

# THE CONVEYOR 2020

A publication of the California Construction and Industrial Materials Association

WINTER ISSUE

## TRANSPORTATION CALIFORNIA

### 2020 Priorities related to SB 1 funding

Mark Watts, Legislative Advocate & Kiana Valentine, Executive Director of Transportation California.



#### SEE INSIDE:

6 TRANSPORTATION

14 LEGISLATIVE

16 ENVIRONMENTAL

# U.S. EPA FINALIZES NEW NAVIGABLE WATERS PROTECTION RULE, NARROWING SCOPE OF WATERS OF THE UNITED STATES

By Michael N. Mills and Sarah M. Taylor, Stoel Rives LLP

**O**n January 23, 2020, the U.S. Environmental Protection Agency (“EPA”) and the Department of the Army (“Army”) finalized the Navigable Waters Protection Rule to define “waters of the United States” (“WOTUS”). EPA and the Army were directed by President Trump in Executive Order 13788 to review the Clean Water Rule: Definition of ‘Waters of the United States’ promulgated in 2015 during the Obama administration, and to consider interpreting the term “navigable waters” in a manner consistent with Justice Scalia’s opinion in *Rapanos v. United States*, 547 U.S. 715 (2006). EPA and the Army published a proposed Navigable Waters Protection Rule on December 11, 2018. Public comment on the proposed rule closed on April 15, 2019. As expected, this final rule scales back the enforcement and regulatory reach of the federal government by adopting a narrower interpretation of which bodies of water are subject to federal regulation under the Clean Water Act.

Essentially, the final rule “recognizes that waters of the United States are waters within the ordinary meaning of the term, such as oceans, rivers, streams, lakes, ponds, and wetlands, and that not all waters are waters of the United States.” (See The Navigable Waters Protection Rule: Definition of “Waters of the United States”, Pre-Publication Notice, page 6.) The final rule outlines four clear categories of waters that are federally regulated: (1) the territorial seas and traditional navigable waters;

(2) perennial and intermittent tributaries to those waters; (3) certain lakes, ponds, and impoundments; and (4) wetlands adjacent to jurisdictional waters.

The final rule also delineates categories of waters that are not to be considered “waters of the United States.” These include:

- Waterbodies that are not included in the four categories listed above;
- Groundwater;
- Ephemeral features;
- Diffuse stormwater run-off and directional sheet flow over upland;
- Many roadside and farm ditches;
- Prior converted cropland;
- Artificially irrigated areas, including fields flooded for agricultural production;
- Artificial lakes and ponds, including water storage reservoirs;
- Water-filled depressions constructed or excavated in upland or in non-jurisdictional waters incidental to mining or construction activity, and pits excavated in upland or non-jurisdictional waters for the purpose of obtaining fill, sand, or gravel;
- Stormwater control features excavated or constructed in upland or in non-jurisdictional waters to convey, treat, infiltrate, or store stormwater run-off;
- Groundwater recharge, water reuse, and wastewater recycling structures, including detention, retention, and infiltration basins and ponds that are constructed in upland or in non-jurisdictional waters; and
- Waste treatment systems.



The final rule becomes effective 60 days after publication in the Federal Register. Notably, the final rule does not undermine the existing permitting and regulatory system, and permits and 401 Water Quality Certifications issued under the prior rules will continue as is unless the permitting agency chooses to revisit them.

Importantly, this new federal rule does not affect California’s ability to define and regulate waters of the state. This final federal rule takes a narrower scope of what water is subject to regulation than does the California State Water Resources Control Board in the State Wetland Definition and Procedures for Dredged or Fill Materials to Waters of the State adopted in April 2019. Though the final federal WOTUS rule could reduce the number of permits required, particularly for projects concerning isolated wetlands, practically speaking, because California projects will still be subject to California state regulations, the new federal rule is not expected to have a significant effect in California. ■