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WHY WATERS REGS MATTER TO DEVELOPERS

THE REDEFINITION OF WATERS OF THE US AND CALIFORNIA'S NEW WATER REGULATIONS COULD HAVE A BIG IMPACT ON DEVELOPMENTS NEAR WETLANDS.

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The Federal Government and California State government are both redefining water restrictions, and developers should pay close attention to the changes. Any development involving a wetland could be significantly impacted by these changes.

"Developers looking to buy or build on property with wetlands or other water features must be careful," Scott Birkey, a land use and natural resources partner at Cox, Castle and Nicholson, tells GlobeSt.com. "If their proposed development would result in any impacts to those features—such as filling or working within the features—then the developer may need a permit

for that work from the federal government under the Clean Water Act. Otherwise, the developer risks being in violation of the Act."

Developers outside of California will need to determine if their property or project is subject to these regulations. "The key to determining whether a wetland or a water feature is subject to the Clean Water Act turns on the phrase "waters of the United States." This phrase establishes the scope of the federal government's authority to regulate these features," says Birkey. "This makes the definition of that phrase critically important."

The impetus to make this change came from the Trump Administration's rejection of broad federal regulations, instead decreasing the federal scope and handing regulation off to the state, which has catalyzed California to tighten regulations. The new rule will regulate wetlands or other features only if they actually abut a navigable water way, and will only regulate a stream if it flows perennially or intermittently," Clark Morrison, a partner at Cox Castle and Nicholson, tells GlobeSt.com. "That is, a drainage feature that flows only when it rains will not be covered by the Clean Water Act. The new regulations establish a healthy list of exemptions, including exemptions for sheet flows, groundwater, certain farmlands, most irrigation or drainage ditches, and various types of water treatment facilities. Although some of these exemptions existed prior to the new rule, in many cases they have been expanded or made more concrete. The bottom line is that many minor features that one may find on a development site will no longer require a federal permit for the fill or elimination of such features."

Developers are still looking for clarification to comply with the new definition. "What's particularly troublesome about efforts to define this phrase is that it's not always immediately obvious whether a feature on the ground—wet or not—constitutes a 'water of the United States.' A good example of this are topographical features called swales that may be normally dry throughout the year, but collect water or convey flow during a significant rain event," says Birkey. "Does this mean that grading or placing fill into that swale requires a permit? That answer turns on whether the swale is a 'water of the United States.'"