
# Watershed Moment: U.S. Supreme Court Narrows Federal Power Under Clean Water Act

## What this means for energy infrastructure in and around "wetlands"

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**May 25, 2023.**

Today, the United States Supreme Court curtailed the federal government's power to regulate wetlands under the Clean Water Act (CWA). Its decision in *Sackett v. EPA* changes the test for whether wetlands are "waters of the United States" for purposes of CWA jurisdiction, and the ruling will have ripple effects on industries nationwide.

For businesses with energy infrastructure operating in and around wetlands, key takeaways include:

- The *Sackett* decision conflicts with the EPA's newest rule change published on January 18, 2023, which took effect on March 20, 2023.

- While the EPA will take time to modify its new rule to accommodate the *Sackett* decision, the decision clarifies the answer to a critical question the energy industry needed for its long-term planning and capital investments in and around wetlands.

- The *Sackett* decision reflects the current Court's newly employed limitation on regulatory overreach. With less risk of civil or criminal liability arising from EPA enforcing the CWA and more certainty for planning new development in and around areas that might have previously been improperly included as "waters of the United States," companies can avoid unreasonable permitting delays and regulatory uncertainty for properties and operations in and around wetlands.

The *Sackett* decision comes after over a decade of acrimonious litigation between the Environmental Protection Agency and Idaho landowners Michael and Chantell Sackett, who argued they did not require an EPA permit to build a home on their property. The EPA contended that the Sackett property, near Priest Lake, Idaho, contained wetlands that qualify as "navigable waters" regulated and permitted by the CWA. The Sacketts fought their way to the Supreme Court and asked for the proper test to determine whether wetlands are "waters of the United States" under the CWA.

The Court held that for a wetland to be under CWA jurisdiction, it must, "as a practical matter [be] indistinguishable from waters of the United States." The opinion supports a two-part test: (1) is the "water" to which the wetland is connected "a relatively permanent body of water connected to traditional interstate navigable waters"; and (2) is the wetland's connection to such water a "continuous surface connection" that makes it "difficult to determine where the 'water' ends and the 'wetland' begins"? As Justice Alito penned, "[w]etlands that are separate from traditional navigable waters cannot be considered part of those waters, even if they are located nearby."

This new test has important implications for current regulatory rules, which had expanded the EPA's and Army Corps of Engineers' view of waters qualifying for federal jurisdiction. The new rule took the "significant nexus" standard articulated in the U.S. Supreme Court's 2006 *Rapanos* concurrence and expanded it by stating:

> A water now has a "significant nexus" if it has a "material influence" on the chemical, physical, or biological integrity of traditional navigable waters, the territorial seas, or interstate waters. In making this determination, the agencies will aggregate all "similarly situated" waters and their adjacent wetlands in a "catchment" - an "area of the land surface that drains to a specific location for a specific hydrologic feature." The EPA and US Army CoE also maintain federal jurisdiction under the new proposed rule over "relatively permanent flows" - which may exist based on multiple repeated storm events with monsoon-like rainfall.

The new rule is inconsistent with the *Sackett* decision and will likely be withdrawn and revised. In the meantime, companies with energy infrastructure operating in and around wetlands should know to what extent the decision will disrupt the current regulatory landscape.

Do you have pending CWA permit applications based on the broader definition that may need to be withdrawn, or development planned in and around wetlands in the future where you may need guidance? For questions about this decision or to discuss its impact to your business, contact a member of the Energy, Oil & Gas Team.


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