

Environmental Law, Energy & Land Use Practice Group

March 2, 2017

NOTICE TO CLIENTS AND FRIENDS

Federal Development: "Waters of the United States" Rule

On February 28, 2017, President Donald J. Trump issued an executive order stating the following policy: “[i]t 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”.

The President ordered the Administrator of the Environmental Protection Agency and the Assistant Secretary of the Army for Civil Works to review the Final Rule entitled “Clean Water Rule: Definition of ‘Waters of the United States’,”¹ (the “2015 Rule”), in order for it to be consistent with the foregoing policy and to publish for notice and comment a proposed rule rescinding or revising the rule, as appropriate and consistent with law. The 2015 Rule has been characterized as expanding federal jurisdiction over state waters. The Executive Order also required them to 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). This may suggest a potential restriction on federal jurisdiction over smaller bodies of water.

Such regulatory review efforts of the Administrator, the Assistant Secretary and of the heads of all executive departments and agencies must include all orders, rules, regulations, guidelines, or policies implementing or enforcing the 2015 Rule for consistency with the new policy set forth in the Executive Order and shall rescind or revise, or publish for notice and comment proposed rules rescinding or revising, those issuances, as appropriate and consistent with law and with any changes made as a result of a rulemaking proceeding undertaken pursuant to subsection (a) of this section.

Regarding any litigation before the Federal courts related to the 2015 Rule, the Administrator and the Assistant Secretary must promptly notify the Attorney General of the pending regulatory review so that the Attorney General may, as he deems appropriate, inform any court of such review and take such measures as he deems appropriate concerning any such litigation pending the completion of further administrative proceedings related to the rule.

The regulatory provisions resulting from this executive order, could have significant impact for multiple sectors, such as real estate and agriculture. As such, it is reasonable to anticipate that litigation may follow the rulemaking process.

To further discuss or obtain additional information on how this development may impact you, please feel free to contact us at your convenience.

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¹ 80 Fed. Reg. 37054 (June 29, 2015).