

INSIGHTS

The Rule of Law, Agency Enforcement and the Environment

November 6, 2018

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Over the past two years, officials within President Trump's administration have invoked the rule of law regarding the administration's enforcement goals on issues ranging from [marijuana production](#) to [immigration](#). Late last month, we saw a glimpse into how the Department of Justice's Environment and Natural Resources Division (ENRD), at the time led by Acting Assistant Attorney General (AAG) Jeffrey H. Wood, [\[1\]](#) views application of the rule of law to environmental and natural resource litigation and enforcement. The Acting AAG presented the keynote speech at the American Bar Association's Section of Environment, Energy, and Resources (SEER) Conference. He reflected on his time as AAG with ENRD. ([His full remarks are available here.](#)) Acting AAG Wood's remarks built upon the March 2018 guidance entitled "Enforcement Principles and Priorities." Bracewell's Environmental Strategies Group developed a blog series on the guidance, [accessible here](#).

In his remarks at the SEER Conference, Wood emphasized that the impartial rule of law is as much a method of decision-making as it is an outcome. For ENRD, this includes everything from increasing prosecution of wildlife trafficking crimes to defending controversial — but still lawful — projects such as federally permitted pipelines. ENRD continues to defend such projects around the country, consistent with the March 2018 guidance, prioritizing enforcement cases that protect American infrastructure. And, although ENRD and other federal agencies have continued to bring tough enforcement actions against regulated entities for a variety of violations, Wood explained that they should strive for predictability and a fair and neutral reading of environmental laws and regulations. Instead of using enforcement to dictate a preferred policy, Acting AAG Wood asserted that ENRD's new approach will be to drive straight down the middle: Civil enforcement actions should never be used to convert guidance documents into binding rules, which would violate due process by evading notice and comment requirements. Many regulated entities welcomed this perspective based on their strong preference for a more stable and discernible background of legislation, regulation, and enforcement against which they can plan, invest, permit and comply.

But if the rule of law may be invoked to attack an agency's decision as unpredictable, unlawful or untethered to binding regulation, it may also serve to shield an agency as well. Acting AAG Wood described how FOIA requests for agency documents can often solicit documents that are, in the end, irrelevant to an agency decision-maker's final action because they are pre-decisional or "deliberative." Although such documents may be subject to production under FOIA, they may never have even been seen by a final decision-maker. Reversing DOJ's position from 1999, Acting AAG Wood recently issued a memo clarifying that they are not part of an agency's final

record for purposes of judicial review, and therefore should neither be produced at court nor listed as privileged information. Acting AAG Wood followed the views previously expressed by Attorney General Sessions that nationwide injunctions issued by federal district courts against agencies or federally permitted projects also frustrate the rule of law.

Rounding out his remarks, Acting AAG Wood reviewed ENRD's cases before the Supreme Court for this term. Much of ENRD's current Supreme Court activity involves amicus briefing on behalf of the government. This term, the Court's docket includes three cases — [*Carpenter v. Murphy*](#), [*Washington State Department of Licensing v. Cougar Den, Inc.*](#) and [*Herrera v. Wyoming*](#) — involving various Native American treaty rights. The Court will also hear arguments about designating critical habitat under the Endangered Species Act in [*Weyerhaeuser Co. v. U.S. Fish and Wildlife Service*](#), and it will consider whether Virginia's ban on uranium mining is preempted in [*Virginia Uranium, Inc. v. Warren*](#) and whether property owners must exhaust takings claims in state court before presenting federal takings claims in [*Knick v. Township of Scott, Pennsylvania*](#).

Finally, Acting AAG Wood described the “kid’s climate suit” — more properly, [*Juliana v. United States*](#) — as an effort to involve Article III courts in redesigning the United States’ environmental policy. The *Juliana* plaintiffs assert that existing climate policy violates an unenumerated constitutional right to a “climate system capable of sustaining human life.” For Acting AAG Wood, these climate change-based claims seek to usurp the lawful roles that Congress, the Executive and administrative agencies have with regard to climate policy. The Supreme Court has most recently [*denied the government's petition*](#) for a writ of mandamus to dismiss the suit as outside the jurisdiction of Article III courts, reasoning that the extraordinary relief requested was more appropriately directed to the Court of Appeals for the Ninth Circuit.

Under Acting AAG Wood, emphasis on the rule of law is an animating and decision-making principle that has shaped ENRD actions over the past two years — a trend Wood was confident would continue under the leadership of ENRD's new AAG, Jeffrey Bossert Clark.

[\[1\]](#) Jeffrey Bossert Clark assumed leadership of ENRD as assistant attorney general on November 1, 2018. At that time, Jeffrey H. Wood resumed his duties as principal deputy assistant attorney general of ENRD.