

Wetlands: Legal Update



Defining “Waters of the United States”

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Wetlands - Background

- The jurisdictional scope of the CWA is “navigable waters,” defined in section 502(7) of the statute as “waters of the United States, including the territorial seas.”
 - EPA regulates discharges of pollutants, including dirt and other dredged or excavated material, into “navigable waters” (CWA Section 301).
 - USACOE regulates placement of “dredge or fill material” into “navigable waters” (Section 404), which in turn are defined as “waters of the United States” (Section 1362(7)).

“Waters of the United States”



“Waters of the United States”



“Navigable waters”



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Float a canoe?

“Navigable in fact”



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“Waters of the United States”



“Waters of the United States”



“Waters of the United States”

- EPA and the Corps define WOTUS to include “adjacent wetlands”
 - Adjacent to TNW, tributaries
- Does adjacent mean only “abutting”?
 - Agencies defined adjacent to include bordering, contiguous, or neighboring and wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like.
- Is there a minimum qualitative connection to TNW required for adjacent wetlands to be WOTUS?

WOTUS Interpretation Timeline

- *Riverside Bayview Homes* (1985)
- “1986 Regulations” defining WOTUS at 40 CFR § 120.2; 33 CFR § 328.3
- *SWANCC v. U.S. Army Corps of Engineers* (2001)
- 2003 EPA / USACOE Guidance
- *United States v. Rapanos* (2006).
- 2007-08 EPA / USACOE Guidance (“*Rapanos* Guidance”)
- Clean Water Rule (2015)
- Repeal Rule (Repealing Clean Water Rule) (2019)
- Navigable Waters Protection Rule (2020)
- *Pascua Yaqui Tribe v. EPA* – vacated, remanded NWPR (Aug. 2021)
- New WOTUS Definition Rule (Part 1) (Jan. 2023)
- *Sackett v. EPA* (2023)
- Amended WOTUS Definition Rule (forthcoming?)

WOTUS Interpretation – *Riverside Bayview Homes*

United States v. Riverside Bayview Homes (1985)



- Involved wetlands adjacent to navigable tributary of Lake St. Clair.
- Court upheld regulation of traditionally navigable waters (TNW), interstate waters, their tributaries and wetlands adjacent to each.
- Adjacent wetlands are “inseparably bound up” with the waters to which they are adjacent.
- SCOTUS deferred to the Corps’ ecological judgment.

WOTUS Interpretation - *SWANCC*

Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers (SWANCC) (2001)

- Non-navigable, isolated, intrastate waters.
- Determination of jurisdiction based on Migratory Bird Rule
 - Presence in or use of those wetlands by ducks, geese, and other birds.
 - Birds in turn affected interstate commerce (hunting, harvesting, migrating across state lines).



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WOTUS Interpretation - *SWANCC*

- “[W]here an administrative interpretation of a statute invokes the outer limits of Congress’ power, we expect a clear indication that Congress intended that result.”
- Finding “nothing approaching a clear statement from Congress that it intended section 404(a) to reach an abandoned sand and gravel pit.”
- Introduced concept of “significant nexus” as determining jurisdiction over waters not navigable in fact.

WOTUS - *Rapanos*

Rapanos v. United States (2006)



WOTUS Interpretation - *Rapanos*

Justice Stevens (dissent):

Would uphold the government's interpretation as reasonable. The inclusion of ***all wetlands adjacent to tributaries of navigable waters*** was most consistent with the CWA's purpose of eliminating pollution in the nation's waters.

WOTUS Interpretation - *Rapanos*

Scalia (plurality opinion):

Waters of the United States ***“includes only those 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 that only those wetlands that have a “continuous surface connection,” a flow of water, between those wetlands and the other traditional bodies of water, are subject to jurisdiction under the CWA.***

WOTUS Interpretation - *Rapanos*

Kennedy (concurrency):

- Rejected “continuous surface connection”, opining instead that jurisdiction depends on whether there is a “***significant nexus***” between the wetland and the other water body.
- Whether the wetlands “***either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters*** more readily understood as ‘navigable.’”
- More detailed evidence of connection required for nexus to “lesser waters” (i.e. not traditionally navigable).

WOTUS Interpretation - *Rapanos*

	<i>Non-Navigable Tributaries</i>	<i>Wetlands Adjacent to Non-Navigable Tributaries</i>
Plurality	Jurisdiction exists if the water is a “relatively permanent, continuously flowing” body of water that flows into a traditional navigable water.	Jurisdiction exists if the wetlands have a “continuous surface connection” with a relatively permanent, continuously flowing body of water that flows into a traditional navigable water.
Kennedy	Jurisdiction exists if the water has a significant nexus to a traditional navigable water.	Jurisdiction exists if the wetlands have a significant nexus to a traditional navigable water.

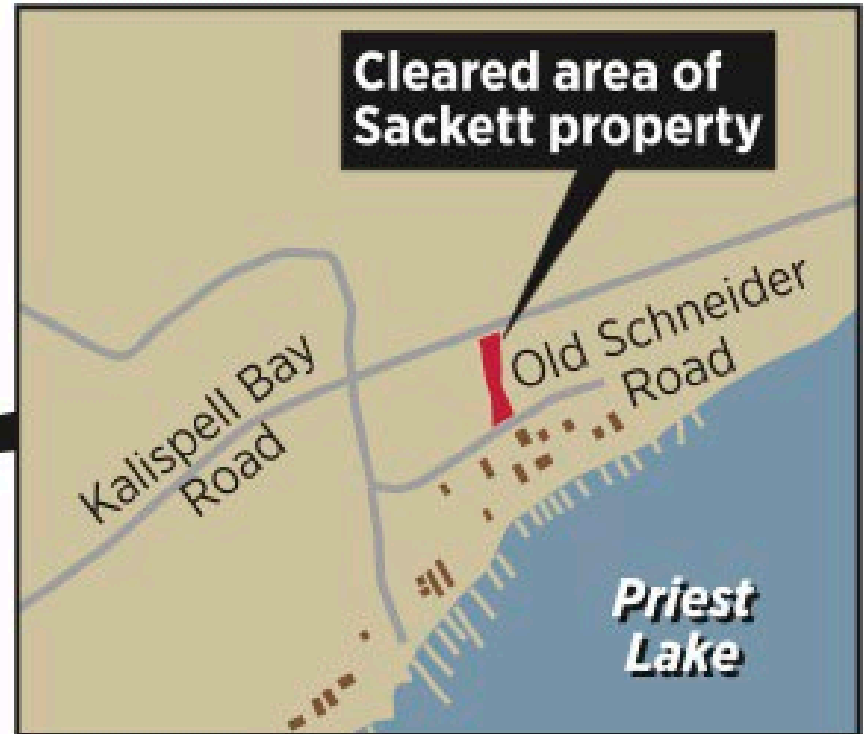
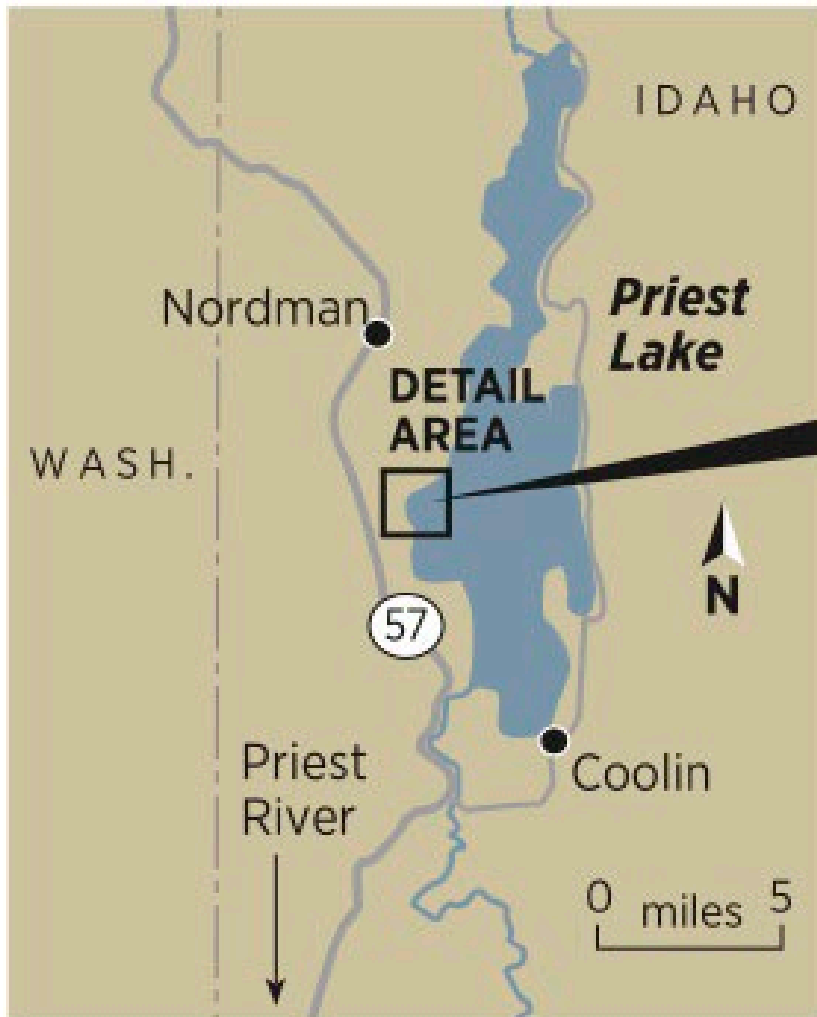
	A “significant nexus” exists where the water “either alone or in combination with similarly situated lands in the region, significantly affects the chemical, physical, and biological integrity” of a traditional navigable water.	A “significant nexus” exists where a wetland “either alone or in combination with similarly situated lands in the region, significantly affects the chemical, physical, and biological integrity” of a traditional navigable water.
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WOTUS Interpretation - Post-*Rapanos*, Pre-Sackett

- Clean Water Rule (2015)
- Repeal Rule (Repealing Clean Water Rule) (2019)
- Navigable Waters Protection Rule (2020)
- *Pascua Yaqui Tribe v. EPA* – vacated, remanded NWPR (Aug. 2021)
- Final rule (Part 1) to revise WOTUS definition (Jan. 2023).

Sackett v. EPA (2023)





For an aerial view of the property go to:

<http://tinyurl.com/3rqv4z2>

Sackett v. EPA



Sackett v. EPA (2023)

- EPA and the Corps claimed property was subject to CWA jurisdiction as a wetland.
- Agencies provided little supporting explanation, issued compliance order directing owners to remediate site in 5 months, threatened fines and penalties.
- Sacketts challenged in 2008.
- District Court and 9th Cir. sided with agencies, no right to review of order.

Sackett v. EPA (2023)

- SCOTUS found in favor of Sacketts in 2012. Held that a compliance order was a reviewable final agency action.
- On remand, district court granted summary judgment for agencies, applied Kennedy's "significant nexus" test.
- 9th Cir. affirmed, over Sackett's objection that the plurality's "continuous surface water connection" test was the proper standard.

Sackett v. EPA (2023)

- From “Significant Nexus” to “Continuous Surface Connection”
 - In a 9-0 decision, the “significant nexus” test from Justice Kennedy’s *Rapanos* opinion thrown out by the Supreme Court of the United States as a method for determining federal jurisdiction over adjacent wetlands under the CWA.
 - While all 9 threw out the “significant nexus” test, a 5-4 majority replaced it with the “continuous surface connection” test from Justice Scalia’s *Rapanos* opinion.
 - Also requires that “adjacent” wetlands be “indistinguishable” from covered waters to be considered WOTUS, which implies abutment.

Sackett v. EPA (2023)

Majority (Alito)

“In sum, we hold 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.”

“This requires the party asserting jurisdiction over adjacent wetlands to 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.”

Sackett v. EPA (2023)

Majority (Alito)

“In *Rapanos*, the plurality spelled out clearly when adjacent wetlands are part of covered waters. It explained that “waters” may fairly be read to include only those wetlands that are “as a practical matter indistinguishable from waters of the United States,” such that it is “difficult to determine where the ‘water’ ends and the ‘wetland’ begins.” 547 U. S., at 742, 755 (emphasis deleted). **That occurs when wetlands have “a continuous surface connection to bodies that are ‘waters of the United States’ in their own right, so that there is no clear demarcation between ‘waters’ and wetlands.”** *Id.*, at 742; cf. 33 U. S. C. §2802(5) (defining “coastal waters” to include wetlands “having unimpaired connection with the open sea up to the head of tidal influence”). **We agree with this formulation of when wetlands are part of “the waters of the United States.”** We also acknowledge that temporary interruptions in surface connection may sometimes occur because of phenomena like low tides or dry spells.”

Sackett v. EPA (2023)

- *Concurrence (Kavanaugh)*

“As enacted in 1972, the Clean Water Act protected ‘the waters of the United States.’ §§1311(a), 1362(7), 1362(12). In 1975, the Army Corps interpreted ‘waters of the United States’ to include wetlands “adjacent to other navigable waters.’ 40 Fed. Reg. 31324. In 1977, Congress expressly adopted that same understanding of the Act, amending the Act to make clear that only the Federal Government, and not the States, may issue Clean Water Act permits for dumping dredged or fill material into certain ‘waters of the United States,’ ‘including wetlands adjacent’ to those covered waters. Clean Water Act, 91 Stat. 1601; 33 U. S. C. §1344(g). **In that 1977 Act, Congress thus expressly recognized ‘adjacent wetlands’ as ‘waters of the United States.’**

Sackett v. EPA (2023)

- *Concurrence (Kavanaugh)*

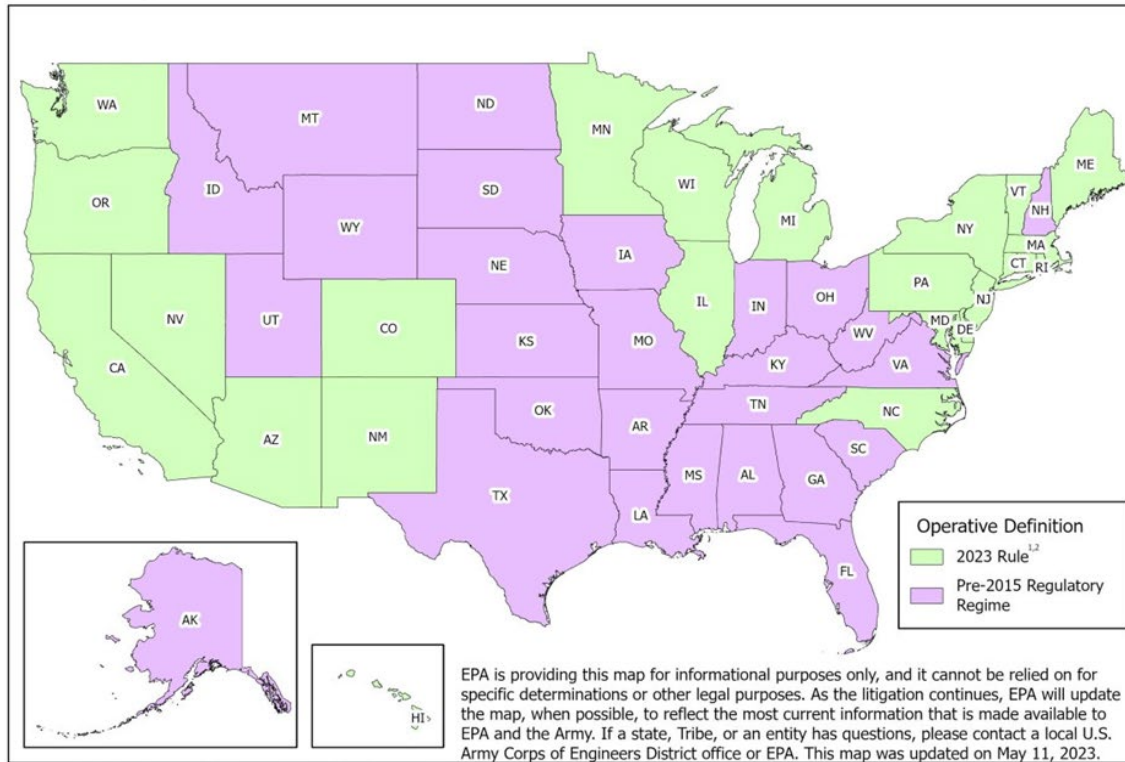
“In my view, the Court’s ‘continuous surface connection’ test departs from the statutory text, from 45 years of consistent agency practice, and from this Court’s precedents. **The Court’s test narrows the Clean Water Act’s coverage of ‘adjacent’ wetlands to mean only ‘adjoining’ wetlands. But ‘adjacent’ and ‘adjoining’ have distinct meanings: Adjoining wetlands are contiguous to or bordering a covered water, whereas adjacent wetlands include both (i) those wetlands contiguous to or bordering a covered water, and (ii) wetlands separated from a covered water only by a man-made dike or barrier, natural river berm, beach dune, or the like.**” *Sackett* at pg. 1362.

Current Status

- Pending new guidance from the agencies, WOTUS interpretation remains a patchwork.
 - 23 states subject to 2023 WOTUS Rule
 - 27 states subject to pre-2015 interpretive regime

Current Status

Operative Definition of "Waters of the United States"



¹Also operative in the U.S. territories and the District of Columbia

²The 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).

Current Status - 2023 Rule

40 CFR 120.2(a)

Waters of the United States means:

(1) Waters which are:

- (i) Currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
- (ii) The territorial seas; or
- (iii) Interstate waters, including interstate wetlands;

(2) Impoundments of waters otherwise defined as waters of the United States under this definition, other than impoundments of waters identified under paragraph (a)(5) of this section;

(3) Tributaries of waters identified in paragraph (a)(1) or (2) of this section:

- (i) That are relatively permanent, standing or continuously flowing bodies of water; or
- (ii) That either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of waters identified in paragraph (a)(1) of this section;

(4) Wetlands adjacent to the following waters:

- (i) Waters identified in paragraph (a)(1) of this section; or
- (ii) Relatively permanent, standing or continuously flowing bodies of water identified in paragraph (a)(2) or (a)(3)(i) of this section and with a continuous surface connection to those waters; or
- (iii) Waters identified in paragraph (a)(2) or (3) of this section when the wetlands either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of waters identified in paragraph (a)(1) of this section;

(5) Intrastate lakes and ponds, streams, or wetlands not identified in paragraphs (a)(1) through (4) of this section:

- (i) That are relatively permanent, standing or continuously flowing bodies of water with a continuous surface connection to the waters identified in paragraph (a)(1) or (a)(3)(i) of this section; or
- (ii) That either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of waters identified in paragraph (a)(1) of this section.

Current Implementation Status

- Do we have a new definition?
 - In June 2023, the agencies indicated intent to issue revised definition by September 1, 2023.
 - Agencies have requested a stay in litigation challenging current definition rule.
- Legal challenges to amended rule expected.
- 2024 election also likely to impact.

Current Implementation Status

Open Questions Following *Sackett*

- Ephemeral Streams
 - Are these “bodies of water?”
 - What constitutes “relatively permanent”?
 - What is a “temporary interruption” or “dry spell”?
- Does “indistinguishable” language require more than a continuous surface connection?
- Wetlands separated from a TNW by a barrier.
 - Natural barrier
 - Artificial barrier – what if permitted?
- Can agencies craft a workable rule / definition following *Sackett*?