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Supreme Court Adopts “Continuous Surface Connection” Test For Whether Wetlands Are Covered By The Clean Water Act

Client Alert | May 25, 2023

Decided May 25, 2023 ***Sackett v. EPA*, No. 21-454** **Today, the Supreme Court held that the Clean Water Act covers only those wetlands with a continuous surface connection to other covered waters. Background:** Under the Clean Water Act, the EPA has jurisdiction over “navigable waters,” which are defined as “the waters of the United States.” The Sacketts purchased property containing wetlands that were separated by a road from a tributary that eventually fed into a traditionally navigable intrastate lake. After the Sacketts made certain improvements to the property, the EPA determined that they violated the Clean Water Act by discharging fill material into those wetlands without a permit.

The Sacketts sued, alleging that the EPA lacked jurisdiction under the Clean Water Act because any wetlands on their property were not “waters of the United States.” The district court granted summary judgment to the EPA, and the Ninth Circuit affirmed. Applying the test set forth in Justice Kennedy’s opinion concurring in the judgment in *Rapanos v. United States*, 547 U.S. 715 (2006), the court determined that the wetlands on the Sacketts’ property, together with wetlands across the road, were “waters of the United States” subject to the EPA’s jurisdiction because they had a “significant nexus” to a traditionally navigable water.

Issue: Whether the Ninth Circuit set forth the proper test for determining whether wetlands are “waters of the United States” under the Clean Water Act. **Court's Holding:** No. The Clean Water Act covers wetlands only if they have a continuous surface connection to bodies of water that are “waters of the United States” in their own right, such that the wetlands are indistinguishable from those waters.

> *“[T]he CWA extends to only those ‘wetlands with a continuous surface connection to bodies that are “waters of the United States” in their own right . . . .’”*

Justice Alito, writing for the Court **What It Means:**

- Today’s decision should provide more assurance to landowners, property developers, and farmers. If wetlands do not have a continuous surface connection to waters of the United States, those wetlands do not fall under the Clean Water Act’s reach.
- Following the *Rapanos* plurality, the Court concluded that the term “waters” encompasses “only those relatively permanent, standing or continuously flowing bodies of water forming geographical features that are described in ordinary parlance as ‘streams, oceans, rivers, and lakes.’” And the Court clarified that wetlands qualify as jurisdictional waters only if they are “indistinguishably part of a body of water that itself constitutes ‘waters’ under the [statute],” which requires a “continuous surface connection” and the absence of any “clear demarcation

Related People

Lucas C. Townsend

Bradley J. Hamburger

Brad G. Hubbard

Russell Balikian

Stephen J. Hammer

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between ‘waters’ and wetlands.”

- The Court recognized that “phenomena like low tides or dry spells” may sometimes cause “temporary interruptions in surface connection” and clarified that landowners cannot “carve out wetlands from federal jurisdiction by illegally constructing a barrier on wetlands otherwise covered by the” statute.
- The Court explained that adopting the significant-nexus test advanced by Justice Kennedy in *Rapanos* would interfere with traditional state authority over private property and require a “freewheeling inquiry” that is inconsistent with the statutory text, provides landowners little guidance, and creates “serious vagueness concerns” in light of the statute’s criminal penalties.
- Justice Kavanaugh (joined by three other Justices) concurred in the judgment. He agreed the wetlands on the Sacketts’ property were not covered by the statute, but he would have held that the statute covers both “wetlands contiguous to or bordering a covered water” and “wetlands separated from a covered water only by a man-made dike or barrier, natural river berm, beach dune, or the like.”

The Court's opinion is available here. Gibson Dunn’s lawyers are available to assist in addressing any questions you may have regarding developments at the Supreme Court. Please feel free to contact the following practice leaders:

Appellate and Constitutional Law Practice

Thomas H. Dupree Jr. +1 202.955.8547 tdupree@gibsondunn.com	**Allyson N. Ho** +1 214.698.3233 aho@gibsondunn.com	**Julian W. Poon** +1 213.229.7758 jpoon@gibsondunn.com
Lucas C. Townsend +1 202.887.3731 ltownsend@gibsondunn.com	**Bradley J. Hamburger** +1 213.229.7658 bhamburger@gibsondunn.com	**Brad G. Hubbard** +1 214.698.3326 bhubbard@gibsondunn.com

Related Practice: Environmental Litigation and Mass Tort

Stacie B. Fletcher +1 202.887.3627 sfletcher@gibsondunn.com	**Daniel W. Nelson** +1 202.887.3687 dnelson@gibsondunn.com	**David Fotouhi** +1 202.955.8502 dfotouhi@gibsondunn.com

Related Practice: Land Use and Development

Mary G. Murphy +1 415.393.8257 mgmurphy@gibsondunn.com	**Benjamin Saltsman** +1 213.229.7480 bsaltsman@gibsondunn.com

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Environmental

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