



# The Water Report™

Water Rights, Water Quality & Water Solutions in the West

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## “WATERS OF THE UNITED STATES”

NOT QUITE CLEAR YET

by Richard M. Glick and Diego Atencio (Davis Wright Tremaine: Portland, Oregon)

### INTRODUCTION

The Clean Water Act (CWA or “the Act”) grants the federal government authority to regulate discharges of pollutants into “navigable waters,” which the Act helpfully defines as “waters of the United States, including the territorial seas” (WOTUS). 33 U.S.C. § 1362(7). What could be clearer than that?

Alas, decades of litigation and administrative attempts at delineating the limits of government jurisdiction have failed. The resulting uncertainty is of course vexing to landowners, the government, and courts alike.

In the latest attempt at clarity, the US Environmental Protection Agency (EPA) and the US Army Corps of Engineers (Corps) — the two agencies tasked with enforcing the CWA — published a new rule (“the new rule”) in June 2015 in an attempt to resolve the issue. Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. 124 (Jun. 29, 2015) (to be codified at 33 CFR Pt. 328; 40 CFR Pts. 110, 112, 116, et al.). Opponents of the rule were quick to assail it in court in challenges filed in federal district and appellate courts across the country. These cases attack the new rule, but raise questions as to subject matter jurisdiction. Specifically, they argue that CWA language granting original jurisdiction to the circuit courts — authorizing review of approvals and promulgation of “any effluent limitation or other limitation,” as well as issuances or denials of “any permit” — does not apply to the new rule because the rule is simply definitional. *Id.* At present, the US Circuit Court of Appeals for the Sixth Circuit has asserted jurisdiction and issued a nationwide stay of the new rule pending the court’s decision. *See id; In re E.P.A.*, 803 F.3d 804 (2015). However, given its significance and the US Supreme Court’s express desire to revisit the issue, the rule will certainly find its way back to the nation’s highest court.

Without clear guidelines, EPA and the Corps face tough questions in determining whether they may exercise jurisdiction over a particular piece of property. In two recent decisions, *Sackett v. E.P.A.*, 132 S.Ct. 1367 (2012) and *U.S. Army Corps of Engineers v. Hawkes Co., Inc.*, 136 S.Ct. 1807 (2016), the Supreme Court upped the ante by allowing early judicial review of asserted government jurisdiction (discussed below). As a result, the agencies must choose between a lax enforcement policy and the use of considerable resources in arriving at legally defensible jurisdictional determinations. Landowners, meanwhile, find it difficult to understand the scope of activities that they may legally carry out on their property. *Id.* at 1816. The risk to landowners of filling jurisdictional wetlands is of great concern to the Supreme Court, which has noted that without access to the courts, landowners are left with the untenable choice of either complying with EPA restoration plans or facing potentially catastrophic financial penalties and criminal sanctions. Haphazard enforcement of the CWA also adds risk to critically important water resources. Nobody wins.

## WOTUS

Scope of  
JurisdictionMigratory Bird  
Rule

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Headwaters and irregularly flowing creeks constitute over half of the river miles in the continental United States, while wetlands serve important ecological functions like pollution filtration and flood control. According to EPA data, roughly 117 million people in the continental United States use public drinking water systems that rely on intermittent, ephemeral, or headwater streams. David Pettit, *The New Federal Clean Water Rule*, 25 *Envtl. L. News* 34 (2016).

## WOTUS IN THE SUPREME COURT

The Supreme Court has considered the scope of WOTUS jurisdiction three times, yet ambiguity remains. In *United States v. Riverside Bayview Homes I*, 474 U.S. 121 (1985) — the first Supreme Court case to address the WOTUS issue — the Court heard a challenge to the Corps' assertion of jurisdiction over wetlands adjacent to other "waters of the United States," where the wetlands did not visibly connect to the adjacent jurisdictional water. The Court held that the Corps' claim of jurisdiction was reasonable, persuaded by the Corps' judgment that adjacent wetlands "may function as integral parts of the aquatic environment even when the moisture creating the wetlands does not find its source in the adjacent bodies of water." *Id.* at 134-135.

Shortly after the *Riverside Bayview* decision, the Corps claimed jurisdiction over intrastate waters that provided habitat for migratory birds, using the birds' significance to interstate commerce as its justification (this became known as the "Migratory Bird Rule"). See Karen Crawford et al., Memorandum for Ecos Concerning Waters of the United States Issues 3 (2014).

The Migratory Bird Rule was challenged in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC*). In that case, a consortium of suburban Chicago municipalities seeking to dispose of non-hazardous waste challenged the Corps' assertion of jurisdiction over the consortium's chosen site: an isolated sand and gravel pit that hosted several permanent and seasonal ponds, as well as 121 species of birds. *Id.* at 162-164. The Court held that the CWA does not support the Corps' jurisdiction under the Migratory Bird Rule. To hold otherwise, the Court noted, would read the significance of the word "navigable" out of the statute altogether, since it would allow the Corps' to assert jurisdiction over waters wholly distant from a navigable waterway. *Id.* at 172. Importantly, the decision did not disturb the Court's prior holding in *Riverside Bayview*; to the contrary, the Court reaffirmed the idea that the term "navigable" does not limit the CWA's applicability only to waters that are navigable in fact. Crawford et al., *supra* note 12, at 4.

*Rapanos v. United States*, 547 U.S. 715 (2006) is the most recent Supreme Court case to address the WOTUS rule directly. In it, a fractured Court decided 5-4 that the government had overreached, but could not agree on the correct test. Writing for the plurality, Justice Scalia held that "waters of the United States" means "relatively permanent, standing or flowing bodies of water," and excludes "ordinarily dry channels through which water occasionally or intermittently flows." *Id.* at 732-33. He rejected the notion that a "Land is Waters" approach — where hydrographic features and the continuous presence of water are absent — could confer federal jurisdiction to an agency. *Id.* at 734.

Justice Kennedy's concurring opinion endorsed a very different approach, relying on ecological principles and the precedent set in *Riverside Bayview*. He held that CWA jurisdiction exists over waters sharing a "significant nexus" with navigable waters. *Id.* at 779. For there to be such a nexus, he wrote, the water in question must "significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" *Id.* at 780. Meanwhile, in his concurring opinion, Justice Roberts chided the Corps for its overreach, stating that "[r]ather than refining its view of its authority in light of our decision in *SWANCC*, and providing guidance meriting deference under our generous standards, the Corps chose to adhere to its essentially boundless view of the scope of its power. The upshot today is another defeat for the agency." *Id.* at 758.

In the post-*Rapanos* landscape, courts have struggled to determine which test to apply in CWA jurisdictional cases. Federal agencies were reluctant to exercise jurisdiction over isolated or distant waterways. "According to the *New York Times*, in the four-year period between 2006 and 2010, more than 1,500 major pollution investigations of '[c]ompanies that have spilled oil, carcinogens, and dangerous bacteria into lakes, river and other waters [were] not being prosecuted, according to Environmental Protection Agency regulators working on those cases. . . ." Pettit, *supra* note 8, at 36. Further, Justice Kennedy's "significant nexus" test was difficult to apply in practice. Several legislative and administrative efforts to add clarity followed, but each effort was discontinued before it could supplement or replace existing law. *Id.* at 35-36.

## JUDICIAL REVIEW OF JURISDICTIONAL DETERMINATIONS

Since deciding *Rapanos*, the Supreme Court has twice touched on WOTUS through the lens of administrative procedure issues. Plaintiffs in both cases were advocating for the reviewability of either EPA or Corps action. In both instances, a favorable judicial outcome would have allowed the plaintiffs to challenge the jurisdictional foundation of the agency action.

The first case concerned an Idaho family — the Sacketts — that filled part of their residential lot with dirt and rock in anticipation of building a home. *Sackett v. E.P.A.*, 132 S.Ct. 1367, 1370 (2012) (*Sackett*).

<p><b>WOTUS</b></p>	<p>Several months after doing so, EPA sent the Sacketts an enforcement order declaring that they had discharged pollutants into wetlands that were jurisdictional by virtue of their proximity to a nearby lake, which was itself a water of the United States. <i>Id.</i> at 1370-71. The Sacketts requested a hearing regarding EPA’s jurisdiction to no avail. They then challenged the compliance order in federal district court, which dismissed the claims for lack of subject matter jurisdiction, and the Ninth Circuit affirmed the decision on appeal. <i>Id.</i> at 1371. At the Supreme Court, the Sacketts argued that the issuance of a compliance order is a final agency action that is subject to judicial review. The Court agreed unanimously, holding that: compliance orders mark the consummation of the EPA decision-making process; that they determine rights and obligations from which legal consequences flow; and that the Sacketts did not have any other adequate remedy in a court. <i>Id.</i> at 1371-1373.</p>
<p><b>Compliance Order</b></p>	<p>The second case, <i>United States Army Corps of Engineers v. Hawkes Co., Inc.</i>, 136 S.Ct. 1807 (2016) (<i>Hawkes</i>), is Sackett’s twin. The case arose after a peat mining company, Hawkes Co., sought review of a Jurisdictional Determination (JD) issued by the Corps. <i>Id.</i> at 1809-10. JDs are formal opinions that reflect the Corps’ definitive view on whether a particular piece of property contains waters of the United States. <i>Id.</i> at 1811. In this case, the Corps’ JD responded in the affirmative, finding that the property was subject to the Corps’ jurisdiction under the Clean Water Act. <i>Id.</i> at 1813. Hawkes Co. sought review in federal district court, but the district court dismissed the case for want of subject matter jurisdiction. <i>Id.</i> On appeal to the Supreme Court, Hawkes Co. argued that JDs are a “final agency action,” and, as in <i>Sackett</i>, the Court unanimously agreed for largely the same reasons. <i>Id.</i></p>
<p><b>“Final Agency Action”</b></p>	<p>At face value, <i>Sackett</i> and <i>Hawkes</i> appear insignificant to the WOTUS issue. Both cases turn on a mechanical application of the same well-known principles of administrative law. The outcomes would have likely been identical even in a world where WOTUS issues did not exist. In context, however, the cases may have greater meaning. They may even motivate the Supreme Court to greenlight EPA’s new rule.</p>
<p><b>Immediate Review</b></p>	<p>Without the new rule, <i>Sackett</i> and <i>Hawkes</i> may have been two steps in the wrong direction. Knowing that compliance orders and jurisdictional determinations are immediately reviewable, EPA and the Corps’ will be less willing to assert their authority in instances where their jurisdiction is not abundantly clear. This will make CWA enforcement even less effective than it was previously. If, instead, EPA and the Corps continue with business as usual, the judicial review provided for in <i>Sackett</i> and <i>Hawkes</i> will lead to increased litigation over jurisdictional issues. This will slow down the regulatory process and deprive landowners of the beneficial use of their land pending resolution of the litigation.</p>
<p><b>Continued Chaos?</b></p>	<p>The Supreme Court seems to recognize that more is needed to avoid continued chaos. As Justice Alito notes in his <i>Sackett</i> concurrence: “Allowing aggrieved property owners to sue (in opposition to a compliance order) under the Administrative Procedure Act is better than nothing, but only clarification of the reach of the Clean Water Act can rectify the underlying problem.” <i>Sackett</i> at 1375-76 (2012).</p>
<p><b>Intent of New Rule</b></p>	<p style="text-align: center;"><b>THE NEW RULE</b></p> <p>On June 29, 2015, EPA and the Corps published a new rule defining the waters of the United States (cited above). The rule was developed in response to the “urgent need to improve and simplify the process for identifying waters that are and are not protected under the Clean Water Act.” EPA, Clean Water Rule Litigation Statement, <a href="http://www.epa.gov/cleanwaterrule/clean-water-rule-litigation-statement">www.epa.gov/cleanwaterrule/clean-water-rule-litigation-statement</a>.</p>
<p><b>Jurisdiction Increase?</b></p>	<p>The new rule increases categorical jurisdictional determinations, and is intended to minimize the need for case-specific analyses. EPA Website: “What the Clean Water Rule Does” at <a href="http://www.epa.gov/cleanwaterrule/what-clean-water-rule-does">www.epa.gov/cleanwaterrule/what-clean-water-rule-does</a> (last visited on June 28, 2016); and Claudia Copeland, <i>EPA and the Army Corps’ Rule to Define “Waters of the United States,”</i> Congressional Research Service, January 4, 2016, p.11 (<a href="https://fas.org/sgp/crs/misc/R43455.pdf">https://fas.org/sgp/crs/misc/R43455.pdf</a>).</p>
<p><b>Categorical Jurisdiction</b></p>	<p>In the aggregate, the agencies estimate that positive jurisdictional determinations will increase by roughly 3 to 5 percent relative to previous practices. Copeland, <i>supra</i> at 11. This estimate is controversial, as many of the opponents filing challenges assert that the rule vastly extends government jurisdiction. <i>See, In re E.P.A.</i>, 803 F.3d 804, 806 (2015); <i>see also</i> Jeff Kray, <i>Clean Water Act: Waters of the United States Rule Faces Political, Legislative, and Legal Challenges</i>, Marten Law, <a href="http://www.martenlaw.com/newsletter/20150603-water-united-states-rule-faces-challenges">www.martenlaw.com/newsletter/20150603-water-united-states-rule-faces-challenges</a>.</p>
<p><b>“Adjacent” Boundaries</b></p>	<p>Among the new rule’s categorically jurisdictional waters — i.e., those that are per se jurisdictional — are: traditionally navigable waters, all interstate waters and wetlands, the territorial seas, tributaries, impoundments, and all waters that are adjacent to the previously listed waters. Copeland, <i>supra</i> at 5. The new rule adds the requirement that tributaries “show physical features of flowing water — a bed, bank, and ordinary high water mark — to warrant protection.” EPA Website: <a href="http://www.epa.gov/cleanwaterrule/what-clean-water-rule-does">www.epa.gov/cleanwaterrule/what-clean-water-rule-does</a> (last visited Jun. 23, 2016). A water is now “adjacent” if it meets the rule’s definition of “neighboring,” which itself is explained using several defined boundaries (or “distance limitations”). The first boundary ropes in “all waters located in whole or in part within 100 feet of the ordinary high water mark (OHWM) of a jurisdictional water.” The second includes “all waters located in whole or in part within the 100-year floodplain that are not more than 1,500 feet from the OHWM of a jurisdictional water.” Copeland, <i>supra</i> at 6.</p>

**WOTUS**

**Case-Specific Analysis**

**Procedural Defects**

**Procedure v. Resolution**

**CWA Intent**

**Wetlands Distinction**

The new rule lays out two other defined sets of waters that may be deemed jurisdictional if they are determined to have a significant nexus to a jurisdictional water. The first set includes “prairie potholes, Carolina bays and Delmarva bays, pocosins, western vernal pools, and Texas coastal prairie wetlands.” The second set includes “waters located in whole or in part within the 100-year floodplain of a traditional navigable water, interstate water, or the territorial seas and within 4,000 feet of the high tide line or OHWM of a jurisdictional water.” These are the only waters that would require a case-specific analysis; any water not falling into one of the two defined sets would be deemed categorically jurisdictional or categorically excluded. *Id.* at 7-8.

**CHALLENGES TO THE RULE**

While the new rule does meet its objective — i.e., adding clarity to the interpretation of WOTUS — its opponents argue that it possesses fatal flaws. Indeed, they claim that the rule is not consistent with the significant nexus test as defined by Justice Kennedy in *Rapanos*. *In re E.P.A.*, 803 F.3d 804, 806 (6<sup>th</sup> Cir. 2015). The opponents also contend that the rule suffers from two serious procedural defects. First, they argue, the final rule is not a logical outgrowth of the proposed rule, as the latter “did not include any... distance limitations in its use of terms like ‘adjacent waters’ and ‘significant nexus.’” *Id.* At 808. Second, the opponents claim that the rule’s distance limitations are not supported by science, making the agencies’ decision-making arbitrary and capricious. EPA did not help itself in this regard by releasing a draft of the rule before receiving comments from its own Science Advisory Board (“SAB”), thus giving the impression that SAB review is mere window dressing. If the procedural allegations are true, both would constitute fatal violations of the Administrative Procedure Act. *In re E.P.A.*, *supra* at 808.

These arguments were persuasive enough to convince the US Court of Appeals for the Sixth Circuit to stay the implementation of the new rule — which, among other things, requires a showing of a substantial possibility of success on the merits of a claim. *Id.* at 807. The opponents’ satisfaction of that threshold, combined with language by the court that should not inspire the agencies’ confidence, suggests that the new rule sits atop a shaky foundation. Consequently, if the rule is to arrive at the Supreme Court, its justices might face the prospect of invalidating the rule on procedural grounds and not the merits, despite the Court’s long held desire to resolve the WOTUS issue.

That possibility, however, remains in the distant future. In February, a fractured 1-1-1 ruling by a three-judge panel of the Sixth Circuit resolved the question of whether the Supreme Court had original jurisdiction to consider the rule’s challenge (as opposed to the federal district courts). Amena H. Saiyid, *Full Sixth Circuit Won’t Review Water Rule Venue Question*, Bloomberg BNA, [www.bna.com/full-sixth-circuit-n57982070204/](http://www.bna.com/full-sixth-circuit-n57982070204/). The weak nature of the ruling may invite an early appeal to the Supreme Court regarding the jurisdictional issue. *Id.* If not, a Sixth Circuit decision is expected before the end of the year. See Patrick A. Parenteau, *Sending a Message on WOTUS?*, American College of Environmental Lawyers, <http://acoel.org/post/2016/06/02/Sending-a-Message-on-WOTUS.aspx>.

**CONCLUSION**

Regardless of the outcome of challenges to the new rule, it is clear that there is nothing approaching consensus on the meaning of WOTUS. But consensus in this area is not at all a realistic goal, and whatever the agencies promulgated would have been found to be gross government overreach by some and not protective enough by others.

The real problem is the Clean Water Act itself. The focus of the Act was to stop the discharge of toxic pollutants into waterways — recall images of the Cuyahoga River burning as the impetus leading to broad, bipartisan support for stepped up environmental protection. In that context, a more nuanced definition of WOTUS perhaps seemed unnecessary.

Filling of wetlands is a different concern creating different imperatives. There is no particular reason to think that Congress will be any better at forging consensus than EPA and the Corps, and we know from observation over the past decade that Congress no longer is a consensus driven body. Could a clear congressional articulation of the bounds of federal jurisdiction clear the water? Probably not, but good legislative drafting could better frame the issues for the inevitable court challenge.

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