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New Uncertainties About WOTUS Definition

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An April 12, 2023, ruling by the U.S. District Court for the District of North Dakota has created a regulatory patchwork across the nation in which the definition of ‘waters of the United States’ (WOTUS), and subsequently, the jurisdiction of the Clean Water Act, now differs by state. For example, West Virginia and Pennsylvania currently rely on different WOTUS definitions to determine Clean Water Act jurisdiction.

This split creates more uncertainty about the extent that a project will impact WOTUS (if at all), what permitting will be required, and how much cost/time will be necessary to obtain appropriate permitting. It also creates inconsistencies from state to state on how the jurisdiction of the Clean Water Act is applied. For example, the Corps may determine that a water is regulated under the Clean Water Act based on the definition of WOTUS effective in one state, while the same water would not be federally-regulated based on the definition of WOTUS effective in another state. It will be difficult for regulating agencies to consistently differentiate between the two definitions, especially when a Corps District regulates WOTUS across states with differing effective definitions.

The nationwide split occurred when the North Dakota district court granted a preliminary injunction that halted the implementation and enforcement of the Biden administration’s new definition of WOTUS (2023 Rule) in the following 24 states: Alabama, Alaska, Arkansas, Florida, Georgia, Indiana, Iowa, Kansas, Louisiana, Mississippi, Missouri, Montana, Nebraska, New Hampshire, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Utah, Virginia, West Virginia, and Wyoming.

In granting the preliminary injunction, the North Dakota district court had harsh criticism for the 2023 Rule, noting that “the new 2023 Rule is neither understandable nor ‘intelligible,’ and its boundaries are unlimited.” It also stated that the 2023 Rule “raises a litany of other statutory and constitutional concerns.” The district court went further to state that the changing definitions of WOTUS “have created nothing but confusion, uncertainty, unpredictability, and endless litigation.” The 2023 Rule was published as final in the *Federal Register* on January 18, 2023, (88 *Fed. Reg.* 3004) and became effective on March 20, 2023 in 48 states. A March 19, 2023, preliminary injunction granted in the U.S. District Court for the Southern District of Texas had already enjoined the new WOTUS definition in Texas and Idaho prior to the definition becoming effective.

A third judicial challenge to the 2023

Rule is pending. In April 2023, the Commonwealth of Kentucky and certain industry groups appealed the decision of the U.S. District Court for the Eastern District of Kentucky, which denied a motion for preliminary injunction to stop the enforcement of the 2023 Rule in Kentucky until May 10, 2023. On May 10, the Sixth Circuit granted an injunction, staying the enforcement of the 2023 Rule in Kentucky, one day after the district court denied the Commonwealth's motion for an emergency injunction of the 2023 Rule pending the appeal. Therefore, as of May 11, 2023, the 2023 Rule is not effective in Kentucky while the appeal is pending.

As of May 11, 2023, the 2023 Rule is effective in 23 states, while the 1986 definition of WOTUS (which was in effect nationwide prior to the 2023 Rule) is in effect in the remaining 27 states.

The two definitions of WOTUS are conceptually similar, with both being based on the 1986 definition, as interpreted by early-2000s U.S. Supreme Court decisions regarding WOTUS, primarily the seminal *Rapanos v. U.S.* case. The U.S. Supreme Court in *Rapanos* identified two tests for determining WOTUS, with the more narrow test being established by Justice Antonin Scalia (i.e., relatively permanent waters and wetlands with a continuous surface connection to such waters), and the broader test being asserted by Justice Anthony Kennedy (i.e., the significant nexus test). Under the 1986 definition, the regulated community and regulators could base their jurisdictional arguments on either the Scalia or Kennedy test for identifying WOTUS. However, because the 2023 Rule codifies both *Rapanos* tests, it, arguably, requires the more inclusive, significant nexus test to be considered.

It is unclear whether additional judicial actions will occur in advance of the highly-anticipated U.S. Supreme Court decision in *Sackett v. EPA*, which will opine on whether the Ninth Circuit set forth the proper test to determine whether wetlands

are WOTUS. The Supreme Court's decision may significantly affect the 2023 Rule and USEPA's ability to define WOTUS. The Sackett decision is expected to be issued by early summer 2023.

Babst Calland will continue to stay up-to-date on the developments related to WOTUS and the Clean Water Act, in general.

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