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U.S. Supreme Court Redefines "Waters of the United States," Narrowing the Scope of Clean Water Act Wetland Jurisdiction

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On May 25, 2023, the U.S. Supreme Court's decision in *Sackett v. Environmental Protection Agency,*[i] narrowed the scope of wetlands that would be considered "waters of the United States" pursuant to the Clean Water Act[ii] ("CWA" or the "Act").

The Clean Water Act

The Environmental Protection Agency ("EPA") and the Army Corps of Engineers ("Corps") jointly enforce the CWA, which prohibits the discharge of pollutants—including dredged or fill materials—into "navigable waters" without a permit.[iii] The CWA defines "navigable waters" as the "waters of the United States" ("WOTUS"). Accordingly, the definition of WOTUS establishes the geographic reach of federal jurisdiction under the CWA. In 1977, Congress amended the CWA to expressly recognize that wetlands "adjacent" to WOTUS were covered under the Act.[iv] However, the lack of a WOTUS definition in the Act and the lack of a definition of "adjacent" has led to decades of litigation over what constitutes jurisdictional wetlands under the Act.

WOTUS Litigation

The extent of the CWA's jurisdiction has been the subject of litigation almost since the get-go. The Supreme Court first construed the meaning of WOTUS in 1985 *U.S. v. Riverside Bayview Homes*,[v] where the Court deferred to the Corps' decision to regulate adjacent wetlands as WOTUS because they are "inseparably bound up" with navigable waters.

Subsequently, in 2001, in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*[vi] (SWANCC), the Court rejected the Corps' so-called "migratory bird rule", which sought to extend CWA jurisdiction over wetlands adjacent to WOTUS to isolated ponds that "are or would be used as [a] habitat" by migratory birds or endangered species.[vii] The idea was that the use of isolated wetlands by birds that could be hunted and were therefore part of the stream of commerce brought those wetlands under the coverage of Congress' commerce clause jurisdiction. The Supreme Court rejected that logic, holding that because the wetlands in SWANCC were not physically adjacent to navigable waters, the CWA's coverage of adjacent wetlands did not extend to "isolated" wetlands.[viii]

The Court's next opportunity to interpret the CWA's jurisdiction came in 2006 in *Rapanos v. U.S.*,[ix] . Unfortunately, no position commanded a majority opinion. Instead, a plurality opinion authored by Justice Scalia set forth a standard which limits the CWA's coverage to "certain relatively permanent bodies of water connected to traditional interstate navigable waters and to wetlands that are 'as a practical matter indistinguishable' from those waters."[x] In contrast, Justice Kennedy's concurrence established a different and somewhat broader "significant nexus" standard, by which CWA jurisdiction over adjacent wetlands required only a significant nexus between the wetland and its adjacent navigable waters."[xi]

WOTUS Regulations

Over the past several decades, the EPA and Corps (collectively, the "Agencies") repeatedly promulgated regulations and guidance attempting to define WOTUS in a manner consistent with the Supreme Court decisions. Most recently, the Agencies issued the "Revised Definition of 'Waters of the United States,'"[xii] which took effect on March 20, 2023.

Under this rule, WOTUS was broadened to include traditional navigable waters, interstate waters, the territorial seas, as well as their tributaries and adjacent wetlands. Wetlands were defined as "adjacent" when they are "bordering, contiguous, or neighboring" covered waters. WOTUS was interpreted as including intrastate lakes and ponds, streams, or wetlands that meet the "relatively permanent" or "significant nexus" standard.

The Sackett Decision

That brings us to the *Sackett* decision. In 2004, the Sacketts bought property near Priest Lake, Idaho, and began backfilling the lot with dirt to prepare for building a home. The EPA notified the Sacketts that their backfilling, without a permit, violated the CWA because their property contained wetlands. The EPA classified the wetlands on Sackett's property as WOTUS because they were near a ditch that fed into a creek, which fed into Priest Lake, a navigable, intrastate lake. The Sacketts sued the EPA, arguing that the wetlands on their property are not considered WOTUS.

In its decision, the Supreme Court essentially adopted Justice Scalia's "relatively permanent" standard set forth in *Rapanos*.[xiii] The *Sackett* Court held that "the CWA's use of 'waters' encompasses 'only those relatively permanent, standing or continuously flowing bodies of water'" such as "'streams, oceans, rivers, and lakes.'"[xiv] The Court held that to assert jurisdiction over an adjacent wetland under the CWA, the government must establish the following two factors: (1) that that the adjacent body of water constitutes WOTUS, meaning a relatively permanent body of water connected to traditional interstate navigable waters such as streams, oceans, rivers, and lakes; and (2) that the wetland has a continuous surface connection with that water, making it difficult to determine where the water ends and the wetland begins.[xv]

Since the wetlands on the Sacketts' property did not have a continuous surface connection and was "distinguishable from any possibly covered waters," the Court found they were not considered WOTUS under the CWA.[xvi]

In reaching this conclusion, the Court rejected the EPA's argument to defer to its most recent rule providing that WOTUS includes adjacent wetlands if they are "neighboring" covered waters and meet the "significant nexus" test.[xvii] The Court explained that "[t]he EPA's interpretation is inconsistent with the CWA's text and structure and clashes with 'background principles of construction.'"[xviii] Among other reasons, the Court stated how "[r]egulation of land and water use lies at the core of traditional state authority" and without a clear statement from Congress, "[an] overly broad interpretation of the CWA's reach would impinge on this authority."[xix]

One of the more interesting aspects of the *Sackett* decision was that all nine justices agreed that the wetlands on the Sackett's property were, by any standard, too far removed from a Waters of the US as to be considered adjacent to those waters. Typically, the case would have ended there, but the majority made it clear that they wanted to limit the government's CWA jurisdiction. It is interesting in this regard that Justices Kavanaugh and Gorsuch, in concurring opinions, expressed the view that the majority opinion impermissibly limited the government's ability to regulate activities impacting wetlands.

Conclusion

The *Sackett* decision ultimately clarifies the definition of WOTUS, narrows the scope of the CWA, and essentially strikes down the Agencies' 2023 rule.

Please note that this is a general overview of developments in the law and does not constitute legal advice. Nothing herein creates an attorney-client relationship between the sender and recipient. If you have questions regarding the Clean Water Act, or any other aspect of environmental law, please contact Brendan Mooney (bmooney@cullenllp.com) at (516) 357-3757, Amie Kalac (akalac@cullenllp.com) at (609) 279-0900 or Neil Yoskin (nyoskin@cullenllp.com) at (609) 279-0900. We thank Sharlene Cubelo, a 2023 Summer Law Clerk with Cullen and Dykman LLP, for her assistance in the preparation of this advisory.

Footnotes

[i] *Sackett v. Environmental Protection* Agency, No. 21-454, 2023 WL 3632751 (2023).

[ii] 86 Stat. 816, as amended, 33 U. S. C. § 1251 et seq.

[iii] 33 U. S. C. §§ 1311(a), 1344(a), 1362.

[iv] 33 U. S. C. § 1344(g).

[v] *U.S. v. Riverside Bayview Homes,* 474 U.S. 121 (1985).

[vi] *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001).

[vii] *Sackett*, 2023 WL 3632751, at *7 (citing 53 Fed. Reg. 20765 (1988); 51 Fed. Reg. 41217 (1986)).

[viii] *Solid Waste Agency of Northern Cook County*, 531 U.S. at 168-72.

[ix] *Rapanos v. U.S.*, 547 U.S. 715 (2006).

[x] *Sackett*, 2023 WL 3632751, at *2 (quoting *Rapanos*, 547 U.S. at 755).

[xi] *Id.* at *2 (quoting *Rapanos*, 547 U.S. at 779-80).

[xii] 88 Fed. Reg. 3004 (2023) (to be codified in 40 CFR § 120.2).

[xiii] *Sackett*, 2023 WL 3632751, at *14.

[xiv] *Id.* at *2 (quoting *Rapanos*, 547 U.S. at 739).

[xv] *Id.* at *1.

[xvi] *Id.* at *17.

[xvii] *Id.* at *3-4.

[xviii] *Id.* at *3 (quoting *Bond v. U.S.*, 572 U. S. 844, 857 (2014)).

[xix] *Id.* at *14.

Practices

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