UPDATE: Federal District Court Enjoins Biden Administration's WOTUS Rule in Texas and Idaho

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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 May 17, 2023, the U.S. Environmental Protection Agency and the U.S. Army Corps of Engineers appealed the district court ruling in *Texas v. EPA* to the U.S. Court of Appeals for the Fifth Circuit. This appeal would only affect the Biden Administration's WOTUS rule as it applies to Texas and Idaho (not the additional 24 states where the rule has been enjoined). As a reminder, a U.S. Supreme Court decision in *Sackett v. EPA* is expected in the coming weeks.

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. We will continue to monitor litigation to the Biden administration's WOTUS rule and provide updates as warranted.

UPDATE: On April 12, 2023, the U.S. District Court for the District of North Dakota issued a preliminary injunction blocking the Biden Administration's WOTUS rule in an additional twenty-four states (the case is *West Virginia v. EPA*, Case No. 3:23-cv-00032-DLH-ARS). For more information about this development, see our recent eAlert.

UPDATE: On April 6, 2023, in an expected move, President Biden vetoed the Congressional Review Act joint-resolution that attempted to undo his administration's WOTUS rule. The president maintained his administration's rule "provides clear rules of the road" and emphasized that repealing the rule would have

led to “increased uncertainty… [that] would threaten economic growth.” The three legal challenges discussed in this alert (playing out in the federal courts of Texas, Kentucky, and North Dakota) remain ongoing.

UPDATE: On March 31, 2023, the U.S. District Court for the Eastern District of Kentucky denied plaintiffs’ motions for preliminary injunction in another challenge to the Biden Administration’s WOTUS rule, this one brought by the state of Kentucky and “various business groups.” (The case is *Kentucky v. EPA*, Case No. 3:23-cv-0007-GFVT). The court explained that the plaintiffs cannot meet the high standard for blocking the rule while their lawsuit proceeds, because they cannot demonstrate how they are currently being harmed by the rule. The court further explained that the case itself is not ‘ripe’ for judicial review, because until the government enforces the rule’s application, all harms inflicted by the rule remain hypothetical. By dismissing the motions without prejudice, the court has left the door open for future attempts to enjoin the rule, once plaintiffs can establish injury in fact.

The outcome in this case underscores a markedly different legal interpretation than the one offered by the U.S. District Court for the Southern District of Texas in *Texas v. EPA* (discussed at length below). In *Texas*, the court found that the state-plaintiffs had standing, because states are entitled to “special solicitude” and do not have to meet all of the normal standards to establish standing. The court also found that the state of Texas had quantified with sufficient certainty the financial costs it would incur if it were forced to adopt the new WOTUS rule. Notably, both courts agreed that the private industry groups could not prove injury and therefore lacked standing. The court in *Texas* did not discuss the ripeness doctrine.

As the situation currently stands, the law remains in effect throughout the nation, except for in the states of Texas and Idaho. There is another motion for injunction filed by more than twenty states, which is pending before the District Court of North Dakota. Additionally, Congress has invoked the Congressional Review Act in an attempt to strike down the new WOTUS rule, and recently passed a resolution to repeal the rule in the Senate. The Congressional Review Act effort is all but destined to fail: the Act would also require a joint-resolution from the House and would be subject to the president’s veto.

On March 19, 2023, the U.S. District Court for the Southern District of Texas issued a preliminary injunction to temporarily halt the enactment of the Biden administration’s new waters of the United States (WOTUS) rule within the borders of Texas and Idaho. (The case is *Texas v. EPA*, Case No. 3:23-cv-00017). In addition to the two state plaintiffs, eighteen national trade organizations asked the court to enjoin the rule across the nation. The court denied the trade organizations’ request, finding that the organizations did not have standing to sue because they could not prove they would suffer irreparable harm as a result of the rule’s implementation. On March 20, 2023, the rule became effective throughout the United States, except in Texas and Idaho.

Supreme Court Precedent and a Pending Decision – Contextualizing the Biden Administration’s WOTUS Rule

Though the district court’s discussion of the Biden administration’s WOTUS rule largely constrains itself to the language of the rule and the legal theories presented by each party, the 800 pound gorilla in the opinion is the pending U.S. Supreme Court decision in *Sackett v. EPA*. (8 F.4th 1075 (9th Cir. 2021), *cert. granted* Jan. 24, 2022). The issue in *Sackett* is whether the Ninth Circuit applied the proper test under the Clean Water Act to determine whether wetlands are WOTUS. The Ninth Circuit used the “significant nexus” test, which originates from Justice Kennedy’s concurrence in *Rapanos v. United States*. (547 U.S. 715

(2006)). During oral argument, the justices discussed the merits of both the significant nexus test and the *Rapanos* plurality's alternate test, the "relatively permanent" test (authored by Justice Scalia). The Court's ruling in *Sackett* is expected to clarify the process agencies should use to define WOTUS, and could be handed down as early as this summer.

Critics of the Biden administration's WOTUS rule argue that the administration should have waited for the Court to determine the outcome of *Sackett* before promulgating a new rule. In a fact sheet released alongside the rule, the Biden administration counters that the rule is simply codifying the definition of WOTUS that "has been implemented by every administration in the last 45 years."

An Overview of *Texas v. EPA*

In their motion for the preliminary injunction, the states argued that the plain language of the Clean Water Act does not extend the federal government's jurisdiction to

- non-navigable interstate waters,
- impoundments and wetlands with no hydrologic connection to navigable waters, or
- isolated ponds and mudflats, but that the Biden Administration's new WOTUS rule would extend to all three of these types of water features.

The defendant federal agencies responded that federal jurisdiction over interstate waters is consistent with the Act's history, text and purpose.

In the memorandum opinion accompanying the injunction, the court explains that state plaintiffs identified two aspects of the Biden administration's WOTUS rule that it considers troubling:

- that the rule codifies a modified version of significant nexus test, and
- that the rule "imposes jurisdiction on *all* interstate waters, regardless of their navigability." (Opinion at 7).

With regard to the first issue, the court writes that the significant nexus test in the Biden administration's rule is "materially different from the standard Justice Kennedy articulated in *Rapanos*" because the rule expands federal jurisdiction over features that Justice Kennedy did not include, such as ephemeral drainages, ditches and non-navigable interstate waters. (Opinion at 21). This leads to the second issue: the court reasons that the by constructing the significant nexus test so that it includes all interstate waters, the administration is essentially reading the word 'navigable' out of the statute. Additionally, the court takes issue with the rule's language allowing the Environmental Protection Agency and Army Corps of Engineers to regulate "interstate waters, regardless of their navigability." (Opinion at 7). The court identifies the word 'navigable' as a "central requirement" of the Clean Water Act and thus finds both instances of its exclusion from the rule to be impermissible. (Opinion at 22).

We will continue to monitor the status of this rule and provide updates as necessary. For more information about the Biden administration's WOTUS rule and a brief overview of how the term WOTUS operates within the Clean Water Act, see Nossaman's previous *eAlert*.