

# The High Court's Environmental Docket Continues to Make Waves

**T**HE Supreme Court decided two cases in May that will have profound implications for environmental protection around the country, *Sackett v. EPA* and *National Pork Producers Council v. Ross*.

The first is about whether the Sacketts can build a house on wetlands under the Clean Water Act's protections, and is a startling attack on congressional authority. The CWA gives the federal government jurisdiction over "navigable waters" and defines that term as "the waters of the United States." In a provision which divvies up permitting authority between the federal government and the states, the statute makes clear that "adjacent wetlands" are included.

Justice Alito wrote the majority decision. It holds that waters of the United States are, first, "relatively permanent, standing, or continuously flowing bodies of water forming geographical features that are described in ordinary parlance as streams, oceans, rivers, and lakes" and, second, that wetlands must have a "continuous surface connection with that water, making it difficult to determine where the water ends and the wetland begins." The wetlands on the Sackett property do not satisfy this test.

In concurring opinions, authored by Justices Kavanaugh and Kagan (where they concurred in the judgment about the Sackett property only), the two accuse the majority of blatantly rewriting the CWA. As they both explain, the majority admits that some wetlands must qualify. But rather than stick to the word "adjacent," which is in the act, the Court goes for something like "adjoining" instead. Those two concepts are different. An adjacent wetland might be nearby a river, but it may lack the required "continuous surface connection with that water" if it is separated

from the navigable water by a natural or artificial barrier such as a dike.

This change poses a threat to water quality and flood prevention around the country, as Kavanaugh laments. For example, wetlands on the other side of a levee along the Mississippi River, but which are crucial to flood prevention, will be unprotected. He also explains that the new definition will not provide any additional clarity about which waters are regulated. Without a scientifically moored understanding of the connections between different waters, these questions will persist.

On that topic, the majority opinion rejects EPA's "policy arguments about the ecological consequences" of its decision, explaining that the CWA "does not define the EPA's jurisdiction based on ecological importance." But that again ignores the text of the statute, where Congress explained that the act's primary purpose is to "restore and maintain the chemical, physical, and biological integrity of the nation's waters." James McElfish wrote in the ELI blog that it will now be up to states to protect wetland, but there are difficult hurdles there.

In the other big case *Pork Producers*, hog raisers challenged California's new program forbidding them from selling pork that was raised inhumanely, invoking the "dormant Commerce Clause." That doctrine is a gloss on the Constitution's Commerce Clause and holds (in simplified terms) that states cannot intrude on areas of interstate commerce or regulate outside of their borders. According to petitioners, California violated that doctrine because the program would affect how pork producers in states like Iowa and North Carolina raised their pigs, if they planned to sell in California.

The case presented a threat to many state laws and policies, including health



**Bethany A. Davis Noll** is executive director at NYU Law's State Energy & Environmental Impact Center: [bethany.davisnoll@nyu.edu](mailto:bethany.davisnoll@nyu.edu).

and safety laws as well as programs that encourage renewable energy because all of them can have extraterritorial effects. The Court agreed and, in an opinion authored by Gorsuch, relied on that point to reject the challenge.

One section of Gorsuch's opinion, joined by only Thomas and Barrett, did not have majority agreement, but it is interesting to read now in light of their later votes in *Sackett*. The section addresses a doctrine that has developed under *Pike v. Bruce Church, Inc.* That case instructs courts to balance the burden on interstate commerce with the "putative local benefits" before striking down the state law under the dormant Commerce Clause. The three justices (all of whom would later sign the majority decision in *Sackett*) explain that they will not strike down California's program under that doctrine, because policy choices about moral or health issues "usually belong with the people and their elected representatives." They point out that if Congress would like to regulate pork production and preempt California's program, it can. And in their view, Congress is "better equipped" than the Court to "identify and assess all the pertinent economic and political interests at play across the country" for purposes of adopting a uniform nationwide rule. Now refer back to *Sackett*, where Kagan accuses the majority of adopting a "reflexive response to Congress's enactment of an ambitious scheme of environmental regulation." Given the later language in *Pork Producers*, she may be right.

**At issue are the reach of federal law and states' ability to protect their citizens**