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Waters of the U.S. (WOTUS): In Light of Pending Litigation that Stays the 2023 Rule, and Before New Rules Are Issued, EPA Attempts to Clarify the Definition.

Several lawsuits are pending that challenge the Biden' Administration's January 18, 2023, Waters of the U.S. (WOTUS) Rule. The Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers (Corps) are implementing the 2023 rule in 24 states, Washington, D.C., and the U.S. Territories. Courts have issued orders preventing (or staying) implementation of the 2023 rule in 26 states, and thus the agencies are interpreting "waters of the U.S." in those states consistent with the pre-2015 regulatory regime and the U.S. Supreme Court's ruling in *Sackett*. *See* About Waters of the U.S.

The Trump Administration's March 12, 2025, Guidance

On March 12, 2025, in an attempt to clarify implementation of the WOTUS definition and in anticipation of promulgating new legally binding regulations, the EPA and the Corps released a Memorandum to the Field that provides guidance to agency staff concerning implementation of the WOTUS definition. The memo states that its purpose is to provide "national consistency and eliminate confusion about the scope of [the phrase] '**adjacent wetlands**,' and specifically the phrase '**continuous surface connection**' as used in the U.S. Supreme Court's decisions in *Rapanos* and *Sackett*."

The memo's primary objective is to provide for "more effective and efficient approved jurisdictional determinations, permitting actions and other relevant actions consistent with *Sackett*."

The "Significant Nexus" Standard Rejected in *Sackett*

Rather than repeating it here, one should read the entire memo for a detailed discussion of the history of the WOTUS rules and the *Rapanos* and *Sackett* cases. Of particular note is the Court's ruling in *Sackett* that "the *Rapanos* plurality was correct" and the Court's decision to reject (now former) Justice Anthony Kennedy's "significant nexus" standard. The Court ruled in *Sackett* that the EPA "has no statutory basis to impose it." *Sackett*, 598 U.S. at 680.

Current Rules Confuse the "Adjacency" Criterion

After taking to task the agencies' guidance issued in 2008 and what the memo refers to as the "Pre-2015 Regulatory Regime," the memo states:

> With significant nexus having been struck down by the Court in *Sackett*, we are left to determine what the pre-2015 regulatory regime's approach to adjacency looked like without that evaluation. The Corps' pre-2015 regulatory regime provides clarity on this point in the previously used *Rapanos* "Approved Jurisdictional Determination Form," which states, "[a] wetland that is adjacent to but that does not directly abut an RPW requires a significant nexus test."

The memo continues:

> Removing the significant nexus portion from that statement leaves the simple fact that **unless a wetland has a continuous surface connection** – directly abutting a requisite jurisdictional water – **it cannot be determined to be jurisdictional as an adjacent wetland**.

The 2023 Rule

The agencies then turn to the Biden Administration's January 18, 2023, Rule, which addressed, in part, the implementation of the "continuous surface connection" criterion. The memo states [formatting revised by the author for clarity]:

> Under the relatively permanent standard for adjacent wetlands, wetlands meet the continuous surface connection requirement if:

1. They physically abut, or touch, a relatively permanent paragraph (a)(2) impoundment;
2. Or a jurisdictional tributary when the jurisdictional tributary meets the relatively permanent standard:
3. Or if the wetlands are connected to these waters by a **discrete feature** like a non-jurisdictional ditch, swale, pipe, or culvert.

The memo continues:

> The agencies' "discrete features" language is in tension with the pre-2015 regime and *Sackett* and the purpose of this memo is to align the agencies' interpretation of **adjacency** with *Sackett*.

The memo then rejects the "discrete features" language and concludes:

> Therefore, an interpretation of "continuous surface connection" which allows for wetlands far removed from and not directly abutting covered waters to be jurisdictional as adjacent wetlands **has the potential to violate the direct abutment requirement** for "adjacent wetlands" under the plurality's standard [established in *Rapanos*] and now Sackett's endorsement of that standard.
>
> Therefore, any components of guidance or training materials that assumed a **discrete feature** established a continuous surface connection **are rescinded.** [Emphasis added.]

The memo then summarizes the agencies' "clear two-part test" for determining Clean Water Act jurisdiction over adjacent wetlands.

1. The **adjacent body of water must be a "water of the United States**," which generally means traditional navigable waters, or a relatively permanent body of water connected to a traditional navigable water; and
2. The **wetland**, assuming it satisfies the agencies' longstanding regulatory definition of "wetlands" at 33 C.F.R. 328.3 and 40 C.F.R. 120.2, must have a **continuous surface connection** to a requisite covered water making it difficult to determine where the water ends, and wetland begins.

Acknowledging that there may be instances where the "line drawing problem is difficult" (*e.g.,* drought, low tide, or instances of temporary interruptions in surface

connection), the agencies state they will address those circumstances on "a case-by-case basis and provide further clarity when appropriate to guide future implementation."

Next Steps: Guidance Is Not Legally Binding – New Rules on the Horizon

One of the fundamental principles of administrative law is that "guidance" documents only serve to clarify agency policies and procedures. Nevertheless, they are not "legally binding" in the same way as statutes passed by Congress and rules and regulations that have been duly promulgated by agencies based on the authority provided in statutes. The memo recognizes this distinction specifically stating at footnote 3:

> The Clean Water Act and the EPA and Corps regulations, interpreted consistent with the *Sackett* decision, contain legally binding requirements. This guidance does not substitute for those provisions or regulations, nor is it a regulation itself. Thus, it does not impose legally binding requirements on the EPA, the Corps, Tribes, states or the regulated community.

Here, the agencies anticipate additional guidance and/or rulemaking stating: "The agencies will use a forthcoming Federal Register notice and recommendations docket on 'WOTUS Notice: The Final Response to SCOTUS' as well as other stakeholder engagement opportunities to identify areas of implementation challenges to be later addressed either through **additional guidance or rulemaking."**

Issues on the Table and "Listening Sessions"

The EPA and Corps issued a "Pre-Publication Notice" that lists three overarching issues for which the agencies are seeking comment:

1. The scope of "relatively permanent" waters and to what features this phrase applies;
2. The scope of "continuous surface connection" and to which features this phrase applies; and
3. The scope of jurisdictional ditches.

The agencies will hold six listening sessions in late March-April 2025 to solicit recommendations for further administrative action; two open to all stakeholders, one open to states, one open to tribes, one open to industry and agricultural stakeholders, and one open to environmental and conservational stakeholders.

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