2018 Legal Update: Developments in Environmental Law You Should Know About

Presented by
Laura Kerr
A&WMA, Oregon Chapter
June 2018
Environmental Regulation Under the @realDonaldTrump Administration
#trumpagenda
#TRUMPAGENDA

- Healthcare Reform
- Gorsuch Nomination
- Tax Reform
- Immigration Reform
- Trade Reform
# Regulatory Agenda: Regulatory Rollback

## 33 Rules Have Been Overturned
- Flood building standards
- Proposed ban on a potentially harmful pesticide
- Freeze on new coal leases on public lands
- Methane reporting requirement
- Anti-dumping rule for coal companies
- Decision on Keystone XL pipeline
- Decision on Dakota Access pipeline
- Third-party settlement

## 24 Rollbacks Are in Progress
- Clean Power Plan
- Paris climate agreement
- Car and truck fuel-efficiency standards
- Offshore oil and gas leasing
- Status of 10 national monuments
- Status of 12 marine areas
- Limits on toxic discharge from power plants
- Coal ash discharge regulations

## 10 Rollbacks Are in Limbo
- Wetland and tributary protections
- Methane emission limits at new oil and gas wells
- Limits on landfill emissions
- Mercury emission limits for power plants
- Hazardous chemical facility regulations
- Groundwater protections for uranium mines
- Efficiency standards for appliances

*Source: New York Times*
REGULATORY AGENDA: POLICY REINTERPRETATION

• Clean Air Act stationary source classifications
  – Major source: 10 tpy (single HAP), 25 tpy (combo)
  – Area source: all other stationary sources

• 1995 Seitz Memo
  – Adopted “Once-In, Always In” policy
  – Criticized for disincentivizing emission reductions

• January 2018 Reclassification Memo
  – Withdrew OIAI policy, effective immediately
  – Plain language justification for reinterpretation
REGULATORY AGENDA: CROWDSOURCING

ENVIRONMENTAL PROTECTION AGENCY

40 CFR § 122.2


Clean Water Act Coverage of “Discharges of Pollutants” via a Direct Hydrologic Connection to Surface Water

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice; Request for Comment.

SUMMARY: The Environmental Protection Agency (EPA) is requesting comment on the Agency’s previous statements regarding the Clean Water Act (CWA) and whether pollutant discharges from point sources that reach jurisdictional surface waters via groundwater or other subsurface flow that has a direct hydrologic connection to the jurisdictional surface water may be subject to CWA regulation. EPA is requesting comment on whether the Agency should consider clarification or revision of those statements and if so, comment on how clarification or revision should be provided.

DATES: Comments must be received on or before [Insert date 90 days after publication date].
ENVIORNMENTAL ENFORCEMENT

• “Back to Basics”
  – Stepping back from new air emissions monitoring technology relied on by Obama administration
  – Focus on numeric limits, not subjective criteria
  – Rejection of “regulation via enforcement”
  – Increased deference to state enforcement

• EPA has enforcement discretion
  – Significant reduction in number of civil cases filed
  – Significant reduction in civil penalties
FIRST TERM CIVIL PENALTIES (CWA/CAA CONSENT DECREES)

Source: Environmental Integrity Project
CIVIL CASES FILED

Source: Environmental Integrity Project
#regulatoryvoid
#TRUMPBUMP

<table>
<thead>
<tr>
<th>Organization</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sierra Club</td>
<td>• 700% increase</td>
</tr>
<tr>
<td>Earthjustice</td>
<td>• 160% increase</td>
</tr>
<tr>
<td>EDF</td>
<td>• “surge of support”</td>
</tr>
<tr>
<td>NRDC</td>
<td>• “exponential bump in engagement”</td>
</tr>
</tbody>
</table>
BLUE STATES FIGHT BACK

• State Attorneys General
  – Lawsuits to prevent rollback of federal regulations
  – Enforcement actions under state law and federal citizen suit provisions

• State Regulatory Agencies
  – Increased focus on inspections and enforcement
  – Increased rulemaking

• State Legislative Efforts
  – Legislation proposed to preserve Obama-era status quo
**Takeaways**

- Environmental “regulation” is shifting from DC to federal courts and to the states
- Potential for greater state-by-state differences in environmental regulation and enforcement
CWA Updates

• Cases
• Regulatory changes
Are discharges from a point source to groundwater subject to the Clean Water Act?

- Hawai‘i Wildlife Fund v. Cty. of Maui, 886 F.3d 737 (9th Cir. 2018)
- EPA’s request for comments (83 Fed. Reg. 7,126 (Feb. 20, 2018))

Round Butte Dam
ENVL. LAW & POLICY CTR. V. U.S. EPA, CASE NO. 3:17CV01514 (N.D. OHIO)
THE WATERS OF THE UNITED STATES RULE

- What is the WOTUS Rule and why does it matter?
- Status of the “Obama Era” WOTUS Rule
- Status of the “Trump Era” WOTUS Rule
CERCLA Updates

• Cases
• Regulatory changes
• Superfund Priorities
• National Priority List
CA. DEP’T OF TOXIC SUBSTANCES, CONTROL V. WESTSIDE DELIVERY, LLC, 888 F.3d 1085 (9TH CIR. 2018)

– Purchase of contaminated site through tax auction
– Original owner failed to pay taxes
– Defendant liable because of contractual relationship with seller

Tax sale or tax auction purchase does not shield the buyer from third-party CERCLA liability
113(f) contribution claim

- Corrective actions under RCRA qualify as “response” actions under CERCLA

- Settlement under RCRA may give rise to a CERCLA contribution claim
Genuine Parts Co. v. EPA, 890 F.3d 304 (D.C. Cir. 2018)

– Vacated EPA’s rule adding the site to NPL
– Lack of evidence that underground aquifers were connected = Arbitrary and capricious
Rockwell International Wheel & Trim Site

- First-ever EPA proposed vapor intrusion site
- NPL listing based solely on risk to human health from vapor intrusion from subsurface contamination
- Indoor air quality concerns
EPA – THE SUPER(FUN)d PRIORITY

• Pruitt Memo (May 2017)
  – Retracts CERCLA remedy selection authority from regional offices
  – Sites with estimated cost exceeding $50M
  – Only EPA Administrator can select the remedy
EPA – THE SUPER(FUN)D PRIORITY

Recommendations to Streamline and Improve the Superfund Program:

- Expediting Cleanup and Remediation;
- Re-invigorating Responsible Party Cleanup and Reuse;
- Encouraging Private Investment;
- Promoting Redevelopment and Community Revitalization; and
- Engaging Partners and Stakeholders.