New US Waters Definition May Rock The Boat

By **Christopher Thomas and Andrea Driggs** (January 19, 2023)

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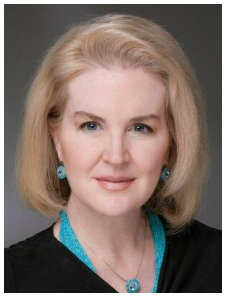

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On Dec. 30, 2022, the U.S. Environmental Protection Agency and the U.S. Department of the Army jointly announced the latest final rule attempting to define "waters of the United States," or WOTUS. The rule was published in the Federal Register on Jan. 18, and it will take effect 60 days after publication.

Among other things, the WOTUS definition determines the scope of the Clean Water Act's two major permitting programs: Section 402 of the CWA,[1] which governs National Pollutant Discharge Elimination System permits, and Section 404(a) of the CWA,[2] which regulates the discharge of dredged or fill material into navigable waters.

The agencies assert that the rule is intended to restore the pre-2015 definition of waters of the U.S., accounting for various subsequent court decisions.[3]

Changes to the rule were, according to the agencies, informed by the CWA's text, the scientific record, and "the agencies' experience and technical expertise after more than 45 years of implementing the longstanding pre-2015 regulations defining 'waters of the United States.'"[4]

The rule is also intended to provide additional guidance regarding the agencies' views on which wetlands should be considered waters of the U.S.[5]

Changes to the definition of "waters of the United States" can significantly impact permitting and project development by regulated entities. The new rule eschews the broad categories of the previous WOTUS rule in favor of a much more context-specific approach, the significant nexus test, increasing uncertainty and litigation risks for regulated entities. This is particularly true for projects that may affect ephemeral and intermittent waters.

Background

Congress did not define "waters of the United States" in the Clean Water Act,[6] and therefore, the EPA and the U.S. Army defined that term in the regulations. However, since 2015, there have been three different WOTUS rules.[7]

On June 9, 2021, the EPA and the U.S. Army announced that they would replace the Trump administration's Navigable Waters Protection Rule, which used Justice Antonin Scalia's 2006 plurality test in Rapanos v. U.S. The Trump administration's rule was relatively clear and would have excluded, for example, ephemeral waters.

Then, on Dec. 7, 2021, the agencies announced that they would return to the approach used in the pre-2015 regulations but informed by intervening U.S. Supreme Court precedent.[8]

This final rule and prepublication notice represent the latest attempt to define WOTUS.

Sackett v. EPA

On Oct. 3, 2022, the Supreme Court heard oral arguments in Sackett v. EPA. The issue is whether their second trip to the Supreme Court will finally provide an answer to the question of whether they can build their home on a somewhat soggy two-thirds-acre residential lot that has been in dispute for more than 15 years.

For the court, the question presented is whether the U.S. Court of Appeals for the Ninth Circuit set forth the proper test for determining whether wetlands are waters of the U.S. under the Clean Water Act.

During the oral arguments, Justice Elena Kagan asked about the Biden administration rulemaking and its attempt to redefine WOTUS and provide guidance on which wetlands should be considered waters of the U.S.; the acting solicitor general informed the Supreme Court that the rule provides additional guidance about which adjacent wetlands should qualify.[9]

The Biden Rule

The Latest WOTUS Rule

The agencies determined that the following should be considered waters of the U.S.:

- Traditional navigable waters, the territorial seas and interstate waters, or Paragraph (a)(1) waters;

- Impoundments — created by discrete structures like dams and levees that are often human-built — of waters of the U.S., or Paragraph (a)(2) impoundments;

- Tributaries to traditional navigable waters, the territorial seas, interstate waters[10] or Paragraph (a)(2) impoundments when the tributaries meet either the relatively permanent standard or the significant nexus standard;

- Wetlands adjacent to Paragraph (a)(1) waters, wetlands adjacent to and with a continuous surface connection to relatively permanent Paragraph (a)(2) impoundments, wetlands adjacent to tributaries that meet the relatively permanent standard and wetlands adjacent to Paragraph (a)(2) impoundments or jurisdictional tributaries when the wetlands meet the significant nexus standard (jurisdictional adjacent wetlands); and

- Intrastate lakes and ponds, streams or wetlands not identified in Paragraphs (a)(1) through (4) that meet either the relatively permanent standard or the significant nexus standard, or Paragraph (a)(5) waters.[11]

The rule retains exclusions for prior converted cropland, waste treatment systems and features that were "generally considered non-jurisdictional under the pre-2015 regulatory regime."[12] However, the exclusion for prior converted cropland would cease upon a change of use.[13]

The exclusions do not apply to traditional navigable waters, territorial seas and interstate waters.

Relatively Permanent and Significant Nexus Standards

Like the Trump administration rule, the latest rule considers "relatively permanent, standing or continuously flowing waters connected to paragraph (a)(1) waters, and waters with a continuous surface connection to such relatively permanent waters or to traditional navigable waters, the territorial seas, or interstate waters" to be waters of the U.S.[14]

These are included because these relatively permanent waters will almost always significantly affect traditionally navigable waters, territorial seas and interstate waters.[15]

However, the agencies concluded that relative permanence is insufficient as the sole test for CWA jurisdiction.[16] Consequently, the rule also adopts the significant nexus standard, which encompasses "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."[17]

Adjacent Wetlands and WOTUS

The new rule also provides that an adjacent wetland must have either a continuous surface connection to the "relatively permanent, standing, or continuously flowing water" that is connected to a paragraph (a)(1) water or it must, whether by itself or together with "similarly situated [waters,] significantly affect the chemical, physical, or biological integrity of a paragraph (a)(1) water."[18]

The agencies have indicated that, under this test, the Sacketts' property would be considered jurisdictional; it would be a wetland that is adjacent to a jurisdictional tributary that, together with other similarly situated adjacent wetlands, have a significant nexus to a traditional navigable water.[19]

Takeaways

Regulated entities that routinely seek permits under the CWA need a clear and consistent WOTUS definition. Some of these operate in the western U.S., where regulated waters may not even be wet. Given these considerations, the rule raises some significant issues.

The release of the rule before the Supreme Court's decision in Sackett may also prove to be unfortunate, as the Supreme Court could discard or narrow the significant nexus test.[20]

The rule should concern regulated entities for two primary reasons:

First, the rule doubles down on the significant nexus test articulated by Justice Anthony Kennedy in Rapanos v. U.S.[21]

This test, which by its very nature is fact-intensive,[22] will result in many more case-by-

case determinations, increasing costs and delays for regulated entities and creating additional permitting uncertainties.

For example, the agencies assert that a case-specific analysis of the effects of intrastate lakes and ponds, streams or wetlands not identified in Paragraphs (a)(1) through (4) of the rule on downstream waters is appropriate from both a scientific and policy perspective.[23]

The rule will significantly expand federal jurisdiction over ephemeral and intermittent waters. The agencies note that, in Arizona, 96% of stream channels, by length, are classified as ephemeral or intermittent.[24] The agencies seem to suggest that many of these streams should be included as WOTUS, stating that the functions that streams provide to benefit downstream waters occur even when streams do not flow constantly.[25]

They also state that nonjurisdictional findings for streams in Arizona increased 10 times and that nonjurisdictional findings for streams in New Mexico increased 36 times following implementation of the 2020 Trump administration rule, which had expressly rejected including ephemeral streams as waters of the U.S.[26]

Conclusion

The rule will subject more projects to federal permitting and require many more individual assessments, increasing the cost, uncertainty and other administrative difficulties for regulated entities.

While the rule attempts to avoid some of the failings of the previous rulemakings, its context-dependent approach leaves ample ground for litigation. As Justice Samuel Alito wrote, "We should not require regulated parties to 'feel their way on a case-by-case basis' where the costs of uncertainty are so great."[27]

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Disclosure: The authors filed an amicus brief on behalf of the American Exploration and Mining Association in Sackett v. EPA.

[1] 33 U.S.C. § 1342.

[2] 33 U.S.C. § 1344(a).

[3] These include United States v. Riverside Bayview Homes, 474 U.S. 121 (1985) (Riverside Bayview); Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, 531 U.S. 159 (2001) (SWANCC); and Rapanos v. United States, 547 U.S. 715 (2006) (Rapanos).

[4] Prepublication Notice at 58.

[5] Id. at /1-/20.

[6] 33 U.S.C. § 1251 et seq.

[7] 80 Fed. Reg. 37054 (June 29, 2015); 84 Fed. Reg. 56626 (Oct. 22, 2019); 85 Fed. Reg. 22250 (Apr. 21, 2020).

[8] 86 Fed. Reg. 69372 (Dec. 7, 2021).

[9] Letter of U.S. EPA to the Supreme Court, No. 21-454 (U.S. Dec. 30, 2022).

[10] The agencies temporarily deferred action "related to considering designating waters that cross a State/Tribal boundary as interstate waters" under the WOTUS definition. Prepublication Notice at 25/1-/20.

[11] Id. at /1-/2; see 33 C.F.R. § 328.3(a).

[12] Prepublication Notice at 228.

[13] Id. at 229.

[14] Id. at 9.

[15] Id. at 12.

[16] Id. at 13.

[17] Id. at 9 (emphasis added).

[18] Id. at 10.

[19] Id. at 45 n.35.

[20] This also seems to foreshadow a potential repeat of the NWPR/County of Maui debacle. There, on April 21, 2020, the EPA and the Corps released the Navigable Waters Protection Rule: Definition of "Waters of the United States," 85 Fed. Reg. 22250. Two days later, the Supreme Court ruled in County of Maui, Hawaii v. Hawaii Wildlife Fund that the federal government could regulate discharges to groundwater after all, depending upon the application of a host of factors only partially identified in the Court's opinion. 140 S. Ct. 1462 (2020).

[21] As Justice Scalia noted, Justice Kennedy's "reading of 'significant nexus' bears no easily recognizable relation to either the case that used it (SWANCC) or to the earlier case that case purported to be interpreting (Riverside Bayview)." Rapanos, 547 U.S. at 753.

[22] Emboldened by the case-specific factors in County of Maui, the Rule draws an analogy between the "functional equivalent" standard in County of Maui and the significant nexus standard, noting that both "require an analysis focused on the specific facts at issue in a particular instance." Prepublication Notice at 141.

[23] Id. at 10/1-/26.

[24] Id. at 98.

[25] Id. at 98, 128.

[26] Id. at 217.

[27] County of Maui, 140 S. Ct. at 149/1-/22 (Alito, J., dissenting) (quoting Rapanos, 547 U.S. at 758).