



UPDATE: Federal Court Enjoins Biden Administration's WOTUS Rule in 24 States

05.25.2023

UPDATE: On May 25, 2023, the U.S. Supreme Court overturned the Ninth Circuit, and ruled in *Sackett v. EPA* that the Environmental Protection Agency and Army Corps of Engineers incorrectly designated a portion of the Sacketts' property as waters of the United States and that the Sacketts should have been permitted to backfill the property without facing penalties under the Clean Water Act. While all nine justices agreed that EPA improperly regulated the discharge of fill material to the Sacketts' property, the justices were divided regarding the reasons the Sacketts should win, which is a little bit reminiscent of the Court's prior ruling in *Rapanos v. United States*, although the number of justices supporting different reasoning has changed. (547 U.S. 715 (2006)) Justice Alito authored the majority opinion for the case joined by Chief Justice Roberts, and Justices Gorsuch, Thomas, and Coney-Barrett. In addition, the decision contains three separate concurring opinions authored by Justices Thomas, Kagan and Kavanaugh, each embracing different grounds for ruling that EPA improperly regulated the discharge of fill to the Sacketts' property.

Justice Alito's majority opinion, embraced by 5 of the justices and constituting the holding in the case, establishes a new statement of the test for determining if wetlands are Waters of the United States. The new test incorporates the "continuous surface connection" test from Justice Scalia's plurality opinion in *Rapanos*. The opinion holds that to assert jurisdiction over an adjacent wetland under the Clean Water Act, a party must 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."

While the concurring opinion authored by Justice Thomas praises the majority opinion for "curb[ing] a serious expansion of federal authority that has simultaneously degraded States' authority," the concurring opinions authored by Justice Kavanaugh and Justice Kagan both criticize the Alito opinion for creating a 'new' test, rather than relying on the one Congress set forth in federal Clean Water Act statute. All three

opinions, however, concur in the ruling that the EPA improperly regulated the Sacketts' construction activities.

The Supreme Court's ruling has significant implications for, at a minimum, the wetlands-related provisions of the final rule recently adopted by EPA and the U.S. Army Corps of Engineers to define 'waters of the United States'. The recent rule defines wetlands as waters of the United States when, among other things, there is a significant nexus (which may consist of a groundwater, surface water, or other biological or chemical connection) between wetlands and relatively permanent bodies of water connected to traditional interstate navigable waters. The Supreme Court's ruling overturns the significant nexus text, and therefore EPA and the Army Corps of Engineers will need to take action to conform their recently adopted rule to the Court's holding.

We are reviewing the *Sackett* opinion in more detail and will soon publish a separate eAlert explaining the effects of this change in the law.

UPDATE: On April 21, 2023, the U.S. Court of Appeals for the Sixth Circuit granted the State of Kentucky's request for an administrative stay of the Biden administration's 2023 WOTUS rule. (The lead case is *Kentucky v. EPA*, case number 23-5343, and Kentucky appealed the decision on April 18, 2023). The stay is effective immediately and will last until May 10, 2023. The Sixth Circuit informed the U.S. EPA and Army Corps of Engineers that the agencies have until May 1 to respond to the challengers' motions for a stay of the rule pending their appeals.

UPDATE: On April 18, 2023, the state of Kentucky appealed the U.S. District Court for the Eastern District of Kentucky's ruling in *Kentucky v. EPA* to the U.S. Court of Appeals for the Sixth Circuit. As a reminder, in *Kentucky v. EPA*, the district court held that Kentucky could not show how it was currently being injured by the Biden administration's WOTUS rule. The district court therefore held that the case was not ripe for review. For a longer explanation of *Kentucky v. EPA* decision, see the update to our previous eAlert. We will continue to monitor litigation to the Biden administration's WOTUS rule and provide updates as warranted.

On April 12, 2023, the U.S. District Court for the District of North Dakota issued a preliminary injunction blocking the Biden administration's Waters of the United States (WOTUS) rule in twenty-four states (the case is *West Virginia v. EPA*, Case No. 3:23-cv-00032-DLH-ARS). Taking into account the earlier injunction affecting the states of Texas and Idaho (see our previous eAlert), the Biden administration's WOTUS rule does not apply to the following twenty-six states: Idaho, Texas, Alabama, Alaska, Arkansas, Florida, Georgia, Indiana, Iowa, Kansas, Louisiana, Mississippi, Missouri, Montana, Nebraska, New Hampshire, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Utah, Virginia, West Virginia and Wyoming.

In *West Virginia*, the court's opinion followed a similar format as the opinion in *Texas v. EPA* (Case No. 3:23-cv-00017), where the U.S. District Court for the Southern District of Texas enjoined the Biden administration's WOTUS rule in Texas and Idaho. As in *Texas*, the court in *West Virginia* began by discussing the background of the WOTUS rule at issue and the broader history of WOTUS' role within the Clean Water Act. For a summary of the beleaguered Biden administration's 2023 WOTUS rule and the relevant legal history, see our previous eAlert and the Environmental Protection Agency's "Waters of the United States" webpage.

The court then began its legal analysis with a discussion of standing. (Standing is a constitutional requirement holding that the party filing a lawsuit must show injury, causation and redressability before a federal court can hear the case.) Notably, in *Kentucky v. EPA* (Case No. 3:23-cv-0007-GFVT), another recent

case where state-plaintiffs brought a motion for a preliminary injunction to block the Biden administration's WOTUS rule, the U.S. District Court for the Eastern District of Kentucky ruled against the states, finding that the states could not show how they were being injured by a rule that had not yet been enforced (see our updated eAlert). However, the court in *West Virginia* rejected this legal analysis and instead adopts the approach employed in *Texas*, where the court held states are entitled to special solicitude on issues affecting state sovereignty, and thus do not have to meet every aspect of the standing requirement.

The court next applied the four-part inquiry to determine whether a preliminary injunction was warranted. The four factors the court must weigh while making the inquiry are:

- whether there is a threat of irreparable harm to the party bringing the suit (the movant),
- the balance of the harms between the party seeking to block the action and the party whose action would be enjoined,
- the movant's likelihood of success on the merits, and
- the public interest. The court once again adopted the reasoning in *Texas*, taking the unusual step of inserting block quotes from the *Texas* opinion to underscore its agreement with that court's analysis.

Both courts found that the state-plaintiffs were likely to succeed on the merits of their case, because "at least two aspects [of the 2023 Rule] are unlikely to withstand judicial review." (Opinion at 17, quoting *Texas* at 10). The court held that the Biden administration's rule "reads navigability out of the [Clean Water Act]" and applies a different test than the one outlined in the Supreme Court case *Rapanos v. United States* (that test is the 'significant nexus' test). (Opinion at 18, quoting *Texas* at 10) (547 U.S. 715 (2006)). The court concludes by "find[ing] the new 2023 Rule is neither understandable nor "intelligible, and its boundaries are unlimited. . . [which] raises a litany of other statutory and constitutional concerns." (Opinion at 19).

As the law currently stands, the nation is divided — about half the country applies the Biden administration's 2023 WOTUS rule, while the other half will determine whether waters are jurisdictional using regulatory framework prior to 2015 (pre-2015 framework). An explanation of the pre-2015 framework and accompanying guidance documents can be found at the Environmental Protection Agency's website. The U.S. Supreme Court is expected to issue a ruling on *Sackett v. EPA* (Docket No. 21-454), a case that directly addresses WOTUS, in the near future (the expected release date range will begin in the next few days and last until the end of June). One potential outcome of the Court's ruling in *Sackett* is a directive to the EPA and Army Corps of Engineers to reconsider their 2023 WOTUS rule.

We will continue to monitor the status of this rule and the outcome of *Sackett v. EPA* and will provide updates as necessary.