

Sea Change?: Water Policy Under the Biden Administration



Kyle Robisch

With the new year comes a new president. Will the new year and administration also bring new water policy? Bet on it. Just as President Trump undid President Obama's signature water policy decision—the Clean Water Rule, which clarified and arguably expanded federal water permitting jurisdiction—President Biden is likely to rewind many of President Trump's water policy (and, more generally, environmental policy) decisions over the next four or more years. Beyond reversing President Trump's policies, expect

President Biden, and his nominee to helm the U.S. Environmental Protection Agency (EPA), former head of North Carolina Department of Environmental Quality Michael Regan, to put their own stamp on federal and state water policy.

What might that look like? Begin with the obvious: President Biden is likely to scrap, and perhaps even revamp, how EPA and the U.S. Army Corps of Engineers define “waters of the United States” (WOTUS). President Obama issued a new federal rule stretching the scope of that rule, and with it, the likelihood that a discharge or development activity triggered federal water permitting jurisdiction. President Trump undid that rule and issued a new, narrower one. Under President Biden, expect the regulatory seesaw to swing back toward the Obama-era approach. Whether President Biden merely revokes the current WOTUS rule, or also promulgates its own broader regulation, federal regulators are likely to require more federal water permits, more often.

The recent EPA Lead and Copper Rule revamp could also change. Just before Christmas last year, EPA modernized federal regulations governing lead and copper pipes, which hadn't been updated since 1991. Under the new rule, utilities are required to regularly test lead levels at child-care facilities and elementary schools, publicize information about lead water service lines, and tighten lead testing practices. Yet, some criticized the rule's lead pipe replacement obligations, which require utilities to replace a minimum of three percent of known or suspected lead service lines in certain communities annually, which is facially less than the old seven percent annual replacement requirement. (The EPA did, however, reduce exceptions baked into the old rule—EPA estimated those exemptions functionally watered down the seven percent requirement to closer to a one percent annual replacement rate.) President Biden could tweak or redo the rule; if he does, expect a Regan-

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led EPA to toughen testing and replacement requirements.

Other water policy changes could involve modifications to the Corps' recently released nationwide permits (which preauthorize and precondition certain common dredge-and-fill activities estimated to have minimal environmental impacts) and the Trump administration's rewritten coal-fired power plant wastewater regulations (which the Biden administration might simply stop defending in federal court).

More generally, environmental justice might animate more of EPA's enforcement and policymaking agenda. An Administrator Regan could also crank up enforcement. In North Carolina, Regan prioritized environmental enforcement, landing major settlements from energy and chemical companies in the state.

The EPA might even reverse the Trump administration's decision to delegate dredge-and-fill authority to the Florida Department of Environmental Protection. That decision, which made Florida just the third state to assume that authority, is already facing some headwinds:

environmental groups challenged the rule in Washington, D.C., federal court in January, while Florida Agriculture Commissioner Nikki Fried publicly called on President Biden to rescind the decision.

All of this is subject, as always, to litigation. Expect challenges to every Biden-led effort to backtrack from a Trump-era environmental decision. So, while we know what President Biden might try to do, whether his administration can get it done—and if so, how quickly, and to what degree—is the bigger question. Stay tuned!

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2021 Florida Water Resources Conference Canceled



Due to concerns for health and safety, the action taken by Gov. Ron DeSantis banning large gatherings, travel restrictions, and factors beyond our control that will severely impact the quality and negatively affect attendance, we regret to inform you that the 2021 Florida Water Resources Conference, scheduled for March 28-31, 2021, at the Gaylord Palms Resort and Convention Center has been canceled.

Thank you for your continued support and dedication to Florida's clean water environment.

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Water Environment Federation (along with the National Association of Clean Water Agencies, Water Research Foundation, and WaterReuse Association) as a Utility of the Future Today honoree for its water reuse program. It was one of 65 utilities in the nation praised for transformational work in community engagement, watershed stewardship, and recovery of resources such as water, energy, and nutrients.

“We’re honored to be recognized by the Water Environment Federation and its partners for embracing innovative ways to better serve our community with our comprehensive program that beneficially reuses 100 percent of the wastewater,” said Mike Hudkins, manager of the water reclamation division of Orange County Utilities.

The utility currently operates three regional water reclamation facilities that treat and reuse 60 million gallons per day of wastewater. Its extensive reuse system provides reclaimed water for agricultural, commercial, and residential irrigation; aquifer recharge; wetlands; and cooling.

Rejecting arguments by the **Suwannee River Water Management District**, an administrative law judge has backed renewing a permit for a North Florida business to pipe hundreds of thousands of gallons of spring water a day to a nearby bottling plant.

Judge G.W. Chisenhall issued a 44-page order recommending that the district approve the permit for Seven Springs Water Co., which sells water to a Nestlé Waters North America bottling facility in the Ginnie Springs area of Gilchrist County.

Seven Springs filed the challenge last year after the district indicated it would not approve the permit. In part, the district pointed to the water being used by Nestlé, while the five-year permit would be held by Seven Springs.

“The greater weight of the competent substantial evidence establishes that the water allocation will be sealed in bottles, packages, or other containers for sale for human consumption at the facility, which is not owned or controlled by Seven Springs (one of the effects of this is that there will be no way for the district to ensure compliance with any conditions for issuance limiting the bottling/packaging use—the district will not be able to enforce the permit against Nestlé),” the district said in a document filed last month in the case.

But Chisenhall pointed to a contract

between Seven Springs and Nestlé and wrote that Seven Springs “provided reasonable assurances, supported by competent, substantial evidence during the final hearing” that the plant would be able to process the requested amount of water.

“Seven Springs provided competent, substantial, and un rebutted evidence of the contractual obligation between it and Nestlé, and of the obligation for all water to be used at the bottling plant,” Chisenhall wrote. “Thus, the district now has reasonable assurances that all of the water withdrawn by Seven Springs will be utilized for a beneficial use, i.e., bottled water for personal consumption.”

Under administrative law, Chisenhall’s recommended order will go back to the district for final action.

The proposed permit renewal has drawn criticism from environmentalists, who point to concerns about issues such as the effects of spring withdrawals on the Santa Fe River. The proposed permit would allow Seven Springs to withdraw nearly 1 million gallons a day from its wells and provide it to Nestlé.

The **U.S. Department of the Interior** has taken steps to strengthen the Land and Water Conservation Fund (LWCF) by rescinding Trump administration policies that significantly undermined the landmark conservation program. Secretarial Order 3396 revokes Secretarial Order 3388, an order signed on Nov. 9, 2020, that unilaterally imposed new restrictions to inhibit the availability of LWCF funding for federal land and water acquisitions.

“The Land and Water Conservation Fund has been crucial to protecting public lands, conserving wildlife habitats, and improving access to outdoor recreation. The department’s actions affirm our support for

one of America’s most successful and popular conservation programs,” said Shannon A. Estenoz, principal deputy assistant secretary for fish and wildlife, and parks. “We look forward to further strengthening this successful program to ensure that all communities, from hikers and sportsmen, to urban and underserved citizens, have access to nature and the great outdoors.”

In addition to rescinding the November 2020 Bernhardt policy, Secretarial Order 3396 instructs the National Park Service to revise the *Land and Water Conservation Fund Assistance Manual* to remove the restrictive policies implemented in the previous order, and to reinstate pre-existing implementation of the LWCF state assistance program and Outdoor Recreation Legacy Partnership (ORLP) program. The ORLP program is the only LWCF competitive grant program dedicated to addressing the recreational gap in underserved urban areas.

Since its inception in 1965, the LWCF has funded \$4 billion worth of projects in every county in the United States. Last year, Congress permanently funded the LWCF at \$900 million per year with wide bipartisan support. At no cost to taxpayers, the LWCF supports increased public access to, and protection for, federal public lands and waters—including national parks, forests, wildlife refuges, and recreation areas—and provides matching grants to state and tribal governments for the acquisition and development of public parks and other outdoor recreation sites.

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Correction

On page 16 of the February 2021 issue of the magazine, the first paragraph of the article stated that a municipal water tank in Destin was the winner of the 2020 Tank of the Year competition sponsored by Tnemec. The water tank belongs to Destin Water Users, which is a member-owned, nonprofit private utility.

