

EPA Releases Revised WOTUS Definition

Posted on [September 4, 2023](#) by [tiffany.dowell](#)

Last week, the Environmental Protection Agency (“EPA”) and the US Army Corps of Engineers (“COE”) released a final rule to amend the WOTUS definition previously issued in January. This amended rule was issued in response to the United States Supreme Court’s decision in *Sackett v. EPA*.

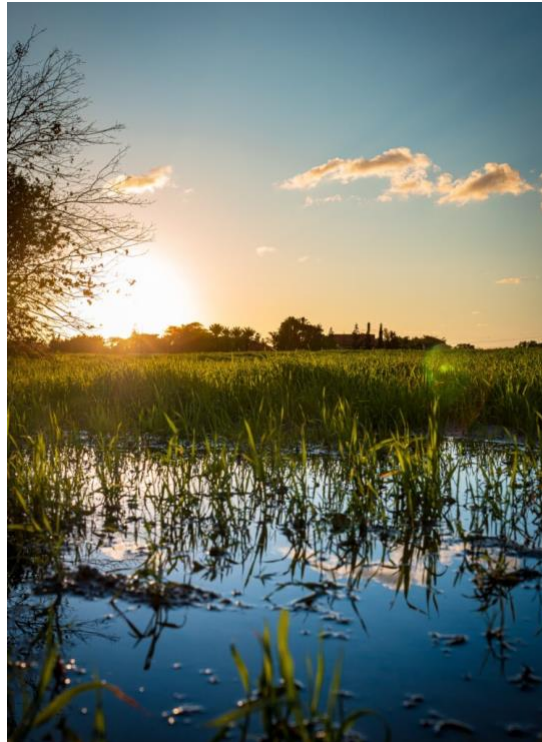


Photo by omer havivi via Pexels

Background

The definition of WOTUS is really a question regarding the scope of the Clean Water Act (“CWA”).

Congress, acting under the Commerce Clause, passed the CWA in 1972. The CWA gave federal jurisdiction over “navigable waters,” a term that was defined as being “waters of the United States” to the EPA and the US Army Corps of Engineers. The CWA did not, however, define “waters of the United States.” This has resulted in decades of rulemaking by the agencies and litigation over the scope of this phrase.

The landmark Supreme Court case came in 2006 in *Rapanos v. U.S.* This case resulted in the now-famous 4-1-4 plurality decision that has driven WOTUS rulemaking ever sense. The plurality opinion, written by Justice Scalia, held that only “relatively permanent, standing, or continuously flowing” bodies of water were considered WOTUS under the CWA. Further, for wetlands, only those with a “continuous surface connection” to a relatively permanent body of water would satisfy the CWA meaning of WOTUS. Justice Kennedy authored an opinion concurring in part and dissenting in part. He agreed with the plurality’s ruling on whether the wetland was a WOTUS in this case but believed a wholly different test was proper to analyze the question. For Justice Kennedy, the question was whether a wetland shared a “significant nexus” with a water that was already recognized as a WOTUS. A “significant nexus” would exist if a wetland “significantly affected the chemical, physical, and biological integrity” with a recognized WOTUS. After this, the Obama administration promulgated a final rule in 2015, which was repealed and then replaced by the Trump administration’s final rule in 2020, which was repealed by the Biden administration in 2021 and replaced with the Biden rule in January 2023. The Biden Rule essentially adopted both the Scalia “relatively permanent body of water” test and the Kennedy “significant nexus” test, and provided that waters meeting either of these tests were jurisdictional. To hear more about the Biden rule, [click here](#).

Then, earlier this year, the United States Supreme Court issued its opinion in *Sackett v. EPA*. In that decision, the Court found the “significant nexus” test was improper, limited wetland jurisdiction to those with a continuous surface connection, meaning those wetlands that are indistinguishable from a water, and appeared to adopt Scalia’s relatively permanent body of water test. For more detail on the *Sackett* opinion, click [here](#) for a blog post and [here](#) for a podcast episode. It was in response to the *Sackett* decision that the EPA and COE amended the WOTUS rule published in January to comply with the Court’s ruling.

The impact of the scope of the WOTUS definition is significant for landowners, as lands meeting the definition of a WOTUS require a landowner to obtain a federal permit before undertaking certain actions such as dredge and fill (i.e. moving dirt) or discharging a point source pollutant. [For more background, [click here](#).]

Amended Rule

The EPA released its [prepublication version of the amended final rule](#) on August 29, 2023. To view a red-lined version of the amended rule as compared to the January 2023 rule, [click here](#). To see a chart explaining the changes, [click here](#).

The amended rule can be split into two parts: Jurisdictional waters and excluded waters.

Jurisdictional waters

The rule provides that “waters of the United States” includes five categories of waters:

(1) Waters which are: (i) currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters subject to the ebb and flow of the tide; (ii) the territorial seas; or (iii) interstate waters.

(2) Impoundments of waters otherwise defined as WOTUS under this definition, other than impoundments of waters identified in paragraph (5) of this section.

(3) Tributaries of waters listed in paragraphs (1) and (2) of this section that are relatively permanent, standing, or continuously flowing bodies of water.

(4) Wetlands adjacent (having a continuous surface connection) to waters: (i) identified in paragraph 1 of this section, or (ii) relatively permanent, standing, or continuously flowing bodies of water identified in paragraphs (2) or (3) of this section and with a continuous surface connection to those waters.

(5) Intrastate lakes and ponds not identified in paragraphs (1) – (4) that are relatively permanent, standing, or continuously flowing bodies of water with a continuous surface connection to the waters identified in paragraphs (1) or (3) of this section.

The vast majority of changes came within this section. The amended rule does away with any mention of the significant nexus test and modifies the definition of adjacency to be a “continuous surface connection.”

Excluded waters

Next, the amended rule lists certain categories of water that are not jurisdictional even if they would otherwise meet the jurisdictional definitions:

- 1) Waste treatment systems, including ponds or lagoons, designed to meet the requirements of the CWA;
- (2) Prior converted cropland designated by the Secretary of Agriculture (Determination made by EPA; exclusion ceases upon change of use);
- (3) Ditches excavated wholly in and draining only dry land that do not carry a relatively permanent flow of water;
- (4) Artificially irrigated areas that would revert to dry land if the irrigation ceased;
- (5) Artificial lakes or ponds created by excavating or diking dry land to collect and retain water which are used for such purposes as stock watering irrigation, settling basins, or rice growing;
- (6) Artificial reflecting or swimming pools or other small ornamental bodies of water created by excavating or diking dry land to retain water for primarily aesthetic reasons;
- (7) Waterfilled depressions created in dry land incidental to construction activity and pits excavated in dry land for the purpose of obtaining fill, sand, or gravel unless and until the construction or excavation operation is abandoned and the resulting body of water meets the definition of WOTUS;
- (8) Swales and erosional features (e.g. gullies, small washes) characterized by low volume, infrequent, or short duration flow.

Note that this section remains unchanged from the original Biden rule published in January 2023.

Effective Date

The EPA and COE announced this amended rule as a final rule, which will be effective upon publication in the Federal Register. Unlike many rules, there will not be a notice and comment period for the amended rule. Though most rules do require notice and comment rulemaking, the Administrative Procedures Act provides that when an agency finds good cause that public notice and comment procedures are impracticable, unnecessary, or contrary to the public interest, the

agency may issue a rule without allowing for a comment period. Here, the EPA and COE say that a comment period is unnecessary. “Because the sole purpose of this rule is to amend these specific provisions of the 2023 Rule to conform with *Sackett*, and such conforming amendments do not involve the exercise of the agencies’ discretion, providing advance public notice and seeking comment is unnecessary.” In light of this, the EPA and COE announced that the amended rule will be effective upon publication in the federal register...in some states. Remember that currently, there is an injunction in place pending litigation making the January 2023 Biden rule inapplicable in 23 states, including Texas. In light of that, the amended rule will not go into effect in the states currently under an injunction until that issue is resolved in litigation. Thus, for Texas, until the injunction is lifted, the amended rule will not go into effect. Instead, Texas will be under the pre-2015 rule plus the decision in *Sackett*. Practically speaking, it may not make a significant difference as the amended rule was written so as to align with the *Sackett* opinion, but it is important to note the states where the amended rule will not immediately go into effect. To see a map of which states are currently under injunctions and which are not, [click here](#).

Remaining Questions

In reviewing the amended rule, I flagged a few questions to consider.

First, the rule includes “interstate waters” as being jurisdictional but does not limit this term to only those waters that are relatively permanent, standing, or continuously flowing bodies of water as was done with other parts of the rule and held in *Sackett*. This could potentially be problematic. Assume there was an intermittent or ephemeral creek that crossed a state line. Under *Sackett*’s relatively permanent body of water test, it would not be jurisdictional, but under the amended rule, it likely would.

Second, the amended rule does not define the meaning of “tributary.” The definition of a tributary has been a source of confusion and litigation for many years. While the amended rule does make clear that to be jurisdictional, a tributary must be a relatively permanent, standing, or continuously flowing body of water, it does not further define what qualifies as a tributary. This lack of clarity seems ripe for potential litigation.

Third, the amended rule limits jurisdictional wetlands to those that are “adjacent,” which is defined as having a “continuous surface connection.” This was the language from the *Sackett* opinion. There was, however, additional language included in *Sackett* that was not included here. The Supreme Court further described jurisdictional wetlands as those where boundaries were “indistinguishable” or difficult to determine when the water ended and the wetland began. This language was not included in the rule, although the “continuous surface connection” language would likely be interpreted this way given the *Sackett* opinion.

Finally, what about lawsuits? It is certainly likely there will be additional lawsuits filed against the amended rule once it is published in the federal register. Groups from either side could file suits challenging the rule as being either too broad or too narrow. There could also potentially be a challenge to the agencies’ decision not to allow public comment. Additionally, keep in mind that the litigation filed earlier this year challenging the original rule is still pending. While certain portions of those challenges related to the significant nexus test may be rendered moot, many other specific claims about the rule could still be relevant and those lawsuits will likely proceed.