Environmental Law & Policy Update

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Washington DC

National Waterways Conference
March 11, 2020
Congressional Review Act

- Enacted in 1996
- Allows Congress to review and disapprove federal regulations on expedited basis
- 60 day window ("session days" / "legislative days")
- Pre-2017: one time
- 2017: 12+ times
- 2021: payback?
  - Maybe for some rules, but CRA not available for repeals of:
    - Clean Power Plan
    - Clean Water Rule
Changing Composition Among the Circuits

Source: NPR analysis of data from Federal Judicial Center and the United States Courts. Download the data here.
Credit: Renee Klahn/NPR
NEPA

- CEQ regulations widely viewed as outdated
  - Adopted in 1978
  - Supplemented over 40+ years by guidance
- Exec. Order 13807
  - Infrastructure projects
- ANPRM (June 20, 2018)
- Proposed Rule (Jan. 10, 2020)
- Comment deadline - this week
Key Proposed Changes: Procedures

- Timelines and length
- Timely coordination
- Avoiding duplication
- Role of the applicant
Key Proposed Changes: Substance of Analysis

• Purpose and need

• Alternatives
  – “Technically and economically feasible”
  – No alternatives outside of agency’s jurisdiction

• Effects
  – Close causal relationship
  – No cumulative impacts
Key Proposed Changes: Other

- Agencies may not impose additional requirements
- Judicial review
- Does not (directly) address GHG emissions
Comment Topics

- Industry generally supports
- Procedures
  - Deadlines:
    - 6 months for EAs
    - Lack of teeth?
  - Length: 75 pgs. for EAs
  - Coordination with other agencies
  - Avoid duplication
    - Mandatory tiering/adoptions
- Substance of analysis:
  - Purpose and need
  - Alternatives
    - Maximum number?
  - Effects
    - Cumulative impacts
  - Restrictions on other agencies
  - Mitigation: Nexus/effect requirements
  - Role of the applicant
Water Update

1. WOTUS
2. State 404 Assumption
3. Section 401
EPA and Army Finalize Rule to Repeal 2015 “Waters of the U.S.” Definition

The Environmental Protection Agency and Department of the Army have finalized a rule to repeal the 2015 Clean Water Rule and re-codify the regulatory text defining “waters of the United States” that existed prior to 2015. Read the final rule.

EPA and Army Sign the Navigable Waters Protection Rule

On January 23, the Environmental Protection Agency and the Department of the Army finalized this rule to define “waters of the United States.” Learn more about the Navigable Waters Protection Rule.
Navigable Waters Protection Rule

• “Step Two” of repeal and replace

• Proposal issued Dec. 11, 2018/published Feb. 14, 2019

• Prepublication final rule issued January 23, 2020
  – Not yet in Federal Register

• Purpose: “establish the boundary between [WOTUS] and the waters subject solely to State and tribal authority.”
Proposed vs. Final Rule: Jurisdictional Waters

### Proposed Jurisdictional WOTUS Categories

1. Traditional navigable waters (including territorial seas);
2. Tributaries of traditional navigable waters;
3. Certain ditches;
4. Certain lakes and ponds;
5. Impoundments of otherwise jurisdictional waters; and
6. Wetlands adjacent to jurisdictional waters

### Final Jurisdictional WOTUS Categories

1. Traditional navigable waters and territorial seas;
2. Perennial and intermittent tributaries;
3. Lakes, ponds, and impoundments of jurisdictional waters; and
4. Wetlands adjacent to jurisdictional waters
Big Picture Concepts

• Ephemeral streams essentially out
• Focus on Surface Connection
  – Subsurface connection ≠ jurisdictional
• “Typical Year”
• “Adjacent” Wetlands
  – Revised from proposal w/r/t berms, banks, dunes, breaks
  – Inundation from jurisdictional water in “typical year”

Non-Jurisdictional Waters

• Waters that don’t meet requirements for jurisdictional waters – “catch-all” exclusion

• Waste treatment systems

• Groundwater

• Ephemeral features

• Ditches unless tributary or adjacent wetland
Non-Jurisdictional Waters (cont’d)

• If in “uplands” (now defined) or non-jurisdictional waters:
  – Artificial lakes and ponds
    • Like water storage reservoirs; farm, irrigation, stock watering, log cleaning ponds
  – Water-filled depressions incidental to mining or construction activity, pits for the purpose of obtaining fill, sand, or gravel
  – Stormwater control features
  – Groundwater recharge, water reuse, and wastewater recycling structures
• Artificially irrigated areas
• Prior ConvertedCropland
What’s ahead?

- Final repeal rule scheduled to become effective 60 days after publication
- Litigation challenging repeal rule highly likely
  - Nationwide Injunctions?
  - 1986 Rules spring back?
  - SCOTUS?
WOTUS Status (currently, without the new rule in effect)
State Assumption of CWA 404 Permitting

• CWA Section 404(g) and (h) provides a process for states to “assume” the federal 404 wetlands permit program.

• History of 404 Assumption (only two states with “assumption”)
  – Michigan
  – New Jersey

• Renewed Interest in 404 Assumption
  – Cooperative Federalism
  – Reduce costs and streamline permit process
  – States seriously exploring options
  – “Assumable waters”
  – ESA consultation?
Proposed Update to Water Quality Certification Regs

- 1,081 comments filed
- Comments from states, state agencies span a broad range from strong support to strong concern

EPA is proposing a complete overhaul of its longstanding regulations, which serve as the “umbrella” regulatory framework to implement Section 401 of the Clean Water Act (“CWA” or “the Act”). EPA’s proposal drastically undermines the tenets of cooperative federalism in the CWA and inappropriately encroaches into authority expressly reserved to the states and authorized tribes (hereinafter referred to as “certifying authorities” or “states”) under Section 401, 33 U.S.C. 5 1341. As recognized by Congress, states are in the best position to protect their waterways through their own individualized water quality certification processes.

The State of Alaska
Department of Environmental Conservation
OFFICE OF THE COMMISSIONER
POST OFFICE BOX 11800
Juneau, Alaska 99811-1800
PHONE 907.465.0944

I, Governor Michael J. Dunleavy, believe state’s rights to protect our waters can be maintained while providing a predictable permitting scheme and schedule for project proponents.

I champion the efforts the Federal Government is taking in promoting efficient permitting processes and reducing regulatory uncertainties. As a state rich in energy and natural resources, Alaska presents the United States with tremendous economic opportunities. Alaska stands ready to enhance the President’s vision of the United States to

Utah Infrastructure and Economic Growth, Utah supports robust and responsible energy development of all kinds and is grateful for the Administration’s emphasis on that issue. Although there are several aspects of the proposed EPA rule that Utah finds to be reasonable and clarifying, many aspects of the proposed rule are inconsistent with the goal of cooperative federalism. Specifically, Utah is concerned that the

State of Utah
GARY R. HERBERT
Governor

L. Scott Baird
Executive Director
Kim Shelley
Director of Operations
PFAS

• Per- and polyfluoroalkyl substances (PFAS)
• Group of more than 5,000 man-made chemicals
  – Perfluorooctanoic acid (PFOA) and perfluorooctane sulfonate (PFOS)
  – Newer PFAS alternatives such as GenX and perfluorobutane sulfonic acid (PFBS)
• Unique physical and chemical properties
  – Oil-repelling, water-repelling
  – Stain-resistant
  – Friction reducing
• Extensively manufactured and used worldwide
• Numerous applications: non-stick coatings; stain-resistant textiles; paper products; firefighting foams; medical devices; paints; lubricants; surfactants; and many others
Why are Concerns Arising?

- Impacts to drinking water supplies (surface and groundwater)
- Ubiquity of contaminants in the overall environment
- Consumer awareness and biomonitoring
- Allegations of potential persistent, bio-accumulative and/or toxic effects
- Evolving science on hazards and risks
- Public anxiety and distrust of synthetic chemicals
- Perception of slow governmental responses
Where are the Chemicals Coming From?

- Use of “aqueous film-forming foam” (AFFF) to fight fires
- Manufacturing and processing wastes and by-products
- Biosolids & discharges from water and wastewater treatment
- Consumer use and exposure
- Airborne deposition
- Fire-fighter training activities
- Catastrophic incidents
- Accidental spills and releases
PFAS in Tap Water and at Industrial / Military Sites
PFAS Regulatory History

- 2000-2002: PFOS phaseout
- 2002-present: Series of TSCA orders and SNURs
- 2010/2015: EPA-led voluntary PFOA phaseout
- 2016: EPA established a **health advisory** for PFOS and PFOA, recommending a combined limit of 70 parts per trillion (ppt) in drinking water
- Currently:
  - No PFAS chemical is listed or designated as a hazardous substance under CERCLA
  - No federal Maximum Contaminant Level (MCL)
  - Not regulated as hazardous wastes, hazardous air pollutants, or toxic water pollutants
  - No federal cleanup standards
- Increasing patchwork of State requirements
Key PFAS Provisions in FY2020 NDAA

- Addition of PFOA, PFOS, GenX, and other PFAS to the TRI
- TSCA reporting and notification rules for PFAS manufacturers and importers
- SDWA monitoring requirements for PFAS substances
- USGS nationwide PFAS sampling program
- Interim EPA guidance on PFAS disposal and process for prioritizing PFAS
- Interagency working group and research coordination on emerging contaminants
- Ban on use of fluorinated aqueous film-forming foam (AFFF) at military facilities
H.R. 535: PFAS Action Act of 2019

- Passed House on January 10, 2020
- **Within 1 year**: EPA designates PFOA, PFOS as CERCLA hazardous substances
- **Within 5 years**: EPA decides whether to designate all PFAS under CERCLA
- Requires comprehensive toxicity testing on all PFAS under TSCA
- 5-year prohibition on manufacture, processing, distribution of certain PFAS
- **Within 2 years**: EPA issues SDWA national drinking water standard for PFAS
- **Within 180 days**: EPA adds PFOA and PFOS to CAA Sec. 112 list of HAPs
  - Within 1 year of HAPs listing, EPA must revise list of source categories
- **Within 6 months**: EPA issues SWDA regulations on PFAS disposal
- **Within 2 years**: EPA issues CWA human health water quality criteria for PFAS
- **Within 4 years**: EPA must issue ELGs and pretreatment standards for PFAS
Senate Action on PFAS?

- Senate EPW Chairman Barrasso does **not** plan to take up H.R. 535
- Nearly 20 PFAS-related bills currently pending in the Senate
- S. 3227, Prevent Future American Sickness ("PFAS") Act of 2020:
  
<table>
<thead>
<tr>
<th><strong>Within 1 year:</strong></th>
<th>EPA designates all PFAS as CERCLA hazardous substances</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>All food in contact with PFAS deemed unsafe under FFDCA</strong></td>
<td></td>
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<tr>
<td><strong>Within 180 days:</strong></td>
<td>EPA adds all PFAS as a class to CAA Sec. 112 list of HAPs</td>
</tr>
<tr>
<td><strong>Within 1 year of HAPs listing, EPA must revise list of source categories</strong></td>
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</tr>
<tr>
<td><strong>Within 180 days:</strong></td>
<td>Prohibition on disposing AFFF by incineration</td>
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</table>


## Recent Regulatory Initiatives

### EPA and other Federal Agencies

- **EPA Feb. 2019 Action Plan & related**
  - Interim cleanup guidelines issued
  - EPCRA TRI expansion & proposed rule
  - Coordination with public water systems
  - Prioritized TSCA risk evaluations
  - Actions pending: Potential MCLs and CERCLA hazardous substance listings
  - Yesterday: EPA preliminary determination to regulate PFOS/PFOA under SDWA

- **CDC & ATSDR**
  - PFAS exposure assessments
  - Multi-site PFAS study

- **FDA**
  - Food and food packaging assessments/restrictions

- **DOD**
  - Military facility assessments and cleanups

### States

- Widespread groundwater and surface water monitoring
  - CA, MA, NY, NJ, NH
- State-specific surface and groundwater standards
- Directives to conduct sampling and testing
- Bans and restrictions on certain PFAS in fire-fighting foams, food contact paper
- Chemical content disclosures and warnings
- Consideration of PFAS monitoring for discharges to POTWs, storm sewers, NPDES permits
## Select PFAS Standards & Guidance for Water

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Type of Value</th>
<th>PFOA</th>
<th>PFOS</th>
<th>PFBS</th>
<th>GenX</th>
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<tbody>
<tr>
<td>U.S. EPA</td>
<td>Lifetime Health Advisory for DW</td>
<td>70</td>
<td>70</td>
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<tr>
<td>U.S. EPA</td>
<td>Regional Screening Level for GW</td>
<td>400</td>
<td>400</td>
<td>400,000</td>
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<tr>
<td>U.S. EPA</td>
<td>Interim Recommendation for GW</td>
<td>40</td>
<td>40</td>
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<tr>
<td>California</td>
<td>Notification Level for DW</td>
<td>5.1</td>
<td>6.5</td>
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<tr>
<td>California</td>
<td>Response Level for DW</td>
<td>10</td>
<td>40</td>
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<tr>
<td>Michigan</td>
<td>Human Non-Cancer Value for Surface DW</td>
<td>420</td>
<td>11</td>
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<tr>
<td>Michigan</td>
<td>Generic Cleanup Criteria for DW and GW</td>
<td>70</td>
<td>70</td>
<td>—</td>
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<tr>
<td>Michigan</td>
<td>Screening Levels for DW</td>
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<td>8</td>
<td>1,000</td>
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<td>New Jersey</td>
<td>Interim Specific GW Quality Standard</td>
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<td>N. Carolina</td>
<td>Health Goal for GW</td>
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<td>Texas</td>
<td>Tier 1 Protective Concentration Level for GW</td>
<td>290</td>
<td>560</td>
<td>34,000</td>
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<tr>
<td>Canada</td>
<td>DW Screening Value</td>
<td>200</td>
<td>600</td>
<td>15,000</td>
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<tr>
<td>Canada</td>
<td>Maximum Acceptable Concentration for DW</td>
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<td>600</td>
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- All values shown in parts per trillion (ppt)
- Source: Interstate Technology & Regulatory Council (ITRC); Cal. SWRCB
- Last updated: January 2020; February 2020
## Select PFAS Standards & Guidance for Soil

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Type of Value</th>
<th>PFOA</th>
<th>PFOS</th>
<th>PFBS</th>
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<tr>
<td>U.S. EPA</td>
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<td>Michigan</td>
<td>GW Surface Water Protection Criteria: Drinking Surface Water</td>
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<td>GW Surface Water Protection Criteria: Non-Drinking Surface Water</td>
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<td>N. Carolina</td>
<td>Preliminary Soil Remediation Goal</td>
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<td>Texas</td>
<td>Protective Concentration Level: 0.5-Acre</td>
<td>0.003</td>
<td>0.05</td>
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<td>Texas</td>
<td>Protective Concentration Level: 30-Acre</td>
<td>0.0015</td>
<td>0.025</td>
<td>0.053</td>
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<td>U.S. EPA</td>
<td>Regional Screening Level</td>
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<td>Generic Cleanup Criteria</td>
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<td>3.2</td>
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<td>N. Carolina</td>
<td>Preliminary Soil Remediation Goal</td>
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<td>Texas</td>
<td>Protective Concentration Level: 0.5-Acre</td>
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<td>Texas</td>
<td>Protective Concentration Level: 30-Acre</td>
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<td>1.5</td>
<td>80</td>
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<td>Canada</td>
<td>Soil Screening Value: Agricultural/Residential Parkland Land Use</td>
<td>0.7</td>
<td>2.1</td>
<td>61</td>
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</tbody>
</table>

- All values shown in parts per million (ppm)
- Source: Interstate Technology & Regulatory Council (ITRC); last updated: January 2020
Published in early 2020

Amends 50 C.F.R. Part 10 to add a new section:

The prohibitions of the [MBTA] that make it unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, or kill migratory birds, or attempt to engage in any of those actions, apply only to actions \textit{directed at} migratory birds, their nests or their eggs.
Proposed Rule on Incidental Taking (cont’d)

- Essentially adopts/codifies M-Opinion
- Preamble devoted to legal analysis supporting interpretation
  - Language of the Act
  - History
  - Constitutional concerns
  - Adoption as a matter of law and policy
M-Opinion Litigation

- NGOs and States filed summary judgment motions on Jan. 17, 2020
  - Plaintiffs have standing
  - M-Opinion is erroneous
  - Violation of NEPA
- Briefing scheduled to conclude on May 1, 2020
ESA Rules Litigation

- Challenges to 2019 revisions to regulations (Section 4, Section 7 and Blanket 4(d) rule)
- Motions to intervene filed by industry groups, 13 states and Pacific Legal Foundation
- Motion to dismiss filed by DOJ – Lack of standing and ripeness
Rulemakings in the Works

- Addition of a definition of “habitat” in the wake of the Supreme Court decision in the *Weyerhaeuser* (dusky gopher frog) case
  - Currently at OMB
- Clarification of consideration of benefits in designating critical habitat
- Revisions to Section 10 permit regs
- Revised definition of “significant portion of its range”
Settlement of Challenge to Permit Program

Settlement agreement filed challenging certain portions of BGEPA permit program on Oct. 16, 2019.

FWS intends to publish updated bald eagle population figures based on actual survey data by Dec. 31, 2020.

FWS to issue proposed rule by Aug. 31, 2021.

FWS to issue final rule by Aug. 31, 2020.
Environmental Enforcement: Trends & Statistics

- Steady decline in number of EPA facility inspections

![Graph showing Federal Inspections and Evaluations](image-url)
Trends & Statistics

- Steady decline in civil enforcement cases
Trends & Statistics

- Steady decline in the number of federal environmental criminal prosecutions, with a 10% decline in the last five years and a measured 60% decline over the last twenty years.
Understanding Enforcement Trends

- Stats tell just part of the story due to limited data sets, lack of uniform coding of enforcement cases, and fact-specific nature of individual cases.
- EPA data improving, targeting inspection resources more efficiently.
- Industry investments in environmental compliance programs.
- Self-reporting and cooperation policies.
- Fewer yet more complex cases.
- Tightening of some judicial standards applicable to enforcement.