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Wetlands Regulation in Pennsylvania After 'Sackett' Ruling

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Last month the U.S. Supreme Court restricted federal jurisdiction over filling and altering wetlands. See *Sackett v. Environmental Protection Agency*, No. 21-454 (U.S. May 25, 2023). The president promptly expressed both disappointment and concern that the government could no longer assure protection of wetlands, and therefore surface water quality. You may have received fundraising emails from environmental groups declaring *Sackett* to be a "disaster for Pennsylvania."

But the practicing bar has to advise our clients: private, public, and NGO. The Pennsylvania Clean Streams Law extends the Department of Environmental Protection's jurisdictional reach to all "waters of the commonwealth." Those waters are understood to be more inclusive than the federal jurisdictional limit under any reading. So if Pennsylvania still regulates the same broad set of wetlands and other waters, does Sackett change anything in Pennsylvania?

Close analyses of the Supreme Court's opinions abound. Therefore, I offer only a brief thumbnail here. Section 301 of the federal Clean Water Act prohibits discharges of pollutants from a "point source" to "navigable waters" without a permit. 33 U.S.C. § 1311(a). The Act defines "navigable waters" to mean "the waters of the United States." Id. § 1362(7). Section 404 of the Act authorizes permits for the discharge of dredged or fill material to those waters of the United States. Id. § 1344. At least some wetlands must be included within "the waters of the United States" because a state seeking to take over the federal permitting program over discharges of dredged or fill material to navigable waters "including wetlands adjacent thereto" may follow a procedure to administer that section 404 program. Id. § 1344(g)(1).

The United States Environmental Protection Agency issues regulations governing issuance of those section 404 permits, but the permits themselves are issued by the Army Corps of Engineers. EPA's regulations define "wetlands" to mean "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." 40 C.F.R. § 120(c)(1). But not all wetlands are "waters of the United States."

EPA, the Corps, and the Supreme Court have ebbed and flowed in their understanding of the jurisdictional reach of the Act since the 1970s. The Supreme Court endorsed regulation over wetlands "adjacent to" navigable waters, even if they do not have a surface connection, in United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985). The Court rejected the exercise of jurisdiction over waters isolated from navigable waters (such as a pool in an old quarry) merely because they might be used by migratory birds that might also use a navigable water. Solid Waste Agency of N. Cook County v. Army Corps of Eng'rs, 531 U.S. 159 (2001). The Court then splintered over what counted as "adjacent" between actual touching and the migratory bird rule in Rapanos v. United States, 547 U.S. 715 (2006), with no test having majority support.

The Sacketts sought to build a home in Idaho on a lot with some wetlands on it, but fairly distant from a navigable water in the conventional sense. They had previously prevailed in the Supreme Court over the question whether they could obtain pre-enforcement judicial review of an administrative order asserting regulatory jurisdiction over their wetlands. Sackett v. Envt. Prot'n Agency, 566 U.S. 120 (2012). The substance of that dispute returned to the Court ten years later, resulting in the most recent ruling.

All nine justices appear to have agreed that the wetlands on the Sacketts' property are not subject to Clean Water Act regulation. But they did not agree on what the test for jurisdiction ought to be. Justice Alito's majority opinion limits federal jurisdiction to (a) waters that are traditionally navigable, (b) surface waters that are tributaries to traditionally navigable waters, and (c) wetlands adjoining either in the sense that there is a continuous surface connection between the wetland and the surface water such that one cannot readily tell where one begins and the other ends. Estimates are that that test will remove about half the wetlands from federal jurisdiction as would be regulated under the EPA's effort to regulate wetlands with a "significant nexus" to a navigable water.

But in Pennsylvania, the Clean Streams Law regulates discharges to "waters of the commonwealth": "any and all rivers, streams, creeks, rivulets, impoundments, ditches, water courses, storm sewers, lakes, dammed water, ponds, springs and all other bodies or channels of conveyance of surface and underground water, or parts thereof, whether natural or artificial, within or on the boundaries of this Commonwealth." 35 Pa. Stat. Ann. § 691.1.

Pennsylvania understands wetlands to be "waters of the commonwealth" discharges to which are subject to regulation under chapter 105 of the environmental regulations. Chapter 105 defines "wetland" using the EPA definition quoted above. 25 Pa. Code § 105.1. So, unless specifically excepted, all wetlands that meet the EPA definition are subject to state regulation without regard to their connection to a surface water. That is, Pennsylvania regulates more wetlands than does the federal government under any understanding of the Clean Water Act.

For many wetlands, though, the federal and state jurisdictions overlap, requiring both a state and a federal permit in order to fill. The agencies have worked around the requirement for two permits through the issuance by the Corps of State Programmatic General Permits. When one of those applies, an activity that obtains a Pennsylvania permit also obtains a permit – akin to the old nationwide permits – from the Corps to satisfy the Clean Water Act. In Pennsylvania, the principal state permit is PASPGP-5 for fills affecting less than one acre of wetland. Larger impacts would be challenging to permit under either the state or federal scheme.

By constricting federal jurisdiction Sackett reduces the frequency at which permittees would require PASPGP-5 (or any other Corps general permit); the wetland to be filled may be subject to state regulation, but Sackett may put it outside of Clean Water Act jurisdiction. From the perspective of a permit applicant, this difference is minimal.

However, from the perspective of enforcement, the difference is, in principle, not trivial. A person who violates his or her Chapter 105 permit is subject to enforcement by the Commonwealth and also under the citizen suit provision of the Pennsylvania Clean Streams Law, 35 Pa. Stat. Ann. § 691.601(c). Depending upon how enforcement plays out, jurisdiction would be in the state courts or the Environmental Hearing Board.

For dual-jurisdiction wetlands, a violation of the Chapter 105 permit would also violate the Corps general permit, and therefore the Clean Water Act. The United States can enforce and private parties can bring a citizen suit under the Clean Water Act. 33 U.S.C. § 1365. Accordingly, constriction of federal jurisdiction deprives federal agencies of enforcement rights and private plaintiffs of a federal forum.

Sackett also may have implications for litigation over approval of interstate natural gas pipelines regulated under the federal Natural Gas Act. One cannot practically construct a pipeline across Pennsylvania without multiple impacts on streams and associated wetlands. The Federal Energy Regulatory Commission issues certificates of public convenience for those pipelines that, in general, preempt state regulation. However, section 3(d) of the Natural Gas Act provides, in part, that "nothing in this chapter affects the rights of States under . . . the [Clean Water Act]." 15 U.S.C. § 717b(d)(3).

Section 401 of the Clean Water Act, 33 U.S.C. § 1341, requires a state certification to a federal permitting or licensing agency that the project seeking the federal approval will not cause a violation of state water quality standards. That requirement in conjunction with section 3(d) of the Natural Gas Act allows Pennsylvania to certify that a pipeline will not cause a violation of water quality standards if the pipeline obtains and complies with permits from the Commonwealth under, among other things, Chapter 105. Because a state water quality standard may apply to wholly intrastate waters outside federal jurisdiction, Sackett would seem not to affect all this litigation. However, section 401 only calls for a water quality certification if the activity – the pipeline project – will result in a discharge to the navigable waters. So, for any wetland impact of a pipeline project through newly non-jurisdictional federal wetlands, there is at least an issue as to whether the state may issue a water quality certification and thereby condition the water quality certification on state permits.

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