



July 30, 2025

Strengthening Cooperative Federalism and the Impact of the Criminal Enforcement Executive Order

Jessica E. Merrigan



SpencerFane®

Executive Order 14294

- The Fighting Overcriminalization of Federal Regulations executive order was signed May 9, 2025.
(<https://www.federalregister.gov/documents/2025/05/14/2025-08681/fighting-overcriminalization-in-federal-regulations>)
- Part of the broader deregulatory effort of this administration.
- Not directed specifically at environmental criminal enforcement, but it will have implications for environmental programs.
- This does not do away with criminal enforcement of Clean Water Act and other environmental acts – but it will likely decrease certain types of actions under the current administration.

Where Are We / Where Aren't We?

- This does not eliminate the availability of federal criminal enforcement of environmental laws.
- But it does impose new obligations on federal agencies that have criminal authority.
- And it may discourage criminal prosecutions based on strict liability or negligence.
- Note however that this is JUST an executive order and has not modified any existing law or statute of limitations (most of which are 5 years).

Directives to Agencies

- Disclose in all new rulemakings: (1) the conduct subject to criminal enforcement, (2) the authorizing statute, and (3) the applicable mens rea (guilty mental state) standard.
- Publish by May 8, 2026 (and annually thereafter) a list of criminally enforceable regulations, including penalty ranges and mens rea standards.
- Assess if it can adopt a background mens rea standard and review existing standards.
- Issue U.S. Department of Justice (DOJ) referral guidance by June 23, 2025, which must factor in harm, economic benefit, defendant expertise, and awareness of illegality. ***(Have not seen this yet from EPA)***

Impact on Criminal Enforcement

- States as policy that “Criminal enforcement of criminal regulatory offenses is disfavored.”
- Directs that “Prosecution of criminal regulatory offenses is most appropriate for persons who know or can be presumed to know what is prohibited or required by the regulation and willingly choose not to comply, thereby causing or risking substantial public harm.”
 - “Knowing” currently means knowing of the actions, not necessarily that they were illegal
 - No current requirement of substantial public harm
- We may see a delay / pause on referrals until the directed guidance is created.

Impact on Clean Water Act Actions

- Clean Water Act allows criminal enforcement for negligent discharge to waters of the United States without a permit (33 USC 1319(c)(1))
 - Knowing could be complicated by ever changing scope of “waters of the United States”
- Likely no impact on clearcut cases – falsifying reports, knowing illegal disposal, etc.
- Likely no impact on prosecution for repeat violations given evidence supporting intentional / knowing acts.

Cooperative Federalism 2.0

- EPA announced its “Five Pillars” “Powering the Great American Comeback”
- Pillar 3: Permitting Reform, Cooperative Federalism, and Cross-Agency Partnership
 - *“Any business that wants to invest in America should be able to do so without having to face years-long, uncertain, and costly permitting processes that deter them from doing business in our country in the first place. It will be important for the EPA to work with our partners at the state and federal levels to ensure projects are being approved and companies can invest billions of dollars into our nation. Streamlining these processes, while partnering with businesses to follow the necessary steps to safeguard our environment, will incentivize investment into our economy and create American jobs,” said Administrator Zeldin.*

Where Are We / Where Aren't We

- Most of the environmental acts, including the Clean Water Act, are built around cooperative federalism and the shared federal / state role
- Missouri is the primary permitting authority for most Clean Water Act programs except the Section 404 program
- Over time we see different shifts in federal role including through permit issuance, permit comments and enforcement (where EPA maintains authority even if not primary permitting)

Where Are We / Where Aren't We

- In the first Trump administration we saw specific directives on inspection planning and coordination as well as coordination / deference on enforcement.
- We have not seen that yet for this round.
- Concept of cooperative federalism among the justifications for proposed EPA budget cut (though this ignores massive portion of EPA budget that goes to states)
- EPA cited cooperative federalism in its action on State Implementation Plans under the Clean Air Act.

Questions?

