

Power Sector Clean Water Act Outlook – (De)regulation and Litigation in the New Administration

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Overview

- **Overarching Themes**
- **Waters of the United States Rule *redux***
- **Steam Electric Effluent Limitation Guidelines**
- **Coal Ash Impoundment Citizen Suits**
- **Other Issues to Watch**
- **Questions?**



Waters of the United States (a.k.a. Clean Water) Rule – A Quick Refresher

- Joint EPA-Army Corps of Engineers rule – published June 2015
- **Defines “waters of the United States”** subject to Clean Water Act jurisdiction – based primarily on Justice **Kennedy’s “significant nexus” test** in *Rapanos v. United States* (2006)
- Challenged by >100 parties, including 27 states – in multiple courts of appeals and 13 district courts
- Rule stayed by 6th Circuit in Oct. 2015. **Merits fully briefed, but litigation stayed . . .**
- **Supreme Court granted cert on whether district courts or Courts of Appeals have jurisdiction** to hear challenges to the rule
 - Oral argument October 11, 2017

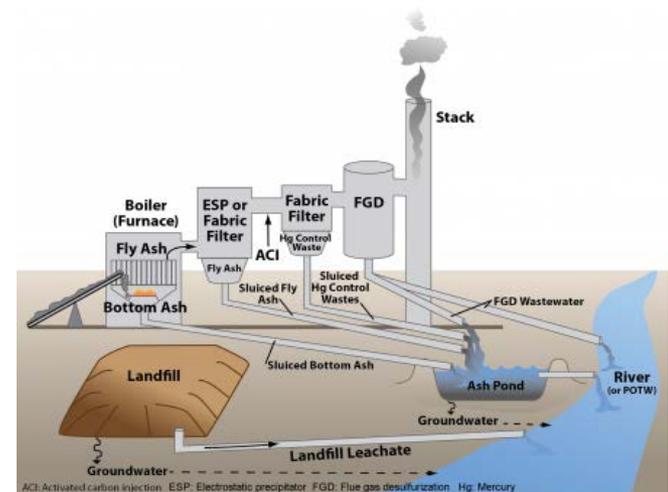
Waters of the United States Rule, Next Steps

- Feb. 28, 2017, President signed **Executive Order** directing EPA, Army Corps of Engineers to issue a **proposed rulemaking to rescind or revise**
 - **Agencies must “consider”** interpreting WOTUS consistent with Justice **Scalia test** from *Rapanos*
- Administration plans a “2-Step” Rulemaking Process:
 - **Step 1** (Proposed June 2017): “recodify” preexisting 1986 rule
 - **Step 2** (forthcoming): codify new approach, based on or incorporating Scalia test from *Rapanos*
- **Challenging issues and litigation ahead**
 - forum(s) to be decided by Supreme Court



Steam Electric Effluent Limitation Guidelines (ELG) – Background

- Steam Electric Effluent Limitation Guidelines Final Rule (Sept. 2015)
 - **First update since 1982**
 - Covers fossil and nuclear steam plants – projected to affect ~135 plants
 - Limits on discharges of toxic metals
 - Existing and new source standards – direct discharge and pretreatment
- Sets **technology-based standards** for **multiple discharge streams**:
 - **Flue gas desulfurization** wastewater
 - **Fly ash** and **bottom ash** transport water
 - **Flue gas mercury control** wastewater
 - **Gasification** wastewater
 - **Combustion residual leachate**
- **Original compliance deadline: 2018 – 2023**
- **Variance petitions** pending



Steam Electric Effluent Limitation Guidelines (ELG) – Revision and Litigation

- **Litigation** in Fifth Circuit (*Southwestern Electric Power Co., et al. v. EPA*) – industry and environmental challenges
- March-April 2017: Utility Water Act Group and Small Business Administration **petitioned EPA for reconsideration and administrative stay**
- April: **EPA granted reconsideration and issued administrative stay pending judicial review**
- August: EPA announced **intent to conduct rulemaking to revise** bottom ash and FGD requirements (by 2020)
- September: EPA **finalized deadline extension to 2020**
- **Next steps: Rulemaking and litigation**



CWA Citizen Suits – Coal Ash Impoundments, “Groundwater Conduit” Theory

- **Multiple recent district court decisions in CWA citizen suits** alleging discharges without, or in violation of, permits . . .
- Claims: **Unpermitted seeps, use of WOTUS as part of waste treatment system, alleged permit violations**
- **“Groundwater Conduit Theory”**
 - E.g.: *Sierra Club v. VEPCO* (E.D. Va. Mar. 23, 2017); others . . .
 - District Courts split, no Circuit Court decisions; 9th Cir. case pending
 - NB: CCR rule requirement to web publish groundwater monitoring data?
- ***Tenn. Clean Water Network v. TVA* (M.D. Tenn.) (August 2017):** requires full excavation of coal ash waste complex



Other Issues to Watch . . .

- **2017 Nationwide Permits** – Programmatic CWA 404 permits, including Nationwide Permit 12 – critical for transmission and distribution lines and pipeline projects. Court challenge by NGOs likely
- **Section 316(b) Cooling Water Intake Structures Rule** – 2nd Cir. litigation pending (argued September 2017); Endangered Species Act implementation issues
- **Other key citizen suits, e.g. . . .**
 - **Total Maximum Daily Load** “constructive submission” theory – pending before 4th Cir. in *OVEC v. Pruitt*
 - **“Permit shield” challenges** – 4th Cir. Decision in *OVEC v. FOLA*
- **Water Quality Standards** – industry challenges to recent rules, existing consent decrees, and new citizen suits drive EPA action

Closing Thoughts Questions?

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