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U.S. Supreme Court Significantly Limits Scope of Federal Government's Jurisdiction Under the Clean Water Act

On Thursday, May 25, 2023, the U.S. Supreme Court handed down a decision in [Sackett v. EPA](#), a closely watched case concerning the jurisdictional reach of the federal government's ability to regulate sources of pollution under the Clean Water Act (CWA). Specifically, the Court addressed the test for determining whether wetlands are "waters of the United States" within the scope of the CWA. The CWA prohibits the discharge of pollutants into "[navigable waters](#)," which the CWA defines as "[the waters of the United States](#)." The definition has been the subject of numerous cases and interpretations, most recently in the 2006 Supreme Court decision in [Rapanos v. United States](#), which created multiple tests for what constituted "waters of the United States." The majority in *Sackett* has created a single, much narrower test.

The background of *Sackett v. EPA* dates back to 2007, when plaintiffs Michael and Chantell Sackett began backfilling their property with dirt and rock, about 300 feet from Priest Lake. The Sacketts received a notice from the U.S. Environmental Protection Agency (EPA), which instructed the Sacketts to stop work because of the presence of wetlands protected by the CWA, which bars the discharge of pollutants, including rocks and sand, into "waters of the United States." The EPA reasoned that the wetlands on the Sacketts' lot fed into a creek that led to Priest Lake. The U.S. Supreme Court granted the Sacketts' petition for *certiorari* after the Ninth Circuit Court of Appeals affirmed a summary judgment motion in favor of the EPA.

All of the Justices concurred in judgment that the particular wetlands on the Sacketts' property did not fall within the regulatory scope of the CWA. However, the Supreme Court split 5-4 on the standard for determining the particular wetlands protected under the CWA, with Justice Kavanaugh joining the three liberal justices in

dissent.

As recognized by the Court, the phrase “waters of the United States” has been a persistent problem that “has sparked decades of agency action and litigation.” In *Rapanos*, the last time the Supreme Court attempted to address the scope of “waters of the United States,” the Court came out with a 4-1-4 decision featuring multiple tests for determining whether a particular wetland could be considered to fall within the CWA category of “waters of the United States.” Circuit courts have held that a wetland qualifies as a “water of the United States” if it satisfies the “significant-nexus” test proffered by Justice Kennedy. Under Kennedy’s test, the “significant-nexus” requirement could be met if the wetlands, either “alone or in combination with similarly situated [wet]lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters [more readily] understood as navigable.”

Since the Court’s decision in *Rapanos*, courts, agencies, and landowners have struggled to define the statute’s geographic scope. Each of the Obama, Trump, and Biden Administrations had promulgated separate regulations (2015, 2020, and 2023), attempting to address the scope of the CWA, with each regulation facing various legal challenges.

In *Sackett*, the conservative majority rejected the “significant-nexus” standard favored by the EPA and the U.S. Army Corps of Engineers. Instead, the majority adopted a much more restrictive standard, finding that the CWA protects only wetlands that are “as a practical matter indistinguishable” from traditional waters of the United States. The Court’s new test now “requires the party asserting jurisdiction over adjacent wetlands to establish ‘first, that the adjacent [body of water constitutes] ... ‘waters of the United States,’ (i.e., a relatively permanent body of water connected to traditional interstate navigable waters); and second, that the wetland has a **continuous** surface connection with that water, making it difficult to determine where the ‘water’ ends and the ‘wetland’ begins.” [Emphasis included.]

The majority’s holding is a more narrow interpretation of the CWA’s jurisdiction than even the Trump Administration’s now-repealed

2019 “Navigable Waters Protection Rule.” An [amicus brief](#) filed by professional associations representing water regulators and managers warned that this new definition will “exclude 51% (if not more) of the Nation’s wetlands” from the Act’s protections.

One strong criticism of the majority’s decision is that for the last 45 years – and through eight different presidential administrations – the federal government has required discharge permits in wetlands “adjacent” to water bodies, even if a dune, levee, or other barrier separated the two, yet the majority’s new test narrows the Act to “adjoining” wetlands, leaving historically covered “adjacent wetlands unprotected.” The historical application of the federal government’s jurisdiction over “adjacent” wetlands stems from the CWA itself, whereby [§1344\(g\)\(1\)](#) makes note that discharges may be permitted into any waters of the United States, except for traditional navigable waters, “including wetlands adjacent thereto.”

Justice Elena Kagan spoke to this concern in her concurrence, stating: “in ordinary language, one thing is adjacent to another not only when it is touching, but also when it is nearby. So, for example, one house is adjacent to another even when a stretch of grass and a picket fence separate the two.” Justice Brett Kavanaugh also addressed the issue, noting: “Natural barriers such as berms and dunes do not block all water flow and are in fact evidence of a regular connection between a water and a wetland.” Kavanaugh continued that “[b]y narrowing the Act’s coverage of wetlands to only adjoining wetlands, the Court’s new test will leave some long-regulated adjacent wetlands no longer covered by the Clean Water Act, with significant repercussions for water quality and flood control throughout the United States.”

In addition to the new standard developed by the Court, environmental groups have increased concern in light of Justice Clarence Thomas’s concurring opinion, where he indicates that other aspects of the Clean Water Act and other environmental statutes overstep Congress’s authority to regulate activities that affect interstate commerce and are subject to constitutional challenges.

In the meantime, we can expect the EPA and U.S. Army Corps of Engineers to issue new agency guidance and regulations concerning the federal government's jurisdictional reach under the CWA in light of the standard set forth in *Sackett*.

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