

New WOTUS definition finalized, new challenges expected

On January 23, the U. S. Environmental Protection Agency and the U. S. Army Corps of Engineers pre-published the final Navigable Waters Protection (NWP) Rule, which (yet again) redefines the scope of waters regulated under the Clean Water Act (CWA). In particular, the final NWP Rule revises the definition of “waters of the United States” (WOTUS) in 12 federal regulations and will become effective 60 days after publication in the *Federal Register*.

Once effective, the NWP Rule will almost certainly be challenged in the courts by NGOs and other interested parties. These challenges could result in the courts staying the NWP Rule in some, or all, states while the lawsuits are litigated.

The NWP Rule is the final step in fulfilling the Trump administration’s promise to repeal and replace the Obama administration’s 2015 Clean Water Rule (CWR), which many believe improperly expanded the scope of waters regulated under the CWA. Effective December 23, 2019, EPA and the Corps repealed the CWR and restored the WOTUS definition that existed before 2015. Prior to the repeal, the pre2015 rule’s WOTUS definition applied in approximately half of the states, while the CWR’s WOTUS definition applied in the remainder (including Pennsylvania), resulting in certain states having more federally regulated waters than other states.

The stated intent of the NWP Rule is to provide “clarity, predictability and consistency” regarding CWA jurisdiction. Consistent with President Trump’s February 28, 2017, Executive Order, the NWP Rule heavily reflects and relies upon Supreme Court Justice Antonin Scalia’s interpretation of the pre-2015 rule’s definition of WOTUS, as expressed in his plurality opinion in the seminal case, *Rapanos v. United States* (547 U.S. 715 (2006)). Missing from the NWP Rule is any reference to the significant nexus test discussed in Justice Anthony Kennedy’s concurring opinion in *Rapanos*. As background, Justice Scalia opined that relatively permanent, standing or continuously flowing

waters and wetlands with a continuous surface connection to such relatively permanent waters should be regulated under the CWA, while Justice Kennedy advocated for CWA jurisdiction for wetlands with a significant nexus to a navigable water (i.e., a significant effect on the chemical, physical and biological integrity of traditional navigable waters).

Scope of NWP Rule is narrower and clearer than previous rules

The NWP Rule consolidates jurisdictional waters into four categories: (1) territorial seas and navigable-in-fact waters; (2) tributaries; (3) lakes, ponds and impoundments of jurisdictional waters; and (4) adjacent wetlands. As expected, the WOTUS definition in the NWP Rule is much narrower and will federally regulate less waters than would have been regulated under the CWR. The NWP Rule also provides more clarity as to the scope of WOTUS than the pre-2015 rule. The NWP Rule includes 16 definitions and 12 exclusions, as compared to the five definitions and two exclusions in the pre2015 rule, including, for the first time, definitions to clarify the prior converted cropland and waste treatment system exclusions. The NWP Rule also categorically excludes, among other things, ephemeral streams and ditches without perennial or intermittent flow.

We note that despite attempts to provide clarity, the NWP Rule still contains terms that may be subjectively interpreted. For example, the rule relies on conditions in a “typical year” to determine whether a water meets the definition of an “adjacent wetland,” “lakes and ponds, and impoundments,” or a “tributary.” These determinations can be subjective because a “typical year” is determined by the “normal periodic range” of climatic conditions in a geographic area on a rolling 30-year basis.

Practical impact to Pennsylvania expected to be small

While the NWP Rule is intended to clarify the scope of federally regulated waters, the practical impact of the

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rule on the regulation of waters in Pennsylvania is expected to be small. Under Pennsylvania's Clean Streams Law, "waters of the Commonwealth" broadly include "any and all rivers, streams, creeks, rivulets, impoundments, ditches, water courses, storm sewers, lakes, dammed water, ponds, springs and all other bodies or channels of conveyance of surface and underground water, or parts thereof, whether natural or artificial, within or on the boundaries of this Commonwealth." Pennsylvania's definition of "waters of the Commonwealth" is more expansive (i.e., includes more types of waters) than the NWP Rule's WOTUS definition. Therefore, projects that are expected to impact, or discharge into, a water of the Commonwealth will still (typically) require state permitting, even though federal permitting by EPA or the Corps may not be required. There may also be implications in limited circumstances as to whether Spill Prevention, Control and Countermeasure (SPCC) plans would be needed for certain facilities.

In states with less expansive definitions of state waters, the NWP Rule is expected to be a more significant consideration for permitting and spill planning/ response.

Controversy continues and challenges anticipated

While many in industry and agriculture have supported the NWP Rule, a number of NGOs and other interested parties have signaled that they will challenge the NWP Rule on procedural and substantive grounds. In addition, the EPA's own Science Advisory Board and other scientific organizations have criticized the NWP Rule as being in conflict with established science and the objectives of the CWA. With legal challenges looming, the NWP Rule may be stayed in some or all states, with the pre-2015 rule remaining the definition of WOTUS nationwide or in select states.

Babst Calland will continue to actively monitor this controversial regulatory issue. If you have questions about the NWP Rule or other water-related matters, contact Lisa M. Bruderly at 412-394-6495 or lbruderly@babstcalland.com