



611 Anton Blvd, Suite 140  
Costa Mesa, CA 92626  
714-436-0855  
IdeaHall.com



## **CALIF. BRACING FOR POTENTIAL EPA, CLEAN WATER ACT CHANGES**

January 12, 2016

By Andrew McIntyre

Law360, Los Angeles (January 12, 2017, 6:41 PM EST) -- California is bracing for a potential reduction of U.S. Environmental Protection Agency and Clean Water Act regulation of waters and wetlands by shoring up its own set of regulations ahead of the incoming administration, and developers as a result face uncertainty and potentially higher costs and more regulatory hurdles, lawyers say.

Attorneys say President-elect Donald Trump or Congress could make substantial changes to federal regulations, opening up more areas for development unless states like California rush to put in place their own state protections, and that's creating uncertainty in the development community.

And the question of requirements for capturing stormwater runoff at development sites, a costly endeavor, is hanging in the balance, since the EPA may roll back regulations there and California may not come up with the same level of regulation, according to lawyers.

Partly at issue is an ongoing dispute about how far the U.S. government's jurisdiction extends in protecting waters and wetlands under the Clean Water Act. The government's reach under President Barack Obama has expanded, and the question of jurisdiction is playing out in a variety of courts.

Meanwhile, Trump has nominated Oklahoma Attorney General Scott Pruitt, a frequent critic of the EPA, to run the agency, and has indicated that reducing environmental regulations is one of his top priorities as president.



One way California is stepping up is by increasing regulatory efforts of the State Water Resources Control Board, as well as expanding the role of the California Department of Fish and Wildlife. Those agencies are preparing to step in and fill a regulatory gap should federal rules change, lawyers say.

"Waters, wetlands, aquatic features that have been carved out from federal jurisdiction, the state wants some form of protection," said Scott Birkey of [Cox Castle & Nicholson LLP](#). "Given the new Trump administration and their efforts to downplay the importance of wetland features, it's likely that you're going to see a very bullish State Water Resources Control Board."

Water Resources has historically devoted much of its time to water conservation in the drought-stricken state, although the agency also does work in permitting and licensing, stormwater, beach and ocean protection, and river delta areas. And the California Department of Fish and Wildlife has expanded its jurisdiction to include certain areas that once had water but now no longer do. That agency traditionally only had jurisdiction in waters and banks of waters.

"The state of California has already started to fill that gap," said Clark Morrison of Cox Castle. "You have two agencies in the state that are really stepping in to the regulatory role in a broad way."

While protection of wetlands in the state is likely to remain even if federal regulations are rolled back, the state could see changes in other areas.

The EPA has been particularly active in providing guidance on stormwater capture, which limits the areas where developers can build and increases development costs. New California regulations in that area may not keep pace with federal regulation, particularly given the state's affordable housing crisis and its push to streamline development.

"You could see some relaxation of some of the guidance," Jeremy N. Jungreis of Rutan & Tucker LLP said. "The EPA has been aggressive in ... requiring large amounts of stormwater to be captured and stored. That could change."

If developers in California wish to fill in wetlands, they have the burden of proof of demonstrating to the federal government that they can't modify their projects, and then have to negotiate a way



to compensate for the loss of wetlands — for example, by adding additional wetlands or restoring other wetlands.

Developers in the Golden State currently face significant cost and time delays in getting required permits to fill in wetlands. Morrison pointed to a project in which a developer has been trying for 10 years to secure permits for building on a 5-acre plot of land, and the University of California, Merced, has been working for more than seven years on permitting for a project that involves roughly 1 acre of land, Morrison said.

"There is uncertainty in the planning process and uncertainty in the environmental review process," Morrison said of potential changes. Soon, for example, developers will have that same burden of proof they have at the federal level at the state level, which could make the approval process more burdensome, he said.

"The biggest impact I would say is the continuing uncertainty for real estate development," said Brian C. Fish of Dentons. "The process is inherently full of risk and uncertainty. And this just adds another factor that's out of control of the real estate community."

Part of the complexity is that even within the state there are wildly conflicting agendas. Conservation proponents want to see more areas protected, while Gov. Jerry Brown and others are seeking to streamline review processes for building new housing as the state continues to face an affordable housing crisis.

Lawyers say the State Water Resources Control Board could put in place a significantly more expansive set of rules to counter major changes at the federal level.

"It could be more expansive," Morrison said. "That will create a whole new regulatory layer in California."

Additionally, California is now implementing regulation enacted well before the presidential election. In 2014, the state enacted the Sustainable Groundwater Management Act, requiring the adoption of sustainability plans for groundwater basins.

"That could result in some additional impact analysis," said Chris Locke of Farella Braun & Martel LLP. "California has been very aggressive ... to prevent any net loss of wetlands, and protect wetlands, and protect surface water and groundwater quality."