Foster Garvey

Case Law Update: Change in Federal Wetland Regulation: Sackett v. Environmental Protection Agency (U.S. Supreme Court, 2022)

How Does it Impact Wetland Regulation in Washington State?

Many of those who have followed federal regulation of wetlands in recent decades were not surprised to see yet another major shift in federal law as a result of the U.S. Supreme Court's May 25, 2023, decision in *Sackett v. Environmental Protection Agency*. The decision has significant ramifications for landowners and developers encountering known wetlands or potential wetland conditions on real property. The decision is likely to result in an increase in wetland regulatory activity here in Washington State as the Supreme Court's decision narrows which wetlands fall under federal jurisdiction as "Waters of the United States" ("WOTUS") under the federal Clean Water Act.

The Sackett case involved Idaho landowners Michael and Chantell Sackett, who sought approval for a residential dwelling approximately 300 feet from a lake. The United States Environmental Protection Agency ("EPA") ordered the landowners to stop work because wetlands on the property were considered a WOTUS. The U.S. Court of Appeals for the ninth Circuit held that the Sackett's property was a WOTUS and therefore subject to federal jurisdiction.

The *Sackett* Court held that in order to fall within the federal Clean Water Act's protection, a wetland must have a "continuous surface connection" to a traditionally covered body of water, one that is "relatively permanent, standing or continuously flowing – described in ordinary parlance as 'streams, oceans, rivers, and lakes' – so there is "no clear demarcation between waters and wetlands." This was a significant departure form the rule in *Rapanos v. United States* where the Ninth Circuit had applied the "significant nexus" test, which captured far more wetlands if they had a "'significant nexus' to waters that are or were navigable in fact or that could be reasonably so made."

Here in the State of Washington, the Washington State Department of Ecology ("Ecology") stands with only a few other states that have adopted independent State statutory schemes that regulate and protects non-WOTUS wetlands. In Washington State, Chapter 90.48 RCW, the State Water Pollution Control Act and Chapter 90.58 RCW, the Shoreline Management Act, also give Ecology and local governments authority to regulate wetlands that fall outside the latest WOTUS jurisdictional definition. In addition to state regulatory authorities local governments in Washington have adopted critical areas ordinances pursuant to the Washington State Growth Management Act, Chapter 36.70 RCW. These local ordinances contain comprehensive wetland regulatory requirements that overlap with applicable State and federal wetland laws.

The impact of the *Sackett* decision will still be felt here in Washington as determinations of federal jurisdiction over wetlands will still be required on a case by case basis, with some still meeting the definition articulated in *Sackett*. Applicants having impacts to WOTUS will continue to be subject to permitting involving the U.S. Army Corps of Engineers where there is a “continuous surface connection.”

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NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

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SACKETT ET UX. *v.* ENVIRONMENTAL PROTECTION AGENCY ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 21–454. Argued October 3, 2022—Decided May 25, 2023

Petitioners Michael and Chantell Sackett purchased property near Priest Lake, Idaho, and began backfilling the lot with dirt to prepare for building a home. The Environmental Protection Agency informed the Sacketts that their property contained wetlands and that their backfilling violated the Clean Water Act, which prohibits discharging pollutants into "the waters of the United States." 33 U. S. C. §1362(7). The EPA ordered the Sacketts to restore the site, threatening penalties of over $40,000 per day. The EPA classified the wetlands on the Sacketts' lot as "waters of the United States" because they were near a ditch that fed into a creek, which fed into Priest Lake, a navigable, intrastate lake. The Sacketts sued, alleging that their property was not "waters of the United States." The District Court entered summary judgment for the EPA. The Ninth Circuit affirmed, holding that the CWA covers wetlands with an ecologically significant nexus to traditional navigable waters and that the Sacketts' wetlands satisfy that standard.

Held: The CWA's use of "waters" in §1362(7) refers only to "geographic[al] features that are described in ordinary parlance as 'streams, oceans, rivers, and lakes'" and to adjacent wetlands that are "indistinguishable" from those bodies of water due to a continuous surface connection. *Rapanos* v. *United States*, 547 U. S. 715, 755, 742, 739 (plurality opinion). To assert jurisdiction over an adjacent wetland under the CWA, a party 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." *Ibid.* Pp. 6–28.

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(a) The uncertain meaning of "the waters of the United States" has been a persistent problem, sparking decades of agency action and litigation. Resolving the CWA's applicability to wetlands requires a review of the history surrounding the interpretation of that phrase. Pp. 6–14.

(1) During the period relevant to this case, the two federal agencies charged with enforcement of the CWA—the EPA and the Army Corps of Engineers—similarly defined "the waters of the United States" broadly to encompass "[a]ll . . . waters" that "could affect interstate or foreign commerce." 40 CFR §230.3(s)(3). The agencies likewise gave an expansive interpretation of wetlands adjacent to those waters, defining "adjacent" to mean "bordering, contiguous, or neighboring." §203.3(b). In *United States* v. *Riverside Bayview Homes, Inc.*, 474 U. S. 121, the Court confronted the Corps' assertion of authority under the CWA over wetlands that "actually abut[ted] on a navigable waterway." *Id.*, at 135. Although concerned that the wetlands fell outside "traditional notions of 'waters,'" the Court deferred to the Corps, reasoning that "the transition from water to solid ground is not necessarily or even typically an abrupt one." *Id.*, 132–133. Following *Riverside Bayview*, the agencies issued the "migratory bird rule," extending CWA jurisdiction to any waters or wetlands that "are or would be used as [a] habitat" by migratory birds or endangered species. 53 Fed. Reg. 20765. The Court rejected the rule after the Corps sought to apply it to several isolated ponds located wholly within the State of Illinois, holding that the CWA does not "exten[d] to ponds that are not adjacent to open water." *Solid Waste Agency of Northern Cook Cty.* v. *Army Corps of Engineers,* 531 U. S. 159, 168 (*SWANCC*) (emphasis deleted). The agencies responded by instructing their field agents to determine the scope of the CWA's jurisdiction on a case-by-case basis. Within a few years, the agencies had "interpreted their jurisdiction over 'the waters of the United States' to cover 270-to-300 million acres" of wetlands and "virtually any parcel of land containing a channel or conduit . . . through which rainwater or drainage may occasionally or intermittently flow." *Rapanos*, 547 U. S., at 722 (plurality opinion).

Against that backdrop, the Court in *Rapanos* vacated a lower court decision that had held that the CWA covered wetlands near ditches and drains that emptied into navigable waters several miles away. As to the rationale for vacating, however, no position in *Rapanos* commanded a majority of the Court. Four Justices concluded that the CWA's coverage was limited to certain relatively permanent bodies of water connected to traditional interstate navigable waters and to wetlands that are "as a practical matter indistinguishable" from those waters. *Id.*, at 755 (emphasis deleted). Justice Kennedy, concurring only in the judgment, wrote that CWA jurisdiction over adjacent wetlands

requires a "significant nexus" between the wetland and its adjacent navigable waters, which exists when "the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity" of those waters. *Id.*, at 779–780. Following *Rapanos*, field agents brought nearly all waters and wetlands under the risk of CWA jurisdiction by engaging in fact-intensive "significant-nexus" determinations that turned on a lengthy list of hydrological and ecological factors.

Under the agencies' current rule, traditional navigable waters, interstate waters, and the territorial seas, as well as their tributaries and adjacent wetlands, are waters of the United States. See 88 Fed. Reg. 3143. So too are any "[i]ntrastate lakes and ponds, streams, or wetlands" that either have a continuous surface connection to categorically included waters or have a significant nexus to interstate or traditional navigable waters. *Id.*, at 3006, 3143. Finding a significant nexus continues to require consideration of a list of open-ended factors. *Ibid.* Finally, the current rule returns to the agencies' longstanding definition of "adjacent." *Ibid.* Pp. 6–12.

(2) Landowners who even negligently discharge pollutants into navigable waters without a permit potentially face severe criminal and civil penalties under the Act. As things currently stand, the agencies maintain that the significant-nexus test is sufficient to establish jurisdiction over "adjacent" wetlands. By the EPA's own admission, nearly all waters and wetlands are potentially susceptible to regulation under this test, putting a staggering array of landowners at risk of criminal prosecution for such mundane activities as moving dirt. Pp. 12–14.

(b) Next, the Court considers the extent of the CWA's geographical reach. Pp. 14–22.

(1) To make sense of Congress's choice to define "navigable waters" as "the waters of the United States," the Court concludes that the CWA's use of "waters" encompasses "only 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.'" *Rapanos*, 547 U. S., at 739 (plurality opinion). This reading follows from the CWA's deliberate use of the plural "waters," which refers to those bodies of water listed above, and also helps to align the meaning of "the waters of the United States" with the defined term "navigable waters." More broadly, this reading accords with how Congress has employed the term "waters" elsewhere in the CWA—see, *e.g.*, 33 U. S. C. §§1267(i)(2)(D), 1268(a)(3)(I)—and in other laws—see, *e.g.*, 16 U. S. C. §§745, 4701(a)(7). This Court has understood CWA's use of "waters" in the same way. See, *e.g.*, *Riverside Bayview*, 474 U. S., at 133; *SWANCC*, 531 U. S., at 168–169, 172.

The EPA's insistence that "water" is "naturally read to encompass

wetlands" because the "presence of water is 'universally regarded as the most basic feature of wetlands'" proves too much. Brief for Respondents 19. It is also tough to square with *SWANCC*'s exclusion of isolated ponds or *Riverside Bayview*'s extensive focus on the adjacency of wetlands to covered waters. Finally, it is difficult to see how the States' "responsibilities and rights" in regulating water resources would remain "primary" if the EPA had such broad jurisdiction. §1251(b). Pp. 14–18.

(2) Statutory context shows that some wetlands nevertheless qualify as "waters of the United States." Specifically, §1344(g)(1), which authorizes States to conduct certain permitting programs, specifies that discharges may be permitted into any waters of the United States, except for traditional navigable waters, "including wetlands adjacent thereto," suggesting that at least some wetlands must qualify as "waters of the United States." But §1344(g)(1) cannot define what wetlands the CWA regulates because it is not the operative provision that defines the Act's reach. Instead, the reference to adjacent wetlands in §1344(g)(1) must be harmonized with "the waters of the United States," which is the operative term that defines the CWA's reach. Because the "adjacent" wetlands in §1344(g)(1) are "includ[ed]" within "waters of the United States," these 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 CWA. To hold otherwise would require implausibly concluding that Congress tucked an important expansion to the reach of the CWA into convoluted language in a relatively obscure provision concerning state permitting programs. Understanding the CWA to apply to wetlands that are distinguishable from otherwise covered "waters of the United States" would substantially broaden §1362(7) to define "navigable waters" as "waters of the United States *and adjacent wetlands*." But §1344(g)(1)'s use of the term "including" makes clear that it does not purport to do any such thing. It merely reflects Congress's assumption that certain "adjacent" wetlands are part of the "waters of the United States."

To determine when a wetland is part of adjacent "waters of the United States," the Court agrees with the *Rapanos* plurality that the use of "waters" in §1362(7) may be fairly read to include only wetlands that are "indistinguishable from waters of the United States." This occurs only when wetlands have "a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between 'waters' and wetlands." 547 U. S., at 742.

In sum, the CWA extends to only wetlands that are "as a practical

matter indistinguishable from waters of the United States." This requires the party asserting jurisdiction to 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." *Rapanos*, 547 U. S., at 755, 742. Pp. 18–22.

(c) The EPA asks the Court to defer to its most recent rule providing that "adjacent wetlands are covered by the [CWA] if they 'possess a significant nexus to' traditional navigable waters" and that wetlands are "adjacent" when they are "neighboring" to covered waters. Brief for Respondents 32, 20. For multiple reasons, the EPA's position lacks merit. Pp. 22–27.

(1) The EPA's interpretation is inconsistent with the CWA's text and structure and clashes with "background principles of construction" that apply to the interpretation of the relevant provisions. *Bond* v. *United States*, 572 U. S. 844, 857. First, "exceedingly clear language" is required if Congress wishes to alter the federal/state balance or the Government's power over private property. *United States Forest Service* v. *Cowpasture River Preservation Assn.*, 590 U. S. ___, ___. The Court has thus required a clear statement from Congress when determining the scope of "the waters of the United States." Second, the EPA's interpretation gives rise to serious vagueness concerns in light of the CWA's criminal penalties, thus implicating the due process requirement that penal statutes be defined "'with sufficient definiteness that ordinary people can understand what conduct is prohibited.'" *McDonnell* v. *United States*, 579 U. S. 550, 576. Where penal statutes could sweep broadly enough to render criminal a host of what might otherwise be considered ordinary activities, the Court has been wary about going beyond what "Congress certainly intended the statute to cover." *Skilling* v. *United States*, 561 U. S. 358, 404. Under these two principles, the judicial task when interpreting "the waters of the United States" is to ascertain whether clear congressional authorization exists for the EPA's claimed power. Pp. 22–25.

(2) The EPA claims that Congress ratified the EPA's regulatory definition of "adjacent" when it amended the CWA to include the reference to "adjacent" wetlands in §1344(g)(1). This argument fails for at least three reasons. First, the text of §§1362(7) and 1344(g) shows that "adjacent" cannot include wetlands that are merely nearby covered waters. Second, EPA's argument cannot be reconciled with this Court's repeated recognition that §1344(g)(1) "'does not conclusively determine the construction to be placed on . . . the relevant definition of "navigable waters."'" *SWANCC*, 531 U. S., at 171. Third, the EPA

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falls short of establishing the sort of "overwhelming evidence of acquiescence" necessary to support its argument in the face of Congress's failure to amend §1362(7). Finally, the EPA's various policy arguments about the ecological consequences of a narrower definition of "adjacent" are rejected. Pp. 25–27.

8 F. 4th 1075, reversed and remanded.

ALITO, J., delivered the opinion of the Court, in which ROBERTS, C. J., and THOMAS, GORSUCH, and BARRETT, JJ., joined. THOMAS, J., filed a concurring opinion, in which GORSUCH, J., joined. KAGAN, J., filed an opinion concurring in the judgment, in which SOTOMAYOR and JACKSON, JJ., joined. KAVANAUGH, J., filed an opinion concurring in the judgment, in which SOTOMAYOR, KAGAN, and JACKSON, JJ., joined.