**Clean Water Act Jurisdiction Issues:**
**Waters of the United States (WOTUS) and Indirect Discharges**

**Waters of the United States**

The term "navigable waters," defined as the "waters of the United States" sets the scope of federal jurisdiction under the Clean Water Act ("CWA")—thereby defining for water quality purposes what features are left to be regulated solely by the states. On May 25, 2023, the Supreme Court in *Sackett v. EPA* unanimously ruled out of bounds EPA and U.S. Army Corps of Engineers' extension of the reach of the Clean Water Act ("CWA") to surface water bodies with a "significant nexus" to a "water of the United States" ("WOTUS"). While the Supreme Court applied the statutory text to sharpen the edges of what has been a problematically vague provision of law, implementation of the *Sackett* ruling remains an issue of significant concern, both as a matter of law and as a matter of practicality.

The Court directly addressed the proper test for determining WOTUS with respect to USACE's claim of authority over petitioners' wetland in North Idaho and all nine justices agreed that USACE exceeded its authority in its claim over the wetland at issue. A five-Justice majority adopted the jurisdictional test forth in Justice Scalia's plurality opinion in *Rapanos v. U.S.,* holding that CWA jurisdiction extends "only [to] those relatively permanent, standing or continuously flowing bodies of water 'forming geographic[al] features' that are described in ordinary parlance as 'streams, oceans, rivers, and lakes'" as well as "adjacent wetlands that are 'indistinguishable' from those bodies of water due to a continuous surface connection."

Despite the pending Supreme Court ruling in *Sackett*, on January 18, 2023, EPA and the U.S. Department of the Army (together, the "Agencies") had published a final rule in the Federal Register titled "Revised Definition of 'Waters of the United States'" (the "January 2023 Rule"). The January 2023 Rule was the fourth substantive rulemaking since 2015 to try to address the scope of Clean Water Act jurisdiction and it included in the Final Rule the now-rejected "significant nexus" text.

On September 8, 2023, following the Court's ruling in *Sackett* and <u>without issuing a draft for public comment</u>, the Agencies published a final rule in the Federal Register titled "Revised Definition of 'Waters of the United States'; Conforming" (the "Conforming Rule") purporting to align the definition of WOTUS with the Supreme Court's decision in *Sackett*. However, the Conforming Rule should be revised to align with *Sackett* by correcting overstatements in the record associated with the January 2023 Rule. As one example, under the January 2023 Rule, the Agencies asserted that a continuous surface connection "does not require surface *water* to be continuously present between the wetland and the tributary." 88 Fed. Reg. at 3096 (emphasis added). No changes were made in the Conforming Rule to clearly reflect the admonition from the Supreme Court that wetlands "must be indistinguishable from waters of the United States." *Sackett*, 598 U.S. at 678-679. There are also remaining ambiguities regarding the "relatively permanent" standard largely because the Administration has implied it may take an aggressive stance, thus undermining reliance many years of reliance on *Rapanos* guidance implementation of relative permanence of waters. Notice and comment rulemaking would provide an opportunity for the highlighting and elucidation of remaining uncertainties.

As a practical matter, the Corps of Engineers has been stymied in its review of projects by seeming Administration resistance to implementing *Sackett*, bringing issuance of Approved Jurisdictional Determinations first to a total halt and now to a painful trickle. The impact to projects is real and of significant concern because the stability of securing an Approved Jurisdictional Determination on which to rely is often a key foundation to project development. The *Sackett* decision on its face provides significant sharpening of jurisdictional lines and can be implemented promptly and reasonably notwithstanding the remaining ambiguities.

**Indirect Discharges (*County of Maui* Implementation)**

On November 27, 2023, EPA published in the Federal Register, at 88 Fed. Reg. 82,891, a notice announcing draft guidance ("Draft Guidance") on applying the U.S. Supreme Court's decision in *County of Maui v. Hawaii Wildlife Fund*, 140 S. Ct. 1462 (2020), in the Clean Water Act ("CWA") Section 402 National Pollutant Discharge Elimination System ("NPDES") permit program for point source discharges that travel through groundwater before reaching waters of the United States. According to the EPA, the Draft Guidance is intended to "describe the Maui decision's functional equivalent standard, considerations for determining which discharges through groundwater may require coverage under an NPDES permit, and the types of information that may be useful to NPDES permitting authorities in developing appropriate permit conditions." The Draft Guidance, however, reads like a rule and makes assertions that appear to overextend the *County of Maui* ruling and improperly foreclose relevant considerations. We provide the following as just two examples:

- The Draft Guidance does not well reflect that discharges to groundwater should be presumed to be non-jurisdictional unless and until a site-specific evaluation by the permitting authority indicates that the *County of Maui* factors (or other relevant factors) weigh in favor of a functional equivalent determination for any documented point source. The Supreme Court's multi-factor balancing test makes clear that point source discharges to groundwater requiring permits are the exception rather than the rule.
- The Draft Guidance states that "[t]he existence, or lack, of a state groundwater protection program is not relevant to whether the functional equivalent of a direct discharge analysis applies, and the existence of a state groundwater protection program does not obviate the need for an NPDES permit" and that it would "be inconsistent with Maui to consider the existence of a state groundwater protection program when determining whether a discharge through groundwater is subject to the CWA." But permitting authorities, like the Texas Commission on Environmental Quality, are best suited to determine what factors are relevant to evaluating whether a specific discharge to groundwater is the functional equivalent of a direct discharge. Consideration of a state groundwater protection program may be relevant to a permitting authority's NPDES permit determination or to the conditions of those permits depending on the specific circumstances. EPA should not foreclose such consideration --- particularly by "guidance."

**Requests of EPA and USACE.**

- **Waters of the U.S.** Promptly implement *Sackett* including through a renewed focus on the plain language of the ruling and issuing requested AJDS. Use of notice and comment in the rulemaking process would provide opportunity to clarify remaining uncertainties in how the Agencies conform the rule to the *Sackett* ruling.
- **Indirect Discharges (*County of Maui* implementation).** Revise the draft guidance to emphasize that it is not a rule and to provide more flexibility to the permitting agencies to address what constitutes a "functional equivalent" of a direct discharge, recognizing that it is the exceptional circumstance.

**Requests of Congress.**

- Provide oversight to ensure transparency and accountability in rulemaking and implementation.
- Provide resources appropriate to assure federal jurisdiction is not unduly burdensome.