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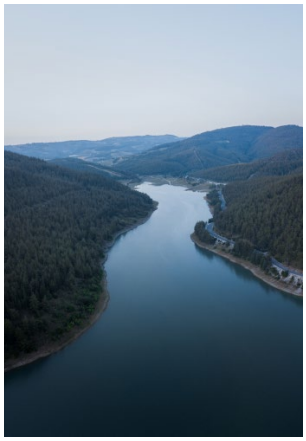

U.S. Supreme Court Narrows WOTUS, Limiting Scope of Clean Water Act

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On May 25, 2023, the U.S. Supreme Court weighed in on the decades-long dispute over the jurisdictional reach of the Clean Water Act ("CWA"). In *Sackett v. Environmental Protection Agency*, the Court's majority issued a sweeping ruling that limited the scope of federal regulation over wetlands and other waters by adopting a narrow interpretation of federally-regulated "waters of the United States" ("WOTUS").

The Court ruled that the wetlands on the Sacketts' property were not subject to CWA jurisdiction, rejecting claims of federal jurisdiction over the wetlands by the Environmental Protection Agency ("EPA") and the Army Corps of Engineers ("Corps") (collectively, the "Agencies"). In rendering its decision, the Court's majority concluded that so-called "adjacent" wetlands are subject to the CWA only when they are "as a practical matter indistinguishable from waters of the United States," such that it is "difficult to determine where the 'water' ends and the 'wetland' begins" and there is "no clear demarcation between 'waters' and wetlands."

The Court's decision in *Sackett* undermines a recent rulemaking by the EPA and the Corps, which adopted a broader definition of WOTUS that the *Sackett* Court described as "inconsistent with the text and structure of the CWA." As a result of *Sackett*, the Biden Administration will likely proceed with further rulemaking to conform the regulatory definition of WOTUS to the Court's decision. In the short term, we can expect the Agencies to issue interim guidance.

Background

The CWA applies to "navigable waters," which is defined as "the waters of the United States, including the territorial seas." The statute, however, does not further define WOTUS, resulting in ambiguity, decades of agency rulemaking and litigation, and a patchwork application of CWA jurisdiction across different states and Corps districts. As explained in prior VNF alerts and summarized below, the definition of WOTUS has been in flux for decades, particularly since the early 2000s.

In 2006, the Supreme Court issued the fractured (4-4-1) *Rapanos v. United States* decision, in which a majority of the Court agreed only on the outcome and not on the grounds. The Justices authored five different opinions, including opinions from Justice Scalia and Justice Kennedy that set forth competing tests for evaluating whether particular wetlands are subject to CWA jurisdiction. Justice Scalia's plurality opinion interpreted CWA jurisdiction narrowly and extending only to (1) "relatively permanent, standing or flowing bodies of water" (not intermittent or ephemeral flows of water); and (2) those wetlands that have "a continuous surface connection" to, and are practically "indistinguishable" from, other jurisdictional waters (not based on a "mere hydrologic connection" to a wetland). In contrast, Justice Kennedy's concurring opinion announced a broader "significant nexus" test, which asks whether there is a significant nexus between the wetlands and another jurisdictional water, such that the "wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity" of those navigable waters. Most lower courts concluded that Justice Kennedy's "significant nexus" test constituted the Court's holding in *Rapanos*, but Justice Scalia's "continuous surface connection" test was also applied in some circumstances. For example, the Department of Justice took the position that CWA jurisdiction exists if either Justice Scalia's test or Justice Kennedy's test is satisfied.

In 2015, under the Obama Administration, the Agencies published the "2015 Clean Water Rule," which relied on Justice Kennedy's "significant nexus" test from *Rapanos.* The 2015 Clean Water Rule established three categories of WOTUS: (1) waters that are categorically "jurisdictional by rule;" (2) waters that are subject to a case-specific analysis; and (3) waters that are categorically excluded from jurisdiction. The first category of "jurisdictional by rule" waters included wetlands and other waters deemed "adjacent" to other jurisdictional waters. The term "adjacent" was defined to include nearby waters separated only by manmade or natural barriers such as constructed dikes, natural river berms, and beach dunes.

In 2019, under the Trump Administration, the Agencies repealed the 2015 Clean Water Rule. In 2020, the Agencies published the "Navigable Waters Protection Rule," which defined WOTUS more narrowly. The Navigable Waters Protection Rule eliminated the case-by-case "significant nexus" test, replaced that test with "categorically jurisdictional and categorically excluded waters," and moved the regulations closer to Justice Scalia's "relatively permanent" test from *Rapanos*. As to "adjacent" wetlands, however, the Navigable Waters Protection Rule retained the concept of jurisdiction over wetlands that are separated from jurisdictional waters only by manmade or natural barriers. Specifically, the rule interpreted "adjacent wetlands" to include wetlands that *directly abut* jurisdictional waters as well as *non-abutting* wetlands that are (1) "inundated by flooding" from a jurisdictional water in a typical year; (2) physically separated from a jurisdictional water only by certain natural features e.g., a berm, bank, or dune); or (3) physically separated from a jurisdictional water by an artificial structure that "allows for a direct hydrologic surface connection" between the wetland and the jurisdictional water in a typical year.

Most recently, in January 2023, under the Biden Administration, the Agencies published a final rule that restored the case-by-case "significant nexus" test but also attempted to incorporate elements of Justice Scalia's "relatively permanent" test (the "2023 Rule"). The 2023 Rule also restored the concept of jurisdiction over "adjacent" wetlands that are separated from jurisdictional waters only by manmade or natural barriers. The 2023 Rule is currently being challenged in several federal courts, and it has been enjoined in 24 states.

The *Sackett* Decision

The Sackett property is a residential lot near a tributary that feeds into a non-navigable creek, which, in turn, feeds into Priest Lake, an intrastate body of water that the EPA designated as traditionally navigable. Writing for the majority, Justice Alito emphasized that a 30-foot road separated the tributary from wetlands on the Sackett property from the tributary. However, the agency record indicated that below the surface of the road, the wetlands on the Sackett property were interconnected by shallow sub-surface flow with tributary and other jurisdictional waters. Despite the presence of the road, the EPA concluded that the wetlands were "adjacent" to the tributary road. The EPA further concluded that the wetlands had a "significant nexus" to Priest Lake when viewed together with the "similarly situated" Kalispell Bay Fen, providing a separate basis for EPA's assertion of jurisdiction. After discovering wetland fill on the Sackett's property, the EPA issued a compliance order requiring the Sacketts to restore the wetlands or face civil penalties under the CWA. The Sacketts appealed, and the Ninth Circuit affirmed the EPA's compliance order.

The Supreme Court reversed the Ninth Circuit and unanimously agreed that wetlands on the Sackett property are not subject to CWA jurisdiction. In a 5-4 majority opinion, Justice Alito rejected both of the EPA's asserted bases for jurisdiction, including the "significant nexus" test and the notion that wetlands separated from a jurisdictional water by a barrier are jurisdictional "adjacent" waters, and held that "the CWA extends to only those wetlands that are 'as a practical matter indistinguishable from waters of the United States.'" Justice Alito wrote that Justice Scalia was "correct" that "the CWA's use of 'waters' encompasses 'only those relatively permanent, standing or continuously flowing bodies of water 'forming geographical features' that are described in ordinary parlance as 'streams, oceans, rivers, and lakes'"; and that "adjacent" wetlands are regulated only if they are "indistinguishably part of a body of water that itself constitutes 'waters' under the CWA," such that they "qualify as 'waters of the United States"' in their own right."

Like *Rapanos*, the *Sackett* decision included multiple opinions from the Justices. Unlike *Rapanos*, however, a majority of the Supreme Court in *Sackett* agreed on both the outcome and the grounds. Four other Justices joined Alito's opinion, which makes it the definitive holding of the Supreme Court. Thus, *Sackett* clearly resolves longstanding questions about CWA jurisdiction in a way that *Rapanos* did not.

Justice Kavanaugh, joined by Justices Sotomayor, Kagan, and Jackson, wrote separately to criticize the Court's "continuous surface connection" test. Justice Kavanaugh argued that the test improperly narrowed the CWA's coverage of "adjacent" wetlands to mean only "adjoining" wetlands, and that the resulting exclusion of wetlands separated from a covered water only by man-made or natural barriers "will leave some long-regulated adjacent wetlands no longer covered by the [CWA], with significant repercussions for water quality and flood control throughout the United States."

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Justice Thomas, joined by Justice Gorsuch, filed a separate opinion that suggests further narrowing of CWA jurisdiction based on historic notions of navigability at the time of the law's 1972 passage.

Impact of *Sackett* Decision

As noted above, the Biden Administration will likely change significant aspects of the 2023 Rule as a result of the *Sackett* decision. The Court expressly rejected Justice Kennedy's significant nexus test, one of the foundations of the 2023 Rule, and replaced it with Justice Scalia's "continuous surface connection" test. Whether voluntarily, or as part of litigation over the 2023 Rule, the Biden Administration will likely rewrite the 2023 Rule to be consistent with *Sackett*.

Congress could attempt to amend the CWA, but such an attempt is unlikely to succeed for political reasons. Thus, *Sackett* will likely continue to be the law of the land (or more specifically, the law of the wetlands) for some time to come.

The Supreme Court's holding in *Sackett* is effective immediately, allowing landowners and permit applicants to rely on the Court's holding in asserting more limited CWA jurisdiction in permit processes, enforcement actions, and other interactions with the Agencies. The Agencies will likely issue interim guidance regarding CWA jurisdiction in the near future.

For More Information

Van Ness Feldman closely monitors and counsels clients on water, air, and other environmental regulatory developments. If you would like more information about the implementation of the Clean Water Act, please contact Duncan Greene, Jenna Mandell-Rice, Joseph Nelson, Jonathan Simon, or any member of our Land Use, Water, or Natural Resources practices in Seattle, WA at (206) 623-9372 or Washington, D.C. at (202) 298-1800.

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