



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

Date: 01/22/2024

To: Commissioner Katrina Kessler, Commissioner Sarah Strommen, Executive Director John Jaschke

From: Interagency Team Staff: Melissa Kuskie (DNR), Anna Hotz (MPCA), Lewis Brockett (BWSR), Les Lemm (BWSR), Ken Powell (BWSR), Tim Smith (BWSR), David Weirens (BWSR)

An interagency staff team convened in October 2023 to discuss the status of Waters of the United States (WOTUS), after the U.S. Environmental Protection Agency (EPA) issued a rule to ensure that the definition of WOTUS for purposes of the U.S. Clean Water Act conforms to the U.S. Supreme Court Decision (*Sackett vs. Environmental Protection Agency*) that was issued on May 25, 2023.

The purpose of this ad-hoc team was to assess the impacts of this change to Minnesota's waters and wetlands and to develop related information and policy options for consideration by agency leadership. This assessment should be considered preliminary, as the EPA and U.S. Army Corps of Engineers have not yet provided detailed rule implementation guidance.

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 within federal jurisdiction according to the "significant nexus," standard (this standard was eliminated in recent rulemaking.)

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

- The procedures for identifying wetlands remain applicable; though determining whether delineated wetlands are under the jurisdiction of the U.S. Clean Water Act (CWA) 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

The issue of what waters are considered WOTUS has been a frequent subject of litigation and policy changes by the federal government. We recognize the State of Minnesota has strong and independent protections built on state law; however, we also recognize there are some aspects of our state programs that are either tied to or reliant on federal jurisdiction. Therefore, the changes to federal jurisdiction resulting from the *Sackett* decision mean we may also want to consider potential adjustments to state law.

Policy options the team is prepared to address include:

1. Do nothing, understanding some reduction of protected wetlands.
2. Fill regulatory gaps for newly unregulated waters, which would require coverage under state law.
3. Evaluate and propose other changes to regulatory standards to improve levels of protection under state law and address changes to federal authority that have occurred over time.

A preliminary assessment is available to inform the Governor's Office and Cabinet, legislators, Minnesota Tribal Governments, and other interested groups on this important issue.