

## Trump Executive Order Targets EPA Waters of the United States Rule

March 1, 2017

On February 28, 2017, President Trump signed an executive order aimed at reversing the controversial Clean Water Rule, also known as the Waters of the United States (WOTUS) Rule, implemented under the Obama Administration. The executive order calls on the Environmental Protection Agency (EPA) and Army Corps of Engineers to begin the lengthy administrative process of rescinding or revising the rule. The WOTUS Rule was one of several Obama-era environmental regulations specifically criticized by President Trump during the presidential campaign. Our memo analyzing the potential impact of the Trump Administration on the WOTUS Rule and other environmental rules and policies is available [here](#).

The WOTUS Rule was finalized in June 2015 and became effective on August 28, 2015. The rule defines “waters of the United States” in the context of the U.S. Clean Water Act (CWA), and therefore helps clarify what bodies of water are subject to federal protection, particularly in cases of ditches and where small wetlands and streams lead to rivers, lakes, and other large bodies. Before this rule, the prevailing test came from the 2006 Supreme Court case *Rapanos v. United States*, in which Justice Kennedy held that waters must have a “significant nexus” to navigable rivers and seas to receive federal protection.

Numerous industry and farm groups, and more than 30 states, claimed the rule would expand federal jurisdiction over ditches, wetlands and isolated streams, and infringe on private and state property holdings. These groups sued to enjoin the WOTUS Rule, and on October 9, 2015, the U.S. Court of Appeals for the Sixth Circuit stayed the rule nationwide. A related jurisdictional question has been accepted for review by the U.S. Supreme Court.

Although the executive order does not repeal the WOTUS Rule, it directs the EPA and Army Corps of Engineers to review the WOTUS Rule for consistency with the goals of “promoting economic growth [and] minimizing regulatory uncertainty” and to consider a new rule that reflects Justice Scalia’s plurality opinion in *Rapanos* that CWA jurisdiction attaches only to “navigable waters” and other waters with a relatively permanent flow, such as rivers or lakes. The executive order directs the Attorney General to take appropriate action concerning the pending litigation of the WOTUS Rule in light of these directives.

Any rescission or revision of the WOTUS Rule will be subject to the notice and comment requirements applicable to federal rulemaking, and will have to address the scientific record compiled by the EPA in support of the rule, a process that could take months, and possibly years, to complete, and is expected to be the target of administrative and legal challenges by environmental groups and other stakeholders.

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If you have any questions regarding the matters covered in this publication, please contact any of the lawyers listed below or your regular Davis Polk contact.

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