

**Sackett: Back on the WOTUS carousel**

David Chung and Henry Leung

*David Chung* is a partner in the Environment and Natural Resources group at Crowell & Moring LLP in Washington, D.C.

*Henry W. Leung* is an associate in the Litigation and Environment and Natural Resources groups at Crowell & Moring LLP in San Francisco.

[Sackett v. EPA](#) presented an opportunity for the Supreme Court to articulate a clear and easily administered test for what constitutes “waters of the United States” (WOTUS) under the Clean Water Act (CWA)—a question that has generated considerable uncertainty and a seemingly endless carousel of litigation and regulatory proceedings. Although *Sackett* provided some measure of clarity, the last several months prove the WOTUS carousel keeps spinning.

**Path to Sackett and the Court’s holding**

Since the CWA’s enactment, there has been confusion about the Act’s jurisdictional reach. The Supreme Court’s 2006 4-1-4 opinion in [Rapanos v. United States](#) added to that confusion. Some circuits held waters could be jurisdictional under either the *Rapanos* plurality’s “relatively permanent” standard or the “significant nexus” standard from Justice Kennedy’s concurring opinion; other circuits applied only the significant nexus standard. Both the Obama and Trump administrations sought to provide clarity and certainty by promulgating the Clean Water Rule and Navigable Waters Protection Rule (NWPR), respectively. Both rules were mired in extensive litigation; both were repealed after administration changes.

The Biden administration finalized [the 2023 Rule](#) as *Sackett* remained pending. Under that rule, waters and wetlands are jurisdictional if they meet either the relatively permanent or significant nexus standards. The rule clearly stated the government belief that the relatively permanent standard was insufficiently protective; the significant nexus standard operated as a backstop for exercising federal regulatory authority over more waters and wetlands.

In May 2023, the Supreme Court in *Sackett* unequivocally and unanimously rejected the significant nexus standard. Moreover, a 5-4 majority of the Court endorsed the *Rapanos* plurality’s standard, holding that “the CWA extends only to those wetlands that are as a practical matter indistinguishable from waters of the United States,” meaning they must have a “continuous surface connection” to “a relatively permanent body of water connected to traditional interstate navigable waters” such that it is “difficult to determine where the water ends and the wetland begins.” These holdings struck down a cornerstone of the 2023 Rule.

**Back to the regulatory drawing board?**

Clarity remains elusive after *Sackett*. Shortly after the Court’s ruling, the Corps froze the processing of approved jurisdictional determinations until September, when EPA and the Corps

issued a rule to “conform” the WOTUS definition to *Sackett* ([Conforming Rule](#)). That rule took effect immediately; the agencies explained that “notice and opportunity for comment is unnecessary” because *Sackett* invalidated certain provisions of the 2023 Rule and thus, the conforming amendments do not involve the exercise of agency discretion.

The Conforming Rule is as important for what it did *not* do as it is for what it accomplished. The agencies scrubbed all remnants of the significant nexus standard from the 2023 Rule. Tributaries, wetlands, and intrastate waters are jurisdictional only under the relatively permanent standard. Interstate wetlands are no longer categorically jurisdictional, and the intrastate (other waters) category covers only lakes and ponds. Finally, “adjacent” now means only waters “having a continuous surface connection.”

The Conforming Rule did *not* revisit the 2023 Rule’s interpretation of the “relatively permanent” standard, even though aspects of that interpretation seem difficult or impossible to reconcile with *Sackett*. For instance, under the 2023 Rule, wetlands meet the continuous surface connection requirement if they are connected to a relatively permanent water by a discrete feature like a non-jurisdictional ditch, swale, pipe, or culvert, because such features serve as physical connections regardless of distance or flow. However, *Sackett*’s clarification that the continuous surface requirement is still satisfied despite temporary interruptions in surface connection due to low tides or dry spells plainly contemplates there must typically be a continuous surface *hydrologic* connection. And if discrete features like river berms and beach dunes sever jurisdiction because it is easy to determine where a water ends and a wetland begins, can a ditch, swale, or other discrete feature be used to maintain jurisdiction? These and other questions remain unanswered.

## Back to the courts

Several states and industry groups challenged the 2023 Rule shortly after the rule’s issuance. Two courts (the Southern District of Texas in [Texas v. EPA](#) and the District of North Dakota in [West Virginia v. EPA](#)) preliminarily enjoined the rule in early 2023. Those injunctions remain in place and thus, two different versions of the “relatively permanent” standard (pre-2015 and 2023) are currently in effect. After the Conforming Rule, the plaintiffs amended their complaints in both the [Texas](#) and [West Virginia](#) cases, and they seek, among other things, vacatur of the Biden interpretation of “relatively permanent.”

Those lawsuits are facial challenges to the Biden administration’s interpretation of WOTUS. In the meantime, other courts are free to weigh in on what WOTUS means post-*Sackett* in as-applied challenges. This last December in [Lewis v. United States](#), the Fifth Circuit did just that in a case involving wetlands in Louisiana. Earlier in litigation, the federal government had conceded that the wetlands in question do not satisfy the *Rapanos* “adjacency” test. The court therefore had no difficulty concluding the wetlands could not be “adjacent” under *Sackett* either. Notably, the court went further to explain that 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” and thus, “it is not difficult to determine where the ‘water’ ends and any ‘wetlands’ on Lewis’s property begin—there *is simply no connection whatsoever*.” This holding

portends that, at least in the pending Texas cases, the 2023 Rule's interpretation of "continuous surface connection" is on shaky ground.

*Sackett* provided some clarity by bringing an end to case-specific assertions of jurisdiction under the nebulous significant nexus standard. But key questions remain open to interpretation: what is relatively permanent? What satisfies the "continuous surface connection" requirement? The WOTUS carousel is spinning at full speed again, and it is again equipped with a regulatory patchwork of inconsistent rules. Let us hope this one doesn't spin for another 15-plus years.