



Association of State Wetland Managers Hot Topics Webinar Series

Looking Back, Looking Forward: A Review of Trump Administration Rulemakings and Charting a Path Forward

January 12, 2021
2:00pm-4:00pm EST



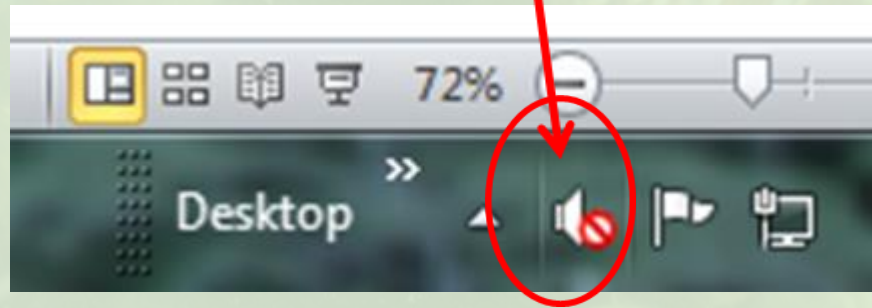
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AGENDA

2:00pm – 2:10pm	Welcome and introductions
2:10pm – 2:20pm	Federal Policy Changes Overview
2:20pm – 2:40pm	Waters of the U.S., Maui Decision
2:40pm – 3:00pm	Clean Water Act Section 401
3:00pm – 3:20pm	Nationwide Permits
3:20pm – 3:40pm	National Environmental Policy Act
3:40pm – 4:00pm	Q & A Session



Today's Presenters



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For more than 37 years, the Association of State Wetland Managers (ASWM) has stayed true to its mission to "promote and enhance protection and management of wetland resources, to promote application of sound science to wetland management efforts and to provide training and education for our members and the public." From ASWM's inception, one of the goals of the Association as identified by its first Board of Directors, was to "encourage minority participation in wetland protection, restoration and management." This goal remains important to ASWM, and we will continue to work on this while also recognizing there is much ground to cover. [Read full statement here.](#)

New ASWM Publication



ASWM Insights on the Final WOTUS Rule: The 2020 Navigable Waters Protection Rule

On April 21, 2020, the US Environmental Protection Agency (EPA) issued the Navigable Waters Protection Rule





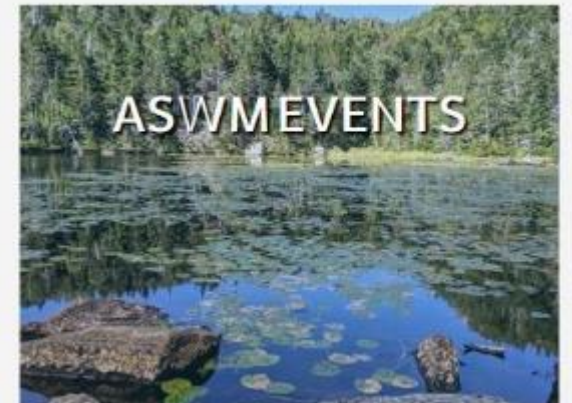
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The Association of State Wetland Managers is a nonprofit membership organization established in 1983 to promote and enhance protection and management of wetland resources, to promote application of sound science to wetland management efforts and to provide training and education for our members and the public.





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- Free Participation in our Member's Only Wetland Webinar Series
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Webinar Overview

- The Trump Administration has been a time of substantial change to water protection programs.
 - This webinar will review four key programs as a lens for discussing current and potential future actions
 - Definition of “Waters of the United States”
 - Section 401 water quality certification regulations
 - Section 404 Nationwide Permits
 - CEQ’s NEPA regulations
- What challenges do these and other changes pose to state and tribal programs?
- What potential actions could be taken by new Biden Administration?



The past four years were like ...





EXECUTIVE ORDERS

Presidential Executive Order on Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the “Waters of the United States” Rule

ECONOMY & JOBS | Issued on: February 28, 2017

EXECUTIVE ORDERS

Executive Order on Promoting Energy Infrastructure and Economic Growth

ENERGY & ENVIRONMENT | Issued on: April 10, 2019

EXECUTIVE ORDERS

Presidential Executive Order on Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure

INFRASTRUCTURE & TECHNOLOGY | Issued on: August 15, 2017

How it started ...



DEPARTMENT OF DEFENSE

Department of the Army, Corps of Engineers

33 CFR Part 328

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 110, 112, 116, 117, 120, 122, 230, 232, 300, 302, and 401

[EPA-HQ-OW-2018-0149; FRL-10004-88-OW]

RIN 2040-AF75

The Navigable Waters Protection Rule: Definition of "Waters of the United States"

AGENCY: Department of the Army, Corps of Engineers, Department of Defense; and Environmental Protection Agency (EPA).

ACTION: Final rule.

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 121

[EPA-HQ-OW-2019-0405; FRL-10009-80-OW]

RIN 2040-AF86

Clean Water Act Section 401 Certification Rule

AGENCY: Environmental Protection Agency (EPA)

ACTION: Final rule.

COUNCIL ON ENVIRONMENTAL QUALITY

40 CFR Parts 1500, 1501, 1502, 1503, 1504, 1505, 1506, 1507, 1508, 1515, 1516, 1517, and 1518

[CEQ-2019-0003]

RIN 0331-AA03

Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act

AGENCY: Council on Environmental Quality

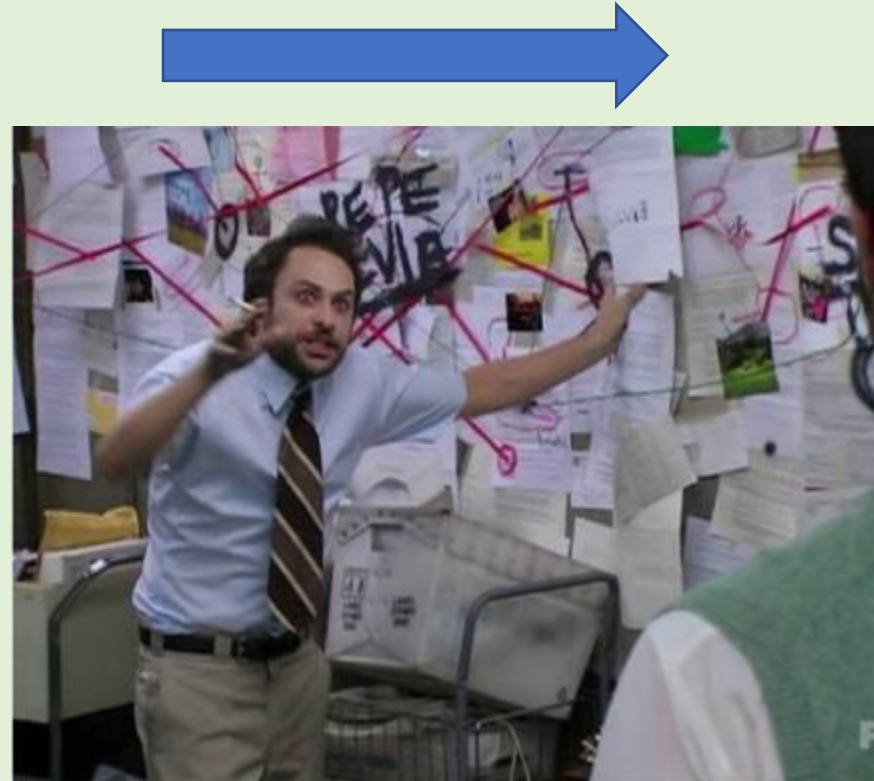
ACTION: Final rule.

How it ended (for now) ...



It's all connected!

- CWA geographic jurisdiction:
Navigable Waters Protection Rule
- CWA regulated activities:
County of Maui v. Hawaii Wildlife Fund
and subsequent EPA guidance



- CWA 401 WQCs
- NEPA review
- NWPs



Looking forward: pathways for change ...

- Legislative: Congressional Review Act
- Executive: Rulemaking (revising regulations or guidance)
- Judicial: Litigation challenges





“Waters of the United States”

- WOTUS establishes the geographic scope of the Act, and what waters CWA programs will protect.
 - Statute regulates discharges to “navigable waters,” defined as “waters of the US, including the territorial seas.”
- EPA and the Army Corps have defined WOTUS in regulations, beginning in the mid-1970s.
 - Definition was largely unchanged from late 70s to 2015.
 - 2015: Clean Water Rule redefined WOTUS, with heavy emphasis on science.
 - 2020: Navigable Waters Protection Rule re-redefined WOTUS more narrowly than previous interpretations.



“Waters of the United States”

- Waters listed as WOTUS in 2020 NWPR:
 - Territorial seas and traditional navigable waters (a)(1)
 - Tributaries (a)(2)
 - Lakes and ponds, and impoundments of WOTUS (a)(3)
 - Adjacent wetlands (a)(4)



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“Waters of the United States”

Waters excluded from WOTUS in the NWPR:

- Waters not listed as WOTUS
- Groundwater
- Ephemeral features
- Diffuse stormwater run-off
- Ditches not identified as WOTUS
- Prior converted cropland (PCC)
- Artificially irrigated areas
- Artificial lakes and ponds
- Water-filled depressions incidental to mining or construction activity
- Stormwater control features
- Groundwater recharge, water reuse, and wastewater recycling structures



State/Tribal Implications of “Waters of the United States”

- CWA focuses on WOTUS, so a narrower definition reduces CWA programs:, such as:
 - Scope of assumable programs under 402 and 404
 - Waters requiring CWA standards under 303
 - Permits subject to 401 water quality certification
 - Use of oil spill cleanup fund under 311
- States and Tribes can choose to protect more waters as “waters of the State/Tribe”
 - Those programs would be based on state or tribal law and not federally enforceable
 - Some states have self-imposed limitations on being more protective than federal requirements



County of Maui v. Hawaii Wildlife Fund (140 S. Ct. 1462 (2020))

- The central issue was whether the Clean Water Act requires a permit when pollutants originate from a point source but are conveyed to navigable waters by a non-point source (in this case, groundwater).
- Permit is required when such a discharge is the "functional equivalent of a direct discharge."
- Transit time
- Distance traveled
- Nature of material through which the pollutant travels
- Extent pollutant is diluted or chemically changed as it travels
- Amount of pollutants entering navigable waters (i.e., certain streams, rivers, lakes, and oceans) relative to the amount of pollutants that leaves the point source
- The manner by or area in which pollutants enter navigable waters
- Degree to which the pollutant (at that point) has maintained its specific identity
- The Court indicated that the most important factors would be the time it takes for a pollutant to reach navigable waters and the distance traveled, but it provided very little clear guidance regarding the time and distance factors.



Draft Guidance Memorandum: Applying Maui

- Interpretation of SCOTUS *functional equivalent test*
 1. *An actual discharge of a pollutant to a water of the United States is a threshold condition that must be satisfied before the need for an NPDES permit is triggered.*
 2. The discharge of pollutants that reaches, or will reach, a water of the United States must be from a point source to trigger NPDES permitting requirements.
 3. Only a subset of discharges of pollutants to groundwater that ultimately reach a WOTUS are the “functional equivalent” of a direct discharge to a water of the United States.
 4. *Considering System Design and Performance as Part of the “Functional Equivalent” Analysis*



Implications for States/Tribes

- For some confirms existing approach
- Others will need to rethink programs
- Guidance leaves open can states create their own threshold criteria?
- Do you weigh any of these factors differently?

Practical Implementation Questions?
What does a permit look like?
What does the form look like?
Where will this new data be housed?
New reporting systems?
Where is the point of compliance?
Do you need to do a reasonable potential analysis?
How do you deal with mixing zones, attenuation, etc.?



401 Water Quality Certification

- CWA §401 provides:
 - No federal permit or license can be issued that may result in a discharge to waters of the United States
Unless
 - The state or authorized tribe certifies that the discharge is consistent with standards and other water quality goals, or waives
- No 401 cert or waiver means no federal permit or license



401 Water Quality Certification

- EPA finalized new 401 cert regulations in July 2020:
- Establishes timelines that may not be paused
- Restricts scope of considerations to applicable water quality requirements related to the discharge, not activity as a whole
- Requires cert to cite legal authority for certification decisions
- Indicates 401 cert conditions in permits/licenses are enforceable only by federal agencies



State/Tribal Implications of 401 Water Quality Certification

- New rule affects State/Tribal 401 certification programs:
- Requires a pre-filing meeting request from applicant before certification process begins
- Establishes timeframes potentially inconsistent with existing state/tribal programs
- Limits considerations to water quality requirements imposed on point sources, potentially narrower than existing programs



Nationwide Permits

- CWA § 404(e) authorizes the Sec. of the Army to issue general permits for categories of dredge/fill discharges in WOTUS with no more than minimal adverse environmental impacts.
- Typically issued every five years (this time ahead of schedule).
- Reduce administrative process and approval time.
- Are subject to 401 certification, and (where applicable) CZMA consistency determination.
- Require pre-construction notification (PCN) to the Corps for some but not all of the NWP.
- Currently more than 50 permit programs for various projects that fall under a NWP.
- Authorize about 35,000 activities per year (reported) plus about 30,000 non-reporting activities.



Nationwide Permits

- Sept. 15, 2020: Proposal to reissue with modification the existing NWP's & general conditions and definitions (ahead of the usual 5-year cycle).
- Several issues: fewer PCNs required, removal of 300 linear foot threshold for stream bed loss, timing of 401 certification...
- January 4, 2021: Corps issued the Final Rule – effective 60 days from publication in FR (not in FR yet).
- Reissuing and modifying 12 existing NWP's & four new NWP's.
 - Revises the NWP general conditions and definitions for the above 16 NWP's.
 - Not reissuing or modifying the remaining 40 existing NWP's or finalizing proposed new NWP E at this time. (continue to be in effect under the January 6, 2017, final rule).
- Retaining PCN requirement for federal permittees.
- Removed 300 linear foot limit for losses of stream bed in 10 NWP's (21, 29, 39, 40, 42, 43, 44, 50, 51, and 52) and replaced with ½ acre metric



State/Tribal Implications of Nationwide Permits

- NWPs can be an effective way of reducing administrative burden, but overuse can result in more than minimal adverse effects on aquatic resources.
- States and tribes may prefer individual permits authorizing discharge into certain resource types.
- Fewer PCNs would make it more difficult for states/tribes to understand impacts.
- Possible actions by Biden Administration – New Congress
 - Congressional Review Act
 - Stop publication
 - Require changes to ACOE approach to permitting (e.g., remove oil and gas pipelines altogether)
 - Extend deadline to match previous March 2022 expiration deadline of all other current NWPs.



National Environmental Policy Act(NEPA)

- In August 2017, Executive Order 13807 directed CEQ to revise NEPA regulations to ensure quicker reviews of infrastructure projects
- CEQ published a final rule in July 2020, which applies to all NEPA processes, not just those related to infrastructure. The rule:
- Applies to all NEPA reviews commenced on or after September 14, 2020.
- Preempts all federal agency procedures/guidelines that are not "consistent" with the rule
- Directs 85 federal agencies to propose revised agency procedures to conform by September 14, 2021



National Environmental Policy Act(NEPA)

- The new rule: Sets presumptive time and page limits for EISs and EAs
- Redefines definition of “major federal action,” and actions that do not qualify
- Defines alternatives and impacts that will not be considered
- Repeals requirements to consider cumulative and indirect impacts
- Allows applicants/contractors to assume a greater role in EIS preparation
- Encourages use of State and Tribal documents prepared to comply with NEPA.



State/Tribal Implications of NEPA

- Could reduce federal government transparency about potential harms from federal actions to state and tribal resources
- Could reduce meaningful participation by states and tribes in analysis of impacts from federal actions
- Could limit consideration of climate change effects
- Could leave environmental justice concerns vulnerable, by downplaying cumulative and indirect effects
- By allowing project proponents to lead EIS preparations, could lead to potential conflicts of interest undisclosed to states, tribes, and the public

Questions and Discussion





Thank You!

Association of State Wetland Managers

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