

SEPTEMBER 2025

VOL. 25-8

PRATT'S

ENERGY LAW REPORT



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ISBN: 978-1-6328-0836-3 (print)
ISBN: 978-1-6328-0837-0 (ebook)
ISSN: 2374-3395 (print)
ISSN: 2374-3409 (online)

Cite this publication as:

[author name], [*article title*], [vol. no.] PRATT’S ENERGY LAW REPORT [page number] (LexisNexis A.S. Pratt);

Ian Coles, *Rare Earth Elements: Deep Sea Mining and the Law of the Sea*, 14 PRATT’S ENERGY LAW REPORT 4 (LexisNexis A.S. Pratt)

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Editorial Office
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POSTMASTER: Send address changes to *Pratt's Energy Law Report*, LexisNexis Matthew Bender, 230 Park Ave. 7th Floor, New York NY 10169.

U.S. Environmental Protection Agency and Army Corps of Engineers to Revisit “Waters of the U.S.” Definition Under Clean Water Act

*By Chad M. Burchard**

In this article, the author explains that the U.S. Environmental Protection Agency and the U.S. Army Corps of Engineers are reviewing their interpretation of the definition of “the waters of the United States” under the Clean Water Act.

U.S. Environmental Protection Agency (EPA) Administrator Lee Zeldin has announced that the EPA will work with the U.S. Army Corps of Engineers (Corps) to review their interpretation of the definition of “the waters of the United States” under the Clean Water Act (CWA).

THE STATUTE

Enacted into law in 1972, the CWA bars “the discharge of any pollutant” into “navigable waters,” which it defines as “the waters of the United States, including the territorial seas.”¹

The definition of “pollutant” under the CWA is broad and includes not only substances such as “chemical wastes” and “radioactive materials” but also “rock” and “sand.”² Thus, virtually any earth moving activity could require a permit depending on whether or not it impacts the waters of the United States, and making this determination has not proven to be easy.

The EPA and the Corps enforce the CWA, and both have the power to issue permits for activities otherwise barred by the CWA. For decades, these agencies have taken an expansive view of the definition of “the waters of the United States.”

In 1975, the Corps issued regulations construing the CWA to cover wetlands adjacent to other covered waters, a construction that the U.S. Supreme Court upheld in *U.S. v. Riverside Bayview Homes, Inc.*³ In *Riverside*, a residential developer “place[d] fill materials on its property as part of its preparations for construction of a housing development.”⁴ The Corps, “believing that the

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¹ 33 U.S.C. Sections 1311(a), 1362(7), and 1362(12)(A).

² 33 U.S.C. Section 1362(6).

³ *U.S. v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985).

⁴ *Id.* at 124.

property was 'adjacent wetland' under the 1975 regulation defining 'waters of the United States,' filed suit. . . ."⁵

The Court admitted that "[o]n a purely linguistic level, it may appear unreasonable to classify 'lands,' wet or otherwise, as 'waters.'" However, it also noted that "the transition from water to solid ground is not necessarily or even typically an abrupt one,"⁶ and that "we cannot say that the Corps' judgment in these matters is unreasonable."⁷ The Court deferred to the Corps, holding that because the developer's "property is part of a wetland that actually abuts on a navigable waterway, [the developer] "was required to have a permit. . . ."⁸

THE MIGRATORY BIRD RULE

In 1986, the Corps issued what became known as the "Migratory Bird Rule," asserting that the CWA covered intrastate waters which, "are or would be used as a habitat by birds protected by Migratory Bird Treaties."⁹ The Court addressed this rule in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*.¹⁰ In that case, the petitioner had inquired about whether a permit was required under the CWA in order to fill in some ponds, and, after learning that "migratory birds had been observed at the site, the Corps," citing the Migratory Bird Rule, determined that one was required.¹¹ The Court, however, disagreed. "In order to rule for [the Corps] here, we would have to hold that the jurisdiction of the Corps extends to ponds that are *not* adjacent to open water,"¹² "[b]ut we conclude that the text of the statute will not allow this."¹³

Just a few years later, in *Rapanos v. U.S.*,¹⁴ the Court again addressed the definition of "the waters of the United States" under the CWA. That decision involved an enforcement action against developers alleged to have illegally filled wetlands and a separate action brought by property owners whose request for a permit to fill in their property had been denied. This time, however, the Court

⁵ Id.

⁶ Id. at 132.

⁷ Id. at 135.

⁸ Id.

⁹ 51 Fed. Reg. 41217.

¹⁰ *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001).

¹¹ Id. at 164.

¹² Id. at 168.

¹³ Id.

¹⁴ *Rapanos v. U.S.*, 547 U.S. 715 (2006).

was split. In a plurality opinion, four of the justices announced their view that the “only plausible interpretation” of “the waters of the United States” was that it includes only “relatively permanent, standing, or continuously flowing bodies of water,”¹⁵ and that “*only* those wetlands with a continuous surface connection to bodies of water that are ‘waters of the United States’ in their own right, so that there is no clear line of demarcation between ‘waters’ and wetlands, are ‘adjacent to’ and covered by the [CWA].”¹⁶

Justice Kennedy took a different view. Though he concurred with the plurality in vacating the judgments of the appellate court, he believed that the proper way to determine whether the CWA covered a particular wetland was not the plurality’s test, but rather whether a “significant nexus” exists between the wetland and navigable waters. This would be found “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.’”¹⁷

In a memorandum issued jointly by the EPA and the Corps, these agencies asserted that jurisdiction under the CWA existed if either the Rapanos plurality’s “relatively permanent” or Justice Kennedy’s “significant nexus” tests were met.¹⁸

ANOTHER CHALLENGE

It was not until June 29, 2015, that the EPA and the Corps issued the “Clean Water Rule: Definition of ‘Waters of the United States.’”¹⁹ However, that rule was soon challenged in court and subjected to injunctions.

In 2019, the rule was repealed and on April 21, 2020, the agencies published the “Navigable Waters Protection Rule: Definition of the Waters of the United States.”²⁰ That rule for the first time used the Rapanos plurality’s test to define “waters of the United States,” but it, too, was quickly subjected to legal challenges.

On January 18, 2023, the agencies published the “Revised Definition of ‘Waters of the United States.’” That rule again allowed the agencies to

¹⁵ Id. at 740.

¹⁶ Id. at 742.

¹⁷ Id. at 780.

¹⁸ See Clean Water Act Jurisdiction Following U.S. Supreme Court’s Decision in Rapanos v. United States & Carabell v. United States (June 6, 2006), superseded December 2, 2008.

¹⁹ 80 Fed. Reg. 37054.

²⁰ 85 Fed. Reg. 22250.

determine CWA coverage based on either the “relatively permanent” or “significant nexus” tests.

THE *SACKETT* DECISION

However, just a few months later, the Supreme Court handed down its decision in *Sackett v. Environmental Protection Agency*,²¹ which adopted the view of the plurality in *Rapanos* and held that the CWA covers only “‘wetlands with a continuous surface connection to bodies that are ‘waters of the United States’ in their own right,’ so that they are indistinguishable from those waters.”²²

On September 8, 2023, the EPA and the Corps published a revised definition of “the waters of the United States” to comply with *Sackett*.²³ However, it too was challenged in the courts.

According to the EPA’s website: “As a result of ongoing litigation on the January 2023 Rule, the agencies are implementing the January 2023 Rule, as amended by the conforming rule, in 24 states, the District of Columbia, and the U.S. Territories. In the other 26 states, the agencies are interpreting ‘waters of the United States’ consistent with the pre-2015 regulatory regime and the Supreme Court’s decision in *Sackett* until further notice.”²⁴

CONCLUSION

Whatever rule the EPA and the Corps next issue, controversy over the definition of “the waters of the United States” under the CWA is unlikely to end anytime soon.

²¹ *Sackett v. Environmental Protection Agency*, 598 U.S. 651 (2023).

²² *Id.* at 684 quoting, in part, *Rapanos*, 547 U.S. at 742, 755.

²³ See 88 Fed. Reg. 61964.

²⁴ Definition of “‘Waters of the United States’: Rule Status and Litigation Update,” available at <https://www.epa.gov/wotus/definition-waters-united-states-rule-status-and-litigation-update> (last retrieved April 7, 2025).