

Press Coverage | June 7, 2023

Lawyers Eye Maui as Potential Avenue for CWA Enforcement Post-Sackett

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Brooks Smith, a partner in Troutman Pepper’s Environmental + Natural Resources Practice Group, was quoted in the June 7, 2023 *InsideEPA* article, [“Lawyers Eye Maui as Potential Avenue for CWA Enforcement Post-Sackett.”](#)

Smith echoed this idea, noting that Justice Scalia, in a previous WOTUS suit *Rapanos v. United States*, essentially said that “you can’t evade jurisdiction.”

“In *Maui* it was in the context of 402 NPDES permits, but you couldn’t evade the 402 permit simply by discharging into a noncovered water feature that then was upstream and flowed into a covered feature. So, I read that to suggest, if you were to read *Sackett* to say ephemeral waters are no longer jurisdictional, and you had a 402 discharge into an ephemeral water, on its face you might say a NPDES permit is no longer required because it’s not a discharge into a [WOTUS]. But I think under the Kavanaugh, Scalia interpretation, you may nonetheless be required . . . to protect downstream waters,” Smith added.

While Craig and Schiff note that court review of this particular issue may stem from a legal challenge to a permit, Smith points to the EPA guidance currently under White House review.

“What I wonder is whether this will bubble up as an appeal to a forthcoming EPA rule... or as an appeal from one of these lower court decisions. I think that actually may influence how the Supreme Court reacts as well,” Smith said.

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