

# Lawsuits: ‘It’s shaping up to be Obama’s third term’

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## Time out?

Glitzenstein said he anticipates the new administration will ask judges to pause lawsuits, while agencies reconsider policies.

“You can see a lot of judges being open to that,” he said. “Judges are very eager when they have the opportunity to not waste their time.”

The Justice Department, however, will have to be more artful than merely renouncing previously argued positions, Glitzenstein said.

“Judges don’t like people coming in and saying, ‘We’re doing different things because we’re different people,’” he said. “Process does matter.”

## ‘Obama’s third term’

So do elections, said Scott Yager, chief environmental counsel for the National Cattlemen’s Beef Association. “It’s shaping up to be Obama’s third term,” he said. “The same people we had then are back now.”

The Obama administration produced the 2015 Clean Water Rule, redefining the Waters of the United States. The rule brought ditches and ponds thousands of feet from navigable waterways under the Clean Water Act.

Trump dumped the rule in favor of the “Navigable Waters Protection Rule,” reducing how far the federal rule reaches into fields and pastures.

Blue states and environmental groups are suing to overturn the Trump rule. They also are suing to kill Trump’s reforms to the Endangered Species Act and National Environmental Policy Act.

The cattlemen’s association, American Farm Bureau Federation and other agriculture groups have formally intervened in the suits, positioning themselves to defend Trump’s environmental policies, even if the Justice Department under Biden changes course.

“It makes intervening way more important for agriculture,” said Eastern Washington attorney Toni Meacham, who represents the Washington Cattlemen’s Association, intervenors in a lawsuit to defend Trump’s ESA reforms.

“These lawsuits don’t just stop,” she said. “Now more than ever it’s going to be important for agriculture to retain the small gains it’s made.”

The ESA, NEPA and WOTUS lawsuits are in districts courts, the bottom rung of the federal judiciary. The cases are a long way from the U.S. Supreme Court.

Yager said he anticipates fighting in court to uphold the Trump rules for as long as possible, while also working with the Biden administration on writing new rules.

“We want to make sure Trump policies are in place until there is an official change,” he said.

## Ever-flowing WOTUS

Biden will inherit the WOTUS controversy under circumstances similar to those Trump faced when he took office.

The Obama EPA finalized its definition in 2015, immediately igniting lawsuits from red states,



U.S. Fish and Wildlife Service

**The dusky gopher frog in Louisiana was at the center of one of the major environmental lawsuits argued during the Trump administration.**



Matthew Weaver/Capital Press

**Washington attorney Toni Meacham says the upcoming change in White House administrations makes farm and ranch groups’ intervention in lawsuits more important.**

and farm and industry groups. The Justice Department was fighting those suits when Trump took office.

Six weeks into his presidency, Trump directed the Environmental Protection Agency to review the 2015 rule. With respect to the ongoing lawsuits, Trump told the EPA to promptly notify the U.S. attorney general of the pending review and for him to do what “he deems appropriate.”

Significantly, Trump also told the EPA to be guided by Justice Antonin Scalia’s 2006 opinion in *Rapanos v. United States*.

The Rapanos case stemmed from landowners in Michigan filling wetlands for a shopping mall and condominiums without a Clean Water Act permit. The Army Corp of Engineers sued the property owners.

The landowners lost in district court and the court of appeals. The U.S. Supreme Court produced an usual 4-1-4 ruling, an indecisive outcome that Chief Justice John Roberts lamented as “unfortunate.”

In Scalia’s view, the Michigan case was just an example of a Corps that was out of control. The Corps’ application of the Clean Water Act was so broad it extended to “dry washes in immense arid deserts,” he wrote.

The act, according to Scalia, had a narrower definition of Waters of the United States. “They include streams, rivers, lakes, oceans — in short, relatively permanent, continuously standing or flowing bodies of water.”



Scott Yager

Four justices signed the opinion. And four justices signed a sharply different opinion by Justice John Paul Stevens. He said the court should defer to

the Corps’ expertise in preventing water pollution.

The justice in the middle of the ruling was Anthony Kennedy, who’s opinion has been the most consequential, even though no other justice signed it.

Kennedy said he agreed more with Stevens than Scalia, but agreed with Scalia that the case should be sent back to the court of appeals. His reasoning was much different than Scalia’s, however.

Borrowing a phrase from an earlier court opinion in a Clean Water Act case, Kennedy said the Corps should determine whether the filled-in wetlands had a “significant nexus” to navigable waters.

Scalia criticized Kennedy’s opinion for relying on a phrase not in the law. Nevertheless, federal courts have held up Kennedy as the controlling opinion.

As the Trump administration worked on remodeling WOTUS based on Scalia’s opinion, it was simultaneously defending in court an Obama rule that aligned more with Stevens’ opinion.

The Justice Department didn’t completely abandon the Obama rule, but it turned into sort of a neutral party, telling federal judges in various jurisdictions that a review was underway and asking them to sit tight and not make any rulings.

Some judges, however, didn’t wait. Federal district judges in Texas and Georgia in 2019 struck down the 2015 rule.

The most thorough dismantling of the Obama rule was by District Judge Lisa Godbey Wood in Southern Georgia.

The rule went beyond Kennedy’s “significant nexus” test, Wood wrote. “The court is bound by Justice Kennedy’s opinion.”

Ten months after Wood’s rul-

ing, the Trump EPA finalized its WOTUS definition, prompting lawsuits across the country.

Two days before the Trump rule went into effect, Judge William Martinez in Denver on June 19, 2020, stayed the rule in Colorado. The rule is now in effect in the other 49 states.

In his stay order, Martinez said that five Supreme Court justices rejected Scalia’s opinion, but Trump took it, fleshed it out and made it the law of the land. “Rapanos forecloses this interpretation of the (Clean Water Act),” Martinez wrote.

## Future of WOTUS

Yager, the lawyer for the cattlemen’s association, said he doubts the Biden administration can resuscitate Obama’s Clean Water Rule, not after the rulings against it.

Yager said Obama veterans will have a chance to show they’ve learned from their mistakes and write a rule that “threads the needle” between the Trump rule and the Obama rule.

“I think we have a good shot at getting a resolution people can live with,” he said.

## Endangered species

In Northern California federal court, 21 blue states are suing to overturn Trump’s ESA reforms. Twelve red states have intervened to defend the changes.

Environmental groups filed a separate lawsuit in the same court. Farm and industry groups have joined in as intervenors.

The Trump administration’s handling of the ESA case *Weyerhaeuser v. U.S. Fish and Wildlife Service* illustrates how a White House can shift positions without repudiating previous court arguments.

During the Obama administration, USFWS designated 1,544 acres owned or leased by the Weyerhaeuser timber company near New Orleans as “critical habitat” for the dusky gopher frog.

The frog, listed as endangered under the ESA, hasn’t been on the tree farm since 1965. Evenly spaced rows of trees block too

much sun, so it’s no longer frog “habitat.”

But if Weyerhaeuser burned some clearings, frogs could live there, so it was “critical habitat” — as in critical for recovery, the USFWS said.

By the time Trump took office, Weyerhaeuser had lost in federal district court and the court of appeals. While the case was waiting to be heard by the Supreme Court, the Trump administration proposed new rules for designating critical habitat.

Justice Ruth Bader Ginsburg asked the government lawyer arguing the case against Weyerhaeuser whether the company’s land would be critical habitat under the pending Trump rules.

The lawyer said he thought that even under Trump’s proposal the tree farm would be critical habitat because the land held such great promise for frog conservation.

In an 8-0 ruling, the Supreme Court vacated the lower court rulings, but not because of the pending Trump rule.

Chief Justice Roberts wrote that for land to be “critical” habitat, it has to be habitat.

“Adjectives modify nouns,” he wrote.

The high court sent the case back to the appeals court. The Trump administration asked the appeals court to let USFWS reconsider its decision to designate Weyerhaeuser’s tree farm as critical habitat.

“Potential policy changes may influence the service’s analysis,” the Justice Department wrote.

The appeals court sent the case back to where it started, in 2013, the District Court for Eastern Louisiana.

All the parties, including Weyerhaeuser, the Center for Biological Diversity and USFWS, soon agreed to settle the case. USFWS withdrew the “critical habitat” designation from the tree farm, and everyone agreed the settlement didn’t set any precedent.

## NEPA revisions

Seven months into his term, Trump signed an executive order calling for “discipline and accountability” in federal environmental reviews.

He was three years into his term before his administration announced NEPA reforms. The rule went into effect Sept. 14.

Federal lawsuits to overturn the rule are pending in Virginia, New York and California.

The lawsuit farthest along is before Judge James Jones in Virginia. On Sept. 11, he denied a motion by environmental groups to issue a preliminary injunction to block the reforms from taking effect.

Jones, a Clinton appointee, said he may need to hear expert testimony before deciding the rule’s legality.

The American Farm Bureau Federation and the National Cattlemen’s Beef Association are among the groups that have intervened in the lawsuit.

Yager said an early decision in Virginia favorable to the Trump rule could at least delay its replacement.

“It might slow down the Biden administration a bit,” Yager said.

# Fine: Farm was also fined \$7,200 for not reporting the first worker’s death

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In September, Health Secretary John Wiesman ordered more than 3,000 Gebbers employees to be tested for COVID-19. Less than 1% of the workforce tested positive, a low rate compared to the general population of Okanogan County.

The farm cited the low rate to buttress its argument that it sought to protect workers by consulting with an infectious disease specialist. The farm’s safety plan relied on isolating workers in groups of 42, rather than the state standard of 15.

“The number (15) is not some magical number,” Philpott said.

Gebbers’ alternative plan ran afoul of state regulators as early as May. An H-2A worker complained that he was quarantined without access to water to drink or wash with.

L&I initiated an inves-

tigation May 28 and fined the farm \$13,200 for violations related to the use of bunk beds and not having barriers in kitchens and lavatories.

L&I started another investigation in July after anonymous calls from workers. The first caller said someone had died of COVID-19 and that worker he lived with were not tested and sent to different cabins, according to an L&I.

A second caller said he feared hundreds of workers were infected, including himself, and that he was worried he would die. The caller said the sick were not being treated, according to L&I.

L&I ordered Gebbers on July 22 to come into compliance with state standards. Agency investigators returned unannounced daily to see whether the farm complied.

Gebbers racked up its large fine over a 12-day

period, July 16-27.

On each day, a bus with a capacity of 42 passengers took 42 farmworkers to and from orchards. The workers were not 6 feet apart, according to L&I. The farm incurred an \$84,000 fine for every day.

Over the same 12 days, the farm violated rules by housing workers in bunk beds, according to L&I. The penalty for the housing violation was also \$84,000 a day.

Lesser violations rounded out the fine. L&I said the company didn’t keep toilet paper or have hand-washing stations in every field bathroom, and didn’t have physical barriers in a community kitchen.

The farm also was fined \$7,200 for not reporting the first worker’s death to L&I within eight hours. The worker died at a hospital, and the farm didn’t know of his death until several days later, Philpott said.

# Chlorpyrifos: Buffer zones have been increased around sensitive sites and bodies of water

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handle chlorpyrifos. In the past, unlicensed employees could spray if they were supervised by someone who is licensed.

Buffer zones have been increased around sensitive sites and bodies of water. For aerial applications or non-targeted air-blast sprayers, the buffer is 300 feet. For targeted air-blast sprayers, the buffer is 150 feet, and for other ground-based equipment, it is 60 feet.

Sensitive sites include farmworker housing units, though not farm residences or non-residential agricultural buildings such as barns and livestock facilities. That is based on feedback from farm groups, Kachadoorian said.

“There was some concern that they have control over their own properties, and that to actually put a buffer there would take away a lot of land when they could just basically leave,” she said. “So we allowed that particular option.”

Farm residences are already covered by protections in the federal Application Exclusion Zone, part of the U.S. Agricultural Worker Protection Standard.

Mixing and loading chlorpyrifos can only be done by licensed applicators or by those who successfully complete an ODA-approved training course after March 1, 2021.

Farms will be required to keep and maintain records for three years after

each application.

Finally, after Dec. 31, 2023, it will become illegal to use or sell chlorpyrifos in the state except for cattle ear tags, seed treatment and granular formulations.

“We believe that with our (protective) measures, the phaseout of December 2023 is appropriate,” Kachadoorian said.

Jenny Dresler, a lobbyist for the Oregon Farm Bureau and Oregonians for Food and Shelter, said the groups are still reviewing the final rule, though it does not appear to identify proposed alternatives or provide public funding for research.

“These are very significant restrictions,” Dresler said. “We are going to be looking for an investment so growers aren’t left without any tools down the road.”

Kachadoorian said it is unlikely the state will dedicate any assistance from the general fund, especially when the legislature is dealing with the coronavirus pandemic and 2020 fire season.

However, Oregon State University did receive a \$162,794 specialty crop block grant from ODA earlier this year to study alternatives to chlorpyrifos.

“We really intend to be meeting with other industries and find out what we can do to help them be able to grow their crops effectively,” Kachadoorian said.