

What Happens Next

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401 Cert. Rule



The Draft Rule

- Draft Rule was promulgated on August 22, 2019 (84 Fed. Reg. 44080)
- Comments Due October 21, 2019
- The WOTUS repeal rule received 700,000 comments; expect fewer here.



Litigation

- Certain States and Enviros will likely file challenges.
 - There may be multiple challenges filed in district courts around the country – expect forum shopping.
 - Plaintiffs may have a good chance of success on the merits and may succeed in getting the new rule stayed because it's a novel new interpretation of the law and is arguably inconsistent with Supreme Court precedent.
 - Litigation will certainly last past the 2020 election.
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Congressional Review Act

- Congress has 60 legislative days to review a new regulation submitted to Congress for review, and can overrule the regulation by passing a joint resolution. That joint resolution, of course, can be vetoed by the President. 5 U.S.C. § 801(b)(2)
- If the Democrats take the White House, and take control of Congress, it might be used. Expect the current administration to work hard to avoid the CRA by submitting to Congress more than 60 legislative days before the end of the Trump administration.



The Election

- If Trump is re-elected, expect the litigation to continue well into his second term. If the courts rule against the administration, expect extended continued rule-making efforts.
 - If the administration changes hands in January 2021, expect the new administration to stop defending it in court and to begin to unwind this rule, assuming it hasn't gone final. If it has gone final by then and survived the legal challenges, it is possible that EPA will try to repeal and replace it.
 - Expect new litigation by the pipeline industry under the second scenario.
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Conclusion

- It's going to be a mess for a long time.
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