

EPA PROPOSES ROLLBACK OF WETLANDS PROTECTIONS

The new EPA clean water regulatory proposal could fast track a much stricter state proposal in California.

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The EPA has proposed a new regulation over clean waters that would limit the waterways that fall under federal protection and roll back Obama-era rules. The announcement has come as California's Water Board is releasing a much stricter guideline, intended to close regulatory loopholes. The EPA's proposal could fast-track the state-level regulation.

"EPA's proposal comes just as the Water Board is rolling out its own program for final adoption," Clark Morrison, a partner at [Cox, Castle & Nicholson LLP](#), tells GlobeSt.com. "Unfortunately, the State's program has serious flaws, and the new EPA proposal has put the State's program on a fast-track for approval with almost no additional public review. At a time when the State is facing a serious housing crisis, this rush to judgment may be highly unproductive."

California's water rule has been in the works for a decade, but has faced challenges.

"California's State Water Board has been working on a new wetlands program for the last ten years, with fierce opposition from industry," says Morrison. "Although originally conceived as a stopgap for certain limited regulatory loopholes created by the Supreme Court, the Water Board's proposal has morphed into a full-fledged regulatory program with teeth far sharper than those of even Obama's Clean Water rule."

The new EPA rule could also complicate efforts to comply with the Federal Endangered Species Act, according to Morrison. "The most expeditious way to get ESA coverage is to do it through the Army Corps of Engineers during the wetland Clean Water Act process," he says. "If a landowner or developer does not have federal wetlands on his or her property, he or she must secure ESA coverage directly from the Fish and Wildlife Service. This process is more protracted, often taking years longer than the original process would have taken, and is subject to stricter legal standards."

The EPA regulation could also complicate California projects in other ways, particularly through the Habitat Conservation Planning process. "Although Habitat Conservation Planning is an important and valuable tool, the limited staff at the federal wildlife agencies will be hard-pressed to address the greatly increased workload," adds Morrison.

The EPA proposal has a long runway before it is adopted. The process includes a lengthy public vetting process and likely litigation, all of which could take years before implementation. "In the meantime, the State of California will begin to implement its new program in 2019," explains Morrison. "If a landowner or developer is planning a project that may affect wetlands, it would be prudent to file an application to the regional water board as soon as possible. Applications submitted before the effective date of the new California program will not be required to comply with the provisions of that program."