Waters of the United States (WOTUS)

On December 7, 2021, EPA and the Department of the Army (together, the "Agencies") published a proposed rule in the Federal Register titled "Revised Definition of 'Waters of the United States'" (the "Proposed Rule"). Comments [were] due on February 7, 2022. The Proposed Rule is the fourth substantive rulemaking since 2015 to try to address the problematic vagueness of the term "navigable waters," defined as the "waters of the United States," which sets the scope of federal jurisdiction under the Clean Water Act—thereby defining what features are left to be regulated solely by the states. The prior rulemakings all resulted in litigation, a slew of court decisions, and, in the end, continued uncertainty about the scope of federal jurisdiction. This latest rulemaking is another swing of the pendulum and expands the reach of federal jurisdiction under the Clean Water Act over features that convey or hold water to varying, potentially minimal, degrees and durations. The Proposed Rule expands federal jurisdiction to a substantial degree compared to the Navigable Waters Protection Rule ("NWPR"), which became effective in June 2020.

In 2006, the Supreme Court issued a fractured decision in *Rapanos v. U.S.*, 547 U.S. 715. Justice Scalia's plurality opinion interpreted "waters of the United States" to "include[] only those relatively permanent, standing or continuously flowing bodies of water forming geographic features that are described in ordinary parlance as streams[,] . . . oceans, rivers, [and] lakes," and only those wetlands with a "continuous surface connection" to such jurisdictional bodies "so that there is no clear demarcation between 'waters' and wetlands." Justice Kennedy's concurring opinion found that the CWA provides the Agencies with jurisdiction over waters that "possess a significant nexus to waters that are or were navigable in fact or that could reasonably be so made," i.e., when tributaries or wetlands, "either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" The Agencies adopted guidance addressing the decisions in prior case law and *Rapanos* but for years did not propose to modify the regulatory definition of "waters of the United States" to incorporate these Supreme Court decisions.

In 2015, the Agencies amended the regulatory definition to address the Supreme Court's interpretations of "waters of the United States" and provide a new basis for federal jurisdiction, promulgating the "Clean Water Rule: Definition of 'Waters of the United States'" ("2015 Rule"). Largely adopting Justice Kennedy's concurring opinion in *Rapanos* (and arguably going beyond it), the 2015 Rule asserted jurisdiction over traditional navigable waters and tributaries and wetlands with a significant nexus to such waters and asserted bright line tests for many features. In doing so, the 2015 Rule relied heavily on EPA's "Connectivity Report," which synthesized peer-reviewed publications on hydrologic interconnection among water bodies, but which acknowledged connection is a gradient. This rule was stayed and remanded to the Agencies by multiple district courts. It was repealed by rulemaking effective in December 2019.

In June 2020, the NWPR became effective. Because of the decades of uncertainty and litigation over prior assertions of expansive federal jurisdiction under the Clean Water Act, this rule adopted a new framework and bright lines excluding ephemeral streams and wetlands that lack surface connection to adjacent jurisdictional waters and leaving such features to state regulatory regimes. Multiple district courts have vacated this rule as well, and the Proposed Rule is the rulemaking to repeal that rule.

The Agencies are not proposing to purely revert to the pre-2015 status quo, which was recodified in a December 2020 rule. Rather, they are proposing to adopt a regulatory interpretation of the significant nexus standard articulated by Justice Kennedy in *Rapanos* and leave jurisdictional determinations to a case-by-case review under either a "relatively permanent" test or a regulatory "significant nexus" standard.

By failing to apply statutory lines preventing the gradient of connection from being applied to its extremes, the Proposed Rule either reverts the regulatory landscape to all the uncertainty that has plagued Clean Water Act

implementation or provides a cover for functionally unfettered assertions of federal jurisdiction that allow the statute's authority to be exceeded.

Importantly, all iterations of the definition of waters of the United States, including the Proposed Rule, have recognized the appropriateness and importance of maintaining long-standing exemptions from federal jurisdiction for prior converted cropland and waste treatment systems and acknowledged that groundwater is not a water of the U.S. The preamble mentions that, subject to case-by-case review, longstanding practices to exclude certain ditches and features in uplands from jurisdiction will be carried forward, but no regulatory hook is provided for this generalized statement. If the exemptions expressly stated in the NWPR are abandoned—such as those for many ditches and other water management infrastructure—there needs to be an effort to otherwise advance clarity in the Proposed Rule. Any revised definition should respect the traditional state and local governmental authority over land and water use and carry forward and advance appropriate exemptions for ditches, canals, and other man-made water management infrastructure.

Requests of Congress.

- **Ask EPA and USACE to stop pursuing the proposed WOTUS rule ("Proposed Rule") until the Supreme Court issues guidance in *Sackett v. EPA*.** The issue accepted for Court review will inform the scope of federal jurisdiction under the Clean Water Act. Waiting for Court guidance increases the likelihood that a rulemaking could bring clarity to stakeholders and respect the balance of federal and state power.
- **If the Agencies move forward with the Proposed Rule, encourage the clear and appropriate limits of federal jurisdiction**. A Proposed Rule should include exemptions for ditches, canals, and other man-made water management infrastructure, which are critical to state and local management of land and water use. Any expansion of federal jurisdiction should be acknowledged in a transparent manner and Congress should match those burdens with appropriate permitting resources and tools (e.g., flexibilities should be added to general permitting or resources deployed to accommodate reasonable permitting timelines and mitigation approaches).
- **Use Congressional oversight to ensure transparency and accountability in rulemaking and implementation** so that the Agencies do not have unfettered cover to expand federal jurisdiction under a vague regulatory standard