

INSIGHTS

WOTUS, the ESA, and Permitting through Changing Regulations with Ann Navaro and Brittany Pemberton

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Who does the Clean Water Act effect?

Infrastructure projects and anybody who has waters of the United States on their property.

What is under federal protection?

An example would be the Mississippi River or something that is an Interstate, actual instrumentality of commerce.

What stance has the Biden administration taken on the 2020 Clean Water Act?

The Biden administration had early on identified the Trump WOTUS rule as something it wanted to look at very quickly. The administration said they were going to repeal this rule and go back to an earlier set of regulations that dates back to 1986 as modified by a couple of Supreme Court decisions. The Biden administration announced that they are also going to do a second rulemaking that tries to extend protections of the Clean Water Act into more places.

What stance do you think the government will take on Arizona vacating the Trump WOTUS rule?

The plaintiffs in that case seemed to be celebrating that the Trump WOTUS rule has been vacated nationwide. It's unclear if the government will take the same position because in previous litigation, over the Obama era, definition of Waters of the United States, certainly recognized the potential for circumstances where district courts might arrive at different conclusions on the legality of the rule. And the Justice Department has historically taken the

position that district courts, absent particular circumstances, that their rules are confined to the parties before them, and the geographic extent of their jurisdiction so it will be interesting to see what position the government takes in the next few days.

Do you think the Environmental Protection Agency and the Courts will issue guidance together?

In the past, at various times the EPA and the Court have seen things a little bit differently. Together now, in this instance, EPA really has the lead, in defining 404, even though they do it jointly with the Court, and so they'll issue some sort of joint guidance and joint statement in terms of the scope of the rule, and then that will be rolled out to the different corps districts and in the meantime. There's going to be some level of uncertainty until they issue that guidance whether it applies only in Arizona or nationwide at this point, this is certainly where the Biden administration is headed.

Can you see a timeline down the road where there is going to be the case where we've got a WOTUS definition and it's settled and not at issue in the courts?

At least under the 961986 rule, as modified by RAPANOS. Things seem to be not settled, but at least kind of moving forward under that scenario, even though there were always individual cases like the Sacketts and others who wanted to challenge the applicability of the rule based on their specific facts, which is always going to happen. But optimistically there could be a future in which the Supreme Court becomes happy with a rule where eventually things will settle. But realistically, given the history of it, that's probably unlikely.

What are we going to see on the ESA from this administration?

Not much has really changed since June when NOAA fisheries and the Fish and Wildlife Service announced that they would take action to rescind, revise or otherwise take some kind of reconsideration on some key Endangered Species Act rulemakings that were completed towards the tail end of the Trump administration, some in late 2019 some in late 2020 and the direction to do that really came from the top on the first day of the Biden administration. The president signed an executive order that was all about protecting public health and the environment and restoring science and climate change and things like that and the administration called out a number of Trump administration actions that the president wanted various administrative agencies to take a closer look at and consider a rulemaking process to rescind revise etc.

How do you approach those kinds of projects when the very frameworks that you'd be trying to authorize your project under, are in flux?

There's going to be some degree of flux, and it's unlikely to die down anytime soon, given how increasingly polarized things have been getting. So when it comes to planning projects, obviously everybody wants to be able to rely on a stable regulatory regime. But, it seems like we are less and less able to have any expectation of that and so continuing to work closely with the agencies following their guidance and executing your planning kind of in accordance with the current regime. But kind of understanding that things may change and so having on your horizon, perhaps bigger issues that may come into play is really important.

For questions about the Clean Water Act or the Endangered Species Act please contact [Daniel Pope](#), [Ann Navaro](#), or [Brittany Pemberton](#).

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