

WOTUS & Water Quality in the West in a Post-Sackett World

Theresa A Dunham
Kahn, Soares & Conway, LLC

Sackett v. EPA 598 U.S. 651 (2023)

General Background

- Latest Supreme Court decision in the long-running debate as to when is a wetland also a water of the United States (WOTUS), or alternative, what is the geographic extent of Clean Water Act (CWA) jurisdiction.
- Ninth Circuit held that property owners’ lot contained wetlands covered under the Clean Water Act based on the “significant nexus” test.
- A significant nexus exists if the waterbody (alone or in combination) significantly affects the chemical, physical, or biological integrity of traditional navigable waters, the territorial seas, or interstate waters.
- Supreme Court granted certiorari to address the long-standing issue of, *What is the proper test for determining whether wetlands are waters of the U.S.?*

Summary of Prior History of Cases Decided by U.S. Supreme Court

Case	Key Rule Established
<i>U.S. v. Riverside Bayview Homes</i> 474 U.S. 121 (1985)	Applied the migratory bird rule.
<i>SWANCC v. Army Corps</i> 531 U.S. 159 (2001)	Rejected the migratory bird rule.
<i>Rapanos v. U.S.</i> 547 U.S. 715 (2006) (plurality opinion)	<p>4 Justices: Coverage does not extend beyond two categories of waters – (1) relatively permanent bodies of water connected to traditional navigable waters; and, (2) wetlands with close proximity to traditional waters and that are “as a practical matter indistinguishable from waters of the United States.”</p> <p>4 Justices: Deferred to Government’s determination.</p> <p>1 Justice (Kennedy) concurring in judgment established the “significant nexus” test between the wetland in question and a navigable water.</p>

Revolving Door of Regulations in Response

2015 Obama Rule – Incorporating Significant Nexus Test

2019 Obama Rule Repealed

- 2020 Trump Rule – Limiting geographic extent
- 2023 Biden Rule – Repealed Trump rule, returns to Significant Nexus Test
- 2025 Joint Memo Guidance re: “Continuous Surface Connection”
- 2025 Trump request for comments, listening sessions, new revision of regulations

The Sackett Decision

The Justices Line Up... Nine votes in judgment but not in opinion			
Majority Opinion	Concurring Opinion	Concurring in Judgment	Concurring in Judgment
Alito (author) CJ Roberts Thomas Gorsuch Barrett	Thomas (author) Gorsuch	Kagan (author) Sotomayor Jackson	Kavanaugh (author) Sotomayor Kagan Jackson

Key Factors Considered by the Majority

- Significant nexus test uncertain, difficult to apply, complicated manual
- Requires expert consultants to make determinations and advocate for project proponents Army Corps determinations
- Lack of ability to obtain Corps determination
- Process costly, inefficient and vague
- Significant civil and criminal penalties if you are wrong

Majority Opinion Holding

- *“We hold that the CWA extends to only those wetlands that are ‘as a practical matter indistinguishable from waters of the United States.’”*
- Two part test to determine if a wetland is a water of the United States
 - (1) Adjacent body of water is a relatively permanent body of water connected to traditional interstate navigable water
 - (2) Wetland has a continuous surface connection with the water, making it difficult to determine where the ‘water’ ends and the ‘wetland’ begins

Implications for the West

- Decision limits geographic scope of the CWA jurisdiction
- Excludes seasonal vernal pools that would not be considered adjacent wetlands connected to a water of the United States
- Opponents of *Sackett* claim that nearly 60 million acres of wetlands and streams are no longer subject to the CWA

Examples of Post-Sackett Litigation

- *White v. U.S. Environmental Protection Agency* 737 F.Supp.3d 310, Decided June 17, 2024
 - Portions of plaintiff's property are in a low-lying region along a creek and a river is prone to flooding
 - Plaintiff attempted improvements to minimize flooding risks and facilitate productive uses, including agriculture and mineral extraction.
 - EPA claimed plaintiff's flood control work took place in wetlands adjacent to federally regulated waters
 - Plaintiff challenged the EPA's amended August 2023 rule, claiming that the "adjacent wetlands" provisions do not conform with *Sackett's* interpretation of the CWA
 - Plaintiff alleges the Amended Rule unlawfully omits *Sackett's* "indistinguishability" requirement for wetlands to be subject to federal regulatory authority
 - Plaintiff filed a complaint in March of 2024 and request for preliminary injunction in April
 - Motion for Preliminary Injunction Denied, failure to show likely to succeed on the merits
- *U.S. v. Valentine* 751 F.Supp.3d 617, Decided September 27, 2024
 - Defendants, in the logging business, upgraded and extended forest roads on their land
 - In 2018, Army Corps issued a cease-and-desist order alleging illegal filling of federally regulated wetlands
 - Defendants argued that *Sackett* made clear that wetlands may only be regulated if they are "indistinguishable" from "waters of the United States"
 - Court denied Defendants' motion for partial judgment because the Army Corps has jurisdiction due to continuous surface connection with water of the U.S.

Another Case to Watch that Impacts the West

PCFFA v. Karl Strock, et al. 657 F.Supp.3d 1341 (2023) – On appeal to the Ninth Circuit Court of Appeal

Key Issue in the Case

Extent of the exemption from National Pollutant Discharge Elimination System Permits for agricultural return flows

The Case

- PCFFA et al. allege that defendants (Conant, et al., San Luis & Delta-Mendota Water Authority, and intervenor defendant Grassland Water District) are discharging pollutants from the San Luis Drain without an NPDES permit
- Under § 1342(l)(1) (“The Agricultural Return Flows Exception”), “[t]he Administrator shall not require a permit . . . for discharges composed entirely of return flows from irrigated agriculture, nor shall the Administrator directly or indirectly, require any State to require such a permit.” 33 U.S.C. § 1342(l)(1)
- PCFFA argues that discharges from the San Luis Drain are not entirely from agricultural return flow and are unrelated to crop production thus all discharges from the drain need an NPDES permit
- Additional sources of pollutants identified by PCFFA include
 - i. Groundwater originating from beneath “non-irrigated” land adjacent to the Drain which seeps into the Drain through cracks and weep holes
 - ii. Sediment that has settled out over time in the Drain from the waters it carries, and which is purportedly discharged into Mud Slough “when it is scoured and reworked by flows in the Drain”
 - iii. Water transported into tile drains underneath the retired agricultural land occupied by a solar project.
 - iv. Flows of polluted water in the Drainage Area that allegedly stem from “highways, residences and other non-irrigated lands”.
- Defendants counter that the four sources are either:
 - i. Independently exempt under the Act as nonpoint sources
 - ii. Related to crop production
 - iii. Unproven in their existence,
 - iv. Or a combination of all three.
- District Court Holding: There was no genuine dispute of material fact regarding whether plaintiffs’ alleged sources of pollutants constitute nonpoint sources or whether they stem from “activities related to crop production,” and thus, these alleged sources of pollutants do not prevent application of the Agricultural Return Flows Exception.

Amicus Brief Filed By Western Agricultural and Water Interests

- Irrigated agriculture in the west depends on drainage systems and necessary infrastructure to support crop production
- Congress' purpose for the Exemption was to put irrigated agriculture on equal footing with non-irrigated agriculture under the CWA
- Exemption allows agriculture in the west to grow without onerous impediments under the CWA
- California independently regulates nonpoint source discharges from irrigated agriculture
- Requiring NPDES permits for discharges from agricultural drains equates to treating return flows as point source discharges, which would defeat the purpose of the exemption
- If incidental seepage, precipitation, and other nonpoint sources of pollution were found to negate the Exemption, this would lead to absurd results or may even destroy the exemption altogether

Status of the Case

- Case fully briefed before the Ninth Circuit Court of Appeal
- Hearing held October 2024