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# Supreme Court Upends Current Wetlands Determinations Under the Clean Water Act

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*Hinshaw Alert*

The U.S. Supreme Court has just severely cut back on the reach of the Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers' jurisdiction under the Clean Water Act (the Act). In an opinion issued on May 25, 2023, the majority opinion upholds contentions of the Sacketts, a couple who were threatened with orders to restore a filled portion of their Idaho residential back yard, which was near a ditch that was not far from, but clearly not part of, an intrastate lake on the grounds water seeping from their land was allegedly "waters of the United States" (WOTUS). (*Sackett v EPA,* Case no. 21-454, ___U. S.___ , 2023 U.S. LEXIS 2202).

The five justice majority opinion finds that EPA's view of wetlands jurisdiction applied to the Sackett property was too expansive. It notes that the Act prohibits discharges to "navigable waters," which is a term defined by the Act as "waters of the United States." It explains that "waters" has been defined as flowing water, or water moving in waves, as with a river's mighty waters; also: the sea or seas bordering a particular country or continent or located in a particular part of the world. It finds this dictionary meaning hard to reconcile with classifying "lands," wet or otherwise, as "waters."

The majority limits wetlands that may be called "waters of the United States" (WOTUS) under the Clean Water Act to lands with surficial water connected to waters of the United States (i.e. traditional water bodies). The Court held in specific language as follows:

> "In sum, we hold that the CWA extends to only those wetlands that are "as a practical matter indistinguishable from waters of the United States." Rapanos, 547 U. S., at 755 (plurality opinion) (emphasis deleted). This requires the party asserting jurisdiction over adjacent wetlands 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." Id., at 742."

In Justice Samuel Alito's majority opinion, he parses the text of the Act, with focus on the definition of "waters of the United States" and the fact it expressly includes "navigable waters," which is the traditional phrasing of the waters the Constitution establishes as federal jurisdiction. He takes note of other references by the Congress to the term "waters" and concludes it invariably

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references traditional surface water bodies that are apparent on the surface, such as rivers and lakes. He also examines the idea put forth in defense of the current definition, which is derived from Justice Kennedy's concurring opinion in the *Rapanos* case, that as long as there is scientifically a "significant nexus" with surface waters, the law can extend to wetlands and other situations not visibly connected with the waters on the surface. In Kennedy's *Rapanos* opinion, a "significant nexus" between wetlands and navigable waters was asserted to exist where "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.

The final judgment of reversal of the Ninth Circuit was unanimous, *i.e.*, 9-0. However, there is a concurring opinion, written by Justice Kavanaugh and joined by Justices Kagan, Sotomayor, and Jackson that takes exception to some of the majority reasoning. There is also a concurrence in the judgment only, written by Justice Kagan, concurred in by Sotomayor and Jackson. Justice Kavanaugh takes exception to what his concurrence opinion terms a too limited understanding of the meaning of adjacency of waters when dealing with whether a wetland is "adjacent" to traditional surface water. The concurrence is limited to the judgement of reversal, and seems to seek to keep open the idea that adjacency does not have to be immediate and physical. Justice Kagan, joined by Sotomayor and Jackson, JJ., emphasizes that she believes Congress reacted to the SWANCC decision in amendments that expand the meaning of adjacency to reach more wetlands.

The majority Alito opinion expresses frank disagreement with the concurrences. It indicates that "these arguments are more than unfounded. We have analyzed the statutory language in detail, but the separate opinions pay no attention whatsoever to *[33 U.S.C.] §1362(7)*, the key statutory provision that limits the CWA's geographic reach." That subsection defines "navigable waters" as "the *waters* of the United States, including the territorial seas." The majority opinion claims, "Thus, neither separate opinion even attempts to explain how the wetlands included in their interpretation fall within a fair reading of 'waters.' Textualist arguments that ignore the operative text cannot be taken seriously."

The *Sackett v EPA* opinion is causing a serious reaction around the country, with states that are fighting the current rule feeling they will most certainly overturn it based on this new Sackett opinion, while environmentalist groups are castigating the Court. Also, in the case of some lands that have been classified under Army Corps processes as "jurisdictional" and are almost surely no longer within the Supreme Court definition, owners and developers may perceive renewed opportunity.

There is sure to be hubbub over this decision, and a reaction in some states that are more worried over preservation of wetlands and groundwaters than others is to be expected. A similar phenomenon occurred when, years ago, the Supreme Court said that isolated water bodies, such as the water-filled former quarry and ponding in SWANCC (*Solid Waste Agency of Northern Cook Cty. V. Army Corps of Engineers,* 531 U. S. 159, 121 S. Ct. 675, 148 L. Ed. 2d 576 (2001)) were not WOTUS. There the Court rejected the migratory bird rule as a proper basis to assert Clean Water Act jurisdiction over several isolated ponds located wholly inside Illinois. Many, but not all, states followed and created a regulatory scheme back in to replace the vacated federal scope.

As a matter of additional perspective, it seems the Court is consciously making a holding that preserves the traditional separation of the scope of jurisdiction between the federal government and the states respecting the waters within a given state that are not expressly "waters of the United States" as defined by the Act itself. Justice Alito's opinion basically says just that. In so doing, the majority clearly feels that its judgment is appropriate, given the wording of the Act itself.