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EPA, Army Corps Amend ‘Waters of the United States’ Rule Following Sackett v. EPA

On August 29, the U.S. Environmental Protection Agency (EPA) and Army Corps of Engineers (the Corps) (collectively, the Agencies) issued a Final Rule revising the definition of "waters of the United States" (WOTUS) under the Clean Water Act (CWA) in accordance with the Supreme Court's May 25 decision in *Sackett v. EPA* (*Sackett*).

The Final Rule significantly narrows the scope of what is considered a wetland or waterway under the CWA. Under the Final Rule, WOTUS are now defined as encompassing "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.'" As a result, the Final Rule disregards the "significant nexus test" previously applied by the Agencies to conclude that a wetland was a WOTUS even if it was "separated from other 'waters of the United States' by man-made dikes or barriers, natural river berms, beach dunes and the like." Thus, in order for a wetland to be considered federally jurisdictional under the Final Rule, the waters must be relatively permanent, continuously flowing or standing bodies of water with a continuous surface connection to WOTUS. Importantly, among other items that require clarification, we note that the Final Rule does not provide definitions for "relatively permanent," "continuously flowing" or "continuous surface connection." The Final Rule also may have a limited impact in certain jurisdictions like New Jersey, Connecticut and Massachusetts, which assert state jurisdiction to differing extents.

The Final Rule is effective immediately. Concurrently with the Final Rule, the Corps is rescinding a pause in issuing jurisdictional determinations imposed following *Sackett*. If you or your organization has a question about the application of the Final Rule, please reach out to one of the attorneys listed in the sidebar.

You can find the Agencies' Final Rule here.

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