

Utah Land Use Institute Fall Conference

Wetland Decision – *Sackett v. EPA*

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The Clean Water Act

- In response to massive pollution of our nation's waterways, in 1972 with amendments in 1977 and 1987, Congress enacted the Clean Water Act (CWA) but limited the protection to the navigable waters. See 33 U.S.C. § 1251(a), § 1311(a), § 1344(a), § 1362(12).
- Congress defined the term “navigable waters” as “the waters of the United States.” See 33 U.S.C. § 1362(7).
- Congress has never defined the terms “the waters of the United States.”

“the waters of the United States”

- There is no dispute the Great Salt Lake and Utah Lake are waters of the United States, together with its tributary rivers and streams.
- **1985**: Wetlands that are adjacent to navigable waters (Utah Lake) are waters of the United States. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 131–32, 135 (1985).
- **2001**: Isolated wetlands with no surface water connection to a navigable water are not waters of the United States. *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers*, 531 U.S. 159, 167–68 (2001).
- **2006**: A majority of the SCOTUS could not decide if wetlands that are not adjacent to navigable waters but have a roadside ditch or other waterway that empties to a navigable water miles away are waters of the United States. *Rapanos v. United States*, 547 U.S. 715 (2006).

Why Do We Care?

“The reach of the Clean Water Act is notoriously unclear. Any piece of land that is wet at least part of the year is in danger of being classified by EPA employees as wetlands covered by the Act, and according to the Federal Government, if property owners begin to construct a home on a lot that the agency thinks possesses the requisite wetness, the property owners are at the agency's mercy. The EPA may issue a compliance order demanding that the owners cease construction, engage in expensive remedial measures, and abandon any use of the property. If the owners do not do the EPA's bidding, they may be fined up to \$75,000 per day (\$37,500 for violating the Act and another \$37,500 for violating the compliance order).” *Sackett v. EPA*, 566 U.S. 120, 132 (2012) (Alito, J).

Why Do We Care?

- Clean Water Act Hammers:
 - Imprisonment, if convicted (even for negligent a discharge)
 - Criminal fines
 - Civil penalties over \$75,000 per day for each violation
 - 5-year statute of limitations
 - Citizen-suits
- Compliance is costly and uncertain
 - Army Corps permitting process is arduous, expensive, and long
 - Army Corps has discretion to grant or deny
 - Experts are required
 - Litigation is costly and a long uncertain process

Clean Water Act Triggers

- Section 402

Forbids the “addition” of any pollutant from a “point source” to “navigable waters” without a permit from EPA.

- Section 404

Prohibits the discharge of dredged or fill material into navigable waters without a permit issued by the Army Corps.

The *Sackett* majority two-part test

- Threshold: The CWA's use of "waters" refers only to geographic features that are described in ordinary parlance as streams, oceans, rivers, and lakes and to adjacent wetlands that are indistinguishable from those bodies of water due to a continuous surface connection.
- To assert jurisdiction over an adjacent wetland under the Clean Water Act, a party must establish,
 - first, that the adjacent body of water constitutes waters of the United States (i.e., a relatively permanent body of water connected to traditional interstate navigable waters); and
 - second, that the wetland has a continuous surface connection with that water, making it difficult to determine where the water ends and the wetland begins.

Revised definition of “waters of the United States”

- On September 8, 2023, EPA and Army Corps published their “revised final rule” re-defining the Clean Water Act definition of “the waters of the United States” (WOTUS).
- The revised definition purports to conform to the May 2023 *Sackett v. EPA* opinion by the Supreme Court of the United States.
- The revised definition does not apply in Utah and 26 other states (enjoined). See *Texas v. EPA*, Nos. 23-00017 & 23-00020 (S.D. Tex. March 19, 2023); *West Virginia v. EPA*, No. 23-00032 (D.N.D. April 12, 2023); *Kentucky v. EPA*, Nos. 23–5343/5345 (6th Cir. May 10, 2023).

The Good News

- The agencies will no longer apply the unclear “significant nexus” test to wetlands. All nine (9) Supreme Court Justices rejected this test.
- “Adjacent” means having a continuous surface water connection, not just in the neighborhood.

(2) *Adjacent* means having a continuous surface connection. ~~bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes, and the like are “adjacent wetlands.”~~

- The Army Corps has resumed rendering approved jurisdictional determinations.

The Bad News

- Relatively permanent and man-made ditches are the next litigation battleground.
- The revised definition does not define “relatively permanent” or “continuously flowing”
 - Missing: “only those relatively permanent, standing or continuously flowing bodies of water ‘forming geographic[al] features’ that are described in ordinary parlance as ‘streams, oceans, rivers, and lakes.’”
 - Missing: jurisdictional waters are “indistinguishable from waters of the United States,” such that it is “difficult to determine where the ‘water’ ends and the ‘wetland’ begins.”
- Many delegated states may have a definition of “waters of the state” that is broader than “waters of the United States”.

What “waters” are part of WOTUS under revised definition?

- Traditional Navigable Waters (a)(1)
- Territorial Seas (a)(1)
- Interstate Waters (a)(1)
- Impoundments (a)(2)
- Tributaries (a)(3)
- Adjacent Wetlands (a)(4)
- Intrastate Lakes and Ponds (a)(5)

Tributaries are part of WOTUS

(3) Tributaries of waters identified in paragraph (a)(1) or (2) of this section:

• ~~That~~ are relatively permanent, standing or continuously flowing bodies of water; ~~or~~

~~(ii) That either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of waters identified in paragraph (a)(1) of this section;~~

Adjacent Wetlands are part of WOTUS

(4) Wetlands adjacent to the following waters:

(i) Waters identified in paragraph (a)(1) of this section; or

(ii) Relatively permanent, standing or continuously flowing bodies of water identified in paragraph (a)(2) or (a)(3) of this section and with a continuous surface connection to those waters; ~~or~~

~~(iii) Waters identified in paragraph (a)(2) or (3) of this section when the wetlands either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of waters identified in paragraph (a)(1) of this section;~~

Ditches are not part of WOTUS or are they?

(b) The following are not “waters of the United States” even where they otherwise meet the terms of paragraphs (a)(2) through (5) of this section:

(3) Ditches (including roadside ditches) excavated wholly in and draining only dry land and that do not carry a relatively permanent flow of water;

What is Relatively Permanent? 88 Fed. Reg. 3004 (Jan. 18, 2023)

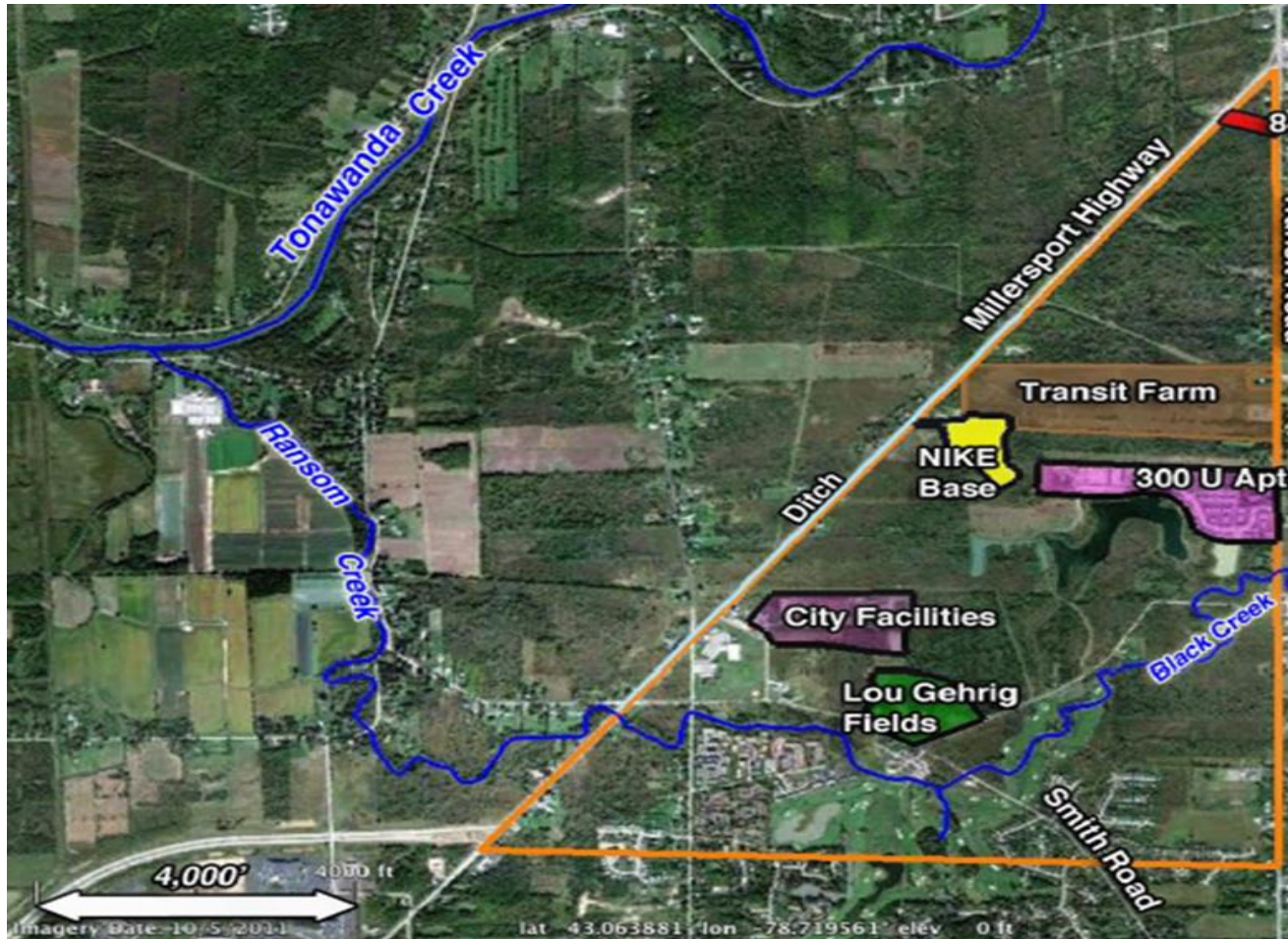
A number of commenters suggested that the agencies interpret relatively permanent tributaries to include those that flow year-round or at least seasonally (*e.g.*, typically three months), consistent with the approach in the *Rapanos* Guidance. This rule encompasses tributaries that are “relatively permanent” under the *Rapanos* Guidance. However, the agencies have decided not to use the term “seasonal” from the *Rapanos* Guidance for several reasons. First, the

The agencies decided not to establish a minimum duration because flow duration varies extensively by region.

Roadside Ditch



Roadside Ditch



The Takeaways

- Relatively permanent, continuously flowing man-made ditches are the next litigation battleground.
- The revised WOTUS definition does not define “relatively permanent” or “continuously flowing”
 - Missing: “only those relatively permanent, standing or continuously flowing bodies of water ‘forming geographic[al] features’ that are described in ordinary parlance as ‘streams, oceans, rivers, and lakes.’”
 - Missing: jurisdictional waters are “indistinguishable from waters of the United States,” such that it is “difficult to determine where the ‘water’ ends and the ‘wetland’ begins.”

QUESTIONS?

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