Sackett v. EPA: Supreme Court Clarifies Clean Water Act Scope but Creates Uncertainty for Companies and Investors

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The Opinion. On May 25, 2023, the Supreme Court issued an opinion in *Sackett v. Environmental Protection Agency*. Though the Court was unanimous that the Sacketts' land does not fall within Environmental Protection Agency ("EPA") jurisdiction under the Clean Water Act, it split 5-4 in its reasoning—and the majority opinion has significant ramifications for both environmental regulation and administrative authority as a whole.

The 15-year-long dispute centered around Idaho landowners, Michael and Chantell Sackett, who sought to build a house on their property approximately 300 feet from a lake. In 2007, after the Sacketts began backfilling land to prepare the lot for construction, they received a notice from the EPA ordering them to stop work because wetlands on the property were considered a Water of the United States ("WOTUS") and therefore protected under the Clean Water Act. The U.S. Court of Appeals for the 9th Circuit applied the "significant nexus" test from *Rapanos v. United States* and held that the Sackett's land was in fact a WOTUS and therefore within the EPA's jurisdiction. The Supreme Court agreed to hear the case and revisit the test for deciding if a wetland is a WOTUS.

The majority opinion, written by Justice Alito, substantially narrows what wetlands—non-navigable waterways that are not independently subject to the Clean Water Act—can still be covered under the Act. To fall within the Clean Water Act's protection, a wetland now must have a "continuous surface connection" to a traditionally covered body of water—one that is "relatively permanent, standing or continuously flowing . . . described in ordinary parlance as 'streams, oceans, rivers, and lakes'—so that there is "no clear demarcation between waters and wetlands." In other words, an adjacent wetland must be "indistinguishabl[e]" from one of these traditional bodies of water. This is a significant departure from the "significant nexus" test previously in use, in which wetlands qualified for Clean Water Act protection if they had a "'significant nexus' to waters that are or were navigable in fact or that could reasonably be so made."

In disposing of the significant nexus test, the *Sackett* majority endorsed a narrower view of federal administrative authority. It held that a statute must be "exceedingly clear" for

an administrative agency (like the EPA) to exercise authority over private property. The majority emphasized the serious consequences for even inadvertent violations of the Clean Water Act—and since the statute does not allude to the "significant nexus" test, EPA actions implementing that standard are too large an infringement on private property to be upheld.

Regulatory Uncertainty and State Regulation of Waters. The decision is sure to spark uncertainty in the regulatory landscape and complicate permitting across the country. The Army Corps of Engineers has paused key wetlands determinations pending the release of guidance from the Biden administration clarifying the impact of the *Sackett* ruling. That uncertainty may stall industrial initiatives until there is a clearer picture of the scope of the decision's jurisdictional implications.

Post-*Sackett*, potentially more than 51% of the country's wetlands are unprotected, and individual states will have to determine how to regulate non-WOTUS as federal authority is scaled back. Currently, states employ highly disparate regulatory schemes. As of 2022, nearly half of states rely on the federal definition of WOTUS and regulate intrastate waters no greater than the extent of federal regulations. Thus, following *Sackett*, these states will rely on the "continuous surface connection" test for determining state regulatory authority. Thirteen states have additional laws in place that prohibit state agencies from adopting regulations more stringent than corresponding federal law. Seven states plus D.C. have various gap-filling provisions in place to regulate waters that fall outside the federal definition. An additional nineteen states have enacted extensive permitting programs for non-WOTUS. The following table provides an overview of which states fall into each category:[1]

States That Rely on Federal Interpretations of WOTUS (Least Protection)	States That Regulate Some Non-WOTUS (Some Protection)	States with Comprehensive Protections of Non-WOTUS (Most Protection)
Alabama*	Arizona*	California
Alaska	District of Columbia	Connecticut
Arkansas	Illinois	Florida
Colorado*	Indiana	Maine
Delaware	North Carolina*	Maryland
Georgia	Ohio	Massachusetts
Hawaii	West Virginia	Michigan*
Idaho*	Wyoming	Minnesota*
Iowa		New Jersey
Kansas		New York
Kentucky		Oregon*
Louisiana		Pennsylvania
Mississippi		Rhode Island
Missouri		Tennessee*
Montana		Vermont

[1] *See* https://www.eli.org/sites/default/files/files-pdf/52.10679.pdf.

States That Rely on Federal Interpretations of WOTUS (Least Protection)	States That Regulate Some Non-WOTUS (Some Protection)	States with Comprehensive Protections of Non-WOTUS (Most Protection)
Nebraska Nevada New Mexico North Dakota Oklahoma South Carolina South Dakota* Texas* Utah		Virginia* Washington Wisconsin*
* Indicates state that has a "stringency prohibition"—i.e., a law in place prohibiting state agencies from regulating aquatic resources more stringently than the federal standard. Some stringency prohibitions are broad, while some are narrow, focusing only on particular programs or activities		

Source: https://www.eli.org/sites/default/files/files-pdf/52.10679.pdf.

In the wake of *Sackett*, many states have already begun to reexamine their current programs, and battles between conservationists and developers are likely to ensue. These inconsistencies may pose significant challenges for conducting business across states, as companies may be required to navigate unpredictable and varying regulations and permitting processes.

Continued Erosion of Federal Administrative Authority. The holding of *Sackett* extends well beyond the facts of the case and the context of the Clean Water Act. The majority opinions announce the arrival of a new "clear statement rule" requiring "Congress to enact **exceedingly clear language** if it wishes to significantly alter the balance between federal and state power and the power of the government over private property." Thus, the federal government can only infringe upon private property rights of landowners whose property contains wetlands with an "exceedingly clear" statement of authorization to do so contained within the statute itself. As discussed below, this does not mean such property escapes regulation by the states, only that EPA regulations under the Clean Water Act do not reach wetlands without a "continuous surface connection."

In her concurrence in judgment only, Justice Kagan remarked on the similarities between *Sackett* and last year's opinion *West Virginia v. Environmental Protection Agency*. In *West Virginia*, the Court held that that the "major questions doctrine" required "clear Congressional authorization" for a regulatory agency to make "decisions of vast economic and political significance." The Court found that the Clean Air Act "could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion."

The thrust of each of these opinions is to effectively deny the EPA authority to promulgate environmental regulations without explicit Congressional authorization. This follows a pattern of deregulation by the Supreme Court in the past three years with cases such as *West Virginia* and *Nat'l Fed'n of Indep. Bus. v. OSHA*. The Court will likely continue to apply the "clear statement rules" announced in *Sackett* and the major questions doctrine decisions as a cudgel to strike down environmental and public health regulations without an "exceedingly clear" "Congressional authorization."

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