

Navigating the Many Definitions of "Waters of the United States"

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More than a third of Montana homes are in areas of moderate to high wildfire risk.[1] That risk is especially pronounced for rural homeowners like Navy veteran and former firefighter Joe Robertson. He lived in the woods of Montana, where wildfires have become increasingly common and severe. If a wildfire would have threatened Joe's property, the only available water source would have been a small, nameless streamlet that flowed nearby—equivalent to the capacity of a few garden hoses.

In 2013 and 2014, Joe dug some small ponds around the streamlet so fire engines could fill up to defend his and his neighbor's homes in case of fire. What Joe didn't realize was that these actions to protect his home from wildfire would trigger a powerful federal agency to aggressively pursue him for legal penalties.

According to the Environmental Protection Agency (EPA), the nameless channel adjacent to Joe's property constituted "navigable water" or "waters of the United States" (WOTUS) subject to federal regulation under the Clean Water Act (CWA). The agency claimed that Joe needed permission from the United States Army Corps of Engineers (Corps) to dig these ponds. At age 77, the federal government sentenced Joe Robertson to prison for 18 months and fined him $130,000—a conviction upheld by the Ninth Circuit Court of Appeals.

Joe appealed the decision to the United States Supreme Court, contesting the confusing and unclear definition of "navigable waters." On April 15, 2019, the Court granted his petition, vacated the Ninth Circuit's ruling, and overturned the fine.[2] Sadly, Joe passed away in March 2019 before he could receive justice.

Congress passed the CWA to regulate pollution in the nation's navigable waterways. But over time, its application has expanded to cover many types of water on private property across the United States.

This research in brief examines how the federal government's definition and regulation of "WOTUS" has changed over the past several decades, creating regulatory uncertainty for property owners. To add to the problem, the burden of identifying whether regulated waters exist on a property falls on its owners—not on the government. Instead of punishing private landowners for their failure to follow opaque laws, the federal government must follow the clear standards set by recent Supreme Court rulings for which waters are federally regulated and which are not.

Figure 1. History of Regulating Waters of the United States



The Complex History of Regulating Waters of the United States

Federal oversight of American waterways began in earnest in 1899 with the Rivers and Harbors Act. This act granted the Corps regulatory power over any navigable water and prevented the construction of any structure in any navigable waterway without the Corps' authorization. It also made it unlawful to "excavate or fill, or in any manner to alter or modify" any navigable water of the United States.[3]

The Water Pollution Control Act of 1948 followed, becoming the first major federal law to address water pollution. In 1972, it was amended to create the CWA.[4]

The CWA was created to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.[5] Congress granted the EPA (created in 1970), along with the Corps, the authority to enforce the Act through the prevention, reduction, and elimination of pollution of the "navigable waters" defined as "waters of the United States." In this piece, we use these two terms interchangeably. The EPA, however, has the final say and can veto almost any Corps action. Since 1972, government and industry have spent over $1 trillion to reduce water pollution.[6] For over 50 years, these agencies have steadily expanded their claimed authority over private property, interpreting "navigable waters" in the broadest terms possible, as figure 1 shows.

Expanding Interpretation: The 1986 Regulations

A series of rulemakings that started in 1977 and later became known as the "1986 Regulations" extended the scope of the agencies' claimed authority to regulate "navigable waters" to the outer limits of Congress's power to regulate interstate commerce.[7] Federal authority was asserted not just over interstate waters, but also intrastate waters that are connected in some way to interstate or foreign commerce, as well as all tributaries of such waters and all "wetlands" that are "adjacent" to any regulated water.[8] This definition encompassed ditches that occasionally filled with water and many other ephemeral channels through which water occasionally flowed.

In 1985, the Supreme Court ruled in *United States v. Riverside Bayview Homes* that wetlands may qualify as WOTUS due to their proximity to navigable waters.[9] In 1986, the so-called Migratory Bird Rule extended the agencies' power even further to isolated bodies of water that are occasionally used by birds when they migrate.[10]

For the next 20 years, the EPA and the Corps continued to enforce this expansion of the power originally intended by the CWA. Only once during that period did the Supreme Court limit the agencies' power. In its 2001 ruling in *Solid Waste Agency of Northern Cook County v. USACOE*, the Court ruled that the EPA and the Corps do not have authority over isolated waters under the Migratory Bird Rule.[11]

Rapanos v. United States

The issue of the continued expansion of the EPA and the Corps' regulatory authority came to a head again in 2006 when the Supreme Court decided *Rapanos v. United States*.[12] Michigan landowner John Rapanos had come under fire in 1989 after the Corps decided it had jurisdiction over his land by claiming that 80-year-old drainage ditches were "navigable waters."[13] After being threatened with jail time and thousands of dollars in fines, Rapanos appealed his case to the Supreme Court.

In *Rapanos*, five justices held the agencies' 1986 Regulations invalid for attempting to assert authority over all tributaries of traditionally navigable waters and adjacent wetlands. However, no single opinion garnered a majority.

The plurality opinion, authored by Justice Antonin Scalia, restricted the definition of "waters of the United States" to encompass only "relatively permanent" bodies of water, excluding "occasional," "intermittent," or "ephemeral" flows, and required wetlands to have a

"continuous surface connection" that makes it difficult to determine where the water ends and the wetland begins.[14] The concurring opinion, presented by Justice Anthony Kennedy, proposed a broader "significant nexus" standard, allowing for federal regulation of wetlands if they "significantly" impact the integrity of more traditionally navigable waters.[15] These two opinions set the stage for the next 20 years of WOTUS uncertainty.

Post-*Rapanos* Guidance

Shortly after *Rapanos*, the EPA and the Corps issued guidance on establishing jurisdiction.[16] This "post-*Rapanos* guidance" combined aspects of both Justice Scalia's *Rapanos* plurality and Justice Kennedy's concurrence, creating additional confusion.

Michael and Chantel Sackett were early victims of this new regime. They had purchased a lot in Idaho and were preparing to build a home. In 2007, the EPA informed the couple that their preliminary earth-moving activities to prepare their lot for building had breached the CWA's prohibition on discharging pollutants into navigable waters. The EPA then issued a compliance order threatening fines exceeding $40,000 per day if the couple didn't follow its Restoration Work Plan.

In fact, the Sacketts' property was separated from any water by a 30-foot road. But the EPA asserted that it was regulated because it was connected under the surface to an unnamed tributary that flowed into a non-navigable stream, ultimately leading to Priest Lake, a navigable body of water.[17]

The Obama Administration's Clean Water Rule

While the Sacketts worked their way through the court system (including a trip to the Supreme Court in 2012 that proved they had the right to sue the EPA), the post-*Rapanos* guidance and its version of the significant nexus test reigned supreme.[18] However, in 2015, the Obama administration finalized the so-called Clean Water Rule, an expansive definition of "navigable waters" covering an estimated 60% of the nation's waterways.[19]

The EPA claimed the new rule would add clarity by using the significant nexus test.[20] However, this definition was blocked by courts in 27 states within months of its adoption.[21] A patchwork approach emerged: the Clean Water Rule governed in some states, and the 1986 Regulations and post-*Rapanos* guidance governed in others, adding to regulatory uncertainty. This patchwork regime governed until December 2019, when the Trump administration repealed the 2015 rule and recodified the 1986 Regulations.[22]

The Trump Administration's Navigable Waters Protection Rule

In 2020, the Trump administration published the Navigable Waters Protection Rule defining "WOTUS" based primarily on Scalia's relatively permanent test.[23]

The new rule returned to states and tribes the right to manage their resources. It also directly stated what WOTUS does *not* include: "objects that only contain water in direct response to rainfall; groundwater; many ditches, including most farm and roadside ditches; prior converted cropland; farm and stock watering ponds; and waste treatment systems."[24] This rule narrowed the definition of WOTUS and reduced the resources subject to the EPA and the Corps' authority. But this rule still allowed jurisdiction beyond navigable waters, including wetlands that have no surface connection and intermittent tributaries.

The Trump administration's rule was implemented nationwide,[25] but a federal judge in the District of Arizona vacated it in August 2021.[26] This decision returned the entire country to the 1986 Regulations.

The Biden Administration's Rule

In January 2023, the Biden administration enacted yet another definition of navigable waters. It permitted the regulation of waters based on (1) a "relatively permanent standard" test inspired by Justice Scalia's *Rapanos* plurality and (2) a test inspired by Justice Kennedy's "significant nexus" test.[27] The test brought under federal control any feature that might affect the "chemical, physical, or biological integrity" of navigable waters. The agencies were to make determinations under the tests with reference to a broad and open-ended list of factors.[28] However, the Biden rule was blocked by courts in 27 states, so it did not take effect in large portions of the country.[29]

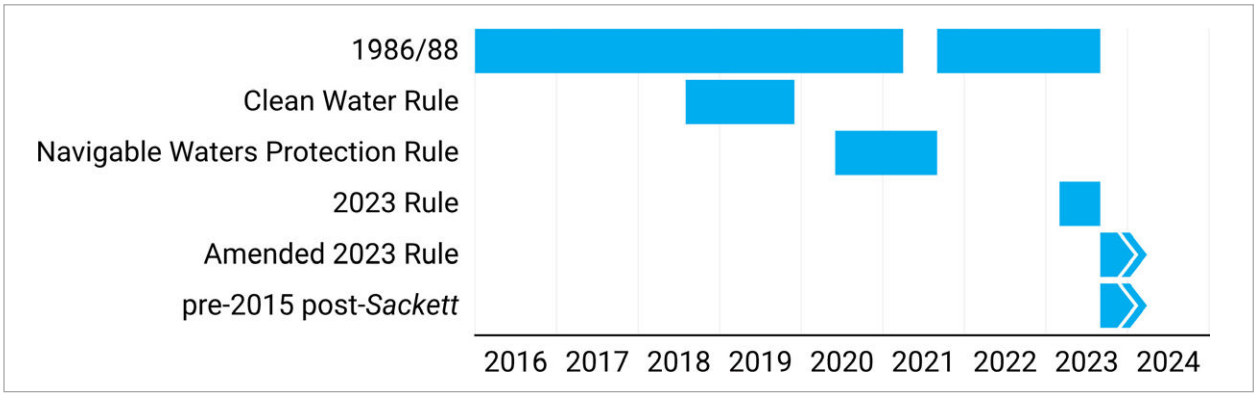
Sackett v. EPA

In September 2022, the Sacketts returned to the Supreme Court to argue the illegality of the significant nexus test and challenge the regulation of their property 15 years earlier. On May 25, 2023, all nine justices ruled that the significant nexus test is illegal. In a majority opinion written by Justice Samuel Alito, the Court criticized numerous aspects of the agencies' historical approach to navigable waters and adopted the *Rapanos* plurality's approach to federal jurisdiction. The Court's opinion stated that the CWA only protects "those relatively permanent, standing or continuously flowing bodies of water.[30] For a wetland to be protected by the CWA, it must (a) have a continuous surface connection to a covered waterway and (b) be "as a practical matter indistinguishable" from the covered waterway.[31]

With *Sackett* on the books, the EPA and the Corps amended their 2023 rule, purportedly to adhere to *Sackett*. They issued a "conforming" rule that removes references to the significant nexus test but otherwise leaves the remainder of the rule intact. Since then, the EPA has resumed activities under a truncated version of the pre-2015 approach that it claims adheres to *Sackett*.

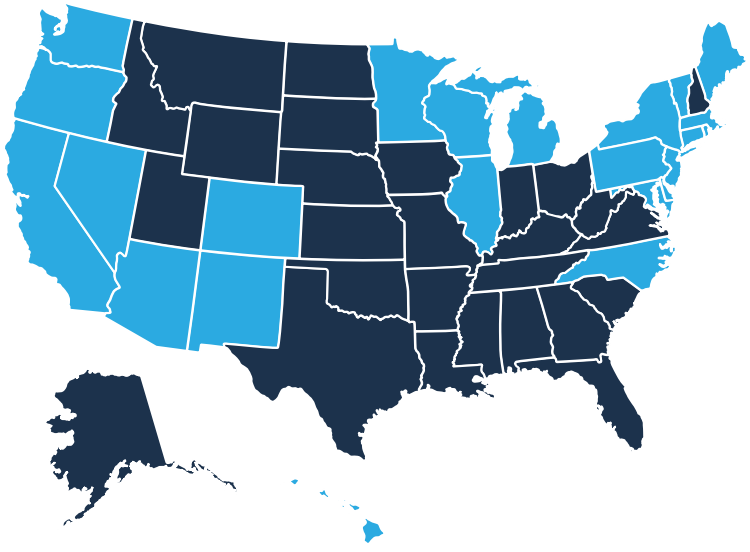
After each rule change, court cases have let judges block the changes for their respective districts. Different federal standards emerged from state to state. Currently, 23 states use the 2023 rule, and 27 states use the pre-2015 regime compliant with *Sackett*.

Figure 2. Overlapping Regulatory Regimes



Source: Created with data from https://permits.ops.usace.

Figure 3. Operative Definition of "Waters of the United States"



Source: US Army Corps of Engineers, "12 May 2023 - Definition of 'Waters of the United States': Rule Status and Litigation Update," press release, May 12, 2023, https://www.usace.army.mil/Media/Announcements/Article/3394482/12-may-2023-definition-of-waters-of-the-united-states-rule-status-and-litigatio/; Kate R. Bowers and Laura Gatz, "Waters of the United States (WOTUS): Frequently Asked Questions About the Scope of the Clean Water Act" (report no. R47408, Congressional Research Service, Washington, DC, June 22, 2023).

The Landowner's Regulatory Burden

Through all these changes, the burden of navigating the EPA and Corps' regulations has crushed landowners, who are required to identify potential WOTUS on their property. Not getting the agencies' approval before starting renovation or development work can result in substantial fines and even imprisonment, as in Joe Robertson's case.

To initiate any work requiring a permit, property owners must generally first secure an Approved Jurisdictional Determination (AJD) to definitively identify which waters are subject to the CWA. Obtaining an AJD often means hiring expensive consultants.

As Judge Jane Kelly of the United States Court of Appeals for the Eight Circuit pointed out, "This is a unique aspect of the CWA; most laws do not require the hiring of expert consultants to determine if they even apply to you or your property."[32]

The permitting process can take up to 10 years to complete.[33] An affirmative AJD may result in additional permitting requirements and project design changes to mitigate water impacts. In *Rapanos v. United States*, the Court cited academic research that found the average cost to obtain a permit was over $270,000[34]—about $470,000 in 2024 when adjusted for inflation.[35] This figure does not include any mitigation or design change costs.[36]

Additionally, those who applied for a permit during a rule change may have to re-apply to comply with an ever-changing regulatory regime.[37] Property owners who don't get permits for activities near water bodies risk being sued by the EPA, environmental groups, or even private citizens for violating regulations—even where such violations were entirely accidental.[38] Fines can reach over $66,000 per day for each violation.[39]

Congress is aware of this burden and has tried to limit it. In early 2023, both houses of Congress voted to overturn the 2023 rule under the Congressional Review Act, but President Biden vetoed this action, leaving the rule in place.[40] Senator Joe Manchin (D-WV) stated that "[t]he Administration's WOTUS rule is yet another example of dangerous federal overreach. The proposed changes would inject further regulatory confusion, place unnecessary burdens on small businesses, manufacturers, farmers and local communities."[41]

On January 17, 2024, the Creating Confidence in Clean Water Permitting Act was introduced to limit the burden on property owners and to require agencies to interpret WOTUS in compliance with *Sackett v. EPA* The bill passed in the House on March 21 but did not move forward.[42]

Notes

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2. "Robertson v. United States," Pacific Legal Foundation accessed April 22, 2024, https://pacificlegal.org/case/united-states-v-robertson/.
3. 33 U.S.C. 403.
4. "History of the Clean Water Act," US Environmental Protection Agency, last updated June 12, 2024, https://www.epa.gov/laws-regulations/history-clean-water-act.
5. 33 U.S.C. 1251.
6. David A. Keiser and Joseph S. Shapiro, "Consequences of the Clean Water Act and the Demand for Water Quality," *Quarterly Journal of Economics* 134, no. 1(2019): 349–96, https://doi.org/10.1093/qje/qjy019.
7. Rapanos v. United States, 547 U.S. at 724 (citing 42 Fed. Reg. 37,122, 37,144 n.2 (July 19, 1977)).
8. 33 C.F.R. § 323.2(a)(2)–(5), (d) (1978).
9. United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985).
10. 51 Fed. Reg. 41,217 (November 13, 1986).
11. 531 U.S. 159 (2001).
12. 547 U.S. 715 (2006).
13. "Rapanos v. United States," Pacific Legal Foundation, accessed August 16, 2024, https://pacificlegal.org/case/scotus-rapanos/.
14. Rapanos v. United States, 547 U.S. 715, 739 (2006) (Scalia, J., plurality).
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21. In re EPA & Dep't of Defense Final Rule, 803 F.3d 804 (6th Cir. 2015), vacated on other grounds; In re U.S. Dep't of Defense, 713 Fed. Appx. 489 (6th Cir. 2018); North Dakota v. U.S. EPA, 127 F. Supp. 3d 1047 (D.N.D. 2015).
22. Office of the New York State Attorney General, "AG James Leads Coalition in Suing over Trump's Repeal of Clean Water Rule," New York State Attorney General, July 21, 2019, https://ag.ny.gov/press-release/2019/ag-james-leads-coalition-suing-over-trumps-repeal-clean-water-rule.
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26. "U.S. Judge Vacates Trump Water Rule on Environmental Grounds", *Reuters*, August 30, 2021
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29. These states are Alabama, Alaska, Arkansas, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Louisiana, Mississippi, Missouri, Montana, Nebraska, New Hampshire, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia, and Wyoming.
30. Sackett v. EPA, 598 U.S. at 678 (2023) (quoting Rapanos, 547 U.S. at 742).
31. Sackett v. EPA, 598 U.S. at 684 (2023).
32. Hawkes Co., Inc. v. U.S. Army Corps of Engineers, 782 F.3d 994, 1003 (8th Cir. 2015) (Kelly, J., concurring).
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42. H.R. 7023, 118th Cong. § 1 (as passed by the House, 2023).
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Providing Regulatory Certainty to Landowners

Since the passage of the CWA, the definition of WOTUS has had various interpretations through court cases, executive orders, and agency rules.[43] With the past three presidents each creating different rulings on what WOTUS entails, it is difficult for property owners to comply because the law is unclear on what is regulated and what is not. What's more, the burden of determining what constitutes WOTUS and what does not falls on property owners. If they get it wrong, they could be subject to ruinous fines and even jail time.

In 2023, in response to the Biden administration's expansion of what constitutes WOTUS, Congressman Frank Lucas (R-OK) stated, "America's farmers, ranchers, and landowners deserve a WOTUS definition that is fair and provides regulatory clarity and certainty to agriculture and businesses."[44] Later that year, the Supreme Court provided such a definition in *Sackett*. The Court clarified that the agencies may only regulate relatively permanent and continuously flowing bodies of water and wetlands with a continuous surface connection that are "as a practical matter indistinguishable" from such covered waterways.[45]

After years of ambiguity, the Supreme Court has finally provided a clear definition of what constitutes WOTUS and what does not. To provide certainty to landowners across the United States, the EPA and the Corps must faithfully interpret the *Sackett* decision. Doing so will provide clarity for landowners seeking to follow the law, instead of punishing them for their failure to follow an extremely complex and murky set of regulations. Landowners like Joe Robertson deserve clarity and notice of the law.



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