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The U.S. Supreme Court Narrows Federal Agency Regulation of Wetlands

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On May 25, 2023, the United States Supreme Court, in the case of *Sackett v. Environmental Protection Agency*, unanimously ruled that the Clean Water Act's (Act) regulations governing "wetlands" are not as broad and far-reaching as the U.S. Environmental Protection Agency (EPA) and Army Corps of Engineers desire to assert jurisdiction. Rather, in a clear rebuke to the federal agencies, the Court held that for wetlands to be regulated under the Act, the wetlands must be "waters of the United States" (waters connected to traditional navigable waters) and have a continuous surface connection with that water, "such that it is difficult to determine where the 'water' ends and the 'wetland' begins." The Court's decision will have a profound impact on how federal agencies regulate wetlands for years to come and will certainly reduce federal agency jurisdiction.

Background

The regulation of wetlands has a long and tortured history in the courts and in its application. The federal agencies gave the term "wetlands" a broad and expansive meaning under the Act's regulation of "waters of the United States" to include adjacent wetlands that are "bordering, contiguous or neighboring". See 40 C.F.R. § 203.3(b). The Court has grappled with the competing definitions, meanings, and regulations for years in cases such as *U.S. v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers*, 531 U.S. 159 (2001), and *Rapanos v. United States*, 547 U.S. 715 (2006). As Justice Samuel Alito asked rhetorically in the Court's majority opinion in *Sackett*, "What are landowners to do if they want to build on their property?" These Court decisions which preceded *Sackett* have frustrated the regulated community and stymied projects (and economic development) using confusing or complicated standards or criteria such as "significant nexus" with a lengthy list of hydrological and ecological factors. Under the current regulatory regime, traditional navigable waters, interstate waters, tributaries, and adjacent wetlands, including interstate lakes, ponds, and streams were federally regulated. This regulatory approach essentially captures all waters, as the layperson may know it, and places people and projects at risk of a lengthy, expensive permit process, or worse, federal, civil, or criminal enforcement. As the Court observes in *Sackett*, the Act has become a "potent weapon" with "crushing consequences even for inadvertent violations."

In 2004, Michael and Chantell Sackett purchased a small lot near Priest Lake, just north of Coeur d'Alene, Idaho. Preparing to build a home on the lot, the Sacketts backfilled their property with dirt and rocks. The Sacketts were unaware that their lot contained "wetlands." A few months later, the EPA served a compliance order on the Sacketts, stating that their backfilling violated the Clean Water Act. The order directed the Sacketts to restore the property to its condition before the backfilling and warned that failure to comply exposed them to civil penalties of over $40,000 per day. The Sacketts did not believe they violated the Act and filed suit against the EPA.

The Clean Water Act protects "waters of the United States." Over the years this phrase has been stretched, beyond recognition, by regulation and case law. EPA regulations expounded on the phrase "waters of the United States" to encompass "all waters…that could affect interstate or foreign commerce" and "wetlands adjacent to those waters."

The Sacketts probably could not have dreamed that moving dirt and rock on their property could be regulated by the Clean Water Act. They likely had no expectation that a wetland on their lot could be construed as being "adjacent" to navigable or interstate waters. But "adjacent" had been defined by the EPA to mean "bordering" or "contiguous" or "neighboring." Thus, the EPA directed its agents to assert jurisdiction and regulate the disturbance of a wetland "adjacent" to non-navigable tributaries when the wetland had "a significant nexus to a traditional navigable water." According to the EPA, a "significant nexus" existed when "wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical and biological integrity" of those waters.

In writing the Court's opinion in the *Sackett* case, Justice Samuel Alito explained that the EPA's definition of "adjacent to" meant, "in the same neighborhood." The Sackett lot was separated from an unnamed tributary by a 30-foot road. The tributary fed into a creek that emptied into Priest Lake. As Justice Alito pointed out, it was not the EPA's position that the Sackett wetland significantly affected the ecology of Priest Lake. Instead, the EPA coupled the Sackett wetland with a large wetland area *in the neighborhood* and concluded that, collectively, these wetlands impacted the ecology of Priest Lake.

Impact of the *Sackett* Decision

By ruling in the Sacketts' favor, the Court has now terminated the federal agencies' overly expansive interpretation and enforcement of wetlands. The Court concluded that the Clean Water Act regulates navigable waters which are "waters of the United States." And importantly, the meaning of waters includes "only those relatively permanent, standing or continuously flowing bodies of waters..." that is in ordinary parlance, streams, oceans, rivers, and lakes. The Court reached this conclusion in light of the Act's consistent use of the word "waters" elsewhere in the statute and the critical phrase "waters of the United States." To fall under federal regulation, wetlands must be "indistinguishable from waters of the United States"; meaning a relatively permanent body of water connected to traditional navigable waters and have a continuous surface connection with that water. In essence, the waters in question must adhere to the Clean Water Act's meaning, not the federal agencies' expansive interpretation. Hopefully, this common-sense, practical approach will allow the regulated community more consistent decision-making by all agencies where the project involves wetlands.

The decision in *Sackett* may trigger legislation and regulation in the states to assume some of the regulatory reach that *Sackett* has removed from the EPA and the Army Corps of Engineers. Justice Alito points out that the federal Clean Water Act expressly recognizes the responsibility of the states to "prevent, reduce, and eliminate pollution" and to plan the development and use of land and water resources. Landowners and land developers should anticipate a regulatory push by environmentalists and prepare to respond.

If you would like more information on the Court's decision and how it could impact you or a project, please contact Charles R. Schaller or Michael T. Dawkins or a member of our Real Estate team or Government Enforcement and Investigations team.