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Waters of the United States/Clean Water Act: Environmental Organizations Notice of Intent to Sue U.S. Environmental Protection Agency for Alleged Violations of Endangered Species Act

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The Waterkeeper Alliance and a number of other environmental organizations (collectively “Waterkeeper”) sent a February 13th Notice of Intent to Sue (“NOI”) to the United States Environmental Protection Agency and United States Corps of Engineers (collectively “EPA”) alleging violations of the Endangered Species Act (“ESA”) in issuing a revised regulatory definition and final rule defining the scope of waters federally protected under the Clean Water Act.

The other organizations authoring the NOI include:

- Center for Biological Diversity
- Center for Food Safety
- Turtle Island Restoration Network
- Waterkeeper Alliance
- Humboldt Baykeeper
- Lake Worth Waterkeeper
- Missouri Confluence Waterkeeper
- Russian Riverkeeper
- Monterey Coastkeeper
- Rio Grande Waterkeeper
- Snake river Waterkeeper
- Sound Rivers
- Upper Missouri Waterkeeper

The referenced EPA rule was issued through a prepublication notice by EPA on January 23rd. It addresses the Clean Water Act definition of waters of the United States (“WOTUS”). The rule has been denominated by EPA as the Navigable Waters Protection Rule.

EPA had previously rescinded the Obama era revision/clarification of WOTUS.

The definition of WOTUS is arguably one of the three critical jurisdictional terms in the Clean Water Act. Its importance is magnified by the fact that it is also relevant to non-National Pollution Discharge Elimination System programs such as:

- Section 404 of the Clean Water Act Wetland Permits
- Section 311 Oil/Hazardous Substances Release Requirements
- Clean Water Act Spill Prevention Control and Countermeasure Regulations

As a result, the scope of the definition of WOTUS has been the subject of frequent litigation, legislative oversight, rulemakings and public policy debates since the enactment of the modern version of the Clean Water Act in 1972.

The Waterkeeper NOI alleges that EPA has violated Section 7(a)(2) of the ESA.

The ESA provides for the conservation of threatened and endangered plants and animals and habitats in which they are found. The lead agencies for implementing ESA are the United States Fish and Wildlife Service and the United States National Oceanic and Atmospheric Administration Fishery Service. The agencies maintain a list of endangered species which can include birds, insects, fish, reptiles, mammals, crustaceans, flowers, grasses and trees.

The law requires federal agencies, in consultation with the previously referenced agencies, to ensure the actions they authorize, fund, or carry out are not likely to jeopardize the continued existence of any listed species or result in the destruction or adverse modification of designated critical habitat of such species. It also prohibits any action that causes a “taking” of any listed species of endangered fish or wildlife.

The ESA term “endangered” means a species is endangered of extinction through all or a significant portion of its range. “Threatened” means a species is likely to become endangered within the foreseeable future. The ESA defines species to include subspecies, varieties, and, for vertebrates, distinct population segments.

The alleged violation of Section 7(a)(2) of the ESA is based on Waterkeeper’s argument that the final EPA WOTUS rule “may affect” ESA-listed species without EPA having first engaged in a mandatory consultation. Further, it is alleged that the implementation of the rule prior to the conclusion of consultation activities constitutes a violation of Section 7(d) of the ESA, which is stated to prohibit the irretrievable commitment of resources pending the completion of consultation. This provision is stated to require EPA to consult under the ESA prior to taking any action that it funds, authorizes, or carries out so that it may affirmatively “insure” that the action is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of designated critical habitat.

Waterkeeper argues that EPA made a discretionary policy decision to narrow the scope of the WOTUS through a rulemaking. As a result, it is argued that EPA should have consulted as to whether the rule’s direct or indirect effects trigger may affect threshold of the ESA. The NOI cites EPA preamble language, noting that Congress gave the agencies discretion to articulate reasonable limits on the meaning of WOTUS.

EPA’s alleged failure to consult with the relevant federal agencies is also argued to guarantee “that some wetlands and other waters will be degraded or destroyed without the possibility that a reasonable and prudent measure could ever be implemented to protect a listed species or its critical habitat because the Agencies have improperly foreclosed the possibility of consultations in the rule.”

The NOI can be found [here](#).