



Walter Wright, Jr.
wwright@mwlaw.com
(501) 688.8839

Applicability Date Change/Waters of the United States Rule: Center for Biological Diversity Notice of Intent to Sue U.S. Environmental Protection Agency/Corps of Engineers for Violations of the Endangered Species Act

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The Center for Biological Diversity and a number of other organizations (collectively “CBD”) submitted a February 14th Notice of Intent to Sue alleging that the United States Environmental Protection Agency and the Army Corps of Engineers (collectively “EPA”) violated Section 7(e)(2) and Section 7(d) of the Endangered Species Act (“ESA”) because of those agencies two-year delay of the Clean Water Rule. See Definition of “Waters of the United States” – Addition of an Applicability Date to 2015 Clean Water Rule, 83 Fed. Reg. 5200 (Feb. 6, 2018).

The Clean Water Rule addressed the Clean Water Act definition of “Waters of the United States” by delaying the effective date of the rule. See 80 Fed. Reg. 37,054 (June 29, 2015).

CBD argues that EPA violated the previously referenced sections of the ESA by finalizing the rulemaking without first consulting with the United States Fish and Wildlife Service and the National Marine Fishery Service and failing to prepare a Biological Opinion.

CBD’s February 14th letter argues that the applicability date rule change will alter the protection for several categories of wetlands and replace such protections with a “vague and arbitrary definition based on undisclosed guidance, interpretations, memos, letters, and policies, which is likely to eliminate these and many other protections.” It further argues that the rule alters Clean Water Act jurisdiction and the change has not been evaluated nor is there any legitimate basis.

The letter further states in part:

Cumulatively, the resulting loss of waters and wetlands will degrade and destroy habitat for endangered species, harming or even killing individuals from numerous listed species.

The specific violations are alleged to include:

- Failure to Insure No Jeopardy; Failure to Insure Against Destruction or Adverse Modification of Critical Habitat
- Irreversible or Irretrievable Commitment of Resources

[A copy of the February 14th letter can be downloaded here.](#)