

WOTUS IS RESCINDED BY EXECUTIVE ORDER

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On February 28, 2017, the United States Environmental Protection Agency Administrator, E. Scott Pruitt signed a Notice of Intention to Rescind the Waters of the United States rule, promulgated by EPA and the Army Corps of Engineers pursuant to the Clean Water Act. The Senior Official Performing the Duties of the Assistant Secretary of the Army for Civil Works, Douglas W. Lamont, will sign the document today, March 1, 2017. The EPA and Army Corps intend to revise the regulations to “provide greater clarity and regulatory certainty concerning the definition of “waters of the United States,” consistent with the principles outlined in the Executive Order and the agencies’ legal authority.” Administrator Pruitt’s letter states:

Due to concerns about the potential for continued regulatory uncertainty, as well as the scope and legal authority of the 2015 Rule, 31 states and a number of other parties sought judicial review in multiple actions. Seven states plus the District of Columbia, and an additional number of parties, then intervened in those cases. On October 9, 2015, the U.S. Court of Appeals for the Sixth Circuit stayed the 2015 Rule nationwide pending further action of the court.

On February 28, 2017, the President of the United States issued an Executive Order directing the EPA and the Army to review and rescind or revise the 2015 Rule. Today, the EPA and the Army announce their intention to review that rule, and provide advanced notice of a forthcoming proposed rulemaking consistent with the Executive Order. In doing so, the agencies will consider interpreting the term “navigable waters,” as defined in the CWA in a manner consistent with the opinion of Justice Scalia in *Rapanos*. It is important that stakeholders and the public at large have certainty as to how the CWA applies to their activities.

https://www.epa.gov/sites/production/files/2017-02/documents/cwr_fr_notice_prepublication_version.pdf

This Notice of Intent followed immediately upon the execution of Presidential Executive Order on Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the “Waters of the United States” Rule. The Executive Order provides that “it is in the national interest to ensure that the Nation’s navigable waters are kept free from pollution, while at the same time promoting economic growth, minimizing regulatory uncertainty, and showing due regard for the roles of the Congress and the States under the Constitution.”

Further, EPA and the Army Corps “shall review the final rule entitled “Clean Water Rule: Definition of ‘Waters of the United States,’” 80 Fed. Reg. 37054 (June 29, 2015), for consistency with the policy set forth in section 1 of this order and publish for notice and comment a proposed rule rescinding or revising the rule, as appropriate and consistent with law.”

Importantly, the President weighed in on interpretation of the Clean Water Act, stating: the “definition of “Navigable Waters” in Future Rulemaking. In connection with the proposed rule described in section 2(a) of this order, the Administrator and the Assistant Secretary shall consider interpreting the term “navigable waters,” as defined in 33 U.S.C. 1362(7), in a manner consistent with the opinion of Justice Antonin Scalia in *Rapanos v. United States*, 547 U.S. 715 (2006).”

The Executive Order may be challenged as overreaching into the judiciary and the legislative branch by attempting to assert his own

interpretation of the statute.

The Executive Order can be found [here](#).

For practical purposes, the rule defining “Waters of the United States” under the Clean Water Act, predating the WOTUS Clean Water Rule, will continue to be effective and enforced until EPA and the Army Corps propose a new rule. It is generally agreed that the pre-existing rule created confusion due to the case-by-case determinations required to ascertain federal authority under the Clean Water Act. The pending cases challenging the WOTUS rule in the Sixth Circuit and a number of District Courts will now be deemed moot.

The California environmental attorneys at Bick Law LLP will continue to monitor the proposals for new rulemaking and the enforcement of the existing rule to assist clients to manage the complexities of the Clean Water Act.