Revised WOTUS Rule Quick Read & Key Points

Overview. On September 8, 2023, EPA and the Corps final rule amending the January 2023 rule defining waters of the United States (WOTUS) was published in the federal register and is now in effect. The rule purports to align with the Supreme Court's May 25 opinion in *Sackett v. EPA* which, among other findings, eliminated the "significant nexus" test from Justice Kennedy's opinion in the 2006 *Rapanos* ruling. However, the rule leaves much unsettled.

I.   What does the Rule settle?

➢ Significant nexus out as a jurisdictional test
➢ Continuous surface connection between a wetland and a traditional navigable water (TNW) or a relatively permanent (RP) tributary required.
➢ Isolated and ephemeral waters (like vernal pools, playa lakes, prairie potholes) are out.
➢ Adjacent wetlands must have a continuous surface connection to a TNW or RP tributary.
➢ Wetlands separated by a barrier such as a man- made dike, barrier, natural river berm, beach dune and the like are no longer jurisdictional. However, a landowner cannot construct a barrier in wetlands that would otherwise be covered by the CWA.
➢ Interstate waters are categorically in without requiring a RP flow to a TNW, but interstate wetlands are out
➢ The January 2023 Biden rule cannot be enforced as a whole. It can only be enforced as amended.
➢ The Rule retains the exclusions in the Jan. 2023 Biden rule. These include, prior converted cropland, waste treatment systems, ditches, artificially irrigated areas, artificial lakes or ponds, artificial reflecting pools or swimming pools, waterfilled depressions created in dry land incidental to construction activity and pits excavated in dry land for the purpose of obtaining fill, sand or gravel and swales and erosional features (e.g. gullies and small washes).

II.   What is not settled under the Rule?

➢ What constitutes relatively permanent flow (RPF)?
➢ What criteria will be applied to determine where the water ends, and the wetlands begin and how temporary do interruptions have to be??
➢ How will the agencies define the extent of upstream tributary reach to meet the RPF test and will the agencies still use the ordinary high water mark criteria in determining tributary reach?
➢ Are upland ditches that flow into a TNW jurisdictional?
➢ How will the agencies determine the extent and frequency of flow needed to meet the adjacent wetland standard? For example, as noted in Judge Kavanaugh's

Sackett concurrence, "how temporary do interruptions in surface connection have to be for wetlands still be covered"?

➢ Will the agencies honor approved jurisdictional determinations (AJDs) issued under the 2020 rule? Previously they have said this will not, but they have not updated this policy post-Sackett (which is less inclusive than the 2020 rule)

➢ How does the rule affect ESA section 7 consultations?

➢ How will the rule affect ongoing and prospective CWA section 401 WQC process with the states?

➢ How will the rule affect the scope of assumable waters for states that wish to take over the 404 program (Only New Jersey, Michigan and Florida have done so)?

III.   What are the likely future issues?

➢ Clarifying guidance is needed especially addressing relatively permanent flow, but the rule does not address whether this will happen.

➢ Sackett does not allow for an RPF to flow through a non jurisdictional water downstream to a TNW, but this is in the January 2023 rule preamble – what will the Corps consider jurisdictional?

➢ Workshops with affected stakeholders and the public are planned for this fall – how much input will EPA and the Corps use in future guidance and or rulemaking.

➢ Need to resolve litigation under the January 2023 Biden rule that currently has left that rule in place in 24 states.

➢ Litigation likely challenging the revised rule and will be needed to address some of the remaining questions.

➢ How will states "fill the gaps" in wetland protection?

➢ Does the rule's categorical inclusion of interstate waters without regard to evidence of RPF to a TNW comport with Sackett?