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EPA and the Corps Finalize (the Next) New Definition of WOTUS

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Projects involving oil or natural gas development or pipeline construction require U.S. Army Corps of Engineers (Corps) permitting for impacts from crossing, or otherwise disturbing, federally regulated streams and wetlands. The extent of required federal permitting is dependent on the definition of “waters of the United States” (WOTUS), which determines federal jurisdiction under the Clean Water Act (CWA). Typically, the more impacts to federally regulated streams and wetlands, the more likely the permitting will cause project delays and increase expenses.

As one of their last actions for 2022, U. S. EPA and the Corps (the Agencies) released a prepublication notice of a new definition of WOTUS on December 30, 2022. The new definition will become final 60 days after publication in the *Federal Register*.

Although the Agencies have promoted this final rule as establishing a “durable definition” that will “reduce uncertainty” in identifying WOTUS, this definition does not appear to provide much-needed clarity. Rather, generally speaking, the new definition



codifies the approach that the Agencies have already been informally utilizing to determine WOTUS, which entails relying on the definition of WOTUS from the late 1980s, as interpreted by subsequent U. S. Supreme Court decisions (e.g., *Rapanos v. United States*, 547 U.S. 715 (2006)). The Agencies reverted back to this definition in August of 2021, when the U.S. District Court for the District of Arizona vacated the definition of WOTUS promulgated by President Trump’s administration, referred to as the Navigable Waters Protection Rule (NWPR).

The Agencies’ current approach to interpreting WOTUS relies heavily on both of the frequently discussed tests identified in the *Rapanos* decision. In *Rapanos*, Justice Antonin Scalia issued the plurality opinion, 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” (i.e., adjacent wetlands). 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 wetlands, either alone or in combination with similarly situated lands in the region,

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

President Biden’s new definition directly quotes and codifies these tests as regulations that may be relied upon to support a WOTUS determination. Publication of this definition, at this time, is likely a preemptive move by the Agencies in advance of the Supreme Court’s impending decision in *Sackett v. EPA*, a case in which the Court is considering whether the Ninth Circuit “set forth the proper test for determining whether wetlands are ‘waters of the United States.’” Some have speculated that the U. S. Supreme Court’s opinion may support a more narrow interpretation of WOTUS than is currently being implemented by the Agencies. If true, this inconsistency would create even more uncertainty in identifying WOTUS.

While this new WOTUS definition may not, conceptually, be a significant change to how the Agencies approach regulating streams and wetlands, the new definition could expand how the Agencies evaluate whether a wetland is “adjacent” to a WOTUS and whether a waterbody will “significantly affect” a WOTUS, both of which would support federal jurisdiction of the stream/wetland. The preamble to the new definition includes lengthy discussion regarding adjacent wetlands. In addition, the new definition of “significantly affect” enumerates five factors to be assessed and five functions to be considered in evaluating whether a potentially unregulated water will have a “material influence” on a traditionally navigable water. Factors include distance from the traditionally navigable water, hydrologic factors (e.g., frequency, duration, magnitude of hydrologic connection) and climatological variables (e.g., temperature and rainfall). Functions include contribution of flow, retention and attenuation of runoff and provision of habitat and food resources for aquatic species in traditionally navigable waters. Both the factors and the functions are broad and open to interpretation, which could lead to the Agencies asserting jurisdiction over more waterbodies.

The new definition also codifies that the effect of the potentially regulated water must be evaluated “alone or in combination with similarly situated waters in the region,” which

will likely broaden how the Agencies evaluate the potential regulation of ephemeral and isolated waterbodies.

If the fate of the new WOTUS definition follows the same path as President Obama’s Clean Water Rule and President Trump’s Navigable Waters Protection Rule, the new definition will be challenged quickly after it becomes effective. These challenges may result in the stay or vacatur of the new definition. If this occurs, the Agencies may, again, revert back to the current definition of WOTUS.

Babst Calland will continue to follow these and other Clean Water Act developments. If you have any questions about these developments, contact Lisa Bruderly at 412-394-6495 or lbruderly@babstcalland.com.