

UPDATE ON WOTUS AND EPA'S PROPOSED FEDERAL WQS FOR TRIBAL RESERVED RIGHTS

Robert D. Singletary
DEQ Deputy Executive Director

WOTUS

- Question at issue is which waters are subject to the reach of Federal authority and which waters fall within the States' traditional authority to administer and protect waters within their boundaries.
 - Not whether certain waters are to be protected.

SCOTUS WOTUS Decisions

- *United States v. Riverside Bayview Homes Inc.*, 474 U.S. 121 (1985)(confirmed that “navigable water” applied to wetlands that were adjacent to navigable waters)
- *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001)(isolated ponds serving as habitat for migratory birds were not navigable water)
- *Rapanos v. United States*, 547 U.S. 715 (2006)(4-1-4 Split)
 - Justice Scalia’s plurality opinion focused on a “**relatively permanent**” test for determining federal jurisdiction (“[W]aters that are “relatively permanent, standing or continuously flowing” or on wetlands that are immediately adjacent to such waters.”)
 - Justice Kennedy’s partially concurring opinion focused on a “**significant nexus**” test for determining federal jurisdiction (“[Federal] jurisdiction over wetlands depends upon the existence of a significant nexus between the wetlands in question and navigable waters in the traditional sense.”)
- *Sackett v. Env’t Protection Agency*, 598 U.S. ____ (2023)
 - Whether the 9th Circuit’s use of Justice Kennedy’s “significant nexus” test was the proper test for determining whether wetlands are considered WOTUS.
 - Justice Alito’s majority opinion rejected the “significant nexus” test in favor of the “relatively permanent” test.

Oklahoma's Comments to Obama EPA's WOTUS Rule

(2014 Public Comment Period)

- Emphasized States' primary and essential role in protecting water quality and availability.
- Expressed concern with ambiguity and uncertainty in proposed rule.



STATE OF OKLAHOMA

November 14, 2014

Gina McCarthy
Administrator
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, NW (1101A)
Washington, DC 20460

Jo Ellen Darcy
Assistant Secretary of the Army
(Civil Works)
108 Army Pentagon
Washington, DC 20310-0108

Re: Definition of "Waters of the United States" under the Clean Water Act
Proposed Rule: **Docket ID No. EPA-HQ-OW-2011-0880**

Dear Administrator McCarthy and Assistant Secretary Darcy:

As co-regulators under the Clean Water Act ("CWA") and State environmental agencies responsible for managing the water quantity and quality of Oklahoma's streams, lakes and aquifers, we urge you to suspend the current rulemaking process, engage the States in a more meaningful dialogue, and ultimately work with us to develop a rule that truly clarifies where the limited jurisdiction of the Federal government ends and where the more expansive jurisdiction of our agencies begins relative to waters of the United States ("WOTUS") as defined by the CWA. Discussed more thoroughly below, the current proposal undeniably creates more confusion and leaves the door open for unrestrained and unnecessary expansion of Federal jurisdiction, which in many ways will be more detrimental to our efforts to restore and protect Oklahoma's waterways.

Before highlighting our most significant concerns, please note that we have participated in the development of comment letters you will receive from a number of organizations in which we are members. Specifically, we wholeheartedly support the additional comments and input that you have received and/or will receive from the Western States Water Council, Association of Clean Water Administrators, Environmental Council of States, and Groundwater Protection Council, among others.

I. States are Central to Clean Water Success

It is noteworthy that the Federal Water Pollution Control Act has long recognized the importance of partnership between local, State and Federal governments going back to its inception in 1948 and continuing through the various amendments that have brought us to the CWA of today. The existence and need for a State-Federal partnership has been present

Oklahoma's Comments to Trump EPA's Navigable Waters Protection Rule

(2017 Public Comment Period)

- States' primary role in water resource management
 - Sections 101 (b) and (g) provide that it is the policy of Congress to protect the rights of States in their effort to eliminate pollution and that States have the authority to allocate quantities of water within their boundaries, as well as underscoring that federal agencies shall cooperate with them when solutions are developed. See 33 U.S.C. §§ 1251(b), (g).
 - Supreme Court's plurality opinion also specifically recognized "the CWA's stated 'policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of the States to prevent, reduce, and eliminate pollution, [and] to plan the development and use of ... water resources.'" *Rapanos*, 547 U.S. at 737.
- Need for certainty
- Adoption of Justice Scalia's "Relatively Permanent" and "Continuous Surface Connection" approach
- Addition of specific exclusions (for example: agricultural exemptions, etc. . .)
- Exemption of groundwater



State of Oklahoma

June 19, 2017

The Honorable Scott Pruitt
Administrator
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, NW (1101A)
Washington, DC 20460

Douglas W. Lamont, P.E.
Senior Official performing the duties of
Assistant Secretary of the Army (Civil Works)
108 Army Pentagon
Washington, DC 20310-0108

Re: State of Oklahoma's response to U.S. EPA's request for input on the forthcoming proposal to revise the definition of "waters of the United States" set forth in the Clean Water Rule (Final Rule, 80 Federal Register 37,054 (June 29, 2015))

Dear Administrator Pruitt and Mr. Lamont:

The State of Oklahoma, as are all States, is charged with the primary responsibility and right to prevent, reduce, and eliminate water pollution and to plan the development and use of water resources within its boundaries. As such, the State of Oklahoma (inclusive of the State environmental agencies responsible for managing the quantity and quality of Oklahoma's streams, lakes and aquifers) appreciates the opportunity to engage with the U.S. Environmental Protection Agency ("U.S. EPA") and the U.S. Army Corps of Engineers ("U.S. ACE") in a more meaningful dialogue, and to ultimately work to develop a revised definition of "waters of the United States" that both recognizes the States' essential role in the protection and management of water resources and also actually provides clarification as to the jurisdiction of the Federal Government. The State of Oklahoma strongly supports the development of a new federal definition of "waters of the United States" consistent with the Supreme Court's plurality opinion written by Justice Scalia in *Rapanos v. United States*, 547 U.S. 715, 126 S.Ct. 2208 (2006). In defining those non-navigable tributaries or wetlands that are to be considered waters of the United States, the U.S. EPA and the U.S. ACE should focus on water features that are likely to directly impact a traditional navigable water ("TNW"). It is essential that the new definition: (1) respect the States' primary responsibilities and rights related to the protection and use of water resources; and (2) provide certainty regarding which waters are covered under the regulatory definition.

Oklahoma's Comments to Biden EPA's WOTUS Rule

(2021 Federal Consultation Period)

- Strongly supports an approach consistent with the Justice Scalia's plurality opinion in *Rapanos*.
- Need to protect resource and provide certainty to the public, regulated entities, and regulators.
- Respect the States' responsibility and right to protect waters within their boundaries.
- Consistent with the U.S. Constitution and Statutes, provide flexibility to do so in a manner that ensures public health, safety, and economic prosperity.
- Dispel false argument that the waters are not protected unless they are included within a Federal definition of WOTUS.

Kenneth E. Wagner
Secretary of Energy & Environment



J. Kevin Stitt
Governor

STATE OF OKLAHOMA
OFFICE OF THE
SECRETARY OF ENERGY & ENVIRONMENT

October 4, 2021

Casey Katims, Deputy Associate Administrator, Intergovernmental Relations
Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Re: The State of Oklahoma's Comments related to the Federal Consultation Period for revising the Definition of "Waters of the United States" (WOTUS)

Dear Deputy Associate Administrator Katims:

On behalf of the State of Oklahoma, please accept the following comments related to the intent of the U.S. Environmental Protection Agency ("EPA") and the U.S. Army Corps of Engineer ("USACE") to revert to the WOTUS regulations in place prior to the Clean Water Rule ("2015 WOTUS Rule"). Without weighing into the ongoing legal debate as to whether a district court can vacate a national rule, the State of Oklahoma reiterates its support of the general concepts contained in the Navigable Waters Protection Rule.

The EPA and the USACE recognized under both the Obama/Biden administration in the 2015 WOTUS Rule, 80 Fed. Reg. 37054-37127 (June 29, 2015), and the Trump/Pence administration in the Navigable Waters Protection Rule ("NWPR"), 85 Fed. Reg. 22250-22342 (April 21, 2020), that the pre-2015 definition of WOTUS, as amended by or interpreted through relevant SCOTUS decisions, does not provide sufficient clarity or certainty for proper implementation. The State of Oklahoma believes that the uncertainty in the pre-2015 WOTUS regime remains unacceptable. However, if the agencies are going to implement a pre-2015 WOTUS regime, the State of Oklahoma strongly supports an approach consistent with the Supreme Court's plurality opinion written by Justice Scalia in *Rapanos v. United States*, 547 U.S. 715, 126 S.Ct. 2208 (2006).

In regard to the EPA and the USACE's stated intent to develop a new definition of WOTUS to replace the definition contained in the NWPR, a definition which will once again attempt to re-delineate the boundary between Federal and State authority when it comes to the protection of water quality, it is essential to recognize that the States are charged with the primary responsibility and right to prevent, reduce, and eliminate water pollution and to plan the development and use of water resources within their boundaries. Any new rule developed must protect the resource and provide certainty to the public, regulated entities, and regulators. Moreover, any new rule must respect the States responsibility and right to protect waters within their boundaries and, consistent with the U.S. Constitution and Statutes, provide the States with flexibility to do so in a manner that ensures public health, safety, and economic prosperity. As Administrator Regan stated in his comments as the Secretary of the North Carolina DEQ

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Sackett v. EPA

- Whether the 9th Circuit’s use of Justice Kennedy’s “significant nexus” test was the proper test for determining whether wetlands are considered WOTUS.
- **Certiorari was granted on January 24, 2022**
- Oral argument was on October 3, 2022
- Decision was expected June 2023

No. _____

In The
Supreme Court of the United States

MICHAEL SACKETT; CHANTELL SACKETT,
Petitioners,

v.

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY;
MICHAEL S. REGAN, Administrator,
Respondents.

**On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit**

PETITION FOR WRIT OF CERTIORARI

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Oklahoma's Comments to Biden EPA's WOTUS Rule

(2022 Public Comment Period)

- Requested that EPA Withdraw or Pause WOTUS Rulemaking pending outcome in *Sackett v. EPA*.
- Respect the States' responsibility and right to protect waters within their boundaries.
- Need to protect resource and provide certainty to the public, regulated entities, and regulators.
- Strongly supports an approach consistent with the Justice Scalia's plurality opinion.
 - "Interpreting WOTUS as covering 'relatively permanent, standing or continuously flowing bodies of water' that are connected to traditional navigable waters, as well as wetlands with a continuous surface connection to such water bodies."
- Even if both tests were included as proposed, Justice Kennedy's "significant nexus" test would essentially swallow Justice Scalia's "relatively permanent" test, and greatly expands federal jurisdiction.
- Consistent with the U.S. Constitution and Statutes, provide States flexibility to do so in a manner that ensures public health, safety, and economic prosperity.
- Again, dispel false argument that the waters are not protected unless they are included within a Federal definition of WOTUS.

Kenneth E. Wagner
Secretary of Energy & Environment



J. Kevin Stitt
Governor

STATE OF OKLAHOMA
OFFICE OF THE
SECRETARY OF ENERGY & ENVIRONMENT

February 7, 2022

The Honorable Michael S. Regan,
Administrator,
Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

The Honorable Michael L. Connor
Assistant Secretary of the Army for Civil Works
U.S. Department of the Army
108 Army Pentagon
Washington, D.C. 20310

Re: The State of Oklahoma's Request and Comments related to the Proposed "Revised Definition of 'Waters of the United States'" (Docket ID No. EPA-HQ-OW-2021-0602)

Dear Administrator Regan and Assistant Secretary Connor:

All States, including the State of Oklahoma, are charged with the primary responsibility and right to prevent, reduce, and eliminate water pollution and to plan the development and use of water resources within their boundaries. As such, on behalf of the State of Oklahoma, please accept the following request and comments related to the U.S. Environmental Protection Agency ("EPA") and the U.S. Army Corps of Engineer ("USACE")'s proposed "Revised Definition of 'Waters of the United States'" ("WOTUS"), 86 Fed. Reg. 69372 (Dec. 7, 2021).

I. Request that EPA and USACE Withdraw or Pause WOTUS Rulemaking

As an initial matter, considering the Supreme Court of the United States' recent decision to revisit the definition of WOTUS in *Sackett v. EPA*, Case No. 21-454 (cert. granted Jan. 24, 2022) and, thereby, potentially provide clarity on the extent of Federal jurisdiction under the Clean Water Act, the State of Oklahoma requests that the EPA and the USACE withdraw or pause their current effort to redefine WOTUS until after the Court issues a decision in that case. As the stated purpose of the current rulemaking effort is to "improve clarity, implementability, and long-term durability of the definition [of WOTUS]," it would be prudent and rational for the agencies to consider the Court's decision prior to proceeding with this rulemaking process. In fact, considering the substantial effort that such a significant rulemaking places upon the agencies, the stakeholders, and the public, it would be irresponsible and nonsensical to proceed with this effort prior to the Court's decision, especially since the Court essentially granted *cartiorari* on the very issue that the agencies are seeking comment (*i.e.*, whether the "significant

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DEQ'S PERSPECTIVE ON EPA'S 2023 WOTUS RULE

- EPA purportedly incorporated both Justice Scalia's "relatively permanent" test and Justice Kennedy's "significant nexus" test for determining federal jurisdiction.
- From DEQ's perspective, EPA should have focused on the "relatively permanent" test.
- Practical effect of incorporating both Justice Kennedy's "significant nexus" test and Justice Scalia's "relatively permanent" test is that the narrower interpretation of Federal jurisdiction (Justice Scalia's approach) is consumed by the broader interpretation (Justice Kennedy's approach).
 - Essentially negates the plurality's stricter interpretation and extends the reach of Federal jurisdiction.
- EPA did not adequately respect States' primary role in water resource management.
 - As EPA Administrator Regan stated in his comments as Secretary of the North Carolina DEQ during the Trump EPA's NWPR rulemaking process, EPA should *"allow states the flexibility to regulate the waters necessary to achieve the goals of the Clean Water Act and in a manner that ensures the health, safety, and economic prosperity of their citizens."*

Oklahoma's Response to EPA's Final 2023 WOTUS Rule

- On **January 18, 2023**, Final 2023 WOTUS Rule was published in the Federal Register. *See* 88 Fed. Reg. 3004-3114 (Jan. 18, 2023).
- On February 21, 2023, West Virginia and 23 other States (including Oklahoma) filed a challenge to the rule in a Federal District Court in North Dakota.
- Federal District Courts granted preliminary injunctions staying the 2023 WOTUS Rule in 27 States pending SCOTUS decision.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
EASTERN DIVISION

STATES OF WEST VIRGINIA, NORTH DAKOTA, GEORGIA, and IOWA, <i>et al.</i> ,	
Plaintiffs,	Case No. 3:23-cv-00032-PDW-ARS
v.	Hon. Peter D. Welte
U.S. ENVIRONMENTAL PROTECTION AGENCY, <i>et al.</i> ,	
Defendants.	

PLAINTIFF STATES' MOTION FOR PRELIMINARY INJUNCTION

Under Federal Rule of Civil Procedure 65 and D.N.D. Civ. L. R. 7.1(B), and for the reasons stated in the accompanying memorandum, the Plaintiff States move for a preliminary injunction order enjoining Defendants from enforcing the final rule entitled, "Revised Definition of 'Waters of the United States,'" 88 Fed. Reg. 3004-3114 (January 18, 2023).

Dated: February 21, 2023

Respectfully submitted,

PATRICK MORRISEY
Attorney General of West Virginia

/s/ Michael R. Williams
Lindsay See
Solicitor General
Michael R. Williams
Senior Deputy Solicitor General

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SCOTUS SACKETT DECISION

- On May 25, 2023, the U.S. Supreme Court issued a decision in *Sackett v. Env't Protection Agency*, 598 U.S. ____ (2023).
 - Rejected the “significant nexus” test in favor of the “relatively permanent” test.
 - “Waters” refers only to “geographic[al] 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.”
 - For Federal jurisdiction, a wetland must:
 - (1) Be adjacent to a waterbody that constitutes WOTUS (*i.e.*, a relatively permanent body of water connected to traditional interstate navigable waters); and
 - (2) Have a continuous surface connection with that water (making it difficult to determine where the ‘water’ ends and the wetland’ begins.”).

EPA'S CONFORMING RULE

- On August 29, 2023, EPA and U.S. ACE issued a final direct rule purportedly revising the 2023 WOTUS rule to align with the U.S. Supreme Court's decision in *Sackett*.
 - *See Revised Definition of "Waters of the United States"; Conforming*, 88 Fed. Reg. 61964 (Sept. 8, 2023).
- The Conforming Rule eliminates –
 - "Significant nexus" test;
 - "Adjacent wetlands;" and
 - "Interstate wetlands."
- The Conforming Rule –
 - Does not affect longstanding Agricultural exemptions,
 - Includes longstanding exclusions for "prior converted cropland" and "waste treatment systems," and
 - Includes additional exclusions for: ditches; artificially irrigated areas; artificial reflecting pools or swimming pools; waterfilled depressions; and swales and erosional features.

EPA'S CONFORMING RULE

- Judicial challenges to the Conforming Rule are anticipated.
 - Question is whether the conforming Rule fully and accurately codifies the *Sackett* decision.
 - As expected, many believe that the rule's surgical amendments do not go far enough and that the 2023 WOTUS rule should be vacated in its entirety.
- Procedural questions –
 - Failing to comply with APA notice and opportunity to comment requirements.
- Substantive questions –
 - Continues to extend CWA jurisdiction to “tributaries, impoundments, and wetlands that have a continuous surface connection to waters that *are not* traditional navigable waters, territorial seas, or interstate waters.”
 - Court concluded that CWA jurisdiction extends only to wetlands (and other relatively permanent bodies of water connected to traditional interstate navigable waters) with a continuous surface connection to such “waters of the United States” in their own right.
 - Justice Alito's majority opinion highlighted concerns with qualifying language related to the definitions of “tributaries” and what constitutes a relatively permanent, standing, or flowing body of water. Consequently, the jurisdiction of wetlands adjacent to those waterbodies is still in dispute
- Deadlines for challenging –
 - Federal District Court hearing the *West Virginia, et al., v. EPA, et al.*, case required proposals for further proceedings within 21 days after publication.
 - General deadline for petition for judicial review is __ days after publication.

STATUS OF WOTUS IN OKLAHOMA

- Conforming Rule effective as of September 8th in 23 States, the District of Columbia, and U.S. Territories.
- As a result of existing preliminary injunctions blocking implementation of the 2023 WOTUS Rule, the pre-2015 regulatory regime is *currently* applicable in the other 27 States (including Oklahoma).

GENERAL PROHIBITION ON POLLUTION

- Oklahoma statutes provide DEQ the following general authority:

If the Executive Director finds that any of the air, land or waters of the state have been, or are being, polluted, the Executive Director shall make an order requiring such pollution to cease within a reasonable time, or requiring such manner of treatment or of disposition of the sewage or other polluting material as may in his judgment be necessary to prevent further pollution. It shall be the duty of the person to whom such order is directed to fully comply with the order of the Executive Director.

See 27A O.S. § 2-6-105(B).

WATERS OF THE STATE

- In Oklahoma, our State statutes define “Waters of the State” to mean:

[A]ll streams, lakes, ponds, marshes, watercourses, waterways, wells, springs, irrigation systems, drainage systems, storm sewers and all other bodies or accumulations of water, surface and underground, natural or artificial, public or private, which are contained within, flow through, or border upon this state or any portion thereof, and shall include under all circumstances the waters of the United States which are contained within the boundaries of, flow through or border upon this state or any portion thereof.

See 27A O.S. § 1-1202(20); see also 82 O.S. § 1084.2(3).

EPA'S PROPOSED RESERVED RIGHTS RULE

- **Reserved Rights Rule** - On December 5, 2022, EPA proposed *Water Quality Standards Regulatory Revisions To Protect Tribal Reserved Rights*, 87 Fed. Reg. 74,361 (Dec. 5, 2022)
 - Not to be confused with EPA's Proposed *Federal Baseline WQS for Indian Reservation Waters*, 88 Fed. Reg. 29,496 (May 5, 2023)
- **Purpose** - Purportedly to ensure that tribal reserved rights are adequately preserved and protected by new or existing WQS.
- **Shared Desire** - DEQ shares desire to protect all water rights and beneficial uses of water, including reserved rights.

EPA'S PROPOSED RESERVED RIGHTS RULE

- **Significant Concerns** – On March 6, 2023, OSEE/DEQ submitted comments on the proposed rule.
 - Centers on requirement that States gather information and *determine the nature and extent of reserved rights* to determine whether WQS are adequately protective.
 - *Authority* - EPA doesn't have authority to determine nature and extent of tribal reserved rights (much less delegate to States).

EPA'S PROPOSED RESERVED RIGHTS RULE

- **Significant Concerns (Continued)-**
 - *Extremely complex determination*
 - Reserved Rights include “any rights to aquatic and/or aquatic-dependent resources reserved or held by tribes, either expressly or implicitly, through treaties, statutes, executive orders, or other sources of Federal law.”
 - Sources of Federal law establishing reserved rights do not typically lay out the precise nature and extent of the reserved right, but require a determination of the nature and extent of the right necessary to satisfy the purpose of the reservation.
 - Every element of the proposed definition requires an extremely complex analysis: “any rights;” “aquatic and/or aquatic-dependent resources;” “reserved or held;” “expressly or implicitly;” and “through treaties, statutes, executive orders, or other sources of Federal law.”
 - Determination of what constitutes the unsuppressed use of any reserved resources (unsuppressed by water quality or availability), requiring consideration of past, present, and future uses (which in turn requires taking “into account factors that may have substantially altered a waterbody.”).

EPA'S PROPOSED RESERVED RIGHTS RULE

- **Significant Concerns (Continued)-**
 - *Especially Difficult Determination in Oklahoma*
 - Oklahoma has 39 federally recognized tribal nations
 - “Indian country” ranging from reservations to 100,000+ acres of tribal trust land scattered across the State.
 - Reserved rights created through separate and distinct treaties, statutes, executive orders, and/or other sources of Federal law.
 - *Triennial Review*
 - Requires State to determine that all existing WQS protect all reserved rights during the required triennial review
 - Reoccur every three years.

EPA'S PROPOSED RESERVED RIGHTS RULE

- **Significant Concerns (Continued)-**
 - *Vulnerable to Infinite Challenges*
 - Complexity of determining the nature and extent of any reserved right makes any proposed WQS based on that determination vulnerable to challenge by EPA or a third-party.
 - Even more vulnerable considering the number of tribal nations, varying nature of their respective reserved rights, and the triennial review requirements.
 - *Potential Federalization of Oklahoma WQS*
 - Provides infinite opportunities for EPA to disapprove Oklahoma WQS.
 - Creates opportunity for federalization of Oklahoma WQS program.

EPA'S PROPOSED RESERVED RIGHTS RULE

- **Significant Concerns (Continued)-**
 - *Impeding Development of New and Implementation of Existing WQS*
 - Missing required timelines could, in and of itself, provide a justification for EPA to federalize Oklahoma WQS.
 - *Impact on State Resources*
 - *Uncertainty for State, Tribal nations, and Regulated Industry*