On May 25, 2023, the U.S. Supreme Court unanimously decided in favor of landowners on a case (Sackett v. U.S. Environmental Protection Agency) that hinges on federal limits over waters and wet areas. AGC submitted a friend of the court brief in support of the Sacketts. The decision aligns with AGC's brief, and the Justices acknowledge the need for clarity due to the severity of criminal sanctions under the Clean Water Act, a key issue that AGC raised. The Court rejected the use of the flawed "significant nexus" test for determining when projects require a federal permit and established a new test for evaluating when a wetland is a water of the United States (WOTUS). (Read the full AGC article here. AGC is a member of the Waters Advocacy Coalition.)

Sackett v. EPA, No. 21-454: Summary and Takeaways

Holdings

- The Clean Water Act (CWA) "extends to only those wetlands that are 'as a practical matter indistinguishable from waters of the United States.'" (at 22)
- For wetlands to be jurisdictional, they must: (i) be adjacent to a "relatively permanent body of water connected to traditional interstate navigable waters" and (ii) have a "continuous surface connection with that water, making it difficult to determine where the 'water' ends and the 'wetland' begins." (at 22)
- "Waters of the United States" (WOTUS) are therefore:
    1. Traditional interstate navigable waters
    2. Relatively permanent bodies of water connected to traditional interstate navigable waters
    3. Wetlands that have a continuous surface connection with either (1) or (2)

Takeaways

- **The _Sackett_ holding is not limited to wetlands.**
    - Like *Rapanos*, *Sackett* does not merely clarify the test for jurisdiction for adjacent wetlands. In both cases, the waters at issue were wetlands, yet the majority's holding (outlined above) on its face covers more than just wetlands.
    - The *Sackett* majority adopts the *Rapanos* plurality's test for jurisdiction, which addresses both wetlands and non-wetlands.
        - *First*, the majority "conclude[d] that the *Rapanos* plurality was correct" 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." (at 14) The majority's conclusion is based on the text, structure, and history of the CWA, as well as the Court's prior CWA decisions.

- *Second*, the majority *rejected* the Government's position that "waters" is naturally read to encompass wetlands. (at 17) In the majority's view, that position is difficult to reconcile with *SWANCC* and *Riverside Bayview* and the Act's explicit recognition of the States' primary responsibilities and rights in 33 U.S.C. § 1251(b). (at 17-18)
- *Third*, the majority acknowledged that 33 U.S.C. § 1344(g)(1) means that at least some "adjacent wetlands" qualify as WOTUS. But the majority emphasized that 33 U.S.C. § 1362(7) is the operative provision that defines the CWA's reach. Thus, if wetlands are to be jurisdictional, they must qualify as WOTUS in their own right. The way wetlands can qualify as WOTUS in their own right is to be "indistinguishably part of a body of water that itself constitutes 'waters' under the CWA." (at 19)
- *Finally*, the majority underscores that the *Rapanos* plurality was clear on when adjacent wetlands are part of WOTUS: they must be "as a practical matter indistinguishable from [WOTUS] such that it is difficult to determine where the water ends and the wetland begins" and "[t]hat occurs when wetlands have a continuous surface connection to bodies that are [WOTUS] in their own right, so there is no clear demarcation between waters and wetlands." (at 21)

  - Under the majority's (and *Rapanos* plurality's) formulation, there is no way to answer the question of what wetlands are jurisdictional without simultaneously answering the question of what *other WOTUS* the wetlands must be part of. The majority's answer is wetlands must be part of either traditional interstate navigable waters or relatively permanent bodies of water connected to such traditional interstate navigable waters.

- **The "significant nexus" test is gone.**
  - All nine justices voted to reverse the Ninth Circuit's opinion, which applied the "significant nexus" test to the Sacketts' wetlands. Although there was a 5-4 split over what the test should be, it is telling that not one justice attempted to defend "significant nexus" as an appropriate test.
  - The majority held that the "significant nexus" theory is "particularly implausible." (at 23) The majority further held that "the CWA never mentions the 'significant nexus' test, so the EPA has no statutory basis to impose it." (at 24) The majority reached these conclusions in the context of rejecting the Government's position that the phrase "waters of the United States" is broad enough to extend to all water in the U.S. and that the "significant nexus" test is the only thing preventing the Government from asserting jurisdiction over all water.
  - Nothing in the majority's rejection of "significant nexus" appears to be limited to wetlands. On the contrary, in criticizing the Government's significant nexus test as a "freewheeling inquiry," the majority specifically took issue with the Government's approach of aggregating "'similarly situated' *waters"* and "assess[ing] the aggregate effect of that group based on a variety of open-ended

factors that evolve as scientific understandings change." (at 24-25) This is a clear rejection of the Government's use of the significant nexus test to assert jurisdiction over either wetlands or "waters" generally.

- The majority was not persuaded by various policy arguments about the ecological consequences of a narrow definition of adjacent. The majority noted that "the CWA does not define the EPA's jurisdiction based on ecological importance, and we cannot redraw the Act's allocation of authority." (at 27)

- **"Adjacent" cannot mean "near" or "neighboring;" to be jurisdictional, wetlands must not be separated from other WOTUS.**
  - After surveying various dictionary definitions of "adjacent," the majority held that "only one meaning [of the term adjacent] produces a substantive effect that is compatible with the rest of the law." "Adjacent wetlands" can only mean those that are indistinguishably part of another WOTUS. (at 20)
  - The majority rejected the Government's longstanding regulatory definition of "adjacent" that includes the term "neighboring." According to the majority, "wetlands that are separate from traditional navigable waters cannot be considered part of those waters, even if they are located nearby." (at 20) That holding is the focus of Justice Kavanaugh's disagreement with the majority as detailed in the principal concurring opinion.
  - The majority's formulation of when wetlands are part of other WOTUS appears to require a surface *hydrologic* connection. The majority agrees with the *Rapanos* plurality's formulation that it has to be difficult to determine where the water ends and the wetland begins. (at 21) The majority also acknowledges that "temporary interruptions in surface connection may sometimes occur because of phenomena like low tides or dry spells," which further suggests that there generally must be some sort of surface *water* connection. (at 21) Finally, it appears that any barrier (between a wetland and WOTUS) severs jurisdiction, with the caveat that a "landowner cannot carve out wetlands from federal jurisdiction by illegally constructing a barrier on wetlands otherwise covered by the CWA." (at 21-22, footnote 16).
  - As Justice Kavanaugh points out in his concurring opinion, the majority opinion leaves many questions unanswered—*e.g.*, how "temporary" interruptions in surface connection must be for wetlands to remain jurisdictional; whether continuous surface connections can be established by ditches, swales, pipes, or culverts; how difficult does it have to be to discern the boundary between a water and a wetland. The Agencies may try to address some or all of these questions in a future rulemaking or guidance document.

- ***Sackett* does not allow for jurisdiction over ordinarily dry (ephemeral) features**
  - The majority begins by analyzing the CWA's text, and it immediately concludes that the *Rapanos* plurality was correct that the term "waters" encompasses *only*

those relatively permanent, standing or continuously flowing bodies of water described in ordinary parlance as streams, oceans, rivers, and lakes. (at 13)

- The majority quotes directly from page 739 of the *Rapanos* plurality when concluding that the plurality got it right. (at 13)
    - Here is the full passage from the *Rapanos* plurality's holding (on page 739) that the *Sackett* majority quoted from: "In sum, on its only plausible interpretation, the phrase 'the waters of the United States' includes only those relatively permanent, standing or continuously flowing bodies of water forming geographic features that are described in ordinary parlance as streams, oceans, rivers, and lakes. The phrase does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall. The Corps' expansive interpretation of 'the waters of the United States' is thus not based on a permissible construction of the statute."
- In refusing to defer to the Government's position, the majority highlighted that "the scope of EPA's conception of 'the waters of the United States' is truly staggering when this vast territory [covered by wetlands] is supplemented by all the additional area, *some of which is generally dry*, over which the Agency asserts jurisdiction." (at 23) The majority sees no clear statement in the CWA that would be required to significantly alter the balance of federal and state power under the Government's broad interpretation.
- Shortly after *Rapanos* was decided, EPA and the Corps concluded that "relatively permanent" does not include ephemeral tributaries which flow only in response to precipitation and intermittent streams which do not typically flow year-round or have continuous flow at least seasonally. *See Rapanos* Guidance at 7. The Biden Rule, however, seeks to broaden what constitutes "relatively permanent." Because *Sackett* does not explain what "relatively permanent" means, it is unclear just how long water must be flowing or standing within a stream, river, or lake to constitute "relatively permanent flow." The agencies will undoubtedly continue to exploit this ambiguity moving forward to try to characterize as many features as having "relatively permanent" flow as possible. But it seems implausible that ordinarily dry features could satisfy the *Sackett* majority's relatively permanent test.

- ***Sackett* does not clarify what it means for a relatively permanent water to be "connected to" a traditional, interstate navigable water**
    - The majority in *Sackett* pulls a key phrase directly from the *Rapanos* plurality in formulating the test for jurisdiction: "a relatively permanent body of water *connected to* traditional interstate navigable waters" (at 22). But the *Sackett* majority does not shed any light on what it means to be "connected to" or when such connections are so tenuous as to sever jurisdiction. The agencies will likely continue to exploit this ambiguity to try to pull in as many relatively permanent features as possible, regardless of distance from a traditional interstate navigable water.