

Sackett v EPA and Waters of the United States

John B. King

Breazeale, Sachse & Wilson, L.L.P.

(225) 381-8014

jbk@bswllp.com

www.bswenviroblog.com

Outline

- Background
- Recent WOTUS Rules
- Sackett v EPA
- Agency Response
- Other Responses
- Questions

Background

- Clean Water Act, 42 USCA § 1344 and § 1362(7)
 - Regulates the discharge of “dredged or fill material into the navigable waters at specified disposal sites”
 - ‘Navigable waters’ means “waters of the United States, including the territorial sea”
- Various regulatory definitions of WOTUS over the years
 - 39 Fed. Reg. 12119 (April 3, 1974)
 - Limited to waters that are ‘navigable-in-fact,’ i.e., traditional navigable waters (used or could be used in interstate or foreign commerce)
 - *NRDC v. Callaway*, 392 F.Supp. 685 (D.D.C. 1975): CWA asserted jurisdiction to maximum extent permissible under Commerce Clause
 - 40 Fed. Reg. 31324 (July 25, 1975)
 - 42 Fed. Reg. 37144 (July 19, 1977)
 - 47 Fed. Reg. 31810 (July 22, 1982)
 - 51 Fed. Reg. 41250 (November 13, 1986) - effective January 12, 1987
- General expansion of definition over the years to include more waters

Background

1986 Regulatory Definition (33 CFR §328.3)

§ 328.3 Definitions.

For the purpose of this regulation these terms are defined as follows:

(a) The term "waters of the United States" means

(1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(2) All interstate waters including interstate wetlands;

(3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:

(i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or

(ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(iii) Which are used or could be used for industrial purpose by industries in interstate commerce;

(4) All impoundments of waters otherwise defined as waters of the United States under the definition;

(5) Tributaries of waters identified in paragraphs (a) (1)–(4) of this section;

(6) The territorial seas;

(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a) (1)–(6) of this section.

(1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide

(2) All interstate waters including interstate wetlands

(3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce

(4) All impoundments of waters otherwise defined as waters of the United States under the definition

(5) Tributaries of waters identified in Par. (a) (1) through (4) of this section

(6) The territorial seas

(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in Par. (a) (1) through (6) of this section

- *Adjacent* means bordering, contiguous, or neighboring.
- Includes wetlands separated from other WOTUS by man-made dikes or barriers, natural river berms, beach dunes and the like

Background

- ***US v. Riverside Bayview Homes, 474 US 121 (1985)***

- Upheld jurisdiction of wetlands adjacent to traditional navigable waterways

- Wetlands 'actually abutted' the TNW

- Deferred to agency's "legal judgment" regarding extent of regulation due to "inherent difficulties of defining precise bounds to regulate waters."

- ***Solid Waste Agency of Northern Cook County (SWANCC) v. Corps, 531 US 159 (2001)***

- Jurisdiction of the Corps does not extend to ponds that are not adjacent to open water

- Non-navigable, intrastate, isolated ponds are not 'navigable waters' merely because they serve as habitat for migratory birds

- To rule otherwise would assume that "the use of the word navigable in the statute ... does not have any independent significance."

- ***Rapanos v. US, 547 US 715 (2006) – Scalia Plurality and Kennedy Concurrence***

- Scalia: WOTUS include only those relatively permanent, standing, or continuously flowing bodies of water, and adjacent means there must be a continuous surface connection such that there is no clear demarcation between waters and wetlands

- Kennedy: Need a significant nexus to TNW, which exists if the wetlands, 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

Recent WOTUS Rules

- **The Clean Water Rule**

- 80 Fed. Reg. 37054 (June 29, 2015)
- Provided expansive definition of ‘waters of the United States’
- Challenged in numerous district / appellate courts - led to a “patchwork” of regulation

- **The Navigable Waters Protection Rule**

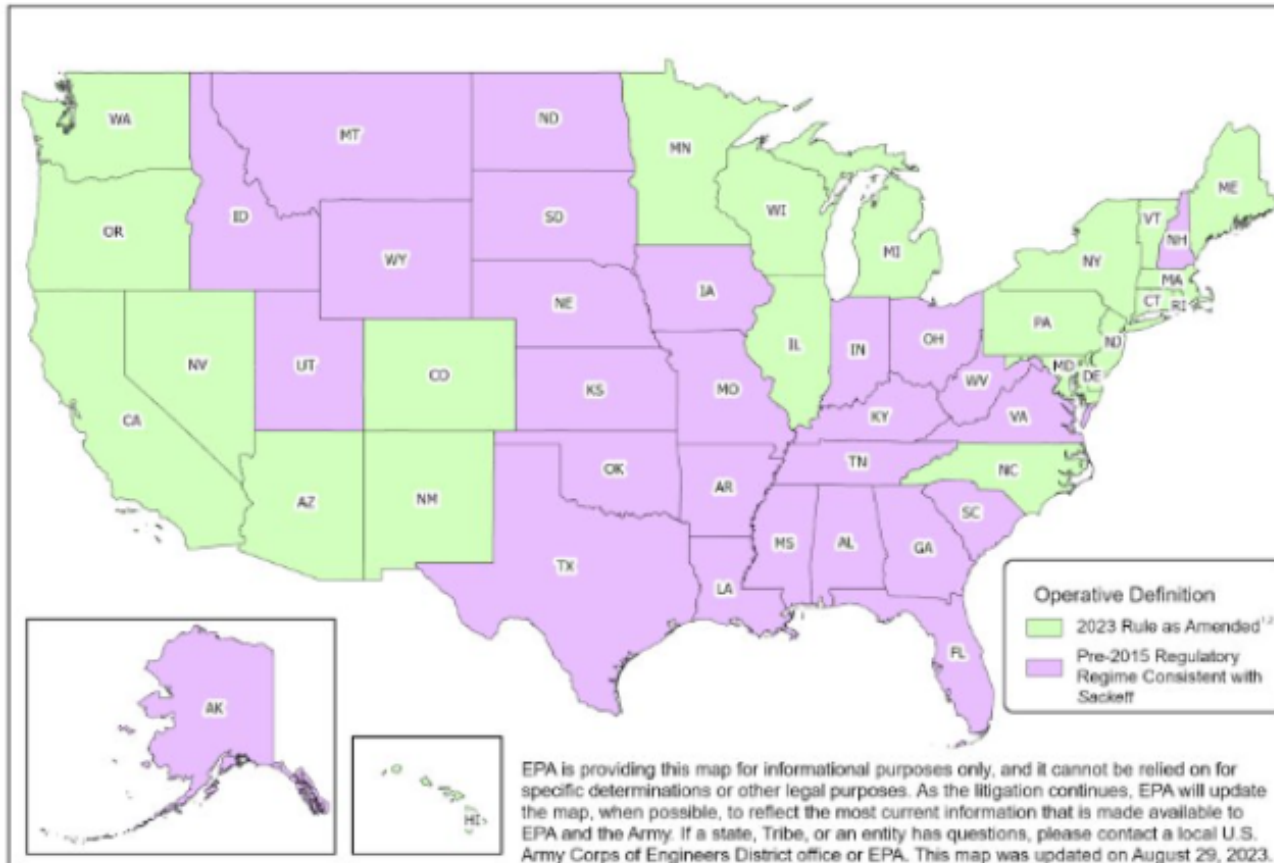
- 85 Fed. Reg. 22250 (April 21, 2020)
- Patterned after Justice Scalia’s limited view of jurisdiction in *Rapanos*
 - WOTUS “encompass relatively permanent flowing and standing waterbodies that are traditional navigable waters in their own right or that have a specific surface water connection to traditional navigable waters, as well as wetlands that abut or are otherwise inseparably bound up with such relatively permanent waters”
- Vacated and remanded by Arizona district court
- EPA / Corps immediately stopped enforcement and used 1986 definition / *Rapanos* Guidance

- **Revised Definition of Waters of the United States**

- 88 Fed. Reg. 3004 (Jan. 18, 2023) – effective March 20, 2023
- Exercising discretion to restore “waters [as] defined by the longstanding 1986 regulations,” with amendments to reflect “interpretation of the statutory limits on the scope of” WOTUS as “informed by Supreme Court case law”
- Stayed in 27 states by litigation

Recent WOTUS Rules

Operative Definition of "Waters of the United States"



¹Also operative in the U.S. territories and the District of Columbia

²The pre-2015 regulatory regime implemented consistent with Sackett is operative for the Commonwealth of Kentucky and Plaintiff-Appellants in Kentucky Chamber of Commerce, et al. v. EPA (No. 23-5345) and their members (Kentucky Chamber of Commerce, U.S. Chamber of Commerce, Associated General Contractors of Kentucky, Home Builders Association of Kentucky, Portland Cement Association, and Georgia Chamber of Commerce).

Sackett v EPA

- ***Sackett v. EPA*, 8 F.4th 1075 (9 Cir. 2021)**
 - Relates to a residential lot purchased in 2004
 - EPA issued a compliance order to Sackett
 - Led to Supreme Court ruling that judicial review of a CO was available (*Sackett v EPA*, 566 U.S. 120 (2012))
 - Sackett argued that Scalia's formulation in *Rapanos* was correct
 - Court applied Kennedy's 'significant nexus' test
- **US Supreme Court agreed to review the Ninth Circuit decision**
 - Whether the U.S. Court of Appeals for the 9th Circuit set forth the proper test for determining whether wetlands are "waters of the United States" under the Clean Water Act, 33 U.S.C. § 1362(7).
- **May 25, 2023 - Reversed Ninth Circuit decision and remanded (598 U.S. 651)**
 - Five justices voted in favor of majority opinion
 - Thomas Concurrence (with Gorsuch)
 - Kagan Concurrence (with Sotomayor and Jackson)
 - Kavanaugh Concurrence (with Kagan, Sotomayor, and Jackson)

Sackett v EPA

Waters:

- Court “refused to read ‘navigable’ out of the statute, holding that it at least shows that Congress was focused on ‘its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made.’”
- Traditional Navigable Waters: Interstate waters that were either navigable in fact and used in commerce or readily susceptible of being used in that way
- “We conclude that the *Rapanos* plurality was correct: the CWA's use of “waters” encompasses “only those relatively permanent, standing or continuously flowing bodies of water ‘forming geographic[al] features’ that are described in ordinary parlance as ‘streams, oceans, rivers, and lakes.’”
- In discussing the relatively permanent standard, the *Rapanos* court stated: “The phrase does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall.” *Rapanos*, 126 S.Ct. at p. 2225

Sackett v EPA

Adjacent Wetlands:

- Meaning of “waters is hard to reconcile with lands, wet or otherwise, as waters.”
 - *Rapanos*: CWA “simply does not authorize this ‘Land Is Waters’ approach to federal jurisdiction.”
- Agreed with *Rapanos* “formulation of when wetlands are part of ‘the waters of the United States.’”
 - In sum, we hold that the CWA extends to **only** those wetlands that are as a practical matter indistinguishable from waters of the United States. This requires the party asserting jurisdiction over adjacent wetlands to establish:
 - first, that the adjacent body of water constitutes waters of the United States, (i.e., a relatively permanent body of water connected to traditional interstate navigable waters); and
 - second, that the wetland has a continuous surface connection with that water, making it difficult to determine where the ‘water’ ends and the ‘wetland’ begins.
- “Wetlands that are separate from [TNW] cannot be considered part of those waters, even if they are located nearby.”
- Summary
 - Continuous surface connection to RPW
 - Indistinguishable from the RPW
 - Difficult to determine where waters end and wetlands begin
 - No clear demarcation between waters and wetlands

Sackett v EPA

- Court noted that “temporary interruptions in surface connection may sometimes occur because of phenomena like low tides or dry spells.”
- Corps historically included wetlands “separated from a covered water only by a man-made dike or barrier, natural river berm, beach dune, or the like.”
 - Justice Kagan’s concurrence pointed out that the majority opinion was “excluding all the wetlands in [this] category,” thus “narrow[ing] the scope of” the CWA.
 - Justice Kavanaugh’s concurrence: “By narrowing the Act’s coverage of wetlands to only adjoining wetlands, the Court’s new test will leave some long-regulated adjacent wetlands no longer covered by the Clean Water Act.”
 - Landowner cannot carve out wetlands from federal jurisdiction by illegally constructing a barrier on wetlands otherwise covered by the CWA. Whenever the EPA can exercise its statutory authority to order a barrier’s removal because it violates the Act, that unlawful barrier poses no bar to its jurisdiction.
- The Court noted that EPA’s “‘significant nexus’ theory is particularly implausible” and “the EPA has no statutory basis to impose it.”
 - Justice Kavanaugh stated that he agreed “with the Court’s decision not to adopt the ‘significant nexus’ test for determining whether a wetland is covered under the Act.”

Agency Response

Conforming Rule, 88 Fed. Reg. 61964 (Sep. 8, 2023)

- Removed references to “significant nexus”
- **Revised definition of “adjacent”**
 - Means “having a continuous surface connection”
 - Deleted references to separation by man-made barriers

Revised definition of “adjacent” →

(2) *Adjacent* means having a continuous surface connection. ~~bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes, and the like are “adjacent wetlands.”~~

- **Did not address “indistinguishable” part**
 - “In sum, we hold that the CWA extends to only those wetlands that are ‘as a practical matter indistinguishable from waters of the United States.’” *Sackett*, 598 US at p. 678.

Agency Response

What has the Corps said about a “continuous surface connection”?

- Corps – NO District Communication, Oct. 25, 2023
 - “Means any part of the wetland physically touching a jurisdictional water (i.e. TNW, RPW, territorial sea, impoundment, etc.), or connected to a jurisdictional water by a discrete feature such a non-jurisdictional ditch, swale, pipe, culvert, etc.”
 - CSC “is a physical requirement, not a constant hydrologic requirement.”
- Rapanos Guidance, December 2008
 - There is an unbroken surface or shallow subsurface connection (may be intermittent) to a jurisdictional water, p. 5
 - Does not require surface water to be continuously present between wetlands and tributary, p. 7
 - This is a “physical connection” requirement, p. 7
- January 2023 Rule, 88 Fed. Reg. 3004 (Jan. 18, 2023)
 - All wetlands that directly abut jurisdictional waters have an unbroken surface or shallow subsurface connection because they physically touch the jurisdictional water, p. 2093
 - A continuous surface connection does not require a constant hydrologic connection, p. 3095
 - Could be “more than several hundred feet from the tributary,” p. 3094

What has the Corps said about “indistinguishable”?

- Rapanos Guidance and Jan. 2023 Rule preamble – generally silent

Agency Response

- Amended 2023 Rule (the Conforming Rule) is enjoined in Louisiana
 - Operating under the pre-2015 Regulatory regime in line with the *Sackett* decision
- Received a webinar from EPA/Army on October 19, 2023
 - Not provided any of the slides
 - Will be placed on EPA's website for use in the near future
- Will move forward with issuing AJDs under the pre-2015 Regime
 - Must send certain AJDs to EPA Region HQ and HQUSACE for review.
 - Backlog of AJD requests
 - Prioritizing AJDs (in accordance with RGL 16-01) associated with permit applications versus stand-alone AJD requests

Other Responses

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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
EASTERN DIVISION**

STATE OF WEST VIRGINIA, *et al.*,)
)
 Plaintiffs,)
)
 AMERICAN FARM BUREAU)
 FEDERATION, *et al.*,)
)
 Plaintiff-Intervenors)
)
 v.)
)
 UNITED STATES ENVIRONMENTAL)
 PROTECTION AGENCY, *et al.*,)
)
 Defendants,)
)
 CHICKALOON VILLAGE)
 TRADITIONAL COUNCIL, *et al.*,)
)
 Defendant-Intervenors.)

No. 3:23-cv-32-DLH-ARS
Hon. Daniel L. Hovland

PARTIES' PROPOSAL FOR FURTHER PROCEEDINGS

Accordingly, the Parties propose that the Court enter an order providing that:

1. Plaintiff-Intervenors' motion for summary judgment, ECF Nos. 144-45, is stricken.
2. State Plaintiffs shall file an amended complaint to challenge the Amended 2023 Regulations by no later than November 13, 2023.
3. Plaintiff-Intervenors shall file an amended complaint to challenge the Amended 2023 Regulations by no later than November 13, 2023.¹
4. The Agencies shall answer or otherwise respond to the amended complaints by no later than December 13, 2023.
5. Defendant-Intervenors shall answer or otherwise respond to the amended complaints by no later than December 13, 2023.
6. The Parties shall propose a schedule or schedules for further proceedings no later than December 21, 2023.

Other Responses

HB 5893 - Clean Water Act of 2023 (Oct. 18, 2023)

“(7) PROTECTED WATER RESOURCES.—

“(A) IN GENERAL.—The term ‘protected water resources’ means all waters subject to the ebb and flow of the tide, the territorial seas, and all interstate and intrastate waters (and their tributaries), including lakes, rivers, streams (including intermittent and ephemeral streams), wetlands, and all impoundments of the foregoing, to the fullest extent that these waters are subject to the legislative power of Congress under the Constitution.

Questions?

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