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PREVIEW

OF UNITED STATES SUPREME COURT CASES

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Sackett v. EPA
and
Merrill v. Milligan

ENVIRONMENTAL LAW

Does the Clean Water Act's Jurisdiction Over "The Waters of the United States" Extend to Wetlands That Have No Direct Surface Connection to Navigable Waters?

CASE AT A GLANCE

Congress enacted the Clean Water Act (CWA) to eliminate the discharge of pollutants into the nation's "navigable waters." Asserting that a residential vacant lot owned by the Sackett family near Priest Lake, Idaho, is a wetland needing protection, the federal government prohibited the Sacketts from building their house without obtaining a CWA permit. The Sacketts challenged the government's action, arguing the CWA does not authorize regulation of wetlands that lack a direct and continuous surface connection to a navigable water.

Sackett v. EPA
Docket No. 21-454

Argument Date: **October 3, 2022** From: **The Ninth Circuit**

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Introduction

This appeal is Michael and Chantell Sackett's second trip to the Supreme Court over the 15-year life span of this litigation concerning their property near Priest Lake, Idaho. In *Sackett v. Environmental Protection Agency*, 566 U.S. 120 (2012), the Supreme Court's first decision in this case, the Court unanimously held the Sacketts could challenge the EPA's administrative compliance order immediately upon issuance without the agency first taking further action to enforce its order. The Court then remanded the case for the lower courts to decide the merits of the Sacketts' claims.

Congress enacted the Clean Water Act (CWA), 33 U.S.C. § 1251, *et seq*., to restore the chemical, physical, and biological integrity of the nation's waters and eliminate the discharge of pollutants into those waters at the source of the discharge. 33 U.S.C. § 1251(a). The CWA enables federal agencies, including the Environmental Protection Agency (EPA) and (Army Corps), of Engineers "Army Corps", to regulate "navigable waters," which the CWA defines as "the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7). The EPA and Army Corps have interpreted "waters of the United States" expansively, which interpretation the Court has weighed and analyzed with regard to the statutory language and purpose of the CWA.

As Justice Samuel Alito noted in his concurring opinion in the Sacketts' first appeal, "The reach of the Clean Water Act is notoriously unclear." But Congress has not acted to clarify the definition of "the waters of the United States," and the EPA and Army Corps have interpreted their regulatory jurisdiction broadly in order to accomplish the CWA's ambitious goals. Moreover, the Court has not been able to arrive at a consensus regarding the reach

of the CWA over wetlands in its last significant case interpreting "waters of the United States." In that case, *Rapanos v. United States*, 547 U.S. 715 (2006), Chief Justice John Roberts wrote a separate concurrence, lamenting that government's failure to implement clarifying rulemaking and the Court's lack of consensus meant that "lower courts and regulated entities will now have to feel their way on a case-by-case basis." As predicted, the Sacketts and the government have returned to the Supreme Court seeking further clarity.

Issue

What is the proper test for determining whether wetlands are "waters of the United States" under the CWA?

Facts

Michael and Chantell Sackett purchased a two-thirds–acre vacant lot in a residential subdivision near, but not on, the shore of Priest Lake in the Idaho panhandle. In 2007, after obtaining building and construction permits from local authorities, the Sacketts began preparing to build a house on the lot by moving earth and adding fill. The Sackett family's lot is bordered on the north by Kalispell Bay Road, a paved roadway. On the other side of the road is a manmade drainage ditch through which water, collected from the 35 acres of wetlands to the north, continuously flows. The water in the ditch flows into Kalispell Creek, which then empties into Priest Lake. The Sacketts' lot is bordered on the south by a gravel road, and on the far side of that road are a row of lakefront houses on Priest Lake. There is no direct surface-water connection between the Sacketts' lot and the lake, although a subsurface connection likely exists.

After the Sacketts began preparing the site to build their house, officials from the EPA and Army Corps issued the Sacketts an administrative compliance order, asserting the Sacketts' lot contained a wetland "adjacent to" Priest Lake (a navigable water) and that the Sacketts had unlawfully added fill materials to their lot—a discharge of pollutants under the CWA—without first obtaining a CWA permit. The EPA ordered the Sacketts to cease construction and restore the lot to its original preconstruction condition. The EPA claimed it could regulate the alleged wetland on the Sacketts' lot because the lot was "adjacent to" the drainage ditch under the Army Corps' regulations, notwithstanding the road barrier, and that the ditch was a tributary of Priest Lake. Failure to comply with the order could result in administrative and civil penalties of up to $75,000 per day.

The Sacketts stopped construction. But rather than expend the time (788 days on average) and expense ($271,596 on average) necessary to navigate the CWA permit process, the Sacketts filed a lawsuit under the Administrative Procedures Act (APA), 5 U.S.C. §§ 701–706, asking the U.S. District Court for the District of Idaho to enjoin enforcement of the EPA's compliance order. The Sacketts also sought a declaratory judgment that the compliance order exceeded the EPA's authority under the CWA.

Whether the Sacketts could challenge the EPA's compliance order under the APA was the subject of the Sacketts' first five-year journey to the Supreme Court. The district court dismissed the Sacketts' lawsuit, and the Ninth Circuit affirmed the dismissal because the EPA's compliance order was not yet final, and the EPA had not yet acted to enforce the order against the Sacketts. The Supreme Court unanimously reversed the lower courts' decisions, holding the EPA's compliance order was, in fact, a "final agency action" for which there was "no adequate remedy" apart from review of that order under the APA as the Sacketts had done. The Supreme Court directed the lower courts to adjudicate the Sacketts' claims, setting the path for the Sacketts' future return to the Court.

Following the Supreme Court's first decision, the EPA added a wrinkle to the case by amending its compliance order. Over the next seven years, the parties litigated issues raised in the amended order, after which the district court ruled in favor of the EPA on the merits. During the course of the Sacketts' ensuing appeal to the Ninth Circuit, however, the EPA added another wrinkle by withdrawing its now-12-year-old compliance order. In a two-paragraph letter to the Sacketts, the EPA informed them that "several years ago EPA decided to no longer enforce the [order] against you" and "EPA does not intend to issue a similar order to you in the future for this Site." The EPA then moved to dismiss the appeal as moot, arguing that the order's withdrawal gave the Sacketts the relief they requested. The EPA also argued the case was moot because the agencies had promulgated a new definition of "waters of the United States" in 2020.

The Ninth Circuit, not happy with the EPA's litigation strategy, denied the EPA's motion to dismiss the appeal as moot, explaining that the EPA's decision to no longer enforce its order was not binding on the agency and could be reversed in the future. Furthermore, the court noted the EPA continued to assert it had authority to regulate the Sacketts' property under the CWA if it later chose to do so. The court further stated that the 2020

regulation was irrelevant because the core of the Sacketts' APA claim was their challenge to the CWA's statutory definition, not the agencies' regulations interpreting and implementing the CWA.

With the mootness issue out of the way, the Ninth Circuit proceeded to the merits of the Sacketts' challenge. At issue was the test the court should use to judge whether the EPA had acted within its authority under the CWA. The Sacketts argued the court should evaluate the EPA's compliance order under the test articulated by Justice Antonin Scalia in *Rapanos*, which limits the wetlands the EPA can regulate to only those "with a continuous surface connection to" navigable waters. The EPA, by contrast, argued the court should employ Justice Anthony Kennedy's "significant nexus" test in *Rapanos*. The Ninth Circuit held "Justice Kennedy's understanding of 'significant nexus' provides the governing standard for determining when wetlands are regulable under the CWA." In so holding, the court explained that it was following its decision in a prior case and also agreed with the Seventh Circuit's decision to also utilize Justice Kennedy's test. The court held Justice Kennedy's test should be adopted under the Supreme Court's direction in *Marks v. United States*, 430 U.S. 188 (1977), which held that when a "fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'"

Using Justice Kennedy's test, the Ninth Circuit had no problem upholding the EPA's order under the then-existing Army Corps' regulation defining "waters of the United States." The regulation in effect at the time defined "waters of the United States" to include "'wetlands' that are 'adjacent' to traditional navigable waters and their tributaries." The regulations further provided that wetlands are "adjacent" to a navigable water if they "border" or "neighbor" a tributary to the navigable water despite the existence of an artificial barrier (like a road) between the wetland and the tributary. Accordingly, the Ninth Circuit held that the EPA "properly concluded that the wetlands on the Sacketts' lot were adjacent to the unnamed [ditch] tributary to Kalispell Creek thirty feet away, notwithstanding that Kalispell Bay Road lies in between the [Sacketts'] property and the tributary."

The Ninth Circuit further held that the wetland on the Sacketts' lot bore a "significant nexus" with Priest Lake because, as the EPA reasonably concluded, the Sacketts' lot, together with similarly situated lands in the region, "provide important ecological and water quality benefits…'especially important in maintaining the high quality of Priest Lake's water, fish, and wildlife.'" The court pointed out that the EPA reasonably determined that the "Sacketts' wetlands, combined with the similarly situated [Kalispell Bay] Fen [wetland complex], 'significantly affect the chemical, physical, and biological integrity of' Priest Lake.…" In short, the Ninth Circuit upheld the EPA's order and interpretation of the CWA.

The Sacketts again appealed to the Supreme Court. Fifteen years after the Sacketts attempted to begin construction on their home near Priest Lake, the Sacketts' lot remains vacant.

Case Analysis

This case presents the Supreme Court with a soggy middle ground to test the extent of the CWA's wetland jurisdiction. Both the Sacketts and the EPA ask the Court to formally adopt one of the divergent tests proposed in the Court's fractured *Rapanos* decision to determine whether a wetland is a "water of the United States" subject to regulation under the CWA. The Sacketts argue the Court should adopt Justice Scalia's reasoning, while the government counters that Justice Kennedy's "significant nexus" test is superior and was correctly applied by the Ninth Circuit to fulfill the purpose of the CWA.

The Sacketts assert their residential lot does not fall under the EPA's CWA jurisdiction because their lot, and any water that may be on it, has no continuous surface connection with a navigable water or with the drainage ditch on the other side of the road from their property. Moreover, any subsurface water flow between the wetlands located across the road from the Sacketts' lot flows toward, and not from, the Sacketts' lot, making any such subsurface flow unrelated and unconnected to the water in Priest Lake. The Sacketts argue the Court should adopt a two-step test following Justice Scalia's plurality opinion in *Rapanos* and drawing upon the Supreme Court's prior cases interpreting the CWA's jurisdiction, *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), and *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001). Justice Kennedy's "significant nexus" test, the Sacketts argue, is at odds with the statutory language of the CWA and the Supreme Court's precedents and presents problematic federalism issues.

In *Riverview Bayview Homes*, the Supreme Court unanimously upheld the extension of CWA jurisdiction to wetlands directly connected to a navigable water. Like the Sacketts, the landowner in *Riverside Bayview Homes* attempted to add fill to its property in preparation for homebuilding when the Army Corps demanded that construction cease unless and until the landowner secured a CWA permit. Unlike the Sacketts, the wetland on Riverside Bayview Homes' property was directly connected to and "extended beyond the boundary of" its property to the navigable waterway. While the Court acknowledged that, on a "purely linguistic level, it may appear unreasonable to classify 'lands,' wet or otherwise, as 'waters,'" the Court afforded deference to the Army Corps' implementing regulations under *Chevron USA v. Natural Resources Defense Council*, 470 U.S. 116 (1985), to hold that it was "reasonable for the Corps to interpret the term 'waters' to encompass wetlands adjacent to waters as more conventionally defined." Thus, given the "inherent difficulties of defining precise bounds to regulable waters, the Corps' ecological judgment about the relationship between waters and their adjacent wetlands provides an adequate basis for a legal judgment that adjacent wetlands may be defined as waters under the [CWA]."

The Supreme Court next tackled the breadth of the CWA's jurisdiction in *Solid Waste Agency*, where the Court struck down the Army Corps' "Migratory Bird Rule" as exceeding the authority granted by the CWA. In this case, the Army Corps asserted its CWA regulatory jurisdiction over an "abandoned sand and gravel pit in northern Illinois which provides habitat for migratory birds" but was not a wetland. The Army Corps, in an "attempt to 'clarify' the reach of its jurisdiction," promulgated a new regulation extending the definition of waters to include wholly intrastate waters "which are or would be used as habitat by other migratory birds which cross state lines." The Court held this was an overreach. The Court clarified its prior holding in *Riverside Bayview Homes*, where it had stated that the word "navigable" was of "limited import," by explaining that the statement did not mean a court should "give it no effect whatever." The Court said it, therefore, "declined" the Army Corps' "invitation to take what they see as the next ineluctable step after *Riverside Bayview Homes*: holding that isolated ponds, some only seasonal, wholly located within two Illinois counties, fall under [the CWA]'s definition of 'navigable waters' because they serve as habitat for migratory birds." The text of the CWA, the Court concluded, does not allow the federal government's jurisdiction to extend to "ponds that are not adjacent to open water."

Finally, in *Rapanos*, the Supreme Court confronted whether a wetland not directly connected to a navigable water fell within the federal government's CWA jurisdiction, but failed to provide a clear answer. John Rapanos wanted to build a shopping center on his 54-acre property that had "sometimes-saturated soil conditions." Although the nearest body of navigable water was over 10 miles away, there were nearby ditches or manmade drains that carried water from his property and eventually emptied it into navigable waters. The then-applicable regulation extended the Army Corps' CWA jurisdiction to include interstate waters and intrastate lakes, rivers, streams (including intermittent streams), and wetlands. The regulation also reached "tributaries of [such] waters," as well as "wetlands adjacent to [such] waters" and tributaries. The regulation broadly defined "adjacent" wetlands as those "bordering, contiguous [to], or neighboring" waters of the United States, including "wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like.…" The lower courts upheld the Army Corps' jurisdiction over the wetlands on the Rapanos' property because there was a hydrological connection between the wetlands and the navigable water and the Army Corps' regulations defining adjacency were entitled to deference under *Chevron*.

While a five-member majority of the Court agreed to vacate the decision of the court of appeals and remand the case for a determination regarding whether the wetlands were, in fact, adjacent to navigable waters, there was no majority view regarding how to define "the waters of the United States" as applied to these wetlands. Justice Scalia, writing for a four-member plurality, utilized a textualist approach, explaining that the CWA's "use of the definite article ("the") and the plural number ("waters") shows plainly that [the CWA] does not refer to water in general" but a subset of waters. According to the dictionary definition, he continued, "'the waters' refers more narrowly to water within geographical features, such as oceans, rivers, and lakes." Based on the Court's reasoning in *Riverside Bayview Homes* and *Solid Waste Agency*, Justice Scalia interpreted the CWA as reaching "*only* those wetlands with 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...." Under this standard,

Justice Scalia announced a two-part test for determining whether the CWA applies to a wetland: first, the adjacent channel must contain a "water of the United States" ("a relatively permanent body of water connected to traditional interstate navigable waters"), and second, the wetland must have a "continuous surface connection with that water, making it difficult to determine where the 'water' ends and the 'wetland' begins."

In a separate concurrence, Justice Kennedy proposed an alternative test based upon the key "significant nexus" phrase employed in *Riverside Bayview Homes*. He disagreed with the plurality, asserting that its textualist analysis read too many requirements into the CWA's definition of navigable waters at the expense of the CWA's purpose. But at the same time, in accordance with the Court's decision in *Solid Waste Agency*, Justice Kennedy stated the Court must "give the term 'navigable' some meaning." Justice Kennedy thus proposed that the Corps' jurisdiction over wetlands "depends upon the existence of a significant nexus between the wetlands in question and navigable waters in the traditional sense." A significant nexus exists sufficient to invoke the CWA's jurisdiction over a wetland, Justice Kennedy explained, when the "wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'"

Drawing on the *Rapanos* plurality test, the Sacketts argue the Supreme Court should adopt a two-part test (with three total subparts). First, a court should determine whether a wetland may be considered a "water" under the CWA. The wetland may be considered a "water of the United States" if two factors are satisfied: (1) there is a continuous and physical surface-water connection, such that it is difficult to say where the wetland ends and the "water" begins, and (2) the water connected to the wetland is a hydrogeographic feature ordinarily referred to as a "water," such as a stream, river, lake, or ocean. If the wetland may be considered a water after this analysis, the court should next determine whether the water falls within Congress's authority to regulate interstate commerce. The Sacketts acknowledge that Congress, through the CWA, intended to reach not just interstate navigable waters but also intrastate waters that "serve as a link in a channel of interstate commerce." But, the Sacketts argue, although the CWA may reach intrastate waters, that reach should be limited to waterways that link to interstate waters. If the EPA can regulate their property, the Sacketts posit, "it is hard to imagine any property in this country that would be exempt from EPA's reach."

The EPA, naturally, asks the Court to adopt Justice Kennedy's "significant nexus" test from *Rapanos*, as the Ninth Circuit did to uphold the EPA's jurisdiction over the Sacketts' property. The Court has long held that wetlands adjacent to navigable waters are included in "the waters of the United States." This fulfills the policy goals of the CWA because wetlands, including wetlands without a continuous surface connection to navigable waters, critically affect the chemical, physical, and biological integrity of the nation's navigable waters. The EPA argues the "significant nexus" test more fully enables the government to fulfill the CWA's purpose and more faithfully follows the Court's reasoning in *Riverside Bayview Homes*. Furthermore, the EPA argues that requiring a "continuous surface connection" with a navigable water makes little sense because it leads to arbitrary and illogical results, especially where an artificial barrier may be relatively insignificant and changeable, and a pervasive hydrological connection may exist regardless of the barrier. This requirement, the EPA continues, also relies upon a misreading of *Riverside Bayview Homes* because the plurality in *Rapanos* "misconceived the nature of the line-drawing problem" in *Riverside Bayview Homes* by conflating the Court's examples of "areas that are not wholly aquatic but nevertheless fall far short of being dry land" with an outer boundary of a covered water. The *Rapanos* plurality erred, the EPA continues, by using those examples to "determine whether particular types of hydrogeographic features should be regarded as 'waters' under the Act." The EPA takes further exception to the Sacketts' proposed test because it attempts to improperly foreclose CWA jurisdiction over artificial tributaries—despite the CWA's express contemplation of regulation of drainage ditches—beyond even what the *Rapanos* plurality required. As the EPA concludes, the Ninth Circuit's application of the "significant nexus" test especially makes sense in cases like this, where the tributary of the navigable water is only separated from the wetland on the Sacketts' property by 30 feet, and the Sacketts' property lies only 300 feet away from Priest Lake.

Significance

The Ninth Circuit aptly noted that "[s]ince the CWA was enacted, agencies and courts have struggled to identify the outer definitional limits of the phrase 'waters of the United States,' which in turn defines the scope of the

federal government's regulatory jurisdiction under the CWA." The frustration regarding the reach of the CWA and the EPA's enforcement regime has been expressed by multiple members of the Supreme Court through plurality and concurring opinions in *Solid Waste Agency*, *Rapanos*, and the Court's prior decision in this case. The past three presidential administrations' successive issuances of multiple proposed rules redefining "the waters of the United States," and the associated court challenges, has further muddied the waters. In August 2021, the U.S. District Court for the District of Arizona vacated the Navigable Waters Protection Rule that had been proposed in 2020; and in November 2021, federal agencies, including the EPA, announced a new proposed rule intending to "put back into place the pre-2015 definition of 'waters of the United States,' updated to reflect consideration of Supreme Court decisions." The Supreme Court's decision in this case could potentially settle the question and provide clarity and guidance outlining the jurisdiction of the CWA to wetlands and the definition of "the waters of the United States."

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