



## EPA and the Corps Revert Back to Pre-2015 Definition of “Waters of the United States”

The U.S. Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers (Corps) announced, on September 3, 2021, that they would halt implementation of the current definition of “waters of the United States” (WOTUS) effective immediately and revert back to the pre-2015 definition until further notice. The switch is the result of an August 30, 2021 order from the U.S. District Court for the District of Arizona in the case of *Pascua Yaqui Tribe v. U.S. Environmental Protection Agency*, which remanded and vacated the definition of WOTUS promulgated by the Trump administration in 2020 (commonly referred to as the Navigable Waters Protection Rule (NWPR)). While there was speculation that the court’s *vacatur* could be narrowly interpreted to apply only to states where the plaintiffs in the case were located (i.e., Arizona, Minnesota, Washington and Wisconsin), EPA and the Corps have changed the WOTUS definition nationwide.

### Importance of the Definition of WOTUS

The definition of WOTUS identifies which waters are federally-regulated under the Clean Water Act (CWA), and, therefore, determines when a federal permit is required for projects that involve dredging or filling of a waterbody (i.e., a Section 404 permit) or the discharge of pollutants into a surface water (i.e., a NPDES permit). The WOTUS definition also affects federal spill reporting and spill prevention planning.

With regard to Section 404 permitting, the more expansive the definition of WOTUS, the more waters that are federally-regulated. The extent of WOTUS impacts caused by a project determines whether an individual or a general Section 404 permit is required, with the process for obtaining an individual permit typically resulting in more Corps involvement, cost and delay.

### Significance of the Change in WOTUS Definition

When the Trump administration promulgated the NWPR in 2020, environmental groups criticized and challenged the new WOTUS definition, claiming that it was too narrow and did not federally regulate enough types of waters. For example, the NWPR did not federally regulate ephemeral streams or other waters based on Justice Anthony Kennedy’s “significant nexus” test, introduced in the seminal Supreme Court opinion – *Rapanos v. United States and Carabell v. United States*.

By vacating the NWPR, WOTUS are defined under a definition promulgated in the late 1980s and interpreted in subsequent EPA/Corps guidance documents that were issued following the *Rapanos* and *Solid Waste Agency of Northern Cook County (SWANCC) v. United States* Supreme Court decisions. This earlier definition and subsequent interpretations are generally considered to be more expansive and inclusive than the NWPR. Subsequently, reverting to this earlier definition is expected to result in more waters being federally-regulated.

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## Biden Administration Intent to Revise the WOTUS Definition

President Biden has always intended to revise the definition of WOTUS. In his first week in office, he asked EPA and the Corps to consider revising or rescinding the current definition. On June 9, 2021, EPA and the Corps announced their intent to revise the WOTUS definition “to better protect our nation’s vital water resources.” The agencies identified a two-step process, which would first restore protections in place prior to 2015 with updates to reflect relevant Supreme Court decisions, and a second rulemaking that would continue to “refine and build” on the prior definition. In addition to developments in science, EPA and the Corps identified that the new rulemaking would consider, among other things, the effects of climate change and input received from disadvantaged communities with environmental justice concerns.

On the same day, the Department of Justice (DOJ) filed a motion to request remand of the NWPR to EPA and the Corps. DOJ also asked courts to stay judicial challenges to the current WOTUS definition while the Biden administration reconsidered the definition. However, the court in the *Pascua Yaqui Tribe* case, instead remanded and vacated the NWPR definition. This *vacatur* prompted the EPA/Corps decision on September 3, 2021 to revert to the pre-2015 WOTUS definition.

### Anticipated Impact and Timing

While the WOTUS definition proposed by the Biden administration will certainly be more expansive than the NWPR, it is yet unclear as to how far the pendulum will swing with the proposed rulemakings. The agencies have expressed their intent to develop a “durable” definition of WOTUS based on input from “diverse perspectives and based on an inclusive foundation.” To start this process, the agencies solicited pre-proposal written recommendations about how to define WOTUS and implement this definition. In addition, the agencies held several public meetings, during which the public could provide verbal recommendations. More public engagement is anticipated, including 10 geographically focused roundtables for stakeholders.

Among other things, the Biden administration’s definition of WOTUS is most likely to regulate waters (including ephemeral streams) that are considered to have a “significant nexus” to traditionally navigable waters. This definitional change is expected to require more projects to obtain federal CWA permitting, thus extending the time and increasing cost of permitting for many projects with impact to waters.

No timeframe for the new rulemakings has been announced. While EPA’s Spring 2021 Unified Agenda of Regulatory and Deregulatory Actions identified revision of the definition of WOTUS as a “long-term action,” with unspecified dates for the proposed and final actions, it is unclear whether this most recent change in WOTUS definition will also change the schedule for proceeding with the proposed rulemakings.

Babst Calland will continue to track developments related to the federal regulation of waters and will provide necessary updates. If you have any questions or would like any additional information, please contact Lisa M. Bruderly at (412) 394-6495 or [lbruderly@babstcalland.com](mailto:lbruderly@babstcalland.com).

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