Supreme Court Ends Marathon 'Ping-Pong' Game at EPA/Army Corps Over Definition of 'Waters of the U.S.,' at Least for Now

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Authors:

Stephen N. Haughey
Christina Wieg

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In its fourth, and most recent, opportunity since 2001 to define the scope of the Clean Water Act (CWA), on May 25, 2023, the U.S. Supreme Court finally breathed some measure of order, certainty, fair notice, and due process into the "waters" that constitute jurisdictional "waters of the U.S." (WOTUS) under the statute. In a unanimous 9-0 opinion (*Sackett v. Environmental Protection Agency*) authored by Justice Alito, the Court rejected the U.S. Environmental Protection Agency and Army Corps of Engineers' (the "Agencies") use of the vague and subjective "significant nexus test" (SNT) to assert jurisdiction over a wetland the Agencies had found to be "adjacent" to Priest Lake in Idaho, but which was in fact separated from the lake by a large roadway, a manmade ditch, and a substantial segment of a non-navigable, unnamed tributary, and also lacked any defined continuous surface or subsurface connection with the lake.

In its decision, the Supreme Court concluded that the SNT used to define jurisdictional "adjacent" wetlands is inconsistent with the text of the CWA, both as written and as interpreted in prior decisions of the Court, and is so vague and subjective that it fails to provide fair notice to the regulated community of its obligations, while also imposing potentially severe civil and criminal penalties on those who guess wrong. While unanimous in rejecting further use of the SNT for wetlands, the Court was divided on the proper standard to be applied when determining whether a wetland is "adjacent" to a WOTUS and thus is a jurisdictional WOTUS:

- Justices Alito, Roberts and Barrett would require that there be a continuous surface connection between the wetland and

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the WOTUS.

- Justices Thomas and Gorsuch, while supporting the continuous surface connection requirement (thus making a majority of the Court in support of this requirement), wrote separately to express their view that the term "navigable" in the CWA is not being properly followed, and they would define all WOTUS as "waters within Congress' traditional authority over the interstate channels of commerce."
- Justices Kavanaugh, Kagan, Sotomayor and Jackson wrote separately to opine that imposing a continuous surface connection requirement improperly narrows the statutory term "adjacent," turning it into "adjoining," and they would rely on the "ordinary meaning" of the word "adjacent" while still rejecting further use of the overreaching, vague and subjective SNT.

While *Sackett* involved a dispute over wetlands, there is no reason to believe the Court's view on the validity of the SNT for adjacent wetlands would be any different than its view on the continued validity of using the same test to determine whether small streams, often located miles away from the nearest jurisdictional WOTUS, would be any different. Thus, at a minimum, the *Sackett* decision also calls into question the continued use of the SNT for small streams, if not outright overruling its further use by implication. In addition, while not expressly stating so, the *Sackett* decision effectively overrules the Army Corps/EPA's revised WOTUS rule issued on January 18, 2023 (88 Fed. Reg. 3004), at least with respect to the continued use of the SNT (which the agencies kept in the revised rule, but renamed as the "significantly affect" test, and even broadened it) for wetlands and most likely for streams as well.

Starting shortly after the Supreme Court's decision in 2001 (*Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers*), the number of rewrites (at least seven) of this important rule long ago crossed the point of sublime to the realm of bizarre. And during this time, the rule has been the subject of at least four separate Supreme Court appeals, including the *Sackett* decision. By far the most controversial aspect of the rule has been the incredibly broad, vague and subjective SNT used to determine

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whether wetlands and streams, often miles away from the nearest WOTUS, either by themselves or considered together with other "similarly situated" waters in the region, have a "substantial" effect on the chemical, biological, and/or physical integrity of the nearest WOTUS. The Court's latest ruling eliminates this vague and subjective test, providing more certainty to developers and homebuilders.

Based on the decision and guiding principles offered from several members of the Court, the Agencies will have to revise their rule again, this time to focus on factors that demonstrate a direct and continuous surface connection between a wetland and a nearby WOTUS, in order for the wetland to be jurisdictional. And they'll most likely need to adopt the similar factors to show a direct and substantial connection between small ephemeral/headwater streams and downgradient traditional waterways, in order for those streams to also be jurisdictional.

Key Takeaways

- At a minimum, the *Sackett* decision calls into question the continued use of the SNT for small streams, if not outright overruling its further use by implication.
- While not expressly stating so, the *Sackett* decision effectively overrules the Army Corps/EPA's revised WOTUS rule issued on January 18, 2023 (88 Fed. Reg. 3004), at least with respect to the continued use of the SNT (which the Agencies had kept in the revised rule, but renamed as the "significantly affect test") for wetlands and most likely for ephemeral streams as well.
- Developers and homebuilders should reevaluate (1) permit applications pending with the Corps; (2) jurisdictional determinations obtained that have not yet been acted on; and (3) delineation reports obtained from consultants, in order to determine the impact of the Sackett ruling on these important steps in the Corps' Section 404 permitting process.

If you have any questions about the *Sackett* decision or its potential impact on a particular site, please contact the authors or any

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