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More Uncertainty Ahead – WOTUS, SCOTUS and What it Means for Your Project

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Since 2015, jurisdiction under the Clean Water Act (CWA or the Act) has been in a near constant state of flux, creating a challenging regulatory landscape for project developers and the regulatory community. The last few months have been no exception, and a recent move by the Supreme Court is likely to create further uncertainty for the time being.

Shortly after President Biden came into office, he issued an Executive Order directing federal agencies to review all regulations enacted during the Trump administration, including the Navigable Waters Protection Rule (the 2020 Rule), which outlined a new definition of "waters of the United States" (WOTUS). WOTUS is a key term for defining the scope of federal jurisdiction under the Act, and the 2020 Rule significantly narrowed the definition. Not surprisingly, after completing their review of the 2020 Rule, on June 9, 2021, the Environmental Protection Agency (EPA) and the Army Corps of Engineers (the Corps) announced their intent to promulgate a revised definition of WOTUS. Then, in August 2021, a federal district court in Arizona vacated and remanded the 2020 Rule. In response, EPA and the Corps officially halted implementation of the 2020 Rule and began interpreting WOTUS in a manner consistent with the regulatory regime that existed before 2015.

On December 7, 2021, EPA and the Corps issued a new proposed rule to revise the definition once more. Under this proposal, WOTUS would be interpreted to include:

> traditional navigable waters, interstate waters, and the territorial seas, and their adjacent wetlands; most impoundments of "waters of the United States"; tributaries to traditional navigable waters, interstate waters, the territorial seas, and impoundments that meet either the relatively permanent standard or the significant nexus standard; wetlands adjacent to impoundments and tributaries that meet *either the relatively permanent standard or the significant nexus standard*; and "other waters" *that meet either the relatively permanent standard or the significant nexus standard*.[1]

The proposed rule is considered a first step and would codify the pre-2015 definition of WOTUS, with amendments to incorporate the EPA's interpretation of Supreme Court case law.[2] The last day to submit comments on the Biden administration's proposal is February 7, 2022.

Although the proposed rule is being touted as a first step in providing certainty by implementing a "familiar approach," the EPA and the Corps recently announced that they will "consider changes through a second rulemaking that they anticipate proposing in the future, which would build upon the foundation of [the current] proposed rule."[3] It is not yet clear what the second rulemaking might entail, though it is more likely to broaden than restrict the scope of the CWA.

Adding to this uncertainty, on January 24, 2022, the United States Supreme Court granted a petition for writ of certiorari in *Sackett v. EPA*, a long-evolving case concerning whether certain wetlands constitute "waters of the United States."

In *Sackett v. EPA*, the Sacketts purchased a residential property near Idaho's Priest Lake. After they began placing sand and gravel fill on the "soggy" lot, the Sacketts received an administrative compliance order from the EPA asserting the property contained wetlands and is subject to protection under the CWA. The 2007 order required the Sacketts to remove the fill and restore the property to its original, natural condition.

The Sacketts sued the EPA, and the case wound its way through federal courts until 2021, when the Ninth Circuit Court of Appeals decided the EPA correctly determined that the CWA extends to the Sacketts' property because the wetlands at issue are adjacent to a jurisdictional tributary and have a significant nexus to Priest Lake, a traditional navigable water. In reaching this conclusion, the Ninth Circuit applied the test set forth in former Justice Kennedy's concurring opinion in *Rapanos v. United States*, known as the "significant nexus test," and rejected the Sacketts' argument that former Justice Scalia's plurality opinion in *Rapanos* is the governing legal standard. Under the Scalia approach, "waters of the United States" includes "relatively permanent, standing or flowing bodies of water" and wetlands with a "continuous surface connection" to such permanent waters.

The Sacketts petitioned for a writ of certiorari to appeal the decision to the Supreme Court. On January 24, 2022, the Court granted the petition, but limited its review to the question "Whether the Ninth Circuit set forth the proper test for determining whether wetlands are 'waters of the United States' under the [CWA.]" Although this limiting language appears to be an attempt to side-step the Sacketts' request for the Court to broadly "revisit *Rapanos*[,]"it seems the Court will need to reexamine *Rapanos* and address which test(s) have controlling weight to give lower courts direction in applying that precedent moving forward.

Given the Biden administration's proposed rule attempts to codify both the relatively permanent and significant nexus tests in *Rapanos*, a decision from the Supreme Court on that very issue later this year could potentially undermine or even upend current rulemaking efforts. In the meantime, project proponents will face continued uncertainty regarding the breadth of permitting requirements under the CWA. Developing a project in the midst of regulatory uncertainty calls for the development of a careful—and sometimes conservative—strategy to ensure success.

[1]86 Fed. Reg. 69,372, 69,382 (Dec. 7, 2021)(emphasis added).
[2]*Id.*
[3]*Id.* at 69,374.