

EPA Finalizes Amendments to WOTUS Rule

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Overview

On August 29, the Environmental Protection Agency (EPA) issued a final amendment to its “Waters of the United States (WOTUS) rule that became final earlier this year. The amendment was necessary because the EPA had issued its final rule before the U.S. Supreme Court released its opinion in a case where the definition of a wetland under the Clean Water Act was at issue. With the amendment, the EPA purports to conform the regulatory definition to fit the Supreme Court’s opinion in the Sackett case.

Note: For further discussion of the Sackett opinion, click here: <https://lawprofessors.typepad.com/agriculturallaw/2023/05/victory-for-property-rights-scotus-narrows-federal-control-of-land-use.html>

Background

On December 30, 2022, the EPA and the U.S. Army Corps of Engineers (COE) announced the final “Revised Definition of ‘Waters of the United States’” rule which became effective on March 20, 2023. 88 *Fed. Reg.* 3004 (Jan. 18, 2023). It represents a “change of mind” of the agencies from the positions that they held concerning a WOTUS and wetlands from just over three years ago. The bottom line is that the new interpretation was extremely unfriendly to agriculture, particularly to farmland owners in the prairie pothole region of the upper Midwest.

As promised, the Final Rule uses a definition that was in place before 2015 (for purposes of the Clean Water Act) for traditional navigable waters, territorial seas, interstate waters, and upstream water resources that “significantly” affect those waters.

Note: Two joint memos were published with the final rule to set forth the delineation of the implementation of roles and responsibilities between the agencies. One is a joint coordination memo to “ensure accuracy and consistency of jurisdictional determinations under the final rule.” The other is a memo with the USDA to provide “clarity on the agencies’ programs under the Clean Water act and the Food Security Act (Swampbuster).”

Adjacency. With the Final Rule, the EPA attempted to restore the “significant nexus” test via “adjacency.” This is a big change in the definition of “adjacency.” It doesn’t mean simply “abutting.” Instead, “adjacent” includes a “significant nexus” and a “significant nexus” can be established by “shallow hydrologic subsurface connections” to the “waters of the United States. A “shallow subsurface connection,” the Final Rule states, may be found below the ordinary root zone



(below 12 inches), where other wetland delineation factors may not be present. Frankly, that means farm field drain tile.

Specifically, the Final Rule set forth two kinds of adjacency: 1) the traditional “relatively permanent” standard; and 2) the “significant nexus” standard. The EPA and the COE say the agencies will not assume that all wetlands in a specific geographic area are similarly situated and can be assessed together on a watershed basis in a significant nexus analysis. But it is clear from the Final Rule that the agencies intend to expand jurisdiction over isolated prairie pothole wetlands using the “significant nexus” standard.

Note: The “significant nexus” can be established via a connection to downstream waters by surface water, shallow subsurface water, and groundwater flows and through biological and chemical connections. The Final Rule states that adjacency can be supported by a “pipe, non-jurisdictional ditch... or some other factors that connects the wetland directly to the jurisdictional water.” This appears to be the basis for overturning the NWPR. Consequently, the prairie pothole region is directly in the “bullseye” of the Final Rule.

Prior converted cropland. The agencies say the final rule increases “clarity” on which waters are not jurisdictional – including prior converted cropland. This doesn’t make much sense. Supposedly, the agencies are “clarifying” that prior converted cropland, (which is not a water), is not a water, but it somehow could be a water if the agencies had not clarified it? In addition, the burden is placed on the landowner to prove that prior converted cropland is actually prior converted cropland and therefore not a water.

Ditches and drainage devices. The Final Rule is vague enough to give the government regulatory authority over non-navigable ponds, ditches, and potholes.

The Sackett Opinion - Implications for Agriculture

The *Sackett* opinion has significant ramifications for agriculture. It solidified the Trump Administration’s National Water Protection Rule (NWPR) of 2019 as the correct approach to defining a federally jurisdiction wetland under the Clean Water Act. The NWPR limited federal jurisdiction to traditional navigable waters and their tributaries. Under the NWPR and the Sackett opinion, streams and ditches and private waters that don’t have a continuous surface connection to navigable waters aren’t subject to the CWA. This will make it more difficult for the EPA or COE to assert regulatory control over private land under the CWA – as the Congress intended. It also eliminates federal control under the CWA over private ponds, as well as ditches and streams where there is no continuous flow into a WOTUS.

Also, farmers that are in the farm programs are subject to the Swampbuster rules. A “wetland” is defined differently under Swampbuster. There are two separate definitions. The one at issue in *Sackett* involves “waters of the United States” contained in 33 U.S.C. Sec. 1362(7) which a “navigable water” must be. To have jurisdiction over those waters the Court is saying that the government must 1) establish that an adjacent water body is a relatively permanent body of water connected to interstate navigable water; and 2) such area has a continuous surface connection with that water making it difficult to determine where the water ends, and the wetland begins.



Swampbuster involves the definition of a wetland contained in 16 U.S.C. 3801(27). So, there are two different definitions of a "wetland" - one for CWA purposes - which ties into the "navigable waters of the United States" definition, and the other one for Swampbuster. This all means that a farmers may not have a wetland that the EPA/COE can regulate under the CWA, but might have a wetland that can't be farmed without losing farm program benefits.

The Court's decision will not likely have any discernable effect on water quality. While the decision does set forth a narrower interpretation of "the waters of the United States" for purposes of the entire CWA, the matter of pollution control is a separate matter. As noted above, navigation and pollution control are two separate issues which the Court's opinion more clearly distinguishes. This is due, in part, to the Supreme Court's decision in a case from Hawaii in 2020. In that case, the Court held that a "pollutant" that reaches navigable waters after traveling through groundwater requires a federal permit if the discharge into the navigable water is the "functional equivalent" of a direct discharge from the actual point source into navigable waters. *Hawai'i Wildlife Fund, et al. v. County of Maui*, 886 F.3d 737 (2018), vac'd and rem'd. by *County of Maui v. Hawaii Wildlife Fund, et al.*, 140 S. Ct. 1462 (2020). That is a broad interpretation of "discharge of pollutants" creating the distinct possibility that a contamination of federal jurisdictional waters could result from activities on land that is not subject to the CWA under the *Sackett* Court's definition of a "wetland."

In addition, the Court's decision in *Sackett* applies only to the federal CWA. It has no application to existing state and local regulations. Indeed, many of those rules were already in place before the CWA amendments of 1972, and many of them are significant.

EPA Amendments

On August 29, the EPA and the COE issued a finalized amendment to the existing WOTUS rule that had been issued March of 2023 in light of the Supreme Court's decision in *Sackett v. United States EPA*. The amendments modify the definition of "waters of the United States" contained at 33 C.F.R. §328.3. Key points of the amendment are as follows:

- The amendment is effective immediately upon issuance.
- The amendment was finalized without issuing a draft for public comment under the "good cause" exception to the notice-and-comment requirement of the Administrative Procedure Act because EPA believed that a rule update was "sufficiently urgent." 5 U.S.C. 553(d)(3).
- Purports to remove the "significant nexus" test that allowed streams and wetlands adjacent to larger water bodies to be jurisdictional under the CWA. The U.S. Supreme Court, in *Sackett v. EPA* unanimously rejected the significant nexus test.
- Purports to limit federal jurisdiction over wetlands to those that are relatively permanent and have a continuous surface connection to navigable waterways.
 - Wetlands which would share a surface water connection with a WOTUS but no longer have that connection due to manmade barriers such as levies, dikes or sand dunes are not included in the definition of a WOTUS



Many questions are left unaddressed, particularly “nuts-and-bolt” issues about the particular definition of “ditches” and other farm features that are filled with water only sometimes (ephemeral streams, etc.)

Currently, 27 states have enjoined the final rule from taking effect. See *Texas v. United States Environmental Protection Agency*, No. 3:23-cv-17, 2023 U.S. Dist. LEXIS 45797 (S.D. Tex. March 19, 2023); *West Virginia v. United States Environmental Protection Agency*, No. 3:23-cv-032, 2023 U.S. Dist. LEXIS 64372 (D.N.D. April 12, 2023). *Kentucky v. United States Environmental Protection Agency*, Nos. 23-5343/5345, 2023 U.S. App. LEXIS 11517 (6th Cir. May 10, 2023).

Note: The states where the rule is enjoined are: AK; AL; AR; FL; GA; IA; ID; IN; KS; KY; LA; MO; MS; MT; ND; NE; NH; OK; OH; SC; SD; TN; TX; VA; VT; WV and WY.

These outstanding cases regarding the 2023 rule are currently paused with their future uncertain.

Conclusion

Will the litigation concerning the definition of a WOTUS end? Unlikely. But, to have the Supreme Court unanimously decide any part of a major environmental case, which is what happened in *Sackett* with respect to the rejection of the significant nexus test and that the Sackett’s tract was not a wetland, is rare.

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