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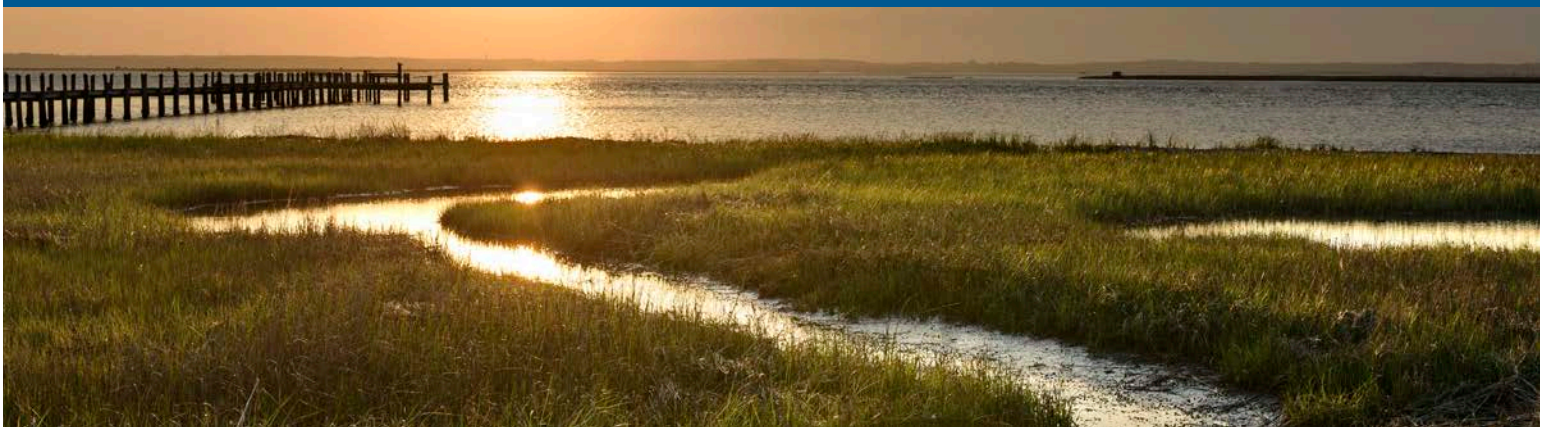

SACKETT II WETLAND CASE BREWING EVEN AS "WATERS OF THE UNITED STATES" DEFINITION SIMMERS

BY: HENRY R. ("SPEAKER") POLLARD, V

On January 24, 2022, the United States Supreme Court granted an appeal to reconsider the extent of federal Clean Water Act (CWA) jurisdiction involving wetlands on a couple's property in Idaho. The appellants (the Sacketts) are no strangers to the Supreme Court: in 2012, they won a landmark procedural case when the Court held that they could appeal an EPA unilateral administrative order before EPA actually tried to enforce it ("Sacket I"). The underlying enforcement case by EPA has been percolating since then, culminating in a Ninth Circuit Court of Appeal's holding that the wetlands on their property are federally regulated. The Sackett's appeal of this decision to the Supreme Court will turn on "whether the Ninth Circuit set forth the proper test for determining whether wetlands are 'waters of the United States' under the [CWA], 33 U.S.C. § 1362(7)" ("Sacket II").

Most regulatory and permitting programs established through the CWA turn in part on whether the activity in question involves "navigable waters," with that term being defined by statute for several key programs merely as "waters of the United States" (WOTUS). The meaning of WOTUS has therefore been left by Congress to the U.S. Army Corps of Engineers and EPA to define by regulation. The WOTUS regulatory definition is foundational to the reach of CWA regulatory and permitting obligations for discharges of pollutants and dredge and fill material, among others. However, that definition and interpretations of it have been in legal flux over the years, leading to uncertainty for regulated parties and other stakeholders.

Hardly helping in this regard was the Supreme Court's 2006 fractured decision in *Rapanos v. United States* construing the meaning of WOTUS based on its statutory context and Supreme Court precedent about the scope of WOTUS. The *Rapanos* decision in turn has led to splintered lines of cases in the federal district and appellate courts based on whether they chose to follow either the *Rapanos* plurality opinion by Justice Scalia or the concurring opinion by Justice Kennedy. The different opinions in *Rapanos* and the resulting different lines of cases have also greatly affected how EPA and the Corps have interpreted and redefined WOTUS several times over since *Rapanos*, resulting in further litigation and perpetuating uncertainty as to where federally regulated waters begin and end.

In the Sackett's case, this story has played out (again) in the Ninth Circuit, which held that EPA acted properly in applying the generally broader "significant nexus" test from Justice Kennedy's concurring opinion in *Rapanos* rather than the generally narrower "relatively permanent waters" test from Justice Scalia's plurality opinion. With the Sackett's appeal of the Ninth Circuit's decision having been granted, the Supreme Court as currently constituted would appear well-positioned to resolve at least some aspects of the conflicting

opinions of the *Rapanos* decision and, in turn, to offer greater certainty as to the scope of WOTUS. As noted above, though, the issue on appeal has been narrowly framed by the Court to whether "wetlands" are regulated WOTUS. In this light, it seems that the Court will not address – at least not directly – the degree to which tributaries, ponds and other forms of water bodies are jurisdictional WOTUS.

Another pot cooking on the WOTUS stove is the new definition of WOTUS proposed by the Corps and EPA on December 7, 2021 for public comment. (See a related article in the previous issue of our E&NR Practice newsletter.) The Biden Administration EPA may seek to promulgate the new definition as a final rule before the Supreme Court issues its opinion in the Sackett II appeal later this year, with the hope that doing so will render the appeal moot. However, the issues of underlying statutory authority as to which wetlands should be regulated as WOTUS may prove substantial and durable enough to allow the Court to carry on with rendering a decision despite any new rulemaking on the WOTUS definition.

The brewing Sackett II appeal should be monitored closely, along with the simmering WOTUS definition rulemaking. One hopes that the boiled-over mess from the *Rapanos* decision can be cleaned up when both are done.

Sackett v. EPA, 142 S.Ct. 896 (January 22, 2022) (cert. granted), available here; *Rapanos v. United States* 547 U.S. 715, 126 S. Ct. 2208 (2006).

POLITICAL PING PONG? WHAT'S GOING ON WITH THE UTILITY SECTOR'S CLEAN AIR ACT MERCURY AND AIR TOXICS STANDARDS?

BY: LIZ C. WILLIAMSON

EPA recently issued a proposed rule ("the Proposed Rule") regarding the Mercury and Air Toxics Standards (MATS), which regulate hazardous air pollutant (HAP) emissions from coal and gas-fired electric generating units (EGUs) in the power sector. The Proposed Rule responds to Executive Order 13990's instruction to EPA to reconsider the MATS Appropriate and Necessary final rule published on May 22, 2020 ("the 2020 Rule"). EPA undertook a thorough review of the 2020 Rule and its findings. The 2020 Rule has two components. First, it addresses the Clean Air Act (CAA) Section 112(n)(1)(A) required determination as to whether it is "appropriate and necessary" to regulate HAPs from coal and gas-fired units. Second, the 2020 Rule undertakes the residual risk and technology review (RTR) under CAA Sections 112(f)(2) and 112(d)(6). This article discusses both elements.

The Appropriate and Necessary Determination. In 2000, EPA determined that it is appropriate and necessary to regulate HAPs from coal and oil-fired EGUs. The Final MATS Rule reaffirmed this finding in 2012, establishing HAP emission limits for coal and oil-fired units. The Final MATS Rule was challenged in the D.C. Circuit. On appeal, the U.S. Supreme Court took up the narrow issue

of whether EPA considered the costs of MATS compliance when making the appropriate and necessary determination. In *Michigan v. EPA*, the Court remanded the case back to the D.C. Circuit, finding that costs must be considered. On remand, EPA addressed MATS costs in the 2016 Rule ("the 2016 Rule") under the Obama Administration. The 2016 Rule found it is appropriate and necessary to regulate HAPs from EGUs. Then the 2020 Rule, under the Trump Administration, reconsidered the cost analysis and applied a different cost methodology than the 2016 Rule. In the 2020 Rule EPA found the MATS rule was not appropriate and necessary. By this point, the EGU sector had already achieved compliance with MATS by installing controls and monitors or opting to shut down units to avoid compliance costs.

The Proposed Rule rejects the 2020 Rule's cost methodology and finds it is appropriate and necessary to regulate HAPs from coal and oil-fired EGUs. EPA based its analysis on the complete MATS administrative record and the statute. EPA proposes a "totality-of-the-circumstances" framework for the appropriate and necessary analysis. It considers the advantages of regulation (public health, environmental effects) and disadvantages of the regulation (costs, impacts to the EGU sector and society). EPA bases its appropriate and necessary conclusions on the public health and environmental impacts of mercury and other HAP emissions on the population. EPA ties these impacts to the power sector, finding that utilities emitted six times more mercury than any other sector and are the predominant source of hydrochloric acid and hydrogen fluoride emissions in the country. EPA ultimately decided that MATS compliance costs are small, considering either the higher 2012 cost estimate or EPA's lower *ex post* cost estimate, when placed in the context of the industry's revenues and expenditures.

The Risk and Technology Review.

CAA Section 112(f)(2)(A) requires EPA to consider each category of standards promulgated under Section 112 within eight years of promulgation. The second phase of rule development, RTR, is a risk-based analysis to determine whether more health-protective standards are needed to address remaining health risks from the source category "to provide an ample margin of safety to protect public health . . . or to prevent, taking into consideration costs, energy, safety, and other relevant factors, an adverse environmental effect."

For MATS, the 2020 Rule finalized the RTR. That rule concluded that the residual risks of air toxic emissions from coal and oil-fired EGUs is acceptable, and the current MATS rule provides an ample margin of safety to protect public health and to prevent an adverse environmental effect. No new developments in cost-effective HAP emissions controls were identified in the technology review. The 2020 Rule maintained the MATS rule without revision. EPA is presently reconsidering the RTR review. The Proposed Rule deferred EPA's decision on the 2020 Rule RTR findings to a later rulemaking.

What's to come.

Comments are due on April 11, 2022. EPA seeks comments on the overall necessary and appropriate finding. EPA also requests information to be considered in the RTR review. EPA has an informal timeline for the RTR that includes publication of the Notice of Proposed Rulemaking on June 2022 with a Final Rule by April 2023, according to the Fall Unified Agenda.

So what now?

EPA's decision to find that regulation of air toxics from coal and gas-fired EGUs is appropriate and necessary has been expected. It reaffirms prior EPA decisions in 2000, 2012, and 2016, bolstered by a belt and suspenders approach and a comprehensive dataset. Since EGUs are already in compliance with MATS, there may be even less motivation to challenge the appropriate and necessary determination, even if flaws are discovered in EPA's analysis.

In contrast, the RTR reconsideration has the potential to disrupt the *status quo*. Specifically, EPA

will determine if the current MATS Rule provides sufficient protection and what, if any, HAPs require further control to be sufficiently protective. More stringent emissions limitations or control technology requirements may result. Non-EGUs should track this rulemaking, as it may serve as a template for future RTR reviews for other Section 112 rules.

EPA has requested information in furtherance of the RTR review in the Proposed Rule. For example, EPA solicits emissions data, risk-related data, control technology information, monitoring information, and overall stakeholder input. We anticipate that EPA will evaluate the responses and will supplement the administrative record. EGUs subject to MATS should consider commenting. EGUs have special expertise concerning how their units operate and how MATS control technology works, including equipment limitations and emissions reduction capabilities. The EGU sector would better position itself by adding substantive information to achieve a balanced RTR administrative record.

EO 13990, "Protecting Public Health and the Environment and Restoring Science To Tackle the Climate Crisis" (Jan. 25, 2021)
Proposed Rule, "National Emission Standards for Hazardous Air Pollutants: Coal- and Oil-Fired Electric Utility Steam Generating Units—Revocation of the 2020 Reconsideration, and Affirmation of the Appropriate and Necessary Supplemental Finding; Notice of Proposed Rulemaking," **87 Fed. Reg. 7624 (Feb. 9, 2022)**
Final Rule, "National Emission Standards for Hazardous Air Pollutants: Coal- and Oil-Fired Electric Utility Steam Generating Units—Reconsideration of Supplemental Finding and Residual Risk and Technology Review," **85 Fed. Reg. 31286 (May 22, 2020)**
Final Rule, "Supplemental Finding that It is Appropriate and Necessary to Regulate Hazardous Air Pollutants from Coal- and Oil-Fired Electric Utility Steam Generating Units," **79 Fed. Reg. 24420 (Apr. 25, 2016)**
Final Rule, "National Emission Standards for Hazardous Air Pollutants From Coal- and Oil-Fired Electric Utility Steam Generating Units and Standards of Performance for Fossil-Fuel-Fired Electric Utility, Industrial-Commercial- Institutional, and Small Industrial-Commercial-Institutional Steam Generating Units," **77 Fed. Reg. 9304 (Feb. 16, 2012)**
Notice of Regulatory Finding, "Regulatory Finding on the Emissions of Hazardous Air Pollutants from Electronic Utility Steam Generating Units," **65 Fed. Reg. 79825 (Dec. 20, 2000)**
Michigan v. EPA, 576 U.S. 743 (2015)
42 U.S.C. § 7412 (Clean Air Act, Section 112)

THE IT COUPLE: ENVIRONMENTAL JUSTICE AND PFAS

By: Ryan W. Trail

EPA recently held its first of two public meetings to garner input on environmental justice considerations related to the development of the proposed per- and polyfluoroalkyl substances (PFAS) national primary drinking water regulation (NPDWR) under the Safe Drinking Water Act. The purpose of the public meetings is for EPA to share information and provide an opportunity for communities to offer input on the development of the proposed PFAS NPDWR and the regulation's fair treatment of all people regardless of race, color, national origin, or income.

During the March 2, 2022 meeting, which was held virtually, representatives of environmental groups

and community activists urged EPA to develop multiple regulations under various environmental statutes to regulate PFAS. Commenters argued the proposed PFAS drinking water standards will have no effect on the underlying source of PFAS, nor will it address issues related to disposal of water treatment wastes.

Commenters also urged EPA to move more quickly in developing Clean Water Act effluent limitation guidelines (ELGs) for PFAS. Currently, EPA has sufficient data to develop and propose ELGs for the organic chemicals, plastics and synthetic fibers industry, and the metal finishing and electroplating industry, which it intends to issue in mid-2023 and mid-2024, respectively.

Many commenters noted dischargers of PFAS are concentrated in environmental justice communities. EPA stated it is currently studying the possibility of disproportionate impacts from PFAS air pollution on environmental justice communities. One regulatory option EPA is considering is to list certain PFAS compounds as hazardous air pollutants.

Finally, several commenters urged EPA to regulate PFAS as a class, rather than as individual compounds or small groups. Individuals urged EPA to consider class-based regulation to avoid spending an inordinate amount of time developing regulations for PFAS compounds in smaller groups. EPA stated it is currently evaluating additional PFAS compounds and will consider regulating the chemicals in larger groups if it can be justified scientifically.

A second public meeting will be held on April 5, 2022. Individuals planning to participate must register here no later than April 4, 2022. Individuals may sign-up to make brief oral remarks as a part of their registration. EPA anticipates issuing a final regulation in fall 2023 after considering all public comments on the proposal.

Notice of Public Meeting: Environmental Justice Considerations for the Development of the Proposed Per- and Polyfluoroalkyl Substances (PFAS) National Primary Drinking Water Regulation (NPDWR),
87 Fed. Reg. 27 (February 9, 2022)

Biden Administration Updates

Please visit https://www.williamsmullen.com/biden-resources for legal updates related to new legislation, policies and initiatives driven by the Biden administration.

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- ENVIRONMENTAL ENFORCEMENT IN THE CURRENT REGULATORY CLIMATE
- INTELLECTUAL PROPERTY CONSIDERATIONS FOR MANUFACTURERS

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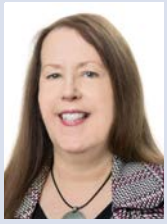

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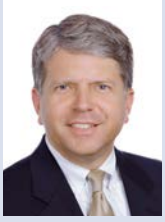

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