July 16, 2019

Current Developments in State and Federal Environmental Regulation and Permitting

Missouri Waste Control Coalition Conference 2019
Lake of the Ozarks, MO

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Topics Outline

- Highlight major environmental initiatives of Trump Administration
- Enforcement topics
- Cooperative federalism, Certainty, and state impacts
- Worker safety
- Strategies and responses
The environmental times, they are a-changin’

● (With apologies to Bob Dylan)

● Executive Orders
  – 13777: Enforcing the Regulatory Reform Agenda, Mar. 1, 2017
  – *13766: Expediting Environmental Reviews and Approvals for High Priority Infrastructure Projects, Jan. 30, 2017
  – *Presidential Memorandum Regarding Construction of the Keystone XL Pipeline, Jan. 24, 2017
  – *Presidential Memorandum Regarding Construction of the Dakota Access Pipeline, Jan. 24, 2017
  – Others

● President Trump announces plans to withdraw from Paris Climate Accord, June 1, 2017

● EPA announces plans to review EPA’s Clean Power Plan regulation, March 28, 2017

● EPA, Corps of Engineers announce plans to rescind and repropose regulation defining “Waters of the United States” under Clean Water Act, June 27, 2017

● Scott Pruitt appointed EPA administrator; later resigns; Andrew Wheeler becomes EPA Administrator
Or maybe not . . .

- Ship turns slowly
- Other administrations have tried to change directions and reduce environmental regulations in broad way, with only limited success
- State authorities
- NGO stakeholders
- Courts
- Civics lessons on their way
OPINION | POLITICS & IDEAS

Donald Trump’s Belated Civics Lesson

The president is learning how the Constitution works—and he’s not happy.

President Trump at a press conference in Tokyo, Nov. 6. PHOTO: KIYOSHI OTA/POOL/EPA-EFE/REX/SI

By William A. Galston

Nov. 7, 2017 6:55 p.m. ET

President Trump has gradually discovered the meaning of the oath he swore on Jan. 20, and he doesn’t seem to like it. In the course of an interview on “The Larry O’Connor Show” last week, he said, “The saddest thing is that because I’m the president of the United States, I am not supposed to be involved with the Justice Department. I am not supposed to be involved with the FBI. I’m not supposed to be doing the kinds of things that I would love to be doing. And I’m very frustrated by it.”
Regulations: Making them, changing them

- Regulations are based on statutory authority and directives
- Starting point: Laws passed by Congress authorize (or direct) agency to take certain actions
- Notice and comment rulemaking
- Multiple stakeholders
  - EPA
  - States: The new federalism
  - NGOs: Non-governmental organizations
  - Regulated industries
  - Public
- Courts: Judicial review of EPA decisions
  - Tests: “Arbitrary and capricious,” judicial deference
  - Department of Justice
Selected EPA Initiatives

Clean Power Plan
Waters of the United States jurisdictional rule
Administrator Pruitt: Cooperative federalism
Administrator Wheeler: Certainty agenda

Reducing, clarifying regulatory requirements
Wheeler’s Promise Of EPA ‘Certainty’ Agenda Draws Skepticism, Derision

March 14, 2019

EPA Administrator Andrew Wheeler’s promise that the agency’s agenda will bring regulatory “certainty” is drawing a mix of skepticism and derision from observers including industry and state officials who say it either exaggerates the benefit of some actions or ignores controversial -- and legally uncertain -- rollbacks that risk creating more uncertainty.

- Risk communication
- Regulations based on clear authority
- Clear directions to states, regulated community
- EPA to “stay in its lane”
- Examples
  - Affordable Clean Energy rule
  - WOTUS regulation
In the Cross-Hairs: Clean Power Plan

- Supreme Court stay
- EPA repeal and replace
  - June 2019: EPA issued final Affordable Clean Energy (ACE) Rule
- Paris Accord withdrawal begins a process
- Impact of natural gas prices
- The future for renewable fuels, energy conservation
- Roles of the states, private sector
Starbucks brews a greener plan for 10,000 environmentally friendly stores

As part of its new "Starbucks Greener Stores" initiative, the coffee retailer plans to have 10,000 environmentally friendly stores worldwide by 2025.

Among the goals of the program, announced Thursday, is for the company to generate enough energy by solar and wind power to offset all the electricity needed to run the chain's stores in U.S. and Canada.
In the crosshairs: “Waters of the United States” regulation

- “Waters of the United States”: Establishes jurisdiction under Clean Water Act
- EPA has moved to repeal 2015 regulation; Proposed revised definition December 2018, hearing in Kansas City February 2019
- In litigation; 2015 regulation being implemented in some states, but not in others.
The EPA is providing this map for informational purposes only, and it cannot be relied on for specific determinations or other legal purposes. As the litigation continues, the EPA will update the map, when possible, to reflect the most current information that is made available to the EPA and the Army. For specific requests, please contact the Army Corps of Engineers or EPA. This map was updated on September 11, 2018.

Applicable Definition

- **2015 Clean Water Rule***
- **Pre-2015 Regulations and Guidance***

* Also applicable in the U.S. territories
“Waters of the United States” jurisdictional scope

- Regulatory uncertainty
  - What test applies?
  - Illustrates hazards to industry of guidance, agency discretion
  - How will Army COE make jurisdictional determinations?
  - Consider approaching Army COE local office to seek case-specific jurisdictional determination (JD)

- Recent court rulings: Groundwater discharges that reach surface waters
  - Fourth and Ninth Circuit Courts of Appeals; Supreme Court to decide
  - Citizen suits

- State-specific jurisdictional scopes
Administration Enforcement Priorities

● EPA officials: Return to core mission—Preserving clean air, clean water

● At the same time:
  – Encourage manufacturing and development
  – Encourage growth and development in energy sector

● Delegate more lead authority to the states: “Cooperative Federalism”

● Focus EPA’s resources on programs where there is no state authority or states invite EPA to take lead

● Enforce based on clear, articulated regulations, “rule of law”

● Recent reports: Although enforcement numbers are down, many traditional enforcement approaches continue
Justice News

Department of Justice
Office of Public Affairs

FOR IMMEDIATE RELEASE

Tuesday, February 27, 2018

Tyson Poultry Fined $2 Million for Violating the Clean Water Act

Tyson Poultry Inc. was sentenced in federal court in Springfield, Missouri, to pay a $2 million criminal fine, serve two years of probation, and pay $500,000 to directly remedy harm caused when it violated the Clean Water Act, the Justice Department announced. The charges stemmed from discharges at Tyson’s slaughter and processing facility in Monett, Missouri that led to a major fish kill event.

Tyson Poultry, the nation’s largest chicken producer, is headquartered in Springdale, Arkansas, and is a subsidiary of Tyson Foods Inc. According to court records, Tyson Poultry’s conviction arose out of a spill at its feed mill in Aurora, Missouri, where it mixed ingredients to produce chicken feed. One ingredient was a liquid food supplement called “Alimet,” which is a trademark of the U.S. headquarters. When that feed was mixed with water, it caused a spill that ultimately flowed into nearby waterways.
Administration Enforcement Priorities

- "Business as usual"?
- Supplemental Environmental Projects
- EPA regional reorganizations
EPA National Compliance Initiatives

- Evolution of EPA’s National *Enforcement* Initiatives Program

- FY 2020 – 2023, issued June 2019
  - Reducing excess air emissions of harmful pollutants
  - Stopping aftermarket defeat devices for vehicles and engines
  - Reduce hazardous air emissions from Hazardous Waste Facilities
  - Reduce risks of accidental releases at industrial and chemical facilities
  - Reduce significant noncompliance with NPDES permits
  - Reduce noncompliance with drinking water standards at community water systems

- 2017 – 2019 initiatives modified or returned to EPA’s core compliance/enforcement programs
  - Reduce air pollution from the largest sources
  - Ensure energy extraction activities comply with environmental laws
  - Keep raw sewage and contaminated stormwater out of nation’s waters
  - Prevent animal waste from contaminating surface and groundwater
  - Cut Hazardous Air Pollutants (HAPs)
Cooperative Federalism

- Concurrent jurisdiction: Federal and state
- September 2017, Ed Galbraith (MDNR) to Edward Chu (EPA Region 7)
  - “Cooperative federalism”
  - “Revisit and clarify our respective roles”: setting priorities, inspections, permitting
  - “I would ask Region 7 to step back...” from routine practice of conducting inspections and taking enforcement actions in Missouri
- EPA Response
  - In general
  - Delegated programs vs. non-delegated programs
Trump's EPA shifts more environmental enforcement to states

By ELLEN KNICKMEYER, ASSOCIATED PRESS

BOKOSHE, Okla. — May 20, 2019, 11:50 AM ET
Cooperative Federalism: Addressing Certain Risks

- Permit shield
- Enforcement shield from citizen suits
- Citizen suits, generally
- Differing interpretations: Now vs. the future
- Differing interpretations: Now vs. now
- How do you make your permits, agreements stand up over time?
Meanwhile, in the states . . .

Changing personnel, teams
Changing emphasis
Missouri: Regulatory Reform

Comprehensive review of MDNR’s regulations

Multiple stakeholder meetings

Goals: Eliminate unneeded regulations, duplication

Large number of regulations eliminated, simplified
MDNR Reorganization

Changes in management personnel, including directors
Reorganized Hazardous and Solid Waste Management programs (March 2019)
   - Solid Waste Program became “Waste Management Program”
   - Picked up RCRA Subtitle C permitting, enforcement
   - Hazardous Waste Program became “Environmental Remediation Program” with these sections
     - BVCP
     - Federal Facilities
     - Superfund
     - Tanks
     - Budget and Planning
MDNR Reorganization, Cont’d

Created internal unit to advise MDNR programs regarding risk assessment and risk management

- Will not replace traditional role of MDHSS in risk assessments for cleanup decisions

Emphasis on issuing permitting decisions promptly, reducing backlogs

Division of Energy moving back to DNR from DED
DOJ-OSHA Worker Endangerment Initiative

- December 17, 2015 Memo
  - Prosecutors should charge other felony Title 18 offenses
  - USAO to work with Environmental Crimes Section
- MOU between DOJ and DOL
- Civil enforcement by DOJ Environmental Enforcement Section
Worker Safety

- OSHA Construction and General Industry standards, General Duty Clause
- OSHA electronic reporting rule
- OSHA silica rule, fracking
- Enforcement staying strong
- Fatigued driving, falls amongst leading causes of death
EPA Worker Protection initiatives

- EPA working with DOJ to pursue worker exposure incidents as environmental crimes
- EPA Worker Protection Standard: Ag worker exposures to pesticides, chemicals in Farms, nurseries, forests, and . . .
- EPA Asbestos Worker Protection Rule: Extends OSHA’s asbestos standards to state, local employees
Why Being “OSHA Legal” Isn’t Enough

Go beyond compliance to better protect your employees and business.

EHS Today, August 31, 2018
- EPA, OSHA may have overlapping jurisdictions
- Many EPA restrictions on same chemicals can be stricter than OSHA
- Recommendations: Be proactive; monitor, assess, look ahead
- Don’t get stuck having to use a chemical that is being banned.
- Keep an eye on industry and voluntary standards and on EPA’s chemical assessment programs under TSCA and other authorities.
Department of Justice guidelines for compliance programs

- DOJ evaluates corporate compliance programs in deciding whether to charge companies and individuals with criminal violations of environmental and other laws

- Extensive guidance

- April 2019 update (paraphrased)
  - Does company program identify and evaluate the regulatory risks it faces in its business and the possibilities for improper actions by employees?
  - Is the program effective in addressing those risks?
  - Extensive details for program components
  - Potential examples: RMP, Process Safety
Current status, takeaways

- EPA's enforcement continues; cases continue to be referred to DOJ
- Most enforcement matters do not involve difficult jurisdictional issues
- States are still in charge of their own programs, enforcement
- States will take more leading roles
- Emerging policy on Supplemental Environmental Projects
Response strategies

- Don’t assume regulators will be less inclined to enforce
- Be aware the regulators you are dealing with may not perceive any difference in regulatory approach, outcomes for a given situation
- States may have their own enforcement strategies, may pursue parallel enforcement proceedings
- Consider the long term: What happens if agencies pursues a different approach in the future?
- Document, document, document
- Look ahead, look ahead, look ahead
Conclusions
Questions?

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