

Wrangling Continues over Revised WOTUS Conforming Rule Issued in Response to *Sackett v. EPA*

By Gary L. Pasheilich

On September 8, U.S. EPA and the Army Corps of Engineers published a final conforming rule amending the definition of “waters of the United States” in response to the U.S. Supreme Court’s recent *Sackett* decision.

As we have reported over the past several months, 2023 has seen major developments regarding the definition of “waters of the United States” under the Clean Water Act. First, U.S. EPA and the Corps issued a final rule in January (“January Rule”) that sought to define the term under two competing tests: the “continuous surface connection” test, focusing on the presence of “relatively permanent” waters; and the “significant nexus” test, which provided a much broader standard for determining jurisdictional waters.

In May, the U.S. Supreme Court ruled in *Sackett v. EPA* that: “[T]he 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] ... ‘water[s] 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.” Consequently, the Court effectively eliminated the “significant nexus” test.

The September final “conforming” rule (“Conforming Rule”) incorporates certain targeted revisions to the January Rule in response to the *Sackett* decision, including removing the “significant nexus” test from consideration when identifying tributaries and other waters as federally protected, and also revising the “adjacent wetlands” definition, limiting such wetlands to those “having a continuous surface connection” with navigable waters. As such, wetlands separated from traditional regulated waters by berms or other obstructions are no longer regulated.

A major point of contention is that the Conforming Rule became effective immediately upon publication, thereby avoiding public notice and comment procedures. The Conforming Rule has also received substantive criticism for this lack of public input prior to issuance, as well as the lack of a definition of a “relatively permanent” waterbody and the absence of an exclusion for “ephemeral features,” which only possess water after rainfall events or snow melt.

An additional area of uncertainty involves the fact that the *Sackett* decision and the Conforming Rule will effectively create two sets of standards applicable to the country due to pending litigation. Litigation that challenged the January Rule resulted in injunctions being imposed in 27 states. With those injunctions remaining in place, going forward, those states will implement the pre-2015 standard as modified by the *Sackett* decision. For the remaining 23 states, the District of Columbia and U.S. Territories, they will implement the January Rule as modified by the *Sackett* decision and the Conforming Rule.

The two competing sets of standards referenced above are sure to create even more regulatory confusion going forward. Importantly, however, it was recently reported that the parties to the Texas and North Dakota litigation involving the January Rule have sought to withdraw certain pending dispositive motions and amend their complaints to address the Conforming Rule as part of their challenges. As such, it is unclear whether this two-tiered regulatory approach will be maintained in the interim.

As noted by Michael L. Connor, Assistant Secretary of the Army for Civil Works, “[w]ith this final rule, the Corps can resume issuing approved jurisdictional determinations that were paused in light of the *Sackett* decision.” However, critics identifying the above substantive issues note that the Conforming Rule will instead likely result in more uncertainty and confusion regarding implementation and what waters are subject to federal jurisdiction. EPA and the Army Corps are expected to issue implementation guidance going forward, but no timetable has been set for doing so. Public outreach webinars were held by EPA in September, but the agency provided little clarification regarding implementation of the Conforming Rule, which is “still being considered.” EPA also states that it intends to hold listening sessions into the fall of 2023, but has not yet announced dates for such sessions.

One takeaway favorable for many stakeholders is that, notwithstanding the problems noted above, the Conforming Rule is narrower than the January Rule, and the practical result is that many jurisdictional determinations will conclude that more waterbodies are not subject to federal jurisdiction at this point. For example, EPA has publicly stated that between 1.2 million miles to 4.9 million miles of ephemeral streams and up to 63% of wetlands are potentially impacted by the *Sackett* decision and are no longer subject to federal jurisdiction. While estimates may vary, it is clear that the *Sackett* decision substantially narrowed federal jurisdiction under the Clean Water Act.

For more information, please feel free to contact any of Roetzel’s EHS professionals.

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