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Locke Lord QuickStudy: Supreme Court Limits the Scope of ??“Waters of the ?U.S.”?: What Developers Need to Know? ?

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The definition of the term “waters of the United States” (“WOTUS”) in the Clean Water Act (“CWA”), and the resulting scope of the jurisdiction of the U.S. Environmental Protection Agency (“EPA”) and U.S. Army Corps of Engineers (“USACE”) under the statute, has been engulfed in uncertainty for decades, in spite of (or perhaps exacerbated by) a series of Supreme Court decisions on this issue. On May 25, 2023, the Supreme Court issued its decision in *Sackett v. Environmental Protection Agency*,[1] seeking to finally put an end to the nearly 50-year cycle of rulemakings and litigation that have seen the extent of federal jurisdiction ebb and flow. On behalf of a narrow majority of five justices, Justice Alito announced that WOTUS are limited to “streams, oceans, rivers, and lakes” (*i.e.*, relatively permanent water bodies that are connected to waters that are navigable in fact), as well as wetlands that share a “continuous surface connection” with navigable waters. The prior rationale of “significant nexus” for federal jurisdiction over “adjacent” wetlands is no longer applicable.

The Sacketts’ Saga: A Decision 15 Years in the Making

The *Sackett* case began in 2007, when EPA classified wetlands on the Sacketts’ lot as WOTUS. EPA contended that the Sacketts could not fill the wetlands on their property without a permit, as they were “adjacent” to an unnamed tributary on the other side of a 30-foot-wide road and had a “significant nexus” to the unnamed tributary. EPA’s view stemmed from the “significant nexus” standard articulated by Justice Kennedy in his concurring opinion in *Rapanos v. United States*, 547 U.S. 715 (2006). This standard is met “if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as ‘navigable.’” The Sacketts doggedly pursued their challenge to the EPA’s order, including a prior appeal to the Supreme Court on a point of administrative law, ultimately challenging the holding of *Rapanos* in this appeal. The particular facts in the *Sackett* case are essentially a footnote to the Court’s decision. All nine justices sided with the Sacketts based on their specific facts, but the Court split 5-4 on the reasoning and what the proper test should be to determine whether a wetland qualifies as WOTUS.

The Majority Opinion: Continuous Surface Connection, Indistinguishable from Traditional Navigable Waters

The majority opinion, penned by Justice Alito (and joined by Chief Justice Roberts and Justices Thomas, Gorsuch, and Barrett) rejected the "significant nexus" test articulated by Justice Kennedy in *Rapanos*, describing it as "particularly implausible" and having no practical limits to its reach.

Rather, the majority held that the CWA extends to only those "wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right," (*i.e.*, a relatively permanent body of water connected to traditional navigable waters) such that they are "indistinguishable" from those waters. Though jurisdiction requires a continuous surface connection, the majority acknowledged that "temporary interruptions in surface connection may sometimes occur because of phenomena like low tides or dry spells."

Watch this (Adjacent) Space: the Principal Concurring Opinion

In a separate, "principal" concurrence, Justice Kavanaugh (joined by Justices Kagan, Sotomayor, and Jackson) asserted that the two-part test put forward by the majority went beyond the text and intent of the CWA. Rather, they would have held that the federal government may regulate wetlands that are "(i) contiguous to or bordering a covered water, or (ii) separated by a covered water only by a manmade dike or barrier, natural river berm, beach dune, or the like." The principal concurrence contends that the majority's test removes protections for wetlands under category (ii).[2] Justice Kavanaugh's concurrence argues that the majority opinion ignores the plain meaning of the term "adjacent" in the CWA and replaces it with the much narrower term "adjoining", thereby "imposing a restriction nowhere to be found in the text" of the statute. In so doing, Justice Kavanaugh argues, the Court is leaving "some long-regulated adjacent wetlands no longer covered by the Clean Water Act, with significant consequences for water quality and flood control throughout the United States."

What *Sackett* Means for the Regulated Community

Whether or not one agrees with Justice Kavanaugh's criticism of the legal reasoning in the majority opinion, or the more forceful criticism contained in Justice Kagan's separate concurrence, the fact remains that, unlike *Rapanos*, *Sackett* produced a majority opinion that establishes a new standard for WOTUS that is now the law of the land. The decision has enormous significance and is likely to have far-reaching consequences. The following are some of the immediate implications of, and questions raised by, the Court's decision:

1. Clarity, and ability to avoid several federal requirements for many projects

The new standard is both more clear and substantially more limited than the "significant nexus" test it replaces. Many projects will be able to proceed without the need to seek a jurisdictional determination from USACE, and without the need to utilize the USACE's Nationwide Permit program. The lack of a CWA permitting requirement will frequently remove the only federal "hook" for the application of environmental impact reviews under the National Environmental Policy Act, and the requirement for federal agency consultation under section 7 of the Endangered Species Act and section 106 of the National Historic Preservation Act.

2. But still some gray areas and questions

Despite its ostensible clarity, the Court's new "continuous surface connection" standard raises some questions of its own. Justice Kavanaugh identified several potential gray areas in his concurring opinion:

- How “difficult” must it be to determine the boundary between a jurisdictional water and a wetland for the latter to be covered by the CWA?
- When does a surface connection that periodically dries up become non-jurisdictional?
- How “temporary” do “interruptions in surface connection” need to be for wetlands still to be covered by the CWA? How does the new standard apply in areas where storms, flood controls, and erosion frequently shift or breach natural river berms?
- Can EPA and USACE establish a continuous surface connection based on the presence of a ditch, swale, pipe, or culvert?
- It remains clear that wetlands may not be separated from a jurisdictional water by an artificial barrier ?constructed illegally, ?but how will USACE deal with prior jurisdictional determinations finding that such wetlands *are* covered under the CWA based on the Corps’ prior understanding of WOTUS?

3. The Biden Administration must comply with the decision, but will continue to push to restore federal jurisdiction.

The *Sackett* decision all but dooms the Biden Administration’s recently issued WOTUS rule, which would have regulated ephemeral creeks ??and small ponds based on significant nexus alone. But the Biden Administration has already telegraphed its intention to push back, with President Biden tweeting in response to the decision that the White House “will…use every legal authority we have to protect our nation’s waters.” The questions raised by Justice Kavanaugh and identified above provide a potential road map for a future EPA/USACE rulemaking that may seek to reclaim some of the federal government’s former jurisdiction.

4. Developers may be inundated with a patchwork of state and local laws

The majority opinion had distinct federalism overtones, stating that regulation of those wetlands beyond the scope of the CWA is the province of the states, particularly given the CWA’s express policy to preserve the states’ “primary” authority over land and water use. Indeed, most states do have some version of their own CWA on the books, and in the absence of extensive federal jurisdiction, may begin to enforce their own laws more aggressively or even adopt new, more stringent laws to fill the void left by the *Sackett* decision. However, many states simply lack the resources necessary for effective enforcement, while other states will simply have no interest in imposing new restrictions on development within their borders. The result will likely be a patchwork of rules and standards that differ from state to state, adding a new level of complexity for developers that operate regionally or nationally.

5. Future environmental regulations will continue to face greater scrutiny by the current Supreme Court.

The method of statutory interpretation employed by the *Sackett* majority continues the Court’s trend of requiring a clear statement from Congress when determining the scope of agency jurisdiction, as epitomized in last year’s decision in *West Virginia v. EPA*, 142 S. Ct. 2587 (2022). In both decisions, the Court held that EPA lacked the necessary “clear congressional authorization” for its claimed regulatory authority. In next term’s *Loper Bright Enterprises v. Raimondo* case, the Supreme Court is poised to address the continuing vitality of agency deference established in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 US 837 (1984), and it appears increasingly likely that the *Chevron* ship has sailed. Indeed, there is no mention of *Chevron* in any of the four *Sackett* opinions. Thus, for at least a majority of the justices, the scope of an agency’s authority is not the sort of question upon which courts should defer.

Closing Thoughts

Sackett v. EPA demands serious attention for several reasons. First, ?the decision means that a great many wetlands and even wetland types such as prairie potholes and playa lakes, to name a few, are no longer subject to ?federal CWA permitting and ?protection. Some of these wetlands may be protected by state law or local development restrictions, but by and large the presence of those wetlands that lack a continuous surface connection to traditional navigable waters will no longer require federal authorization for development and may not even warrant federal consultation. While *Sackett* may be hailed as a victory for landowners and developers for that reason, some degree of caution is warranted as the Biden Administration processes the new jurisdictional landscape and develops its regulatory response.

One also wonders if the sweeping impact of the *Sackett* decision will prompt a legislative response from Congress. The natural assumption is that with Congress so divided, it is unable to pass any wetlands legislation. While environmental issues are often highly partisan, with the WOTUS rule being one of the foremost examples, even in this Congress there is some baseline of agreement between the parties on environmental protection, as evidenced by the bipartisan support that the Recovering America's Wildlife Act has attracted.[3] Consider that, as Justice Kavanaugh observed in his concurrence, "since 1977, no one has seriously disputed that the Act covers adjacent wetlands. And…eight consecutive Presidential administrations have recognized that…" and one can see at least the possibility that Congress would accept the Court's direction to provide a clear statement regarding the intended scope of CWA jurisdiction. While that statement would undoubtedly be narrower than the "significant nexus" standard, it could, for example, restore the plain meaning of the term "adjacent" in the statute. The likelihood of such Congressional action, albeit slim, may be determined by the manner in which developers and landowners exercise their newfound freedom, and the extent to which states step in to fill the regulatory void.

For questions regarding the *Sackett* decision or to discuss how it may affect your existing or planned development projects, please contact the authors.

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[1] No. 21–454 (May 25, 2023).

[2] Justice Thomas (joined by Justice Gorsuch) concurred separately to suggest that a more fulsome examination of the scope of the federal Commerce Power might require more dramatic limits on the EPA's and the USACE's regulatory authority.

[3] Wetlands provide essential habitat for wildlife, an aspect of their ecological value that is ?virtually ignored by the text of the CWA, which focuses almost exclusively on water ?quality. ?

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