Congressional Research Service
Informing the legislative debate since 1914

Legal Sidebar

Supreme Court Narrows Federal Jurisdiction Under Clean Water Act

June 21, 2023

On May 25, 2023, the Supreme Court decided *Sackett v. EPA*, a case with significant implications for the scope of federal jurisdiction under the Clean Water Act (CWA). While the Court unanimously agreed that the lower court applied the wrong standard for determining when wetlands are considered "waters of the United States" (WOTUS) based on their adjacency to other jurisdictional waters, it split 5-4 on the appropriate test.

The majority formally adopted the approach taken by a four-Justice plurality in the 2006 case *Rapanos v. United States*. Under the majority's test, "waters" are limited to relatively permanent bodies of water connected to traditional navigable waters and to wetlands that are "waters of the United States" in their own right by virtue of a continuous surface connection to other jurisdictional waters so that there is no clear demarcation between the bodies. Wetlands that are neighboring covered waters but are separated by natural or artificial barriers are excluded.

The CWA prohibits discharging certain pollutants into navigable waters, defined as "the waters of the United States, including the territorial seas" without a permit, but the statute does not define WOTUS. The definition of WOTUS is important because it determines which waters are subject to federal government regulations and protections, including CWA permitting programs. In January 2023, the U.S. Army Corps of Engineers (Corps) and the U.S. Environmental Protection Agency (EPA)—the two agencies tasked with implementing the CWA—issued a final rule redefining WOTUS. (See this report for an in-depth discussion of the rule and the previous regulations promulgated to define the term.) The Court's ruling in *Sackett* construes the reach of the CWA more narrowly than the new or previous regulatory interpretations or the approach adopted by the courts of appeals since *Rapanos*. While the *Sackett* decision does not directly address the merits of the new rule, its rejection of several elements included in the rule casts doubt on the current regulatory framework. It also evinces the Court's decreasing reliance on deferential modes of statutory construction as well as its increasing insistence on clear congressional authorization for agency action.

Prior Supreme Court Rulings Regarding WOTUS

The Supreme Court has considered the scope of WOTUS in prior cases. (See this report for an in-depth discussion of those cases.) Most recently, in 2006, the Supreme Court decided *Rapanos v. United States*, a

Congressional Research Service
https://crsreports.congress.gov
LSB10981

pair of consolidated cases that concerned the extent of CWA jurisdiction over wetlands near ditches or man-made drains that emptied into traditional navigable waters. Some had hoped that *Rapanos* would provide clarity on jurisdictional questions that lingered after earlier decisions. Instead, the Court issued a fractured 4-1-4 decision with two different standards and no majority opinion providing a rationale indicating how to determine whether a particular waterbody is a water of the United States.

Writing for a four-Justice plurality, Justice Scalia articulated a bright-line rule holding that WOTUS includes only "relatively permanent, standing or continuously flowing bodies of water" (such as streams, rivers, or lakes) and wetlands that have a "continuous surface connection" to other waters subject to the CWA. In a concurring opinion joined by no other Justice, Justice Kennedy wrote that the Corps should determine on a case-by-case basis whether wetlands have a "significant nexus" to traditionally navigable waters. Justice Kennedy further wrote that a significant nexus exists when the wetland, either alone or in connection with similarly situated properties, significantly impacts the chemical, physical, and biological integrity of a traditionally navigable water.

Following *Rapanos*, lower courts considered which Justice's opinion should apply. Every court of appeals to consider the two standards has held either that Justice Kennedy's significant nexus standard is controlling or that jurisdiction may be established under either standard. Some courts declined to identify which opinion is controlling, either because the parties stipulated that the significant nexus standard applied or because both tests had been met. The Ninth Circuit held in 2007 that Justice Kennedy's concurrence "is the narrowest ground to which a majority of the Justices would assent if forced to choose in almost all cases" and therefore provided the controlling standard for cases within its circuit.

Regulations Defining WOTUS

The Corps and EPA have also defined WOTUS through successive regulations. For much of the past several decades, regulations promulgated by the Corps and EPA in 1986 and 1988, respectively, have been in effect. The agencies supplemented these regulations with interpretive guidance in 2003 and 2008 in response to Supreme Court rulings.

In 2015, the Corps and EPA issued the Clean Water Rule, which redefined WOTUS in the agencies' regulations. The Trump Administration rescinded the Clean Water Rule in 2019, temporarily reverted to the pre-2015 framework, and in 2020 codified a new definition in the Navigable Waters Protection Rule. In August 2021, a federal district court vacated the Navigable Waters Protection Rule, prompting the agencies to return again to the pre-2015 framework.

Most recently, on January 18, 2023, the Corps and EPA published a new rule (the 2023 WOTUS Rule) revising the definition of WOTUS. Overall, the definition of WOTUS in the 2023 WOTUS Rule is narrower in scope than the Clean Water Rule and broader than the Navigable Waters Protection Rule. Of particular relevance in the context of *Sackett*, the 2023 WOTUS Rule provides that certain wetlands are jurisdictional based on their adjacency to other covered waters and, as in previous regulations, defines *adjacent* as "bordering, contiguous, or neighboring." Specifically, the rule includes wetlands that are adjacent to a traditional navigable water, the territorial seas, or an interstate water, as well as and wetlands that are adjacent to jurisdictional impoundments or tributaries and meet either the relatively permanent or significant nexus standard.

Sackett v. EPA: Litigation History

The petitioners, Chantell and Michael Sackett, own a parcel of land in Idaho, near Priest Lake and across the road from a wetlands complex that drains into an unnamed tributary of a creek that in turn feeds into the lake. In 2007, after they began backfilling the property with sand and gravel, EPA issued a compliance order directing them to restore the site. In 2008, the Corps issued a jurisdictional determination

concluding that the property contained wetlands subject to regulation under the CWA, after which EPA issued an amended compliance order that extended the compliance deadlines. The Sacketts sued EPA, arguing that the compliance order was arbitrary and capricious because its underlying jurisdictional basis was flawed. The district court granted summary judgment in favor of EPA, ruling that the Sacketts' property contained jurisdictional wetlands.

The Ninth Circuit affirmed the district court's grant of summary judgment in EPA's favor. On the merits, the court held that it was bound by its precedent to apply as the controlling opinion Justice Kennedy's concurrence in *Rapanos*. Applying Justice Kennedy's significant nexus test, and looking to the regulations that were in effect when EPA issued the amended compliance order, the court held that the record "plainly supports" EPA's conclusion that the wetlands on the Sacketts' property were adjacent to a jurisdictional tributary. The court also upheld EPA's conclusion that those wetlands, together with the similarly situated wetlands complex across the road, had a significant nexus to Priest Lake, a traditional navigable water. The court thus concluded that EPA reasonably determined that the Sacketts' property was subject to federal jurisdiction under the CWA and the relevant regulations.

The Supreme Court's Decision

The Supreme Court granted review to address "whether the Ninth Circuit set forth the proper test for determining whether wetlands are 'waters of the United States' under the Clean Water Act." On review, the Court unanimously reversed the Ninth Circuit. Although all nine Justices agreed that the lower court applied the wrong standard for identifying WOTUS, the Court was split 5-4 on the appropriate test. Justice Alito wrote the majority opinion and was joined by Chief Justice Roberts and Justices Thomas, Gorsuch, and Barrett.

With respect to what constitutes "waters," the majority reaffirmed the *Rapanos* plurality's interpretation, holding 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." The majority acknowledged that the Court's prior jurisprudence interpreted CWA jurisdiction to extend beyond traditional navigable waters but cautioned that those earlier cases "refused to read 'navigable' out of the statute, holding that it at least shows that Congress was focused on its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." The majority reasoned that this interpretation was consistent with definitions of *waters* elsewhere in the CWA and in other statutes.

The majority acknowledged that some but not all wetlands are covered under the CWA and held that jurisdictional wetlands "must be indistinguishably part of a body of water that itself constitutes 'waters' under the CWA." Quoting the *Rapanos* plurality, the majority held that WOTUS includes "only those wetlands that are as a practical matter indistinguishable from waters of the United States, such that it is difficult to determine where the water ends and the wetland begins. That occurs when wetlands have a continuous 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."

The majority reasoned that its interpretation harmonized the statutory term *waters of the United States* with Section 404(g)(1) of the CWA, which was added in 1977 and authorizes states to apply to EPA for approval to administer permits for certain kinds of discharges into any WOTUS except for certain traditional navigable waters, "including wetlands adjacent thereto." The majority explained that because the adjacent wetlands in Section 404(g)(1) "are 'includ[ed]' within 'waters of the United States,'" the term *navigable waters* could not include WOTUS *and* adjacent wetlands, but only those adjacent wetlands that qualify as WOTUS "in their own right." As a result, the majority concluded that wetlands "that are separate from traditional navigable waters cannot be considered part of those waters, even if they are located nearby."

In addition to reaffirming the *Rapanos* plurality's standard, the majority also rejected the significant nexus test. The majority stated that Congress must "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" and cautioned that an overly broad interpretation of the CWA's reach would impinge on the regulation of land and water use, an area at the core of traditional state authority. The majority also wrote that EPA's interpretation "gives rise to serious vagueness concerns in light of the CWA's criminal penalties." In particular, the majority emphasized that the boundary between a significant nexus and an insignificant one was "far from clear," that "similarly situated" waters was also a vague concept, and that application of the significant nexus test required consideration of "a variety of open-ended factors that evolve as scientific understandings change." According to the majority, the significant nexus test amounted to a "freewheeling inquiry" that "provides little notice to landowners of their obligations under the CWA."

The majority also rejected EPA's interpretation of WOTUS as including wetlands that are "neighboring" to covered waters but separated by dry land. In particular, the majority disagreed with EPA's argument that the reference to adjacent wetlands in Section 404(g)(1) indicates that Congress implicitly ratified the Corps' regulatory definition of *adjacent wetlands* that was in place when Congress added that section of the CWA in 1977. Contrary to EPA's argument, the majority found that the definition of *adjacent wetlands* was "[f]ar from [] well settled" as of the 1977 CWA amendments. The majority also disputed EPA's policy arguments regarding the environmental consequences of a narrower definition, noting that "the CWA does not define the EPA's jurisdiction based on ecological importance."

The case also generated three concurring opinions. Justice Thomas joined the judgment in full and wrote a separate concurring opinion, joined by Justice Gorsuch, to discuss the historical meaning of the terms *navigable* and *of the United States* in the phrases *navigable waters* and *waters of the United States*. Justice Thomas wrote that, prior to the enactment of the CWA, navigable waters were generally understood to be those waters that were or could be used for interstate or foreign commerce and that wetlands were historically excluded from the term. Justice Thomas further wrote that "[i]t would be strange indeed" if, in enacting the CWA, "Congress sought to effect a fundamental transformation of federal jurisdiction over water through phrases that had been in use to describe the traditional scope of that jurisdiction for well over a century and that carried a well-understood meaning." Applying this reasoning, Justice Thomas concluded that the wetlands on the Sacketts' property were not jurisdictional because they lack a surface connection with a traditional navigable water; the nonnavigable tributary across the street from the Sacketts' property is not, has never been, and cannot reasonably be made a highway of interstate or foreign commerce; Priest Lake is purely intrastate and has not been shown to be a highway of interstate or foreign commerce; and EPA did not establish that the Sacketts' actions would obstruct or otherwise impede navigable capacity or the suitability of a water for interstate commerce.

Consistent with his long-standing views, Justice Thomas criticized federal environmental law's dependence on an "expansive interpretation" of the Commerce Clause, which deviates from the original meaning of the Constitution. Justice Thomas characterized EPA's interpretation as "a federal police power, exercised in the most aggressive possible way," and argued that it "renders the use of the term 'navigable' a nullity and involves an unprecedented and extravagant reading of the well-understood term of art 'the waters of the United States.'"

Justice Kavanaugh, joined by Justices Kagan, Sotomayor, and Jackson, wrote an opinion concurring in the judgment. Although he agreed with the majority's decision not to adopt the significant nexus test and its conclusion that the wetlands on the Sacketts' property are not covered by the CWA, Justice Kavanaugh disagreed with the holding that only wetlands with a continuous surface connection are jurisdictional. Instead, Justice Kavanaugh argued that wetlands are jurisdictional if they are bordering, contiguous, or neighboring to covered waters, even if they are separated from those waters by a natural or artificial barrier. Justice Kavanaugh criticized the majority's ruling as "depart[ing] from the statutory text, from 45 years of consistent agency practice, and from this Court's precedents."

Justice Kavanaugh criticized the majority for narrowing the test to cover only "adjoining" wetlands—those contiguous to or bordering a covered water—as opposed to "adjacent" wetlands, which he defined as including both wetlands contiguous to or bordering a covered water and wetlands separated from a covered water only by a man-made dike or barrier, natural river berm, beach dune, or the like. According to Justice Kavanaugh, *adjacent* and *adjoining* are commonly understood to have distinct meanings, and Congress's use of the broader term *adjacent* in the 1977 CWA amendments unambiguously means that the statute does not require wetlands to adjoin (or touch) covered waters.

Addressing the environmental impacts of the majority's decision, Justice Kavanaugh warned that the majority's narrowing of coverage to adjoining wetlands would exclude "long-regulated and long-accepted-to-be-regulable wetlands" and would have significant repercussions for water quality and flood control throughout the United States, such as by excluding wetlands separated by flood control levees from the Mississippi River and wetlands adjacent to but not adjoining Chesapeake Bay and its covered tributaries. He also identified several areas in which the majority's decision would generate regulatory uncertainty.

Justice Kagan wrote a concurring opinion in which Justices Sotomayor and Jackson joined. While she expressed agreement with Justice Kavanaugh's interpretation of *adjacent* consistent with its ordinary meaning and his emphasis on the environmental function of wetlands, including those that are separated from a covered water by natural or artificial barriers, she wrote separately to criticize the majority's reliance on what she described as a "judicially manufactured clear-statement rule."

Justice Kagan argued that there was no ambiguity or vagueness around the meaning of *adjacent* in the text of the CWA. Citing her dissent last term in *West Virginia v. EPA*, she asserted that it was therefore inappropriate for the majority to rely on a "judicially manufactured clear-statement rule" not to deal with statutory vagueness or ambiguity but instead to correct the perceived overbreadth of the CWA. Justice Kagan argued that this approach amounted to "a thumb on the scale for property owners—no matter that the [CWA] ... is all about stopping property owners from polluting."

Implications of the Court's Decision

The Court's ruling narrows the scope of jurisdiction under the CWA as compared to both its longstanding regulatory implementation and the interpretation adopted by lower courts post-*Rapanos*. While the extent of the change will depend on how the Corps and EPA implement various aspects of the decision, the *Sackett* majority's exclusion of wetlands that are separated from covered waters by natural or artificial barriers means that fewer wetlands will be covered than under any regulatory framework developed by the Corps or EPA since the 1970s. Additionally, while the majority recognized that "temporary interruptions in surface connection" such as from low tides or dry spells would not defeat jurisdiction, it is not clear how temporary such an interruption must be in order to preserve a wetland's jurisdictional status.

Additionally, with respect to the bodies of water that are considered "waters" under the CWA, the majority's ruling covers "only those relatively permanent, standing or continuously flowing bodies of water forming geographical features that are described in ordinary parlance as streams, oceans, rivers, and lakes." The majority opinion does not explicitly address ephemeral waters, which flow only in response to precipitation, or intermittent waters, which flow continuously during certain times of year (such as when snowpack melts). At a minimum, however, the majority's interpretation would appear to exclude ephemeral waters. This narrows the scope of *waters* as compared to the 2023 WOTUS Rule (but not the 2020 Navigable Waters Protection Rule).

The Future of Federal and State Regulation

The Court's decision in *Sackett* will have significant impacts on federal and state water regulation, but the full extent of those impacts is not yet clear. Following the Court's decision, the Corps and EPA stated that they "will interpret the phrase 'waters of the United States' consistent with the Supreme Court's decision in Sackett" and that they "continue to review the decision to determine next steps." Because the agencies have consistently extended jurisdictional coverage to more wetlands than are covered under *Sackett*, there is no current or previous regulatory framework that they could apply that would comport with the *Sackett* majority's holding. It remains to be seen whether the Corps and EPA will seek to amend their current regulations, supplement the regulations with guidance, or issue new regulations.

Although the *Sackett* majority was decisive in its articulation of a jurisdictional test, the majority left unanswered numerous questions about the parameters of the test. Justice Kavanaugh's concurring opinion identified some issues that may arise in the future, including how to determine whether a wetland is "indistinguishable" from a covered water; how the test applies to wetlands with temporary interruptions in surface connection due to seasonal variations or to wetlands in areas where storms, floods, and erosion frequently shift or breach natural barriers; and whether ditches, swales, pipes, or culverts can establish a continuous surface connection. These questions could be addressed in future regulations (and disputed in future litigation), though the majority's ruling suggests that the Court will not take a deferential view toward agency interpretations of those issues.

Neither the 2023 WOTUS Rule nor any prior regulation was presented to the Supreme Court for review in *Sackett*, so the Court's decision does not automatically affect the status of the 2023 WOTUS Rule. The majority opinion nevertheless rejects jurisdictional interpretations that are reflected in the 2023 WOTUS Rule, so the continued viability of the rule is uncertain.

The 2023 WOTUS Rule has been challenged in five lawsuits across three federal district courts. Prior to the Supreme Court's decision in *Sackett*, two of those courts—the U.S. District Court for the Southern District of Texas and the U.S. District Court for the District of North Dakota—issued preliminary injunctions barring implementation of the 2023 WOTUS Rule in the states that are participating in the lawsuits before those courts. The U.S. District Court for the Eastern District of Kentucky denied the plaintiffs' motions for preliminary injunction and dismissed the case, but after the plaintiffs appealed that decision, the U.S. Court of Appeals for the Sixth Circuit issued an injunction pending appeal that bars implementation of the 2023 WOTUS Rule in Kentucky and for the plaintiff organizations and their members. A total of 27 states and six industry associations and their members are covered by the preliminary injunctions and injunction pending appeal. The Corps and EPA have stated that they will interpret WOTUS "consistent with the pre-2015 regulatory regime" as to those states and plaintiffs. For now, the 2023 WOTUS Rule remains in effect elsewhere. Further proceedings in the 2023 WOTUS Rule litigation may affect the status of the rule in individual states or nationwide.

In the meantime, the Court's decision in *Sackett* could delay CWA permitting and other actions as the Corps and EPA determine how to implement the decision. In particular, the Corps may delay issuing approved jurisdictional determinations (AJD), which are used to identify whether a particular parcel of land contains WOTUS and which may be used in the CWA permitting process. After the Supreme Court decided *Rapanos*, the Corps urged its district offices to delay issuing AJDs for areas beyond the limits of the traditional navigable waters, and EPA interim guidance directed agency employees not to represent an agency position on the effect of the decision until the agencies issued final guidance interpreting WOTUS in light of the Court's decision. At least one Corps district office has placed the issuance of AJDs on hold until further notice. It is not yet clear if the agencies will impose similar directives nationwide.

Finally, the Court's ruling could also affect regulation of waters at the state level. The CWA expressly reserves to states the right to issue more stringent regulations, and states may choose to cover more waters in their own regulations. While some states regulate waters within their borders beyond the scope of

federal jurisdiction, some state laws bar environmental state agencies from promulgating regulations beyond what is federally required. A narrowed definition of WOTUS at the federal level could thus result in greater state-level divergence in the scope of covered waters.

Considerations for Congress

The scope of CWA jurisdiction has long been of interest to Congress. Some Members of Congress filed *amici curiae* briefs with the Court in *Sackett*, expressing their views on the issues presented in that case: A coalition of 199 Members and a group of three Representatives from the Congressional Western Caucus filed briefs with the Court in support of the Sacketts, and a coalition of 167 current and former Members filed a brief in support of EPA. Following the Court's decision, some Members have issued statements either supporting or criticizing the ruling.

The *Sackett* majority's emphasis on clear statement rules is also indicative of a shift in how the Supreme Court views the relationship between Congress and agencies' regulatory authority. This is the second consecutive term in which the Supreme Court has curtailed EPA's regulatory authority by holding that Congress was required to provide clear authorization to EPA and had failed to do so in the relevant statutory text. In *West Virginia v. EPA*, the Court applied the major questions doctrine to hold that, because regulation of greenhouse gas emissions from power plants presented a question of vast economic or political significance and there was not clear evidence of congressional intent to task EPA with balancing the nationwide energy mix, the Clean Air Act did not authorize EPA to issue emission guidelines that were based in part on shifting electricity generation from higher-emitting sources to lower-emitting ones. Similarly, in *Sackett*, the majority reasoned that because broadening the scope of WOTUS would "alter the balance between federal and state power and the power of the Government over private property," the Court would require "exceedingly clear language" from Congress in support of EPA's interpretation.

Following *Sackett*, Congress could consider proposing legislation to provide a definition of WOTUS or provide more specific instruction to the agencies and regulated parties as to the interpretation of the CWA. The Supreme Court's increasing insistence on clear congressional intent to delegate regulatory authority, and its decreasing reliance on or reference to more deferential modes of judicial review, suggest that any regulatory actions taken pursuant to such legislation would be subject to close judicial scrutiny.

Author Information

Kate R. Bowers
Legislative Attorney

Disclaimer

as a CRS Report may include copyrighted images or material from a third party, you may need to obtain the permission of the copyright holder if you wish to copy or otherwise use copyrighted material.