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CleanLaw 86

Sackett v. EPA Decision: What the Justices Said and What this Means for Water, with Jody Freeman, Richard Lazarus, and Steph Tai — June 21, 2023

Intro:

Welcome to Clean Law from Harvard's Environmental and Energy Law Program. In this episode, Harvard Law Professor and EELP's Founding Director Jody Freeman, who is also an independent director of ConocoPhillips, speaks with Harvard Law Professor Richard Lazarus and University of Wisconsin Madison Professor of Law Steph Tai about the US Supreme Court's recent decision in *Sackett v EPA*.

They discuss how the Court's reliance on a dictionary definition of waters will drastically limit Clean Water Act protections: severely shrinking what qualifies as covered wetlands and streams, and as a result, enfeebling the federal government's ability to protect the larger water bodies the act still clearly covers. With a deep dive into the history of the Clean Water Act, the Supreme Court's prior decisions, and the science of watersheds, they put into context how the Sackett decision flies in the face of what Congress intended when it passed this landmark legislation.

We hope you enjoy this podcast.

Jody Freeman:

Welcome to CleanLaw. Today, we'll do a deep dive on the Supreme Court's decision this term, in Sackett versus EPA. We're joined for this discussion by Steph Tai and Richard Lazarus. First, let me introduce Steph. Steph is a professor of law at the University of Wisconsin. They are an expert in the interaction between environmental and health sciences and environmental law and administrative law. They have in the past, before becoming a law professor, been an appellate attorney at the Environment and Natural Resources Division in the Department of Justice, but now as a professor at the University of Wisconsin, Steph has become a leading expert who writes amicus briefs about the scientific background in environmental law cases. Welcome, Steph.

Steph Tai:

Thank you.

Jody:

Richard, of course, is known to our listeners as my partner here in the Environmental and Energy Law Program. He's my colleague, of course, at Harvard Law School, and one of the nation's best-known experts in environmental law and Supreme Court environmental litigation. Richard, you are the, as you know, the Howard and Katherine Aibel Professor of Law at Harvard Law School. Welcome, and thank you for joining us.

Richard Lazarus:

Oh, Jody, I'm absolutely delighted to be here. I always like doing these podcasts.

Steph:

And I'm very excited to be here. Thank you very much.

Jody:

Well, this is going to be a very interesting conversation and we'll get right to it. Richard, can I ask you, without going into the long saga that led up to this decision, to just summarize what the Supreme Court decision here amounts to? What did the Court hold?

Richard:

Yeah, and I'll do it very quickly, Jody. So what this case concerned was the geographic reach of the Clean Water Act. That's one of the nation's most important pollution control laws passed, really, in 1972. The more precise legal issue before the Court turned on the meaning of navigable waters, which the statute defines as waters of the United States, and particularly in this case, as those terms applied to wetlands.

Most broadly speaking, the Court had two rulings in the case. The first, was the term waters in the United States are only those "relatively permanent, standing or continuously flowing bodies of water that form geologic features." That's a dictionary definition which the Court embraced. Then second, on the wetlands question in particular, the Court said, the only wetlands that are covered by the Clean Water Act are those which are "Indistinguishably part of a body of water that constitutes waters in the United States." As we'll discuss, both these rulings significantly reduce the reach of the Clean Water Act, and the Clean Water Act regulates discharges of pollutants in the waters in the United States. So this is a big case.

Jody:

So we'll get to the implications in a moment, and I'll turn to you, Steph, to talk first about what this means for water pollution control and management of the aquatic systems of the United States. But just to be clear for listeners who are coming to this for the first time, and Richard, you jump in here, if anything I say doesn't jibe with you, we're talking about the 1972 landmark Clean Water Act, which for the first time forbade the discharge of pollution into the nation's waterways without a permit and also forbade the discharge of dredged or fill material into the waters of the United States without a permit. So we're talking today about those prohibitions.

Richard:

Absolutely. A revolutionary law, right? For the first time, what the Water Act did was said, "you cannot discharge pollutants into the waters of the United States without a permit." So all those discharges were presumptively unlawful. Before they hadn't been, the Clean Water Act says they're all presumptively unlawful. If you want to do them, you've got to get a permit. That was dramatic.

Jody:

And that's one of the revolutionary aspects of the law, and we'll talk more about that in a bit, but just to put that out on the table as the framework, and then as everyone knows, I think, but I want to make clear, this law is

jointly implemented by the United States Environmental Protection Agency and the Army Corps of Engineers. And the Army Corps is in charge of issuing permits to anybody who wants to dredge or fill their property if their property qualifies as "Waters of the United States," including wetlands, which this case defines. Right, Richard?

Richard:

Absolutely. It's a really interesting statute that way, how two different agencies administer it.

Jody:

The last fact I want to mention that in this case the petitioners are two people, the Sacketts, who had a lot that was near a lake called Priest Lake, and they began backfilling it to build on it, and they did that without applying for a permit. So that's what sort of kicked off litigation. And there's a long saga of litigation, we can talk about it in a bit, but that's the context here. These are property owners, they want to develop their property, they dumped or filled material into what arguably is waters of the United States, questions whether they have to get a permit, and if they don't do that, are they subject to civil and criminal penalties? So with that background, Steph, based on what Richard said about the limited jurisdiction now of these agencies, as the Court narrowly defined what constitutes waters of the United States, what do you think are the implications for management of the nation's aquatic systems?

Steph:

So to give some context into this, it's not only the feds that have regulatory authority over wetlands in general. There are a few states that also have their own wetlands protections law, basically, dredge and fill permits for ones that are not federal wetlands. However, that's not many of the states. And so what this means is that the loss of federal coverage is the loss of all coverage for these areas in those states that haven't adopted anything that goes above and beyond the federal standard.

In our amicus brief, we represented 12 water science societies and we actually had a number of scientists working with us to conduct models to show the loss of wetlands coverage in various kinds of areas. One of the things that they determined was that if the Court uses a continuous surface water connection test, which is what they're moving towards to traditional navigable waters required for wetlands, more than 50% of wetlands in some watersheds would no longer be protected by the Clean Water Act. With respect to streams: Ephemeral and intermittent streams would not be jurisdictional waters and thus more than 90% of stream length, in some watersheds, would no longer be protected by the Clean Water Act.

And this is shown through a number of different models looking at where continuous connections exist versus where there are either intermittent connections due to changes in climate, rainy season connections versus dry season, non-connections, various things like that. And so it's going to be a pretty significant loss as a result of the test that's being used by the Supreme Court.

Jody:

So, Richard, just to jump back to you, the way you articulated the Court's holdings and the definition it used, I want to stress something you said. You said, when you were quoting from the Court, "Only those relatively permanent standing or continuously flowing bodies of water forming geographical features described in ordinary parlance as streams, oceans, rivers, and lakes." So now, we're talking about what the agencies have

jurisdiction to regulate. So those are the, what we recognize as waters of the US that are sort of relatively permanent and we recognize them on a sort of common conversation as that.

And then Richard, you talked about adjacent wetlands that are quote, "Practicably indistinguishable and have a surface connection." So Richard, I just want to be really crystal clear about this. Are you saying that wetlands that are a mile or two or three or 10 away from a permanent standing body of water, like a lake or a river that is always flowing, are those wetlands that are a little bit further away, are they completely unregulable by the EPA and by the Army Corps?

Richard:

As I read the opinion, I don't think you have to be a mile away. The Sacketts wetlands were 300 feet away. One was 30 feet away, and the Court said it's not physically adjacent. It can be separated by a berm between the two, and according to the Court, it's not regulated. This is a dramatic effect. I was actually just traveling around central Illinois last week and I was driving through it and I was looking at these water bodies going, "Not covered, not covered, not covered." It was amazing to me how much would not be covered.

And to understand the significance of this, Jody, one has to realize that what the Court has done is not only eliminate a large number of waters that were themselves protected, they've actually made it impossible to protect those waters which are covered because most pollution doesn't go in the first instance into those relatively permanent waters. It goes into water bodies that are hydrologically connected to them. So what will happen now is people will pollute into those other waters and those waters, because they're hydrologically connected, those pollutants will end up in the covered waters. But because the non-covered waters are not covered, EPA will never know about those discharges. They'll have pollution levels increasing in the covered waters, but they won't know where the discharges are because the discharges aren't covered.

Jody:

This gets us something really important. I want to flip back the Steph for more clarification. We're talking here about how pollution moves around through hydrological connections in aquatic systems that are not always visible to the naked eye. I want to say the words "fate and transport," but I know I'll get in trouble. And the idea that a surface connection has to exist to have jurisdiction kind of flies in the face of the scientific knowledge we have about how these aquatic systems work. In other words, the pollutants move without there needing to be a surface connection. Steph, am I misstating the science terribly or have I got it about right?

Steph:

No, you've got it about right. And let me explain a little bit more. There's a lot of different ways in which there can be hydrological connections, there can be subsurface connections where pollution can move through, for example, extremely porous subsurfaces like karst, and therefore something that appears on the surface not to be connected to some navigable waters is actually in fact connected. And that sometimes filling in with various dredge and fill materials into seemingly disconnected waters can actually still lead to travel of pollutants to these navigable waters. Things that everyone accepts are navigable waters. There's that part.

But I also want to emphasize that there's a lot of other types of connections that aren't necessarily subsurface connections, but everyone recognizes their connections. So for example, there's a lot of areas in the West, that

for most of the year, are pretty disconnected from navigable waters because it's the dry season. There's a long dry season in the West. But when there actually is a rainy season, then there's this very strong connection.

And so if you pollute those areas, and they might not even be watery areas, it might just be an area in which there is some kind of temporary stream during a rainy season, then you've got lots of pollution that can travel into what are considered traditionally navigable waters. And so we tried to emphasize that in our brief and we tried to emphasize that this science is well understood and it's not magic.

I mentioned modeling, and that often causes discomfort for non-scientists, but these models are based on actual physical tests. Physical tests about how certain types of material can transmit pollutants through there, and sometimes very visible physical tests such as actually sending dye tracers through just to show that, yes, in fact, if you put something in this one area and there is a rainy season, yes, it ends up in another area. And so we tried to explain that to the Court, that the science isn't magic, that it's well understood, and it's well understood that these types of areas can be connected in ways that don't fit into the Supreme Court's surface recognizable kind of test.

Jody:

So we often encounter this kind of problem in environmental law. I'm sure both of you would agree, where law and science don't necessarily overlap or the law doesn't take into account the science sufficiently.

And I just want to return to you, Richard, and ask you this, what's the point of the Clean Water Act? Why does all this scientific conversation matter? Why does it matter that pollutants go from certain areas that are sometimes wet and sometimes dry and wind up in navigable waters of the US. Why does this conversation matter to the law under the Clean Water Act?

Richard:

Yeah, we don't have to guess what the purpose of the Clean Water Act is, it's in the very first section of the Act, Section 101, it says, its purpose is to preserve the biological, physical, and chemical integrity of the nation's waters. That is the purpose of the statute. And unfortunately, what the Court has done here, it's made it impossible to do that, both to those waters that are now no longer covered themselves, which are important, and because their connection to the waters the Court says are covered. So all sets of those waters will no longer be effectively protected by the statute.

And when Congress did this in 1972, they did it deliberately. They deliberately decided we needed a national law, a comprehensive law. They deliberately defined the term navigable waters, meaning waters of the United States, as a broad term, and the accompanying legislative history said, "We're doing that deliberately. We want to tap into the full scope of Congress's power under the Commerce Clause." So they were intentionally not making this depend on traditional notions of navigability. And that's been the settled law. And now, the Court has turned back the clock.

Jody:

So I really want to get into this now in some detail because you've laid out what the Act clearly says and what the legislative history clearly shows, and yet the Supreme Court's decision in this case seems to ignore both of those things. So let's talk about this history that's quite interesting, the fact that the Congress uses the term

"navigable waters" and then goes on to define the term "navigable waters" to say, "Waters of the United States," which seems broader, as you just said, compared to the traditional notion of navigation, waters of the US seems broader. Richard, why did Congress use the term navigable and define it more broadly?

Richard:

Yeah, I wish they hadn't. That's our conundrum. And in the opinion, what you see is, Alito scratches his head and he says, "Why did they define navigable waters as waters the United States?" And it essentially ignores the definition of waters of the United States and says, "Boy, they confused that, they should have just said navigable waters."

And their answer, basically is, they took an old term of art, navigable waters, but then to make clear they were not wedding the jurisdiction of this statute to it, they defined it as waters of the United States, and they included legislative history to make it clear. As we may discuss soon, the Supreme Court understood just that. In 1985. They recognized it and they said they didn't mean to go just traditional navigable waters. It's of limited import, the term navigable. And they meant to go further understanding the hydrologic connection and how you can't just focus on one, you got to focus on the whole. And the Court did that nine to zero in the Riverside Bayview case.

Jody:

Let's talk about Riverside Bayview and then let's talk about SWANCC and then let's talk about Rapanos, and then let's wind up here in the Sackett case. But I don't want us to go too far down the rabbit hole. So let me give a quick framing and then turn to you, Richard, and then to you, Steph, to add some color commentary.

So Riverside Bayview, which Richard's talking about, the 9-0 decision the Supreme Court handed down that said, "Look, when this Clean Water Act says navigable waters, that includes wetlands that abut navigable waters." And Congress did not mean a traditional notion of you have to be able to essentially sail or have a ship traverse the waterway for it to be covered by the Act.

And then the Court in a subsequent case called SWANCC, struck down the migratory bird rule and held that isolated intrastate ponds, that's the way the Court characterized them, isolated intrastate ponds that migratory birds touch down on that were not themselves adjacent to open water, you know, lakes or a running stream, that those ponds were not jurisdictional waters under the Clean Water Act. And so the Court there constricted what EPA and the Corps could do.

And then subsequent to that, right, Richard, we get to the Rapanos case, in which, bear with me folks, the Supreme Court vacated a lower court decision that extended jurisdiction of these agencies that read the Clean Water Act to cover ditches or drains or intermittently wet areas that were miles from open water. But the Court did not give us a majority rationale for rejecting those areas as wetlands because four justices, a plurality, agreed to one rationale, four justices would've deferred to the Army Corps and EPA's authority to regulate those wetlands, in that case, in Rapanos, and one justice, Justice Kennedy laid out his own test for determining whether the areas in that case would've been covered by the authority of the Clean Water Act, and he called that the significant nexus test.

Richard, I just did my very best to be as brief as possible. Can you explain the Rapanos case from 17 years ago, I think it is, and how this decision in Sackett does or does not line up with Rapanos?

Richard:

Okay. If it's okay with you, Jody, I'd like to go back a little before Rapanos.

Jody:

Sure.

Richard:

And then put Rapanos and perspective with regard to Sackett.

Jody:

Great.

Richard:

So what's fascinating about the Sackett case is that it has Justice Scalia's fingerprints all over it, although of course he died in 2016, but seven years later, a ruling comes out, which is all Justice Scalia, and this is underscored in a couple ways. One, the Riverside Bayview case is decided in the fall of 1985, nine to zero. What happened six months later? Justice Scalia joins the Court.

So what all justices find easy in the fall of 1985, unanimously easy, is that waters of the United States is functional, you've got to recognize the hydrologic cycle, they've got a problem. They can't just deal with traditional navigability. They all get it, Rehnquist, everyone gets it. Easy case, nine to zero written by Justice White, who's no big environmentalist.

Scalia comes on, September '86, and right away he plants two seeds in the Court's rulings, which come to fruition ultimately in Sackett. The first one is, he says, "Stop reading that legislative history," which the Riverside Bayview Court had looked at. "Stop reading legislative history. That's irrelevant. You've got to look at the text."

Second, he says, "Congress, their Commerce Clause authority is really limited. It doesn't extend to any activity affecting interstate commerce." He plants those two seeds during the 1990s in a series of cases. Those two seeds then express themself for the first time, in a Clean Water Act case, in SWANCC in 2001. As you said, that's where the Court says, "All right, we actually think the word navigable means something." Why? Because they refused to look at the legislative history unlike Riverside Bayview. And they also say, "We think this raised some serious question of constitutional law, too," because they're now adopting Scalia's idea of limited Congress Commerce Clause authority. That's the first shoe that drops.

The second shoe looks like it's dropping in 2006, that's Rapanos. And just before it hits the ground, Kennedy boots it away. Because in that case, Scalia wants to do sort of this dictionary definition. The navigability is important. He wants to go back to waters being a dictionary definition of these permanent standing waters, geological features. But Kennedy denies him his fifth vote, and Kennedy announced a different test, significant nexus test, which actually was in the SWANCC case in 2001. He announces it and the shoe doesn't drop. And EPA then does all these rule makings, which are a group hug of Kennedy's significant nexus test.

Jody:

So Richard, let me intervene and ask one more thing here. And Steph, maybe you can chime in, too. Kennedy's significant nexus test is an acknowledgement of the hydrological connection theory, that in fact, we shouldn't go too far here and limit the authority of these agencies and limit what Congress can do to give the agencies power to regulate these waters that are adjacent and also that are hydrologically connected, because they have an impact. The aquatic systems are interlinked. Steph, can you comment on that, that Kennedy captured something that was true about the science of these systems. Right?

Steph:

Yeah. I think he recognized that it's not just visual connections that makes an actual connection between potentially wet area and a navigable water. It's actually really similar to the tests that Justice Breyer created in Maui versus Hawaii Wildlife Fund, where he talked about, "Look, if you have a discharge from a point source that's not directly into surface waters but is a functional equivalent of a discharge into surface waters, then that counts for the permit requirements under the Clean Water Act." And you can sort of see a connection between the significant nexus test and the functional equivalent test. They're both trying to get at the same thing. Right? Some actual scientific connection between what's the polluting activity and the actual pollution occurring in the waters.

Jody:

And Richard, back to you, as you pointed out, after the plurality decision in Rapanos, Kennedy's concurrence, the EPA and the Corp had to go back and figure out, "Well, how are we going to regulate wetlands? What's going to count? What fits under the significant nexus test?"

Richard:

Right. And so they follow Kennedy's guidance, significant nexus, which obviously the other four justices, and that's going to be Justice Stevens and all, they got broader, but they certainly also said, "We agree with Kennedy, too." So there looked like there were five votes for that significant nexus test. And there was language in the SWANCC case written by Rehnquist supporting the notion of significant nexus.

So they run with it. But the problem, of course, is the Court isn't static. And not long after, President Trump comes in, he puts three new justices on the Court and everyone knows that point that significant nexus is probably dead and Rapanos is going to be the new majority view. It's so obvious, that in the Sackett case, which basically inverts the Rapanos plurality into a majority opinion, the petitioners in that case weren't subtle. The cert petition basically said, I'm not going to quote, this basically said, look, there were four votes in Rapanos, we count at least five votes now. Grant this case and convert the plurality in the majority, and the Court granted. So no one was surprised, but disappointed.

Jody:

Well, so meanwhile, in the background over the period of years, the Obama administration tries to write a rule that will explain the jurisdiction of EPA and the Corp and what wetlands are covered and what aren't, using the significant nexus test. Trump administration comes in, that rule gets repealed, rescinded, and replaced with a narrower definition. That rule gets rescinded and replaced now by the Biden administration, which is trying to put out its own regulations.

So there's a series of rulemakings trying to define what constitutes jurisdictional waters under the Act, and there's a bunch of litigation in the background that we won't get into that's trying to gum up the works and prevent these agencies from exerting their authority. So it's really a legal mess when cert is granted in this case. And we ultimately get the decision we got. Let's talk about that decision.

First I should mention the Sacketts have won twice. They first went up to the Supreme Court on the question of really an administrative procedure issue, justiciability issue, which was, hey, can they get judicial review when all that's happened is a compliance order has been issued by EPA to comply with the Act? And they haven't because they haven't applied for a permit.

And the argument was, "Look, you're not at the end of the agency's decisional process. It's not final. You've just received a compliance order, nothing has happened to you, so you don't get access to judicial review." That goes up Supreme Court in a case called, you won't be surprised, Sackett, and they win. So they win on that issue and then they go back to the lower courts and they go up on the merits, Richard, as you described, and now they win this case. Let's talk about the opinions. Richard, let's talk about Justice Alito's opinion for the majority. Tell us what you think of it, his reasoning, and whether you think it's sound.

Richard:

Yeah, happy to do that. If it's okay, I'd like to do one earlier jurisdictional issue.

Jody:

Sure.

Richard:

To show how much the government knew that this case was destined not to have a good result, they tried to kill the case. They withdrew the administrative compliance order against the Sacketts. They actually said, "We're not going to enforce it, we're not doing it now, we won't in the future." So they tried to make the case moot, they tried to kill the case, and they put a ruling. So they tried to say, "We're done. Sacketts, go build. We're not going to stop you from building." And the Court took the case anyway, even though as a prac matter, there was nothing left to it. The mistake they may have made was they didn't withdraw their original jurisdictional determination. And that's what arguably kept it alive. All right?

So the Alito opinion for the Court, and it's for five justices, and we'll talk next about the concurring opinions. Let me tell you what I think was not surprising about it and what was surprising about it. What wasn't surprising was that the majority, written by Justice Alito, embraces Rapanos. They take Scalia's plurality and Rapanos and they basically make it just like the petitioners wanted, they make it a majority ruling. They rely on the dictionary definition of waters. That's where they get basically the same definition of permanent geological features, standing waters, continuously flowing, streams, ocean, lakes. That's all from Rapanos, it's now a majority opinion.

They also reject the idea, which wasn't a surprise, that Congress had ratified the prior more expansive view of the EPA because EPA had done it in the mid 1970s and Congress had since amended the Act twice, aware of what EPA had done, and even included the word wetlands. And so there was a good argument that it ratified,

the majority rejected that. That wasn't a surprise. Scalia had rejected it too in 2006. And this makes the case have broader legs.

The Court also in coming up with this narrow interpretation, they embraced certain statutory of construction, some cannons, which they said support a narrower reading of the law that's significant here, it's significant for all kinds of environmental statutes. And we'll talk later, but this is not unlike the West Virginia Case the Court did a year ago.

Jody:

Yes. So I want us to definitely get there about the clear statement rule tear that the Supreme Court is on. So we'll come back to that.

Richard:

Yeah. But they added to the clear statement rule in terms of major question notions that here you needed to have clear authorization because, one, the Clean Water Act has a criminal dimension to it. So whatever they said about jurisdiction would apply to potential criminal penalties, too. And that's true for almost all environmental statutes. They said it has to be clear, and they also said it's going to affect property rights. It's going to affect private property rights. So they created two new cannons. And the rule of lenity cannon, by the way, is a direct repudiation of what the Supreme Court said, and a mid 1990s decision called Babbitt v. Sweet Home written by Justice John Paul Stevens, who addressed this issue and rejected it, and the Court doesn't even cite the case.

Jody:

Well, wait, that was a little too quick. And I want folks to appreciate this. The Court essentially in Sackett is saying, the fact that there are potential criminal penalties here, and the fact that here there is an imposition on private property by the government are both reasons to read the government's authority narrowly. And I just want to be clear about what you said about the jurisprudence on Lenity weighing against that construction. Say that one more time so we get it.

Richard:

Yeah. Basically the rule of lenity provides if a federal law may be applied criminally, then we need to make sure the defendant has fair notice of it. And so we're going to read ambiguous provisions in the defendant's favor. And the Supreme Court in a case over the Endangered Species Act in 1995-

Jody:

Babbitt.

Richard:

Babbitt v. Sweet Home, that doesn't require us to read the statute as a whole, always in a way in favor of defendant. And therefore, say anything ambiguous has to go in the defendant's favor. Why? Because one, a regulation can provide the missing clarity, and two, prosecutor discretion, and three, most criminal provisions require the violation be knowingly.

Jody:

Right. It's a tough standard to meet.

Richard:

Which is an additional provision.

Jody:

And your point here is the Court is essentially repudiating that case. Babbitt versus Sweet Home, doesn't bother to cite it, was your point?

Richard:

Yeah. They don't even bother to cite the case.

Jody:

Steph, can you weigh in here, what's striking to you about the Alito opinion? We'll keep talking about this for a little while because there's so much in it to wrestle with, but Steph, do you have initial reaction to that opinion?

Steph:

Yeah, there's a few things I have in terms of reaction to that opinion. One thing is just that the "commitment" to textualism isn't there. He even recognizes that the dictionary definitions treat adjacent as meaning next to. He agrees with the concurrences that say that no, the dictionary has defined adjacent as next to. And he does so again through that clear statement rule, which does seem sort of presented just so that he can reach a different conclusion than pretty much every single dictionary definition.

Jody:

Steph, let me jump in there just to make sure we're clear on what we're saying here. Richard pointed out that the Court was textualist in reading the word waters, to say these freestanding large geological structures like lakes, et cetera.

Steph:

Yes.

Jody:

But then it seemed to be not textualist in reading the word adjacent.

Steph:

Absolutely.

Jody:

Because adjacent wetlands would be, if we looked in the dictionary, and you're saying what Justice Alito acknowledged was, look in the dictionary and look at that word, and it means next to, doesn't necessarily mean conjoined. But then faced with that dictionary definition, he reverts and says, "Well, we don't have to accept that," and rereads adjacent to mean practically indistinguishable from the larger water body. Is that what you're talking about?

Steph:

Yeah. For example, I flew on a plane recently and apparently I had no adjacent passengers because I wasn't touching them or in a way visually indistinguishable from them. So it does seem to be a really extreme read of a word that's fairly clear to most people.

Jody:

So a kind of selective textualism. Richard, can you weigh in on this? The sort of selective textualism?

Richard:

Well, one, selective textualism, and two, this was part of the opinion that was surprising. Because as a practical matter, wetlands are not fairly indistinguishable, practically indistinguishable. The whole idea is they're not just part of that traditional water body. They're nearby and they're separate and they're connected, but they're hydrologically connected. They're not the same thing. He said, "Wetlands are covered only if they're part of that water body."

And I think scientists are going to be scratching their heads, and EPA and the Corp, going to scratch and say, "What does that mean?" Because it's just made up here and it doesn't reflect the science of it. And there's certainly a selective textualism. But here, there was also something revealing about the opinion. There was some language Alito used where he basically referred to the wetlands as fetid waters. And then he says, "We're basically going to turn these fetid waters into places for the use and enjoyment of people." So he basically is completely rejecting the policy decisions made by Congress in the Clean Water Act by saying, "I think these are feted waters." That's a 19th century view. It's not a 1972 view. It's a 19th century view in saying, "Let's get rid of these feted waters and let them be used and enjoyed by people."

Jody:

It's certainly not a 2023 view, Steph, right? Tell us something about what wetlands do. And people now talk about wetlands as performing hugely valuable ecosystem services, like filtration of pollutants, flood control by buffeting floodwaters. Steph, are wetlands fetid waters? What do they do in our aquatic systems?

Steph:

They provide a lot of ecosystem services. One of the main things they do is provide buffers against floods. Another thing they do is they do a lot of chemical filtration. It's not just that it's a wet area that provides a lot of chemical filtration. It's the specific ecosystem that is contained in that wetland that does that. So it is fine balance. Right? Sometimes I think that folks who think that, "Okay, if we fill in these 'fetid waters' we can just put in wetlands buffers elsewhere." And science has shown that that's really, really difficult to do. A lot of artificial wetlands don't have the same filtration properties or even the same flood protection properties as

actual natural wetlands, which developed over thousands of years and have reached that kind of ecological balance. And so there's a great loss here.

Richard:

Yeah. Justice Alito, he has to work overtime to not include these waters. And he does it one by, as Steph says, ignoring the dictionary definition of adjacent, and two, ignoring the clear import of section 4O4G of the statute.

Jody:

Yes. I wanted to get you to 4O4G. So can you do that?

Richard:

Where Congress in 1977 makes clear that adjacent wetlands are covered. The definition of adjacent wetlands at the time that Congress says that is not this definition of Alito. And Alito basically is only way out of that, is to say, "Well, it couldn't mean that because if it meant that that would be a radical expansion, and I've just said there's no radical expansion." But instead of saying, "No, this is evidence that there was deliberately," he sort of does this tautology.

Jody:

It's a tautological argument. And I wanted to just point out, and we may not have the time to really do this justice, but there is a moment in the Alito opinion, in the majority opinion where he says, "Category A is states can issue permits for some discharges into waters of the US. But then there's category B, which is an exception to that, but not into traditional navigable waters." And then there's category C because the statute says, "Yes, well adjacent wetlands are included in category B, traditional navigable waters." There's this whole analysis he does, category A, B, C of the statute, to come to the conclusion that ta-da, "If you read it my way, you get to the inexorable conclusion inevitably that adjacent wetlands must be part and parcel and indistinguishable from the navigable waters." And Justice Kagan, when we get to her, she sort of throws up her hands and says, "You can category A, category B, category C, this all the way to quadratic equations, and you cannot get the logic to work here."

Richard:

Right. And he's ignoring the legislative history. This wasn't an incidental provision. This was fought over in 1977. There were people who tried to get the statute amended to take out wetlands, that navigable, waters, water of the United States, was not going to include wetlands. And they lost. And instead, Congress for the first time recognized that adjacent wetlands were covered. And they knew about EPA's regulatory definition at the time, which prevailed in the courts. So he's working really hard here and he's not being a textualist.

Jody:

Yeah. And this gets us to the concurrences, which I think are really worth spending some time on to understand who's arguing what in the concurrences. It's interesting, Richard, and I wondered if you thought it was surprising that we didn't have any dissents in the case. In other words, everybody, 9-0, thinks that the Sackett's property don't qualify as jurisdictional wetlands.

Richard:

That's right. And I would say I was surprised by that, but I think it's a little misleading because I think there was a lot of justice strategy going on there, in this way. The most surprising thing was that Kavanaugh did not join the five. He instead said, "I think it's covered here by adjacency." And he was willing to buy EPA and the Corp's US argument on adjacency. At oral argument, Chief Justice Roberts expressed some interest in that and so did Justice Barrett express some interest in it. I think what happened here is that Kagan, Sotomayor and Jackson were playing strategy. Kavanaugh was on that side. They were going to embrace Kavanaugh. They weren't going to criticize him. They weren't going to tear him apart for doing things. They were going to embrace it and say, "We agree with reversal, we're with you," in a hope-

Jody:

To get the chief.

Richard:

The chief or Barrett would come over. And once they didn't, they didn't want to look two-faced and say, "Never mind." And so I think that actually if they were left to their own devices, we would've seen the kind of dissent we saw by the four justices written by Stevens on that. Instead, they're willing to buy into it.

Jody:

Wait, just to be clear, you think the four might have gone the way of Steven's dissent in Rapanos?

Richard:

In Rapanos. Right.

Jody:

And instead, it's a concurrence.

Richard:

The three I think that Sotomayor, Kagan and Jackson, left to their own devices, they might have done significant nexus with Kennedy or the broader view of Steven's, but they were going to play, which shows you they're going to play. Kavanaugh's willing to come over. "All right, we love you, Brett." And then they're hoping, because there were noises made in argument both by Roberts who said, "It doesn't have to be physically right there," and Barrett who said that as well. So we're just hoping they could bring one over and they kept that way.

Steph:

Can I add in a random point about Kavanaugh?

Jody:

Yes, please.

Steph:

So I don't know if this actually influenced him or not, but this was the most targeted amicus brief I'd ever seen. It was Colorado's amicus brief and it had, I think, two paragraphs devoted to the importance of clean water for beer. And so-

Jody:

For beer?

Steph:

That's just funny.

Jody:

For beer?

Steph:

Yeah. And I was like, "Oh, this is targeted to Kavanaugh."

Jody:

Yeah. About that. I just want to get to Kavanaugh for a moment because this concurrence, as far as I can tell, over and over repeating and repeating the fact that adjacent doesn't mean adjoining and you can't turn adjacency into adjoining, it's like doing violence to that text. And he goes at this over and over again, and I just wanted both of you to comment on what's going on there. Is it just what it seems like, which is he actually can appreciate there's a difference between these two things? Or is it more, does he appreciate this hydrological connection idea and he's worried about aquatic systems? What's really going on there? Richard and then Steph.

Richard:

A quick answer. I really want to hear what Steph has to say, too. I think he emphasized it, oral argument, something, which is a major theme. He was really moved by the fact that every single administration, Democrat and Republican had taken this view of adjacency since the 1970s. Everyone. Reagan had done it, Bush one had done it, Bush two had done it. He said that in an oral argument. He said, "Well, everyone has thought it means that and Congress amended the law. Let's do that. Let's look at the system and see how it's worked." I think that affected him as much as the text, the fact that it had been settled and all administrations that what Obama or Biden and the rest had done here was nothing radical. It was what every administration had done, including, remember, he's a product of the Bush administration, both one and two, and very much was involved politically during the Clinton administration.

Jody:

Right. Steph, your take on the Kavanaugh concurrence.

Steph:

Yeah. I also think that he actually does believe in the science somewhat. He joined the majority opinion in County of Maui versus Hawaii Wildlife Fund, which was a surprise to many. And that majority opinion committed to a functional equivalence test that was based on the science that we presented to them. Not saying that this was incredibly persuasive or anything, but it was something that seemed to be foundational to the way that Breyer ruled, and Kavanaugh agreed with it. And so I do think that that was driving his opinion somewhat in Sackett as well.

Richard:

Yeah, he's shown more pragmatism.

Jody:

And the Kagan, Sotomayor and Jackson concurrence here. It's quite short and it's essentially a repeat of the kind of thing Justice Kagan wrote in the West Virginia case, which I want to bring in just a moment, but it's essentially saying, "You're not doing textualism, this is actually quite clear, adjacent doesn't mean adjoining." And she brings in, Richard, the history of the Clean Water Act. She brings in the purpose of the law, what Congress trying to actually accomplish here, which was entirely missing from the majority opinion. Anything there surprise you, Richard?

Richard:

Yeah. So what surprised me is that unlike the West Virginia clean air case from last year, she kind of wrote this one quickly. This is not a major effort at a dissent. She is not really tearing apart the majority. She takes no effort to respond to Thomas and Gorsuch who basically get a complete buy on what they write. I think it's because she doesn't want to do anything to alienate Kavanaugh, but there's a cost to that. There's a major cost because then a lot of those other arguments, like the dictionary definition, no response and other things. So I think I understand it strategically. My guess is maybe she was saving herself because she knew the next month was the Harvard and North Carolina admissions cases, and that's going to be her long dissent. And I don't think she really put as much into this as I hoped she would.

Jody:

It's interesting because I felt a sense of disappointment there wasn't a dissent that really took the majority to task and chimed in about the danger of the Thomas-Gorsuch approach and view of the Commerce Clause. And I do want to spend a couple minutes on that because lurking here in the Thomas-Gorsuch concurrence is a very radical view of the Commerce Clause and what Congress can do and what it means for environmental law more generally. Richard, can you give us a sense of the heart of that concurrence? What is Thomas doing when he says, "I'm going to pick up where the majority left off"?

Richard:

Yeah, it's a crazy opinion. Alito's is a really frustrating opinion, which I find unpersuasive. It's not crazy. The Thomas and Gorsuch concurrence is completely out of bounds. So what he does, he says, "Look, we agree with the majority, waters of the United States is limited to this, those permanent geological features as in the dictionary." Then he says, "But of course, that leaves two other limitations on the Clean Water Act we haven't

addressed yet, but we will in the future. One, it doesn't have to be a water of the United States. It all has to be navigable." And he says, "The test is the 19th century, the Daniel Ball case."

Jody:

Daniel Ball. Unbelievable.

Richard:

Which basically means that it's the only waters capable of being used as highways for interstate or foreign commerce.

Jody:

Literal navigation, what he saying.

Richard:

Right. Literal navigation. So he says, "Not only does it have to meet their narrow definitial waters, but that's not enough." So he says, "It's got to be the 19th century Daniel Ball test." But then, as though that's not enough, he says, "And they can only cover it if the discharge affects navigability in some way."

Jody:

If there are impediments in the way of ships.

Richard:

Right. So this Clean Water Act, the purpose of which Congress says, first provision, "preserve the chemical, physical, and biological integrity of the nation's water." It turns out for Gorsuch and Thomas, it's actually no more than the Rivers and Harbors Act of 1899 or 1892 or 1890. There are three of them in 1890.

Jody:

There are three of them, yeah. But they're trying to eliminate a century of legislation.

Richard:

Yeah. But I'm just calling it the Rivers Harbor Act in 1972 because they're saying that's all the Clean Water Act in 1972 was.

Jody:

I see, I see.

Richard:

Was an updated version of the Rivers and Harbors Act. But here's what really bothers me about this case, and that is I look really carefully at the legal analysis in it, and his citations, his quotes, his use of precedent, both the

Court's opinions and the statutes. And I have to say, it is either incompetent or dishonest, because I'll give you a couple examples. He says, "The reason why we know this is so, these two limitations, is the Court has on a longstanding basis used the term navigable waters and waters the United States interchangeably." So when Congress in 1972 defined navigable waters as waters of the United States, it wasn't broadening it because the two have always meant the same thing.

Jody:

Which is not so.

Richard:

And he says, "It precisely tracks the language of the Daniel Ball and they treat them interchangeably." You go back and look at the Daniel Ball decision, guess how many times the Supreme Court in the Daniel Ball case uses the term, waters of the United States? 5, 4, 3, 1? No, zero. The term, waters of the United States, does not appear once in the Daniel Ball case. What appears is, navigable waters in the United States.

Well, that of course may be the same thing as navigable waters. He refers to River and Harbors Act and says they use it interchangeably. They don't. I don't know whether it's just incredibly bad research by a law clerk and no one bothered to check it up or not. But the one thing I did check, Jody, you'll be happy to know, when I read this opinion, realized how poorly it was put together, that I'm happy to report there was no Harvard law student this year clerking for either Justice Thomas or Justice Gorsuch, because anyone who had taken our classes would not have made that mistake.

Jody:

Well, first of all, I appreciate the level of detail here that you're bringing to the knowledge of the statutory history plus the case law. Right? Knowing this, well, we know that the evolution in the jurisprudence, he's ignoring Riverside Bayview and all the other cases that really represent the modern jurisprudence of the Clean Water Act. What's so worrying here, is you get thrust back a century or more as if nothing has happened. Similarly, as if the Commerce Clause had never developed.

Richard:

Right. And no one responds.

Jody:

That's what I found very disappointing.

Richard:

Which means the lower courts, especially sympathetic judges, may say, "Well, the only ones who spoke to this issue and said that the new issues are Thomas." It's an invitation to a bunch of very conservative judge lower Courts to pick up his invitation.

Jody:

So let's talk about invitation. Steph, can I come to you? What is going to happen next? When you read this, you were a government lawyer at ENRD in the Department of Justice. You know how these cases then lead to additional litigation. I think, Richard, you commented on the newness of the Court saying, "Oh, well, when regulation purports to affect property rights, oh, well, when environmental statute like this purports to impose or could potentially impose criminal penalties, we therefore ought to read the provisions narrowly, the authority narrowly." Steph, how do you see that having legs in future litigation?

Steph:

Yeah, so I can respond from the government side angle because I have a colleague in HSSI who just completed a fellowship at the Office of Management and Budget, which again, reviews all federal rules. And what he's been working on in the past year is responding to decisions like West Virginia versus EPA, and now Sackett, to sort of advise how to pack basically the regulatory background to respond to potential concerns raised by courts as a result of prior West Virginia versus EPA, but now potentially Sackett, because I think he's still continuing with them.

And a lot of that is going to be talking about sort of potential limits in this affecting property rights. All the stuff that you can maybe glean from the concerns of justices coming out of those two opinions, to try to maybe walk back some of the severity of some of these challenges. Now, we know that these challenges are still going to exist. My suggestion is probably what's going to happen is the regulations that come out now from the Biden administration are going to contain a lot more background, trying to say that, "No, no, there's no major questions thing here. No, no, it's not really going to affect a lot of property values because it also has its bonus in this other way." Something to balance all of that out.

Jody:

So the government is going to have to play some defense based on decisions like these?

Steph:

Yes.

Jody:

You refer to West Virginia. So let's talk about it now. I'll give you my quick take, and then Richard, I'll ask you for yours, and Steph for yours. We've had two really important decisions for environmental law in the last term and now this term, but they reach much more broadly, potentially. They're high impact cases, but in different ways. And here's my quick take. West Virginia versus EPA, which constrained the Environmental Protection Agency's ability to choose the method they wanted for setting power plant, greenhouse gas standards, couldn't choose a method that's really the most cost-effective and the smartest way to cut CO2 pollution from the power sector. The Court limited what they could do. But in doing so, that's really not a major constraint, I would say, on the operation of the Clean Air Act. I would say it's bad for climate change regulation. I don't think it's the correct reading of the statute, but it doesn't disable the agency in some general sense from implementing the Clean Air Act.

The far-reaching aspect of that case is really the Court's formal embrace of the major questions doctrine, which has reached far beyond the environmental and climate arena to say basically, generally, to the federal

government, to agencies, "Watch out. If you do things with rules, if you regulate in a way that we consider to be of major significance politically, economically, we are going to be looking for explicit, super, hyper, clear congressional language. Broad language isn't going to suffice." That's the far-reaching ness of West Virginia versus EPA. To me, Sackett is much more disabling for the statute, and it also has these clear statement rules in it that are more far-reaching, but it's not quite the major questions doctrine. So Richard, am I seeing this in a way sympathetic to how you see it, or is it different how you see the two together?

Richard:

Absolutely right, Jody. The actual ruling, the word system could not support the Clean Power Plan, and regulating based on the grid and all the rest of the detail. The actual ruling was striking down some of what EPA was trying to do, which was new and expansive, but it wasn't a body blow. It would a wonderful thing if they had done it, and I wish they had.

This one is a body blow to the Clean Water Act. EPA wasn't trying something new here. EPA was trying to do what they've been doing for 50 years and it's working well, and the Court is using those same cannons and some more to basically undo what's been happening. It's much worse.

And I want to add one thing about sort of DOJ and ENRD and EPA, how they'll respond to this case. Because I think people may underestimate how much they're going to respond to it. These are government lawyers. They're not public interest groups. They take what the Supreme Court says seriously. They're going to say, "This is what the Court has said." Like it or not, they take it seriously.

They're not looking for a way to do an end run around the Supreme Court, especially an opinion which says, "You've been doing an end run around us. You've been ignoring our rulings." They're going to take it seriously. We may want to criticize the rulings of the rest, but they're going to take them as rulings by the United States Supreme Court, a majority. And their job, and that's ENRD, DOJ, and that is EPA, they're going to take these rulings seriously.

Jody:

And the Corp.

Richard:

And the Corp will be celebrating because what basically had happened is the Court endorsed the Corp's 1972 view of the Act. So the oldest people of the Corp, not the new ones, will be celebrating that they're right. But I think that there's going to be a real battle. I think the political people and the Biden administration will be pushing them to ignore the Supreme Court. Often the way that Trump political people may have told them to ignore the statutory text and the career people, they're going to say, "We don't like these rulings, but the United States Supreme Court has spoken. And our job is to obey the law, and it to take seriously the Court's ruling, whether we like it or not." So there's going to be some tension, which we didn't see, in the West Virginia versus EPA, there was an easy pathway. This one, there's not. And how they come up with the next waters of the United States rule.

Jody:

See, I disagree a little bit there. I would say that the same tension that is the political impetus to try to do as much as you can under these statutes to accomplish the environmental protection or climate response mission that you think these agencies are obligated under the Clean Air Act and environmental protection under the Clean Water Act, I think that political mission is in some tension with the legal constraints in both these cases. There's always that conflict an administration wants to push, and then career folks, and especially DOJ says, "No, there are constraints." So the stress comes from the fact that we have these really old statutes that have not been updated to deal with contemporary problems, and the Court is increasingly saying, "Show us the explicit clear language. Show us the explicit clear language."

Before I give you guys closing remarks and wind up, I do want to point out one thing that really affected me when I read the Alito opinion for the majority, and I wonder if you might comment on it. And it also connects to something in West Virginia and prior cases, too. There is a real tone and tenor and attitude of real disdain for the enterprise of the agencies in these cases, for the job the government has been given by Congress in these statutes. A sense of, the government is the enemy, the government imposes and impinges on liberty.

There's a line in the Alito opinion, Richard, that says, "The Clean Water Act is a potent weapon and it has crushing consequences." Not, "There's a mission. Congress gave the agency a mission to protect the waters of the United States. This was a historic thing." Nothing likewise in the Clean Air Act case West Virginia, similar language. And in prior cases that we all know well, Arlington and so on, the big cases involving regulation, there's a real dismissal here, dismissive tone about what the government is doing. Did you have that reaction too? I think it's very corrosive and very dangerous.

Richard:

I certainly did, and it's one of the things that I find most troubling about it. It's a very limited view of the role of the federal government in favor of the states. It's unnecessary. The libertarian streak goes against government in general. It wouldn't be just limited to the federal government, but I think would ultimately apply to the states as well. But you're right, it's all about these "fetid wetlands," the crushing consequences of the statute. There's no appreciation for the fact that these laws over the past 50 years have been so successful in protecting our air and our water, and more needs to be done. But he even acknowledged, in the beginning he says, "It's been successful." But now they're going to make it so it can't be successful. It's very discouraging.

Jody:

Yeah. Steph, any closing comments from you? We've done this deep dive, but when you step back and look at Sackett and the aftermath and what you expect to see coming, any thoughts from you?

Steph:

My thoughts are, first, there's just a reaction of dismay from Sackett, if only because maybe I had my hopes unduly lifted by success in Maui, so that was really disappointing. I think what we're going to see now is just a lot more in terms of political advocacy on the state level so that state departments can step in. But again, there's going to be a political split in that. And so to the extent that the political action is going to happen, I think that there's going to be a pivot to state regulation of wetlands fills.

Jody:

So Steph, in that sense, a state like California that has a Porter-Cologne Act or a powerful clean water law, that could help fill the gap here, but you're saying lots of states won't?

Steph:

Right. And so that's going to vary a lot. And then one thing that I think this might lead to, and this is really just speculative, but there's been a lot of basically original jurisdiction cases between different states as a result of water disputes. This could potentially exacerbate some of that. Right? To the extent that there's anything involving clean water related, and there are, you have a regulated state existing next to unregulated state, you might see more water tensions. Again, that's not going to be a huge part of the original jurisdiction docket, but it definitely has been a rise in original jurisdiction docket stuff as a result of interstate disputes about water. And I can't see how this would help that at all.

Jody:

Richard, you wrote a terrific op-ed in the Washington Post about this case. You did not hold back. I think it was the unleashed version of Professor Richard basically saying a very pithy version of the kinds of comments you've made here. Anything in closing that we ought to know about Sackett and the expected aftermath?

Richard:

It's very disappointing. It's a very disappointing decision. It's the one which the Court has shown once again that it's going to pay zero attention to the real problems this nation faces. And the statutes had enough give in them that a Court could fairly, just like Riverside Bayview case in 1985, they could fairly say, "This is good enough. The problem is important enough. It's good enough to let the agency do its work."

And we saw the Court do that with Rehnquist and White and a series of conservative justices in 1985. And this is the Court, which is on this sort of vendetta. "This is the only way to make law. This is the only way to do it, and you've got to do it this way." And it's got an anti-government thrust to it. And as a practical matter, since Congress doesn't make laws at all, it's an intellectual endeavor that actually makes it really hard to address the pressing problems of the day, whether it's water quality for people or whether it's climate change. And these problems are compelling. Time is not fungible. We lose time the longer we wait, and the Court just doesn't care. Let the consequences fall as they might. And that's exactly what Gorsuch has said, "You've got to do it the right way. And it doesn't work, too bad."

Jody:

I hate to end these podcasts on a negative note. I will say that this is going to be one of those cases that provides excellent fodder for the first year course in legislation and regulation, where here we are teaching them about tools and techniques of statutory interpretation, and we're going to present them with a textualism when it turns out that the Court seems to perform textualism when it wants to and avoid textualism when it doesn't want to. And I think Justice Kagan had it about right when she characterized the Court as being, well, she wouldn't have said anything like intellectually dishonest, but certainly inconsistent in its application of textualism. Richard?

Richard:

Yeah. I think one can end up with a little upbeat part here, and that is, as Steph reminds us, it was just a few years ago that basically the same Court decided the County Maui case in a very pragmatic, positive way, we took account of it. Just last week, we saw a major civil rights case, the Voting Rights Act case, Milligan. The Court surprised us with a little more pragmatism, understanding how things work. Today, we had a major Indian law case, the Haaland case, surprised everyone. Everyone thought the Court was going the other way. Instead, it's seven to two in favor of tribal rights.

Jody:

Yeah. There's something about environmental cases though, Richard, isn't there? There's something about cases involving EPA. I can't prove it, but it feels like a Court has a real reaction to the assertion of authority. Maybe because it affects property rights, maybe because environmental regulation affects the state-federal balance, maybe it's a combination, but don't you think there's something about them?

Richard:

Oh, yeah. And there are three justices who say it at every possible opportunity, and that's Gorsuch, Alito, and Thomas. And we just have to hope the more cases where, as in Maui, the chief justice and Kavanaugh breakaway.

Jody:

And maybe Barrett.

Richard:

And Barrett will. We just have to hope. Right?

Jody:

Yeah.

Richard:

And I never give up hope. I always think there's a way to get to them. This case was certainly not a moment to celebrate, but there've been some other decisions this term where they've surprised us in a favorable way, and the Alito, Gorsuch, Thomas triumvirate has not prevailed.

Jody:

Well, let me leave it there. On that positive note. This has been a terrific discussion. I so appreciate, Steph, you joining us. It's been terrific to have you on CleanLaw.

Steph:

Thank you for having me.

Richard:

Yeah, it was a real pleasure. Thanks, Jody.

Jody:

Richard, it was great, of course, my colleague and friend, to be with you. That's it for today. We look forward to another podcast coming soon on the Loper Bright decision, what Will Happen to Chevron? Stay tuned. See you then.