

On May 25, the U.S. Supreme Court issued its decision in *Sackett v. EPA* (#21-454), reversing the decision of the 9th Circuit and remanding the case for further proceedings consistent with its decision. The Court found that the wetlands on the Sacketts' property are not "waters of the United States" (WOTUS), because they are "distinguishable from any possibly covered waters." Justice Alito wrote the opinion of the Court, joined by Chief Justice Roberts and Justices Thomas, Gorsuch, and Barrett. Justice Kagan wrote an opinion concurring in the judgment, joined by Justices Sotomayor and Jackson. Two additional concurring opinions were written by Justices Thomas (concurring in full) and Kavanaugh (concurring in the judgment).

Citing the Justice Scalia plurality opinion in *Rapanos*, the five-Justice majority Court concluded that the definition of WOTUS in Clean Water Act (CWA) §1362(7) "encompasses 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."

The Court held that WOTUS does not apply to all wetlands, but extends only to those wetlands with a continuous surface connection to bodies of water that are WOTUS in their own right, so that they are indistinguishable from those waters. The Court acknowledged that "temporary interruptions in surface connection may sometimes occur because of phenomena like low tides or dry spells." In footnote 16, the Court said: "Although a barrier separating a wetland from a water of the United States would ordinarily remove a wetland from federal jurisdiction, a landowner cannot carve out wetlands from federal jurisdiction by illegally constructing a barrier on wetlands otherwise covered by the CWA. Whenever the EPA can exercise its statutory authority to order a barrier's removal because it violates the Act...that unlawful barrier poses no bar to its jurisdiction."

The Court noted that EPA's interpretation of adjacent wetlands in the 2023 WOTUS Rule – including wetlands with a significant nexus to traditional navigable waters – is inconsistent with the text and structure of the CWA. The Court required Congress to "enact exceedingly clear language if it wishes to significantly alter the balance between federal and state power and the power of the Government over private property. Regulation of land and water use lies at the core of traditional state authority. An overly broad interpretation of the CWA's reach would impinge on this authority." The court also pointed to CWA §1251(b), which expressly protects the primary responsibilities of States to prevent, reduce, and eliminate pollution and to plan the development and use of land and water resources. "It is hard to see how the States' role in regulating water resources would remain 'primary' if the EPA had jurisdiction over anything defined by the presence of water." The Court held that the CWA does not define EPA's jurisdiction based on ecological importance, and it anticipates a partnership between the States and the Federal Government. "States can and will continue to exercise their primary authority to combat water pollution by regulating land and water use."

The Court further noted that EPA's significant nexus interpretation "gives rise to serious vagueness concerns in light of the CWA's criminal penalties. Due process requires Congress to define penal statutes with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." The Court expressed concerns that the CWA could sweep broadly enough to "criminalize mundane activities like moving dirt" and put a "staggering array of landowners" at risk of criminal prosecution or onerous civil penalties, because a property that appears to be dry may later be determined to be subject to the CWA under guidance in a complicated agency manual.