U.S. Supreme Court Drastically Restricts When Construction Needs a Federal Clean Water Act Permit*

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Ten years ago, we represented a property owner who had obtained local zoning and wetlands permits to build 299 homes on 364 acres. Part of the land to be developed was an agricultural field that flooded during the spring. The flood water spilled over a berm, into a ditch, into a tributary of a river, then into a small river, and eventually into a large river. Only the large river was a so-called "traditional navigable waterway," in that it flowed across a state line and was deep and wide enough to carry interstate commerce. But the U.S. Army Corps of Engineers determined that the *agricultural field*, which was only wet for several weeks per year, had a "significant nexus" to the large river, and thus *the field* was a "water of the United States." As a result, the property owner, before preparing the land for residential construction, had to obtain a federal § 404 Clean Water Act permit from the Army Corps.

That permit process took two-and-one-half years; cost the property owner about $250,000; required the owner to dedicate 85 acres as permanent open space; and was conditioned on various other on-site mitigation projects. The delay and expense of the federal § 404 process ended up being a major factor in the development never being built.

But under a May 25, 2023 decision of the U.S. Supreme Court, this scenario should never recur because the Court has eliminated the "significant nexus" test for federal Clean Water Act permitting that was the basis of the Army Corps' demand that our client obtain a § 404 permit. Under the new decision, the large river is a water of the United States, but the field, the berm, and the ditch are not. The tributary and the small river would only require a § 404 permit if they had a "relatively permanent, continuous" flow into the larger river. Across the country, the Supreme Court has reduced the permitting jurisdiction of the U.S. EPA and the Army Corps by *millions of acres*.

It is hard to overstate the impact of *Sackett v. Environmental Protection Agency* (*https://www.supremecourt.gov/opinions/22pdf/21-454_4g15.pdf*).

Background

The federal Clean Water Act requires anyone proposing to discharge pollutants, including building foundation materials such as rocks and dirt, into "waters of the United States," to obtain a permit. A property owner proposing to fill or excavate a site must first determine whether any part of the construction will occur within a water of the United States. EPA and the Army Corps have issued regulations and guidance, but defining what the Court has called "the outer reaches of the Clean Water Act" has been notoriously difficult.

In a 2006 decision, *Rapanos*, the U.S. Supreme Court attempted clarification, but failed. In that case, one justice suggested, as a middle ground, that the Act be construed to cover navigable waters plus wetlands that have a "significant nexus" to a navigable water, and within which construction could impact the "chemical, physical, and biological integrity" of a navigable water.

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* *This article can be found at: https://www.hinckleyallen.com/publications/u-s-supreme-court-drastically-restricts-when-construction-needs-a-federal-clean-water-act-permit/. Attorneys Hollister and Gomes practice in Hinckley Allen's Hartford office. Attorneys Main and Dieter practice in the firm's Providence, Boston, Hartford, and New York offices. Bidushi Adhikari is a law student at Boston University and a 2023 Summer Associate at Hinckley Allen.*

After *Rapanos*, EPA and the Corps began to use the significant nexus test as the standard but requiring a permit from every property owner whose proposed construction activity had *either* a chemical, physical, *or* biological connection, however attenuated, to a traditional navigable water – such as the agricultural field of our client.

The *Sackett* Decision

The Sacketts, who live in Idaho, filled part of a small lot as part of building a house. The lot was "adjacent to" – near but separated by a road – an unnamed tributary that fed into a non-navigable creek, that fed into Priest Lake, a lake wholly located within Idaho but considered to be navigable. The Corps served the Sacketts with a notice of violation. The Sacketts sued the Corps for an illegal assertion of jurisdiction, and ultimately, they appealed to the U.S. Supreme Court. In its new decision, the Court threw the significant nexus test into the dust bin, reasoning that its limits were impossible to determine, and covered a "staggering" amount of dry or only intermittently wet land. In place of significant nexus, the Court held that construction proposed in water bodies that are not a traditional navigable water, and wetlands and other bodies of water that don't have the physical connection to a navigable water as described in *Sackett*, no longer need a federal Clean Water Act permit.

Pointers, Caveats, Takeaways

1. Under *Sackett*, a traditional navigable water has at least three characteristics: interstate, navigable, and used in commerce (or capable of being used, with reasonable improvements to the waterbody). In addition, a regulated water of the U.S. is now limited to a traditional navigable water, and any waterbody or wetland that is permanent and has a continuous surface water connection, such that the waterbody or wetland are indistinguishable from the navigable water.

2. An astounding feature of the *Sackett* decision is that all nine Justices voted to overturn the significant nexus test and adopt the narrower definition.

3. The decision was written by Justice Alito and is another example of the Court curtailing federal government authority and returning regulation to the states.

4. There will still be debates on jurisdiction, including the meanings of permanent, continuous, navigable, and adjacent. Another interesting question will be whether droughts or floods stemming from climate change can alter whether a water body or land is covered by the Act.

5. The *Sackett* decision should be read with these cautions:

- In response to *Sackett*, EPA and the Army Corps have apparently paused all permitting activity while they figure out what to do;
- As of the date of this alert, federal courts in Texas and North Dakota have granted motions by the federal government to "stay" lawsuits seeking to vacate the Biden administration's January 2023 proposed definition of waters of the United States, until EPA and the Army Corps publish a revised regulation;
- It is unlikely that previously issued federal permits will be affected, modified, or vacated; and
- The *Sackett* decision itself cautions against property owners building berms or similar structures to try to defeat Clean Water Act jurisdiction.

While federal Clean Water Act jurisdiction has been curtailed, every state unquestionably has "police power" authority to define and regulate intrastate water bodies and wetlands. In response to *Sackett*, each state will now have a choice to modify its regulations to assert control over construction now released from federal jurisdiction or do nothing. In our next commentary about *Sackett*, we will explain how wetlands regulation may evolve in jurisdictions where Hinckley Allen lawyers practice environmental law: Massachusetts, Rhode Island, New Hampshire, New York, and Connecticut. More to follow.

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