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New WOTUS Rule Significantly Narrows Federal Jurisdiction under Clean Water Act

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On August 30, 2023, the United States Corps of Engineers (Corps) and Environmental Protection Agency (EPA) released a prepublication version of their final rulemaking amending their previous definition of “waters of the United States” (WOTUS) under the Clean Water Act (CWA”(*Good Cause Rule*). The rulemaking was issued under the “good cause” exception from notice and comment rulemaking because it was partly mandated by the US Supreme Court's decision in *Sackett v. EPA* issued in May.

Unexpectedly, the agencies extended the Court's “relatively permanent” standard to both wetlands and tributaries, vastly reducing the jurisdictional reach of the CWA. This approach may be an effort by EPA to head off more litigation over this issue. The Good Cause Rule provides some clarity as to what is “in” and “out” of future federal oversight, although future guidance will be needed, including new definitions of key terms.

The *Sackett* case concerned only CWA jurisdiction over “adjacent wetlands” under the CWA. The justices uniformly rejected the agencies' application of the “significant nexus” standard, with the majority concluding that for a wetland to be jurisdictional, it must be “as a practical matter indistinguishable” from a larger river or lake and have a “continuous surface water connection” to that water body. The majority applied the legal reasoning from the Court's plurality decision in *Rapanos v. United States* and included language indicating that in the Court's view, only “relatively permanent, standing or continuously flowing bodies of water” should be subject to the reach of the CWA.

While it was widely expected that the agencies would interpret the *Sackett* decision narrowly in amending the definitions, the Good Cause Rule makes extensive changes to the WOTUS definitions that will have broad implications:

- **Significant nexus no more**: The Good Cause Rule removes the “significant nexus” standard entirely from the definitions of adjacent wetlands, tributaries, and intrastate waters. This standard derives from the *Rapanos* decision and had been applied by the agencies since 2007. Under the significant nexus rule, tributaries, and wetlands that, alone or in combination with similarly situated waters, “significantly affect the chemical, physical, or biological integrity” of jurisdictional waters were defined as WOTUS. These criteria are struck in the Good Cause Rule.

- **Tributaries must be "relatively permanent"**: Going beyond the precise holding of the *Sackett* case, the agencies included new language defining tributaries as waters "that are relatively permanent, standing or continuously flowing bodies of water." This almost certainly eliminates jurisdiction for ephemeral waterways that are precipitation -dependent and likely has implications for even intermittent waterways that flow only part of the year. Importantly, the agencies are ceding jurisdiction over these types of streams, which represent approximately half of the streams in the United States and a greater percentage in the arid west.

- **Wetlands must be "relatively permanent" and have a "continuous surface water connection":** The agencies implemented conforming changes in response to *Sackett* that will now require a wetland to have both a surface connection to a larger river, lake, or tributary (as redefined) **and** be "relatively permanent, standing or continuously flowing bod[y] of water." This will certainly eliminate jurisdiction for a majority of wetlands in the United States.

- **Guidance will be required:** While the Good Cause Rule makes sweeping changes to jurisdiction, there are some terms that will need to be defined through guidance. For instance, the agencies will need to define whether "relatively permanent" means only perennial streams or whether it also includes some intermittent streams. The agencies will also likely need to further define "continuous surface water connection" in some circumstances.

- **Impact on Existing Litigation of the January 2023 WOTUS Rule:** EPA and the Corps will implement the January 2023 Rule, as amended by the Good Cause Rule, in 23 states. In the other 27 states where the January 2023 Rule has been enjoined, EPA and the Corps will interpret WOTUS consistent with the pre-2015 regulatory regime and the Supreme Court's decision in *Sackett* until further notice.

The Rule has potentially wide-reaching implications for any project seeking "dredge and fill" permits under CWA Section 404, and will also have implications for the administration of Section 402 (NPDES permits), Section 401 (state water quality certification), and potentially all programs administered under the CWA. Upon final publication of the Good Cause Rule, the Corps will likely resume jurisdictional determinations that were paused as a result of the *Sackett* decision. It warrants immediate consideration in overall permit strategy and in some cases may prompt seeking new approved jurisdictional determinations. Some states have already indicated their intent to seek ways to fill the gap in wetland and stream protection within their borders, and the Good Cause Rule will likely prompt more to do the same. This will likely result in broader differences in permitting requirements between states, as some states will require permits when Section 404 does not. EPA and the Corps plan to hold a webinar about the Good Cause Rule on September 12th.

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