Sackett v. EPA: Departure from Textualism Significantly Limiting Clean Water Protection

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Introduction

On May 25, 2023, the Supreme Court issued its long-awaited opinion in *Sackett v. EPA*, a case challenging the Clean Water Act's (CWA) applicability to certain wetlands.[1] In its decision, the Court significantly narrowed protections for wetlands and intermittent streams under federal law, upending 50 years of water protection. By some estimates, this decision leaves vulnerable more than 50% of wetlands in some US watersheds, which play a critical role in water quality, flood control, carbon storage, and supporting biodiversity, as well as intermittent or ephemeral streams that make up 90% of stream length in some watersheds.[2] In addition to limiting the scope of regulated waters, the decision will also make it more difficult to protect waters that are still covered by the CWA because of the unregulated discharges of pollution that will enter water bodies hydrologically connected to those protected waters.

In this analysis I briefly review the litigation and regulatory history of the CWA and then turn to the *Sackett* decision, reviewing the majority opinion, concurrences, and questions that the decision raises.

Litigation and Regulatory History

The Clean Water Act grants EPA and the Army Corps of Engineers authority to regulate the discharge of pollutants into "navigable waters," which the CWA defines as "the waters of the United States [WOTUS], including the territorial seas."[3] Specifically, the CWA prohibits any discharge of dredged or fill material into waters of the US without a permit. For nearly 50 years, EPA and the Corps have implemented rules regulating these waters. Courts have previously considered which wetlands are covered and protected from pollution by the CWA's permitting scheme as interpreted by agency rulemaking. EELP's Waters of the United States regulatory tracker page provides information about key regulatory and legal developments over time.

Litigation

The Supreme Court has repeatedly addressed the definition of WOTUS. Most recently, when the Supreme Court addressed this question in *Rapanos v. United States* in 2006, the Court was split between two different tests for determining which wetlands are covered.[4] Justice Scalia endorsed a restrictive test under which "relatively permanent, standing or continuously flowing bodies of water," that are connected to traditional navigable waters, as well as wetlands with a "continuous surface connection," are covered. Justice Kennedy set forth a more expansive test under which wetlands with a "significant nexus" to navigable waters can be regulated. For more, read EELP's analysis of past litigation on the definition of WOTUS.

Rulemakings

In recent years, the Obama, Trump, and Biden administrations promulgated regulatory revisions to application of agency jurisdiction under the CWA, including clarification of which wetlands are covered under the the Act. Under the Biden administration's rule, which took effect in March 2023, tributaries, many wetlands, intrastate lakes, intrastate ponds, intrastate streams, and some impoundments must meet either

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[1] *Sackett et ux. v. EPA et al.*, 598 U.S. ____ (2023).
[2] Brief of Scientific Societies as Amici Curiae in Support of Respondents, *Sackett et ux. v. EPA et al.*, 598 U.S. ____ (2023), https://www.supremecourt.gov/DocketPDF/21/21-454/228171/20220616144200253_21-454_Amici%20Brief.pdf
[3] 33 U.S.C. §1362(7).
[4] *Rapanos v. United States*, 547 U.S. 715 (2006).

Justice Kennedy's or Justice Scalia's *Rapanos* test to be considered WOTUS. The Agencies' rule, therefore, requires waters to: (i) be relatively permanent and have a continuous surface connection to an included waterbody; *or* (ii) significantly affect the biological, physical, or chemical integrity of a traditional navigable water, the territorial seas, or interstate waters.[5] Several petitioners have challenged the rule and it currently blocked in over half of the states, reverting those states to the pre-2015 clean water rule.[6] As we describe below, the *Sackett* decision will likely require the Agencies to revise the rule. EELP's analysis of the final rule is available here.

Sackett v. EPA

At issue in the *Sackett* case is the definition of "waters of the United States" as it applies to the wetlands on the Sackett property in Idaho, which is located near Priest Lake. As the Court noted, "[t]he phrase has sparked decades of agency action and litigation."[7] The Sackett decision draws heavily on Justice Scalia's test in *Rapanos* and narrows the interpretation of adjacent wetlands to significantly limit the scope of the CWA, with major implications for wetland protection and water quality across the United States.

Majority Opinion

The Court was unanimous in holding that the wetlands on the Sacketts' property in Idaho at issue were not covered by the CWA. In addition, the Court unanimously rejected Justice Kennedy's "significant nexus" test as unworkable. However, the Court divided over what test should apply to make this determination. Justice Alito, writing for the majority, announced a test that draws on the *Rapanos* plurality: "we hold that the CWA extends to only those wetlands that are 'as a practical matter indistinguishable from waters of the United States.' [...] This requires the party asserting jurisdiction over adjacent wetlands to establish 'first, that the adjacent [body of water constitutes] . . . 'water[s] of the United States,' (i.e., a relatively permanent body of water connected to traditional interstate navigable waters); and second, that the wetland has a continuous surface connection with that water, making it difficult to determine where the 'water' ends and the 'wetland' begins.'"[8] The concurring Justices criticized this test which, it argued, reflected the majority's departure from the text and the reliance on interpretive canons to make policy decisions.

Justice Alito framed the majority opinion in the context of the threat that CWA poses to private landowners, calling the act a "potent weapon."[9] He expressed concern that broad jurisdiction criminalizes "mundane activities like moving dirt."[10] This deep skepticism toward the Act and the Agencies' roles in enforcing it pervade the argument.[11] Just Alito explained that states historically regulated waters, and that Congress has

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[5] The agencies explained that Justice Scalia's relatively permanent standard is "administratively useful" because it includes waters that will "virtually always significantly affect" traditional navigable waters, territorial seas, and interstate waters. *See* 88 Fed. Reg. at 3095 (guidance for application of relatively permanent standard to wetlands); 88 Fed. Reg. at 3096 (guidance for application of significant nexus standard to wetlands).

[6] *Kentucky et al. v. EPA et al.,* Docket Nos. 23-5343/5345 (6th Cir. April 20, 2023). *See also* EPA, Operative Definition of Waters of the United States (May 2023), https://www.epa.gov/system/files/styles/large/private/images/2023-05/WOTUS_operative_definition_05122023.jpg?itok=5ECqOyXx; EPA, Pre-2015 Regulatory Regime, https://www.epa.gov/wotus/pre-2015-regulatory-regime.

[7] Alito Majority Opinion, p. 6.

[8] Alito Majority Opinion, p. 22, citing *Rapanos*, 547 U. S., at 755 (plurality opinion).

[9] Alito Majority Opinion, p. 3.

[10] Alito Majority Opinion, p. 13.

[11] For example, Justice Alito explained that, "[w]ithin a few years, the agencies had 'interpreted their jurisdiction over 'the waters of the United States' to cover 270-to-300 million acres' of wetlands and 'virtually any parcel of land containing a channel or conduit . . . through which rainwater or drainage may occasionally or intermittently flow.'" Alito Majority Opinion, p. 9, citing *Rapanos v. United States*, 547 U. S. 715, 722 (2006) (plurality opinion). He discussed in detail the burdens of the permitting process for landowners, explaining that, "[e]ven if the Corps is willing to provide a jurisdictional determination, a property owner may find it necessary to retain an expensive expert consultant who is capable of putting together a presentation that stands a chance of persuading the Corps. And even then, a landowner's

had a more limited role, "eventually" passing the CWA, and neglecting to mention the water quality crisis the nation faced when the Act was passed.

In determining the scope of the law, the Court states that it "start[s], as we always do, with the text of the CWA."[12] However, as the concurrences point out, the Court quickly departed from textual analysis, relying on the dictionary definition of the statutory term "waters of the United States" and then departing from textual analysis in its consideration of adjacent wetlands.

To interpret the coverage for adjacent wetlands, the majority adopted what Justice Kavanaugh referred to as "unorthodox statutory interpretation" by presenting a formula, with WOTUS as category A, navigable waters as category B, and adjacent wetlands as category C, concluding that, "because the adjacent wetlands in §1344(g)(1) are 'includ[ed]' 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."[13] The Court therefore narrowed "adjacent" to mean a wetland so closely situated as to be "indistinguishable" from adjoining waters.

In rejecting the "significant nexus" test articulated by Justice Kennedy in *Rapanos*, the Court relied on the clear statement rule to argue that given the implications of CWA jurisdiction for both state authority over private property and potential criminal penalties. Specifically, the Court explained that "[p]articularly given the CWA's express policy to 'preserve' the States' 'primary' authority over land and water use, [...] this Court has required a clear statement from Congress when determining the scope of 'the waters of the United States'" in the context of private property rights.[14] It added that, "EPA's interpretation gives rise to serious vagueness concerns in light of the CWA's criminal penalties."[15]

Concurring Opinions

Justice Kavanaugh's primary concurrence, joined by Justices Kagan, Sotomayor, and Jackson, drew out many of the conceptual gaps in the Court's reasoning, arguing that "the Court's 'continuous surface connection' test departs from the statutory text, from 45 years of consistent agency practice, and from this Court's precedents" by narrowing the meaning of the word "adjacent" to "adjoining." In contrast, Justice Kavanaugh called for a textualist approach: "I would stick to the text. There can be no debate [...] that the key statutory term is "adjacent" and that adjacent wetlands is a broader category than adjoining wetlands."[16] Justice Kavanaugh explained that the majority rewrites the definition of "adjacent" to mean "adjoining" by "creat[ing] ambiguity where none exists."[17] The concurrence would therefore include within the scope of the CWA "wetlands separated from a covered water only by a manmade dike or barrier, natural river berm, beach dune, or the like" in addition to wetlands directly bordering covered waters because "the statutory text ('adjacent') does not require a continuous surface connection between those wetlands and

chances of success are low, as the EPA admits that the Corps finds jurisdiction approximately 75% of the time." Alito Majority Opinion, p. 13.

[12] Alito Majority Opinion, p. 14.

[13] Alito Majority Opinion, p. 19.

[14] Alito Majority Opinion, p. 23.

[15] Alito Majority Opinion, p. 24.

[16] Kavanaugh Concurrence, p. 14.

[17] Justice Kavanaugh explained that, "[a]djoining wetlands are contiguous to or bordering a covered water, whereas adjacent wetlands include both (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." Justice Kavanaugh further argued that that "the decisive point here is that the term adjacent' in this statute is unambiguously broader than the term 'adjoining.' On that critical interpretive question, there is no ambiguity. We should not create ambiguity where none exists. And we may not rewrite 'adjacent' to mean the same thing as 'adjoining,' as the Court does today." Kavanaugh Concurrence, p. 2.

covered waters."[18] Justice Kavanaugh also pointed out that the CWA uses the term "adjoining" in other instances in the act to narrow its scope intentionally, while it does not do so in the provision at issue here.[19]

In addition to textual analysis and statutory context, Justice Kavanaugh explained that "longstanding and consistent agency interpretation reflects and reinforces the ordinary meaning of the statute."[20] Indeed, for "45 years and across all eight Presidential administrations, the Army Corps has always included in the definition of 'adjacent wetlands' not only wetlands adjoining covered waters but also those wetlands that are separated from covered waters by a manmade dike or barrier, natural river berm, beach dune, or the like."[21] The concurrences also noted the significant "real-world" ecological implications of the decision, which Justice Alito appeared to dismiss in favor of landowner rights.

Justice Kavanaugh noted, "[b]y narrowing the Act's coverage of wetlands to only adjoining wetlands, the Court's new test will leave some long-regulated adjacent wetlands no longer covered by the Clean Water Act, with significant repercussions for water quality and flood control throughout the United States."[22] The concurrence described the Mississippi River's levee system, which "would seemingly preclude Clean Water Act coverage of adjacent wetlands on the other side of the levees, even though the adjacent wetlands are often an important part of the flood-control project, " and risks to the Chesapeake Bay "if fill can be dumped into wetlands that are adjacent to (but not adjoining) the bay and its covered tributaries."[23]

In a separate concurrence joined by Justices Sotomayor and Jackson, Justice Kagan drew parallels between this decision and *West Virginia v. EPA*. Justice Kagan criticized the Court's use of what she called "pop-up clear-statement" rules that enable the Court to "cabin the anti-pollution actions Congress thought appropriate" by appointing itself "as the national decision-maker on environmental policy," usurping the role of Congress and expert agencies.[24] Recalling her dissent in *West Virginia*, Justice Kagan explained that these special canons "'magically appear [...] as get-out-of-text-free cards' to stop the EPA from taking the measures Congress told it to."[25] She wrote, "[s]o I'll conclude, sadly, by repeating what I wrote last year, with the replacement of only a single word. '[T]he Court substitutes its own ideas about policymaking for Congress's. The Court will not allow the Clean [Water] Act to work as Congress instructed. The Court, rather than Congress, will decide how much regulation is too much.'"[26]

In addition, Justice Thomas authored a concurrence joined by Justice Gorsuch calling for drastic narrowing of the CWA beyond the holding in *Sackett*, arguing that "wetlands are just the beginning of the problems raised by the agencies' assertion of jurisdiction in this case."[27] He argued that the CWA, properly checked by the Commerce Clause, should be limited to navigable waters traditionally used for interstate commerce following the Daniel Ball test from 1870.

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[18] Kavanaugh Concurrence, p. 4.
[19] "By contrast to the Clean Water Act's express inclusion of "adjacent" wetlands, other provisions of the Act use the narrower term "adjoining." Compare 33 U. S. C. §1344(g) with §§1321(b)–(c) ("adjoining shorelines" and "adjoining shorelines to the navigable waters"); §1346(c) ("land adjoining the coastal recreation waters"); see also §1254(n)(4) ("estuary" includes certain bodies of water "having unimpaired natural connection with open sea"); §2802(5) ("'coastal waters'" includes wetlands "having unimpaired connection with the open sea up to the head of tidal influence")." Kavanaugh Concurrence, p. 5.
[20] Kavanaugh Concurrence, p. 8.
[21] Kavanaugh Concurrence, p. 6.
[22] Kavanaugh Concurrence, p. 2.
[23] Kavanaugh Concurrence, p. 12.
[24] Kagan Concurrence, p. 5.
[25] Kagan Concurrence, p. 6, citing *West Virginia*, 597 U. S., at ___–___ (dissenting opinion) (slip op., at 28–29).
[26] Kagan Concurrence, p. 6, citing *West Virginia*, 597 U. S., at ___–___ (dissenting opinion) (slip op., at 32).
[27] Thomas Concurrence, p. 27.

Looking Ahead

EPA and the Army Corps relied on both the Scalia and Kennedy tests in crafting the current WOTUS rule. Given the Court's rejection of the Kennedy test, they will likely need to propose a narrower rule that defines WOTUS consistent with the Scalia-based test articulated in *Sackett*. In the interim, however, the Agencies have stated that they will interpret WOTUS consistently with *Sackett*[28] and the Corps announced that it paused its Approved Jurisdictional Determinations.[29]

The decision raises many questions about which wetlands and other waters will be deemed jurisdictional going forward, creating regulatory uncertainty for regulators and landowners. Specifically, what implications will the "relatively permanent" waters standard have for seasonal or other intermittent waters?[30] How will various human-made disruptions to a "continuous surface connection" affect jurisdiction? The concurrence raised a range of questions about the administrability of the decision that highlight other uncertainties.[31] In addition, the courts and agencies will need to understand how this decision interacts with *County of Maui v. Hawaii Wildlife Fund*, which held that the CWA requires a permit when pollutants are directly discharged from a point source into navigable waters or when there is a "functional equivalent" of a direct discharge.[32]

With this limited view of federal jurisdiction for waters, states and local governments will now need to consider their authority to protect critical wetland resources. While some have downplayed the importance of federal clean water protections by arguing that states will continue to protect water resources (including the Farm Bureau of Arkansas, whose amicus brief was cited by the majority), many states have laws preventing the state from doing more to protect water resources than the federal government requires. In fact, at least two-thirds of states have laws that could restrict authority of state or local agencies to do more to protect waters unprotected under the CWA.[33] Many states currently lack the legal authority to step into the gap that *Sackett* creates to protect important wetlands.

EELP will track the regulatory response to this decision and future developments at our Waters of the United States regulatory tracker page.

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[28] EPA, Definition of "Waters of the United States": Rule Status and Litigation Update, https://www.epa.gov/wotus/definition-waters-united-states-rule-status-and-litigation-update; Army Corps, Supreme Court Ruling in Sackett v. Environmental Protection Agency, https://www.usace.army.mil/Media/Announcements/Article/3409141/26-may-2023-supreme-court-ruling-in-sackett-v-environmental-protection-agency.

[29] See https://mavensnotebook.com/2023/05/30/notice-u-s-supreme-court-decision-in-sackett-army-corps-approved-jurisdictional-determinations-ajds-paused/.

[30] The Court tried to address this question: "We also acknowledge that temporary interruptions in surface connection may sometimes occur because of phenomena like low tides or dry spells." Alito Majority Opinion, p. 21.

[31] "For example, how difficult does it have to be to discern the boundary between a water and a wetland for the wetland to be covered by the Clean Water Act? How does that test apply to the many kinds of wetlands that typically do not have a surface water connection to a covered water year-round—for example, wetlands and waters that are connected for much of the year but not in the summer when they dry up to some extent? How "temporary" do "interruptions in surface connection" have to be for wetlands to still be covered? [...] How does the test operate in areas where storms, floods, and erosion frequently shift or breach natural river berms? Can a continuous surface connection be established by a ditch, swale, pipe, or culvert? [...] The Court covers wetlands separated from a water by an artificial barrier constructed illegally, [...] but why not also include barriers authorized by the Army Corps at a time when it would not have known that the barrier would cut off federal authority? The list goes on." Kavanaugh Concurrence, pp. 13-14.

[32] *Cnty. of Maui, Hawaii v. Hawaii Wildlife Fund*, 206 L. Ed. 2d 640, 140 S. Ct. 1462 (2020).

[33] Environmental Law Institute, State Constraints: State-Imposed Limitations of the Authority of Agencies to Regulate Waters Beyond the Scope of the Federal Clean Water Act (2013), https://www.eli.org/sites/default/files/eli-pubs/d23-04.pdf.