

# *Sackett v EPA* and Waters of the United States

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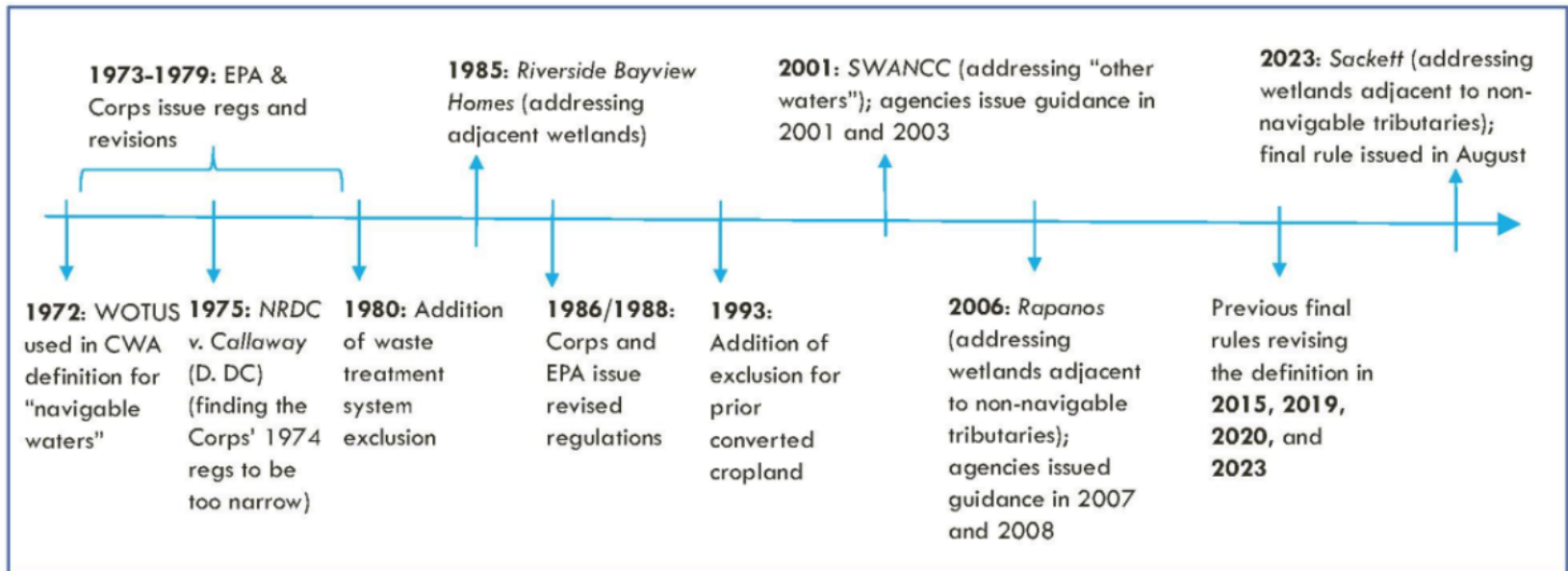
# Outline

- Background
- Recent WOTUS Rules
- Sackett v EPA
- Agency Response
- Lewis v US
- National Litigation
- Questions

# Background

## Background: “Waters of the United States” Over Time

The definition of “waters of the United States” has been a subject of dispute and addressed in several major Supreme Court cases.



# Background

- Clean Water Act, 42 USCA § 1344 and § 1362(7)
  - Regulates the discharge of “dredged or fill material into the navigable waters at specified disposal sites”
  - ‘Navigable waters’ means “waters of the United States, including the territorial sea”
- Various regulatory definitions of WOTUS over the years
  - 39 Fed. Reg. 12119 (April 3, 1974)
    - Limited to waters that are ‘navigable-in-fact,’ i.e., traditional navigable waters (used or could be used in interstate or foreign commerce)
    - *NRDC v. Callaway*, 392 F.Supp. 685 (D.D.C. 1975): CWA asserted jurisdiction to maximum extent permissible under Commerce Clause
  - 40 Fed. Reg. 31324 (July 25, 1975)
  - 42 Fed. Reg. 37144 (July 19, 1977)
  - 47 Fed. Reg. 31810 (July 22, 1982)
  - 51 Fed. Reg. 41250 (November 13, 1986) - effective January 12, 1987
- General expansion of definition over the years to include more “waters”

# Background

## 1986 Regulatory Definition (33 CFR §328.3)

### § 328.3 Definitions.

For the purpose of this regulation these terms are defined as follows:

(a) The term "waters of the United States" means

(1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(2) All interstate waters including interstate wetlands;

(3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:

(i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or

(ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(iii) Which are used or could be used for industrial purpose by industries in interstate commerce;

(4) All impoundments of waters otherwise defined as waters of the United States under the definition;

(5) Tributaries of waters identified in paragraphs (a) (1)–(4) of this section;

(6) The territorial seas;

(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a) (1)–(6) of this section.

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(4) All impoundments of waters otherwise defined as waters of the United States under the definition

(5) Tributaries of waters identified in Par. (a) (1) through (4) of this section

(6) The territorial seas

(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in Par. (a) (1) through (6) of this section

- *Adjacent* means bordering, contiguous, or neighboring.
- Includes wetlands separated from other WOTUS by man-made dikes or barriers, natural river berms, beach dunes and the like

# Background

- ***US v. Riverside Bayview Homes, 474 US 121 (1985)***

- Upheld jurisdiction of wetlands adjacent to traditional navigable waterways

- Wetlands 'actually abutted' the TNW

- Deferred to agency's "legal judgment" regarding extent of regulation due to "inherent difficulties of defining precise bounds to regulate waters."

- ***Solid Waste Agency of Northern Cook County (SWANCC) v. Corps, 531 US 159 (2001)***

- Jurisdiction of the Corps does not extend to ponds that are not adjacent to open water

- Non-navigable, intrastate, isolated ponds are not 'navigable waters' merely because they serve as habitat for migratory birds

- To rule otherwise would assume that "the use of the word navigable in the statute ... does not have any independent significance."

- ***Rapanos v. US, 547 US 715 (2006) – Scalia Plurality and Kennedy Concurrence***

- Scalia: WOTUS include only those relatively permanent, standing, or continuously flowing bodies of water, and adjacent means there must be a continuous surface connection such that there is no clear demarcation between waters and wetlands

- Kennedy: Need a significant nexus to TNW, which exists if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as navigable

# Recent WOTUS Rules

- **The Clean Water Rule**

- 80 Fed. Reg. 37054 (June 29, 2015)
- Provided expansive definition of ‘waters of the United States’
- Challenged in numerous district / appellate courts - led to a “patchwork” of regulation

- **The Navigable Waters Protection Rule**

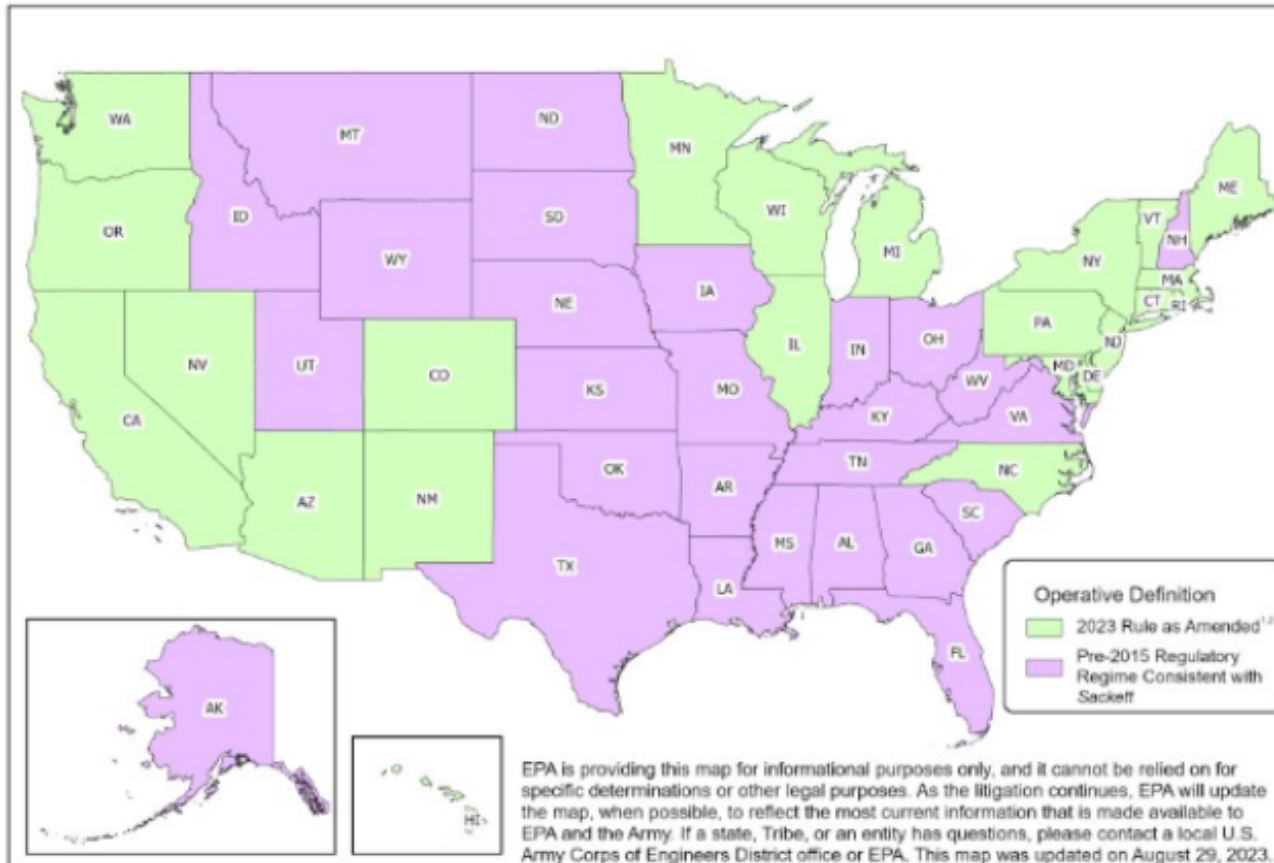
- 85 Fed. Reg. 22250 (April 21, 2020)
- Patterned after Justice Scalia’s limited view of jurisdiction in *Rapanos*
  - WOTUS “encompass relatively permanent flowing and standing waterbodies that are traditional navigable waters in their own right or that have a specific surface water connection to traditional navigable waters, as well as wetlands that abut or are otherwise inseparably bound up with such relatively permanent waters”
- Vacated and remanded by Arizona district court
- EPA / Corps immediately stopped enforcement and used 1986 definition / *Rapanos* Guidance

- **Revised Definition of Waters of the United States**

- 88 Fed. Reg. 3004 (Jan. 18, 2023) – effective March 20, 2023
- Exercising discretion to restore “waters [as] defined by the longstanding 1986 regulations,” with amendments to reflect “interpretation of the statutory limits on the scope of” WOTUS as “informed by Supreme Court case law”
- Stayed in 27 states by litigation

# Recent WOTUS Rules

## Operative Definition of "Waters of the United States"



<sup>1</sup>Also operative in the U.S. territories and the District of Columbia

<sup>2</sup>The pre-2015 regulatory regime implemented consistent with Sackett is operative for the Commonwealth of Kentucky and Plaintiff-Appellants in Kentucky Chamber of Commerce, et al. v. EPA (No. 23-5345) and their members (Kentucky Chamber of Commerce, U.S. Chamber of Commerce, Associated General Contractors of Kentucky, Home Builders Association of Kentucky, Portland Cement Association, and Georgia Chamber of Commerce).



# Sackett v EPA



- ***Sackett v. EPA*, 8 F.4th 1075 (9 Cir. 2021)**
  - Relates to a residential lot purchased in 2004
  - EPA issued a compliance order to Sackett
    - Supreme Court ruling that judicial review of a CO was available (*Sackett v EPA*, 566 U.S. 120 (2012))
  - Sackett argued that Scalia’s formulation in *Rapanos* was correct
  - Court applied Kennedy’s ‘significant nexus’ test
- **US Supreme Court agreed to review the Ninth Circuit decision**
  - Whether the U.S. Court of Appeals for the 9th Circuit set forth the proper test for determining whether wetlands are "waters of the United States" under the Clean Water Act, 33 U.S.C. § 1362(7).
- **May 25, 2023 - Reversed Ninth Circuit decision and remanded (598 U.S. 651)**
  - Five justices voted in favor of majority opinion
  - Thomas Concurrence (with Gorsuch)
  - Kagan Concurrence (with Sotomayor and Jackson)
  - Kavanaugh Concurrence (with Kagan, Sotomayor, and Jackson)

# Sackett v EPA

## Waters:

- Court “refused to read ‘navigable’ out of the statute, holding that it at least shows that Congress was focused on ‘its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made.’”
- Traditional Navigable Waters: Interstate waters that were either navigable in fact and used in commerce or readily susceptible of being used in that way
- “We conclude that the *Rapanos* plurality was correct: the CWA's use of “waters” encompasses “only those relatively permanent, standing or continuously flowing bodies of water ‘forming geographic[al] features’ that are described in ordinary parlance as ‘streams, oceans, rivers, and lakes.’”
- In discussing the relatively permanent standard, the *Rapanos* court stated: “The phrase does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall.” *Rapanos*, 126 S.Ct. at p. 2225

# Sackett v EPA

## Adjacent Wetlands:

- Meaning of “waters is hard to reconcile with lands, wet or otherwise, as waters.”
  - *Rapanos*: CWA “simply does not authorize this ‘Land Is Waters’ approach to federal jurisdiction.”
- Agreed with the *Rapanos* “formulation of when wetlands are part of ‘the waters of the United States.’”
  - In sum, we hold that the CWA extends to **only** those wetlands that are as a practical matter indistinguishable from waters of the United States. This requires the party asserting jurisdiction over adjacent wetlands to establish:
    - first, that the adjacent body of water constitutes waters 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.
- “Wetlands that are separate from [TNW] cannot be considered part of those waters, even if they are located nearby.”
- Summary
  - Continuous surface connection to RPW
  - Indistinguishable from the RPW
    - Difficult to determine where waters end and wetlands begin
    - No clear demarcation between waters and wetlands

# Sackett v EPA

- Court noted that “temporary interruptions in surface connection may sometimes occur because of phenomena like low tides or dry spells.”
- Corps historically included wetlands “separated from a covered water only by a man-made dike or barrier, natural river berm, beach dune, or the like.”
  - Justice Kagan’s concurrence pointed out that the majority opinion was “excluding all the wetlands in [this] category,” thus “narrow[ing] the scope of” the CWA.
  - Justice Kavanaugh’s concurrence: “By narrowing the Act's coverage of wetlands to only adjoining wetlands, the Court's new test will leave some long-regulated adjacent wetlands no longer covered by the Clean Water Act.”
  - 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 “‘significant nexus’ theory is particularly implausible” and “the EPA has no statutory basis to impose it.”
  - Justice Kavanaugh stated that he agreed “with the Court's decision not to adopt the ‘significant nexus’ test for determining whether a wetland is covered under the Act.”

# Agency Response



September 27, 2023

**JOINT COORDINATION MEMORANDUM TO THE FIELD BETWEEN THE U.S. DEPARTMENT OF THE ARMY, U.S. ARMY CORPS OF ENGINEERS (CORPS) AND THE U.S. ENVIRONMENTAL PROTECTION AGENCY (EPA)**

- Establishes a process by which the Corps and EPA will coordinate on Clean Water Act geographic jurisdictional matters to ensure accurate and consistent implementation of the pre-2015 regulatory regime where that regulatory regime is operative.
- Applies to 1986 Regulations
  - (a)(3) - all other waters
  - (a)(7) - wetlands adjacent to waters

# Agency Response



September 27, 2023

**JOINT COORDINATION MEMORANDUM TO THE FIELD BETWEEN THE U.S. DEPARTMENT OF THE ARMY, U.S. ARMY CORPS OF ENGINEERS (CORPS) AND THE U.S. ENVIRONMENTAL PROTECTION AGENCY (EPA)**

**II. Specified Draft Approved Jurisdictional Determination Coordination Requirements: Local Level Review of Draft Approved Jurisdictional Determinations.** All draft approved JDs assessing wetlands under paragraph (a)(7) and other waters under paragraph (a)(3) of the 1986 regulations shall be coordinated at the local level in accordance with the procedures in this memorandum. Such draft approved JDs may be elevated to the headquarters level of the agencies (HQ) under section II.D below. Draft approved JDs shall be coordinated for the previously specified categories of waters if jurisdiction is being asserted, as well as if jurisdiction is not being asserted.

# Agency Response

## Conforming Rule, 88 Fed. Reg. 61964 (Sep. 8, 2023)

- Removed references to “significant nexus”
- Revised definition of “adjacent”
  - Means “having a continuous surface connection”
  - Deleted references to separation by man-made barriers

Revised definition of “adjacent” →

(2) *Adjacent* means having a continuous surface connection. ~~bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes, and the like are “adjacent wetlands.”~~

- Did not address “indistinguishable” part
  - “In sum, we hold that the CWA extends to only those wetlands that are ‘as a practical matter indistinguishable from waters of the United States.’” *Sackett*, 598 US at p. 678.

# Agency Response

## What has the Corps said about a “continuous surface connection”?

- Rapanos Guidance, December 2008
  - There is an unbroken surface or shallow subsurface connection (may be intermittent) to a jurisdictional water, p. 5
  - Does not require surface water to be continuously present between wetlands and tributary, p. 7
  - This is a “physical connection” requirement, p. 7
- January 2023 Rule, 88 Fed. Reg. 3004 (Jan. 18, 2023)
  - All wetlands that directly abut jurisdictional waters have an unbroken surface or shallow subsurface connection because they physically touch the jurisdictional water, p. 2093
  - A continuous surface connection does not require a constant hydrologic connection, p. 3095
  - Could be “more than several hundred feet from the tributary,” p. 3094
- Corps – NO District Communication, Oct. 25, 2023
  - “Means any part of the wetland physically touching a jurisdictional water (i.e. TNW, RPW, territorial sea, impoundment, etc.), or connected to a jurisdictional water by a discrete feature such a non-jurisdictional ditch, swale, pipe, culvert, etc.”
  - CSC “is a physical requirement, not a constant hydrologic requirement.”

## What has the Corps said about “indistinguishable”?

- Rapanos Guidance and Jan. 2023 Rule preamble – generally silent



# Agency Response

## Updates for Tribes and States on “Waters of the United States”



November 15, 2023



# Agency Response

## Pre-2015 Regulatory Regime: (a)(7) Adjacent Wetlands

### Continuous Surface Connection

- Wetlands have a continuous surface connection when they physically abut or touch a jurisdictional water.
  - Abutting wetlands are those that “touch” a jurisdictional water (i.e., they are not separated by uplands, a berm, dike, or similar barrier from the OHWM of the water to which they are adjacent).
- Wetlands also have a continuous surface connection when they are connected to a jurisdictional water by a discrete feature like a non-jurisdictional ditch, swale, pipe, or culvert (per pre-2015 case law, see *United States v. Cundiff* (2009), and prior EPA practice).
- Note that *Sackett* is clear that “a landowner cannot carve out wetlands from federal jurisdiction by illegally constructing a barrier on wetlands otherwise covered by the CWA.”



# Lewis v US

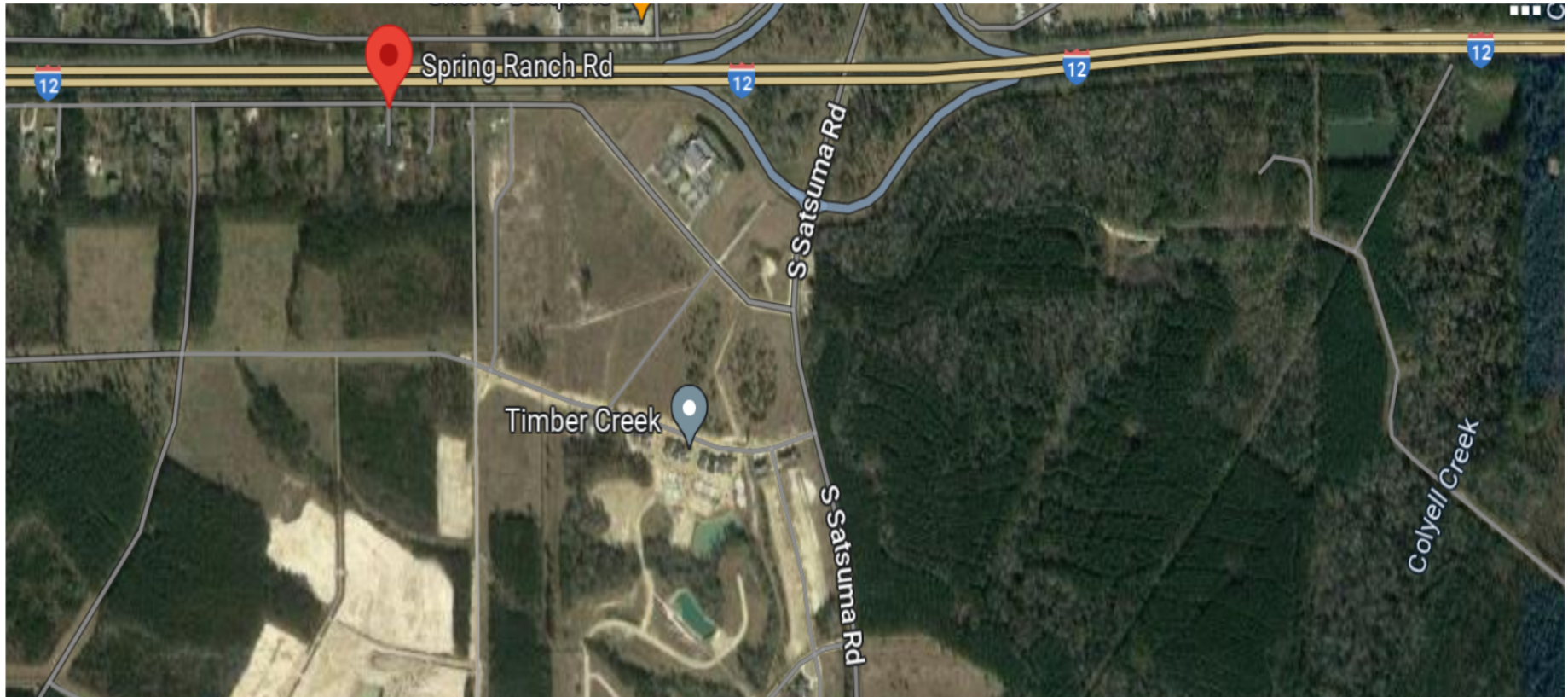
*Lewis v. United States*, 88 F.4th 1073 (5<sup>th</sup> Cir. 2023)

- Landowners “caught in the coils of the” Corps
- “During this period, two Supreme Court cases, three Approved Jurisdictional Determinations (AJDs), two federal court cases resulting in two remand orders, and two appeals to this court have transpired. **Enough is enough.**”

7. Lewis describes ongoing travails with USACE over other tracts within the Livingston Parish property, which suggest the possibility of future litigation. In light of the agency’s utter unwillingness to concede its lack of regulatory jurisdiction in this case following *Sackett*, we admonish it not to pursue actions

against Lewis that could be challenged under the Equal Access to Justice Act’s bad-faith provision. 28 U.S.C. § 2412(b); *see Gate Guard Servs., L.P. v. Perez*, 792 F.3d 554, 564 (5th Cir. 2015) (imposing attorney fees for bad faith of government agency).

# Lewis v US





# Lewis v US

U.S. ARMY CORPS OF ENGINEERS  
**APPROVED**  
JURISDICTIONAL DETERMINATION

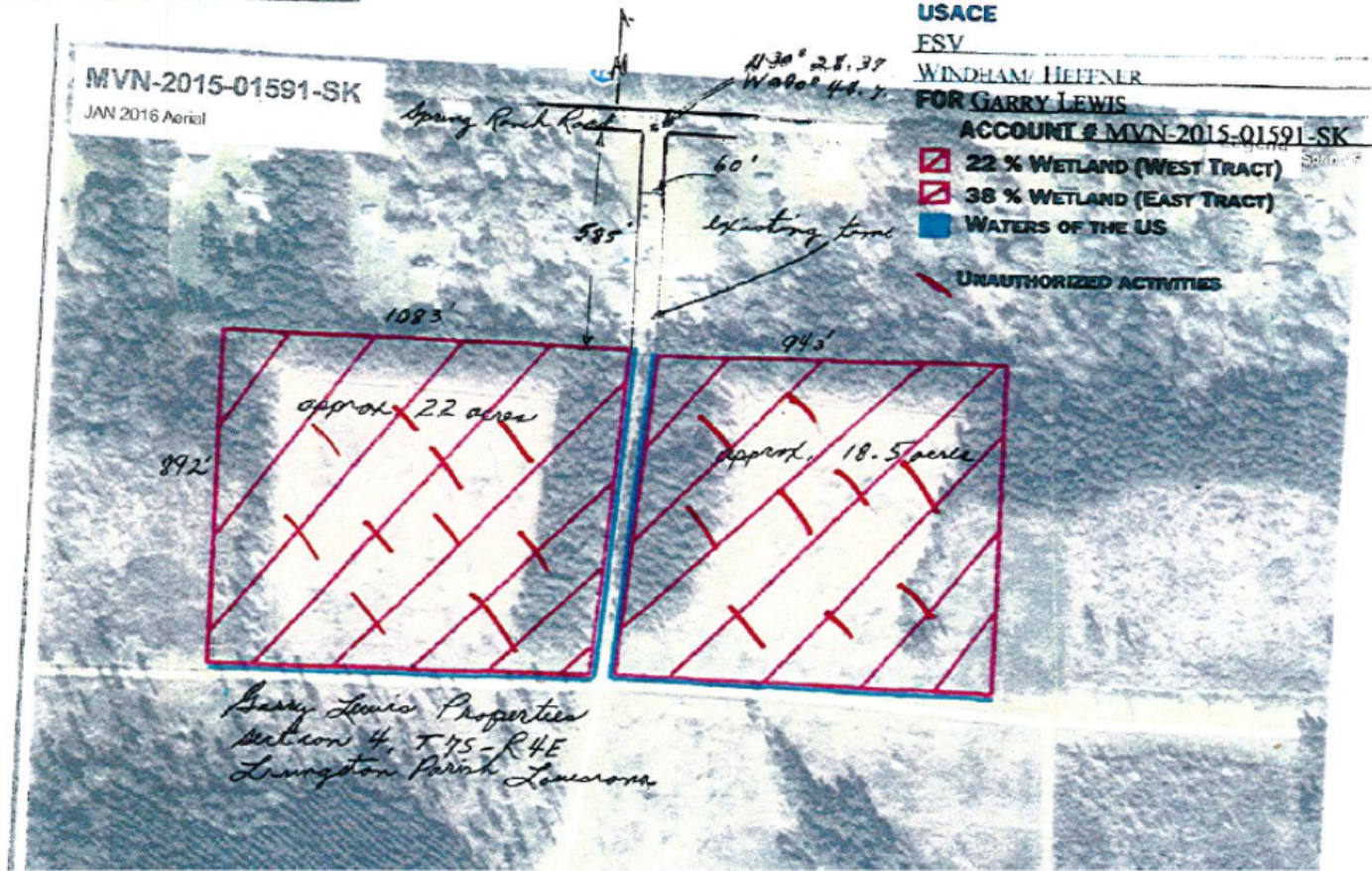


EXHIBIT  
3204

AR 180 AND AR 03

# Lewis v US



## West Tract

- Roadside ditch
- Switch Cane Bayou
- Colyell Creek (RPW)
- Colyell Bay (TNW)

## East Tract

- Roadside ditches
- Unnamed tributary (non-RPW)
- Colyell Creek (RPW)
- Colyell Bay (TNW)

## Lewis v US

- “There is **no ‘continuous surface connection’** between any plausible wetlands on the Lewis tracts and a ‘relatively permanent body of water connected to traditional interstate navigable waters.’ Recall that the nearest relatively permanent body of water is removed miles away from the Lewis property by roadside ditches, a culvert, and a non-relatively permanent tributary. In sum, it is not difficult to determine where the ‘water’ ends and any ‘wetlands’ on Lewis's property begin—there is simply no connection whatsoever. There is no factual basis as a matter of law for federal Clean Water Act regulation of these tracts.”
- Important points:
  - No continuous surface connection even when water may flow through ditches, a culvert, and a non-relatively permanent tributary.
  - *Sackett* holding relating to a determination of where waters ends and wetlands begin was specifically incorporated into the decision.

# National Litigation

Case 3:23-cv-00032-DLH-ARS Document 201 Filed 02/26/24 Page 1 of 7

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NORTH DAKOTA

STATES OF WEST VIRGINIA;  
NORTH DAKOTA; GEORGIA;  
and IOWA; *et al.*,

Plaintiffs,

and

AMERICAN FARM BUREAU  
FEDERATION, *et al.*,

Intervenor-Plaintiffs,

v.

U.S. ENVIRONMENTAL  
PROTECTION AGENCY, *et al.*,

Defendants,

and

CHIKALOON VILLAGE  
TRADITIONAL COUNCIL, *et al.*,

Intervenor-Defendants.

Case No. 3:23-cv-00032-DLH-ARS

Hon. Daniel L. Hovland

PLAINTIFF STATES' MOTION FOR SUMMARY JUDGMENT

- **Violates the Clean Water Act**

- Misapplied Clear Supreme Court Precedent
- Still Seek to Regulate with Vague and Overbroad Categories
- Still Violates Key Principles of Statutory Interpretation

- **Violates the Administrative Procedure Act**

- Still Arbitrary and Capricious
- Continue to Flout Key Procedural Requirements

- **Violates the Constitution**

- Commerce Clause
- Fifth Amendment Due Process Clause
- Tenth Amendment



# Takeaways

- *Sackett* was an express approval of the Scalia opinion in *Rapanos*
  - The ‘law of the land’
  - A restriction on jurisdiction
  - Influenced by continuing jurisdictional reach of the Corps / EPA??
- But, the Corps / EPA continue to expansively view their jurisdiction under CWA
  - Ignoring the express limitations established in *Rapanos* / *Sackett*
  - Use interpretations and guidance to avoid *Rapanos* / *Sackett*
- Will continue to apply expansive view in individual cases (ie, AJDs, permits)
  - Force an individual to fight specific AJDs / permit decisions
- Best practice = include information supporting lack of jurisdiction in the record of AJD / permit

# Questions?

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