

Supreme Court Limits the Clean Water Act's Reach

by Megan J. Houdeshel, Michael Drysdale, and Kayla Race

On May 25, 2023, the U.S. Supreme Court ruled in Sackett v. EPA that the Clean Water Act's jurisdictional reach only extends to wetlands with a "continuous surface connection" to traditional navigable waters or a relatively permanent body of water connected to traditional navigable waters. In so ruling, the Court both narrows federal jurisdiction over wetlands and limits the Army Corps of Engineers ("Corps") and Environmental Protection Agency's ("EPA") authority to interpret the scope of their jurisdiction under the Clean Water Act overall. The Court stated that statutory language must be "exceedingly clear" to support an interpretation that alters the balance between federal and state power or the authority to regulate private property. The Court's ruling has several practical implications, including:

1. The acreage of wetlands under federal jurisdiction will almost certainly be reduced;
2. EPA and the Corps have significantly reduced flexibility to interpret the scope of their jurisdiction through regulations;
3. In the near-term, there will be tremendous uncertainty regarding the scope of the Corps' and EPA's authority to regulate under Section 404 of the Act, which could lead to permitting delays for projects;
4. Further litigation is certain to follow over what qualifies as a "continuous surface connection" and how "relatively permanent" a water body connecting to a traditional navigable water must be to fall under federal jurisdiction; but
5. In the long term, this ruling should lead to simpler and faster determinations regarding whether specific wetlands are regulated under the Clean Water Act.

This case is the culmination of decades of dispute, including a prior trip to the Supreme Court, between the Sacketts and the Corps and EPA regarding construction of a small home near Priest Lake Idaho. *See Sackett v. EPA*, 566 U.S. 120 (2012). The Sacketts' property is located across a 30-foot road from a ditch, which fed into a non-navigable creek, which in turn fed into Priest Lake, which the EPA designated as "traditionally navigable." The EPA informed the Sacketts that their grading activity had filled wetlands on their property that were protected by the Clean Water Act because the wetlands had a "significant nexus" with or "significantly affect the chemical, physical and biological

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integrity of” traditionally navigable waters—principles that had been established in prior Supreme Court precedent. See *Rapanos v. United States*, 547 U.S. 715, 779–80 (2006) (Kennedy, J., concurring). The EPA ordered the Sacketts to restore the wetlands or pay over \$40,000 per day. The Sacketts challenged the EPA’s interpretation in court, and both the district court and Ninth Circuit sided with the EPA.

The Supreme Court held that the EPA’s interpretation “proves too much” and unanimously rejected the EPA’s “significant nexus” test and application of the Clean Water Act to the Sacketts’ wetlands. The new test established by the Court requires wetlands to be “indistinguishable” from and have a “continuous surface connection” with a “relatively permanent body of water connected to traditional interstate navigable waters.” In addition, the Court’s decision curtails the agencies’ ability to interpret statutory language defining the scope of their jurisdiction by stating that the EPA must, but failed to, “provide clear evidence that it is authorized to regulate in the manner it proposes,” and a statute must have “exceedingly clear language if [Congress] wishes to significantly alter the balance between federal and state power and the power of the Government over private property.”

While all nine members of the Court ruled in favor of the Sacketts and rejected the “significant nexus” test as the appropriate test for determining whether wetlands were regulated under the CWA, four members of the Court—Justices Kavanaugh, Sotomayor, Kagan, and Jackson—disagreed with the Court’s new “continuous surface connection test.” Those four justices, in a concurrence authored by Justice Kavanaugh, criticized the majority for departing from and narrowing the statutory text that refers to “adjacent” wetlands. The concurrence argued that “adjacent” wetlands should be interpreted to cover “(i) those wetlands contiguous to or bordering a covered water, *and* (ii) wetlands separated from a covered water only by a man-made dike or barrier, natural river berm, beach dune, or the like.” The majority’s test covers only the former. Justice Kavanaugh’s concurrence asserts that the majority’s new test inappropriately replaces the word “adjacent” with “adjoining,” is “sufficiently novel and vague,” and “may create regulatory uncertainty.”

The Court’s decision in *Sackett* will considerably impact the EPA’s and Corp’s recently promulgated rule (and associated litigation challenging that rule) that uses the “significant nexus” standard in defining the term “waters of the United States” under the Clean Water Act and whether and when that includes wetlands, prairie potholes, vernal pools, and playa lakes. Likewise, any entities that develop near wetlands and other non-navigable waters will be impacted.

Moving forward, the EPA, Corps, and the courts will have to interpret what it means for a wetland to be “indistinguishable” from and have a “continuous surface connection” to “waters of the United States.” They will need to consider issues like whether the surface connection must have visible water flows, and, if so, must that water flow continuously throughout the year. They will need to consider what creeks and streams that only have water flowing during times of high precipitation, or only in the springtime when snow melts, are relatively permanent enough to support regulation of wetlands connected to

them. They will also need to consider how drought and changing precipitation patterns with climate change might impact these determinations. The decision may also lead to interesting results. As Justice Kennedy noted in rejecting the test adopted today in favor of the “significant nexus” test in *Rapanos v. United States*, the continuous surface connection test forecloses jurisdiction over wetlands abutting a traditional navigable water, but lacking a continuous surface connection, but may permit jurisdiction over wetlands miles away that are only connected to a traditional navigable water by the bed of a creek with impermanent flows.

Further disputes and litigation over implementing the Court’s decision are likely and will result in more uncertainty and delay for the regulated community in the near-term. In the long-run, however, application of the Court’s decision should result in more clarity for industries such as mining and renewable energy regarding when and where projects will implicate federal jurisdiction. However, project developers will need to keep a keen eye on how states respond because, as the Court’s decision notes, states may fill the regulatory space as they see fit. Some Western states have statutes prohibiting their agencies from promulgating or enforcing environmental protections that are more stringent than federal law. Other states may more aggressively develop state wetland law to compensate for the curtailment of federal jurisdiction. As with all developments in wetland regulation in the past quarter century, there will undoubtedly be unexpected ripple effects.

Dorsey & Whitney attorneys are available to counsel clients developing or seeking to develop near wetlands or other water bodies to help navigate these new legal waters.