

■ Permitting Reform and Environmental Review

Endangered Species Act

Issue Overview

In many areas of the country, land development and construction activities are impacted by the Endangered Species Act (ESA) due to their potential to affect federally listed species or their designated critical habitat. As the list of protected species grows, more private land is being designated as critical habitat and more housing projects trigger the ESA's cumbersome federal permitting processes.

Obtaining required ESA authorizations is neither easy nor fast, as it typically entails conducting species surveys, preparing biological assessments or habitat conservation plans, modifying planned projects to comply with species conservation measures, and providing compensatory habitat mitigation – each of which can result in significant delays and cost increases for project proponents. Furthermore, the innate uncertainty associated with many aspects of the ESA, coupled with the increasing number of other authorizations needed to construct new housing create additional challenges, delays and compliance costs that are difficult to recoup. Land owners are increasingly finding that the ESA permitting process is too expensive and difficult to navigate to provide needed affordable housing, which invariably translates into fewer projects being built and higher home prices.

Solutions

- Restore the regulatory reforms put in place during the first Trump administration, including finalizing a regulatory definition for the term “habitat,” restoring the 4(d) rule to authorize unavoidable impacts to “threatened” species, requiring full consideration of potential economic impacts from proposed critical habitat designations, and streamlining the ESA’s interagency Section 7 Consultation process.
- Rescind the U.S. Fish and Wildlife Service’s Mitigation Policy and Endangered Species Compensatory Mitigation Policy.
- Support language in H.R. 9533, the ESA Amendments Act of 2024, that amends the ESA’s Section 7 consultation provisions to clarify the purpose of formal consultations is minimization of potential impacts to species or habitat, and not mitigation for unavoidable impacts.

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Waters of the United States (WOTUS)

Issue Overview

The regulatory phrase “waters of the United States” (WOTUS) determines the extent of federal jurisdiction under the Clean Water Act (CWA). This regulation directly impacts builders and developers who must obtain CWA permits for their land development or construction activities if those activities result in either a discharge of pollutants or the placement of dredged or fill material into CWA jurisdictional waters or wetlands.

Unfortunately, the WOTUS definition has changed numerous times over the past two decades due to Supreme Court cases and executive branch interpretations and it is now nearly impossible for land owners to know for certain if their properties contain WOTUS. Even the U.S. Army Corps of Engineers (Corps) and the U.S. Environmental Protection Agency (EPA) – the agencies responsible for overseeing the CWA permitting process – are unclear as to the scope of their jurisdiction. If jurisdiction is found, builders and developers are subjected to an onerous and uncertain permitting process that can take years and cost hundreds of thousands of dollars.

Solutions

- End the EPA/Corps’ current interagency approved jurisdictional determination (AJD) elevation review process that results in the issuance of non-regulatory coordination memorandums.
- Direct EPA and the Corps to implement the revised WOTUS rule consistent with the Supreme Court’s *Sackett* ruling and cease relying upon non-CWA jurisdictional features (i.e., ephemeral streams, man-made drainage ditches, pipes, and culverts) to provide a “continuous surface water connection” between an adjacent wetland and a downgradient jurisdictional waterbody.
- Undertake a federal rulemaking to amend the definition of WOTUS and provide needed regulatory guidance to clarify how the agencies are interpreting the concepts of “relatively permanent flow” and “continuous surface water connection” to establish federal CWA jurisdiction over certain wetlands and landscape features.
- Streamline the CWA jurisdictional determination and permitting processes to speed up development.