Introduction: The Sackett case is about the scope of jurisdiction of the Clean Water Act, a federal statute and sets of regulations intended to clean up and keep clean the rivers and lakes of and the oceans around the United States. For real estate lawyers and their developer or lender clients, it is all about which tracts of property and what activities on a tract require a permit from a federal agency to allow development. The statute has two major components – the Section 402 discharge program dealing with runoff from property into waterways, and the Section 404 program which deals with when something can be removed from or something added to a property (the so called "dredge and fill" regulations).

Both programs use as a definition of their jurisdictional reach the term "waters of the United States", sometimes called "WOTUS". The term "waters of the United States" has been a part of federal law since at least the Rivers and Harbors Act of 1899. It is used in the Clean Water Act. But no statute defines the term "waters of the United States" or describes by characteristics of either waters or lands what that term means. The definition of what is meant by the term "waters of the United States" has been left to administrative regulation, and various court decisions approving or disapproving the application of the term to particular situations.

The Sackett II case deals with the Section 404 program, but its holding will also govern the extent of the 402 program (which includes the National Pollution Discharge Elimination System or "NPDES"). The 404 program is more than an administrative requirement which developers and lenders or their lawyers must comply with. Violations can bring criminal penalties including fines and jail time. The federal agencies involved are the Environmental Protection Agency ("EPA") and the U.S. Army Corps of Engineers ("COE" or the "Corps"). Broadly speaking, the EPA leads the rule making process and the Corps administers the regulations, although both agencies can be and are involved in both processes. Of course, if judicial enforcement or criminal enforcement becomes an issue, the U. S. Department of Justice can become involved.

I. The Sackett Cases

A. The Sackett Property and the Planned Lake Cottage

Mr. and Mrs. Sackett wanted to build a lake cottage near Priest Lake in Idaho. They bought in 2004 a lot of about 0.64 acres in an existing neighborhood in which houses similar to the one they wanted to build had already been built. Priest Lake is in the northern part of the Idaho panhandle, just a few miles from the Canadian border and about 80 miles northeast of Spokane, Washington. The lake seems (from my examination of Google Earth) to be fed by water from several creeks, probably from runoff of the nearby mountains, and the Priest River seems to flow from the lake. The lake is a significant lake, several miles long and a few miles wide. The various opinions state, without analysis, that Priest Lake is a navigable water and a "water of the United States".

The Sackett lot is bounded on both the north and south by existing roads. To the north is Kalispell Bay Road and to the south is Old Schneider Road. South of Old Schneider Road is a developed community of residential lakefront properties. The Sackett lot is about 300 feet from the shore of Priest Lake. To the north of Kalispell Road is the "Kalispell Bay Fen", a large wetland area. Surface water from the Fen drains to "an unnamed tributary" (meaning a ditch)

along the north side of Kalispell Bay Road, to Kalispell Creek, and the creek then empties into Priest Lake.

The Sacketts got a building permit in 2007 and began the construction of their planned lake cottage, and as part of that process brought in fill for the foundation. In November of 2007, the EPA sent the Sacketts an Administrative Compliance Order claiming that the lot on which they had placed fill contained a wetland which was a "water of the United States" and that they must obtain a permit for development of the lot under the Section 404 program or remove the fill. In May of 2008, the EPA conducted a site visit, the results of which were memorialized into a July, 2008 report concluding that the lot contained wetlands that were part of the "waters of the United States". The Sacketts did not remove the fill and the EPA threatened them with fines of many thousands of dollars a day for their non-compliance with the Clean Water Act regulations. The Sacketts went looking for legal help and found the Pacific Legal Foundation which took on their case and filed suit against the EPA and the Corps.

B. A Quick Summary of Sackett I

In that litigation, the Sacketts, via their attorneys, argued that the regulation should not apply to their property or their project, and that their lot was not within the definition of the "waters of the United States". The EPA argued that wetlands can be parts of the "waters of the United States" and that the Sackett lot contained wetlands, and so was within the agency's jurisdiction. The definition of "waters of the United States" used at that time were taken from regulations adopted in the late 1980s (called in this paper the pre-2015 regulations). But the agency said it had merely notified the Sacketts that they might be subject to fines, and since the agency had not filed any litigation to actually impose the fines, the case was not ripe for any judicial determination. The US District Court for the District of Idaho agreed with the EPA. 2008 WL 3286801. The Ninth Circuit Court of Appeals affirmed. 622 F. 3d 1139 (9thCir. 2010). The United States Supreme Court issued certiorari and heard the case. The Supreme Court decided that the Administrative Compliance Order was enough of a final agency action to make the case ripe for judicial review and sent it back to the lower courts for hearings on the merits. 566 U. S. 120, 182 L. Ed. 367 (2012).

C. A Summary of Sackett II

On hearing on the merits, the District Court held that the Sackett's property was indeed within the definition of "waters of the United States", and that the Sacketts must either obtain a permit for their planned construction of the lake cottage or remove the fill they had placed on the lot. 2019 WL 13026870 (D. Idaho 2019). The Sacketts appealed. In an interesting action not widely reported by commentators, one day before the briefing deadline at the Ninth Circuit, the EPA sent a letter to the Sacketts withdrawing the Administrative Compliance Order, stated that it had decided not to enforce the order, and stated that it did not intend to issue a similar order in the future for the site. The Ninth Circuit decided that the letter did not make the case moot and affirmed. 8 F. 4th 1075 (9th Cir. 2021). The Sacketts again sought review at the United States Supreme Court and the Court again granted certiorari. The case was argued in October , 2022,

and the decision and opinions were handed down in May, 2023. Sackett v. EPA, 598 U.S. 651, 143 S. Ct. 1322, 215 L. Ed. 2d 579 (2023).

All members of the Court held that the Sackett's lot was not within the areas defined properly as "waters of the United States". All Justices agreed that the "significant nexus test" articulated by Justice Kennedy in the 2006 Rapanos case, should not be applied to determine the boundaries of the "waters of the United States". In that regard, the decision was unanimous.

There were, however, four separate opinions. A five-judge majority joined in the opinion of the Court authored by Justice Alito. The majority consisted of Roberts, Alito, Thomas, Gorsuch, and Barrett. A concurring opinion was written by Justice Kagan in which Justices Sotomayor and Jackson joined. A concurring opinion was written by Justice Thomas and joined in by Justice Gorsuch. A concurring opinion was written by Justice Kavanaugh, joined in by Justices Kagan, Sotomayor and Jackson.

The majority opinion recited the unchallenged rule that the historically navigated rivers of the United States and the interstate lakes used for navigation, and the bays and oceans around the United States are "waters of the United States". The differences of opinion concerned (as had several previous opinions) whether wetlands can be defined as within the term "waters of the United States" and if so, what wetlands can be so identified so as to be subject to EPA and COE jurisdiction and regulation. The majority opinion interpreted the statute to hold that wetlands that are adjacent to traditional navigable waters are included within "waters of the United States". The Court established a two part test to establish the jurisdictional boundary with respect to the wetlands:

First, the body of water adjacent to the wetlands must constitute a water of the United States. That means that the water of the United States to which the wetland is adjacent must be a relatively permanent body of water connected to traditional interstate navigable waters.

Second, the adjacent wetland must have a continuous surface connection with that water, making it difficult to determine where the water ends and the wetland begins.

The decision that the Sackett lot does not contain a wetland which is part of the "waters of the United States" and the decision that determination of what wetlands are "waters of the United States" is not to be determined using the "significant nexus" analysis is not the end of this story, merely the end of one facet of the continuing controversy over the jurisdictional reach of the Clean Water Act and the definition of the "waters of the United States."

II. Regulatory Background and Developments -- Before and After Sackett I and Sackett II, and Ongoing

A. The Old Days – Pre 2015

The Clean Water Act was passed in 1972 and amended in 1977. 33 U.S.C. Sections 1251 et. seq. From the time of its passage, the issue of a jurisdictional boundary (which has always been

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