



What's Up with WOTUS: A Look at the Current WOTUS Definition and Recent Supreme Court Decision

Brigit Rollins, Staff Attorney

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What's Going On?

- The term “waters of the United States” – aka, WOTUS – is central to the Clean Water Act
 - Only those waters defined as WOTUS are regulated under the CWA
- In December 2022, EPA released its latest rule redefining WOTUS
 - This is approx. the fourth WOTUS rulemaking EPA has undertaken since 2015
- On May 25, the Supreme Court released its decision in *Sackett v. EPA*, overruling much of EPA’s latest definition



Overview

- ✓ WOTUS Background
- What's in the New Rule?
- *Sackett v. EPA*
- Where Do We Go From Here?
- Final Thoughts

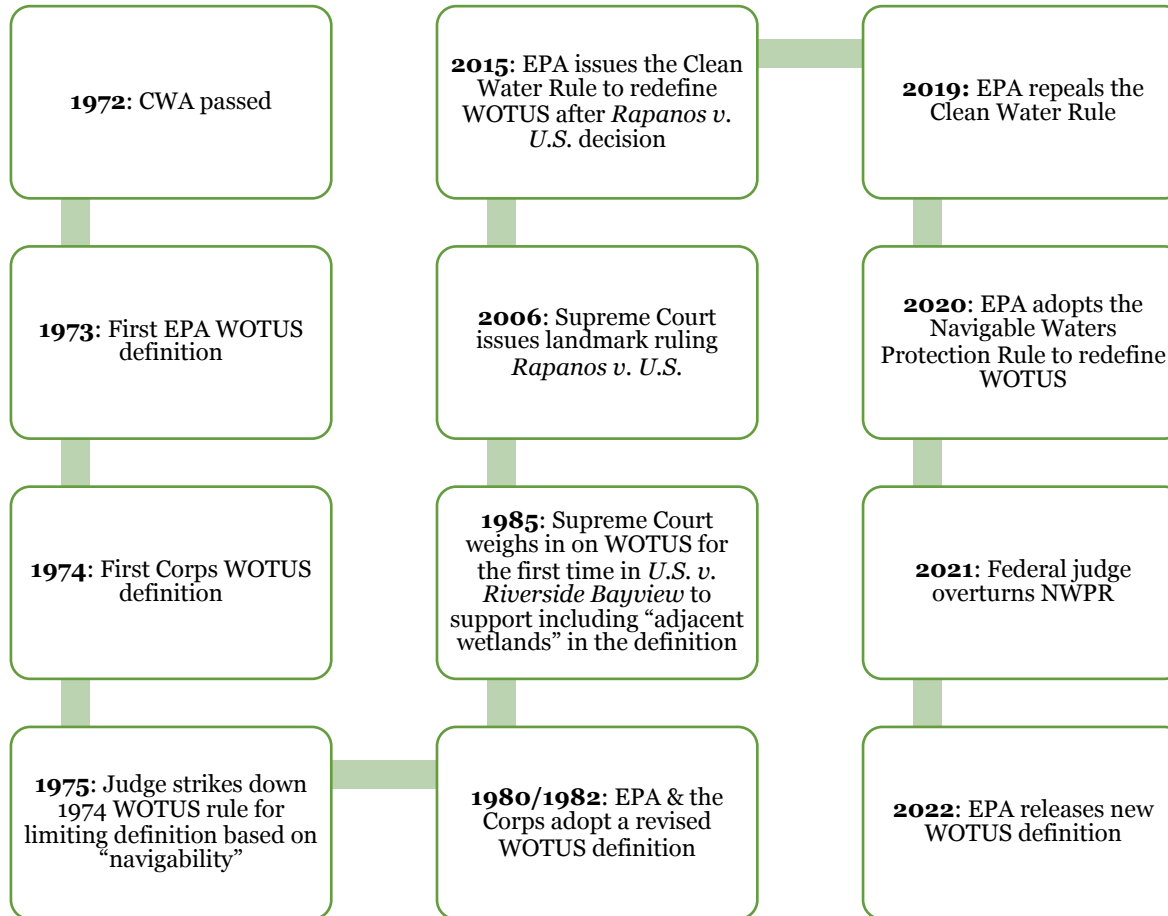


WOTUS Background: The Basics

- Congress passed the CWA in 1972 in order to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a).
- To accomplish this goal, the CWA prohibits unpermitted discharges of any pollutant from a discernable, concrete source into “navigable waters.” 33 U.S.C. § 1342.
- The CWA defines “navigable waters” as “the waters of the United States, including the territorial seas.” 33 U.S.C. § 1362(7).
- Congress did not define the term “waters of the United States,” instead leaving it up to EPA and the Army Corps of Engineers
- Since 1972, there have been multiple agency regulations and Supreme Court decisions aimed at defining WOTUS



WOTUS Background: General Timeline



WOTUS Background: “Navigable Waters”

- The legal concept of “navigable waters” arose from Supreme Court case law
- In *The Daniel Ball*, 77 U.S. 557 (1870), the Court stated:

“Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.”
- The Court’s finding in *The Daniel Ball* continues to serve as the definition for waters that are considered “navigable-in-fact”



WOTUS Background: “Navigable Waters” Under the CWA

- When the Corps released its first definition of WOTUS in 1974, it defined jurisdictional waters as “those waters of the United States which are subject to the ebb and flow of the tide, and/or are presently, or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce.” 33 C.F.R. § 209.12(d)(1) (1974)
- A year later, a federal court in the District of Columbia struck down the Corps’ 1974 WOTUS definition in *Nat. Res. Defense Council v. Callaway*, 392 F. Supp. 685 (D. D.C. 1975), finding that WOTUS could not be “limited to the traditional tests of navigability” because Congress had “asserted federal jurisdiction over the nation’s water to the maximum extent permissible.”
- While no court has held that CWA jurisdiction is limited to waters which are “navigable-in-fact,” the Supreme Court in *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng’rs*, 531 U.S. 159 (2001) concluded that “the term ‘navigable’ has at least the import of showing us what Congress had in mind as its authority for enacting the CWA[.]”



WOTUS Background: 1980s WOTUS Definition

In the 1980s, WOTUS was defined by EPA and the Corps as:

- All waters which are susceptible to use in interstate or foreign commerce, including all waters subject to the ebb and flow of the tide
- All interstate waters, including interstate wetlands
- All other intrastate waters of which the use, degradation, or destruction of would affect interstate or foreign commerce
- All impoundments of waters otherwise defined as a WOTUS
- Tributaries of waters identified in the previous four categories
- The territorial seas
- Wetlands adjacent to any WOTUS (so long as that WOTUS is not itself a wetland; inclusion of adjacent wetlands was upheld by the Supreme Court in *U.S. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985))



WOTUS Background: *Rapanos v. U.S.*

- The Supreme Court's landmark WOTUS decision, *Rapanos v. U.S.*, 547 U.S. 715 (2006) considered the scope of wetlands jurisdiction under the CWA
 - Specifically, the Court considered the extent of CWA jurisdiction over wetlands near ditches or man-made drains that emptied into traditional navigable waters
- The Court did not produce a majority opinion; instead, the case resulted in a four-justice plurality opinion authored by Justice Scalia and a concurrence from Justice Kennedy writing for himself
- Following *Rapanos*, courts and EPA have either applied Justice Kennedy's opinion on its own or together with the plurality opinion
 - No court has applied the plurality opinion on its own



WOTUS Background: Relatively Permanent vs. Significant Nexus

The relatively permanent standard comes from the plurality opinion authored by Justice Scalia in *Rapanos v. U.S.*

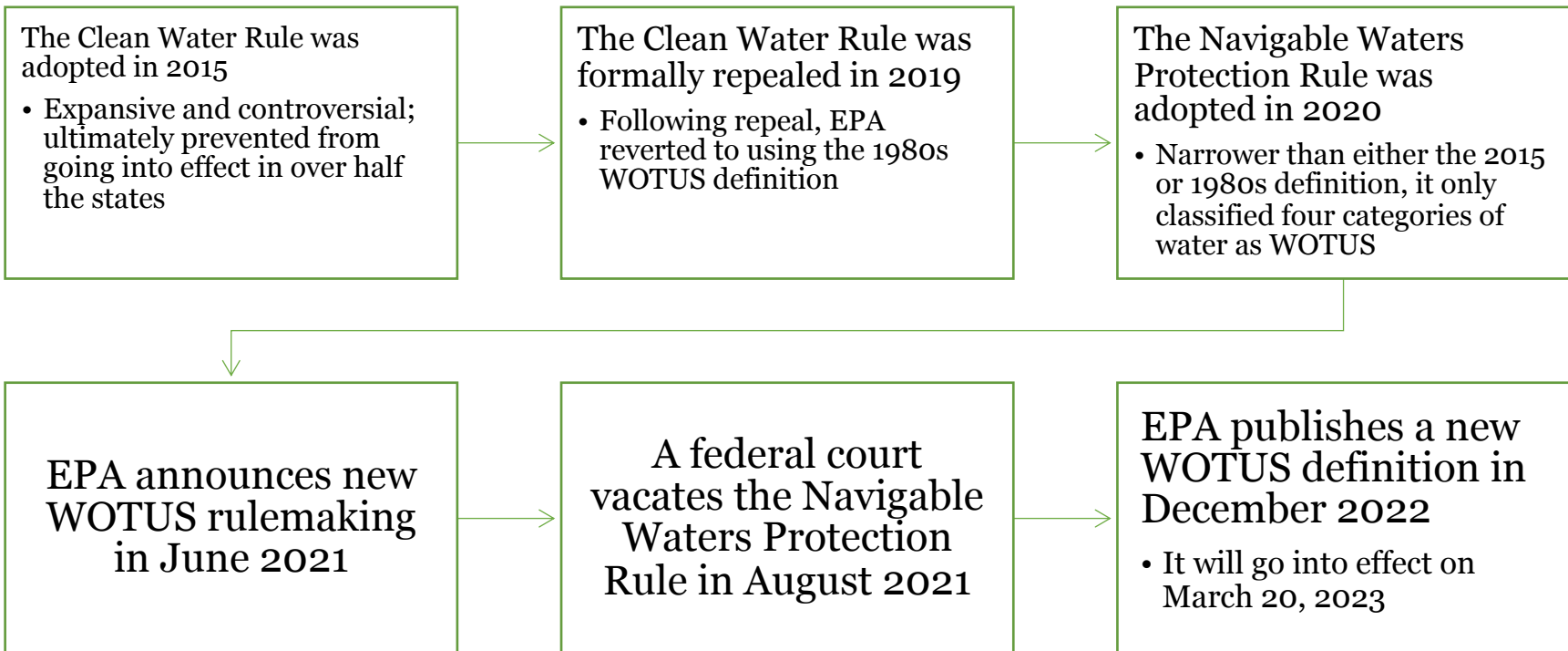
- Interprets WOTUS to include non-navigable waters only if they are “relatively permanent, standing or continuously flowing bodies of water” and wetlands that share a “continuous surface connection with” such waters

The significant nexus test comes from Justice Kennedy’s concurrence in *Rapanos v. U.S.*

- Interprets WOTUS to include waters or wetlands that possess “a significant nexus to waters that are or were navigable in fact or that could reasonably be made so”
- A significant nexus exists if the water or wetland “either alone or in combination with similarly situated lands in the region, significantly affect[s] the chemical, physical, and biological integrity of other covered waters more readily understood as navigable”



WOTUS Background: Response to *Rapanos* – 2015 to Present



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What's in The New Rule?: The Basics

New rule includes five categories of WOTUS:

1. Traditional navigable waters used for interstate or foreign commerce; the territorial seas; and interstate waters
2. Impoundments of waters otherwise identified as a WOTUS, except for impoundments of waters identified under the fifth category of WOTUS
3. Tributaries of traditional navigable waters or impoundments that are either: relatively permanent, standing or continuously flowing bodies of water; or that alone or in combination with similarly situated waters in the region significantly affect the chemical, physical, or biological integrity of traditional navigable waters
4. Wetlands adjacent any of the following: traditional navigable waters; a relatively permanent, standing or continuously flowing impoundment or tributary; an impoundment or tributary if the wetlands either alone or in combination with similarly situated waters have a significant nexus with a traditional navigable water
5. Interstate lakes and ponds, streams, or wetlands that do not fall into any of the above categories provided the water shares either a continuous surface connection or a significant nexus with a WOTUS



What's in the New Rule?: “Adjacent”

- “Adjacent” is defined under the 2023 rule as “bordering, contiguous, or neighboring.”
- “Adjacent wetlands” are defined as wetlands that are “separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes, and the like[.]”
- The same definition of “adjacent” has been used in WOTUS definitions since the 1980s



What's in the New Rule?: “Significantly Affect”

- This is the first time a definition of “significantly affect” has been codified in the WOTUS context
- “Significantly affect” is defined to mean “a material influence on the chemical, physical, or biological integrity of” traditional navigable waters, the territorial seas, and interstate waters
- To determine whether a water “significantly affects” a traditional navigable water, territorial sea, or interstate water, EPA will consider different functions and factors

Functions:

- Contribution of flow
- Transport of materials
- Retention and attenuation of floodwaters and runoff
- Modulation of temperature in traditional navigable waters
- Provision of habitat for aquatic species in a traditional navigable water

Factors:

- Distance of water from a traditional navigable water
- Hydrologic factors and the rate of hydrologic connections
- Size, density, or number of waters that are “similarly situated”
- Landscape position and geomorphology
- Climatological variables



What's in the New Rule?: “Similarly Situated”

- The term “similarly situated” is not defined in the text of the 2023 rule itself, but EPA has provided guidance on how the term is implemented
- According to EPA, waters will be “similarly situated” when they lie within the catchment area of the WOTUS of interest
 - When implementing the significant nexus standard, tributaries and adjacent wetlands within the catchment area of the WOTUS of interest will be analyzed as part of the significant nexus analysis
- EPA will use a variety of tools to determine a catchment area including topographic maps, automated modeling systems, and GIS tools



What's in the New Rule?: Exclusions

Excluded from the definition of WOTUS:

- Waste treatment systems, including treatment ponds or lagoons, designed to meet CWA requirements
- Prior converted cropland
- Ditches, including roadside ditches, excavated wholly in and draining only dry land and that do not carry a relatively permanent flow of water
- Artificially irrigated areas that would revert to dry land if irrigation ceased
- Artificial lakes or ponds created by excavating or diking dry land to collect and retain water which are used for purposes such as stock watering, irrigation, settling basins, or rice growing
- Artificial reflecting or swimming pools or other small ornamental bodies of water
- Waterfilled depressions created in dry land incidental to construction activity
- Swales and erosional features such as gullies or small washes that are characterized by low volume, infrequent, or short duration flow



Current Legal Challenges

- Currently, there are three lawsuits that have been filed to challenge the new WOTUS rule
 - *State of Texas v. EPA*, No. 3:23-cv-00017 (S.D. Tex.)
 - *Kentucky Chamber of Commerce v. EPA*, No. 3:23-cv-00008 (E.D. Ky.)
 - *State of West Virginia v. EPA*, No. 3:23-cv-00032 (D. N.D.)
- Plaintiffs raise numerous arguments, but three claims are raised in each case:
 1. The 2023 rule impermissibly expands CWA jurisdiction
 2. The 2023 rule violates the Tenth Amendment of the U.S. Constitution
 3. The 2023 rule violates the Major Questions Doctrine
- The lawsuits have resulted in the 2023 rule being enjoined in 28 states
- All of the three lawsuits are currently stayed following the ruling in *Sackett v. EPA*



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The Highlights



- On May 25, the U.S. Supreme Court released its long-awaited opinion in *Sackett v. EPA*
- The question before the Court was whether *Rapanos* should be revisited to adopt the plurality's relatively permanent test for WOTUS jurisdiction under the CWA
- Ultimately, the Court sided with the plaintiffs and adopted the *Rapanos* plurality opinion



Pathway to the High Court

- In 2007, the Sacketts began constructing a home on a plot of land they purchased in Idaho near Priest Lake, a navigable water
- As part of the construction, they began to fill in a wetland without a CWA permit
- According to EPA, the wetland the Sacketts filled in was WOTUS, and the agency began enforcement actions
 - The wetland drained into a tributary of Priest Lake, but did not share a surface connection with the lake
 - EPA concluded the wetland had a “significant nexus” with Priest Lake
- The Sacketts filed suit, and eventually brought their case to the Supreme Court
 - The Sacketts argued that the wetland was not a WOTUS because it did not share a surface connection with Priest Lake – argued that the significant nexus test should not be applied
- On October 3, 2022, the Supreme Court heard arguments in Sackett v. EPA



Plaintiff's Arguments

The Sacketts made two primary arguments in favor of adopting the plurality's opinion from *Rapanos*:

1. The plurality's "continuous surface connection" test is the more constitutionally sound interpretation of WOTUS

2. Adopting the plurality opinion would resolve over a decade of confusion

Limiting CWA jurisdiction to "navigable waters" and the wetlands that share a continuous surface connection with such waters would bring the definition of WOTUS in line with Congress's authority to regulate interstate commerce

The Sacketts claim that the lack of a clear rule has forced private landowners to "feel their way" through CWA regulation on a case-by-case basis

A bright-line definition would provide regulators and landowners with stronger certainty about which waters are WOTUS



EPA's Arguments

EPA advanced two primary arguments in response:

1. Regulators and landowners were not as confused as the plaintiffs suggest

Since *Rapanos*, courts have consistently found that at least those wetlands that meet the significant nexus test are a WOTUS

2. Every definition of WOTUS has included some wetlands that do not share a continuous surface connection with a navigable water

Courts and regulators have found that “adjacent” means more than “directly abutting” since the CWA was adopted in 1972



The Court's Conclusion

Ultimately, the Supreme Court ruled in favor of the plaintiffs, finding that:

- **The CWA's use of "waters" in ["waters of the United States"] refers only to "geographic[al] features that are described in ordinary parlance as 'streams, oceans, rivers, and lakes'" and to adjacent wetlands that are "indistinguishable" from those bodies of water due to a continuous surface connection.**



Defining “Waters”: The Evidence

- The Court began by defining the word “waters” in “waters of the United States”
- Evidence the Court relied on to reach its conclusion included dictionary definitions, common legal terms, and statutory history:
 - Black’s Law Dictionary: “[Waters] may designate a body of water, such as a river, a lake, ore an ocean, or an aggregate of such bodies of water[.]”
 - Random House Dictionary: Defining “waters” as “a. flowing water, or water moving in waves [...]. b. the sea or seas bordering a particular country or continent[.]”
 - The CWA’s use of the word “navigable” in “navigable waters” signals that WOTUS “principally refers to bodies of navigable water like rivers, lakes and oceans.”
 - The Rivers and Harbors Act of 1899, which preceded the CWA, covered “all rivers, lakes, and other waters that flow across or form a part of State boundaries.”
 - The CWA protects the rights of States to manage pollution and develop land and water resources.



Defining “Waters”: The Conclusion

Relying on that evidence, the Court concluded that “waters” refers to:

- “Only those relatively permanent, standing or continuously flowing bodies of water forming geographical features that are described in ordinary parlance as streams, oceans, rivers, and lakes.”



Defining “Adjacent Wetlands”: The Evidence

- Next, the Court determined wetland jurisdiction by defining the term “adjacent”
- While the Court acknowledged that the definition of “waters” would seem to exclude wetlands, it relied on section 1344(g)(1) of the CWA to show that some wetlands must be included in WOTUS
 - Section 1344(g)(1) allows states to regulate certain discharges into WOTUS, except for discharges made into traditionally navigable waters or “wetlands adjacent thereto”
- To determine what wetlands the CWA regulates as “waters of the United States”, the Court concluded that such wetlands must qualify as “waters” in their own right
 - Such wetlands must be “indistinguishably part of a body of water that itself constitutes ‘waters’ under the CWA”



Defining “Adjacent Wetlands”: The Evidence, Cont.

- While the term “adjacent” can be defined as either “contiguous” or “near,” the Court found that a wetland separate from a traditional navigable water may not be considered a part of that water even if it is located nearby
- The Court reasoned that if section 1344(g)(1) were read to include wetlands that were not indistinguishably part of otherwise covered waters, then the section would expand the CWA’s definition of “navigable waters” to “waters of the United States *and adjacent wetlands*”
- Because the Court finds that Congress did not intend for section 1344(g)(1) to expand the definition of WOTUS, it adopts the plurality’s opinion from *Rapanos*



Defining “Adjacent Wetlands”: The Conclusion

The Court determined that the CWA extends jurisdiction to:

- Those wetlands that are “indistinguishable from waters of the United States.”
- To assert CWA jurisdiction over an adjacent wetland, it must first be established that “the adjacent body of water constitutes a [WOTUS], (*i.e.*, a relatively permanent body of water connected to traditional interstate navigable waters); and second, that the wetland has a continuous surface connection with that water, making it difficult to determine where the ‘water’ ends and the ‘wetland’ begins.”



Overturing the Significant Nexus Test

Finally, the Court specifically overturned the significant nexus test, relying on two primary conclusions:

The significant nexus test broadened the definition of “waters of the United States” beyond what Congress intended

The Court requires Congress to use “exceedingly clear language if it wishes to significantly alter the balance between federal and state power”

Congress did not use to term “significant nexus” within the text of the CWA

The significant nexus test to too vague to satisfy Due Process

The CWA imposes criminal violations for even negligent behavior – the significant nexus test is too vague to alert landowners when they may be in violation of the statute



Everyone Has an Opinion

- While all nine Justices agreed in the outcome – that the wetlands on the Sacketts’ property should not be regulated as a WOTUS – they did not all agree in the reasoning, with Justices Thomas, Kagan, and Kavanaugh writing concurrences
- Justice Thomas: Would limit WOTUS only to traditional navigable waters
- Justice Kagan: Argued that “adjacent” means more than just “abutting” and would have taken a broader approach
 - The Kagan concurrence is the closest to a dissent
- Justice Kavanaugh: Also argued that “adjacent” includes “neighboring and nearby”; would have taken a broader approach to wetlands jurisdiction
 - Raised questions about wetlands that would share a continuous surface connection with a navigable water but for natural or man-made barrier such as sand dunes or levees



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EPA Response

- So far, the response from EPA has been minimal
- After the decision, EPA said it would interpret WOTUS consistent with the ruling in *Sackett*
- In June, EPA announced that it intends to issue a final rule by September 1, 2023 to bring the 2023 WOTUS rule in line with *Sackett*
 - The announcement was part of a court filing in one of the lawsuits challenging the 2023 rule
- Currently, it is unclear what exactly this new rule will look like
 - Likely to remove all references to the significant nexus test, and narrow wetlands jurisdiction
 - Possibly address some of the concerns raised in the Kavanaugh concurrence?



On-Going Lawsuits

State of Texas v. EPA, No. 3:23-cv-00017 (S.D. Tex.)

Currently stayed while EPA drafts new WOTUS rule

Commonwealth of Kentucky v. EPA, No. 3:23-cv-00007 (E.D. Ky.)

Currently stayed while EPA drafts new WOTUS rule

State of West Virginia v. EPA, No. 3:23-cv-00032 (D. N.D.)

Currently stayed while EPA drafts new WOTUS rule

Note:

The stayed cases may be resolved by EPA's anticipated rule, or may continue to litigate



What About Other Laws?

- Reminder: the federal government sets the floor, not the ceiling!
- The *Sackett* decision applies only to the CWA, not to state laws
- Many states have existing laws regulating water and wetlands pollution, these laws still apply post-*Sackett*
 - Example: California's Procedures for Discharges of Dredged or Fill Material to Waters of the State impose permit requirements on anyone who discharges dredged or fill material into wetlands, and "waters of the state"
- Other federal laws may still impose limitations on wetlands and other water bodies that no longer fall under WOTUS
 - The *Sackett* ruling does not affect the definition of "wetlands" for the purposes of Swampbuster
 - The designations of critical habitat under the Endangered Species Act are not impacted by *Sackett*



Is it Over Now?



- It is currently unclear whether the “WOTUS Rollercoaster” has come to an end
- EPA’s updated rule may still face lawsuits
- Next year is an election year – a change in presidential administration could signal another change in WOTUS
- The future of WOTUS remains uncertain



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Final Thoughts

- Ultimately, the 2023 WOTUS rule is similar to the 1980s WOTUS rule
- *Sackett* represents a narrowing of the WOTUS definition, and is a break from previous Supreme Court rulings on the term
- It is not yet clear how EPA will define WOTUS following *Sackett*
- State and other federal laws may still impose limits on water and wetlands pollution
- We haven't heard the last of WOTUS!

