



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

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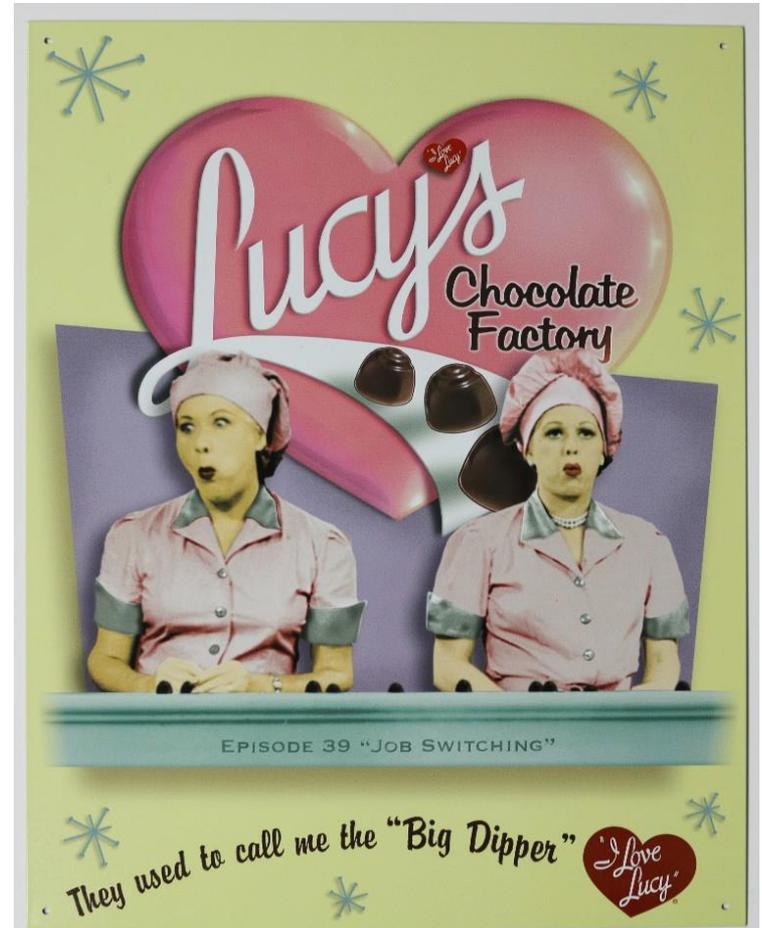
July 10, 2018

Fighting a Losing Game??



Recent Storm Water Developments and Trends ...Sometimes it's like fighting a losing game!!

- "You're Fired!":
Environmental Regulatory Environment under Trump Administration
- "Let her roll!":
Waters of the United States Rulemaking Update
- "Fighting a losing game":
California's efforts to eliminate trash in storm water
- **Updates on Trending Issues**



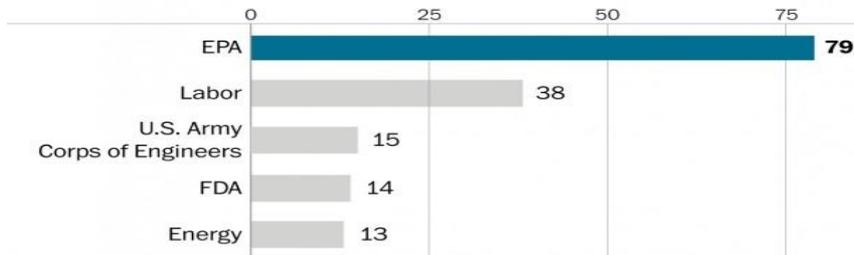
Regulatory “Hit List”

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.

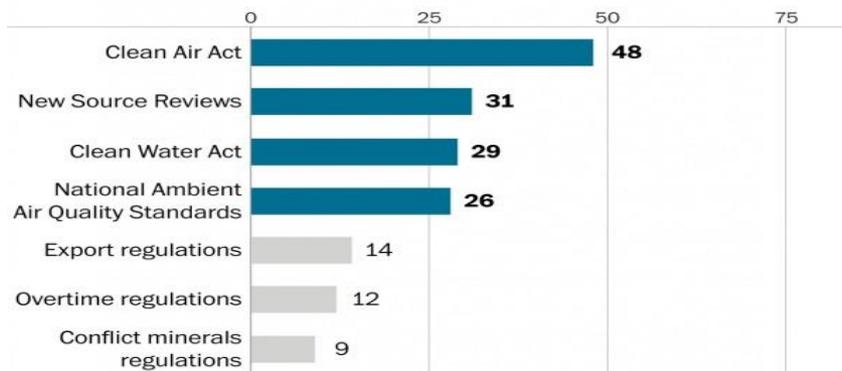
COMMENTS BY AGENCY

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



“You’re Fired!”—EO 13771: 1 in, 2 out

- “[W]henver 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 or otherwise promulgates a **new regulation**, it shall identify at least **two existing regulations to be repealed**”
- For FY2017 (through 9/30), “the total incremental cost of all new regulations, including repealed regulations, to be finalized this year shall be no greater than zero”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 underway (*Public Citizen et al. v. Trump et al.*) – 14 states intervened in favor of Administration. “The Executive Order will block or force the repeal of regulations needed to protect health, safety, and the environment, across a broad range of topics.”
- RESULT: Increase in funding to environmental special interest groups and citizen suits

Executive Order 13771

- 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.
- RESULT: Increase in funding to environmental special interest groups and citizen suits



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**

For FY 2018 and beyond, the director of the Office of Management and Budget's Office of Information and Regulatory Affairs (OIRA) provided agencies with a total amount of incremental costs that will be allowed.

The regulatory cost savings and future cost saving estimates, under EO 13771 are all available at OIRA's Regulatory Reform: Two-for-One and Regulatory Cost Caps website.

Budget Cuts at EPA

- The proposed FY 2019 budget for the EPA provides \$6.146 billion to support EPA's new FY 2018 – FY 2022 Strategic Plan and mission of protecting human health and the environment.
- The “budget maintains core environmental protection with respect to statutory and regulatory obligations, and provides the direction and resources to return the EPA to its core mission of protecting human health and the environment.” (EPA Website)

Trump budget seeks 23 percent cut at EPA, eliminating dozens of programs

“The EPA already has lost hundreds of employees to buyouts and retirements over the past year, and its staffing is now at Reagan-era levels. Under the latest budget, the Agency would continue to shrink in size and ambition.” (Washington Post)

New EPA Strategic Goals



- New strategic goals that guide EPA's approach to protect human health and the environment:
 - **Goal 1 – Core Mission:** Deliver real results to provide Americans with clean air, land, and water, and ensure chemical safety.
 - **Goal 2 – Cooperative Federalism:** Rebalance the power between Washington and the states to create tangible environmental results for the American people.
 - **Goal 3 – Rule of Law and Process:** Administer the law, as Congress intended, to refocus the Agency on its statutory obligations under the law.

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.
- **February 2016:** Sixth Circuit decided the District Court versus Court of Appeals jurisdiction issue. En banc hearing denied. Decided Court of Appeals has jurisdiction.
- **July 2017:** EPA and Army Corps propose to repeal 2015 definition of WOTUS Rule.
- **January 22, 2018:** U.S. Supreme Court issued a unanimous decision that challenges to the Clean Water Rule were properly brought before the federal District Courts NOT the Court of Appeals. **Invalidates Sixth Circuit ruling.**

WOTUS Rule: What Next?

- The new WOTUS rule reinstated in all states, except in the 13 western states for which the District Court of ND issued a stay in 2015.
- EPA/Army Corp: Applicability date of new WOTUS rule delayed for two years until January 31, 2020.
- BUT...EPA moving to “permanently and completely: repeal the 2015 definition of WOTUS and re-codify the pre-2015 definition until the agencies finalize a new definition.
- June 29, 2018—Agencies currently seek additional public comments on the WOTUS rule (until July 29, 2018).
- SCOTUS ruling still relevant because there will be inevitable challenges to any Trump administration replacement rule.

“Fighting a Losing Game” ...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.

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.

“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. Estimated cost is \$4 to \$10 per capita.
- 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.**



For Questions or Advice...

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