**From:** Oliver Orjiako
**To:** Sonja Wiser
**Cc:** Christine Cook
**Subject:** FW: US Supreme Court ruling on Wetlands
**Date:** Monday, September 11, 2023 2:46:05 PM

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Hi Sonja:

Please, for the record. Thanks.

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**From:** Carol Levanen <cnldental@yahoo.com>
**Sent:** Monday, September 11, 2023 2:41 PM
**To:** Karen Bowerman <Karen.Bowerman@clark.wa.gov>; Gary Medvigy <Gary.Medvigy@clark.wa.gov>; Michelle Belkot <Michelle.Belkot@clark.wa.gov>; Glen Yung <Glen.Yung@clark.wa.gov>; Sue Marshall <Sue.Marshall@clark.wa.gov>; Kathleen Otto <Kathleen.Otto@clark.wa.gov>; Oliver Orjiako <Oliver.Orjiako@clark.wa.gov>; Jose Alvarez <Jose.Alvarez@clark.wa.gov>
**Subject:** US Supreme Court ruling on Wetlands



Clark County Council September 11, 2023
P.O. Box 5000
Vancouver, Washington 98666

FOR THE PUBLIC RECORD AND THE COMPREHENSIVE PLAN UPDATE

**Re: U.S. Supreme Court Decision and Ruling on regulation of Wetlands**.

Dear Councilors,

Clark County Citizens United, Inc. believes this is a very concise United States Supreme Court Ruling on wetlands and property rights. There is no guessing what this court had to say about how the Sacketts were treated and how the Environmental Protection Agency and Corp of Engineers went far beyond their jurisdiction, with unreasonable and illegal wetland regulation.

CCCU sees the same thing happening to landowners, right here in Clark County. It took one landowner in Hockinson, ten (10) years before the Corp would allow them to divide their land. Environmental Services and Code Enforcement staff continue to run roughshod over land owners, calling grass lined swales, farm ponds, old stormwater facilities, ditches and dips in the ground, that grow a few wetland plants, as regulated "wetlands". The law says a wetland must have three things, **(1) predominant wetland soil,(2) inundated with continuous water, and (3) a predominance of wetland plants**. But here in Clark County, staff bypasses the soil test, disregards how the dip in the ground holds water, and claims a few wetland plants, will suffice. They justify it with a subjective state check off list, that can be

manipulated by numbers. The state wants to preserve *real* wetlands, not every divot in the ground that sometimes holds water.

There needs to be a major overhaul of Clark County's Wetland and Critical Lands Ordinance, in order to comply with court actions and newly enacted state laws. County environmental policies must match what the legislature and the courts have determined to be the law of the land. CCCU is watching closely, whether Clark County understands their charge and will do the right thing.

Sincerely,

Carol Levanen, Exec, Secretary

Clark County Citizens United, Inc.
P.O. Box 2188
Battle Ground, Washington 98604

**SUPREME COURT OF THE UNITED STATES Syllabus SACKETT ET UX. v. ENVIRONMENTAL PROTECTION AGENCY ET AL. CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT No. 21–454. Argued October 3, 2022—Decided May 25, 2023**
https://www.supremecourt.gov/opinions/22pdf/21-454_4g15.pdf

*Petitioners Michael and Chantell Sackett purchased property near Priest Lake, Idaho, and began backfilling the lot with dirt to prepare for building a home. The Environmental Protection Agency informed the Sacketts that their property contained wetlands and that their backfilling violated the Clean Water Act, which prohibits discharging pollutants into "the waters of the United States." 33 U. S. C. §1362(7). The EPA ordered the Sacketts to restore the site, threatening penalties of over $40,000 per day. The EPA classified the wetlands on the Sacketts' lot as "waters of the United States" because they were near a ditch that fed into a creek, which fed into Priest Lake, a navigable, intrastate lake. The Sacketts sued, alleging that their property was not "waters of the United States." The District Court entered summary judgment for the EPA. The Ninth Circuit affirmed, holding that the CWA covers wetlands with an ecologically significant nexus to traditional navigable waters and that the Sacketts' wetlands satisfy that standard. Held: The CWA's use of "waters" in §1362(7) refers only to "geographic[al] features that are described in ordinary parlance as 'streams, oceans, rivers, and lakes' " and to adjacent wetlands that are "indistinguishable" from those bodies of water due to a continuous surface connection. Rapanos v. United States, 547 U. S. 715, 755, 742, 739 (plurality opinion). To assert jurisdiction over an adjacent wetland under the CWA, a party must establish "first, that the adjacent [body of water constitutes] . . . 'water[s] 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." Ibid. Pp. 6–28.*

*on). The EPA, however, offers only a passing attempt to square its interpretation with the text of §1362(7), and its "significant nexus" theory is particularly implausible. It suggests that the meaning of "the waters of the United 24 SACKETT v. EPA Opinion of the Court States" is so "broad and unqualified" that, if viewed in isolation, it would extend to all water in the United States. Brief for Respondents 32. The EPA thus turns to the "significant nexus" test in order to reduce the clash between its understanding of "the waters of the United States" and the term defined by that phrase, i.e., "navigable waters." As discussed, however, the meaning of "waters" is more limited than the EPA believes. See supra, at 14. And, in any event, the CWA never mentions the "significant nexus" test, so the EPA has no statutory basis to impose it. See Rapanos, 547 U. S., at 755–756 (plurality opinion). 2 Second, the EPA's interpretation gives rise to serious vagueness concerns in light of the CWA's criminal penalties. Due process requires Congress to define penal statutes "'with sufficient definiteness that ordinary people can understand what conduct is prohibited'" and "'in a manner that does not encourage arbitrary and discriminatory enforcement.'" McDonnell v. United States, 579 U. S. 550, 576 (2016) (quoting Skilling v. United States, 561 U. S. 358, 402–403 (2010)). Yet the meaning of "waters of the United States" under the EPA's interpretation remains "hopelessly indeterminate." Sackett, 566 U. S., at 133 (ALITO, J., concurring); accord, Hawkes Co., 578 U. S., at 602 (opinion of Kennedy, J.). The EPA contends that the only thing preventing it from interpreting "waters of the United States" to "conceivably cover literally every body of water in the country" is the significant-nexus test. Tr. of Oral Arg. 70–71; accord, Brief for Respondents 32. But the boundary between a "significant" and an insignificant nexus is far from clear. And to add to the uncertainty, the test introduces another vague concept—"similarly situated" waters—and then assesses the aggregate effect of that group based on a variety of open-ended factors that evolve as scientific understandings Cite as: 598 U. S. ____ (2023) 25 Opinion of the Court change. This freewheeling inquiry provides little notice to landowners of their obligations under the CWA. Facing severe criminal sanctions for even negligent violations, property owners are "left 'to feel their way on a case-by-case basis.'" Sackett, 566 U. S., at 124 (quoting Rapanos, 547 U. S., at 758 (ROBERTS, C. J., concurring)).*

*Where a penal statute could sweep so broadly as to render criminal a host of what might otherwise be considered ordinary activities, we have been*

*wary about going beyond what "Congress certainly intended the statute to cover." Skilling, 561 U. S., at 404. Under these two background principles, the judicial task when interpreting "the waters of the United States" is to ascertain whether clear congressional authorization exists for the EPA's claimed power. The EPA's interpretation falls far short of that standard. B While mustering only a weak textual argument, the EPA justifies its position on two other grounds. It primarily claims that Congress implicitly ratified its interpretation of "adjacent" wetlands when it adopted §1344(g)(1). Thus, it argues that "waters of the United States" covers any wetlands that are "bordering, contiguous, or neighboring" to covered waters. 88 Fed. Reg. 3143. The principal opinion concurring in the judgment adopts the same position. See post, at 10–12 (KAVANAUGH, J., concurring in judgment). The EPA notes that the Corps had promulgated regulations adopting that interpretation before Congress amended the CWA in 1977 to include the reference to "adjacent" wetlands in §1344(g)(1). See 42 Fed. Reg. 37144. This term, the EPA contends, was """obviously transplanted from""" the Corps' regulations and thus incorporates the same definition. Brief for Respondents 22 (quoting Taggart v. Lorenzen, 587 U. S. ___, ___ (2019) (slip op., at 5)). This argument fails for at least three reasons. First, as we have explained, the text of §§1362(7) and 1344(g)(1) 26 SACKETT v. EPA Opinion of the Court shows that "adjacent" cannot include wetlands that are not part of covered "waters." See supra, at 22. Second, this ratification theory cannot be reconciled with our cases. We have repeatedly recognized that §1344(g)(1) "'does not conclusively determine the construction to be placed on . . . the relevant definition of "navigable waters."'" SWANCC, 531 U. S., at 171 (quoting Riverside Bayview, 474 U. S., at 138, n. 11); accord, Rapanos, 547 U. S., at 747–748, n. 12 (plurality opinion). Additionally, SWANCC rejected the closely analogous argument that Congress ratified the Corps' definition of "waters of the United States" by including "'other . . . waters'" in §1344(g)(1). 531 U. S., at 168–171. And yet, the EPA's argument would require us to hold that §1344(g)(1) actually did amend the definition of "navigable waters" precisely for the reasons we rejected in SWANCC. Third, the EPA cannot provide the sort of "overwhelming evidence of acquiescence" necessary to support its argument in the face of Congress's failure to amend §1362(7). Id., at 169–170, n. 5. We will infer that a term was "'transplanted from another legal source' . . . only when a term's meaning was 'well-settled' before the transplantation." Kemp v. United States, 596 U. S. __, __–__(2022) (slip op., at 9–10).*

*Far from being well settled, the Corps' definition was promulgated mere*

*months before the CWA became law, and when the Corps adopted that definition, it candidly acknowledged the "rapidly changing nature of [its] regulatory programs." 42 Fed. Reg. 37122. Tellingly, even the EPA would not adopt that definition for several more years. See 45 Fed. Reg. 85345 (1980). This situation is a far cry from any in which we have found ratification. See, e.g., George v. McDonough, 596 U. S. ___, ___ (2022) (slip op., at 5) (finding ratification when "Congress used an unusual term that had a long regulatory history in [the] very regulatory context" at issue). The EPA also advances various policy arguments about Cite as: 598 U. S. ____ (2023) 27 Opinion of the Court the ecological consequences of a narrower definition of adjacent. But the CWA does not define the EPA's jurisdiction based on ecological importance, and we cannot redraw the Act's allocation of authority. See Rapanos, 547 U. S., at 756 (plurality opinion). "The Clean Water Act anticipates a partnership between the States and the Federal Government." Arkansas v. Oklahoma, 503 U. S. 91, 101 (1992). States can and will continue to exercise their primary authority to combat water pollution by regulating land and water use. See, e.g., Brief for Farm Bureau of Arkansas et al. as Amici Curiae 17–27. V Nothing in the separate opinions filed by JUSTICE KAVANAUGH and JUSTICE KAGAN undermines our analysis. JUSTICE KAVANAUGH claims that we have "rewrit[ten]" the CWA, post, at 12 (opinion concurring in judgment), and JUSTICE KAGAN levels similar charges, post, at 3–4 (opinion concurring in judgment). These arguments are more than unfounded. We have analyzed the statutory language in detail, but the separate opinions pay no attention whatsoever to §1362(7), the key statutory provision that limits the CWA's geographic reach to "the waters of the United States." Thus, neither separate opinion even attempts to explain how the wetlands included in their interpretation fall within a fair reading of "waters." Textualist arguments that ignore the operative text cannot be taken seriously.*

*VI In sum, we hold that the CWA extends to only those "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. Rapanos, 547 U. S., at 742, 755 (plurality opinion) (emphasis deleted); see supra, at 22. This holding compels reversal here. The wetlands on the Sacketts'*

*property are distinguishable 28 SACKETT v. EPA Opinion of the Court from any possibly covered waters. * * * We reverse the judgment of the United States Court of Appeals for the Ninth Circuit and remand the case for further proceedings consistent with this opinion. It is so ordered.*

*Clark County Citizens United, Inc. P.O. Box 2188 Battle Ground, Washington 98604*
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