



## SCOTUS to Revisit *Rapanos*

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In [Sackett v. EPA](#) the U.S. Supreme Court will decide the proper test for determining when “wetlands” are “waters of the United States.” The Clean Water Act (CWA) prohibits any person who lacks a permit from discharging pollutants, including rocks and sand, into “navigable waters,” defined as “waters of the United States.”

CWA regulations define “waters of the United States” to include “wetlands” that are “adjacent” to traditional navigable waters and their tributaries.

In [Rapanos v. United States](#) (2006), Justice Scalia, writing for four Justices, stated that “waters of the United States” extends to “relatively permanent, standing or flowing bodies of water” and to wetlands with a “continuous surface connection” to such permanent waters.

For Justice Kennedy, writing alone, if wetlands have a “significant nexus” to navigable waters they are “waters of the United States.” According to the Ninth Circuit, while the Scalia plurality did not totally reject the concept of a “significant nexus,” it opined that only wetlands with a “physical connection” to traditional navigable waters are “waters of the United States.”

In this case the Sackett’s purchased a “soggy residential lot” 300 feet from Idaho’s Priest Lake. To the north of their lot, with a road in between, is a wetland that drains to a tributary that feed into a creek that flows southwest of the Sacketts’ property and empties into Priest Lake.



After obtaining permits from the county the Sacketts began backfilling the property with sand and gravel to create a stable grade. The Environmental Protection Agency issued the Sacketts a “formal administrative compliance order” explaining they were violating the CWA.

Before the Ninth Circuit the Sacketts argued that the Scalia opinion controls whether their property contains wetlands. The Ninth Circuit disagreed.

Per the Supreme Court in *Marks v. United States* (1977), if there aren't five votes to support one rationale of a Supreme Court case the holding of the case is “the narrowest ground to which a majority of the Justices would assent if forced to choose in almost all cases.” According to the Ninth Circuit the Kennedy concurrence supplied the controlling rule in *Rapanos* because if forced to the four dissenting Justices that would have joined Kennedy's opinion rather than Scalia's.

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