

A Nagging Question

Supreme Court Ruling Limits Federal Land-Use Regulation

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Priest Lake, Idaho, is a place of spectacular natural beauty. The Priest Lake Chamber of Commerce calls it “Idaho’s Crown Jewel.” It is a popular vacation destination, where travelers enjoy fishing, hiking, rock climbing, and an array of outdoor activities. A vacation there, says the Chamber, will only tempt visitors to stay longer.

Michael and Chantell Sackett were so tempted, and in 2004 they bought a small parcel of land near Priest Lake, planning to build a home. In preparation to build, they began backfilling the lot with dirt. The process was interrupted by the Environmental Protection Agency (EPA), which classified the land as “waters of the United States” (WOTUS) because they were near a ditch that fed into a creek, which fed into Priest Lake, a lake entirely within the boundaries of Idaho. The EPA ordered them to stop backfilling and restore the site, threatening penalties of over \$40,000 per day.

On May 25, 2023, the United States Supreme Court issued its opinion in *Sackett v. Environmental Protection Agency*, 598 U.S. ____, 143 S.Ct. 1322 (2023), addressing what the Court called a “nagging question” about the reach of federal land-use regulation. More on that ruling later. First, some important background.

Takeaway

A new U.S. Supreme Court ruling limits the power of the federal government to regulate land use and resolves decades of uncertainty.

It Begins with Water

The Clean Water Act (CWA) was originally passed by Congress in 1972 and has been amended several times since.

The Act prohibits the “discharge of any pollutant” into “navigable waters” without a permit, and it empowers the EPA and the U.S. Army Corps of Engineers (Corps) to promulgate and enforce rules to prevent such discharge. “Pollutant” is broadly defined to include not only chemical contaminants, but also materials such as rock and sand. “Navigable waters” are defined as “waters of the United States, including the territorial seas.” Only waters falling within this definition are within the jurisdiction of the EPA and the Corps.

The law imposes severe civil and criminal penalties, even for inadvertent violations. If landowners want to build on

their property, the EPA recommends asking the Corps for a jurisdictional determination. However, this can be an onerous and expensive process. First, the Corps claims it has no obligation to make such a determination. Second, the process may require large expenditures on expert consultants. Even then, the Corps ultimately finds jurisdiction about 75 percent of the time. Once jurisdiction is found, the landowner must begin the long and expensive process of seeking a permit.

For years, the EPA and the Corps have promulgated rules attempting to define the meaning of WOTUS. The rule, known as the WOTUS rule, has gone through several iterations over the years, typically following the enforcement priorities of the agencies and the presidential administrations. During this time, courts have issued several opinions clarifying the meaning of the law and the rules.

Courts Wade In

At the heart of the controversy is just how much power the agencies should have over land use. The agencies have generally sought to define broadly the waters—and therefore the land—over which they may exercise control.

The rules defined the waters of the United States to include waters and adjacent wetlands that “could affect interstate or foreign commerce,” whether they did or not. They extended regulation to “intrastate lakes, rivers, streams (including intermittent streams), mudflats, sand flats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds,” and defined “adjacent” to mean “bordering, contiguous, or neighboring,” including those separated from covered waters “by man-made dikes or barriers, natural river berms, beach dunes, and the like.” “Wetlands” included areas “inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal conditions do support, a prevalence of vegetation typically adapted for life in saturated soil conditions.”

In the first Supreme Court case concerning WOTUS, the Court dealt with wetlands that abutted a navigable waterway. The Court noted that wetlands were not exactly navigable waters, but nevertheless held that wetlands abutting a navigable waterway were within the jurisdiction of the Corps. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985).

After that case, the agencies expanded their rules further. The “migratory bird rule” included any waters or wetlands that “are or would be used as habitat” by migratory birds or endangered species, a rule that would include nearly all waters or wetlands in the United States. The Court rejected this rule in *Solid Waste Agency of Northern Cook Cty. v.*

Army Corps of Engineers, 531 U.S. 159 (2001) (*SWANCC*), holding that the CWA does not cover ponds that are not adjacent to open water.

After *SWANCC*, the agencies attempted to narrow the applicability of the Court’s holding. They took the position that the holding only limited its authority over waters that were nonnavigable, isolated, and intrastate, and instructed staff to exercise broad authority. Ultimately, the agencies were using an interpretation that included almost any land containing even an intermittent drainage ditch, covering almost 300 million acres.

A Watershed Case

In *Rapanos v. United States*, 547 U.S. 715 (2006) (plurality opinion), the Court addressed a regulatory decision dealing with wetlands near ditches and drains that, through a series of ditches and streams, emptied into navigable waters over 11 miles away. No majority decision was reached.

In a plurality opinion, four Justices said the CWA covered “relatively permanent bodies of water connected to traditional interstate navigable waters” and “wetlands with such a close physical connection to those waters that they were ‘as a practical matter indistinguishable from waters of the United States.’” Four Justices would have allowed agency jurisdiction. Justice Kennedy, while concurring in the judgment, suggested jurisdiction required a “significant nexus” between the wetlands and the navigable waters. He said that nexus exists if “the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity” of the waters.

After *Rapanos*, the agencies made several other rules, eventually settling on a rule that broadly defined WOTUS to include traditional navigable waters, interstate waters, the territorial seas, as well as their tributaries and adjacent wetlands. Also included were intrastate lakes and ponds, streams, or wetlands with *either* a continuous surface connection to those waters *or* a significant nexus to interstate or traditional navigable waters. Again, the agencies’ test included almost all waters and wetlands in the United States. This set the stage for the Sacketts’ case.

Sacketts and the Supremes

After the EPA’s attempt to thwart the Sacketts’ plans, the Sacketts sued, claiming the property was not within the EPA’s jurisdiction. For almost 20 years, the property sat empty while the parties duked it out in a series of court proceedings. On May 25, the U.S. Supreme Court issued its opinion.

All of the Justices decided the case in the Sacketts' favor. The U.S. Supreme Court rejected the "significant nexus" test and held that the CWA covers only wetlands that are "as a practical matter indistinguishable from waters of the United States."

To meet this test, the water must be adjacent to "a relatively permanent body of water connected to traditional interstate navigable waters," and also must have "a continuous connection with that water, making it difficult to determine where the 'water' ends and the 'wetland' begins."

The majority (Alito, Thomas, Gorsuch, and Barrett) examined the history of federal water regulation. Regulation of land and water use is normally a state matter, and federal law on these issues is necessarily tied to the federal government's power to regulate interstate commerce. In keeping with that, the statutes were originally limited to keeping "traditional navigable waters" free of impediments, and, in fact, the current CWA uses the term "navigable waters." The Court acknowledges that at least some adjacent wetlands are jurisdictional.

However, the Court concluded, wetlands that are separate from traditional navigable waters are not part of those waters even if they are nearby. A continuous surface connection is required. The Court also noted that a landowner may not escape federal jurisdiction by illegally constructing a barrier on wetlands otherwise covered by the CWA.

Justice Thomas, joined by Gorsuch, contributed an opinion concurring in full. Thomas observed that the agencies' expansion of their jurisdiction is "indicative of deeper problems with the Court's Commerce Clause jurisprudence," which has given the federal government much more power than originally intended by the Constitution's framers and ratifiers.

Justice Kavanaugh issued a separate concurrence, joined by Sotomayor, Kagan, and Jackson. He agreed that the Sacketts' land was outside the scope of the CWA. However, he believed the Court read the rule too narrowly. "Adjacent" and "adjoining" have separate meanings, he argued. "Adjacent" can include waters that are nearby but without a continuous surface connection, and thus wetlands separated from covered waters by man-made barriers, river berms, beach dunes, and the like should still be jurisdictional.

Justices Kagan, Sotomayor, and Jackson issued a separate concurrence agreeing with Kavanaugh regarding the definitions of "adjacent" and "adjoining." They also cite several policy reasons focused on Congress' intent to regulate pollution and protect the environment. They, and Kavanaugh, appear to assume the existence of federal power under the expansive modern reading of the Commerce Clause.

Per a statement released on June 26, the EPA and the Army Corps of Engineers are now developing a rule to amend the final "Revised Definition of 'Waters of the United States'" consistent with the Court's holding and intend to issue a final rule by Sept. 1, 2023. It should be noted, however, that the Court's holding makes it much more difficult to craft a rule that would increase the agencies' authority while still withstanding a similar court challenge.

Nothing in this publication should be construed as legal advice for a particular situation. For specific advice, consult an attorney. ➔

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UPDATE

The EPA and the Army Corps of Engineers announced the final rule in response to the decision in *Sackett v. EPA* on August 29, 2023. The new rule removes the significant nexus standard relating to tributaries, adjacent wetlands, and "additional waters." It also removes the factors to be considered in determining whether wetlands "significantly affect" the integrity of the waters as related to the significant nexus test. Under the new rule, and in accord with the Court's holding, the waters or wetlands must be relatively permanent, standing, or continuously flowing bodies of water and have a continuous surface connection to the waters of the United States. The rule removes interstate wetlands from the interstate waters covered. It also removes wetlands and streams from covered intrastate waters. Under the new rule, covered intrastate waters must be lakes and ponds that are relatively permanent, standing or continuously flowing bodies of water with a continuous surface connection to traditional navigable waters or their tributaries. The new rule also redefines "adjacent" to require a continuous surface connection. Wetlands that are near waters of the United States but separated from them by manmade dikes or barriers, natural river berms, beach dunes, and the like are no longer included in jurisdictional waters.

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