When You're Weary: the Implications of Federal Rulemaking under the Clean Water Act and Endangered Species Act for Planning and Defending Infrastructure Projects[1]

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[1] The authors have attempted to create clever titles for this article consistent with the session title—"Bridge Over Troubled Waters." The authors apologize if their attempt to be clever is an abysmal failure.

I. Introduction: I'm On Your Side

As expected, the Biden Administration is in the process of taking on significant rulemaking efforts to reverse or reform many of the actions of its predecessor. The spring Unified Agenda, the report that lists potential federal rulemaking actions, predicts a very busy few years for all agencies in the environmental, natural resources, and health and safety space.[2] Big ticket regulatory efforts include proposed revisions to regulations issued under a bevy of federal laws critical to infrastructure construction including, the National Environmental Policy Act, the Migratory Bird Treaty Act, the Federal Land Policy and Management Act, the Mineral Leasing Act, the Outer Continental Shelf Lands Act, and, of course, the Clean Water Act and the Endangered Species Act. Beyond the four corners of the Code of Federal Regulations, agencies are equally, if not more, active—issuing guidance on climate and environmental justice topics, the use of public lands and natural resources, tribal engagement, and mitigation.

In other words, as has become increasingly the case over the years, the only thing certain for infrastructure and energy development when it comes to interacting with the federal government is the certainty of change. We take a deep dive into shifting requirements under two statutes, the implications for infrastructure project planning, and the potential for litigation challenging federal rulemakings and project-specific decisions, all of which impact infrastructure development by non-federal entities.

II. When Times (and Waters) Get Rough: The Clean Water Act & the Continued Saga of Defining its Jurisdictional Reach

If the Trump Administration's regulatory reform agenda was motivated by a desire to limit regulation, strictly adhere to the statutory text of environmental laws, and provide regulatory certainty to the public, few areas provide a clearer example of that approach than the Clean Water Act (CWA). The most significant rulemaking under the CWA, and one of the most significant for the Administration generally, was the Trump Administration's Navigable Waters Protection Rule, which revised the definition of that most important jurisdictional phrase "waters of the United States" (WOTUS).[3] The Trump Administration also promulgated a new CWA Section 401 Rule to increase the predictability and timeliness of Section 401 water quality certifications, which the Trump Administration believed had been used by some states to delay significant and controversial infrastructure projects.[4]

Of course, achieving regulatory certainty is easier to do when a President and party hold the Executive Branch for more than four years. As soon as President Biden took office, the new Administration flagged dozens of rules for review, including the Navigable Waters Protection Rule and the CWA Section 401 Certification Rule.[5] That list also included the Trump Administration's

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[2] *Spring 2021 Unified Agenda of Regulatory and Deregulatory Actions*, OMB (last visited July 30, 2021) https://www.reginfo.gov/public/do/eAgendaMain.

[3] *See* The Navigable Waters Protection Rule: Definition of "Waters of the United States," 85 Fed. Reg. 22,250 (Apr. 21, 2020). Before promulgating the Navigable Waters Protection Rule, the Trump Administration repealed the 2015 Clean Water Rule and briefly reinstated WOTUS regulations. *See* Definition of "Waters of the United States"—Recodification of Pre-Existing Rules, 84 Fed. Reg. 56,626 (Oct. 22, 2019).

[4] *See* Clean Water Act Section 401 Certification Rule, 85 Fed. Reg. 42,210 (July 13, 2020).

[5] Press Release, Fact Sheet: List of Agency Actions for Review (Jan. 21, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/fact-sheet-list-of-agency-actions-for-review/.

reissuance of a handful of the many U.S. Army Corps of Engineers (USACE) Nationwide Permits as well, which had happened only a week earlier.[6] And today, now that the Biden Administration has filled key Cabinet and agency positions, we are seeing a regular stream of press releases announcing that agencies are in the process of soliciting comments on the Trump-era rules as they work towards crafting replacements.[7]

The Waters of the United States

The jurisdictional reach of the CWA extends to "navigable waters," which in turn is defined as "the waters of the United States, including the territorial seas."[8] What more can be said or written about this phrase – apparently more as the Administration embarks on another rulemaking. Infamously, the phrase itself remains undefined by Congress, and there is little indication that Congress will take up its pen to clarify the phrase through an amendment. There is little else in the CWA that judges and lawyers can draw on to understand this phrase, and courts have struggled in interpreting the statutory language in the context of challenges to the various attempts to promulgate a regulatory definition and in the context of challenges to specific regulatory action.

The Supreme Court has made three attempts to determine the meaning of the phrase, with varying degrees of success.[9] In *United States v. Riverside Bayview Homes, Inc.*, the Supreme Court confirmed that non-navigable wetlands, when adjacent to traditionally navigable waterways, counted as waters of the United States because hydrological connections resulted in "significant effects on water quality and the aquatic ecosystem."[10] But in *Solid Waste Agency of Northern Cook County v. U.S. Army USACE of Engineers*, the Supreme Court rejected the extension of jurisdiction over features "not adjacent to open water."[11] On its third attempt to provide more certainty to what WOTUS means, the Supreme Court fractured with a plurality emphasizing the importance of a "continuous surface connection" between jurisdictional wetlands and navigable-in-fact waterways and Justice Kennedy concluded that a significant nexus standard was "necessary."[12] The Obama Administration attempted the first rulemaking to redefine "waters of the United States" since 1986. The Obama Administration attempted to address the *Rapanos* decision by promulgating the Clean

[6] *Id.*
[7] *See* Notice of Intention to Reconsider and Revise the Clean Water Act Section 401 Certification Rule, 86 Fed. Reg. 29,541 (June 2, 2021); Press Release, EPA, Army Announce Intent to Revise Definition of WOTUS (June 9, 2021), https://www.epa.gov/newsreleases/epa-army-announce-intent-revise-definition-wotus.
[8] 33 U.S.C. § 1362(7). The phrase "navigable waters" appears in the Clean Water Act's definition of "discharge of a pollutant." *Id.* § 1362(14).
[9] The meaning and administration of WOTUS has also been a significant background issue in at least two other Supreme Court cases. In *Sackett v. U.S. Environmental Protection Agency*, 566 U.S. 120 (2012), after EPA issued a compliance order to landowners who had unknowingly filled wetlands on their property, the Court concluded that parties could seek judicial review of compliance orders even when enforcement had not been initiated. In *U.S. Army USACE of Engineers v. Hawkes Co., Inc.*, 136 S.Ct. 1807 (2016), the Supreme Court concluded that a jurisdictional determination—the USACE' decision whether a feature counts as a WOTUS—was reviewable. Justice Alito filed a concurrence in *Sackett* claiming that the "reach of the Clean Water Act is notoriously unclear, *Sackett*, 566 U.S. at 132, a sentiment echoed by Justice Kennedy in his *Hawkes* concurrence. 136 S.Ct. at 1816.
[10] 474 U.S. 121, 131–35 (1985) [hereinafter *Riverside Bayview*].
[11] 531 U.S. 159, 167–68 (2001) [hereinafter *SWANCC*].
[12] *Rapanos v. United States*, 547 U.S. 715, 742, 788 (2006) [hereinafter *Rapanos*].

Water Rule based, in part, on Justice Kennedy's concurrence, but after numerous legal challenges the rule's effectiveness was limited.[13]

Shortly after President Trump took office, his administration issued an executive order specifically directing the U.S. Environmental Protection Agency (EPA) and USACE to review the Clean Water Rule for the purpose of "promoting economic growth, minimizing regulatory uncertainty, and showing due regard for the roles of Congress and the States under the Constitution."[14] The Trump administration first repealed the Clean Water Rule and reinstated the earlier 1986 regulations as modified by the Supreme Court's *SWANCC* and *Rapanos* decisions.[15] Then came the Trump Administration's Navigable Waters Protection Rule itself, which attempted to re-ground WOTUS in a legal rather than scientific framework. Instead of determining whether a feature was WOTUS based on the existence of a hydrological connection to a navigable-in-fact waterway—a determination that involves significant fact gathering and analysis—the Navigable Waters Protection Rule identified four categories of features that would always be considered WOTUS per *SWANCC* and a harmonized reading of the *Rapanos* plurality and concurrence. The rule also excluded other features from consideration as WOTUS as well.

Like the Clean Water Rule before it, the Navigable Waters Protection Rule was swiftly challenged in the courts by both state attorneys general and numerous non-governmental organizations. Although the cases themselves were unique, at their core, the Rule's opponents typically alleged that (1) the Rule was inconsistent with prior scientific findings that supported the Clean Water Rule, (2) the Rule fails to achieve the CWA's purpose of "restoring and maintaining the chemical, physical, and biological integrity of the Nation's Waters," and (3) the Rule inappropriately treats the *Rapanos* plurality's "surface connection" requirement as lawful when five Supreme Court justices rejected that interpretation.[16] Certain plaintiffs moved for preliminary injunctions—even nationwide preliminary injunctions—to stop the Rule going into effect, but with the brief exception of the State of Colorado, plaintiffs failed to prevent the Rule from taking effect.[17] Other plaintiffs raced towards summary judgment only to find the Biden Administration seeking to remand the rule without vacatur—its request was granted.[18]

The Biden Administration justified these abeyances and remands without vacatur by promising to begin a new rulemaking process that will address what the Administration believes are key deficiencies in the Navigable Waters Protection Rule.[19] First, EPA and USACE intend to restore protections that were in place *before* the 2015 Clean Water Rule—i.e., the 1986 WOTUS regulations—signaling that the agencies are not immediately aiming to adopt the heavily challenged Obama-era rule which extended CWA jurisdiction to the maximum extent allowed by the significant nexus standard.[20] The agencies also anticipate developing a new rule that again

[13] *See discussion at* Navigable Waters Protection Rule, 85 Fed. Reg. 22,250, 22,257–59 (Apr. 21, 2020).
[14] Exec. Order No. 13,778, 82 Fed. Reg. 12,497 (Mar. 3, 2017).
[15] *See* Recodification of Pre-Existing Rules, 84 Fed. Reg. 56,626 (Oct. 22, 2019).
[16] *See, e.g.*, Complaint at 21–24, *California v. Wheeler*, No. 3:20-cv-3005 (N.D. Cal. May 1, 2020).
[17] Colorado succeeded in obtaining a preliminary injunction against the Navigable Waters Protection Rule which was later vacated by the Court of Appeals for the Tenth Circuit. *See* Judgment, *Colorado v. Wheeler*, No. 20-1238 (Mar. 2, 2021).
[18] *See* Order granting Motion to Remand without Vacatur, *South Carolina Coastal Conservation League v. Wheeler*, No. 2:20-cv-01687 (D.S.C. July 15, 2021).
[19] *See* Press Release, *supra* note 7.
[20] *Id.*

defines WOTUS in light of the pre-2015 rule, the Clean Water Rule, and the Navigable Waters Protection Rule.[21] Although we do not know much about a potential new definition, the agencies did express an interest in addressing "the effects of climate change on our waters" and "the experience of and input received from . . . states, Tribes, local governments, community organizations, environmental groups, and disadvantaged communities with environmental justice concerns."[22] On July 30, 2021, EPA and USACE announced that a "forthcoming foundational rule [will] restore the regulations defining WOTUS that were in place for decades …" and that they would hold public meetings in August 2021 to hear stakeholder perspectives, including ideas regarding "how to implement [the] definition as the agencies pursue this process."[23]

What this means for projects should be rather obvious at this point in the ping-pong match. An expanded definition of what constitutes WOTUS means that there will be more locations where either discharges of pollutants and dredged and fill material encounter WOTUS. Most significantly for the arid southwest, the Biden Administration will likely re-assert jurisdiction over many ephemeral waters. That means projects that might not have been under CWA jurisdiction under the Navigable Waters Protection Rule will again have to seek the appropriate authorizations for their activities. And those authorizations, as federal actions, will trigger additional reviews under the Endangered Species Act, the National Environmental Policy Act, the National Historic Preservation Act, and other regimes. Project opponents will have additional leverage to challenge projects using those procedural and substantive review frameworks. With climate change and environmental justice concerns shaping the rulemaking—and the probability that Obama-era agency veterans do not want to reprise the litigation losses they experienced with the 2015 rule—we may see a significantly modified version of the 1986 rules in light of this Administration's policy commitments.

Given that litigation over the eventual Biden Rule is an absolute certainty, future plaintiffs are likely to make heavy use of the legal interpretation presented in the preamble to the Navigable Waters Protection Rule. The Trump Administration justified its rule on the grounds that the rule was consistent with the text of the CWA and *Riverside Bayview*, *SWANCC*, and *Rapanos*, and it explained that consistency extensively. We can expect to see substantial analysis from the Biden Administration justifying a more expansive approach in order to anticipate legal challenge using the last rule's legal justification.

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[21] *Id.*

[22] *Id.* In their confirmation hearings before the United States Senate, both EPA Assistant Administrator for the Office of Water Radhika Fox and Assistant Secretary of the Army for Civil Works Michael Connor both expressed the need to work with local stakeholders and the importance of an "enduring rule." *Hearing on the Nominations of Radhika Fox to be Assistant Administrator of Water of the Environmental Protection Agency Before the S. Comm. on Public Works* (May 12, 2021), https://www.epw.senate.gov/public/_cache/files/5/1/512163b7-ef4e-4ff3-9a51-c6057bb1b5a2/A08DC241A8A4969F584785B17E1A7706.spw-05122021---nominations.pdf. *See also Hearing on the Nomination of Michael Connor to be Assistant Secretary for the Army for Civil Works, United States Department of Defense, S. Comm. on Public Works* (July 14, 2021), https://www.epw.senate.gov/public/_cache/files/a/d/adb209ae-9b47-4006-9d50-ea766a2e0aba/2303BAB541EEC14237078A466BA7AA8E.spw-07142021-b.pdf.

[23] "EPA and Army Announce Next Steps for Crafting Enduring Definition of Waters of the United States," July 30, 2021) (https://www.epa.gov/newsreleases/epa-and-army-announce-next-steps-crafting-enduring-definition-waters-united-states).

Section 401 Water Quality Certifications

The Trump Administration also promulgated a CWA Section 401 Rule pertaining to state water-quality certifications.[24] Section 401 requires that permit applicants provide federal agencies with a certification obtained from relevant state agencies that a proposed project will comply with all applicable provisions of the CWA.[25] If a state agency fails to act on the request for certification "within a reasonable period of time (which shall not exceed one year)," the certification requirements of Section 401 are waived.[26] Critics of the Section 401 Rule viewed it as restricting a state's ability to ensure that water quality standards were maintained. The regulations governing the Section 401 certification process had not been revised since the early 1970s and federal courts have increasingly grappled with the implications of the text of Section 401 as some states use it more aggressively than in the past. For example, in *New York State Department of Environmental Conservation v. Federal Energy Regulatory Commission*,[27] the Second Circuit concluded that the statutory requirement that a state agency acts "within a reasonable period of time (which shall not exceed one year)" prohibited state agencies from resetting the clock when they requested application revisions.[28] The Section 401 Rule codified certain circuit court decisions that made the certification process more predictable and also excluded consideration of several kinds of project impacts not directly related to water quality.[29]

Once promulgated, the Section 401 Rule was quickly challenged but EPA has requested that the Section 401 Rule be remanded without vacatur.[30] Consistent with President Biden's Executive Order titled "Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis,"[31] the EPA published a Notice of Intention and is soliciting comment on a possible replacement rule.[32] EPA specifically asked for comment on such things as pre-filing meeting requests, certifications requests, the construction of the phrase "reasonable period of time," the scope of the certification, certification actions and federal review, and enforcement.[33] EPA anticipates submitting a notice of proposed rulemaking in February 2022.[34]

Regardless of the eventual content of the rule, Section 401 certifications are issued by state agencies and we are starting to see attempted use of Title VI of the Civil Rights Act as a vehicle to challenge a state 401 certification.[35] Title VI provides that "No person in the United States shall,

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[24] Clean Water Act Section 401 Certification Rule, 85 Fed. Reg. 42,210 (July 13, 2020).
[25] 33 U.S.C. § 1341(a)(1).
[26] *Id.*
[27] 884 F.3d 450 (2d Cir. 2018).
[28] 884 F.3d at 455–56.
[29] 85 Fed. Reg. 42,250 (July 13, 2020).
[30] *See, e.g.*, Motion to Remand without Vacatur, In re Clean Water Act Rulemaking, No. 3:20-cv-04636 (N.D. Cal., July 1, 2021).
[31] Exec. Order No. 13,990, 86 Fed. Reg. 7,037 (Jan. 20, 2021).
[32] Notice of Intention to Reconsider and Revise the Clean Water Act Section 401 Certification Rule, 86 Fed. Reg. 29,541 (June 2, 2021).
[33] *Id.* at 29,543.
[34] *See* Clean Water Act Section 401: Water Quality Certification, RIN 2040-AG12 (2021), https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202104&RIN=2040-AG12.
[35] *See* Blue Ridge Environmental Defense League, Title VI Environmental Justice Complaint against the Virginia Department of Environmental Quality (June 18, 2018) (challenging multiple state authorizations issued in connection with the Atlantic Coast Pipeline), https://www.bredl.org/pdf5/180618_Title_VI%20_Complaint.pdf; Southern Environmental Law Center, Complaint under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d regarding

on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."[36] State agencies typically rely on federal funds for certain environmental and natural resource programs, meaning that the agencies must ensure that their actions do not result in either intentional discrimination or disparate impacts on minority communities. Project opponents are beginning to explore environmental opposition tactics under Title VI by filing complaints with EPA, arguing that a state decision discriminates by allowing a project with disproportionate impact on particular communities (and therefore that EPA must ensure that its funds are used consistent with the Title VI nondiscrimination obligation). How successful these efforts are remains to be seen, but project proponents encountering opposition should at least begin to consider the possibility.

III. Feeling Small (Like an American Burying Beetle): The Endangered Species Act & Species Protection

During the Trump administration, the Services—U.S. Fish and Wildlife Service (FWS) and National Marine Fisheries Service (NMFS)—made a number of changes to their regulations implementing the Endangered Species Act (ESA), the main legal and regulatory means for protecting and ensuring the recovery of imperiled species.[37] In this section, we discuss the regulatory changes enacted by these rules, their potential impacts on infrastructure projects, the legal status of these rules, the Biden Administration's response to date, and the potential path forward. In summary, we expect many of these changes to be modified or reversed in line with the new Administration's priorities and climate focus.

Overview of the Endangered Species Act

For our purposes, the ESA can be divided into three main provisions:[38]

- Section 4 provides a "listing" process by which the Services can identify species that may be in need of ESA protection, consider whether to list a species as threatened or endangered, seek public comment, and take steps to begin conserving species while they

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the Tennessee Department of Environment and Conservation (May 16, 2021) (challenging Tennessee's water quality certification for the Byhalia Connection Pipeline), https://www.southernenvironment.org/uploads/words_docs/Byhalia_TitleVI_letter.pdf.

[36] 42 U.S.C. § 2000d.

[37] The Secretaries of the Interior and Commerce share responsibilities for implementing most of the provisions of the ESA. Generally, marine species are under the jurisdiction of the Secretary of Commerce, who has delegated that authority to the Assistant Administrator for the National Marine Fisheries Service (NMFS). All other species are under the jurisdiction of the Secretary of the Interior, who has delegated that authority to the Director of the U.S. Fish and Wildlife Service (FWS). Together, these two agencies are referred to as "the Services" in this paper.

[38] Two other provisions, Section 10 and Section 11, are beyond the scope of this article. Section 10 establishes a permitting program that allows individuals undertaking private activities to "take" certain endangered species, as long as those "takes" are incidental to carrying out an otherwise lawful activity, do not jeopardize the survival of the species, and various other requirements are met. 16 U.S.C. § 1539(a). And, Section 11 authorizes citizens to sue to enforce the ESA directly against other private actors or to compel the federal government to comply with the ESA. Citizens are limited to injunctive relief, and prior to seeking an injunction, a plaintiff must provide 60 days' written notice of the alleged violations. 16 U.S.C. § 1540(g).

wait to be listed.[39] Section 4 also requires the Services to designate "critical habitat" for listed species.[40]

- Section 7 requires federal agencies to ensure that any action they authorize, fund, or carry out will not be likely to jeopardize the continued existence of any endangered or threatened species or destroy or adversely modify designated "critical habitat."[41] Section 7 is implemented through consultation between federal agencies and the Services.

- Section 9 prohibits the unauthorized "take" of listed species by any person, organization, or entity.[42] The statute defines "take" to cover a broad range of activities from harassment to pursuit to trapping to killing a listed species.[43]

Summary of Trump Administration Regulatory Changes

In August 2019 and December 2020, the Services finalized a series of related rules amending aspects of the ESA regulations related to listing, critical habitat, take protections for threatened species, and Section 7 consultation. Even though these provisions may be short lived, considering them is useful to understanding how anticipated changes will reflect the new Administration's policy goals and how changes will impact infrastructure development.

Generally speaking, these changes were favorable to infrastructure development in that they tend to provide clarity regarding the Services' decisionmaking processes and somewhat reduce the circumstances in which Section 7 consultation might be triggered (i.e., through narrowing either the effects or the species and areas that could trigger consultation). However, the narrowing effects of these changes also engendered opposition and litigation.

- *Listing decisions:*

The Trump Administration made a number of changes that pertain to listing species. For example, it removed language from the prior regulation that explicitly prohibited the Services from considering "possible economic or other impacts."[44] And, it amended the regulations regarding the listing of threatened species. Under the ESA, a threatened species is one that is "likely to become an endangered species within the foreseeable future."[45] The term "foreseeable future" is not defined by the statute, so as part of the rule amendments, the Services defined that term so that they look "only so far into the future as the Services can reasonably determine that both the future threats and the species' response to those threats are likely."[46] These changes drew criticism that

[39] 16 U.S.C. § 1533.
[40] *Id*. § 1533(b)(2).
[41] *Id*. § 1536(a)(2).
[42] *Id*. § 1538(a). In addition to Section 10 permitting, "take" may also be authorized via Section 7 consultation. *See* 16 U.S.C. § 1536(o)(2) ("[A]ny taking that is in compliance with the terms and conditions specified in a written incidental take statement … shall not be considered to be a prohibited taking of the species concerned" for purposes of Section 9 of the ESA.).
[43] 16 U.S.C. § 1532(19).
[44] Endangered and Threatened Wildlife and Plants; Regulations for Listing Species and Designating Critical Habitat, 84 Fed. Reg. 45,020, 45,052 (Aug. 27, 2019) (amending 50 C.F.R. § 424.11(b)).
[45] 16 U.S.C. § 1532(20).
[46] 50 C.F.R. § 424.11(d).

they may (1) lead to improper consideration of economic impacts,[47] (2) create pressure to avoid listing a particular species,[48] and (3) limit the Services' ability to consider the potential impacts of climate change in listing decisions.[49]

- *Protections for threatened species:*

In another 2019 action, FWS rescinded a default rule (a so-called "blanket rule") that gave threatened species the full protections of endangered species unless a regulation specifically stated otherwise.[50] By rescinding the blanket rule, FWS must now, on a species-by-species basis, "determine what, if any, protective regulations are appropriate for species that the Service in the future determines to be threatened."[51] Although many commenters argued that these changes would leave vulnerable species without appropriate protections, FWS responded that it intended "to finalize species-specific 4(d) rules concurrent with final threatened listing or reclassification determinations."[52]

- *Critical habitat:*

Additionally, the Services made several changes to their regulations for designating critical habitat. First, in response to a recent Supreme Court decision (*Weyerhauser Co. v. U.S. Fish & Wildlife Service*),[53] the Services required that, to be designated critical habitat, an unoccupied area must have "reasonable certainty" that it "will contribute to the conservation of the species that the area contains one or more of those physical or biological features essential to the conservation of the species."[54] Second, the Services may now decline to designate critical habitat in several circumstances, including where "threats to the species' habitat stem solely from causes that cannot be addressed through management actions resulting from" Section 7 consultations.[55] Several commenters expressed concern that these changes would result in the Service declining to designate critical habitat for species threatened by climate change or to designate unoccupied areas to which species may need to relocate in response to climate change.[56]

Third, also in 2020, FWS finalized a rule that amended an existing process for deciding when to exclude areas from critical habitat designation pursuant to ESA Section 4(b)(2).[57] That provision requires FWS to make listing decisions based on "the best scientific data available and after taking into consideration the economic impact" of listing (among other factors).[58] However, under the new rule, FWS may in its discretion to exclude an area from designation based on "credible"

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[47] 84 Fed. Reg. at 45,024.
[48] *Id.* at 45,026.
[49] 84 Fed. Reg. at 45,025-26, 45,032.
[50] Endangered and Threatened Wildlife and Plants; Regulations for Prohibitions to Threatened Wildlife and Plants, 84 Fed. Reg. 44,753, 44,753-54 (Aug. 27, 2019).
[51] 83 Fed. Reg. 35,174 (July 25, 2018) (proposed rule).
[52] 84 Fed. Reg. at 44,755-56.
[53] 139 S. Ct. 361, 368, 369 n.2 (2018) (holding that "an area is eligible for designation as critical habitat . . . only if it is habitat for the species").
[54] 50 C.F.R. § 424.12(b)(2); 84 Fed. Reg. at 45022.
[55] *Id.* § 424.12(a)(1)(ii).
[56] 16 U.S.C. § 1532(5)(A); 84 Fed. Reg. at 45042.
[57] *Id.* § 1533(b)(2).
[58] *Id.*

economic impact information provided by the proponent of exclusion (such as a permittee or a lessee).[59] FWS must still weigh the benefits of including or excluding the area, but it will "give weight" to information provided by the proponent's experts.[60] Commenters feared that this process would "presume the validity" of such information even if speculative, which would allow non-FWS entities to drive designation decisions.[61] And, the rule change also means that FWS may now consider excluding lands managed by the Federal government.[62]

- *Section 7 consultation:*

Finally, and significantly for private applicants seeking federal authorizations, the Services made a number of changes in 2019 to the Section 7 consultation process. Among the key amendments, the Services "simplif[ied]" the definition of "effects of the action," essentially the scope of review, by "collapsing the terms 'direct,' 'indirect,' 'interrelated,' and 'interdependent' and by applying a two-part test of 'but for and 'reasonably certain to occur'" to define the potential effects of a federal action that must be considered.[63] They also created a new regulatory section, "activities that are reasonably certain to occur,"[64] that sets a threshold for attributing impacts to federal agency actions by requiring (1) "clear and substantial" evidence of impacts (2) that are "reasonably certain" to occur.[65] Critics claim these changes may make it easier for federal agencies to avoid Section 7 consultation and could reduce consideration of potential climate impacts since the threshold is now higher.[66]

Litigation Regarding and Status of Trump Administration Rules

Not surprisingly, each of the various ESA rules has been challenged in federal court. First, three different groups of plaintiffs brought facial challenges to the three rules finalized in 2019 in the Northern District of California: (1) a coalition of 17 states led by California and Massachusetts, along with the District of Columbia and New York City;[67] (2) the Animal Legal Defense Fund;[68] and (3) a coalition of environmental groups led by the Center for Biological Diversity.[69] A similar state coalition also led by California filed a facial challenge to the December 2020 rules

[59] 50 C.F.R. § 17.90(c).
[60] *Id.* § 17.90(d)(1).
[61] Endangered and Threatened Wildlife and Plants; Regulations for Designating Critical Habitat, 85 Fed. Reg. 82,376, 82,380 (Dec. 18, 2020).
[62] *Id.* § 17.90(d)(1)(iv).
[63] 84 Fed. Reg. at 44,989.
[64] 84 Fed. Reg. at 44,989.
[65] 50 C.F.R. § 402.17.
[66] The Services also amended the definition of "destruction or adverse modification" of critical habitat to indicate that determinations of whether a federal agency action impacts critical habitat are made with regard to the habitat "as a whole", not the action area, critical habitat unit, or another smaller scale. 83 Fed. Reg. 35178, 35181-82 (July 25, 2018) (proposed rule). Commenters noted that this change could mean that small habitat losses would no longer be considered "destruction or adverse modification." Endangered and Threatened Wildlife and Plants; Regulations for Interagency Cooperation, 84 Fed. Reg. 44976, 44983 (Aug. 27, 2019). The Services responded that "clarified but does not change the Services' approach to assessing critical habitat" as explained in a prior rulemaking preamble. *Id.*
[67] *California v. Bernhardt,* No. 4:19-cv-06013 (N. D. Cal.).
[68] *Animal Legal Defense Fund v. Bernhardt,* No. 4:19-cv-06812 (N.D. Cal.).
[69] *Center for Biological Diversity v. Bernhardt,* Case No. 4:19-cv-05206 (N. D. Cal.).

promulgating a definition of "habitat" and revising the process by which FWS designates and excludes critical habitat.[70] All of these cases were assigned to Judge Jon S. Tigar.[71]

On May 18, 2020, Judge Tigar dismissed the case filed by the environmental groups on standing grounds.[72] The rest of the cases remain on the docket, but the parties stayed proceedings in each to allow the Biden administration adequate time to review the rules and determine how it would like to proceed with the litigation.[73] On June 4, 2021, the Services announced that, consistent with Executive Order 13990, "Protecting Public Health and the Environment and Restoring Science To Tackle the Climate Crisis,"[74] they intend to take further action on the five rules in some form.

More specifically, the Services intend to propose to:

- **Rescind in full the December 2020 regulations that revised the process for considering exclusions from critical habitat designations.** FWS will revert to implementing the prior FWS/NMFS regulation (50 C.F.R. § 424.19) and related joint 2016 policy on ESA Section 4(b)(2) exclusions.

- **Rescind the 2020 regulatory definition of habitat.**

- **Revise the 2019 regulations for listing species and designating critical habitat** to reinstate prior language affirming that listing determinations are made "without reference to possible economic or other impacts of such determination," along with other potential revisions also under discussion.

- **Revise the 2019 regulations regarding Section 7 consultation including** the definition of "effects of the action" and associated provisions to that portion of the rule, with other potential revisions also under discussion.

- **Reinstate protections for threatened species that were rescinded in 2019 by reinstating the** "blanket 4(d) rule" to re-establish the default of automatically extending protections provided to endangered species to those listed as threatened, unless the Services adopts a species-specific 4(d) rule.[75]

These actions have the potential to moot some—if not all—of the claims in the three ongoing lawsuits. However, it is currently unclear whether these actions will reach certain amendments. For example, the Services' announcement does not specify whether they will review, rescind, or

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[70] *California. v. Bernhardt,* No. 4:21-cv-00440 (N. D. Cal. Jan. 9, 2021).
[71] Following a number of years in private practice, Judge Tigar was a California Superior Court judge for the County of Alameda for ten years before he was appointed to the federal bench by former President Barack Obama.
[72] *Center for Biological Diversity*, No. 4:19-cv-05206, Doc. # 87.
[73] *See, e.g.,* Stipulation *California v. Bernhardt*, No. 4:19-cv-06013, Doc. #137 (Feb. 9, 2021); Order, Doc. #139 (Feb. 16, 2021) (granting 60-day stay).
[74] 86 Fed. Reg. 7,037 (Jan. 20, 2021). The administration also published a list of agency actions for review at https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/fact-sheet-list-of-agency-actions-for-review/.
[75] Press Release, U.S. Fish & Wildlife Serv. And NOAA Fisheries to Propose Regulatory Revisions to Endangered Species Act (June 4, 2021), https://www.fws.gov/news/ShowNews.cfm?ref=u.s.-fish-and-wildlife-service-and-noaa-fisheries-to-propose-regulatory-&_ID=36925.

revise the new definition of "foreseeable future" used in considering whether to list a species as "threatened"; some of the regulation changes related to the *Weyerhauser* decision; or some of the changes to the effects that trigger Section 7 consultation. Given the Administration's climate priorities, however, it seems unlikely that these provisions will remain in place.

Reflecting these uncertainties, the parties to the cases challenging the 2019 rule changes disagree as to whether those cases should be dismissed or held in abeyance pending the conclusion of the Services' rulemaking activities. They have stipulated to a schedule under which they will brief this issue in August and September 2021.[76] The parties to the lawsuit challenging the 2020 rules have obtained a further stay until August 19, 2021 to allow them to negotiate a settlement and will file a motion regarding further proceedings at that time.[77]

What's Next?

The timing of the new administrative actions listed above is uncertain, but the federal Regulatory Agenda suggests that the Services expect to publish proposed rules throughout the next six months.[78] It is likely to take a year or more to finalize new regulations.

And—depending upon what Trump administration provisions remain in place and how some of the revisions are handled—it is nearly certain that any final rules issued by the Biden administration will face litigation. Like the lawsuits challenging the 2019 and 2020 rules, new lawsuits could take the form of facial challenges brought in federal district court under the Administrative Procedure Act. Or, judicial review of final Biden administration actions could be brought in the context of challenges to specific projects. As is always the case, litigation will create uncertainty for the Services and federal agencies engaged in the Section 7 consultation process as well as non-federal parties whose projects consultation is intended to inform. It may be some time before these challenges are resolved with certainty.

IV. Your Time Has Come to Shine: Defending Federal Decisions Critical to Non-Federal Infrastructure Projects

As has been the case for decades, in an effort to stop projects of concern, project opponents often challenge the decisions of federal agencies to issue permits or other authorizations needed for infrastructure development. Increasingly, broad national strategies drive protests and challenges to local projects. Federal decisions can be challenged for violations of various substantive statutes,

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[76] *See, e.g.*, Stipulation, *California v. Bernhardt*, No. 4:19-cv-06013, Doc. #145 (July 19, 2021); Order, Doc. #146 (July 22, 2021) (setting schedule on motion for further stay).

[77] *See* Stipulation, *California. v. Bernhardt,* No. 4:21-cv-00440, Doc. #20 (July 19, 2021); Order, Doc. #21 (July 22, 2021).

[78] *See, e.g.*, Endangered and Threatened Wildlife and Plants; Revision of the Regulations for Designating Critical Habitat, RIN 1018-BD84 (2021), https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202104&RIN=1018-BD84; Endangered and Threatened Wildlife and Plants; Regulations for Prohibitions to Threatened Wildlife and Plants, RIN 1018-BF88, (2021), https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202104&RIN=1018-BF88; Endangered and Threatened Wildlife and Plants; Regulations for Listing Species and Designating Critical Habitat, RIN 0648-BK47 (2021) https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202104&RIN=0648-BK47; Endangered and Threatened Wildlife and Plants; Section 7 Regulations, RIN 0648-BK048 (2021), https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202104&RIN=0648-BK48.

such as the ESA and the National Environmental Policy Act (NEPA), pursuant to the Administrative Procedure Act (APA).[79] Under the APA, a court may set aside agency action found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."[80] In reaching its conclusion, the court relies on the agency's "administrative record" of its decision.

While the recipient of the federal approval may not be named in the lawsuit, it is critical that the nonfederal entity intervene since a court can enjoin, temporarily or permanently, the efficacy of the challenged decision rendering that permission un-useable. The beneficiary of the federal decision must be present both to accurately explain the facts of the project, assess plaintiffs' claims of harm in light of those facts, and to demonstrate what sort of harm it will suffer in the event of a preliminary or permanent injunction – the federal government cannot, and will not, articulate the economic and other injuries that may be suffered by the holder of the federal permission or the public interest if the project is delayed or cancelled altogether because of litigation.[81]

For example, in *City of Austin v. Kinder Morgan, et al.*, the plaintiffs moved for a preliminary injunction based on alleged violations of both the ESA and NEPA by the FWS.[82] Plaintiffs sought vacatur of the federal decision and an injunction halting construction of the pipeline. The court declined to issue a preliminary injunction because the plaintiffs had failed to establish the type of "irreparable harm" that is a necessary predicate for such extraordinary relief.[83] In arriving at that conclusion, the Court rejected the argument that an injunction was warranted because of alleged violations of the ESA Incidental Take Statement, thoroughly considering the facts addressing those claims provided by Kinder Morgan itself. In another case, one of the many styled *Sierra Club v. U.S. Army Corps of Engineers*, the court declined to issue a preliminary injunction based in part on the finding that the permittee had "committed major resources to the FS Pipeline project over the last 18 months, including engaging in an intensive effort to comply with the myriad state and federal environmental regulations."[84]

When federal decisions related to private development are preliminarily or permanently enjoined or vacated by a court, it is often because of a failure of process – the federal agency has failed to consider relevant impacts or issues sufficiently or the agency has failed to provide an adequate explanation for its conclusions. For example, in *Defenders of Wildlife v. U.S. Department of the Interior*, one of the many decisions related to the Atlantic Coast Pipeline, the Fourth Circuit held that that the FWS's conclusions in its ESA Biological Opinion were "arbitrary and capricious" because, among other reasons, of failure to consider the "best scientific and commercial data available" and failure to consider and explain the agency's own evidence related to species survival.[85] The court vacated the FWS's actions rendering them a nullity.[86]

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[79] 5 U.S.C. §§ 701–706.
[80] *Id*. at § 706.
[81] Some federal statutes, such as the Clean Water Act and ESA, have citizen suit provisions that allow private citizens to sue alleged violators directly. These provisions are beyond the scope of this article, but present another opportunity for project opponents to challenge projects of concern.
[82] *City of Austin v. Kinder Morgan,* 447 F. Supp.3d 558 (W.D. Texas 2020). Plaintiffs also brought a claim under the ESA citizen suit provision against Kinder Morgan.
[83] *Id*. at 567.
[84] *Sierra Club v. U.S. Army USACE of Engineers*, 900 F. Supp.2d 9, 42 (D.D.C. 2013).
[85] *Defenders of Wildlife v. U.S. Department of the Interior*, 931 F.3d 339, 346, 352 (4th Cir. 2019).
[86] *Id*. at 366.

Good process and active engagement with the federal agency during the review process and during litigation are key to a good result and a defensible federal decision. Applicants can and should help ensure that issues are thoroughly considered and addressed in the agency's administrative record and then engage actively in subsequent litigation to protect the applicant's interest. And this strategy cuts across all areas of infrastructure where federal permissions and reviews are needed – pipelines, wind projects, solar projects, road projects, water resource projects, electric lines, LNG facilities, carbon capture and storage projects, etc. Regardless of the type of project and its perceived benefits, there will be someone who objects to the project for big or little picture reasons – and who is able to seek recourse in the federal courts.

V. Sail on Silver Girl: The Prospects for Project Opposition during the Biden Years

The rulemakings we have described so far, along with many others, will shape the administrative obligations of project proponents. If categories of WOTUS are expanded, project proponents will again grapple with more complex permitting obligations, project planning, and the need for expert consultant assistance as additional "waters of the United States" are identified. A new Section 401 rule may be another more complex regulatory process to navigate successfully, depending on the predilection of the particular state. If climate change becomes a basis for listing more endangered and threatened species, or if the blanket 4(d) rule returns for threatened species, project proponents will be more likely to need expert biologist assistance in evaluating the impacts of their projects and successful mitigation strategies.

But those are the only impacts of regulations *as such*. Important concerns like climate change or environmental justice go beyond accounting for, say, the process of listing a species that is uniquely exposed to changing climates or inserting provisions to require proponents and agencies take a hard look at impacts on environmental justice communities. Climate change and environmental justice need to be understood at a fundamental level as both shaping this Administration's regulatory actions and as concerns which galvanize project opponents to explore new tactics in their opposition to infrastructure projects. Obviously this goes beyond preparing for a suit filed under the Administrative Procedure Act or the Endangered Species Act, or other statutes that may provide a right of action against a project proponent or an authorizing agency.

We have already noted that environmental justice concerns may motivate project opponents to use Title VI of the Civil Rights Act to file an administrative complaint against a state agency that provides a water quality certification to a project. Environmental justice concerns may also motivate plaintiffs to propose ordinances to municipal authorities (or convince those same authorities to deny municipal roadway or improvements permits) that restrict project construction. In one instance, project opponents successfully intervened to challenge a state-level condemnation action on environmental justice grounds, even when broader climate change or environmental justice issues were not typically understood to be the focus of state court determinations of lawful access to property.[87]

It should be understood that there is a palpable urgency to these claims (and that climate change and environmental justice often overlap). Because these are urgent concerns for many Americans,

[87] *See, e.g.*, Complaint in Intervention, *Byhalia Pipeline LLC v. Scottie Linda Washington Fitzgerald*, No. CT-4260-20, Div. I (Shelby Cnty. Cir. Ct. Jan. 29, 2021).

there may not be a significant relaxation of project opposition litigation that might have come during previous left-of-center administrations. In at least one case, challengers to the Navigable Waters Protection Rule opposed the federal government's request to put the litigation on pause.[88] And it may be that interest groups deem the Biden Administration's climate and environmental justice action to be unfortunately inadequate.

These new developments regarding environmental justice and climate change are evolving against the backdrop of significant project opposition victories over the past four years. Although some significant projects were completed[89] and the Supreme Court held that the Natural Gas Act allows FERC certificate holders to condemn both private and state lands,[90] project opponents successfully challenged the use of Nationwide Permit 12 for oil and gas projects based on an ESA Section 7 Consultation claim.[91] The pipeline at the center of that litigation—the Keystone XL pipeline—was eventually canceled by its proponent after President Biden rescinded the presidential permit that President Trump used to authorize the pipeline.[92] Other projects were canceled even after successful project defenses in court, as the costs of litigation and the uncertainty of subsequent challenges raised profitability concerns.[93]

If project proponents expect to be faced with the significant challenge of responding not just to new rulemakings but new tactics deployed to stop or delay important infrastructure projects—as well as more standard challenges under well-understood regulatory frameworks—it cannot be understated just how important it is to have a legal team that includes experts in the legal complexities of the administrative process and in litigation implicating federal permissions related to infrastructure projects. Those experts can anticipate hurdles and work with federal agencies to anticipate challenges – as well as ensure that key issues are thoroughly addressed. Also critical are public relations professionals who are on the front lines of addressing community concerns. Statements from PR professionals can signal that a company is aware of community concerns and ready to actively address and engage those concerns, but comments that reveal a lack of engagement with these perspectives can very well be used against the project in court filings or statements to the press.

For the foreseeable future, stable regulatory regimes in these project critical areas just can't be found. A nimble multi-disciplinary team who can anticipate and, hopefully, address the troubled waters that lie ahead is the best bridge over troubled waters.

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[88] *See* Response in Opposition re Motion to Remand to U.S. EPA; U.S. Army USACE of Engineers without Vacatur, *South Carolina Coastal Conservation League v. Wheeler*, 2:20-cv-01687 (D.S.C., July 12, 2021).
[89] Order Granting Motion to Dismiss, *City of Austin v. Kinder Morgan Texas Pipeline*, No. 1:20-cv-00138 (W.D.Tex. Mar. 25, 2021).
[90] *See Penneast Pipeline Co., LLC v. New Jersey*, 141 S.Ct. 2244, 2263 (2021).
[91] *Northern Plains Resource Council v. U.S. Army USACE of Engineers*, 454 F. Supp. 3d 985, 992 (D. Mont. 2020).
[92] Coral Davenport, *The Keystone XL pipeline project has been terminated*, N.Y. TIMES (June 9, 2021), https://www.nytimes.com/2021/06/09/business/keystone-xl-pipeline-canceled.html.
[93] Ivan Penn, Atlantic Coast Pipeline Canceled as Delays and Costs Mount, N.Y. TIMES (July 5, 2020), https://www.nytimes.com/2020/07/05/business/atlantic-coast-pipeline-cancel-dominion-energy-berkshire-hathaway.html.