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Back to the Future: The Biden Administration Releases Final WOTUS Rule

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On December 30, 2022, the Environmental Protection Agency (“EPA”) and the Army Corps of Engineers (the “Corps”) (the “Agencies”) released a pre-publication version of yet another new rule redefining “waters of the United States” (“WOTUS”) under the Clean Water Act (“CWA”) (the “Final Rule”). The Final Rule comes more than a year after the Agencies released their initial proposal to redefine the term, substantively mirrors the language of the initial proposal with a few exceptions, and will go into effect 60 days after its publication in the Federal Register. Notably, the preamble implies that the Final Rule will be the Agencies’ final attempt to craft a “durable” definition of WOTUS. This is a departure from the Agencies’ initial proposal, which indicated that this Final Rule would be the first step toward redefining WOTUS, and that a second rulemaking to craft a durable definition of the term would begin in 2023. The Final Rule makes no mention of a second rulemaking.

In essence, the Final Rule reverts back to pre-2015 standards with updates aimed to reflect Supreme Court precedent. While it would maintain some longstanding interpretations of WOTUS (e.g., traditional navigable waters and interstate waters), for some waters like tributaries, intrastate lakes and ponds, and streams, the Final Rule codifies the two tests established by the Supreme Court in *Rapanos*, defining a waterbody as jurisdictional if it meets **either** the relatively permanent test **or** the significant nexus test. With respect to wetlands, the Final Rule would consider the following as WOTUS: (1) wetlands *adjacent* to traditional navigable waters, territorial seas, and interstate waters; (2) wetlands *adjacent to and with a continuous surface connection* to a relatively permanent tributary or impoundment of WOTUS; and (3) wetlands adjacent to impoundments of WOTUS or jurisdictional tributaries when the wetlands *meet the significant nexus test*.

In the preamble to the Final Rule, the Agencies indicate that the “significant nexus” test is used to “identify waters that, either alone or in combination with similarly situated waters in the region, *significantly affect* the chemical, physical, or biological integrity of traditional navigable waters, the territorial seas, or interstate waters[.]” Final Rule at p. 9 (emphasis added). In turn, the Final Rule revises the definition of “significantly affect” to refer to “a material influence” on traditional navigable waters, the territorial seas, or interstate waters. It also lists functions to be assessed and factors to be considered to determine whether waters have a material influence on other waters. The Final Rule clarifies that the Agencies will consider factors that may vary regionally,

including the contribution of flow, retention and attenuation of floodwaters and runoff, modulation of temperature in other WOTUS, the provision of habitat and food resources for aquatic species in other WOTUS, and landscape position and geomorphology.

In addition, while the Final Rule maintains longstanding exclusions (e.g., prior converted cropland and waste treatment systems), it incorporates six additional exclusions. These types of waters are **not** jurisdictional waters, and include ditches excavated wholly in and draining only dry land, and that do not carry a relatively permanent flow of water, as well as swales and erosional features that are characterized by low volume, infrequent, or short duration flow.

While the agencies do not acknowledge or explain the departure from the originally planned two-step rulemaking, it may be related to an anticipated decision from the U.S. Supreme Court in *Sackett v. EPA*, which is expected sometime later this year. The Court agreeing to review this case, which concerns CWA jurisdiction for certain wetlands in Idaho, complicated the Agencies' planned rulemakings. The *Sackett* decision could very well impact the "significant nexus" test, which could force the Agencies to revise the definition yet again. Even if the Supreme Court issues a narrower decision with which the Agencies' Final Rule does not conflict, the Final Rule will almost certainly be challenged in district courts throughout the country, continuing the regulatory uncertainty regarding Clean Water Act jurisdiction.

The Final Rule appears to be an attempt by the Agencies to have a broad rule that doesn't explicitly choose a winner among competing court tests. It provides the Agencies with the opportunity to apply both tests, which may provide a better defense for the inevitable legal challenges the Final Rule will face. The outcome for the regulated community will likely be continued uncertainty in the implementation of the Final Rule and the need to closely track any guidance and policies issued, including revisions to regional delineation manuals. The Final Rule could also increase the time it takes for a jurisdictional determination to be made and the need for applicants to conduct their own legal and technical analyses to influence decision making.

Any rulemaking is a balancing test between providing bright-line certainty or a degree of ambiguity to establish flexibility to address different fact patterns. This Final Rule chooses ambiguity, which could potentially lead to disparate outcomes, extended reviews, and the need for legal and technical assistance.

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