Wisconsin Legislative Council
INFORMATION MEMORANDUM

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FEDERAL JURISDICTION OVER WETLANDS: RECENT DEVELOPMENTS AND THEIR IMPACT IN WISCONSIN

The federal Clean Water Act regulates the discharge of pollutants into "navigable waters," which the act defines as "the waters of the United States, including the territorial seas."[1] That law also refers to "navigable waters…including wetlands adjacent thereto."[2]

Numerous federal rulemakings and much litigation have ensued regarding the meaning of both "waters of the United States" and which wetlands are "adjacent" to a navigable water. For example, at its broader moments, the law has been applied to wetlands having a significant nexus to a navigable water even if not having a surface connection thereto.

A 2023 decision of the Supreme Court of the United States supplied the most recent interpretation. In summary, the Court established narrower understandings for both "waters of the United States" and "adjacent" wetlands. With regard to the latter, it held that "adjacent" means having a continuous surface connection to a navigable water. Soon after this decision was issued, federal rules were revised accordingly.

This information memorandum discusses the impacts of the new understanding of "adjacent" wetlands. It provides an overview of federal and state wetland permitting, presents a timeline of significant judicial and regulatory actions interpreting "adjacent," and then summarizes the 2023 Supreme Court decision and the subsequent federal rule revision. Finally, it discusses how these developments affect Wisconsin's regulation of wetlands.

OVERVIEW OF WETLANDS PERMITTING

In Wisconsin, both federal and state law regulate impacts to wetlands. Wetlands that fall within federal jurisdiction ("federal wetlands") are subject to both state and federal requirements. All other wetlands ("state wetlands" or "nonfederal wetlands") are subject to only state requirements.

Federal Wetland Permitting

The main source of federal authority to regulate wetlands is the federal Clean Water Act. Under that act, a person who wishes to discharge dredged material or fill material into navigable waters must obtain a permit from the U.S. Army Corps of Engineers (USACE).[3]

A permit from USACE is not valid unless the state in which the permitted activity occurs issues a water quality certification. A water quality certification affirms that the permitted activity will

[1] 33 U.S.C. s. 1362 (7).
[2] 33 U.S.C. s. 1344 (g) (1).
[3] 33 U.S.C. s. 1344.

meet state water quality standards.[4] Denial of a water quality certification by a state, in effect, invalidates a federal permit.

In order for a state to exercise its water quality certification jurisdiction, the state must have adopted water quality standards that are applicable to wetlands. In Wisconsin, the Department of Natural Resources (DNR) has promulgated these standards.[5]

State Wetland Permitting

Wisconsin law requires a person to obtain an individual wetland permit or to be authorized under a wetland general permit before conducting an activity that will result in a discharge of dredged material or fill material into a wetland, unless the activity is exempt from that requirement.[6] Historically, the jurisdictional distinction between a federal wetland and a state wetland had primarily a procedural, and not substantive, significance. Similar standards applied to both federal and state permits.[7] However, after the enactment of 2017 Wisconsin Act 183, various wetland permitting exemptions apply to state wetlands, as described below. These exceptions make the jurisdictional distinction more consequential in certain circumstances. If a wetland ceases to be subject to federal jurisdiction, it may then qualify for a state exemption.

FEDERAL REGULATORY CHANGES AND LITIGATION

The scope of wetlands subject to federal jurisdiction has shifted several times over the last few decades following federal court decisions and changes in federal rules. The following timeline summarizes key legal developments in this area:

- In May 1973 and April 1974, shortly after the 1972 amendments to the federal Clean Water Act were enacted, the U.S. Environmental Protection Agency (EPA) and USACE, respectively, issued rules that defined "waters of the United States." Very generally, those definitions were relatively narrow, including only waters that could be navigated for commerce, and not adjacent wetlands. A federal court held that the definitions were too narrowly drawn.[8]
- In July 1980, EPA issued a revised rule, and USACE issued a corresponding rule in November 1986. Of particular relevance to wetlands, these two rules applied to all wetlands that are "adjacent to" specified types of navigable waters.[9]
- In January 2001, the Supreme Court of the United States decided *Solid Waste Agency of Northern Cook County (SWANCC) v. USACE*. The Court held that USACE had exceeded its authority by requiring a federal permit for an action affecting a "non-navigable, isolated, intrastate" water.[10]

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[4] 33 U.S.C. s. 1341.

[5] The water quality standards are found in ch. NR 103, Wis. Adm. Code. The rules regarding the water quality certification process are found in ch. NR 299, Wis. Adm. Code.

[6] s. 281.36 (3b), Stats.

[7] In practice, the state role in the federal process—the water quality certification—means that all wetlands permit applications include state review.

[8] *Natural Resources Defense Council, Inc. v. Callaway*, 392 F. Supp. 685 (D.D.C. 1975).

[9] Specifically, the definition included wetlands adjacent to traditional navigable waters, interstate waters, the territorial seas, impoundments, tributaries, or "other waters" (that are not wetlands themselves).

[10] 531 U.S. 159 (2001).

- In June 2006, the Supreme Court of the United States issued multiple opinions in *Rapanos v. United States*. A four-justice plurality interpreted "waters of the United States" to apply only to wetlands that have a "continuous surface connection" to other navigable waterbodies. In a separate opinion for himself, Justice Kennedy instead concluded that wetlands with a "significant nexus" to navigable waterbodies fall within federal jurisdiction.[11]
- In December 2008, EPA and USACE issued guidance that largely adopted Justice Kennedy's "significant nexus" test for evaluating whether wetlands adjacent to navigable waterbodies fall within federal jurisdiction on a case-by-case basis.
- In June 2015, EPA and USACE issued a final rule, entitled the "Clean Water Rule: Definition of 'Waters of the United States'." The 2015 rule attempted to reduce the number of wetlands that were subject to a case-specific analysis by establishing numeric criteria for evaluating whether a wetland was sufficiently "adjacent" to a navigable waterbody as to fall within federal jurisdiction. The rule was subsequently challenged by Wisconsin and 12 other states.[12]
- In February 2017, President Trump issued an executive order directing EPA and USACE to issue a proposed new rule to rescind or revise the 2015 rule.
- In 2015 and 2018, a federal court enjoined the enforcement of the 2015 rule in 13 states, and another federal court enjoined its enforcement in Wisconsin and 11 other states.[13]
- In October 2019, EPA and USACE issued a final rule that repealed the 2015 rule.[14]
- In April 2020, EPA and USACE issued a new final rule. Under the 2020 rule, a wetland was an "adjacent wetland" if the wetland abutted or was flooded by a navigable water, or if it was separated from such a water by a natural barrier, like a berm, or an artificial barrier, like a dike or road as long as the artificial barrier allowed for a direct hydrological surface connection between the wetland and the water.
- In 2021, a federal court vacated the 2020 rule.[15]
- On January 18, 2023, EPA and USACE issued a new final rule entitled "Revised Definition of 'Waters of the United States'." In relevant part, the 2023 rule extended federal jurisdiction to wetlands with a "significant nexus" to navigable waters (similar to the test used by Justice Kennedy in *Rapanos*, described above). The rule defined "adjacent" to mean "bordering, contiguous, or neighboring." Wetlands separated from other waters of the United States by artificial dikes or barriers, natural river berms, beach dunes, and the like qualified as "adjacent."[16]
- On May 25, 2023, the Supreme Court of the United States decided *Sackett v. EPA*, described below. In relevant part, the Court ruled that the Clean Water Act extends to only those wetlands with a continuous surface connection to bodies of water that are themselves

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[11] 547 U.S. 715 (2006).

[12] However, after Attorney General Kaul took office, Wisconsin withdrew from the litigation.

[13] *North Dakota v. EPA*, 127 F. Supp. 3d 1047 (D.N.D. 2015); *Georgia v. Pruitt*, 326 F. Supp. 3d (S.D. Ga 2018). The effect of various injunctions was that the 2015 rule eventually applied in only 22 states. For a map of the currently operative definition of "waters of the United States," see the map at the bottom of the EPA website "Definition of 'Waters of the United States': Rule Status and Litigation Update."

[14] 84 Fed. Reg. 56626 (Oct. 22, 2019).

[15] *Pascua Yaqui Tribe v. EPA*, 557 F. Supp. 3rd 949 (D. Ariz. 2021).

[16] 88 Fed. Reg. 3004, 3144 (Jan. 18, 2023).

"waters of the United States." In other words, a wetland must be as a practical matter indistinguishable from a water of the United States.[17]

- On August 29, 2023, EPA and USACE revised the 2023 rule to conform it to the Court's decision in *Sackett*.[18]

SACKETT V. EPA

At issue in *Sackett* was an attempt by EPA to exercise jurisdiction over a wetland on a parcel of private property on the basis that the wetland was "adjacent" to a water of the United States. As recited in the Court's majority opinion, this wetland was across a 30-foot wide road from an unnamed tributary that fed into a non-navigable creek that fed into a lake that was conceded to be a "water of the United States." EPA based its jurisdictional claim on the "significant nexus" of the wetland to that lake, especially when the wetland was considered in the context of a much larger nearby wetland complex that was also near the lake.

In relevant part, the Court rejected the EPA's interpretation of "adjacent." It held that adjacent wetlands are those that are indistinguishable from a water of the United States due to a continuous surface connection with that water that makes it difficult to determine where the "water" ends and the "wetland" begins. For the majority of the Court, "adjacent" means something like "abutting" or "adjoining." It is not enough to merely be "nearby."[19]

Prior understandings of "adjacent" encompassed a wider range of federal wetlands. For instance, in the 2023 rule as originally promulgated, a wetland could be separated from a water of the United States by a natural or artificial barrier and still be a federal wetland.[20] Under *Sackett*, a wetland that lacks a continuous surface connection is not a federal wetland.[21]

The Court also established that the phrase "waters of the United States" encompasses only those relatively permanent, standing, or continuously flowing bodies of water that are described in ordinary parlance as streams, oceans, rivers, and lakes.[22] Thus, a wetland adjacent to a different type of waterbody is not subject to federal jurisdiction even if having a continuous surface connection thereto.

REVISED FEDERAL RULE

On August 29, 2023, EPA and USACE issued a final rule to revise the 2023 rule to conform to *Sackett*. Although the 2023 rule was not directly before the Court in *Sackett*, EPA stated that "the decision in *Sackett* made clear that certain aspects of the [January 18,] 2023 rule are invalid."[23]

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[17] *Sackett v. U.S. Envtl. Protection Agency*, 143 S. Ct. 1322, 1341.

[18] See "Amendments to the 'Revised Definition of 'Waters of the United States'" (pre-publication version).

[19] *Sackett* at 1339-40.

[20] 88 Fed. Reg. at 3144 (2023).

[21] All nine Justices agreed that the wetland at issue in the *Sackett* case was not subject to federal jurisdiction. In a concurring opinion, however, four Justices sharply disagreed with the majority's interpretation of "adjacent." These Justices opined that a wetland is "adjacent" to a water of the United States if: (a) the wetland is contiguous to or bordering that body of water; or (b) the wetland is separated from that body of water only by an artificial dike or barrier, natural river berm, beach dune, or the like. [*Sackett* at 1362.]

[22] *Sackett* at 1336.

[23] See [Fact Sheet for the Final Rule: Amendments to the Revised Definition of "Waters of the United States" (Aug. 2023).]

The revised rule removes the "significant nexus" test and clarifies that "adjacent" simply means "having a continuous surface connection."[24]

IMPACT IN WISCONSIN

As discussed above, *Sackett* diminishes federal regulatory authority by reducing the number of federal wetlands. It affects only federal authority; it does not directly impair the authority of Wisconsin to regulate wetlands within the state. However, some wetlands that are no longer federal wetlands because of the decision may now qualify for existing state exemptions based on that change in status.

Before 2001, Wisconsin did not have its own wetland permitting process. Instead, it relied on DNR to enforce state standards through its issuance or denial of water quality certifications, described above, whenever a USACE permit was required by federal law.

The *SWANCC* decision in 2001, described above, significantly curtailed federal wetland jurisdiction by excluding from the Clean Water Act any "nonnavigable, isolated, intrastate" wetland. In the absence of a USACE permit, Wisconsin (and other states) lost the opportunity to apply a water quality certification process to regulate activities on the affected wetlands.

In response, Wisconsin promptly enacted a state permitting process for nonfederal wetlands.[25] Under this process, a state permit is required for an activity that will result in a discharge of dredged material or fill material into a wetland, whether federal or nonfederal.[26]

Some activities occurring in a nonfederal wetland, however, are exempt from this requirement. These activities include the following:

- A discharge into a nonfederal wetland that occurs in an urban area[27] if all of the following criteria are satisfied:
  - The discharge does not affect more than one acre of wetland per parcel.
  - The discharge does not affect a rare and high-quality wetland.[28]
  - The development related to the discharge is done in compliance with any applicable stormwater management zoning ordinance or stormwater discharge permit.
- A discharge into a nonfederal wetland that occurs outside an urban area, if all of the following criteria are satisfied:
  - The discharge does not affect more than three acres of wetland per parcel.
  - The discharge does not affect a rare and high-quality wetland.
  - The development related to the discharge is a structure, such as a building, driveway, or road, with an agricultural purpose.[29]

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[24] See "Amendments to the 'Revised Definition of 'Waters of the United States'" (pre-publication version).

[25] See 2001 Wisconsin Act 6.

[26] s. 281.36 (3b), Stats.

[27] "Urban area" means any of the following: (a) an incorporated area; (b) an area within one-half mile of an incorporated area; or (c) an area in a town that is served by a sewerage system. [s. 281.36 (4n) (a) 5., Stats.]

[28] "Rare and high quality wetland" means a wetland that is directly adjacent or contiguous to certain trout streams or that consists of 75 percent or more of certain types of wetland, such as a floodplain forest or sedge meadow. [s. 281.36 (4n) (a) 3., Stats.]

[29] These exemptions were created by 2017 Wisconsin Act 183. For more information, see Legislative Council, 2017 Wisconsin Act 183, Act Memo.

The jurisdictional determination (i.e., whether a given wetland is federal or nonfederal) will have a practical effect on the outcome of permitting decisions for activities that fall into the above exempt categories. Former federal wetlands that became nonfederal wetlands after *Sackett* and the revised 2023 rule may now qualify for a state exemption.

This information memorandum was prepared by Ethan Lauer, Senior Staff Attorney, on September 6, 2023.