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A Quarterly Publication of POWER Engineers **WINTER 2020**



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# CURRENTS

**WINTER 2020**

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## Perspective on 42 Years in the Environmental Consulting Business

Rob Reid | Retiring Environmental Division Manager

**A**s I head into retirement, I would like to pass along some thoughts about my career in the environmental consulting business. Whether you're a seasoned veteran yourself or just starting off in the business, perhaps an idea or two can help you in your own career.

42 years is a very long time, yet it seems to have flown by as I've enjoyed a variety of projects and worked with great clients and co-workers over the years.

It's hard to believe I started my career with a master's degree making \$6/hour as a Staff Biologist.

In this business, change is a given. Administrations will come and go and regulations will ebb and flow. While understanding the technical aspects of the job are important, success as an environmental consultant depends on putting in the work and building relationships inside and outside your company.

### Keys to a Rewarding Career

Upon reflection, I've identified some attributes that helped me build a rewarding career. It takes hard work, paying attention to detail, doing the right thing when no one is looking, being a team player, mentoring younger/less experienced staff, staying abreast of regulations, and personally knowing agency regulatory staff.

Above all, help your clients have successful projects. Find out what keeps them

awake at night. Help solve their problems, become their trusted advisor and exceed their expectations. This can lead to decades long, mutually beneficial business relationships—and sometimes even lifetime friendships.

*...success as an environmental consultant depends on putting in the work and building relationships inside and outside your company.*

When it comes to leadership styles, some work better than others. I would describe my leadership as trying to see the forest, not just the trees, instilling common sense into decision making, anticipating problems before they occur and building a trusted team.

I also found it helps to have a good sense of humor, be a good listener, give your team free reign but watch to keep things out of the ditch, and gather appropriate input to make the hard decisions when needed.

This has been a great career for me, but it's not for everyone. You need to have more than one operating gear to endure the stress of the job, including the long nights and weekends getting proposals and reports completed and out the door. Client expectations can be killers if you don't know what they are, so again nurture those relationships to build a win-win solution.

### Looking Forward

I have been with POWER nearly nine years and I do not think there is a better place I could have chosen to end my career. My only regret is that I wish I would have joined POWER earlier in my career—it is a special company.

In retirement, I plan to hunt and fish, enjoy the outdoors, travel with my wife (still have a few more Caribbean Islands to check off the list) and who knows—maybe work a little if

the opportunity arises.

And finally, I would like to offer words of encouragement to my successor as Environmental Division Manager, Maria Gou. As former President of Zephyr Environmental, serving as our Business Unit Director for Air Quality since the 2018 acquisition, I know she will do a great job and I wish her and everyone my best. 🍀



# Making Your Generating Unit More Grid-Friendly: Check the Air Quality Box

**Brian Petermann, P.E.**  
Senior Air Quality  
Project Manager

**T**he industry of generating and delivering electric power is undergoing dramatic and rapid change. Renewable energy, decreasing coal-fired capacity and changing demand patterns are increasing the complexities of operating the power grid.

In response, utilities are wisely making changes to their generating units to make them more “likeable” by the grid and to improve their economics. The number and range of these projects have steadily increased as utility generating units are looking for ways to operate at lower loads, improve load change response times and lower operating costs.

Achieving these goals will likely require one or more plant modifications. But before moving forward with a plan, you should first determine if there is an air permitting requirement.

## **Why Check the Air Quality Box?**

Projects at a generating unit that result in an increase in pollutant emissions may require a permit before those changes can be made. Utilities have suffered significant enforcement actions when state and

federal agencies found out and concluded that modification projects took place without a permit.

This is not a good situation for an offending utility because of the potential monetary penalties, retrofit of costly new emission controls and negative public perception. This can be avoided by performing certain assessments, and maybe simple permitting, prior to approval and initiation of the desired generating unit changes.

## **What Are the Rules?**

At an existing plant, only those projects considered a “modification” may need a permit. A modification is any physical change, or even an operational change, that results in an emission increase.

Some changes are exempt, such as routine maintenance repair and replacement (RMRR) projects. Based on this, plant changes that are either RMRR or do not result in an emission increase generally do not require a permit.

Need a visual aid to help perform your air quality assessment? Check out this handy process flow diagram at [www.powereng.com/grid](http://www.powereng.com/grid)



*Grid of the future. Changes to the U.S. electricity industry are forcing coal-fired power plants to make modifications in order to meet the needs of an evolving power grid.*

### Do I Need a Permit or Not?

Assessing plant projects for permitting requirements is a process. Of course, each project is unique and requires a tailored approach with much more detail than we've provided here, but these basic steps provide a good framework for performing your assessment.

#### 1. Define the Project

Defining the project is critically important to the assessment of potential air permitting requirements. This includes collecting information and data necessary to not only describe the project itself but also its potential interrelated effects on the plant.

How this is communicated is key. Information can be collected through written requests, but a face-to-face meeting with all applicable plant staff is far more effective, especially with regard to interactive operational and emission effects. This is where you clearly define the purpose, schedule, specific plant changes and impact on the generating unit operation.

#### 2. Determine If Emissions Are Affected

This is a key step because it can determine if the project assessment can be ended at

this stage or not. You must determine if your project is:

- Not a modification
- Possibly a modification, but does not affect emissions.

If it is not a physical change or change in the method of operation, if it is RMRR, or if the change has no impact on emissions, then the assessment can stop at this point.

RMRR determination considers project nature, extent, purpose, frequency and cost. A complete and accurate project definition is important to make a confident determination. Plant projects that have no tie to emissions are not considered a modification. This assessment and its conclusions need to be fully documented for the utility's files. Depending on the state air agency, some utilities may also need to submit a project notification to validate why a permit is not required.

#### 3. Define the Emission Increase

If you have determined that the proposed plant project cannot be exempted, the next step is to understand the extent of the emission change.

The trigger for potential major permitting at a generating unit is either:

- Any increase in the maximum hourly emission rate of sulfur dioxide, nitrogen oxides, or particulate
- A **significant** increase in annual emissions.

An increase in maximum hourly emission rate is typically governed by whether there is an increase in maximum fuel burn rate. Assessing the increase in annual emission is more involved and considers past actual emissions and future "projected" emissions based on assumptions. These assumptions may be considered limitations after permit issuance, so this should be approached in a strategic, holistic way.

#### 4. Document and Decide

If the project is considered a modification with an emission increase, a decision is made at this point whether the benefits of the desired plant project are worth the cost of getting a permit. This is an important decision for the utility and a thorough, accurate and creative assessment of the project and its costs is critical.

**Grid-Friendly Generating** >>> continued on page 10

# FROM THE TRENCHES

## Tales from the Pipeline with a Little Lagniappe

Jude LeDoux | Senior Project Manager

“**W**hen the sun finds its home in the western sky it is a field of glory for sure ...but much more than that it is a sacred place...and it is Saturday Night in Death Valley.”

Those are the words you hear at the beginning of each football game at Louisiana State University's Tiger Stadium on Saturday nights. And these immortal words were all I was thinking about that fall Friday morning when we drove up to the jobsite.

Only one thing stood between me and kickoff—the final two miles of a proposed pipeline route that we needed to delineate for wetlands.

My co-worker and I began our normal pre-check routine with a safety meeting and equipment inspection. Joined by an archaeological crew who would tag along to conduct a cultural survey, we all began to walk the route.

After some time, I noticed the crew discussing our surroundings. Standing in a horse pasture full of manure, and overlooking the beautiful Pearl River, I jokingly asked, “Historic artifacts here?” The answer I received, as they discovered a hole full of pottery and arrowheads, was: “You have to think of the big picture. This wasn't a horse pasture 200 years ago.”

As we continued our surveys, my mind wandered, pondering about where I was, the history and the days of old. I am a biologist after all. I look for wetlands, animals and, of course, I enjoy being out

The excitement of it being Friday and the awesome views made the day go by fast. We stopped for a lunch break and I pulled out my typical granola bars, banana and a bottle of water. My co-worker brought a piece of cucumber and a bell pepper—interesting to say the least. I teased him for starting his new diet on a day when we were trekking miles through the wilderness and declared I would not carry him out of the woods.

The archaeologists eventually caught up with us and shared how this area had the most artifacts they have ever found!

*And when you work in the great outdoors, you get tested and introduced to challenges. This day was no different.*

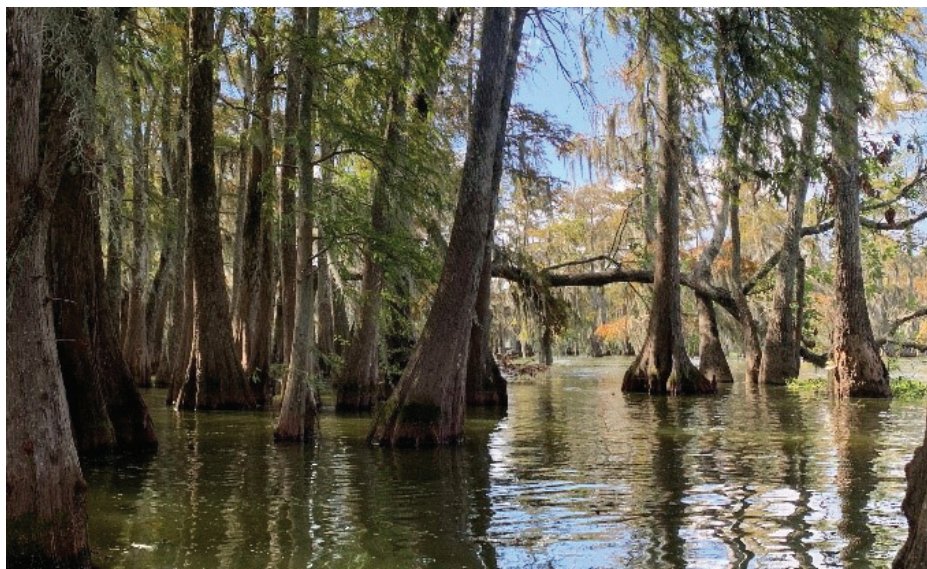
in Mother Nature. And when you work in the great outdoors, you get tested and introduced to challenges. This day was no different.

My mind really began to race. What happened here so many years ago?

My brain quickly changed gears, however, when I realized what was happening now... rain, and lots of it! It rained more than I could ever imagine, and there was one thing I forgot that day that I would never forget again—rain gear. We were all soaked to the bone within minutes.

But we forged ahead, like troopers on a mission, to complete our task and end the week with a victory. What we didn't realize was that we were on low-lying land, where all the rain from the surrounding area drains. The water rose in biblical

**Valuable wetlands:** The vegetation in wetlands act as a natural filter, removing toxins and pollutants from runoff water before it returns to the ground.







fashion, and before we knew it, we were walking in waist-deep water. It felt like we were on a Jacques Cousteau series instead of conducting a wetland delineation.

Like an oasis in the desert, we saw a fallen tree large enough that we could all get on top of to gather our senses and assess the situation. By this time, my co-worker was completely exhausted and could no longer go on without adequate rest.

So to pass the time while we took a break, we decided to talk about folklore and the mythical creature, Rougarou. I mean what better setting than sitting on a tree in the middle of a flooded forest with numerous historic artifacts around us. We shared stories until the sun started to set. It was time to do something.

Right then, with an already frightened mindset from our folklore tales, we heard a loud crashing noise and giant splashing footsteps coming toward us. Instantly re-

cognizing what was happening and that it was not hypothermic hallucinations, there was an additional loud screaming growl that shook all of us to the inner most rain-soaked core of our bodies. In sheer terror, we practically walked on water along the rest of the route to get out of there. Even my exhausted, non-eating co-worker suddenly had more than enough energy to evacuate the area in a hurry.

We completed the day with more data and excitement than what we wanted or expected. Wetlands, historic artifacts and a visit from a Rougarou. How else would you start a weekend in Louisiana, right?

The wetland delineation and cultural survey were complete, the client was happy and we made it home safe. As my family and I walked into the LSU Tiger Stadium the next day, I had a different feeling. I was more aware of the history around me and, of course, I made sure to eat before the game.

Preparedness was on my mind as it started to rain after the opening kickoff. This time I reached down for my rain jacket, and the roar was that of the crowd. Geaux Tigers!



## Speaking Cajun

### Bayou (BY-you):

A small river or stream with a slow current.

### Gris-Gris (gree-gree):

A good luck charm.

### Fais-Do-Do (FAY-doh-doh):

Cajun party with music, dancing and plenty of food.

### Lagniappe (LAN-yap):

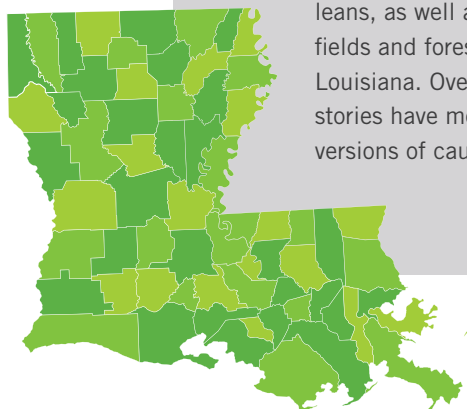
Cajun term that means “a little extra”. Also means “a small gift given to a customer by a merchant at the time of the purchase.”

### Parish (PEAR-ish):

Louisiana’s geographic regions, like county in other states.

### Rougarou (Roo-gah-roo):

A Cajun or Acadian variation of the original French words “loup garou,” the rougarou is said to be a large, terrifying werewolf-like creature that haunts the swamps around Acadiana and New Orleans, as well as the sugar cane fields and forests in southern Louisiana. Over generations the stories have morphed but remain versions of cautionary tales.



# NEWS BRIEFS

Stay informed on  
the issues that affect  
your projects

## NATIONAL NEWS

### EPA Offers New Self-Audit Program for Existing Oil & Gas Owners

On December 19, the U.S. Environmental Protection Agency (EPA) expanded an existing self-audit and disclosure program to now include “existing” owners of upstream oil and natural gas exploration and production facilities (well sites, associated storage tanks and pollution control equipment). This expanded self-audit program provides the opportunity for “existing” owners to identify and self-disclose Clean Air Act violations. The program requires a review of the storage tank battery vapor control system design and is available for a limited time of 12 months.

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### Congress Considers Migratory Bird Protection Act of 2020 Regarding Incidental Take

On January 30, the U.S. Fish and Wildlife Service (USFWS) proposed a rule that provides regulatory clarity of the scope of the Migratory Bird Treaty Act (MBTA) regarding “intentional take” of migratory birds. In 2017, the Department of Interior

Solicitor’s Office completed an in-depth analysis of the MBTA to determine the act only covers intentionally injured bird species as a result of commercial activities. Subsequently, the Migratory Bird Protection Act of 2020 (H.R. 5552) was presented to Congress initially on January 8, and the bill would prohibit any “incidental take” (i.e., injure, capture, or kill) of migratory birds unless commercial activities are authorized under a permit issued by the USFWS. The bill has been published in the Federal Register and will be solicited for public input until March 19, 2020.

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### CEQ Proposes Significant NEPA Revisions

On January 9, President Trump announced that the Council on Environmental Quality (CEQ), a division of the Executive Office of the President, has issued a proposed new rule that would make significant changes to its regulations implementing the National Environmental Policy Act (NEPA). The purpose of these revisions is to modernize the 50-year-old regulations; make the federal permitting process more efficient and impose time limitations; clarify agency responsibility as well as definitions and terminology; reinforce page limits for NEPA documents; outline what content will be required in Environmental Impact Statements; allow applicants and contractors to contribute to the preparation of environmental documents; and omit the “direct and indirect effects” and “cumulative effects” terms, as they are not required under NEPA. Public comments are due March 10, 2020. CEQ will also host two public hearings on the proposed rule in Denver, Colorado, and Washington, D.C.

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### EPA Releases Interim Recommendations for PFAS Contaminated Groundwater

On December 19, EPA issued interim recommendations for addressing Perfluorooctanoic Acid (PFOA) and Perfluorooctanesulfonate (PFOS) groundwater

contamination under federal cleanup programs, including corrective action programs under Comprehensive Environmental Response, Compensation and Liability Act (CERCLA or Superfund), and under the Resource Conservation and Recovery Act. Issuance of these recommendations is a priority under EPA’s February 2019 per- and polyfluoroalkyl substances (PFAS) Action Plan. The interim recommendations include using a screening level of 40 parts per trillion (ppt) to determine if PFOA and/or PFOS is present and may warrant further attention, and using 70 ppt for PFOA and PFOS as the preliminary remediation goal for groundwater that is a current or potential source of drinking water. Although these interim recommendations provide guidance for federal clean-up programs, it must be noted that some states have established much lower advisory levels and/or enforceable drinking water standards for specific PFAS chemicals.

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### USACE, EPA Announce Proposed Changes to WOTUS Rule

On January 23, EPA and USACE announced the Navigable Waters Protection Rule (Rule), which re-establishes federal regulatory authority under the Clean Water Act (CWA) for waters of the U.S. (WOTUS). Under the new Rule, the agencies identify four categories of waters that are federally regulated under the CWA: territorial seas and traditional navigable waters; perennial and intermittent tributaries to those waters; certain lakes, ponds and impoundments; and wetlands adjacent to jurisdictional waters. The Rule also details 12 categories of exclusions, features that are not WOTUS, such as: features that only contain water in direct response to rainfall (e.g., ephemeral features); groundwater; many ditches; prior converted cropland;



and waste treatment systems. The final rule will become effective 60 days after publication in the Federal Register.

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### **EPA Proposes CCR and Effluent Limitations Guideline Changes**

In November 2019, EPA proposed changes to coal combustion residual (CCR) regulations that affect unlined surface impoundments. A new deadline (August 31, 2020) is proposed for facilities to stop placing CCR wastes into these impoundments. The proposal specifies that all unlined impoundments must be retrofitted or closed, not just those where groundwater impacts have been detected. Perhaps more significantly, the proposed rule redefines clay-lined surface impoundments as “unlined,” which would require them to be retrofitted or closed. EPA also proposed revisions to steam electric power plant effluent limitation guidelines (ELGs), which apply to flue gas desulfurization wastewater and bottom ash transport water. Among other changes, the proposal changes the technology basis for treatment of these wastewater sources and proposes new dates for compliance. EPA is currently reviewing and evaluating public comments

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### **USFWS Drafts Plan to Recover Rusty Patched Bumble Bee**

On January 24, the USFWS published a Draft Recovery Plan for the rusty patched bumble bee (*Bombus affinis*). Recovery plans describe the necessary criteria a species must attain to be downlisted or delisted from the federal Endangered Species Act, as well as potential tools and goals to accomplish those criteria. The rusty patched bumble bee previously occupied tall grass and mixed grass prairie habitat in numerous counties across the Great Lakes region, New England and south to North Carolina. However, recent extreme

population declines due to disease, habitat loss and pesticide use have reduced their occupied range by 87%. Recovery criteria spelled out in the draft recovery plan largely focus on increased populations objectives. Recovery actions to attain these criteria include the management and protection of habitat. The USFWS is accepting comments on the draft recovery plan until February 24, 2020.

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### **EPA Updates CEDRI**

In December 2019, EPA finalized the 2020 updates to the Compliance and Emissions Data Reporting Interface (CEDRI). Although primarily cosmetic, some changes were made to the reporting system. CEDRI is used for electronic reporting under many MACT and NSPS regulations, including 63 DDDDD (Industrial Boiler MACT), 63 LLL (Portland Cement MACT) and 63 ZZZZ (Engine MACT). As part of this update, EPA has discontinued the use of web forms for these regulations. Web forms may continue to be used until September 30, 2020, at which time the submittals will switch to the EPA's Excel workbook templates. Allocating additional time to complete the forms and updating the facility's NAICS code in CEDRI is recommended due to reported submittal issues with the new system.

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### **Transportation Climate Initiative Releases Draft MOU**

On December 17, the Transportation and Climate Initiative (TCI), a regional collaboration of 12 Northeastern states and the District of Columbia, released a draft Memorandum of Understanding (MOU) that provides details on a proposed cap-and-invest system to facilitate a reduction in greenhouse gas (GHG) emissions from the transportation sector. Approximately 40% of the region's GHG emissions can be attributed to this sector. Signatory Jurisdictions

of the final MOU (expected in Spring 2020) will jointly develop a Model Rule that establishes a cap on GHG emissions from the transportation sector (via caps for on-road diesel and motor gasoline fuels that will decrease over time), and will make a commitment to implement individual cap-and-invest programs. Comments on the draft MOU are due February 28, 2020.

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### **EPA Issues RMP Reconsideration Final Rule**

In December 2019, EPA published the final Risk Management Program (RMP) Reconsideration Rule. Through this rule, EPA finalized the changes to the RMP Amendments Rule issued in January 2017—changes driven primarily by objections highlighted in three petitions for reconsideration. EPA stated that the changes finalized in the Reconsideration Rule address potential security risks associated with the new information disclosure requirements introduced in the Amendments Rule. Other changes include reducing unnecessary and ineffective regulatory burdens on facilities and emergency responders and better harmonized RMP requirements with the Occupational Safety and Health Administration Process Safety Management standard.

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### **EPA Issues MACT Rule Changes Pursuant to Court Ordered Deadlines**

EPA is under court-mandated deadlines in 2020 to finalize Risk and Technology Review (RTR) rulemakings for many Maximum Achievable Control Technology (MACT) source categories. These deadlines are in two “bins”: March 13 and June 30. Twenty RTR rules must be issued in March, including these source categories: metal can, metal coil, plastic parts, HCl

production, ethylene production, asphalt processing and roofing, reinforced plastics and composites production, paper and other web integrated iron and steel, stationary combustion, solvent extraction for vegetable oil, site remediation, municipal solid waste landfills, and miscellaneous organic National Emission Standards for Hazardous Air Pollutants (NESHAP), or MON. Key revisions common to some of the rules include removing Startup, Shutdown and Malfunction (SSM) exemptions in accordance with the 2008 Sierra Club vs. EPA court case; enhancement of flare requirements, and incorporation of the El Paso heat exchange system monitoring method.

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#### Federal Agencies Share Rulemaking Activities Through Fall 2020

On December 26, the Office of Management and Budget published its semi-annual agenda of upcoming regulatory activities for various departments and executive agencies for the next 12 months. The Trump administration is targeting regulatory reform to eliminate ineffective, duplicative or obsolete regulations. EPA has approximately 100 agenda items along with many relevant updates from the Departments of Labor, Defense, Transportation, Energy and the Interior. To gain insight into the regulatory targets and view the full agenda for the various departments and agencies, visit [reginfo.gov](http://reginfo.gov).

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#### STATE NEWS

##### KDHE Requires KEIMS for All Submittals

The Kansas Department of Health and Environment (KDHE) has developed and launched the Kansas Environmental Information Management System (KEIMS), an online data management system used to create and manage permit applications, compliance reports and more. This system will serve as a “one-stop-shop” for the Di-

vision of Environment and can be used by various parties, including but not limited to: property owners, consultants, tank owners and facility operators. As of January 1, 2020, all air permit applications and compliance reports must be submitted through KEIMS. KDHE will no longer accept paper copies. KEIMS has a variety of tools for facilities, including reminders about upcoming compliance submittals and integrated forms for all air permit applications. KEIMS is currently being used by the Bureau of Remediation and the Bureau of Air, but is expected to expand services and incorporate more of the Division of Environment throughout the year.

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##### TCEQ Approves Bexar County SIP Revision

On January 15, the Texas Commission on Environmental Quality (TCEQ) approved a \$179B Demonstration State Implementation Plan (SIP) Revision proposal for the Bexar County (San Antonio) Ozone Nonattainment Area. The SIP revision demonstrates Bexar County would attain the 2015 Ozone National Ambient Air Quality Standards by its attainment deadline “but for” emissions coming from outside the United States. EPA approval of TCEQ’s proposed \$179B demonstration could prevent Bexar County from being reclassified from a marginal to a moderate nonattainment area. If the SIP revision is approved by EPA, marginal ozone nonattainment area requirements would continue to apply until Bexar County is formally redesignated attainment.

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##### Ohio Releases Statewide Action Plan for PFAS in Drinking Water

On December 2, the Ohio Department of Health and Ohio EPA released the Ohio PFAS Action Plan for Drinking Water. Developed at the direction of the Governor, the plan is a first step in determining if PFAS chemicals are common in the public water

systems in Ohio. Under the plan, Ohio EPA will coordinate the testing of approximately 1,500 public water supply systems within the state during 2020. Where PFAS are detected, analytical results will be evaluated against screening levels for six PFAS compounds. These comparative evaluations will be used to provide guidance to drinking water system operators to mitigate possible health risks and to identify appropriate short-term and long-term measures to reduce exposures.

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##### PADEP Finalizes Public Participation Guidance for Development of Regulations

On December 14, the Pennsylvania Department of Environmental Protection (PADEP) published final guidance that outlines the process by which environmental regulations are developed, reviewed and finalized in Pennsylvania. The new guidance better defines the public participation process, including: public comment periods, the roles of advisory committees and the Independent Regulatory Review Council, advance notices of proposed and final rulemaking, and other submissions regarding regulations that the public can submit to PADEP at any time.

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## What You Need to Know About Developments Under the Migratory Bird Treaty Act

Sandi Snodgrass | Holland and Hart, LLP

**T**he Migratory Bird Treaty Act (MBTA) carries out the United States' commitment to four treaties with Canada, Japan, Mexico and Russia, respectively, that protect birds that migrate across international borders.

The MBTA applies to over 1,000 species of native migratory birds and makes it unlawful to "pursue, hunt, take, capture, kill, attempt to take, capture or kill, [or] possess" any of those birds or their parts, nests or eggs, unless expressly permitted by federal regulations.

The MBTA is administered by the U.S. Fish and Wildlife Service (Service). However, its penalty provisions are solely criminal (as opposed to civil), meaning its enforcement is carried out by the Department of Justice (DOJ), not the Service. For each unauthorized take of protected bird, a violator may be subject to penalties of up to \$15,000, imprisonment for up to six months, or both, regardless of intent.

Currently, some permits are available under the MBTA for narrow purposes, such as falconry or importing of migratory birds. However, permits are not generally available to authorize the injury or death of migratory birds during otherwise lawful activities—such as mining, oil and gas operations, or transmission lines or renewable energy facilities. This is commonly referred to as incidental take.

### Circuit Split on Incidental Take

Several U.S. Courts of Appeals have had split decisions on whether incidental take falls within the scope of the MBTA's take prohibition. On the one hand, the Second Circuit (covering Connecticut, New York and Vermont) and Tenth Circuit (covering Colorado, Kansas, Oklahoma, New Mexi-

co, Utah and Wyoming) have concluded that entities can be held liable for incidental take.

The Fifth Circuit (covering Louisiana, Mississippi and Texas) has reached the opposite conclusion, holding that "take" under the MBTA is limited to deliberate acts done directly and intentionally to migratory birds. Prior decisions from the Eighth Circuit (covering Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota and South Dakota) and Ninth Circuit (covering Alaska, Arizona, California, Nevada, Oregon and Washington) support this conclusion.

Thus, the judicial interpretation of the scope of the MBTA's criminal prohibitions varies depending on where the action occurs.

### Dueling Solicitor's Opinions

In January 2017, in the last days of the Obama Administration, the Solicitor of the Interior, the top lawyer at the Department of Interior (DOI), issued a Solicitor's Opinion that concluded that the MBTA's prohibitions include incidental take.

Less than a month later, the Trump Administration temporarily suspended and withdrew this opinion. In December 2017, the new Acting Solicitor of the Interior issued a new Solicitor's Opinion that reached the exact opposite conclusion as the previous one, finding that the statute's prohibitions apply only to affirmative actions that have as their purpose the taking or killing of migratory birds, their nests, or their eggs and do not apply to incidental take.

Thus, the current position of DOI is that any migratory bird injuries or mortalities that occur during the course of otherwise lawful activities is not an MBTA violation. Not surprisingly, the second Solicitor's

Opinion has already been challenged in court, with two lawsuits filed in May 2018 by conservation organizations and a similar complaint filed by eight states in September 2018. The court recently consolidated these cases and rejected the government's motion to dismiss, but it is still too early to tell whether or how those lawsuits may affect this issue.

### Practical Implications

One of the practical implications of DOI's position is that the Service's Office of Law Enforcement currently will not refer any incidental take of migratory birds to DOJ for prosecution. While DOJ is not bound by the Solicitor's Opinion, it is highly unlikely (especially under the current Administration) that it would independently pursue an MBTA prosecution for incidental take.

Another practical implication is that the Service will not have the same leverage to negotiate commitments from project proponents to implement minimization or mitigation measures for migratory birds. In fact, the Service issued a guidance memo in April 2018, which clarifies that the Service may not withhold a permit or request or require mitigation based upon incidental take concerns under the MBTA.

However, the consideration of impacts to migratory birds will still be part of environmental analyses under the National Environmental Policy Act, which will likely continue to result in some level of migratory bird conservation in actions authorized by federal agencies.

It continues to be advantageous for project proponents to work with the Service to avoid and minimize impacts to migratory birds.







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### **Three Tips for Success**

#### **1. Get Management Buy-In**

The requirement for a permit assessment of proposed projects must come from senior management. If top management is convinced of the need, then the directive to conduct these assessments will be taken seriously.

Educating management on the risks of regulatory fines, resulting capital costs and negative public perception is key to convince them of the importance of this process.

#### **2. Bring Your Environmental Staff in Early**

If you have an active capital project approval process, consider incorporating a required review step performed by key environmental staff.

If your environmental staff is experienced in permitting assessment techniques, they may be able to review most, if not all, of the proposed projects without a need for additional assistance. Make sure their process includes documentation of the assessment for corporate files for future reference and support in case of inquiry.

For more complicated projects, your staff may need the services of a specialized environmental consultant. This is someone who can perform more in-depth analysis

and calculations. They can draw on deeper resources and apply successful approaches from other projects for estimating costs and assessing the project's impact on emissions.

Incorporating a process flow diagram can bring consistency and confidence to the effort and is useful as an education tool. The overall process creates documentation needed for the utility files.

#### **3. Get Out on the Plant Floor**

One-on-one discussions with generating plant staff will go a long way to gaining buy-in at the plant operations level. They need to see environmental staff and consultants as part of the plant team working for a common cause, not a roadblock to moving forward with a desired project.

When the plant staff understand the need to consider the permitting aspects of their proposed project, they can provide better information for the assessment process.

Following these general steps and with these tips in mind, you can more confidently check that air quality box when planning your next plant modification. 