

SOCIAL MEDIA AND RULEMAKING IN THE TRUMP ADMINISTRATION

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No presidential candidate has matched President-elect Donald Trump's ability to use social media to garner attention and disseminate information regarding his priorities. Whether he will be able to continue that trend as a sitting president remains to be seen, as evidenced by the significant controversy created regarding the use of social media in the administrative law context during the Obama Administration.

In 2014, the EPA used some groundbreaking strategies to engage the public after issuing a notice of proposed rulemaking that would expand the waters regulated by the Clean Water Act, or as it was commonly known "Waters of the U.S." or "WOTUS" rulemaking.¹ The agency established an extensive social media presence and "took the unusual step of engaging with the opposition [to the rule] during the notice-and-comment period by creating a webpage titled 'Ditch the Myths,'" a riff on the American Farm Bureau Federation's "Ditch the Rule" social media campaign designed to advocate against the rule.² The agency also used a tool called Thunderclap to reach supporters, which is described as an online flash mob, and encouraged users to share their support for clean water during various social media campaigns.³

The EPA's efforts to reach the public on social media proved problematic and led to the release of a U.S. Government Accountability Office (GAO) report scolding the agency.⁴ The GAO specifically stated

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1. Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37,054 (June 29, 2015).

2. Nina Hart, et al., *Social Media: Changing the Landscape of Rulemaking*, NAT'L RESOURCES & ENV'T, Summer 2015, at 28.

3. *Id.* at 29.

4. *See generally* U.S. GOV'T ACCOUNTABILITY OFFICE, ENVIRONMENTAL PROTECTION AGENCY—APPLICATION OF PUBLICITY AND PROPAGANDA AND ANTI-LOBBYING PROVISIONS (2015).

that the EPA “violated the [publicity or propaganda and anti-lobbying] provisions through its use of social media in association with its rulemaking efforts to define ‘Waters of the United States’ under the Clean Water Act (CWA) during [fiscal years] 2014 and 2015.”⁵ The GAO report made clear that strategies used during election campaigns can be illegal if tried by government officials in some context.

In 2013, the Administrative Conference of the United States (ACUS), an independent federal agency dedicated to improving the rulemaking process, provided guidance to agencies on the use of social media in rulemaking.⁶ The report encouraged agencies to “identify the specific goals they expect to achieve through the use of social media and carefully consider the potential costs and benefits.”⁷ ACUS also outlined several effective approaches to using social media, like using blogs or social media platforms to disseminate information, updates, and clarifications regarding the content of a proposed rule. However, these recommendations pre-date the GAO’s findings and do not reflect the ever-changing social media landscape. The transition to the new administration is an ideal opportunity to update ACUS Recommendation 2013-5 and educate new officials regarding the use of social media in rulemaking, and policymaking in general, as they prepare to take over federal agencies.

5. *Id.*

6. *See* ADMIN. CONFERENCE OF U.S. (ACUS), ADMINISTRATIVE CONFERENCE RECOMMENDATION 2013-5, SOCIAL MEDIA IN RULEMAKING (2013).

7. *Id.* at 7.