The Supreme Court’s Sackett Decision

Matt Shudtz
Law and Policy Fellow

RBC Workshop
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Roadmap

- CWA jurisdictional wetlands, today
- How we got here
- What’s next
How we got here:
The Sacketts’ dream home

- Priest Lake, Idaho
- Existing subdivision with sewer hookup
- 300’ from property to lake
- Large wetlands complex
- Started “site prep,” Feds showed up

How we got here: Timeline

• Historically: property part of Kalispell Bay Fen complex
• 1996: prior owners were informed that property contained jurisdictional wetlands
• 2004: Sacketts purchased property
• 2007: Sacketts dumped 1,700 cu yds of gravel and sand to fill wetlands and prep site for homebuilding (no permit)
• May 2007: complaint →
  • USACE/EPA inspection, observing soils, vegetation, and pooling of water consistent with wetland
    • Sacketts’ consultant: “site is part of a wetland”
  • JD based on property being similarly situated to wetlands with significant nexus to Priest Lake
“...the government often tramples on individuals’ property rights by taking it without compensation and by unreasonable regulation or intrusion.”

How we got here: PLF’s dream case?

https://pacificlegal.org/

Credit: Keith Kinnard/AP
How we got here: FedSoc’s dream team?


Images collected by Randy E. Barnett and Josh Blackman, An Introduction to Constitutional Law, www.conlaw.us
### How we got here: FedSoc’s dream team?

Wetlands themselves need not be navigable

<table>
<thead>
<tr>
<th>Wetlands Standards</th>
<th>Significant Nexus Test</th>
<th>Continuous Surface Connection</th>
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<tbody>
<tr>
<td>TMarshall</td>
<td>-4.069</td>
<td>JPStevens</td>
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<td>WJBrennan</td>
<td>-2.547</td>
<td>RBGinsburg</td>
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<tr>
<td>WHRehnquist</td>
<td>3.605</td>
<td>CThomas</td>
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</table>

Data from the Martin-Quinn Scores project, [http://mqscores.wustl.edu/](http://mqscores.wustl.edu/)
• “Did the Ninth Circuit set forth the proper test for determining whether wetlands are “waters of the United States” under the Clean Water Act, 33 U.S.C. § 1362(7)? ”
  • “significant nexus” test used
What is a “water of the United States?”
- Traditionally navigable

What does “adjacent” mean?
- Answer: “continuous surface connection” and “no clear demarcation”
CWA jurisdictional wetlands, today


33 C.F.R. § 328.3 (USACE regulations) & 40 C.F.R. § 120.2 (EPA regulations)
A *jurisdictional* or *covered* wetland is:

(1) A wetland

(2) That is adjacent to

(3) A body of water that is a “water of the United States” in its own right
“Wetlands means those 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 vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.”

33 C.F.R. § 328.3(c)(1); 40 CFR § 120.2(c)(1)
CWA jurisdictional wetlands, today

(2)

EPA & USACE regs:
“Adjacent means having a continuous surface connection.”

SCOTUS:
also, “no clear demarcation between ‘waters’ and ‘wetlands’”

EPA & USACE: left this out of regs
CWA jurisdictional wetlands, today

Waters of the United States

- Traditionally navigable waters
  - “Currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide”
- Tributaries
  - “relatively permanent, standing or continuously flowing bodies of water”
- Impoundments
  - Unless artificially created exclusively for stock watering, irrigation, settling basins, or rice growing

See 33 C.F.R. § 328.3(a); 40 C.F.R. § 120.2(a)
A *jurisdictional* or *covered* wetland is:

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A: Rapanos
B: Trump rule
C: changes: Rapanos > Trump rule
D: Obama rule
E: Obama rule > Trump rule
What's next: Federal regulation and litigation

- **USACE actions – project planning & development**
  - Aquatic Ecosystem Restoration (esp. § 206 CAP) – prioritize restoring hydro. connect. for floodplain wetlands, improve physical + biological integ. of ephemeral streams
  - Technical assistance, esp. for EJ communities
  - Avoid creation of non-jurisdictional wetlands

- **USACE actions – regulatory**
  - Approved JD transparency – website
  - Confirmed (per 2008 rule): non-jurisdictional waters can provide compensatory mitigation
  
  See O’Connor [March 2024 memo](#)

- **PLF Cases**
  - Robert White (NC) – multiple uses, permit requirements in coastal counties – wetlands case
  - Skip & Val Valentine (NC) – road improvements on forested land – wetlands case
  - Dan Ward – (IA) – pond creation – not wetlands case