ENVIRONMENTAL ESSENTIALS WEBINAR SERIES

Five Under-the-radar Environmental Law Issues You Should Know About In The New Year

January 2016
CLEAN WATER ACT
SECTION 316(B) – EXISTING FACILITIES

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GENERAL

• Goal of CWA Section 316(b) is to minimize adverse environmental impacts (AEI) of all cooling water intake structures (CWIS) that withdraw water from waters of the United States
• Requirements implemented through NPDES permits
• Prior to rule, NPDES permit writers minimized AEI at existing facilities by applying best professional judgment (BPJ)
• Rule published April 15, 2014 (79 Fed.Reg. 48,300) applies to certain existing facilities; other facilities are to continue to minimize AEI by use of BPJ
• Rule applies when design intake flow exceeds 2 mgd and 25 percent or more of flow is used for cooling
IMPORTANT ISSUES/QUESTIONS

• NPDES permit authorities are mainly states; each may interpret requirements differently
• If a facility purchases water, is the supplier an “independent supplier” as defined by the rule?
• If facility uses cooling impoundment to dissipate heat, is it a closed-cycle recirculating systems (CCRS)?
• If a facility uses a cooling impoundment it may have more than one CWIS
• Is actual intake flow greater than 125 mgd?
• What is need for data collection and timing requirement?
• Are threatened/endangered species present in source water?
IMPLEMENTATION

• Evaluate applicability issues and meet with NPDES permit authority
• Discuss with NPDES permit authority data collection requirements applicable to facility and timing
• Renewal applications for a permit that expires after July 14, 2018, must include rule applicable 40 CFR 122.21(r) requirements
CLEAN WATER ACT
SECTION 316(B) – EXISTING FACILITIES

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FEDERAL ENVIRO ENFORCEMENT - CONSEQUENCES

• If violations can be established, in settlements or in the form of orders there are:
  – Cash Penalties
    o Available in administrative, civil, or criminal
  – Injunctive Relief
  – Possible “Supplemental Environmental Projects”
  – Now: “Mitigation as Injunctive Relief in Civil Enforcement Settlements” – November 2012 EPA Guidance Memo
HOW “MITIGATION” DIFFERS FROM INJUNCTIVE AND SEPS

• Injunctive Relief – order re future operations, requiring physical or operational upgrades to the facility
• SEP = voluntary, enviro-beneficial project not about facility’s compliance; need a nexus to the violation – geographic and substantive; trade for penalty reduction
• “Mitigation”
  – Very familiar in, for example, wetlands context – restoration or offset
  – Under Shinkman memo, can limit future air emissions or water discharges below legal requirements to offset past excesses, can require other actions to reduce the impact of past polluting, or can include cash payment to the affected – not voluntary and no penalty reduction
HOW IS ENFORCEMENT “MITIGATION” BEING APPLIED

• Looked at 10 air enforcement CDs from 2015
  – Mit’n > penalty at least half the time; same size or larger than injunctive component in 4/10
  – SEP-style “pet projects” in 9/10; on-site upgrades in 4/10
    o Wood stove replacements (6), energy efficiency (3), school boilers, lead abatement, pave roads, renewables projects (2), retire credits, electric mowers, CNG fleets, community health monitoring (“grab bag”)
  – Where applied, injunctive still the 800-pound gorilla: $172MM avg; up to $620MM. Mitigation ranged $200K to $8MM.
  – Interesting: pay USFS for projects to restore damage to forests and fish from acid precipitation, build anaerobic digester for farm wastes, third party audits/oversight.
THE POLICY

• For natural resources that are important, scarce, or sensitive
  – Harmful effects to land, water, wildlife, and other ecological resources (natural resources) caused by land- or water-disturbing activities
• A net benefit - or at least a no net loss – goal
• Requires avoidance, minimization and then mitigation
• Establishes a category of irreplaceable natural resources
APPLICABILITY

• Environmental Protection Agency
• Department of the Interior
  – Bureau of Land Management
  – National Park Service
• Department of Agriculture
  – U.S. Forest Service
• Department of Defense
  – U.S. Army Corps of Engineers
IMPLICATIONS

• Overshadows the NEPA procedural requirement
• Expands cost and obligations of authorizations
• Problems of proof of success (monitoring, etc.)
• Questions of legal enforceability (especially “net benefit”)
• Identification of irreplaceable resources to be avoided
• Enhancement of Third Party mitigation banks and offerings
• Increased transparency and public involvement
EPA’S RMP RULEMAKING – HOW BAD COULD IT REALLY BE?

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OVERVIEW

• April 2013 – West, Texas fertilizer plant explosion
• Aug. 2013 – Executive Order 13650
• Dec. 2013 – OSHA PSM RFI
• May 2014 – Working Group Report
• July 2014 – EPA RMP RFI
• Dec. 21, 2015 – EPA proposed rule sent to OMB
• March 2016 – Expected publication of EPA proposed rule
WHAT WILL EPA PROPOSAL LIKELY INCLUDE?

• Expanded incident investigation requirements
  – Key issues – definitions of “root cause,” “catastrophic release,” and “near miss”

• Expanded process hazard analysis requirements
  – Key issues – require safer alternatives analysis; definition of “feasible”

• Mandatory third-party audits
  – Keys issues – cost, availability, site knowledge, impartiality
WHAT WILL EPA PROPOSAL LIKELY INCLUDE?

• New requirements for coordination with first responders
  – Key issues: ERP requests; annual coordination
• New information sharing requirements
  – Key issues: ERP summary; chemicals on site; accident history
• Emergency response drill requirements
  – Key issues: table tops; drills; LEPC participation
WHAT WILL PROPOSAL LIKELY NOT INCLUDE

• Updates to list of regulated substances
• Definition of RAGAGEP
• Require, as opposed to assess, IST
• Expanded MI requirements
• “Safety Case” regulatory model
• Additional facility siting requirements
• Automated detection and monitoring requirements
• Requirement to release off-site consequence data
ADDITIONAL INFORMATION


• EPA Docket: http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OEM-2014-0328-0001
• EPA Rulemaking Presentation: Risk Management Modernization Rule, November 19, 2015, Small Business Advocacy Review, Panel Outreach Meeting Presentation (too be provided)
AGENCIES AND RULES

• California Interagency Refinery Task Force (IRTF)
• California Department of Industrial Relations (DIR) – Cal/OSHA
  – PSM: New Industrial Safety Ordinance – Section 5189.1
• California Environmental Protection Agency (CalEPA)
  – RMP: New CalARP Article 6.5
STATUS AND TIMING

• First draft circulated September 2014
• Stakeholder outreach and informal comments
• Latest draft circulated September 2015
• No formal proposal as of 12/31/2015 (target November 2015)
• Target for adoption: Summer 2016
KEY NEW PROGRAM ELEMENTS

• Damage Mechanism Reviews
• Hierarchy of Hazard Controls Analysis
• Human Factors Program
• Management of Organizational Change
• Safeguard Protection Analysis
• Process Safety Culture Assessments
THANK YOU

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