***Sackett v. EPA*: Wading Through the Muck to Navigate a Path Forward**

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I. Introduction

In 2021, a record-breaking 297 million people recreationally visited the various national parks across the United States.[1] Nonetheless, the United States is a nation where the notion of preserving natural resources is in constant battle with the incessant desire for economic growth and human entitlement to property rights. The tension between these interests is demonstrated in conversations around the nation's waters. Equitable access to clean, readily available water is a principle carried over from English Common Law, as is the sentiment that one's labor mingled with the earth establishes an inherent value worthy of protection by law. Our federal government is tasked with balancing these factors when creating, adapting, stretching, and redacting environmental initiatives. At issue in this paper is the notoriously vague definition of "navigable waters" within the Clean Water Act of 1972 ("CWA"), the potential modification of its meaning as it relates to wetlands, and the implications of any such decision-making.

The CWA is a comprehensive piece of legislation passed in 1972. The CWA was not a wholly new piece of legislation, but instead was built upon the Federal Water Pollution Act of 1948.[2] The CWA created a structure to regulate pollutants in the "waters of the United States" ("WOTUS"); it established baseline standards for surface water contaminants; it created a legal permitting process for point source pollution; it funded sewage treatment plants; and it began national conversations about non-point source pollution problems (ozone, fertilizer runoff, smog,

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[1] *Annual Visitation Highlights,* NPS.GOV, https://www.nps.gov/subjects/socialscience/annual-visitation-highlights.htm (Last updated July 26, 2022).
[2] *History of the Clean Water Act*, EPA.GOV, https://www.epa.gov/laws-regulations/history-clean-water-act (last updated July 6, 2022).

and greenhouse gas emissions to name a few of these problems).[3] The CWA broadly establishes the commitment to maintain the quality of our nation's waters, which include "navigable waters."[4] The organizations largely responsible for this task are the United States Army Corps of Engineers ("Corps") and the United States Environmental Protection Agency ("EPA"). These federal agencies have created their own, more specific definitions for what constitutes "navigable waters" subject to their purview under the CWA, and they have been recently contemplating the role of "wetlands" as "navigable waters" or as waters "adjacent" to "navigable waters." Wetlands and how they relate to navigable waters regulated under the CWA is of relevance because water from these bodies affect the quality and quantity of the traditional navigable waters. Wetlands are thus an important fixture in agency regulation of WOTUS pollutants. Wetlands are also an increasingly popular real estate option for residential and commercial ventures.

Sackett v. EPA, a case now pending in the Supreme Court of the United States, has sparked contentious debate over the definitional parameters of a "wetland" when a couple in Idaho—the Sacketts— bought a lot containing a wetland and filled the lot without seeking a permit to do so. *Sackett* is fundamentally about regulating pollutant discharge in wetlands adjacent to traditionally navigable waters of the United States, demanding a determination for when wetlands should be a jurisdictional water within the CWA. In *Sackett v. EPA*, although the Supreme Court is likely to rule in favor of the Sacketts, Congressional intent and legislative history suggest that the Supreme Court should rule in favor of the EPA in order to affirm that the EPA is the best situated body to regulate WOTUS and should thus have more sweeping authority to do so. Holding for the Sacketts would unnecessarily limit the EPA's permitting authority over

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[3] *Id.*
[4] 33 U.S.C. § 1251(a).

waters that fail to meet the continuous surface connection standard (i.e., adjacent, non-navigable, wetlands, tidal estuaries, etc.).

II. *Sackett v. EPA*

Plaintiffs Chantell and Michael Sackett purchased a residential lot on a wetland near Idaho's Priest Lake.[5] The Sacketts wanted to develop the soggy lot, but the EPA had previously ruled that building on the lot unpermitted would violate the CWA.[6] Nonetheless, the Sacketts began to fill the lot with sand and gravel, compelling the EPA to send an administrative compliance order to the Sacketts, demanding that they restore the property to its natural state.[7] The EPA claimed that the Sacketts' property fell under their permitting authority as a wetland, and that the Sacketts did not have adequate permitting under § 404 of the CWA.[8] The Sacketts sued the EPA in 2008, arguing that the EPA's jurisdiction under the CWA did not extend to their property.[9] This case has been in the federal court system for over fourteen years now.

On October 3, 2022, oral arguments for *Sackett* were finally heard in front of the Supreme Court of the United States.[10] The EPA argued the Sackett lot was a wetland, and as such, qualified as part of the "navigable waters" the Act tasks the EPA with regulating.[11] The EPA's argument hinged on existing precedent, demanding employment of the significant nexus test when determining whether a wetland is covered under the CWA.[12] Alternatively, the Sacketts responded that the EPA's test created an attenuated connection through a significant nexus framework, but a better framework for analysis would be the continuous surface connection

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[5] Sackett v. United States EPA, 8 F4th. 1075 (9th Cir. 2021).
[6] *See Id.*
[7] *Id.*
[8] *Id.*; *See* also 33 U.S.C.§ 1341.
[9] *See Id.*
[10] *See* Sackett v. EPA, No. 21-454 (U.S. argued Oct. 3, 2022).
[11] *See id.*
[12] *Id.*

test.[13] Thus, *Sackett* has tasked the Supreme Court—decision still pending—with the following question: “What is the proper test for determining whether wetlands are ‘waters of the United States’ under the Clean Water Act?”[14]

III. Brief History of the Clean Water Act

Federal jurisdiction over WOTUS is codified by the CWA.[15] The CWA was an expansion of the 1948 Federal Water Pollution Control Act, which deals with regulating pollutant discharge into navigable waters of the United States, particularly surface waters.[16] The CWA defines “navigable waters” as “waters of the United States, including the territorial seas,[17] but the law does not further define the scope of federal jurisdiction. In practice, the role of interpreting the CWA has been left to the EPA and Corps who are guided by the CWA policy goals set forth in §101 of the Code of Federal Regulations and §1251 of the United States Code.

The overarching objective of the CWA is to restore and maintain the chemical, physical, and biological integrity of the nation’s waters.[18] Navigable waters are waters that have been or could be used for commerce and interstate transport.[19] Additionally, once those waters have been deemed navigable, such waters cannot be distinguished otherwise.[20] The Ninth Circuit appellate court decision of *Sackett v. EPA* argues that "waters of the United States" includes "wetlands" that are "adjacent" to traditional navigable waters and their tributaries.[21] "Wetlands" were defined as "areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of

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[13] *Id.*
[14] *Id.*
[15] 33 U.S.C. § 1251 *et seq*.
[16] *See History of the Clean Water Act, supra* note 2.
[17] 33 U.S.C. § 1362(7).
[18] 33 U.S.C. § 1251(a).
[19] 33 C.F.R. § 329.4 (2022).
[20] *Id.*
[21] *See* Sackett v. United States EPA, 8 F4th. 1075 (9th Cir. 2021).

vegetation typically adapted for life in saturated soil conditions."[22] Further, "adjacent" was defined as "bordering, contiguous, or neighboring," and the regulations explicitly stated that "adjacent wetlands" where an artificial barrier or dike was raised to separate them from waters of the United States were not excluded.[23] These variable definitions all point towards the idea that wetlands adjacent to traditional navigable waters should be included in jurisdictional authority of the EPA under the CWA.

One of the national goals set forth in the CWA is to eliminate the discharge of pollutants into WOTUS by 1985.[24] Other primary objectives include (1) maintaining the chemical, physical, and biological integrity of US Waters; (2) regulating the discharge of pollutants; (3) and improving water quality—all of which indicate the ultimate intent of the act is monitoring polluters. Supreme Court precedents have shaped agency implementation of the CWA by defining the scope of agency authority in cases like *United States v. Riverside Bayview Homes, Inc.*, *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, and, most impactfully, *Rapanos v. United States*.[25]

In *Riverside Bayview Homes,* the Supreme Court held that adjacent wetlands fell within the scope of the CWA and could be regulated by federal agencies.[26] In *SWANCC,* the Supreme Court placed limitations on the Corps "Migratory Bird Rule," which expanded jurisdiction to intrastate waters including isolated wetlands, which provided habitat to some migratory bird populations.[27] At the same time, the Supreme Court upheld a joint definition (Corps and EPA) for WOTUS to

[22] *See id; See also* 33 C.F.R. § 328.3(b) (2008).
[23] *See* 33 C.F.R. § 328.3(c) (2008).
[24] 33 U.S.C. § 1251(a)(1).
[25] United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985); Solid Waste Agency of N. Cook Cnty. v. United States Army Corps of Engineers, 531 U.S. 159 (2001); Rapanos v. United States, 547 U.S. 715 (2006).
[26] *See* Riverside Bayview Homes, Inc., 474 U.S. at 135.
[27] *See* Solid Waste Agency of N. Cook Cnty, 531 U.S. at 168.

include navigable rivers, their tributaries, and adjacent wetlands.[28] At issue in each of these cases was the question of "What constitutes waters of the United States under the CWA?"—a central question posed in *Sackett*. *Rapanos* continues these conversations and provides two different approaches to answering the question: (1) the "significant nexus test" written by Justice Kennedy and (2) the "continuous surface connection test" written by Justice Scalia.[29]

IV. Rapanos Tests

In *Rapanos,* Plaintiff John Rapanos sought to fill in three wetland areas on his property to build a shopping center.[30] The Supreme Court, in trying to create a test for when wetlands constitute jurisdictional waters under the CWA, failed to reach a majority opinion, and instead developed Scalia's continuous surface connection test as the plurality opinion of the court and Kennedy's significant nexus test, which is the prevailing precedent as the most narrowly written non-majority opinion.[31]

Kennedy's significant nexus test requires that a wetland is: (1) adjacent to traditional navigable water of the United States or (2) adjacent to a tributary that flows into a navigable water AND it satisfies the significant nexus test.[32] To satisfy the significant nexus test, the wetland must influence the chemical, physical, and biological integrity of navigable water.[33] Justice Kennedy's significant nexus test grants the EPA greater leeway in exercising regulatory authority over wetlands, where a significant nexus of activity makes exchange between bodies likely.[34]

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[28] *Id.* at 160-161.
[29] Rapanos v. United States (Scalia), 547 U.S. at 167 AND (Kennedy) at 167, 172.
[30] *Id.* At 1.
[31] *See generally id.*
[32] *Id.* at 164-166.
[33] *Id.*
[34] *Id.* At 21-24.

Scalia's continuous surface connection test covers a wetland under the CWA if: (1) the adjacent channel contains waters of the United States, AND (2) the wetland has a continuous surface connection with that water, making it difficult to determine where the "water" ends, and the "wetland" begins.[35] Scalia's test, though more of a bright line rule, still requires discernment by the judiciary to determine where the adjacent waters stop and start. The continuous surface connection test would restrict EPA's regulation of wetlands by limiting its authority primarily to adjacent navigable waters with a continuous surface connection, leaving many wetland properties largely unaccounted for and thus unregulated.

V. Developments Since *Rapanos*

The EPA and Corps have not been passive since the most recent ruling under *Rapanos.* Instead, they have integrated the significant nexus test into their deliberative framework for their definition of WOTUS in 2008, which was then clarified under the 2015 Clean Water Rule.[36] These developments, along with the recently published definitions for WOTUS released by the Biden administration,[37] have played a significant role in the oral arguments presented to the Supreme Court. The EPA argued in *Sackett* that, while the new agency rules do not inherently require either standard, the significant nexus test better reflects the standards set by the EPA since *Rapanos*.[38] The new definition does not set specific distance limits for wetlands, but upstream water resources that significantly affect the quality or quantity of that water are now

[35] *Id.*
[36] Jonas Monast, Enhancing the Role of Wetlands in Flood Mitigation: Policy Recommendations for North Carolina (May 2021) (unpublished manuscript) (North Carolina Collaboratory).
[37] Jaycee Dean & Nicole Granquist, *Biden Administration Finalizes Waters of the United States Rule in Latest Move Involving Ongoing Water Quality Saga*, JDSUPRA.COM (Jan. 6, 2022) https://www.jdsupra.com/legalnews/biden-administration-finalizes-waters-2595562/.
[38] *See* Sackett v. United States EPA, 8 F4th. 1075 (9th Cir. 2021).

included.[39] Additionally, adjacent wetlands meet jurisdictional standards if they (1) are relatively permanent; (2) meet the significant nexus standard; or (3) are adjacent to WOTUS.[40] In December 2022, the EPA reached out directly to the Supreme Court, explaining how their new rules provided additional guidance to Justice Kagan's questions.[41] It remains to be seen how these new rules will affect the Supreme Court's decision in *Sackett,* but the new rule provides a possible middle-road for a textualist approach that embraces the significant nexus test.

VI. Outcomes of *Sackett v. EPA*

A. *Continuous Surface Connection Test (Bright Line Rule)*

The Supreme Court will likely create a new precedent and rule in favor of the Sacketts and in support of the continuous surface connection test (a bright line rule). Oral arguments revealed small indications of where the Supreme Court justices' concerns lay on this matter with six justices asking questions leaning towards textualist approaches predicated upon legislative intent (Roberts, Kavanaugh, Coney Barrett, Brown Jackson, Sotomayor, and Kagan). This outcome is likely largely because the composition of the Court has shifted ideologically since the *Rapanos* holding. Roberts, Thomas, and Alito were all part of the Scalia plurality in *Rapanos*, and it is reasonable to presume they will vote as they did in that case.[42] The three new

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[39] *EPA and Army Finalize Rule Establishing Definition of WOTUS and Restoring Fundamental Water Protections*, EPA.GOV (Dec. 30, 2022) https://www.epa.gov/newsreleases/epa-and-army-finalize-rule-establishing-definition-wotus-and-restoring-fundamental.
[40] *Id.*
[41] Letter from Respondents Notifying the Court of the Joint Final Rule Agreed on Between the EPA and the Dept. of the Army Regarding "Waters of the United States" under the Clean Water Act, Sackett v. EPA, No. 21-454 (argued Oct. 3, 2022).
[42] *See* Rapanos v. United States, 547 U.S. 715 (2006). Of these justices, Roberts is by far the most likely to change his vote. As a textualist that asked relatively sympathetic questions to the EPA, Roberts demonstrated some reticence to accept Sackett's characterization of how the two *Rapanos'* tests work and whether the facts in this case would not be satisfied under either of those standards.

conservative justices (Gorsuch, Kavanaugh, and Coney Barrett) are likely to vote with their conservative colleagues, as they have tended too thus far in their tenures.[43]

As a bright line rule, the continuous surface connection test will leave less discretion to EPA administrators to make case-by-case determinations. This will likely shrink their capacity to regulate cases that do not fit neatly into the continuous surface connection test categories like the Sackett's. This will dramatically limit the EPA's capacity to regulate wetlands, and adjacent waters. Developers, contractors, and those seeking to build in these often-scenic spaces will appreciate the EPA's limited authority to regulate their activities in these spaces, as they are often highly valuable pieces of property. Clean water advocates, commercial/residential fishing groups, and recreational waterway users will likely be frustrated that the EPA cannot limit projects which could detrimentally impact water quality.

B. Significant Nexus Framework (Flexible Legal Standard)

The three progressive justices (Sotomayor, Kagan, and Brown Jackson) are likely to rule in favor of the EPA. These justices seemed compelled by the argument that legislative history paired with the text of the CWA meaningfully defined navigable waters as inclusive of bodies adjacent to wetlands like the one at issue in *Sackett*. The CWA's policy goals, and its legislative history support a ruling for the EPA, solidifying the use of the significant nexus framework for judicial analysis.[44] This is because the EPA believes the significant nexus test better fulfills the CWA policy objective of improving the chemical, biological, and physical integrity of the nation's waters by regulating the entry of pollutants.[45]

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[43] Kavanaugh and Coney-Barrett seemed interested in detail-oriented questions most closely aligned with Roberts and the progressive justices, but it is reasonable to assume they will still vote in favor the Sacketts and the use of continuous surface connection test.
[44] *See* 33 U.S.C. § 1251 *et seq.*; *See also* Rapanos v. United States, 547 U.S. 715 (2006).
[45] *See id.*

As a flexible legal standard, the significant nexus test allows the agency decision makers nuance to make determinations in their permitting and enforcement on a case-by-case basis. As the current precedential standard (as the most narrowly written concurrence), ruling in favor the EPA would not cause a dramatic shift in the regulatory powers of the EPA. A ruling in favor of the significant nexus test would complement the EPA's newly written rules, which seek to allow a contextual tailoring of decisions by EPA administrators. Developers, contractors, and those seeking to build in these often-scenic spaces will be frustrated by the EPA's continued authority to limit development in these spaces and will argue that this is a limitation of their property rights. Meanwhile, clean water advocates, commercial/residential fishing groups, and recreational waterway users may see this as a bolstering of their property rights to use and enjoy clean waterways.

VII. Conclusion

Waters of the United States will remain an ambiguous term where United States courts will need to determine whether a contested property truly is subject to the auspices of the EPA's and Corps' regulating authorities. *Sackett v. EPA* empowers the Supreme Court to solidify the role of expert agencies—the EPA and Corps— as the best possible bodies to define and broadly regulate "waters of the United States" codified under the CWA. Instead, the Supreme Court is likely to rule in favor of the Sacketts and the continuous surface connection test from *Rapanos.* This decision will limit the EPA's permitting authority over wetlands that do not meet the continuous surface connection standard (i.e., adjacent, non-navigable, wetlands, tidal estuaries, etc.), leading to degraded water quality. A decision diametrically opposed to the CWA's objective to improve the quality of the waters of the united States by regulating pollutants.