Dissecting Sackett v. EPA: Impacts of SCOTUS's Decision

By Christina D. Bonanni, Ian A. Shavitz

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On May 25, 2023, the U.S. Supreme Court (the "Court") issued its decision in *Sackett v. Environmental Protection Agency*, 598 U.S. ___ (2023) (" *Sackett*") concerning the scope of the U.S. Environmental Protection Agency's (EPA) jurisdiction to regulate wetlands under the Clean Water Act (CWA). The decision significantly narrowed EPA's jurisdictional reach and raises many questions about how the federal agencies involved—the EPA and the U.S. Army Corps of Engineers—will carry out their permitting and enforcement functions going forward.

Under the CWA, the U.S. Army Corps of Engineers and EPA have authority to regulate the discharge of pollutants to navigable waters from a point source (33 U.S.C. § 1362(12)), and the discharge of dredged or fill materials into navigable waters (33 U.S.C. § 1344). "Navigable waters" is defined as "the waters of the United States [WOTUS], including the territorial seas." (33 U.S.C. § 1362(7)). The term "waters of the United States", or WOTUS, as used in the CWA was never defined explicitly in the statute and this most recent decision in *Sackett* is the fourth time that the Court has considered this issue. As such, the jurisdictional limits of the Corps and EPA over "navigable waters" under the CWA hinge on how WOTUS is defined.

In deciding *Sackett*, the Court held that the term "waters" in "waters of the United States" refers only to

“geographical features that are described in ordinary parlance as ‘streams, oceans, rivers, and lakes’” and includes adjacent wetlands that are “indistinguishable” from the aforementioned bodies of water due to a “continuous surface connection.” Based on this, in order to assert jurisdiction over an adjacent wetland under the CWA, the Court developed a two-part test: (i) does that adjacent body of water constitute a “water of the United States” (utilizing the test of a relatively permanent body of water connected to traditionally navigable waters, which was established by Justice Antonin Scalia in the Court’s opinion in *Rapanos v. United States*, 547 U.S. 715 (2006)); and (ii) whether the wetland has a “continuous surface connection with that [relatively permanent body of water], making it difficult to determine whether the water ends and the wetland begins.”

This decision, while clarifying some of the prior ambiguity from the Court’s rulings on the question, in turn, raises many questions for the regulated community. While the *Sackett* case was making its way through the Court, the EPA and the U.S. Army Corps of Engineers issued a Final WOTUS rule, which construed the term “waters of the United States” broadly (*i.e.*, the EPA and the Corps had broad jurisdiction over wetlands) and which went into effect on March 20, 2023. The Court’s decision in *Sackett* cuts the other way and raises uncertainty for developers who were initially seeking permits under the recent rulemaking on WOTUS and now, in light of the *Sackett* decision, may find their project no longer implicates any regulated wetlands. It is likely that the Biden Administration will rewrite the Final WOTUS rule issued on March 20, 2023, to be consistent with *Sackett* and, in the meantime, we can expect the EPA and U.S. Army Corps of Engineers to issue interim guidance regarding CWA jurisdiction.

For questions regarding this Client Alert and how the *Sackett* opinion could impact project development, please contact Lippes Mathias’ Environment & Energy Team Practice Leader, Ian Shavitz at ishavitz@lippes.com or, Senior Associate, Christina Bonanni at cbonanni@lippes.com.