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Insights

The United States Supreme Court's Decision in *Sackett v. EPA* Narrows the Jurisdictional Scope of Wetlands Protected Under the Clean Water Act

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After many decades of uncertainty around the meaning of "the waters of the United States" (WOTUS), the United States Supreme Court narrowed the definition of WOTUS under the Clean Water Act (CWA) in its opinion on May 25, 2023. The Supreme Court's decision limits the scope of federal authority to regulate the filling of wetlands under Section 404 of the CWA and instead shifts authority to the states.

In its majority opinion in *Sackett v. EPA*, the Supreme Court moved away from the previously-used broad-based significant nexus test for determining which water bodies and wetlands qualify as WOTUS and are afforded protection under the CWA. Instead, the Supreme Court determined that the CWA's geographical reach, given the text of the statute, is limited to relatively permanent bodies of water connected to traditional interstate navigable waters that are commonly referred to as geographical features, such as streams, oceans, rivers, and lakes.

In addition to the geographical features, the text of the CWA also includes adjacent wetlands in its qualification of WOTUS. To constitute an adjacent wetland, the Supreme Court decided it must share a "continuous surface connection" with those geographical water bodies. To determine if a wetland has a "continuous surface connection" with those geographical features, it must be difficult for one to discern where the geographical water feature ends and the wetland begins; thus, the wetlands must be indistinguishable from such bodies of water they are connected to. This means there must be a definitive surface connection present in order for a wetland to be considered adjacent to WOTUS for purposes of protection under the CWA.

This majority opinion and the establishment of the continuous surface connection test provides landowners with greater clarity on the scope of federal regulator's jurisdiction over waters on their land. With the continuous surface connection test, many wetlands that were previously considered jurisdictional no longer fall within the CWA's protection and

under the federal government's authority.

Because jurisdictional determinations will be made on a case-by-case basis, landowners have the ability to demonstrate that onsite wetlands lack the required surface water connection, protecting the rights of the landowner and providing greater clarity on regulatory processes applicable to developing property containing wetlands.

The Lowndes Land Use, Zoning & Environmental Group will continue to monitor the regulatory authorities' implementation of this new jurisdictional rule under the federal and state assumed 404 programs. If you have any questions about how this new rule affects the development of your property, or any other real property rights, land use, or environmental matters, please contact Jonathan Huels.