

Regulatory Changes: Massachusetts Wetlands Permitting

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The U.S. Supreme Court recently issued an opinion in *Sackett v. EPA* that established a stricter test for whether the federal Clean Water Act (CWA) applies to a wetland. The test limits federal jurisdiction to wetlands with a continuous surface connection to traditional navigable waters (i.e., oceans, lakes, rivers, and streams which are navigable). As a practical matter, this means that isolated vegetated wetlands, ephemeral streams, and other temporary waters, including many vegetated wetlands (e.g., swamps and marshes), are now beyond the reach of the CWA.¹

Sackett's elimination of federal jurisdiction over certain wetlands will have at least two key implications for wetlands permitting in Massachusetts. First, development on these wetlands will be subject to less stringent federal requirements. Second, activities impacting some isolated vegetated wetlands will not require notice or permitting at any level – federal, state, or local – in municipalities that do not protect this category of wetlands under their own bylaw or ordinance.

Fewer Wetland Impacts Count Toward Federal Impact Threshold

The U.S. Army Corps of Engineers (the Corps) administers a general permit for residential, commercial, and institutional development on federal jurisdictional waters, including jurisdictional wetlands. The general permit allows self-verification for projects that impact less than 5,000 square feet of many jurisdictional waters. Projects that exceed this threshold need to file a Preconstruction Notice (PCN) with the Corps, who will determine whether an individual permit is required.

After *Sackett*, fewer development projects will meet the 5,000 square-foot impact threshold. Since many areas that historically have been classified as federal wetlands are no longer within federal jurisdiction, any impacts to such areas will not count toward the impact threshold. This means that more projects will be able to stay below the threshold and be eligible for self-verification or require no Corps involvement. Staying below this 5,000 square-foot impact threshold is particularly important for projects not otherwise subject to review under the Massachusetts Environmental Policy Act (MEPA); in addition to filing a PCN with the Corps, projects that meet the threshold must obtain a water quality certification from the Massachusetts Department of Environmental Protection, which can trigger the MEPA review process.

Isolated Vegetated Wetlands No Longer Regulated in Many Municipalities

Sackett excludes isolated vegetated wetlands from federal jurisdiction, and this category of wetlands is only subject to Massachusetts state regulation in limited circumstances. As a result, local wetland bylaws are generally the only remaining source of protection available. However, wetland bylaws have only been adopted by approximately half of the state's municipalities² – and not all bylaws extend protection to isolated vegetated wetlands.

The takeaway here is that development on isolated vegetated wetlands will no longer be subject to notice or permitting requirements in municipalities that do not specifically regulate these wetlands³. This change may have significant implications for development on such sites.

Further Information

Developers and property owners in Massachusetts would be well advised to consider the implications of these regulatory changes with respect to development in areas that contain wetlands. For questions about the information in this advisory, please contact the authors or your usual Goulston & Storrs attorney.

This advisory was written in consultation with EcoTec president Paul McManus, LSP, SPWS.

**This advisory should not be construed as legal advice or legal opinion on any specific facts or circumstances. The contents are intended for general informational purposes only, and you are urged to consult your own lawyer concerning your situation and any specific legal questions you may have.*

¹ The U.S. Army Corps of Engineers is expected to issue guidance addressing *Sackett's* jurisdictional test, which should provide further insight into how *Sackett* will affect federal wetland delineations.

² Large municipalities that do not have a wetland bylaw include Brockton, Cambridge, Medford, Somerville, and Waltham.

³ Vegetated wetlands that border on even the smallest intermittent stream continue to be regulated as "bordering vegetated wetlands" under Massachusetts state wetland regulations. The state regulations include a Request for Determination of Applicability Process which provides for a binding determination regarding wetland jurisdiction.