Will EPA Disobey The Supreme Court Again?

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The Environmental Protection Agency may be trying to interpret away the decision of the United States Supreme Court in *Sackett v. Environmental Protection Agency*, 598 U.S. 651 (2023), which greatly restricted the reach of the Clean Water Act. A recent case suggests that EPA will ignore the key words and concepts in *Sackett* and restore its pre-*Sackett* authority as much as it can.

Before *Sackett*, EPA and the U.S. Army Corps of Engineers insisted that the "waters of the United States" regulated by the Clean Water Act included a wide range of wetlands as well as waters. The act, they said, applied to normally dry wetlands as well as normally dry streambeds, desert washes, and roadside ditches. It also applied to wetlands far from any traditionally navigable water.

The Supreme Court disagreed. It reasoned that because the Clean Water Act applies only to *waters*, and not wetlands, Congress did not intend to regulate wetlands other than those that are indistinguishable from regulated waters. *Sackett* envisions regulated wetlands as stands of reeds bordering a river—stands so tall and dense that an observer cannot readily tell where the water ends and the wetland begins. The Court ruled that wetlands are regulated only when they have a "continuous surface connection" to waters of the United States so that there is "no clear demarcation" between waters and wetlands.

In September 2023 EPA issued a regulation that was intended to conform its previous regulations to the decision in *Sackett*. This regulation specifies that regulated wetlands "adjacent" to waters are those with a "continuous surface connection". But what about the rest of the Supreme Court's test: that there be no clear demarcation between waters and wetlands? This part of the Supreme Court's test does not appear in EPA's regulations.

Despite this truncated conformity, EPA could still comply with *Sackett* if in practice it implemented the Supreme Court's test. But its interest seems to be elsewhere. If you read *Sackett*, you might conclude that the only regulated part of a wetland is the part indistinguishable from a regulated water. You would be wrong, according to EPA. In a case we are litigating, EPA has taken the position that when the Supreme Court said "indistinguishable" it meant nothing more than "abut", and that when any one part of the wetland abuts—touches—a water, the whole wetland is regulated. The wetlands in that case consist of almost all of an island that would have been identified as dry land by anyone not schooled in the arcane arts of identifying government-regulated wetlands. The ground was dry. The groundwater level was about 2-3 feet below the surface. But, according to the government's expert, that dryness didn't prevent it from being a wetland.

This is not the first time EPA and the Corps have tried to avoid the consequences of a Supreme Court decision. In *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001), generally referred to as "*SWANCC*", the Supreme Court ruled that "isolated waters" are not regulated by the Clean Water Act. Following *SWANCC*, however, EPA and the Corps acted as though there was only one isolated water in the United States—the pond at issue in *SWANCC*—and they continued to assert broad authority over wetlands and ditches quite far from traditionally navigable waters.

In the Supreme Court's next Clean Water Act case, *Rapanos v. U.S.*, 547 U.S. 715 (2006), a plurality of four justices was none too pleased that the agencies had all but ignored the Supreme Court's decision in *SWANCC*. But because the four justices did not make up a majority, their opinion was generally ignored by the agencies and most lower courts, which adopted the "significant nexus" concept advanced by Justice Kennedy in his concurrence.

All that changed with *Sackett*, as least in theory. In *Sackett* the Supreme Court unanimously rejected significant nexus. The majority ruled that "waters of the United States" includes only relatively permanent bodies of water forming geographical features "described in ordinary parlance as 'streams, oceans, rivers, and lakes.'" Regulated wetlands are limited to wetlands indistinguishable from these waters.

Will EPA and the Corps continue to insist that “indistinguishable” and “no clear demarcation” mean nothing more than “abut”? Will the courts go along with the agencies, or will they use the test set out in *Sackett*? Only time will tell.

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