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Use or Abuse of Social Media by Texas Administrative Agencies

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Introduction

On December 14, 2015, the General Counsel of the United States Government Accountability Office ("GAO") issued Opinion B-326944[1] ("the Opinion") regarding application of federal publicity or propaganda and anti-lobbying provisions to certain social media activities of the Environmental Protection Agency ("EPA"). The Opinion responded to a request from Senator James Inhofe, Chairman of the United States Senate Committee on Environment and Public Works, concerning the EPA's use of social media platforms in association with the agency's "Waters of the United States" ("WOTUS") rulemaking.

The Opinion concluded that the use of appropriated funds associated with implementing a particular EPA social media campaign and establishing hyperlinks to two NGO webpages violated prohibitions against publicity or propaganda and grassroots lobbying contained in appropriations acts for FYs 2014 and 2015. The EPA was directed to report the violation to the President and Congress, with a copy to the Comptroller General.

Is this a uniquely federal issue, or a new concern for agency counsel in Texas? Administrative agencies are growing more proficient and aggressive in their use of social media as a communications tool. This should be viewed as a positive development in administrative practice. Enhanced communication fosters public education and interest in agency activities, with resulting enhanced participation and public ownership of agency programs. A new generation may rely on these platforms exclusively for information about agency activities. How, then, can such well-intentioned efforts go awry? What law constrains the use of social media by Texas administrative agencies? What lessons can Texas administrative lawyers learn from the Opinion?

Background[2]

The EPA's Waters of the United States rule is an outgrowth of the federal Clean Water Act ("CWA").[3] The CWA was passed by Congress in 1972 as one of the cornerstones of federal environmental protection. Its objective is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters"[4] by eliminating discharges of pollutants into all "navigable waters". The Act made it unlawful to discharge any pollutant from a point source into navigable waters. "Navigable waters" are defined by the Act as "the waters of the United States, including the territorial seas."[5] However, "waters of the United States" were not defined by the Act, and the phrase has been the subject of much contention as its scope has been steadily

[1] See Attachment A.
[2] For a comprehensive scholarly analysis of the GAO opinion in the context of federal agency activities, see Shannon O'Neil, *Thunderstruck: The Government Accountability Office's Recent Ruling on Agency Social Media Use*, 17 N.C.J.L. & TECH. ON. 293 (2016).
[3] 33 U.S.C. § 1251, *et seq*.
[4] 33 U.S.C. § 1251(a).
[5] 33 U.S.C. § 1362(7).

expanded from traditional navigable rivers to isolated and seasonal wetlands. Administration of certain portions of the CWA are shared by the EPA with the U.S. Army Corps of Engineers. Thus both agencies have contributed various guidance documents to assist in interpretation. The assertion of CWA jurisdiction by the federal government over a water feature may lead to environmental protection from the perspective of the government and to permitting requirements, project delay, and development restrictions from the perspective of the landowner.

The issue was addressed by the United States Supreme Court in *Rapanos v. United States*.[6] However, a fractured opinion by the Court led to more confusion. In response, the EPA determined to define the term through formal rulemaking leading to the WOTUS rule.[7] Not surprisingly, the proposed rule proved highly controversial. A variety of legal challenges (including a challenge by the State of Texas) were ultimately consolidated at the Sixth Circuit Court of Appeals. That court determined in February 2016 that it had jurisdiction to hear suits over the rule and granted a nationwide stay of the rule pending further action of the court.[8] Meanwhile, the United States Supreme Court held recently in the unrelated case of *U.S. Army Corps of Engineers v. Hawkes Co*.[9] that a jurisdictional determination by the Corps of Engineers was a final agency action and that there were not adequate administrative alternatives to challenging the rule in court.

The EPA released the proposed rule in March 2014. According to information provided by EPA to the GAO's General Counsel, the agency used social media platforms in connection with the WOTUS rulemaking from February 2014 through July 2015. EPA engaged social media to clarify the issues concerning the WOTUS proposed rule, to provide information about streams and wetlands, to demonstrate the rule's relevance, to provide opportunities for public engagement, and to correct what it viewed as misinformation concerning the rule.[10]

The EPA's use of social media encompassed four categories: Thunderclap, the #DitchtheMyth Campaign, the #CleanWaterRules Campaign, and EPA's Links to External Websites. A thorough explanation of these categories is found at pages 3 through 10 of the Opinion attached as Attachment A, and will not be entirely repeated here. However, a brief explanation of the Thunderclap platform and EPA's links to external websites may be helpful.

As described by the GAO General Counsel, Thunderclap is a "crowdspeaking platform" that allows a single message to be shared across multiple Facebook, Twitter, and Tumbler accounts at the same time. A campaign organizer creates a Thunderclap page used to describe the campaign with a limited message to be shared by those who sign up to support the campaign. While the Thunderclap page will reflect the identity of the campaign organizer and the source of the message, the message itself may not. The organizer selects a supporter goal (for example,

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[6] 547 U.S. 715 (2006).
[7] 33 C.F.R. § 328.3 (Waters of the United States are all waters traditionally protected under the CWA, as well as most seasonal streams, wetlands near protected rivers and streams, and bodies of water that are significantly connected to traditionally protected waters).
[8] *Murray Energy Corp. v. U.S. Dep't. of Def.* et al, 817 F.3d 261 (6th Cir. 2016) and related cases.
[9] 136 S.Ct. 1807 (2016).
[10] GAO General Counsel Opinion B-326944, December 14, 2015, page 3; see also letter dated August 7, 2015, from US EPA General Counsel, with attached memorandum.

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