

The P*i*OGA Press

February 2022 • Issue 142

Recent updates on Nationwide Permits and waters of the United States, with more expected

The U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers have recently issued updates regarding Nationwide Permits (NWP) under Section 404 of the Clean Water Act (CWA) and Section 10 of the Rivers and Harbors Act of 1899, as well as a new proposed definition of waters of the United States (WOTUS). More developments on both subjects are anticipated in 2022 from these agencies, as well as from the U.S. Supreme Court.

On December 27, 2021, the Corps published a final rule reissuing 40 existing NWPs and issuing one new NWP (Water Reclamation and Reuse Facilities) (86 Fed. Reg. 73522). Broadly, NWPs authorize certain work in streams, wetlands and other WOTUS when those activities will result in no more than minimal individual and cumulative adverse environmental effects. This final rule rounds out NWP rulemaking activities that began in September 2020, when the Corps, under the Trump administration, proposed to reissue the 52 existing NWPs and issue five new NWPs.

As background, in January 2021, the Corps modified and reissued 12 of the existing NWPs and issued four of the

five proposed NWPs. The January 2021 final rule also revised and reissued the NWP general conditions and definitions. The focus of that rule was largely to revise and re-issue NWPs that relate to the energy industry, including the division of existing NWP 12 (Utility Line Activities) into three NWPs, depending on the type of utility line: oil and natural gas pipeline activities (NWP 12), electric utilities and telecommunications (NWP 57), and utility lines for water and other substances (NWP 58). The December 2021 rule does not address these 16 NWPs that were finalized in January 2021.

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This December 2021 reissuance makes relatively minor changes to several NWPs, including NWP 13 (Bank Stabilization) and NWP 27 (Aquatic Habitat Restoration, Enhancement and Establishment Activities). It also states that the NWPs will be subject to the general conditions and definitions included in the January 2021 rule, making the general conditions and definitions for all NWPs consistent. Previously, these NWPs had been subject to the general conditions and definitions in effect in 2017.

The NWPs in this rule replace the 2017 versions of those permits and complete the rulemaking process to reissue all of the NWPs. These NWPs go into effect on February 25 and will expire on March 14, 2026, consistent with the expiration date of the NWPs that were reissued in January 2021.

More NWP changes expected in 2022

The Biden administration intends to reevaluate the NWPs later this year. According to the Fall 2021 Unified Agenda of Regulatory Actions, the Corps is planning a comprehensive rulemaking in 2022 to reexamine all NWPs issued in 2021 “to identify NWPs for reissuance, modification, or issuance, in addition to identifying potential revisions to general conditions and definitions in

order to be consistent with Administration policies and priorities.” Changes to the NWP program are expected to undo Trump administration revisions, which, arguably expanded the permits’ applicability, and also address climate change and environmental justice concerns.

The Corps stated that it is considering whether additional steps should be taken to ensure the NWP program aligns with the Biden administration’s policies and priorities, including Executive Order 13990, “Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis.” This order directs agencies to review and address regulations from the previous administration that conflict with national objections to improve public health and the environment. Further, this order directs agencies to prioritize environmental justice. According to Assistant Secretary of the Army for Civil Works Michael L. Connor, “The [Corps] will also be reviewing the overall NWP program to ensure consistency with the administration’s policies, including the need to engage affected communities.”

Changes to WOTUS

The Corps and EPA published a proposed revision to the WOTUS definition on December 7 (Rule 1), with the public comment period closing on February 7. This proposed definition is similar to the pre-2015 definition of WOTUS, with updates to reflect relevant Supreme Court decisions (e.g., *Rapanos v. United States*) that occurred in the early 2000s. In *Rapanos*, Justice Scalia issued the plurality opinion, holding that WOTUS would include only “relatively permanent, standing or continuously flowing bodies of water” connected to traditional navigable waters, and to “wetlands with a continuous surface connection to such relatively permanent waters.” Justice Kennedy, however, advanced a broader interpretation of WOTUS in his concurring opinion, which relied on the concept of a “significant nexus,” and stated that wetlands should be considered as WOTUS “if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered water.” The December 2021 proposed WOTUS definition would incorporate Justice Kennedy’s significant nexus test into the regulations.

The impact of the December 2021 proposed WOTUS definition is generally not expected to be significant because, under the current definition of WOTUS, the Corps, in most jurisdictions, has been relying on 2008 guidance which also considers Kennedy’s significant nexus test. However, the Biden administration intends additional (potentially more expansive) revisions to the WOTUS definition in a second rulemaking (Rule 2). Broadly, the

more expansive the definition of WOTUS, the more waters that are federally regulated, and the more likely that surface water impacts from a project will require Section 404 permitting. The increased amount of impacts to federally-regulated waters may result in a project exceeding NWP or state programmatic permit (e.g., PASPGP-6) thresholds and requiring an individual Section 404 permit.

As stated in the Fall 2021 Unified Agenda, “[t]his second rule proposes to include revisions reflecting on additional stakeholder engagement and implementation considerations, scientific developments, and environmental justice values. This effort will also be informed by the experience of implementing the pre-2015 rule, the 2015 Clean Water Rule, and the 2020 Navigable Waters Protection Rule.”

U.S. Supreme Court agrees to hear WOTUS case

In addition to planned WOTUS changes by the Biden administration, the U. S. Supreme Court, in January 2022, signaled that it would weigh in on the WOTUS debate, when it agreed to hear the case of *Sackett v. USEPA*. In *Sackett*, landowners in Idaho have a long-standing challenge to an administrative order issued against them for allegedly conducting fill activities without a Section 404 permit. Much of the Sacketts’ arguments pertain to whether the wetlands in question were appropriately delineated as WOTUS by applying Justice Kennedy’s significant nexus test in *Rapanos*.

In 2021, despite the Sacketts’ arguments, the Ninth Circuit held that the “significant nexus” test in the Kennedy concurrence was the controlling opinion from *Rapanos*. The Sacketts petitioned the U.S. Supreme Court to consider whether *Rapanos* should be revisited to adopt the plurality’s test for wetland jurisdiction under the CWA. However, the court agreed instead to consider the narrow issue of whether the Ninth Circuit “set forth the proper test for determining whether wetlands are ‘waters of the United States.’” The Supreme Court’s decision as to whether Justice Kennedy’s concurring opinion is controlling will be very significant in future interpretations of WOTUS.

With expected WOTUS developments from the U.S. EPA, the Corps and the U. S. Supreme Court, 2022 is shaping up to be a critical year for federal water law.

Babst Calland will continue to track developments and changes to the NWP program and WOTUS. If you have any questions about these developments, contact Lisa Bruderly at 412-394-6495 or lbruderly@babstcalland.com or Evan Baylor at 202-853-3461 or ebaylor@babstcalland.com.