



WOTUS Review: Post-Sackett and Beyond

Brigit Rollins, Staff Attorney

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Overview

- ✓ WOTUS Review
- *Sackett v. EPA*: Ruling and Response
- Litigation Continues
- Beyond WOTUS: State & Fed. Wetlands Regulation
- Final Thoughts

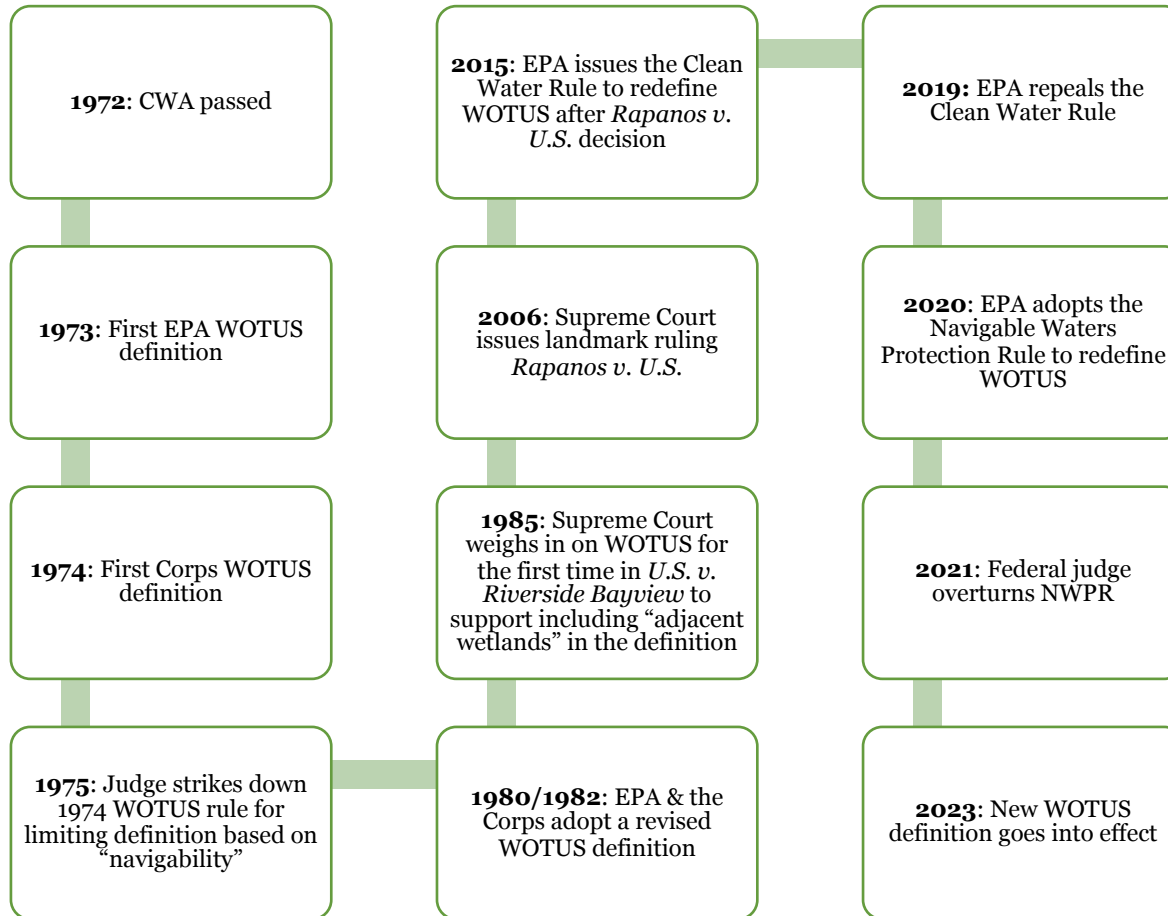


WOTUS Background: The Basics

- 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”

- No court has ever found that the definition of WOTUS is limited to waters that are traditionally navigable
- “[...] Congress chose to define the waters covered by the [CWA] broadly. Although the [CWA] prohibits discharges into ‘navigable waters,’ [...] the [CWA’s] definition of ‘navigable waters’ as ‘the waters of the United States’ makes it clear that the term ‘navigable’ as used in the [CWA] is of limited import.”
 - *U.S. v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1985).
- “Although we have acknowledged that the CWA extends to more than traditional navigable waters, we have refused to read ‘navigable’ out of the statute[.]”
 - *Sackett v. EPA*, 143 S.Ct. 1322, 1337 (2022)



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.*

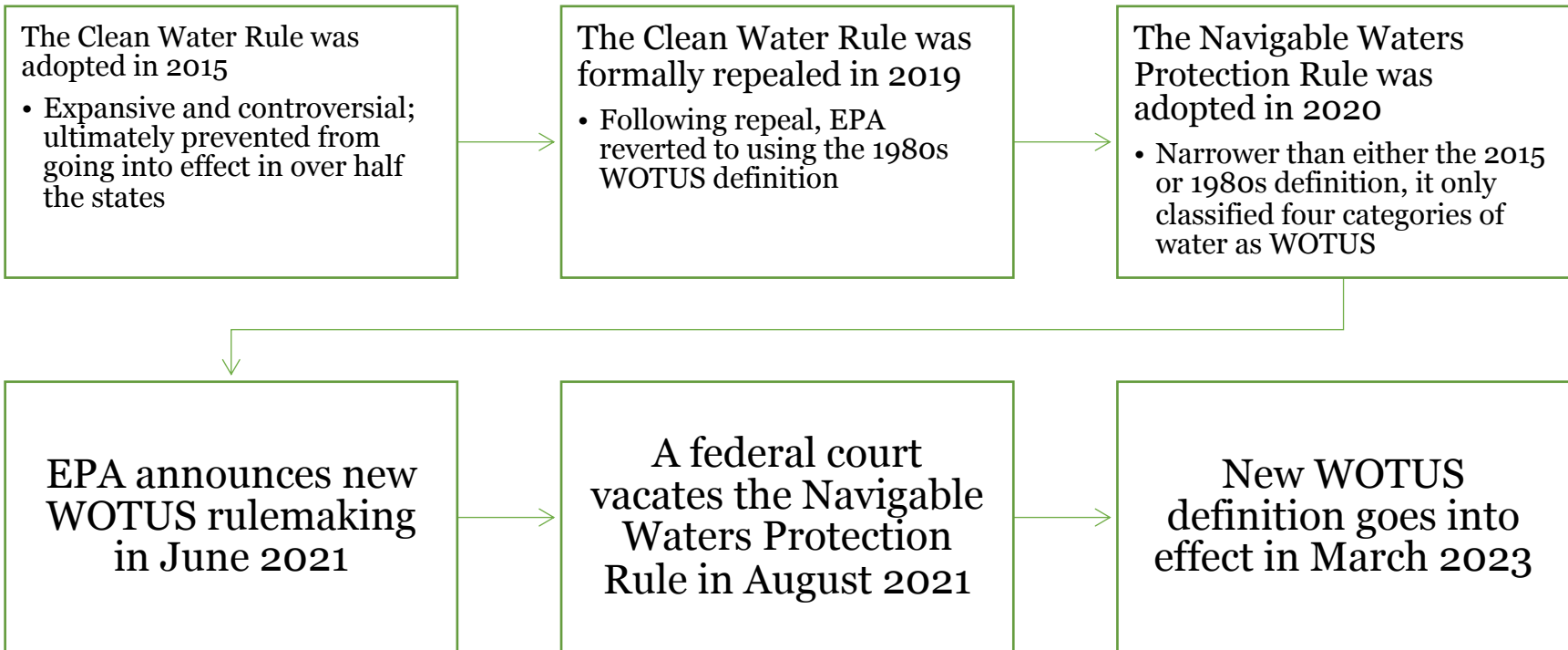
- Interprets WOTUS to include non-navigable waters only if they are “relatively permanent, standing or continuously flowing bodies of water” and wetlands that share a “continuous surface connection with” such waters

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



What's in the 2023 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



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Sackett v. EPA – 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



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



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 Court concluded that “waters” in “waters of the United States” means:

- “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 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.”



EPA Response

- On August 29, EPA issued an updated WOTUS rule in response to the *Sackett* decision
- Known as the Final Conforming rule, the new definition is meant to “conform” WOTUS with the Supreme Court’s ruling
- EPA amended the rule without public comment, stating that:
“Because the sole purpose of this rule is to amend these specific provisions of the 2023 Rule to conform with *Sackett*, and such conforming amendments do not involve the exercise of the agencies’ discretion, providing advance public notice and seeking comment is unnecessary.”



What's in the Conforming Rule?

The Conforming 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 WOTUS
3. Tributaries of traditionally navigable waters that are relatively permanent, standing, or continuously flowing
4. Wetlands adjacent to traditionally navigable waters or that share a continuous surface connection with a tributary or impoundment
5. Relatively permanent, standing, or continuously flowing intrastate lakes and ponds not already identified as WOTUS



“Adjacent”: Compare & Contrast

“Adjacent” under the original 2023 rule was defined as:

- Bordering, contiguous, or neighboring and included wetlands separate from WOTUS by man-made dikes or barriers, river berms, and beach dunes

“Adjacent” under the Conforming Rule is defined as:

- Having a continuous surface connection with another WOTUS



Other Changes

All references to the significant nexus test have been removed under the Conforming Rule

The Conforming Rule excludes interstate wetlands from its definition of “interstate waters”

- The *Sackett* ruling determined that interstate waters refers to “all rivers, lakes, and other waters that flow across or form a part of State boundaries”



Keep in Mind...

- The Court in *Rapanos* noted that “relatively permanent” waters did not “necessarily exclude streams, rivers, or lakes that might dry up in extraordinary circumstances, such as drought,” or “*seasonal* rivers, which contain continuous flow during some months of the year but no flow during dry months.”
- While EPA has referenced this portion from *Rapanos*, there is no clear guidance how this will be applied
 - How many months must a water “contain continuous flow” to meet the relatively permanent standard?
 - Will some water bodies that dry up periodically due to drought be considered WOTUS while others will not?



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Current Legal Challenges: Lawsuits

- 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.)
 - *Commonwealth of Kentucky v. EPA*, No. 3:23-cv-00007 (E.D. Ky.)
 - *State of West Virginia v. EPA*, No. 3:23-cv-00032 (D. N.D.)
- All three were filed earlier this year to challenge the 2023 WOTUS rule and are still on-going
- Between these lawsuits, the 2023 WOTUS rule has been enjoined in 27 states
 - In these states, EPA is interpreting WOTUS consistent with the pre-2015 definition and the *Sackett* decision



Current Status

- Plaintiffs in *State of Texas v. EPA* and *State of West Virginia v. EPA* have filed amended complaints to challenge the WOTUS definition as amended by the Conforming Rule
 - Largely making the same arguments as the initial complaints
- *Commonwealth of Kentucky v. EPA* is currently before the Sixth Circuit
 - Parties are arguing over the lower court's decision to deny an injunction



Legal Arguments

Jurisdictional claim

- Plaintiffs argue that CWA jurisdiction only extends to “navigable waters”

Tenth Amendment claim

- Plaintiffs argue that WOTUS violates the Tenth Amendment by allowing EPA to regulate water resources beyond the scope of interstate commerce

Major Questions Doctrine

- Plaintiffs argue that WOTUS has vast economic significance to regulate the development of land and water resources, and Congress did not clearly empower EPA with such authority

Lack of notice and comment

- Plaintiffs argue that the Conforming Rule is “of such great import and interest” that public notice and comment should have been required



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Wetlands Beyond WOTUS



- Reminder that *Sackett* and WOTUS only affect the CWA
- Many state and federal laws continue to regulate wetlands
- These could become more relevant in light of the *Sackett* ruling



Swampbuster: The Basics

Introduced in the 1985 Farm Bill, and implemented by USDA's Natural Resource Conservation Service

Encourages wetlands conservation by denying certain incentives to anyone who produces agricultural commodities on converted wetlands

Most USDA programs require participants to comply with Swampbuster – violation of Swampbuster can result in USDA program benefits ineligibility



Swampbuster: “Wetlands” Definition

Swampbuster defines a wetland as an area that:

1. Has predominance of hydric soils;
2. Is inundated with water at a frequency sufficient to support hydrophytic vegetation (aka wetland hydrology);
3. Supports hydrophytic vegetation under normal circumstances



Swampbuster: Exemptions

- Many exemptions prevent ineligibility from USDA benefits
- Exemptions include:
 - Production on prior-converted wetlands. 7 C.F.R. 12.5(b)(1)(i)
 - Conversion occurred prior to December 23, 1985, produced at least one agricultural commodity prior to that date, and did not support woody vegetation on that date
 - Conversion has a minimal effect on wetland functions and wetlands in the area. 7 C.F.R. 12.5(b)(1)(v)
 - NRCS has developed a list of categorical minimal effects exemptions
 - Landowner or producer mitigates the effects of converting a wetland. 7 C.F.R. 12.5(b)(1)(vi)
 - Mitigation can mean restoration of a converted wetland, enhancement of an existing wetland, or creation of equivalent wetland functions on a new site
 - Mitigation must be done according to a plan approved by NRCS



Endangered Species Act: Critical Habitat

- Along with protecting species, the ESA also protects areas designated as critical habitat
 - Critical habitat may be designated for any listed species
 - Any area that contains the physical or biological features essential to conserve the species could be designated as critical habitat, regardless of whether the species is currently occupying the area
- While there is no definition of “habitat” under the ESA, the Supreme Court has determined that in order for an area to be critical habitat, it must be capable of serving as habitat for the relevant species



Critical Habitat & Private Land

Both private and public land can be designated as critical habitat

A critical habitat designation does not affect land ownership, allow the government to take or manage property, establish a formal conservation area, or allow government access to private land

How do landowners fit into critical habitat?

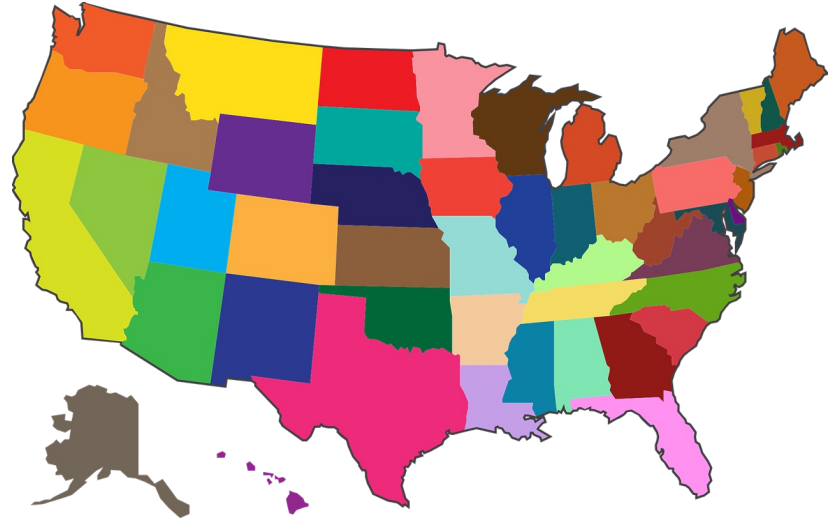
While the ESA requires all federal agencies to ensure that their actions will not “adversely modify” or destroy critical habitat, private landowners do not have the same requirement

However, if the private landowner would like to carry out an activity that has a “federal nexus,” critical habitat limitations may apply



State Laws

- Many states have their own laws regulating water and wetlands pollution which will be unaffected by the *Sackett* decision
- Because these laws are state specific, they are highly varied – you may need to check with your state environment or natural resources department to see how wetlands are regulated
- Reminder: feds set the floor, not the ceiling!



State Law: Michigan

Wetlands in Michigan are protected under a state law known as Part 303 which protects wetlands that are:

- Connected to the Great Lakes or Lake St. Clair
- Located within 1000 ft. of the Great Lakes or Lake St. Clair
- Connected to an inland lake, pond, river, or stream
- Located within 500 ft. of an inland lake, pond, river, or stream
- More than 5 acres in size
- Any other wetland deemed essential to the preservation of Michigan's natural resources

Under Part 303, a permit is needed to do the following:

- Deposit fill material into a wetland
- Dredge, remove, or permit the removal of soil or minerals from a wetland
- Construct, operate, or maintain any use or development in a wetland
- Drain surface water from a wetland

A Part 303 permit will only be issued if:

- The permit would be in the public interest, is otherwise lawful, and is necessary to realize the benefits of the activity
- No unacceptable disruption to aquatic resources would occur
- The proposed activity is wetland dependent, and no reasonable alternatives exist



State Law: California

California's Porter-Cologne Water Quality Control Act gives the state authority to regulate wetlands

- Porter-Cologne requires a permit to discharge dredge and fill materials to “waters of the state”
- “Waters of the state” includes both natural and some artificial wetlands
- California has what's known as a “no net loss” policy for wetlands

An area is considered a wetland if:

- It has continuous or recurrent saturation of the upper substrate caused by groundwater, or shallow surface water, or both
- The duration of such saturation is sufficient to cause anaerobic conditions in the upper substrate
- The area's vegetation is dominated by hydrophytes or the area lacks vegetation

A permit will only be granted if:

- The applicant has shown that they attempted to avoid or minimize impacts to waters of the state
- The potential impacts will not contribute to a net loss of overall abundance, diversity, and condition of aquatic resources
- The discharge will not violate water quality standards
- The discharge will not cause or contribute to significant degradation of waters of the state



State Law: Florida

Florida regulates dredge and fill through its Environmental Resource Program Permits

- “Dredging” means excavation of wetlands or other surface waters or excavation in upland that creates wetlands or other surface waters
- “Filling” means depositing any material in wetlands or other surface waters

Wetlands are defined as:

- Those areas that are inundated or saturated by surface water or groundwater at a frequency and a duration sufficient to support, and under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soils

When considering whether to issue a permit, Florida will consider:

- Whether the applicant has shown that state water quality standards will not be violated by the proposed activity
- The effects on public health, safety, welfare, and property rights
- The effects on fish and wildlife
- Adverse effects on navigation or harmful erosion
- Other factors including effects on marine productivity, whether the project is temporary/permanent, effects to historical and archeological resources



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Final Thoughts



- Despite *Sackett* ruling, there is still no streamlined WOTUS definition
- Litigation is an open question – could still send EPA back to the drawing board
- Other state and federal laws regulating wetlands have increase importance – some states may seek to alter their laws going forward
- No end to WOTUS roller coaster in sight!

