

## EPA Shifts Some CWA Oversight From Regions To DC

By **Juan Carlos Rodriguez**

*Law360 (April 4, 2018, 7:08 PM EDT)* -- The U.S. Environmental Protection Agency has moved to give more oversight of Clean Water Act permitting decisions to leaders in Washington, D.C., transferring authority that had been reserved for regional offices, according to a memo released Wednesday.

In a March 30 memo that was released Wednesday by Public Employees for Environmental Responsibility, EPA Administrator Scott Pruitt re-delegated the authority to make special CWA jurisdictional determinations to the assistant administrator for the Office of Water, a position now filled by David Ross. Making those determinations had formerly been the responsibility of the leaders of the EPA's 10 regional offices.

Under the Clean Water Act, jurisdictional determinations are used to determine when an aquatic body is a "water of the United States" and thus subject to the act's regulatory requirements. Making a determination requires intensive technical analysis and can be very costly and time-consuming.

A "special" determination like the ones at issue in Pruitt's memo, have "significant issues or technical difficulties," according to a 1989 memorandum of understanding between the EPA and the U.S. Army Corps of Engineers, which makes the vast majority of jurisdictional determinations.

The memo highlights the Trump administration's focus on waters of the United States jurisdictional determinations as, separately, the EPA has begun the process of rolling back an Obama-era rule that attempted to more clearly define what waters actually qualify as waters of the United States. The agency also has said it plans to craft its own rule defining the term.

The EPA said Wednesday that the intent of Pruitt's memo is to improve predictability in the special jurisdictional determination process.

"This memo explains that jurisdictional determinations that raise significant issues or technical difficulties should be handled in a consistent and uniform manner, particularly during the WOTUS rulemaking," EPA spokeswoman Liz Bowman said in a statement.

As to the question of how regional offices, which handle the day-to-day regulatory and permitting matters that arise in this area, will be affected, Bowman said the offices "will absolutely be involved" in the determination process, although she did not specify how or to what extent.

The EPA also noted that special jurisdictional determinations are rare, noting that while the Army Corps makes thousands of jurisdictional determinations each year, the EPA may make only “one or two” special determinations each year.

PEER characterized the EPA’s move as an effort to politicize the special jurisdictional determination process.

“This latest move by Pruitt is his plan B as it is becoming increasingly clear that his Clean Water rewrite plan is illegal and will be tossed out in court,” PEER New England Director Kyla Bennett said in a statement. “This amounts to a crude Clean Water Act coup d’état.”

Pruitt’s memo also gives authority to request an Army Corps review of proposed permit decisions to the water office chief. Parker Moore, a principal at Beveridge & Diamond PC, said reviews are most often requested by companies when a permit is being denied, but environmental groups also may mount challenges to approved permits.

Moore said because the EPA’s authority in this regard is through a memorandum of understanding with the Corps, it’s not quite clear if the EPA can unilaterally change the process.

And the memo gives the water office assistant administrator the authority to veto any Army Corps decision to issue a pollution discharge permit under Section 404(c) of the CWA.

David Chung, a partner at Crowell & Moring LLP, objected to PEER’s assertion that the veto authority provision “removes any role” for EPA regional offices in the veto process, noting that there is an existing federal regulation for this process in which a regional administrator makes a recommendation to EPA headquarters, which then approves or rejects it.

“The memo neither purports to override nor could override the rule,” Chung said.

Taken as a whole, Moore said Pruitt’s memo could antagonize regional office employees who have traditionally had more autonomy in these types of matters.

“I don’t see how they do this without further ruffling the feathers of career staff within the agency because of a lack of trust,” Moore said. “And I think it’s going to further energize the environmental community.”

The Sierra Club’s deputy legislative director for land and water, Dalal Aboulhosn, agreed that the memo will upset regional staffers.

“I think his memo is showing his contempt for the staff out in the regions by saying, ‘We’re not going to trust your judgment, and I need to double check your work, and I know better than you do when it comes to what’s happening in your parts of the country,’” she said.

--Editing by Jack Karp.