

Clean Water Act Enforcement *Post-Sackett*

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*speaking only in her personal capacity

Michael Sackett v. EPA (Sackett II),
143 S.Ct. 1322 (2023)



Court adopts the *Rapanos* plurality test

- Waters “may fairly be read to include only those wetlands that are *as a practical matter indistinguishable from waters of the United States*, such that it is difficult to determine where the water ends and the wetland begins.” (cleaned up, emphasis added).
- “That occurs when wetlands have *a continuous surface connection to bodies that are waters of the United States* in their own right, so that there is no clear demarcation between waters and wetlands.” (cleaned up, emphasis added)
- Temporary interruptions OK (low tides, dry spells)
- Illegal barriers do not destroy jurisdiction

August 2023 Conforming Rule

- 173 Fed. Reg. 61,964, Effective Sept. 8, 2023
- Codifies the *Sackett* ruling in the C.F.R.
- Changes:
 - Removed “interstate wetlands” as a separate category
 - Removed “significant nexus standard,” including from the standard for tributaries and adjacent wetlands
 - Revised definition of adjacent to mean “having a continuous surface connection”
 - Removed term “significantly affect” and its definition

Enforcement efforts

- Reduces the Act's reach
- Open questions
 - What waters will count?
 - What does it mean for a wetland to be “indistinguishable”?
 - How much of a disruption to the connection is too much?
 - Discharges to a wetland that reach other waters of the United States may count.
- State rules may play a bigger role
- Federal legislation?
 - Majority opinion interpreted the statute
 - Constitutional arguments