Sackett Ruling, 'Waters' Rule Fix Won't Dry Up Wetlands Suits

By **Matthew Ahrens, Thomas Goslin and Allison Sloto** (July 18, 2023)

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In its May 25 decision in Sackett v. U.S. Environmental Protection Agency, the U.S. Supreme Court attempted to establish a clear standard for when a wetland constitutes "waters of the United States," or WOTUS.[1]

Fresh on the heels of that decision, the Biden administration, in statements published on June 26 by the EPA and the U.S. Army Corps of Engineers, announced that it would amend a rule defining WOTUS that the agencies had just finalized on Jan. 18.[2] The goal of the amendments is to harmonize the regulatory definition of WOTUS with the definition just handed down by the Supreme Court.[3]

The Sackett decision, while not directly addressing the recent rule, presented difficulties to third parties seeking to determine whether a permit would be required for filling or dredging wetlands.

Thus continues an over-50-year effort by the federal government to define WOTUS and establish the jurisdiction of the federal Clean Water Act, or CWA — which has been subject to many rules and regulations that have been withdrawn by subsequent administrations, or overturned, in whole or part, by federal courts.

While details of the proposed revision to the rule were not provided by the EPA or the Corps, the consequences for those seeking permits for projects or real estate developments could be significant. And it is a virtual certainty that the revised rule — no matter its contents — will promptly be challenged in court, continuing the WOTUS legal saga for some time to come.

The CWA serves as the primary federal statute governing water pollution, and generally prohibits discharging pollutants into navigable waters without a permit. Under the CWA, "navigable waters" are very broadly defined to include WOTUS.

Thus, any development project that would involve filling or dredging wetlands constituting WOTUS requires a permit under Section 404 of the CWA. If such a project could have a significant impact on wetlands, developers need to obtain a project-specific individual permit — which is often a time-consuming and costly process, and can open avenues for public review and comment, and burdensome terms and conditions.

Moreover, there is the inherent risk that the Corps, which administers the WOTUS permitting program, could deny a permit — which, in turn, could result in major changes to, or potentially the termination of, the project.

Even projects that have an insignificant impact on WOTUS may need to obtain coverage under a general permit, including one or more of the nationwide permits, which set forth general requirements for certain categories of projects.

Failure to obtain permits or comply with CWA permitting requirements, whether individual or general, can result in significant fines and penalties.

Since the CWA was enacted in 1972, courts, regulators and private parties have labored to determine the scope of its jurisdiction. The Supreme Court alone has weighed in on the question four times since 1985, most recently with its decision in Sackett.

In Sackett, the Supreme Court sought to crystalize CWA jurisdiction by establishing a clear standard for when wetlands constitute WOTUS, holding that "the CWA extends to only those wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that they are indistinguishable from those waters."

This holding, while seemingly straightforward, marks a significant departure from prior Supreme Court decisions on the topic — most notably the 2006 case of Rapanos v. U.S., where Justice Anthony Kennedy established what become known as the significant nexus test.

Under the significant nexus test — which, until Sackett, governed agency interpretation of jurisdiction under Section 404 of the CWA — an adjacent wetland would constitute WOTUS where it, either alone or in combination with similarly situated wetlands in the region, significantly affects the chemical, physical and biological integrity of navigable waters.

Determining whether a wetland significantly affects a navigable water can often be a challenging undertaking, necessitating detailed scientific analysis that may produce unclear results. Thus, each of the past three presidential administrations promulgated rules that, in part, sought to assist parties making such a determination, including the rule finalized by the Biden administration in January.

In response to the court's decision in Sackett, and its new continuous surface connection test, the EPA and the Corps announced that they would revise their most recent rule, which attempted to provide what the agencies then described as a "durable definition" of WOTUS. That rule, however, was largely based on the now-discarded significant nexus test.

This being the case, the "durable definition" needs to be rewritten. According to the EPA and the Corps, the agencies are developing a new rule, which they intend to finalize by Sept.1, interpreting the phrase "waters of the United States" to be consistent with the Sackett decision.

However, there is no legal requirement for a new rule to be completed by that time. In fact, the agencies' intended finalization date is only 67 days from the date they announced their intent to modify the existing rule.

We note that issuance of a final rule or a material amendment to an existing rule — especially when related to a controversial topic such as regulation of WOTUS — is highly unlikely to occur within 90 days after issuance of a proposed rule, if the agencies seek public notice and comment.

However, to meet the agencies' self-imposed deadline, EPA representatives stated at a hearing on July 13 that the EPA and the Corps would forgo issuing a draft rule for public notice and comment — invoking an exception to the generally required rulemaking procedures when an agency believes that a rule update is urgently needed.

That decision encountered opposition from Republican lawmakers at the hearing, and almost certainly will be challenged in court.

Indeed, regardless of the substance of, or process for finalizing, the new rule, it will very likely be subject to comprehensive scrutiny and judicial challenge by multiple parties on all sides of the political spectrum.

That said, irrespective of the terms of the new rule that will be issued, the practical implication of the Supreme Court's decision in Sackett — and any regulation that is consistent with that decision — is that the number of wetlands subject to federal jurisdiction under the CWA has declined, as fewer wetlands will have a continuous connection to navigable waters than a significant nexus.

This should mean that fewer future construction projects will need to obtain federal WOTUS permits. However, it is worth noting that about half of U.S. states have their own laws regulating wetlands, and this decision will not directly affect those requirements.

California and New York, for example, have strong state-level wetland protections, and it is not expected that the Sackett decision will have a meaningful impact on permitting requirements in those states. However, some believe that the Sackett decision could prompt certain states to reduce or eliminate wetlands protections in an effort to encourage local development.

North Carolina, for example, passed a law on June 27 that limits state wetland regulation to those wetlands constituting WOTUS under the CWA. State environmental regulators estimate that this will result in 2.5 million acres of North Carolina wetlands losing all legal protection.

The Sackett ruling may also mean that fewer projects will become subject to federal review under the National Environmental Policy Act. NEPA requires the lead agency of a project involving a "major federal action" to evaluate relevant environmental effects before taking such action.

The NEPA review process can take a significant amount of time to complete — often much longer than a year — given the comprehensive environmental review that may be required, and the fact that NEPA provides various governmental agencies, and the public, the opportunity to participate in, and provide comments to, a NEPA review.

For many projects that have a significant impact on regulated wetlands, the only major federal action is the issuance of a permit under the CWA to affect such wetlands. To the extent that fewer WOTUS permits are required as a result of the Sackett decision, it is likely that fewer projects will require NEPA review — substantially reducing or eliminating what could otherwise be a major hurdle to the start of project construction.

But while the Supreme Court's decision in Sackett provides a much clearer test for determining whether wetlands are subject to CWA jurisdiction, and may be welcome news for some project and real estate developers, many questions remain. As Justice Brett Kavanaugh noted in his concurring opinion, those unknowns include:

- How does the test operate in areas where floods, storms and erosion affect the surface connection?
- Can a continuous surface connection be established by a pipe or ditch?
- How will the test apply to wetlands that experience intermittent interruptions to continuous connection to a covered water, such as wetlands and waters connected for most of the year but not in summer when a connective portion may dry up?
- What is the impact on wetlands that were intentionally separated from navigable waters by a manmade levee or other structure intended to control flooding or for other legitimate purposes?

Whether and how the new WOTUS rule will address these questions remains to be seen. The agencies have given themselves a short period of time to tackle what has proven to be a very challenging subject, and it would not be surprising if the rulemaking extended beyond the agencies' self-imposed Sept. 1 deadline.

As noted above, it is also expected that the rule will be promptly challenged in court whenever it is finalized. Thus, while the Sackett decision provides some clarity concerning CWA jurisdiction over wetlands — and presumably the new rule will do the same — the half century struggle to define once and for all what constitutes WOTUS is likely to continue for years to come.

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[1] Sackett v. U.S. Environmental Protection Agency, 143 S. Ct. 1322 (2023).

[2] 88 FR 3004.

[3] https://www.epa.gov/wotus/amendments-2023-rule.