

CIBO

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Sackett v. EPA, “waters of the US”

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WOTUS RULE RECENT CHRON

- Brief recent history of definition of “waters” in CWA §1362(7)
- Trump 2020 Rule
- Biden 2023 Rule I
- Congressional Review Act Resolution of Disapproval vetoed
- Cases challenging Biden Rule
- Sackett v. US (Supreme Court) 9-0
- Biden 2023 Rule II

WOTUS BIDEN RULE – core of the controversy

Clean Water Act	1. US can regulate “navigable waters” 2. Navigable waters = “waters of the US”
<i>SWANCC v. US</i> (2001)	nonnavigable, isolated, intrastate waters <i>not</i> waters of the US
<i>Rapanos v. US</i> (2006)	Scalia “relatively permanent” water connected to traditional water = wotus
	Kennedy water with “significant nexus” to traditional navigable water = wotus

Pre-2015 - 2015 Obama Rule signif nexus plus - 2020 Trump Rule relatively permanent

Biden 2022 Rule: retains both tests, removes bright lines, codifies 2008 nonbinding Guidance

- “relatively permanent” waters with a continuous surface connection to such relatively permanent waters or to traditional navigable waters, the territorial seas, or interstate waters.
- “Significant nexus” includes “waters that, either alone or in combination with *similarly situated waters in the region*, significantly affect the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, or the territorial seas.”
- Intrastate lakes and ponds, streams, or wetlands not identified as traditional navigable waters, . . . that meet either the relatively permanent standard or the significant nexus standard.

WOTUS BIDEN RULE – core of the controversy

EXAMPLES Is this a water of the US, subject to federal jurisdiction?

Type of water	Pre-Biden in or out?	Biden rule
ephemeral or intermittent stream	Rapanos relatively permanent test: out	maybe in
intrastate pond	SWANCC v. US: out	maybe in
Sackett property, adjacent wetlands	US Supreme Court pending case	in

BIDEN WOTUS RULES & LEGAL CHALLENGES

- I. Biden WOTUS Rule I (88 Fed Reg 3004; Jan 18, 2023)
 - 01.18.23 Final rule >> lawsuits
 - 03.20.23 Rule took effect but enjoined in 27 states (5.9.23)
 - *WV (+23 States) v. EPA* (ED ND)
 - *KY v. EPA*, (6th Cir) (reversing ED KY)
 - *TX & ID v. EPA* (SD TX)
- II. 05.25.23 Supreme Court Opinion in *Sackett v. EPA*
- III. Biden WOTUS Rule II response to *Sackett* (88 Fed Reg 61964; Sept 9, 2023)
 - 09.08.23 Published, in effect, “good cause” for immediate effect without notice / comment
 - Final rule reviewed by OMB / OMB meetings w/ stakeholders Jul Aug 2023
 - Pending lawsuits, new lawsuits

Sackett v. EPA

I. JUDGMENT 9-0

II. HOLDING Reverse 9th Circuit & Remand

- “waters” in CWA §1362(7) includes wetlands that are indistinguishable from the adjacent body of water due to a continuous surface connection
- Test
 1. wetland is adjacent, relatively permanent body of water connected to traditional interstate navigable waters
 2. wetland has continuous surface connection with the waterbody, making it difficult to determine where each begins and ends

III. OPINIONS

Majority opinion	Alito + Roberts CJ, Thomas, Gorsuch, Barrett
Concurring opinion	Thomas + Gorsuch
Concurring in judgment	Kagan + Sotomayor Jackson
Concurring in judgment	Kavanaugh + Sotomayor, Kagan, Jackson

Sackett v. EPA

REASONING OF THE COURT

- Text of Clean Water Act
- Balance of powers: Federal v. State and Government v. private property
- Legal implications of reading the statutory text too broadly
- “The wetlands on the Sacketts’ property are distinguishable from any possibly covered waters.”

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Sackett v. EPA Concurrences

Concurring opinion Thomas + Gorsuch

- “navigable” & “of the US” define jurisdiction, interstate commerce

Concurring in judgment Kagan + Sotomayor Jackson

- Continuous surface connection test wrong; “adjacent” wetlands, also means “nearby”
- Corps/EPA regs for half century, “adjacent wetlands” can be “separated from covered water only by a manmade dike or barrier, natural river berm, beach dune, or the like.”

Concurring in judgment Kavanaugh + Sotomayor, Kagan, Jackson

- Concur 1. significant nexus test wrong 2. Sackett land has no covered wetlands
- Narrowing test for “adjacent” to mean only “adjoining” changes 45 years of federal regulation, significant water quality and flood control repercussions

BIDEN RULE II

POTENTIAL ISSUES

- I. “Good Cause” for no notice/comment under Administrative Procedures Act
- II. Significant nexus test
- III. “Adjacency” definition
- IV. “Relatively permanent” and *Rapanos* plurality test, endorsed by the *Sackett* majority
- V. Other

Judicial Review of Major Agency Regulations

WV v. EPA SCT June 2022

- Clean Air Act, “best system of emission reduction adequately demonstrated”
- HELD: major questions doctrine, no deference, reverse/remand (6-3)

Sackett v. EPA SCT May 2023

- Clean Water Act, “waters of the US”
- HELD: ambiguous statutory text & broad agency reach based on open-ended multi-factor test for US jurisdiction, reverse/remand (unanimous)

Loper Bright Enterprises v. Raimondo SCT 2023/2024

- Magnuson-Stevens Fishery Conservation & Management Act, ambiguous statute, judicial deference, Chevron doctrine