

Waters of the United States/Clean Water Act: Federal Appellate Court Addresses Jurisdictional Challenge



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The United States Court of Appeals for the Fifth Circuit (“Fifth Circuit”) addressed in a December 18, 2023, Consolidated Opinion whether certain Louisiana wetlands were subject to Clean Water Act jurisdiction. See *Lewis v. United States*, 88 F.4th 1073 (5th Cir. 2023).

The question was considered in the context of the United States Supreme Court’s recent decision in *Sackett v. Environmental Protection Agency*, 598 U.S. 651 (2023) which interpreted the key Clean Water Act definition of Navigable Waters (defined as waters of the United States).

Garry Lewis (“Lewis”) owned two twenty-acre tracts of real estate. He asked the Fifth Circuit to hold that his property was not subject to federal jurisdiction under the Clean Water Act. This was based on the argument that the wetlands on the tracts did not fit within the scope of Clean Water Act definition of waters of the United States.

The Fifth Circuit opinion’s opening paragraph expresses clear concern about the challenge Lewis has faced noting:

Appellants are landowners (referenced together as “Lewis”) caught in the coils of the United States Army Corps of Engineers’ (USACE’s) assertions of Clean Water Act jurisdiction over “wetlands” on their inland Louisiana property for going on ten years. During this period, two Supreme Court cases, three Approved Jurisdictional Determinations (AJDs), two federal court cases resulting in two remand orders, and two appeals to this court have transpired. Enough is enough.

The Fifth Circuit considered the validity of two Approved Jurisdictional Determinations (“AJDs”) undertaken by the United States Army corps of Engineers (“USACE”). The AJDs were undertaken in 2017 and 2020.

An AJD is an analysis by the USACE as to whether the property has characteristics that subject it to Clean Water Act jurisdiction. If so, the landowner must seek a permit from the USACE pursuant to Section 404 of the Clean Water Act if he or she wishes to add dredge or fill to the property.

Lewis initially sought an AJD in 2013 for his property. He intended to add it to develop the two tracts. In 2017, after seven site visits, the USACE determined that 22% of the first track and 38% of the second contained wetlands subject to Clean Water Act jurisdiction.

Lewis appealed the 2017 AJD to the United States District Court (“Court”).

When the USACE conducted the Lewis AJDs, the United States Supreme Court had not yet adopted a single test to determine when wetlands are “waters of the United States” and thus subject to Clean Water Act coverage. The Supreme Court *Rapanos* plurality opinion in 2006 suggested two tests for determining federal wetland jurisdiction:

First, four justices endorsed an adjacency test, where the Clean Water Act only covers wetlands that share a “continuous surface connection” with traditionally covered waters, like interstate rivers; or

Second, one justice suggested that the Clean Water Act requires a significant nexus between a wetland and a nearby, relatively permanent body of water.

The Court concurred with Lewis’s objection to the 2017 AJD. It agreed that the property’s wetlands were not covered federal waters under either the adjacency test or the significant nexus test. The Court remanded the 2017 AJD to the USACE for further review and to make a new determination.

The USACE in 2020 issued another AJD that continued to assert jurisdiction over one of the twenty-acre tracts. It justified jurisdiction by connecting the Lewis property to Colyell Bay, a traditional waterway ten to fifteen miles away, through roadside ditches, a culvert, an unnamed tributary, and a creek under the significant nexus test.

Lewis challenged the 2020 AJD in federal court. The USACE then withdrew the AJD in order to reconsider jurisdiction on remand. Thereafter, the Court dismissed Lewis’ challenge as moot.

Lewis appealed both the 2017 and 2020 AJDs to establish that the USACE has no jurisdiction over his property. The Fifth Circuit stayed the appeal until the Supreme Court decided *Sackett*.

In *Sackett*, the Supreme Court adopted the adjacency test. Whether a wetland is considered a water of the United States is now determined in a two-part test:

First, the adjacent body of water must be a traditional water of the United States; and

Second, the wetland must have a continuous surface connection with that adjacent water so as to be indistinguishable.

In *Lewis*, the Fifth Circuit held that both the 2017 and 2020 AJDs were invalid under the *Sackett* adjacency test. The Lewis property had no continuous surface connection with a traditional water of the United States. It was miles away from the nearest water, so there was “no factual basis as a matter of law for federal Clean Water Act regulation of these tracts.”

The Fifth Circuit also rejected the Court’s dismissal of the 2020 AJD for mootness following the USACE’s voluntary withdrawal for two reasons.

First, voluntarily withdrawing does not moot a case unless the court can be certain that the “wrongful behavior” will not recur. According to the Fifth Circuit, the USACE will continue to wrongfully assert jurisdiction after withdrawing the AJD, so the case is not moot. Consequently, the Court must prevent the USACE from continuously attempting to assert jurisdiction over Lewis’ property.

Second, the Fifth Circuit rejected the mootness claim because an AJD is a final, reviewable agency action. If the USACE were able to moot review through withdrawal, it would be able to “create an ‘endless loop’ of financially onerous regulatory activity.” Each remand prevents Lewis from working on his property while he waits on an additional AJD. Due to these steep legal consequences for Lewis, the issue is not moot.

Finally, the Fifth Circuit notes that the USACE should not be allowed to reconsider jurisdiction on remand because *Sackett*’s adoption of the adjacency test makes certain that the Lewis property contains no federal wetlands. Therefore, the USACE should not be able to consider jurisdiction again on remand.

The Fifth Circuit also suggests in a footnote that, if the USACE continues to assert jurisdiction over Lewis' other properties in separate litigation, it could be subject to bad faith sanctions under the Equal Access to Justice Act.

Judge Higginson agreed in a concurring opinion that the issue was not moot, but not because the AJD is a final, reviewable agency action. Instead, he would have justified the mootness analysis only on the Court's voluntary withdrawal analysis. He also disagreed with the majority's suggestion that the USACE should be subject to bad faith sanctions concerning litigation that has neither been initiated nor is before the Court.

A copy of the opinion can be downloaded [here](#).