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Relatively (Im)permanent

The ever changing scope of the Clean Water Act

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Presenters



Rebecca Andrews

Partner

rebecca.andrews@bbklaw.com

(619) 525-1392



Shawn Hagerty

Partner

shawn.hagerty@bbklaw.com

(619) 525-1327

About Us

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Agenda

1. Clean Water Act Basics to Understand Sackett
2. The Sackett Case
3. Proposed New WOTUS Rule
4. Implications
5. Q&A

Statutory and Regulatory Basics

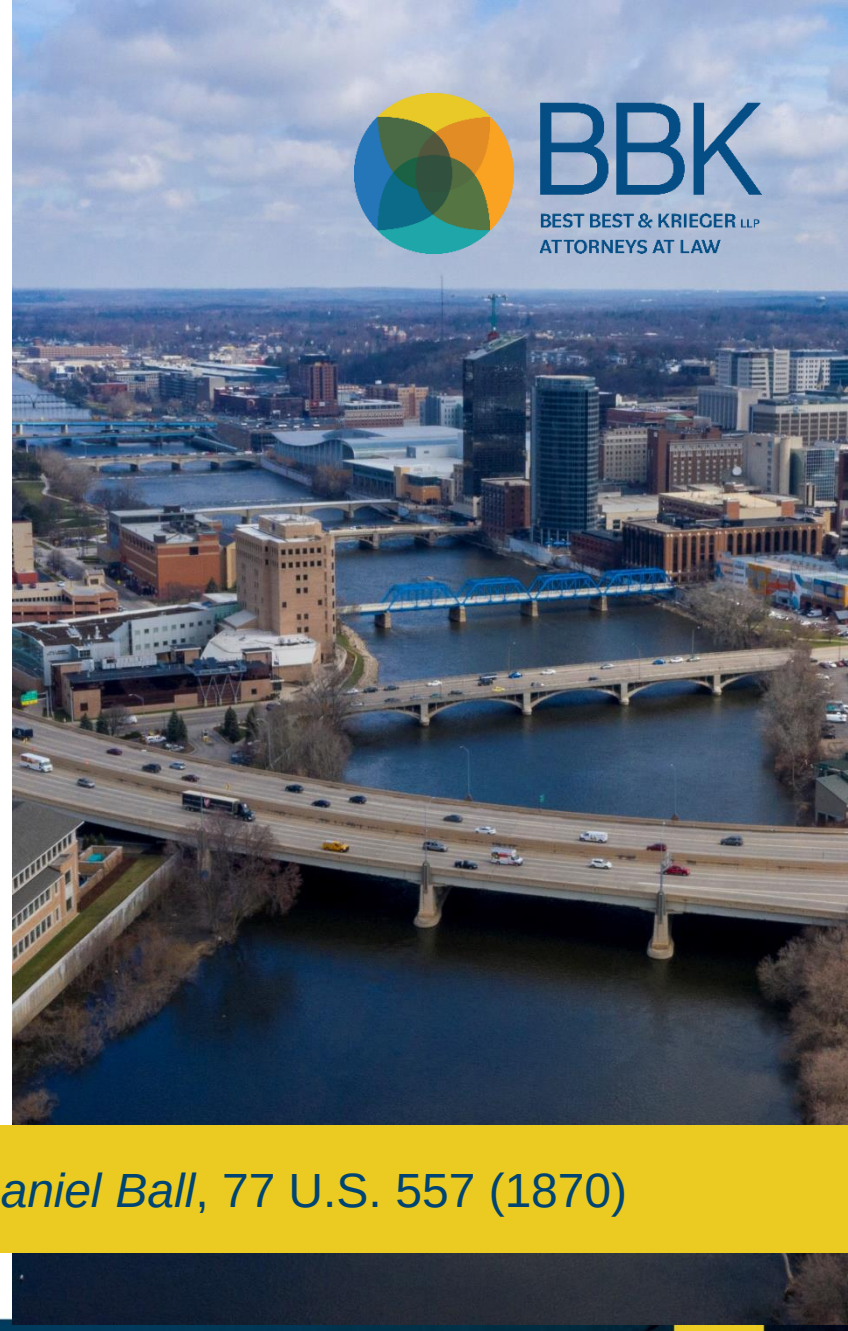
1. Clean Water Act prohibits discharges of any pollutant into “navigable waters.”
2. Act defines “navigable waters” to mean “the waters of the United States, including the territorial seas.”
3. 1977 amendment to Act—includes “wetlands adjacent” to traditional navigable waters as a sub-set of WOTUS.
4. Regulatory history.

Supreme Court WOTUS Basics

1. The Daniel Ball
2. Riverside Bayview
3. SWANCC
4. Rapanos



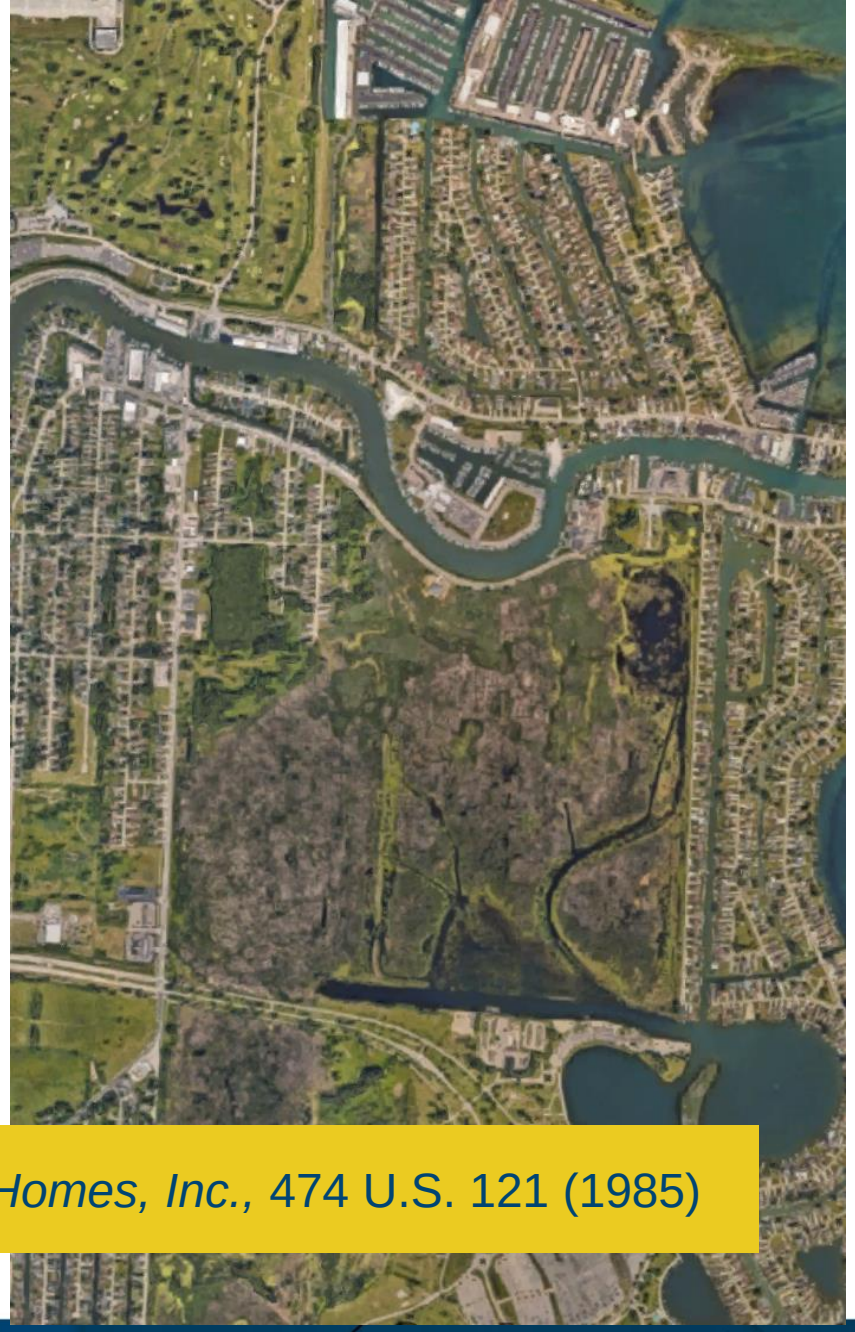




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The Daniel Ball, 77 U.S. 557 (1870)







United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985)

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SWANCC v. U.S. Army Corps of Eng'r, 531 U.S. 159 (2001)

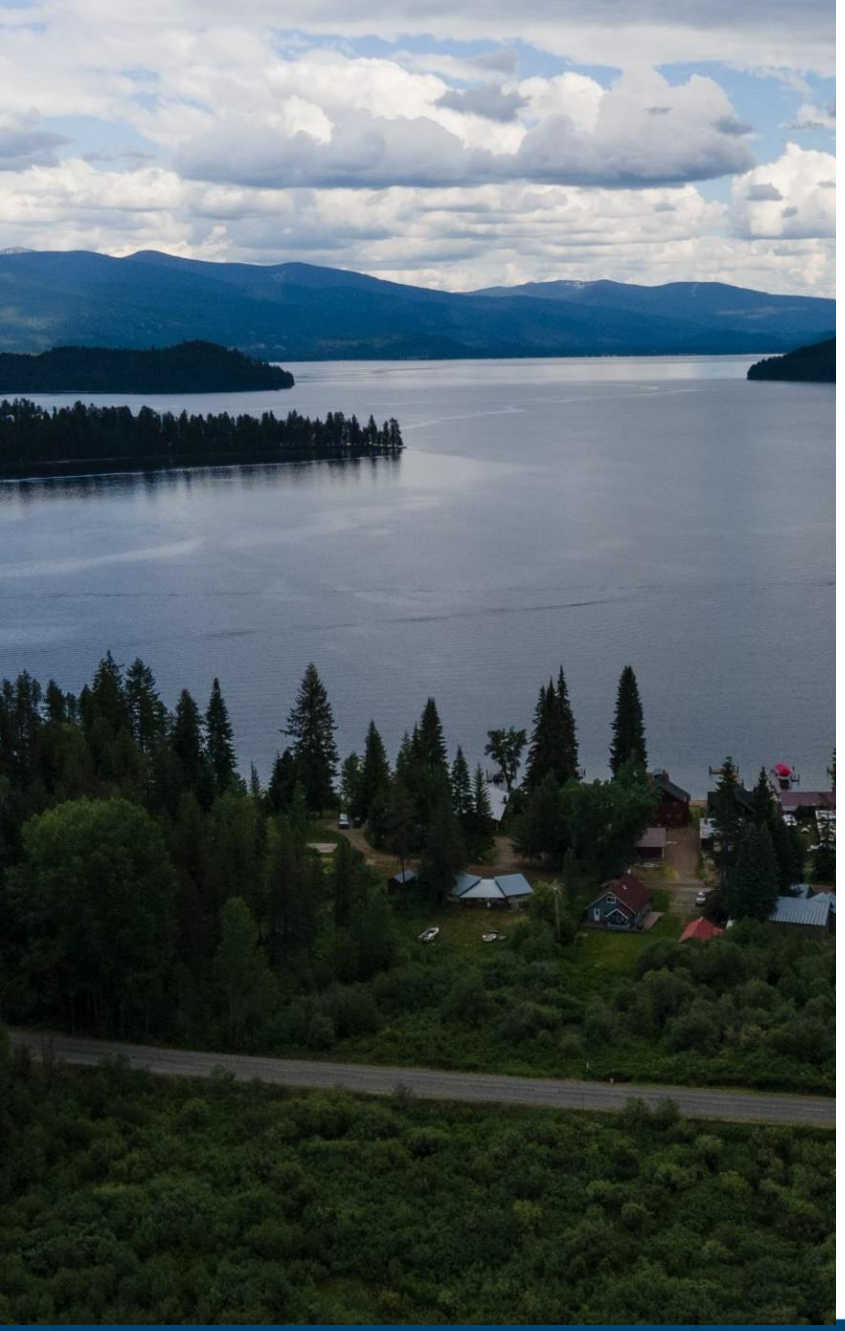


Rapanos v. United States, 547 U.S. 715 (2006)

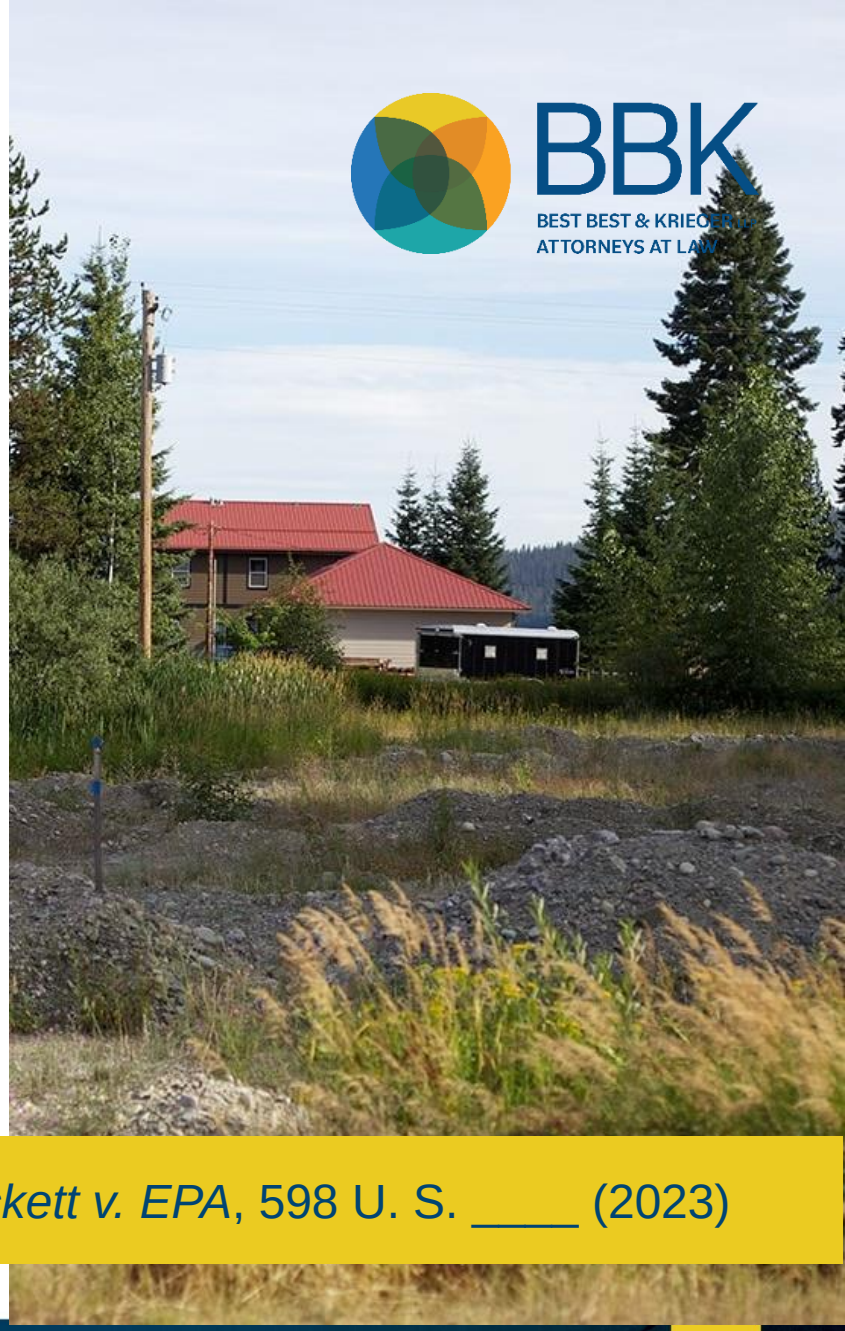


Sackett

1. Factual Setting and Background
2. Majority opinion
3. Concurring opinions







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Sackett v. EPA, 598 U. S. ____ (2023)

Sackett—Majority Opinion

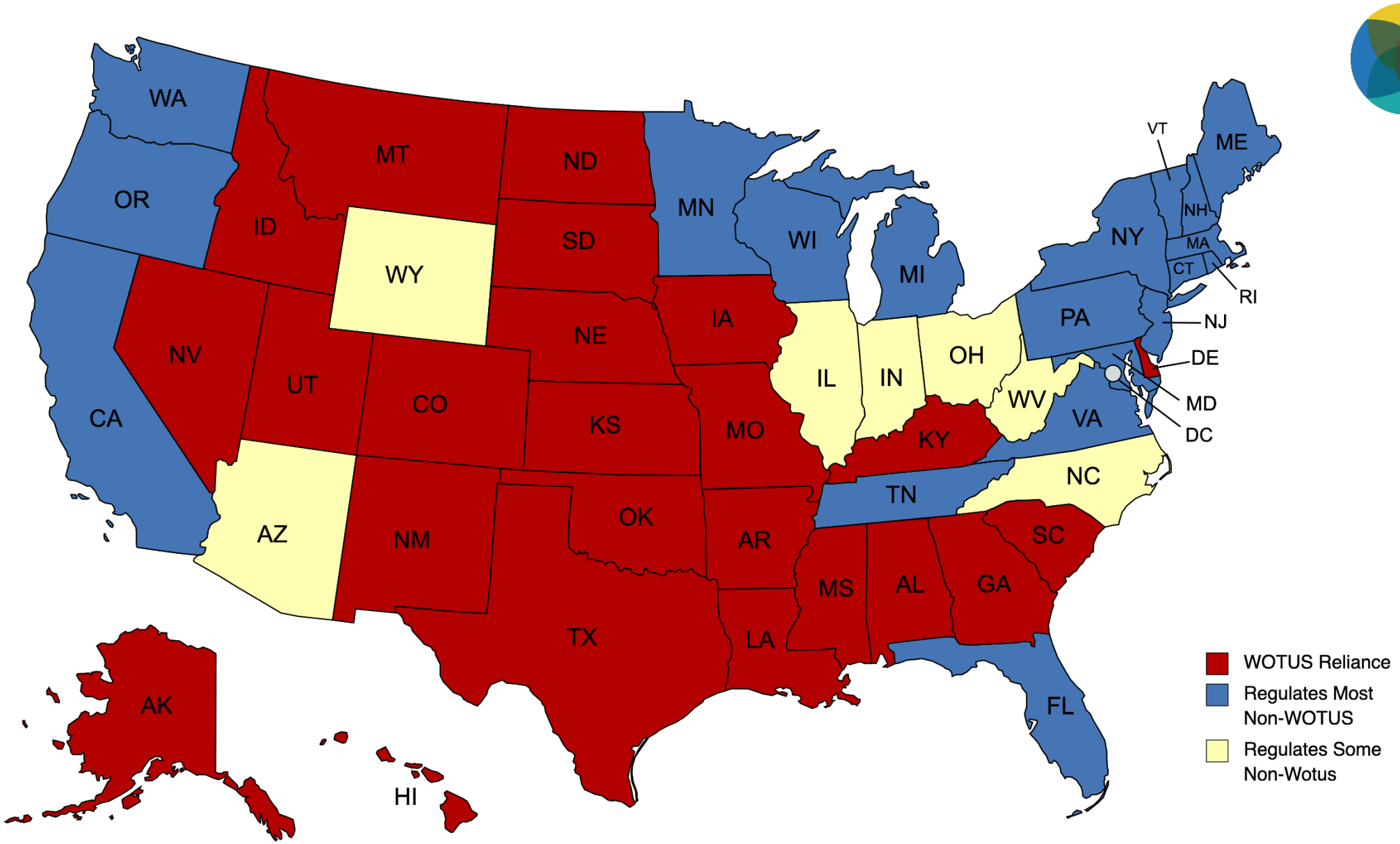
1. WOTUS is
   A. Traditional interstate navigable waters (and impoundments of TNW);
   B. Relatively permanent bodies of water connected to traditional interstate navigable waters;
   C. Wetlands that have a continuous surface connection with 1 or 2.
2. No “significant nexus” test.
3. Not persuaded by
   1. Deference to EPA/Corps;
   2. Ecological/policy arguments.

Sackett—Concurring Opinions

1. Thomas
2. Kagan
3. Kavanaugh

Immediate Implications of Sackett

1. Impact will depend on jurisdiction.
2. Limited states and expansive states.
3. Expansive states—shift to state law.
4. Limited states—increased unregulated waters.


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WOTUS Reliance
Regulates Most Non-WOTUS
Regulates Some Non-Wotus

EPA/ACOE Revised Definition of WOTUS

1. Issued “final” revised definition—No public comment period.
2. Text of rule itself generally consistent with Sackett.
3. However, preamble possibly more expansive than Sackett.
4. Litigation.





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Long-Term Implications of Sackett

1. More unregulated or state regulated waters.
2. Many questions:
   A. “Relatively permanent”;
   B. “Temporary interruption”;
   C. Natural changes;
   D. Types of connections and barriers;
   E. Relationship to “functional equivalent of a direct discharge” standard.

Important Underlying Themes

1. Relationship among the Act's text, Act's objectives and science.
2. Deference – watch upcoming case, *Loper Bright Enterprises v. Raimondo, Case No. 22-451.*
3. "Clear statement" and relationship between Congress, Executive and Judicial branches.

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Questions?

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