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The EPA and Army Amend "Waters of the United States" Rule in Response to the Supreme Court's Sackett II Ruling

The U.S. Environmental Protection Agency (EPA) and the Army Corps of Engineers have issued a final regulation amending their 2023 Clean Water Act definition of "Waters of the United States" (WOTUS) in response to the U.S. Supreme Court's recent decision in *Sackett II.* EPA's press release discussing this development is available here.

Sackett II was decided in May and struck down the agencies' previous definition asserting authority over properties with a "significant nexus" to wetlands and streams. The Supreme Court held the agencies exceeded the authority granted to them by Congress under the Clean Water Act.

In the EPA's August 29 news release announcing this new rule, the EPA said, "The amendments issued today are limited and change only parts of the 2023 rule that are invalid under the *Sackett v. EPA* [*Sackett II*] decision. For example, today's final rule removes the significant nexus test from consideration when identifying tributaries and other waters as federally protected." In the new definition of WOTUS, the agencies are removing references to waters that "significantly affect" interstate waters, references to certain intrastate wetlands and streams, and a detailed definition of "significantly affect." The agencies said that to be covered under the Clean Water Act, "adjacent wetlands" now must have a continuous surface connection to other covered waters.

As always, the agencies' applications of these terms in specific situations and implementations in the field will be the keys for projects potentially affected.

Today's rule was issued without customary notice-and-comment rulemaking proceedings, citing emergency authority and the need to conform the 2023 definition to the *Sackett II* decision. The EPA said this new definition and rule will become effective when published in the Federal Register.

In announcing this new rule, the EPA says the Army Corps of Engineers will resume issuing jurisdictional determinations for projects under the Clean Water Act. Jurisdictional determinations sometimes can help provide certainty to project owners and developers whose projects may affect wetlands, streams, and other waters subject to Clean Water Act jurisdiction.

The EPA announced it will hold a webinar on September 12 to discuss the new rule, but registration is required and attendance is limited. The webinar will be recorded and posted to the EPA's website for later viewing.

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