

WHEN *SACKETT* MEETS *COUNTY OF* *MAUI*

⚡ University of Toledo College of Law ⚡
⚡ November 3, 2023 ⚡

**23rd Annual Great Lakes Water Law
Conference: The Clean Water Act's
Next 50 Years**

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**THE CLEAN WATER ACT HAS TWO
DIFFERENT PERMIT PROGRAMS. THE
SUPREME COURT LIKES ONE, BUT NOT THE
OTHER.**

SECTION 402'S WEB:

What does
Section 402
STOP?



Damage to
Aquatic
Ecosystems

Public
Nuisance

Public
Health
Impairments

Damage to
Aquatic Life

Public
Use
Limitations

Private
Nuisance



SECTION 404'S WEB

What does
Section 404
STOP?



THE CWA'S 50+ YEARS AT THE SUPREME COURT

	1972-1981	1982-1991	1992-2001	2002-2011	2012-2023	TOTAL
NPDES DECISIONS	6	3	2	3	3: <i>Decker; LA County; County of Maui</i>	17
SECTION 404 DECISIONS	0	1: <i>Riverside Bayview</i>	1: <i>SWANCC</i>	3: <i>Borden Ranch; Rapanos; Coeur Alaska</i>	3: <i>Sackett I; Hawkes; Sackett II</i>	8
DECISIONS ON OTHER STUFF	7	3	3	2	1: <i>Where to challenge WOTUS rules</i>	16

WOTUS DECISIONS COME FROM SECTION 404:

THE SUPREME COURT'S INTERPRETATIONS OF “WATERS OF THE UNITED STATES”



RIVERSIDE BAYVIEW: 9-0

Wetlands adjacent to traditionally navigable waters are jurisdictional.



SWANCC: 5-4

No isolated waters on the basis of the Migratory Bird Rule.



RAPANOS: 4-1-4

Pick your test for non-traditionally navigable waters: direct surface water connection to TNW, significant nexus, or either/or.

2006: THE *RAPANOS* SPLIT

Justice Scalia's plurality:

Wetlands are covered when they have a direct surface water connection to relatively permanent "waters."

NO federal Courts of Appeals followed ONLY the plurality.

Justice Kennedy:

Waters are covered when they have a significant nexus to traditionally navigable waters such that pollution can affect those waters.

ALL Courts of Appeals used this test (7th, 9th & 11th used ONLY this).

Justice Stevens' dissent:

The test should be broader but we accept both the plurality's and Justice Kennedy's.

1st, 3rd, 8th Circuits accepted both; 4th, 5th, and 6th probably do.

Priest Lake, Idaho

02

SACKETT V. EPA:
ONCE MORE INTO THE
BREACH . . .



50 Old Schneider Rd. Priest River, ID 83856

**Priest
Lake**



View south from Kalispell Bay Road along east edge of Sackett property, taken during 2008 site visit.

FROM THE NINTH CIRCUIT OPINION



East side of the lot showing strip of excavated ground that was being filled when EPA officials arrived, taken during 2007 site visit.

NOTE THE NINTH CIRCUIT'S ACTUAL SIGNIFICANT NEXUS ANALYSIS:



- (1) The wetlands were adjacent to an unnamed stream 30 feet away and *on the other side of a road*,
- (2) That is tributary to Kalispell Creek,
- (3) Which flows into Priest Lake, a traditional navigable water.



- (4) The Sacketts' wetlands are part of one of the 5 largest complexes along the 62-mile-long shoreline.
- (5) These wetlands, in combination, significantly affect the integrity and water quality of Priest Lake.

THE DISTRICT COURT RELIED MORE SIMPLY ON A DIRECT, IF SUBSURFACE, CONNECTION.



THE *CERTIORARI* QUESTION IN *SACKETT V. EPA*:

Whether the Ninth Circuit set forth the proper test for determining whether wetlands is [sic] “waters of the United States” under the Clean Water Act, 33 U.S.C. § 1362(7).

**Justice
Alito for
the
Court:
Justices
Alito,
Roberts,
Thomas,
Gorsuch
& Barrett**

**Justice Thomas's
concurrence
(with Justice
Gorsuch):
Commerce Clause**

FOUR OPINIONS IN SACKETT

**Justice
Kagan's
concurrence
(with Justices
Sotomayor &
Jackson)**

**Justice
Kavanaugh's
concurrence
(with Justices
Kagan,
Sotomayor &
Jackson)**



County of Maui's Wastewater Treatment Facility

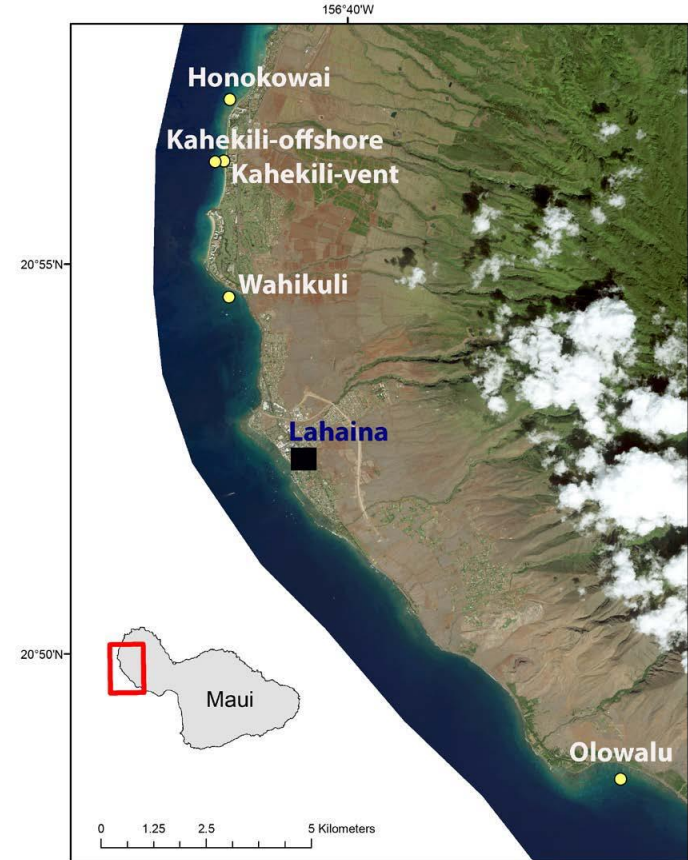
Photograph courtesy of Warren
Gretz/National Renewable Energy
Laboratory

03

BUT: *COUNTY OF* *MAUI*

APRIL 23, 2020: THE FUNCTIONAL EQUIVALENCE TEST

“We hold that the statute requires a permit when there is a direct discharge from a point source into navigable waters or when there is the functional equivalent of a direct discharge. . . . That is, an addition falls within the statutory requirement that it be ‘from any point source’ when a point source directly deposits pollutants into navigable waters, or when the discharge reaches the same result through roughly similar means.”



CONSIDER THE AUGUST 2023 FINAL WOTUS RULE:

**TRADITIONAL “NAVIGABLE WATERS”
& UNCONTESTED WATERS**

TERRITORIAL SEA

COMMERCE

EBB & FLOW

INTERSTATE

**ANYTHING ELSE COVERED BY *SACKETT*
(*E.G.*, RELATIVELY PERMANENT)**

IMPOUNDMENTS

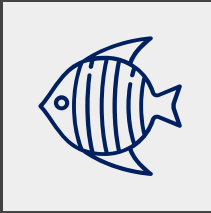
TRIBUTARIES

**WETLANDS W/
CONTINUOUS SURFACE
CONNECTION**

**INTRASTATE W/
CONTINUOUS SURFACE
CONNECTION**

**NOT WASTE TREATMENT SYSTEMS, PRIOR CONVERTED CROPLAND, DITCHES, IRRIGATED DRY
LAND, ARTIFICIAL LAKES & PONDS, ARTIFICIAL ORNAMENTAL WATERS, SWIMMING POOLS,
CONSTRUCTION PITS, EROSIONAL FEATURE**

NOW CONSIDER *SACKETT + MAUI COUNTY*



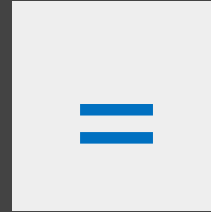
DISCHARGES INTO TRADITIONAL NAVIGABLE WATERS

Ocean, territorial
sea, commerce,
ebb & flow,
interstate



DISCHARGES INTO DIRECTLY ADJACENT WATERS

Relatively permanent
waters with a direct
surface water
connection to TNW.



FUNCTIONALLY EQUIVALENT DISCHARGES

Discharges—**probably
mostly Section 402
discharges**—that are the
functional equivalent of
discharging into WOTUS.

IN OTHER WORDS:



WE NOW CARE LESS ...

... about what the
pollutants went INTO,



AND CARE MORE ...

... about where they end
up.

