

Sackett/Waters of the United States: Virginia Department of Environmental Quality Memorandum Addressing State Jurisdiction Over Wetlands and Streams



Walter Wright, Jr.
wwright@mwlaw.com
(501) 688.8839

07/19/2023

The Virginia Department of Environmental Quality (“VDEQ”) issued a June 29th memorandum describing the actions it will take to protect the state’s wetlands and streams in light of the United States Supreme Court May 25th decision in *Sackett v. U.S. Environmental Protection Agency* (“*Sackett*”).

The June 29th VDEQ memorandum is transmitted from Mike Rolband to Stakeholders in the Commonwealth of Virginia and references as the subject:

Recent Supreme Court Decision *Sackett v. Environmental Protection Agency (EPA)* - Effect in Virginia and How to Move Forward Without Economic Dislocation

The United States Supreme Court in *Sackett* significantly narrowed the scope of what constitutes a water of the United States (“WOTUS”) for purposes of the Clean Water Act. (See previous blog post [here](#).)

The *Sackett* decision will eliminate from Clean Water Act 404 jurisdiction a significant percentage of the United States’ wetlands.

The VDEQ memorandum notes that Virginia has what it describes as a “very broad and comprehensive statutory definition of state waters.” It notes that Virginia waters are defined to include:

... all water, on the surface and under the ground, wholly or partially within or bordering the [Commonwealth] or within its jurisdiction.

The definition also includes the phrase “including wetlands.”

Virginia law is stated to prohibit:

... excavating, filling, draining, or other activities that cause significant alteration or degradation of existing wetland acreage or functions without a permit.

The memorandum notes that since 2001 the state has regulated activities in surface waters (i.e., wetlands and streams) through its Virginia Water Protection Permit program which is stated to require the:

... avoidance and minimization of wetland impacts to the maximum extent practicable and compensation for any unavoidable loss of wetland functions.

The referenced regulation is of course unaffected by the Sackett decision.

VDEQ states it will make its own state surface water determinations to ensure that the Sackett decision does not hinder efficient processing of Virginia water protection permits. The federal permitting uncertainty associated with Sackett and the United States Corps of Engineers halting of delineations is referenced.

VDEQ states it will provide clarity on the geographical limits and types of wetlands and streams regulated. This is stated to include an expansion of VDEQ's ability to work with private sector Professional Wetland Delineators certified by the Virginia Department of Professional and Occupational Regulation.

The June 29th memorandum describes the state process including a review of the delineation report requirements.

Several states already operate through delegation the Clean Water Act 404 program. However, whether those programs will be affected by Sackett of course depends upon their scope of the relevant definition of waters. Nevertheless, many states (like Virginia) have much broader definitions of jurisdictional waters than the Clean Water Act and are expected (like Virginia) to seek regulation of wetlands that are no longer subject to Clean Water Act jurisdiction.

A copy of the VDEQ memorandum can be downloaded [here](#).