Wetlands: Regulation and Litigation Update

The battle over the "Waters of the United States"

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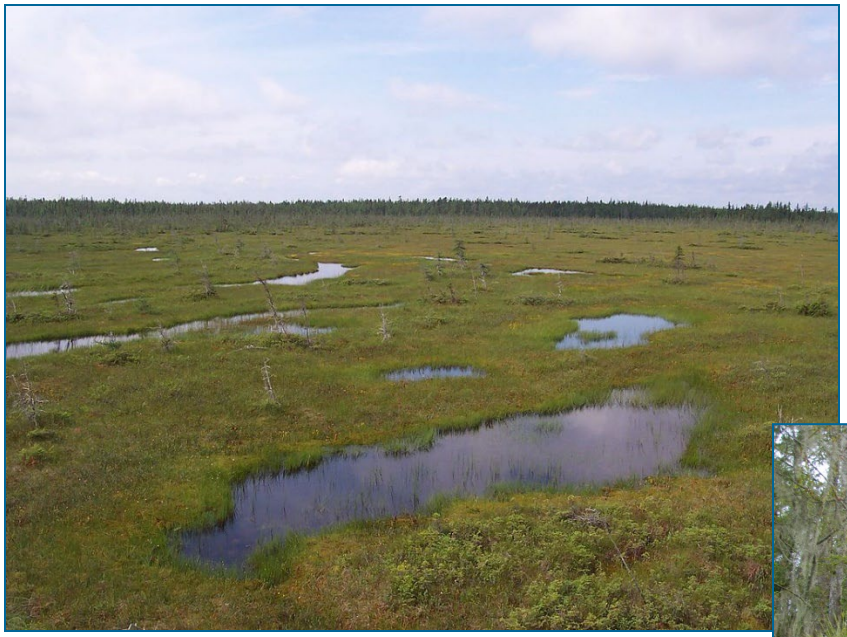
Wetlands - Background

- The jurisdictional scope of the CWA is "navigable waters," defined in section 502(7) of the statute as "waters of the United States, including the territorial seas."
  - EPA regulates discharges of pollutants, including dirt and other dredged or excavated material, into "navigable waters" (CWA Section 301).
  - USACOE regulates placement of "dredge or fill material" into "navigable waters" (Section 404), which in turn are defined as "waters of the United States" (Section 1362(7)).
- Existing regulations (last codified in 1986) define "waters of the United States" as traditional navigable waters, interstate waters, all other waters that could affect interstate or foreign commerce, impoundments of waters of the United States, tributaries, the territorial seas, and adjacent wetlands. 33 CFR 328.3; 40 CFR 120.2.

“Navigable waters”



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Float a canoe?

“Navigable in fact”

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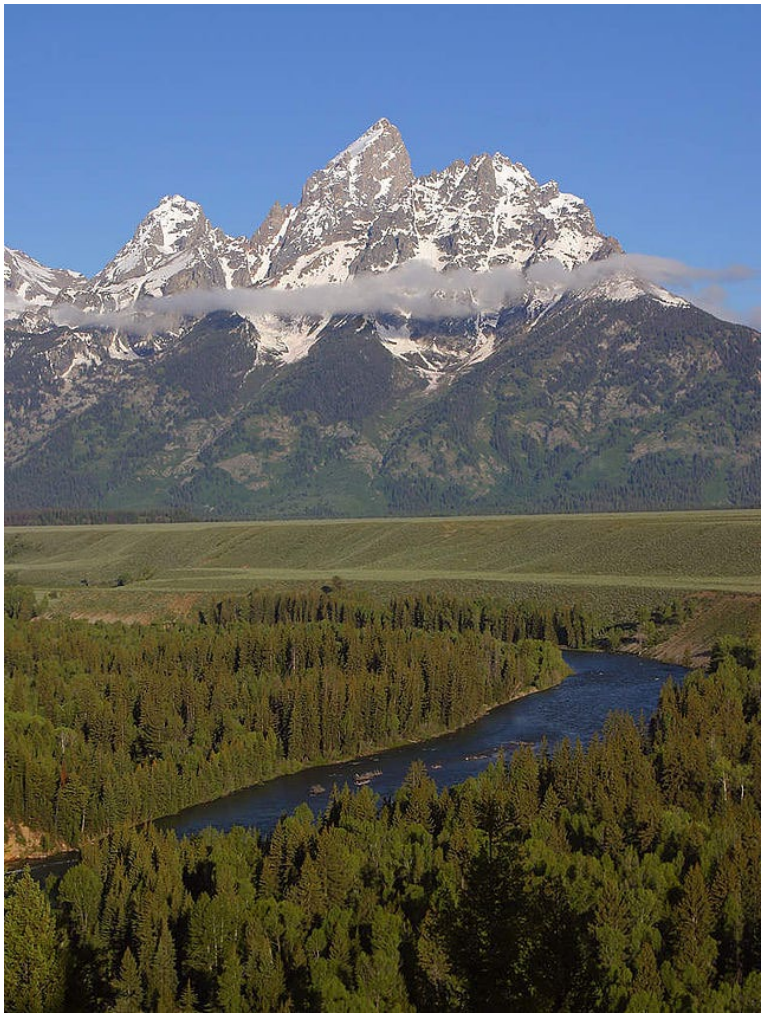
“Waters of the United States”

“Waters of the United States”



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WOTUS Interpretation Timeline

- *Riverside Bayview Homes* (1985)
- "1986 Regulations" defining WOTUS at 40 CFR § 120.2; 33 CFR § 328.3
- *SWANCC v. U.S. Army Corps of Engineers* (2001)
- 2003 EPA / USACOE Guidance
- *United States v. Rapanos* (2006).
- 2007-08 EPA / USACOE Guidance ("*Rapanos* Guidance")
- Clean Water Rule (2015)
- Repeal Rule (Repealing Clean Water Rule) (2019)
- Navigable Waters Protection Rule (2020)
- *Pascua Yaqui Tribe v. EPA* – vacated, remanded NWPR (Aug. 2021)
- Proposed rule (Part 1) to revise WOTUS definition (Dec. 2021)
- *Sackett v. EPA* (forthcoming)

Pre-2015 Regulatory Regime – *Riverside Bayview Homes*

***United States v. Riverside Bayview Homes* (1985)**

- Involved wetlands adjacent to navigable tributary of Lake St. Clair.
- Court upheld regulation of traditionally navigable waters (TNW), interstate waters, their tributaries and wetlands adjacent to each.
- Adjacent wetlands are "inseparably bound up" with the waters to which they are adjacent.
- SCOTUS deferred to the Corps' ecological judgment.

Pre-2015 Regulatory Regime – 1986 Regulations

- **Jurisdictional Waters**
  - All waters currently used, used in the past or may be susceptible to use in interstate or foreign commerce.
  - All interstate waters including interstate wetlands.
  - Intrastate waters the destruction or degradation of which could affect interstate or foreign commerce.
    - Includes those used for interstate recreation, use of fish or shellfish in interstate commerce and industrial commercial uses.
  - Impoundments of jurisdictional waters.
  - Tributaries of any of the above.
  - The territorial seas.
  - Adjacent wetlands
    - Bordering, contiguous or neighboring.
    - Wetlands separated by man-made barriers are still "adjacent"

- **Non-Jurisdictional Waters**
  - Waters not meeting the above definitions
  - Waste treatment systems

Pre-2015 Regulatory Regime - *SWANCC*

***Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers (SWANCC)* (2001)**

- Non-navigable, isolated, intrastate waters.
- Determination of jurisdiction based on Migratory Bird Rule
  - Presence in or use of those wetlands by ducks, geese, and other birds.
  - Birds in turn affected interstate commerce (hunting, harvesting, migrating across state lines).

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Pre-2015 Regulatory Regime - *SWANCC*

- '[W]here an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result."
- Finding "nothing approaching a clear statement from Congress that it intended section 404(a) to reach an abandoned sand and gravel pit."
- Introduced concept of "significant nexus" as determining jurisdiction over waters not navigable in fact.

Pre-2015 Regulatory Regime – 2003 Guidance

2003 Joint Memorandum Guidance

(68 FR 1991, 1995 (Jan . 15, 2003))

- "Traditional navigable waters" (TNW) are jurisdictional
  - Includes isolated, intrastate waters *if* they are navigable in fact (e.g. the Great Salt Lake).
- Wetlands adjacent to TNW are jurisdictional.
- Tributaries of TNW and wetlands adjacent to tributaries are generally jurisdictional but may require additional analysis.
- No jurisdiction over isolated, non-navigable, intrastate waters where the sole basis for jurisdiction rests on the factors set forth in the Migratory Bird Rule.
- Ambiguity as to whether "commerce-based" jurisdiction at 33 CFR 328(a)(3) will survive more generally.

Pre-2015 Regulatory Regime - *Rapanos*

Rapanos v. United States (2006)

Pre-2015 Regulatory Regime - *Rapanos*

Justice Stevens (dissent):

Would uphold the government's interpretation as reasonable. The inclusion of ***all wetlands adjacent to tributaries of navigable waters*** was most consistent with the CWA's purpose of eliminating pollution in the nation's waters.

Pre-2015 Regulatory Regime - *Rapanos*

Scalia (plurality opinion):

Waters of the United States ***"includes only those relatively permanent, standing or continuously flowing bodies of water 'forming geographical features' that are described in ordinary parlance as 'streams[,] . . . oceans, rivers, [and] lakes," and*** that ***only those wetlands that have a "continuous surface connection," a flow of water, between those wetlands and the other traditional bodies of water***, are subject to jurisdiction under the CWA.

Pre-2015 Regulatory Regime - *Rapanos*

Kennedy (concurrence):

- Rejected "continuous surface connection", opining instead that jurisdiction depends on whether there is a ***"significant nexus"*** between the wetland and the other water body.
- Whether the wetlands ***"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.'"
- More detailed evidence of connection required for nexus to "lesser waters" (i.e. not traditionally navigable).

Pre-2015 Regulatory Regime

	Non-Navigable Tributaries	*Wetlands Adjacent to Non-Navigable Tributaries*
Plurality	Jurisdiction exists if the water is a "relatively permanent, continuously flowing" body of water that flows into a traditional navigable water.	Jurisdiction exists if the wetlands have a "continuous surface connection" with a relatively permanent, continuously flowing body of water that flows into a traditional navigable water.
Kennedy	Jurisdiction exists if the water has a significant nexus to a traditional navigable water.	Jurisdiction exists if the wetlands have a significant nexus to a traditional navigable water.

	A "significant nexus" exists where the water "either alone or in combination with similarly situated lands in the region, significantly affects the chemical, physical, and biological integrity" of a traditional navigable water.	A "significant nexus" exists where a wetland "either alone or in combination with similarly situated lands in the region, significantly affects the chemical, physical, and biological integrity" of a traditional navigable water.

Pre-2015 Regulatory Regime

- Which interpretation controls?
- *Marks* holding regarding plurality opinions – the position taken by members who concurred on the "narrowest grounds" controls.
- Many courts allowed application of either plurality or Kennedy concurrence.
  - In many cases, the tests will agree, but not:
    - Where there is no surface connection between the water body or wetland and a traditional navigable water but there is a "significant nexus."
    - Where there is a slight surface hydrological connection but the nexus between the wetland and the traditional navigable water is not significant.
- SCOTUS taking the question on directly in *Sackett v. EPA* (2022).

Pre-2015 Regulatory Regime – 2008 "Rapanos Guidance"

- Agencies will assert jurisdiction over:
  - Non-navigable tributaries of traditional navigable waters ***that are relatively permanent where the tributaries typically flow year-round or have continuous flow at least seasonally*** (typically 3 months).

Pre-2015 Regulatory Regime – 2008 "Rapanos Guidance"

- Agencies will assess significant nexus for:
  - Non-navigable tributaries that are not relatively permanent (and wetlands adjacent thereto).
  - Wetlands adjacent to but that do not directly abut a relatively permanent non-navigable tributary.
- "Significant nexus" analysis includes consideration of hydrologic and ecologic factors.

Pre-2015 Regulatory Regime – 2008 "Rapanos Guidance"

- Agencies will generally not assert jurisdiction over:
  - Swales or erosional features (gullies, small washes characterized by low volume, infrequent or short duration flow).
  - Ditches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water.

Clean Water Rule (2015)

- Proposed rule in 2014.
- Over 1 million comments received.
- 400 public outreach meetings.
- Sought to replace time consuming individual case-specific analysis with bright-line jurisdictional categories.

Clean Water Rule

- **Jurisdictional Waters by Rule**
  - Traditional navigable waters
  - Interstate waters
  - Territorial seas
  - Impoundments of jurisdictional waters
- **Jurisdictional Waters by Rule, as defined**
  - Covered Tributaries
  - Covered Adjacent waters
- **Case-Specific Waters**
  - "Similarly situated" waters that must be analyzed in combination
  - Waters within the 100-year floodplain or within 4,000 feet of the high tide line of a jurisdictional water

Clean Water Rule

Exclusions from the CWA

- Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the Clean Water Act.
- Prior converted cropland (PCC).
- The following ditches:
  - Ditches with ephemeral flow that are not a relocated tributary or excavated in a tributary.
  - Ditches with intermittent flow that are not a relocated tributary, excavated in a tributary, or drain wetlands.
  - Ditches that do not flow, either directly or through another water, into a TNW
- The following features:
  - Artificially irrigated areas that would revert to dry land should application of water to that area cease;
  - Artificial, constructed lakes and ponds created in dry land such as farm and stock watering ponds, irrigation ponds, settling basins, fields flooded for rice growing, log cleaning ponds, or cooling ponds;
  - Artificial reflecting pools or swimming pools created in dry land;
  - Small ornamental waters created in dry land;
  - Water-filled depressions created in dry land incidental to mining or construction activity, including pits excavated for obtaining fill, sand, or gravel that fill with water;
  - Erosional features, including gullies, rills, and other ephemeral features that do not meet the definition of tributary, non-wetland swales, and lawfully constructed grassed waterways; and
  - Puddles.
- Groundwater, including groundwater drained through subsurface drainage systems.
- Stormwater control features constructed to convey, treat, or store stormwater that are created in dry land.
- Wastewater recycling structures constructed in dry land; detention and retention basins built for wastewater recycling; groundwater recharge basins; percolation ponds built for wastewater recycling; and water distributary structures built for wastewater recycling.

Clean Water Rule

- Criticisms
  - Includes tributaries that have physical signs of flowing water, even if they don't run all year round, and ditches that "look and act" like tributaries;
  - Added definition of "neighboring" which effectively changed definition of "adjacent to" thereby expanding EPA oversight to any body of water within 1,500 feet of another water body already covered by the rule; and
  - Extended protections to regional water features, such as prairie potholes and coastal bays.
- 31 states successfully sought injunctions to block enforcement of the 2015 WOTUS Rule in federal courts.
- After change in administration, the agencies delayed the effective date of the Clean Water Rule and returned to interpreting WOTUS using the pre-2015 definitions.
- The agencies later repealed the Clean Water Rule in 2019 (the "Repeal Rule"), then replaced it in 2020.

Navigable Waters Protection Rule (2020)

- **Jurisdictional waters include**
  1) territorial seas and traditional navigable waters
  2) perennial and intermittent tributaries that contribute surface water flow to traditional navigable waters (including ditches and other channels that relocate or are constructed in tributaries)
  3) certain lakes, ponds, and impoundments of jurisdictional waters (including lakes and ponds that are traditional navigable waters, contribute surface water flow to or are flooded by a traditional navigable water directly or through another jurisdictional water in a typical year)
  4) Adjacent wetlands

Navigable Waters Protection Rule (2020)

- Removed interstate streams as separate jurisdictional category.
- Excluded ephemeral streams and water features.
- Required rivers, streams, and other natural channels to contribute flow directly or indirectly to a territorial sea or TNW; and excluded wetlands that are not adjacent to another non-wetland jurisdictional water.
- Eliminated the much debated “significant nexus” to a navigable water as a basis for jurisdiction.

Pascua Yaqui Tribe v. EPA

- A number of Native American tribes, represented by Earthjustice, challenged the NWPR in 2020.
- Argued rule violated the CWA and both Repeal Rule and NWPR were arbitrary and capricious.
- Challenged agency support for rulemaking and use of selective citations to the Science Report.

Pascua Yaqui Tribe v. EPA

- Tribes filed for summary judgment.
- Industry groups and the Sacketts intervened and cross-moved for summary judgment.
- EPA agreed to a voluntary remand without vacatur.
- Sacketts opposed remand.
  - Argued that *Rapanos* plurality controlled so EPA could not change the definition of "adjacent wetlands" from the NWPR.
- Plaintiffs pushed for vacatur of the NWPR.

Pascua Yaqui Tribe v. EPA

August 2021 – court found in favor of plaintiffs, remanding the NWPR with vacatur.

- 9th Circuit had just rejected Sacketts' argument regarding the *Rapanos* plurality.
- The question of vacatur required the Court to assess the merits.
- The Court found that impacts to ephemeral streams, wetlands, and other aquatic resources could have "cascading and cumulative downstream effects"

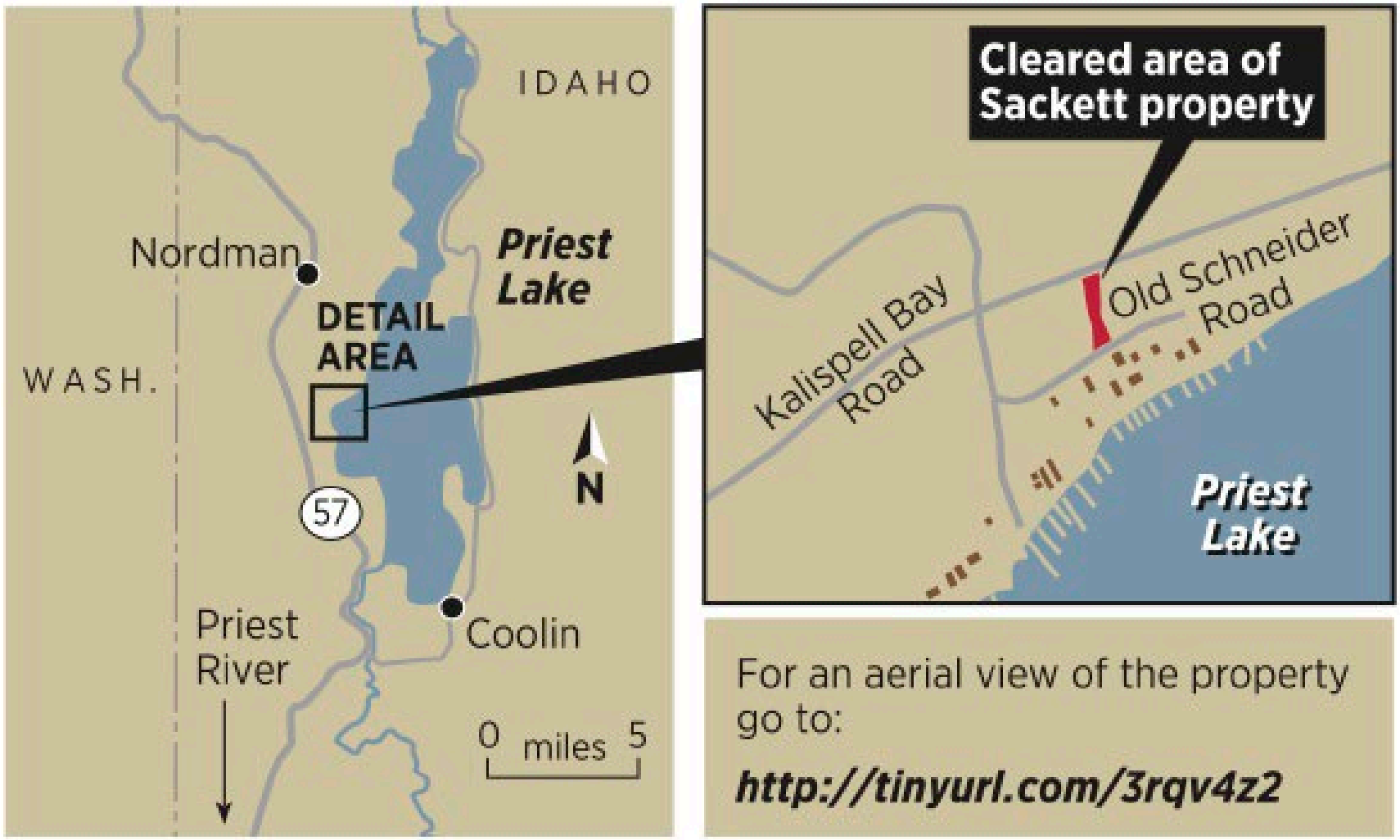
Pascua Yaqui Tribe v. EPA

- Between June 22, 2020 and April 15, 2021, the Corps made approved jurisdictional determinations under the NWPR of 40,211 aquatic resources or water features, and found that **approximately 76% were non-jurisdictional**.
- The Agencies identified **333 projects** that would have required Section 404 permitting under the CWA prior to the NWPR but no longer do.
- The reduction in jurisdiction has "been particularly significant in arid states." **In New Mexico and Arizona**, **nearly every one of over 1,500 streams assessed under the NWPR were found to be non-jurisdictional**—a significant shift from the status of streams under both the Clean Water Rule and the pre-2015 regulatory regime.

New WOTUS Rulemaking (2021)

- June 2021 - Biden administration announced intent to undertake 2-part WOTUS rulemaking.
  - First step – foundational rule to restore longstanding protections (i.e. pre-2015 regime).
  - Second step – additional rule to build on that regulatory foundation.
- First rule proposed in December 2021.
  - Restores definition to pre-2015 regime, updated to reflect consideration of SCOTUS precedents (i.e. *Rapanos*).

Sackett v. EPA (2022)


IDAHO
Nordman
Priest Lake
DETAIL AREA
WASH.
57
N
Priest River
Coolin
0 miles 5
Cleared area of Sackett property
Kalispell Bay Road
Old Schneider Road
Priest Lake
For an aerial view of the property go to:
http://tinyurl.com/3rqv4z2

Sackett v. EPA

Sackett v. EPA (2022)

- EPA and the Corps claimed property was subject to CWA jurisdiction as a wetland.
- Agencies provided little supporting explanation, issued compliance order directing owners to remediate site in 5 months, threatened fines and penalties.
- Sacketts challenged in 2008.
- District Court and 9th Cir. sided with agencies, no right to review of order.

Sackett v. EPA

- SCOTUS found in favor of Sacketts in 2012. Held that a compliance order was a reviewable final agency action.
- On remand, district court granted summary judgment for agencies, applied Kennedy's "significant nexus" test.
- 9th Cir. affirmed, over Sackett's objection that the plurality's "continuous surface water connection" test was the proper standard.

Sackett v. EPA

- SCOTUS Oral Argument Oct. 3, 2022
- Opportunity to revisit *Rapanos*
- Numerous amicus briefs filed.
  - Indiana Farm Bureau filed a joint brief with 19 other state farm bureaus.
- Likely to complicate the agencies' rulemaking.

Current Implementation Status

- Shortly after *Pascua Yaqui Tribe* order, EPA and USACE announced they would halt implementation of NWPR and would interpret WOTUS consistent with the pre-2015 regulatory regime.
- In December 2021, the agencies proposed the rule that would amend the definition of WOTUS consistent with the same, but adding "significant nexus."

Current Implementation Status

- **Jurisdictional Waters**
  - All waters currently used, used in the past or may be susceptible to use in interstate or foreign commerce.
  - All interstate waters including interstate wetlands.
  - Intrastate waters
    - That are relatively permanent, standing or continuously flowing bodies with a continuous surface connection to TNW; or
    - That either alone or in combination have significant nexus to TNW.
  - Impoundments of jurisdictional waters.
  - Tributaries of any TNW or their impoundments.
    - That are relatively permanent, standing or continuously flowing bodies with a continuous surface connection to TNW; or
    - That either alone or in combination have significant nexus to TNW.
  - The territorial seas.
  - Wetlands adjacent to
    - TNW
    - Impoundments or tributaries of TNW that are relatively permanent, standing or continuously flowing bodies with a continuous surface connection between the wetlands and the water
    - Impoundments or tributaries of TNW when the wetlands either alone or in combination have significant nexus to TNW.
- **Non-Jurisdictional Waters**
  - Waters not meeting the above definitions
  - Waste treatment systems
  - Prior converted cropland

Current Implementation Status

- Examples of non-jurisdictional waters under pre-2015 standard:
  - Three ditches in California that were created wholly from uplands, drain only uplands, and that do not carry a relatively permanent flow of water.
  - An ephemeral stream in Ohio in an agricultural field, which loses bed and bank and flows into a swale. A significant nexus determination showed that the stream does not have a significant nexus to a TNW.
  - Nearly 600 linear feet of an ephemeral stream in Ohio with no adjacent or abutting wetlands and that supports a very small watershed (18 acres); provides low functions and is six miles away from the nearest TNW, leading to the conclusion that the stream does not have more than a speculative or insubstantial effect on the integrity of the TNW.
  - Three wetlands in Ohio surrounded by upland that exhibit no connectivity to any apparent surface water channel and that have no distinct surface water connection to a water of the United States.

Current Implementation Status

- Two wetlands in Wisconsin that are surrounded by uplands and that share no surface water or ecological connections with the nearest tributary.
- A wetland in Arkansas separated from another wetland by an earthen berm, surrounded by uplands, and considered isolated.
- Wetland in Oregon where ponding was created by a concrete and cinder block wall with no connecting pipes or nearby storm drains, preventing any water from flowing offsite. Based on the lack of hydrologic connections and distance from the nearest stream, the wetland does not have chemical, biological, or physical connection to downstream waters or TNWs.
- A large forested wetland in Washington (~17 acres) that is separated from the nearest stream by miles of residential and commercial developed land, and that is surrounded by elevated upland and a topography that would preclude shallow subsurface flows or surface flows into the nearest jurisdictional water; no ecological connections were identified.

Current Implementation Status

- Two small wetlands in Washington that do not have a likely surface or subsurface hydrologic connection to jurisdictional waters, based on the presence of well-drained soils, the distance (thousands of feet) between the wetlands and potential jurisdictional waters, and the presence of impervious surfaces and berms which would limit connectivity; no ecological connections were identified.
- Two small emergent wetlands in Idaho that are several hundred feet from the nearest river, which drain into upland swales that terminate in a closed basin upland area with well-drained soils, no outlet, and no other aquatic resources.
- An emergent wetland in Alaska that is surrounded by development (including a large road) that severed any surface or shallow subsurface hydrologic connections that may have once existed with a nearby wetland complex and lake.