



Legal Panel Presentation: **Storm Water Issues and Trends**

Presentation To
NAFSMA Annual Conference 2017

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Vitameatavegamin??



Recent Storm Water Developments and Trends

We live in a “Vitameatavegamin World...”

- “It’s So Tasty Too!”:
Environmental Regulatory Environment under Trump Administration
- “The answer to all your problems is in this little bottle!”:
Waters of the United States Rulemaking Update
- “Spoon your way to health”:
California’s efforts to eliminate trash in storm water
- **Updates on Trending Issues**




Executive Order 13771: 1 in, 2 out



- “[W]henever an ... agency publicly proposes ... or otherwise promulgates **a new regulation**, it shall identify at least **two existing regulations to be repealed**”
- For FY2017 (through 9/30), “the total incremental cost of all new regulations, including repealed regulations, to be finalized this year shall be no greater than zero”
- Legal challenge already underway (*Public Citizen et al. v. Trump et al.*) – 14 states intervened in favor of Administration.

Executive Order 13771

OIRA issued final interpretative guidance on the Executive Order on April 5, 2017



EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

April 5, 2017

M-17-21

MEMORANDUM FOR: REGULATORY POLICY OFFICERS AT EXECUTIVE DEPARTMENTS AND AGENCIES AND MANAGING AND EXECUTIVE DIRECTORS OF CERTAIN AGENCIES AND COMMISSIONS

FROM: Dominic J. Mancini, Acting Administrator
Office of Information and Regulatory Affairs *Dominic Mancini*

SUBJECT: Guidance Implementing Executive Order 13771, Titled "Reducing Regulation and Controlling Regulatory Costs"

- EO only applies to final “significant regulatory actions.” Generally \$100 MM+ in economic impact, though certain exceptions for nat’l defense and emergencies.
- Agency must finalize two “deregulatory actions” **prior to** finalizing a new “significant regulatory action,” and the incremental cost must be \$0
- Requirements apply agency-wide: “Regulatory savings by a component in one agency can be used to offset a regulatory burden by a different component in that same agency.” This means, for example, that a new water regulation does not necessarily need to be offset by two water-related “deregulatory actions.”

Executive Order (EO) 13777: “Regulatory Reform”

- Each agency must designate a “Regulatory Reform Officer” and convene a “Regulatory Reform Task Force” to identify existing regulations to repeal, replace, or modify, and to seek input from stakeholders
- On Mar. 24, Administrator Pruitt named Samantha Dravis, Associate Administrator for the Office of Policy, as EPA’s Regulatory Reform Officer. Chief of Staff, Ryan Jackson, named as chair of Regulatory Reform Task Force.
- EPA sought public comments on **identifying regulations that eliminate jobs, are outdated, unnecessary or ineffective, or impose costs that exceed benefits.** EPA received over 70,000 comments in the 30 day period. (Comment period closed on 5/15/17)
- Each Regulatory Reform Task Force is required to issue a progress report.

Budget Cuts at EPA

- Trump FY18 budget blueprint released in March:
 - Proposes reducing EPA outlays by 31%
 - Projected 25% reduction in staff (nearly 4,000 full time employees)
 - More detailed version to be disclosed soon
 - Battle then moves to Congress

America First **A Budget Blueprint to Make** **America Great Again**

POLITICS AND POLICY

Senate Passes Spending Bill to Avert Government Shutdown

Donald Trump expected to sign \$1.1 trillion spending bill; move would fund federal government through September

In contrast, the budget deal signed by President on May 5 to fund government through end of FY17 (thru 9/30/17) essentially keeps Obama-era funding across the board at EPA.

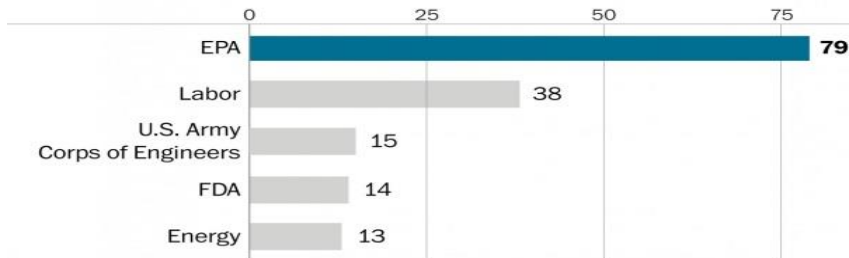
Regulatory “Hit List”

A regulatory rollback wish list

President Trump instructed the Commerce Department to get public feedback about which government regulations are interfering with domestic manufacturing. It received 168 comments, mostly from trade groups in the food production, contracting and medical production fields. Here is what they said.

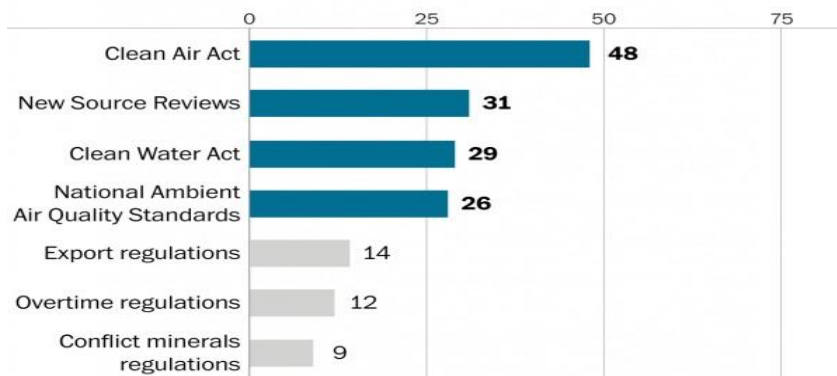
COMMENTS BY AGENCY

The Army Corps of Engineers was mentioned in conjunction with the EPA regarding water rules. Agencies not listed were mentioned fewer than 10 times.



COMMENTS BY REGULATION

New Source Reviews and air quality standards are related to the Clean Air Act. Conflict minerals regulations are related to Dodd-Frank financial reform.



Source: Commerce Department

THE WASHINGTON POST



From EPA Website on WOTUS Rulemaking

Agencies Initiate OMB Review of Step One Proposed Rule

•On February 28, 2017, President Trump issued an Executive Order directing the Administrator of the EPA and the Assistant Secretary of the Army for Civil Works to review the Clean Water Rule and publish for notice and comment a proposed rule rescinding or revising the rule, as appropriate and consistent with law. EPA, Department of Army, and the Army Corps of Engineers have submitted a proposed rule for review to the Office of Management and Budget consistent with this Executive Order.

Presidential Executive Order on Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the "Waters of the United States" Rule

Notice of Intention to Review and Rescind or Revise the Clean Water Rule

Legal Update: “Waters of the U.S.” Litigation

- EPA “Waters of the US” Rule promulgated in May 2015. By some estimates, 60% of previously unregulated bodies will be regulated.
- **August 2015:** U.S. District Court for District of North Dakota issued an order which temporarily blocked the rule in 13 states.
- **October 2015:** Sixth Circuit Court of Appeals temporarily blocked the rule nationwide.
- Rule currently **ON HOLD**. Prior regulations defining “waters of the United States” are in effect.
- **February 2016:** Sixth Circuit decided the District Court versus Court of Appeals jurisdiction issue. En banc hearing denied. Decided Court of Appeals has jurisdiction.
- **August 16, 2016:** Eleventh Circuit refused to hear the issue. Left it to the Sixth Circuit to decide.

WOTUS Rule Under Attack By State Coalition

- A 20-State Coalition has asked EPA to preserve the role of the States in protecting the nation's water resources.
- Position: EPA/Army Corp have an opportunity to “pursue a lawful rule”
- States: Justice Scalia's plurality opinion in *Rapanos* should control.
- The plurality concluded: CWA jurisdiction extends “only [to] those relatively permanent, standing or continuously flowing bodies of water ‘forming geographic features’ that are described in ordinary parlance as ‘streams[,] . . . oceans, rivers, [and] lakes,’” *Rapanos*, 547 U.S. at 739 (Scalia, J., plurality) (quoting *Webster's New International Dictionary* 2882 (2d ed. 1954)), and “wetlands with a continuous surface connection to” those waters, *id.* at 742.

“Spoon your way to health” ...California’s Efforts to Eliminate Trash in Storm Water



- On April 15, 2015 the State Water Resources Control Board adopted the so-called “Trash Amendments” to address impacts of trash on the beneficial uses of California surface waters.
- Established a statewide water quality objective for trash and a prohibition of trash discharge, or deposition where it may be discharged, to the State’s surface waters.
- Require implementation through requirements incorporated into MS4 permits with limited interim planning through monitoring and reporting orders.

“*Spoon your way to health*” ...California’s Efforts to Eliminate Trash in Storm Water

- Many Regional Water Boards have issued Orders that go well beyond the scope of their authority.
- Require the permittees that have regulatory authority over “Priority Land Uses” to choose one of two approaches:
 - **Track 1:** Install, operate, and maintain **Full Capture Systems**, or
 - **Track 2:** Install, operate and maintain alternative systems that achieve **Full Capture System Equivalency**.
- If Track 2 is chosen, then the permittee **MUST** submit a detailed Implementation Plan (within 18 months).
- No one knows what constitutes “Full Capture System Equivalency” and Regional Boards have unfettered discretion to determine if the permittee has satisfied the standard.

“Spoon your way to health” ...California’s Efforts to Eliminate Trash in Storm Water



- Sets a very dangerous precedent.
- Allows permitting authority essentially to require expensive control projects in areas where there is absolutely no impairment for trash.
- May cause scarce resources to be diverted away from programs and projects where the resources are really needed.
- May become model for other States.



Update on Trending Issue: Regional Permitting

Section 402(p)(3)(B) of the CWA provides that MS4 permits may be issued on a system-wide or jurisdiction-wide basis.



- Loosely based on watershed permitting
- Often times does not recognize geographical or political boundaries
- Ostensible goal: to streamline permitting oversight and implementation, but may have the opposite effect
- Legal Impediments
- **If it's not broke...why "fix" it?**

Update on Trending Issue: TMDLs...Still??

- November 22, 2002 EPA Memorandum
- November 12, 2010 EPA Memorandum
- November 26, 2014 EPA Memorandum
 - Updates aspects of 11/22/2002 Memo
 - Replaces 11/12/2010 Memo
- Disguised Numeric Effluent Limits
- Blue Ribbon Panel?
- **Battle we need to continue to fight.**



Update on Trending Issue: EPA “Remand Rule”

- Proposed in January 2016 in response to 9th Circuit decision in *Environmental Defense Center, et al. v. EPA*, 344 F.3d 832 (2003).
- 9th Circuit found that EPA regulations for obtaining coverage under a small MS4 general permit did not provide adequate public notice or permit authority review of BMPs.
- Three options: (1) Traditional General Permit Approach; (2) Procedural Approach; and (3) State Choice Approach
- Overall standard: reduce pollutants discharged from MS4s to the maximum extent practicable and to protect water quality.
- Comment period closed on 3/21/2016. Under Settlement Agreement between EPA and petitioners, EPA must have final rule ready for publication by 11/17/2016.
- **Final Rule was signed on 11/17/2016. EPA adopted Option (3).**

For Questions or Advice...

Please call or email:

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