UPDATE: Agencies Announce Intent to Issue Final WOTUS Rule by September 1st

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JULY WOTUS UPDATES: On July 12, 2023, the U.S. Environmental Protection Agency and the U.S. Army Corps of Engineers sent a letter to top Republican lawmakers, confirming that the Corps:

1. has temporarily paused processing all Approved Jurisdictional Determinations (AJDs) and
2. is currently only issuing AJDs for areas where no water resources are involved (dry land AJDs) or where "water resources meet the terms of exclusions under the 2023 Rule or the pre-2015 regulatory regime."

The agencies further stated that they will not resume issuing other forms of AJDs until the effective date of their new forthcoming WOTUS rule. Following the Agencies' letter, on July 17th, EPA sent their final rule on amendments to the revised definition of 'Waters of the United States' to the Office of Information and Regulatory Affairs for EO 12866 review, which review can take up to 90 days but is expected to be fast-tracked for this rule.

Assuming the agencies are on track to achieve their target publication date of September 1st, the Corps may not resume issuing AJDs until November 1st (60 days after publication in the Federal Register). If counting from the date the Supreme Court released the *Sackett* decision, this adds up to about a 5-month period of paused AJDs. In the meantime, permit applicants will continue to face the difficult business decision of whether to move forward relying on preliminary jurisdictional determinations (PJDs) or wait multiple months for AJD issuance to restart.

On June 26, 2023, the U.S. Environmental Protection Agency (EPA) and the Army Corps of Engineers (Corps) announced their intent to amend the Biden administration's January 2023 waters of the United States (WOTUS) rule and issue a new final rule by September 1, 2023 – without first publishing a proposed rule and seeking public comment. The new rule will update the January 2023 WOTUS rule to be consistent with the United States Supreme Court's holding in *Sackett v. EPA* and is intended to resolve current

regulatory uncertainty regarding the federal government's jurisdiction over WOTUS of the Clean Water Act.

The Administrative Procedure Act (APA) provides limited exceptions from the usual rulemaking process – *when the agency has "good cause" to find the usual proposed rulemaking notice and comment process would be "impracticable, unnecessary, or contrary to public interest," the agency may skip this step and proceed to issuing a final rule.* The agencies may take the position that issuing a proposed rule is unnecessary because the administration already completed the typical APA process in connection with its issuance of the January 2023 WOTUS rule, which is the same rule they are now amending. The agencies also may view the notice and comment process as contrary to the public interest because it would further prolong this period of regulatory uncertainty. However, if the agencies receive substantive adverse comments during the period between publication of the final rule in the Federal Register and the rule's effective date (here, likely 60 days after the September 1st publication, so October 31, 2023), then the agencies must withdraw the final rule prior to the effective date and pursue the normal rulemaking process (starting with a proposed rule and a notice and comment period).

Despite the agencies' attempt to fast-track this rulemaking, their approach to the process and substance of the new final rule are likely to be litigated.

The agencies likely opted to pursue a final rule (rather than taking the typical year plus to develop guidance) because of congressional pressure (House and Senate Republicans sent a letter to the agencies urging action on this issue on June 21, 2023) and the outsized impact prolonged uncertainty would have on the public. The agencies also may be attempting to insulate the new final rule from changes or potential reversal given the upcoming election year.