



Environmental Update

January 2023

EPA and Army Seek to Reset WOTUS Rule Regulatory Framework Before *Sackett* Ruling

On December 30, 2022, the U.S. Environmental Protection Agency (EPA) and the U.S. Department of the Army (Army) released a final rule (2022 Rule) establishing a revised definition of “waters of the United States” (WOTUS) under the Clean Water Act (CWA). The final rulemaking resets the regulatory landscape to mirror the pre-2015 definition of the term (commonly referred to as “the 1986 regulations”) and includes protection for traditional navigable waters, the territorial seas, interstate waters, *and* upstream waters that “significantly affect” waters typically viewed as within federal jurisdiction under the Commerce Clause (U.S. Const. art. 1, § 8, cl. 3).

The “New” 2022 Rule

The long-awaited 2022 Rule identifies five categories of waters that fall within CWA jurisdiction. EPA and the Army currently define WOTUS to include:

- Traditional navigable waters, the territorial seas, and interstate waters
- Impoundments of “waters of the United States”
- Tributaries of traditional navigable waters, the territorial seas, interstate waters, or impoundments when the tributaries meet either the relatively permanent standard or the significant nexus standard (“jurisdictional tributaries”)
- Wetlands adjacent to traditional navigable waters, territorial seas, and interstate waters; wetlands adjacent to and with a continuous surface connection to relatively permanent impoundments, or jurisdictional tributaries when the jurisdictional tributaries meet the relatively permanent standard; and wetlands adjacent to impoundments or jurisdictional tributaries when the wetlands meet the significant nexus standard (“jurisdictional adjacent wetlands”)

- Intrastate lakes and ponds, streams, or wetlands not previously listed that meet either the relatively permanent standard or the significant nexus standard

These categories mostly resemble the 1986 regulations with some minor revisions. For example, the 2022 Rule limits the universe of waters that may be considered an impoundment but adds the territorial seas to the list of waters that may be considered a tributary.

The rule also codifies eight exclusions from the definition of WOTUS for features that were previously considered non-jurisdictional under the pre-2015 regulatory landscape. Those exclusions are (1) waste treatment systems; (2) prior-converted cropland designated by the Secretary of Agriculture; (3) ditches (including roadside ditches); (4) artificially irrigated areas; (5) artificial lakes or ponds; (6) artificial reflecting pools or swimming pools; (7) water-filled depressions created in dry land incidental to construction activity; and (8) swales and erosional features. EPA and the Army believe that codification of the exclusions would “provid[e] clarity and certainty” and “simplify the process of determining jurisdiction.”

The last section of the 2022 Rule contains definitions for key terms found in the rulemaking. EPA and the Army decided to stick with the 45-year-old definition of “adjacency,” but still opted to add new definitions for other concepts critical to a determination of whether a wetland falls within CWA jurisdiction. Under the 2022 Rule, adjacency continues to mean “bordering, continuous, or neighboring.” The 2022 Rule adds a new definition for “significantly affect,” which means to have “a material influence on the chemical, physical, or biological integrity

of” traditional navigable waters. EPA and the Army also included functions and factors to be assessed and considered in the determination of whether a waterbody meets the definition of significantly affect.

Notably, the 2022 Rule does not contain a bright-line test to determine whether a wetland falls within the definition of WOTUS. Instead, its parameters allow regulators to account for regional hydrogeologic and seasonal variations across the country. Also, before publication, EPA and the Army led 10 implementation-focused regional roundtables to discuss regional issues in implementing the definition of WOTUS, which EPA states will help “synthesize[] key actions the agencies will take to enhance and improve implementation of ‘waters of the United States.’”

The rule will become effective 60 days after it is published in the Federal Register. Once published, the final rule will be available at Regulations.gov and the Federal Register, under docket number EPA-HQ-OW-2021-0602. Several resources associated with the final rule are also available on EPA’s website, including a joint coordination memo from EPA and the Army that is intended to ensure accurate and consistent WOTUS determinations.

Past Attempts to Define WOTUS

EPA and the Army have inherited the difficult task of defining WOTUS through regulation since Congress failed to do so. There is little dispute that the CWA confers federal jurisdiction over traditional navigable bodies of water like territorial seas, rivers, lakes, and interstate waters. The complexity arises, however, when federal regulation is contemplated over bodies of water adjacent to traditional navigable waters, like wetlands. This is the central question at the heart of one of the most important CWA cases in a generation, *Sackett v. EPA* (No. 21- 454) (*Sackett II*).

In *Sacket II*, an Idaho couple sought to build a home on their property a few hundred feet from Priest Lake, a popular destination for recreation and vacation. Shortly after beginning construction, EPA issued an administrative order to halt construction due to the presence of protected wetlands on the property. The Sackett property shares no surface connection to Priest Lake and contains no streams, rivers, lakes, or similar bodies of water. In 2008 the Sacketts

appealed EPA’s administrative order. The challenge went all the way to the U.S. Supreme Court (SCOTUS), which held that the Sacketts had standing to challenge the EPA order (*Sackett v. EPA*, 566 U.S. 120, 132 S. Ct. 1367 (2012) (*Sackett I*)). The case was then remanded to the Ninth Circuit for a determination of whether the wetlands on the Sacketts’ property fell within the definition of WOTUS. The Ninth Circuit sided with EPA and relied on the significant nexus test to find the wetlands on the Sacketts’ property subject to CWA jurisdiction. The Sacketts then appealed to SCOTUS for a second time. In October 2022 SCOTUS held oral argument on *Sackett II*. A ruling is expected in the first half of 2023.

The timing of the Biden administration’s 2022 Rule was unexpected given the pending *Sackett II* decision. It is unknown how the 2022 Rule may influence the Court’s ruling. The U.S. Department of Justice filed a letter with SCOTUS the same day the 2022 Rule was released, highlighting the portions that addressed questions the justices raised during the October oral argument. The Sacketts’ counsel responded on January 9, 2023, arguing that the 2022 Rule still failed to address the justices’ questions about which wetlands Congress intended the CWA to cover.

In the interim period before SCOTUS rules on *Sackett II* and the 2022 Rule goes into effect, uncertainty over the definition of WOTUS will remain. Despite three prior SCOTUS decisions on the definition of WOTUS, federal appellate courts continue to apply different tests to determine whether a body of water qualifies as a WOTUS. SCOTUS last interpreted the definition of WOTUS in 2006, in *Rapanos v. United States* (547 U.S. 715), in which a four-justice plurality led by Justice Antonin Scalia adopted a “relatively permanent” standard. Relatively permanent waters are those that are relatively permanent, standing or continuously flowing, and connected to traditional navigable waters, the territorial seas, or interstate waters. Justice Scalia’s two-part test for determining whether waters are relatively permanent focused on whether the waters have (1) relative permanence and (2) a “continuous surface connection” between the traditional navigable water and the wetland (to demonstrate adjacency). Justice Kennedy disagreed, however, and argued for a “significant

nexus” standard. Waters that meet the significant nexus standard are those that “either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of other covered waters more readily understood as ‘navigable.’”

The 2022 Rule embodies both these standards and explains that waters that significantly affect traditional navigable waters, the territorial seas, and interstate waters include waters that meet the relatively permanent standard as well as those that meet the significant nexus standard. Incorporating both standards, of course, broadens the rule to potentially include certain ephemeral and intermittent streams, as well as isolated wetlands.

Legal Challenges Lie Ahead

The push to finalize the rulemaking before a *Sackett II* ruling could suggest that the administration believes it has found an approach SCOTUS may be willing to adopt. Or that it anticipates SCOTUS will issue a very narrow opinion on the CWA jurisdictional issues. Either way, the administration is prepared for the litigation challenges that lie ahead – the preamble notes that if one segment of the rule is invalidated, the other portions of the regulations shall remain.

After several decades of litigation over the definition of WOTUS, it is assured to continue. Those who view themselves as negatively impacted by the final rule are likely to argue that it broadens the scope of CWA jurisdiction and threatens to delay development and land use projects that rely on timely and consistent jurisdictional determinations. Various environmental interest groups, nonprofits, and certain states, however, will likely say the “new” definition of WOTUS is a step in the right direction compared to the Trump administration’s 2022 Navigable Waters Protection Rule, but does not go far enough to achieve the CWA’s mandate to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”

We will continue to monitor the status of the 2022 Rule, as well as track the *Sackett II* ruling and any litigation that may be filed to challenge the new WOTUS rulemaking if it goes into effect.

FOR MORE INFORMATION

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