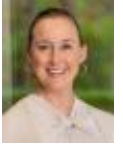


# WOTUS Whiplash 4.3: The Revision to the Revised Definition of 'Waters of the United States'

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**The third major development of 2023 for defining 'Waters of the United States' ('WOTUS') has arrived.**

*First*, in early 2023, the United States Environmental Protection Agency ("EPA") and the United States Army Corps of Engineers ("USACE") (together, the "Agencies") revised the definition of "Waters of the United States" (the "2023 Rule"). This definition controls which water

resources qualify for federal protection under the Clean Water Act ("CWA") (see WOTUS Whiplash 4.0 for a description of the 2023 Rule). *Second*, in May, the United States Supreme Court released its *Sackett v. EPA* decision. *Third* (and likely the final WOTUS milestone of the year), the Agencies recently issued yet another revised WOTUS definition in light of *Sackett*. This article breaks down the Supreme Court's impactful *Sackett* decision, the Agencies' corresponding 2023 Rule revision, and the consequences of such changes for states like North Carolina – which is simultaneously undergoing state environmental statutory changes.

## **The Regulatory Landscape Pre-*Sackett***

Before *Sackett*, the Supreme Court's *Rapanos* decision controlled whether wetlands separated from a recognized WOTUS by a natural or man-made barrier fell under CWA jurisdiction. If they did, impacts to those wetlands required a permit from the USACE under Section 404 of the CWA. In *Rapanos*, the Court failed to reach a coherent majority decision. Justice Scalia drafted the four-justice plurality opinion, holding that WOTUS included: (1) only those waters that are "relatively permanent, standing, or continuous[ly] flowing" such as streams, rivers, and lakes; and (2) only those wetlands that share a continuous surface connection with such waters. But Justice Kennedy, who cast the deciding vote in *Rapanos*, created a different test. This test, which became the most commonly cited rule for WOTUS, assessed whether a wetland possessed a "significant nexus" to a recognized WOTUS. This "significant nexus" test extended CWA protections to wetlands that "either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters . . . ."

In addition, pre-*Sackett*, the Agencies adopted WOTUS definitions in various rules, manuals and policies that, like Justice Kennedy's "significant nexus" test, considered "adjacent wetlands" to be jurisdictional—including those that are "separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like." When the Agencies issued the 2023 Rule, they basically combined Scalia's *Rapanos* approach (putting relatively permanent tributaries and streams back under federal jurisdiction

through continuous surface connections) with Kennedy's *Rapanos* approach (applying the "significant nexus" test to non-navigable tributaries and adjacent wetlands). The Agencies published the 2023 Rule knowing that the Supreme Court would soon thereafter issue an opinion in *Sackett*, which was argued in October 2022.

### ***Sackett v. EPA***

The Sacketts sued the EPA in 2008 over whether they had violated the CWA by backfilling a wetland on their property without a Section 404 permit from USACE. The EPA argued that this wetland shared a significant nexus with Priest Lake, a WOTUS separated from the Sacketts' property by a 30-foot road. On May 25, 2023, a five-justice majority issued its opinion in *Sackett*, which greatly limited federal CWA jurisdiction over wetlands nationwide. The Court found that the Agencies' rules were inconsistent with the CWA's text and structure and held that the CWA extends only to 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." Writing for the majority, Justice Alito concluded that "the CWA's use of 'waters' encompasses 'only those relatively permanent, standing or continuously flowing bodies of water 'forming geographic[al] features' that are described in ordinary parlance as 'streams, oceans, rivers, and lakes.'"

Under the 2023 Rule, which was not at issue in *Sackett*, wetlands without a continuous surface connection to a body of water could still be federally protected WOTUS if the wetland had a "significant nexus" to surface waters. But *Sackett* rejected the "significant nexus" test in favor of defining covered wetlands as those that are wet or "wet-lands." Thus, any WOTUS definition using "adjacency" or "adjoining" to define CWA-protected waters is irrelevant. Instead, there must now be a continuous surface water connection between "wet lands" and the open, navigable-in-fact WOTUS for the federal government to claim jurisdiction. Wetlands that qualify as WOTUS must be "indistinguishable" from WOTUS and "have a continuous surface connection to bodies that are" WOTUS.

### **The Regulatory Landscape Post-*Sackett***

The Agencies responded to *Sackett* by announcing they would develop new guidelines for determining federal jurisdiction by September 1, 2023. And they met that unprecedented deadline, taking a scalpel to the 2023 Rule to conform it to *Sackett* (the "Sackett Rule"). The Agencies removed from the 2023 Rule references to the "significant nexus" test, including deleting from the WOTUS definition interstate wetlands and those tributaries, streams, and wetlands containing a significant nexus to other WOTUS. They also redefined "adjacent" within the 2023 Rule to no longer include those wetlands separated from WOTUS by certain geographic features and limiting the meaning of "adjacent" to those waters "having a continuous surface connection" to another.

Despite these precise revisions, the Agencies did not define a "continuous surface connection" or a "relatively permanent" body of water under the Sackett Rule. Thus, lawyers and consultants must make this initial interpretation by picking through the preamble to the 2023 Rule. And they must wait to see how the Agencies, primarily the USACE, implement the Sackett Rule to wetlands in the field.

### **Challenges for State Law and Regulation**

Although the *Sackett* Court removed federal protection from wetlands, it acknowledged that the states could provide that protection. Justice Alito pointedly noted that "[r]egulation of land and water use lies at the core of traditional state authority"; because the CWA anticipates a partnership between the states and the federal government, the states "can and will continue to exercise their primary authority to combat water pollution by regulating land and water use."

And North Carolina exercised its authority to provide greater state protection for its wetlands until June 27, 2023. On that date, the North Carolina General Assembly overrode a gubernatorial veto to pass Senate Bill 582, entitled "An Act to Make Various Changes to the Agricultural and Wastewater Laws of the State" (the "2023 NC Farm Act"). The 2023 NC Farm Act restricts the state definition of "wetlands" to those "that are waters of the United States as defined by 33 C.F.R. § 328.3 and 40 C.F.R. § 230.3," *i.e.*, only those WOTUS regulated by the Agencies. The General Assembly directed the Environmental Management Commission ("EMC"), the state rule-making authority, to implement this definition of "wetlands" until the EMC formally adopts a permanent rule to amend the existing definition of wetlands. Until then, wetlands in North Carolina are only those the federal government recognizes and protects as WOTUS, unless a state statute (for example, the Coastal Area Management Act) specifically provides otherwise.

The combination of the *Sackett* opinion, the 2023 NC Farm Act, and the Sackett Rule cast doubt as to whether the state's isolated wetlands rules remained in effect, despite having a separate regulatory definition that was not by the 2023 Farm Act. The EMC Chair requested the North Carolina Department of Environmental Quality ("NCDEQ") to advise on the assimilation of federal and state definitions. At the EMC's meeting in September, the NCDEQ Division of Water Resources ("DWR") provided an update to the regulated community. It also issued a public notice regarding the implementation of the revised definition of wetlands in the 2023 NC Farm Act, including the following:

- Where the USACE and a 404 Permit applicant agree that all features on the property are potentially jurisdictional, DWR will process the related state certification required by Section 401 of the CWA.
- Where there are questions regarding the jurisdictional status of the wetlands, the USACE will evaluate those wetlands under the *Sackett* Rule. DWR will move forward on these projects once it has a decision from USACE.
- Isolated wetlands and non-jurisdictional wetland permits will not be necessary for properties that have received Approved Jurisdictional Determinations from the USACE confirming the wetlands are not under the *Sackett* Rule.

Questions remain as to the specifics of North Carolina's regulatory jurisdiction of wetlands as State waters. The 2023 NC Farm Bill was introduced before the *Sackett* opinion was released. And given the breadth of *Sackett*, the Bill's proponents may not have intended the resulting consequences. The filling of unregulated wetlands may result in reduced floodwater mitigation and stormwater filtration, affecting surface water quality and other ecological functions. Counties bearing the brunt of storm impacts increasingly caused by climate change have made gains in resiliency planning. But those gains may be reduced or eliminated if policymakers do not address the potential loss of wetlands in those counties.

### **Navigating Uncharted WOTUS**

Despite the uncertainty cast over wetlands by *Sackett*, the 2023 NC Farm Act, and the Sackett Rule, it's important to remember that the CWA has four other categories of protected waters. And several state laws continue to apply to activities impacting wetlands even if CWA Section 404 permit requirements do not. These include the Sedimentation and Pollution Control Act with respect to enforcement actions for land-disturbing activities and the Coastal Area Management Act for development activities in coastal counties. Since the 2023 Rule was not before the *Sackett* Court, the conforming Sackett Rule may be exposed to challenges. Expect to see more guidance from the Agencies as the USACE makes jurisdictional determinations in the field. Landowners will need to identify the water features on their property to understand what federal and state regulatory programs are at play beyond Section 404 of the CWA. Strategies to manage uncertainty include working with a professional team to consider: preliminary versus approved jurisdictional determinations; state and local requirements; avoidance opportunities; and development plans with built-in flexibility.

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