

# Arkansas Water Laws and Regulations Webinar: Transfer/Sale of Water/Water Project Development Issues



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09/25/2020

I undertook a presentation as part of the Arkansas Water Laws and Regulations webinar titled:

*Transfer/Sale of Water/Water Project Development Issues ("Presentation")*

The Presentation undertook a discussion of a number of issues and considerations associated with the management and development of water related projects.

Key initial points made in the Presentation included two primary factors that determine whether water is available:

- Is source water available?
- Assuming a source is available, is it clean enough (i.e., water quality) to be cost effectively treated and used?

The Presentation addressed the fact that water supply and water quality issues have traditionally been dealt with separately. Nevertheless, it was noted that today there is a recognition that the availability of a safe and reliable water supply is dependent upon water that is not too impaired to efficiently treat and use (water quality/water quantity overlap).

Initial issues raised included:

- Water development projects can trigger various statutory/regulatory programs
- The design, construction, operation, maintenance, and management of facilities that provide wastewater services and water generate complex issues
- Alternatives to developing water supplies include purchasing and related financing issues

Topics addressed included:

- Development of new water facilities/supplies/infrastructure
- Start permitting early
- Pursue all required permits simultaneously
- Recognize construction/design issues
- Public projects requiring permits
- Address likelihood permits will be appealed/challenged
- Do employees/consultants recognize that most of what they write can be obtained through discovery/Freedom of Information Act

- All communication should be prepared with the thought they may appear in open court or an administrative hearing
- Regardless of Trump Administration interpretation of regulations, environmental/citizen suit activity can drive compliance with the federal statutory standards
- Recognize creative argument/obstacles
- Presence of Endangered Species Act critical habitat and/or threatened or endangered species
- Interstate or interbasin transfers
- Federal reservation of rights
- Clean Water Act jurisdictional issues
- FERC licenses
- Construction project risk management
- Recognize risks
- Lack of scope and definition by owner
- Improper risk allocation in contracts
- Performance guarantees and acceptance testing
- Subjective standards for water quality
- Broad range of influent parameters
- Measuring the standards
- Remedying failure to meet guarantee
- Challenges of meeting taste and odor, color, and noise guarantees
- What is the baseline for raw water
- Different ways to treat different influents
- Noise
- Environmental Assessment/services
- What is the scope of work?
- Do the professionals being utilized have both the authority and expertise to address these issues?
- Environmental due diligence responsibility
- Who is responsible for supervising environmental due diligence?
- Who is responsible for determining the appropriate assessment activities?
- Are the right environmental professionals being utilized (different professionals have different areas of expertise)?
- Should limitation of liability clauses be eliminated or revised in environmental consultant/professional service agreements?
- Should third party reliance provision be revised to include other parties?
- National Environmental Policy Act (“NEPA”)
- Jurisdiction (major federal actions that significantly impact the human environment)
- Major CEQ rule revisions in 2020 (which were detailed in the presentation/slides)
- NEPA is procedural not substantive but failure to follow can result in project being enjoined
- Do subsequent developments after NEPA EIS require revised EIS?
- Even if CEQ regulations address a NEPA issue, will the federal courts agree?
- Role of Endangered Species Act in water projects
- Noting Section 7 applicable to federal activities and 9 applicable to all private and governmental activities
- Address whether critical habitat is relevant and even if not project can arguably affect endangered or threatened species
- U.S. Fish and Wildlife Service proposal to define the term “habitat”
- Recent Arkansas Endangered Species Act issues include Neosho mucket/rabbit’s foot and burying beetle
- Water flow issues
- Variability in surface water flow can impact water quality

- Endangered Species Act may be triggered if water quantity adversely affects threatened or endangered species
- Alternatives to water supply development (i.e., can water be purchased or otherwise acquired?)
- Contract issues are critical
- Certainty of supply
- Economic factors
- Technical considerations
- Relevant terms
- Pricing methodology
- Transfer authorizations needed?
- Water service issues/competition/1926(b)(federal debt protection)
- Sometimes creates dispute between municipalities and rural water districts as to territory that can be entered
- Often occurs through an annexation of territory in the city
- Medical marijuana
- Noting significant consumption of water by cultivation facilities
- Noting various pollutants that will be generated in wastewater by cultivation facilities

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