

WATER FORUM

CHALLENGES & CHALLENGERS

WOTUS RULE CHALLENGES • EXPANSIVE EPA INTERPRETATION • NEW ENDANGERED SPECIES

December 4, 2024

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Presented by:





JOSEPH SANTORO

Director, Policy & Government Affairs
Council for Quality Growth





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MEGAN KING

Director, Programs & Events
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Upcoming Council Events



Emerging Leaders Initiative

December 10
5:30-7:30 PM

Fado Irish Pub Buckhead
273 buckhead ave | atlanta

**2024
Holiday
Mixer**

Presenting Sponsorships Available. Contact Megan King at MK@CouncilforQualityGrowth.org



Upcoming Council Events



JOIN THE COUNCIL FOR
Coffee & Conversations
December 12
9:00-10:00 AM

COUNCIL FOR QUALITY GROWTH
5901-C Peachtree Dunwoody Rd., Suite 500

Meet our leadership team and see how to
best leverage membership for your policy needs.

For details or to register, please contact Morgan Peek
MPeek@CouncilforQualityGrowth.org.



Upcoming Council Events



39th Annual Meeting &

LEGISLATIVE RECEPTION



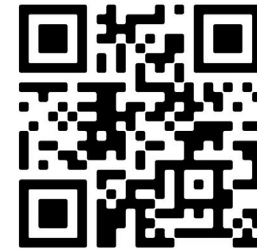
with the Georgia General Assembly

Presented by **amazon**  **OHIO RIVER SOUTH**

December 17 • 6:00-8:00 PM

CHEROKEE TOWN & COUNTRY CLUB

SPONSORSHIPS &
TICKETS AVAILABLE
ONLINE AT
[www.Councilfor
QualityGrowth.org](http://www.CouncilforQualityGrowth.org)



Member Tickets = \$125
Non-members must sponsor

For more information,
contact Megan King at
MK@CouncilforQualityGrowth.org



Upcoming Council Events



WEDNESDAY
**JAN
22**

11:30 AM

**Cherokee
Conference
Center**





GERALD POUNCEY

Chairman

Morris, Manning & Martin, LLP





STEPHEN MCCULLERS

Associate

Morris, Manning & Martin, LLP





Water Forum

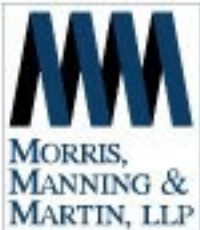
Council for Quality Growth
December 4, 2024

Gerald L. Pouncey
Stephen A. McCullers



Outline

- Status of State Challenges to WOTUS Rule
- Court Decisions Applying *Sackett*
- Florida's Loss of the 404 Program
- Tri-Colored Bat Listing



Waters of the U.S. Refresher

- U.S. Supreme Court *Sackett* decision in May 2023
- Waters subject to federal regulation:
 - Traditional interstate navigable waters (such as major rivers, lakes, and oceans)
 - “Relatively permanent” bodies of water connected to traditional interstate navigable waters
 - Adjacent wetlands that have a “continuous surface connection” making it difficult to determine where the water ends and the wetland begins



State Challenges to Water Rule

- Biden Administration issued “Conforming Rule”
- State Challenges to the Rule
 - Preliminary injunction against the rule issued in two cases (applies to 26 states including Georgia)
 - In a third case, Kentucky recently filed an amended complaint
- Overall Claims:
 - Agencies failed to seek public comment
 - “Adjacent” definition fails to require that wetland be indistinguishable from WOTUS
 - Rule captures minor water features that cross state lines



State Challenges to Water Rule

- In states challenging the Biden Rule, the “pre-2015 regulatory regime” plus *Sackett* applies
- Big question is what the new administration will do
 - Recent letter from House Committee on Transportation may provide some insight
 - Focus on failure to follow *Sackett* and indistinguishable factor
 - Likely rejection of broad surface connection interpretation
 - Possible rejection of required EPA review of Corps decisions



Court Decisions Applying *Sackett*

- *United States of America v. Sharfi*
 - Summary Judgment, South Florida, Sept. 2024
 - Magistrate Report and Recommendation:
 - Intermittent or ephemeral ditches or channels with seasonal flow do not satisfy *Sackett* (relatively permanent water 2 miles away)
 - Photographs submitted did not show any “visible surface connection” making it difficult to determine where the water ends and the wetland begins
 - Hearing on objections to Report scheduled in December.



Court Decisions Applying *Sackett*

- *Glynn Env't Coal., Inc. v. Sea Island Acquisition, LLC*, No. CV 2:19-050
 - Motion to Dismiss, South Georgia, March 2024
 - Rejected claim of Clean Water Act jurisdiction as surface runoff, groundwater, pipes, and culverts do not provide a continuous surface connection between wetlands on the property and a traditionally navigable water
 - Property 100s of feet away from permanent water
 - Photographs showed a “clear demarcation” between the property and the traditionally navigable water
 - Appeal pending



Court Decisions Applying *Sackett*

- *Juban Land Holdings v. Corps*
 - Vacatur and Remand, Louisiana, January 2024
 - Claim the Corps does not have jurisdiction over wetlands as ditches and culverts with ephemeral or intermittent flow cannot serve as a continuous surface connection
 - Appears to be heading toward settlement with the Corps preparing a new Approved Jurisdictional Determination



Court Decisions Applying *Sackett*

- *Lewis v. United States* (December 2023)
 - Fifth Circuit Court of Appeals – Louisiana
 - Corps claimed jurisdiction over wetlands “connected” to a relatively permanent water several miles away by roadside ditches, a culvert, and non-relatively permanent tributary
 - Held:
 - “. . . it is not difficult to determine where the ‘water’ ends and any ‘wetlands’ on Lewis’ property begin”
 - “. . . there is no ‘continuous surface connection’ between any plausible wetlands on the Lewis tracts and a ‘relatively permanent body of water’”



Court Decisions Applying *Sackett*

- *United States v. Andrews*
 - Connecticut 2023
 - Government enforcement for landowner allegedly filling approximately 13.3 acres of wetlands without a permit
 - The defendant represented himself *pro se* and failed to properly comply with the Court's Local Rules, which resulted in the Court deeming Government's factual assertions admitted
 - The Court found that the wetlands on Defendant's property are jurisdictional under *Sackett*
 - Not clear if the Court would have reached the same conclusion if the defendant had properly opposed the Government's assertions



Court Decisions Applying *Sackett*

- Conclusions from the available cases:
 - Courts have focused on the language of the *Sackett* case, in particular the “relatively permanent” requirement for tributaries and the “continuous surface connection” and “indistinguishable” language for wetlands
 - Property owners have been successful in challenging claims of jurisdiction where connections are based on anything other than a continuous surface water connection
 - Where property owners have been unsuccessful, there have been other factors, such as having the government’s facts admitted unchallenged (Andrews) or having an increased burden of proof during preliminary injunction hearings (White)



Section 404 Permitting

- The Army Corps issues Clean Water Act dredge and fill permits (404 Permits) in almost all states
- Florida was one of three states (others are Michigan and New Jersey) that assumed Section 404 permitting



Florida's Section 404 Program

- December 2020
 - Florida successfully petitioned EPA to transfer authority for wetland permitting under the Clean Water Act from the Corps to Florida
- February 15, 2024
 - The U.S. District Court for the District of Columbia vacated EPA's transfer of the federal wetland permitting program to Florida



Loss of 404 Permitting Program

- Endangered Species Act
 - Under the Act, “federal action” triggers the requirement to consider protected species
 - Government prepared a “programmatically” opinion considering species impacts due to the transfer of the permitting program to Florida and Florida’s issuance of all future permits
 - The court rejected this approach because this “programmatically” consideration could not replace the species consideration needed for each individual permit
- Florida has tried various legal challenges to stay or reverse the Court’s opinion, but has been unsuccessful so far



Implications of Loss of Program

- Numerous pending permit and related actions are returning to the Corps from Florida
 - About 950 pending permit and related actions
- Corps district offices in Florida do not have adequate staff to resume wetlands permitting projects
- Many state permit applications do not have all the information the Corps requires
- Permits requests for projects are being distributed to Corps offices across the country while Corps restaffs and trains Florida personnel
 - 200 project managers nationwide
 - Private contractor for assistance

Tri-Colored Bat



Credit: US Fish and Wildlife



Tri-Colored Bat

- Endangered Species Act
 - On September 14, 2022, the U.S. FWS proposed a rule to list the Tri-Colored Bat as an endangered species
 - Significant population declines have occurred because of white-nose syndrome
 - Target listing date was September 2024, but listing has not occurred yet



Tri-Colored Bat

- The listing of the bat as endangered would have wide ranging implications on development activities
- These bats have a large geographical range and are threatened by the destruction of trees.
 - The bats are present in 39 states (including all Georgia counties)
 - Winter hibernation sites include caves and mines
 - In the spring, summer, and fall, females roost in small groups in live or dead leaf clusters or beard lichen



Tri-Colored Bat

- Once listed, consideration of the bat will be required where there is federal action, such as permit decisions including wetland permits issued by the Corps
- The big question is for permits that have been issued but the work has not yet been completed
 - The Corps may decide to review existing projects not yet completed to determine impacts to the bat from these projects and could potentially revise the permit



Tri-Colored Bat

- The Fish and Wildlife has prepared draft voluntary, step-by-step guidelines that federal agencies and non-federal project proponents may take to comply with the Endangered Species Act requirements for the bat
 - Complete initial desktop species list review
 - If bat may be present, use online question system to evaluate impacts
 - If impacts are likely, coordinate with Fish and Wildlife Service regarding project and voluntary mitigation measures
 - If impacts will likely adversely affect bat, additional mitigation measures will likely be required



Tri-Colored Bat

- Developers seeking wetland permits should consider proactively completing some or all of the recommended steps even before the bat is listed as endangered
 - A key issue is tree clearing in areas suitable for forage and/or roosting habitat during the “active season” from April 1 to October 15

Questions?



Water Forum

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