THE WATER INSTITUTE

"WATERS OF THE UNITED STATES:" WETLANDS' CONTENTIOUS HISTORY UNDER THE CLEAN WATER ACT

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CWA "WATERS OF THE UNITED STATES"

- 33 U.S.C. §1362 (in part):
  - (7) The term "navigable waters" means the waters of the United States, including the territorial seas.

- 40 C.F.R. §120.2 (in part):
  - (a) Waters of the United States means:
    - (1) Waters which are:
      - (i) Currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
      - (ii) The territorial seas; or
      - (iii) Interstate waters;
    - (2) Impoundments of waters otherwise defined as waters of the United States under this definition, other than impoundments of waters identified under paragraph (a)(5) of this section;
    - (3) Tributaries of waters identified in paragraph (a)(1) or (2) of this section that are relatively permanent, standing or continuously flowing bodies of water;
    - (4) Wetlands adjacent to the following waters:
      - (i) Waters identified in paragraph (a)(1) of this section; or
      - (ii) Relatively permanent, standing or continuously flowing bodies of water identified in paragraph (a)(2) or (a)(3) of this section and with a continuous surface connection to those waters;
    - (5) Intrastate lakes and ponds not identified in paragraphs (a)(1) through (4) of this section that are relatively permanent, standing or continuously flowing bodies of water with a continuous surface connection to the waters identified in paragraph (a)(1) or (a)(3) of this section.

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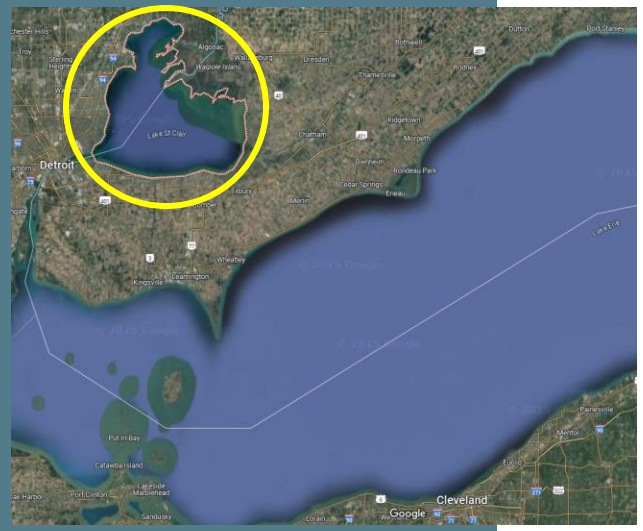
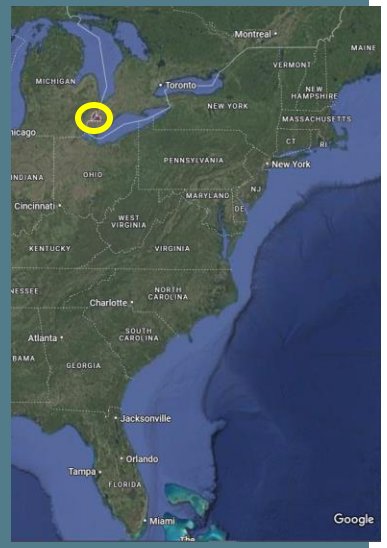
U.S. V. RIVERSIDE BAYVIEW HOMES

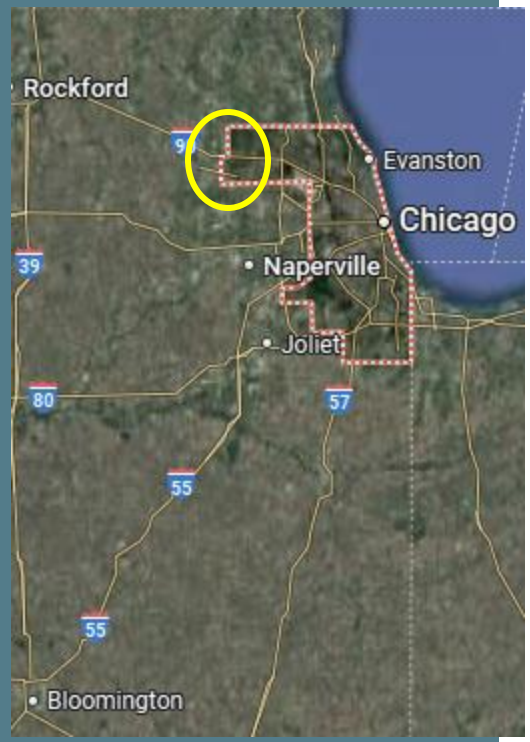


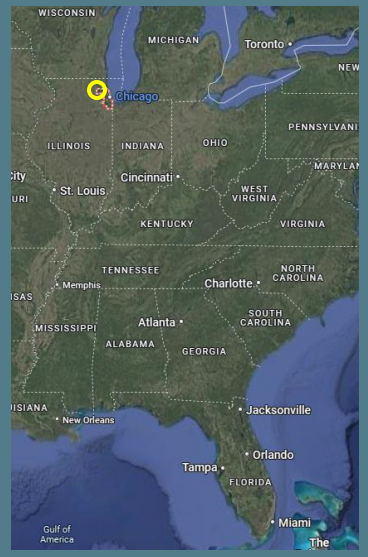


- 106 S.Ct. 455 (1985)
  - What constitutes "waters of the United States" for Clean Water Act dredge and fill purposes (*i.e.*, Section 404).
    - "…80 acres of low-lying, marshy land near the shores of Lake St. Clair…"
    - Began filling the marsh for housing development construction.
    - Corps sued claiming that the marsh was an "adjacent wetland" under the "waters of the United States" regulatory definition from 1975.
    - Broad construction of exceptions to takings by the Court: "…is a taking only 'if the ordinance does not substantially advance legitimate state interests…or denies an owner economically viable use of his land.'"
    - "The regulation extends the Corps' authority under § 404 to all wetlands adjacent to navigable or interstate waters and their tributaries."

U.S. V. RIVERSIDE BAYVIEW HOMES

- "…saturation by either surface or ground water is sufficient to bring an area within the category of wetlands, provided that the saturation is sufficient to and does support wetland vegetation."
  - Here, the "presence of vegetation that requires saturated soil" when the water source was groundwater was sufficient to constitute a "wetland," which, as defined by the Corps constituted a "water of the United States."
  - Important because it required no surface connection.
  - "On a purely linguistic level, it may appear unreasonable to classify 'lands,' wet or otherwise, as 'waters.' Such a simplistic response, however, does justice neither to the problem faced by the Corps in defining the scope of its authority under § 404(a) nor to the realities of the problem of water pollution that the Clean Water Act was intended to combat."
- Court found that such waters were covered by Section 404 as long as they directly abutted "navigable waters."
- Substantial *Chevron* deference given to the Corps in the drafting of its "waters of the United States" regulations.
- Set the standard for delineating wetlands determinations for nearly 20 years.

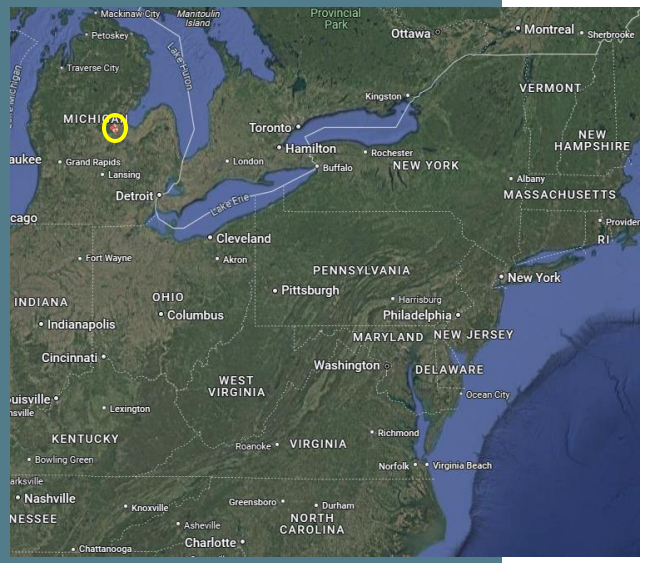




SOLID WASTE AGENCY OF NORTHERN COOK COUNTY V. U.S.

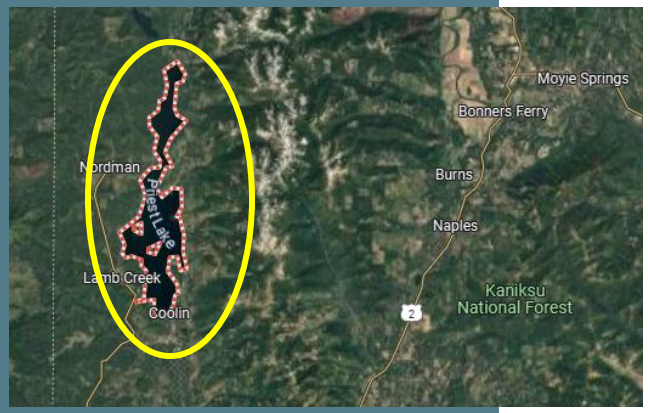
- 121 S.Ct. 675 (2001)
  - Centered around the question of whether artificially-created gravel pits that had filled with water and acquired the functionality of a wetland was a “water of the United States” under Section 404.
    - As of 1986, the Corps issued guidance stating that its “waters of the United States” jurisdiction extended into “intrastate waters” used by birds protected by the Migratory Bird Treaties (the “Migratory Bird Rule”).
    - By the time of this case, the Corps was recognizing Section 404 jurisdiction over artificially-created waters that otherwise met waters or wetland criteria.
      - Recognized that “navigable waters” was not a limiting term, but that “Congress evidenced its intent to ‘regulate at least some waters that would not be deemed ‘navigable’ under the classical understanding of that term.’”
      - Court here refused to extend 404 jurisdiction to “ponds that are not adjacent to open water.”
      - Court rejected the argument that Congress had sanctioned 1977 regulations that extended 404 jurisdiction to “isolated wetlands and lakes, intermittent streams, prairie potholes,….”
      - Court also rejected that Congress authorized the Migratory Bird Rule.
      - Areas are not made “navigable waters” just because they are habitats for migratory birds.
    - This decision eliminated from Corps Section 404 authority vast areas that had been subject to protection since the late 1970s.

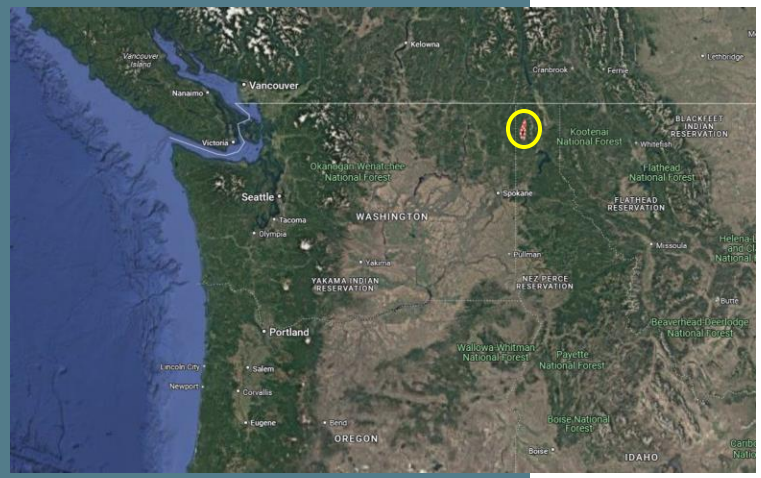
RAPANOS V. U.S.



- 126 S.Ct. 2208 (2006)
  - Backfilled wetlands for development.
  - Though sometimes saturated, the nearest “navigable water” was 11-20 miles away.
    - Justice Scalia referred to the Corps making Section 404 permit determinations as acting as an “enlightened despot.”
    - Scalia derided the Corps regulating regarding the “waters of the United States” as seeking “to extend the definition…to the outer limits of Congress’s commerce power.”
  - The three waterbodies at issue in this case were deemed covered by Section 404 because they had hydrological connections to each other and adjacent tributaries of navigable waterways.
    - The Court observes that traditional nineteenth century definitions of “waters of the United States” were explicitly expanded in the CWA.
    - The Court then proceeds to search of a reasonable definition of “waters” in a 1954 edition of Webster’s, concluding that “[n]one of these terms encompasses transitory puddles or ephemeral flows of water,” and commenting that “the Corps has stretched the term ‘waters of the United States’ beyond parody.”
    - “In sum, on its only plausible interpretation, the phrase ‘the waters of the United States’ includes only those relatively permanent, standing or continuously flowing bodies of water ‘forming geographic features’ that are described in ordinary parlance as ‘streams[,] … oceans, rivers, [and] lakes.’”
  - With this finding, and even grating the Corps deference under Chevron, the Court still found that, “The Corps’ expansive interpretation of the ‘the waters of the United States’ is thus not ‘based on a permissible construction of the statute.’”

SACKETT V. ENVIRONMENTAL PROTECTION AGENCY





- 143 S.Ct. 1322 (2023)
  - Land backfilling for home construction.
  - Justice Alito, writing for the Court asserts that "[t]he CWA is a potent weapon" that "imposes what have been described as 'crushing' consequences 'even for inadvertent violations.'"
    - The conservative members of the Court seem concerned more with the penal nature of 404 sanctions.
  - The Court decided that the wetlands sought by Congress to be considered waters were those that are "indistinguishably part of a body of water that itself constitutes 'waters' under the CWA."
- The Court held "that the CWA extends to only those wetlands that are 'as a practical matter indistinguishable from waters of the United States.'"
  - Basically, unless wetlands are directly attached to a "navigable water," they are no longer consider "waters of the United States" and are thus not subject to the Corps permitting jurisdiction.
  - Justices Kagan and Kavanaugh assert that this decision represents a judicial rewrite of the Clean Water Act.
  - This opposition may have been prescient before the current administration.

…AND THE HITS JUST KEEP ON COMING

- *Loper Bright Enterprises v. Raimondo*, 144 S.Ct. 2244 (2024)
  - Whatever benefit of the doubt that federal courts used to give to agencies' interpretations of their own statutes no longer exists.
  - *Chevron* was deferred to in the interpretation of "waters of the United States" as recently as *Rapanos*, so this is disturbing.
- *Knick v. Township of Scott, Pennsylvania*, 139 S.Ct. 2162 (2017)
  - Cemetery takings case that largely overturned the federal court jurisdictional requirements relied on in *Riverside Bayview* (i.e., *Williamson*).
- The significance of these cases is that it is now easier to challenge allegations of federal takings (*Knick*) and agency rules that may provide for broader interpretations of key phrases such as "waters of the United States" are no longer due deference (*Loper Bright*).
  - Coupled with the deregulation of the current administration, this jurisprudence sets the stage for staggering reversals of environmental protections.

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THANK YOU

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