

P3s in Arkansas

Arkansas Department of Transportation

2019 TRC Transportation Conference & Equipment Expo

Mitchell, Williams, Selig, Gates & Woodyard, P.L.L.C.

Larry Watkins, Esq. (Part 1)



- Larry Watkins is an attorney at the law firm of Mitchell, Williams, Selig, Gates & Woodyard, and he represents and advises lenders, owners, contractors, engineers, architects, and suppliers on construction contracts, project finance, public-private partnerships, licensing & business regulation, and design & construction litigation, mediation, and arbitration. Mr. Watkins is also an American Arbitration Association Panel Construction Industry Arbitrator and Mediator, a Professor of Construction Law (ADJ) at the University of Arkansas School of Law, Little Rock, and a frequent author on and presenter of construction legal matters in Arkansas.
- Mr. Watkins has construction contract experience with all types of projects, including public buildings, private facilities, hospitals, offices, residential developments, educational buildings, industrial facilities, energy plants, and infrastructure.

John Bryant, Esq. (Part 2)



- John Bryant is an attorney at the law firm of Mitchell, Williams, Selig, Gates & Woodyard, and practices primarily in the area of public finance, with experience in taxable and tax-exempt, and public and private finance transactions. He serves regularly in a variety of roles including bond counsel, underwriter's counsel, issuer's counsel, trustee's counsel and borrower's counsel.
- Mr. Bryant has served as lead counsel for transactions involving multiple types of issuers across the State of Arkansas and across the country. He has also provided legal counsel for financing numerous types of public projects, including schools and water treatment plants.

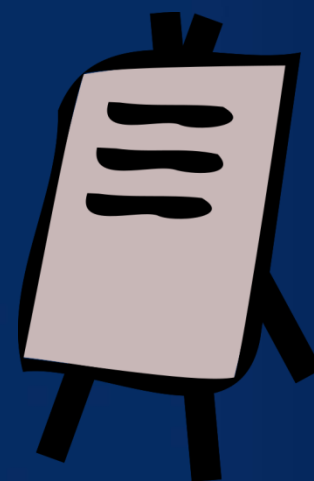
P3 OVERVIEW

PART 1: P3 CONTRACT & LEGAL STRUCTURE

- ❖ P3 CONCEPT
- ❖ STRUCTURE OF P3s
- ❖ KEY ELEMENTS OF A P3
- ❖ TYPES OF P3s IN ARKANSAS
- ❖ ARKANSAS TRANSPORTATION P3s
- ❖ QUESTIONS

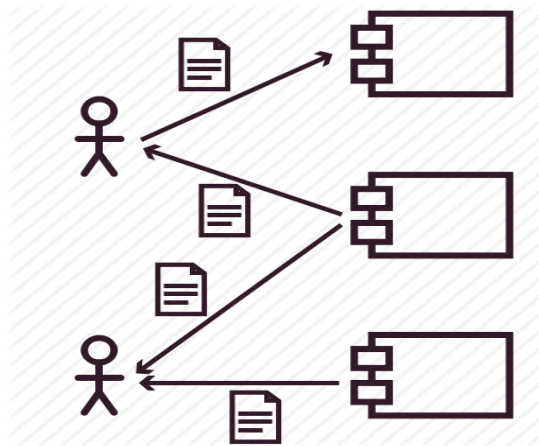
PART 2: FINANCING P3 PROJECTS

- ❖ P3 PRIVATE FINANCING
- ❖ P3 PUBLIC FINANCING
- ❖ QUESTIONS



PART 1

P3 CONTRACT & LEGAL STRUCTURE



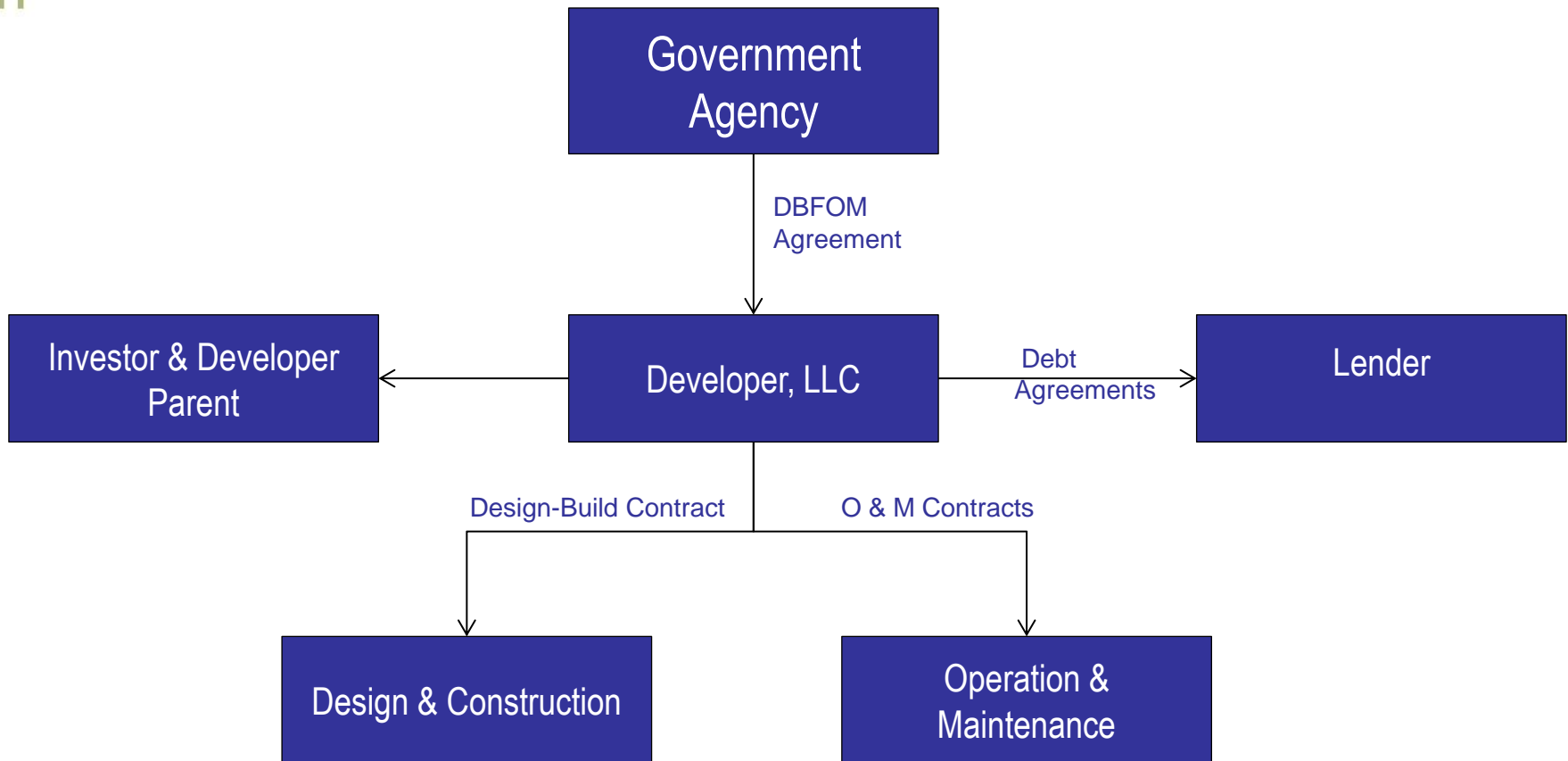
P3 CONCEPT

- ❑ Private company manages the complete delivery and operation of a public project
- ❑ Private companies are better at designing and building public projects – P3s add financing and O & M



- ❑ A P3 project cost is not based on the sum of design and construction costs but on the life cycle value (e.g. 30 yrs.)

STRUCTURE OF P3s



ELEMENTS OF A P3

- ❑ **DBFOM Agreement Between Developer & Government**
 - D = Design: Surveying, Engineering, Permitting
 - B = Build: Construction and Project Management
 - F = Finance: Banks, Private Equity & State/Fed. Bonds
 - O = Operate: Daily operation (e.g. wastewater plant)
 - M = Maintain: Routine replace & repair (e.g. building)
- ❑ **Cost Analysis Based on Life Cycle; Value for Money (VFM)**
- ❑ **Funding from Public – Whether Traditional or P3**
- ❑ **Project Must Have a Revenue Stream (e.g. WPA or Toll)**
- ❑ **Developer Paid Via Availability Payment or Revenue Risk**
- ❑ **P3s Can Be Delivered Now – Rather than Wait for 20 Yrs.**
- ❑ **P3s Are Returned to the Gov. Agency at End of Term**

TYPES OF P3s IN ARKANSAS

❑ P3 Enabling Legislation

- A.C.A. § 22-10-101 *et seq.*
- State - ARDOT and Local Projects Excluded
- Allows DB, DBOM, DBFOM, Concession



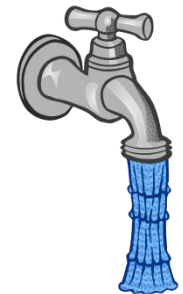
❑ P3 Transportation Statute

- A.C.A. § 27-67-206(j)
- Provides Solely for State Transportation Projects
- Allows DB, DBF, Concession = DBFOM



❑ P3 Water Statute

- A.C.A. § 22-9-203(j)
- Provides Solely for Municipal-level Water Projects
- Allows DB, DBOM, DBF, DBFOM



TYPES OF P3s IN ARKANSAS

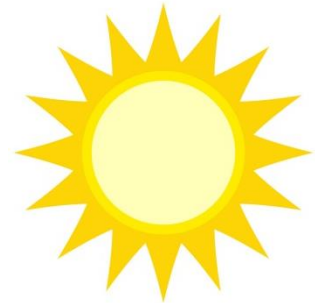
❑ Energy Performance Legislation

- A.C.A. § 19-11-1201 *et seq.*
- State Projects to Improve Energy Efficiency



❑ Renewable Energy/Net Metering Statute

- A.C.A. § 23-18-601 *et seq.*
- No Entity Requirements; Energy Projects
- May Allow Concession or DBFOM



❑ Non-Statutory (e.g. Ground Lease)



ARKANSAS TRANSPORTATION P3s

□ ARDOT P3s Authorized by A.C.A. § 27-67-206(j)

- “Authorized Entity” is a private legal entity
- “Concession” is an agreement transferring rights to the private partner for the project
- “Qualification-based” award means no competitive bidding
- ARDOT may receive solicited and unsolicited proposals
- Contract awarded for greatest value for the state
- Authorizes D, B, F, O, and M (O based on Concession)

□ P3 Project Types (Examples)

- Toll Road (Electronic Toll; RR)
- Toll Road (Traditional; RR)
- Bridges (Availability Payment)
- Express Lanes (RR)
- Commercial Vehicle Lanes (RR)



QUESTIONS



PART 2

FINANCING P3 PROJECTS



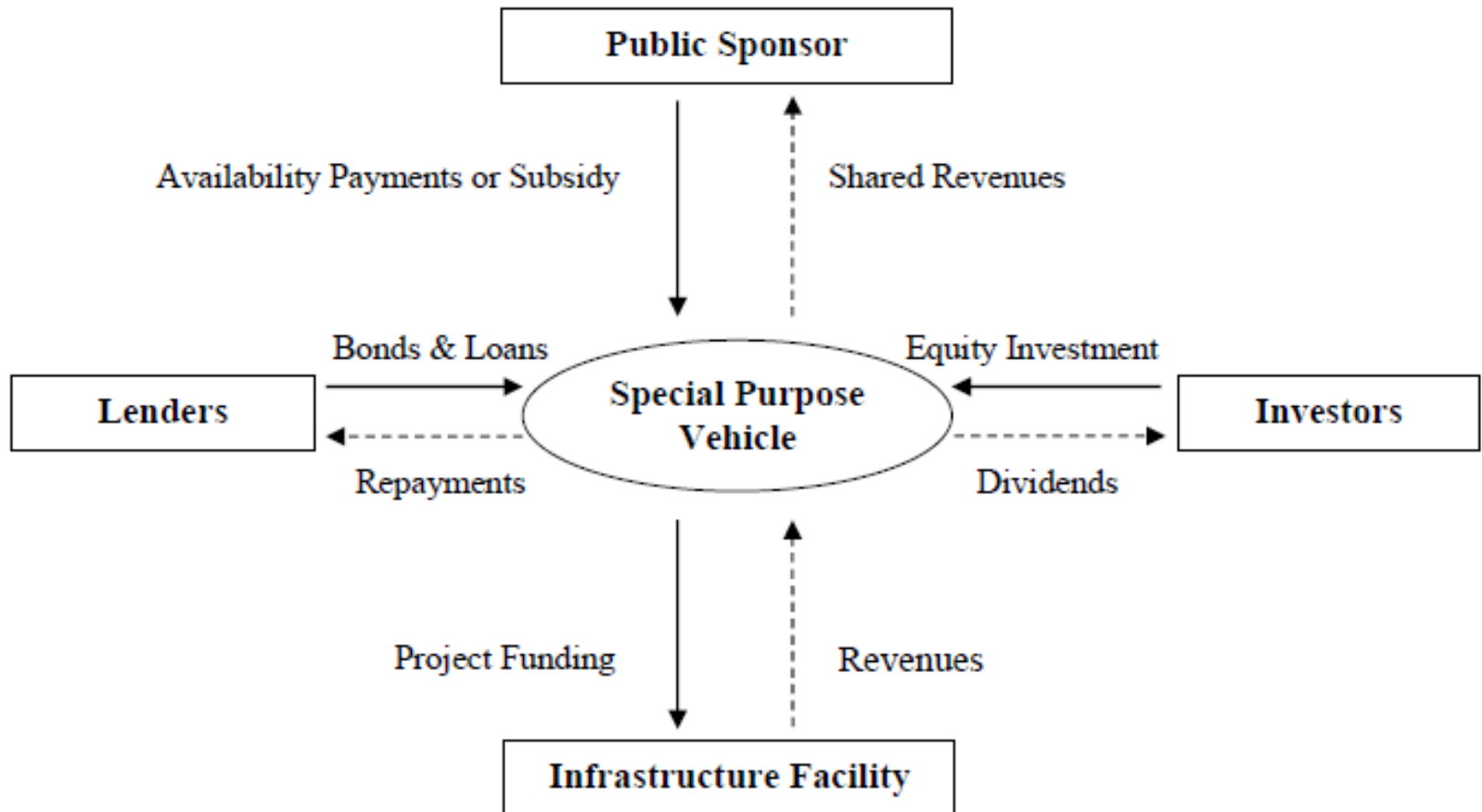
P3 PRIVATE FINANCING

- ❑ Introduction: P3 Private Financing
- ❑ Financing Versus Funding
- ❑ Conventional Private Finance Options
- ❑ Basic P3 Financing Structure



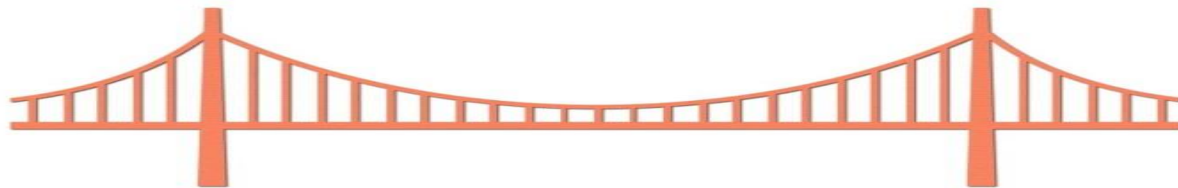
P3 PRIVATE FINANCING

Basic P3 Private Financing Structure



P3 PUBLIC FINANCING

- ❑ Introduction: P3 Public Financing
- ❑ Authority & Limits of Financing by AR Public Entities
- ❑ Possible Public Financing Options for an P3 in AR



QUESTIONS




Environmental Legal Concerns for P3s Projects in Arkansas

Walter G Wright
wwright@mwlaw.com

MITCHELL | WILLIAMS

Mitchell, Williams, Selig, Gates & Woodyard, P.L.L.C.



We will briefly identify and update a number of Arkansas and federal environmental issues that may be of interest to transportation projects.

Arkansas Environmental, Energy and Water Law Blog

<http://www.mitchellwilliamslaw.com/blog>

Three posts five days a week

92nd Arkansas General Assembly

State Government Reorganization

- Department of Energy and Environment (ADEQ Director Becky Keogh named Secretary)
 - Arkansas Department of Environmental Quality (“ADEQ”)
 - 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)

Petroleum Storage Tank

- Federal Petroleum Underground Storage Tank Rules - comprehensively revised for the first time since original promulgation in the late 1980 and affects:
 - Recordkeeping
 - Inspections
 - Monitoring
 - Etc.

Arkansas has adopted the revisions which go into effect this fall.
- Note continuing importance of Arkansas Petroleum Storage Tank Trust Fund (and maintaining eligibility)
- Provides 1.5 million for corrective action
- Provides 1 million for third party claims
- Arkansas legislation from two sessions ago eliminated requirement for aboveground storage tanks to pay fees and be registered - but !!! – must voluntarily register and pay fees to maintain Trust Fund eligibility.

Relevant to fleet fueling facilities, skid tanks, etc.

National Environmental Policy Act

- Applies to major federal actions affecting the quality of the human environment
- Requires federal agencies to prepare a detailed Environmental Impact Statement (“EIS”) if above two elements applicable
- NEPA does not dictate substantive results (like Clean Water Act, etc.) but mandates compliance with procedural requirements (including undertaking an environmental assessment to determine if EIS is required [unless a categorical exclusion is applicable])
- Recent Arkansas examples of Transportation/NEPA issues
 1. I-630 widening
 2. I-30 project

Streamlining NEPA

- Trump Administration Focus
 - Executive Order 13807 (outlining processes and requirements to expedite environmental review and approval of major infrastructure projects)
 - Includes goal of agencies completing NEPA project reviews within two years
 - One Decision Federal Policy requires all federal agencies to issue project approval within certain number of days of lead agency's Record of Decision (applicable to DOT, Corps, etc.)
 - MOU requires deadlines and processes for agency coordination, communication, and dispute resolution
 - Council of Environmental Quality updating regulations
 - DOT rules revising NEPA regulations related to changes made by Congress in the MAP-21 and FAST Acts.

Concerns

- Executive Order and agency rules do not guarantee win if challenged by others
- Critical to ensure basis for concluding a procedural mechanism is satisfied is sound
 - Example – River Project (is project adequately defined?)
- Careful with segmenting issues (common with linear projects)
 - Does federal jurisdiction (i.e., Clean Water Act) cover only small part of project? (for example as opposed to uplands)
 - Do segments/parts have independent utility?
- Is the basis for a NEPA categorical exclusion sound?
 - Example – Texas repaving project

Clean Water Act - Update

A Clean Water Act NPDES permit must be acquired if five jurisdictional elements are met:

- a person
- adds a
- pollutant
- to navigable waters (waters of the United States)
- from a point source

The absence of any one of these jurisdictional definitions eliminates Clean Water Act NPDES permitting requirements

.

The scope of the term “waters of the United States” from a Clean Water Act standpoint has been the subject of debate, regulatory activity, litigation, and confusion for many years. Its importance is magnified by the fact it is also relevant to non-NPDES programs.

Relevance to linear/construction projects?

1. Stormwater Construction Permits
2. SPCC regulations
3. 311 Oil/Spill release
4. 404 wetland permitting

WOTUS

Key Definition - Waters of the United States
Continuing debate over appropriate scope

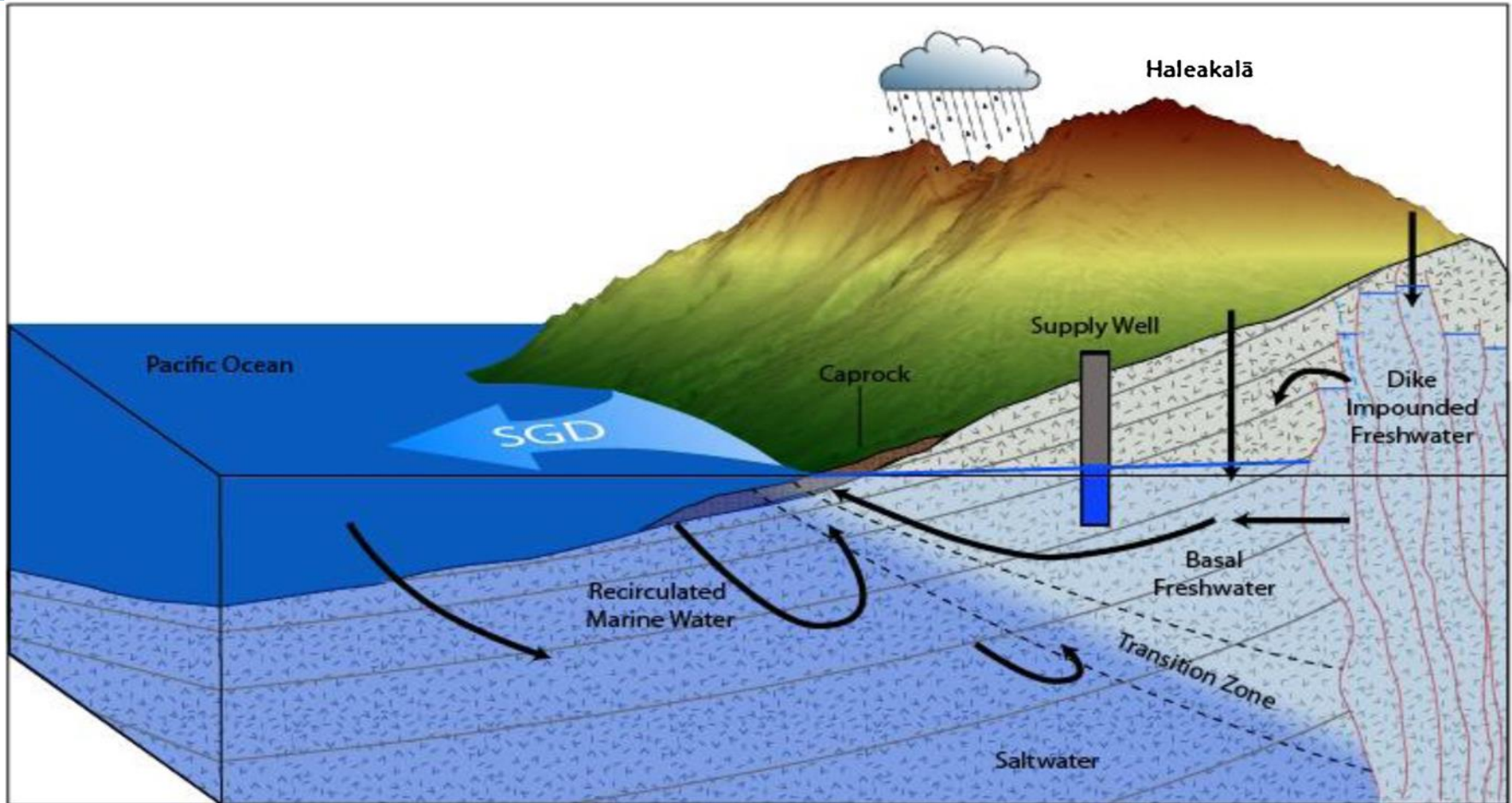
1. Obama Definition Rule Revoked
2. Trump Rule Proposed

Will be decided by the U.S. Supreme Court

Does a Discharge to Groundwater Require an NPDES Permit?

- A current important Clean Water Act jurisdictional issue is whether, and to what extent, a discharge of pollutants into groundwater can potentially trigger Clean Water Act programs.
- Is groundwater potentially a water of the United States?
- With limited exceptions groundwater has not been identified as a water of the United States.
- EPA has issued guidance limiting jurisdiction.
- *Maui* case/will be decided by U.S. Supreme Court

Groundwater Injection (County of Maui)



Does a Discharge to Groundwater Require a Clean Water Act NPDES Permit?: U.S. Environmental Protection Agency Issues April 15th Interpretive Statement (cont.)

- EPA stated in an April 15 Interpretive Statement that the Clean Water Act is:

...best read as excluding all releases of pollutants from a point source to groundwater from NPDES program coverage and liability under section 301 of the Clean Water Act, regardless of a hydrologic connection between the groundwater and a jurisdictional surface water.

Note: EPA'S view will be subject to the Supreme Court decision.

Interim – Environmental organizations and others will file actions based on their view of the issue.

Possible Impacts?

Why Important

- Areas where close connection between groundwater and surface water
- Aquifer close to ground surface and some can be highly transmissive
- Some activities can lead to seepage into offsite surface waters (pipeline ruptures)
- Effect on improvements, ponds, etc. (fly ash ponds)

Note: Arkansas statute provides broader jurisdiction by use of term “Waters of the State” (providing authority for its “nondischarge” permitting programs)

Wetland Mitigation Rules Review

- July 2019 EPA/corps preproposal to review and revise regulations titled “Compensatory Mitigation for Losses of Aquatic Resources” (the “Mitigation Rule”)
- Standards and Regulations for Compensatory Mitigation Projects
- Compensatory Mitigation refers to restoration, establishment, enhancement and/or preservation of wetlands, streams or other aquatic resources
- Will address a number of topics including mitigation ratio

Note – Critical to also look at each Corps District rules which will vary.

Arkansas Construction Stormwater Permit

- Five-year term expires October 31, 2021
- ADEQ will presumably begin considering changes in the next 6-12 months
- Recently revised ADEQ Industrial Stormwater Permit reflected few substantive changes
- EPA Construction Stormwater Permit modified in 2019 (applicable to non-delegates states)
- Will any of these changes be considered by ADEQ?
 - Removes examples of types of parties that could be considered “operator”
 - Revises three BMPs
 - Clarify the roles and responsibilities of individual operators in multiple operator arrangements

Remember Appropriate Use of Tools Such as:

- Arkansas Pollution Control and Ecology Commission Regulation No. 2 – Short Term Activity Authorization
Notification Requirements

- Corps of Engineers Nationwide Permits (general permit for similar categories of activities)
 - Examples for linear activities:
 - 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)

Note Preconstruction Notice Requirements

Note NEPA procedural requirements still apply if federal action

Other Clean Water Act Issues

1. Arkansas Water Quality Trading
2. Arkansas Antidegradation
3. Arkansas Water Quality Standards/Minerals
4. Arkansas Water Quality Standards/Nutrients
5. Regulation No. 2

Cooperative Federalism?

- EPA prioritizing greater control by the states
- Arkansas a vocal proponent of the approach
- Greater state responsibility but no additional federal resources
- Baseline statutes have not changed
- Environmental organizations challenging EPA decisions

Citizen Suit Activity

Two Types

- Citizen Enforcement Against an Alleged Violator
- Against EPA, Corps of Engineers, etc., for alleged failure to undertake non-discretionary duty

Environmental groups have ramped up both during Trump Administration.

Arkansas Medical Marijuana Rules

Relevant to the transportation facilities/contractors associated with Arkansas's enactment of the Medical Marijuana Amendment?

- Employee issues associated with the legal use of medical marijuana?

Arkansas Medical Marijuana Amendment

- The Arkansas Medical Marijuana Amendment decriminalizes from a state (Arkansas) standpoint certain use of marijuana.
- Establishment of regulation of cultivators and dispensaries
- Does not require “Employer to accommodate the ingestion of marijuana in a workplace or an employee working under the influence of marijuana.”
- Outlines process pursuant to which an individual can become a “Qualifying Patient” who can use medical marijuana
- Doctor certifies he/she has a “Qualifying Medical Condition”
- Marijuana is still illegal at the federal level as a DEA Schedule I controlled substance.

Arkansas Amendment

Non-Discrimination Provision

- Non-compliance with the Arkansas Medical Marijuana Amendment of 2016 (AMMA) can pose significant risks for an employer. It includes a non-discrimination provision directed at employers. The provision provides that:
 - “An employer shall not discriminate against an applicant or employee in hiring, termination, or any term or condition of employment, or otherwise penalize an applicant or employee, based upon the applicant’s or employee’s past or present status as a qualifying patient or designated caregiver.”

Employer Issues/Suggestions

Create Written Job Descriptions which Designate Safety Sensitive Positions within your Organization?

The AMMA permits employers to “exclude a qualifying patient from being employed in or performing a safety sensitive position based on the employer’s good faith belief that the qualifying patient was engaged in the current use of marijuana.”

Safety sensitive position is defined as “any position designated in writing by the employer as a safety sensitive position in which a person performing the position while under the influence of marijuana may constitute a threat to health or safety.

Creating written job descriptions which designate certain jobs as “safety sensitive positions” permits employers to exclude job applicants and employees with medical marijuana registry ID cards from those positions.



NOTE:

- Still Illegal at Federal level as Schedule I Controlled Substance
- U.S. Department of Transportation Guidance Trumps State Law and Prohibits Use of Medical Marijuana by Haz Mat Carriers
- Companies Subject to Federal Drug Workplace Act Must Prohibit Use
- OSHA General Duty Clause? (maintain safe work place)