

In Debate Over High Court Wording, 'Wetland' Remains Murky

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The U.S. Supreme Court significantly reduced the scope of Clean Water Act regulation over wetlands last year in *Sackett v. Environmental Protection Agency*.^[1] The key holding is that wetlands are regulated only if they are "indistinguishably part of a body of water that itself constitutes 'waters' under the CWA."^[2] This means that wetland is regulated if it "has a continuous surface connection with that water, making it difficult to determine where the 'water' ends and the 'wetland' begins."^[3] Federal agencies and members of the regulated community are interpreting the Supreme Court's language differently, and these different interpretations make a big difference in determining whether any individual wetland is subject to Clean Water Act regulation. The most recent agency regulation defining "the waters of the United States" includes wetlands adjacent to other regulated bodies of water. It states that "'adjacent' means having a continuous surface connection."^[4] The regulations do not define "continuous surface connection," but in the January 2023 preamble to the August 2023 final rule, the agencies referred to a 2008 guidance memorandum that stated "continuous surface connection" means "the wetland directly abuts the tributary (e.g., they are not separated by uplands, a berm, dike or similar feature)," and does not mean that "surface water [must] be continuously present between the wetland and the tributary."^[5] Neither the regulation nor the guidance memorandum have any specific requirement that a wetland be indistinguishable from a tributary. In enforcement cases, the agencies have argued that *Sackett*'s language about indistinguishability is simply descriptive and does not create any additional requirement. Members of the regulated community have interpreted that language more narrowly. They have argued that the phrase "continuous surface connection" does not make sense in the context of *Sackett* unless it means there is surface water connecting a wetland and nearby body of water. Among other arguments, private parties have pointed to the Supreme Court's statements that the term "waters" in the Clean Water Act generally refers to "bodies of open water," and that regulated wetlands "must be indistinguishably part of a body of water that itself constitutes 'waters' under the CWA."^[6] Some private parties are also arguing that *Sackett* requires a showing that a wetland is indistinguishable from a regulated body of surface water, in addition to showing that there is a continuous surface

connection. These types of arguments are being advanced by defendants in enforcement cases, challengers to jurisdictional determinations and plaintiffs in challenges to the latest agency regulation. The different interpretations of Sackett can make an enormous difference in an individual case. If the agencies' interpretation is correct, then they only need to prove that some part of a wetland abuts a regulated surface body of water in order for the entire wetland to be regulated. This means that a Clean Water Act permit may be required for activities long distances away from the regulated body of water. If the regulated parties' interpretation is correct, then a Clean Water Act permit is required only for work in wetland areas that share surface water with a regulated body of water where it is hard to determine where the wetland ends and the water begins, which typically are close to the body of water. At least three lower courts have addressed the meaning of this language since Sackett. The first case, *United States v. Andrews*,^[7] was a civil enforcement action brought by the U.S. Department of Justice against unrepresented property owners who filled in portions of a wetland on their property in Connecticut. In June 2023, the U.S. District Court for the District of Connecticut held there was a continuous surface connection because the affected wetlands were part of a continuous wetland complex that "directly abuts" a regulated tributary and "continuous surface flow paths link the wetlands to the [tributary]."^[8] In *Lewis v. United States*, decided in December 2023, the U.S. Court of Appeals for the Fifth Circuit considered a challenge to a jurisdictional determination by the U.S. Army Corps of Engineers on a property in Louisiana.^[9] The court held there was no jurisdiction because "the nearest relatively permanent body of water is removed miles away from the Lewis property by roadside ditches, a culvert, and a non-relatively permanent tributary," which means that "it is not difficult to determine where the 'water' ends and any 'wetlands' on Lewis's property begins."^[10] The court's discussion appears to make the indistinguishability of wetlands an essential requirement for Clean Water Act jurisdiction, especially because the court relied in part on photographs in which the boundaries of the wetlands and tributaries were apparent. The most recent ruling, *Glynn Environmental Coalition Inc. v. Sea Island Acquisition LLC*,^[11] decided by the U.S. District Court for the Southern District of Georgia on March 1, was a citizen suit brought regarding activities on a property in Georgia. An appeal is now pending.^[12] In *Glynn Environmental*, the district court found that affidavits stating that the wetland and a nearby creek "are directly connected 'via culverts and pipes'" do not establish a "direct surface connection," and that the affidavits failed to indicate that "Dunbar Creek ever has a surface connection with the Subject Property, even when tides change." The court also noted that "the images attached to Plaintiffs' amended complaint show there is a 'clear demarcation' between the Subject Property and Dunbar Creek."^[13] The Southern District of Georgia appears to hold that the presence of surface water is necessary for there to be a continuous surface connection. Its reliance on photographs also appears to make indistinguishability of wetlands and other waters a requirement for Clean Water Act regulation. It remains to be seen how other lower courts will interpret Sackett's language about "continuous surface connection" and the indistinguishability of wetlands and waters. Where the courts ultimately land on this issue will have significant practical consequences for property owners across the country. The opinions expressed are those of the author(s) and do not necessarily reflect the views of their employer, its clients, or Portfolio Media Inc.,

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[1] Sackett v. Environmental Protection Agency, 598 U.S. at 651 (2023). [2] Id. at 676. [3] Id. at 678-79 (quoting Rapanos v. United States, 547 U.S. 715, 742 (2006)). [4] 33 CFR 328.3(a)(4), -(c)(2); 40 CFR 120.2(a)(4), -(c)(2). [5] Final Rule, Revised Definition of "Waters of the United States," 88 Fed. Reg. 3004, 3096 (Jan. 18, 2023) (citing U.S. EPA & U.S. Army Corps of Engineers, Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States & Carabell v. United States (Dec. 2, 2008)). [6] Sackett, 598 U.S. at 672, 676. [7] United States v. Andrews, 677 F.Supp.3d 74 (D. Conn. 2023). [8] Id. at 87-88. [9] Lewis v. United States, 88 F.4th 1073 (5th Cir. 2023). [10] Id. at 1078. [11] Glynn Environmental Coalition Inc. v. Sea Island Acquisition LLC, 2024 WL 1088585 (S.D. Ga. 2024). [12] 11th Cir., March 7, 2024. [13] Id. *5.

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