

Sackett v. EPA, 598 US 591 (2023)

Majority (Alito):

CWA covers wetlands a) adjacent to waters of the US (relatively permanent navigable waterways or their tributaries), which b) have a continuous surface connection to such waters, “...making it difficult to determine where the ‘water’ ends and the wetland begins.”

Dissent (Kavanaugh):

“***Adjacent***’ and “***adjoining***’ have distinct meanings...By narrowing the Act’s coverage of wetlands to only ‘***adjoining***’ wetlands, the Court’s new test will leave some long-regulated adjacent wetlands no longer covered by the Clean Water Act, with significant repercussions for water quality and flood control throughout the United States.” (emphasis added).

Post-Sackett Questions

Majority opinion recognizes jurisdiction where, “temporary interruptions in surface connection may sometimes occur because of phenomena like low tides or dry spells.” Fact-specific inquiry.

Discharge from point source that travels through groundwater to nearby surface water may require Clean Water Act permit. In general, CWA If pollutant discharged to groundwater travels only a short distance before release to river, lake, etc. *County of Maui v. Hawaii Wildlife Fund*, 140 S. Ct. 1462 (2020).

Will dredge & fill activity release pollutants that flow underneath barrier and through groundwater to navigable waterways (or their tributaries)?

Monitor/Publicize Sackett Impact on Wetlands

- Track state action to fill wetland gaps. As of May 2024, at least 24 states lacked authority to regulate adjacent wetlands that are newly exempt. <https://environmentalintegrity.org/wp-content/uploads/2024/05/Wetlands-Sackett-report-5.23.24.pdf>
- Track Army Corps “non-jurisdictional” decisions. See, e.g., NJD actions for Charleston district at <https://www.sac.usace.army.mil/Missions/Regulatory/Issued-Jurisdictional-Determinations/>
- Satellite/GIS mapping of adjacent wetlands to track development/losses.