WATER QUALITY REGULATION IN THE WAKE OF *SACKETT V. EPA*

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ABSTRACT

The Clean Water Act ("the Act") has become fertile ground for extensive litigation in the federal courts. And no issue has been more prominent than the Act's jurisdictional trigger term, "navigable waters," defined in the Act simply as "the waters of the United States" ("WOTUS").[2] This designation determines whether projects and other activities require federal permits to discharge into, dredge, or fill waters.[3] The most recent addition to this series of cases, *Sackett v. EPA*, provides an updated definition of WOTUS and comes to us from Bonner County, Idaho. [4] This article provides a brief background of the litigation before *Sackett*, the route by which *Sackett* arrived in the U.S. Supreme Court, the Court's updated definition of WOTUS as provided in *Sackett's* majority opinion, and some thoughts and observations about what comes after *Sackett*.

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I. SETTING THE STAGE FOR SACKETT

For fifty years, the question of what constitutes "the waters of the United States" was left to the Environmental Protection Agency ("EPA") and the U.S. Army Corps of Engineers to determine through rulemaking and associated guidance and manuals. While the U.S. Supreme Court came tantalizingly close to announcing a WOTUS test in *Rapanos v. United States*[5], it ultimately failed to deliver a majority opinion in that case.[6]

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[1] This article is adapted, and updated, from Norman M. Semanko, *Sackett v. EPA: North Idaho's Clean Water Act Wild Card*, ADVOCATE, Sept. 2023, at 24 (2023).

[2] 33 U.S.C. § 1362(7).

[3] 33 U.S.C. §§ 1342, 1344.

[4] *Sackett v. Env't Prot. Agency*, 598 U.S. 651 (2023).

[5] *Rapanos v. U.S.*, 547 U.S. 715 (2006)

[6] For a review and analysis of *Rapanos*, *see* Norman M. Semanko, *When Land is Water: Clean Water Act Jurisdiction*, ADVOCATE, Jan. 2007, at 23 (2007).

In *Rapanos*, a plurality opinion of four Justices, authored by Justice Scalia, concluded that "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.'"[7] Under the plurality test, "the waters of the United States" are relatively permanent bodies of water connected to traditional interstate navigable waters through a continuous surface connection.[8] One Justice concurred with the plurality in the result—that wetlands near ditches and drains that eventually emptied into navigable waters at least 11 miles away were not jurisdictional under the Act—but not in its reasoning.[9] This broader interpretation of jurisdiction under the Act found that "the waters of the United States" include those waters and adjacent wetlands that possess a "significant nexus" to traditional navigable waters.[10]

Since *Rapanos*, the scope of "navigable waters" has gone back and forth—expanding and contracting—thereby resembling a game of ping pong between different Presidential Administrations.[11] All of that changed with the U.S. Supreme Court's May 25, 2023 ruling in *Sackett v. EPA*.[12] Interestingly enough, the story begins and ends in North Idaho.

II. THE SACKETTS' ROUTE TO THE SUPREME COURT

Michael and Chantell Sackett own a small piece of property near Priest Lake, in Bonner County, Idaho.[13] The Sacketts wanted to build a home on their lot and began to fill it with dirt and rocks in preparation for the construction.[14] EPA stepped in and issued a compliance order to the Sacketts, threatening civil penalties of approximately $40,000 per day and informing them that their activities violated the Act because their property contained jurisdictional wetlands.[15] The Sacketts maintained that EPA had no jurisdiction over their property under the Act.[16]

After several years of proceedings, the U.S. District Court entered summary judgment for EPA and the Ninth Circuit affirmed, holding that the Act

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[7] *Rapanos*, 547 U.S. at 739 (plurality opinion).

[8] *Id.* at 742, 755 (plurality opinion).

[9] *Id*. at 759 (Kennedy, J., concurring)

[10] *Id.* at 779–780 (Kennedy, J., concurring).

[11] *See* Norman M. Semanko, *Red Paddle-Blue Paddle: Clean Water Act Ping Pong*, ADVOCATE, Mar./Apr. 2021 at 22 (2021).

[12] *Sackett*, 598 U.S. at 651.

[13] *Id.* at 661–62.

[14] *Id.* at 662.

[15] *Id.*

[16] *See generally*, Sackett v. E.P.A, 566 U.S. 120 (2012) (*Sackett I*) (holding that EPA compliance order was final agency action and therefore subject to review under the APA).

covers adjacent wetlands with a significant nexus to traditional navigable waters and that the Sacketts' lot satisfied that standard.[17] The Supreme Court granted certiorari to decide the proper test for determining whether wetlands are "waters of the United States."[18]

At the time that *Sackett* was under consideration in the Ninth Circuit, litigation brought in numerous federal district courts by states and various groups, challenging the regulatory definition of WOTUS, was calculated to result in the issue ultimately being taken up by the U.S. Supreme Court.[19] As predicted, however, *Sackett* proved to be the wild card that actually made it to the Supreme Court.[20]

III. THE SACKETT MAJORITY OPINION EXPLAINED

Justice Alito delivered the opinion of the Court on behalf of a majority of five Justices.[21] The Court held that the Act only applies to wetlands that have a "continuous surface connection" with "waters of the United States."[22] In doing so, the opinion expressly adopted Justice Scalia's plurality opinion from *Rapanos*.[23] It also rejected Justice Kennedy's "significant nexus" test.[24]

The *Sackett* majority opinion adopted Justice Scalia's *Rapanos* conclusion that "waters" in the Act 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,'" also referred to as "traditional navigable waters."[25] Further, the opinion concluded that wetlands are included within "waters of the United States" and must, therefore, "qualify as 'waters of the United States' in their own right."[26] The wetlands must be "indistinguishably part of a body of water that itself constitutes waters of the United States."[27] As the plurality stated in *Rapanos*, the term "waters" in the Act "may fairly be read to include only those wetlands that are 'as a practical matter

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[17] Sackett v. U.S. Env't Prot. Agency, 8 F.4th 1075, 1091–93 (9th Cir. 2021).

[18] *Sackett*, 595 U.S. at 663.

[19] *See* Pamela King & Hannah Northey, *Who's suing over Trump's WOTUS rule?,* E&ENEWS, June 24, 2020 (discussing challenges filed by conservative interests, states, environmental groups, and tribes in California, Colorado, New Mexico, Oregon, Washington, Massachusetts, South Carolina, and Arizona).

[20] Semanko, *supra* note 11 at 23.

[21] *Sackett*, 598 U.S. at 656. The Ninth Circuit's decision was reversed and remanded, 9-0. In addition to Justice Alito's majority opinion, concurring opinions were penned by Justices Thomas, Kagan, and Kavanaugh.

[22] *Id.* at 678.

[23] *Id.* at 678.

[24] *Id.* at 679–82.

[25] *Id*. at 670–73 (citing *Rapanos*, 547 U.S. at 739).

[26] *Id.* at 676.

[27] *Sackett*, 598 U.S at 676.

indistinguishable from waters of the United States,' such that it is 'difficult to determine where the "water" ends and the "wetland" begins.'"[28] Such indistinguishability only "occurs 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."[29] "Wetlands that are separate from traditional navigable waters cannot be considered part of those waters, even if they are located nearby."[30]

IV. WHAT'S NEXT?

Even with the *Sackett* majority opinion firmly in place, litigation was sure to continue after the decision, including challenges to the Biden Administration's WOTUS Rule,[31] which was underpinned by the now defunct "significant nexus" test.[32] Approximately three months after the *Sackett* decision was issued, the Biden Administration issued an amended WOTUS Rule,[33] in an attempt to conform to the Supreme Court's decision in *Sackett*.[34]

Even before *Sackett* was decided—and the WOTUS Rule was amended—the Rule had been stayed in 27 states, including Idaho, while the federal courts ultimately proceed to determine its validity under the Act.[35] Post-*Sackett*, Idaho and Texas have jointly filed an amended complaint and motion for summary judgment, seeking to strike down the amended WOTUS Rule in its entirety.[36] In a similar challenge, West Virginia and twenty-three other states are also seeking to have the amended WOTUS Rule overturned,[37] as is the Commonwealth of Kentucky.[38]

In the meantime, the Fifth Circuit Court of Appeals has fired the first salvo, ruling in a long-standing enforcement action and making clear that the rule

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[28] *Id.* at 678 (quoting *Rapanos*, 547 U.S. at 742).

[29] *Id.* (quoting *Rapanos*, 547 U.S. at 742).

[30] *Id.* at 676.

[31] Revised Definition of "Waters of the United States", 88 Fed. Reg. 3004 (proposed Jan. 18, 2023).

[32] *Id.* at 3143.

[33] Revised Definition of "Waters of the United States'; Conforming, 88 Fed. Reg. 61964 (proposed Sept. 8, 2023).

[34] *Amendments to the 2023 Rule*, U. S. ENV'T PROT. AGENCY (Dec. 4, 2023), https://www.epa.gov/wotus/amendments-2023-rule.

[35] *Definition of "Waters of the United States": Rule Status and Litigation Update*, U. S. ENV'T PROT. AGENCY (Sept. 8, 2023), https://www.epa.gov/wotus/definition-waters-united-states-rule-status-and-litigation-update.

[36] Second Amended Complaint and Petition for Review, Texas v. U.S. Env't Prot. Agency, No. 3:23-cv-00017 (S.D. Tex. Nov. 11, 2023).

[37] Complaint, Virginia et al. v. U.S. Env't Prot. Agency, No. 3:23-cv-0032 (D.N.D. Feb. 16, 2023).

[38] Complaint, Kentucky v. U. S. Env'l Prot. Agency, No. 3:2023cv00007 (E.D. Ky. 2023).

announced in *Sackett* will be the prevailing rule applied by that—and presumably other—federal courts, not the Biden Administration's amended WOTUS Rule. In dismissing a ten-year dispute over whether certain wetlands in Louisiana were jurisdictional under the Act, the Court of Appeals held "that the Supreme Court's recent decision in *Sackett v. EPA* controls the undisputed facts here and mandates that Appellants' property lacks wetlands that have a continuous surface connection to bodies that are [WOTUS] in their own right, so that there is no clear demarcation" between waters and wetlands.[39] "In sum, it is not difficult to determine where the 'water' ends and any 'wetlands' on Lewis's property begin."[40]

EPA appears reluctant to willingly accept the full implications of the Supreme Court's landmark ruling in *Sackett,* after fifty years of implementing the Act without such clear jurisdictional limits. However, it is certain that litigation to further interpret and implement the decision—and shape future water quality regulation—will continue for some time to come.

[39] *Lewis v. United States*, 88 F.4th 1073, 1078 (5th Cir. 2023).
[40] *Id*.