

New Frontiers of Environmental and Energy Law

From Climate Change to Corporate Sustainability

*Kevin Minoli, Alston & Bird
Romy Diaz, PECO Energy
Paula Schauwecker, Beveridge & Diamond
Marshall Morales, Sidley Austin*

SIDLEY



ALSTON & BIRD



Agenda

- Key Events from 2017–2018
 - Regulations, Enforcement, and Litigation
- Energy Sector
 - Greenhouse Gases, Climate Change, Renewable Energy
- Disclosures and Reporting
 - Regulations, Corporate Goals, Sustainability Disclosures



ALSTON
& BIRD

EPA in the Trump Administration

What was it like?

3

January 20, 2017

EPA @ 11:59 a.m.

EPA Administrator Gina McCarthy	EPA Headquarters 1200 Pennsylvania	General Counsel Avi Garbow
		

ALSTON
& BIRD

4

January 20, 2017

EPA @ 12:01 p.m.

Acting EPA Administrator
Catherine McCabe



De Facto
EPA Headquarters



Acting General Counsel
Kevin S. Minoli



ALSTON & BIRD

Under the Media Microscope

BuzzFeed News Scott Pruitt Has More Questions To Answer, EPA Ethics Officials Say

SENATE COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

Senators Carper, Udall Demand Answers on Administrator Scott Pruitt's 2017 Public Financial Disclosure

THE HILL

Top EPA official: Pruitt's condo rental met ethics rules

BY TIMOTHY CAMA - 03/30/18 06:32 PM EDT

In a memo dated Friday distributed to reporters and the EPA, the ethics official stated that the rental met the requirements of the ethics rules. The memo also stated that the rental was not prohibited by the rules.

Top EPA ethics official discloses that he has urged additional investigations into Scott Pruitt

The Washington Post

Disclosing the trust of the people to the letter Monday.

Top EPA ethics official pushed investigations

Scott Pruitt Has More Questions To Answer, EPA Ethics Officials Say

ALSTON & BIRD

Under the Media Microscope

The New York Times

The E.P.A.'s Ethics Officer Once Defended Pruitt. Then He Urged Investigations.

By Eric Lipton
June 30, 2018

WASHINGTON — The chief ethics officer of the Environmental Protection Agency — the official whose main job is to help agency staffers obey government ethics laws — has been working behind the scenes to push for a series of independent investigations into possible improprieties by Scott Pruitt, the agency's administrator, a letter sent this week says.

The letter is the first public acknowledgment that [redacted] who has frequently defended Mr. Pruitt's actions since he took over the agency in February 2017, is now openly questioning whether Mr. Pruitt violated federal ethics rules.



Donald J. Trump
@realDonaldTrump

While Security spending was somewhat more than his predecessor, Scott Pruitt has received death threats because of his bold actions at EPA. Record clean Air & Water while saving USA Billions of Dollars. Rent was about market rate, travel expenses OK. Scott is doing a great job!

5:03 PM - 7 Apr 2018



Donald J. Trump
45th President of the United States of America
Washington, DC
Instagram: @realDonaldTrump
Joined March 2009

ALSTON & BIRD

7

ALSTON & BIRD

Repeals, Rollbacks, & Replacements

The first 2 ½ years.

8



Regulatory Flood

- Obama Administration Push to Finalize Regulations
 - “A lot of points get scored in the fourth quarter.”
 - President Barack Obama
 - “We are landing planes, not taking off new planes.”
 - Gina McCarthy
- Congressional Review Act
 - 60-Day Clock
 - “Joint Resolution of Disapproval” of regulation by Congress
 - Repeals regulation & prohibits re-issuance of the same or substantially similar rule
 - Joint Resolutions prior to 2017: 1 (2001)
 - Joint Resolutions since 2017: 16

ALSTON & BIRD 9



Regulatory Flood → Regulatory Freeze

- Trump Administration Race to Stop New Rules
 - No new signatures on unsigned rules
 - No new publishing in the Federal Register
 - No new obligations taking effect
- Executive Orders
 - 2 for 1
 - Repeal 2 existing for 1 new regulation
 - No new regulatory burden
 - Offset new obligations by repealing others

ALSTON & BIRD 10

Regulatory Freeze → Regulatory Rejection

- All Obama Administration Rules Targeted:

- All Environmental Areas

- Air
 - Land
 - Water
 - Chemicals & pesticides
 - Climate Change

- Several Non- Environmental Areas

- FOIA
 - Advisory committees



ALSTON
& BIRD

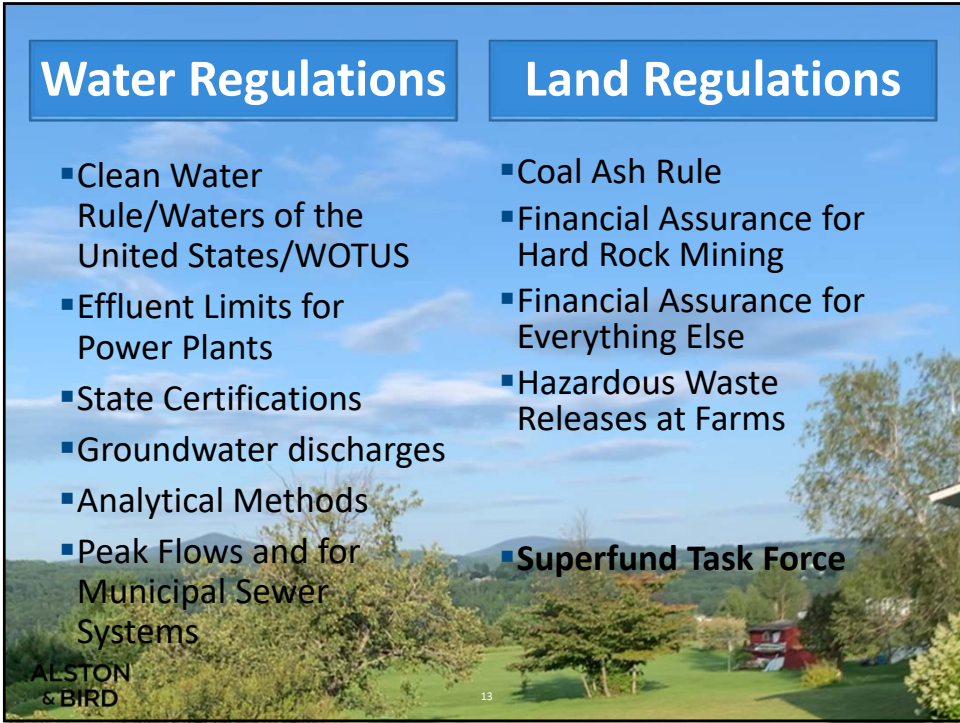
11

Air Regulations

- Clean Power Plan
- Releases of Methane
- Regional Haze
- Ozone Designations
- Fuel Economy Standards
- Risk Management Plans
- New Source Review
- Marine Engines
- Mercury & Air Toxics
- Montreal Protocol Implementation
- Paris Accords
- Cross-state Air Pollution
- Landfill Standards
- Startup/Shutdown/Malf unction

ALSTON
& BIRD

12



Water Regulations

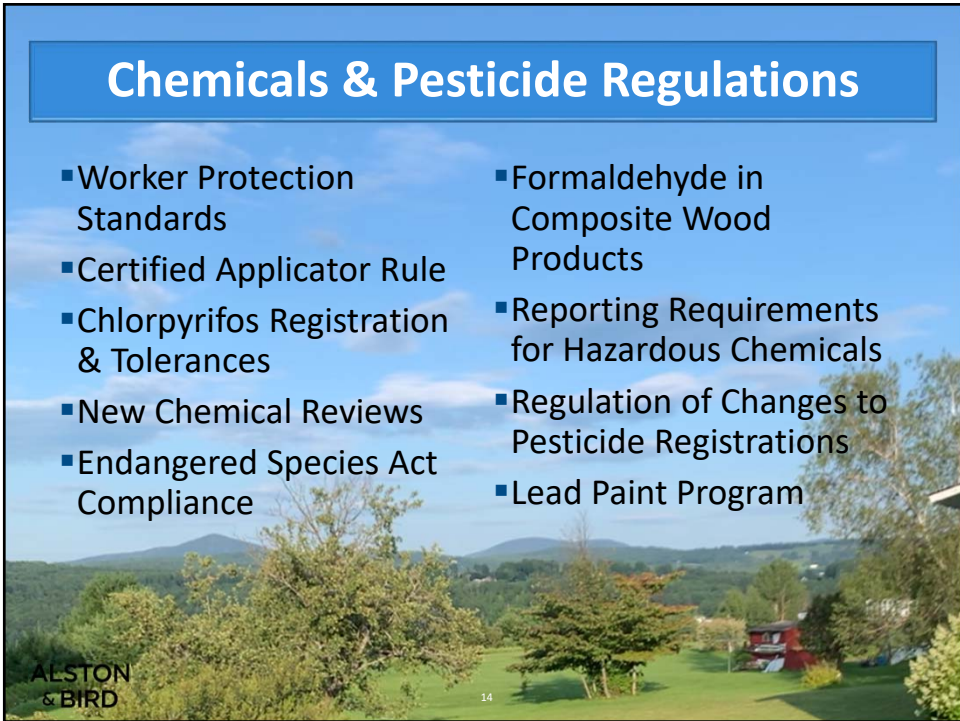
- Clean Water Rule/Waters of the United States/WOTUS
- Effluent Limits for Power Plants
- State Certifications
- Groundwater discharges
- Analytical Methods
- Peak Flows and for Municipal Sewer Systems

Land Regulations

- Coal Ash Rule
- Financial Assurance for Hard Rock Mining
- Financial Assurance for Everything Else
- Hazardous Waste Releases at Farms
- **Superfund Task Force**

ALSTON & BIRD

13



Chemicals & Pesticide Regulations

- Worker Protection Standards
- Certified Applicator Rule
- Chlorpyrifos Registration & Tolerances
- New Chemical Reviews
- Endangered Species Act Compliance
- Formaldehyde in Composite Wood Products
- Reporting Requirements for Hazardous Chemicals
- Regulation of Changes to Pesticide Registrations
- Lead Paint Program

ALSTON & BIRD

14



ALSTON
& BIRD

Enforcement or Compliance?
Does a name change make a difference?

15

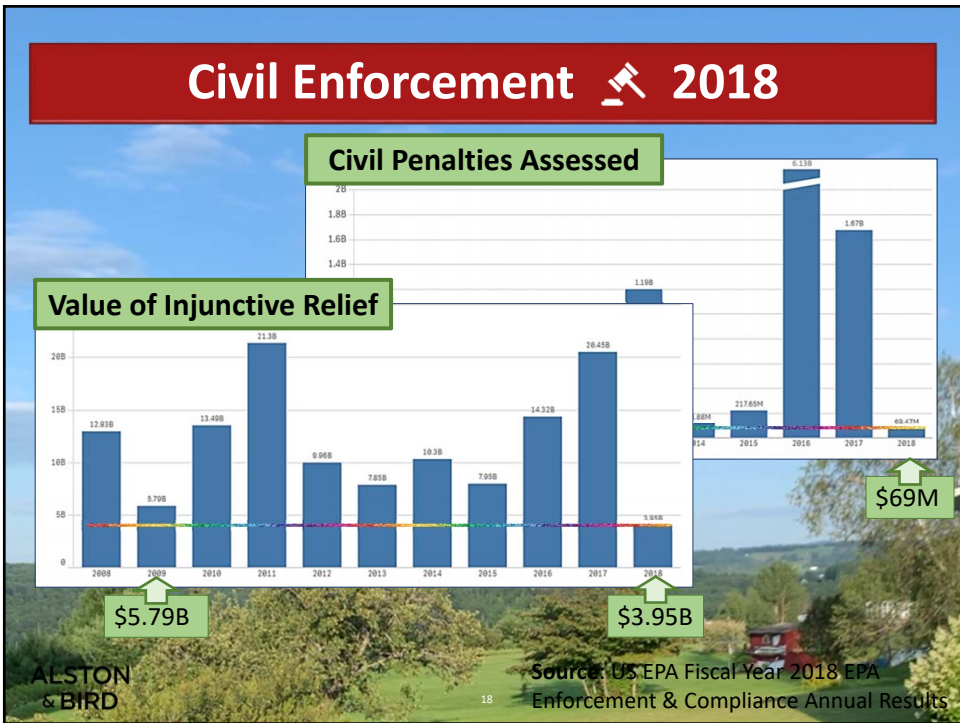
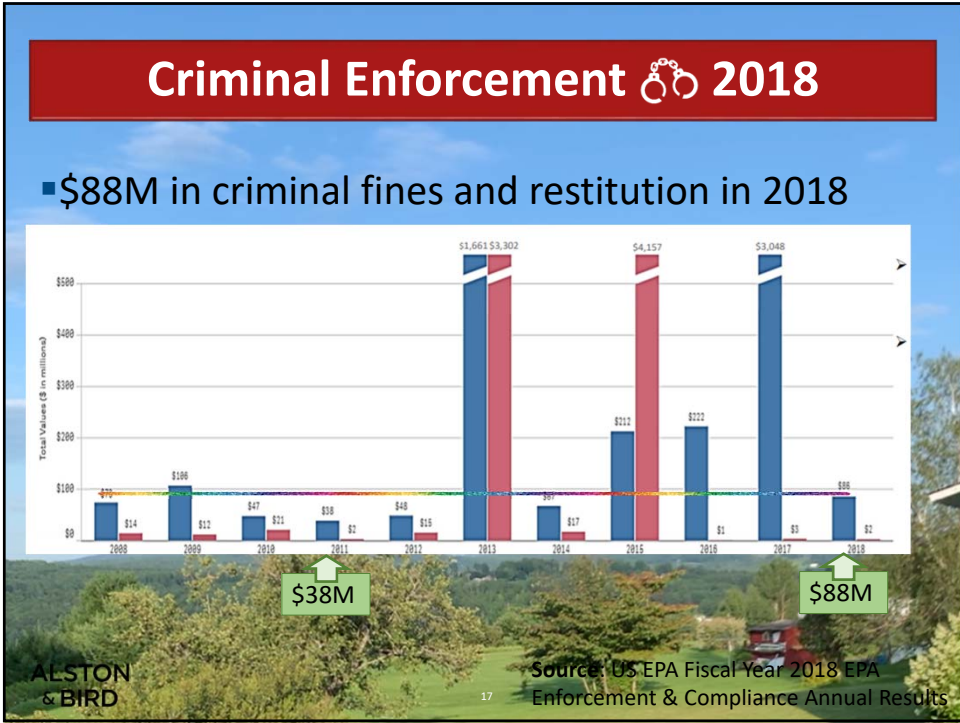


National Compliance Initiatives 2020-23

- **Air**
 - Creating Cleaner Air for Communities by Reducing Excess Emissions of Harmful Pollutants
 - Stopping Aftermarket Defeat Devices for Vehicles and Engines
- **Hazardous Chemicals**
 - Reducing Hazardous Air Emissions from Hazardous Waste Facilities
 - Reducing Risks of Accidental Releases at Industrial and Chemical Facilities
- **Water**
 - Reducing Significant Non-Compliance with National Pollutant Discharge Elimination System (NPDES) Permits
 - Reducing Non-Compliance with Drinking Water Standards at Community Water Systems

ALSTON
& BIRD

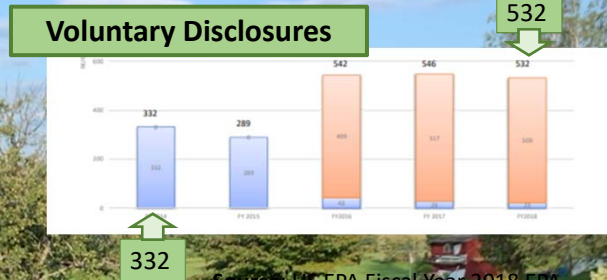
16



Enforcement vs Compliance 2018

- Inspections:
 - 2008: **20,030**
 - 2015: **15,731**
 - 2018: **10,612**

- Voluntary Disclosures
 - 1500+ Facilities



ALSTON & BIRD

Source: US EPA Fiscal Year 2018 EPA Enforcement & Compliance Annual Results

ALSTON & BIRD

Attorneys At Law

KEVIN S. MINOLI
PARTNER

Admitted to Practice in Oregon only

✉ kevin.minoli@alston.com

☎ 202.239.3760 (d)
202.239.3300 (o)
202.860.5581 (m)

🏠 The Atlantic Building
950 F Street, N.W.
Washington, D.C. 20004-1404

🌐 www.alston.com

Fuel Mix Cleaner: More Needed

Utility-Scale Net Electricity Generation*

Natural Gas: 33.2% (PA)	31.7% (U.S.)
Coal: 22.4%	28.7%
Nuclear: 39.3%	21.2%
Renewables: 4.7%	17.3%
Petroleum-Fired: 0.1%	0.3%

* EIA as of 3/21/19

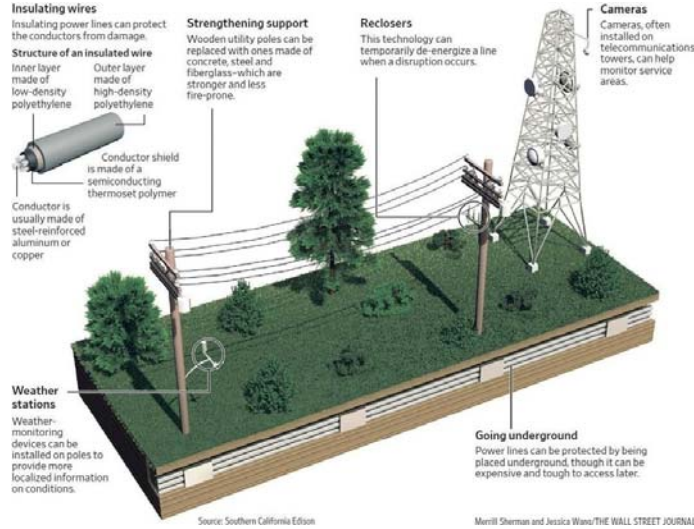


Technology Investment Drivers

- Safety, reliability and resilience
- Customer experience
- Physical and cyber security
- Sustainability
 - Low carbon technologies
 - Renewable energy access
- Risk management
 - Process-oriented approach (i.e., “reasonable standard”)
 - Best practices and industry standards

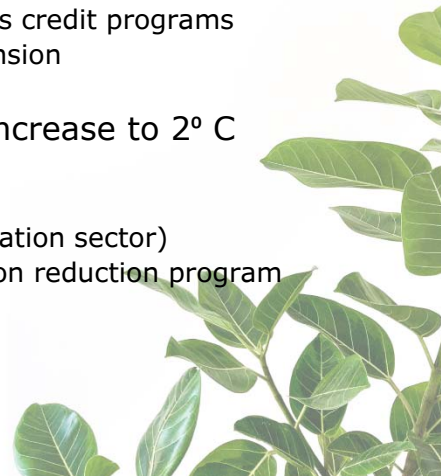


Threats Require Safer Grid



Decarbonizing Energy Supply

- GHG emissions reductions
 - Increase state renewable energy requirements
 - Nuclear energy zero emissions credit programs
 - Regional GHG Initiative Expansion
- Limit Global Temperature Increase to 2° C
 - Internal operations
 - Customer solutions
 - Electrification (e.g., transportation sector)
 - Economy-wide carbon emission reduction program



Disclosure and Reporting: Overarching Trends

- Increasing pressure on companies to:
 - Disclose information on expanding scope of non-financial “environment, social and governance” (ESG) topics
 - Improve quality, increase formality of information disclosed over time (more detail, greater comparability and assurance)
 - Improve substantive performance on ESG topics disclosed

Disclosure and Reporting (cont.)

- Many different drivers
 - Regulatory requirements, procurement initiatives, investor indices, NGO rankings and campaigns, shareholder resolutions
 - Company sustainability and CSR goals, desire to prevent or manage potential reputational and financial risks
 - Talent recruiting and retention

What's Happening Around the World? Mandatory Requirements

- EU Non-Financial Reporting Directive
- Modern Slavery Disclosure Laws
 - CA, UK, Australia, New South Wales
- Other Business and Human Rights disclosure or reporting initiatives
 - French Vigilance Law, Swiss Responsible Business Initiative
- Extractive industry disclosures and conflict minerals (EU and Canada)

What's Happening Around the World? Influential Voluntary Initiatives

- Global Reporting Initiative (GRI)
- Sustainability Accounting Standards (SASB)
- Task Force on Climate Development (TFCD)
- Corporate Human Rights Benchmark (CHRB)
- UN Global Compact
- UN Sustainable Development Goals (SDGs)
- Sustainable Stock Exchanges Guidance on ESG Reporting

Extra-Regulatory Requirements

- Can have the effect of regulations
- Expectations from new “accountability centers” – investors, shareholders, lenders, insurers, large retailers, NGOs
- NGO criteria-setting bodies and ecolabel programs (can be required by customers, or later adopted by government bodies, e.g. in federal procurement context)
- Supplier codes of conduct

Expanding Scope of ESG Topics

- Conflict Minerals
 - US Dodd-Frank/SEC Rule
 - Limited to the derivatives tantalum, tin, tungsten, gold
 - EU Conflict Minerals Initiative
 - Limited to same minerals as Dodd-Frank/SEC Rules
 - Primary minerals produced in DRC
 - NGO and Civil Society Organizations are driving actions on other minerals, including cobalt.
 - May extend more broadly to other raw materials of concern
 - Not limited to particular area

Expectations to Improve Quality and Increase Formality

- Climate Disclosures
 - Investors perceive climate disclosures and SEC enforcement to be largely inadequate
 - Climate Change is big concern among investors
- 2018: institutional investors petitioned SEC to require ESG disclosures

Expectations to Improve Substantive Performance

- Labor and Human Rights
 - Corporate Human Rights Benchmark
 - Pilot methodology launched in 2016 with emphasis on evaluating corporate human rights performance
 - Initial focus on extractives, apparel and agricultural products
 - Pilot now focused on ICT (Information Communications Technology)
 - Annual “check ups” designed to ensure long-term comparison of individual companies over time
 - Will ultimately rank the top 500 companies globally

Risk Profile of Sustainability Disclosures

- Enforcement for non-compliance with disclosure requirements
- FTC Green Guides/Section 5 of FTC Act (unfair or deceptive claims)
- Lanham Act/competitor claims
- Consumer protection lawsuits
- SEC risks associated with false or misleading statements (express or by omission)
- Shareholder action
- U.S. Tariff ACT
- CAATSA

