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SCOTUS Ruling Outlines Test for Determining Whether Wetlands are "Waters of the U.S."

BY AMANDA ZURETTI • JUNE 6, 2023

In *Sackett vs. Envtl. Prot. Agency*, U.S., No. 21-454 (May 25, 2023), the U.S. Supreme Court held that the proper test for determining whether wetlands are "waters of the United States" within the meaning of the federal Clean Water Act (CWA) 33 U.S.C. §1251 et seq. (1972) was determined by the plurality in *Rapanos v. United States*, 547 U.S. 715, 739, 126 S. Ct. 2208, 2225 (2006), i.e., that the phrase "the waters of the United States" includes only those relatively permanent, standing or continuously flowing bodies of water "forming geographic features" that are described in ordinary parlance as "streams[,] … oceans, rivers, [and] lakes."

While the Court was unanimous on the point that the CWA did not apply to the Sackett's lot, the Court was split on the reasoning. The minority noted that the Court's new test may be just as vague as the test it sought to replace and that "[b]y narrowing the Act's coverage of wetlands to only adjoining wetlands, the Court's new test will leave some long-regulated adjacent wetlands no longer covered by the Clean Water Act, with significant repercussions for water quality and flood control throughout the United States."

The Court's decision effectively limits the scope of the Environmental Protection Agency's and Army Corps of Engineers' jurisdiction over certain wetlands. It is anticipated that both agencies will need to revisit guidance dated June 5, 2007, under which the two agencies adopted the now outdated "significant nexus" test articulated in *Rapanos*. The EPA's website now shows a new post that "In light of [the *Sackett*] decision, the agencies will interpret the phrase 'waters of the United States' consistent with the Supreme Court's decision in *Sackett*. The agencies continue to review the decision to determine next steps."