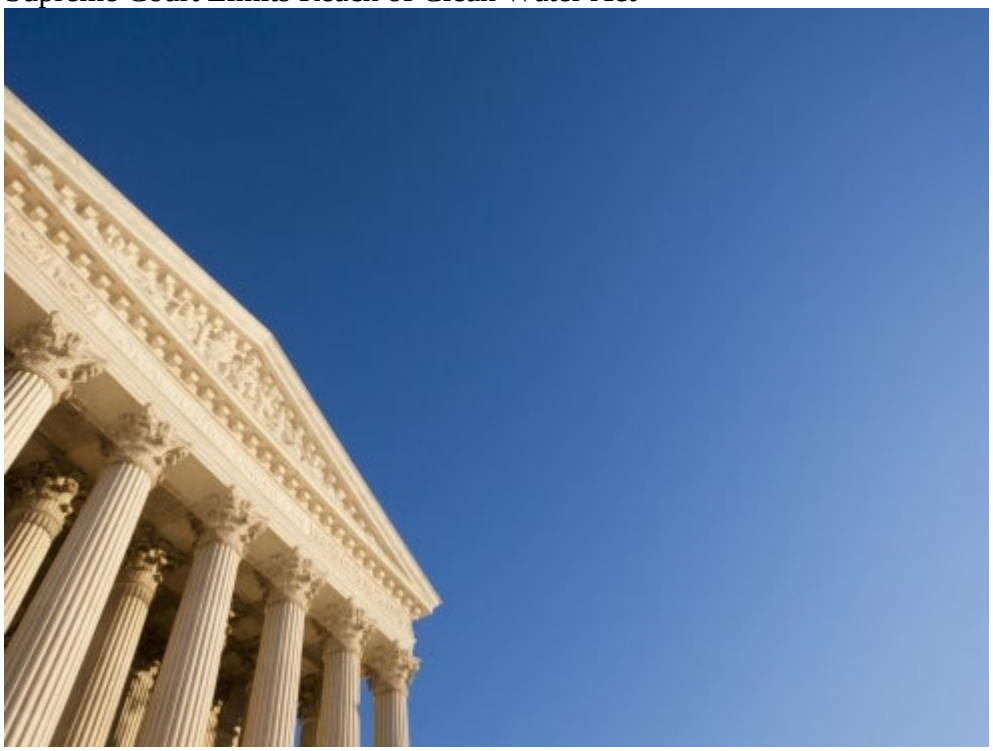
Updates
May 26, 2023
Supreme Court Limits Reach of Clean Water Act



The U.S. Supreme Court, on May 25, 2023, narrowed the reach of the Clean Water Act, in the latest judicial effort to define the "waters of the United States" that Congress intended to regulate. *Sackett v. Environmental Protection Agency* (No. 21-454) (*Sackett II*). The ruling, which is the second Supreme Court opinion involving the Sacketts' property in Idaho, is plainly at odds with the latest effort by the U.S. Environmental Protection Agency and the Army Corps of Engineers to define the CWA's reach.[1]

In the most important interpretation of the CWA's jurisdiction in 17 years, the majority opinion authored by Justice Samuel A. Alito held that the CWA regulates only those wetlands that adjoin a relatively permanent body of water that is connected to a traditional navigable water (e.g., a river, lake, or bay) such that the wetlands are practically indistinguishable from that body of water. The Court expressly adopted the plurality opinion from the Court's last attempt to define what "waters" are covered by the CWA, in the famously fractured *Rapanos v. United States*, 547 U.S. 715 (2006). The *Rapanos* plurality opinion had concluded that Congress intended to regulate only those wetlands with a "continuous surface connection" to a relatively permanent body of water connected to a traditional interstate navigable water.

The majority and all three concurring opinions in *Sackett II* squarely rejected former Justice Anthony M. Kennedy's approach to CWA jurisdiction under *Rapanos*, which allowed the agencies to regulate water bodies with a "significant nexus" to a traditional navigable water. Following *Rapanos*, numerous courts adopted the "significant nexus" test as the controlling standard. During both the Obama and Biden administrations, administrative rulemakings by the EPA and the Army Corps relied heavily on the "significant nexus" test. Critics complained that the multifactored, open-ended "significant nexus" test—which considers a lengthy list of hydrological and ecological factors—often required a highly technical, fact-intensive, and individualized analysis.

*Sackett II* arose after the EPA determined that the Sacketts' property contained "adjacent wetlands" that were subject to the CWA, based on the agency's finding that the wetlands had a "significant nexus" to a nearby lake.

The U.S. Court of Appeals for the Ninth Circuit upheld the EPA's assertion of federal jurisdiction on the same basis. The Supreme Court reversed, concluding that "the CWA extends to only those wetlands that are as a practical matter indistinguishable from waters of the United States." To meet this test, the wetlands must have a "continuous surface connection" to a "relatively permanent body of water connected to traditional interstate navigable waters," such that it is "difficult to determine whether the 'water' ends and the 'wetland' begins."

While the Court unanimously rejected the significant nexus test, four Justices concurred only in the judgment. Justice Brett Kavanaugh, joined by Justices Elena Kagan, Sonia Sotomayor, and Ketanji Brown Jackson, disagreed with the majority's narrow definition of jurisdiction, arguing that the majority's "continuous surface connection" test was too narrow and ignored the Act's distinction between "adjacent" and "adjoining" wetlands. Justice Kavanaugh's opinion posited that the CWA's use of the word "adjacent" means that wetlands do not need to be contiguous to or bordering a water of the United States to be jurisdictional. Justice Kagan, joined by Justices Sotomayor and Jackson, wrote separately, criticizing the majority for substituting its judgment for that of Congress. Justice Clarence Thomas, joined by Justice Neil Gorsuch, wrote separately that he would have further restricted CWA federal jurisdiction, reasoning that, under the Commerce Clause, Congress can only regulate waters with a more direct link to navigability and the literal channels of commerce. The decision will have profound and lasting implications on the scope of federal authority under the CWA.

**Background**

The CWA requires a permit to discharge pollutants (including rocks and dirt) into a "navigable water," which is defined under the Act only as "waters of the United States." CWA § 502(7), 33 U.S.C. § 1362(7). As Justice Alito lamented in the first Supreme Court decision involving the Sacketts in 2012, this spare and circular definition is "notoriously unclear" and "hopelessly indeterminate." *Sackett v. Environmental Protection Agency*, 566 U.S. 120, 133 (2012) (Alito, J., concurring) (agency jurisdictional determinations under the CWA are subject to judicial review). Justice Alito echoed that theme in *Sackett II*, writing that "the outer boundaries of the Act's geographical reach have been uncertain from the start. The Act applies to 'the waters of the United States,' but what does that phrase mean?"

Since the *Rapanos* decision in 2006, there has been a flurry of unsuccessful efforts to answer this question—including informal agency guidance in 2008 that sought to clarify how the *Rapanos* decision should be applied; regulations in 2015 under the Obama administration that broadly interpreted federal jurisdiction; regulations in 2020 under the Trump administration that narrowly interpreted federal jurisdiction; and new regulations in 2023 under the Biden administration that sought to codify the law in existence before the 2015 regulations. Not surprisingly, each set of regulations has been challenged aggressively in court, resulting in a confusing patchwork of applicable rules. For instance, due to various court rulings in 2023, the Biden administration's regulations are currently in effect in 23 states and on hold in the other 27.[2]

The Court's May 25 *Sackett II* decision did not directly address the validity of the 2023 regulations, but has nevertheless doomed them. The issue in the case was whether a wetland on the Sacketts' property qualified as a "water of the United States." A small unnamed tributary on the other side of the road from the wetland flowed into a nonnavigable creek, which in turn flowed into Priest Lake, an intrastate body of water that EPA had designated as a traditional navigable water. The EPA found that the wetland on the Sacketts' property had a "significant nexus" to the lake, based on the finding that the wetland, in combination with a large nearby wetland complex, significantly affected the lake's ecology.

With the "significant nexus" basis for asserting jurisdiction now defunct, a new rulemaking appears to be inevitable. So too is litigation over any new final rule that the agencies adopt.

**Implications**

The Court's decision has major ramifications for federal regulatory authority under the CWA. The Biden administration's new regulations covered aquatic features such as ephemeral creeks and small ponds that lack a continuous surface connection to a "water of the United States," provided they have a significant nexus to a traditional navigable water. The clear logic of the Supreme Court's opinion renders insupportable both the rulemaking and judicial decisions adopting the significant nexus standard. The Biden rule also included as jurisdictional all interstate waters, including wetlands, regardless of their permanence or their hydrological connection to another water of the United States. Wetlands without a surface connection to interstate water are likely now excluded from federal regulation, and there is also doubt over whether the CWA covers at all those interstate non-wetland waters that are not relatively permanent bodies of water with a connection to a traditional navigable water.

Various stakeholders have already called on the Biden administration to withdraw its new regulations in light of the opinion.

How states react to the decision will be critical to watch. While some states have adopted complementary water regulations, others have not. With more waters now falling solely within state jurisdiction, states will have to consider if and how they will address the gap that *Sackett II* creates.

**Endnotes**

[1] 88 Fed. Reg. 3004 (Jan. 18, 2023).

[2] *See* EPA, *Definition of "Waters of the United States": Rule Status and Litigation Update*.



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