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## California's Response to the Trumpian Rollback of Wetland Protections Under the Clean Water Act

Clark Morrison\*

### Introduction

On February 28, 2017, President Donald Trump signed one of his first executive orders rolling back federal environmental protections for clean air and water.<sup>1</sup> This order, Presidential Executive Order on Restoring the Rule of Law, Federalism and Growth by Reviewing the "Waters of the United States Rule" (Trump Executive Order), directed the U.S. Army Corps of Engineers (Corps) and Environmental Protection Agency (EPA) to initiate the withdrawal of an Obama-era regulation that defined the scope of federal jurisdiction over wetlands and other "waters of the United States" (collectively, "WOTUS").<sup>2</sup>

That the President signed this executive order was not surprising. His newly appointed EPA Administrator, Scott Pruitt, had made it his job as Oklahoma Attorney General to use litigation to rein in what he perceived as regulatory excesses of the EPA. In fact, in that capacity, Mr. Pruitt had already initiated litigation against the very rule that the Trump Executive Order now seeks to withdraw.<sup>3</sup>

But the executive order did not stop there. Trump further directed the Corps and EPA to initiate a rulemaking to pare back the pre-Obama definition of WOTUS, updated and adopted by the Reagan administration some thirty years ago.<sup>4</sup> The Executive Order explicitly endorses a very

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1. 82 Fed. Reg. 12497-8 (2017) (Waters of the United States Rule).

2. 33 U.S.C. § 1251 *et seq.* (1971) (which itself originated in the Federal Water Quality Control Act Amendments of 1972, 86 Stat. 816).

3. See *Murray Energy Corp., et al. v. U.S. Env'tl. Prot. Agency, et al.*, 817 F.3d 261 (6th Cir. 2016).

4. "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

narrow WOTUS definition promoted by the late Justice Antonin Scalia in his non-controlling plurality opinion in *Rapanos v. United States*.<sup>5</sup> On July 27, the administration published a proposed rule “to initiate the first step in a comprehensive, two-step process intended to review and revise the definition of [WOTUS]” consistent with the President’s executive order.<sup>6</sup> The rule is, quite literally, a proposal to “repeal and replace” President Barack Obama’s WOTUS Rule.

It is hard to overstate the significance of this action. If adopted, the President’s repeal and replace will eliminate federal protection for millions of acres of wetlands around the country, including the significant vernal pool wetland complexes that characterize California’s rural landscape. Under the current proposal, federal jurisdiction would be limited to only truly navigable waters and immediately adjacent wetlands with a demonstrable surface flow connection to navigable waters.

The State of California has reacted swiftly. Early next year, the State Water Resources Control Board (State Water Board) is expected to adopt and refer to the Office of Administrative Law its own comprehensive program for the protection of wetlands and other “waters of the State.”<sup>7</sup> This new program—the State Wetland Definition and Procedures for Discharges of Dredged or Fill Materials to Waters of the State (the Dredge and Fill Procedures or the Procedures)—has been in the works for many years. But the Trump Administration’s actions have given a renewed sense of urgency to this effort and parried long-standing arguments that the State’s program would be duplicative of and in conflict with the federal program.

Originally intended to address the limited regulatory gap left by the Supreme Court’s decision in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*<sup>8</sup> (SWANCC), as described below, the Dredge and Fill Procedures are now being crafted to fill the considerable regulatory void to be created by the President’s retreat. In fact, the State’s program will go much further than existing Federal regulations and, arguably, even further than the expansive Obama-era WOTUS definition that is now in its death-throes.

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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).” Waters of the United States Rule, *supra* note 1.

5. *Rapanos v. U.S.*, 547 U.S. 715 (2006).

6. 82 Fed. Reg. 34889 (2017) (Definition of “Waters of the United States” Proposed Rule).

7. STATE WATER RES. CONTROL BD., CLEAN WATER ACT SECTION 401 – CERTIFICATION AND WETLANDS (2017), <https://perma.cc/HLS8-EAM6>.

8. *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001).

These dramatic developments follow a long series of decisions in which the U.S. Supreme Court struggled to address the appropriate scope of federal jurisdiction under the Clean Water Act. This article will describe that judicial history, the evolution of the federal wetlands regulatory program in response to the Court's decisions (including the Trump administration's current effort to pare back federal jurisdiction), and the State of California's ambitious program to fill the "Trump Gap" with its own protections for wetlands and other waters of the State.

### **Early History of the 404 Program**

Since the passage of the Clean Water Act, the courts have been called on many times to determine the appropriate scope of federal jurisdiction over waters covered by that statute. Most of these cases have arisen in the context of Section 404 of the Clean Water Act, which prohibits the unpermitted discharge of dredged or fill material into covered wetlands and other types of waters.<sup>9</sup> The recurring issue in these cases is the extent to which a water must be "navigable" to be governed by Section 404.

This question about navigability is present in the very language of the statute. Although the statute prohibits discharges into "navigable waters," it defines this term without any reference to navigability whatsoever. That is, the Clean Water Act defines the term "navigable waters" to mean "the waters of the United States, including the territorial seas."<sup>10</sup> So, at its most basic level, the vexing question is whether a "navigable water" must be "navigable" at all.

Although the Corps initially viewed its jurisdiction as extending only to waters that were navigable-in-fact, in 1975 the Corps issued regulations redefining WOTUS to include not just navigable waters, but also tributaries, interstate waters and their tributaries, and non-navigable intrastate waters whose use or misuse could affect interstate commerce.<sup>11</sup> These regulations also covered "freshwater wetlands" that were "adjacent" to other waters (without any specific requirement that those wetlands be navigable or have some connection to interstate commerce).<sup>12</sup>

As presently written—since the Obama administration's WOTUS definition has been stayed by the courts—the Corps's jurisdiction under Section 404 covers (with certain exceptions) the following bodies of water:

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9. 33 U.S.C. § 1344 (1971).

10. 33 U.S.C. § 1352(7) (1971); 33 C.F.R. § 328.3(a) (1986) (Army Corps Regulation Defining Waters of the U.S.).

11. 40 Fed. Reg. 31320 (1975) (Army Corps Regulation Defining Waters of the U.S.).

12. *Id.*

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- (1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
- (2) All interstate waters including interstate wetlands;
- (3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:
  - (i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or
  - (ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
  - (iii) Which are used or could be used for industrial purpose by industries in interstate commerce;
- (4) All impoundments of waters otherwise defined as waters of the United States under the definition;
- (5) Tributaries of waters identified in paragraphs (a) (1)— (4) of this section;
- (6) The territorial seas;
- (7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a) (1)— (6) of this section.<sup>13</sup>

The first major case to test the validity of these regulations was *United States v. Riverside Bayview Homes, Inc.*,<sup>14</sup> in which the Supreme Court considered whether the Corps's assertion of jurisdiction over "adjacent wetlands"<sup>15</sup> was valid under the Clean Water Act. In this case, the Sixth Circuit<sup>16</sup> held that the wetlands in question were not "adjacent" because they were not subject to actual flooding by nearby navigable waters. That is, the court was looking for some hydrologic connection sufficient to support jurisdiction. The Supreme Court reversed, holding that it was not unreasonable for the Corps

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13. 33 C.F.R. § 328.3 (1986) (Army Corps Regulation Defining Waters of the U.S.).

14. *U.S. v. Riverside Bayview Homes*, 474 U.S. 121 (1985).

15. The term "wetlands" is defined in the Corps's regulations to mean "those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas." Army Corps Regulation Defining Waters of the U.S., 33 C.F.R. § 323.2(c) (1986).

16. *U.S. v. Riverside Bayview Homes*, 729 F.2d 391 (6th Cir. 1984)

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to find that, as a general matter, adjacent wetlands are sufficiently “bound up” with nearby navigable waters to justify the assertion of jurisdiction without any fact-specific showing of that connection.<sup>17</sup>

In its analysis, the Court specifically considered the extent to which a water must actually be navigable to be subject to the Clean Water Act.<sup>18</sup> Citing a Senate report, the Court stated that “[a]lthough the Act prohibits discharges into ‘navigable waters,’ . . . the Act’s definition of ‘navigable waters’ as ‘waters of the United States makes it clear that *the term ‘navigable’ as used in the Act is of limited import.*”<sup>19</sup>

*Riverside Bayview Homes* was followed several years later by the Supreme Court’s decision in *SWANCC*.<sup>20</sup> *SWANCC* involved a non-navigable water-filled mining pit that was isolated from (and not adjacent to) any other body of water.<sup>21</sup> In asserting jurisdiction, the Corps relied on 33 C.F.R. § 328.3(a)(3), which covers “[a]ll other waters such as intrastate lakes, rivers, streams . . . , mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation, or destruction of which could affect interstate commerce.” The Corps had asserted a Commerce Clause connection over the *SWANCC* mining based upon its “Migratory Bird Rule,” which posited that a Commerce Clause connection exists for any non-navigable isolated water “which are or would be used by . . . migratory birds that cross state lines.”<sup>22</sup>

Given the attenuated Commerce Clause connection asserted by the Migratory Bird Rule, it was an easy target. In striking down the rule, the Court—in an opinion authored by Justice Rehnquist—struggled again with the import of the term “navigability” in the Clean Water Act. Distinguishing *Riverside Bayview Homes*, the Court reasoned:

We cannot agree that Congress’s separate definitional use of the phrase “waters of the United States” constitutes a basis for reading the term “navigable waters” out of the statute. We said in *Riverside Bayview Homes* that the word ‘navigable’ in the statute was of “limited import” . . . . But it is one thing to give

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17. *Riverside Bayview*, 474 U.S. at 134.

18. *Id.* at 133.

19. *Riverside Bayview*, 474 U.S. at 133. (internal citations omitted, emphasis supplied).

20. *Solid Waste Agency of N. Cook Cty v. U.S. Army Corps of Eng’rs*, 531 U.S. 159 (2001).

21. *Id.* at 163.

22. 51 Fed. Reg. 41,206, 41,217 (Preamble) (1986) (Proposed Rule Increasing Clarity on the Waters of the U.S.).

a word limited effect and quite another to give it no effect whatever.<sup>23</sup>

### **California's Response to SWANCC**

SWANCC generated regulatory tremors in California. Prior to SWANCC, the Water Board and its nine Regional Water Quality Control Boards (the "Regional Water Boards") generally followed the federal definition of WOTUS when exercising their authority to "certify" proposed Corps permits under Section 401 of the Clean Water Act. When the Corps backed away from asserting jurisdiction over non-navigable isolated waters as a result of SWANCC, the Water Boards lost their ability to exercise their oversight (at least under Section 401) with respect to those waters.

To fill this gap, the Water Board's Office of Chief Counsel issued guidance advising the Regional Water Boards to assert jurisdiction over isolated non-navigable waters through the Porter-Cologne Water Quality Control Act.<sup>24</sup> As stated in this guidance, "[g]iven the State [of California] and federal 'no net loss' of wetlands policy, the [Regional Water Boards] should consider regulating any discharges of waste to waters that may no longer subject to [Corps] jurisdiction . . ."<sup>25</sup> Ever since, the Regional Water Boards have asserted their own jurisdiction in these instances by requiring the issuance of "waste discharge requirements" (i.e., permits under Porter-Cologne) for isolated non-navigable waters disclaimed by the Corps under SWANCC.

Despite its exclusive reliance on Clean Water Act section 401 to regulate wetland fills prior to SWANCC, the State of California had already initiated its own wetlands initiative in 1993.<sup>26</sup> In Executive Order W-59-93, Governor Wilson declared it to be the State's policy "[t]o ensure no overall net loss and long-term net gain in the quantity, quality, and permanence of wetlands acreage and values in California in a manner that fosters creativity, stewardship, and respect for private property."<sup>27</sup>

Governor Wilson's executive order included a number of subordinate policies and programs, including a proposal for a "pilot" delegation of Clean Water Act permitting authority in the San Francisco Bay Area to the San

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23. *Solid Waste Agency of N. Cook Cty*, 531 U.S. at 172.

24. Water Board Office of Chief Counsel, *EFFECT OF SWANCC v. UNITED STATES ON THE 401 CERTIFICATION PROGRAM*, p. 5 (January 25, 2001); California Porter-Cologne Act of 1969, Cal. Water Code § 13000 et seq. (2017).

25. *Id.* at 5.

26. California Wetlands Policy, Executive Order W-59-93 (August 23, 1993).

27. *Id.* at Section II(1).

Francisco Regional Water Board and the Bay Conservation and Development Commission.<sup>28</sup> The executive order stated that this pilot project would be “part of a longer term effort to explore feasibility of Statewide delegation, with adequate funding, of the program.”<sup>29</sup>

The delegation program never happened (and one wonders why it is not being considered today). Nonetheless, since Governor Pete Wilson established the foundation for a California-based wetlands program, some of the Regional Water Boards began to develop their own practices for the protection of wetlands. They did this partly through policies added to their basin plans, but mostly through certification conditions imposed on development projects on an *ad hoc* basis.<sup>30</sup> When SWANCC signaled a limited federal retreat from the Clean Water Act, however, the Water Board initiated the establishment of a comprehensive State regulatory program for wetlands and other “waters of the State.”<sup>31</sup>

Over the last few years, and with much interaction with environmental, business and other stakeholders, the State Water Board began to issue public drafts of such a policy. The most recent draft—the “Dredge and Fill Policy” described above—was published in July of this year.<sup>32</sup> The originally stated objective of what has become the Dredge and Fill Policy was to “fill the gap” left by the Supreme Court’s decision in SWANCC.<sup>33</sup> As noted above, however, the Water Board is now going much further than that in light of the Trump administration’s recent actions.

### **Rapanos and the Obama WOTUS Rule**

The Water Board’s current effort was catalyzed by regulatory developments following the Supreme Court’s 2006 decision in *Rapanos*. In this case, the Supreme Court again struggled with the question of how much connection a non-navigable water must have to a navigable water to

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28. *Id.*

29. Executive Order W-59-93 (August 23, 1993) <https://perma.cc/472A-Z28X>.

30. See LOS ANGELES REGIONAL WATER QUALITY CONTROL BOARD, BASIN PLAN FOR THE COASTAL WATERSHEDS OF LOS ANGELES AND VENTURA COUNTIES, Chapter 5—Plans and Policies (Sept. 11, 2014).

31. See Clean Water Act § 401, 33 U.S.C. 1341, *supra* note 7.

32. WATER BOARD, STATE WETLAND DEFINITION AND PROCEDURES FOR DISCHARGES OF DREDGED OR FILL MATERIALS TO WATERS OF THE STATE (July 21, 2017) (“2017 Dredge and Fill Procedures Final Draft”).

33. EFFECT OF SWANCC V. UNITED STATES ON THE 401 CERTIFICATION PROGRAM, *supra* note 24.

establish jurisdiction under the Clean Water Act.<sup>34</sup> The case involved separate questions of jurisdiction over *non-navigable wetlands* (such as the adjacent wetlands considered in *Riverside Bayview Homes*) and *non-navigable tributaries* of traditional navigable waters (i.e., the extent to which federal jurisdiction creeps up to the headwaters of a navigable river), respectively.<sup>35</sup>

The Court found it difficult to reach agreement on these issues; the justices issued five separate opinions. To make things overly simple, although no single opinion won a majority of the Court, Justice Robert Kennedy's opinion (which offered a generous theory of jurisdiction) generally is recognized as controlling.<sup>36</sup> Justice Scalia, in his own plurality opinion, offered a significant counter-weight (and a far more restricted theory of jurisdiction) to the views of Justice Kennedy.<sup>37</sup>

From a lawyer's perspective, the interaction of the justices in this case is fascinating. Characteristically, Justice Kennedy offered a somewhat malleable view of navigability. Citing language from earlier decisions that focused on the nexus between navigable and non-navigable waters as the basis for limited extensions of jurisdiction (e.g., *Riverside Bayview Homes*), Justice Kennedy expressed the general view that non-navigable waters may be subject to jurisdiction whenever they bear a "significant nexus" to other, navigable waters:

When the Corps seeks to regulate wetlands adjacent to navigable-in-fact waters, it may rely on adjacency to establish its jurisdiction. Absent more specific regulations, however, the Corps must establish a significant nexus on a case-by-case basis when it seeks to regulate wetlands based on adjacency to nonnavigable tributaries . . . [I]n most cases regulation of wetlands that are adjacent to tributaries and possess a significant nexus with navigable waters will raise no serious constitutional or federalism difficulty. . . and as exemplified by SWANCC, the significant-nexus test itself prevents some problematic applications of the statute.<sup>38</sup>

Justice Kennedy offered no clear rule, however, for determining when such a nexus might exist.

Not surprisingly, Justice Scalia offered a more restrictive view of federal jurisdiction. Rather than the vague "significant nexus" theory offered by

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34. *Rapanos*, *supra* note 5.

35. *Id.*

36. *Id.* at 759 (Kennedy, J. concurrence).

37. *Rapanos*, *supra* note 5, at 739–742 (Scalia, J. op.).

38. *Id.* at 782–783 (Kennedy, J. concurrence)

Justice Kennedy, Justice Scalia focused on the *relative permanence* of water in a given location.

In sum, in its only plausible interpretation, the phrase ‘waters of the United States’ includes only those relatively permanent, standing or continuously flowing bodies of water ‘forming geographic features’ that are described in ordinary parlance as ‘streams, . . . oceans, rivers and lakes. (citation omitted). The phrase does not include channels through which waters flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall . . . . Therefore, *only* those wetlands with a continuous surface connection to bodies that are ‘waters of the United States’ in their own right, so that there is no clear demarcation between ‘waters’ and wetlands, are ‘adjacent to’ such waters and covered by the Act.<sup>39</sup>

Thus, for linear features, Justice Scalia insisted on a “relatively permanent” flow to establish jurisdiction.<sup>40</sup> For nonlinear features such as wetlands, Justice Scalia insisted on a continuous surface water connection between the feature and some traditionally navigable water.<sup>41</sup> In short, Justice Scalia rejected the flexible notions of navigability expressed by Justice Kennedy, as well the Court’s decision in *Riverside Bayview Homes* and even, to some extent, SWANCC. It would require a fairly dramatic rewrite if one were to incorporate Justice Scalia’s views into the list of WOTUS now contained in 33 C.F.R. § 328.3.

On December 2, 2008—following the Presidential election but prior to the inauguration of President Obama—the Corps and EPA issued joint guidance entitled “Clean Water Act Jurisdiction Following the U.S. Supreme Court’s Decision in *Rapanos v. United States & Carabell v. United States*” (“*Rapanos* Guidance”).<sup>42</sup> The *Rapanos* Guidance, somewhat heroically, endeavored to formulate a policy that would reconcile the almost impossibly conflicting jurisdictional theories of Justices Kennedy and Scalia.

As set forth below, the result was a marvelous regulatory pretzel:

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39. *Id.* at 739, 742 (emphasis in original).

40. *Id.* at 739.

41. *Rapanos*, *supra* note 5, at 742.

42. U.S. ARMY CORPS OF ENGINEERS AND U.S. ENVIRONMENTAL PROTECTION AGENCY, CLEAN WATER ACT JURISDICTION FOLLOWING THE U.S. SUPREME COURT’S DECISION IN *RAPANOS V. UNITED STATES & CARABELL V. UNITED STATES*, at 1 (Dec. 2, 2008).

The agencies will assert jurisdiction over the following waters:

Traditional navigable waters

Wetlands adjacent to traditional navigable waters

Non-navigable tributaries of traditional navigable waters that are relatively permanent where the tributaries typically flow year-round or have continuous flow at least seasonally (e.g., typically three months)

Wetlands that directly abut such tributaries

The agencies will decide jurisdiction over the following waters based on a fact-specific analysis to determine whether they have a significant nexus with a traditional navigable water:

Non-navigable tributaries that are not relatively permanent

Wetlands adjacent to non-navigable tributaries that are not relatively permanent

Wetlands adjacent to but that do not directly abut a relatively permanent non-navigable tributary

The agencies generally will not assert jurisdiction over the following features:

Swales or erosional features (e.g., gullies, small washes characterized by low volume, infrequent, or short duration flow\_

Ditches (including roadside ditches) excavated whole in and draining only uplands and that do not carry a relatively permanent flow of water

The agencies will apply the significant nexus standard as follows:

A significant nexus analysis will assess the flow characteristics and functions of the tributary itself and the functions performed by all wetlands adjacent to the tributary to determine if they significantly affect the chemical, physical and biological integrity of downstream traditional navigable waters

Significant nexus includes consideration of hydrologic and ecologic factors.<sup>43</sup>

It is important to keep in mind that in formulating its own wetlands regulatory program, the State of California need not engage in these intellectual acrobatics. This is because, of course, state environmental structures for clean water are not tied to concepts of navigability.

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43. CLEAN WATER ACT JURISDICTION FOLLOWING THE U.S. SUPREME COURT'S DECISION IN *RAPANOS V. UNITED STATES* & *CARABELL V. UNITED STATES*, *supra* note 42, at 1.

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Not surprisingly, the Obama administration engaged in its own post-*Rapanos* rulemaking to define the scope of federal jurisdiction along the lines expressed by Justice Kennedy. The resulting rule, commonly known as the “WOTUS Rule,” was adopted in June 2015.<sup>44</sup> The WOTUS Rule was promptly litigated by a number of states (one of which was, as noted above, represented by Scott Pruitt), farming interests, environmental groups and others, and has been stayed pending the resolution of the litigation.

Given the Trump administration’s proposal to “repeal and replace” Obama’s WOTUS Rule, it is unlikely ever to have the force of law. The rule is nonetheless important because it stretched Kennedy’s “significant nexus” theory almost beyond recognition, generating the political kick-back that led to its pending demise. In fact, the standards contained in the WOTUS Rule might better be characterized as based upon a *theoretical* rather than a *significant* nexus theory. It is hard to imagine a wetland or other water—other than those specifically exempted—that would not be subject to jurisdiction. It is not a stretch to say the Obama administration had essentially brought us back, however briefly, to the days of the Migratory Bird Rule.

### **Trump and the California Response**

As they say, elections matter. If Administrator Pruitt follows through with the directives in Trump’s Executive Order as proposed in the Federal Register, the Corps and EPA will fall back to the line drawn by Justice Scalia. Essentially, there will be no real federal protection of the vernal pools and seasonal wetlands that dominate much of California’s Central Valley and Sierra foothills.

Trump’s proposal deflated the most persuasive available arguments against the Dredge and Fill Procedures (i.e., that a state program would largely be duplicative and conflicting). The Water Board is now moving quickly, having published an updated version of the Dredge and Fill Procedures in July and public workshops to take public testimony.<sup>45</sup> Public comments were due in September, and as of the date this article was written the Water Board staff is preparing responses to public comments with hopes to bring the proposal back for final adoption early next Spring, subject to whatever final actions are needed from the Office of Administrative Law.<sup>46</sup>

The Dredge and Fill Procedures originally were intended simply to fill the SWANCC gap. Their purpose is now to fill the much more considerable pending Trump gap. At this point, the regulated community is focused

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44. Clean Water Rule: Definition of “Waters of the United States”, 80 Fed. Reg. 37054 (June 29, 2015) (to be codified at 40 C.F.R. pts. 110, 112, 116, et al.)

45. 2017 Dredge and Fill Procedures Final Draft, *supra* note 32.

46. See STATE WATER RES. CONTROL BD, *supra* note 7.

heavily on preventing the Water Board from doing something more ambitious than simply maintaining the regulatory *status quo*. It is not clear they will succeed.

Structurally, the Dredge and Fill Procedures would establish a permit process to be exercised by the Regional Water Boards in the context of the Section 401 certification process or, for those wetlands and waters of the State that are no longer subject to Federal jurisdiction, Porter-Cologne. To address concerns about conflicts with the standards and procedures implemented by the Corps under the Clean Water Act, the Procedures incorporate, with conforming modifications, both the Corps's 2008 mitigation rule<sup>47</sup> and EPA's so-called "404(b)(1) Guidelines."<sup>48</sup> They also require the Regional Water Boards, to a limited extent, to defer to and rely upon delineations, alternatives analyses, and certain other documents prepared for the Corps for any WOTUS to be affected by a proposed project.

There are a number of important issues that remain to be resolved. A few notable examples include:

Definition of Wetlands. Under the Clean Water Act, a wetland is a wetland only if it satisfies three established parameters: wetland hydrology, hydric soils, and the presence of certain concentrations of wetland plants.<sup>49</sup> The Procedures would abandon the traditional three parameter test and designate an area as a wetland even if it exhibits *no wetland vegetation*.<sup>50</sup> Under this new test, an ordinary un-vegetated mudflat would be treated as if it were a vernal pool.<sup>51</sup> In some ways this makes little difference because, regardless of whether they are defined as wetlands, two-parameter features will be treated as waters of the State. The potential for confusion and conflicts due to different wetland definitions at the State and Federal levels is extraordinarily high. One obvious way of addressing the problem would be to retain the 3-parameter definition but designate 2-parameter features as "special aquatic sites." This would give them the same regulatory protections as 3-parameter wetlands but without the need for conflicting definitions.

404(b)(1) Alternatives Analyses. Under the 404(b)(1) Guidelines, a discharge of dredged or fill material may not be permitted if there is a practicable alternative to the proposed project that would be less

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47. 33 C.F.R. Part 330.

48. 40 C.F.R. § 230 et seq.

49. 40 C.F.R. § 232.2 (2011); *see also* U.S. ENVIRONMENTAL PROTECTION AGENCY, SECTION 404 OF THE CLEAN WATER ACT: HOW WETLANDS ARE DEFINED AND IDENTIFIED, <https://perma.cc/AH67-9A2Z>.

50. 2017 Dredge and Fill Procedures Final Draft, *supra* note 32 at 1–2.

51. *Id.*

environmentally damaging to the aquatic environment. That is, a proposed project must be the “LEDPA” (the “least environmentally damaging practicable alternative”). Because the burden of proof typically is on the applicant to show clearly that his or her project is the LEDPA, for large projects this requirement requires lengthy and extraordinarily complex reports that often take years to prepare. For small projects, however, the Corps typically requires far less rigor in these analyses, and often does not require them at all for fills proposed under the Nationwide Permit program. Under the Procedures, the Regional Water Boards would require the preparation of full and rigorous “LEDPA analyses” for any fill of a water of the State that exceeds 0.2 acres, which ordinarily would not be required for the fill of a Federal WOTUS.<sup>52</sup> This eliminates the important timing benefits of the Nationwide Permit program, which is heavily relied upon by public agencies like CalTrans and the High Speed Rail Authority. It will be important for the Water Board to find some way of resolving this conflict.

Deference to Corps Delineations and Other Regulatory Documents.

Although the Dredge and Fill Procedures require the Regional Water Boards to defer to delineations, LEDPA analyses and other documents prepared at the federal level as noted above, the Procedures provide broad latitude for the Water Boards to disagree with the federal documents and require preparation of different documents for their own purposes. That is, the streamlining intended to be built into the deference requirements is not particularly enforceable, and may lead to duplicative and technical studies for projects affecting both WOTUS and non-WOTUS waters of the State.

Treatment of Prior Converted Croplands (PCC) and Agricultural Exemptions.

Under federal law, wetlands that were converted to agricultural use prior to 1985 are not treated as WOTUS unless their agricultural use is abandoned for five years and wetland conditions return. The Dredge and Fill Procedures include a trigger for abandonment that is more sensitive than the federal standard, and this may lead to unanticipated assertions of jurisdiction over active farmland.<sup>53</sup> The agricultural community has also expressed concern that the Dredge and Fill Policies would allow the imposition of restrictions on “normal farming activities,” which are currently exempt from regulation under Section 404(f) of the Clean Water Act.<sup>54</sup>

Exclusions. The Procedures do contain some helpful exclusions from coverage, particularly for artificial features. There are some mechanical problems with the way these are drafted, which we expect will be worked out in the final draft. One problem, however, is that the list of exclusions does not include a number of exclusions that have been used by the Corps over the years and which are identified in the preamble to the Corps’s 1986

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52. 2017 Dredge and Fill Procedures Final Draft, *supra* note 32, at 6.

53. *Id.* at 12.

54. 2017 Dredge and Fill Procedures Final Draft, *supra* note 32, at 11.

regulations. These exclusions (e.g., ditches, construction-related features) were upgraded to the level of regulation in the 2008 WOTUS Rule, but do not appear to have made it into the Procedures, at least as of the date of submission of this article. The other very problem is that the exclusions have little practical effect. That is, they do not exclude the features from the procedures, but only from the presumption (applicable to wetlands) that there are practicable alternatives to filling the feature in question.

Mitigation Requirements. Although the Draft Procedures incorporate the Corps's 2008 mitigation rule, the text of the Procedures appears to include requirements that are not currently found at the federal level,<sup>55</sup> particularly with respect to considerations of watershed-based mitigation planning. This does not appear, however, to be a high priority item for resolution among those industry groups expressing concern about the Procedures.

In summary, the State Water Board is proposing a robust regulatory program with standards that are higher than those found in current Federal regulation and a geographic scope that is broader than even President Obama's proposal. If President Trump's "replace" of the Obama rule is unsuccessful and the current Corps regulations remain in effect, there will be many practical challenges to making the State and Federal programs work together. It will be a learning experience to say the least, and the Water Boards will need adequate staffing and training to manage this program. If the Trump administration succeeds, however, the potential for conflicts will be limited to only those waters that are navigable as defined by Justice Scalia. Either way, the State of California will step into leadership on these issues, and we will have a new and more effective set of protections for all of California's wetlands, regardless of whether they "are or could be used by migratory birds."

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55. *Id.* at 9–10.

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