

# SCOTUS: Landmark Case Defines Clean Water Act Jurisdiction

June 01, 2023

**On May 25, 2023, the United States Supreme Court significantly curtailed the federal government's authority to regulate wetlands under the Clean Water Act (CWA) in a 9 to 0 decision. The Court held that the Clean Water Act extends only to wetlands that have a continuous surface connection with "waters" of the United States. With a relatively permanent body of water connected to traditional interstate navigable waters, it may well be difficult to determine where the water ends, and the wetlands begin.**

Prior to the Court's decision, if a homeowner or developer was unsure whether it would be permissible to affect a specific area that might fall under the U.S. Environmental Protection Agency (EPA)'s CWA jurisdiction, the EPA recommended seeking a determination from the Army Corps on the issue. In such reviews, the EPA used the highly subjective "Significant Nexus" test to determine the extent of the CWA jurisdiction.[1]

The nine justices agreed that the Ninth Circuit incorrectly ruled that Idaho landowners Michael and Chantell Sackett need a Clean Water Act permit to build a home on their property. However, as in past opinions, the Court diverged on exactly what triggers the inclusion of particular wetlands under CWA jurisdiction, with just five of the Justices agreeing to a limited definition of which wetlands are covered under the law.

Writing for the majority, Justice Samuel Alito said, "The CWA prohibits the discharge of pollutants into only 'navigable waters,' which it defines as 'the waters of the United States, including the territorial seas.' The meaning of this definition is the persistent problem that we must address."

"Based on the CWA's history and text, only those bodies of water that are 'indistinguishable' from and have a 'continuous surface connection to' permanent, standing or continually flowing bodies of water, such as streams and oceans, are governed by the law." Justice Alito was joined by Chief Justice Roberts and Associate Justices Thomas, Gorsuch, and Barrett, thereby rejecting the "Significant Nexus" test.

"The wetlands at the center of the case don't meet this definition because they are distinguishable from those kinds of bodies of water," according to Justice Alito. He likened the wetlands to "puddles, which are also defined by the ordinary presence of water, even though few would describe them as 'waters'."

The Court articulated the following new test to be used in determining the jurisdiction of 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."*

The *Sackett* decision sets forth a clear test for determining EPA jurisdiction. This test is a significant setback for any future attempt to expand CWA authority to wetlands and streams that are isolated, ephemeral, or not obviously connected to a navigable lake or stream. Likewise, the ruling represents an enormous victory for homeowners and developers. The Court's narrow reading of the statute's scope will also loosen up the requirements for permitting and rollback enforcement. Real estate developers and homeowners are now free from the long arm of the CWA's jurisdiction that some say unnecessarily encumbered countless properties.

[1] *Rapanos v. United States*, 547 U.S. 715 (2006).

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