

Preliminary Assessment: Waters of the United States (WOTUS) Rule Changes and Impacts to Minnesota

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The May 25, 2023, U.S. Supreme Court decision, *Sackett v. Environmental Protection Agency* (“*Sackett*”) and the associated conforming rule “Revised Definition of Waters of the United States [WOTUS]” effective September 8, 2023, produced a level of confidence regarding the definition of WOTUS. The definition had previously been subject to competing court interpretations and changing regulatory approaches under multiple presidential administrations. The *Sackett* decision and conforming WOTUS rule resulted in changes to the definition of WOTUS (and therefore, to the waters regulated by the Clean Water Act, or CWA, in the U.S.), reducing the geographic scope of CWA-regulated waters.

Some states, including Minnesota, have been working to assess impacts to the regulation and protection of waters resulting from this revised WOTUS definition, largely to determine which waters may have lost regulatory protections. This effort is somewhat complicated by the still-limited guidance provided by the U.S. Environmental Protection Agency (EPA) regarding implementation of the conforming rule. While the regulatory changes are straightforward, the on-the-ground assessment of whether a wetland has a “continuous surface connection” to a “relatively permanent” tributary, for example, requires case-specific decision-making.

This paper discusses wetlands and water regulatory jurisdictional issues as they relate to the state of Minnesota authorities as a result of *Sackett* and the conforming WOTUS rule. It will also provide high-level policy options for consideration. At this time, this assessment has not evaluated any impact or consideration relating to tribal or other authorities. Staff from the Minnesota Board of Water and Soil Resources (BWSR), the Department of Natural Resources (DNR) and the Minnesota Pollution Control Agency (MPCA) contributed to the preparation of this paper.

State of Minnesota Water Regulatory Programs

Minnesota has strong protections for its state waters through three key statutory/regulatory programs. Minnesota statute establishes the following authorities to regulate activities affecting waters:

- Public Waters Work Permit Program (PWWPP) (Minn. Stat. §103A.201) – regulates alterations to the course, current, or cross section of public waters and public waters wetlands; administered by the DNR. The definition of public waters and public water wetlands includes open (deeper) water wetland types (types 3, 4, and 5) that are 10 acres or more in size in unincorporated areas or 2.5 acres or more in size in incorporated areas, and watercourses that have a drainage area of greater than 2 square miles.
- Water quality standards (WQS) (Minn. Stat. §115.03) – regulates point source and non-point source discharges and physical alterations of waters of the state. Generally applied through other regulatory programs, such as National Pollutant Discharge Elimination System (NPDES)

permits or CWA Section 401 Water Quality Certifications (401 Certification). Administered by the MPCA. Waters of the state are defined in M.S. § 103G.005 as, “surface or underground waters, except surface waters that are not confined but are spread and diffused over the land. Waters of the state includes boundary and inland waters.” For this analysis, we will focus on the 401 Certification program, which regulates all water quality impacts to waters of the state if a federal permit/authorization is required (typically a CWA Section 404 permit – this federal permit is needed for impacts to WOTUS).

- [Wetland Conservation Act \(WCA\)](#) (see - [WCA Statute Compilation | MN Board of Water, Soil Resources \(state.mn.us\)](#)) – regulates draining, filling, and in some cases excavation in all wetlands exclusive of public waters wetlands; administered by local governments with oversight from the BWSR (for activities requiring a permit to mine pursuant to Minn. Stat. §91.481, the DNR administers WCA). Jurisdiction is defined by application of standards contained in the “United States Army Corps of Engineers (Corps) Wetland Delineation Manual” (January 1987).

Clean Water Act, Section 404/401 Jurisdiction

2008 WOTUS Guidance (Pre-Sackett)

The determination of jurisdiction under the CWA prior to the May 25, 2023, *Sackett* Supreme Court decision was the result of a prior Supreme Court decision, *Rapanos v. United States* (February 21, 2006), and post-*Rapanos* rulemaking and agency guidance. This decision resulted in two standards for identifying waters: the “relatively permanent” standard, and the “significant nexus” standard. Both standards were implemented as tests via EPA/Corps guidance in 2008. The former standard holds that WOTUS includes “relatively permanent, standing or continuously flowing bodies of water,” and wetlands that have a “continuous surface connection” to such waters. The “significant nexus” standard clarifies if certain waterbodies, such as tributaries and wetlands, are subject to the CWA based on their connection to and effect on larger downstream waters that Congress sought to protect. A “significant nexus” exists if the waterbody (alone or in combination with other similarly situated waters) significantly affects the chemical, physical, or biological integrity of downstream traditional navigable waters, the territorial seas, or interstate waters.

Since the *Rapanos* decision, each succeeding presidential administration has attempted to provide regulatory clarity by either expanding or narrowing the scope of WOTUS. These efforts have always brought legal challenges that have impeded making progress on clarifying WOTUS. The *Sackett* decision and associated rule amendment are the latest such effort to address this issue.

WOTUS rule changes - September 8, 2023

Though the May 25, 2023, U.S. Supreme Court ruling in *Sackett v. Environmental Protection Agency* did not directly apply to the EPA and Corps 2023 WOTUS rule, it did make clear “that certain aspects of the 2023 rule are invalid.” To comply with this decision, the EPA and Corps issued a final rule on September 8, 2023, that revised the definition of WOTUS to include the changes outlined below. It should be noted that the final rule is an amendment to the WOTUS rule issued in January 2023. The revised final rule:

- i. Removes the “significant nexus” test as a basis for finding that tributaries, wetlands, or other waters are WOTUS.
- ii. Revises the adjacency test for when a wetland is adjacent to a WOTUS (and therefore jurisdictional as WOTUS), by requiring presence of a “continuous surface connection.”

- iii. Clarifies that interstate wetlands do not fall within the interstate category of WOTUS (wetlands are no longer jurisdictional based on their interstate nature/location and must instead meet the adjacency test in paragraph ii to be considered jurisdictional).
- iv. Clarifies the types of features that can be considered under the “additional waters” category.
- v. Does not change the regulations that apply to WOTUS.

Effects of the WOTUS Changes in Minnesota

The revised rule implementing *Sackett* is expected to significantly reduce federal jurisdiction when a wetland does not have a continuous surface connection (e.g., seasonal potholes, floodplains, wet meadows, forested peatlands, etc.) and where a water would have previously been jurisdictional under the eliminated “significant nexus” standard. While the Court held that the continuous surface connection must be such that the wetland is “indistinguishable” from the WOTUS to which it is adjacent, it is unclear as to how the federal agencies will interpret and apply this holding.

While considerable uncertainty remains, BWSR, MPCA, and DNR believe:

- The procedures for identifying wetlands using the Corps 1987 Wetland Delineation Manual remain applicable; determining whether delineated wetlands are CWA-jurisdictional is subject to further analysis under the new WOTUS definition.
- The *Sackett* decision focused on the geographic scope of what are WOTUS and did not address the types of regulated activities under the CWA.
- *Sackett* did not change state and tribes’ authority to be more environmentally protective than the federal program.

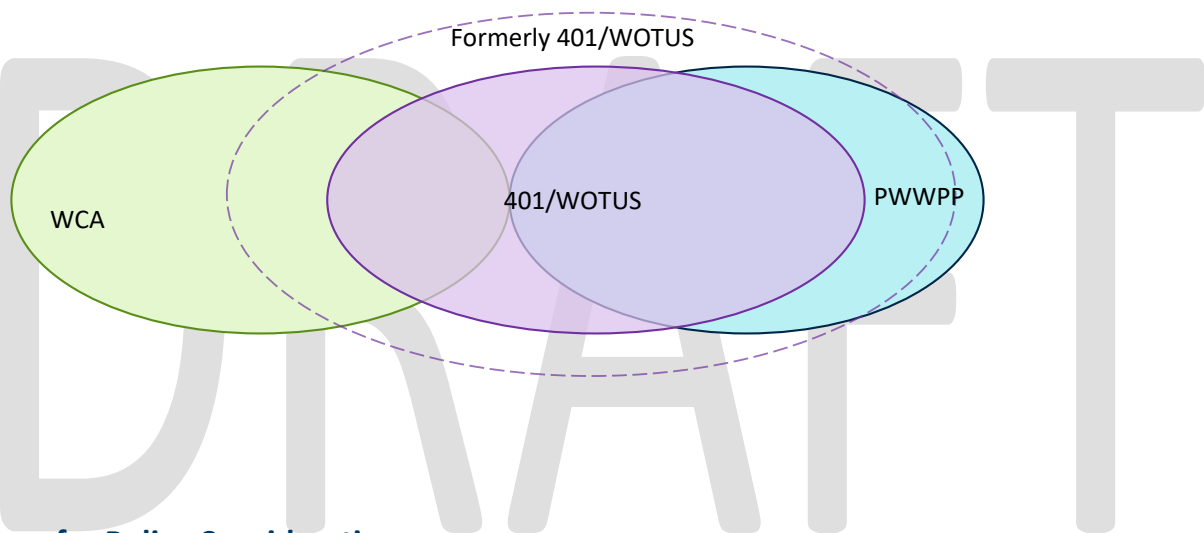
Current regulatory “gaps”

Finalization of the latest WOTUS rule has resulted in a renewed interest in assessing the status of Minnesota’s water regulatory programs to determine whether the changing WOTUS definition has altered the protections afforded to waters in Minnesota. The most common regulatory “gap” to consider is whether any waters are newly unregulated in Minnesota (i.e., waters that are not regulated by the state that were previously federally regulated and now no longer meet the definition of WOTUS). However, there are three key regulatory gaps to consider (including newly unregulated waters):

1. Newly unregulated waters (no longer WOTUS) and not PWWPP or WCA. Previous work undertaken by the agencies at the direction of the legislature to assess the possibility of Minnesota assuming the CWA Section 404 program identified the types of waters that state programs did not cover that Section 404 permits did cover at the time. Some of these waters may no longer be WOTUS and are therefore newly unregulated. These waters include:
 - Headwaters streams: streams/reaches (generally in headwaters of a watershed) with a drainage area less than two square miles (i.e., are not defined as public waters);
 - Areas of water basins where the water depth exceeds the criteria (8.2 feet) used to identify wetlands and that are not public waters - approximately 89,000 basins ([Wetlands Regulatory MN Assumable Waters Analysis 5-3-18](#))
2. Waters that remain covered by PWWPP or WCA that have lost 401 Certification review for state WQS (no longer WOTUS). This could include:
 - Wetlands no longer considered adjacent to other WOTUS (e.g., those separated by a river berm)

- Wetlands and streams that were previously jurisdictional under the recently eliminated significant nexus standard.
3. Waters that remain covered by PWWPP or WCA that have never been subject to 401 Certification review. This “gap” has always existed and is not the result of WOTUS definition changes. This could include:
- Small, isolated wetlands, or waters that may yet be considered WOTUS but whose impacts are not regulated by a federal permit program (e.g., draining or inundation of a wetland or public water).

Figure 1. Conceptual representation of jurisdictional overlap



Issues for Policy Consideration

A key consideration for discussion is how the scope of water protection in Minnesota has changed because of the new WOTUS rule and what Minnesota policymakers may wish to do to expand state protections to offset the reduced federal jurisdiction. As noted previously, the *Sackett* decision did not affect regulated activities; however, if programmatic changes or legislation are being considered to address the scope of state regulatory jurisdiction, it may be appropriate to also discuss regulatory standards under state law. Each agency will use their discretion to evaluate the program under their purview for potential recommendations that would further the protection of Minnesota’s water resources. Policy options would include the following:

1. Do nothing. WCA and PWWPP would continue to address wetlands and public waters in Minnesota under the current statutory/regulatory frameworks. The 401 certification program would continue to be required for federally authorized projects impacting WOTUS. In Figure 1 above, this action maintains the regulatory coverage of the shaded ovals.
2. Filling the first regulatory gap (newly unregulated waters) would require coverage under WCA or PWWPP of the waters previously identified for Section 404 assumption efforts. Some of these waters may yet remain WOTUS, but identifying which would be a case-by-case exercise (possibly involving legal challenges). Given the difficulty in identifying specific newly-unregulated waters,

filling this gap could generally be accomplished by extending WCA or PWWPP coverage to the types of waters identified in the CWA Section 404 Prior Jurisdictional Analysis on page 3. In Figure 1 above, this action would fill the areas within the dashed circle that are currently outside WCA and PWWPP jurisdiction.

3. Filling the second and third regulatory gaps (waters that are state regulated but do not have water quality standards review) would necessitate statutory and regulatory change to require state WQS review of all WCA and PWWPP authorizations. The MPCA's 401 Certification program could transition to a state WQS program, operating under a similar mechanism, with a greater emphasis on state interagency coordination. In Figure 1 above, this action would, if combined with policy option 1, ensure that all areas (within the dashed line, and within the WCA and PWWPP ovals) receive a state WQS review.
4. A related policy option is to evaluate and propose any necessary changes to regulatory standards for WCA or PWWPP. This option would, on its own, likely not fill the regulatory gaps identified above (though could address some elements of them) but would help to ensure improved levels of protection under existing state law and address changes to federal authority that have occurred over time. As an example, the regulatory standards evaluated under this option could include certain WCA exemptions.

Note: It may be necessary to conduct further analysis to identify workload impacts associated with potential policy changes.

Additional information:

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