

Definition.¹⁷ With regard to the Relatively Permanent Test, which was later adopted by the Court in *Sackett*, the plurality opinion determined:

- The Clean Water Act covers non-navigable waters in addition to traditional navigable waters, but the plurality declined to “decide the precise extent to which the qualifiers ‘navigable’ and ‘of the United States’ restrict the coverage of the Act.” Instead, the plurality focused on the meaning of “the waters” in 33 U.S.C. § 1362(7). The plurality concluded that “[o]n this definition, ‘the waters of the United States’ include only relatively permanent, standing or flowing bodies of water. The definition refers to water as found in **‘streams,’ ‘oceans,’ ‘rivers,’ ‘lakes,’ and ‘bodies’ of water ‘forming geographical features.’**”¹⁸
- The plurality also noted that “[b]y describing ‘waters’ as ‘relatively permanent,’” it did not “necessarily exclude streams, rivers, or lakes that might dry up in extraordinary circumstances” or “*seasonal* rivers which contain continuous flow during some months of the year,” and, further, that it had “no occasion in this litigation to decide exactly when the drying-up of a streambed is continuous and frequent enough to disqualify the channel as a ‘wate[r] of the United States.’”¹⁹
- Upon this opinion, the plurality sought remand of the cases for a determination by the lower courts “whether **the ditches or drains near each wetland are ‘waters’** in the ordinary sense of containing a relatively permanent flow; and (if they are) whether the wetlands in question are ‘adjacent’ to these ‘waters’ in the sense of **possessing a continuous surface connection** that creates the boundary-drawing problem we addressed in *Riverside Bayview*.”²⁰
- In *Sackett v. EPA*, the Court adopted the approach of the *Rapanos* plurality to defining “waters” under the Clean Water Act and held that “the party asserting jurisdiction over adjacent wetlands [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.’”²¹

¹⁷ See generally *Rapanos v. United States*, 547 U.S. 715 (2006) (“*Rapanos*”).

¹⁸ *Id.* at 731-32 (emphasis added) (citations omitted).

¹⁹ *Id.* at 732 n.5.

²⁰ *Id.* at 757 (emphasis added).

²¹ *Sackett v. EPA*, 598 U.S. 651, 678-79 (2023) (quoting *Rapanos*, 547 U.S. at 742) (“*Sackett*”).