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Revised WOTUS Rule Limits Reach of Clean Water Act

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Following years of administrative rulemaking and litigation, on September 8, 2023, the Environmental Protection Agency (EPA) and Army Corps of Engineers (Corps) released a revision to the definition of waters of the United States (WOTUS) that significantly curtails the jurisdictional scope of the Clean Water Act (CWA) and, as a result, agencies' authority to require permits for work in certain waters and wetlands. (88 Fed. Reg. 61964 (Sept. 8, 2023)).

This Revised WOTUS Rule follows in the wake of the U.S. Supreme Court's decision interpreting what is a WOTUS under the CWA in *Sackett v. Environmental Protection Agency*, 598 U.S. __, 143 S. Ct. 1322 (2023). The big change in *Sackett*, and consequently in the Revised WOTUS Rule, is that intrastate wetlands are jurisdictional only if they have a "continuous surface connection" to a traditional navigable water, impoundment, or relatively permanent tributary to a traditional navigable water. (88 Fed. Reg. at 61966 (*see* revision to 40 CFR § 120.2(a)(4) and 33 CFR § 328.3(a)(4)); *Sackett*, 143 S. Ct. at 1341).

Background

In 1972, Congress enacted the CWA, overriding a veto from President Nixon to codify the law. The CWA regulates the discharge of pollutants to "navigable waters," which are defined to mean "waters of the United States, including the territorial seas." (33 U.S.C. § 1362(7)). The term "waters of the United States" is not further defined in the CWA. This has created various regulatory and judicial interpretations of the term and

resulted in differing agency determinations as to the scope of their authority over waters and wetlands. The EPA and the Corps each issued regulations in the mid-1970s to define WOTUS. The Corps re-codified its definition in 1986, which reflected both its and the EPA's interpretation of the WOTUS definition. (51 Fed. Reg. 41206, 41216–17 (Nov. 13, 1986)). Then, in 2006, even though it did not result in a clear majority opinion, the U.S. Supreme Court's decision in *Rapanos v. United States*, 547 U.S. 715 (2006), represented a milestone in the history of the CWA's jurisdictional reach. Justice Antonin Scalia's plurality opinion for four justices would have limited the CWA's applicability to "relatively permanent, standing, or continuously flowing bodies of water" with connections to navigable water bodies. (*Id.* at 739). Justice Anthony Kennedy's concurring opinion would have instead expanded the CWA's reach to those waters, plus waterbodies with a "significant nexus" to navigable waters, which would include wetlands that "significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" (*Id.* at 780).

In the years following *Rapanos*, the agencies made jurisdictional determinations as to whether waters were a WOTUS based on the two standards elucidated in the *Rapanos* opinions, meaning that waters would be within the CWA's jurisdiction if they either were relatively permanent or had a significant nexus to navigable waterways. However, beginning in 2015, the EPA has revised the definition of WOTUS under each presidential administration. (80 Fed. Reg. 37054 (June 29, 2015); 85 Fed. Reg. 22250 (Apr. 21, 2020); 88 Fed. Reg. 3004 (Jan. 18, 2023)). Most recently, effective March 20, 2023, the EPA and Corps had adopted a new rule defining WOTUS. (88 Fed. Reg. 3004 (Jan. 18, 2023)). However, only a few months later, the Supreme Court's *Sackett* decision effectively nullified the EPA's and Corps' March 2023 WOTUS rule and forced the agencies to adopt yet another new WOTUS rule.

Sackett v. EPA

The *Sackett* case has a lengthy history. In 2004, the Sacketts acquired a lot near Priest Lake in Idaho. They began backfilling their property in anticipation of building a home, but the EPA sent them a compliance order informing them that the backfilling violated the CWA because the existing wetlands on their property were "adjacent to" an unnamed tributary on the other side of a 30-foot road from their property, which feeds into a non-navigable creek, which in turn feeds into Priest Lake, which is a WOTUS. The Sacketts sued the EPA, alleging that the wetlands on their property were not a WOTUS. After years of litigation in federal district court in Idaho and the Ninth Circuit Court of Appeals, the U.S. Supreme Court decided in favor of the Sacketts. (*Sackett*, 143 S. Ct. at 1331–32).

The Court held that consistent with its 2006 decision in *Rapanos*, "waters" could only be read to include wetlands that are "'as a practical matter indistinguishable from waters of the United States,' such that it is 'difficult to determine where the "water" ends and the "wetland" begins.'" (*Id.* at 1340 (quoting *Rapanos*, 547 U.S. at 742, 755)). The Court specified that the CWA extends only to adjacent wetlands if:

> (1) the body of water adjacent to the wetland is a WOTUS (*i.e.*, a relatively permanent body of water connected to traditional interstate navigable waters), and
>
> (2) the wetland must have a "continuous surface connection with that [WOTUS] making it difficult to determine where the 'water' ends and the 'wetland' begins."

(*Id.* at 1341). However, the Court acknowledged that a water may be a WOTUS even if some "temporary interruptions in surface connection … occur because of phenomena like low tides or dry spells." (*Id.*).

The Court's explanation that CWA jurisdiction only extends to "adjacent" wetlands means that "wetlands separated from a [water of the United States] only by a man-made dike or barrier, natural river berm, beach dune, or the like" are not jurisdictional. (*Id.* at fn. 16; see also *Id.* at 1362 (Kagan J. Concurring Opinion), 1365–66 (Kavanaugh J. Concurring Opinion)). The Court does clarify that a landowner cannot construct a barrier to separate a wetland from a WOTUS simply to remove the wetland from federal jurisdiction. (*Id.* at fn. 16).

Justice Kavanaugh's concurring opinion, in which he concurred with the holding but not with the decision, teases out the meaning of the majority's holding related to separated wetlands. Justice Kavanaugh explains that for the last 45 years, jurisdictional adjacent wetlands included both (i) those wetlands contiguous to or bordering a covered water, *and* (ii) wetlands separated from a covered water only by a man-made dike or barrier, natural river berm, beach dune, or the like. Now, the Court's new test, in his opinion, will leave some long-regulated adjacent wetlands no longer covered by the Clean Water Act, with the potential for significant repercussions for water quality and flood control throughout the United States. The example given by Justice Kavanaugh is that wetlands on the other side of a levee from a WOTUS, like those wetlands separated from the Mississippi River by levees, are no longer jurisdictional wetlands subject to regulation under the CWA. (*Id.* at 1365–66, 1368 (Kavanaugh J. Concurring Opinion)).

September 2023 Revised WOTUS Rule

Following the *Sackett* decision, the EPA and Corps revised their March 2023 WOTUS Rule to be consistent with the decision in *Sackett*. The Revised WOTUS Rule became final and effective on September 8, 2023. The Revised WOTUS Rule has two significant changes. First, it limits the extent of wetlands that are jurisdictional under the CWA. Second, it eliminates the "significant nexus standard" under which waters that "significantly affect the chemical, physical, or biological integrity of traditional navigable waters" were previously considered jurisdictional. (88 Fed. Reg. at 61964, 61966).

Wetlands are no longer jurisdictional merely because they are "bordering, contiguous, or neighboring" to such waters. Wetlands are only jurisdictional if they have a continuous surface connection to: (1) a WOTUS; or (2) "Relatively permanent, standing or continuously flowing bodies of water identified [as a WOTUS] and with a continuous surface connection to those waters." (*Id.*; *see* revisions to 40 CFR §§ 120.2(a)(4), (c)(2) and 33 CFR §§ 328.3(a)(4), (c)(2)).

The elimination of the significant nexus standard means that tributaries to navigable waters, wetlands adjacent to a WOTUS, and intrastate lakes and ponds are only jurisdictional if they are "relatively permanent, standing or continuously flowing bodies of water." (*Id.*; *see* revisions to 40 CFR §§ 120.2(a)(3)–(5) and 33 CFR §§ 328.3(a)(3)–(5)). Such waters are no longer jurisdictional if they "significantly affect the chemical, physical, or biological integrity of traditional navigable waters." (*Id.*).

Looking Ahead

In the wake of *Sackett* and the Revised WOTUS Rule, certain wetlands will no longer be regulated as a WOTUS under the CWA. In particular, wetlands cut off from a WOTUS by a levee or berm will no longer be subject to CWA jurisdiction. Without a federal permitting requirement for discharging dredge and fill material into wetlands, such wetland activities will likely not have a federal permitting "hook." Therefore, such activities will not be subject to review under the National Environmental Policy Act, will not be required to consult with other federal agencies under the Endangered Species Act, and will not be required to obtain a CWA Section 401 water quality certification.

Despite the clarity from the *Sackett* decision, uncertainties in what is considered a WOTUS will persist. For example, in considering what constitutes a "relatively permanent" body of water, how frequently must water flow? Or when evaluating whether a tributary connects a wetland to a WOTUS, for how long of a duration and at what frequency can dry spells occur in the tributary for the tributary still to be considered as

providing the continuous surface connection necessary to establish jurisdiction? If the representative history is any indicator, the Revised WOTUS Rule will likely end up in further litigation. However, the Revised WOTUS Rule and the *Sackett* decision provide the most definitive guidance on the definition of a WOTUS in nearly 20 years.