October 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.

"Once In, Always In" Policy

Recent Developments. EPA has indicated that it plans to take action on the currently "frozen" rule by issuing a Proposed revision and/or revocation of the rule by December 2021.

Background. On November 19, 2020, the U.S. EPA published its Final Rule for the termination of the agency's long-standing "once in, always in" policy. This policy has historically prevented "major" sources of hazardous air pollutants ("HAP"), i.e., those with the potential to emit greater than 10 tpy of any single HAP or 25 tpy for all HAPs, from ever being considered a minor/area source even if such source reduced their HAP emissions below the major source levels. EPA's final action now allows a major source to reduce its emissions below the significant source threshold and then opt out of the Title V permitting process (with respect to HAPs) and other programs directed at major sources only.

Biogenic Carbon Emissions

Recent Developments. On July 1, 2021, the House Appropriations Committee approved EPA's FY2022 spending bill that requires EPA and other agencies to develop policies that "reflect the carbon benefits of forest bioenergy and recognize biomass as a renewable energy source." Numerous groups have petitioned Congress to drop the biomass carbon neutrality language from the bill.

As expected, the EPA did not attempt to finalize the Biomass Neutrality Rule before the election. EPA had reportedly sent the Biomass rule back to OMB for review. Recent discussions between EPA and our industry coalition partners indicate that EPA now believes it may need to revise and rewrite the draft rule that is intended to classify biomass as carbon neutral when burned for energy. EPA appears to be concerned about the potential impact of the currently worded rule on other recent EPA actions. EPA reportedly remains committed to the carbon neutrality concept and has indicated it will seek to promptly revise the internal draft.

Background. On December 17, 2020, the House passed the FY2020 Appropriations Bill. As with the FY2019 Bill, the FY2020 Bill emphasized the key role that forests can play in addressing the energy needs of the United States. The Bill directed DOE, DOA, and U.S. EPA to ensure that Federal policy relating to forest bioenergy is consistent across all Federal departments and agencies and recognizes the full benefits of the use of forest biomass for energy, conservation, and responsible forest management. The Bill also directed the agencies to establish clear and simple policies for the use of forest biomass as an energy solution, including policies that reflect the carbon-neutrality of forest bioenergy and recognize biomass as a renewable energy source.

CLEAN WATER ACT

Prepared by Kilpatrick Townsend.

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

Recent Developments. On August 31, 2021, the U.S. District Court for Arizona issued an Order which remanded and vacated the Trump-era "Navigable Waters Protection Rule" (NWPR, sometimes referred to as the "Waters of the U.S."/"WOTUS" Rule). EPA and the U.S. Army Corps have been in the process of reconsidering the NWPR, but the Court's decision has vacated the rule. The plaintiffs in the case, six Native American tribes with members in several states, including AZ, MN, WI, and possible others, had argued that the NWPR failed to properly protect waters of the U.S. and was fundamentally flawed in its legal basis. The court agreed and found that leaving the NWPR in place while the agencies were reconsidering it could result in serious environmental harm.

On September 3, 2021, EPA and the Corps issued a joint statement which confirmed that the agencies, in light of the recent court decision, have halted implementation of the NWPR and will interpret "waters of the United States" consistent with the pre-2015 regulatory program. The statement confirms that neither the Trump-era NWPR Rule nor the Obama-era WOTUS Rule are considered to have any remaining effect. The agencies stated that they will continue to focus their efforts on developing a new rulemaking regarding the proper definition of WOTUS. Importantly, the regulated community now faces significant regulatory uncertainty in light of the agencies' decision, as sections of the pre-2015 rules have been found unlawful by the courts, and the guidance documents provided by the agencies have been superseded by more current guidance.

On June 9, 2021, EPA issued a statement which confirmed that the agency will initiate a new rulemaking process with the goal of expanding the definition of "waters of the US" as compared to the Trump administration's 2020 final WOTUS rule. Newly appointed EPA Administrator Michael Regan has repeated his statements that EPA will seek to find a compromise on the heavily disputed and litigated definition of "waters of the US." He has not provided further details.

In early September 2021, SLMA signed on to two sets of comments prepared by (1) the Waters Advocacy Coalition and (2) NAFO. These comments urged EPA and the Corps to use restraint when considering the scope of the federal government's authority to regulate waters to provide a clear and reasonable rule that will provide clarity and certainty to landowners going forward.

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 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 US.

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

Prepared by Kilpatrick Townsend.

NEPA Regulatory Reform

Recent Developments. On June 4, 2021, the USFWS confirmed that it is reviewing the July 2020 USFWS action and plans to either rescind or revise the rulemaking. On June 29, 2021, the government issued an interim final rule that extended by two years the deadline for federal agencies to update their NEPA rules to align with the July 2020 rule. The deadline is now set for September 16, 2023.

Background. On July 15, 2020, the Trump Administration issued a final rule to complete the significant changes to NEPA. The Final Rule became effective on September 14, 2020; however, several lawsuits have been filed which seek to halt the implementation of the rule. The Final Rule established several significant program changes including:

- A 2-year limit on the time that can be spent conducting an environmental review (historically, NEPA reviews often take up to 4 years), and
- Agencies may now develop categories of activities that require no environmental assessment at all.
- The Rule simplifies the definition of "effects" which must be evaluated by striking specific references to direct, indirect, and cumulative effects. Under the new definition, effects must be reasonably foreseeable and have a reasonable causal relationship to the proposed actions or alternatives. This means that an effect must have a proximate causal relationship to the agency action to require evaluation. The Rule clarifies that effects should not be considered significant if they are remote in time, geographically remote, or the result of a lengthy causal chain.
- The Rule changes current policy by stating that analysis of cumulative impacts is not required under NEPA. As such, only the reasonably foreseeable effects of the actual project in question should be considered in the NEPA analysis.

ESA Regulatory Reforms

Background. The federal government has asked a California court to pause the pending litigation discussed below in order to provide time for it to reconsider the Trump-era rules.

On August 12, 2019, the Department of the Interior finalized a series of rules, to significantly revise the process and factors to be used when considering ESA listing decisions. Among other things, the rules would impact the following key issues within the ESA program:

- Agencies will be allowed to solicit and consider economic impact data as part of a species' listing decision;
- An agencies' consideration of unoccupied areas as potential critical habitat for a species will be limited to situations where there is inadequate occupied habitat; and
- Species designated as "threatened" will no longer be required to receive the same level and types of protections as "endangered" species.
- The concept of the "foreseeable future" will be shortened in time and scope such that potential threats to a species such as climate change are no longer required to be considered.

The changes to the ESA would only impact *future* listing decisions. At least 17 states and multiple environmental groups have filed legal challenges to the recently issued final rule.

OCCUPATIONAL SAFETY & HEALTH ACT

Prepared by Kilpatrick Townsend.

OSHA Request for Information on Updating the Mechanical Presses Standard

OSHA seeks public comments regarding potential updates to the mechanical power presses standard. The current standard was issued in 1971 and based upon the 1971 American National Standards Institute (ANSI) industry consensus standard for mechanical power presses. The 1971 ANSI standard has been updated several times since then. OSHA is seeking information regarding whether it should update the mechanical power presses standard and, if so, how closely the standard should follow the current ANSI standard for mechanical power presses. It is also seeking information on the types of presses that should be covered, the use and certification of equipment, and other topics such as presence-sensing device initiation (PSDI) systems, and requirements for press modifications, training, and injury reporting.

Comments may be submitted electronically at https://www.regulations.gov; via facsimile to the OSHA Docket Office at (202) 693-1648; or by mail, hand delivery, express mail, messenger or courier service to OSHA Docket Office, Docket No. OSHA-2007-0003, U.S. Department of Labor, Room N-2625, 200 Constitution Avenue, NW., Washington, DC 20210. Comments should refer to Docket Number: OSHA-2007-0003-0001. Comments will be accepted until **October 26, 2021**.

EMPLOYMENT LAW

Prepared by Wimberly & Lawson, P.C.

Executive Order Requiring COVID Vaccination/Testing

Recent Developments. In what many consider President Biden's most bold move regarding COVID-19, he issued an Executive Order on September 9, 2021 in effort to require that federal employees, federal contractors, and large employers of 100 or more employees require their employees to be vaccinated.

Background. The Executive Order is unprecedented as never before has the government issued a mandate requiring employees to submit to a vaccination or weekly medical testing or risk severe disciplinary action, including termination. The Executive Order also contemplates requiring covered employers to provide paid time off for employees to get vaccinated and recover from the vaccination.

The contractor portion includes those that provide services to the federal government. The Executive Order does not apply to businesses with contracts valued below the "simplified acquisition threshold" which is generally set at $250,000; grant holders; and subcontractors that provide only products.

The Executive Order must be implemented by a relatively unusual procedure, an Emergency Temporary Standard (ETS). Such standards are only valid for a period up to six months, then either would expire or be extended by a permanent standard. The concept of such a standard is that the Occupational Safety and Health Administration (OSHA) has determined that COVID-19 presents a grave danger to all covered workplaces, and that the ETS is necessary. While the Administration states that such a standard will be promulgated in the "coming weeks," the last related standard related to healthcare workers took 12 weeks. There will likely thereafter be a break-in period, perhaps six weeks, for which covered employers must comply, on penalty of fines just like every other OSHA standard, up to $14,000 per violation for serious offenses.

There are numerous unanswered questions concerning what the ETS will provide. For example, it is not certain whether the standard applies to 100 employees of a given location or 100 employees company-wide. It is uncertain whether employers will be required to pay for the testing for those employees refusing vaccination. It is not certain what type of test will be required or how employers are required to verify vaccination status. There will be some exemptions to the ETS, and it assumes the exceptions must be allowed for medical and religious reasons. It may be that employers will become overwhelmed with exemption requests, but it is likely that an employee's opposition to vaccines will be deemed a personal belief and will not be considered a religion. It would seem likely that there must be a sincerely held religious belief in order to be exempt from a mandatory vaccination policy.

It is certainly possible that the ETS will go beyond the requirements set forth therein, and it is highly likely that there will be a serious legal challenge to the validity of the ETS. Never before has OSHA required employees to be vaccinated. Until the ETS has been drafted, circulated, and adopted, there is no enforceable mandate requiring any employer to take any action under the September 9, 2021 Executive Order.

The Executive Order represents a tougher position on the part of the Administration, as President Biden in the past only encouraged employers to mandate vaccination against COVID-19. Some believe the recent actions are to provide "cover" or encouragement for employers to mandate such vaccination.

The President's Executive Order for federal workers goes further than requirements previously announced on July 29, 2021, which included an option for on-site federal contractors to choose testing instead of vaccination. Now the Executive Order mandates vaccines for contractors. It will call for the new requirement to be in place for contracts entered into on or after October 15, 2021 and will apply to any workplace location "in which an individual is working on or in connection with a federal government contract or contract-like instrument." There are some exceptions to the government contractor requirement including for those who only sell products to the federal government.

In terms of enforcement, the ETS could cover more than 80 million workers, suggesting that policing employer compliance will be a problem. It is likely that OSHA will rely on whistle-blowers and target specific industries. While employers can begin making plans for meeting the requirements, so many details remain to be covered by the ETS, it is difficult to make plans too definitive. Questions are welcome as to "quesstimates" on what the ETS will look like.

Walk-Outs/ Protests

Recent Developments. The current situation is an appropriate time to remind employers of their obligations under federal laws dealing with not only safety protests, but any protests remotely relating to wages, hours, and terms and conditions of employment.

Background. The National Labor Relations Act protects employees from adverse action from employers for "union or other concerted activity." Such activities go way beyond union matters, and the new Administration has announced that it will take the broadest possible interpretation to protect employees engaging in "protected concerted activity" for their mutual aid or protection. Such activity may be two or more employees banding together regarding issues relating to the terms and conditions of employment, or one employee speaking on behalf of others, or even seeking to induce actions by others. During the pandemic, for example, this writer has experienced numerous incidents of employees not only complaining, but on occasion engaging in sit-ins or walking off the job.

While most know that union employees who strike, in the absence of a no-strike clause in a collective bargaining agreement, are protected from discharge or discipline. Many don't know that the same rules are applicable to walk-outs by non-union employees unrelated to unions. The main exception is that the walk-outs must somehow be causally related to wages, hours, or other terms and conditions of employment. For example, it is unlikely that there can be a protected walk-out over whom the employer selects as customers. Walk-outs over political issues are particularly controversial.

There are some other limitations as to how a walk-out is carried out. Under current National Labor Relations Board (NLRB) rules (which may be changed by the current Administration), while a short-term walk-out or strike is lawful, there is a doctrine that prohibits union and non-union workers from taking part in intermittent strikes, which are generally defined as a series or pattern of short-term strikes for a common goal. Similarly, persons walking off the job cannot engage in a "sit-in" strike, which is a refusal to leave the employer's premises while refusing to work for a considerable period of time after given every opportunity to comply. Wal-Mart has particularly been victimized by intermittent strikes because they were part of a "plan to strike, return to work, and strike again repeatedly."

A union may try to disguise the use of intermittent strikes by calling separate walk-outs having distinct origins and distinct demands, or claiming that the cause of the walk-out is the employer's unfair labor practices.

Persons walking out cannot legally be disciplined for failing to give advance notice or failing to call in early the day of the walk-out. Nor can the employer count the days as absences under an attendance-control program. Further, once the walk-out is over, if the union or an individual offers to return "without condition," the employer must allow the worker to return to his or her original position. The exception is that the law allows employers to hire permanent replacements for workers engaged in an "economic" strike, meaning one not caused by unfair labor practices.

Editor's Note: Walk-outs create situations where experienced labor counsel is a necessity to guide employers in their reaction. The specific words used by management towards those walking out may determine the outcome. For example, if the employer tells those walking out that they are fired if they don't return to work, it will be an unfair labor practice subject to reinstatement and back pay later on. If they employer simply informs the employees that they are subject to being permanently replaced, it is probably lawful. Similarly, management may inform those walking out that they must return to work or leave the premises, and after a period of time, if they refuse to leave the premises or return to work, authorities may be called, and there is the potential for disciplinary action including discharge. The exact words used by management are quite important, and witnesses should be present to verify what was said. This writer has experienced numerous walk-outs over the last six months over issues related to the pandemic such as "hazard" pay.

TDPP Extended for Six Countries

Recent Developments. More than 400,000 citizens of six foreign countries who live and work in the U.S. under Temporary Protected Status (TPS) are able to stay for at least another year.

Background. The countries under the temporary deportation protection program include El Salvador, Nicaragua, Sudan, Honduras, and Nepal. There will be an automatic extension until December 31, 2022 according to a Department of Homeland Security Notice published September 10, 2021.

Trump Regulation Requiring EEOC to Conciliate Rescinded

Recent Developments. The current administration has moved rapidly to eliminate the Trump administrators, even during the terms of their employment, and to eliminate administrative rules and guidance issued by the prior administration.

Background. The most recent example is an EEOC regulation issued during the Trump Administration that required the EEOC to give employers far more information about its findings of alleged discrimination during the process of conciliation. Conciliation is mandated by Title VII where the EEOC files a lawsuit against an employer.

A bill passed both the House and Senate during May and June under the Congressional Review Act rescinding this EEOC regulation. The White House supported the legislation saying it would remove "unnecessary and burdensome standards" established by the rule—which would have encouraged employers to focus in litigation on whether the regulation's terms were met, rather than on the allegations of bias.

Editor's Note: One could argue that the government too often evaluates the success of a law by how many lawsuits are filed, rather than how often voluntary compliance and voluntary settlements are reached.