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CLIENT ALERT

Supreme Court Confirms Clean Water Act Limited to Continuously Connected Wetlands

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KEY TAKEAWAYS

- After decades of uncertainty, the Supreme Court has confirmed that federal Clean Water Act (CWA) jurisdiction is limited to "waters," meaning only continuously connected wetlands.
- This impacts the Environmental Protection Agency's (EPA) and federal Army Corps of Engineers' wetlands regulatory permitting and enforcement programs.
- EPA's National Pollution Discharge Elimination System (NPDES) and other pollution control permitting programs are unlikely to be materially impacted by this ruling.

After decades of dispute, the Supreme Court's decision in *Sackett v. EPA* now provides a clear, uniform interpretation of the phrase "waters of the United States" in the federal Clean Water Act. The significant effect of this decision will be to confirm limits on the kinds of wetlands that federal agencies can regulate under the CWA.

Michael and Chantell Sackett are a couple attempting to build a modest home on a property they purchased in a row of other residential homes on a lake in Idaho in 2004. After their purchase, they began moving dirt and rocks in preparation for construction. Shortly thereafter, the EPA ordered them to cease and desist, and restore the property, or face fines of $40,000 per day.

The EPA interpreted "waters of the United States" broadly to include "[a]ll water that could affect interstate or foreign commerce," their tributaries, and "wetlands adjacent to those waters." That definition not only included wetlands that bordered or were connected to covered bodies of water, but even wetlands nearby that the EPA considered to have a "significant nexus" with surrounding wetlands. The EPA noted that the intermittent wetlands in the Sackett's lot were adjacent to a larger wetlands complex on the other side of a 30-foot road. An "unnamed tributary" then fed into a non-navigable creek, which, in turn fed into Priest Lake, an intrastate body of water that the EPA designated as traditionally navigable. The Supreme Court chose this case to resolve the uncertainty surrounding the phrase "waters of the United States" within the CWA.

Summary of the Agencies' Recent Rule, 88 Fed. Reg. 3143.

The *Sackett* decision occurs against the backdrop of other federal agency regulatory action regarding the definition of "waters of the United States," and related litigation. On January 18, 2023, the EPA and Army Corps (collectively, the "Agencies") issued another in a line of final rules hoping to define the scope of waters covered under the CWA. Under the EPA's current rule, traditional navigable waters, waters that cross state lines, and the territorial seas, as well as their tributaries and adjacent wetlands, are waters of the United States. However, the rule also covers "lakes and ponds, streams, or wetlands" located solely in one state that either have a continuous surface connection to included waters or have a "significant nexus" to interstate or traditional navigable waters. The rule thus provides two tests to identify waters (including wetlands) covered by the CWA jurisdiction: (1) the "relatively permanent standard"; and (2) the "significant nexus standard." The "relatively permanent" test was supposed to identify relatively permanent, standing, or continuously flowing waters that are connected to traditionally navigable interstate waters. Meanwhile, the "significant nexus" test was supposed to identify waters that, alone or combined with other waters, significantly affect the chemical, physical, or biological integrity of the traditionally covered waters.

Summary of *Sackett v. EPA's* Holding

The Supreme Court's *Sackett* decision sets limits on the kinds of waters the Agencies can regulate and specified what the Agencies must prove before they can regulate a wetland. After assessing the facts of the Sackett's case, analyzing the Agencies' rules, and providing a deep dive into the text and history of the CWA, a unanimous *nine* Justices rejected the Agencies' broad interpretation of the CWA. All rejected the government's claim that the Sackett's residential lot contained "waters of the United States." Four Justices, however, merely concurred in the judgment. Justices Kavanaugh, Kagan, Sotomayor, and Jackson offered a separate interpretation and rationale for their judgment.

A five-Justice majority of Chief Justice Roberts and Justices Thomas, Alito, Gorsuch, and Barrett, in an opinion authored by Justice Alito, noted that the Agencies' past rules and practices contained few discernible limits for private property holders. At the same time, citizens may be subject to onerous fines and penalties, including criminal prosecution. The majority of the Court thus rejected the Agencies' extremely broad and vague interpretation.

Reasoning that "waters of the United States" must, ultimately, be "waters," the Supreme Court pronounces the following interpretation and test:

1. The CWA's use of "waters" refers only to streams, oceans, rivers, lakes, and the adjacent wetlands that are indistinguishable from those bodies of water.
2. A party seeking to exercise control over a wetland must generally make a two-fold showing: (1) that the adjacent body of water is a water of the United States; and (2) that the wetland has a continuous-surface-water connection to such an actual water.

WHAT THIS MEANS

The Supreme Court's *Sackett* decision adds clarity to longstanding disputes over the scope of the Agencies' jurisdiction under the CWA. The *Sackett* decision will also certainly mean that the Agencies will need to withdraw their recent regulation, which applies an interpretation of the CWA now rejected by a unanimous Supreme Court.

The decision is nevertheless not likely to materially curtail the EPA's National Pollution Discharge Elimination System (NPDES) and other traditional pollution control permitting programs. In *Maui v. Hawaii Wildlife Fund* in 2020, a six-Justice majority (including Chief Justice Roberts and Justice Kavanaugh) upheld an interpretation of what constitutes a "discharge" of pollutants under the CWA. This interpretation permits certain activities resulting in the contamination of jurisdictional waters to be subject to CWA regulation and permitting, even if the release of pollutants occurs on lands that are not themselves subject to CWA jurisdiction and regulation.

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