

“Waters of the United States” Rule To Be Tested by Pending U.S. Supreme Court Ruling in *Sackett v. EPA*

By Gary Pasheilich

On January 18, U.S. EPA and the Army Corps of Engineers issued a final WOTUS rule that will overlap with a forthcoming U.S. Supreme Court ruling that will define jurisdictional waters under the Clean Water Act.

Under the Clean Water Act, the term “navigable waters” is defined to include “the waters of the United States, including the territorial seas.” The term defines those protected waters under various federal programs, such as water quality standards, permitting that addresses discharges of pollutants, including dredged or fill material, processes addressing impaired waters, oil spill prevention, preparedness and response programs, and water quality certification programs. However, “waters of the United States,” or “WOTUS,” itself is not defined in the Clean Water Act. How the term is interpreted has great implications for development projects that seek to utilize property near jurisdictional waters and which may result in the need to obtain federal permits.

Over the years, EPA and the Army Corps of Engineers have conducted various rulemakings to define WOTUS, but these efforts have remained a battleground with the determination of whether certain waters, including those adjacent to water bodies, qualify as jurisdictional waters being a major point of contention. The definition has been the subject of litigation during its history, with the Supreme Court attempting to address the complex and elusive term in 1985 (*United States v. Riverside Bayview Homes*), 2001 (*Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, or “SWANCC” decision) and 2006 (*Rapanos v. United States*).

The EPA/Corps’ current rulemaking seeks to apply two competing *Rapanos*-era tests, namely a “continuous surface connection” test focused on the presence of “relatively permanent” waters and the “significant nexus” test, which provides for a more tenuous connection to traditional waters, and as a result, a much broader standard for determining jurisdictional waters.

The U.S. Supreme Court is currently considering these issues in *Sackett v. EPA*, with many observers convinced that the Court will scrap or restrict the significant nexus test based upon the Justices’ comments and questions at argument. While the full extent to which the decision will impact the new WOTUS rule remains uncertain, rejection of the significant nexus test would significantly undermine at least part of the rule. A variety of parties, including industry groups and certain states, have challenged the WOTUS rule immediately upon issuance, arguing that it creates an ambiguous legal standard. Moreover, GOP lawmakers are challenging the rulemaking under the Congressional Review Act, seeking to rescind the rule. Although the House voted to approve the resolution, the Biden Administration has vowed to veto the CRA challenge should it make it to the President’s desk.

The next several months until the U.S. Supreme Court issues its ruling will continue to see heightened political attention and legal challenge. In the meantime, the WOTUS rule becomes effective on March

20, 2023 should attempts fail to derail the rule. We shall continue to monitor these events and are prepared to advise clients on planned projects or those under development.

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

Shane Farolino

Practice Group Manager
Environmental, Energy and Health & Safety
330.849.6680 | sfarolino@ralaw.com

Terry Finn

330.849.6605 | tfinn@ralaw.com

Gary Pasheilich

614.572.3428 | gpasheilich@ralaw.com

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