Waters of the United States/U.S. Environmental Protection Agency/Army Corps of Engineers Proposed Rule: 50 Republican Senators Ask for Suspension Until Consideration of Sackett v. EPA

Walter Wright, Jr.
wwright@mwlaw.com
(501) 688.8839

02/21/2022

The 50 Republican United States Senators sent a February 3rd letter to the Administrator of the United States Environmental Protection Agency ("EPA") and Assistant Secretary of the Army for Civil Works ("Corps of Engineers") asking that they:

. . . suspend the pending rulemaking to redefine the scope of waters protected under the Clean Water Act, specifically "waters of the United States" (WOTUS), until the U.S. Supreme Court completes its consideration of *Sackett v. EPA*, Case No. 21-454.

The United States Senators signing the letter include Senators Boozman and Cotton from the State of Arkansas.

The definition of WOTUS is arguably one of the three critical jurisdictional terms of the Clean Water Act. Its importance is magnified since it is relevant to both National Pollution Discharge Elimination ("NPDES") permitting and non-NPDES programs such as:

- Section 404 of the Clean Water Act Wetland Permits
- Section 311 – Oil/Hazardous Substances Release Requirements
- Clean Water Act Spill Prevention Control and Countermeasure Regulations

As a result, the scope of the definition of WOTUS has been the subject of frequent litigation, legislative oversight, rulemakings and public policy debate since the enactment of the modern version of the Clean Water Act in 1972.

EPA and the Corps of Engineers announced on November 19, 2021, a revised definition of WOTUS. They had previously withdrawn the revisions to this Clean Water Act definition promulgated during the Trump Administration.

On December 7, 2021, EPA and the Corps of Engineers proposed a new rule to once again revise the definition of WOTUS.

In *Sackett v. EPA* the United States Supreme Court granted a petition to review the following question:

Whether the Ninth Circuit set forth the proper test for determining whether wetlands are 'waters of the United States' under the CWA.

The Republican Senators in their February 3rd letter state that the *Sackett* case could have major implications for Clean Water Act scope and enforcement. As a result, they argue that it would be:

. . . irresponsible for EPA and USACE to proceed down a regulatory path that could be invalidated or significantly altered as early as this summer.

They further argue that suspending the rulemaking would permit stakeholders to evaluate how a potential decision would affect their position "in this regulatory space."

The February 3rd letter notes additional concerns about the proposed rule such as:

- Exceeds the regulatory authority granted to EPA and the Corps of Engineers by the Clean Water Act
- Seeks to federalize waters in a "land grab" that arguably surpasses its 2015 predecessor
- Improperly encompasses water features traditionally within the sole purview of states
- Reverts from a comparative straightforward application of the 2020 Navigable Waters Protection Rule promulgated by the Trump Administration
- Interjects new uncertainties for nearly every private sector stakeholder

A copy of the February 3rd letter can be downloaded here.