

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



Walter Wright, Jr.
wwright@mwlaw.com
(501) 688.8839

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Co-Author Ethan Brown

The United States District Court for the Eastern District of Virginia (“Court”) addressed in an August 15th Opinion a Clean Water Act jurisdictional question. *See United States v. Chameleon, LLC*, No. 3:23-CV-763–HEH, 2024 WL 3835077 (E.D. Va. Aug. 15, 2024).

The question addressed was whether a parcel of real property in Ashland, Virginia wetlands constituted a Clean Water Act (“CWA”) Water(s) of the United States (“WOTUS”).

Chameleon, LLC, with Gary Layne as its sole officer and registered agent (collectively, “Defendants”) purchased 101.66 acres of forested and undeveloped property in Ashland, Virginia in 2018. In early 2019, Defendants began earthmoving activities. This work included clearing and grubbing activities. Timber harvesting and earthmoving was initiated in the fall of 2019.

The Virginia Department of Environmental Quality (“VDEQ”) subsequently identified the Defendants’ actions as potentially impacting protected wetlands. The state agency was denied access to the property. Therefore, it obtained an inspection warrant. A Notice of Violation was subsequently issued. The United States Corps of Engineers (“Corps”) requested information from Defendants when they did not respond to VDEQ.

The United States Environmental Protection Agency (“EPA”) was apprised of the wetland issue by the Corps. It also sought information from Defendants regarding the impact on the wetlands to the property. When access was refused, EPA obtained an administrative warrant. Defendants were determined to have impacted and disrupted twenty-one (21) acres of wetlands on the property without obtaining the necessary CWA permit.

The United States (“Plaintiff”) sued Defendants for an alleged CWA violation. It alleged that the Defendants had not obtained the appropriate CWA permit from the Corps to undertake the work.

Attached to the Complaint were the results of a survey of the wetlands. They were divided into three zones. The United States Geologic Survey described how each wetland zone was connected, by way of various tributaries and creeks, to a “traditional navigable water,” namely the Chickahominy or the Pamunkey Rivers.

Defendants filed two motions:

- A Rule 12(b)(1) motion claiming a lack of subject matter jurisdiction by the presiding Court.

- A Rule 12(b)(6) motion arguing that the Plaintiff did not adequately support its complaint with factual allegations.

Both motions relied on the United State Supreme Court's ("SCT") decision in Sackett v. EPA.

The SCT in Sackett created a two-part test to determine whether a wetland is considered a CWA WOTUS (i.e., a CWA jurisdictional waterbody):

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."

Defendant's first motion argued that the Corps did not have jurisdiction over the subject matter of this case. They argued that the Plaintiff failed to establish that the wetlands in question fall under the CWA jurisdiction because of their failure to meet the Sackett criteria.

The Court rejected this argument. It states that 28 U.S.C. § 1345 gives federal district courts "original jurisdiction over all civil actions, suits or proceedings commenced by the United States." The United States filed the action. Therefore, the Court had independent jurisdiction to hear the case. Further, because the CWA does not have a subject matter jurisdiction requirement, the Court was noted to have federal question jurisdiction.

The Defendants' second motion argued that Plaintiff did not support its claim with sufficient factual allegations. The Court granted this motion.

To support this motion Defendants relied upon the hyperlinks to the maps that Plaintiff included in its Complaint. They argued that the maps did not show a connection between the "navigable waters" and the wetlands at issue. Plaintiff responded by stating that the Defendants were incorrectly interpreting the mapping software, providing its own map which differed in that "relevant data layers [were] selected."

Because this was a dispute of the facts present in the maps, the Court did not grant this motion on the merits. Instead, it granted the Defendant's 12(b)(6) motion because Plaintiff, in its Complaint, utilized legal conclusions rather than statements of fact. It noted the Plaintiff "merely recited the language and elements of the Sackett test" rather than alleging facts to substantiate those conclusions.

Due to Plaintiff's reliance on legal conclusions in its Complaint and its failure to plead facts with specificity and detail, the Court dismissed the Complaint without prejudice and granted the Plaintiff's leave to amend.

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