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Water law update: Five topics to watch in 2021

State and federal water law permitting can pose significant obstacles for natural gas construction projects that impact waterbodies (e.g., wells pads, access roads and pipelines). The following five new and proposed regulatory changes are likely to significantly affect project design and construction in Pennsylvania.

1. Waters of the United States (WOTUS)

The definition of WOTUS identifies which waters are federally regulated under the Clean Water Act (CWA) and therefore determines when a federal permit is required for projects that involve dredging or filling of a waterbody (i.e., a Section 404 permit). The current WOTUS definition was promulgated in 2020 under the Trump administration. It has been criticized by environmental groups as federally regulating fewer types of waterbodies than the WOTUS definition promulgated under the Obama administration. For example, ephemeral streams are not regulated under the current WOTUS definition.

President Biden has already signaled he intends to change the current WOTUS definition. In his first week in office, he asked the U.S. Army Corps of Engineers and the U. S. Environmental Protection Agency (EPA) to consider revising or rescinding the current definition. He has also asked courts to stay judicial challenges to the current WOTUS definition while his administration reconsiders the issue.

The Biden administration is expected to eventually propose its own definition of WOTUS, which will undoubtedly be more expansive than the current definition and require more projects to obtain federal CWA permitting. Among other things, the Biden administration's definition of WOTUS is likely to regulate waters (including ephemeral streams) that are considered to have a "significant nexus" with traditionally navigable waters. This definitional change is expected to extend the time and increase cost of permitting for many natural gas projects.

2. Nationwide Permits (NWP)

In Pennsylvania, qualifying projects impacting federally regulated waters may be eligible for one of two types of Section 404 general permits (i.e., NWP or the

Pennsylvania State Programmatic General Permit (PASPGP)), in lieu of the more costly and complicated process of obtaining an individual Section 404 permit.

In January, the Corps and EPA revised and reissued 12 existing NWPs and created four new NWPs, all of which were effective on March 15. The revised NWPs largely relate to energy industry activities, including the revision of NWP12 relating to oil and gas pipeline activities.

Pennsylvania subsequently finalized new/revised regional conditions to the NWPs. Many of these regional conditions apply to all NWPs (i.e., regional general conditions); however, other regional conditions apply to a specific NWP or Corps District. For example, the regional conditions for NWP12 include requiring a pre-construction notification (PCN) for activities under NWP12 (consistent with the 2017 NWP12).

When planning a project, it is crucial to identify and comply with the new regional general conditions, as well as conditions applicable to the specific NWP and/or Corps District to avoid project revisions and/or the need to switch from an NWP to a generally more costly and more complicated individual permit. For example, the regional conditions for the reissued NWP12 differ from the regional conditions for the 2017 NWP12. The 2021 regional conditions eliminate the prohibition from using NWP12 for projects involving the permanent loss of more than 300 linear feet of stream bed for a single and complete project. In addition, the 2021 regional conditions require a remediation plan, with the PCN, for pipeline projects completed by horizontal directional drilling or other boring methods to address "any anticipated temporary structures, fills or work within waters of the U.S. necessary for the remediation of inadvertent returns of drilling fluids."

As a further consideration, projects intending to use an NWP should evaluate whether the NWP's applicability criteria have changed recently and whether the proposed project still is eligible for coverage, either through grandfathering of the prior NWP or coverage under the revised/new NWP. In some instances, a project may no longer be eligible for a NWP, and the project may need to be redesigned or permitted under the lengthier individual permitting process. This is especially true if the

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prospective permittee does not have a written verification letter, or the permitted activity was not commenced, or under contract to commence, by March 14, 2021.

Lastly, while use of many NWP, including NWP12, historically have been suspended in Pennsylvania, the most recent NWP final regional conditions allow use of nine of the new/reissued NWPs in “areas within Pittsburgh District’s area of responsibility in the Commonwealth of Pennsylvania.” Previously, the PASPGP (discussed below) was the only general permit available for many activities. This exception to the NWP suspensions offers increased flexibility to use NWPs rather than a PASPGP in the western part of Pennsylvania. However, reliance on the NWPs is not guaranteed because the Pittsburgh District still has discretion to select the permitting tool it considers to be the most effective when evaluating a specific action.

3. PASPGP-6

PASPGP-5 expires on June 30, 2021. The Corps has not yet finalized PASPGP-6, which was proposed in September 2020. PASPGP-6, as proposed, would reduce its eligibility threshold from one acre of temporary and/or permanent impact to 0.5 acre of permanent impact and unlimited acreage of temporary impact. In addition, the reporting threshold, triggering the need for Corps review, would be based on impacts from the overall project (i.e., all regulated activities), rather than from each crossing single and complete project (i.e., crossing of a single water). Future projects that are anticipating PASPGP-6 authorization should evaluate applicability with these proposed thresholds (if finalized as proposed).

4. Section 401 Conditional State Water Quality Certification for NWPs

On December 15, 2020, PADEP conditionally granted 401 Water Quality Certification (WQC) for the new/revised NWPs. The conditions of the 401 WQC are incorporated into the NWP regional conditions at Regional General Condition II.H, as summarized below:

- All necessary environmental permits or approvals must be obtained from the Pennsylvania Department of Environmental Protection and all necessary environmental assessments must be submitted to DEP before beginning any activity authorized by the Corps under an NWP.
- Fill material may not contain any waste as defined in the Solid Waste Management Act.
- Applicants and projects eligible for these NWPs must obtain all necessary state permits and/ or approvals to ensure that the project meets Pennsylvania’s applicable water quality standards, including any project-specific WQC.

Project conditions should be reviewed to determine whether they conform with the 401 WQC. If not, the project could require an individual 401 WQC or waiver.

5. Chapter 105

On December 5, 2020, DEP proposed its first substantive revisions to its stream and wetland regulations (i.e., 25 Pa. Code Chapter 105) since 1991. Chapter 105 regulates obstructions and encroachments of waters of the Commonwealth, similar to the Corps’ Section 404 permitting program under the CWA.

Approximately 20 definitions would be added or amended by the proposed rulemaking. Many of the proposed amendments would codify existing application requirements. However, other amendments introduce new or expanded requirements, which could introduce new hurdles for applicants. Many of these revisions relate to performing an alternatives analysis to demonstrate that the project’s impacts to regulated waters have been minimized or avoided. For example, the alternatives analysis must consider “reasonably foreseeable future development” within the watershed. DEP intends to issue a technical guidance document regarding the Chapter 105 alternatives analysis by July 2021 to enhance the existing alternatives analysis in the Chapter 105 Environmental Assessment form.

The proposed revisions would also provide specificity regarding the application requirements for cumulative impact analyses and water dependency and stormwater management demonstrations. In addition, applicants would be required to develop a compensatory mitigation plan for unavoidable impacts to ensure “no net loss” of wetland resources. If finalized as proposed, the rulemaking will likely increase cost and effort required to obtain a Chapter 105 permit.

Conclusion

As discussed above, 2021 already has, and will continue to, present challenges regarding the permitting of projects that disturb regulated waters, including wetlands, in Pennsylvania. Natural gas project designers and developers should stay abreast of these regulatory changes to anticipate and prepare for new requirements and avoid unnecessary delays.

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