



***Sackett v. EPA* and its impact on the Clean Water Act**

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The Sacketts' property, aerial view (2008)



Another aerial view (2022)



Site in early May 2007



Across the road, May 2007



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Roadside ditch in May 2008



Clean Water Act background

- Unpermitted “discharge” of “pollutants” to “navigable waters” prohibited
- “Navigable waters” defined as “the waters of the United States”
- How far beyond navigable-in-fact waters does the statute go?
 - Abutting wetlands
 - Isolated waters
 - Non-navigable tributaries and neighboring wetlands



Litigation Timeline

- November 2007: compliance order issued
- April 2008: APA lawsuit filed
- March 2012: SCOTUS affirms judicial review
- March 2019: district court affirms EPA jurisdiction on (i) significant nexus and (ii) adjacency to Priest Lake
- August 2021: Ninth Circuit affirms on significant nexus only



EPA's (and the Ninth Circuit's) test

Wetlands may be regulated if they, 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.



The Sacketts' framework

Step one:

- “ordinary parlance” water connected to wetland such that the two are indistinguishable

Step two:

- water-wetland can function as a segment of an interstate channel of commerce



Sackett II Decision

- Unanimous:
 - 1. Significant nexus test rejected
 - 2. EPA has no authority over the Sacketts' lot



Majority standard for “waters”

Relatively permanent waterbody

1. “ordinary parlance” standard +
2. continuous presence of water +
3. connection to traditional interstate navigable waters



Majority standard for wetlands

Continuous surface connection

1. Wetland continuously connected to RPW
2. Surface connection renders the two features “indistinguishable,” *i.e.*,
 - (a) difficult to determine where water ends and wetland begins, or
 - (b) “no clear demarcation”



Justice Kavanaugh's concurrence test

- 1. Wetlands “adjacent” to other covered waters are regulated.
- 2. A wetland is “adjacent” if:
 - It adjoins a covered water, or
 - It is separated from a covered water only by a man-made or natural barrier.



The Thomas and Kagan concurrences

- 1. Justice Thomas: construes “of the United States” as consistent with “channels of commerce”
- 2. Justice Kagan: majority rule is non-textual, and substitutes a landowner-protection policy for Congress’s environmental protection goals



Who has the better argument?

1. “operative” text vs. Section 404(g)(1)
2. adjacent vs. adjoining
3. longstanding agency interpretation
4. Congressional ratification
5. canons of construction
 - federalism
 - vagueness/fair notice
 - mouseholes



What's next?

1. Biden WOTUS rule in trouble
2. Interim final rule expected in September
3. Increased reliance on *County of Maui*





**Learn more on *Sackett v. EPA* at
[pacificlegal.org](https://www.pacificlegal.org)**



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