SQUIRE PATTON BOGGS

US Supreme Court Narrows the Definition of "Waters of the United States" with Respect to Wetlands for Purposes of Federal Jurisdiction under the Clean Water Act

June 2023

Introduction

On May 25, 2023, the US Supreme Court, in *Sackett v. Environmental Protection Agency*, ___ US _ (2023) ("*Sackett*") held that "waters of the United States" for purposes of federal jurisdiction under the Clean Water Act ("CWA") refer "only to geographical features that are described in ordinary parlance as 'streams, oceans, rivers and lakes' and to adjacent wetlands that are 'indistinguishable' from those bodies of water due to a 'continuous surface connection'" a test first articulated in the plurality opinion in *Rapanos v. United States*, 547 US 715 (2006).

To assert jurisdiction over an adjacent wetland, it must be established that the adjacent body of water is itself a "water of the United States" and that the wetland has "a continuous surface connection with that water, making it difficult to determine where the 'water' ends and the 'wetland' begins." *Sackett* at 5, 21. As a result, wetlands like those owned by the *Sackett*s that are "separate from traditional navigable waters" cannot be considered a part of these jurisdictional waters, even if located nearby. *Id.* at 20. The decision significantly undermines the Environmental Protection Agency's ("EPA's") and the United States Army Corps of Engineers' ("Corps") (together the "Agencies") most recent rule to codify the definition of "waters of the United States" promulgated less than 6 months ago and sends them back to the drawing board.

Background

The definition of "waters of the United States" for purposes of jurisdiction under the CWA has been one of the most hotly litigated issues in environmental law in the United States. Under the CWA, the Agencies regulate "navigable waters"—"those waters that are subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce." 33 C.F.R. Part 329.4. The Corps regulates wetlands and makes determinations as to whether a wetland adjoins a navigable water, what discharges may take place into those wetlands, and what activity may take place in them. *See* 33 U.S.C. § 1344.

In a plurality decision from the Supreme Court in 2006, two rules emerged regarding wetlands. *Rapanos*, 547 U.S. at 715. First, Justice Anthony Kennedy pointed to the purpose of the CWA and its objective of "restoring and maintaining the chemical, physical, and biological integrity of the Nation's waters." Therefore, he argued that the CWA should cover wetlands with a "significant nexus" to navigable waters. Second, Justice Antonin Scalia argued that only those wetlands with a continuous surface water connection should be covered under the CWA. Apart from a brief period during the Trump Administration, since the *Rapanos* decision the Agencies have applied both tests to attain the broadest protection of US waters.

These definitions came to clash with the May 25, 2023 decision, with the Supreme Court rejecting the "significant nexus" test and essentially adopting Justice Scalia's approach.

In 2004, Chantell and Michael Sackett purchased property near Priest Lake, Idaho that was once a part of a large wetland complex. To build their home on the lot, the Sacketts obtained the necessary local permits for backfill so that they could begin to build on the areas of the lot that still harbored some wetland characteristics. However, not long after the Sacketts began this construction in 2007, officials from EPA informed the Sacketts that the area contained a regulated "navigable water" and ordered the Sacketts to halt construction and restore the area to a wetland or else face steep fines. At the time, the Agencies interpreted "waters of the United States" to include both waters that "could" affect interstate or foreign commerce and "adjacent" wetlands, defined to include not only "bordering" or "contiguous" but also "neighboring." According to EPA, the Sackett's property was "adjacent" to an unnamed tributary to a non-navigable creek on the other side of a 30-foot road, which in turn fed into Priest Lake, an interstate lake that EPA designated as traditionally navigable. EPA found a "significant nexus" between the *Sackett*'s property and Priest Lake. This action started the 16-year legal battle that has now informed our understanding of the meaning of "waters of the United States."

The Sacketts filed suit under the Administrative Procedures Act, 5 USC §§702 *et seq.*, alleging that EPA lacked jurisdiction. The District Court dismissed the suit, finding that EPA's action did not constitute final agency action. In 2012, the Sacketts received a unanimous decision from the US Supreme Court holding that the Sacketts had the right to challenge the EPA order in court. The District Court ultimately granted summary judgment in favor of EPA and the Ninth Circuit affirmed, finding that the CWA covers adjacent wetlands with a significant nexus to traditional navigable waters ("TNW") and that the Sackett's property fell within that definition.

The US Supreme Court's Decision

The Court heard oral argument on October 3, 2022, and announced its decision on May 25, 2023. The decision was unanimous in reversing and remanding the decision of the Ninth Circuit, although the Justices did not agree on the rationale for reversal. Justice Alito authored the majority opinion and was joined by Justices Roberts, Thomas, Gorsuch, and Barrett. The Court held that "waters of the United States" extend "only to geographical features that are described in ordinary parlance as 'streams, oceans, rivers and lakes' and to adjacent wetlands that are 'indistinguishable' from those bodies of water due to a 'continuous surface connection'." *Sackett* at 1, 4-5.

To assert jurisdiction over an adjacent wetland, it must be established that the adjacent body of water is itself jurisdictional and that the wetland has "a continuous surface connection with that water, making it difficult to determine where the 'water' ends and the 'wetland' begins." *Id.* at 5, 21. This was the test first articulated by Justice Scalia in the plurality opinion in *Rapanos*, 547 US at 757. The second test, articulated by Justice Kennedy in that same plurality opinion, required a "significant nexus" between the wetland and its adjacent navigable waters, which exists when "the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of those waters." *Id.* at 759.

The *Sackett* decision eliminates the "significant nexus" test. The Court rejects the "significant nexus" test on two grounds. First, it would "significantly alter the balance between federal and state power and the power of the Government over private property" and where that is the case, Congress' directive must be "exceedingly clear," but is lacking here. *Id.* at 23. The opinion focuses on EPA's own admission that "'almost all waters and wetlands' are potentially susceptible to regulation under th[e significant nexus] test." *Id.* at 12, 24. Noting that "regulation of land and water lies at the core of traditional state authority" (*id.*), the Court found EPA's "significant nexus theory" implausible—and not grounded in any CWA statutory language. Second, the Court found EPA's interpretation "gives rise to serious vagueness concerns in light of the CWA's criminal penalties" and described it as "hopelessly indeterminate." *Id.* at 24. The Court was particularly critical of the 2023 Rule's use of "another vague concept—'similarly situated' waters" and the Rule's required assessment "based on a variety of open-ended factors." *Id.* An approach that the Court characterized as a "freewheeling inquiry." *Id.* at 25.

The *Sackett* decision also rejects EPA's interpretation of the term "adjacent." First, the Court disagreed with EPA's contention that Congress implicitly ratified EPA's interpretation of "adjacent" wetlands when Congress adopted 33 U.S.C. §1344(g)(1) in the CWA amendments of 1977, after the Corps' regulations promulgated earlier that year had included "adjacent" wetlands as jurisdictional.

The Court cited *United States v. Riverside Bayview Homes, Inc.*, 474 U. S. 121, 138, n. 11; *Solid Waste Agency of Northern Cook Cty. v. Army Corps of Engineers*, 531 U. S. 159, 171 ("*SWANCC*"); *Rapanos*, 547 U. S., at 747–748, n. 12 (plurality opinion) as having already established that §1344(g)(1) "does not conclusively determine the construction to be placed on . . . the relevant definition of 'navigable waters.'" *Sackett* at 26. Further, EPA failed to provide the "overwhelming evidence of acquiescence" needed to support a ratification argument. *See id.*

In short, the *Sackett* decision rejects EPA's definition of "adjacent." In addition, in summary fashion, the *Sackett* decision brushes aside EPA's "various policy arguments about the ecological consequences of a narrower definition of adjacent" stating only "the CWA does not define EPA's jurisdiction based on ecological importance." *Id.* at 27. In conclusion, the Court holds "the CWA extends to only those 'wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right,' so that they are 'indistinguishable' from those waters." *Id.*

Justice Thomas authored a concurring opinion in which Justice Gorsuch joined, arguing that federal CWA jurisdiction only extends to the limits of Congress' traditional jurisdiction over navigable waters and characterized EPA's and the Corps' treatment of the statute "as if it were based on New Deal era conceptions of Congress' commerce power." *Thomas Concurrence* at 27.

Justice Kavanaugh authored a concurring opinion in which Justices Sotomayor, Kagan and Jackson joined. Justice Kavanaugh agreed with the majority's rejection of the "significant nexus" test for determining whether a wetland is within the jurisdiction of the CWA, but disagreed with the majority's conclusion that wetlands are covered only where they have a "continuous surface connection" to waters of the United States; that is, where they are "adjoining" covered waters. *Kavanaugh Concurrence* at 1-2. Justice Kavanaugh saw a distinction between "adjacent" wetlands (wetlands that are contiguous to or bordering on a covered water) and "adjoining" wetlands (which include both wetlands contiguous to or bordering on a covered water and wetlands separated from a covered water only by a man-made dike or barrier, natural river berm, beach dune or the like). *Id.* He viewed the term "adjacent" as broader than "adjoining" and concluded that by narrowing the coverage of wetlands to "adjoining" wetlands, certain "adjacent" wetlands long covered under the Act were no longer covered, a result inconsistent with the CWA. *Id.* at 4-6.

Justice Kagan authored a concurring opinion in which Justices Sotomayor and Jackson joined, largely echoing many of the points made by Justice Kavanaugh, but rebuking her colleagues for substituting its ideas about policymaking for those of Congress. *Kagan Concurrence* 1-6.

As for the Sacketts, the Court held that because of its determination that a navigable water extends to adjacent wetlands only where those adjacent wetlands have a "continuous surface connection to bodies that are 'waters of the United States,'" the wetlands on the *Sacketts* property are distinguishable from any other possible covered property and US EPA did not have jurisdiction over them. The case was reversed and remanded.

Implications for EPA's "Durable" Rule Defining "Waters of the United States"

The Biden Administration's "Revised Definition of 'Waters of the United States'" ("2023 Rule") was published in the Federal Register on January 18, 2023 (88 Fed. Reg. 3004 (Jan. 18, 2023) and took effect on March 20, 2023. It was immediately challenged, and its implementation has been enjoined in twenty-seven states.[1] The 2023 Rule was promoted by the Agencies, as the alternative that "best accomplishes the agencies' goals to promulgate a rule that advances the objective of the Clean Water Act, is consistent with Supreme Court decisions, is informed by the best available science, and promptly and durably restores vital protections to the nation's waters." 88 Fed. Reg. 3054.

The 2023 Rule applies both standards established in *Rapanos*—the "relatively permanent" standard articulated by Justice Scalia and adopted by the plurality and the "significant nexus" standard articulated by Justice Kennedy. The 2023 Rule extends federal CWA jurisdiction over the following:

- traditional navigable waters (i.e., paragraph (a)(1) waters);
- impoundments of WOTUS (i.e., paragraph (a)(2) impoundments);
- jurisdictional tributaries–tributaries to TNW, the territorial seas, interstate waters, or (a)(2) impoundments when the tributaries meet either the relatively permanent standard or the significant nexus standard (i.e., jurisdictional tributaries);
- jurisdictional adjacent wetlands–wetlands adjacent to (a)(1) waters, wetlands adjacent to and with a continuous surface connection to, relatively permanent impoundments, wetlands adjacent to tributaries that meet the relatively permanent standard, and wetlands adjacent to impoundments or jurisdictional tributaries when the wetlands meet the significant nexus standard (i.e., jurisdictional adjacent wetlands); and
- intrastate lakes and ponds, streams, or wetlands not identified in paragraphs (a)(1) through (4) that meet either the relatively permanent standard or the significant nexus standard (i.e., paragraph (a)(5) or "other" waters).

40 C.F.R. § 120.2(a)(1)-(5). The 2023 Rule includes "adjacent" wetlands and defines the term to mean "bordering, contiguous or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are 'adjacent wetlands.'" 40 C.F.R. § 120.2(c)(2).

To determine whether tributaries, wetlands, or "other" waters have a significant nexus to TNW, the Agencies include waters that "either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of waters identified in paragraph (a)(1)." 40 C.F.R. § 120.2(a)(3)(ii); 120.2(a)(4)(iii); 120.2(a)(5)(ii).

To make a "significant nexus" determination, the Agencies consider "functions," including "contribution of flow; trapping, transformation, filtering, and transport of materials (including nutrients, sediment, and other pollutants); retention and attenuation of floodwaters and runoff; modulation of temperature; provision of habitat and food for aquatic species located in traditionally navigable waters"; as well as "factors," including distance from a navigable water; frequency, duration, magnitude, timing and rate of hydrologic connections, including shallow subsurface flow; size, density or number of waters that have been determined to be similarly situated; landscape position and geomorphology; and climatological variables such as temperature, rainfall and snowpack. 40 C.F.R. § 120.2(c)(6)(i) and (ii). These additional criteria were characterized by the Court in *Sackett* as "a list of open-ended factors." *Sackett* at 12, citing 88 Fed. Reg. 3006, 3144.

The 2023 Rule does exclude various categories of waters:

- waste treatment systems;
- prior converted cropland designated by the secretary of agriculture (subject to a "change of use" reversion);
- ditches (including roadside ditches) excavated wholly in and draining only dry land and that do not carry a relatively permanent flow of water;
- artificially irrigated areas that would revert to dry land if the irrigation ceased;
- artificial lakes or ponds created by excavating or diking dry land to collect and retain water and that are used exclusively for such purposes as stock watering, irrigation, settling basins or rice growing;
- artificial reflecting or swimming pools or other small ornamental bodies of water created by excavating or diking dry land to retain water for primarily aesthetic reasons;
- water-filled depressions created in dry land incidental to construction activity and pits excavated in dry land for the purpose of obtaining fill, sand or gravel (subject to an "abandonment" reversion); and
- swales and erosional features (e.g., gullies, small washes) characterized by low volume, infrequent or short-duration flow.

40 C.F.R. § 120.2(b)(1)-(8). There are fewer exclusions here than in the prior rule and the 2023 Rule enables the Agencies to recapture jurisdiction in specific cases.

Moreover, the Agencies' assertions that the 2023 Rule generally recodifies the 2015 Rule was not entirely accurate. A number of factors expand the 2015 Rule, including the listing of paragraph (a)(5) or "other" waters as jurisdictional, application of both "relatively permanent" and "significant nexus" tests; the "functions" and "factors" analysis requirement; and the narrower set of exclusions.

1 The first injunction against the 2023 Rule was issued on March 19, 2023 (the day before it went into effect), by a federal judge in *State of Texas v. EPA*, No. 3:23-cv-00017 (S.D. Tex.) and applies in Texas and Idaho. The second injunction was issued on April 12, 2023, by the court in State of *West Virginia v. EPA*, No. 3:23-cv-00032 (D. N.D.) and applies in 24 different states. Lastly, the district court's denial of a preliminary injunction in *Commonwealth of Kentucky v. EPA*, No. 3:23-cv-0007 (E.D. Ky.), was appealed. On May 10, 2023, the Sixth Circuit issued an injunction pending appeal in two related cases *Commonwealth of Kentucky v. EPA*, Case No. 23-5343, and *Kentucky Chamber of Commerce, et al. v. EPA*, Case No. 23-5345.

The 2023 Rule does not provide a bright-line test; to the contrary, a consultant will generally be required to assist in determining whether particular wet or sometimes wet areas are jurisdictional. If jurisdiction is challenged, "a landowner's chances of success are low, as the EPA admits that the Corps finds jurisdiction approximately 75% of the time." *Sackett* at 13.

As a result of the decision, the 2023 Rule is now on life support. One might question why the Agencies pushed it through before the Supreme Court issued its *Sackett* decision, given how controversial that rulemaking was. Many members of Congress first requested that the agencies wait and, post-issuance, requested that the 2023 Rule be withdrawn. Some theorized that the Agencies promulgated the 2023 Rule to strengthen their position vis-à-vis the Court's decision in *Sackett*. Whatever the rationale, it is clear that key elements of the 2023 Rule now must be removed, and the rule significantly amended. Specifically, 40 C.F.R. § 120.2(a)(3)-(5) will all require removal of references to "significant nexus." With the exception of 40 C.F.R. § 120.2(b) (8), the 2023 Rule's exclusions could be retained largely intact, although that approach is likely not in keeping with the Court's narrower view of CWA jurisdiction. The definition of "adjacent" in § 120.2(c)(2) must be rewritten. The term "significantly affect" in § 120.2(c)(6), which informs determination of "significant nexus" and "adjacent" under the 2023 Rule, should be deleted entirely.

The path to amendment of the definition of "waters of the United States" could be as simple as the Agencies' withdrawal of the 2023 Rule and repromulgation of a rule that squares with *Sackett*. If the Agencies reject that approach or are slow to implement withdrawal, one or more of the currently pending lawsuits challenging the rules will be decided—most likely on dispositive motion—with vacatur of the 2023 Rule. In short, the courts can and will force invalidation of the 2023 Rule and that, in turn, will necessitate that the Agencies amend and repromulgate the definition of "waters of the United States" consistent with *Sackett*. In the meantime, the Corps has announced that it plans to freeze the issuance of jurisdictional determinations until it figures out what to do in response to the *Sackett* decision.

Implications for the States

It remains unclear whether and how states may seek to fill the regulatory gap presented by the Court's dramatic reduction in the number of wetlands subject to federal jurisdiction under the CWA.

For example, states such as California have fully developed programs regulating the dredge and fill of waters within their jurisdictions. California officials expressed their disappointment in the ruling, indicating that it "does not weaken California's more stringent wetlands protections" under the Porter-Cologne Water Quality Control Act" although it "deprives the state of expertise previously provided by the U. S. Army Corps of Engineers and affects multiple neighboring states." California Attorney General Rob Bonta remarked that the decision makes it "all the more critical for states to use their authority to increase water quality protections."

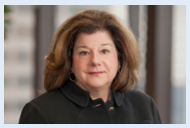
Some states, particularly those in the drier western US such as Arizona and Colorado, rely primarily on the federal CWA's jurisdiction for protection of waters within their states in connection with dredge and fill activities. For example, Colorado's Attorney General Phil Weiser issued a statement on the same day that the *Sackett* decision was released that "[u]nder the Court's new test for which waters would be protected by the Clean Water Act, many of the streams and wetlands in Colorado will be stripped of federal protections and removed from federal oversight because they are temporary in nature, lack year-round flow, and don't have a continuous surface connection to navigable waters. In practice, this means that Colorado will have to step in to address the impacts of dredge and fill activities that have historically been overseen by the US Army Corps of Engineers."

Other states, such as Ohio, regulate "isolated" wetlands as "waters of the state," i.e. wetlands that are not covered as "waters of the United States." *See* R.C. 6111.021. It is unclear how Ohio EPA will react to the *Sackett* decision, but it may be tempted to fill any perceived gaps resulting from the decision through its existing authority. By contrast, the Ohio General Assembly may well move to deregulate certain "isolated wetlands" from coverage as "waters of the state." In the past, Ohio has shown the propensity under certain circumstances to deregulate other water bodies in the wake of reduced federal oversight. For example, in 2022, Governor DeWine signed Sub. HB 175 (134th Ohio General Assembly) which modified the definition of "waters of the United States" in R.C. 6111.01 by tying the definition of ephemeral stream to the then-effective federal "waters of the United States" definition. This initiative began after the Trump Administration's revisions to the definition removed federal jurisdiction over ephemeral streams. The Ohio General Assembly followed suit by removing state-level jurisdiction over these same ephemeral streams. The effect of this initiative was to reduce the number of ephemeral features subject to state regulation. The *Sackett* decision may prompt a similar deregulatory measure for wetlands.

Conclusions

The CWA's definition of "waters of the United States" has been notably narrowed and clarified by the *Sackett* opinion. However, the full implications of the case will not be known for some time as the Agencies work their way through a new or revised rule. States may fill the void in the interim, although that continues to unfold as well. Squire Patton Boggs will continue to track developments with EPA and the Corps, as well as the many states in which we practice. We also would be pleased to provide counsel regarding implications for specific projects.

Contacts



Karen Winters
Environmental, Safety and Health Practice Group Leader | Senior Partner, Columbus
T +1 614 365 2750
E karen.winters@squirepb.com

Carolyn L. McIntosh
Senior Partner, Denver
T +1 303 894 6127
E carolyn.mcintosh@squirepb.com

D. Rees Alexander
Senior Associate, Columbus
T +1 614 365 2798
E rees.alexander@squirepb.com

Charli Davis
Associate, Atlanta,
T +1 678 272 3217
E charli.davis@squirepb.com