

Undefined Sackett Terms Create Uncertainties for EPA's Next WOTUS Policy

Media Mentions

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Inside EPA covered a [Bracewell Environmental Essentials Webinar](#) hosted by **Ann Navaro**, **Sara Burgin** and **Daniel Pope** on June 13, where they discussed the implications of the US Supreme Court's recent decision in *Sackett v. EPA* for the reach of the Clean Water Act at the federal level and in the states.

Inside EPA pointed out Navaro's comments on Sackett that though it is currently unclear how EPA is going to interpret the Sackett decision; it will likely continue to interpret the high court's precedent on WOTUS as broadly as possible.

"Of course, we can't know how EPA and the Army Corps are going to interpret the decision, but the Biden administration WOTUS rule, the 2023 definition, may provide some clues as to where this administration might head if they believe it's allowable under a broad reading of this decision. We can certainly expect this administration to find as much jurisdiction as possible that, in its view, is consistent with the decision," Navaro said.

She also pointed to preamble language in the 2023 rule as an indicator of how the agencies may interpret certain terms in guidance or a future WOTUS rulemaking.

For example, she said that section indicates that "relatively permanent" may include water that flows irregularly, not just on a seasonal basis, "but also because of water management decisions that impact flow, or because water flow is tied to predictable rain cycles or snowmelt."

But she added that streams flowing for only short periods of time, including those generally identified as ephemeral, are now well understood to be non-jurisdictional after the court rejected the significant nexus test in Sackett.

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“So, I expect the question of what ‘relatively permanent’ means to be one that is amenable to some interpretation,” Navaro said.

Navaro then pointed to the terms “continuous surface connection” and “indistinguishable,” noting that the Biden administration’s rule says a constant hydrologic connection is not required in order to show a continuous surface connection. While the rule is based in large part on a significant nexus standard, it also applied Scalia’s test as a separate path for establishing federal jurisdiction over waters.

“I’m not sure this is something folks think the Supreme Court would contemplate, even though the Supreme Court also did recognize that circumstances such as drought or low tides would not necessarily sever jurisdiction over wetlands. Also, I expect that this administration will consider whether non-jurisdictional connections like pipes or non-jurisdictional ditches create a continuous surface connection to establish jurisdiction over wetlands,” Navaro said.