SUPREME COURT "WETLANDS" STANDARD UNDER CLEAN WATER ACT

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In the case of *Sackett v. EPA*, 2023 U.S. LEXIS 2202 (U.S. 5/25/2023), the Supreme Court determined the proper test for determining what type of wetlands were subject to regulation under the Clean Water Act (CWA), requiring a federal "dredge and fill" permit from the Army Corps of Engineers (Corps) prior to development of the land.

Public parks have played a critical role in wetland preservation. In addition to flood control and wildlife habitat, wetlands provide significant environmental protection and benefits by filtering groundwater and reducing water pollution from runoff into adjacent bodies of water.

The Land and Water Conservation Fund (LWCF) provides matching grants to state and local governments to create and expand parks, including wetland preservation through acquisition and conservation easements. Further, to maintain LWCF eligibility, the required Statewide Comprehensive Outdoor Recreation Plan (SCORP) for each State must contain a wetlands priority component which, in part, lists "those wetland types that should receive priority for acquisition."
https://www.nps.gov/subjects/lwcf/upload/LWCF-FA-Manual-Vol-71-3-11-2021-final.pdf

WATER POLLUTION REGULATION

Historically, swamps and similar "wetlands" subject to continuous or intermittent inundation were dredged and filled to allow for land development and construction projects. In so doing, the widespread destruction of wetlands increased the quantity and toxicity of water pollution.

For most of this Nation's history, the regulation of water pollution was left almost entirely to the States and their subdivisions. Federal regulation was largely limited to "traditional navigable waters." Federal jurisdiction ensured interstate waters remained navigable and free of impediments for use in commerce.

By the time the Clean Water Act (CWA) was enacted in 1972, many of the Nation's rivers, lakes, and streams were severely polluted. The legislative intent of the CWA was to mitigate the nationwide water pollution problem by prohibiting "the discharge of any pollutant" into "navigable waters." 33 U. S. C. §§1311(a), 1362(12)(A). In addition to contaminants like "chemical wastes," the CWA defined "pollutant" very broadly to include more mundane materials like "rock, sand," and "cellar dirt."

The Environmental Protection Agency (EPA) and the Corps jointly enforce the CWA. The Corps controls permits for the discharge of dredged or fill material into "waters of the United States." The EPA is tasked with policing violations after the fact, either by issuing orders demanding compliance or by bringing civil actions.

Property owners who violate the CWA by negligently discharging "pollutants" into covered waters may face severe criminal penalties including imprisonment. These penalties increase for knowing violations. On the civil side, the CWA may impose over $60,000 in fines per day for each violation.

FACTS OF THE CASE

In this particular case, the EPA had found Plaintiffs Michael and Chantell Sackett in violation of the CWA for illegally dumping soil and gravel onto "the waters of the United States."

In 2004, Plaintiffs had purchased a small lot near Priest Lake, in Bonner County, Idaho. In preparation for building a modest home, they began backfilling their property with dirt and rocks. A few months later, the EPA sent the Sacketts a compliance order informing them that their backfilling violated the CWA because their property contained protected wetlands. The EPA demanded that the Sacketts immediately "undertake activities to restore the Site" pursuant to a "Restoration Work Plan" that the EPA had provided. The order threatened the Sacketts with penalties of over $40,000 per day if they did not comply.

According to the EPA, the "wetlands" on the Sacketts' lot were "adjacent to" (in the sense that they are in the same neighborhood as) what it described as an "unnamed tributary" on the other side of a 30-foot road. That tributary fed into a non-navigable creek, which, in turn, feeds into Priest Lake, an intrastate body of water that the EPA designated as traditionally navigable.

To establish the required "significant nexus" under the applicable CWA regulation, the EPA had lumped the Sacketts' lot together with the Kalispell Bay Fen, a large nearby wetland complex that the Agency regarded as "similarly situated." According to the EPA, these properties, taken together, "significantly affect" the ecology of Priest Lake.

APA CLAIM

The Sacketts filed suit under the Administrative Procedure Act (APA), 5 U. S. C. §702 et seq., alleging the EPA lacked jurisdiction because any wetlands on their property were not "waters of the United States" subject to CWA "dredge and fill" permit regulation.

Under the APA deferential standard of judicial review, a federal court will generally affirm an agency decision within an area of agency expertise, unless the challenger can prove the agency action was arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law.

In this particular instance, the federal district court had deferred to the agency's wetland designation and granted summary judgment in favor of the EPA. On appeal, the Ninth Circuit affirmed, holding "the CWA covers adjacent wetlands with a significant nexus to traditional navigable waters and that the Sacketts' lot satisfied that standard." The Supreme Court granted certiorari to review the decision by the lower courts and "decide the proper test for determining whether wetlands are 'waters of the United States'" under the CWA.

CWA SIGNIFICANT NEXUS STANDARD

As noted by the Court, the EPA regulations had interpreted "the waters of the United States" to include "all waters" that "could affect interstate or foreign commerce," as well as "wetlands adjacent" to those waters. 40 CFR §§230.3. "Adjacent" was defined in the regulation to mean not just "bordering" or "contiguous," but also "neighboring."

This regulatory definition of "adjacent" included wetlands that were separated from covered waters "by man-made dikes or barriers, natural river berms, beach dunes and the like." In addition, the regulation specified that "wetlands" was a "technical term" that encompassed the following:

> those areas that are 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.

Agency guidance further instructed officials to assert jurisdiction over wetlands "adjacent" to non-navigable tributaries when those wetlands had "a significant nexus to a traditional navigable water." A "significant nexus" was said to exist when "wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity" of those waters. 2007 Guidance 8.

In looking for evidence of a "significant nexus," field agents were told to consider a wide range of open-ended hydrological and ecological factors. The Corps released what would become a 143-page manual to guide officers when they determine whether property meets this definition of wetlands.

ARDUOUS CWA PERMITTING PROCESS

When a landowner wants to build on their property, the EPA recommended asking the Corps for a jurisdictional determination, which is a written decision on whether a particular site contains covered waters. 33 CFR §§320.1(a)(6). The Corps, however, maintained that it had no obligation to provide jurisdictional determinations while announcing exceptions to the legal effect of some previous determinations.

Even if the Corps was willing to provide a jurisdictional determination, the Court noted a property owner might find it necessary to retain an expensive expert consultant who is capable of putting together a presentation that stands a chance of persuading the Corps. Even then, a landowner's chances of success are low, as the EPA admitted the Corps finds CWA jurisdiction approximately 75% of the time.

According to the Court, the costs of obtaining such a permit are "significant." The EPA and the Corps had both admitted that "the permitting process can be arduous, expensive, and long." Further, success in obtaining a permit was far from guaranteed. In its regulation, the Corps had asserted discretion to grant or deny permits based on a long, nonexclusive list of factors that ends

with a catchall mandate to consider "in general, the needs and welfare of the people." 33 CFR §320.4(a)(1) (2022).

After enduring the delay and expense required to exhaust the administrative appeals process, the Court acknowledged a landowner could challenge the Corps jurisdictional determination in federal court. In the alternative, a landowner could choose to seek a permit from the Corps, but this process could take years and cost an exorbitant amount of money. As a result, in the opinion of the Court, many landowners had simply chose not to build.

RIVERSIDE BAYVIEW HOMES

In the case of *United States v. Riverside Bayview Homes, Inc.*, 474 U. S. 121, 106 S. Ct. 455, 88 L. Ed. 2d 419 (1985), the Court noted the Corps had asserted authority under the CWA over wetlands that "actually abutted on a navigable waterway." In construing the meaning of "the waters of the United States," the Supreme Court in this 1985 opinion had expressed concern that wetlands seemed to fall outside "traditional notions of 'waters,'" but deferred to the Corps, reasoning that "the transition from water to solid ground is not necessarily or even typically an abrupt one."

SWANCC

In 2001, in the case of *Solid Waste Agency of Northern Cook County. v. Army Corps of Engineers*, 531 U. S. 159, 121 S. Ct. 675, 148 L. Ed. 2d 576 (SWANCC), the Supreme Court had rejected the Corps assertion of jurisdiction over several isolated ponds located wholly within the State of Illinois, holding the CWA does not "extend to ponds that are not adjacent to open water."

In response, the Corps and EPA had issued guidance that sought to minimize SWANCC's impact, taking the view that the Court's holding was "strictly limited to waters that are 'nonnavigable, isolated, and intrastate.'" As a result, the agency guidance stated: "field staff should continue to exercise CWA jurisdiction to the full extent of their authority" for "any waters that fall outside of that category." According to the Court, the agencies had never defined exactly what they regarded as the "full extent of their authority," encouraging "local field agents to make decisions on a case-by-case basis."

As a result, the Court found a system of "vague" rules had emerged that depended on "locally developed practices." Moreover, deferring to the agencies' localized decisions, the Court noted "lower courts blessed an array of expansive interpretations of the CWA's reach":

> 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

In the case of *Rapanos v. United States*, 547 U. S. 715, 722, 126 S. Ct. 2208, 165 L. Ed. 2d 159 (2006), the Supreme Court vacated a lower court that had held "the CWA covered wetlands near ditches and drains that eventually emptied into navigable waters at least 11 miles away." In so doing, four Justices had concluded the CWA's coverage did not extend beyond the following two categories:

> first, certain relatively permanent bodies of water connected to traditional interstate navigable waters and, second, wetlands with such a close physical connection to those waters that they were "as a practical matter indistinguishable from waters of the United States."

In addition, one Justice had concluded jurisdiction under the CWA requires a "significant nexus" between wetlands and navigable waters. The required "significant nexus" would only exist and 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.

As described by the Court, in response to *Rapanos*, the EPA and the Corps issued guidance documents that "recognized larger grey areas and called for more fact-intensive individualized determinations in those grey areas."

AGENCY RULEMAKING GUIDANCE

As noted by the Court, agency officials were "instructed to assert jurisdiction over wetlands 'adjacent' to non-navigable tributaries based on fact-specific determinations regarding the presence of a significant nexus." In addition, officials were further advised "to make this determination by considering a lengthy list of hydrological and ecological factors." In so doing, the Court noted the agencies had admitted that "almost all waters and wetlands across the country theoretically could be subject to a case-specific jurisdictional determination" under this guidance. 2008 Guidance 8.

As described by the Court, more recently, the agencies had engaged in a flurry of rulemaking to define "the waters of the United States." As characterized by the Court, a 2015 rule would subject "the vast majority of the nation's water features" to a case-by-case jurisdictional analysis:

> Although the rule listed a few examples of "waters" that were excluded from regulation like puddles" and "swimming pools," it categorically covered other waters and wetlands, including any within 1,500 feet of interstate or traditional navigable waters. And it subjected a wider range of other waters, including any within 4,000 feet of indirect tributaries of interstate or traditional navigable waters, to a case-specific determination for significant nexus.

A subsequent rule in 2019 replaced the 2015 rule with a more narrow definition of CWA "waters" that limited jurisdiction to traditional navigable waters and their tributaries, lakes, and "adjacent" wetlands. The 2019 rule also narrowed the definition of "adjacent," limiting it to wetlands that "abut" covered waters, are flooded by those waters, or are separated from those waters by features like berms or barriers. The federal district court had vacated this 2019 rule. In

2023, the agencies promulgated another rule which more broadly defined "waters of the United States" regulation under the CWA:

> traditional navigable waters, interstate waters, and the territorial seas, as well as their tributaries and adjacent wetlands, are waters of the United States. So are any intrastate 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. 40 CFR §120.2

As characterized by the Court, this 2023 rule had reiterated the earlier agency view that "a significant nexus requires consideration of a list of open-ended factors." Further, the 2023 rule acknowledged "field work is often necessary to confirm the presence of a wetland" under this regulatory definition of CWA "waters of the United States." In addition, the 2023 rule instructed "local agents to continue using the Corps' Wetlands Delineation Manual."

In so doing, the agencies maintained that the significant-nexus test had been and remained sufficient to establish CWA jurisdiction over "adjacent wetlands." The Court, however, noted the EPA had conceded "almost all waters and wetlands are potentially susceptible to regulation under that test."

LANDOWNER DILEMMA

In the opinion of the Court, this open-ended "significant-nexus test" placed "many property owners in a precarious position because it is often difficult to determine whether a particular piece of property contains waters of the United States":

> [T]he CWA can sweep broadly enough to criminalize mundane activities like moving dirt, this unchecked definition of "the waters of the United States" means that a staggering array of landowners are at risk of criminal prosecution or onerous civil penalties.

CWA "NAVIGABLE WATERS"

In determining "the extent of the CWA's geographical reach," the Court considered the text of the CWA. As cited by the Court, the CWA applied to "navigable waters" which had "a well-established meaning at the time of the CWA's enactment," unlike the less well-known CWA term "waters of the United States." According to the Court, this "frustrating drafting choice has led to decades of litigation" and the Court's resolve in this particular decision to "try to make sense of the terms Congress chose to adopt."

In defining "navigable waters," the Court found the CWA's deliberate use of the plural term "waters" would typically refer to "bodies of water like streams, oceans, rivers, and lakes" with geographical features encompassing "only those relatively permanent, standing or continuously flowing bodies of water."

While noting "wetlands are not included in traditional notions of 'waters'," the Court acknowledged "the CWA extends to more than traditional navigable waters." In so doing, the Court found "Congress had focused the CWA on "its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made."

As a result, the Court held "the use of 'navigable' signals that the definition principally refers to bodies of navigable water like rivers, lakes, and oceans." Moreover, the Court noted Congress had "employed the term 'waters' elsewhere in the CWA" repeatedly using the term "waters" in "contexts that confirm the term refers to bodies of open water" with conventionally understood "hydrographic features" like "rivers" and "streams."

CWA STATE RESPONSIBILITY

The EPA had argued that CWA "waters" is "naturally read to encompass wetlands" because the "presence of water is 'universally regarded as the most basic feature of wetlands." The Court, however, rejected the notion that the CWA effectively extended EPA's jurisdiction "over anything defined by the presence of water." In so doing, the Court noted the CWA expressly "protects the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution" as well as "to plan the development and use of land and water resources":

> In 1977, Congress amended the CWA to authorize the States to administer EPA approved programs to issue permits for the discharge of dredged or fill material into U.S. waters which were not "traditional navigable waters," including adjacent wetlands.

QUALIFYING CWA WETLANDS

While "the ordinary meaning of waters" in the CWA "might seem to exclude all wetlands," the Court acknowledged "at least some wetlands must qualify as 'waters of the United States'." Specifically, to qualify as "the waters of the United States," the Court would require these wetlands to be "indistinguishably part of a body of water that itself constitutes "waters" under the CWA."

Accordingly, the Court held: "Wetlands that are separate from traditional navigable waters cannot be considered part of those waters, even if they are located nearby." Further, the Court recognized the Corps jurisdiction was limited to wetlands that actually abutted on a navigable waterway and could reasonably determine that wetlands "adjoining bodies of water" were part of those waters. That being said, the Court would defer to "the Corps' decision to regulate wetlands actually abutting a navigable waterway," recognizing "the inherent difficulties of defining precise bounds to regulable waters." In so doing, the Court noted "the transition from water to solid ground is not necessarily or even typically an abrupt one due to semi-aquatic features like shallows and swamps."

The Court, therefore, determined wetlands only occur within the context of the CWA when there is "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." The Court, however,

recognized this formulation of wetlands within the context of the CWA would also include "temporary interruptions in surface connection may sometimes occur because of phenomena like low tides or dry spells." As a result, the Court held "the CWA extends to only those wetlands that are as a practical matter indistinguishable from waters of the United States."

To assert federal jurisdiction under the CWA, the EPA and the Corps would, therefore, have to establish that wetlands were adjacent to a "relatively permanent body of water connected to traditional interstate navigable waters" and "the wetland has a continuous surface connection with that water, making it difficult to determine where the 'water' ends and the 'wetland' begins."

CONCLUSION

Having found 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," so that they are "indistinguishable" from those waters, the Court concluded "the wetlands on the Sacketts' property are distinguishable from any possibly covered waters" and not subject to CWA "dredge and fill" permit regulations. As a result, the Court reversed "the judgment of the United States Court of Appeals for the Ninth Circuit and remanded the case for further proceedings consistent with this opinion."

SEE ALSO:

Denial Of Permit To Develop Coastal Wetland, An Unconstitutional Taking?
James C. Kozlowski *Parks & Recreation*. Jun 1995. Vol. 30, Iss . 6
https://mason.gmu.edu/~jkozlows/lawarts/06JUN95.pdf

Clean Water Act Permit Ignored Adverse Impacts On Park Environment
James C. Kozlowski *Parks & Recreation*. Nov 1993. Vol. 28, Iss . 11
https://mason.gmu.edu/~jkozlows/lawarts/11NOV93.pdf

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