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Is The WOTUS Carousel Finally Stopping Post-Sackett?

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On July 12, 2023, Shortly after the Supreme Court's ruling in *Sackett v. Environmental Protection Agency,* EPA and the Department of the Army issued a letter advising the ranking member of the Senate's Committee on Environment and Public Works, Senator Capito, that the agencies were in the process of "developing a rule to amend the final 'Revised Definition of Waters of the United States." The agencies committed to a definition "consistent with the U.S. Supreme Court's May 25, 2023 decision" in *Sackett*. The agencies had no intention of engaging in a protracted process and advised that the new definition would be issued by September 1, 2023.

Under the wire, EPA and the Corps delivered. EPA released the Final Rule Amendments on August 29, 2023, and provided a red-line markup of the new definition. Among other changes, the revised rule removes portions of the existing definition of Waters of the United States, 33 U.S. C. Sec. 328.3, as set forth below:

Deleted Aquatic Sites: interstate wetlands, intermittent tributaries regardless of whether the tributary satisfies the "significant affects test," [1] wetlands where jurisdiction was previously asserted based on the significant affects test, and wetlands previously labeled "adjacent" unless there is a continuous surface connection to traditional navigable waters or tributaries.

The "significant affects" test was applied by the EPA in reviewing the improvements made to the Sackett's property to conclude that the fill material placed on the property had a significant effect on the unnamed tributary located across a 30-foot road (with no surface connection) that flowed into a non-navigable creek which ultimately entered Priest Lake. EPA argued on appeal to the Supreme Court that the Sackett's property was a water of the United States because wetlands are "adjacent" when they are neighboring, regardless of any separation from other waters by dry land. The Court concluded this was

"inconsistent with the text and structure of the CWA." The Court established its own test – incorporated into the revised definition – requiring a "continuous surface connection to bodies that are 'waters of the United States.'"

Sackett provides the clearest test for jurisdictional wetlands the Supreme Court has historically offered. Previous opinions such as *SWANCC* and *Rapanos* (see here for an overview) offered vague metrics such as Justice Kennedy's "significant nexus" test which EPA and the Corps have struggled to implement evenly, resulting in contentious rulemakings and continuous litigation from all sides for years. While the *Sackett* test is simplistic, that very simplicity provides the clarity members of the regulated community have lacked for decades.

Both *Sackett* and the revised rule (which is after all just a codification of the Supreme Court's decision) have been roundly criticized by environmental groups for eliminating federal protections numerous wetlands have enjoyed for decades, but these criticisms largely ignore one of the key points of *Sackett*: many of these supposed "wetlands" were never wetlands at all– at least not within the plain meaning of the Clean Water Act. Many critics also disregard the role of state environmental regulators and their existing regulations in providing such protections. Such state regulations frequently provide wetland protections which go far beyond those of even the pre-*Sackett* WOTUS definitions.

It is unlikely *Sackett* or the revised WOTUS rule will completely halt the litigation carousel that has been turning these last few years, but the tempo and volume of the ride is likely to be significantly reduced. To be sure, those that are seeking federal permits that comply with Clean Water Act wetlands protection have not had as clear a path forward since (at least) 2015.

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[1] Analysis as to whether an aquatic site affects the chemical, physical or biological integrity of waters of the United States.