



THE US ENVIRONMENTAL OUTLOOK

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The intersection of energy and environmental policies lies at the heart of key issues driving US environmental law. In his February 2013 State of the Union Address, President Obama stated “no area holds more promise than our investments in American energy. After years of talking about it, we’re finally poised to control our own energy future.” He added, however, “for the sake of our children and our future, we must do more to combat climate change.” He urged Congress to pursue a market-based solution to climate change but, recognising that Congress is deeply divided, stated “if Congress won’t act soon to protect future generations, I will direct my cabinet to come up with executive actions” the administration can take.

ENERGY POLICY

The Obama administration is encouraging investment in renewable energy. In 2012, wind energy added nearly half of all new power capacity in America, and solar energy continues to become more affordable. Our firm has seen an increase in transactions to fund renewable energy investments, particularly in wind and solar projects.

It is unclear, however, whether and when renewable energy will satisfy more than a small minority of US energy needs. In the meantime, the natural gas boom has led to cleaner power and greater US energy independence. The US Department of Energy has issued two permits to export liquefied natural gas, and the industry is pressing to expedite licences for export of liquefied natural gas.

President Obama has stated that his administration will strive to cut red tape and speed up new oil and gas permits while at the same time taking steps to encourage research and technology to make natural gas burn even cleaner and protect our air and our water. He has also proposed to use some of our oil and gas revenues to fund an Energy Security Trust that will drive new research and technology to shift our cars and trucks away from oil.

The pending application for approval of the Keystone XL pipeline has been the subject of much debate. This Keystone pipeline would transport crude oil from Alberta, Canada to the US Gulf Coast refineries. In a speech in June 2013, outlining his second-term climate change agenda, President Obama said that he would approve the Keystone XL pipeline only if it would not significantly worsen greenhouse gas emissions. A draft environmental assessment by the State Department, which has jurisdiction over such projects that cross national borders, found that rejecting the pipeline would not reduce greenhouse gas emissions because the Canadian crude oil would be produced and transported by other means, such as by rail. In that regard, a tragic July 2013 derailment in Quebec of rail tankers carrying crude oil has caused renewed focus on the use of rail to transport increasing production of crude oil in North America.

CLIMATE CHANGE

In June 2013 the president announced a Climate Action Plan containing new measures to reduce carbon pollution and adapt to the impacts of climate change, in the absence of legislation by Congress. One specific step was outlined in a Presidential Memorandum entitled ‘Power Sector Carbon Pollution Standards.’ The memorandum directs EPA to work expeditiously to promulgate carbon emission standards for existing and new electric power plants. The power plant initiative may be a precedent for future regulation of other sources of greenhouse gas emissions.

The President’s Climate Action Plan memorandum also asks federal agencies to remove barriers to making climate-resilient investments in sectors including transportation and water management. Pursuant to the plan, the government will develop guidelines for safe buildings and infrastructure and will update flood-risk reduction standards for all federally funded projects. The president’s plan also announces a Climate Data Initiative to make climate data available and stimulate private efforts to address climate-change preparedness. The president’s plan discusses international efforts to address climate change, including reducing emissions from deforestation, expanding clean energy use and negotiating a new global free trade agreement on environmental goods and services that would lower tariffs and other market barriers to trade. It also places significant restrictions on public funding of new coal fired electric plants overseas.

HYDRAULIC FRACTURING

Natural gas production has increased dramatically in the United States, a development that is reducing coal’s share of electricity generation and making America less energy dependent. The increase in natural gas production in the US has been spurred by the technique known as hydraulic fracturing or “fracking,” which involves pumping fluids containing additives into the well. The increased use of fracking to produce oil and gas from shale has increased concerns about the environmental impact of this technique. The scientific and technical issues relating to fracking are still evolving, as are the federal, state and local roles in regulating fracking.

At the request of Congress, EPA is conducting a study of the potential relationship between hydraulic fracking and drinking water resources, and plans to release a draft report for public comment and peer review in 2014. To assist state and federal authorities in addressing treatment and disposal of wastewater from shale gas extraction, EPA’s Office of Wastewater Management issued a March 2011 memorandum titled ‘Natural Gas Drilling in the Marcellus Shale under the NPDES Program Frequently Asked Questions.’ EPA explains that shale gas extraction produces large volumes of wastewater from hydraulic fracturing that can contain high concentrations of dissolved solids (salts), naturally occurring radionuclides, metals and other substances used in drilling and

completing wells. The 2011 memo discusses how such pollutants can be addressed under existing regulations that address oil and gas extraction, centralised waste treatment, acceptance and notification requirements for publicly owned treatment works, pretreatment and storm water.

The Bureau of Land Management of the Department of the Interior (BLM) is developing a rule on hydraulic fracturing. As previewed in 2012, the BLM rule would require operators to disclose the chemicals they use in fracturing activities on public lands, improve assurances of well-bore integrity to verify that fluids used during fracturing operations are not contaminating groundwater and confirm that oil and gas operators have a water management plan in place for handling fluids that flow back to the surface. BLM's website states that the rule will support "the Obama Administration's all-of-the-above commitment and approach to American energy by expanding domestic oil and gas production in order to further American energy self-reliance, while remaining focused on ensuring safe and responsible development on public and Indian lands."

Environmental groups are active in this area and have also challenged fracking activities in the courts. States have traditionally regulated groundwater, and many states have laws or regulations concerning fracking, particularly states with significant oil and gas reserves. Other states are in the process of developing laws and regulations governing fracking. In addition, local governments are now asserting authority over fracking. Such local laws governing fracking potentially conflict with state laws and raise preemption issues. A New York court recently held that a local government may ban fracking as an exercise of its zoning powers. The debate is not expected to be resolved in the near future.

WATER QUALITY

The Clean Water Act was enacted in 1972, and there has been much progress in reducing pollution of US waters through federal technology and water quality-based requirements that are implemented through a national permit programme administered by states with EPA oversight.

EPA's 2011-2015 Strategic Plan for water describes the following key strategies: improve water quality monitoring and information management, as well as working with the states to strengthen water quality standards, improve discharge permits and reduce pollution from diffuse or "nonpoint" sources; sustain and secure the pipes and treatment facilities that constitute the nation's water infrastructure through investments in state revolving loan funds, innovative financing, and an increased commitment to water efficiency; and apply a watershed approach to restoring impaired waters, including developing total maximum daily loads, implementing clean-up plans on a watershed basis, and promoting innovative, cost-effective practices such as water quality trading and watershed permitting.

Unfortunately, however, there is still confusion concerning the basic legal scope and reach of the Clean Water Act. In *Rapanos v United States*, 547 US 715 (2006) the US Army Corps of Engineers sought penalties from John Rapanos, alleging that he discharged a pollutant into the "waters of the United States" by filling 22 acres of wetland. The US Supreme Court rejected that position in a divided 4-1-4 decision. The plurality opinion states that there is jurisdiction over wetlands if there is a continuous connection between it and

relatively permanent, standing or continuously flowing bodies of water. In a concurring opinion, Justice Kennedy expressed the view that a wetland is subject to the Act if it bears a "significant nexus" to a traditional navigable waterway, namely if it significantly affects the physical, biological and chemical integrity of the downstream navigable waterway. In the absence of a majority opinion, EPA and the lower courts continue to wrestle with this fundamental issue.

The Supreme Court recently announced another important decision concerning wetlands. In *Koontz v St Johns River Water Management District*, 2013 WL 3184628 (US 25 June 2013), an applicant seeking a permit to construct on property containing wetlands was asked by the government to either deed a conservation easement or to make improvements to government owned land. The Supreme Court held that the government may not require a permit applicant to provide such in-kind benefits or monetary payments unless such benefits or payments have an "essential nexus" and a "rough proportionality" to the impacts of the proposed permitted activity. While the court's holding is limited to land-use permits, the logic of the decision is broader. In dissent, Justice Kagan predicts that the majority's approach will alter "the very heart of local land-use regulation and service delivery." That may be an over-statement, but one can expect that individuals and businesses will seek to apply the Koontz principle to other areas in which governments (local, state or federal) attempt to condition governmental action on monetary payment or in-kind compensation.

CHEMICAL REGULATION

The Toxic Substances Control Act (TSCA) was enacted by Congress in 1976 and sought to protect the public from unreasonable risk of injury by requiring reporting, record keeping and restrictions concerning the sale of new chemicals. The present legislation has been criticised as outdated because it places the burden on EPA to obtain information on existing chemicals, and companies do not usually volunteer to perform testing on new chemicals.

The Obama administration has asked Congress to pass legislation to strengthen TSCA, and has announced several principles it wishes to be included in updated TSCA legislation, including requiring manufacturers to provide EPA with the necessary information to conclude that new and existing chemicals are safe and do not endanger public health or the environment, and giving EPA authority to set priorities for conducting safety reviews on existing chemicals.

Both the Senate and House of Representatives are considering amendments to TSCA, inter alia to require safety evaluations for active chemicals in commerce, to prioritise chemicals for review and to give EPA more authority to ban unsafe chemicals. In May 2013, Senators Frank Lautenberg (D-NJ) and David Vitter (R-La) introduced a bipartisan bill entitled the Chemical Safety Improvement Act of 2013 to overhaul TSCA. The Chemical Safety Improvement Act of 2013 would direct EPA to prioritise chemicals for review, require safety evaluations for all high priority chemicals, give EPA authority to take action ranging from labeling to a phase-out or ban if a chemical is found unsafe, and authorise EPA to obtain necessary health and safety information from chemical manufacturers. Such legislation may embrace some of the precautionary principles in the REACH legislation in the EU, a possible step toward harmonisation.