

# Waters of the United States: Sackett v. EPA Briefing

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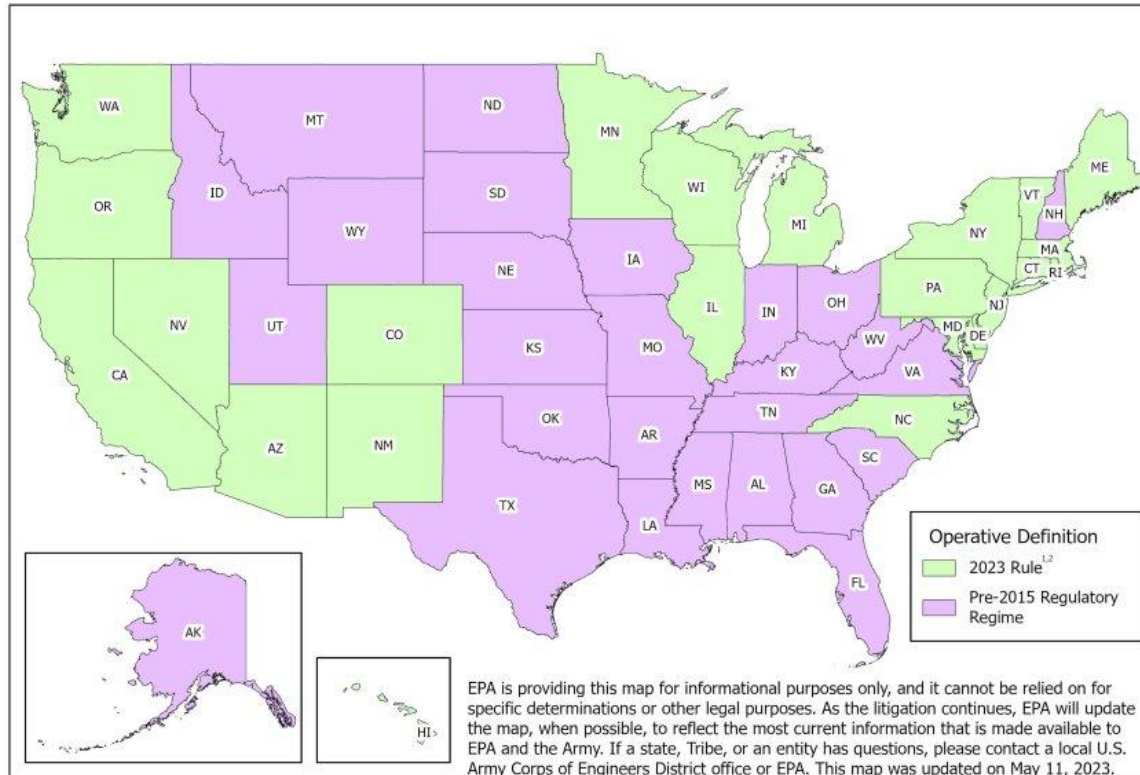


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# Background

- Clean Water Act (CWA) covers all “navigable waters,” which is defined in statute as “the waters of the United States, including the territorial seas.”
  - Water Quality Standards
  - Permitting to address discharges of pollutants, including discharges of dredged or fill material
  - Processes to address impaired waters
  - Oil spill prevention, preparedness and response programs
  - Tribal and State water quality certification programs
- The EPA and the U.S. Department of the Army define “waters of the United States” in regulations.
- The definition has been litigated to the US Supreme Court multiple times over the decades.
- *Sackett v. EPA* is the latest US Supreme Court ruling on WOTUS.

# Operative Definition of "Waters of the United States"



<sup>1</sup>Also operative in the U.S. territories and the District of Columbia

<sup>2</sup>The pre-2015 regulatory regime is operative for the Commonwealth of Kentucky and Plaintiff-Appellants in Kentucky Chamber of Commerce, et al. v. EPA (No. 23-5345) and their members (Kentucky Chamber of Commerce, U.S. Chamber of Commerce, Associated General Contractors of Kentucky, Home Builders Association of Kentucky, Portland Cement Association, and Georgia Chamber of Commerce).

# Pre-2015 Regulatory Regime

## **EPA and USACE Guidance on CWA jurisdiction following SCOTUS decision in *Rapanos v. US* and *Carabell v. US*:**

- Traditional navigable waters
- Wetlands adjacent to traditional navigable waters
- Non-navigable tributaries of traditional navigable waters that are relatively permanent where the tributaries typically flow year-round or have continuous flow at least seasonally (e.g., 3 months)
- Waters that have a “significant nexus” with a traditional navigable water:
  - Non-navigable tributaries that are not relatively permanent
  - Wetlands adjacent to non-navigable tributaries that are not relatively permanent
  - Wetlands adjacent to but that do not directly abut a relatively permanent non-navigable tributary

# *Pre-2015 Regulatory Regime*

## **Jurisdictional wetlands must either:**

1. Have a contiguous, bordering, or neighboring a traditional navigable water  
- OR -
2. Have a significant nexus with a traditional navigable water

# *Sackett v. EPA (2023)*

- Majority opinion adopts the SCOTUS plurality opinion from *Rapanos* (2006).
- To assert jurisdiction over an adjacent wetland under the CWA, a party must establish “first, that the adjacent [body of water constitutes] . . . ‘water[s] of the United States’ (i.e., a relatively permanent body of water connected to traditional interstate navigable waters); and second, that the wetland has a continuous surface connection with that water, making it difficult to determine where the ‘water’ ends and the ‘wetland’ begins.”
- No longer using the “significant nexus” rule to determine whether a particular piece of property contains waters of the United States.
- Wetlands that are separated from traditional navigable waters cannot be considered part of those waters, even if they are located nearby.
- In sum, the Court held that the CWA extends to only those “wetlands with a continuous surface connection to bodies that are ‘waters of the United States’ in their own right,” so that they are “indistinguishable” from those waters.

# *Sackett v. EPA (2023)*

Justice Kavanaugh:

- In my view, the Court’s “continuous surface connection” test departs from the statutory text, from 45 years of consistent agency practice, and from this Court’s precedents. The Court’s test narrows the Clean Water Act’s coverage of “adjacent” wetlands to mean only “adjoining” wetlands.
- By narrowing the Act’s coverage of wetlands to only adjoining wetlands, the Court’s new test will leave some long-regulated adjacent wetlands no longer covered by the Clean Water Act, with significant repercussions for water quality and flood control throughout the United States.

# *Sackett v. EPA (2023)*

Justice Kavanaugh:

- For example, the Mississippi River features an extensive levee system to prevent flooding. Under the Court’s “continuous surface connection” test, the presence of those levees (the equivalent of a dike) would seemingly preclude Clean Water Act coverage of adjacent wetlands on the other side of the levees, even though the adjacent wetlands are often an important part of the flood-control project.
- Likewise, federal protection of the Chesapeake Bay might be less effective if fill can be dumped into wetlands that are adjacent to (but not adjoining) the bay and its covered tributaries.
- Because of the movement of water between adjacent wetlands and other waters, pollutants in wetlands often end up in adjacent rivers, lakes, and other waters. Natural barriers such as berms and dunes do not block all water flow and are in fact evidence of a regular connection between a water and a wetland.



# *Sackett v. EPA (2023)*

Justice Kavanaugh:

- How much of a boundary between a water and a wetland is needed for the wetland to be not covered by the Clean Water Act?
  - E.g., A spoil bank?
- How does that test apply to the many kinds of wetlands that typically do not have a surface water connection to a covered water year-round—for example, wetlands and waters that are connected for much of the year but not in the summer when they dry up to some extent?
  - E.g., Atchafalaya Basin and Pearl River swamp
- How “temporary” do “interruptions in surface connection” have to be for wetlands to still be covered?
  - E.g., seasonal flooding or closure of a flood gate or culverts

# *Sackett v. EPA (2023)*

Justice Kavanaugh:

- How does the test operate in areas where storms, floods, and erosion frequently shift or breach natural river berms?
  - E.g., Atchafalaya Basin
- Can a continuous surface connection be established by a ditch, swale, pipe, or culvert?
  - E.g., Morganza to the Gulf's "leaky levee" design
- The Court covers wetlands separated from a water by an artificial barrier constructed illegally, but why not also include barriers authorized by the Army Corps at a time when it would not have known that the barrier would cut off federal authority?
- The list goes on.

# Current Status

## USACE MVN:

"Please note that as of the issuance of the Supreme Court's ruling on Sackett vs EPA, all AJDs or determinations of jurisdiction are currently suspended and will not be processed until further guidance has been provided to us from USACE HQ. There is no current estimated timeline for this.

Projects can proceed forward with a delineation concurrence or a PJD, but these will depict the presence and extent of wetlands and non-wetland water features regardless of potential jurisdiction."

## HQUSACE REGULATORY

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The U.S. Environmental Protection Agency and U.S. Army Corps of Engineers (the agencies) are in receipt of the U.S. Supreme Court's May 25, 2023 decision in the case of *Sackett v. Environmental Protection Agency*. In light of this decision, the agencies will interpret the phrase "waters of the United States" consistent with the Supreme Court's decision in *Sackett*. The agencies continue to review the decision to determine next steps.

## Supreme Court's Decision in Sackett v. Environmental Protection Agency

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# Questions?

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