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Supreme Court Curtails Federal Jurisdiction Over Wetlands Under Clean Water Act

On May 25, the U.S. Supreme Court published an opinion in *Sackett v. EPA* that significantly curtails the federal government's jurisdiction to regulate wetlands under the Clean Water Act (CWA). Justice Alito authored the majority opinion, joined by Justices Roberts, Thomas, Gorsuch and Barrett. Justices Thomas, Kavanaugh and Kagan wrote concurring opinions.

Sackett stems from a residential home construction project. Michael and Chantell Sackett purchased a plot of land in Bonner County, Idaho, in 2004 and began filling wetlands on the property to build a house. A few months later, the U.S. Environmental Protection Agency (EPA) sent the Sacketts a compliance order stating that the filling was in violation of the CWA without a permit and demanding that the Sacketts immediately restore the site. This compliance order threatened penalties of more than $40,000 per day if the Sacketts failed to comply.

Under CWA sections 1311 (a) and 1362 (7), the federal government has jurisdiction over "navigable waters," which the CWA defines as "waters of the United States, including the territorial seas." Prior to the decision in *Sackett*, the Court last interpreted the jurisdiction granted by this definition in *Rapanos v. United States* in 2006. In a concurring and tie-breaking opinion in *Rapanos,* Justice Kennedy defined jurisdictional "adjacent" wetlands as those with a "significant nexus" to a tributary of a navigable waterway. The *Rapanos* decision set the stage for more than a decade of legal arguments between experts and lawyers on whether wetlands around the country fell under federal jurisdiction.

The EPA's position in *Sackett* was that the wetlands on the Sacketts' property are "adjacent to" a tributary on the other side of the road that feeds into a non-navigable creek feeding into an intrastate lake—one that the EPA designates as traditionally navigable—and therefore the EPA's jurisdiction extended to those wetlands.

The majority opinion in *Sackett* throws out the "significant nexus" test and redefines the CWA's use of "waters" as encompassing "only those relatively permanent, standing or continuously flowing bodies of water forming geographic[al] features that are described in ordinary parlance as 'streams, oceans, rivers[] and lakes.'" Referring to dictionary definitions, Alito notes that this interpretation relies on the CWA's deliberate use of the term "waters," which generally refers to the above-mentioned bodies of water. Therefore, Alito reasoned, because adjacent wetlands are "included within 'the waters of the United States,' these wetlands must qualify as 'waters of the United States' in their own right. In other words, they must be indistinguishably part of a body of water that itself constitutes 'waters' under the CWA." The test the majority applied in *Sackett* for whether a wetland falls under CWA jurisdiction is whether the wetland has a continuous surface connection with the "waters of the United States."

The EPA and U.S. Army Corps of Engineers' curtailed jurisdiction may mean a significantly reduced federal regulatory burden for developers and polluters; however, it also raises questions as to how and to what extent nonjurisdictional wetlands will be impacted, as many state regulations are more restrictive and may conflict with other states' regulations. Furthermore, many state and federal policies require climate resiliency planning as part of the permitting process, and the protection of wetlands plays a major role in those plans, given their role in mitigating floods and storm surges. The impacts of climate change are altering the nature and extent of wetlands and larger bodies of water, which could influence the analysis of the "continuous surface connection" of waters now required for federal jurisdiction.

This new test significantly reduces federal jurisdiction over wetlands under the CWA. While federal jurisdiction is narrowed, many states have expansive definitions of regulated wetlands, and this decision may provide the impetus to continue that

trend. Indeed, the Court points out that states have "the primary responsibilities and rights" under the CWA as further rationale for limiting the federal government's jurisdiction over "anything defined by the presence of water."

If you or your organization have a question about how the effects of *Sackett* may impact your facility, development, community, or environmental, social and corporate governance initiative, please reach out to one of the attorneys in the sidebar.

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