

February 27, 2018

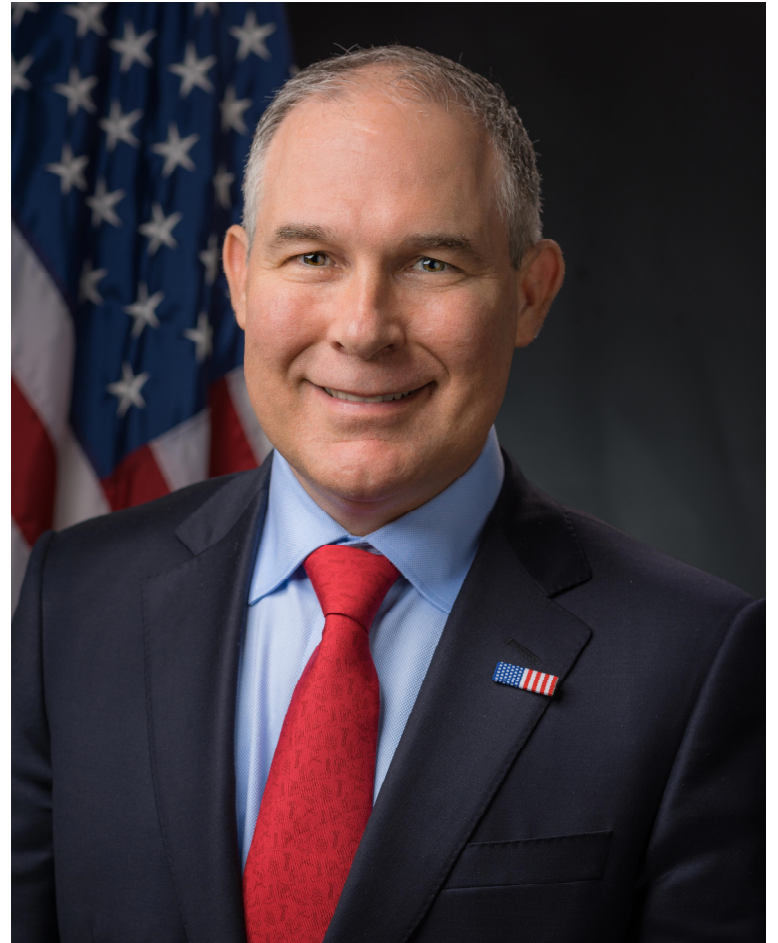
# Environmental Regulatory Trends in the Midwest

AWMA Midwest Section Technical Conference  
Overland Park, Kansas

James T. Price, Esq.



SpencerFane



---

# Topics Outline

- Highlight major environmental initiatives of Trump Administration
- Enforcement topics
- Cooperative federalism and state impacts
- Superfund reforms
- Strategies and responses

---

# The environmental times, they are a-changin’

- (With apologies to Bob Dylan)
- Executive Orders
  - 13771: Reducing Regulation and Controlling Regulatory Costs, Feb. 3, 2017, Fed. Reg.
  - 13777: Enforcing the Regulatory Reform Agenda, Mar. 1, 2017
  - 13783: Promoting Energy Independence and Economic Growth, Mar. 31, 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

---

## 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

DOW JONES, A NEWS CORP COMPANY ▼

DJIA ▼ 23542.82 -0.06%

S&P 500 ▼ 2389.11 -0.06%

Nasdaq ▲ 6769.78 0.03%

U.S. 10 Y

# THE WALL STREET JOURNAL

This copy is for your personal, non-commercial use only. To order personalized copies for distribution to your colleagues, clients or customers visit <http://www.djgdata.com>.

<https://www.wsj.com/articles/fake-trump-related-civics-lesson-152096622>

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: KYORHI OTA/POOL/EPA-EFE/REX/SHUTTERSTOCK



By William A. Galston

Nov. 7, 2017 6:50 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."



SpencerFane



---

# 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
- Courts: Judicial review of EPA decisions
  - Tests: “Arbitrary and capricious,” judicial deference
  - Department of Justice

---

# In the Cross-Hairs: Clean Power Plan

- Supreme Court stay
- EPA has moved to repeal
- Paris Accord withdrawal begins a process
- The future for Clean Power Plan regulations
- The future for renewable fuels, energy conservation
- Roles of the states, private sector



---

## 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
- In litigation; possibilities for partial implementation?
- Regulatory uncertainty
  - What test applies?
  - Illustrates hazards to industry of guidance, agency discretion
  - How will Army COE make jurisdictional determinations?
  - Consider approaching Army COE to seek case-specific jurisdictional determination



---

# 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
  - “Business as usual”?
- Supplemental Environmental Projects

---

# 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

---

## 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

- Extensive regulatory simplification process

- SEPs still encouraged

Kansas

- Certificate of Environmental Liability Release program

- Guidance: Evaluating groundwater plumes that intersect surface waters

---

# EPA Superfund Task Force Report

- Streamline Superfund program
  - Expedite Superfund cleanups
  - Reduce burdens on cooperating parties
  - Create incentives to remedy sites
  - Encourage private investments in sites
  - Promote revitalization

---

# Superfund Program Changes

- EPA HQ takes back authority to approve Records of Decision > \$50MM
- Emphasis on delisting sites, fully or partially
- Identify sites' redevelopment potential
- Retirements, budget cut impacts loom

---

## 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 that 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

---

# Conclusions

# Questions?

---



James T. Price  
Spencer Fane LLP

1000 Walnut Street, Suite 1400  
Kansas City, MO 64106

Telephone: 816-292-8228  
Fax: 816-474-3216

[jprice@spencerfane.com](mailto:jprice@spencerfane.com)  
[www.spencerfane.com](http://www.spencerfane.com)