

The EPA Strikes Back

 briscoelaw.net/the-epa-strikes-back

April 1, 2024



The Supreme Court's decision in *Sackett v. EPA* profoundly limits the regulatory authority of the US Environmental Protection Agency and US Army over wetlands under the Clean Water Act. The *Sackett* decision has been estimated to foreclose federal regulatory over half of the nation's wetlands.

It would have been a mistake, however, to expect the EPA to lay down its authority without pushing back. And pushing back it is.

New (And Improved) Test for Clean Water Act authority over wetlands under *Sackett v. EPA*

The recent decision in *Sackett v. U.S. Environmental Protection Agency*, 598 U.S. 651 (2023), limits the reach of the Clean Water Act to wetlands which are "indistinguishable" from other regulated waters. 598 U.S. at 676, 678-79, 684. The decision elaborates on the term "indistinguishable": a continuous surface connection *such that* there is no clear demarcation between the wetland and the regulated water, and it is difficult to say where one ends and the other begins. *Id.* at 678-79. Based on this standard, the Supreme Court was able to say as a matter of law that no wetland on the Sacketts' residential lot could be regulated under the Clean Water Act because the lot is separated by a thirty foot wide road from the nearest other watercourse, a drainage ditch on the far side of a road. *Id.* at 684, see also *id.* at 662-63. The Court did not consider whether the ditch is regulated, since the Sacketts' property was distinguishable from it in any event. The terms "indistinguishable," "continuous surface connection," "no clear demarcation," and "difficult to say" all derive from the 2006 *Rapanos v. United States* plurality opinion, which the *Sackett* court generally adopts to the extent of its treatment of adjacent wetlands. *Sackett*, 598 U.S. at 678 (citing *Rapanos v. United States*, 547 U.S. 715, 742, 755 (2006)).

Throughout the *Sackett* decision, "indistinguishability" is the standard established by the Court. The expression is used five times, including in the final section of the opinion of the Court applying the standard to the Sacketts' lot. 598 U.S. at 684. The phrase "continuous surface connection" is only used as a way of expressing what "indistinguishable" means, and always in the same sentence with either or both of the phrases "no clear demarcation between" and "difficult to say" where the regulated water ends and the wetland begins. 598 U.S. at 678-79. "Continuous surface connection" only ever appears in the context of, and as a connector between, the phrases "indistinguishable" on the one hand and the phrases "no clear demarcation," and "difficult to tell" on the other hand. *Id.*

Sackett also expressly states that natural barriers sever jurisdiction, 598 U.S. at 678 n.16, and concludes that the manmade barrier in the case (Kalispell Bay Road, a thirty foot wide paved road, *id.* at 662-63) severs jurisdiction without reference to whether the manmade barrier is permeable, *id.* at 684 (no discussion of whether culverts connect Sackett property to ditch across road).

EPA and the Army "Declare Victory" With Conforming Rule

However, the stance that the EPA and Army Corps have taken in response to *Sackett* is substantially broader than the indistinguishability test adopted in the decision. The agencies issued a regulation a few months after the decision that purports to conform their regulatory definition of regulated "adjacent wetlands" to the *Sackett* decision. 88 Fed. Reg. 61,964 (Sept. 8, 2023) (Conforming Rule). The new regulatory text replaces the long-standing definition of "adjacent" as "bordering, contiguous, or neighboring" with the phrase "continuous surface connection." 88 Fed. Reg. 61,964, 61,969. The Conforming Rule also excises all references to the "significant nexus" test as a basis for Clean Water Act authority, based on the Supreme Court's unanimous rejection of that standard in *Sackett*. You can see a table showing the results of the new regulation [here](#).

Subsequent developments show that the agencies read “continuous surface connection” far more broadly than *Sackett* allows, and in a manner that reverts back to the agencies’ practice prior even to *Rapanos*: the “mere hydrologic connection” approach.

The Conforming Rule revises the regulatory definition of “navigable waters” (or “waters of the United States”) published in the Federal Register in January of 2023. See 88 Fed. Reg. 3004 (January 18, 2023) (2023 Rule). An Interagency Coordination Memo released in September 2023 confirms that the agencies will continue to read “continuous surface connection” broadly, i.e. as they always have and without the “indistinguishability” limit that *Sackett* imposes.

The agencies post-*Sackett* approach to “continuous surface connection” includes wetlands that are connected by non-jurisdictional ditches, swales, pipes, or culverts to another regulated water body, under conditions that allow some water to pass at least occasionally between the wetland and the regulated water in one direction or another. *Id.* This “daisy chain” connection is not limited by distance between the wetland and the water body.

As a result, the agencies could take the view that *if* they can connect any given wetland to a traditional navigable water even several miles away through a chain of non-jurisdictional ditches, swales, pipes, culverts, then that remote wetland is *still* regulated, even under *Sackett*. In addition to the “daisy chain” interpretation, the agencies include two additional categories: wetlands separated from other regulated waters by non-permeable natural barriers, and those separated by permeable artificial barriers. 88 Fed. Reg. at 3,095.

This approach is flatly contradicted by the *Sackett* decision itself. Indeed, the adoption of “continuous surface connection” as the new definition of adjacent, without expressly repudiating the interpretation of that term in the 2023 Rule Preamble, appears to be an effort to limit the damage that *Sackett* did to the agencies’ authority to “a mere fleshwound.”

Conclusions

The *Sackett* decision and the Conforming Rule establish that “significant nexus” is no longer an operative criteria in Clean Water Act jurisdictional determinations. But the agencies continue to interpret their regulatory definition of “continuous surface connection” in a broad manner rather than in a narrow manner required by *Sackett*. They may at least deserve high marks for boldness – their interpretation of *Sackett* is to return to the bad old days of mere hydrologic connection.

The good news for now is that federal courts are rejecting agency claims of jurisdiction based on “daisy chains” of non-jurisdictional swales, ditches, pipes, and culverts, and claims of jurisdiction based on non-permeable natural barriers. See, e.g., *Lewis v. US*, 88 F.4th 1073, 1077 (5th Cir. 2023) (wetlands connected to waterway 15 miles away by roadside ditches, culverts, and intermittent creeks not jurisdictional as a matter of law). It remains to be seen if and when EPA and the Army’s regulatory interpretation of “continuous surface connection” will be decisively and permanently rejected.

Tony Francois
235 Montgomery Street, Suite 935
San Francisco, CA 94104
Telephone: (415) 402-2700