Wetlands must connect to navigable waters – SCOTUS

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By Terry A. Hurlbut May 25, 2023

The Supreme Court today handed down a decision clarifying the terms *waters of the United States* and *wetlands*. Under it, *waters of the United States*, within the meaning of the Clean Water Act, must be *navigable* or *connected*. Furthermore, *wetlands* must have a *contiguous surface connection* to waters that are navigable or connected to navigable waters. To paraphrase the opinion, “soggy” “backyard[s],” “mudflats, sandflats, … sloughs, prairie potholes, wet meadows, … playa lakes, … ditches, swimming pools and puddles” *do not* necessarily qualify as wetlands subject to federal regulation.

Defining wetlands

The case at hand is *Sackett et ux. v. Environmental Protection Agency et al.* 598 U.S. ____ (2023).

Michael and Chantell Sackett bought some land near Priest Lake, Idaho, and started to backfill it to build a house. At once the EPA told them their property contained wetlands that came under its jurisdiction. By backfilling the land, they were discharging pollutants into “the waters of the United States.” The property is “near a ditch that [feeds] into a creek, which [feeds] into Priest Lake, a navigable, intrastate lake.” A District Court handed down summary judgment in favor of the EPA, and the Ninth Circuit affirmed.

No one disputed that Priest Lake was navigable and connected to further navigable bodies. (After all, Priest Lake historically supported the transport of logs from logging activity.) But the "wetlands" *were not* a natural extension of the lake, and had no connection, direct or indirect, with it. Being "near the ditch" was not enough.

So says Judge Samuel A. Alito's opinion, which sets a new standard for what are wetlands within EPA jurisdiction. Alito appeared to scold the EPA (and the Army Corps of Engineers) severely for trying to bring every soggy piece of land under their jurisdiction, when the law did not allow that. "The outer boundaries of the [Clean Water] Act's geographical reach have been uncertain from the start," Alito wrote. He also noted that setting these bounds has bedeviled the Court considerably.

Picking the nits

Words like *adjacent* and *contiguous* and *navigable* are the key to understanding Alito's opinion. The EPA almost arbitrarily defined *adjacent* to mean "in the neighborhood." In fact the ditch in question is *on the other side of a road* from the Sacketts' land.

Not so, says SCOTUS. From now on, *adjacent* means connecting contiguously on the surface, so that an obsever can't tell where the wetlands leave off and the waters begin. Being on the other side of a road from a ditch will no longer qualify.

The Court reversed the decision of the Ninth Circuit and remanded the case to that Court. Chief Justice Roberts and Justices Thomas, Gorsuch, and Barrett joined Justice Alito's opinion.

Justice Clarence Thomas, in his concurrence, seemed to chide Alito for not adequately clarifying the adjective *navigable* in his opinion. Furthermore he sought to limit federal jurisdiction to waters navigable in the *interstate* sense, consistent with the Commerce Clause. Justice Gorsuch joined this concurrence.

Justice Elena Kagan, in her concurrence, lamented Alito's redefinition of *adjacent*, and sought to preserve the old meaning. Given that attitude, her reasons for concurring in the reverse-and-remand judgment are not clear. Justices Sonia Sotomayor and Ketanji Brown Jackson joined this concurrence.

How much is enough separation?

Finally Judge Kavanaugh wrote yet another concurrence, making clear that the Sacketts' lands do not fall under the Clean Water Act. The *reason* for that is that the separation of the Sacketts' soggy ground from the ditch on the other side of the road is sufficient to prevent any "pollutant" from getting into that ditch. So the Sacketts' activities do not threaten Priest Lake or any waters downstream of it. But, like Kagan, Kavanaugh thinks Alito conflated the word *adjacent* with the word *adjoining*.

This is actually another instance of the Court reining in the administrative state. The Court did this in *West Virginia v. EPA* last year, and has another similar case now pending.