Post Sackett
What Is the Scope of the Clean Water Act?

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On May 25, the Supreme Court of the United States (SCOTUS) rendered a decision in *Sackett et ux. v. EPA* addressing what Justice Alito referred to as a "nagging question" of what water bodies are covered under the Clean Water Act (CWA).[1] What constitutes "Nation's waters" and what exactly the United States has jurisdiction over, has been hotly contested for decades with different administrations proposing agency rules and guidance to clarify what constitutes a Water of the United States and how such determinations should be made.

The Supreme Court majority reversed the judgment of the U.S. Court of Appeals for the Ninth Circuit and rejected the "significant nexus test" in favor of the plurality opinion in Rapanos. The majority opinions written by Justice Alito held that for the United States to assert jurisdiction over an adjacent wetland it must have "a contiguous 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."[2]

Although there were no dissents, there were three concurring opinions, one by Kavanaugh, Sotomayor, Kagan, and Jackson, a second by Thomas and Gorsuch, and a third by Kagan. Justice Kagan's concurrence was particularly critical of the analytical reasoning associated with the Court's decision. Kagan pointed out that the word "adjacent" (the Act uses the term adjacent wetlands) means nearby and would not require waters to have a surface connection, just as two houses are adjacent even though they may have grass and other structures in between them. Kavanaugh's concurrence also raised pragmatic issues with the majority's "surface connection" requirement since waters could be separated at the surface by a structure, such as dams, but connected below such a structure.

There is no doubt that this opinion will have wide ranging impacts regarding the scope of the regulation of intrastate water bodies without a surface connection to a traditional navigable water that need to be fully evaluated. What is clear is that this new test narrows the United States' CWA jurisdiction over such water bodies, leaving states with sole regulatory authority to make permitting and enforcement decisions. Therefore, this new test will likely have significant development related impacts and increase disparate treatment of intrastate bodies of water between states.

[1] *Sackett v. Env't Prot. Agency, 598 U.S. ___ (2023); See* 33. U.S.C. §1251 et seq. (1972)

[2] *Id.* at 27.

This article provides an overview of *Rapanos v. United States* and prior administration's efforts to define Waters of the United States to show how much of a change this decision represents and provide context to help evaluate the potential impacts.

RAPANOS V. UNITED STATES

Congress amended the CWA in 1972 to include "navigable waters."[3] The Act defines navigable waters as WOTUS.[4] This phrase is key to the application of CWA. Many sections of the CWA include "waters of the United States" as part of their specific provisions.[5]

In 2006 the Supreme Court wrestled with these phrases in *Rapanos v. United States*.[6] The *Rapanos* Court asserted that there was a limitation in the scope of what navigable waters—and in turn WOTUS—may entail.[7] In a plurality opinion, the Court stated that the scope of the CWA extends jurisdiction "only over relatively permanent, standing or continuously flowing bodies of water" and not over "channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall."[8] Concurring, Justice Kennedy disagreed with the plurality and stated that without more specific regulations, the U.S. Army Corps of Engineers (USACOE) "must establish a significant nexus on a case-by-case basis" if wetlands would be regulated "based on adjacency to non-navigable tributaries."[9]

The *Rapanos* decision and Justice Kennedy's use of "significant nexus" to navigable waters created challenges regarding how such an approach could be implemented. The Environmental Protection Agency (EPA) and USACOE subsequently issued guidance "to ensure that jurisdictional determinations . . . are consistent with [*Rapanos*] and supported by the administrative record."[10] This definition remained in place until 2015 when the Obama administration issued new guidance that further utilized the "significant nexus" test to determine which waters fell within the jurisdiction of the United States.

OBAMA ADMINISTRATION

During the Obama administration, EPA and USACOE issued a new rule addressing the definition of WOTUS. Citing ambiguities from past guidance and *Rapanos*, the new regulation stated that the purpose was to make "identifying waters protected under the CWA clearer, simpler, and faster."[11]

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[3] Clean Water Act: General Definitions Sec. 502(7).
[4] § 1251, Sec. 502(7).
[5] *See, e.g.*, § 1251, Sec. 303(c), 303(d), 311.
[6] *Rapanos v. United States,* 547 U.S. 715, 715 (2006) (Plurality opinion).
[7] *Id*. at 734¬¬–738.
[8] *Id*. at 739.
[9] *Id*. at 782 (Kennedy, J. concurring).
[10] *Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States & Carabell v. United States*, U.S. ENV'T PROT. AGENCY & U.S. DEP'T OF THE ARMY (Jun. 5, 2007) https://www.epa.gov/sites/default/files/2016-04/documents/rapanosguidance6507.pdf.
[11] Clean Water Rule: Definition of "Waters of the United States" 80 Fed. Reg. 37054–37127, at 37057 (Jun. 29, 2015) (to be codified at 40 C.F.R. pts. 110, 112, 116, 117, 122, 230, 232, 300, 302, and 401.

This new rule expanded major categories of "waters," like, tributaries and adjacent wetlands. The rule also stated that waters which may not fall under CWA jurisdiction through the text of the rule could still be subject to a "case-specific analysis to determine if a significant nexus exists and the water is a 'water of the United States.'"[12]

With the definitions of tributaries and adjacent waters, the agencies expanded what fell under WOTUS. Of note, "tributaries" would now include areas that had "presence of physical indicators of flow."[13] Also of note were changes to the definition of "adjacent waters."[14] This new definition included "floodplain waters" which are "waters located in . . . the 100-year floodplain and that are within 1,500 feet of the ordinary high water mark of a traditional navigable water."[15]

After the EPA and USACOE published the rule, there was significant backlash from states and certain interest groups.[16] Overall, they argued the rule was too expansive to the point that a federal permit would be required for acts like "till[ing] the soil near gullies, ditches or dry streambeds where water flows only when it rains."[17] There were also concerns over federalism with so many possible waterways being pulled into federal jurisdiction. Despite this pushback, the rule remained in place until President Trump issued Executive Order 13778 ordering the EPA to review the 2015 rule, specifically the definition of "navigable waters" for use in future rulemaking "in a manner consistent with the opinion of Justice Antonin Scalia in Rapanos."[18]

TRUMP ADMINISTRATION

The Trump administration revised four key elements of the WOTUS definition: tributary; lakes and ponds, and impoundments of jurisdictional waters; adjacent wetlands; and, territorial sees and traditional navigable waters.[19] Tributaries, for example, was narrowed to be "a river, stream, or similar naturally occurring surface water channel that contributes surface water flow to a territorial sea or traditional water in a typical year either directly or indirectly . . .."[20] The new rule also explicitly excludes 11 other items from the definition, many of which would have directly fallen under the Obama-era rule.[21]

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[12] *Id.* at 37054.
[13] *Id.* at 30759
[14] *Id.*
[15] *Id.*
[16] Carol Davenport, *Obama Announces New Rule Limiting Water Pollution*, N.Y. TIMES (May 27, 2015). https://www.nytimes.com/2015/05/28/us/obama-epa-clean-water-pollution.html.
[17] *Id.*
[18] Exec. Order No. 13778 at Sec. 2, Sec. 3.
[19] Clean Water Rule: Definition of "Waters of the United States" 85 Fed. Reg. 22250–22342 (Apr. 21, 2020) (to be codified at 40 C.F.R. pts. 110, 112, 116, 117, 122, 230, 232, 300, 302, and 401).
[20] *Id*. at 22251.
[21] The 11 items were: (1) Groundwater, (2) ephemeral features that flow only in direct response to precipitation; (3) diffuse stormwater runoff and directional sheet flow over upland; (4) ditches that are not traditional navigable waters, tributaries, or that are not constructed in adjacent wetlands; (5) prior converted cropland; (6) artificially irrigated areas that would revert to upland if artificial irrigation ceases; (7) artificial lakes and ponds; (8) water-filled depressions constructed or excavated in upland; (9) Stormwater control features constructed or excavated in upland; (10) groundwater recharge, water reuse, and wastewater structures constructed or excavated in upland; (11) waste treatment systems. *Id*. at 22252.

The Trump Administration rolled back the Obama-era WOTUS definition. This change was described by the administration as "providing much needed regulatory certainty . . . for American farmers, landowners and business."[22] Fourteen states sued the EPA to block the rule, arguing that the rule "fails to meet the requirement of the [CWA] since it does not meet its objectives to restore and maintain water quality."[23]

PRESENT AND LOOKING AHEAD

One of President Biden's first acts in office was to issue Executive Order 13990. This order directed "immediate review of agency actions taken between January 20, 2017, and January 20, 2021."[24] Agencies were directed to review past actions if they fell under various policy goals of the Biden administration, specifically if they were counter to science backed data and did not work towards protecting the environment.[25]

In January 2023, the EPA and USACOE published a 141-page document explaining the revisions to the scope of the WOTUS definition and the rule itself.[26] The new rule followed a pre-2015 framework—which expanded the Trump-era rule, but not as much as the Obama-era rule—and included references to the Rapanos plurality opinion for various aspects of the chosen language. For example, the definition of tributaries took on language from the opinion to include tributaries that are "relatively permanent."[27]

The 2023 rule has taken effect in varying capacities. Currently, the regulation is law in 23 of 50 states. Kentucky is one state that has challenged the rule in court alleging injuries from the new rule and "expansion of waters designated as 'navigable waters of the United States.'"[28] The State alleges that "more of its lands and waters [will be] subject to federal oversight, which in turn intrudes on its 'traditional and primary power over land and water use."[29] In this same action, the EPA and USACOE (Agencies) "admit" that the Final Rule "does in fact sweep additional waters into their jurisdiction."[30] This admission lead the Sixth Circuit to approve an injunction for the 2023 rule.[31]

SACKETT ET UX. V. EPA

Before the promulgation of the 2023 rule, the Supreme Court heard arguments in *Sackett v. EPA* in October 2022.[32] In *Sackett* the Court evaluated which "wetlands" fall under the WOTUS definition

[23] Rebecca Beitsch, *14 States Sue EPA Over Rollback of Obama-era Water Rule*, THE HILL (Dec. 20, 2019) https://thehill.com/policy/energy-environment/475500-14-states-sue-epa-over-rollback-of-obama-era-water-rule/.
[24] Exec. Order No. 13990 at Sec. 2
[25] *Id*. at Sec. 1
[26] Revised Definition of "Waters of the United States" 88 Fed. Reg. 3004–3144 (Jan. 28, 2023) (to be codified at 40 C.F.R. pt. 120).
[27] *See Rapanos*, 547 U.S. at 715.
[28] *Kentucky v. U.S. Env't Prot. Agency*, Nos. 23-5353/5354 at 3 (6th Cir. May, 10 2023).
[29] *Id*. at 3.
[30] *Id*. at 4.
[31] *Id*. at 7.
[32] *Sackett v. Env't Prot. Agency*, SCOTUS BLOG, https://www.scotusblog.com/case-files/cases/sackett-v-environmental-protection-agency/ (last updated May 11, 2023).

and the CWA.[33] In the recently released opinion, the Court revisits the *Rapanos* decision to firmly reject Justice Kennedy's significant nexus test.[34] The majority instead agreed with the plurality opinion in *Rapanos* to hold that the "CWA extends to only those 'wetlands with a continuous surface connection to bodies that are 'water of the United States in their own right,' so that they are "'indistinguishable' from those waters."[35] In application, the Court directs that agencies should "reasonably determine that wetlands 'adjoining bodies of water'" are part of the waters that are "abutting a navigable waterway."[36]

In a concurring opinion, Justice Kavanaugh (with Justice Kagen, Justice Sotomayor, and Justice Jackson joining) takes issue with the specific inclusion of "adjoining" wetlands but not "adjacent" wetlands.[37] In this instance, adjoining is a far narrower meaning. In application, this would only cover wetlands that "are contiguous to or bordering a covered water" instead of adjacent wetlands which includes adjoining and "wetlands separated from a covered water only by a man-made dike or barrier, natural river berm, beach dune, or the like."[38] Without adequate coverage, Kavanaugh asserts that there could be "significant repercussions for water quality and flood control throughout the United States."[39]

This decision by SCOTUS is probably not the last time that this issue is addressed, it will likely be a long time before the Court takes up the issue for a very long time.

EXPECTED IMPACTS FROM THIS DECISION

Sackett greatly narrows federal CWA jurisdiction and expands state control over intrastate waterbodies without a direct surface connection to a traditional navigable water. At the very least, the decision will have impacts on development projects (as it may impact CWA permitting requirements), ongoing manufacturing and other operations that discharge pollutants to intrastate waterbodies unconnected to a traditional navigable water, and enforcement of such discharges, particularly in states that have different standards and requirements than the federal government.

Leaving aside the analytical issues highlighted by the Kagan and Kavanaugh concurrences and whether the decision represents judicial activism, the articulated Rapanos plurality "surface connection" test is undoubtedly simpler to apply in practice than the significant nexus test. Only time will tell whether this decision actually results in the benefits many in the regulated community expect (much depends upon subsequent state action) or the environmental harm opponents fear.

[33] *Id.*
[34] *Sackett*, 598 U.S. at ___.
[35] *Id.* (quoting *Rapanos*, 547 U.S. at 742, 755 (plurality opinion)).
[36] *Id.*
[37] *Id.* at ___ (concurring opinion).
[38] *Id.*
[39] *Id.*