

*County of
Maui v. Hawaii
Wildlife Fund*



County of Maui v. Hawaii Wildlife Fund

- ▶ County of Maui injected wastewater into the ground, which eventually led into the ocean. This was done without an NPDES permit.
- ▶ NPDES permits are required for any point source discharge of a pollutant into a water of the United States
- ▶ “The linguistic question here concerns the statutory word ‘from.’”

Significance of *County of Maui*

- ▶ Clean Water Act § 402 mandates a permit for any point source *discharge* of pollutants into a WOTUS
- ▶ *County of Maui* gives us a better understanding of what a discharge is and later we will see *Sackett* gives us a better understanding of what constitutes a WOTUS.

Culinary example from the case

- ▶ A recipe might instruct to add the drippings from the meat to the gravy
 - But how does one accomplish this?
 - There are many ways such as using a ladle or baster, even if added indirectly the result is still drippings from the meat being added to create the gravy



How to determine the functional equivalent of a discharge

Transit time

Distance traveled

Nature of the material through which the pollutant travels

Extent to which the pollutant is diluted or chemically changed as it travels

Amount of pollutant entering the navigable waters relative to the amount of the pollutant that leaves the point source

Manner by or area in which the pollutant enters the navigable waters

Degree to which the pollution has maintained its specific identity

Final Outcome

- ▶ Matter was remanded to further proceedings.
- ▶ Maui County was required to get an NPDES permit.

EPA Guidance (Draft)



- ▶ Functional Equivalent Standard- 7 non-exclusive factors
- ▶ Operator Responsibility
- ▶ Functional Equivalent Analysis
- ▶ Recommended information to submit with an NPDES permit application
- ▶ Factors that must not be considered- intent and existence of a state groundwater protection program

Functional Equivalent Analysis


- Overall approach:
 - Site-specific, flexible with the factors
 - Use of indicator pollutants is acceptable if it is a reasonable indicator for other constituent pollutants
- Long Distance + Long Time Traveled (50+ miles, over 100 years) will likely not require a permit
- Other potentially relevant factors besides time and distance traveled

Recommended information to submit with the NPDES permit application

- ▶ Use existing NPDES forms, request to meet with the permitting authority early in permitting process, submit supplemental information based off the functional equivalent factors

Subsequent Case- Stone v. High Mountain Mining Co., LLC

Gold mine was seeping pollutants into a WOTUS without an NPDES permit. When the lower court analyzed the case, it did not consider all the factors such as dilution and amount of discharge, therefore the lower court's opinion was reversed, and the 10th Circuit Court remanded the case.



A full analysis of all present factors must be completed



Sackett v. EPA

County of Maui



Sackett v. EPA



County of Maui

- Court focused on text, but did not choose the narrowest interpretation due to absurd results; chose a multi-factor test.
- Less focus on clarity for landowners or criminal penalties.
- More focus on purpose of the Act. Also concerned about state's rights.
- Potentially broadens jurisdictional activity.

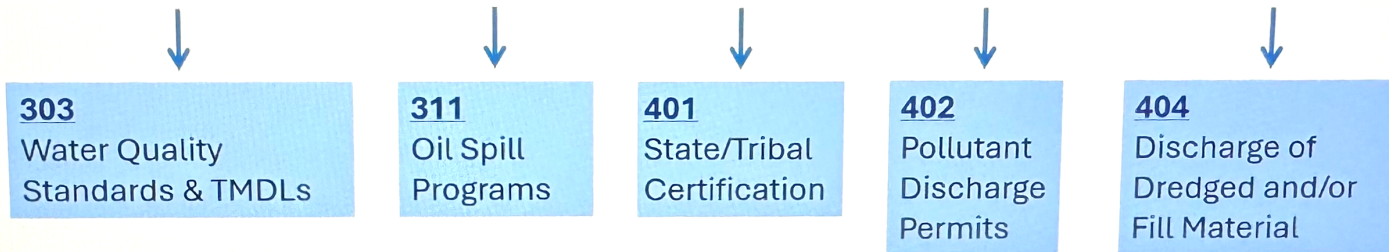
Sackett v. EPA

- Court focused on text; did not choose the narrowest interpretation (Thomas) but close to it.
- More focus on clarity for landowners and criminal penalties.
- Less focus on purpose of the Act.
- Narrows jurisdictional activity.

Significance of *Sackett*

Why “Waters of the United States” Matter

“Navigable Waters”: Waters of the United States, including the Territorial Seas



Definition of “Waters of the United States”

- Affects the extent to which CWA provides protection over waters for the listed programs
- Influences how States and authorized Tribes for certain CWA programs can implement those programs
- May influence how States and Tribes strategize for protecting their resources into the future—such as whether to pursue authorization for additional CWA programs

Source: EPA/USACE WOTUS Public Listening Session Presentation, May 14, 2025

YOU ARE
HERE

**Clean
Water
Rule**
(2015)

**Repeal
Rule**
(2019)

2023 Rule

Continuous surface
connection +
significant nexus

**"Conforming
Rule"**

**Preliminary
Injunction in
Florida**

Pre-2015 +
Sackett

Rapanos
(pre-2015)

Plurality: Continuous
surface connection
Concurrence:
Significant nexus

**Navigable
Waters
Protection
Rule**
(2020)

Sackett v. EPA
(2023)

1. No significant nexus
2. "geographic features"
3. Continuous surface
connection
4. Barrier severs wetland
jurisdiction

Sackett v. EPA

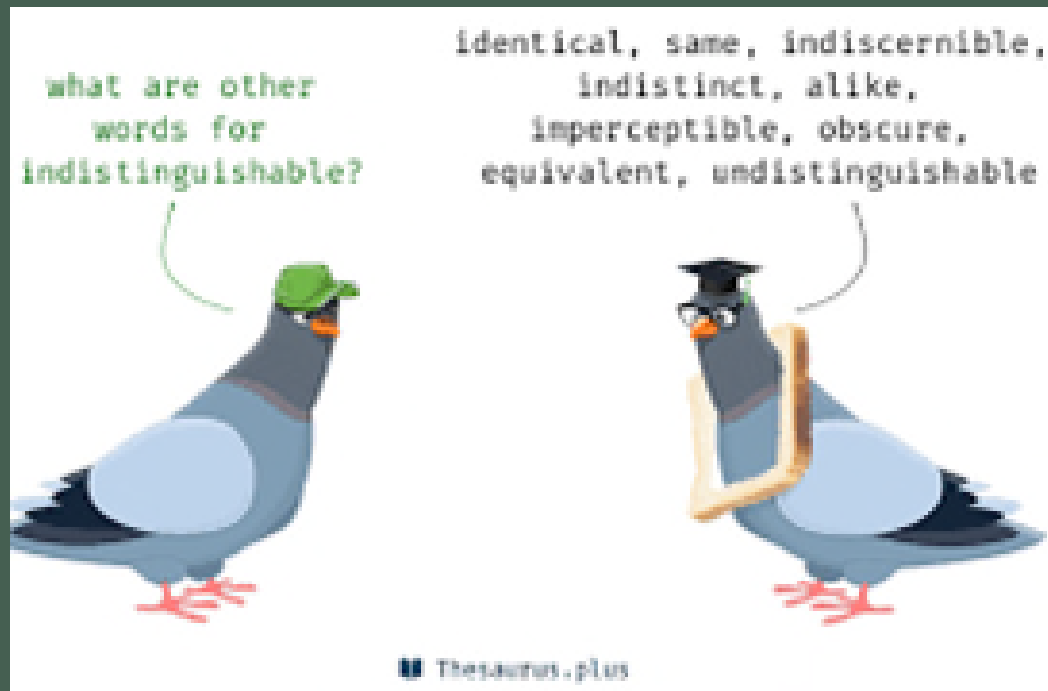
- ▶ Idaho couple began trying to build lake house in 2007.
- ▶ Subsurface flow, no surface connection between ditch and property or Priest Lake and property.



Sackett v. EPA



CWA extends only to wetlands that are “**as a practical matter indistinguishable from waters of the United States.**”



TEST:

- 1 Waterbody adjacent to wetland must itself be a WOTUS, i.e., a relatively permanent body of water connected to traditional interstate navigable waters; AND
- 2 Wetland must have “a continuous surface connection with that water, **making it difficult to determine where the ‘water’ ends and the ‘wetland’ begins.**” 598 U.S. 651, 678-79 (2023)

Also!

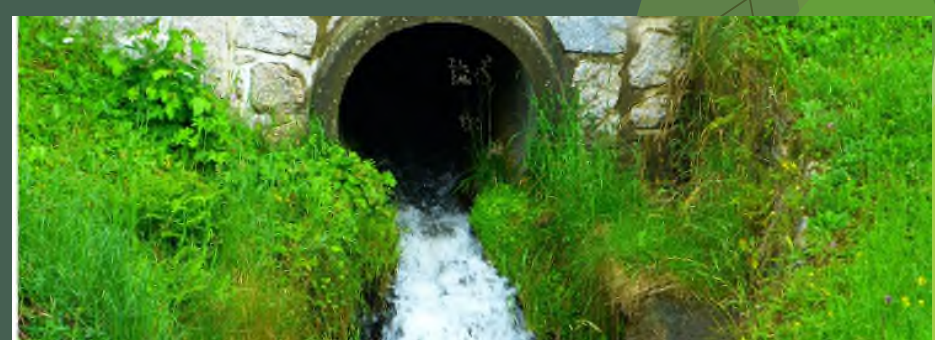
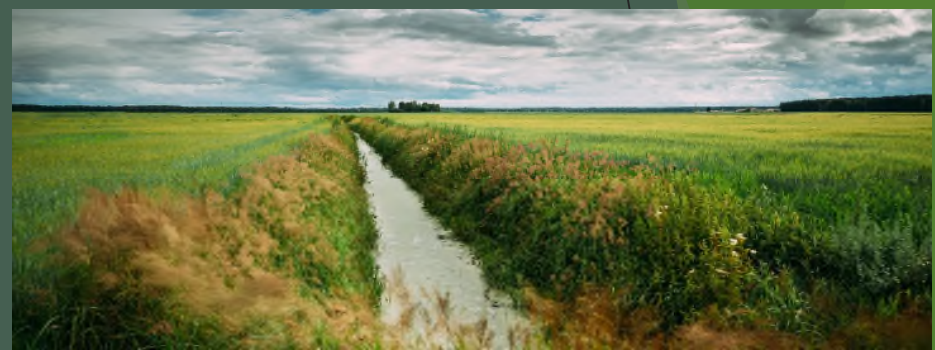
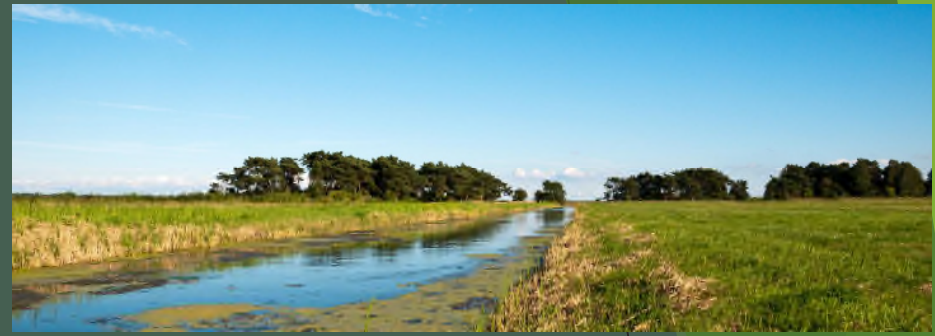
CWA’s use of “waters” encompasses “only those relatively permanent, standing or continuously flowing bodies of water **‘forming geographic[al] features’** that are described in ordinary parlance as **‘streams, oceans, rivers, and lakes.’**”

Sackett v. EPA,
598 U.S. 651, 671 (2023).



Questions after the case:

- ▶ What is a "continuous surface connection"?
Do the wetlands need to abut an RPW?
 - ▶ Does “indistinguishable” hold meaning?
- ▶ What is a "relatively permanent water"?
Court did not address the roadside ditch because was not imperative to the case - road separated wetland from ditch to Priest Lake.
 - ▶ Does “geographic features” hold meaning?



Post-*Sackett* Regulatory Actions

- ▶ Revision to Biden WOTUS rule, called the “Conforming Rule.”
 - ▶ Arguably did not truly conform with *Sackett*.
- ▶ Biden rule is not being applied in all states due to preliminary injunctions.
- ▶ In Florida, the pre-2015 regulatory regime “as modified by *Sackett*” is being applied.

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Pre-2015 regulatory regime, as modified by *Sackett*

- ▶ 2008 *Rapanos* Guidance + *Sackett* i.e., no significant nexus.
- ▶ Piecemeal guidance on this.
- ▶ Further refined most recently by the memo to the field issued by the EPA and Corps on March 12, 2025 interpreting *Sackett* and correcting prior guidance by the agencies.

Case law

- ▶ **U.S. v. Sharfi** (S.D. Florida 12/30/24)
 - ▶ « geographic features » language in Sackett is meaningful (ditches)
 - ▶ « continuous surface connection » means continuous surface *water* connection.
- ▶ **Glynn Environmental Coalition v. Sea Island Acquisition** (S.D. Ga. 3/1/24) (on appeal to 11th Circuit)

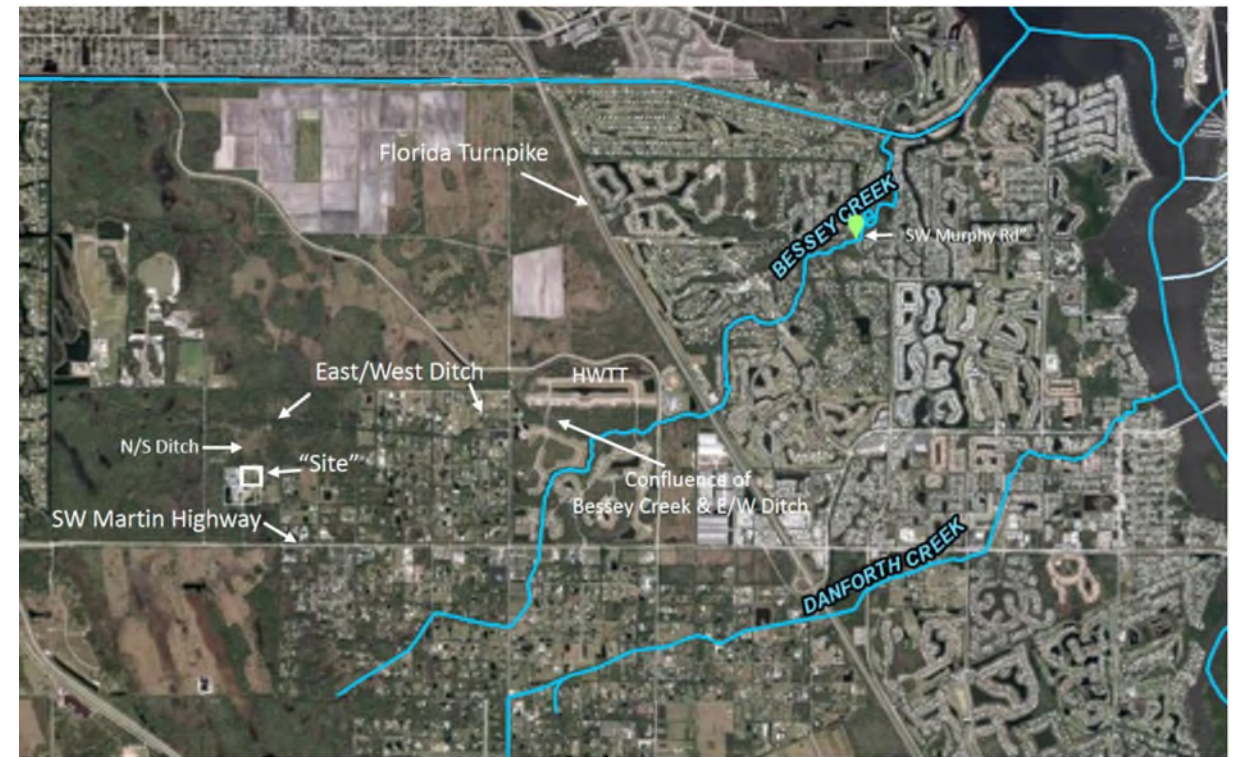


Figure V.C.2.9. Countess Joy East Reference Area W7 wetland sampling point abutting Bessey Creek (Photograph source: USAEXPERTS 0000687).

U.S. v. Sharfi

Current Status

- ▶ Corps and EPA are not relying on lower court cases in the field.
- ▶ Corps and EPA have recognized “indistinguishable” language from *Sackett* matters.
 - ▶ March 12, 2025 field memo: Wetlands must abut relatively permanent waters to be jurisdictional.
 - ▶ But multiple wetlands connection caveat* from pre-2015 joint decision memos.
- ▶ No guidance yet on “waters” / “geographic features” language from *Sackett*.
 - ▶ Currently agencies are using pre-2015 guidance: ditches and canals can be tributaries if they are wet at least 3 months out of the year and have “bed, bank, OHWM”.



See Joint Decision Memos for NWO-2003-60436, LRB-2021-01386 and SAS-2001-13740

Takeaway: despite March 12, 2025 memo, could still have many wetlands be jurisdictional by virtue of the wetland itself, or in combination with another wetland, abutting a feature like a man-made ditch that is not excluded (“located wholly in and draining only uplands and does not carry a relatively permanent flow”), if the Corps considers the ditch a jurisdictional tributary.

.....Wasn't *Sackett* supposed to clear things up?

**CLIENT ALERT: FEDERAL WOTUS GUIDANCE UPDATED – JURISDICTION
OVER DITCHES STILL UNCLEAR**
MARCH 27, 2025

**EPA and Army
Announce Guidance
and a "WOTUS
Notice: The Final
Response to
SCOTUS"**

*City and County
of San Francisco,
California v. EPA*



San Francisco v. EPA

- ▶ City of San Francisco operates two combined wastewater treatment facilities that process both wastewater and stormwater.
 - During periods of heavy precipitation, the combination of wastewater and stormwater may exceed the facility's capacity and may be discharged into the Pacific Ocean or the San Francisco Bay.
- ▶ For many years, San Francisco's NPDES permit for its facility was renewed without controversy, but in 2019, the EPA issued a renewal permit that added two end-result requirements.
 - 1 - prohibits the facility from making any discharge that "contribute[s] to a violation of any applicable water quality standard" for receiving waters
 - 2 - provides that the City cannot perform any treatment or make any discharge that "create[s] pollution, contamination, or nuisance as defined by CA Water Code section 13050

San Francisco v. EPA

San Francisco argued that the end-result requirements exceed EPA's authority...



- SCOTUS held in a 5-4 decision that EPA exceeded its authority under the CWA by imposing vague "end-result" requirements in NPDES permits
 - o EPA has responsibility to outline specifically what steps a permittee must take to ensure that water quality standards are met

"Determining what steps a permittee must take to ensure that water quality standards are met is the EPA's responsibility, and Congress has given it the tools needed to make that determination."

San Francisco v. EPA, No. 23-753, slip op. at 2 (U.S. Mar. 4, 2025).



What is a limitation?

- ▶ The Court analyzed the meaning of the term "limitation"
 - Webster's Dictionary: "a restriction or restraint imposed *from without* (as by law)"
- ▶ A provision that tells a permittee that it must do specific things 
- ▶ A provision that simply tells a permittee that a particular end result must be achieved and that it is up to the permittee to figure out what it should do
 - The restriction here comes from within, not "from without" 

Significance of *San Francisco v. EPA*

- ▶ 8 of the 9 justices preserved EPA's and states' ability to set and enforce limitations that aren't numerical, BUT such limitations must "set[] out actions that must be taken to achieve the objective"
 - Does NOT completely eliminate narrative limitations
- ▶ The ruling marks a shift in how the CWA is applied
- ▶ Emphasizes the importance of the permit shield, protecting permit holders from liability if they comply with all permit conditions

Looking Forward

- ▶ This decision will require EPA to issue more concrete requirements in its NPDES permits, which should provide industry and municipalities with greater certainty about what they need to do to comply
 - Permitting agencies could impose additional limitations/requirements at the renewal or modification stage
- ▶ Potential for increased delays or denials of NPDES permits
 - Justice Barrett noted that EPA often lacks the requisite information to prescribe specific effluent limitations, end-use requirements were issued to avoid lengthy delays
- ▶ Implications for the ability of county governments that operate wastewater treatment facilities to comply with NPDES permit requirements

"If the EPA does its work, our holding should have no adverse effect on water quality"

San Francisco v. EPA, at 3.

- ▶ *San Francisco v. EPA* is the third time in less than five years that the U.S. Supreme Court overturned a Ninth Circuit Court of Appeals interpretation of the CWA
- ▶ Unclear if/when EPA will have the resources to do that which the Supreme Court and its own guidance say, "the CWA demands"



Questions?

