

# KIRKLAND & ELLIS

Kirkland Alert

## Seeking Clarity, the U.S. Supreme Court Narrows Clean Water Act Jurisdiction over Wetlands in *Sackett v. EPA*

07 June 2023

On May 25, 2023, the Supreme Court of the United States (“Supreme Court” or “Court”) issued its latest decision interpreting federal jurisdiction under the Clean Water Act (“CWA” or “Act”) in *Sackett v. EPA*,<sup>1</sup> in which the Court narrowed the geographical scope of federal jurisdiction over wetlands.

The dispute at issue in *Sackett* centers on the statutory definition of “navigable waters” under the CWA. Specifically, the CWA prohibits unauthorized discharges of pollutants to “navigable waters,” which are defined by statute as “the waters of the United States, including the territorial seas.” The CWA provides for civil and criminal penalties for any action that pollutes jurisdictional waters or otherwise violates permits required under the CWA, which can take months or sometimes years to obtain at significant cost. As such, the scope of federal jurisdiction in this area is important, particularly for property owners and developers. Cognizant of the various groups impacted by the CWA’s reach, the courts and the two agencies responsible for enforcing the CWA, the U.S. Environmental Protection Agency (“EPA”) and the U.S. Army Corps of Engineers (“Corps”), have long struggled to reach a consensus on the definition of “waters of the United States” (“WOTUS”) and thus the geographic reach of federal CWA jurisdiction. This has resulted in numerous rulemaking efforts, which have tried to incorporate the Court’s past decisions, to create a practical and lasting definition of WOTUS. Each of these rulemakings has been subject to litigation challenging the rules, and injunctions preventing the application of each rule in various jurisdictions have led to a patchwork of applicability and decades-long uncertainty across the nation.

This *Alert* will provide a brief history of these past rulemakings and summarize the Court’s holding in *Sackett* – that the proper test for determining whether a wetland is a jurisdictional WOTUS is whether the wetland has a continuous surface connection to a

relatively permanent water that is connected to a navigable water – and what the *Sackett* decision may mean for the future of CWA jurisdiction.

## Evolution of the WOTUS Definition

Since 1973, shortly after the CWA was enacted, EPA and the Corps have adopted a series of rules seeking to define their jurisdiction, which is intrinsically entwined with the WOTUS definition – with definitions trending toward including “traditional navigable waters,” related tributaries, and their adjacent wetlands, as well as waters used in interstate commerce and isolated intrastate waterbodies whose degradation or destruction “could affect interstate commerce.”<sup>2</sup> Disagreement over interpretation of the various definitions and the scope of federal CWA jurisdiction has persisted, culminating in multiple Supreme Court cases addressing the issue. From the 1980s onward, EPA and the Corps’ attempts to establish a WOTUS definition by rulemaking have paralleled, and often drawn from, these Supreme Court decisions, including the most prominent case, *Rapanos v. United States*, in 2006.<sup>3</sup>

### *Rapanos* and the “Significant Nexus” Test

In *Rapanos*, a fractured Court offered two definitional tests – neither of which were controlling – to classify WOTUS regulated under the CWA. The narrower test, adopted in the four-Justice plurality opinion, rested on Justice Scalia’s contention that granting agencies authority to regulate intermittent flows would impinge on powers traditionally belonging to the states. Thus, lacking a “‘clear and manifest’ statement from Congress to authorize an unprecedented intrusion into traditional state authority,” – which we note echoes the “major questions” language requiring “clear congressional authorization” required for EPA to limit and shift emissions in the Clean Air Act context, analyzed in our prior [Alert](#) – the plurality agreed that WOTUS were limited to “relatively permanent, standing or continuously flowing bodies of water” connected to navigable rivers, and connected wetlands, and excluded channels with “merely intermittent or ephemeral flow.”<sup>4</sup> The second, more expansive test, set forth in Justice Kennedy’s solo concurring opinion, would extend CWA jurisdiction to any wetland with a “significant nexus” to navigable waters.<sup>5</sup> Under Justice Kennedy’s formulation, wetlands satisfied the nexus requirement if they significantly affected the hydrological or ecological water quality of traditionally navigable waters.<sup>6</sup> Since *Rapanos*, courts have generally applied both tests, but the WOTUS rules promulgated under the Obama and Biden administrations and many courts have predominantly relied on the “significant nexus” test.

# Post-*Rapanos* WOTUS Rule Changes

## *2015 Clean Water Rule*

In 2015, under the Obama administration, EPA and the Corps adopted the Clean Water Rule in part to codify Justice Kennedy’s significant nexus test from *Rapanos* into law.<sup>7</sup> Consistent with past definitions, the Clean Water Rule defined WOTUS to include certain waters that are “jurisdictional by rule,” such as traditional navigable waters, interstate waters, territorial seas, impoundments of such waters, and tributaries that contribute to, or adjacent waters that are contiguous with, the aforementioned waterbodies.<sup>8</sup> The Clean Water Rule also adopted and clarified the significant nexus test from *Rapanos* and incorporated earlier Supreme Court decisions,<sup>9</sup> such that the new WOTUS definition included any waters or wetlands which significantly affect the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, or the territorial seas. The Clean Water Rule was subject to numerous legal challenges and, in October 2015, the Sixth Circuit issued a nationwide stay of the rule. The nationwide stay was lifted in February 2018, but later injunctions by other federal courts prevented the rule from taking effect in 28 states.

## *2020 Navigable Waters Protection Rule*

In September 2019, under the Trump administration, EPA and the Corps repealed the Clean Water Rule and recodified the pre-2015 WOTUS regulations. Shortly thereafter, in January 2020, the agencies finalized the Navigable Waters Protection Rule (“NWPR”), which cut the significant nexus test and limited WOTUS to traditional navigable waterbodies and connected “relatively permanent, standing or continuously flowing bodies of water,” similar to Justice Scalia’s test in *Rapanos*.<sup>10</sup> Both the repeal rule and the NWPR were subject to numerous legal challenges and the NWPR was vacated in August 2021.

## *2023 WOTUS Rule*

The latest rule defining WOTUS was finalized in January 2023.<sup>11</sup> The 2023 WOTUS rule largely reinstated the pre-2015 definitions with some refinements to incorporate Supreme Court case law, including a standard that extends CWA jurisdiction to waters that meet either the *Rapanos* plurality’s “relatively permanent” test or the “significant nexus” test for tributaries, streams, wetlands, and intrastate lakes and ponds. The 2023 rule also required that protected wetlands be “reasonably close such that the wetland can modulate water quantity or quality” in another jurisdictional waterway. In

April 2023, President Biden vetoed Congress' disapproval of the 2023 rule under the Congressional Review Act; however, the rule has been preliminarily enjoined or stayed in at least 27 states as part of ongoing litigation.

## *Sackett v. EPA*

### *Background*

The Sacketts battled EPA for over 15 years to build a house on an empty lot near Priest Lake in Idaho. After commencing backfilling activities on their land, EPA issued a stop order in 2007 stating that the Sackett's land contained wetlands protected under the CWA and therefore required a permit. EPA reasoned that the wetlands on the Sacketts' lot fed into a non-navigable creek that led to Priest Lake, a navigable water, and the introduction of backfill materials in the wetlands were prohibited under the CWA. The Sacketts sued EPA in 2008, arguing that their property was not a wetland and challenging EPA's interpretation of WOTUS. The Ninth Circuit affirmed the district court's opinion relying on Justice Kennedy's "significant nexus" test in *Rapanos*, holding that the wetlands on the Sacketts' property satisfied that standard. The Sacketts appealed the Ninth Circuit's ruling to the Supreme Court, which in 2012 held that the Sacketts had the right to challenge EPA's order and sent the case back to the lower courts.<sup>12</sup> After losing in the lower courts on the merits, the Sacketts returned to the Supreme Court asserting that the wetlands on their property did not meet the WOTUS definition under the CWA. In 2022, the Court heard oral arguments in *Sackett*, and considered the following question: What is the proper test to determine whether wetlands are WOTUS under the CWA?

### *The "Relatively Permanent/Continuous Surface Connection" Test*

The Court's majority opinion in *Sackett*, written by Justice Alito and joined by four other Justices, reversed the Ninth Circuit's ruling and rejected the "significant nexus" standard, opting instead for a narrower definition of WOTUS.<sup>13</sup> The Court held that a wetland is only a WOTUS if it can be established that: (1) an adjacent body of water is a relatively permanent body of water connected to traditional interstate navigable waters, and (2) the wetland has a continuous surface connection with that water, making it difficult to distinguish where the water ends and the wetland begins. Although the Court did "acknowledge that temporary interruptions in surface connection may sometimes occur because of phenomena like low tides or dry spells," it nevertheless concluded that the "wetlands on the Sacketts' property are

distinguishable from any possibly covered waters.”<sup>14</sup> None of the nine Justices supported retaining the “significant nexus” standard. According to Justice Alito, the “significant nexus” test is “far from clear” and “provides little notice to landowners of their obligations under the Clean Water Act” who could face “severe criminal sanctions for even negligent violations.”<sup>15</sup>

In concurring in the judgment that the Sackett’s wetlands were not WOTUS, four Justices found the “relatively permanent” test “overly narrow and inconsistent with the text” of the CWA, which extends coverage to “adjacent” wetlands, including those that are near or close to, but not physically adjoining, navigable water.<sup>16</sup> Without offering a separate test, Justice Kavanaugh explained that the statutory text of the CWA explicitly covers adjacent wetlands and defines a wetland as adjacent if it is (1) “contiguous to or bordering” a WOTUS, or (2) separated from a WOTUS “only by a man-made dike or barrier, natural river berm, beach dune or the like.”<sup>17</sup> “By narrowing the [CWA’s] coverage of wetlands to only adjoining wetlands, the Court’s new test will leave some long-regulated adjacent wetlands no longer covered by the CWA, with significant repercussions for water quality and flood control throughout the United States.”<sup>18</sup>

## Impact of *Sackett* on 2023 WOTUS Rule and Beyond

Although the 2023 WOTUS rule technically went into effect in March 2023, legal challenges stymied its implementation even prior to the *Sackett* decision. By mid-April 2023, the rule was preliminarily enjoined in 27 states. The *Sackett* decision substantially undercuts the Biden administration’s 2023 rule and excludes categories of wetlands that rely on the “significant nexus” test to establish jurisdiction, as are currently covered under the 2023 WOTUS rule. In the wake of the *Sackett* decision and several calls to withdraw the 2023 rule, President Biden said that the U.S. Department of Justice and relevant agencies (such as EPA and the Corps) are currently reviewing the decision and will use “every legal authority” available to address potential changes resulting from the decision, perhaps including additional rulemaking.<sup>19</sup> The EPA’s Unified Agenda indicates that EPA and the Corps will issue a proposed rulemaking that addresses the re-evaluation of the WOTUS definition in November 2023, with a final rulemaking expected in or around July 2024.

It is possible that future WOTUS rulemakings may explore distance-based requirements similar to those discussed during oral argument for *Sackett* that could provide the much-needed clarity and certainty the Court found lacking in prior rules and tests. For example, Justice Sotomayor asked whether a new, distance-based test could be “precise and less open-ended” than adjacency or significant nexus tests, as

used in the 2023 rule.<sup>20</sup> Defining a geographic distance from jurisdictional waters could face legal challenges on the basis that *Sackett* essentially provides that there can be no distance between a covered water and a jurisdictional wetland, and that such set distances are arbitrary and not aligned with the prevailing WOTUS standard. As such, going forward, EPA and the Corps may encounter difficulties in defending distance-based requirements established via rulemaking – as exemplified by challenges to the 2015 Clean Water Rule, which defined WOTUS to include areas found within 100 feet of the ordinary high water mark, or within the 100-year floodplain, and not more than 1,500 feet from the ordinary high water mark.

Some estimate that the *Sackett* decision will result in the removal of almost 90 million acres of wetlands from CWA jurisdiction.<sup>21</sup> Practically speaking, this will leave these wetlands subject to state regulation under state water quality laws, such that states could draft their own permitting requirements as state law allows, or states could elect not to do so at all. Property owners, developers and other organizations with an interest in property development have welcomed the *Sackett* decision in hopes that it will ease the regulatory burden of certain projects, as many previously jurisdictional wetlands will no longer require costly and time-intensive CWA permits. While EPA and the Corps confirmed they are currently interpreting WOTUS consistent with the *Sackett* decision, the agencies have paused review of all requests for approved jurisdictional determinations while they review the decision and determine next steps.<sup>22</sup>

Although *Sackett* sought to clarify CWA jurisdiction, it does not address or resolve all issues or concerns related to the definition of – and federal agencies' regulatory power over – the waters of the United States. As such, we expect future rulemakings and litigation will continue to attempt to refine CWA jurisdiction going forward, as foreshadowed by the majority and concurring opinions. For example, the agencies, states and the regulated community must address the issue of adjacent but not adjoining wetlands and how regulation will affect previously jurisdictional wetlands that are separated by man-made structures, such as a berm or dike. In addition, we are likely to see efforts to further define and clarify terms in the new test, such as what constitutes a “relatively permanent” or “continuously flowing” water, and how to determine if a wetland has a “continuous” surface water connection and whether it is sufficiently “indistinguishable” from covered waters. The Kirkland environmental team advises clients on implementation of CWA and other rulemakings and the impact of Supreme Court decisions on businesses, and will continue to monitor related developments, including the Court's upcoming review of *Chevron* deference given to federal agencies.

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1. 598 U.S. --- (2023). ↩

2. Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. 37053 (June 29, 2015) (codified at 33 C.F.R. Part 328), <https://www.federalregister.gov/documents/2015/06/29/2015-13435/clean-water-rule-definition-of-waters-of-the-united-states>; see also 33 C.F.R. § 328.3 and 40 C.F.R. § 122.2 (showing existing regulations defining WOTUS prior to 2015, as last codified in 1986). ↵
3. *Rapanos v. United States*, 547 U.S. 715 (2006). ↵
4. *Id.* at 733–34. ↵
5. *Id.* at 767 (Kennedy, J., concurring). ↵
6. *Id.* at 780 (Kennedy, J., concurring). ↵
7. See Clean Water Rule, *supra* note 2. ↵
8. Clean Water Rule, *supra* note 2, at Section II. ↵
9. As cited in the text of the Clean Water Rule: *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985); *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001); *Rapanos v. United States*, 547 U.S. 715 (2006). ↵
10. Definition of “Waters of the United States” – Recodification of Pre-Existing Rules, 84 FR 56626 (Oct. 22, 2019), <https://www.federalregister.gov/documents/2019/10/22/2019-20550/definition-of-waters-of-the-united-states-recodification-of-pre-existing-rules>. ↵
11. Revised Definition of “Waters of the United States” Rule, 88 Fed. Reg. 3004 (Jan. 18, 2023) (codified at 33 C.F.R. Part 328), <https://www.govinfo.gov/content/pkg/FR-2023-01-18/pdf/2022-28595.pdf>. ↵
12. *Sackett v. EPA*, 566 U.S. 120, 131 (2012). ↵
13. *Sackett v. EPA*, 598 U.S. --- (2023). ↵
14. *Id.* at 21, 27. ↵
15. *Id.* at 24–25. ↵
16. *Id.* at 12 (Kavanaugh, J., concurring in judgment). ↵
17. *Id.* at 2 (Kavanaugh, J., concurring in judgment). ↵

18. *Id.* (Kavanaugh, J., concurring in judgment). ↵

19. The White House, Statement from President Joe Biden on Supreme Court Decision in *Sackett v. EPA* (May 25, 2023), <https://www.whitehouse.gov/briefing-room/statements-releases/2023/05/25/statement-from-president-joe-biden-on-supreme-court-decision-in-sackett-v-epa/>. ↵

20. Transcript of Oral Argument at 92, *Sackett v. EPA*, 598 U.S. --- (2023) (No. 21-454), [https://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/2022/21-454\\_8m59.pdf](https://www.supremecourt.gov/oral_arguments/argument_transcripts/2022/21-454_8m59.pdf). ↵

21. Earthjustice, Supreme Court Weakens Clean Water Act Protections (May 25, 2023), <https://earthjustice.org/press/2023/supreme-court-weakens-clean-water-act-protections>. ↵

22. See U.S. Army Corps of Engineers, Announcements, Supreme Court Ruling in *Sackett v. Environmental Protection Agency* (May 26, 2023), <https://www.usace.army.mil/Media/Announcements/Article/3409141/26-may-2023-supreme-court-ruling-in-sackett-v-environmental-protection-agency/>. ↵

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# Related Services

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## Suggested Reading

- 29 April 2024 Kirkland Alert PFAS Update: EPA Designates PFOA and PFOS as Hazardous Substances Under CERCLA
- 16 April 2024 Kirkland Alert PFAS Update: EPA Announces its First Enforceable and Final National Drinking Water Standards for Certain PFAS
- 15 December 2023 Kirkland Alert EPA Finalizes Long-Awaited, Extensive Rule Targeting Methane Emissions in Oil and Natural Gas Operations

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