

WOTUS to Get The SCOTUS Treatment, Again

Publications

January 24, 2022

On January 24, 2022, the US Supreme Court agreed to hear a case on the scope and authority of the Clean Water Act (“CWA”). The Court granted certiorari in the case of *Sackett v. U.S. Environmental Protection Agency*, 19-35469, on appeal from the US Court of Appeals for the Ninth Circuit.

The question presented to the Court is, seemingly, straightforward: “Whether the Ninth Circuit set forth the proper test for determining whether wetlands are ‘waters of the United States’ under the Clean Water Act, 33 U.S.C. § 1362(7).” But, this question has wide-reaching implications. The definition of “waters of the United States” (“WOTUS”) sets the jurisdictional limits of the CWA. Under the CWA, the US Environmental Protection Agency (“EPA”) and the US Army Corps of Engineers (“Army Corps”) have the power to regulate, among other things, the discharge of pollutants to navigable water from a point source (33 U.S.C. § 1362(12)) and the discharge of dredged or fill material into navigable waters (33 U.S.C. § 1344). “Navigable waters” are defined in the CWA as “the waters of the United States, including the territorial seas.” 33 U.S.C. §1362(7). “Waters of the United States” is not defined further under the Act, so the agencies have been left to try to craft a definition.

The Army Corps and EPA first proposed a WOTUS definition in 1977 and it has faced revisions and legal challenges ever since. The WOTUS definition has faced Supreme Court review in three previous cases:

- *U.S. v. Riverside Bayview*, 474 U.S. 121 (1985)
- *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001)
- *Rapanos v. U.S.*, 547 U.S. 715 (2006)

In the most recent Supreme Court treatment, the Court did not reach a majority opinion. Justice Scalia authored a plurality opinion, Justice Kennedy wrote a concurring opinion, and Justice Stevens wrote a dissenting opinion. Following the *Rapanos* decision, lower courts and the agencies have grappled with whether to follow the framework laid out by Justice Scalia or Justice Kennedy. The primary difference is how they dealt with bodies of waters on the fringe of jurisdiction, like wetlands. Justice Scalia would include in WOTUS: “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...[and] only those wetlands with a continuous surface connection to bodies that are "waters of the United States" in their own right..." *Id.* at 739-42. Justice Kennedy went beyond wetlands with a "continuous surface connection" to include wetlands and other bodies of water that have a "significant nexus" to more traditional navigable waters. *Id.* at 759.

The WOTUS definition was revised in 2015 by the Obama Administration to expand the definition and then in 2020 by the Trump Administration to narrow the definition; with both definitions facing swift legal challenges, including vacatur of the Trump rule in 2021. Just recently, on November 18, 2021, EPA and the Army Corps announced that they were issuing a proposed rule to re-establish the pre-2015 definition of WOTUS. The current proposed rule includes the "significant nexus" standard for non-traditional navigable waters.

In the case currently before the Supreme Court, Petitioners Michael and Chantell Sackett purchased property in Idaho in 2004 intending to build a home. When the Sacketts began filling in the wetlands on the property, EPA issued an administrative compliance order stating the property contained wetlands subject to CWA authority. The Sacketts were ordered to restore the property or face daily penalties. The Sacketts sued EPA, challenging the compliance order. The case has wound through the courts for years, eventually landing in the Ninth Circuit, where that court applied Justice Kennedy's "significant nexus" test and held that "EPA reasonably determined that the Sacketts' property contains wetlands that share a significant nexus with Priest Lake, such that the lot was regulable under the CWA and the relevant regulations." *Sackett v. EPA*, 8 F. 4th 1075, 1093 (9th 2021).

In their petition for certiorari, Petitioners asked the Court to take the case to clear up the deep confusion over what standard applies and how it is interpreted by lower courts and the agencies. EPA tried to resist certiorari by arguing that the decision below was correctly decided and not in conflict with any opinion of the Court or other courts of appeals. Now, EPA faces an uphill battle before a Court that is more conservative than in 2006 and, in all likelihood, will be receptive to adopting Justice Scalia's "continuous surface connection" standard, thereby narrowing the scope of the CWA.

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