



COLORADO

**Colorado Water
Conservation Board**

Department of Natural Resources

1313 Sherman Street, Room 718
Denver, CO 80203

P (303) 866-3441
F (303) 866-4474

Jared Polis, Governor

Dan Gibbs, DNR Executive
Director

Lauren Ris, CWCB Director

TO: Colorado Water Conservation Board Members

FROM: Amy Ostdiek and Andy Nicewicz, Assistant Attorney General

DATE: November 15, 2023

SUBJECT: Agenda Item 6: WOTUS Updates

This is an informational item with no board action requested.

Over the past year, there have been a number of significant developments concerning federal jurisdiction over “waters of the United States” (WOTUS) under the Clean Water Act (CWA).

The CWA regulates the discharges of pollutants from point sources into waters of the United States, including requiring a permit from the U.S. Army Corps of Engineers (USACE) in order to discharge dredge-and-fill materials (often referred to as a “404 permit”). The meaning of “waters of the United States” and the scope of federal jurisdiction under the CWA have been subject to near-continuous litigation for almost 40 years, and since 2015, the USACE and Environmental Protection Agency (EPA) have promulgated three different versions of agency rules attempting to define that term, with the latest version going into effect in 2023.

The 2023 rule determined whether a body of water is WOTUS protected under the CWA based on whether the water body is “relatively permanent” or has a “significant nexus” with a larger navigable waterway. The 2023 rule went into effect on March 20, 2023, but was immediately subject to several legal challenges. Courts enjoined the rule from going into effect in 28 states (not including Colorado).

Prior to the issuance of the 2023 rule, the U.S. Supreme Court accepted certiorari in *Sackett v. EPA* to review a 9th Circuit Court of Appeals decision on the proper test for whether wetlands are WOTUS. On May 25, 2023, the Supreme Court announced its decision in *Sackett*. In its decision, the Court significantly rolled back the scope of federal jurisdiction to regulate wetlands as WOTUS under the CWA. The Court rejected the “significant nexus test” relied on by the USACE and EPA. Instead, the Court held that, for there to be federal jurisdiction over a wetland under the CWA, first, the wetland must be adjacent to a relatively permanent body of water connected to traditional interstate navigable waters, and, second, the wetland must have a continuous surface connection with that water making it difficult to determine where the “water” ends and the “wetland” begins.

While the 2023 rule was not directly before the Court, the *Sackett* decision nevertheless had the effect of invalidating parts of the 2023 rule. Therefore, the USACE and EPA amended key aspects of the 2023 rule to conform it to the Court’s decision. The conforming rule, “Revised Definition of ‘Waters of the United States’; Conforming,” became effective on September 8, 2023.



The issuance of the revised rule, however, did not necessarily resolve the legal challenges to the 2023 rule. As a result, the federal agencies are implementing the definition of WOTUS under the revised rule in 23 states, the District of Columbia, and the U.S. Territories. In the other 27 states and for certain parties, the federal agencies are currently interpreting WOTUS consistent with the pre-2015 regulatory regime and the *Sackett* decision.

Like most other states, Colorado largely relied on federal regulation of discharge of dredge-and-fill materials. The effect of the *Sackett* decision in Colorado was to remove about 50% of wetlands and water bodies from federal jurisdiction that previously had been covered as WOTUS under the CWA. Colorado has been working to develop its own dredge-and-fill regulatory framework for bodies of water that are no longer considered WOTUS, and it's likely that legislation will be introduced in the upcoming legislative session.

