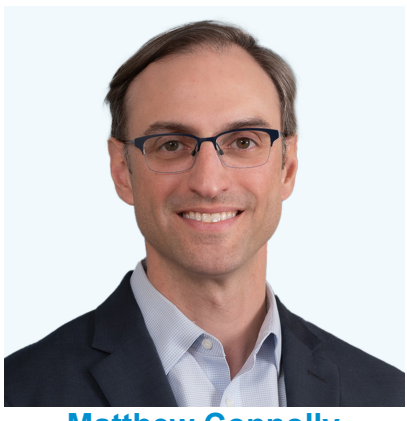
Nutter

ENVIRONMENT & ENERGY INSIGHTS

August 2024 Edition



Matthew Connolly

Matthew Snell

Welcome to the August edition of Nutter's *Environment & Energy Insights*, a monthly update of current trends in environment and energy law. This month we cover:

- EPA's new Facility Response Plan requirements for potential worst-case discharges of hazardous substances; and
- A summary of Clean Water Act jurisdiction over wetlands 15 months after the Supreme Court's *Sackett* decision.

Is your facility a "worst case scenario"? EPA's new rules may think so.

In March 2024, the U.S. Environmental Protection Agency ("EPA") issued a **final rule** requiring facilities to develop a Facility Response Plan ("FRP") for potential worst-case discharges of hazardous substances. The new rule, which will likely impact thousands of additional facilities, greatly expands the FRP requirement for facilities storing oil and **certain other hazardous substances**.

The rule, which went into effect May 28, 2024, requires most regulated facilities to prepare FRPs within 36 months (2027) and is the result of EPA's 2019 settlement with the Natural Resources Defense Council alleging that EPA failed to issue regulations for non-transportation related facilities that could have worst-case spills of hazardous substances.

The rule provides a two-part test to determine if a facility requires an FRP. *First*, the rule applies to facilities that (1) store over 1,000 times (this was significantly reduced from over 10,000 times in the draft rule) the reportable quantity of a hazardous substance and (2) are within 0.5 miles of a navigable water or conveyance to a navigable water (this would include "a direct pathway to navigable waters" such as a storm drain/pipe or a channel that discharges directly into a navigable water). If both parts of the first prong are met, a *second* prong is triggered, so that a facility must determine if a potential substantial harm exists (i.e., a discharge impacts a public water system, injures fish, wildlife, sensitive environments, or public receptors), or if the facility had a reportable discharge of hazardous substances to a navigable water within the last five years.

Because "injury" is broadly defined in the rule to include "a measurable adverse change … in a natural resource or public receptor resulting either directly or indirectly from a discharge", facilities that meet the first prong will almost certainly meet the second. This will require the facility to prepare and submit an FRP to EPA, review and recertify the FRP every five years, and evaluate the FRP each time a hazardous substance is added or a reportable quantity is revised.

If you are wondering whether your facility now needs an FRP, contact Nutter's environmental team.

Clean Water Act jurisdiction over wetlands 15 months after *Sackett*

We thought now would be a good time to check in and see how courts have applied the Supreme Court's new test defining Clean Water Act jurisdictional wetlands in its May 2023 *Sackett* decision. In the brief, a wetland is jurisdictional under *Sackett* if it is (1) adjacent to a jurisdictional waterbody, and (2) the wetland has a continuous surface connection with that waterbody such that it is difficult to determine where the jurisdictional waterbody ends and the wetland begins. (You can find our summary of *Sackett* **here**).

In response to *Sackett*, EPA and the Army Corps of Engineers revised its regulations defining jurisdictional waters in August 2023. (Our summary is **here**.) Notably, the regulations assert jurisdiction over any wetland with a continuous surface connection to a covered water, even if there is no geographical proximity between the wetland and covered water.

Sackett has been cited in more than 50 cases since it was issued, with courts analyzing the level of adjacency and connectivity needed for a wetland to be jurisdictional. Some cases found that challenged wetlands were no longer covered by the Act. For example, in *Lewis v. United States*, the Fifth Circuit found that the at-issue wetlands were not jurisdictional because they were located miles away from the jurisdictional water, connected only by roadside ditches, a culvert, and a non-relatively permanent tributary. Similarly, the Northern District of Georgia dismissed a citizen's suit at the motion to dismiss stage in March 2024 because allegations that a wetland was connected to a jurisdictional waterbody "via culverts and pipes" was insufficient to plausibly allege jurisdiction over the wetland. *Glynn Env't Coal., Inc. v. Sea Island Acquisition, LLC*, (S.D. Ga. Mar. 1, 2024).

In June 2024, however, the Eastern District of North Carolina took a different tack. In *Robert White v. EPA*, a property owner argued that a wetland should only be considered adjacent to a jurisdictional waterbody where the wetland has both a continuous surface connection ***and*** is indistinguishable from the jurisdictional waterbody itself, rather than what the plaintiff described as "intervening non-jurisdictional features." The court rejected this argument and upheld EPA and the Army Corps' regulation, finding that the presence of a continuous surface connection is the feature that makes a wetland indistinguishable from an adjacent jurisdictional waterbody.

At this stage, it is hard to know if courts are applying different standards or simply assessing different facts. As the Supreme Court held in *Sackett*, the "outer reaches" of the Clean Water Act have been a "nagging question" since the Act's inception. It seems as if that question will continue to nag for at least a little longer.

This advisory was prepared by Matthew Connolly, Matthew Snell, and Joseph Jannetty in Nutter's Environmental and Energy practice group. If you would like additional information, please contact any member of our practice group or your Nutter attorney at 617.439.2000.

About Nutter

Nutter is a Boston-based law firm that provides legal counsel to industry-leading companies, early stage entrepreneurs, institutions, foundations, and families, across the country and around the world. The firm's business and finance, intellectual property, litigation, real estate and land use, labor and employment, tax, and trusts and estates practice are national in scope. The firm was co-founded in 1879 by former U.S Supreme Court Justice Louis D. Brandeis, before his appointment to the Court. For more information, please visit **www.nutter.com** and follow the firm on **LinkedIn**.

Our mailing address is:
155 Seaport Blvd, Boston MA 02210 United States

Nutter