FEDERAL REGULATORY UPDATE

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Baton Rouge, Louisiana
## Federal Regulatory Update

### Air
- Oil and Gas NSPS
- Risk Management Program
- Climate
- Policies

### Water
- WOTUS
- Section 401 – WQC
- Proposed Spill Rule

### Waste

### Environmental Justice

### Compliance and Enforcement

### Questions and Comments
## Oil and Gas NSPS

- **The 2012 NSPS Rule**
  - 77 FR. 49490 (Aug. 16, 2012)
  - 40 CFR 60, Subpart OOOO
  - New facilities as of Aug. 23, 2011
  - Targets VOCs
  - RECs or ‘green completions’
  - Storage tanks
  - Equipment leaks

- **The 2016 NSPS Rule**
  - 81 FR 35824 (June 3, 2016)
  - 40 CFR 60, Subpart OOOOa
  - New facilities as of Sep. 18, 2015
  - Targets methane and VOCs
  - Subpart OOOO applies between Aug. 23, 2011 and Sept. 18, 2015
  - Owners/operators to find and repair leaks
  - Next Generation Enforcement, such as optical gas imaging
  - General duty added at 40 CFR 60.5370a(b) and to Subpart 0000

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<tr>
<th>Location and Equipment/Process Covered</th>
<th>Required to Reduce Emissions Under EPA Rules</th>
<th>Rules that Apply</th>
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*Note: Types of sources already subject to the 2012 NSPS requirements for VOC reductions that also are covered by the 2016 methane requirements will not have to install additional controls, because the controls to reduce VOCs reduce both pollutants*
Oil and Gas NSPS

Trump Administration

- Attempts to stay, delay, and revise the 2016 Oil and Gas NSPS Rule
  Otherwise, Oil and Gas NSPS went into effect

  - Removed the transmission / storage segment from regulation under the NSPS
  - Rescinded methane emissions limits for sources in the production / processing segments

  - Fugitive emission monitoring requirements for well sites/compressor stations
    Low production: Every other year v. annual
    Non-low production: Annual v. semi-annual and annual
    Compressor stations: Semi-annual and annual v. initial and quarterly
  - Certification for technical infeasibility for pumps and closed-vent design
    PE and in-house engineer with expertise in design/operation of pumps/CVS
  - Expands the technical infeasibility provision to greenfield sites for the pneumatic pump requirements
    Eliminates distinction between greenfield and non-greenfield sites
  - Alternative means of emission limitation may include existing state programs
Oil and Gas NSPS

Biden Administration

- EO 13990 (Jan. 20, 2021)
  - Required all federal agencies to review all rules issued under Trump Administration
  - Required EPA to consider suspending Trump-era Oil and Gas NSPS

- Congressional Review Act
  - Passed legislation disapproving the Policy Rule
  - Signed by President Biden on June 30, 2021
  - Treated as though the rule “has never taken effect,” 5 USC 801(f)(2)
  - Repealed/revised provisions of 2012 / 2016 Oil & Gas NSPS came back into effect

- Proposal to revise Oil & Gas NSPS - 86 Fed. Reg. 63110 (November 15, 2021)
  - No proposed regulatory text - EPA will issue a supplemental proposal in 2022
  - Would apply to existing sources
  - Add Subpart OOOOOb – update requirements for new sources (after 11/15/21)
  - Add Subpart OOOOc - emission guidelines for states as to methane from this source category
  - Sought comments on ...
    - Finding and repair leaks (fugitive emissions) using advanced technologies / Method 21
    - Zero emissions from new and existing pneumatic controllers
    - Eliminate venting of gas from oilwells and require capture / sale
    - Storage tanks to reduce VOC and methane emissions

- Comment period extended until January 31, 2022
## Oil and Gas NSPS

### Oil and Natural Gas Sources Covered by EPA's Proposed New Source Performance Standards (NSPS) and Emissions Guidelines, by Site

<table>
<thead>
<tr>
<th>Location and Equipment or Process Covered</th>
<th>Required to or Would Be Required to Reduce Emissions under EPA Rules (if finalized as proposed)</th>
<th>2012 NSPS for VOCs (OOOO)</th>
<th>2016 NSPS for Methane &amp; VOCs (OOO0a)</th>
<th>2021 Proposed NSPS for Methane &amp; VOCs (OOO0b)</th>
<th>2021 Proposed Emissions Guidelines for Methane (OOO0c)</th>
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1 Covered for CO only
2 Covered for VOCs only

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# Oil and Gas NSPS

## Table 4—Projected Emissions Reductions Under the Proposed Rule, 2023–2035 Total

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<tr>
<th>Pollutant</th>
<th>Emissions reductions (2023–2035 total)</th>
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<td>Methane (million short tons)</td>
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<tr>
<td>VOC (million short tons)</td>
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<tr>
<td>Hazardous Air Pollutant (million short tons)</td>
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<tr>
<td>Methane (million metric tons CO$_2$ Eq.)$^b$</td>
<td>920</td>
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</table>

$^a$To convert from short tons to metric tons, multiply the short tons by 0.907. Alternatively, to convert metric tons to short tons, multiply metric tons by 1.102.

$^b$CO$_2$ Eq. calculated using a global warming potential of 25.

## Table 5—Benefits, Costs, Net Benefits, and Emissions Reductions of the Proposed Rule, 2023 Through 2035

[Dollar Estimates in Millions of 2019 Dollars]$^a$

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<th></th>
<th>3 percent discount rate</th>
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<td>Present value</td>
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<td>Net Compliance Costs</td>
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<td>Non-Monetized Benefits</td>
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</table>

Climate and ozone health benefits from reducing 41 million short tons of methane from 2023 to 2035.
PM$_{2.5}$ and ozone health benefits from reducing 12 million short tons of VOC from 2023 to 2035.
HAP benefits from reducing 480 thousand short tons of HAP from 2023 to 2035.
Visibility benefits.
Reduced vegetation effects.
Risk Management Program


- Initiated under EO 13650, issued by President Obama, after West Fertilizer explosion/fire
  EO required agencies to improve risk management practices

- Major Changes
  - Root cause analysis for ‘catastrophic release’ or a ‘near-miss’
  - Creates uniform definition of ‘catastrophic release’
  - No definition of ‘near-miss’ (“could reasonably have resulted in a catastrophic release”)

  - Independent third-party to perform compliance audit after a reportable release
    - Standards for third-party qualifications, certifications, findings, response to findings

  - Adds Safer Technology and Alternatives Analysis (STAA) to PHA
    - Applies to paper, petroleum and coal, and chemical manufacturing

  - Require additional coordination with local emergency response agencies
    - Annual notification exercise, annual tabletop exercise, and field exercises every 5 years

  - Increase public availability of information
    - Provide information, upon request, to LEPC
    - Provide information to the public, via web-site or similar means
    - Hold public meeting after a reportable accident

- Originally effective March 14, 2017, but multiple attempts to delay
  - Effective date delayed until March 21, 2017 under Priebus Memorandum
  - Effective date delayed until February 19, 2019, 82 Fed. Reg. 27133 (June 14, 2017)
  - Vacated by D.C. Circuit on August 17, 2018
Risk Management Program


- Rescinds

  Independent third-party to perform compliance audit after a reportable release
  Safer Technology and Alternatives Analysis (STAA) to PHA
  Root cause analysis for a reportable release or a ‘near-miss’
  Providing information to the public upon request and/or on web-site

- Modifies

  Provisions regarding providing certain information to local emergency response
    Modified to information necessary for developing local plan
  Frequency for field exercises to a more flexible schedule
    Modified to require consultation with local official to establish frequency
  Requirement to hold public meeting after incident
    Modified to only for incident with off-site impacts

- Savings

  $87M per year in total annual cost savings (averted costs)
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<th>What</th>
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<tr>
<td>Public Meetings</td>
<td>Within 90 days of any qualifying accident that occurs after March 15, 2021</td>
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<tr>
<td>Develop Emergency Response Programs</td>
<td>Within three years of owner or operator determining that facility is subject to the provisions</td>
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<tr>
<td>Develop exercise plans and schedules</td>
<td>December 2023</td>
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<td>Conduct first notification drill</td>
<td>December 2024</td>
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<td>Conduct first tabletop exercise</td>
<td>December 2026</td>
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<tr>
<td>Conduct first field exercise</td>
<td>According to the exercise schedule established by the owner or operator in coordination with local response agencies</td>
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<td>Submit RMP with new information elements</td>
<td>The owner or operator would provide new information elements with any initial RMP or RMP resubmission made after December 2024.</td>
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<tr>
<td>Comply with new emergency coordination requirments</td>
<td>Already in effect as of September 21, 2018</td>
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<tr>
<td>Comply with remaining minor accident prevention provisions</td>
<td>Already in effect as of September 21, 2018</td>
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Risk Management Program

- EO 13990 (Jan. 20, 2021)
  - Required all federal agencies to review all rules issued under Trump Administration
  - EPA currently plans to prepare a notice of proposed rulemaking (NPRM)

  Source: from EPA Rule List – Fall 2021

- GAO Report, February 2022
  - Climate change may exacerbate natural hazards (flooding, storm surge, wildfires, sea level rise) which could potentially lead to accidental releases of hazardous chemicals
  - 3,200 facilities are located in areas where natural hazards may be impacted by climate change
  - EPA should ensure that facilities are managing risks from natural hazards / climate change

- EPA – Stated it will provide “maximum protection possible” and will make environmental justice a key focus
Climate

- Paris Agreement – rejoined on Day 1

Paris Climate Agreement

JANUARY 20, 2021 • STATEMENTS AND RELEASES

I, Joseph R. Biden Jr., President of the United States of America, having seen and considered the Paris Agreement, done at Paris on December 12, 2015, do hereby accept the said Agreement and every article and clause thereof on behalf of the United States of America.

- Executive Order 13990, January 20, 2021
  - Revoked the permit for Keystone XL Pipeline
  - Re-established use of the Social Cost of Carbon and the Interagency Working Group (IWG)

- Executive Order 14008, January 27, 2021
  - A “whole-of-government” approach
  - Paused new oil and gas leased on public lands / offshore waters

- Announced climate goals:
  - Reducing greenhouse gas pollution from 2005 levels by 50-52% in 2030 as part of the U.S. Nationally Determined Contribution (NDC) under Paris Agreement
  - Creating a carbon pollution-free power sector by 2035
  - Reaching net-zero emissions economy-wide by no later than 2050
Complaint sought relief based on:

- SCC estimates violate the procedural requirements of the APA as a substantive rule that did not undergo the requisite notice-and-comment process
- President Biden, through EO 13990, lacks the authority to enforce the estimates as they are substantively unlawful under the APA
- The Government Defendants acted beyond any congressional authority by basing regulatory policy upon global considerations

Preliminary Injunction issued on Feb. 11, 2022 against multiple federal agencies, including EPA

- Cannot adopt or rely on the IWG’s work product
- Cannot adopt or rely on the SSC
- Cannot rely on EO 13990, Section 5

According to OMB, injunction will impact numerous ongoing rule-makings / federal actions

- DOE – 21 rule-makings
- EPA – 5 rule-makings
- DOI – 3 rule-makings and 27 NEPA-mandated analyses
- DOT – 60 RODs/EIS
Climate

Climate Initiatives Task Force

LOUISIANA’S PATHWAY TO NET ZERO

Graph showing Louisiana’s GHG emissions from 2020 to 2050, with various mitigation strategies and their impacts.
Climate Initiatives Task Force

**Clean Energy Transition**
1: Shift towards a clean, renewable, and resilient power grid.
2: Increase access to and deployment of distributed energy resources.

**Industrial Decarbonization**
3: Monitor, inventory, certify, and support industrial decarbonization.
4: Improve efficiencies in and modernization of industrial processes and facilities.
5: Accelerate industrial electrification, switching to low- or no-carbon fuels and low- or no-carbon feedstocks.
6: Promote reduced-carbon materials.

**Actively Managed Methane Emissions**
7: Increase and mobilize resources for decommissioning legacy oil and gas infrastructure.
8: Monitor and regulate methane emissions.

**Transportation, Development, and the Built Environment**
10: Reduce vehicle miles traveled and increase transportation efficiencies.
11: Increase urban, rural, and regional public transit service.
12: Coordinate land use planning to reduce sprawl and support healthy and resilient communities.
13: Improve the efficiency and resilience of homes and non-residential buildings.
Climate Initiatives Task Force

Natural and Working Lands and Wetlands

14: Preserve and expand natural lands and urban green spaces to maximize climate mitigation and adaptation goals.
15: Restore and conserve Louisiana’s coastal wetlands to maximize climate mitigation and adaptation goals.
16: Support the sustainable management and conservation of working agricultural and forestry lands.

An Inclusive, Low-Carbon Economy

17: Build a more inclusive and resilient economy for all Louisiana residents.
18: Strengthen climate education, research, and innovation as a focus of Louisiana’s energy transition.
19: Prioritize Louisiana workers and businesses in the transition to a low-carbon economy.

Collaboration and Partnership to Ensure Successful Implementation

20: Ensure Louisiana is prepared to maximize potential federal funding opportunities.
21: Position Louisiana as a climate leader by engaging in national and regional dialogues and planning.
22: Align climate action approaches across state government.
23: Coordinate action with local government.
24: Call upon the private sector to align their practices and play a leading role in climate action.
25: Improve engagement with and track progress on outcomes for disadvantaged communities and Indigenous peoples.

Accountability and Adaptability to Ensure Lasting Success

26: Advance an equitable, efficient, and sustainable siting and permitting process for new energy and infrastructure projects.
27: Ensure that Climate Action Plan strategies are effectively and transparently implemented.
28: Track progress in reducing net GHG emissions reductions and adapt the approaches taken as needed.
Carbon Capture, Use, and Sequestration (CCUS)

  - US “will likely have to capture, transport, and permanently sequester significant quantities of” CO2 to reach net zero
  - Federal government has an existing regulatory framework that is capable of safeguarding the environment, public health, and public safety as CCUS projects move forward
  - Provides guidance on ...
    - Facilitating Decision Making on CCUS Projects and Carbon Dioxide Pipelines
    - Public Engagement and Interdisciplinary Research
    - Understanding Environmental Impacts
  - Comment period until March 18, 2022

- Will extend comment period on request of NGOs and members of Congress
  - Common theme in requests to extend...
    - “Novelty” of CCUS
    - Should eliminate fossil fuels so no need for CCUS
Policies - Petitions for Objection Under Title V

- EPA may object to a proposed Title V permit
  - EPA has 45 days from receipt of proposed permit, 40 CFR 70.8(c)
  - Any person may petition EPA within 60 days of expiration of EPA’s 45 days, 40 CFR 70.8(d)
    EPA must object “if petitioner demonstrates ... that the permit is not in compliance with the requirements” of CAA, 42 USCA 7661d(b)(2)
    - Used by NGOs/EPA to ‘override’ state decisions and review prior preconstruction permit decisions

- *PacifiCorp Energy* Decision, Oct. 16, 2017 - EPA will limit its review to whether the Title V permit:
  - Has accurately incorporated “applicable requirements” and
  - ”Includes adequate monitoring, recordkeeping, and reporting requirements to assure compliance with the terms and conditions of the preconstruction permit
  - Will not review prior PSD Program decisions that are incorporated into a Title V permit (i.e., will not “second-guess”)


Policies - Petitions for Objection Under Title V


- Must object if proposed permit is not in compliance with applicable requirements

- Definition of AR in 70.2 was unchanged – includes any standard / requirement in implementation plan

- What are applicable requirements?

  - Sierra Club v EPA, 964 F3d 882 (10th Cir. 2020)
    - Includes all items listed in Section 70.2, and all provisions under implementation plan which broadly requires compliance with CAA
    - “So all of the Act’s requirements constitute ‘applicable requirements’ under the regulation.”

  - Environmental Integrity Project v EPA, 969 F3d 529 (5th Cir. 2020)
    - EPA’s view that Title V permitting process is not the vehicle for re-examining the substantive validity of prior PSD decisions is entitled to deference

  - PacificCorp’s Hunter Power Plant Petition, filed Jan. 14, 2022
    - Sierra Club filed petition seeking to have EPA review prior PSD decisions
Policies - Once In, Always In

- **May 1995 Seitz Memorandum**
  - First set out the OIAI Policy
  - Facilities that are major sources on first compliance date of MACT standard must comply permanently with standard

- **Wehrum Memorandum, dated January 25, 2018**
  - Supersedes the May 1995 Seitz Memorandum, which is withdrawn “effective immediately”
  - Must be withdrawn because “contrary to the plain language of the CAA”
  - OIAI Policy forces area sources to comply with major source requirements
    - Nothing in definition of ‘major source’ or ‘area source’ supports this result
    - Congress placed “no temporal limitations” on the determination of whether a source emits or has PTE
      - EPA had no authority to impose temporal limitation (ie, before the ‘first compliance date’)

- **Major source can become an area source when it takes** ...
  - An enforceable limit on its PTE HAP, and
  - Measures to bring HAP emissions below the applicable threshold, no matter when measures are taken

- **Source will not be subject to major source requirements, including MACT, “so long as the source’s PTE remains below the applicable HAP emission thresholds”**
• California Communities Against Toxics v EPA, 934 F.3d 627 (D.C. Cir. 2019)

-Petitioners claimed that the Wehrum Memorandum is a rule requiring notice and comment
-DC Circuit held that Wehrum Memorandum was not a final agency action under APA
-Not subject to judicial review

• Reclassification Rule, 85 Fed Reg 73854 (November 19, 2020)

-Amended 40 CFR 63.1 and added 63.1(c)(6)
-Codifies the Wehrum Memorandum
-A major source may become an area source at any time upon reducing its emissions of and potential to emit hazardous air pollutants to below the major source thresholds
  Subject to major source requirements until reclassification becomes effective
  Subject to all applicable area source requirements, including notification requirements
  Reclassification does not absolve source of violations committed during major source status

• EO 13990 (Jan. 20, 2021)

-Required all federal agencies to review all rules issued under Trump Administration
-As per EPA Rule List – Fall 2021, EPA is to review the Reclassification Rule and publish for comment a notice of proposed rulemaking either suspending, revising, or rescinding the rule
Waters of the United States

- **US v. Riverside Bayview Homes, 474 US 121 (1985)**
  - Upheld jurisdiction of wetlands adjacent to traditional navigable waterways
    - Wetlands ‘actually abutted’ the TNW
    - The significant nexus between adjacent wetlands and TNW ‘informed their view’
  - Definition of ‘navigable waters’ as WOTUS shows intent to go beyond traditional definition of navigability-in-fact

- **Solid Waste Agency of Northern Cook County (SWANCC) v. Corps, 531 US 159 (2001)**
  - Jurisdiction of the Corps does not extend to ponds that are not adjacent to open water
  - Non-navigable, intrastate, isolated ponds are not ‘navigable waters’ merely because they serve as habitat for migratory birds
  - To rule otherwise would assume that "the use of the word navigable in the statute ... does not have any independent significance."

- **Rapanos v. US, 547 US 715 (2006)** – Plurality Opinion (Scalia) and Kennedy Concurrence
  - Scalia: WOTUS include only those relatively permanent, standing, or continuously flowing bodies of water, and adjacent means there must be a continuous surface connection such that there is no clear demarcation between waters and wetlands
  - Kennedy: Need a significant nexus to TNW
Waters of the United States

• The Clean Water Rule, 80 Fed. Reg. 37054 (June 29, 2015)
  • Provided expansive definition of ‘waters of the United States’
  • Challenged in numerous district / appellate courts
  • Led to a “patchwork” of regulation
    2015 Rule in effect in 22 states
    Prior rule in effect in the other 28 states

• The Navigable Waters Protection Rule, 85 Fed. Reg. 22250 (April 21, 2020)
  • Patterned after Justice Scalia’s opinion in Rapanos
  • WOTUS “encompass relatively permanent flowing and standing waterbodies that are traditional navigable waters in their own right or that have a specific surface water connection to traditional navigable waters, as well as wetlands that abut or are otherwise inseparably bound up with such relatively permanent waters”
  • Four categories of jurisdictional waters
    The territorial seas and traditional navigable waters
    Tributaries of such waters
    Certain lakes, ponds, and impoundments of jurisdictional waters
    Wetlands adjacent to other jurisdictional waters (other than jurisdictional wetlands)
  • Challenged in numerous district / appellate courts
Waters of the United States

- Executive Order 13990, Jan. 20, 2021
  - Required review all rules issued under Trump Administration

- EPA/Corps announced intention to revise WOTUS definition (June 9, 2021)
  - Two rulemakings contemplated:
    - A foundational rule to restore longstanding protections (i.e., restore the regulations in place for decades until 2015)
    - Anticipated second rule that builds on that regulatory foundation

- NWPR remanded / vacated by federal district court in Arizona (Aug. 30, 2021)
  - Halted implementation of the NWPR nationwide
  - Interpreting WOTUS consistent with the pre-2015 regulations until further notice
  - Approved jurisdictional determinations
    Will not be reopened if not associated with a permit action
    Unless criteria for revision under Regulatory Guidance Letter 05-02 is met
  - Pending JDs – Will be completed under current interpretation
  - Permits and applications
    Prior permits - Will not be reopened unless Section 325.7 criteria are met
    Pending permit applications will be completed under current interpretation
Summary of Key Points

The agencies will assert jurisdiction over the following waters:

- Traditional navigable waters
- Wetlands adjacent to traditional navigable waters
- Non-navigable tributaries of traditional navigable waters that are relatively permanent where the tributaries typically flow year-round or have continuous flow at least seasonally (e.g., typically three months)
- Wetlands that directly abut such tributaries

The agencies will decide jurisdiction over the following waters based on a fact-specific analysis to determine whether they have a significant nexus with a traditional navigable water:

- Non-navigable tributaries that are not relatively permanent
- Wetlands adjacent to non-navigable tributaries that are not relatively permanent
- Wetlands adjacent to but that do not directly abut a relatively permanent non-navigable tributary

The agencies generally will not assert jurisdiction over the following features:

- Swales or erosional features (e.g., gullies, small washes characterized by low volume, infrequent, or short duration flow)
- Ditches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water

The agencies will apply the significant nexus standard as follows:

- A significant nexus analysis will assess the flow characteristics and functions of the tributary itself and the functions performed by all wetlands adjacent to the tributary to determine if they significantly affect the chemical, physical and biological integrity of downstream traditional navigable waters
- Significant nexus includes consideration of hydrologic and ecologic factors

Waters of the United States

- 86 Fed Reg. 69372, December 7, 2021 - Proposed rule
  - To restore “waters [as] defined by the longstanding 1986 regulations”
  - With amendments to reflect “interpretation of the statutory limits on the scope of” WOTUS as “informed by Supreme Court case law”

- WOTUS includes ...
  - Traditional navigable waters (TNW)
  - All interstate waters including interstate wetlands
  - All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds
  - All impoundments of waters otherwise defined as WOTUS
  - Tributaries
  - The territorial seas
  - Wetlands adjacent to certain waters (other than waters that are themselves wetlands)
Waters of the United States

§ 328.3 Definitions.

For the purpose of this regulation these terms are defined as follows:
(a) The term “waters of the United States” means
(1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
(2) All interstate waters including interstate wetlands;
(3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:
(i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or
(ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
(iii) Which are used or could be used for industrial purpose by industries in interstate commerce;
(4) All impoundments of waters otherwise defined as waters of the United States under the definition;
(5) Tributaries of waters identified in paragraphs (a) (1)–(4) of this section;
(6) The territorial seas;
(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a) (1)–(6) of this section.

- **No. 3 (other waters)**
  - Scalia formulation - relatively permanent, standing or continuously flowing bodies of water with a continuous surface connection
  - Kennedy “significant nexus” formulation - either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of TNW, interstate waters, or territorial seas

- **No. 5 (tributaries)**
  - Scalia formulation - relatively permanent, standing or continuously flowing bodies of water
  - Kennedy “significant nexus” formulation - either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of TNW, interstate waters, or territorial seas

- **No. 7 (adjacent wetlands)**
  - TNW, interstate waters, or territorial seas, or
  - Scalia formulation - relatively permanent, standing or continuously flowing bodies of water identified as impoundments or relatively permanent tributaries with a continuous surface connection to such waters; or
  - Kennedy “significant nexus” formulation - impoundments or tributaries when the wetlands either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of TNW, interstate waters, or territorial seas
Waters of the United States

- **Sackett v. EPA, 8 4th 1075 (9 Cir. 2021)**
  - Relates to a residential lot purchased in 2004
  - EPA issued a compliance order
    - Led to Supreme Court ruling that judicial review of the order was available
  - Sackett’s argued that Scalia’s formulation was correct
  - Applied Kennedy’s ‘significant nexus’ test

- **US Supreme Court agreed to review Ninth Circuit decision**
  - Whether the U.S. Court of Appeals for the 9th Circuit set forth the proper test for determining whether wetlands are "waters of the United States" under the Clean Water Act, 33 U.S.C. § 1362(7).
Section 401 - Water Quality Certification

- CWA Section 401 (33 USCA 1341)
  Applies to applicants for a federal permit that may result in discharge into navigable waters
  Requires a certification from the state that discharge will comply with CWA
  State must act “within a reasonable period of time (which shall not exceed one year)”

- EPA’s 2020 Clean Water Act Section 401 Certification Rule
  Finalized June 1, 2020 (85 Fed. Reg. 42210, July 13, 2020)
  Effective September 11, 2020

- Executive Order 13990, Jan. 20, 2021
  Required review all rules issued under Trump Administration
  Announced intention to reconsider and revise (86 Fer Reg. 29541, June 2, 2021)

- Section 401 Certification Rule vacated on October 21, 2021
  Back to prior rules (originally published in 1971)

- EPA expects a proposal in Spring 2022
CWA Hazardous Substance Worst Case Discharge Planning Regulations (March 10, 2022)

• Substance of proposal
  • Applies to a facility, which because of its location, could cause substantial harm to the environment from a worst case discharge into or onto navigable water
  • Would require an owner or operator of a facility to prepare and submit a plan for responding to a discharge / substantial threat of discharge of a CWA hazardous substance

• Two initial screening criteria
  • Does the facility have capacity for a CWA hazardous substance onsite at or above a threshold quantity?
  • If so, is the facility is within one-half mile to navigable water or a conveyance to navigable water?

• If so, and if any of the following substantial harm criteria are met, must then submit a CWA hazardous substance FRP to EPA:
  • the ability to adversely impact a public water system
  • the ability to cause injury to fish, wildlife, and sensitive environments (FWSE)
  • the ability to cause injury to public receptors
  • having had a reportable discharge of a CWA hazardous

• Proposal also allows EPA RA to require CWA hazardous substance FRPs, after consideration of site-specific factors for a facility, regardless of whether a facility meets the above criteria
Hazardous Substance Spill Rule

Does the facility have a maximum capacity onsite of a CWA hazardous substance that meets or exceeds 10,000x the RQ?

NO

Is the facility within one-half mile of navigable water or a conveyance to navigable water?

NO

No submittal of Facility Response Plan, except at Regional Administrator discretion

YES

YES

Has the facility had a discharge of a Reportable Quantity within the last five years that reached water?

NO

Is the facility located at a distance such that a worst case discharge has the ability to cause injury to FWSE?

NO

Is the facility located at a distance such that a worst case discharge could adversely impact a public water system?

NO

Is the facility located at a distance such that a worst case discharge has the ability to cause injury to public receptors?

YES

Submit Facility Response Plan

YES

NO
Waste

  - Notice and opportunity for comment
  - Seeking to allow modern electronic alternatives for public notice of the intent to issue hazardous waste permits and other actions
  - Newspaper of general circulation = “online newspapers”
    - Refers to any electronic or internet-accessible newspaper
  - Request comment on whether online newsletters or bulletins published by permitting agencies could qualify as newspapers

- Third Rule, (proposed) signed March 1, 2022
  - Amends manifest regulations regarding e-Manifest System
  - Generally relates to exports of hazardous waste
    - Incorporates exporters into fee system
  - Proposing amendments to three manifest-related reports to allow electronic completion
    - Discrepancy, exception, and unmanifested waste reports
  - Requests public comment on changes to the manifest form
  - Comment period is 60 days from publication
**Waste**

- **PFAS**
  - Granted petition to add PFAS as RCRA hazardous constituents
  - Would support corrective action and/or listing
    - Require sample collection for 29 PFAS between 2023 and 2025
  - Issued final regulatory determinations for PFOA / PFOS under SDWA
    - Could lead to national primary drinking water standard
  - National PFAS testing strategy that uses TSCA authorities to require PFAS manufacturers to provide information on PFAS
  - EPA restarted the process to designate PFOA and PFOS as CERCLA hazardous substances

- **PFAS Strategic Roadmap, 2021-2024**
  - Research - Invest in research, development, and innovation to increase understanding of PFAS exposures and toxicities, human health and ecological effects, and effective interventions that incorporate the best available science.

  - Restrict - Pursue a comprehensive approach to proactively prevent PFAS from entering air, land, and water at levels that can adversely impact human health and the environment.

  - RemEDIATE - Broaden and accelerate the cleanup of PFAS contamination to protect human health and ecological systems.
Waste

RESEARCH
Invest in research, development, and innovation to increase understanding of PFAS exposures and toxicities, human health and ecological effects, and effective interventions that incorporate the best available science.

Objectives
- Build the evidence base on individual PFAS and define categories of PFAS to establish toxicity values and methods.
- Increase scientific understanding on the universe of PFAS, sources of environmental contamination, exposure pathways, and human health and ecological effects.
- Expand research on current and emerging PFAS treatment, remediation, destruction, disposal, and control technologies.
- Conduct research to understand how PFAS contribute to the cumulative burden of pollution in communities with environmental justice concerns.

RESTRICT
Pursue a comprehensive approach to proactively prevent PFAS from entering air, land, and water at levels that can adversely impact human health and the environment.

Objectives
- Use and harmonize actions under all available statutory authorities to control and prevent PFAS contamination and minimize exposure to PFAS during consumer and industrial uses.
- Place responsibility for limiting exposures and addressing hazards of PFAS on manufacturers, processors, distributors, importers, industrial and other significant users, dischargers, and treatment and disposal facilities.
- Establish voluntary programs to reduce PFAS use and release.
- Prevent or minimize PFAS discharges and emissions in all communities, regardless of income, race, or language barriers.

REMEDiate
Broaden and accelerate the cleanup of PFAS contamination to protect human health and ecological systems.

Objectives
- Harmonize actions under all available statutory authorities to address PFAS contamination to protect people, communities, and the environment.
- Maximize responsible party performance and funding for investigations and cleanup of PFAS contamination.
- Help ensure that communities impacted by PFAS receive resources and assistance to address contamination, regardless of income, race, or language barriers.
- Accelerate the deployment of treatment, remediation, destruction, disposal, and mitigation technologies for PFAS, and ensure that disposal and destruction activities do not create new pollution problems in communities with environmental justice concerns.
**Environmental Justice**

**EO 13985 - Jan. 20, 2021**

- Nation deserves an “ambitious whole-of-government equity agenda”

- The term “equity” means the consistent and systematic fair, just, and impartial treatment of all individuals, including individuals who belong to underserved communities that have been denied such treatment

- Requires
  - An equity assessment in federal agencies
  - Allocation of federal resources to advance fairness
  - Promotion of equitable delivery of government benefits and equitable opportunities
Environmental Justice

- Executive Order 14008, January 27, 2021
  - Announced policy to secure EJ for disadvantaged communities
    - Communities that are “historically marginalized and overburdened”
  - Required agencies to make EJ “part of their missions”
  - Created White House EJ Interagency Council and White House EJ Advisory Council
  - Order CEQ to create Climate and Economic Justice Screening Tool

- Justice 40 (EO 14008, Section 223)
  - Whole-of-government effort to ensure that agencies work with states and local communities to deliver at least 40 percent of the overall benefits from federal investments in climate and clean energy to disadvantaged communities
  - 21 priority programs to begin enhancing benefits for disadvantaged communities, such as
    - Flood Mitigation Assistance Program
    - Drinking Water State Revolving Fund
    - Lead Hazard Reduction
    - Rural Energy for America Program
Environmental Justice

Draft FY 2022-2026 EPA Strategic Plan Framework

Mission: To Protect Human Health and the Environment

Principles: Follow the Science, Follow the Law, Be Transparent, Advance Justice and Equity

Strategy 1: Ensure Scientific Integrity and Science-Based Decision Making
Strategy 2: Consider the Health of Children and Other Vulnerable Populations in Our Work
Strategy 3: Advance EPA’s Organizational Excellence and Workforce Equity
Strategy 4: Strengthen Tribal, State, and Local Partnerships and Enhance Engagement

Goal 1: Tackle the Climate Crisis
  - Obj 1.1: Reduce Emissions that Cause Climate Change
  - Obj 1.2: Accelerate Resilience and Adaptation to Climate Change Impacts
  - Obj 1.3: Advance International and Subnational Climate Efforts

Goal 2: Take Decisive Action to Advance Environmental Justice and Civil Rights
  - Obj 2.1: Promote Environmental Justice Efforts at the Federal, Tribal, State, and Local Levels
  - Obj 2.2: Embed Environmental Justice into EPA’s Programs, Policies, and Activities
  - Obj 2.3: Strengthen Civil Rights Enforcement in Communities with Environmental Justice Concerns

Goal 3: Enforce Environmental Laws and Ensure Compliance
  - Obj 3.1: Hold Environmental Visitors and Responsible Parties Accountable
  - Obj 3.2: Detect Violations and Promote Compliance

Goal 4: Ensure Clean and Healthy Air for All Communities
  - Obj 4.1: Improve Air Quality and Reduce Localized Pollution and Health Impacts
  - Obj 4.2: Reduce Exposure to Radiation and Improve Indoor Air

Goal 5: Ensure Clean and Safe Water for All Communities
  - Obj 5.1: Ensure Safe Drinking Water and Reliable Water Infrastructure
  - Obj 5.2: Protect and Restore Waterbodies and Watersheds

Goal 6: Safeguard and Revitalize Communities
  - Obj 6.1: Clean Up and Restore Land for Productive Uses and Healthy Communities
  - Obj 6.2: Reduce Waste and Prevent Environmental Contamination
  - Obj 6.3: Prepare for and Respond to Environmental Emergencies

Goal 7: Ensure Safety of Chemicals for People and the Environment
  - Obj 7.1: Ensure Chemical and Pesticide Safety
  - Obj 7.2: Promote Pollution Prevention
OECA’s Four Policies Incorporating Environmental Justice

• Using All Appropriate Injunctive Relief Tools in Civil Enforcement Settlements (April 26, 2021)
  Resolutions should include advanced monitoring, third-party audits, SEPs

• Strengthening Enforcement in Communities with Environmental Justice Concerns (April 30, 2021)
  Increase inspections in overburdened communities
  Resolve noncompliance through remedies with tangible benefits to the community
  Increase engagement with communities about enforcement

• Strengthening Environmental Justice Through Criminal Enforcement (June 21, 2021)
  Enhance coordination between civil-criminal staff regarding inspections in overburdened communities
  so that criminal staff are apprised of violations that involve potential criminal conduct
  Improve outreach to crime victims
  Enhance remedies sought in environmental criminal cases

• Strengthening Environmental Justice Through Cleanup Enforcement Actions (July 1, 2021)
  Require RPs to take early cleanup actions
  Ensure prompt cleanup actions by RPs
  Use enhancement enforcement instruments, such as installation of advanced monitoring equipment
Compliance and Enforcement

National Compliance Initiatives FY2020 - FY2023

• Air
  • Creating Cleaner Air for Communities by Reducing Excess Emissions of Harmful Pollutants
    - Address significant sources of VOCs which may contribute to NAAQS exceedances and HAPs
  • Stopping Aftermarket Defeat Devices for Vehicles and Engines

• Hazardous Chemicals
  • Reducing Hazardous Air Emissions from Hazardous Waste Facilities
    - Focus on identifying and addressing violations of LDAR requirements for related hazardous waste treatment equipment
  • Reducing Risks of Accidental Releases at Industrial and Chemical Facilities

• Water
  • Reducing Significant Non-Compliance with NPDES Permits
    - Address significant noncompliance (SNC)
  • Reducing Non-Compliance with Drinking Water Standards at Community Water Systems
    - Help ensure delivery of safe water to communities by improving SDWA compliance
Questions and Comments?

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