akerman

Practice Update

Is That Wetland I Want to Develop "Adjacent"? Key Interpretation in Limbo After *Sackett*

June 26, 2023

By Richard G. Leland and Yaffa Solemanzadeh

Last month, the U.S. Supreme Court weighed in on a long-standing controversy over the extent to which the U.S. Environmental Protection Agency (EPA) and the Army Corps of Engineers (ACOE; collectively, the Agencies) have jurisdiction to regulate construction activities in or adjacent to wetlands that are defined as "waters of the United States" (WOTUS). In *Sackett* v. *Environmental Protection Agency,* 598 U.S. ___(2023)(*Sackett),* the Supreme Court significantly limited the definition of WOTUS and removed thousands of acres of wetlands from federal regulatory jurisdiction. While the decision clearly delineates the boundaries of the defined term, standing alone, it has created and will create confusion in the enforcement of the Clean Water Act. The decision should prompt Congressional action to resolve finally the controversy, but if the past is prologue, that action will most likely be a long time in coming.

Section 401(a) of the Clean Water Act,[1] enacted to protect the WOTUS, makes the "discharge of a pollutant" unlawful and subjects any person who does so to significant civil and even criminal penalties under Section 309.[2] The term "discharge of a pollutant" is broadly defined as "any addition of any pollutant to navigable waters from any point source."[3] "Pollutant" is also broadly defined and

Related People

Richard G. Leland

Related Work

Environment and Natural Resources
Environmental Litigation
Real Estate

Related Offices

New York
West Palm Beach

includes sand, dredge spoils, rocks and other materials.[4] Section 404 of the Clean Water Act authorizes the Army Corp of Engineers to issue permits allowing the discharge of dredged or fill materials into the "navigable waters" of the United States. "Navigable Waters" are further defined in the Act as "the waters of the United States."[5]

The question of what constitutes WOTUS as defined in the Clean Water Act has been grappled with by Congress, the courts, and the Agencies for decades. It has been the subject of multiple iterations of regulations promulgated by the EPA and the ACOE under the Carter,[6] Obama,[7] Trump,[8] and Biden[9] administrations, litigation by industry groups[10] and state attorneys general[11] to annul those regulations, and several "visits" to the U.S. Supreme Court. Last month, in *Sackett* the Supreme Court issued an order limiting the scope of the definition of WOTUS, a decision that has significant impacts on environmental regulation under the Clean Water Act.

The issue in *Sackett* was whether the Sacketts had violated the Clean Water Act by backfilling a wetland in order to develop their property. This raised the dispute of the extent to which wetlands constitute WOTUS under the Clean Water Act and the applicable regulations defining that term. The then-applicable regulation of "waters of the United States" included wetlands adjacent to waters that are, among other things, relatively permanent; standing or continuously flowing bodies of water with a continuous surface connection to those waters; or which, either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of waters. According to this definition, the EPA classified the wetlands on the Sackett's property as "waters of the United States," and therefore the Sacketts were in violation of the Clean Water Act. The Sacketts sued, alleging the wetlands on their property were not "waters of the United States." The District Court entered summary judgement for the EPA. The Ninth

Circuit affirmed, holding that the Clean Water Act covers wetlands with an ecologically significant nexus to traditional navigable waters and that the Sackett's wetlands meet that criterion.[12]

The Supreme Court reversed. Writing for the Court, Justice Alito held that "waters of the United States" do not include wetlands that do not have a continuous surface connection to bodies that are waters of the United States in their own right,[13] saying, in effect, that those whose connection was less direct than that were not "adjacent." Justice Alito reasoned that if the Court were to read § 1362(7) of the Clean Water Act to include wetlands that are near traditional navigable waters, then the statute would effectively be amended to define "navigable waters" as "waters of the United States and *adjacent wetlands*" (emphasis in original).[14] And because there is no "clear and manifest" indication that Congress intended the statute to be read as such, the Court and the Agencies, Justice Alito explained, cannot expand the definition in this way.[15] Therefore, the Court held that the Clean Water Act covers only wetlands that are "as a practical matter indistinguishable from waters of the United States."[16] That decision resolved a debate regarding what constitutes an "adjacent" and thus a regulated wetland.

Prior to *Sackett*, the Court had last debated this issue as to what constitutes an "adjacent" wetland in *United States v. Rapanos*, 547 U.S. 715 (2006). The plurality decision in *Rapanos,* authored by Justice Scalia, stated that the proper interpretation of the term includes only areas with relatively permanent and or continuously flowing water. In a concurring opinion, Justice Kennedy advocated that the definition should include wetlands having a "substantial nexus to a body of water fitting the definition." Following the decision in *Rapanos,* Democratic administrations promulgated regulations including the "substantial nexus" test enunciated by Justice Kennedy. See, e.g. 33 C.F.R §120.2(c)(6), promulgated on January 18, 2023, under

the Biden Administration, which incorporates the substantial nexus test in Section 383 (a)(4)(iii), and regulations promulgated under the Trump Administration,[17] which limited coverage to wetlands meeting Justice Scalia's definition. Justice Alito's opinion in *Sackett*, writing for the majority, greatly narrows the scope. The interpretation given is that wetlands are those waters which have a "continuous surface connection" to WOTUS. Therefore, in order to fall under the Agencies' regulations, a wetland must be adjacent to a body of water that constitutes waters of the United States, which are permanent bodies of water connected to interstate navigable waters, and have a continuous surface connection with that water. The Court's interpretation of "adjacent" to mean adjoining seems to directly contradict the Agencies' regulatory definition, which includes those wetlands which "significantly affect the chemical, physical, or biological integrity of waters [used in interstate or foreign commerce, territorial seas, or interstate waters]."[18]

Sackett clearly overrides the substantial nexus test written by Justice Kennedy in *Ramapos,* which granted jurisdiction under the Clean Water Act to wetlands which "affect the chemical, physical, and biological integrity" of navigable waters. Continuous surface connection is too weak of a test as wetlands can ebb and swell, which could make the surface connection disappear or reappear depending on weather conditions such as heavy rains or dry spells. This test will therefore be cause for ambiguity and inconsistent categorizations of wetlands, which can possibly hinder expansion as developers may be inclined to exercise caution when evaluating a property with what may or may not be a wetland under the jurisdiction of the EPA and thus subject to its regulations.

This will also repudiate federal regulation of the Clean Water Act, leaving significant decisions to be made by the states. Industry is hailing this as it loosens regulations. Environmental groups decry

this decision as it has significant ramifications on the conditions of wetlands and, by extension, the WOTUS.

Additionally, this opinion does not directly address the rule promulgated by the Agencies in January 2023, as it does not address how to treat wetlands which may not have a continuous surface connection and yet may still affect the chemical, physical, or biological integrity of nearby navigable waters. It also led to pending cases such as *Texas v. EPA*, No. 3:23-CV-00017 (S.D. Tex., filed Jan. 18, 2023) and *Kentucky Chamber of Com. v. EPA*, No. 3:23-CV-00008-GFVT (E.D. Ky., filed Feb. 22, 2023), which are challenges to the 2023 regulations to be successful. Ultimately, Congress will need to step in to create a less ambiguous definition of WOTUS, and the Agencies will need to promulgate a set of consistent and unambiguous regulations, which will give clear direction to all interested parties and avoid extensive litigation.

Pending either some action by Congress to clarify the statutory definition or further regulatory action consistent with the holding in *Sackett*, interpretation of the extent of the Agencies' jurisdiction is in a state of limbo, and it is probable that there will be inconsistencies among the Corps' districts in their jurisdictional determinations.

---

[1] 33 U.S.C. § 1311(a).

[2] 33 U.S.C. § 1319.

[3] Clean Water Act § 502(12), 33 U.S.C. § 1362(12).

[4] *Id.*

[5] 33 U.S.C. 1362((7).

[6] 40 C.F.R. § 6.102 (1979).

[7] 33 C.F.R. § 328.3 (2015).

[8] 33 C.F.R. § 328.3 (2019).

[9] 33 C.F.R. § 328.3 (2023).

[10] *American Farm Bureau Fed'n v. EPA*, No. 3:23-CV-20 (S.D. Tex., filed Jan. 18, 2023); *Kentucky Chamber of Com. v. EPA*, No. 3:23-CV-00008-GFVT (E.D. Ky., filed Feb. 22, 2023).

[11] *Kentucky v. EPA*, No. 3:23-CV-00007 (E.D. Ky., filed Feb. 22, 2023); *Texas v. EPA*, No. 3:23-CV-00017 (S.D. Tex. Filed Jan. 18, 2023); *W. Virginia v. EPA*, No. 3:23-CV-00032-PDW-ARS (E.D.N.D., filed Feb. 16, 2023).

[12] *Sackett v. EPA*, 8 F.4th 1075, 1092-93 (9th Cir. 2021) *rev'd* 598 U.S. ___ (2023).

[13] *Sackett v. EPA*, 2023 U.S. LEXIS 2202 at *39.

[14] *Id.* at *37.

[15] *Id.*

[16] *Sackett*, at *39, citing *Rapanos*, 547 U.S. at 755.

[17] 33 C.F.R. § 328.3 (2020); 33 U.S.C. § 1251 *et seq*.

[18] 33 C.F.R. §328.3(a)(ii).
