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A Quarterly Publication of POWER Engineers Environmental **SPRING 2020**



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CURRENTS

SPRING 2020

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LEADERSHIP INSIGHTS



Pandemic Reflections: Do We Have What It Takes?

Tim Gessner | Business Unit Director

In the environmental field, one might say surprises are inevitable—a sudden non-compliance issue, an unexpected regulatory change or an accidental spill. We're trained to handle these emergency situations.

I think it's fortunate that our career choice may have helped prepare us to positively respond to the novel coronavirus (COVID-19) pandemic currently impacting our world. Now that we have had several weeks to manage our respective COVID-19 challenges, it may be a good time to reflect on how well we responded to this emergency.

What have we learned about our team, organization and ourselves?

Our Team

How did our team react?

When faced with high levels of stress or anxiety, our emotions can go into overdrive, our brain chemistry can be jolted and our prefrontal cortex (the portion of the brain responsible for cognition and decision-making) can be negatively affected.

People handle this phenomenon differently. Some slow down and manage the process, others garner a heightened sense of awareness and some are susceptible to inefficiencies or complete shutdown.

If carefully observed, especially in the hours and days when the pandemic unfolded, events like COVID-19 can help us identify the team members that excelled in this quickly changing environment. It's

a chance to recognize those that were most effective in helping their team.

Positive actions that we observed included: genuine concern for the wellness of others, clearly communicating the support they could offer, responding with empathy to staff and client situations and calm, organized thoughts during problem-solving.

Our Organization

How did our organizations and/or departments handle the situation?

As COVID-19 began to impact every facet of our lives, information was coming so fast and from so many different sources that it wasn't being digested very well. It's during these high-stress and fast-paced situations that having quality data is a key ingredient for good communication, and the ability to succinctly communicate is highly valuable.

I suspect there are many opportunities for improvement in areas associated with data management and knowledge sharing. For example, we consolidated important information at the end of the week and reissued a summary to our staff.

Moving forward, we may look to improve our data management processes to consolidate the information and make it more easily searchable.

Ourselves

As an individual and as a leader, how did I respond?

Leadership effectiveness is best measured by assessing whether the leader can

motivate their team to positively influence a situation. And while I did my best, I believe there is still room for improvement.

There are a wide variety of skills that could be needed during an emergency and it's not reasonable to expect that we each maintain the highest competency in all of them.

Therefore, when tested by a situation such as this, taking the time to self-reflect and improve the skills necessary to make a meaningful impact is a worthwhile investment. And, by improving our own strengths, we can better complement the skills of others on our team.

A quick review of leadership literature provides a long and varied list of buzz words and management philosophy. When asked to consider the skills I look for in a leader, I gravitate to emotional intelligence, critical thinking, team problem-solving, trustworthiness, clear communication and intestinal fortitude (*they've got guts!*).

It's a daunting list but improvement starts with taking one step forward. I've picked the skill that I'm going to improve, and I challenge you to pick one, too.

There's always a silver lining if you look hard enough to find it. We're not out of the woods yet, but as we adjust to this temporary "normal," let's take a minute to reflect and learn from the experience. It may just help improve our teams, our organizations and ourselves going forward. 🍀



Do You Swear? Six Tips from an Expert Witness

Lisa Barko Meaux

Central Environmental Department Manager and
Project Manager

From pipelines and wind farms, to transmission lines and solar installations, today's energy projects are more heavily scrutinized than ever before—regardless of location or size.

Recent legal challenges to efforts like the Grain Belt Express—a proposed long-haul, 600 kV HVDC transmission line project set to cross portions of Kansas, Missouri, Illinois, and Indiana—demonstrate how a whirlwind of competing perspectives and priorities often leads to formal opposition. In such cases, well-thought-out, documented and credible expert witness testimony can be critical.

Successful testimony requires attention to detail and extensive research; evaluation of the numerous concerns held by the public and regulatory agencies; technical expertise; the ability to prepare material properly for presentation to the public; and most importantly, the ability to effectively deliver information in a public setting, often under cross-examination.

Before you raise your right hand and swear to tell the truth, keep these six tips in mind.

1. Think and Act with the End in Mind

Even if you have been engaged in a project from very early on, assume from the outset that the public or special interest groups will intervene, that the project will proceed to litigation and that expert testimony will be required. Be mindful that every email, work paper and deliverable will be considered discoverable as part of the legal process. As such, know that your work on the project must always be professional, of the highest quality and defensible.

2. Establish Clear Communication Protocols

A secure document management system for project information, deliverables and communications is essential. Further, providing guidelines to the project team from day one about the type of project-related communications that are appropriate, and with whom these may be shared, is prudent. It's a serious setback during the legal

Feeling anxious about cross-examination? Check out these handy tips at www.powereng.com/testify



Be prepared. A mock exercise in cross-examination allows the witness to think through with counsel some of the potential questions the opposing attorney is likely to ask.

discovery process to unearth a previously unknown email chain that raises doubt about the project need or methodologies.

3. Engage the Public Early

The public voice is powerful and can impact your project. Working from early on to build trust and consensus among stakeholders will help solidify the project purpose and need. Part of that process is a well-planned approach to public outreach and stakeholder engagement that includes public open house meetings and maintaining an accurate and complete record of public comments.

4. Keep Pace with Changing Regulations

A compliant project is a defensible project. From Executive Orders 13766 and 13807—currently changing the way federal agencies administer the National Environmental Policy Act—to new guidance from the U.S. Environmental Protection Agency and the U.S. Army Corps of Engineers regarding regulation of “waters of the U.S.,” keeping pace with the federal, state and local

regulations that apply to your project is necessary.

5. Understand Your Role on the Team

The role of an expert witness is to assist decision makers in understanding the evidence within their area of expertise. To do so, a witness must perceive the big picture and understand the relative importance of the key issues they are responsible for representing or sponsoring. This allows testimony to be tailored in a manner that best contributes to the case.

6. Prepare Your Team

The entire witness team needs to understand the strategy of the case and contribute to its success by being prepared. Expert witnesses should thoroughly know their work and work products, their testimony and all of their exhibits, other team members’ testimony, opposing parties’ testimony, personalities, precedent, current events and trends in the industry, and what others have done in similar situations. An effective witness also

understands the major players in the case—typically your team, the opposing team, administrative law judge(s), commission staff and commissioners.

When a witness knows the major players, they can better anticipate the hot topics and important issues and be prepared to respond to tough questions. Individual witnesses should also recognize their weak areas and develop defenses. This is accomplished by drafting and practicing responses to key questions, but not by memorizing responses. Testimony should be perceived as genuine, not rehearsed.

A prepared witness team will be more persuasive because they will appear knowledgeable, confident and likable by being honest, reasonable, calm, rational and objective.

Implementing these tips will help prepare you and your team to take the stand, raise your right hands with confidence and deliver expert testimony. 

An Archaeological Find—A Passion Reaffirmed

Josh McNutt | Cultural Resource Area Lead

I imagine everyone in a professional field has something that gets them out of bed in the morning. It could be the satisfaction of completing a complicated engineering project or identifying a rare plant or animal species. In the case of an archaeologist, it's finding some long-forgotten piece of history.

At the start of almost any archaeologist's career, even the smallest thing can spark the imagination and fuel the passion for the job. As an undergrad working in the field, I remember the first time I was shown how to identify different types of prehistoric pottery. You would have thought I had learned how to split the atom and map the human genome at the same time.

Over the years, the level of excitement for the little things has faded. Sometimes my job involves purposefully avoiding places



The right path. The team follows a prehistoric trail cutting through the desert pavement with the mountains around Blythe, CA and the Colorado River floodplain in the background.

where archaeological sites might be found. Of course, this is a good thing with its own level of satisfaction, but it's not exciting.

On occasion though, I get the opportunity to work on a project that reminds me why I chose this profession in the first place.

Recently, POWER's archaeology team undertook a transmission line project that spanned from southwestern Arizona to southern California. We spent nearly three months in the field working in an area of the desert where the archaeological remains were relatively unknown.

In fact, the project area was thought to have so few important archaeological or environmental resources that it had been made an unrestricted off-road vehicle and camping area.

We discovered bits and scattered remains of some incredible sites—prehistoric trails likely dating several hundred to thousands of years old, pottery and stone tool artifact scatters, rock art and intaglio sites. They were amazing in their own right, if only for the fact that no one expected us to find them.

Unfortunately, the sites we found were largely destroyed by off-road tracks and unwitting campers making fire rings out of prehistoric structures. Each site was a little taste of the magic that all archaeologists hope to find, but also bittersweet due to the damage. That was until the last day of the project.



Ancient tool. A prehistoric knife fragment is discovered, dating back approximately 400 to 500 years.

Our team arrived in the field at first light to get as much work in as possible before the afternoon heat wave. We were looking for two sites located on the very top of ridges and peaks overlooking the Colorado River.

Hiking in the Arizona desert in the early morning can be inspirational on its own. We listened to a herd of wild burros regrouping as they headed back up the canyon, away from the campers and ATV roads near the river.

At the top of a high steeped peak we found our first site. It was utterly destroyed. A federal land management agency had placed a 20-foot-high survey marker in the ground, which attracted off-roaders like a beacon.

Finding only the disturbed remains of the site covered in trash and vehicle tracks left us feeling a little depressed and frustrated.

We headed to the last site expecting more of the same.

Our hike was through a grove of ironwood trees along the bottom of a dry wash. We heard the call of the wild burros again and noticed that one was just ahead of us on the ridgeline. My spirits improved as I thought maybe we had a guide leading us to our next stop. We climbed the ridge out of the ironwood and sure enough the burro had found it.

To our surprise the site was unlike any we had seen before. Off-roaders were unable to reach the area due to the steep, rocky slopes.

We were looking at a near perfect example of all the other damaged sites we had seen

up until then—geoglyphs, sleeping circles, rock alignments, deeply incised prehistoric trails leading off to other clusters of prehistoric fire pits, rock tool scatters and what we were told were prayer and “dreaming” circles.

And just like that, I got that old feeling again. I had missed it. I like to tell this story as a moment I felt reaffirmed in my personal work.

When my job keeps me at my desk approving expense reports and writing negative results memos, I can think of this site and it still gives me chills.

That’s what gets me out of bed in the morning. 🌄



A sacred ring. The prayer circle is said to be a place for worship or dance, although the true purpose of this feature remains unknown.

What are Intaglios?

Intaglios are large, human made art pieces that are excavated or impressed into the ground. They can range in size from a few feet to hundreds of feet across in various geometric shapes or even animal and human figures.

While the best-known intaglios in the world are the Nazca Lines in Peru, some of the most famous in North America are the Blythe and Ripely Intaglios in southwestern Arizona. The term intaglio refers to the process of incising or excavating the shape or image into the surface of the earth.

The dark rocky surface of the region, known as “desert pavement,” is removed to reveal the soft and lighter soil underneath. This contrast makes the figures all that more striking. The stable rock surface and relatively low wind and water disturbance has helped preserve these figures for perhaps a millennium.



NEWS BRIEFS

Stay informed on
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NATIONAL NEWS

EPA, USACE Publish New WOTUS Definition

On April 21, the Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers (USACE) published a **final rule** that clarifies the definition for “waters of the United States” (WOTUS) under the Clean Water Act. The Navigable Waters Protection Rule establishes four categories of waters that are considered WOTUS. This is the second step in a two-step process to revise the definition of WOTUS consistent with the Executive Order “Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the ‘Waters of the United States’ Rule” signed on February 28, 2017. The Rule takes effect on June 22, 2020 and will replace the rule published on October 22, 2019.

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EPA Releases Guidance on Enforcement Discretion Due to COVID-19

On March 26, EPA released a **memorandum** documenting the “COVID-19 Implications for EPA’s Enforcement and Compliance Assurance Program” with a range of enforcement discretion they expect to provide for noncompliance resulting from the COVID-19 pandemic. The relief is

temporary and applies retroactively from March 13, 2020 until rescinded. In general, entities must continue to make every effort to meet their environmental obligations. If compliance is not reasonably practicable, the memo provides the minimum documentation needed to claim enforcement discretion.

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EPA Proposes 2020 Multi-Sector General Permit for Industrial Stormwater Discharges

On March 2, EPA **requested public comment** on the draft 2020 National Pollutant Discharge Elimination System Multi-Sector General Permit (MSGP). The proposed permit will replace the existing 2015 MSGP on June 4, 2020 and includes numerous technical changes and requests for comment from the affected community. The proposed changes include, but are not limited to: requiring universal benchmark monitoring for pH, TSS, and COD across all sectors; updates to sector-specific benchmark monitoring requirements; significant changes to procedures for addressing benchmark exceedances; an inspection-only option for “low-risk” facilities a requirement to post notice of permit coverage and changes to the wait period when obtaining permit coverage. Any changes adopted in the issued EPA MSGP will impact state permitting programs during their next renewal cycles. Comments are due May 31.

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EPA Releases New Interpretation of “Begin Actual Construction” Under NSR

On March 25, EPA released **draft guidance** titled, “Interpretation of ‘Begin Actual Construction’ Under the New Source Review Preconstruction Permitting Regulations,” which would significantly expand the project construction activities allowed before final major New Source Review (NSR) permit issuance. The

current guidance limits these activities to planning, site clearing, grading, etc., and prohibits the construction of anything permanent and associated with the project (e.g., structures and concrete foundations). The new draft guidance narrows the pre-permit prohibition for construction activities, specifically on newly permitted emissions unit(s) prior to permit issuance. Construction of other project items, including foundations, structures and piping is allowed. Comments on the draft guidance are due May 11.

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TSCA Chemical Reporting Rules Signed

On March 17, EPA signed two final rules associated with the Toxic Substances Control Act (TSCA) Chemical Data Reporting (CDR)—one for revisions and one to extend the submission period for CDR from September 30, 2020 until November 30, 2020. The CDR is required every four years and the submission period begins June 1, 2020 for the calendar years 2016 through 2019. Facilities who manufactured (including imported) substances on the Master TSCA Inventory in quantities of 25,000 pounds or more in any year are required to report. Most facilities required to report are from chemical, petroleum and coal product manufacturing and includes manufacturers of byproducts, such as utilities, paper, cement, primary metal and semiconductor, and other electronic component manufacturing. Revisions affect confidentiality claims, processing and use codes, reporting NAICS for the site of manufacture, adding exemptions and clarifying regulatory text.

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EPA Relaxes Refrigerant Management Requirements for HFCs

In March 2020, EPA published a **final rule** rescinding the part of the Obama Administration’s November 2016 rule on revised refrigerant management

requirements that extended leak repair provisions to equipment using substitute refrigerants, including hydrofluorocarbons (HFCs). As a result, equipment containing 50 or more pounds of substitute refrigerants will no longer be required to: 1) repair equipment that leaks above a certain level and conduct verification tests on repairs; 2) periodically inspect equipment for leaks; 3) report chronically leaking equipment to the EPA; 4) retrofit or retire appliances that are not repaired; and 5) maintain related records. EPA did not rescind the applicability of other provisions of the November 2016 rule that had been extended to substitute refrigerants (e.g., technician certification requirements).

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Fish and Wildlife Service Announces Draft Recovery Plan for Eastern Massasauga

On March 27, the U.S. Fish and Wildlife Service completed the public comment period on a Draft Recovery Plan for the Eastern Massasauga Rattlesnake. The species range is divided into three individual conservation units: Minnesota, Wisconsin, Illinois, Iowa and Missouri; Michigan, Indiana and Ohio; and Pennsylvania, New York and Ontario. The recovery plan is accompanied by a Species Status Assessment and a separate working document called a Recovery Implementation Strategy, which describes specific steps to help protect the species. Species-specific recovery criteria described in the Draft Recovery Plan include increases to the probability of continued persistence in the three conservation units, ensuring an adequate quantity and configuration of lands managed for the species and reducing potential threats from climate change.

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EPA Revises Supplemental Findings of MATS Rule

On April 16, in response to the U.S. Supreme Court, EPA completed and released a reconsideration of analysis

conducted for the Mercury and Air Toxics Standards (MATS) rule which regulates hazardous air pollutant emissions (HAPS) from utilities. In 2015, the Supreme Court concluded that the EPA failed to correctly consider the cost-benefit analysis of the MATS rule. This EPA release concludes that the previous administration included the control of non-HAP pollutants (e.g., particle matter) in the cost-benefit analysis for the rule. EPA has determined that only control of HAPS emissions should be used in the cost-benefit analysis. EPA states that the annual cost of compliance for MATS (\$7.4 to \$9.6 billion) is much greater than the HAP control benefit of \$4 to \$6 million, and therefore has determined it is not “appropriate and necessary” to regulate HAPS emitted by utilities. The MATS rule will stay in place despite this conclusion.

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EPA Revises Proposal to Limit Science Used in Rulemaking

In March 2020, EPA published revisions to a proposed rule, first published in April 2018, that would restrict the type of research that can be used by EPA to draft environmental and public health regulations. The initial proposed version of the rule, “Strengthening Transparency in Regulatory Science,” was intended to limit the promulgation of environmental rules based on findings concluded from research data that was not made publicly available. This included data not publicly available due to protection through privacy laws or confidentiality agreements. The March 2020 revision relaxes restrictions in the April 2018 proposed rule that prevented the promulgation of environmental rules not based on publicly available data, now giving preference to studies for which the underlying data is publicly available. This revision also removes applicability to past regulatory actions.

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FERC Announces New Commissioner and Acting General Counsel

On March 31, the Federal Energy Regulatory Commission (FERC) announced James Danly as the new FERC Commissioner. Danly, who has served as the Commission’s General Counsel since September 2017, will serve his Commission term through June 30, 2023. FERC Chairman Neil Chatterjee also named David Morenoff as FERC’s Acting General Counsel. Formerly the Deputy General Counsel under Danly, Morenoff has served in several senior positions within FERC’s Office of the General Counsel.

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EPA Concludes Risk and Technology Review for Stationary Combustion Turbines

On March 9, EPA published a final action following a required residual risk review for the source category of Stationary Combustion Turbines regulated under National Emission Standards for Hazardous Air Pollutants (NESHAP). EPA determined that the risks from stationary combustion turbines due to emissions of air toxics are acceptable and that no new cost-effective controls under the technology review would achieve further emissions reductions. EPA also eliminated the exemption for periods of startup, shutdown and malfunction (SSM) in 40 CFR Part 63, subpart YYYY and established operational standards in lieu of a numeric emission limit during SSM. New SSM operational standards limit simple-cycle startups to one hour and combined-cycle startups to three hours. EPA added electronic reporting requirements for performance tests and periodic compliance reports. An administrative stay of the standards for new lean premix and diffusion flame gas-fired turbines remains in effect.

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EPA Proposes Revisions to CCR Liner and Closure Requirements

On March 3, EPA proposed allowing facilities generating coal combustion residuals

(CCR) to request approval to operate CCR surface impoundments with an alternative liner. Additionally, EPA proposes new requirements for annual closure progress reports as well as allowing an additional closure option for CCR units being closed, including those closed by removal of CCR.
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Integrated Iron and Steel, Miscellaneous Organic NESHAP MACT Amendments Pushed Back

On February 19, the court granted EPA additional time to finalize the Integrated Iron and Steel Manufacturing (Integrated Iron and Steel) and miscellaneous organic chemical manufacturing NESHAP (MON) MACT Risk & Technology Review (RTR) amendments. The deadlines for the final rules are extended from March 13, 2020 to May 5, 2020 for Integrated Iron and Steel and from March 13, 2020 to May 29, 2020 for the MON to allow stakeholders time to review and comment on the proposed RTRs. Regarding Integrated Iron and Steel, EPA proposed a new mercury standard, and solicited comment on unmeasured fugitive and intermittent emissions as well as the cost and effectiveness of potential work practices that could be implemented to control such emissions. For the MON RTR, extensive comments were submitted to EPA concerning regulatory use of the 2016 IRIS unit risk value for ethylene oxide in setting the new standard.
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MS4 General Permits Affected by the 2020 Census

Homes across the nation began receiving invitations to complete the 2020 Census in mid-March which is meant to count every person living in the United States and five U.S. territories. Currently, municipal separate storm sewer systems (MS4s) are permitted for stormwater discharges based on a leveling system that pulls data from

the 2010 Decennial Census. Updated population counts from the 2020 Census will affect future Phase 2 MS4 permit renewals, resulting in leveling changes for existing permittees and new requirements for urban areas without prior MS4 permits. Municipalities must begin to consider the changes to the MS4 permits as soon as the 2020 census numbers are in so they can be prepared for increased regulation of stormwater. Bond projects and strategic budgetary allocations will be needed to keep pace with increased regulations driven by the updates to stormwater management programs.

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STATE NEWS

EPA Approves Revisions to HGB Ozone NAAQS

Approved revisions to the Texas State Implementation Program for the Houston-Galveston-Brazoria (HGB) area became effective on March 16. EPA determined that the area continues to meet the previous ozone National Ambient Air Quality Standards (NAAQS) (1979 1-hour and 1997 8-hour) and meets the criteria for redesignation; therefore, all anti-backsliding obligations were terminated. In addition, the state's proposal to revise the Failure to Attain Fee, commonly referred to as Section 185 Fees, was incorporated into the rule. The revision removes the requirement for stationary sources in the HGB nonattainment area to calculate and pay a fee based on the annual emission.

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PADEP Provides Update on RACT III Rulemaking

On February 13, the Pennsylvania Department of Environmental Protection (PADEP) provided an update on the draft proposed Reasonably Available Control Technology III (RACT III) rulemaking. The RACT III rule would apply to major sources of nitrogen oxides or volatile organic

compounds (VOC) that commenced construction on or before August 3, 2018. The PADEP is proposing that case-by-case determinations made for RACT II would satisfy the case-by-case requirements for RACT III, except in instances where RACT III presumptive requirements are more restrictive. The PADEP is proposing other, more restrictive presumptive requirements for combustion units, turbines and engines; and for certain industry-specific sources. For oil and gas facilities, the rule proposes that fugitive sources of VOC be aggregated with an associated stationary source to determine applicability. The PADEP is also proposing notification requirements for all RACT III facilities within six months and compliance with one year after final rule publication. The PADEP must implement RACT III by January 1, 2023.

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NYSDEC Proposes Updates to Air Dispersion Modeling Guidelines

Earlier this year, the New York State Department of Environmental Conservation (NYSDEC) published proposed updates to Policy DAR-10: *NYSDEC Guidelines on Dispersion Modeling Procedures for Air Quality Impact Analysis*. Policy DAR-10, last updated in 2006, provides specific requirements and guidelines for conducting dispersion modeling analyses in New York State, and summarizes many of the approved modeling methodologies outlined in EPA's Guideline on Air Quality Models (GAQM), also known as Appendix W to 40 CFR Part 51. Policy DAR-10 was reorganized to incorporate the latest guidance and compliance methodologies from EPA's GAQM and contains specific sections on issues such as 1-hour nitrogen dioxide, 1-hour sulfur dioxide, PM_{2.5} modeling and other state-specific modeling issues. The policy is expected to be finalized later in 2020.

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The Shape of Water Law

Emily J. Dupraz and William E. Taylor | Pierce Atwood, LLP

There have been several recent and significant legal changes to the Clean Water Act (CWA), its implementing rules and the manner in which the law has been previously administered that environmental professionals should review.

First, the definition of “waters of the United States” (WOTUS) has been narrowed. Othersignificantchangesinclude: a revision to the 401 water quality certification regulation; a Supreme Court decision that determined that the release of pollutants to groundwater could be subject to the CWA’s permitting scheme; and new interpretations of temperature total maximum daily load (TMDL) regulations.

Waters of the United States

In January 2020, the U.S. Environmental Protection Agency (EPA) issued a final rule revising the definition of WOTUS. The rule narrows the definition by excluding ephemeral waterbodies and wetlands that are not adjacent to other jurisdictional waters. The rule is likely to affect mining, construction, agriculture and aggregate industries. Publication of the rule followed a series of lawsuits challenging the prior rule.

It is anticipated that the definitional change will have the most impact in western states where water flow is not continuous year-round. Opponents of the new rule have argued that it would reduce jurisdiction over thousands of miles of streambeds and millions of acres of wetlands. However, it is unlikely to have that great of an effect because many states have adopted or may adopt rules that are more protective.

401 Water Quality Certification Regulations

On August 8, 2019, EPA issued a proposed rule relating to Section 401 of the CWA. CWA Section 401 requires that applicants seeking a federal license or permit that may result in a discharge into WOTUS also obtain a state certification that the discharge complies with state water quality standards. Existing water quality certification regulations had not been updated in nearly 50 years.

Key proposed changes are: establishing one year as the statutory reasonable period of time for certifying authorities to act on a certification request, clarifying that the start of the statutory timeline for certification review begins upon receipt by the certifying authority of a “certification request” and requiring that supporting information be provided for each condition imposed by the State.

Federal Regulation of Discharges to Groundwater

The Supreme Court recently held, for the first time, that discharges into groundwater which ultimately convey into a navigable water, could be governed by the CWA’s permitting requirements. Relying on CWA’s statutory purpose of protecting the nation’s waterways, the Supreme Court held that a CWA permit is required for a direct discharge—or its “functional equivalent”—of pollutants into anavigable water.

The Supreme Court’s decision settles a disagreement between the federal courts and the EPA. The Fourth and Ninth Circuits held that discharges into groundwater could be governed by the CWA.

In April 2019, EPA took a contrary position and issued an interpretive statement

clarifying that releases of pollutants to groundwater are categorically excluded from the CWA’s permitting requirements, regardless of whether that groundwater is hydrologically connected to surface water. The Supreme Court’s expansion of CWA jurisdiction will have major impacts in many states where discharges to groundwater were not previously regulated.

TMDL Regulations

The Ninth Circuit recently held that EPA has a non-discretionary duty to issue a temperature TMDL for the Columbia and Snake Rivers because the states of Washington and Oregon had failed to do so. These rivers are habitats for several species of salmon and trout, which require cold water temperatures for their survival. Over the years, the water temperatures in the rivers have increased due to dams and point-source discharges, which is significant given that EPA considers “heat” to be a pollutant for issuing TMDLs. Though the extent of its impact is still underdetermined, this decision sets a precedent by which EPA might be required to establish TMDLs for other pollutants where states have failed to act.

Conclusion

While there will always be shifts in policy or regulatory emphasis resulting from new pollutants, new environmental conditions or administrative needs, the changes summarized above are fundamental, structural changes to the CWA that alter long-standing interpretations of both law and rule.

As such, environmental professionals should take note of these changes and reevaluate their expert advice in light of these new legal interpretations. 



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Virginia Moves to Join RGGI

In February 2020, Virginia lawmakers approved legislation to make Virginia a full participant in the Regional Greenhouse Gas Initiative (RGGI) starting in 2021. The RGGI is a carbon dioxide cap-and-trade program with 10 member states in the Mid-Atlantic and New England regions. Governor Ralph Northam is expected to sign the legislation in the coming months. Under the legislation, about half the revenue will go towards assisting Virginia localities affected by recurrent flooding and sea level rise, while the other half will go to a state-administered account to support energy efficiency programs for low-income residents.

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PADEP Proposes Change to Land Recycling Program Requirements

On February 15, PADEP published proposed revisions to Land Recycling Program regulations. The proposed regulations include new standards for three per- and polyfluoroalkyl substances (PFAS) and revisions to existing soil and groundwater standards (a majority will be lowered). Other proposed revisions relate to public involvement plans, practical quantitation limits, requirements for professional seals and report submittal requirements. Separately, PADEP is releasing a draft guidance document for public comment in spring 2020 regarding the use of caps as engineering controls and expects to update the program's technical guidance manual in 2021.

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