



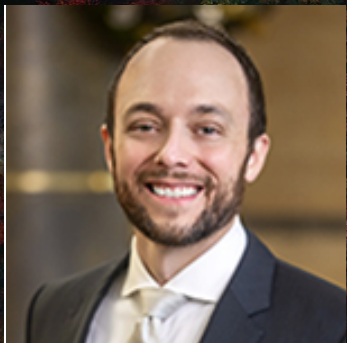
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**2023
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WEBINAR SERIES**

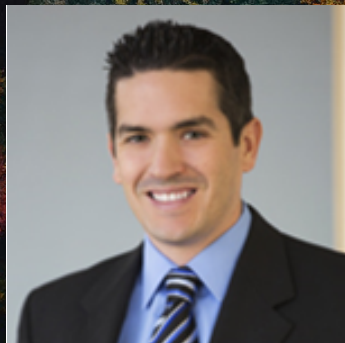
**Evolving Environmental Laws:
Endangered Species Act and WOTUS
Under the Clean Water Act**

April 17, 2023

Presenters



Douglas A. Hastings
Partner | Washington, DC



David K. Brown
Partner | Los Angeles

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Upcoming Earth Day Webinars

- **Regulation and Litigation on the (PFAS)t Track in 2023**

April 18, 2023 | 2:00 – 3:00 PM ET

– Presenters: Stephanie Feingold, Jeremy Esterkin, Kate Deal, Drew Jordan

- **EPA's Chemicals Regulatory Agenda: Testing, Reporting, Rulemaking, and Litigation**

April 19, 2023 | 1:00 – 2:00 PM ET

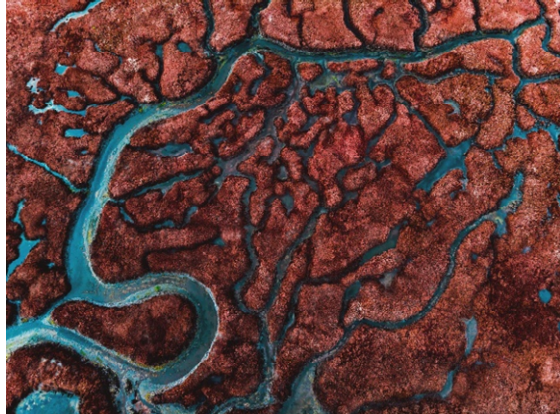
– Presenters: John McGahren, Debra Carfora

- **Environmental Justice and the E in ESG**

April 20, 2023 | 1:00 – 2:00 PM ET

– Presenters: Duke McCall, Rick Rothman, Gina Waterfield (Berkeley Research Group)

Waters of the United States (WOTUS) and the Endangered Species Act (ESA)



- Both evolving through administrative actions and the courts
- WOTUS
 - Background
 - New WOTUS rule
 - Litigation
- ESA





WOTUS

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Overview and Background

- Definition of WOTUS has been debated for decades
- US Supreme Court trilogy of cases:
 - *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985)
 - *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001)
 - *Rapanos v. United States*, 547 U.S. 715 (2006)
- Practically speaking, these Supreme Court decisions introduced additional uncertainty since they offered multiple, competing tests for defining WOTUS

Rapanos

- 4-1-4 Split
- Scalia Plurality: continuous surface connection
- Kennedy Concurrence: significant nexus
- Most courts have treated the “significant nexus” test as functionally controlling



Regulatory History

- Presidents Obama, Trump and Biden have since each introduced their own WOTUS definitions
- President Obama introduced the Clean Water Rule (CWR) in 2015
 - Largely derived from Justice Anthony Kennedy’s “significant nexus” test from *Rapanos*
 - Added “bright line” rules and additional definitions
- President Trump introduced the Navigable Waters Protection Rule (NWPR) in 2020
 - Based on Justice Antonin Scalia’s “relatively permanent” test from *Rapanos*

Regulatory History Cont.

- President Biden introduced the Revised Definition of “Waters of the United States” Rule (RDWR), effective Mar. 20, 2023
 - Appears to chart a middle path between the CWR and the NWPR, using both include Justice Scalia’s relatively permanent test and Justice Kennedy’s significant nexus test
- Unsurprisingly, all three rules have been subject to considerable political debate and immediate legal challenge



Revised Definition of WOTUS Rule

- Under the RDWR, WOTUS is defined as (33 CFR § 328.3(a)):
 1. Traditional navigable waters, territorial seas, and interstate waters/wetlands;
 2. Impoundments of WOTUS;
 3. Tributaries to waters identified in (1) or (2) above that meet either the relatively permanent test or the significant nexus test;
 4. Wetlands adjacent to waters identified in (1) above, or wetlands adjacent to waters identified in (2) or (3) above with either a continuous surface connection to or significant nexus to such waters; and
 5. Intrastate lakes and ponds, streams, or wetlands that meet either the relatively permanent standard or the significant nexus standard

Exclusions to Revised Definition of WOTUS Rule

- RDWR identifies several exclusions from WOTUS jurisdiction (33 CFR § 328.3(b)), including longstanding exemptions for prior converted cropland and waste treatment systems:
 - Ditches (including roadside ditches) excavated wholly in and draining only dry land and that do not carry a relatively permanent flow of water;
 - Artificially irrigated areas that would revert to dry land if irrigation were to cease;
 - Artificial lakes or ponds created by excavating or diking dry land and which are used exclusively for such purposes (e.g., stock watering, irrigation, settling basins, or rice growing);
 - Artificial reflecting/swimming pools or other ornamental bodies of water;
 - Unless and until abandoned, water-filled depressions created in dry land incidental to construction activity as well as pits excavated in dry land for the purpose of obtaining fill, sand, or gravel; and
 - Swales and erosional features (e.g., gullies, small washed) characterization by low volume, infrequent, or short duration flow

Evaluating Hydrologic Features of WOTUS

- RDWR also sets forth certain definitions (33 CFR § 328.3(c)), including factors to be considered in determining whether hydrologic features constitute WOTUS
 - Several defined terms remain unchanged, such as “wetlands,” “adjacent,” “high tide line,” “ordinary high water mark,” and “tidal water”
- New definition of “significantly affect” that contemplates “a material influence on the chemical, physical, or biological integrity of waters”
 - Enumerates five functions to assess and five factors to consider in evaluating whether a water will have a “material influence” on a traditionally navigable water or relatively permanent water

Determining What “Significantly Affects” WOTUS

- Factors to be considered when determining whether waters (either alone or in combination) have a material influence on the chemical, physical, or biological integrity of a traditionally navigable waters
 - Distance to a traditional navigable water;
 - Hydrologic factors, such as frequency, duration, magnitude, timing, and rate of hydrologic connections, including shallow subsurface flow;
 - Size, density, or number of similarly situated waters;
 - Landscape position and geomorphology; and
 - Climatological variables such as temperature, rainfall, and snowpack
- Functions to be assessed
 - Contribution of flow;
 - Trapping, transformation, filtering, and transport of materials (including nutrients, sediment, and other pollutants);
 - Retention and attenuation of floodwaters and runoff;
 - Modulation of temperature in traditional navigable waters; or
 - Provision of habitat and food resources for aquatic species located in traditional navigable waters

Status of Revised Definition of WOTUS Rule

- Like prior WOTUS rules, the RDWR is already subject to harsh scrutiny and legal challenge
- RDWR is already subject to considerable political debate and maneuvering
 - On Mar. 29, 2023, the US House of Representatives and Senate used the Congressional Review Act in an attempt to block the RDWR
 - On Apr. 6, 2023, President Biden vetoed this congressional resolution that would have overturned the RDWR's waterway protections
- At this time, the RDWR is only operative in 24 states
 - On Mar. 19, 2023, Hon. Jeffrey Vincent Brown (S.D. Texas) issued a preliminary injunction against the RDWR, blocking its implementation in Idaho and Texas
 - On Apr. 12, 2023, Hon. Daniel Hovlan (D.N.D.) issued a more expansive preliminary injunction blocking the RDWR from being implemented in 24 other states—Alabama, Alaska, Arkansas, Florida, Georgia, Indiana, Iowa, Kansas, Louisiana, Mississippi, Missouri, Montana, Nebraska, New Hampshire, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Utah, Virginia, West Virginia, and Wyoming

Implications of Revised Definition of WOTUS Rule

- Will seeking a middle ground result in a final, final WOTUS rule?
 - Attempt to codify agencies' mostly familiar standards and practices
 - Retention of relatively permanent standard
 - Reintroduction of the significant nexus standard
- Uncertainty still reigns for RDWR
 - Challenges and appeals forthcoming in federal courts nationwide by a variety of stakeholders
 - Rule issued before Supreme Court's decision in *Sackett v. EPA*
 - Potential second WOTUS rulemaking in light of additional stakeholder engagement and implementation considerations, scientific developments, litigation and environmental justice values

Sackett v. EPA (2012)

- EPA issued a compliance order to Sackett family for filling in an area of their property with dirt and rock
- Sacketts sought review and the Supreme Court determined that the compliance order was a final agency action subject to judicial review



Sackett v. EPA (currently in the Supreme Court)

- Presents question of proper standard for WOTUS
- Sacketts argue for *Rapanos* plurality's test
 - Argue that it consistent with precedent because significant nexus and continuous surface connection in *Rapanos* were apples and oranges
 - Argue that it is a more workable standard for property owners
- Argued in October (before new WOTUS rule)
- Decision likely late spring or early summer

Litigation on RDWR

- *Texas v. EPA* (S.D.Tex)
 - Enjoined application of RDWR in Texas and Idaho
 - Found likely problems with definition of significant nexus + categorical inclusion of interstate waters
- *West Virginia v. EPA* (D.N.D.)
 - Enjoined application in 24 states
 - Found host of issues (e.g. treatment of impoundments, tributary definition)



Litigation on RDWR Cont.

- *Kentucky v. EPA* (E.D.Ky.)
 - Denied P.I. and dismissed for lack of standing
- Cases in earlier stages in other federal district courts





Endangered Species Act

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Endangered Species Act Regulations

- 50th Anniversary of Passage
- Review of Success and Challenges
- Current Overview

Trump Proposed Reform - 2019

- Enacted major overhaul to the ESA
 - Process for listing and delisting species
 - Process for designating critical habitat
 - Interagency consultation under Section 7 of the ESA
 - Repeal of the 4(d) Rule

Judicial Response

Challenges to 2019 ESA Regulations:

- July 5, 2022: *In re: Washington Cattleman's Association*: US District Court for the Northern District of California vacated and remanded Trump's ESA regulations
- September 21, 2022: District Court order stayed by Ninth Circuit
 - “Clear error” to vacate without consideration of merits
- November 16, 2022: District court remands to agencies but keeps rules in place

Biden Administration Response

- January 2021: Biden ordered FWS and NMFS to review Trump-era ESA rules
- June 2022: NMFS and FWS issued final rule rescinding the Trump administration's 2020 amendment regarding definition of habitat for purposes of defining critical habitat
- July 2022: FWS finalized rule rescinding Trump-era definition to how critical habitat is designated
- February 8, 2023: Proposed rule under Section 10 of ESA to strengthen voluntary conservation efforts

Questions?



Biography



Douglas A. Hastings

Washington, DC

+1.202.373.6635

douglas.hastings@morganlewis.com

Doug focuses his practice on environmental and administrative law. Doug represents clients in matters arising under a variety of federal and state environmental statutes, including the Clean Air Act, Clean Water Act, National Environmental Policy Act (NEPA), and Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). He also assists clients in navigating agency proceedings and litigation involving the Administrative Procedure Act.

Biography



David K. Brown

Los Angeles

+1.213.680.6816

david.brown@morganlewis.com

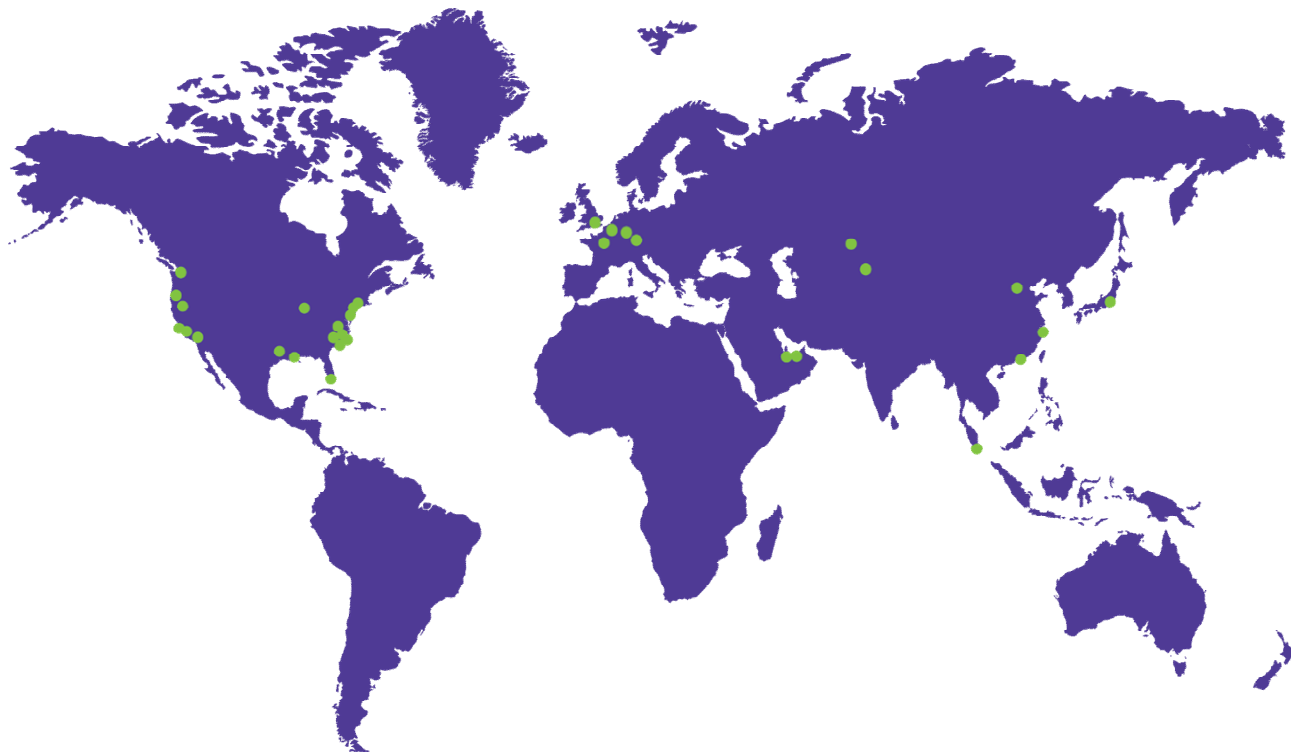
David focuses his practice on environmental regulatory compliance counseling, enforcement defense, and litigation involving air quality, water quality, hazardous substances, and climate change. He advises corporate and municipal clients in the assessment of complex regulatory requirements, threatened enforcement actions, permitting and appeals, due diligence reviews, and reporting and warning requirements arising under federal and state environmental laws. David also serves as co-leader of the firm's Hispanic/Latino Lawyer Network.

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