

Supreme Court Decision Alters Interpretation of Waters of the United States

Alert

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By Brittany Barrientos, Aimee Guzman Davenport, Andy Davis, Dennis Lane, Sarah Lintecum Struby and Claire Williams

The Supreme Court clarified the scope of the Waters of the United States (WOTUS) rule in a long-awaited decision regarding which wetlands are subject to Section 404 of the Clean Water Act (CWA). Declining to exercise jurisdiction over the wetlands at issue, the Court's decision places several provisions in the Environmental Protection Agency's (EPA) current WOTUS rule in jeopardy, leaving application of the rule uncertain in many jurisdictions.

Sackett v. EPA

Petitioners Michael and Chantell Sackett backfilled a portion of their land during construction activities on their property in Idaho. EPA demanded that the Sacketts remove the fill because the property contained protected wetlands and their backfilling violated the CWA, which prohibits the discharge of pollutants (including rocks and sand) into "navigable waters." "Navigable waters" are defined as WOTUS. According to EPA, the wetlands on the Sacketts' property were WOTUS because they had a "significant nexus" to Priest Lake, a traditionally navigable body of water.

The Sacketts filed suit in federal district court alleging EPA did not have jurisdiction because the wetlands were not WOTUS. The district court and the Ninth Circuit sided with EPA, holding that the CWA applies to wetlands with a "significant nexus" to traditionally navigable waters, and the wetlands on the Sacketts' property met the test. The Supreme Court granted certiorari to determine whether WOTUS extended to wetlands with a "significant nexus" or was limited to those with a "relatively permanent" connection.

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In its May 25, 2023 decision, the Supreme Court reversed the Ninth Circuit, concluding the Sacketts' property lacked a sufficient connection to Priest Lake to require a CWA permit. The Court held that the only wetlands subject to regulation under the CWA are "those 'wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right,' so that they are 'indistinguishable' from those waters." *Sackett v. EPA*, No 21-454, slip op. at 27 (May 25, 2023) (relying on *Rapanos v. United States*, 547 U.S. 715, 742, 755 (plurality opinion) (2006)). In reaching its decision, the Supreme Court rejected the "significant nexus" test as "inconsistent with the text and structure of the CWA" and an impingement on state regulatory authority by the federal government. *Id.* at 22.

As Justice Kavanaugh's concurring opinion points out, the majority's continuous surface connection test for CWA-regulated wetlands raises a host of thorny questions and can lead to potentially arbitrary results especially for wetlands that can affect the chemical, physical, and biological integrity of WOTUS including those that are separated from WOTUS by a natural or artificial barrier (*e.g.*, berm, dune, dike, levee) but that have a sufficient connection to allow the flow of pollutants. *Id.* at 13-14 (concurring opinion of Kavanaugh, J.). While the *Sackett* majority sought to clarify the issue, litigation regarding the scope of regulated wetlands is likely to continue.

Notably, the Supreme Court's invocation of the regulatory balance between states and the federal government will likely have implications beyond the interpretation of WOTUS. The majority opinion explained that when Congress alters the balance of power between federal and state governments, including the power to regulate private property rights, it must do so with "exceedingly clear language." *Id.* at 23-24. Since many environmental regulations concern the use of private property and/or the balance of authority between federal and state government, the question of "exceedingly clear language" is likely to appear in the future and guide agency decisions and regulations.

EPA'S WOTUS RULE

The *Sackett* case further complicates an existing patchwork of regulatory requirements. Earlier this year, EPA [published its final rule *Revising the Definition of Waters of the United States*](#) (Revised WOTUS Rule). The Revised WOTUS Rule incorporates the "significant nexus" test that was rejected in *Sackett* and regulates five categories of waters:

- Traditional navigable waters, territorial seas, and interstate waters.
- Impoundments of a WOTUS.
- Tributaries to traditional navigable waters, territorial seas, interstate waters or impoundments when the tributaries meet either the relatively permanent standard or the significant nexus standard.
- Wetlands adjacent to traditional navigable waters, territorial seas or interstate waters, wetlands adjacent to and with a continuous surface connection to a relatively permanent impoundment, wetlands adjacent

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to tributaries that meet the relatively permanent standard, and wetlands adjacent to impoundments or jurisdictional tributaries when the wetlands meet the significant nexus standard.

- Intrastate lakes and ponds, streams or wetlands not otherwise identified that meet either the relatively permanent standard or the significant nexus standard.

After publication, it was challenged by numerous industrial groups and states. Today, the Revised WOTUS Rule is stayed in 27 states, including all four Region 7 states (Iowa, Kansas, Missouri and Nebraska),¹ creating a patchwork implementation of the Revised WOTUS Rule. EPA's [website](#) advises that the 27 states where the Revised WOTUS Rule is stayed should follow the "pre-2015 regulatory regime." The term "regime" is appropriate, as this includes the 1986 regulations, and decades of memoranda and case law.

EPA's new WOTUS rule will remain in effect in all remaining states until stayed or replaced so any application by state agencies before that time should be carefully examined to ensure consistency with the Court's holding in *Sackett*. In certain cases, previously issued jurisdictional determinations based on the "significant nexus" standard may also deserve re-evaluation to determine legality.

IMPLICATIONS OF SACKETT ON THE WOTUS RULE

How EPA's regulations will be updated to account for the Supreme Court's ruling in *Sackett* remains to be seen. Certainly, the significant nexus standard will be eliminated. EPA is also likely to provide additional guidance regarding the continuous surface connection test, which does not provide a bright-line answer to what is a regulated wetland. *See* 88 Fed. Reg. 3004, 3095-96 (Jan. 18, 2023) (highlighting ambiguities in applying the "relatively permanent standard" to wetlands).

The Court's narrowed WOTUS definition will chill agency efforts to expand the reach of the CWA programs to isolated, ephemeral and not clearly connected lakes and streams. This will affect landowners and industries subject to various programs, including those that regulate discharges of dredge and fill material (Section 404), states' certification of permit decisions authorizing such discharges (Section 401), discharges of stormwater and wastewater (Section 402), as well as prevention and cleanup of oil spills and other hazardous substances (Section 311), and application of federal water quality standards (Section 303).

Despite the potential chill at the federal level, states maintain authority to regulate waters course more broadly than EPA. Whether they will do this prior to further EPA guidance or rule revision remains to be seen.

Stinson attorneys will be closely following regulatory developments and are prepared to help you navigate the shifting regulatory landscape.

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¹ The 27 states are: Alabama, Alaska, Arkansas, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, New Hampshire, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia and Wyoming.

CONTACTS

Brittany Barrientos

Aimee Guzman Davenport

Andrew W. Davis

Claire M. Williams

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