US SUPREME COURT ISSUES LANDMARK CLEAN WATER ACT DECISION, SIGNIFICANTLY NARROWING THE SCOPE OF "WATERS OF THE UNITED STATES" UNDER FEDERAL LAW

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It is rare for the US Supreme Court to construe a statutory phrase on multiple occasions. And yet now, for purposes of the federal Clean Water Act (CWA or the Act), it has rendered no less than four interpretations of the phrase “waters of the United States”–a phrase that is meant to define the scope of federal authority to regulate water pollution. On 25 May the Supreme Court issued a landmark CWA decision in *Sackett v. EPA*. The decision significantly narrows the scope of the “waters of the United States,” as compared to the federal government's historically broad view of its authority under the Act. The justices held for the first time that the Act extends only to (a) relatively permanent bodies of water (such as streams, oceans, rivers, and lakes) connected to traditional interstate navigable waters, and (b) wetlands that have a continuous surface connection with those waters, making it difficult to determine where the water ends and the wetland begins. In doing so, the Supreme Court's decision charts a new course for the CWA, following more than a half century of shifting administrative and judicial interpretations and uncertainty for the regulated community. Moreover, and perhaps most importantly, while the decision represents the Supreme Court's most recent interpretation of the phrase “waters of the United States,” it reaffirms that nothing precludes states from regulating waters that are wholly intrastate and therefore not subject to the CWA. Nor does it preclude Congress from changing the law to provide for a definition of the phrase that is broader but still consistent with its Commerce Clause authority.

While the *Sackett* decision most likely will not be the last word on the matter, it is, along with the Supreme Court's earlier decisions in *Riverside Bayview Homes, SWANCC, and Rapanos*,[1] among the most significant legal developments under the CWA.[2] The *Sackett* decision does not change the rigors associated with securing CWA permits in areas of federal jurisdiction; those challenges remain. Likewise, the decision allows states to regulate a broader array of waters and wetlands, beyond the scope of federal jurisdiction. In addition, the *Sackett* decision will almost certainly give rise to thorny questions about what constitutes “relative permanence” and “continuous surface connections” in defining the outer geographic boundaries of “waters of the United States.”

THE DECISION

The majority opinion in *Sackett* was written by Justice Alito and joined by Justices Roberts, Thomas, Gorsuch, and Barrett. The majority expressly adopted the reasoning from the late Justice Scalia's plurality opinion in *Rapanos*—the Supreme Court's prior attempt to clarify the scope of CWA jurisdiction—holding that the Act's use

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of “waters” in the key definitional term “waters of the United States” (33 U.S.C. § 1362(7)) refers only to “those relatively permanent, standing or continuously flowing bodies of water forming geographic[al] features that are described in ordinary parlance as streams, oceans, rivers, and lakes.”[3]

As for wetlands, the majority acknowledged that, at first glance, this interpretation “might seem to exclude all wetlands” from the Act's reach. However, statutory context led the Supreme Court to conclude that the Act must be construed to extend protections to at least some subset of wetlands. In a provision of the Act that authorizes states to administer the CWA § 404 dredge-and-fill permitting program (33 U.S.C. § 1344(g)(1)), Congress indicated that certain “wetlands adjacent” to other waters are jurisdictional. To harmonize this provision with the key definitional term, the majority reasoned that these adjacent wetlands “must qualify as 'waters of the United States' in their own right[,]” i.e., be “indistinguishably part of a body of water that itself constitutes 'waters' under the [Act].”[4]

The majority opinion presents a two-step process under which federal jurisdiction may be asserted over a wetland. The government must 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.”[5]

All nine of the Court's justices concurred with the majority's judgment that the wetlands at issue on the Sackett's property were not jurisdictional. However, a minority of them disagreed with the Court's new test for assessing jurisdiction under the Act. Justice Kavanaugh, joined by Justices Sotomayor, Kagan, and Jackson, contended that the Supreme Court's “continuous surface connection” test wrongfully departs from the statutory text and Supreme Court precedent by narrowing the Act's coverage of “adjacent” wetlands to mean only “adjoining” wetlands. From the viewpoint of the minority, “adjoining 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.”[6]

IMPLICATIONS

The *Sackett* decision's implications are potentially wide-ranging. Though they are still subject to state jurisdiction and any applicable state permitting requirements, waterbodies like wetlands that lack a continuous surface connection with other jurisdictional waters and streams that lack “relatively permanent” flow (such as “ephemeral” streams that flow only in response to precipitation) are no longer subject to the authority of the US Environmental Protection Agency (EPA) and Army Corps of Engineers (Corps) (together, the Agencies). These new limitations likely will have the most significant impact—and raise difficult questions—in regions where water is scarce or seasonal, as well as regions with significant water resources for which subsurface connections (e.g., pipes, culverts, French drains, and shallow ground water) are critical to maintaining water quality and hydrologic dynamics.

Perhaps most notably, the *Sackett* decision eliminates the “significant nexus” test for federal jurisdiction, which came from the opinion that Justice Kennedy issued in *Rapanos*, having opted not to join either plurality in that case. Under the “significant nexus” test, the Agencies asserted jurisdiction over wetlands (and other marginal water bodies) on a case-by-case basis if they determined, based on a number of hydrological and ecological

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factors, that the otherwise isolated features, either alone or in combination with similarly situated waters, could significantly affect the chemical, physical, and biological integrity of traditional navigable waters.

The *Sackett* decision also highlights broader points about the scope of state-versus-federal authority to regulate water pollution. In turning aside the significant nexus test, the majority opinion underscores states' primary role in protecting water quality: "[W]e cannot redraw the Act's allocation of authority .... States can and will continue to exercise their primary authority to combat water pollution by regulating land and water use."[7] As for federal authority, the majority opinion is anchored to a textual analysis of the CWA's definition of "waters of the United States." Underlying this analysis is the principle that Congress limited the Act's geographic reach based on the scope of waters that are traditionally subject to Congress's authority: "navigable waters."[8] In other words, in enacting the CWA, Congress did not assert the full extent and geographic scope of its authority under the US Constitution's Commerce Clause, that is, its authority to regulate "commerce…among the several states," as the US Supreme Court has interpreted that phrase. For instance, the majority points out —again in rejecting the significant nexus test—that "the CWA does not define the EPA's jurisdiction based on ecological importance."[9] However, could it have? The decision suggests that, yes, Congress may broaden the reach of the CWA if it wishes to do so.

While the *Sackett* decision does not make it any easier to obtain a federal CWA permit (e.g., a § 404 dredge-and-fill permit from the Corps) in relation to wetlands and waters where the Act clearly applies, the decision underscores that this type of permit is not required for areas where the law does not apply (in other words, areas where the waters are not "waters of the United States."). Because of the *Sackett* decision, there may be areas of the United States that were previously within the CWA's geographic scope that are no longer within that scope.

WHAT COMES NEXT?

The *Sackett* decision interprets the CWA and defines the scope of the Agencies' jurisdiction to require permits. Given the Supreme Court's attempt to provide a clearer test for discerning where the CWA jurisdiction ends, the decision may well provide a greater degree of certainty to the regulated community. At the same time, albeit in a more limited way than *Rapanos*, it creates new legal "grey areas" that the Agencies and courts will need to examine. Among the new questions presented are the following ones:

- What qualifies as a "*relatively* permanent body of water?" Are all intermittent streams—those that do not flow continuously year-round but regularly and not just in direct response to precipitation—"relatively permanent waters?" If not, what degree of intermittent flow, if any, rises to the level of relative permanence?
- What constitutes a "continuous surface connection" between a wetland and water? How difficult does it have to be to determine where "water" ends and "wetlands" begin? Where there is a temporary interruption in surface connection that is caused by low tides or dry spells, can the surface connection still qualify as continuous? Under what circumstances? Does the existence of a culvert or other manmade connection between a wetland and a water affect the outcome of the analysis? If the area retains vegetation that is consistent with the presence of wetlands, even if "dry" for some period of time, does that factor signal a "continuous connection?"

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As has been the case throughout the CWA's history, this most recent decision will present new questions that could well give rise to legal challenges.

The decision also complicates the Biden administration's legal defense of its recently issued final rule that re-defines the scope of waters protected under the Act, which is tied-up in litigation in multiple federal district courts.[10] That rulemaking depended on the broader conceptions of “adjacency” and “significant nexus” that the Supreme Court expressly rejected in *Sackett*. Faced with defending a rule that is largely inconsistent with controlling Supreme Court precedent, EPA and the Corps may instead ask the courts to remand the rule to them for reconsideration. The Agencies will also need to consider their options for developing and promulgating a new rule and, until such a rulemaking is finalized, new guidance that they will implement in the interim, just as they did following both the 1985 Riverside decision[11] and the 2006 *Rapanos* decision.[12] Meanwhile, in response to the Supreme Court's decision, some Corps districts have indicated that they will pause review and issuance of approved jurisdictional determinations while the Agencies evaluate the impact of the decision.[13]

The *Sackett* decision also may give rise to a new wave of state-level policy activity, as states reexamine their existing laws and regulations with respect to water quality protection, as well as state-level enforcement activity where the scope of state jurisdiction over waters has always existed but is no longer within the scope of the CWA. Some states have already enacted laws that regulate more expansively than the Act, while others have not. Now that fewer waters may be subject to federal jurisdiction, at least some states may feel compelled to close the gap, either by enacting new legislation, adopting new regulations, or enforcing existing state requirements. Needless to say, these state-level responses may be the subject of vigorous policy debate in state legislatures or litigation in state judicial systems.

The *Sackett* decision narrows the scope of federal jurisdiction under the CWA, while raising the stakes regarding how states will regulate waters and wetlands within their boundaries that are not subject to federal jurisdiction. How states handle these important policy decisions will impact where and how projects are developed and the overall regulatory climates in these states. In addition, Congress may be inclined to revisit the scope of the CWA and change the Act's language to expand federal jurisdiction in a manner that is consistent with the limits of its authority under the Commerce Clause. Of course, stakeholders will play an important role in developing these policies, which will have potentially far-reaching ramifications.

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FOOTNOTES

[1] United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985) (holding that the language, policies, and history of the CWA permit the Army Corps of Engineers to require permits for the discharge of material into wetlands adjacent to other “waters of the United States,” and that the Corps' imposition of the permit requirement or denial of a permit does not necessarily constitute a Fifth Amendment taking for which compensation is required); Solid Waste Agency of N. Cook Cnty. (SWANCC) v. U.S. Army Corps of Eng'rs, 531 U.S. 159 (2001) (holding that jurisdiction under the Act does not extend to isolated, abandoned sand and gravel pits with seasonal ponds, which provide migratory bird habitats); Rapanos v. United States, 547 U.S. 715 (2006) (plurality opinion concluding that only those wetlands that have a continuous surface connection to other regulated waters qualify as "waters of the United States"; concurring opinion indicating that wetlands are jurisdictional if they possess a

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"significant nexus" with traditional navigable waters).

[2] For additional background on the history of waters of the United States rulemakings, guidance, and litigation, see our prior alerts: A New Final (But Not the Final?) WOTUS Rule (Jan. 10, 2023); EPA and Corps Release Updated Definition of Waters of the United States (Dec. 3, 2021); Back to the Drawing Board on WOTUS: Federal Court Vacates Trump Administration's Navigable Waters Protection Rule (Sept. 20, 2021); Trump Administration Begins "Round 4" in the Battle Over Clean Water Act Jurisdiction (Jan. 14, 2019).

[3] Sackett v. Env't Prot. Agency, No. 21-454, 2023 WL 3632751, at *2 (U.S. May 25, 2023).

[4] *Id*.

[5] *Id*. at *3 (quoting Rapanos, 547 U.S. at 755, 742).

[6] *Id*. at *31.

[7] *Id*. at *11-*12.

[8] *Id*. at *16.

[9] *Id*. at *16.

[10] For additional background, see A New Final (But Not the Final?) WOTUS Rule (Jan. 10, 2023).

[11] *See Corps of Engineers Wetlands Delineation Manual*, (Jan. 1987), US ARMY CORPS OF ENGINEERS, available at www.lrh.usace.army.mil/Portals/38/docs/USACE%2087%20Wetland%20Delineation%20Manual.pdf.

[12] *See 2008 Rapanos Guidance and Related Documents under CWA Section 404*, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, available at https://www.epa.gov/cwa-404/2008-rapanos-guidance-and-related-documents-under-cwa-section-404 (last visited June 1, 2023).

[13] *See Approved Jurisdictional Determinations are on hold*, CHICAGO DISTRICT CORPS OF ENGINEERS, available at https://www.lrc.usace.army.mil/Missions/Regulatory/Jurisdictional-Determinations/ (last visited June 1, 2023).

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