



# ► Changes in Environmental Regulation:

What clients need to know

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# CHANGES IN ENVIRONMENTAL REGULATION

What Clients Need to Know



► Change is inevitable. Change is constant.

*-Benjamin Disraeli*

When you're finished changing, you're finished.

*-Benjamin Franklin*

If you don't like change, you will like irrelevance even less.

*-General Eric Shinseki*

Change means that what was before wasn't perfect. People want things to be better.

*-Esther Dyson*



# CHANGES IN ENVIRONMENTAL REGULATION

What Clients Need to Know



## ▶ Outline

1. Waters of the United States - Final Rule
2. Northern Long-Eared Bat - Interim Rule

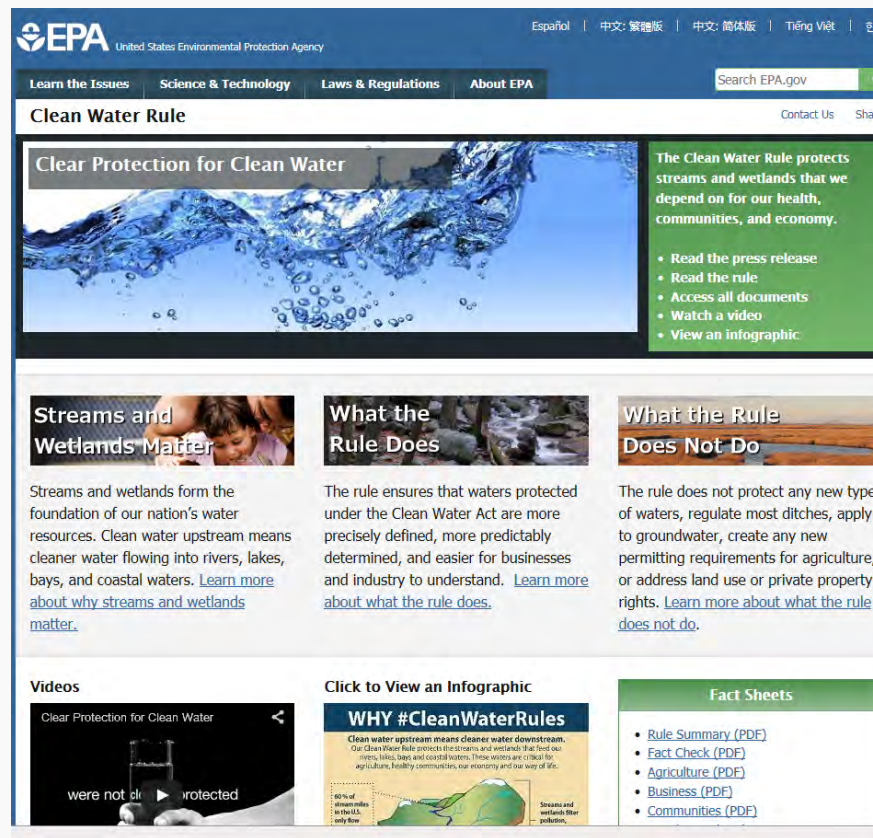


# WATERS OF THE U.S BACKGROUND

Why should you care?

## ▶ Applicability

- The Clean Water Act applies to discharges to “navigable waters” or “Waters of the U.S.”.
- Applies to ALL parts of the Clean Water Act
- CWA defines “navigable waters” as “Waters of the United States, including territorial seas”

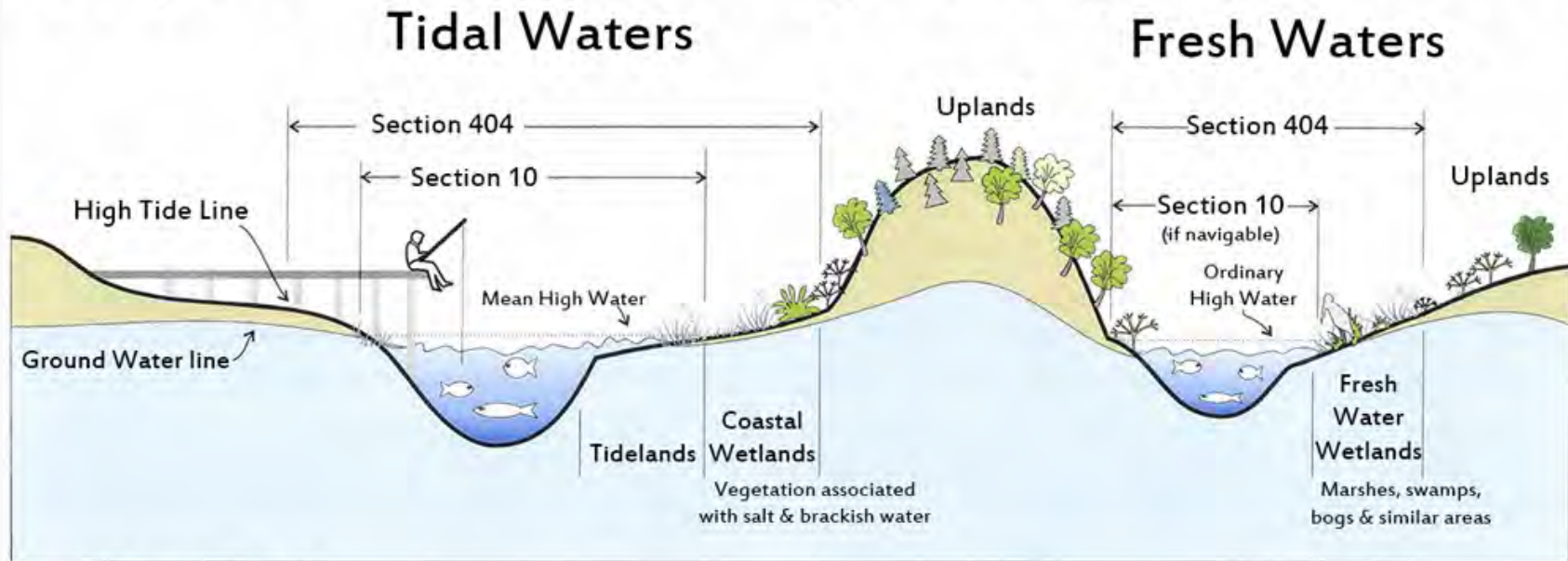


The screenshot shows the EPA website's page for the Clean Water Rule. The header includes the EPA logo and navigation links for 'Learn the Issues', 'Science & Technology', 'Laws & Regulations', and 'About EPA'. A search bar is also present. The main content area features a large image of water splashing with the title 'Clear Protection for Clean Water'. To the right of this image is a green box with the text: 'The Clean Water Rule protects streams and wetlands that we depend on for our health, communities, and economy.' Below this are four bullet points: 'Read the press release', 'Read the rule', 'Access all documents', and 'Watch a video'. Further down, there are three columns of text: 'Streams and Wetlands Matter', 'What the Rule Does', and 'What the Rule Does Not Do'. At the bottom, there are sections for 'Videos' (with a video player thumbnail), 'Click to View an Infographic' (with a 'WHY #CleanWaterRules' infographic), and 'Fact Sheets' (with links to 'Rule Summary (PDF)', 'Fact Check (PDF)', 'Agriculture (PDF)', 'Business (PDF)', and 'Communities (PDF)').

# WATERS OF THE U.S. BACKGROUND

Why should you care?

## ▶ Corps of Engineers Regulatory Jurisdiction



Typical examples of regulated activities

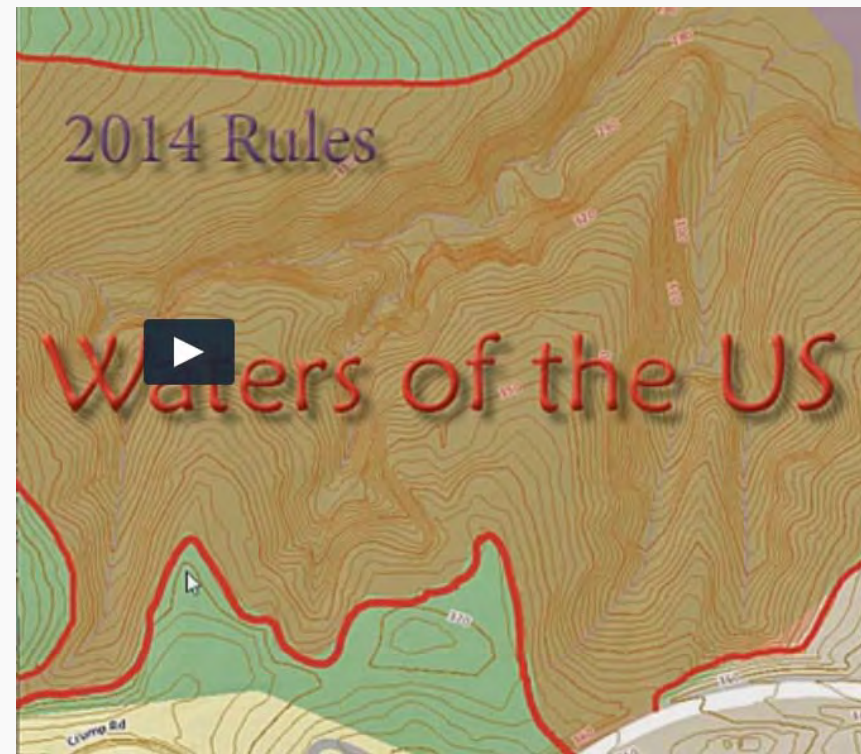
**Section 103**  
Ocean Discharge of Dredged Material  
Ocean discharges of dredged material.

**Section 404**  
Disposal of Dredged or Fill Material  
All filling activities, utility lines, outfall structures, beach nourishment, riprap, jetties, some excavation activities, etc.

**Section 10**  
All Structures and Work (navigable waters)  
Dredging, marinas, piers, wharves, floats, intake/outtake pipes, pilings, bulkheads, ramps, fills, overhead transmission lines, etc.

# WATERS OF THE U.S. BACKGROUND

Why should you care?



<http://d258jt32o5tsbc.cloudfront.net/neweparules15.html>

# WATERS OF THE U.S. BACKGROUND

Recent Timeline





# WATERS OF THE U.S BACKGROUND

Recent Timeline

## ► Prior guidance and competing court cases:

**2001** – *Solid Waste Agency of Northern Cook County (SWANCC) v. Army Corps of Engineers*, 51 U.S. 159 (2001).

**2003** – “Joint Memorandum”

**2006** – *Rapanos v. U.S.*, 547 U.S. 715 (2006)

**2008** – “Joint Memorandum”

**2011** – Guidance issued by EPA and the Corps

**2014** – Proposed rule



# WATERS OF THE U.S BACKGROUND

Recent Timeline



**Mar. 25, 2014**



March 25, 2014 – prepublication of proposed rule

April 21, 2014 - published in the *Federal Register*

November 14, 2014 – public comment period ends

June 1, 2015 – prepublication of final rule

??? – publication in *Federal Register*.

**Final Rule**

# WATERS OF THE U.S. FINAL RULE

What does the rule say?



- ▶ The rule does TWO main things:
  - (1) expands the definition of WOTUS; and
  - (2) changes the process to determine a WOTUS.

# WATERS OF THE U.S. FINAL RULE

What does the rule say?



▶ The rule *expands the definition of WOTUS*

***tributary***  
***adjacent***  
***other waters***

# WATERS OF THE U.S. FINAL RULE

Types of "Waters of the U.S."

## ▶ The rule *changes the process to determine a WOTUS:*

- Lists **SEVEN** types of Waters of the U.S. and groups them into **TWO** categories

**CATEGORY 1:**      **Jurisdiction by rule:**      automatic jurisdiction

**CATEGORY 2:**      **Case by Case Jurisdiction:**      discretionary jurisdiction

# WATERS OF THE U.S. FINAL RULE

Types of "Waters of the U.S"

## ▶ Category 1: Jurisdiction by Rule:

- The agencies automatically take jurisdiction over:

- (1) **Traditional Navigable Waters:** All waters currently used, used in the past, or susceptible to use in interstate or foreign commerce;

- (2) All **interstate waters**, including wetlands;

- (3) **Territorial seas;**

- (4) Impoundments of (1) through (3);

- (5) All **tributaries** of (1) through (4);

- (6) **All waters, including wetlands, adjacent to (1) through (5).**

- This is a NEW category

# WATERS OF THE U.S. FINAL RULE

Types of “Waters of the U.S”



## ▶ Category 2: Discretionary Jurisdiction

- This is a NEW category
- The agencies can determine jurisdiction over these “other waters”.
- These waters may be isolated wetlands, non-connected ephemeral streams, ditches, etc., that are not a tributary or adjacent water.
- The “other waters” will have a “*significant nexus*”.
- The agencies will be able to issue blanket jurisdictional determinations on similarly situated waters in the same watershed.

# WATERS OF THE U.S. FINAL RULE

## Definitions



### ▶ **Tributary:** water with a **bed** and **bank** and **ordinary high water mark** that provides downstream flow

- Duration and volume of water do not matter
- Can be natural or man-made
- Does not lose status as tributary if there are man-made breaks so long as bed and bank can be identified
- Specifically includes ditches unless otherwise excluded





# WATERS OF THE U.S. FINAL RULE

## Definitions - Tributary



# WATERS OF THE U.S. FINAL RULE

## Definitions



▶ **Adjacent:** bordering, contiguous or *neighboring* waters to (1)-(5) waters, including waters separated from waters of the U.S. by dikes or barriers

- New category
- Does not have to touch

# WATERS OF THE U.S. FINAL RULE

## Definitions



## ▶ Neighboring:

**Proposed Rule:** waters in the riparian area or floodplain of traditional navigable waters, interstate waters, or their tributaries

### **Final Rule**

- (i) Waters located within 100 feet of the ordinary high water mark of a category (1) - (5) water;
- (ii) Waters located within the 100-year floodplain of a category (1)-(5) water AND not more than 1500 feet from the ordinary high water mark of such water.

# WATERS OF THE U.S. FINAL RULE

## Definitions



### ▶ Significant nexus

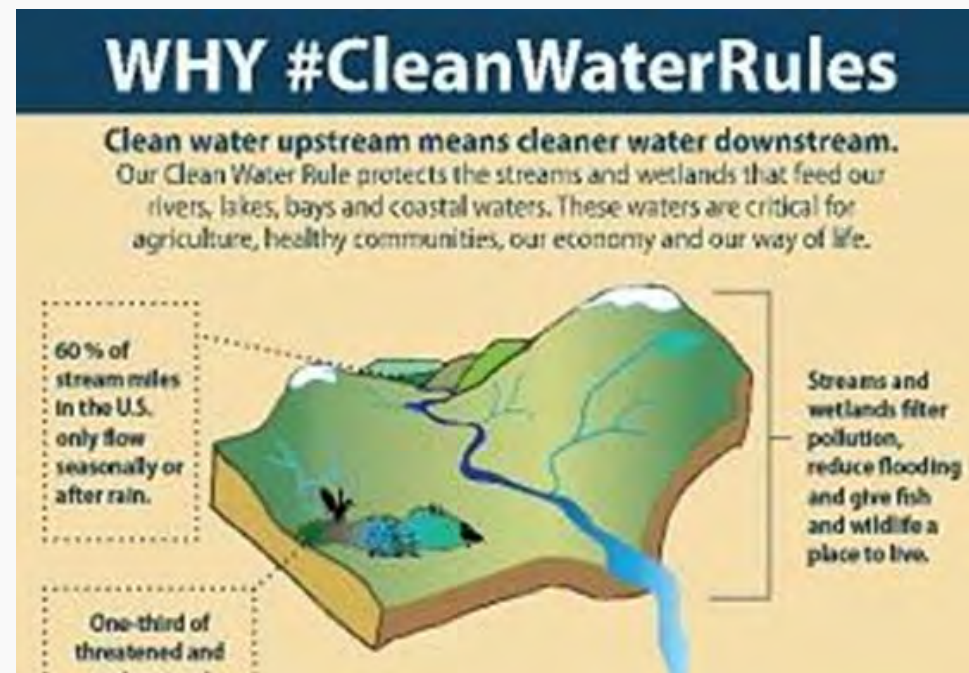
- Determined on a case-by-case basis (part of “Discretionary Jurisdiction” Category)
- Must be more than speculative or insubstantial effect
- Can be based on “similarly situated” waters when they perform similar functions and are located sufficiently close together
- Broadens the area and scope of waters considered

# WATERS OF THE U.S. RESPONSE

What is being said?

## ▶ EPA/USACE's stated purpose for the change:

- “enhance protection of the nation’s public health and aquatic resources, and increase CWA program predictability and consistency by increasing clarity as to the scope of “waters of the United States” protected under the Act.”
- “Ditch the Myth”



# WATERS OF THE U.S. RESPONSE

What is being said?

## ► **Opposition:** American Farm Bureau Federation



# WATERS OF THE U.S. RESPONSE

What is being said?

## ► **Opposition:** Congress

- HR 1732: Regulatory Integrity Protection Act 2015



# WATERS OF THE U.S. RESPONSE

What is being said?



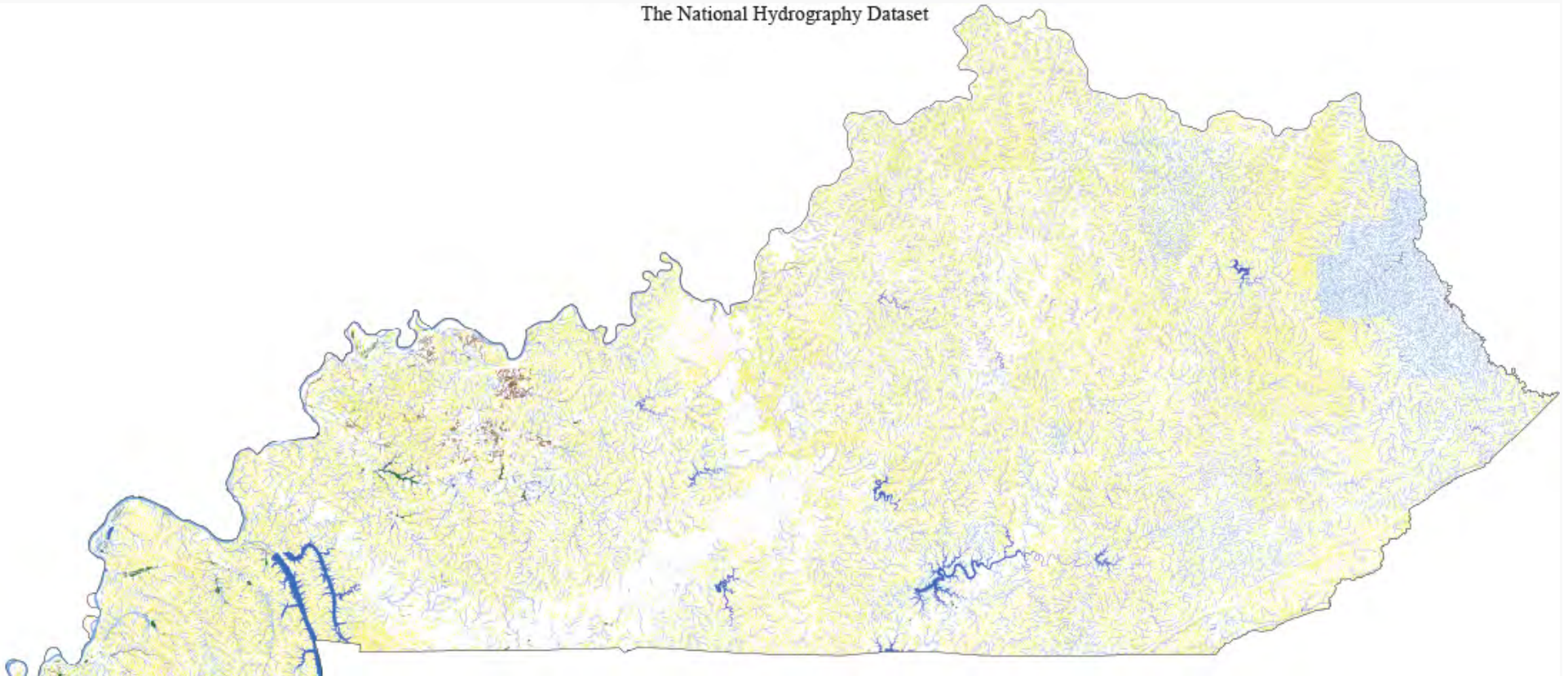


# WATERS OF THE U.S. RESPONSE

What is being said?



The National Hydrography Dataset



# WATERS OF THE U.S. RESPONSE

What is being said?



## ▶ National Hydrography Dataset Maps

- <http://science.house.gov/epa-maps-state-2013#overlay-context>
- Released August 27, 2014
- Came to light during a Congressional Science Committee hearing on WOTUS
- Purpose: depict tributaries and wetlands on a national and state scale
- Generated for EPA by USGS
- Originally requested in 2005 in response to the *Rapanos* case, but they were recently updated in 2013 (one month after EPA announced sending WOTUS rule to OMB)
- EPA says that the maps “have nothing to do with EPA’s proposed rule...”
- Congressman Smith (R-TX): “These maps show the EPA’s plan: to control a huge amount of private property across the country.”

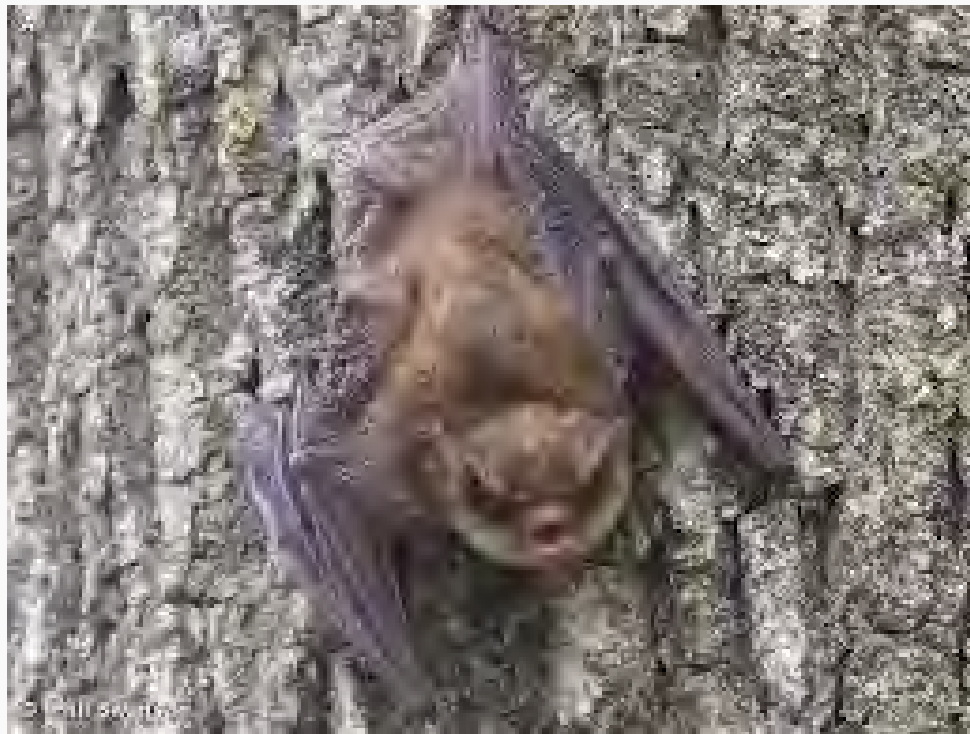


# ▶ NORTHERN LONG-EARED BAT: INTERIM RULE



# NORTHERN LONG-EARED BAT

Background



# NORTHERN LONG-EARED BAT

Construction practices



# NORTHERN LONG-EARED BAT

Conservation Memorandum of Agreement (CMOA)



## Conservation Strategy for Forest-Dwelling Bats

In the Commonwealth of Kentucky

U.S. Fish and Wildlife Service, Kentucky Field Office

April 2015



# NORTHERN LONG-EARED BAT

Conservation Memorandum of Agreement (CMOA)



**June**

Sun	Mon	Tue	Wed	Thu	Fri	Sat
1	2	3	4	5	6	7
8	9	10	11	12	13	14
15	16	17	18	19	20	21
22	23	24	25	26	27	28
29	30					

**July**

S	M	T	W	T	F	S
		1	2	3	4	5
6	7	8	9	10	11	12
13	14	15	16	17	18	19
20	21	22	23	24	25	26
27	28	29	30	31		

QUESTIONS?

Contact Information



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▶ **THANK YOU**  
from Smith Management Group

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