

Federal Environmental and Regulatory Updates Wetlands and Wildlife Developments Under the New Biden Administration

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Today's Presenter



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Uncertainty and change abounds...

- Changes expected in regulations addressing
 - Clean Water Act 404 program (WOTUS)
 - Endangered Species Act (and some high impact listings)
 - Migratory Bird Treaty Act
 - Bald and Golden Eagle Protection Act
 - National Environmental Policy Act
- Most of these changes will also be affected by litigation
- Uncertainty makes timing and cost estimates difficult

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Clean Water Act 404 Permitting

- Is there a water of the United States (WOTUS)?
- Will you be conducting activities within a WOTUS?
- If so, are those activities regulated activities?
- If so, is there a streamlined option for permitting available to you?

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What is a WOTUS?

- What constitutes a WOTUS has been revised several times over the course of the 404 permit program
- The Trump Administration repealed the 2015 Obama era WOTUS definition.
- The 2020 Navigable Waters Protection Rule (NWPR) considerably narrowed what constitutes a WOTUS
- Over a dozen lawsuits challenged the legality of the 2020 rule. In August 2021, an Arizona court vacated the NWPR (other courts have made similar rulings)
- In response to the Arizona ruling, the EPA and Corps announced they will apply a pre-2015 approach to determining WOTUS
 - Pre-2015 approach = 1986 regulatory definition plus guidance established pursuant to the Supreme Court's Rapanos and SWANCC guidance

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Proposed Definition of WOTUS

- The Biden Administration has proposed a rule to revise the definition of WOTUS. The proposed definition largely mirrors the pre-2015 approach to identifying WOTUS.
 - Traditional navigable waters, interstate waters, and the territorial seas, and their adjacent wetlands;
 - Most impoundments of “waters of the United States”;
 - Tributaries to traditional navigable waters, interstate waters, the territorial seas, and impoundments that meet either the **relatively permanent standard or the significant nexus standard**;
 - Wetlands adjacent to impoundments and tributaries, that meet either the **relatively permanent standard or the significant nexus standard**; and
 - “Other waters” that meet either the **relatively permanent standard or the significant nexus standard**.
- Includes long-standing exclusions: Prior Converted Croplands and Waste Treatment Systems.



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