



## Impending Sackett Decision: Reach Of Wetlands Jurisdiction Continues To Be ‘Notoriously Unclear’ But Perhaps Not For Long

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The U.S. Supreme Court recently announced that its next term beginning Oct. 3, 2022, will begin by hearing oral argument in the second Supreme Court case involving [the ongoing saga](#) of the Sacketts’ development of their property in Idaho and their challenge to the Environmental Protection Agency’s authority. The EPA recently filed a brief in reply to the Sacketts’ brief, warning that their proposed test for identifying whether a wetland is covered under the Clean Water Act would “turn on arbitrary and shifting distinctions.” In the Supreme Court’s initial *Sackett* opinion, Justice Samuel Alito wrote in a concurring 2012 opinion that the reach of the Clean Water Act is “notoriously unclear” in the wetlands context and he thought Congress should provide a “reasonably clear rule regarding the reach of the Clean Water Act.”

No matter what decision the Supreme Court renders in [Sackett v. Environmental Protection Agency](#), recent actions of the administrative agencies that administer the wetlands permitting program are a reminder that the agencies have to interpret the court’s rulings to implement the permitting program. Based on recent actions regarding approved jurisdictional determinations (AJD), the waters may continue to be muddy even after the Supreme Court’s upcoming decision.

The U.S. Army Corps of Engineers, in implementing the wetland permitting program together with the EPA, issues approved jurisdictional determinations (AJDs) to property owners and developers about the presence and location or absence of jurisdictional waters on a particular parcel of property. AJDs provide landowners and developers a determination that can be relied upon for planning for the use of the property, including determining the need and scope of a permit application to discharge dredged or fill material in wetlands

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determined to be jurisdiction waters of the United States (WOTUS). Typically, an AJD is valid for five years.

The definition of what constitutes a jurisdictional wetland requiring a dredge and fill permit has changed considerably over the course of the last three administrations. The Obama administration issued a rule in 2015 defining what a jurisdictional wetland is that subjects work in the wetland to permitting. This rule was challenged and stayed in various district courts and the Supreme Court. The 2015 rule was repealed in September 2019 and replaced by the Navigable Waters Protection Rule (NWPR) in April 2020. A federal district court in New Mexico in August 2021 remanded and vacated the NWPR.

The EPA and the Corps gave the New Mexico district court's ruling national effect and consider the NWPR repealed and vacated. The EPA and the Corps on Nov. 18, 2021, announced a proposed rule (published Dec. 7, 2021) to define WOTUS. Further, in the interim before the proposed 2021 rule was finalized, the agencies said they would use the pre-2015 definition of WOTUS. Reports are that EPA is moving forward to finalize its proposed rule.

The Corps' [January 2022 press release](#) created a new type of uncertainty for property owners and developers who had received an AJD during the narrow window of time that the NWPR was in effect from April 2020 until it was vacated in August 2021. The Corps' statement that creates this latest uncertainty is as follows: "The Corps will not rely on an AJD issued under the Navigable Waters Protection Rule (a 'NWPR AJD') in making a new permit decision."

In the same press release, the Corps said it would not revisit permits issued prior to the New Mexico district court's ruling. In contrast, permitting decisions made after the court's Aug. 30, 2021, ruling may be modified, suspended, or revoked if the decision relied on a NWPR approved jurisdictional determination. Further, the Corps stated that all pending permit applications will be evaluated under the pre-2015 regime.

The pre-2015 regime is a reference to the time following the 2012 Supreme Court *Rapanos* decision, in which the Court split 4-1-4. The late Justice Kennedy's concurring opinion (it was the one in the split) used a "significant nexus" test to determine whether a land feature had a "significant nexus" to a water body that comports with the more traditional understand of a "navigable water." It appears likely that the pre-2015 regime will end soon following the Supreme Court's second Sackett decision.

The Small Business Administration (SBA) is also concerned with this uncertainty. It wrote a letter dated April 14, 2022, to the Corps identifying two situations in which entities were threatened with enforcement actions for undertaking work without a wetlands permit, even though the entities had received negative AJD determinations under the NWPR, finding that the proposed projects did not affect jurisdictional wetlands. The SBA letter recommends that the Corps do more to communicate its position beyond relying on the January press release; modify its January announcement to be clear it will not take enforcement actions in situations where a negative AJD was issued and relied upon; and determine and then communicate the impact its position will have on small businesses.

The SBA's uneasiness with the Corps' actions with respect to AJD holders appears to square with the Supreme Court's decision in *U.S. Army Corps*

*Eng'rs v. Hawkes Co.* 578 U.S. 590 (2016) in which all nine justices held that AJDs regarding the definition of “waters of the United States” are final agency actions. Further, the Supreme Court found in *Hawkes* that “A negative JD thus binds the two agencies authorized to bring civil enforcement proceedings under the Clean Water Act, see 33 U. S. C. §1319, creating a five-year safe harbor from such proceedings for a property owner.” The court noted that the property owner during this five-year safe harbor period, when not being required to have a permit following a negative AJD, would not be immune from a citizen suit.

Justice Kennedy’s concurring opinion in *Hawkes* quoted Justice Alito’s “notoriously unclear” statement from the *Sackett* concurrence and went on to say, “An approved Jurisdictional Determination (JD) gives a landowner at least some measure of predictability, so long as the agency’s declaration can be relied upon.” Justice Kennedy’s concurring opinion went further and stated that the Clean Water Act “...especially without the JD procedure where the Government permitted to foreclose it, continues to raise troubling questions regarding the Government’s power to cast doubt on the full use and enjoyment of private property throughout the Nation.”

Property owners and developers have a bit more a wait before a Supreme Court decision addressing the definition of the reach of wetlands jurisdiction under the Clean Water Act, but will have to wait further and see how the Corps and EPA interpret and implement that decision.