LEGAL UPDATES

U.S. Supreme Court Restricts EPA's Power Under Clean Water Act

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Yesterday morning – Thursday, May 25, 2023, in a long-awaited decision, the U.S. Supreme Court dealt a major blow to EPA's ability to regulate wetlands under the Clean Water Act (CWA). In interpreting the meaning of the undefined term "waters of the United States" or "WOTUS" under the CWA, the majority opinion in *Sackett v. EPA* adopted a narrow test for determining when a "wetland" is a WOTUS, triggering permitting requirements and enforcement authority. The Court held that for a wetland to fall within CWA jurisdiction, it must: (1) be "indistinguishable" from an adjacent "relatively permanent, standing or continuously flowing" body of water, such as stream, ocean, river or lake; and (2) the wetland must have "a continuous surface connection with that water, making it difficult to determine where the 'water' ends and the 'wetland' begins." The "continuing surface connection" and the "adjoining" aspect of the water represent significant changes to previously existing law, and will almost certainly enhance landowners' ability to use and redevelop their property.

Decision Adopts Scalia's *Rapanos* Concurrence

The *Sackett* case involved a challenge to CWA jurisdiction by homeowners, who had been prohibited by EPA from building their home based on EPA's determination that the Sackett's lot constituted a protected wetland under the CWA. The 9th Circuit ruled in favor of the EPA. The U.S. Supreme Court disagreed, unanimously overturning the 9th Circuit's decision, allowing the Sacketts to build their home. Notwithstanding that unanimity in result, the Justices were in sharp disagreement on the proper test for determining CWA jurisdiction to regulate wetlands, splintering 5, 3, 4 on how to define WOTUS under the Act.

The majority opinion, written by Justice Alito and joined by four other Justices, relied heavily on arguments of Congressional intent, and alleged federal government overreach to articulate the "indistinguishable" test – a test first penned in a Justice Scalia concurrence in *Rapanos v. United States*. The majority *Sackett* decision claims to provide the clarity *Rapanos* lacked. The Court's prior *Rapanos'* 4-1-4 decision featured competing tests for determining when a wetland falls within the CWA's coverage, including Justice Kennedy's "nexus" test, which the 9th Circuit had applied in ruling in EPA's favor. In *Sackett*, the Supreme Court's majority opinion acknowledges that some "adjacent" wetlands can also qualify as

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"waters of the United States," but only when those adjacent wetlands have a "continuous surface connection" to "traditional interstate navigable waters." Because the wetlands on the Sackett's property had no such connection, the majority ruled EPA lacked jurisdiction to regulate them.

Justice Thomas, joined by Justice Gorsuch, wrote a separate concurrence, arguing for an even stricter interpretation of the CWA focusing on the actual navigability and interstate nature of the adjacent body of water.

Justice Kagan, joined by Justices Sotomayor and Jackson, filed a separate, scathing concurrence that reads more like a dissent. In that concurrence, they accuse the majority of ignoring Congressional intent and appointing the Court "itself as the national decision maker on environmental policy."

In an unusual alignment, Justice Kavanaugh was joined by Justices Kagan, Sotomayor, and Jackson in arguing that the test adopted by the majority in *Sackett* ignores the statutory text and has potentially disastrous consequences for federal watershed management. In Justice Kavanaugh's mind, the majority's test wrongly narrows the Act to '***adjoining***' wetlands, leaving some historically covered "***adjacent"*** wetlands unprotected. For example, Justice Kavanaugh noted that the Mississippi River's levee system creates a barrier that might preclude CWA authority over adjacent wetlands, areas that are traditionally important as part of a flood-control project.

Going Forward Under New *Sackett* Rule

The practical implications of the *Sackett* decision and new interpretation of WOTUS remain to be seen, including how a "continuous surface connection" and "adjoining" versus "adjacent" wetlands will be applied by regulators and the courts. Regardless, it is clear that the *Sackett* decision is a seismic shift in water law that will be impactful to a wide range of landowners and operators for years to come.

Lathrop GPM attorneys have broad experience and are well-versed in a wide range of CWA-related issues. Contact a Lathrop GPM attorney for more information.

Thank you to JJ Mark, a 2023 Summer Associate at Lathrop GPM, who contributed to the writing of this alert.