



# TUWaterWays

Water News and More from the Tulane Institute on Water Resources Law & Policy

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## Clean Water Act Gets the Sack(ett)

If a job is worth doing it is worth doing well, unless that job is protecting the environmental health of America's waters. In that case, for many waters, it may not be anyone's job at all anymore. That is the upshot of the [U.S. Supreme Court's new ruling in Sackett v EPA](#). The Court's majority concludes that the Clean Water Act's reach is limited to navigable waters/waters of the United States and their "adjoining" wetlands. Adjoining wetlands are apparently not the same as "adjacent wetlands" much less the same as those with a "significant nexus" to the water body (which seemed to be the boundary set by previous SCOTUS rulings and upon which the current, albeit contentious, regulatory definition of "waters of the United States" is based). That the Sacketts won this case won't come as a surprise to regular readers of TUWW. Indeed, all nine justices agreed that the Act should not have covered their property.

The Court could have just left things at that, but it couldn't help itself. Five justices went the extra mile to rule that the Act is less far-reaching than it traditionally has been found to be, even less than recent restrictive SCOTUS rulings. Hyperbole you ask? Not in the view of dependably conservative Justice Kavanaugh, who wrote that "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, with significant repercussions for water quality and flood control throughout the United States."

Keep in mind that the legal issue in this, and many recent cases, is not whether Congress exceeded its authority in writing the Clean Water Act but rather what the language of the Act means and whether the agencies charged with carrying out the law should be shown any deference. The fact that Congress has not chosen to change any of the language of the Act (and it has had lots of chances) and that EPA and the Army Corps of Engineers actually have lots of experience as stewards of our nation's waters that no judge possesses has not mattered to many courts – especially SCOTUS, as they have pushed to limit the reach of environmental laws and the authority of executive branch agencies to carry them out. All that effort the [Army Corps and EPA took to promulgate the new waters of the U.S. rule earlier this year was a waste](#). So, where are we now? First, no one should think this opinion clarifies what the law covers. For every question it answered (e.g. was the Sackett property covered by it) it will raise new ones. What waters are actually navigable? What are adjoining wetlands and how is adjoining different from adjacent? How will this impact state water laws?

On that latter note, state and federal water protection laws have often been woven together. Some states, like Louisiana, have relied on federal laws to protect their waters and wetlands, so this will leave a protection gap in those states. Twenty-four states reference the federal jurisdictional reach of "waters of the United States, so in those places state law protections will retreat with the Federal Laws. In probably all states, the cost of protecting their waters and wetlands will go up as the burdens of protection shift from the Federal government to the state. At the end of the day, one can't help but wonder if the purpose of the Clean Water Act was to improve the health of America's water resources or to do as little as possible in as few places as possible. Until yesterday, it certainly

seemed like the Clean Water Act was enacted to deal with very real, and very pervasive problems with the nation's waters. After *Sackett*, we may be reminded of that before too long. We hope not, but if nature had a voice, it might be saying, [you better be good to me](#).

The ball is in your court, legislators of this country, and perhaps [we don't need another hero](#), but we definitely need y'all to [come together](#) to return protections to wetlands or the waters of the United States (including drinking water!) are going to be [funkier than a mosquito's tweeter](#).

## O Beautiful for Spacious Skies,

...For amber waves of grain. Yes, [America is beautiful](#) but there are fewer amber wheat fields in [America's bread basket](#) these days as farmers contend with a drought that keeps dragging on. Compared to some crops—looking at you almonds, alfalfa, corn and others—wheat is not a crop that needs lots of water, but it still is water dependent and, increasingly, that water just isn't there. [Nationally, 33% of this year's winter wheat crop is being plowed under including 19% in Kansas, our biggest wheat grower](#) (though we're pleased to report that certain wheat fields in Kansas near and dear to at least one Institute heart got half an inch of rain for the first time since last fall; we've now got an outside shot at making 20 bushel per acre!). In the past, the answer to a drought was often a well, but [the aquifers in Plains states are also under stress, and bringing pumping in line with ground water recharge could have a very big impact on grain production](#). This is bad news for farmers, but at least they can turn to prayer and crop insurance to buffer the impacts. The same can't be said for others who depend on affordable grain harvest to eat and on the taxes and fees that come from those farms to support their programs.

## So Let it Be, Written, So Let it be Done (Maybe)

The [Colorado River has done some pretty amazing things, like carving the Grand Canyon and fueling a century of population and economic growth in the American West](#). But like the [Giving Tree](#), there is only so much a river can give and this river as given more than is sustainable. Shared by the nation, seven states, various native tribes and Mexico, the River and its users are at a crossroads where either withdrawals go down or the river goes down (and with it withdrawals). This has been known for a very long time, but knowing you need to do something and doing it are very different things, especially if you can get someone else to take the hit. So it has gone for the Colorado until it got the point where the Federal government, which manages the dams and reservoirs on the river, announced that it would impose cuts if the states could not come to an agreement. [And, lo and behold, they have. Spurred by an uncharacteristic sense of shared purpose—and rain and snow in California—the tentative deal calls for California, Nevada and Arizona to cut their water use by 14% by 2026 and for the Federal government to compensate them to the tune of about \\$1.2 billion](#). Did we mention that the use reductions are voluntary as opposed to the looming federal cuts? Well, the reductions are voluntary. Also, the compensation is more an incentive than actual compensation but if it works, it will probably be worth it. As for working, this is, at best, a respite and not a cure for what ails the Colorado and everything and everyone that depends on it. So maybe farmers in California and Arizona can avoid the fate of those in Kansas, but it will take more than this deal to do that.

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### Coming Up:

[2023 State of the Coast Conference](#); May 31-June 2; New Orleans, LA

[River Days of Action](#); June 8-18; Mississippi River

### Water jobs:

[Staff Attorney, Clean Water Program](#); Environmental Integrity Project; multiple locations

[Multiple Associate Positions, Mitigation Program](#); Georgetown Climate Center; Washington, D.C.

[Policy Coordinator](#); The Water Collaborative; New Orleans, LA

[Policy Analyst, Water Justice Organizer, & Artist in Residence](#); Bayou City Waterkeeper; Houston, TX

[Drinking Water Policy Coordinator](#); National Wildlife Federation; various Great Lakes offices

[Lead Policy Advocate](#); James River Association; Richmond, VA



The [Tulane Institute on Water Resources Law and Policy](#) is a program of the Tulane University Law School. The Institute is dedicated to fostering a greater appreciation and understanding of the vital role that water plays in our society and of the importance of the legal and policy framework that shapes the uses and legal stewardship of water.

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