June 2021 Regulatory Update

IN THIS ISSUE:

- **Clean Air Act**
- **Clean Water Act**
- **Endangered Species Act & National Environmental Policy Act**
- **Occupational Health & Safety Act**
- **Employment Law**

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This report only contains information on issues that have changed since the last edition. To view all Clean Air, Clean Water, Occupational Hazard and Safety, and Employment Law issues being tracked by SLMA, log into your member profile on www.slma.org.

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CLEAN AIR ACT

Prepared by Kilpatrick Townsend.

Plywood & Composite Wood Products MACT

Recent Developments. On April 13, 2021, EPA and other parties to the pending lawsuit submitted a Joint Motion to the Court to establish November 16, 2023 as the deadline for EPA to finalize the PCWP MACT. The Court is expected to approve the filing.

EPA has also informed the wood products industry that it is considering conducting HAP emission tests from certain wood products mill equipment as part of its effort to complete the PCWP MACT. SLMA is working with its industry partners on the potential action.

On October 13, 2020, several environmental groups petitioned the U.S. EPA to take action on the PCWP MACT. Petitioners assert that the agency has failed to set emission limits for unregulated hazardous air pollutants (HAPs), as well as process equipment such as kilns at lumber mills. In response to the Petition, SLMA and several other industry coalitions filed a Motion to Intervene in the case on November 12, 2020. EPA has filed a motion to hold the case in abeyance for 120 days to allow for time to consider the petitioner's request.

On August 13, 2020, EPA published it's Final Rule to update the PWCP Risk and Technology Review (RTR). Consistent with the previously proposed rule, the Final Rule concludes that control technologies for HAP emissions for the PCWP industry have not changed since the 2004 MACT was issued and that public health risks are acceptable within "an ample margin of safety." Based on this, the agency did not identify any new control technologies that should be considered when EPA revisits the PCWP MACT (EPA is currently working on the MACT rulemaking).

SLMA and its industry coalition have engaged with EPA regarding the upcoming MACT rulemaking and will continue to pursue dialogue with the agency in order to ensure that the MACT includes work practice standards that are flexible and reasonable for major source lumber producers. EPA is not expected to make any substantive proposals on the MACT rule until mid-2021.

Revisions to "Benefits & Cost" Analysis for Clean Air Act Regulations

Recent Developments. On May 13, 2021, EPA issued an interim final rule that rescinds the December 2020 rulemaking. The Biden administration had previously "frozen" the Rule in order to allow time for the new administration to conduct a review. Environmental groups are pushing EPA to go a step beyond the simple rescission of the new rule and are asking EPA to enact new rules to ensure a proper cost-benefit analysis going forward.

Background. On December 9, 2020, EPA finalized and signed its final rule for "Increasing Consistency and Transparency in Considering Benefits and Costs in the Clean Air Rulemaking Process." The Rule establishes a standardized process for considering costs and benefits when the agency considers rulemakings under the Clean Air Act.

Although longstanding presidential orders requiring cost-benefit balancing date back to 1981, one of the greatest impediments to implementation of the cost-benefit executive orders has been regulatory agencies such as EPA often have interpreted their statutes to limit their ability to fully engage in cost-benefit balancing and thus to comply with the longstanding presidential directives to do more good than harm.

CLEAN WATER ACT

Prepared by Kilpatrick Townsend.

EPA/Corps Rule to Clarify Jurisdiction of "Waters of the US"

Recent Developments. Newly appointed EPA Administrator Michael Regan offered comments to the Senate indicating that they may seek to find a compromise on the heavily disputed and litigated definition of "Waters of the U.S." He did not provide further details.

The Biden Administration is seeking the Stay of all pending litigation related to the WOTUS Rule in order to allow time for the new administration to review and potentially reconsider the rulemaking.

Background. A number of legal challenges have been filed by States and environmental groups in response to EPA's April 21, 2020 publication of its final rule defining "Waters of the US" (WOTUS) over which EPA will have regulatory jurisdiction under the Clean Water Act. The Final Rule seeks to clarify and simplify the definition of WOTUS and was issued in response to the Obama era WOTUS Rule that was finalized in 2015 and broadly expanded the reach of the federal government under the Act. The 2015 Rule was repealed in late 2019, and the current action seeks to "replace" the prior rule.

The revised definition includes four simple categories of jurisdictional waters, provides clear exclusions for many water features that traditionally have not been regulated, and defines terms in the regulatory text that have never been defined before. The final regulation excludes from EPA jurisdiction a number of water features, including the following of particular importance to private forest management:

- Ephemeral streams defined as flowing only in direct response to precipitation,
- Manmade ditches that do not flow into a regulated water, and
- Wetlands that do not touch, i.e., are not "adjacent to," a regulated water of the U.S.

ENDANGERED SPECIES ACT (ESA) & NATIONAL ENVIRONMENTAL POLICY ACT (NEPA)

Prepared by Kilpatrick Townsend.

Designation of Critical Habitat for the Black Pine Snake

Recent Developments. None. The Forest Landowners Association (FLA) has filed a lawsuit challenging the U.S. Fish and Wildlife Service's designation of critical habitat for the black pine snake. The lawsuit alleges that the Service designated thousands of acres of private land as critical habitat based off insufficient scientific evidence and without fully considering the impact on private landowners and forest businesses. The suit alleges that the critical habitat designation sets a precedent for future designations and punishes the voluntary conservation efforts of forest landowners nationwide.

On November 13, 2018, SLMA joined comments submitted by the FLA on the USFWS' reopening of the public comment period on a proposal to designate critical habitat in 9 counties in Mississippi and 1 county in Alabama for the black pine snake. The species was listed as threatened in November 2015.

Proposed Listing of Northern Long-Eared Bat (NLEB)

Recent Developments. None. On March 1, 2021, the D.C. District Court established an 18-month deadline for USFWS to issue a new proposed rule and final listing determination for the NLEB within 18 months after the completion of the Species Status Assessment (SSA) for the species, which is currently in process. USFWS states that it expects the SSA to be complete "by May 2021," which would push the new proposed rule into late 2022.

On February 23, 2021, SLMA joined comments submitted by NAFO to the USFWS regarding the agency's initiation of its 5-year "status review" of the NLEB. The comments urged the agency to retain the species' current "threatened" status and not elevate its status further to "endangered."

Background. On January 28, 2020, the D.C. Circuit issued its Opinion on the challenges to the January 2016 listing of the NLEB as a "threatened" (as opposed to "endangered") species. Because the NLEB was listed only as threatened, the Agencies had issued a specially tailored rule under Section 4(d) of the Endangered Species Act that provided more flexibility to impacted landowners and industry. Multiple environmental groups challenged both the listing and the 4(d) Rule. The D.C. Circuit held that the Agencies failed to properly consider all available information and remanded the Rule back to the Agencies for further consideration. The Court also found that the Agencies did not follow the proper administrative procedures for the prior rulemaking process.

Importantly, the Court did not vacate the Rule but instead sent the Rule back to the Agencies for further review. This means that the current 4(d) Rule will remain in effect until such time that the Agencies issue a new rule on the NLEB. Ironically, the Agencies were already under a routine statutory deadline to "revisit" the Rule, and the timing of the Court-ordered remand will not significantly impact the schedule already in place.

Although it is too early to predict with certainty, because of the ongoing spread of the white-nosed disease that is decimating the NLEB population, many experts anticipate the Agencies will have little choice but to list the NLEB as endangered in the next rulemaking.

OCCUPATIONAL SAFETY & HEALTH ACT

Prepared by Kilpatrick Townsend.

OSHA Refers Employers to Updated CDC Guidance for Vaccinated Individuals

Recent Developments. On May 13, 2021, the Centers for Disease Control (CDC) issued updated guidance stating that fully vaccinated individuals in non-healthcare settings no longer need to wear a face covering or physically distance, unless required by federal, state, local tribal or territorial laws, rules and regulations (including local business and workplace guidance). Additionally, fully vaccinated individuals are not required to undergo testing or quarantine following a known exposure to COVID-19 if the fully-vaccinated individual is asymptomatic. *See* Interim Public Health Recommendations for Fully Vaccinated People | CDC. Individuals are considered "fully vaccinated" if 2 or more weeks have elapsed since they received the second vaccination dose in a two-dose series (Pfizer-BioNTech or Moderna), or 2 or weeks have elapsed since they received a single-dose vaccine (Johnson & Johnson [J&J]/Janssen).

OSHA announced on May 17, 2021 via its website that it is reviewing the CDC guidance and will update its COVID guidance accordingly. This suggests that OSHA's updated guidance may ease workplace requirements on face coverings and social distancing for individuals who are fully vaccinated. The impact of the updated CDC guidance on the OSHA COVID-19 temporary emergency standard currently under review is unknown at this time. Refer to the OSHA COVID-19 Resources page for more ongoing updates. (https://www.osha.gov/coronavirus).

Employer Guidance on Recording Adverse Reactions to COVID-19 Vaccines

Recent Developments. OSHA recently issued guidance for employers on when an employee's adverse reaction to the COVID-19 vaccine must be recorded as a workplace injury or illness:

Employers Who Require COVID-19 Vaccinations

Employers who require their employees to obtain COVID-19 vaccinations as a condition of their employment (that is, for work-related reasons) must report employees' adverse reactions to the vaccine if:

- The injury or illness is a new case under OSHA (this means that the employee has not previously experienced a recorded injury/illness of the same type that affected the same part of the body *or* the

employee previously experienced a recorded injury or illness of the same type that affected the same part of the body but the employee recovered completely and the vaccine had caused the injury or illness to reappear);

AND

- The injury or illness results in one or more of the following conditions: one or more days away from work; restrictive work or transfer to another job; medical treatment beyond first aid; loss of consciousness; a significant injury or illness diagnosed by a physician or other licensed health care professional (examples of "significant" injuries or illnesses include cancer or a chronic irreversible disease; and/or death.

If an employee experiences an adverse reaction from a required vaccination that meets both of these requirements, the employer must record the case on OSHA 300 Log and on an OSHA Form 301 Incident Report within seven (7) calendar days after receiving notice of the employee's adverse reaction. Though it is unlikely that a COVID-19 vaccination will result in death, in-patient hospitalization, amputation, or loss of an eye, remember that these cases must be reported to OSHA as well. (Employers must report work-related fatalities to OSHA within eight (8) hours after the death of the employee and an employee's in-patient hospitalization, amputation or loss of an eye within twenty-four (24) hours.)

Employers Who Recommend COVID-19 Vaccinations

At this time, the Occupational Safety and Health Administration is NOT requiring that employers who simply recommend that their employees receive COVID-19 vaccines record adverse reactions. However, OSHA cautions that the vaccine should be truly voluntary, and employees must be free to choose whether or not to receive the vaccine without fear of job-related consequences. This means that the employee's choice to accept or decline the vaccine will not affect their performance rating or professional advancement, and that an employee who declines the vaccine will not suffer repercussions due to his or her choice. The current exception for voluntary vaccinations also applies to employers who make COVID-19 vaccines available at the workplace or make arrangements for employees to receive the vaccine at an offsite location or who offer the vaccine as part of a voluntary health and wellness program. As long as the employees' choice to receive the vaccine is truly voluntary, employers who facilitate access to the vaccine are not required to record employees' adverse reactions.

OSHA's COVID Vaccine-Related Frequently Asked Questions are accessible at:
https://www.osha.gov/coronavirus/faqs#vaccine.

Workplace Injuries & Illnesses Recordkeeping

Under OSHA's recordkeeping regulations (29 C.F.R. § 1904), covered employers must prepare an OSHA 301 Incident Report or equivalent form for certain work-related injuries and illnesses. Employers must also document each recordable injury or illness on an OSHA 300 Log. A separate OSHA 300 Log must be completed for each of your establishments. At the end of each calendar year, these employers must review their OSHA 300 Logs to ensure that they are complete and accurate and must correct any deficiencies. At the end of each calendar year, all employers, except those who are exempt from OSHA's recordkeeping requirements, must also create an annual summary of the injuries and illnesses using the OSHA Form 300A or equivalent form. Employers are required to retain these records for five years following the end of the calendar year that these records cover. Recordkeeping citations are low-hanging fruit for OSHA. The Occupation Safety and Health Act states that "n[o] citation may be issued… after the expiration of six months following the occurrence of any violation." 29 U.S.C. § 658(c).

On May 19, 2020, OSHA issued updated enforcement guidance for recording COVID-19 cases. Under OSHA's recordkeeping requirements, COVID-19 is a recordable illness, and employers are responsible for recording cases of COVID-19, if:

1. The case is a confirmed case of COVID-19, as defined by the Centers for Disease Control and Prevention (CDC);
2. The case is work-related as defined by 29 C.F.R. § 1905.5; and
3. The case involves one or more of the general recording criteria set forth in 19 C.F.R. § 1904.7.

If an employer makes a reasonable and good faith inquiry and cannot determine whether the COVID-19 exposure more likely than not happened in the workplace, the employer is not required to record the COVID-19 case. Additional information regarding the COVID-19 reporting requirement, including work-relatedness factors for consideration, is available at: https://www.osha.gov/memos/2020-05-19/revised-enforcement-guidance-recording-cases-coronavirus-disease-2019-covid-19.

Electronic Workplace Injuries & Illnesses Reporting

As of January 1, 2015, all employers must report work-related fatalities to OSHA within eight hours of the incident resulting in the fatality and must report to OSHA all work-related in-patient hospitalization that require care or treatment, all amputations, and all losses of an eye within twenty-four hours of the incident.

On May 11, 2016, OSHA issued the final rule requiring employers to electronically submit injury and illness data on an annual basis. The final rule originally required establishments with 250 or more employees to annual submit the OSHA 300 Log, OSHA Form 300A, and OSHA Form 301 incident reports, while establishments with 20 to 249 employees in certain industries (such as manufacturing) are only required to submit the OSHA 300A. On January 24, 2019, OSHA eliminated the requirement that large employers submit their OSHA 300 Logs and OSHA Form 301 incident reports. Covered employers are still required to submit their OSHA Form 300A on an annual basis.

The electronic reporting rule also expressly prohibits employers from retaliating against employees for reporting work-related injuries or illnesses. To that end, the rule requires employers to inform employees of their right to report work-related injuries or illnesses without retaliation. The notice requirement may be satisfied by posting the *OSHA Job Safety and Health—It's the Law* worker rights poster from April 2015 or later. In addition, the employer must ensure that its procedure for reporting work-related injuries and illnesses is reasonable and does not deter or discourage employees from reporting. The OSHA Injury Tracking Application and additional information regarding the electronic reporting requirement are available at: https://www.osha.gov/injuryreporting/.

EMPLOYMENT LAW

Prepared by Wimberly & Lawson, P.C.

Biden Uses Executive Authority to Raise Minimum Wage

Recent Developments. President Biden campaigned on a proposal to raise the minimum wage to $15.00 by 2026. He first tried to carry out this campaign promise as part of the $1.9 trillion stimulus bill, but the Senate parliamentarian ruled that raising the federal minimum wage does not meet requirements to pass the bill by a majority vote (without the opportunity to filibuster) through budget reconciliation. There were later attempts by liberal Democrats to circulate a plan to punish corporations with a tax penalty if employees were not paid at least a certain amount. On April 27, 2021, President Biden signed an executive order requiring that federal contractors pay a $15 minimum wage.

Background. Starting January 30, 2022, agencies will be required to include a $15 minimum wage in new contract solicitations. By March 30, 2022, agencies must implement it into new contracts. The agencies will also incorporate it into existing contracts when they are extended. The current minimum wage for work on covered federal contracts is $10.95. In addition, the bill eliminates over three years the lower minimum wage of $7.65 for federal contractor employees on tips. By 2024, workers regularly earning gratuities will be subject to the same $15

pay as other contractor employees. It will also require government contractors paying workers with disabilities to pay at least $15 per hour.

Such changes come with a great deal of controversy. The non-partisan Congressional Budget Office on February 8, 2021 reported that, while lifting as many as 900,000 American jobs above the poverty level, the $15 minimum wage would cost 1.4 million Americans their jobs. Further, many believe that local and regional minimum wages are more appropriate than a nationwide one, given disparities in job markets and cost of living, as evidenced by the variations in state minimum wage, although 80% of Americans believe the minimum wage should be raised. The nationwide minimum wage has not been raised in over a decade, and 29 states now have minimum wages higher than the federal level.

TPS Status for Burma and Venezuela

Recent Developments. Temporary Protected Status (TPS) allows nationals of a foreign country to live and work in the U.S. because of conflict or disaster preventing their safe return to their home country.

Background. In March, the Department of Homeland Security made the announcement allowing Venezuelans and Burmese to be granted TPS, and extending the status for Syrian nationals living in the U.S. The TPS announcement for Venezuelans is particularly significant, as the Venezuelan population in the U.S. of some 320,000 people will be eligible, making them the largest population of TPS recipients, with El Salvador being next at around 250,000 people. Other countries with nationals in the U.S. on TPS include Haiti, Honduras, Nepal, Nicaragua, Somalia, South Sudan, Sudan, Syria, and Yemen.

Biden Cancels Trump Independent Contractor Rule

Recent Developments. The Trump Administration issued a federal regulation making it easier for businesses to classify workers as independent contractors. While the Trump regulation listed five factors for consideration, the two given the far greatest weight were the nature and degree of the worker's control over the work, and the worker's opportunity for profit or loss based on personal initiative or investment. The final rule issued by the Biden Administration in early May rescinded this regulation.

Background. While the Biden Administration did not replace the Trump regulation, Acting Wage and Hour Division Administrator Jessica Looman told reporters in an agency-arranged conference call how the Department of Labor (DOL) will handle enforcement efforts on the issue of classifying workers as employees or independent contractors. In general, she indicated that the Biden Administration will rely on a long-standing multi-factor test. Among other things, there will be an examination of whether the work performed is "an integral part" of the business, and the worker's "degree of independent business organization and operation." Looman did not foreclose the possibility that DOL could release new guidance or a regulation on employee status in the future.

Pro-Union Task Force

Recent Developments. In May, President Biden signed an Executive Order creating a task force to promote labor organizing as part of a push to strengthen unions.

Background. According to the White House, the Order will direct the task force to promote new ways of using the federal government's policies to encourage workers to organize and successfully bargain with employers. It will be led by Vice President Harris and Labor Secretary Marty Walsh.

In a related matter, Sen. Joe Manchin (D-W.V.) announced that he would vote for the PRO Act, probably the most pro-union law ever proposed. Only three Democrat senators have not joined the bill as sponsors, two Democratic senators from Arizona and Mark Warner from Virginia. However, as long as the filibuster rule remains in effect in the Senate, the bill has little chance in the Senate, although it has already passed in the House, supported by all the

Democrats there.

In another related matter, Acting National Labor Relations Board (NLRB) General Counsel Peter Sung Ohr issued an expansive interpretation of worker's rights to band together to improve working conditions, promising vigorous prosecution of retaliation against concerted employee actions. The memo emphasizes that labor law can safeguard more than just group activity related to union organizing and discussions about "vital categories of workplace life," such as wages and hours. Worker discussions about political and social justice or workplace safety and health may also receive legal protections. He stated: "Going forward, employee activity regarding a variety of societal issues will be reviewed to determine if those actions constitute mutual aid or protection under Section 7 of the Act." Ohr highlighted NLRB precedent showing what type of conduct the Board considers to be concerted, including conversations that involve only a speaker and a listener. Worker talks about certain core workplace issues can make group discussions "inherently concerted" he said.

Union Loss at Amazon

Recent Developments. The 71% to 29% loss by the union campaign at Amazon in Bessemer, Alabama, is the most well-publicized and significant union election of the decade.

Background. The union brought in outside groups to show their strength and solidarity, including churches, the NFL Players' Association, Black Lives Matter organizers, and national celebrities including Senator Bernie Sanders and Danny Glover, and showed a video from President Biden encouraging their organization. The video from President Biden is likely to be used by union organizers in all future union campaigns. Wimberly Lawson has an analysis of this election that is available for free from the firm by emailing jww@wimlaw.com.

Health Subsidies for Laid-Off Employees

Recent Developments. Before May 31, 2021, employers must notify certain former employees that they may be entitled to free health care coverage under recent federal legislation.

Background. The new law provides fully subsidized coverage through COBRA from April 1 through September 30, 2021 for employees who were laid off or lost their job-based health coverage due to reduced hours during the COVID-19 pandemic. The notice must be provided to people who were first eligible to elect coverage from October 2019 to the present, even if the people did not elect COBRA coverage or dropped COBRA coverage.

The Department of Labor has issued model notices that employers can use and has provided questions and answers that employers may have. The notices and other guidance can be found at https://www.dol.gov/agencies/ebsa/laws-and-regulations/laws/cobra/premium-subsidy.

Tax Credit for COVID Vaccination & Recovery

Recent Developments. The American Rescue Plan Act of 2021 (ARP) allows small and mid-size employers, and certain governmental employers, to claim refundable tax credits that reimburse them for the cost of providing paid sick and family leave to their employees due to COVID-19, include leave taken by employees to receive or recover from COVID-19 vaccinations. The ARP tax credits are available to eligible employers that pay sick and family leave for leave from April 1, 2021, through September 30, 2021.

High Welfare Benefits and Unemployment

Recent Developments. Numerous employers and some studies suggest that employees prefer government aid to a regular paycheck. Employers would agree that lower skilled workers are scarce now and many jobs remain unfilled.

Background. Multiple sources indicate that some workers are turning down offers in lower wage occupations because their stimulus checks and jobless benefits pay their bills. Indeed, some report that some of their workers have actually walked off job production lines the minute upon learning their benefits or payments have been received. Kiplinger's report of April 16, 2021, agrees with these conclusions. Even though the federal unemployment supplement has been trimmed to $300.00 a week, and extended through September 30, 2021, the University of Chicago reports that "42% of workers are making more than their pre-unemployment wage." And these analyses do not include food stamps, rental assistance and other government help that may be available to the unemployed, or the stimulus payments that have been made. The first $10,200.00 in unemployment compensation is even tax exempt. University of Chicago economist Casey Mulligan estimates that as a direct result of the federal government's $300.00 enhanced unemployment benefit, between three million and five million fewer people are currently employed. Approximately 16 states have recently announced that they would no longer accept the "free" federal supplemental unemployment benefit program that provides an additional $300 a week because it has become such a disincentive to work.

A report from the April 10-16 edition of the Economist indicates that working offers a measure of economic security and dignity that being out of work never can, and makes the next job easier to get. A paper published by three economists in 2015 came to the conclusion that the American jobs boom coincided with reform movements to make unemployment benefits less generous, demonstrating that the one had caused the other, with the benefit reductions leading to the creation of 1.8 million extra jobs in 2014. Thus, too lavish welfare benefits can discourage work and cutting them make people look harder for a job. Former Treasury Secretary and Obama Administration Economic Director Lawrence Summers states: "Respectfully, I think it is close to self-evident that the fact that people are being paid more to stay at home than they would be to work—in millions of cases—is reducing the available supply of labor."

President Biden recently stated that in response to complaints from employers on the worker shortage, he would advocate that workers cannot turn down suitable job offers and still get unemployment benefits. Some employers are making such offers to their former employees in this regard. Notably, the number of vacancies exceeds hires by more than two million, the largest gap on record, as employers report government payments are incentive for some people to avoid work just at the time employers are struggling to find labor.

One country, however, if often hailed as coming up with a middle ground: Denmark, a country considered a role model by no less than Senator Bernie Sanders. Although Danish unemployment benefits are higher than those of other countries in the industrialized world, that country has found a way to reduce unemployment despite the high benefits. Denmark makes it very hard for persons to stay on welfare. Recipients of unemployment compensation must submit a CV to a coach within two weeks of becoming unemployed, and they can be taken off the unemployment benefits rolls for not trying hard enough to search for work or to keep up with training programs. The example of Denmark suggests that while simply boosting benefits may discourage employment, investment in training, monitoring and enforcement of the rules for those out of work may result in a higher standard of living as well as favorable unemployment patterns.

Unfortunately, the unemployment and welfare benefit programs instituted in recent years in this country seem to be going the other direction by reducing the work requirements as a condition for welfare benefits. This approach may turn out to be very shortsighted by encouraging long-term unemployment.