Impacts of WOTUS Rule on the Arid West

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Summary

- While *Sackett v. EPA* was hailed by some as the end of the arbitrary application of the CWA, the question of what waters constitute WOTUS is far from settled.
- States in the Arid West may be confronting heightened uncertainty as to whether regulation of a given aquatic feature falls to the states or to the federal government.
- EPA and the Corps' continued interpretation of WOTUS will be aided by approved jurisdictional determinations, notice and comment rulemaking, CWA permits, and other forms of guidance.

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Following the U.S. Supreme Court's decision in *Sackett v. EPA*, 598 U.S. 651 (2023), the U.S. Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers (Corps) (collectively the agencies) have promulgated a direct final "conforming" rule (the Conforming Rule) that revises the agencies' January 2023 definition of "waters of the United States" (WOTUS) to conform with the Court's decision. While the *Sackett* Court sought to settle jurisdictional questions under the Clean Water Act (CWA), the Conforming Rule may simply be the start

of a new era of contention over what constitutes WOTUS and how waters outside the scope of the CWA are regulated. These issues will be especially pronounced in the Arid West: the 11 contiguous states west of the 100th meridian (i.e., Montana, Wyoming, Colorado, New Mexico, and contiguous states to the west).
The CWA is a cornerstone of U.S. environmental law that regulates the discharge of pollutants into "navigable waters." It defines "navigable waters" as "waters of the United States." 33 U.S.C. § 1362(7). WOTUS is not defined in the statute but has been defined through rulemaking. The agencies' efforts to define WOTUS reflect a long and tortuous task further complicated by the relevant U.S. Supreme Court decisions assessing the implementation of the definition of WOTUS.

The Supreme Court's first two WOTUS cases provided only piecemeal guidance on the scope of the navigable waters. *See United States v. Riverside Bayview Homes, Inc*, 474 U.S. 121 (1985) (wetlands adjacent to navigable waters fall within CWA jurisdiction); *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001) (CWA jurisdiction did not include "nonnavigable, isolated, intrastate waters"). The Supreme Court made its first attempt to fully define the scope of CWA jurisdiction in *Rapanos v. United States*, 547 U.S. 715 (2006). But the Court's divided reasoning only added to the confusion by providing two incongruent tests for defining WOTUS: The "relatively permanent" test provided that WOTUS "includes only those relatively permanent, standing or continuously flowing bodies of water forming geographic features that are described in ordinary parlance as streams, oceans, rivers, and lakes and does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall." *Id.* at 716 (cleaned up and citations omitted). The "significant nexus" test provided that a water or wetland only fell within the scope of the CWA if such waters possessed a "significant nexus" to "waters that are or were navigable in fact or that could reasonably be so made." *Id.* at 759. Under the "significant nexus" test, wetlands possessed this requisite nexus if they "either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" *Id.* at 780. Following the *Rapanos* decision, lower courts and federal agencies were split on whether to apply the "relatively permanent" test, the "significant nexus" test, or both tests. For details on WOTUS regulatory developments between the *Rapanos* and *Sackett* decisions, see the Insights in this issue by Robin Kundis Craig on *Waters of the United States Regulations, Part V*.

Seeking to settle this "nagging question about the outer reaches of the Clean Water Act," the Supreme Court held in *Sackett v. EPA* that the "relatively permanent" test defined the scope of WOTUS. 598 U.S. at 671. The Court further held that the EPA had "no statutory basis" to impose the "significant nexus" test, making the test inapplicable to a WOTUS determination. *Id.* at 680.

In response to the *Sackett* opinion, the EPA and the Corps issued the Conforming Rule effective September 8, 2023, amending the agencies' January 2023 rule to track the Court's decision. The Conforming Rule eliminates the "significant nexus" test and clarifies, among other things, that the CWA only extends to (1) relatively permanent, standing or continuously flowing bodies of water connected to traditional navigable waters, the territorial seas, or interstate waters and (2) adjacent wetlands and certain impoundments with a continuous surface connection to such waters. *See* 88 Fed. Reg. 61,964, 61,965–66 (Sept. 8, 2023). Because of injunctions stemming from ongoing litigation, the Conforming Rule is only in effect in 23 states and the District of Columbia. The remaining states, including four of those in the Arid West, are subject to the pre-2015 CWA regulatory regime as modified by *Sackett*.

No matter the state, post-*Sackett* implementation is not straightforward, particularly in the Arid West: How will the agencies assess the scope of jurisdiction over ephemeral waters, which are particularly prominent in the Arid West? How will the states go about managing wetlands and other aquatic features that may not be WOTUS but are now (or could be made) subject to state regulation?

What waters fall outside CWA WOTUS jurisdiction and potentially within existing or broadening state regulatory programs remains an open question. Despite adopting the "relatively permanent" test, the Conforming Rule does not resolve the question of when a water is relatively permanent. While it is one thing to declare on paper that only relatively permanent waters are within the scope of CWA jurisdiction, making an on-the-ground determination as to whether a water is relatively permanent is a different task altogether. Is work in a headwaters feature that flows through an ephemeral stream subject to CWA regulation? If an ephemeral feature flows seasonally, is that relatively permanent? Will relatively permanent be different depending on the region of the country? How will the agencies make such an assessment in a technically viable, consistent fashion that provides certainty for the regulated community?

The Conforming Rule provides no guidance on how the agencies will make this distinction. Indeed, the Conforming Rule does not define when a body of water can be classified as "relatively permanent," and the word "ephemeral" is not even printed in the Rule. The *Sackett* opinion is equally unavailing in this regard. In endorsing the "relatively permanent" test, the Supreme Court acknowledged that "temporary interruptions in surface connection may sometimes occur because of phenomena like low tides or dry spells." 598 U.S. at 678. But the Court provided no guidance as to when such interruptions can be considered temporary versus indicative of a break in CWA jurisdiction. This jurisdictional ambiguity is particularly problematic for states in the Arid West, where many environments are characterized by waters that run ephemerally. Until the EPA and the Corps provide clarity on this point, the federal regulation of many bodies of water may be in limbo or subject to litigation.

Seemingly aware of the unanswered questions surrounding ephemeral waters and other jurisdictional ambiguities, the Conforming Rule notes that EPA and the Corps' continued interpretation of WOTUS will be aided by approved jurisdictional determinations, notice and comment rulemaking, CWA permits, and other forms of guidance. *See* 88 Fed. Reg. at 61,966. However, the Conforming Rule does not explain what standards will be applied to such interpretations. Given the Biden administration's express disappointment with the *Sackett* decision, the agencies' guidance may very well serve as a means of retaining a revised form of a case-by-case test back into jurisdictional determinations.

Regardless of how the agencies address these jurisdictional ambiguities, implementation of the revised definition of WOTUS will narrow the CWA's jurisdiction. States may bear the responsibility of monitoring and regulating many more of the wetlands and ephemeral streams within their borders through the myriad of state permitting programs regulating water pollution. According to the EPA, the Conforming Rule "could impact up to 63% of US wetlands by acreage and around 1.2 million to 4.9 million miles of ephemeral streams." *See* Ella Nilsen, *EPA Slashes Federally Protected Waters by More Than Half After Supreme Court Ruling*, CNN (updated Aug. 29, 2023). The Environmental Law Institute (ELI) concluded that 8 of the 11 Arid West states are completely or largely reliant on the CWA to regulate pollutant discharges in waters within their borders—including wetlands and ephemeral streams. *See* James McElfish, *State Protection of Nonfederal Waters: Turbidity Continues*, 52 Env't L. Rep. 10,679, 10,684–85 (2022). According to ELI, California, Oregon, and Washington are the only Arid West states with "comprehensive" state regulations to regulate waters of the state that are not covered by the CWA. *Id.* at 10,686. In turn, some states are constrained by state statute requiring implementation of state programs consistent with the federal CWA. Given that a large share of wetlands and ephemeral streams could now fall under state jurisdiction only, the states will have to determine what, if any, state-level policies should be implemented to regulate pollutant discharges in the absence of CWA jurisdiction.

While *Sackett v. EPA* was hailed by some as the end of the arbitrary application of the CWA, the question of what waters constitute WOTUS is far from settled. Going forward, states in the Arid West may be confronting heightened uncertainty as to whether regulation of a given aquatic feature falls to the states under either state law and/or as part of their implementation of federal law or, in circumstances where the CWA program is

not delegated to the states, to the federal government. While pre-*Sackett* contentions often focused on the jurisdiction of wetlands based on a nexus to downgradient CWA waters, jurisdictional disputes in the post-*Sackett* Arid West may shift to what constitutes a nonjurisdictional feature versus a relatively permanent WOTUS.

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