

Hot Topics in Clean Water Law Webinars

June 7, 2017

September 13, 2017

2:00 - 3:30 PM ET





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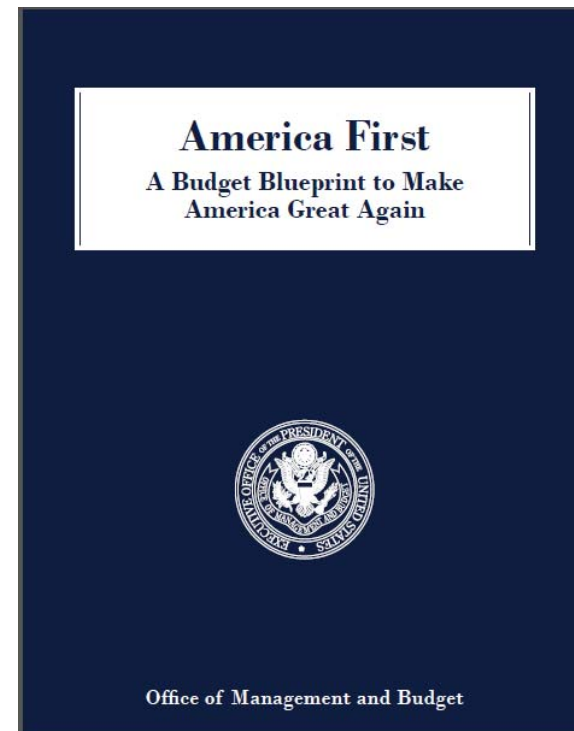
THE CLEAN WATER ACT IN
THE TRUMP ADMINISTRATION:
*WHAT TO EXPECT WITH
REGULATIONS AND
ENFORCEMENT*

NACWA "HOT TOPICS IN CLEAN
WATER LAW" WEBINAR: PART 3

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A NEW ADMINISTRATION – A NEW APPROACH
FEDERAL ENVIRONMENTAL RESET

“Winners make policy. Losers go home.”
Senator Mitch McConnell



Parameters for a Regulatory Reset



CURRENT REGULATORY MEASURES AND PROSPECTS FOR CHANGE

MECHANISMS FOR POTENTIAL CHANGES – FINALIZED RULES

- For all final rules, the new Administration has the option of removing or replacing the existing rule consistent with the APA
 - Requires new proposed rule with notice and public comment (usually 30-60 days)
 - Agency is allowed to change course, but must acknowledge it is doing so, and articulate “good reason for the new” rule
 - Sometimes agency must provide “a more detailed justification than what would suffice for a new” rule
 - If procedures are ignored, groups can challenge the agency in court



CURRENT REGULATORY MEASURES AND PROSPECTS FOR CHANGE

MECHANISMS FOR POTENTIAL CHANGES – FINALIZED RULES

- Rules based on existing scientific record and action-forcing statutes may be more difficult for an agency to change without significant litigation risk
 - Ex., 2015 ozone NAAQS (>1,000 studies)
- Rules based on policymaking judgment will provide an agency with more leeway
 - Ex., WOTUS
- Where pure legal interpretation is at issue, an agency's changed interpretation of an ambiguous statute generally gets deference in court—even if a prior interpretation was upheld as reasonable
 - Ex., Clean Power Plan



CURRENT REGULATORY MEASURES AND PROSPECTS FOR CHANGE

MECHANISMS FOR POTENTIAL CHANGES – AGENCY GUIDANCE

- APA does not apply to interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice
- Agency is allowed to change course, but must articulate “good reason for the new policy”
- Generally enough if “the new policy is permissible under the statute, there are good reasons for it, and the agency believes it to be better”
 - Higher standard where “new policy rests upon factual findings that contradict those which underlay its prior policy” or prior policy has engendered “serious reliance interests”



CURRENT REGULATORY MEASURES AND PROSPECTS FOR CHANGE

MECHANISMS FOR POTENTIAL CHANGES – OTHER EXECUTIVE ACTION

- Actions resting on President Obama's discretion can be undone by stroke of pen
 - “Live by the pen and phone, die by the pen and phone”
 - For example, Executive Order 13693 directs agency heads to hit percentage targets for “clean energy”



Parameters for an Enforcement Reset



NATIONAL ENFORCEMENT INITIATIVES FOR FY 2017 – FY 2019

MUNICIPAL DISCHARGES NEI

- Municipal discharges NEI (MS4s, CSO/SSOs) still on the books, but could be reassessed by new OECAAA
 - “Keeping Raw Sewage and Contaminated Stormwater Out of Our Nation’s Waters”
- This is mature enforcement priority, and EPA has already addressed substantial part of the universe
- Enforcement teams will continue to address new CSO/SSO and MS4 violations *for now*
- New direction: EPA will not likely seek to test new technologies in enforcement settlements and not push measures to address climate change



CLEAN WATER ACT ENFORCEMENT IN THE TRUMP ADMINISTRATION IS PAST PROLOGUE?

- Political transitions have not significantly changed EPA enforcement levels in the past
 - Career staff, not political appointees, do most enforcement work
 - Enforcement priorities are generally stable over time
-
- Obama EPA enforcement numbers were comparable to Bush numbers, and some enforcement numbers even declined (e.g., case initiations and inspections)



CLEAN WATER ACT ENFORCEMENT IN THE TRUMP ADMINISTRATION

WHAT CAN WE EXPECT?

- Subject to dictates of new enforcement philosophy, cases will generally march along
 - Administrator Pruitt may get personally involved when cases raise “significant” issues
- Enforcement staff will continue to pursue Next Generation Compliance provisions in settlements for the time being, including:
 - Ex., “transparency” (notifying communities of discharges online and at receiving waters)
- Costs for settling parties may still be significant





**Or, New Themes for Enforcement at
EPA**

THEMES FOR ENFORCEMENT IN THE NEW EPA

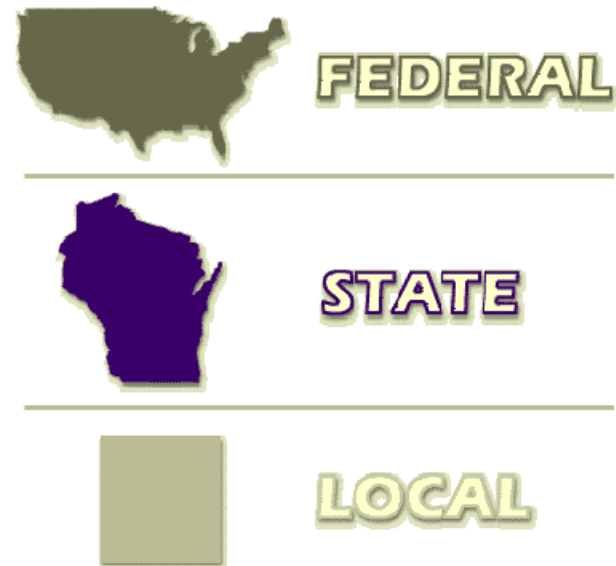
WHAT CAN WE EXPECT?

- Cooperative federalism
 - EPA workgroup with ECOS to develop process for fed-state coordination to avoid duplication of efforts
- Government should stick to the four corners of the statutes and regulations in enforcement
- Focus on cases with threats to human health, not just enforcement “beans” and penalties
 - Focus on community benefits (i.e., SEPs)
- Enforcement is not the place to test new technologies or gap fill regulations
- More focus on compliance assistance



RESETTING FEDERAL-STATE ENFORCEMENT PARADIGM “COOPERATIVE FEDERALISM”

- Expect to see tighter coordination with states on enforcement (e.g., ECOS initiative)
- Political leadership will push for more deference to state enforcement responses
- Latitude under “timely and appropriate” standard for federal involvement
 - Oldies but goodies: “Guidelines for Federal Enforcement in CSO/SSO Cases,” OECA (Apr. 2005)
 - Provides bases to argue state should have the lead



ENFORCEMENT POLICY

POTENTIAL AREAS FOR ENGAGEMENT WITH LEADERSHIP

- Expand use of Supplemental Environmental Projects
 - Senior management even more supportive of SEPs in cases
- Deemphasize penalties and focus on compliance
- Rebalance federal and state roles in enforcement (e.g., ECOS effort, CSO/SSO guidelines memo)
- Injunctive relief confined to four corners of law and not proper for filling regulatory gaps
- Revive compliance assistance programs
- New OECAA expected to be confirmed soon
 - Prior political-level experience, EPA knowledge



SPEAKER PROFILE



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Recognized as a “Next Generation Lawyer” in the *Legal 500 U.S. 2017* guide in the Environment – Regulatory category.

Andrew R. Stewart draws upon his experience as a senior manager at the U.S. Environmental Protection Agency (EPA) and 20 years in environmental law to counsel clients on a broad range of compliance and enforcement matters. Mr. Stewart’s work includes defending government enforcement and citizen suit actions, assisting clients on federal and state permitting requirements, and counseling on other critical environmental obligations. These matters have arisen under all major federal environmental laws, including the Clean Water Act, as well as state laws.

Prior to joining Vinson & Elkins, Mr. Stewart served as an Acting Division Director in the Office of Civil Enforcement at EPA. He managed complex enforcement actions and litigation affecting numerous industrial sectors, including energy, chemical manufacturing, agribusiness, mining, and telecommunications.

While at EPA, he also served as a senior attorney in the Water Enforcement Division, handling combined sewer overflow/sanitary sewer overflow and municipal separate storm sewer system cases and policy issues affecting municipalities. He coordinated issues raised in these cases with the Office of Water and Office of General Counsel, including matters related to financial capability, compliance schedules, and permit terms. Mr. Stewart was also a principal drafter of the “Guidelines for Federal Enforcement in CSO/SSO Cases” memorandum issued by the Office of Enforcement and Compliance Assurance.

Mr. Stewart currently serves as a Vice Chair on the Environmental Enforcement and Crimes Committee within the ABA Section of Environment, Energy, and Resources. Before coming to EPA, Andrew worked in the environmental practice of another international law firm in Washington, D.C.

Citizen Suits in the Trump Era

NACWA "HOT TOPICS IN CLEAN WATER LAW" WEBINAR: PART 3

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The purpose of this presentation is to provide you with current information and it is not intended as, nor is it a substitute for, specific legal advice.

ENVIRONMENTAL CITIZEN SUITS

Basics, Trends and Tactics



What Is a Citizen Suit?

Three types of citizen suits under federal environmental laws

- Claims against an alleged violator to enforce an environmental statute, regulation, or permit
- Claims that a regulated entity's action has created an "imminent and substantial endangerment" under the Resource Conservation and Recovery Act (RCRA), even in the absence of a statutory or regulatory violation
- Claims that EPA failed to perform a non-discretionary statutory duty
 - Distinct from APA suits against EPA challenging specific agency actions

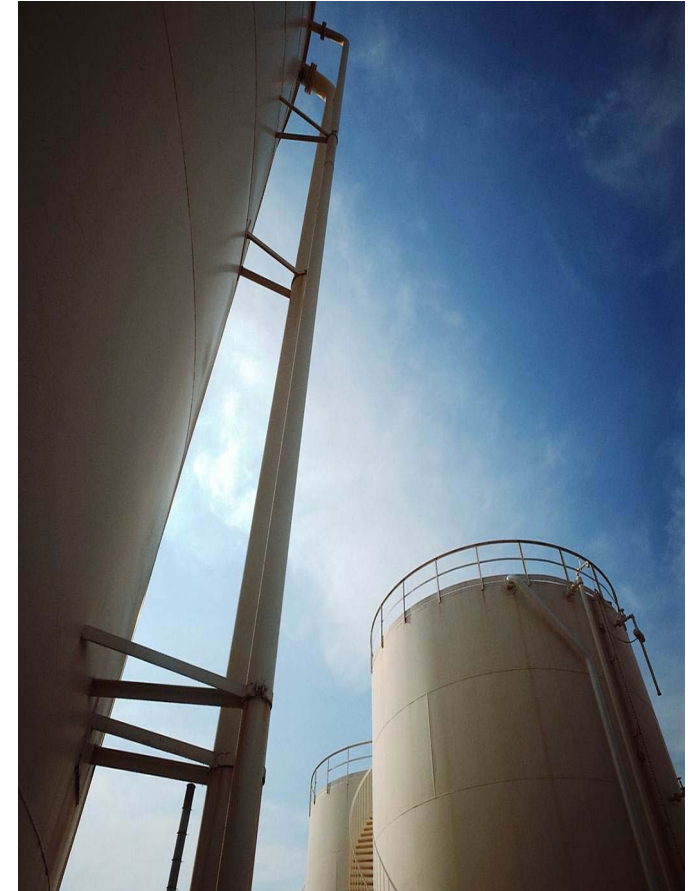
Who Has Standing?

- Federal environmental statutes require Article III standing
- Usually, showing environmental, aesthetic or economic injury is sufficient if:
 - Concrete
 - Particularized
 - Actual or Imminent
- Defendant's action caused injury
- Favorable decision would redress injury
- State laws



Who can be Sued?

- Alleged violator of permit, consent decree, regulation, etc.
- Alleged creator of imminent and substantial endangerment
- EPA for failure to perform a non-discretionary act



Notice and Diligent Prosecution

- Plaintiffs must give a pre-filing notice to the agency, the state, and the alleged violator
- Notice timing requirements depend on which statute is being used and whether there are regulatory notice requirements in addition to the citizen suit notice requirements
- Deficient notice = dismiss claims but without prejudice
 - Can restart clock on “diligent prosecution”
- Diligent prosecution can be a statutory bar
 - Diligent prosecution must begin before suit
 - Usually involves a fact-specific inquiry

Special Aspects of Citizen Suits

NGOs have certain structural advantages in an environmental citizen suit action

Strict liability –no negligence or fault need be proven

More concentrated experience with citizen suits

Threat and bases for recovering attorneys' fees

What Relief is Available?

- **Injunctions to prevent future violations and/or come into compliance**
- **Civil penalties for regulatory violations (strict liability)**
- **Attorneys' fees and costs**

**No recovery for damages,
such as past cleanup costs**



Common Scenarios

- **Enforcement of permit or consent decree**
- **Agency action or inaction**
- **“ISE” with toxic tort claims**
- **Neighbor lawsuit**
- **Aesthetics**

CITIZEN SUIT PROVISIONS: Clean Water Act

The vast majority of environmental citizen suits arise under the Clean Water Act. Why?

- **Wealth of online data generated under NPDES program's self-reporting requirements leads to target-rich environment of potential defendants**
- **Structural advantages for plaintiffs**
- **Difficult to prove compliance with ambiguous permit or consent decree terms**

CITIZEN SUIT PROVISIONS: RCRA

RCRA is the fastest-growing source of citizen suits. Why and how?

- **Broad scope of statute – “endangerment” – can be used in many different contexts**
- **RCRA citizen suits can accompany standard tort lawsuits and raise stakes with the possibility of attorneys’ fees**
- **Not just a tool of environmental groups – can be used by commercial plaintiffs**

What is Trending – RCRA

- Definition of “solid waste” under RCRA citizen suits is expanding to include air emissions. *Little Hocking Water Ass’n v. Dupont*, 91 F.Supp.3d 940 (S.D. Ohio 2015)
- RCRA endangerment claims are expanding to include “contaminants of emerging concern.” *Tennessee Riverkeeper, Inc. v. 3M*, No.5:16-CV-01029 (N.D. Ala., filed June 23, 2016)
- Scope of harm under RCRA endangerment expanding to include climate change. *Conservation Law Foundation v. Exxonmobil*, No. 1:16-cv-11950-MLW (D. Mass. filed Sept. 29, 2016)

What to Expect under Trump Era?



High Level Considerations

- Federal environmental law provides powerful tools to citizens' groups to privately enforce the statutes in courts
- Citizen suits are expected to increase substantially in coming years, due to:
 - Perception of *inadequate enforcement* of and *lagging regulatory measures* under environmental laws by the Trump Administration
 - Increasing creativity of plaintiffs' groups
 - Ongoing increases in fundraising by these groups

High Level Considerations

- Perception of *inadequate enforcement* of and *lagging regulatory measures* under environmental laws by the Trump Administration
 - Enforcement decisions generally are committed to discretion of EPA/DOJ
 - Decrease in regulation by enforcement
 - Decrease in new regulations
 - Scale back of creative regulations from prior Administrations

Citizen Suits in the Trump Era

- Citizens likely to “enter the breach” they perceive as a result of Trump de-regulatory actions and shift in enforcement priorities
 - Suits challenging affirmative regulatory actions
 - Challenge to Trump 2 for 1 Executive Order
 - Suits to challenge regulatory withdrawals or changes
 - Strength depends on whether statute is action-forcing (TSCA reform) or based on court-enforceable settlement (ESA)
 - More deference where based on change in policy and/or legal interpretation

Strategies to Avoid Claims

Negotiating Permits and Consent Decrees: Avoid “fuzzy” language.

- “pollutants that cause or threaten to cause pollution, contamination, or nuisance”
- “implement BMPs that comply with the BAT/BCT requirements”
- “ensure that discharges do not cause or contribute to an exceedance of water quality standards”
- “. . . does not result in an NAL exceedance”
- “. . . to the extent feasible . . .”

Strategies to Avoid Claims

Avoid fuzziness with proactive approach and early engagement

- Consider the possibility of this type of litigation exposure when new permits are drafted.
- Help state/EPA build a better permit system.
- Engage authorities when they *aren't* enforcing.

Only accept achievable permit and consent decree terms and conditions

Strategies to Avoid Claims

Be Attentive to Online Data

- “Bad data” is anything that can give a first impression that a company is a violator
- Permittees must be vigilant about what is going online and routinely *double-check the data*
- Routinely check and correct online profile re missing data, erroneous data, and lost or corrected inspection reports

Strategies to Avoid Claims

How to reduce your chance of being targeted

- Be scrupulous with your data monitoring, recordkeeping and reporting
- Establish a productive working relationship with state and federal regulators before problems occur
- Establish good relationships with the local community
- Consider environmental audits to insure compliance and to fix problems, and disclosure under state or federal audit policies

Citizen Suits in the Trump Era

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Navigating Uncertain Waters: COMPLIANCE STRATEGIES IN THE NEW EPA

Nathan E. Vassar



Opportunities vs. Wait-and-See

- Resisting “take it easy” mode/Engaging Opportunities
- Compliance Audit/CMOM Gap Analysis
- Integrated Plans



Ongoing Practices

- Enforcement Priorities targeting wastewater/stormwater
- Inertia for ongoing cases
- State Enforcement



What's New In Enforcement

- Stipulated Penalty Approach/Updates



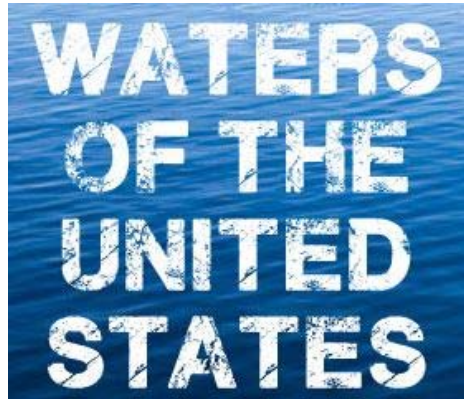
- Implementation of “Next Gen” Compliance



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What's New In Enforcement

- Enforcement in light of WOTUS expected changes



- Citizen Suit Push (as discussed by Karen Hansen)

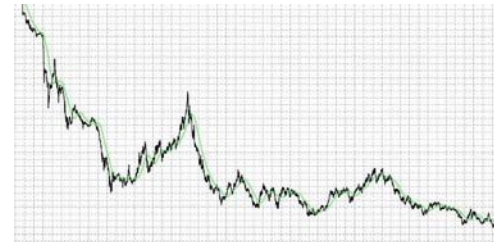
Compliance Strategies

- Regulator Relationships:
 - Don't Wait for Appointees
 - Acting Regional Administrators
 - Communications with state regulators



Compliance Strategies

- Planning for Future Compliance
- Scrubbing and Updating Utility Wish Lists
- Don't Assume No Action (*see State/Citizen initiated actions*)



If There is Breathing Room . . .

- Use it! Pursue identified improvements/practices
 - Don't plan on lax enforcement
 - Be mindful: \$51,570/violation/day
 - Five-year compliance goals/anticipate new requirements



- Stakeholder Engagement (including decision makers/ratepayers)

**Manage Stakeholder
Relations**

Questions?

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NACWA Events at a Glance

Utility Leadership Conference & 47th Annual Meeting

July 23-26, 2017 | St. Louis, MO

Strategic Communications: H2O

July 26-27, 2017 | St. Louis, MO

Hot Topics in Clean Water Law: Part 4

September 13, 2017 | Webinar

National Clean Water Law Seminar & Consent Decree Workshop

November 14-17, 2017 | Savannah, GA

Winter Conference

February 6-9, 2018 | Napa Valley, CA