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How *Sackett v. EPA* likely marks the start of a new era of Clean Water Act regulation

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MAY 14, 2024

Since the 1970s, the U.S. Environmental Protection Agency and U.S. Army Corps of Engineers have expansively interpreted the Clean Water Act to regulate most waters and wetlands in the United States.

Starting in 2000, the U.S. Supreme Court began to limit the geographical scope of Clean Water Act jurisdiction, and the federal agencies used their rulemaking authority to define the "waters of the United States" in response to the Court's decisions. This led to a twenty-year period where successive presidential administrations promulgated back-and-forth regulations, which were variously challenged in court and rescinded by the next administration, resulting in uncertainty about what waters and wetlands were regulated.

The U.S. Supreme Court decision in *Sackett v. U.S. Environmental Protection Agency*,[1] appears to have ended this era. In that case, the Court established a new test that greatly restricts the scope of wetlands subject to the geographic jurisdiction of the Clean Water Act.

Along the way, the Court reduced the ability of the federal agencies to define the scope of Clean Water Act jurisdiction going forward, which may end the dynamic of back-and-forth rulemakings by successive presidential administrations that has created so much uncertainty.

Only time will tell, but *Sackett* appears to usher in a new era in Clean Water Act regulation and law practice. Here are some ways that *Sackett* significantly changes Clean Water Act regulation:

1. *Sackett* significantly reduces the scope of the waters regulated under the Clean Water Act

The most obvious effect of *Sackett* is that it reduces the area subject to regulation. The Clean Water Act regulates discharges of pollutants into the "navigable waters," which are defined as "the waters of the United States, including the territorial seas."[2]

The Supreme Court ruled that "the CWA's use of '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.'"[3] The term "waters" means "bodies of open water."[4]

Wetlands are regulated only if they "qualify as 'waters of the United States' in their own right," i.e., "they must be indistinguishably part of a body of water that itself constitutes 'waters' under the CWA."[5] This means that wetland is regulated if it "has a continuous surface connection with that water, making it difficult to determine where the 'water' ends and the 'wetland' begins."[6] The presence of a barrier separating a wetland from a water ordinarily removes the wetland from federal jurisdiction.[7]

Sackett clearly signals that the Clean Water Act regulates a far smaller group of wetlands than the agencies have assumed for decades.

This reading of the statute significantly reduces the scope of wetlands regulated under the Clean Water Act. For decades, the agencies have regulated wetlands that are "adjacent" to other waters such as tributaries to traditional navigable waters. Tributaries have been interpreted to be any stream, channel or ditch that contributes flow to downstream waters.

While the definition of "adjacent" has varied over the years, the federal agencies have generally included wetlands that do not directly abut other waters and in some cases wetlands that were located significant distances away. Even the Trump Administration regulated wetlands that are separated from other waters by certain berms or other physical barriers.[8]

Now, the Supreme Court is saying that the only regulated wetlands are those that directly adjoin an open water — with no intervening berms or barriers — and have a continuous surface connection that makes it difficult to determine where the water ends and the wetland begins.

Lower courts will undoubtedly grapple with this language for years to come in the context of specific cases, but *Sackett* clearly signals that the Clean Water Act regulates a far smaller group of wetlands than the agencies have assumed for decades.

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2. *Sackett* may lead to changes in the definition of 'wetlands' under the Clean Water Act

Sackett calls into question the very definition of "wetlands" under the Clean Water Act. The term wetlands has been defined in regulations since the 1970s to mean "those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal conditions do support, a prevalence of vegetation typically adapted for life in saturated soil conditions."[9]

Pursuant to this definition, an area qualifies as a wetland for purposes of the Clean Water Act even if surface water is typically absent and soils are simply saturated with ground water during part of the growing season.

The debate over the scope of the Clean Water Act has been dominated by ping-ponging regulations issued by different presidential administrations. That era appears to be over.

Such areas without surface water do not appear to satisfy the test established in *Sackett*, which requires a wetland to have a "continuous surface connection" with an open water such that it is hard to distinguish the boundary between the wetland and the surface water. A wetland with surface water could be indistinguishable from a nearby stream or lake, but a wetland that only has saturated soils would by its very nature seem to be easily distinguishable from an open water.

If the only wetlands regulated under the Clean Water Act are those that have surface water and adjoin an open water, then the longstanding regulatory definition of wetland is overinclusive because it includes areas without surface water that are beyond the statute's reach. This suggests that the definition of wetland may need to be revised, at least for purposes of the Clean Water Act.

3. *Sackett* reduces the role and influence of federal agencies in interpreting the Clean Water Act

For decades, the U.S. Environmental Protection Agency and U.S. Army Corps of Engineers have played a dominant role in defining the scope of "the waters of the United States" by issuing regulations and guidance.

In the 2006 *Rapanos* case, two justices expressly invited the agencies to resolve concerns raised in the Supreme Court's decisions by issuing new regulations.[10] Since that time, the debate over the scope of the Clean Water Act has been dominated by ping-ponging regulations issued by different presidential administrations.

That era appears to be over. The Supreme Court in *Sackett* has severely limited — if not completed circumscribed — the ability of the agencies to define the geographic scope of their jurisdiction.

Sackett was an enforcement case, which means that the Supreme Court directly interpreted the Clean Water Act and was not simply reviewing a regulation issued by the agencies. The Supreme Court gave no deference to the agencies' interpretations, but instead severely criticized the agencies' past regulations and guidance and stated a rule of skepticism that "the EPA must provide clear evidence that it is authorized to regulate in the manner it proposes."[11]

The Court interpreted the statute based on what an ordinary person might understand to be "waters of the United States" so that landowners would have fair notice of what conduct is regulated[12] not based on the science of "ecological importance,"[13] which appears to limit the ability of the agencies to claim deference based on their technical expertise.

All of this will empower opponents of future rulemakings, as well as landowners who disagree with the agencies' jurisdiction in the permitting process.

4. *Sackett* likely marks the beginning of an era of greater clarity and stability in the regulation of wetlands

For years, many in the regulated community have asked for a clearer set of rules for determining whether a wetland is regulated under the Clean Water Act. Until *Sackett*, the federal agencies would determine whether a wetland was regulated based on site-specific factors that gave them broad discretion to assert jurisdiction.

Landowner advocates did not like this because one could not know whether or not an area was regulated without asking the federal agencies, and if the agencies asserted jurisdiction (which was most of the time), there were few bright line rules that would enable a landowner to successfully push back.

Now, the Supreme Court has established a test that is explicitly designed to be understandable to an ordinary person and leaves little to the discretion of agency staff. Whether one likes the test or not, there is not much ambiguity about whether or not a given area is regulated. This will increase the ability of landowners to resist agency assertions of jurisdiction.

Moreover, the 2016 Supreme Court decision in *U.S. Army Corps of Engineers v. Hawkes Co.*[14] allows disaffected permit applicants and property owners to challenge agency jurisdictional determinations in court, something that was not possible previously.

The test set forth in *Sackett* is likely to be in effect for years, unless Congress amends the Clean Water Act. If so, this may mark the end of an era in which successive federal administrations sought through rulemaking to either significantly increase or decrease the scope of Clean Water Act jurisdiction.

Sackett is not just another Clean Water Act case. It makes fundamental changes to how wetlands will be regulated for years to come. Although time will tell, in future years we may look back and identify *Sackett* as the case that reshaped the regulatory landscape under the Clean Water Act.

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Notes:

[1] 598 U.S. 651 (2023).

[2] 33 U.S.C.A. §§ 1311(a), 1362(7), 1362(12)(A).

[3] *Sackett*, 598 U.S. at 671 (quoting plurality opinion in *Rapanos v. United States*, 547 U.S. 715, 739 (2006)).

[4] *Id*. at 672.

[5] *Id*. at 676.

[6] *Id*. at 678-79 (quoting *Rapanos*, 547 U.S. at 742).

[7] *Id*. at 678 n.16.

[8] *See* Final Rule, Navigable Waters Protection Rule: Definition of "Waters of the United States," 85 Fed. Reg. 22250, 22338 (April 21, 2020).

[9] 33 C.F.R. § 328.3(b); 40 C.F.R. § 230.3(t).

[10] *Rapanos*, 547 U.S. at 757-58 (Roberts, C.J., concurring), 812 (Breyer, J. dissenting).

[11] *Sackett*, 598 U.S. at 679.

[12] *Id*. at 680-81.

[13] *Id*. at 683.

[14] 578 U.S. 590 (2016).

About the author

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This article was first published on Westlaw Today on May 14, 2024.

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