's programme is deficient, emergencies or other situations involving significant risk to public health or the environment and serious violations that need to be investigated or addressed by the EPA's criminal enforcement programme (see the 'Interim OECA Guidance on Enhancing Regional-State Planning and Communication on Compliance Assurance Work in Authorized States', dated 22 January 2018).

In June 2017, the Acting Assistant Attorney General issued a memorandum prohibiting the Department of Justice (DOJ) and US attorneys from entering into settlements of environmental claims or charges that provide for a payment or loan to a non-governmental person or entity that was not a party to the dispute or directly harmed by the conduct, subject to certain exceptions. This change reportedly arose out of a concern that the Obama administration had used

settlements to compel defendants to pay funds to third-party groups that were favoured by the administration (see the memorandum titled 'Settlement Payments to Third Parties in ENRD Cases', dated 5 June 2017).

In October 2017, former EPA administrator Scott Pruitt issued a directive terminating the agency's engagement in the practice of 'sue and settle', which generally 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 has the effect of creating EPA priorities and rules based on negotiations with environment groups, outside the normal administrative process that would provide the opportunity for input from states or other affected parties. The directive states that the days of this "regulation through litigation" are terminated (see the 'Directive Promoting Transparency and Public Participation in Consent Decrees and Settlement Agreements', dated 16 October 2017).

In November 2017, Attorney General Jeff Sessions issued an internal memorandum to DOJ components and employees noting that DOJ had in the past published guidance documents (or similar instruments such as letters to regulated entities) that effectively bind private parties without undergoing the notice-and-comment rule-making process. The memorandum states that DOJ will no longer engage in the use guidance to circumvent the rule-making process. It prohibits DOJ from issuing guidance documents that purport to create rights or obligations binding on persons or entities outside the executive branch (including state, local, or tribal governments) and states that guidance should not create binding standards by which DOJ will determine compliance with existing requirements (see the Attorney General memorandum titled 'Prohibition on Improper Use of Guidance Documents', dated 16 November 2017). Then, in January 2018, the DOJ Associate Attorney General issued an internal memorandum to the heads of its civil litigating components and US attorneys stating that the DOJ may not use its enforcement authority to convert agency guidance documents effectively into binding rules, nor may DOJ litigators use non-compliance with guidance documents as a basis for proving violations of applicable law in affirmative civil enforcement cases, including those based on environmental laws (see the memorandum titled 'Limiting Use of Agency Guidance Documents in Affirmative Civil Enforcement Cases', dated 25 January 2018).

In April 2018, the Assistant Administrator of the OECA issued an internal memorandum stating that — contrary to a suggestion in a 2015 enforcement memorandum issued under the Obama EPA — there is no default expectation that 'innovative enforcement' tools such as advanced monitoring and independent third-party verification of compliance with settlement obligations will routinely be sought as injunc-

tive relief in all EPA settlements, where such activities are not required by applicable law. Instead, the determination to include these elements of injunctive relief in a settlement is to be based on the facts and circumstances of each case (see the Memorandum titled ‘The Appropriate Use of Compliance Tools in Civil Enforcement Actions’, dated 3 April 2018).

In May 2018, the EPA announced a renewed emphasis on its audit policy (or voluntary self-disclosure policy), which is intended to encourage regulated entities — primarily through mitigation of civil penalties related to self-disclosed violations — voluntarily to discover, promptly disclose, expeditiously correct and take steps to prevent recurrence of environmental violations. Shortly thereafter, the EPA announced that it is in the process of developing a New Owner Clean Air Act Audit Program tailored to the oil and natural gas sector, and focused on, at a minimum, tank battery vapour control systems, where the EPA and states have seen significant non-compliance. This expands on the EPA’s 2008 ‘New Owner’ policy, which incentivises new owners of regulated facilities to make a clean start by addressing environmental non-compliance that began prior to the acquisition, through enhanced mitigation of civil penalties related to such non-compliance.

Expedited Permitting of Major Infrastructure Projects

In August 2017, President Trump issued an Executive Order requiring federal agencies to process environmental reviews and permitting decisions for major infrastructure projects as One Federal Decision. “Major infrastructure project” means an infrastructure project for which multiple permits by federal agencies will be required and the lead agency has determined that it will prepare an environmental impact statement (EIS) under the National Environmental Policy Act (NEPA). The Executive Order requires that each major infrastructure project has a lead federal agency and that the participating agencies use a single, co-ordinated process for compliance with NEPA and other applicable laws, including preparation of a single EIS and Record of Decision for the project. It sets a goal of reducing the time for processing environmental reviews and permit decisions to an average of approximately two years from publication of a notice of intent to prepare an EIS (see Executive Order 13807 titled ‘Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects’, dated 15 August 2017). Thereafter, the heads of 12 federal agencies executed a Memorandum of Understanding regarding the implementation of the One Federal Decision mechanism (see the ‘Memorandum of Understanding Implementing One Federal Decision Under Executive Order 13807’ executed in March and April 2018).

Executive Order 13807 and the Memorandum of Understanding include many principles that should help to improve efficiency and co-ordination in federal permitting.

The timing goals, however, are not mandatory and the permit processes required under the statutes applicable to the various agencies still must be followed.

Clean Air Act Developments

Several important changes have occurred relating to Clean Air Act (CAA) permitting and regulation.

In December 2017, former EPA Administrator Pruitt issued an internal memorandum to the EPA’s regional administrators to provide clarification and certainty regarding New Source Review (NSR) permitting of major modifications. The memorandum states that when a facility performs a pre-project analysis of projected emissions in accordance with the regulations, unless there is clear error (such as application of the wrong significance threshold), the EPA does not intend to ‘second guess’ the facility’s emissions projections. Instead, the EPA plans to focus its enforcement on the level of post-project actual emissions, not on pre-project emissions projections (see the memorandum titled ‘New Source Review Preconstruction Permitting Requirements: Enforceability and Use of Actual-to-Projected Actual Applicability Test in Determining Major Modification Applicability’, dated 7 December 2017).

In January 2018, the EPA’s Assistant Administrator issued an internal memorandum withdrawing the ‘once in, always in’ policy set out in a 1995 EPA guidance memo, on the grounds that it is contrary to the plain language of the CAA. This policy provided that a facility that is a “major source” of hazardous air pollutants (HAPs) on the first substantive compliance date of an applicable maximum achievable control technology (MACT) standard under Section 112 of the CAA must permanently comply with that standard, even if the facility was subsequently to become an area (minor) source by taking enforceable limits on its potential to emit (PTE) HAPs below the major source thresholds. Critics asserted that this policy served as a disincentive for major sources to implement voluntary reductions of its HAP emissions. In light of the withdrawal of the ‘once in, always in’ policy, a major source that agrees to an enforceable limit on its PTE HAPs and takes measures to reduce its HAP emissions below the applicable major source threshold may become an area source and will not be subject to the major source MACT standards, so long as its PTE remains below the applicable major source HAP thresholds (see the memorandum titled ‘Reclassification of Major Sources as Area Sources Under Section 112 of the Clean Air Act’, dated 25 January 2018).

In March 2018, former EPA Administrator Pruitt issued an internal memorandum that provides that facilities can now take into account projected emission increases and decreases from a proposed project at an existing facility in Step 1 of the process of determining whether the project will trigger the requirement to obtain an NSR permit. If emissions increases are projected to occur, the process moves to Step 2, which

evaluates whether the proposed project will result in a significant net emissions increase, considering other increases or decreases in actual emissions at the facility that are contemporaneous with the proposed project. Previously, accounting for emissions decreases from the proposed project was not allowed in the Step 1 analysis. The EPA explained that this interpretation is consistent with the language of the NSR regulations, provides clarity to permitting authorities and the regulated community, and accords with presidential priority of streamlining regulatory permitting requirements (see the memorandum titled 'Project Emissions Accounting Under the New Source Review Preconstruction Permitting Program', dated 13 March 2018).

In September 2018, the EPA issued a draft guidance on its interpretation of "adjacent" in the context of CAA permitting for all industries other than oil and gas. The NSR and Title V (major source) operating permit programmes apply to "stationary sources" where emissions exceed established thresholds. To determine what comprises a single source, three factors must be satisfied:

- the operations must be under common control;
- they must be located on contiguous or adjacent properties; and
- they must fall under the same major industrial classification (SIC) code.

The guidance explains that "contiguous" refers to operations that share a common boundary or border, or are otherwise in physical contact (with some allowance made for limited separation such as by a right of way). It explains that "adjacent" means operations that are not "contiguous", but are "near by" or in "physical proximity". Significantly, the guidance states that operations that are not near by or in physical proximity shall no longer be considered "adjacent" on the grounds that they share some "functional interrelatedness", such as through a pipeline, railway, or other dedicated conveyance. The EPA provided an opportunity for public review and comment on the draft guidance that ended in October 2018 (see the EPA's draft guidance titled 'Interpreting "Adjacent" for New Source Review and Title V Source Review in All Industries Other Than Oil and Gas', dated 4 September 2018).

In May 2018, former EPA Administrator Pruitt outlined a 'Back-to-Basics' process for the periodic review of the National Ambient Air Quality Standards (NAAQS) required by the CAA. The memorandum sets out five principles for the EPA to observe in future NAAQS reviews:

- meet statutory deadlines;
- address all CAA provisions for NAAQS reviews;
- streamline and standardise the process for development and review of key policy-relevant information;

- differentiate science and policy judgments in the NAAQS review process; and
- issue timely implementation regulations and guidance.

It states that these principles will help the EPA to meet its statutory obligations consistent with its commitment to cooperative federalism and the rule of law (see the memorandum titled 'Back-to-Basics Process for Reviewing National Ambient Air Quality Standards', dated 9 May 2018).

With respect to NAAQS reviews, in April 2018, the EPA issued a notice that it would retain the existing nitrogen dioxide NAAQS of 100 parts per billion (ppb) over one hour. The decision was issued in opposition to industry groups' requests to the EPA to consider easing the standard. Also, in a status report filed in a federal lawsuit in August 2018, the EPA reported that it does not intend to revisit the NAAQS for ozone issued by the EPA in 2015, which lowered the standard from 75 to 70 ppb. The status report noted that the EPA will consider revising the ozone NAAQS in connection with the next five-year review in 2020. Industry groups argue that the limit is too low, while environmental groups urge the EPA to tighten the standard.

CERCLA Developments

The primary federal statute that addresses clean-up of contaminated property is the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), also referred to as the Superfund statute. The EPA's Strategic Plan states that the agency will place particular emphasis on the top priority list (National Priorities List) of Superfund sites and implement the recommendations of the Superfund Task Force recommendations (created by the Trump EPA in May 2017) to accelerate the pace of clean-ups and promote site reuse.

To that end, in March 2018, President Trump signed the Brownfields Utilization, Investment, and Local Development Act (BUILD Act) into law, as part of the Consolidated Appropriations Act of 2018. The BUILD Act amends several provisions of CERCLA to provide additional protections, resources and incentives to redevelopment of brownfields, which are properties with redevelopment or reuse complications resulting from actual or potential contamination. The EPA estimates that there are more than 450,000 brownfield sites in the USA.

The BUILD Act extends the statutory 'bona fide prospective purchaser' defence to tenants who conduct an appropriate environmental site assessment and lease the property with knowledge of existing contamination and take "reasonable steps" after entering into the lease. It also provides liability protection to local governments that acquire brownfields by seizure, tax foreclosure, abandonment, bankruptcy, or other means. Further, the Act reauthorises and doubles the funding for the brownfields programme; provides that local governments are eligible to receive EPA brownfields revi-

talisation grants even if they did not conduct an appropriate environmental site assessment prior to their acquisition of the property (provided they did not cause the contamination); expands eligibility for such grants to include certain non-profit organisations, limited liability companies, limited partnerships and community development entities; increases the funding limit for remediation grants; allows eligible entities to use up to 5% of their brownfields grant funding for administrative costs; and incentivises clean energy projects on brownfield sites and the redevelopment of waterfront brownfield sites.

Clean Water Act Developments

In 2015, the EPA and the United States Army Corps of Engineers (USACE) under the Obama administration finalised a rule that addresses the Clean Water Act (CWA) definition of “waters of the United States”, sometimes referred to as WOTUS (the 2015 Rule). They explained that the purpose of the 2015 Rule was to clarify the scope of waters of the United States that are subject to their jurisdiction and, therefore, require a permit from the USACE to be developed, and asserted that the rule narrowed their jurisdiction. Several states and other opponents of the 2015 Rule sued, questioning the scope and legal authority for the rule, and arguing that it significantly and improperly expands the EPA’s and the USACE’s jurisdiction over purported wetlands on inland property. As a result of several federal court decisions, at present the 2015 Rule is effective in 22 states, the District of Columbia and the US territories, but the pre-2015 Rule regulations apply in the remaining states where the rule has been stayed.

Meanwhile, in February 2017, President Trump issued an Executive Order directing the EPA and the USACE to review the 2015 Rule and publish for notice and comment a proposed rule rescinding or revising the rule, as appropriate and consistent with law. Pursuant to the Executive Order, as Step 1 in a two-step process, the EPA and the USACE have published for notice and comment a proposed rule-making to repeal the 2015 Rule and recodify the regulations that existed before the 2015 Rule (see 83 Fed. Reg. 32227 (12 July 2018)). That process is ongoing. The EPA and the USACE have also announced their plan, as Step 2 in the process, to propose a new rule-making to revise the definition of “waters of the United States” consistent with Justice Scalia’s opinion in *Rapanos v United States*, 547 U.S. 715 (2006).

Rollback of Obama-Era Regulations

Many environmental regulations promulgated under the Obama administration have been, or are in the process of being, rescinded or replaced under the Trump administration. Examples include the EPA’s proposed Affordable Clean Energy Rule, which addresses greenhouse gas emissions from coal-fired electric generating units and power plants, and replaces the Clean Power Plan adopted under the Obama administration (which was stayed by the US Supreme Court in 2016); the EPA’s announcement of its plans to revise the greenhouse gas emissions standards for 2022-25-model cars and light trucks; the Mercury and Air Toxics Standard rule, which addresses air emissions from coal and oil-fired power plants; the Department of the Interior’s delay of implementation of parts of the rule restricting methane emissions from natural gas wells on public and tribal lands; and the EPA’s and the USACE’s proposed repeal of the 2015 Rule under the CWA. In many cases, the Trump administration asserts that the prior administration overreached or exceeded its statutory authority in enacting the regulations.

Other Trends and Developments

The Trump administration’s policies and actions have predictably led to more assertive regulation and enforcement, and an increase in litigation against regulatory authorities and industry, by the states, tribes, local governments, non-governmental organisations and individuals. States and others also have increasingly stepped in to enact environmental laws that are in addition to or more stringent than the federal requirements. For instance, some states, local governments and businesses have moved forward with climate change initiatives, particularly following President Trump’s announcement in June 2017 that the USA will withdraw from the Paris climate accord.

The permitting of oil and natural gas pipelines has emerged as a particular battleground. A myriad of federal and state permits may be required for a pipeline project. Opponents concerned with the potential environmental impacts of a pipeline, or generally opposed to the use of fossil fuels and the development of additional infrastructure to bring them to market, have aggressively opposed these permits through public comments and lawsuits, with varying degrees of success. This opposition heightens the need for thoughtful planning and design by developers with respect to environmental issues and may frustrate the Trump administration’s efforts to streamline and hasten the permitting of these projects.

Federal and state initiatives have also created opportunities for those in the environmental and energy arena. For example, several states have taken action to encourage increased development of onshore and offshore wind, solar, geothermal, hydroelectric and other renewable energy sources, as well as energy storage. Also, the federal BUILD Act expands the opportunities for redevelopment and reuse of brownfield sites.

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Conclusion

While the Obama administration pursued a more progressive (and perhaps aggressive) approach to expanding the reach of environmental regulations and accelerating the rate of emissions and pollution reductions, the Trump administration has sought to reverse that trend and reduce the regulatory burdens on business to allow for more economic development, while still intending to achieve core environmental goals. This has resulted in changes in regulations and enforcement priorities that present opportunities and challenges for persons doing business in the USA. Additional changes are anticipated in the coming year.