NAFSMA Alert - Advanced Notice of Intent to Review, Rescind or Revise Issued on WOTUS

The U.S. Environmental Protection Agency Administrator Scott Pruitt and the Office of the Assistant Secretary of the Army (with Douglas Lamont as the Senior Official Performing the Duties of the ASA for Civil Works) yesterday signed a Notice of Intention to Review and Rescind or Revise the Clean Water Rule.”  The notice [(**click here**)](http://cvfpb.ca.gov/wp-content/uploads/2017/04/WOTUSAdvNPR.pdf), has been submitted to but has not yet been published in the Federal Register.  This action follows the President’s signing of an Executive Order yesterday that calls for such action (text from White House website is provided below).  The 2015 rulemaking has been stayed since October 9, 2015 by the U.S. Court of Appeals for the Sixth Circuit pending further action of the Court.

The joint EPA-Army notice states that “the question of what is a “water of the United States” is one that has generated substantial interest and uncertainty, especially among states, small businesses, the agricultural communities, and environmental organizations, because it relates to the extent of jurisdiction for federal and relevant state regulations.”  The notice also states that “Agencies have inherent authority to reconsider past decisions and to revise, replace or repeal a decision to the extent permitted by law and supported by a reasoned explanation.” The notice also states that “such a revised decision need not be based upon a change of facts or circumstances” and that “A revised rulemaking based “on a reevaluation of which policy would be better in light of the facts” is well within the agency’s discretion,” and [a] change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency’s reappraisal of the costs and benefits of its programs and regulations.”

In closing the notice indicates, “Through new rulemaking, the EPA and the Army seek to provide better 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.

The text of the WOTUS Executive Order signed by the President yesterday is provided below.

**The White House**

Office of the Press Secretary

For Immediate Release

February 28, 2017

Presidential Executive Order on Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the "Waters of the United States" Rule

EXECUTIVE ORDER  
  
- - - - - - -  
  
RESTORING THE RULE OF LAW, FEDERALISM, AND ECONOMIC GROWTH  
BY REVIEWING THE "WATERS OF THE UNITED STATES" RULE

By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

Section 1. 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 the Congress and the States under the Constitution.

Sec. 2. Review of the Waters of the United States Rule. (a) The Administrator of the Environmental Protection Agency (Administrator) and the Assistant Secretary of the Army for Civil Works (Assistant Secretary) 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.

(b) The Administrator, the Assistant Secretary, and the heads of all executive departments and agencies shall review all orders, rules, regulations, guidelines, or policies implementing or enforcing the final rule listed in subsection (a) of this section for consistency with the policy set forth in section 1 of this 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.

(c) With respect to any litigation before the Federal courts related to the final rule listed in subsection (a) of this section, the Administrator and the Assistant Secretary shall promptly notify the Attorney General of the pending review under subsection (b) of this section 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.

Sec. 3. 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).

Sec. 4. General Provisions. (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

DONALD J. TRUMP

THE WHITE HOUSE,  
February 28, 2017.