



## Supreme Court Limits Reach of Clean Water Act Over Wetlands, Leaving Questions for Owners and Developers

In a landmark decision issued May 25, 2023, the U.S. Supreme Court jettisoned a judicial rule on the scope of the Clean Water Act's applicability that had been used to justify an expansive exercise of authority by federal agencies regulating certain wetlands under the Act. The [ruling](#) significantly curtails the jurisdiction of the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers under the Act, precluding their regulation of wetlands that are not directly connected to surface water bodies. The ruling addresses what constitutes "the waters of the United States" (WOTUS) to which the Act applies – a topic that has been the subject of much agency rulemaking, litigation, and controversy in recent years.

The Supreme Court's much-anticipated decision in the return of *Sackett v. Environmental Protection Agency (Sacket II)* to its docket rejected the currently prevailing standard for what constitutes WOTUS and delivered a new test. The Court unanimously reversed the ruling of the Ninth Circuit Court of Appeals, which had held the subject property in Idaho was a wetland subject to the EPA's protection because the property had a "significant nexus" to a nearby lake and tributaries. In this part of the ruling, the Supreme Court unanimously rejected the "significant nexus" test for Clean Water Act wetlands jurisdiction that Justice Anthony Kennedy articulated in his concurring opinion in the seminal *Rapanos v. United States* decision, a 2006 Supreme Court ruling that was the Court's last word on wetlands as "waters of the United States." Since *Rapanos*, the EPA has incorporated the "significant nexus" test into at least two WOTUS rulemaking proceedings and into guidance documents.

At issue in *Sackett II* was whether the EPA and the Corps of Engineers can regulate as “adjacent wetlands” those properties that, when taken together with other similarly situated lands, “significantly affect” – but are physically separated from – traditional water bodies such as oceans, lakes, rivers, and streams. Although the Court’s justices agreed that the “significant nexus” test does not determine whether wetlands are “waters of the United States,” the Court sharply divided five to four on where the line of demarcation lies for jurisdiction for “adjacent” wetlands. The Court’s majority held that the Clean Water Act extends only to those wetlands that are contiguous with relatively permanent and standing water bodies such that the wetlands are indistinguishable from those waters, while the concurring opinions by Justices Brett Kavanaugh and Elena Kagan would also find jurisdiction lies where wetlands are physically separated from but “nearby” such water bodies. In writing for the majority, Justice Samuel Alito adopted many of the principles set out in Justice Antonin Scalia’s *Rapanos* plurality opinion. The majority was critical of the EPA’s claim of potentially broad jurisdiction over wetlands without a continuous surface connection to water bodies and found it difficult to square the EPA’s assertion of expansive jurisdiction with the Act’s express policy of protecting states’ authority to regulate the development and use of land and water resources.

The Court’s majority opinion also conducts a detailed review of the winding (and some would say, tortured) history of the WOTUS definition over the years, the multiple regulations on this topic, the guidance documents issued by the agencies, and the practical challenges that have faced property owners and project developers in seeking clarity on their ability to develop projects and obtain permits.

Although many property owners and project developers will welcome the Court’s new restrictions on the agencies’ wetlands jurisdiction, uncertainties remain.

- The effectiveness of previously issued National Pollutant Discharge Elimination System (NPDES) permits and agencies’ authority regarding ephemeral streams. Although the Court says jurisdictional wetlands require a surface connection to water bodies, the Court also states that such connections may be temporarily severed (for example, during low tide or dry spells). This concession, however, is less significant than what it qualifies – i.e., the water bodies to which these wetlands are appended are only those relatively permanent, standing, or continuously flowing water bodies commonly referred to as streams, oceans,

ivers, and lakes. Not only does this raise the specter that the agencies have no authority to regulate discharges of pollutants to wetlands that are no longer WOTUS under *Sackett II*, but it brings into question their authority to regulate discharges to arroyos, dry washes, and ephemeral streams.

- The effectiveness of the EPA's regulations defining "waters of the United States." The EPA promulgated a new set of regulations in January 2023 defining WOTUS that uses the "significant nexus" test now rejected by the Supreme Court. While this rule has been enjoined in approximately half of the states, it is final and effective in the rest of the nation. This rulemaking essentially codified the "significant nexus" test that the Court rejected in *Sackett II*. Those provisions relating to wetlands are likely void. Whether the "significant nexus" provisions relating to ephemeral tributaries suffer the same fate likely will play out differently in the lawsuits presenting those challenges and in the follow-up rulemaking that the EPA and the Corps will need to undertake to incorporate the Court's *Sackett II* ruling into a revised definition of WOTUS.
- How the Corps will implement the requirements of the *Sackett II* ruling into its jurisdictional manuals and field practices. Many project developers seek to address the uncertainties about wetlands jurisdiction by seeking early jurisdictional determinations from the Corps. How the Corps will react to this ruling, make changes in response, and make individual project jurisdictional decisions in the field remain to be seen.
- The effectiveness of previously issued Corps permits. The Corps recently has refused to issue permits for the discharge of dredged and fill material that are premised on jurisdictional determinations made during the Trump administration, many of which found no jurisdiction on the basis of the same principles now adopted in *Sackett II*. Not only does *Sackett II* appear to render untenable the Corps' refusal to issue permits based on those Trump-era jurisdictional determinations, this new ruling also suggests permits issued on the basis of "significant nexus" considerations are legally infirm.
- Water quality and flood control impacts. The concurring opinions identify potentially adverse impacts to flood control projects and water quality as a result of the Court's ruling.
- This decision does not itself control states' laws that may separately regulate wetlands development, and such state laws could address the potential water quality and flood control impacts identified by Justices Kavanaugh and Kagan.

The state of Colorado, for example, issued a statement on the same day as the *Sackett II* decision saying the state already has developed a draft policy to more broadly protect Colorado wetlands under Colorado law.

- Development projects already in the pipeline that implicate wetlands but without the requisite connections to water bodies specified in *Sackett II* will need to reevaluate the development plans and strategies in light of this ruling.

As always with WOTUS, the agencies' implementation will be the key to this decision's effect with particular projects and in the field. Rulemaking and attendant litigation are certain to follow in the coming months and years. Property owners and project developers will want to consult with their lawyers and project advisers about the ruling's impacts on future development plans and ongoing strategies.

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