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MARSH MADNESS: SCOTUS NARROWS WETLANDS SUBJECT TO CLEAN WATER ACT IN FAVOR OF REGULATED INDUSTRY AND REAL ESTATE DEVELOPERS

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On May 25, 2023, the United States Supreme Court issued its long-awaited opinion in *Sackett v. U.S. Environmental Protection Agency*, diving back into a decades-long debate over the definition of "waters of the United States" (or WOTUS) under the Clean Water Act (CWA). The decision circumscribes the authority of the United States Environmental Protection Agency (EPA) and United States Army Corps of Engineers to regulate wetlands, reducing the amount of wetlands subject to CWA jurisdiction. This change will likely ease regulatory burdens on landowners, property developers, agricultural producers, and industrial dischargers whose projects or facilities have been aggressively regulated by the EPA's sweeping application of the CWA.

The decision is the latest milestone in the *Sackett* saga, which stretches back to the early 2000s, when EPA penalized Idaho landowners Michael and Chantell Sackett for backfilling a portion of their property—including areas the agency then classified as regulated wetlands—in preparation for building a home on the site.

The majority opinion, authored by Justice Samuel Alito and endorsed by four other members of the Court, attempts to clarify which wetlands are subject to regulation under the CWA—a murky area of jurisprudence that has resulted in a flood of litigation, agency action, and business uncertainty over the past several decades.

Under the new test set forth in *Sackett*, a wetland may only be regulated under the CWA if it has a "continuous surface connection" with an adjacent stream, ocean, river, lake, or body of water that constitutes a "water of the United States" (i.e., a body of water that is relatively permanent and "connected to traditional interstate navigable waters"). Applying this test, the Court found that the wetlands on the Sacketts' Idaho property—which were near a ditch that drained into a creek that ultimately emptied into a navigable, intrastate lake—were *not* regulated wetlands under the CWA. The Court's decision reversed the district court's grant of summary judgment for the EPA, which had been affirmed by the Ninth Circuit Court of Appeals.

Notably, the Court in *Sackett* unanimously rejected the more expansive "significant nexus" approach for determining the regulated status of wetlands that EPA embraced in the wake of *Rapanos v. United States*. *Rapanos* was a 2006 Supreme Court case that effectively broadened the jurisdictional scope of the CWA. Under the "significant nexus" test articulated by former Justice Anthony Kennedy in his concurrence in *Rapanos*, a wetland is regulated under the CWA where there is a "significant nexus" between the wetland and its adjacent navigable waters—i.e., where "the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity" of those waters.

The "significant nexus" test previously afforded EPA wide-ranging discretion when determining what constituted a regulated wetland. The *Sackett* opinion concluded that such a test invited the agency to engage in "fact-intensive . . . determinations that turned on a lengthy list of hydrological and ecological factors." The Court criticized EPA's expansive view of "waters of the United States," noting that, "by the EPA's own admission, almost all waters and wetlands are potentially susceptible to regulation" under the significant nexus test. The Court also expressed concerns about EPA's "unchecked definition" of WOTUS, considering the severe penalties—including criminal prosecution and steep civil fines—associated with CWA violations, which can be triggered by even "mundane activities like moving dirt."

The *Sackett* ruling is likely to significantly undermine, if not effectively reject, EPA's efforts to broaden the reach of the CWA through the agency's recent rulemaking enacting a revised definition of "waters of the United States" (effective March 20, 2023). That rule further expanded the meaning of WOTUS to include intrastate water sources that are "relatively permanent" or that meet the "significant nexus" standard—potentially extending EPA jurisdiction to isolated or ephemeral water sources. 40 C.F.R. § 120.2(a)(1)-(5). The states' reactions to the rule have been split. The rule was stayed in dozens of states and remains subject to litigation, as well as further federal rulemaking, in light of the Court's decision in *Sackett*.

The *Sackett* decision will have wide-ranging effects on regulated industry—including all things real estate, from property development to agricultural operations. For the regulated community, the decision will reduce the amount of wetlands subject to the CWA, thereby removing regulatory burdens and red tape. Further, though *Sackett* focused on application of the CWA to wetlands, a reduction of wetlands subject to regulation under the CWA and the narrowed definition of WOTUS will also reduce the scope and impact of EPA's regulations under the CWA and other federal environmental laws that impose obligations on regulated entities (e.g., permitting requirements, discharge limitations and emergency release reporting requirements which are all tied to and regulate discharges to "waters of the United States"). However, despite *Sackett's* narrowing of CWA jurisdiction, in the near term, the regulated community is likely to expend time and resources to evaluate the impact of this decision (and subsequent rulemaking) on pending projects and related requirements concerning water quality standards, discharge permits, and fill material, including

assessing whether state or local laws provide different or more expansive regulation than the federal CWA.

In the wake of *Sackett*, the CWA space will remain active and subject to further changes. Among other things:

- The *Sackett* decision will send EPA back to the drawing board to craft a new regulatory definition of "WOTUS" that more closely comports with the Court's ruling and the CWA statute. EPA's task of rulemaking is further complicated by the competing views offered in the three concurrences filed alongside the majority opinion. See EPA's statement noting its disappointment with the *Sackett* opinion.
- In the meantime, Congress has the ability (if it has the appetite) to amend the Clean Water Act to clarify or expand the law's jurisdictional scope.
- States can step in and impose more protective requirements for waters and wetlands within their borders, as the federal CWA sets only a minimum bar. Given the states' split resulting from EPA's revised WOTUS rule in March 2023, we expect there to continue to be divergence among the states post-*Sackett*.

If you are interested in learning more about what the Supreme Court's latest ruling on WOTUS means for you, your company, or any pending development projects, please contact Bryan Keyt, Erin Brooks, Nora Faris, or any other member of our environmental team at Bryan Cave Leighton Paisner LLP.

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