

# ADMINISTRATIVE WATCH

ADDRESSING ENVIRONMENTAL, ENERGY AND NATURAL RESOURCE ISSUES



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## Executive Order Aims to Roll Back Clean Water Rule

On February 28, 2017, President Donald Trump signed an executive order, *Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the “Waters of the United States Rule”* (the Order), directing his administration to withdraw and reconsider the Clean Water Rule (the Rule), 80 Fed. Reg. 37054 (June 29, 2015). The Order is the first step in following through with President Trump’s campaign pledge to eliminate the Rule, which he characterized as a “massive power grab,” and begins the lengthy process of rescinding or revising the Rule.

The Clean Water Rule sought to clarify the definition of “waters of the United States” (WOTUS) and the extent of federal authority to regulate these waters under the Clean Water Act (CWA) after years of differing interpretations. The Rule was widely regarded by industry as having expanded the extent of waters to be regulated under the CWA. As a result, the Rule was generally considered to broaden the jurisdictional reach of the United States Army Corps of Engineers (the Corps) and United States Environmental Protection Agency (the USEPA) with regard to issues such as permitting for wastewater discharges and dredge and fill activities in navigable waters. The Rule was challenged by numerous industry groups, as well as 31 state attorney generals, including Scott Pruitt, the newly-appointed Secretary of the USEPA. Amid questions as to whether the court of appeals or the federal district court is the appropriate forum to hear challenges to the Rule, the United States Supreme Court granted review of this jurisdictional issue in January 2017. The Rule has been stayed in light of these ongoing challenges.

The recent Order lays out the following policy: “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 Congress and the States under the Constitution.” The Order directs the USEPA and the Corps to review the “Clean Water Rule: Definition of ‘Waters of the United States,’” for consistency with this national policy and to publish a proposed rule rescinding or revising the Rule. USEPA Administrator Pruitt announced that the USEPA intends to immediately implement the Order and publish a notice of intent to review the Clean Water Rule in the *Federal Register*. An advance version of this notice has been posted to the USEPA’s [webpage](#).

The Order also directs the USEPA and the Corps to consider interpreting the term “navigable waters” under the CWA in its rulemaking in a manner consistent with the opinion of Justice Scalia in *Rapanos v. United States*, 547 U.S. 715 (2006). Justice Scalia’s opinion in *Rapanos* endorsed a narrower interpretation of the term, limiting it to include only relatively permanent, standing or flowing bodies of water. Any revision or replacement of the Rule with a narrower definition of WOTUS will require the USEPA to undertake a lengthy rulemaking process, including public notice and comment, which almost certainly will be subject to numerous challenges.

Babst Calland attorneys will be monitoring the USEPA implementation of this Order and any further developments regarding the regulatory definition of “waters of the United States.” If you have any questions, please contact Lisa M. Bruderly at (412) 394-6495 or [lbruderly@babstcalland.com](mailto:lbruderly@babstcalland.com), or Angela M. Kilbert at (412) 394-6498 or [akilbert@babstcalland.com](mailto:akilbert@babstcalland.com).