

2019 TRC Transportation Conference Presentation: Environmental Legal Concerns for P3s Projects in Arkansas



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The 2019 TRC Transportation Conference and Equipment Expo was held this week in Hot Springs, Arkansas.

I undertook a presentation titled:

Environmental Legal Concerns for P3s Projects in Arkansas (“Presentation”)

The purpose of the Presentation was to identify and update a number of Arkansas and federal environmental issues relevant to transportation projects.

Topics addressed included:

- Arkansas General Assembly:
- State Government Reorganization

Department of Energy and Environment (ADEQ Director Becky Keogh named Secretary)

Arkansas Department of Environmental Quality

Public Service Commission

Storage Tank Trust Fund Advisory Committee

State Geologist

- Department of Agriculture Includes Arkansas Natural Resources Commission (which focuses on non-point source pollution)
- Arkansas Petroleum Storage Tank Issues (relevant to fleet fueling, construction skid tanks, etc.)
- Referencing comprehensive revision of the federal petroleum underground storage tank regulations for the first time since the late 1980s
- Noting Arkansas has adopted the federal revisions and they will go into effect this fall
- Referencing Arkansas legislation which previously eliminated the requirement for aboveground storage tanks to pay fees and be registered but mandating that such tanks must be voluntarily registered and fees paid to maintain storage tank Trust Fund eligibility
- National Environmental Policy Act
- Noting application to major federal actions affecting the quality of human environment (jurisdictional triggers)
- Requiring federal agencies to prepare a detailed Environmental Impact Statement (“EIS”) if above two elements are applicable

- Reminder that DOT rules revising NEPA regulations do not dictate substantive results (like Clean Water Act, etc.) but mandate compliance with procedural requirements
- Providing recent Arkansas examples of transportation/NEPA issues

I-630 widening

I-30 project

- Streamlining NEPA
- Executive Order 13807
- DOT rules revising National Environmental Policy Act regulations
- Executive Order and agency rule revisions do not guarantee environmental organizations and others might not prevail in judicial challenges
- Clean Water Update
- Clean Water Act jurisdictional elements

a person

adds a

pollutant

to navigable waters (waters of the United States)

from a point source

- Relevance to linear/construction projects
- Stormwater Construction Permits (Arkansas permit expires 2021)
- SPCC regulations
- 311 Oil/Spill release
- 404 wetland permitting
- Continuing debate over appropriate scope of “Waters of the United States” (Obama definition of rule revoked/Trump rule proposed)
- Issue will be decided by the Supreme Court
- Reference to discharges to groundwater and their potential to invoke jurisdiction (“Maui case”)
- Noting that the Arkansas statute provides broader jurisdiction by use of the term “waters of the state” (providing authority for agency’s permitting programs)
- Wetland Mitigation Rules Review
- July 2019 EPA/corps preproposal to review and revise regulations titled “Compensatory Mitigation for Losses of Aquatic Resources”
- Critical to look at each Corps District rule which will vary
- Arkansas Construction Stormwater Permit
- Expires October 31, 2021
- ADEQ will presumably begin considering changes in the next 6-12 months
- Use of Appropriate Tools
- Arkansas Pollution Control and Ecology Commission Regulation No. 2 – Short Term Activity Authorization
- Corps of Engineers Nationwide Permits

Maintenance(3)

Utility lines (12)

Bank stabilization (13)

Linear Transportation Projects (14)

Minor Discharges (18)

Structural Discharges (25)

Temporary Construction, Access and Dewatering (33)

Discharges in Ditches (46)

- Other Clean Water Act Issues
- Arkansas Water Quality Trading
- Arkansas Antidegradation
- Arkansas Water Quality Standards/Minerals
- Arkansas Water Quality Standards/Nutrients
- Regulation No. 2
- Cooperative Federalism (i.e., EPA prioritizing greater control by the states)
- Citizen Suit Activity (major uptick in the last two years)
- Citizen Enforcement Against an Alleged Violator
- Against EPA, Corps of Engineers, etc., for alleged failure to undertake non-discretionary duty
- Arkansas Medical Marijuana Rules
- Relevance to transportation facilities/contractors
- Employee Issues associated with legal use of medical marijuana
- Noting United States Department of Transportation rules continuing prohibition of use of medical marijuana

A copy of the slides can be downloaded [here](#).