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Newly proposed definition of 'waters of the United States' could ease federal compliance burdens for oil and gas sector

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On December 11, the U.S. Environmental Protection Agency and Army Corps of Engineers released a much-anticipated proposed rule that would redefine "waters of the United States" (WOTUS) under the Clean Water Act (CWA).[1] As compared to the WOTUS definition in the Obama administration's 2015 "Clean Water Rule" (CWR) (currently applicable in Pennsylvania), the proposed rule would significantly reduce the federal government's jurisdiction over surface water, including wetlands, nationwide. Should the proposed rule be finalized as writ ten, the oil and gas sector could see significant changes in CWA permitting/compliance obligations associated with well sites and pipeline construction.

Revised definition limits federal government's CWA jurisdiction

The proposed rule's WOTUS definition is intended to provide predictability and consistency in identifying federally regulated surface waters. The agencies state the proposed WOTUS definition is "straightforward" and cost-effective while still being protective of the nation's navigable waters and respectful of state and tribal authority over their land and water resources.

The proposal focuses on surface waters that are "physically and meaningfully connected to traditional navigable waters," and relies largely on the "relatively permanent water" jurisdictional test established in the late Justice Antonin Scalia's plurality opinion in *United States v. Rapanos*, 547 U.S. 715 (2006). The proposed rule includes the following six categories of waters that are WOTUS and also includes 11 categories of waters or features that are not WOTUS:

WOTUS includes

1. Traditional navigable waters, including territorial seas (TNWs)
2. Tributaries that contribute perennial or intermittent flow to TNWs
3. Ditches that (a) are TNWs, (b) are constructed in a tributary, (c) relocate or alter a tributary such that they are a tributary, or (d) are constructed in an adjacent wetland so long as they meet the definition of tributary
4. Lakes and ponds that (a) are TNWs, (b) contribute perennial or intermittent flow to a TNW in a typical year directly or indirectly through a jurisdictional water, or (c) are flooded by jurisdictional waters in a typical year
5. Impoundments of otherwise jurisdictional waters
6. Wetlands adjacent to jurisdictional waters

WOTUS does NOT include

1. Any feature not identified in the proposal as jurisdictional
2. Groundwater
3. Ephemeral features and diffuse stormwater run-off
4. Ditches that are not defined as WOTUS
5. Prior converted cropland
6. Artificially irrigated areas that would revert to upland if irrigation stopped
7. Artificial lakes/ponds constructed in upland that are not defined as WOTUS
8. Water-filled depressions and pits created in upland incidental to mining or construction activity, and pits excavated in upland to obtain fill, sand or gravel
9. Stormwater control features created in upland to convey, treat, infiltrate or store stormwater run-off
10. Wastewater recycling structures constructed in upland
11. Waste treatment systems

The proposed rule's definition of WOTUS is significantly different from the definition of WOTUS under the CWR, and, as such, would significantly reduce the extent of federally regulated waters. This is especially true in states, such as Pennsylvania, where the CWR's WOTUS definition currently applies. Some of the key differences include:

• **References to "significant nexus" are eliminated.** The

[1] For additional background on the events leading up to the release of the proposed rule, please see the authors' PIOGA Press articles from February and November 2018, and relevant Environmental Alerts on Babst Calland's Perspectives webpage at www.babstcalland.com/ perspectives.

proposed rule does not reference the "significant nexus" jurisdictional test, a hallmark of the CWR, that is based on former Justice Anthony Kennedy's concurring opinion in *Rapanos*. Rather, the proposed rule focuses on "relatively permanent flowing and standing waterbodies" that are or have a surface connection to TNWs

• **"Tributary" is narrowed.** Only surface water channels with perennial or intermittent flow to a WOTUS in a "typical year" would be federally defined as tributaries. Ephemeral features are excluded from the definition. Unlike the CWR's definition of tributary, the proposed rule does not define a tributary based on the presence of defined beds, banks and ordinary high water marks.

• **"Adjacent wetlands" are narrowed.** "Adjacent wetlands" would not be jurisdictional unless they either physically abut a WOTUS or have a direct hydrologic surface connection to another WOTUS other than a wetland. By contrast, the CWR's definition of WOTUS extends jurisdiction to wetlands within a certain dis1. For additional background on the events leading up to the release of the proposed rule, please see the authors' PIOGA Press articles from February and November 2018, and relevant Environmental Alerts on Babst Calland's Perspectives webpage at www.babstcalland.com/ perspectives. Lisa M. Bruderly, Esq. Gary E. Steinbauer, Esq. Authors: 10 The PIOGA Press | January 2019 tance from an ordinary high water mark or within the 100-year floodplain of a WOTUS, even if they are physically separated from a WOTUS.

• **Jurisdiction over ditches clarified.** The proposed rule generally would not categorize ditches as WOTUS, unless they function as TNWs, are constructed in or satisfy the definition of a "tributary," or are constructed in an "adjacent wetland." Even though certain "ditches" under the proposed rule would not be considered jurisdictional, the agencies note that they could be subject to CWA permitting if they meet the definition of "point source."

Potential advantages for oil and gas sector and public comment opportunities

The proposed rule's definition of WOTUS, if finalized as written, would fundamentally alter and substantially narrow the scope of federal CWA authority. For the oil and gas industry, this proposed narrower definition would likely simplify the federal obligations associated with the construction and maintenance of well pads, pipelines and access roads, including the following:

• **Section 404 permitting.** Because, under the proposed rule, fewer waters would be considered to be WOTUS, the extent of impacts to federally jurisdictional waters from well pad, access road or pipeline construction would be expected to decrease, thereby lessening the likelihood of requiring more expensive, resourceintensive and time-consuming individual Section 404 permits.

• **Spill reporting.** Under the proposed rule, the likelihood of spilled materials entering a WOTUS and triggering federal spill reporting requirements would be lessened.

• **Maintenance of ditches.** Under the proposed rule, fewer drainage ditches would be considered to be WOTUS, therefore decreasing the need for Section 404 permits or authorizations to maintain these ditches. We note that, while the proposed rule may reduce certain federal obligations, it does not alter existing state permitting or reporting obligations (e.g., Chapter 102 and Chapter 105 permitting obligations, PPC planning requirements, state spill reporting obligations, etc.).

Oil and gas operators are encouraged to provide their comments on the proposed rule. A 60-day public comment period will open upon publication of the proposal in the *Federal Register*. The agencies are soliciting public comment on all aspects of the proposed rule, including whether:

• The "significant nexus" test must be a component of the proposed new definition of WOTUS.

• The definition of "tributary" should be limited to perennial waters and not those with intermittent flows.

• "Effluent-dependent streams" should be included in the definition of "tributary."

• The jurisdictional cut-off for "adjacent wetlands" should be within the wetland or at the wetland's outer limits.

• A ditch can be both a "point source" and a WOTUS.

• The agencies should work with states to develop, and make publicly available, state-of-the-art geospatial data tools to identify the locations of WOTUS.

Continuing jurisdictional uncertainty and inevitable litigation

While the proposed rule may ultimately be beneficial for the oil and gas sector, it does not bring any immediate changes to the regulatory landscape and is but the first step in what could be a long road to redefine WOTUS. Even if finalized, litigation challenging any final rule adopting all or part of the proposed rule is almost certain. As we have described in previous articles, the litigation challenging the 2015 CWR began almost immediately upon its finalization and still continues. In addition, challenges by states and environmental groups to the Trump administration's efforts to delay implementation of the CWR have resulted in the current regulatory patchwork where the pre-CWR definition of WOTUS is in effect in 28 states and the arguably more expansive CWR definition of WOTUS is in effect in 22 states, including Pennsylvania.

While efforts to finalize this newly proposed rulemaking continue and the inevitable litigation runs its course, the regulated community must continue to contend with these state-dependent differences in the scope of the federal government's authority under the CWA.

If you have any questions about the topics discussed in this article or how they may impact your operations and compliance obligations, contact Lisa M. Bruderly at 412-394-6495 or llbruderly@babstcalland.com, or Gary E. Steinbauer at 412-394-6590 or gsteinbauer@ babstcalland.com.