

Environment & Energy

EPA's Federal Waters Update Seen Vulnerable at Top Court (1)

By Bobby Magill

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- EPA expects to propose a second new waters rule in late 2023
 - Rule creates a 'new legal standard' for Clean Water Act jurisdiction
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A test for federal Clean Water Act jurisdiction over waterways and wetlands that is central to an EPA rule announced last week will make the rule especially vulnerable to an upcoming US Supreme Court ruling, water lawyers say.

The Environmental Protection Agency and the Army Corps of Engineers published their final definition of “waters of the US,” or WOTUS, on Dec. 30—the latest iteration of a Clean Water Act regulation that has shifted in each presidential administration since 2008.

The 2023 rule, which will take effect 60 days after it is published in the Federal Register, is based on a rule that was in effect before 2015. It governs which surface waters are protected from pollution by the federal government by determining if they are “relatively permanent” or have a “significant nexus” with larger navigable waterways.

The rule (RIN: 2040-AG19) was issued while the Supreme Court prepares to rule in *Sackett v. EPA*, which grapples with the “significant nexus” test. The court’s conservative majority was skeptical of that test during the October oral argument. The court is expected to rule in the coming months.

“In light of the Supreme Court majority’s willingness to upend and create new legal doctrine, we should all fully expect that the looming *Sackett* decision will leave this rule vulnerable,” said Noah Perch-Ahern, a partner at Greenberg Glusker LLP in Los Angeles.

The Biden administration plans to further revise and refine the WOTUS definition in a second rule (RIN: 2040-AG13) the EPA plans to propose later this year and finalize by July 2024, according to the Fall 2022 federal regulatory agenda published Wednesday.

The agency previously announced its intent to “consider further refinements” of the 2023 definition, but has been silent about it since the *Sackett* oral arguments. The agency didn’t respond to a request for comment.

But the EPA’s Dec. 30 news release announcing the 2023 rule characterizes it as a “durable rule,” suggesting that “the agencies are thinking they will drop any second rule process,” said Larry Liebesman, a senior adviser at the environmental and water permitting firm Dawson & Associates. “A lot will depend on what the court says in *Sackett*.”

'Significant Nexus'

The "significant nexus" test determines whether smaller water bodies or wetlands substantially affect the chemical, physical, or biological integrity of larger navigable waters. Then-Justice Anthony Kennedy first described the test in the fractured 2006 ruling in *Rapanos v. United States*. There was no scientific definition of "significant nexus" at the time, but the EPA since developed scientific criteria for it and adopted the test.

"If the court rejects the significant nexus test, that would likely mean that the rule would have to be redone," Liebesman said. "It would have been more prudent for the agencies to wait."

In the new rule, the EPA tried to clarify "significant nexus" by adding more criteria to the test, he said.

Criteria include a water body's distance to a navigable water, frequency and duration of water flow, and a smaller body's contribution of flow and sediment to a navigable water body, he said.

New Legal Standard

The 2023 rule stipulates that a smaller water body must have a "material influence" on a larger one for the smaller waterway or wetland to be considered protected under the Clean Water Act.

The "material influence" requirement doesn't add much clarity for the average person trying to determine if a water body on their property falls under federal jurisdiction, Liebesman said.

The 2023 rule "essentially creates a new legal standard" that could be interpreted as setting a higher bar for determining whether a water body falls under Clean Water Act jurisdiction, said Anna Wildeman, counsel at Troutman Pepper Hamilton Sanders LLP in Washington.

The new "material influence" requirement also provides new opportunities for agencies to make judgment calls on a number of technical and policy considerations, she said.

Jurisdiction Expansion

The EPA has also included a new framework for evaluating waterway and wetlands protections, including whether the waters are "similarly situated" with other jurisdictional waters in a region or in their "catchment area."

"This is a substantial expansion compared to the pre-2015 framework," Wildeman said. "Practically speaking, the final rule will require landowners, farmers, and ranchers to conduct a watershed-wide assessment of all waters to understand if a wet area on their property may be jurisdictional."

The new rule is based on a WOTUS definition in place prior to the Obama administration's 2015 Clean Water Rule, which the Trump administration scrapped in 2019 and then replaced in 2020 with the Navigable Waters Protection Rule. The Trump rule drastically reduced the wetlands protected under the Clean Water Act. Courts tossed out that rule, and the Biden administration re-implemented the pre-2015 rule before updating it again with the latest WOTUS definition.

(Updated with EPA plans for second WOTUS rule.)

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