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INSIGHT: TRUMP'S CLEAN WATER ACT ROLLBACK – IMPLICATIONS FOR CALIFORNIA

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Water birds are seen next to the North Shore Yacht Club at the Salton Sea in California.
Photographer: Mark Ralston/AFP/Getty Images

The Trump administration's redefinition of waters protected by the Clean Water Act lets states decide how to protect these waters, and California is one of the first to take action. Cox, Castle & Nicholson LLP attorneys examine the effect of the Trump roll-back and California's response and suggest steps business owners can take while waiting for clarity, especially those planning to develop real estate with wetlands or other waters.

In January, the White House adopted its long-awaited redefinition of waters protected by the Clean Water Act. This new rule will significantly restrict the role of the U.S. Army Corps of Engineers and the EPA in regulating discharges of fill or other pollutants into wetlands and other waters that have been protected since 1986.

It is hard to overstate the significance of this new rule, which likely strips millions of acres of wetlands and other waters of their federal protection. The new, narrowed definition of protected water replaces a far-reaching and inclusive definition promulgated by the Obama administration in 2015 and repealed by the Trump administration last year.

Until now, any wetland or other water feature was protected by the Clean Water Act if that feature had some ecological connection—or "significant nexus"—with a river, lake, sea, tributary, or other navigable body of water. The "significant nexus" test was established by the U.S. Supreme Court in 2006 in Rapanos v. United States.

In its new rule, the Trump administration rejected the "significant nexus" test and articulated a much narrower definition of protected waters. According to White House staff, the new rule defines regulated "waters of the United States" based upon a "unifying legal theory" that asserts jurisdiction based on features that have an actual surface water connection with traditional navigable waters and territorial seas.

States to Decide Protection, California Leads Way

As the Trump administration acknowledged, the new rule will leave the states to decide the level of protection these features will be given under their own laws. A number of states have already adopted or are considering their own stop-gap regulations to protect water features no longer regulated by the Clean Water Act as interpreted by the Trump administration. Not surprisingly, California was one of the first to step into the breach.

In April 2019, California's State Water Resources Control Board (State Water Board)—anticipating the Trump administration's new rule—adopted a far-reaching program to regulate discharges to wetlands and other waters of the state.

This new program takes effect in May, and covers all surface waters and ground water in the state of California, thus blunting the deregulatory effect of the federal action. In fact, the State Water Board's new regulations go further than even the Obama administration's 2015 regulation to protect wetlands and other waters.

As the EPA, the Corps of Engineers, and California's State Water Board (as well as the board's nine regional water quality control boards) adjust to their new roles, there is likely to be significant confusion. Where does federal jurisdiction begin and end? Where does state jurisdiction begin and end?

In areas of overlap—and there will be many—how will landowners respond to the conflicting regulatory standards and definitions applied by the different levels of government? Although California's new rules attempt to reduce these areas of conflict to some extent, significant inconsistencies remain.

The State Water Board is working on guidance to assist the regulated community in interpreting the new regulations. Those of us representing industry and agriculture have requested this guidance to clarify areas of potential conflict and mismatch. While we hope the State Water Board will respond to these concerns, the issues are exceedingly complex. It may be years before we fully understand the combined effect of the Trump roll-back and California's regulatory response.

Prepare Now

In the meantime, California businesses with real estate assets should consider the following:

First, it would be premature to expect any immediate change at the federal level. Environmental groups are lining up to litigate the new federal rule, and undoubtedly they will request a stay of the new rule until it can fully be litigated. There is a good chance that, if control of the White House changes parties next year, the new federal rule may never go into effect.

Second, a lawsuit has been brought against the new state rule. That litigation asserts, among other things, that the State Water Board does not have authority to regulate clean fill as a "pollutant" under Porter-Cologne, which is California's water quality law. The lawsuit is currently scheduled to be heard in May. If the trial court (or a court of appeal) were to rule against the water board, it is almost certain the Legislature would step in to fix any problem identified by the courts. Nonetheless, this may take some time to resolve.

Third, if a property needs to be developed soon, and that site has wetlands or other water features, it would be advisable to apply for a state permit before May. Applications filed in good faith before the new State Water Board rule becomes effective will be "grandfathered" into the old rules.

Applications must be filed with the Regional Water Quality Control Board in whose jurisdiction a property is located. Although we expect some "mission creep" with respect to grandfathered applications, we believe there may be procedural and substantive benefits to acting now.

Fourth, the permit process is likely to be slow and painstaking. With one or two notable exceptions (e.g., the San Francisco regional water board), the water boards will be applying new definitions and tests they have never applied before.

The water boards are short-staffed already, and there will be a steep learning curve. Moreover, they may adopt different approaches to some of the same standards that are already applied at the federal level, leading to some confusion and inconsistencies between state and federal agencies.

If you are planning to develop real estate with wetlands or other waters, the most important thing to do is assemble an experienced team of professionals. The permit process is multi-disciplinary and exceedingly complex, requiring wetland experts, biologists, hydrologists, engineers and yes, even lawyers.

Your team should be able to map a coherent strategy for working with the four or five state and federal agencies you will be facing. And you should ask them for a realistic schedule and budget for both soft costs and land mitigation. In this time of uncertainty, getting your project permitted will take longer, and cost more, than you might expect.

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