

Sackett v. EPA & WOTUS Controversy

- Severely limited Clean Water Act protections for wetlands and intermittent streams
- Roughly 1/2 of U.S. wetlands lost protection
- Biden: *Sackett* “upends the legal framework that has protected America’s waters for decades. It also defies the science that confirms the critical role of wetlands in safeguarding our nation’s streams, rivers, and lakes from chemicals and pollutants that harm the health and wellbeing of children, families, and communities.”

What are “Waters of the United States”?

- CWA applies to “navigable waters,” defined as “waters of the United States”
- CWA: no definition of WOTUS
- EPA/ACE define WOTUS through regulation → controversy ensues...

U.S. v. Riverside Bayview, 474 U.S. 121 (1985)

WOTUS may include freshwater wetlands “adjacent” to other covered waters

Solid Waste Agency of N. Cook Cnty v. ACOE,
531 U.S. 159 (2001)

WOTUS *cannot* include isolated wetlands not adjacent to other covered waters

Rapanos v. U.S., 547 U.S. 715 (2006)

- Scalia: WOTUS includes only those “relatively permanent,” standing or continuously flowing bodies of water forming geographic features ordinarily described as streams, oceans, rivers, and lakes, and does *not* include intermittent/ephemeral streams.
- Kennedy: WOTUS includes waters/wetlands that have a “significant nexus” to traditionally navigable waters; i.e, that “alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity” of traditionally navigable waters.

EPA Pre-Sackett WOTUS Rule

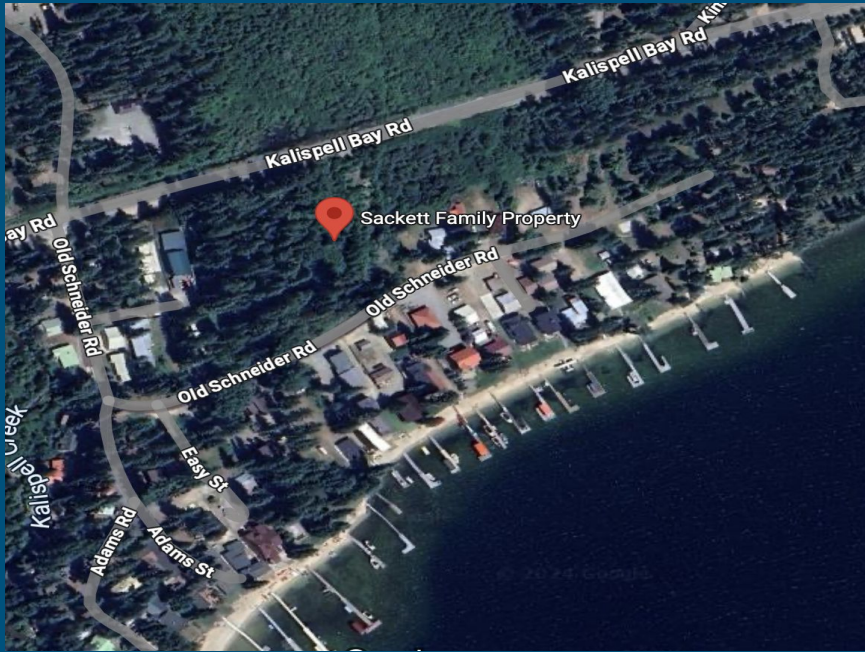
- Covered Wetlands: meet either “relatively permanent” or “significant nexus” test, *and* wetlands adjacent to traditionally navigable waters.
- Covered Streams: meet either “relatively permanent” or “significant nexus” test

EPA Pre-Sackett WOTUS Rule

Exclusions:

1. Wetlands converted to cropland before 1985
2. Waste treatment ponds/lagoons
3. Excavated ditches that do not carry relatively permanent flow
4. Artificially irrigated areas
5. Artificial lakes/ponds/pools
6. Water-filled depressions created by / incidental to construction activity
7. Swales and erosional features (gullies and small washes) w/ low volume, short duration or infrequent flow

Sackett v. EPA, 598 U.S. 651 (2023)



Sackett v. EPA, 598 U.S. 651 (2023)

- WOTUS refers only to “geographic[al] features that are described in ordinary parlance as ‘streams, oceans, rivers, and lakes’ ” and to adjacent wetlands that are “indistinguishable” from those bodies of water due to a *continuous surface connection*.
- To assert jurisdiction over an *adjacent wetland* under the CWA, a party must establish “first, that the adjacent [body of water constitutes] . . . ‘water[s] of the United States’ (i.e., a *relatively permanent body of water connected to traditional interstate navigable waters*); and second, that the wetland has a *continuous surface connection* with that water, making it difficult to determine where the ‘water’ ends and the ‘wetland’ begins.”

Sackett v. EPA, 598 U.S. 651 (2023)

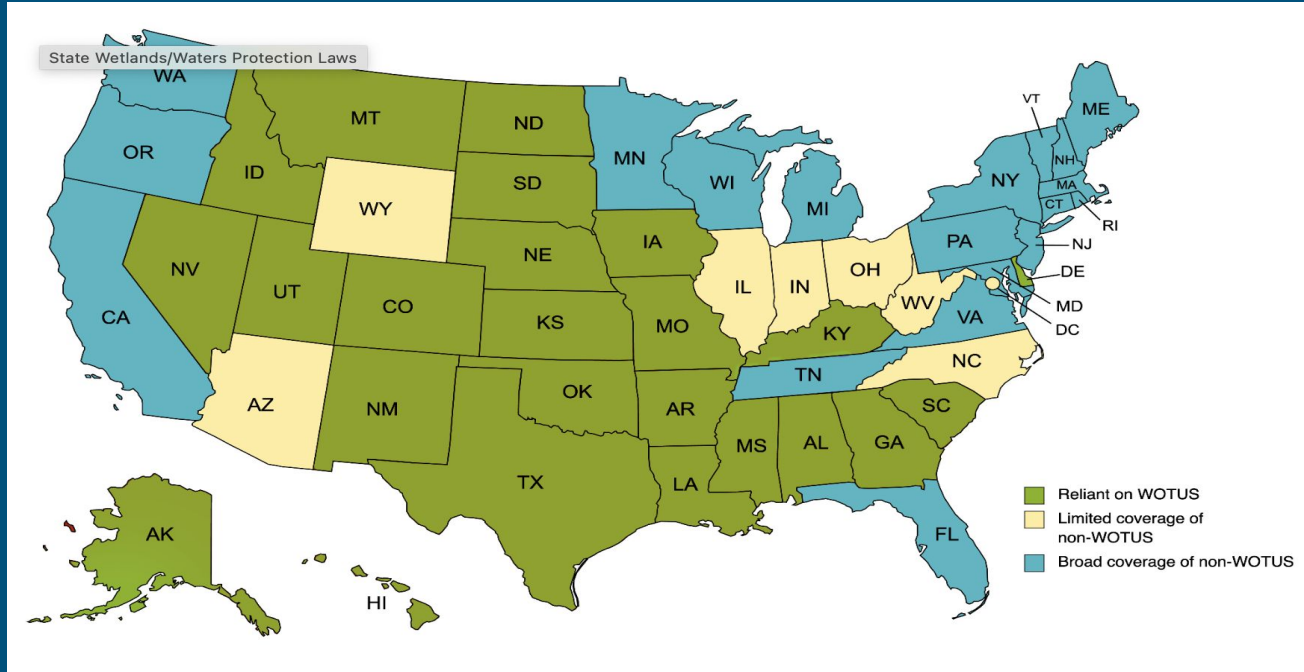
- EPA revised WOTUS rule to conform to *Sackett*:
 - Removed “significant nexus” standard
 - Adjacent wetlands must have a “continuous surface connection” to traditionally navigable water
 - No change to WOTUS exclusions

Sackett Impacts

55% of water flowing out of U.S. river basins can be traced back to intermittent streams.

Over 4.2 million people in NJ receive drinking water from public drinking water systems that rely at least in part on intermittent / ephemeral / headwater streams.

Sackett: Impact on New Jersey



Source: *Filling the Gaps: Strategies for States/Tribes for Protection of Non-WOTUS Waters*, Kihlsinger, et al., Env'tl Law Institute (May 2023)

Sackett: Impact on NJ

- **NJ Freshwater Wetlands Protection Act** protects freshwater wetlands and their buffers (transition areas) and state open waters (including intermittent streams) *regardless* of “relative permanence” or “continuous surface connection” to WOTUS
- **NJ Wetlands Act** protects coastal wetlands *regardless* of whether the coastal wetland has a “continuous surface connection” to WOTUS.
- **NJ Flood Hazard Area Control Act** covers stream channels w/ intermittent flow
- **NJ Surface Water Quality Standards** apply to intermittent streams

Loper Bright Enterprises v. Raimondo, 144 S. Ct. 2244 (2024)

- Overturned “*Chevron* deference”
- What does it mean for federal agency rulemaking and New Jersey?

Chevron v. NRDC (1984)

- Legal dispute over EPA interpretation of Clean Air Act term “stationary source”
- *Chevron* test:
 - Is the statute ambiguous or silent on the question presented? If yes then →
 - Court must defer to agency if its interpretation of statute is “reasonable” or “permissible.”
- *Chevron* Rationale

Chevron Era

Chevron outcomes: sometimes a *win* for *EPA* was *loss* for the environment, and vice versa

- *Chevron v. NRDC* (1984)----- Reagan EPA *wins*, environment *loses*
- *Mass. v. EPA* (2007)----- Bush EPA *loses*, environment *wins*
- *Entergy v. Riverkeeper* (2009)----- Bush EPA *wins*, environment *loses*
- *EPA v. Homer City EME Gen.* (2014)----- Obama EPA *wins*, environment *wins*
- *Michigan v. EPA* (2015)-----Obama EPA *loses*, environment *loses*

Chevron takeaway

Loper Bright Enterprises v. Raimondo, 144 S. Ct. 2244 (2024)

- SCOTUS grants review on limited question: “should *Chevron* be overruled or clarified?”
- Holding:
 - “*Chevron* is overruled.”
 - federal Administrative Procedure Act requires federal courts to exercise independent judgment in deciding whether a federal agency has acted within its statutory authority - federal courts may not defer to an agency interpretation of the law simply because a statute is ambiguous

Loper Bright Enterprises v. Raimondo

Rationale:

- U.S. Const.: It's the responsibility and power of the courts (not agencies) to interpret the law and decide cases and controversies.
- APA specifies that courts, not agencies, will decide “all relevant questions of law” arising on review of agency action—even those involving ambiguous laws.
- Parties to a case can educate the court on relevant scientific and technical issues.

Loper Bright: Takeaways & Potential Impacts

- What is the new, post-*Chevron* standard? Federal courts will use their “independent judgment” to determine the “best reading of the statute”
- Combined effect with *Corner Post*: opens door wider to challenge EPA rulemaking under CWA?
- Increased litigation opportunities for those seeking to challenge federal agency rulemaking

Loper Bright: Limitations

- Does *not* open door to reopen old federal cases that were based on *Chevron*
- *Only* applies to agency interpretations of the *law* - APA still requires federal courts to defer to agency *factual* determinations
- If statute gives agency broad discretion to issue regulations (e.g., “in the public interest” or “reasonable”), court will not set aside as long as “reasoned decision-making”
- Does *not* apply to NJ Courts or NJ agencies

Loper Bright: Limitations

NJ Standard:

- Agency regulations are **presumed valid and reasonable**, and the party challenging the regs bears the burden of proof. *N.J. Dep't of Agric.*, 196 N.J. 366 (2008)
- **A reviewing court will not invalidate an agency's adoption of regulations unless:** (1) the regulations violate the enabling statute's express or implied legislative policies; or (2) there is not substantial evidence in the record to support the findings on which the agency based its action; or (3) in applying the legislative policies to the facts **the agency clearly erred by reaching a conclusion that could not reasonably have been made** upon a showing of the relevant factors. *N.J. Dep't of Agric.*, 196 N.J. 366 (2008)
- NJ Courts "afford an agency '**great deference**' in reviewing its 'interpretation of statutes within its scope of authority and its adoption of rules implementing' the laws for which it is responsible..."**That approach reflects the specialized expertise agencies possess to enact technical regulations** and evaluate issues that rulemaking invites." *Schundler*, 211 N.J. 535 (2012).