

U.S. Supreme Court Issues Ruling in *Sackett v. EPA* Overruling EPA’s “Waters of the United States” Rule

On May 25, the Court issued a ruling adopting late Justice Scalia’s “continuous surface connection” test for determining jurisdictional waters under the Clean Water Act.

The Court’s ruling in *Sackett* is a decisive shift with major implications for property owners and developers, with the Court significantly narrowing the definition from U.S. EPA’s January 8, 2023 “WOTUS” Rule and agency practice. The core development is that, in determining whether a wetland is jurisdictional under the Clean Water Act, the Court has adopted the “continuous surface connection” test, concluding:

[T]he CWA extends to only those wetlands that are “as a practical matter indistinguishable from waters of the United States.” This requires the party asserting jurisdiction over adjacent wetlands to establish “first, that the adjacent [body of water constitutes] ... ‘water[s] 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.”

In doing so, the Court adopted the test that late Justice Scalia set forth in the plurality opinion to the 2006 *Rapanos* case, which was issued along with the broader “significant nexus” standard set forth in a concurrence opinion by Justice Kennedy. Under the latter standard, an adjacent wetland would be deemed jurisdictional where “the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of those waters.” As the Court noted in the *Sackett* decision, agency “field agents brought nearly all waters and wetlands under the risk of CWA jurisdiction by engaging in fact-intensive ‘significant-nexus’ determinations that turned on a lengthy list of hydrological and ecological factors.” Moreover, property owners were left confused regarding the ambiguous and overly technical evaluation necessary to determine whether their projects impact jurisdictional wetlands.

The *Sackett* decision effectively dispenses with the significant nexus test and narrows the standard for wetlands to fall within the jurisdiction of the Clean Water Act upon a more common sense and discernable approach based upon surface connection to navigable waters. As a result, EPA will be forced to reconsider its WOTUS Rule, which has been stayed in 26 states and relies upon the significant nexus test. Already, calls are being issued for EPA to withdraw the rule.

One significant implication of the decision will be the status of existing jurisdictional determinations, particularly for those who have not yet applied for permits from the Army Corps and/or corresponding state agencies. Applicants may now be in a position to reopen decision-making that utilized the significant nexus test and can now present a strong basis to challenge overbroad agency determinations. Although this may have implications for project scheduling and costs, the approach may offer significant relief

regarding permitting obligations and the need to provide wetlands mitigation in connection with affected projects.

Following two prior client alerts in as many months, this alert continues Roetzel's coverage of several major developments in recent months regarding the definition of "waters of the United States" under the Clean Water Act. We will continue to monitor WOTUS-related developments and be prepared to advise clients as to the legal strategy issues affecting their projects post-*Sackett*.

For more information, please feel free to contact any of Roetzel's EHS professionals.

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