

Waters of the United States/Clean Water Act: U.S. Supreme Court Issues Opinion in Sackett v. U.S. Environmental Protection Agency



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The United States Supreme Court (“SCT”) issued an Opinion on May 25th in *Sackett v. Environmental Protection Agency, et al.*, addressing the scope of the Clean Water Act definition “Waters of the United States” (“WOTUS”).

The SCT had granted a Petition for a Writ of Certiorari to address the following question:

Whether the Ninth Circuit set for the proper test for determining whether wetlands are “waters of the United States” under the Clean Water Act, 33 U.S.C. § 1362(7).

The SCT Majority Opinion significantly narrows the scope of what constitutes a WOTUS for purposes of the Clean Water Act.

The Majority articulates a two-part process for determining a WOTUS:

1. The CWA’s use of “waters” in §1362(7) refers only to “geo-graphic[al] features that are described in ordinary parlance as ‘streams, oceans, rivers, and lakes’ ” and to adjacent wetlands that are “indistinguishable” from those bodies of water due to a continuous sur-face connection. *Rapanos v. United States*, 547 U. S. 715, 755, 742, 739.
2. To assert jurisdiction over an adjacent wetland un-der 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.”

The definition of WOTUS is arguably one of the three critical jurisdictional terms of the Clean Water Act. The scope of the definition of WOTUS has been the subject of frequent litigation, legislative oversight, rulemakings and public policy debate since the enactment of the modern version of the Clean Water Act in 1972.

The background to the Sackett decision involves a vacant lot near Priest Lake, Idaho. The United States Environmental Protection Agency (“EPA”) in 2007 sent the owners of the vacant lot (the Sacketts) an Administrative Compliance Order determining that their home construction violated the Clean Water Act because the lot contained jurisdictional wetlands (i.e., WOTUS).

The Sacketts in 2012 successfully argued before the SCT that landowners had legal standing to challenge EPA's wetland determination. The SCT held in that decision that property owners may appeal directly to federal courts from a Clean Water Act wetlands "Compliance Order" issued by the federal government.

The Sacketts then successfully petitioned the SCT to address the issue of whether the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit") applied the incorrect jurisdictional test for determining WOTUS. They had argued in their Petition for Certiorari that the previous SCT decision in *Rapanos v. United States* should be "revisited" to adopt the plurality's test for wetland jurisdiction under the Clean Water Act.

The Ninth Circuit had utilized Justice Kennedy's significant "nexus test" in determining that the Sacketts' property could constitute WOTUS. The Sacketts argued that the plurality opinion authored by Justice Scalia and three other Justices should be adopted as the relevant test. The plurality test held that only those wetlands that have a continuous surface water connection to regulated waters may be regulated.

Justice Alito authored the Majority Opinion in Sackett. He initially notes the role of the Clean Water Act in improving the quality of the United States rivers, lakes, and streams, but then notes:

There is, however, an unfortunate footnote to this success story: the outer boundaries of the Act's geographical reach have been uncertain from the start. The Act applies to "the waters of the United States," but what does that phrase mean? Does the term encompass any backyard that is soggy enough for some minimum period of time? Does it reach "mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, [or] playa lakes?" How about ditches, swimming pools, and puddles?

The SCT's three previous attempts to clarify the meaning of WOTUS are referenced and Justice Alito characterizes the most recent attempt in *Rapanos* as a result in which there was no agreement in the Opinion.

Justice Alito states that the Opinion is an attempt to:

. . . identify with greater clarity what the Act means by "the waters of the United States."

The Opinion rejects EPA's request that the SCT defer to the agency's most recent rule which utilizes the "significant nexus" test, stating:

1. EPA's interpretation is inconsistent with background principles of construction that apply to the interpretation of the relevant Clean Water Act provisions.
2. Congress did not ratify EPA's regulatory definition of "adjacent" when it amended the Clean Water Act to include the reference to "adjacent" wetlands in Section 404(g)(1).

A copy of the 82-page Opinion can be downloaded [here](#).