

Waters of the United States (WOTUS)

REQUEST: The new Administration has an opportunity to break the familiar cycle of EPA and the Corps disregarding the Supreme Court’s attempts to articulate clear limits on the scope of federal authority under the Clean Water Act. Although the Supreme Court attempted to “identify with greater clarity what the Act means by ‘the waters of the United States’” in *Sackett* (May 2023), and the Biden Administration issued a revised regulation with regulatory text that quotes directly from the Supreme Court’s decision, the Biden Administration nonetheless stretched the Supreme Court’s words beyond recognition through implementation of the regulation. Lower courts have taken notice and begun rejecting EPA’s and the Corps’ attempts to assert jurisdiction over features that are not WOTUS under *Sackett*, but that has not deterred the agencies from overreaching. **The new Administration should: (1) immediately withdraw the Biden Administration’s post-*Sackett* implementation guidance memos; and (2) initiate a new rulemaking to revise the regulatory definition of WOTUS by adding definitions, exclusions, and other provisions that will ensure consistency with *Sackett*.**

Explanation: In *Sackett*, the Supreme Court left no doubt that the *Rapanos* (2006) plurality opinion—authored by Justice Scalia—sets forth the correct test for what is a WOTUS under the Clean Water Act: “waters of the United States” encompass only (i) “relatively permanent” bodies of water connected to traditional interstate navigable waters; and (ii) wetlands that have a “continuous surface connection” with relatively permanent waters, “so that they are ‘indistinguishable’ from those waters.” For a wetland to be jurisdictional, it must be “difficult to determine where the ‘water’ ends and the ‘wetland’ begins.”

For over a year-and-a-half and counting, the Biden Administration refused to come to terms with *Sackett*’s unequivocal endorsement of the *Rapanos* plurality’s test. This refusal has led to permitting delays, litigation, and uncertainty, which are impacting land- and facility-owners’ use and enjoyment of their property. Sadly, all of this was predictable. When the Supreme Court was actively considering *Sackett*, the Biden Administration attempted to steer the outcome of the case by issuing a revised WOTUS rule (January 2023), which characterized the *Rapanos* plurality’s test as “extremely limited” and one that “has no grounding in” the statute. The Supreme Court clearly disagreed. Since *Sackett*, EPA has posted numerous “Field Memos” (essentially, instructions to Corps and EPA staff on how to implement the rule) on its website announcing expansive interpretations of the “relatively permanent” and “continuous surface connection” requirements that cannot be squared with the Court’s opinion. For instance:

- Even “if a wetland is divided by a road,” the wetlands on either side of the road are jurisdictional so long as “a culvert [] maintain[s] a hydrologic connection” between the two and *either* wetland has a continuous surface connection to a relatively permanent water. The agencies further claim they can “consider if a subsurface hydrologic is maintained” between the two wetlands as part of assessing whether they can assert jurisdiction over both. (Field Memo LRB-2021-01386)
- A “pipe directly connecting [a wetland and a relatively permanent tributary] under a road serves as a physical connection that meets the continuous surface connection requirement for the wetland.” (Field Memo NAP-2023-01223)
- A wetland “exhibits a continuous surface connection” to a relatively permanent impoundment of a jurisdictional water via “an ephemeral drainage swale” that “conveys water from the surrounding uplands and [the wetland] at a low frequency and low volume” such as after a “rain event.” (Field Memo NAP-2023-01223)

PRIVILEGED & CONFIDENTIAL DRAFT
ATTORNEY WORK PRODUCT

- “Depending on the factual context, including length of the connection and physical indicators of flow, more than one feature such as a non-relatively permanent ditch, other non-relatively permanent channel, or culvert can serve as part of a continuous surface connection where together they provide an unimpaired, continuous physical connection to a jurisdictional water.” Field Memo POH-2023-00187)

These Field Memos illustrate how the Biden Administration attempted to twist *Sackett* (and the underlying *Rapanos* plurality test) to conform to its overbroad and unlawful interpretation of the Clean Water Act.

Lower courts have begun to take note of EPA’s and the Corps’ attempts to disregard the limiting principles articulated by the *Rapanos* plurality and *Sackett*:

- In *Lewis v. United States* (December 2023), the U.S. Court of Appeals for the Fifth Circuit rejected the federal government’s attempt to assert jurisdiction over wetlands in Louisiana as “incompatible with finding adjacency under *Sackett*.” The government tried to argue that the property in question contained jurisdictional wetlands. But as the Court pointed out, the “nearest relatively permanent body of water is removed miles away from the Lewis property by roadside ditches, a culvert, and a non-relatively permanent tributary. In sum, it is not difficult to determine where the ‘water’ ends and any ‘wetlands’ on Lewis’s property begin—there is simply no connection whatsoever.”
- In *United States v. Sharfi* (December 2024), the U.S. District Court for the Southern District of Florida held that “relatively permanent, standing, or continuously flowing bod[ies] of water” do not include “‘intermittent’ or ‘ephemeral’ ditches or channels with seasonal flow” and thus, such ditches and channels near the defendants’ property are not jurisdictional. The Court also held that, even if those ditches and channels are jurisdictional, any wetlands on the defendants’ property are not “indistinguishable” from those ditches and channels because there is no continuous “surface water connection” between the wetlands and the ditches or channels. The Court emphasized that the statement in *Sackett* that “temporary interruptions in surface connection may sometimes occur because of phenomena like low tides or dry spells” and *Sackett*’s requirement that jurisdictional wetlands must be “indistinguishable” from another WOTUS “would have no practical meaning” if physical abutment alone could establish a “continuous surface connection.”

Losses in court, however, did not deter the Biden Administration from continuing to misread *Sackett*. Indeed, all of the “Field Memos” on EPA’s website post-date the Fifth Circuit’s *Lewis* decision. The new Administration should bring an end to this mischief by:

- **Immediately rescinding all “Field Memos” as well as the underlying September 2023 Joint Coordination Memoranda that established the Headquarters-level review and coordination process that has led to the issuance of those “Field Memos.”** Perhaps the most egregious Field Memos are the ones that EPA and the Corps have issued in the 27 states where the Biden Administration’s WOTUS rule was preliminarily enjoined. In those states, EPA and the Corps should be applying the pre-2015 interpretation of the *Rapanos* plurality opinion, which is closer to (but still not entirely aligned with) the Supreme Court’s analysis in *Rapanos* and *Sackett*. Instead, the Biden Administration has effectively disregarded that preliminary injunction by

PRIVILEGED & CONFIDENTIAL DRAFT
ATTORNEY WORK PRODUCT

trying to apply the same overbroad interpretation of the “continuous surface connection” requirement that it is applying in the rest of the country.

- **Following withdrawal of the Joint Coordination Memoranda, encourage the Corps to promptly review and process requests for Approved Jurisdictional Determinations** without the need to engage in any Headquarters-level review or coordination.
- **Initiating a new rulemaking to revise the regulatory definition of WOTUS in a way that actually ensures consistency with *Sackett*.** This does not require a wholesale repeal of the 2023 WOTUS definition. The regulatory text, which largely parrots the wording of the *Sackett* opinion is not itself objectionable. Rather, the problem lies in: (i) the absence of any regulatory text clarifying what constitutes a “relatively permanent water” or a “continuous surface connection”; and (ii) the rule’s preamble, which tries to interpret *Rapanos* plurality’s test in a way that neither *Sackett* nor *Rapanos* allows.
- **Consider issuing new guidance documents in line with *Sackett* that provide further clarity to Agency staff and the public.**