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Significant WOTUS Developments Expected in 2022

Why is the WOTUS Definition Important?

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This article is an excerpt of The 2022 Babst Calland Report, which represents the legal perspective of Babst Calland's energy attorneys addressing the most current business and regulatory issues facing the energy industry. To view the full report, go to reports.babstcalland.com/energy2022-2.



Compliance with federal permitting associated with disturbances to streams and wetlands can be a challenge for large and small pipeline projects, causing delays and increased expenses. The extent of required federal permitting is largely dependent on the definition of “waters of the United States” (WOTUS), which determines federal jurisdiction under the Clean Water Act (CWA).

The definition of WOTUS must be considered anytime there is earth disturbance that may impact a stream or wetland. For example, pipeline construction requires U.S. Army Corps of Engineers (Corps) permitting for impacts from crossing, or otherwise disturbing, federally regulated streams and wetlands. Note that the WOTUS definition is included in 11 federal regulations and affects, not only federal permitting for impacts to regulated streams and wetlands (i.e., Section 404 permitting), but also the applicability of NPDES permitting requirements, federal spill reporting and SPCC plans.

Why is the WOTUS Definition Controversial?

The definition of WOTUS has been hotly contested and frequently changed for more than a decade. Presidents Obama, Trump and Biden have all proposed their own definitions, which largely reflected their agendas for more, or less, stringent regulation. The current definition is actually the definition that was in place prior to the Obama administration. The Corps and U.S. Environmental Protection Agency (USEPA) reverted back to this definition when President Trump's Navigable Waters Protection Rule (NWPR) was vacated by the U.S. District Court for the District of Arizona in August of 2021.

Frequent changes to the WOTUS definition create uncertainty for the energy industry in trying to identify, avoid and/or mitigate impacts to WOTUS. When the definition changes, a Section 404 permit applicant must reevaluate a project's impacts under the new definition. This may require adjustments in the type of permit needed, the time it takes to get the permit or the level of public input.

Much of the controversy surrounding the WOTUS definition relates to the two tests identified in the U.S. Supreme Court's *Rapanos v. United States* decision. Justice Antonin Scalia issued the plurality opinion in *Rapanos*, holding that WOTUS would include only “relatively permanent, standing or continuously flowing bodies of water” connected to traditional navigable waters, and to “wetlands with a continuous surface connection to such relatively permanent waters.” Justice Anthony Kennedy, however, advanced a broader interpretation of WOTUS in his concurring opinion, which was based on the concept of a “significant nexus,” meaning that wetlands should be considered as WOTUS “if the wet-lands, either alone or in combination with similarly situated lands in the region,

significantly affect the chemical, physical, and biological integrity of other covered water.”

In 2022, the on-going debate will continue over the definition of WOTUS. Notably, both the executive and judicial branches of the federal government are expected to weigh in on this definition, without any guarantee that their interpretations will be consistent or that the resulting definition of WOTUS will be any more certain than the current definition.

What Regulatory Changes to the WOTUS Definition Are Proposed?

USEPA and the Corps have already taken the first step to revise the WOTUS definition, as promised by President Biden during his presidential campaign, by publishing a proposed definition in a December 7, 2021 rulemaking (Rule 1). While this proposed definition is similar to the pre-2015 definition of WOTUS, which is currently in effect, it also reflects relevant Supreme Court decisions (e.g., *Rapanos*) that occurred in the early 2000s.

If promulgated, the December 2021 proposed WOTUS definition would incorporate Justice Kennedy’s significant nexus test into the regulations. Practically speaking, however, the impact is not expected to be significant because, in interpreting the current definition of WOTUS, the Corps has already largely been relying on its 2008 guidance, which reflects Justice Kennedy’s significant nexus concept.

A more expansive definition of WOTUS is expected when the Biden administration unveils its second proposed WOTUS rulemaking (Rule 2), planned for publication later this year or early next year. While the language of Rule 2 is yet unknown, as stated in the Fall 2021 Unified Agenda, Rule 2 is expected to reflect “additional stakeholder engagement and implementation considerations, scientific developments, and environmental justice values. This effort will also be informed by the experience of implementing the pre-2015 rule, the 2015 Clean Water Rule, and the 2020 Navigable Waters Protection Rule.”

Also, last month, USEPA’s Science Advisory Board announced that it would be reviewing the proposed rule in light of “important emerging environmental issues,” such as the effects of climate change, whether subsurface water should be included in the definition and the potential impact on EJ areas.

The practical effect of identifying federally-

regulated waters based on concepts such as environmental justice and climate change is uncertain. The spotlight on these issues could result in a new WOTUS definition that encompasses many more waters and requires more public engagement for specific projects requiring Corps permitting.

How will the U.S. Supreme Court Weigh in on the WOTUS Definition for Wetlands?

In addition to the Biden administration’s proposed changes to the WOTUS definition, in January 2022, the U.S. Supreme Court signaled that it would weigh in on the WOTUS debate for the first time since 2006, when it agreed to hear the case of *Sackett v. USEPA*. In *Sackett*, landowners in Idaho have had a long-standing challenge to an administrative order issued against them for allegedly filling wetlands without a permit. The *Sacketts* assert that Justice Kennedy’s significant nexus test in *Rapanos* is not the appropriate test to delineate wetlands as WOTUS, and that, under the test identified by Justice Scalia, the wetlands on their property are not WOTUS.

In 2021, the Ninth Circuit ruled against the *Sacketts*’ position and held that the “significant nexus” test in the Kennedy concurrence was the controlling opinion from *Rapanos*. The *Sacketts* petitioned the U.S. Supreme Court to consider whether *Rapanos* should be revisited to adopt the plurality’s test for wetland jurisdiction under the CWA. However, the Court, instead, will consider the narrow issue of whether the Ninth Circuit “set forth the proper test for determining whether wetlands are ‘waters of the United States.’”

Many believe the 6-3 conservative majority of the Supreme Court could assert a more narrow interpretation of WOTUS, which would give more discretion to the states. Oral arguments are expected this fall.

What to Watch for in 2022?

The regulatory and judicial developments discussed above set up a potential conflict, where a new (likely more expansive) regulatory definition of WOTUS and a Supreme Court opinion that likely narrows the meaning of WOTUS occur in the same general timeframe.

Pipeline developers and others in the energy industry should watch these developments so that they understand how the WOTUS definition may change and how it may affect their permitting strategies.