Victory for Property Rights–SCOTUS Narrows Federal Control of Land Use

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Overview

The U.S. Supreme Court, on May 25, issued its long-awaited opinion in *Sackett v. Environmental Protection Agency, No. 21-454, 2023 U.S. LEXIS 2202 (U.S. Sup. Ct. May 25, 2023),* and narrowed the scope of the federal government's control of land use under the Clean Water Act (CWA) wetland provisions. The Court's decision restores the original understanding of the wetland rules contained in the 1972 CWA amendments, and essentially restores the Trump-era National Water Protection Rule (NWPR). The Court's decision is an important one for agricultural producers and landowners in general.

The *Sackett* decision and its implications for agriculture – it's the topic of today's post.

Background

The scope of the federal government's regulatory authority over wet areas on private land, streams and rivers under the Clean Water Act (CWA) has been controversial for more than 40 years. As part of its interstate commerce power, the Congress has long regulated the navigable waters of the United States. The improvement of navigable waters is the domain of the U.S. Army Corps of Engineers (COE) pursuant to the Rivers and Harbors Act of 1890 (and an 1899 amendment banning private deposits of refuse into navigable waters without a permit). In 1972, under the CWA Amendments of that year, used the concept of "navigable waters" to address water pollution. By attaching federal jurisdiction (vested in the Environmental Protection Agency (EPA)) over water pollution to the concept of navigation, that gave the federal government control upstream to cover not only waters that are navigable, but waters that can impact waters that are navigable. This meant that the concept of pollution was integrated with that of navigation into a single definition that barred the discharge of a "pollutant" (which includes cellar dust) into the navigable waters of the United States. The concept of preserving wetlands was not in mind when the Congress wrote the definition of "a discharge into a navigable water." Thus, the parameters of the definition became the task of the EPA and the COE. Originally, those parameters were narrow in scope. The COE regulatory position was that a discharge permit was require only if a discharge was into waters that were truly navigable, and that didn't include wetlands as well as shallow or isolated wetlands.

But environmental activists sued, and many court opinions have been filed attempting to define the scope of the government's jurisdiction. Ultimately, the courts sided with the environmentalists and the COE and EPA changed their rules to give themselves jurisdiction over streams, mud flats, prairie potholes, or ponds, "the use, degradation, or destruction of which could affect interstate

commerce." The regulatory reach became so broad that in 1985 the EPA's general counsel approved a regulatory guidance letter stating that a migrating bird flying across state lines that contemplated landing and did land in an isolated wetland was enough to confer jurisdiction! While that interpretation was eventually negated by the courts, the matter led to several high-profile criminal cases leading to incarceration of individuals for polluting navigable waters as a result of depositing dirt on dry ground.

On two occasions, the U.S. Supreme Court attempted to clarify the 1986 regulatory definition of a WOTUS, but in the process of rejecting the regulatory definitions of a WOTUS developed by the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (COE), the Court didn't provide clear direction for the lower courts. *See Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers, 531 U.S. 159 (2001); Rapanos v. United States, 547 U.S. 175 (2006).* The lower courts have also had immense difficulties in applying the standards set forth by the U.S. Supreme Court.

Particularly with its *Rapanos* decision, the Court failed to clarify the meaning of the CWA phrase "waters of the United States" and the scope of federal regulation of isolated wetlands. The Court did not render a majority opinion in *Rapanos*, instead issuing a total of five separate opinions. The plurality opinion, written by Justice Scalia and joined by Justices Thomas, Alito and Chief Justice Roberts, would have construed the phrase "waters of the United States" to include only those relatively permanent, standing or continuously flowing bodies of water that are ordinarily described as "streams," "oceans," and "lakes." In addition, the plurality opinion also held that a wetland may not be considered "adjacent to" remote "waters of the United States" based merely on a hydrological connection. Thus, in the plurality's view, only those wetlands with a continuous surface connection to bodies that are "waters of the United States" in their own right, so that there is no clear demarcation between the two, are "adjacent" to such waters and covered by permit requirement of Section 404 of the CWA.

Justice Kennedy authored a concurring opinion, but on much narrower grounds. In Justice Kennedy's view, the lower court correctly recognized that a water or wetland constitutes "navigable waters" under the CWA if it possesses a significant nexus to waters that are navigable in fact or that could reasonably be so made. But, in Justice Kennedy's view, the lower court failed to consider all of the factors necessary to determine that the lands in question had, or did not have, the requisite nexus. Without more specific regulations comporting with the Court's 2001 SWANCC opinion, Justice Kennedy stated that the COE needed to establish a significant nexus on a case-by-case basis when seeking to regulate wetlands based on adjacency to non-navigable tributaries, in order to avoid unreasonable application of the CWA. In Justice Kennedy's view, the record in the cases contained evidence pointing to a possible significant nexus, but neither the COE nor the lower court established a significant nexus. As a result, Justice Kennedy concurred that the lower court opinions should be vacated, and the cases remanded for further proceedings.

Justice Kennedy's opinion was neither a clear victory for the landowners in the cases or the COE. While he rejected the plurality's narrow reading of the phrase "waters of the United States," he also rejected the government's broad interpretation of the phrase. While the "significant nexus" test of the Court's 2001 SWANCC opinion required regulated parcels to be "inseparably bound up with the 'waters' of the

United States," Justice Kennedy would require the nexus to "be assessed in terms of the statute's goals and purposes" in accordance with the Court's 1985 opinion in *United States v. Riverside Bayview Homes*. *474 U.S. 121 (1985).*

The "Clean Water Rule"

The Obama Administration attempted take advantage of the lack of clear guidance on the scope of federally jurisdictional wetland by issuing an expansive WOTUS rule. The EPA/COE regulation was deeply opposed by the farming/ranching and rural landowning communities, and triggered many legal challenges. The courts were, in general, highly critical of the regulation, invalidating it in 28 states by 2019. The CWR became a primary target of the Trump Administration.

The "NWPR Rule"

The Trump Administration essentially rescinded the Obama-era rule and replaced it with its own rule – the "Navigable Waters Protection Rule" (NWPR). *85 Fed. Reg. 22, 250 (Apr. 21, 2020).* The NWPR redefined the Obama-era WOTUS rule to include only: "traditional navigable waters; perennial and intermittent tributaries that contribute surface water flow to such waters; certain lakes, ponds, and impoundments of jurisdictional waters; and wetlands adjacent to other jurisdictional waters. In short, the NWPR narrowed the definition of the statutory phrase "waters of the United States" to comport with Justice Scalia's approach in *Rapanos*. Thus, the NWPR excluded from CWA jurisdiction wetlands that have no "continuous surface connection" to jurisdictional waters. The rule much more closely followed the Supreme Court's guidance issued in 2001 and 2006 that did the Obama-era rule, but it was challenged by environmental groups. Indeed, the NWPR has been challenged in 15 cases filed in 11 federal district courts.

2021 developments. In early 2021, the U.S. Court of Appeals for the Tenth Circuit reversed a Colorado trial court that had entered a preliminary injunction barring the NWPR from taking effect in Colorado as applied to the discharge permit requirement of Section 404 of the CWA. The result of the appellate court's decision is that the NWPR became effective in every state. *Colorado v. United States Environmental Protection Agency, 989 F.3d 874 (10th Cir. 2021).*

A primary aspect of the litigation involving the NWPR is whether it should apply retroactively or whether it is limited in its application on a prospective basis. For example, in *United States v. Lucero, 989 F.2d 1088 (9th Cir. 2021),* the defendant, in 2014, operated a business that charged construction companies for the dumping of soil and debris on dry lands near San Francisco Bay. The Environmental Protection Agency (EPA) later claimed that the dry land was a "wetland" subject to the dredge and fill permit requirements of Section 404 of the Clean Water Act (CWA). As a result, the defendant was charged with (and later convicted of) violating the CWA without any evidence in the record that the defendant knew or had reason to know that the dry land was a wetland subject to the CWA.

On further review, the appellate court noted that the CWA prohibits the "knowing" discharge of a pollutant into covered waters without a permit. At trial, the jury instructions did not state that the defendant had to make a "knowing" violation of the CWA to be found guilty of a discharge violation. Accordingly, the appellate court reversed on this point. However, the appellate court ruled against the

defendant on his claim that the regulation defining "waters of the United States" was unconstitutionally vague, and that the 2020 Navigable Waters Protection Rule should apply retroactively to his case.

The NWPR was also held to apply prospectively only in *United States v. Acquest Transit, LLC, No. 09-cv-555, 2021 U.S. Dist. LEXIS 40143 (W.D. N.Y. Mar. 3, 2021) and United States v. Mashni, No. 2:18-cv-2288-DCN, 2021 U.S. Dist. LEXIS 123345 (S.D. S.C. Jul. 1, 2021).*

More recently, a federal district court in South Carolina remanded the NWPR to the EPA. *South Carolina Coastal Conservation League, et al. v. Regan, No. 2:20-cv-016787-BHH, 2021 U.S. Dist. LEXIS 132031 (D. S.C. Jul. 15, 2021).* The NWPR was being challenged on the scope issue. Even though the NWPR was remanded, the court left the rule intact. That fit with the strategy of present Administration. If the court had invalidated the NWPR, then the Administration would have had to defend the Obama-era rule in court. By not vacating the NWPR allows the current administration to proceed in trying to write a new rule without bothering to defend the Obama-era rule in court.

In *Pasqua Yaqui Tribe v. United States Environmental Protection Agency, No. CV-20-TUC-RM, 2021 U.S. Dist. LEXIS 163921 (D. Ariz. Aug. 30, 2021).* the court vacated the NWPR. The court's order did not specify the scope of the vacatur, but the EPA and the COE soon announced that neither agency would implement the NWPR on a nationwide basis, and will rely on the pre-2015 regulatory definition of a WOTUS until a new rule is developed. This all means that projects that have already received a CWA permit based on the NWPR can continue to rely on the permit until it expires. If a project has received an approved jurisdictional determination based on the NWPR may rely on it for five years from the date of issuance regardless of whether the project has already received a CWA permit based on the jurisdictional determination. For projects that have received a preliminary jurisdictional determination after the date of the court's opinion may continue to rely on it.

Another Revised Rule

On December 7, 2021, the EPA and the COE published a proposed rule redefining a WOTUS in accordance with the pre-2015 definition of the term. *86 FR 69372 (Dec. 7, 2021).* Under the proposed rule, EPA stated its intention to define a WOTUS in accordance with the 1986 regulations as further defined by the courts since that time. In addition, the proposed rule would base the existence of a WOTUS on the "significant nexus" standard set forth in prior Supreme Court decisions. As such, a WOTUS would include traditional navigable waters; territorial seas and adjacent wetlands; most impoundments of a WOTUS and wetlands adjacent to impoundments or tributaries that meet either the relatively permanent standard or the significant nexus standard; all waters that are currently used or were used in the past or may be susceptible to use in interstate or foreign commerce, including all waters that are subject to the ebb and flow of the tide. The proposed rule defines "interstate waters" as "all rivers, lakes, and other waters that flow across, or form a part of State boundaries" regardless of whether those waters are also traditionally navigable. A "tributary" is also defined as being a WOTUS if it fits in the "other waters" category via a significant nexus with covered waters or if it is relatively permanent. The EPA and COE further define the "relatively permanent standard" as "waters that are relatively permanent, standing or continuously flowing and waters with a continuous surface connection to such waters." The "significant nexus standard" is defined as "waters that either alone or

in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, or the territorial seas (the "foundational waters").” The comment period on the proposed rule expires on February 7, 2022.

On December 30, 2022, the agencies announced the final "Revised Definition of 'Waters of the United States'" rule which will become effective on March 20, 2023. It represents a “change of mind” of the agencies from the positions that they held concerning a water of the United States (WOTUS) and wetlands from just over three years ago. The bottom line is that the new interpretation was extremely unfriendly to agriculture, particularly to farmland owners in the prairie pothole region of the upper Midwest.

As promised, the Final Rule uses a definition that was in place before 2015 (for purposes of the Clean Water Act) for traditional navigable waters, territorial seas, interstate waters, and upstream water resources that “significantly” affect those waters.

Note: Two joint memos were published with the final rule to set forth the delineation of the implementation of roles and responsibilities between the agencies. One is a joint coordination memo to “ensure accuracy and consistency of jurisdictional determinations under the final rule.” The other is a memo with the USDA to provide “clarity on the agencies’ programs under the Clean Water act and the Food Security Act (Swampbuster).”

Adjacency. The EPA wants to restore the “significant nexus” via “adjacency.” This is a big change in the definition of “adjacency.” It doesn’t mean simply “abutting.” Instead, “adjacent” includes a “significant nexus” and a “significant nexus” can be established by “shallow hydrologic subsurface connections” to the “waters of the United States. A “shallow subsurface connection,” the Final Rule states, may be found below the ordinary root zone (below 12 inches), where other wetland delineation factors may not be present. Frankly, that means farm field drain tile.

Specifically, the Final Rule sets forth two kinds of adjacency: 1) the traditional “relatively permanent” standard; and 2) the “significant nexus” standard. The EPA and the COE say the agencies will not assume that all wetlands in a specific geographic area are similarly situated and can be assessed together on a watershed basis in a significant nexus analysis. But it is clear from the Final Rule that the agencies intend to expand jurisdiction over isolated prairie pothole wetlands using the “significant nexus” standard.

Note: The “significant nexus” can be established via a connection to downstream waters by surface water, shallow subsurface water, and groundwater flows and through biological and chemical connections. The Final Rule states that adjacency can be supported by a “pipe, non-jurisdictional ditch… or some other factors that connects the wetland directly to the jurisdictional water.” This appears to be the basis for overturning the NWPR. Consequently, the prairie pothole region is directly in the “bullseye” of the Final Rule.

Prior converted cropland. The agencies say the final rule increases “clarity” on which waters are not jurisdictional – including prior converted cropland. This doesn’t make much sense. Supposedly, the agencies are “clarifying” that prior converted cropland, (which is not a water), is not a water, but it

somehow could be a water if the agencies had not clarified it? In addition, the burden is placed on the landowner to prove that prior converted cropland is actually prior converted cropland and therefore not a water.

Ditches and drainage devices. The Final Rule is vague enough to give the government regulatory authority over non-navigable ponds, ditches, and potholes.

The *Sackett* Litigation

During 2021 another significant case with WOTUS-related issues continued to wind its way through the court system. In *Sackett v. Environmental Protection Agency, 8 F.4th 1075 (9th Cir. 2021), t*he plaintiffs bought a .63-acre lot in 2004 on which they intended to build a home. The lot is near numerous wetlands the water from which flows from a tributary to a creek, and eventually runs into a lake approximately 100 yards from the lot. The lake is 19 miles long and is a WOTUS subject to the CWA which bars the discharge of a pollutant, including rocks and sand into it. The plaintiffs began construction of their home, and the EPA issued a compliance order notifying the plaintiffs that their lot contained wetlands due to adjacency to the lake and that continuing to backfill sand and gravel on the lot would trigger penalties of $40,000 per day. The plaintiff sued and the EPA claimed that its administrative orders weren't subject to judicial review. Ultimately the U.S. Supreme Court unanimously rejected the EPA's argument and remanded the case to the trial court for further proceedings. The EPA withdrew the initial compliance order and issued an amended compliance order which the trial court held was not arbitrary or capricious. The plaintiffs appealed and the EPA declined to enforce the order, withdrew it and moved to dismiss the case. However, the EPA still maintained the lot was a jurisdictional wetland subject to the CWA and reserved the right to bring enforcement actions in the future. In 2019, the plaintiffs resisted the EPA's motion and sought a ruling on the motion to bring finality to the matter. The EPA claimed that the case was moot, but the appellate court disagreed, noting that the withdrawal of the compliance order did not give the plaintiffs final and full relief. On the merits, the appellate court concluded that the lot contained wetlands 30 feet from the tributary, and that under the "significant nexus" test of *Rapanos v. United States, 547 U.S. 715 (2006),* the lot was a regulable wetland under the CWA as being adjacent to a navigable water of the United States (the lake). On September 22, 2021, the plaintiffs filed a petition with the U.S. Supreme court asking the Court to review the case. The Supreme Court agreed to hear the case and oral argument occurred in early October of 2022.

Supreme Court opinion. On May 25, 2023, the Court unanimously agreed that the Sackett's lot was *not* a wetland subject to the CWA. All of the Justices rejected the "significant nexus" test when determining EPA/COE regulatory authority over wetlands. The majority (Alito, Roberts, Thomas, Gorsuch and Barrett), then paired back the expansive EPA regulatory authority under the CWA. They replaced the "significant nexus" test with a new standard – the Scalia standard set forth in the plurality opinion of *Rapanos* in 2006. They said that the term "waters" in the statute refers only to geological features that are "streams, oceans, rivers and lakes" and to adjacent wetlands that are indistinguishable from those bodies of water due to a continuous surface connection. For the EPA/Corps to successfully assert jurisdiction, it must: 1) establish that the adjacent water body is a relatively permanent body of water connected to interstate navigable water; and 2) that the wet area

has a continuous surface connection with that water making it difficult to determine where the water ends, and the wetland begins. Justices Kavanaugh, Sotomayor, Kagan and Jackson disagreed on the basis that the majority's approach was too narrow.

As for the 2023 WOTUS rule, the Supreme Court said it was "inconsistent with the text and structure of the CWA" and that EPA has "no statutory basis to impose a significant nexus test." A redo is in order. With the opinion, the Court restored the original position of the EPA in the 1970s – the CWA only applies to waters traditionally recognized as navigable – those subject to the tide; used for transportation, and natural river meanders. Isolated wetlands were excluded where fill would not affect boats.

What about agency deference? Interestingly, there wasn't a single mention of deference by any of the Justices (other than Justice Kavanaugh's retort about the agencies being consistent about "adjacency"). The Court in essence said that the scope of an agency's authority is not the type of question that courts should defer to the agencies. This sets the Court up for another case (*Loper, Bright*) that is coming next term on the issue of *Chevron* deference.

Water quality. The Court's decision will not likely have any discernable effect on water quality. While the decision does set forth a narrower interpretation of "the waters of the United States" for purposes of the entire CWA, the matter of pollution control is a separate matter. As noted above, navigation and pollution control are two separate issues which the Court's opinion more clearly distinguishes. Any negative impact on water quality is minimized (if not negated) because of the Supreme Court's decision in a case from Hawaii in 2020. In that case, the Court held that a "pollutant" that reaches navigable waters after traveling through groundwater requires a federal permit if the discharge into the navigable water is the "functional equivalent' of a direct discharge from the actual point source into navigable waters. *Hawai'i Wildlife Fund, et al. v. County of Maui, 886 F.3d 737 (2018), vac'd and rem'd. by County of Maui v. Hawaii Wildlife Fund, et al., 140 S. Ct. 1462 (2020).* That is a broad interpretation of "discharge of pollutants" creating the distinct possibility that a contamination of federal jurisdictional waters could result from activities on land that is not subject to the CWA under the *Sackett* Court's definition of a "wetland."

In addition, the Court's decision in *Sackett* applies only to the federal CWA. It has no application to existing state and local regulations. Indeed, many of those rules were already in place before the CWA amendments of 1972, and many of them are significant.

Implications for agriculture. The *Sackett* opinion has significant ramifications for agriculture. This really solidifies the National Water Protection Rule of 2019 as the correct approach. That rule limited federal jurisdiction to traditional navigable waters and their tributaries. Now streams and ditches and private waters that don't have a continuous surface connection to navigable waters won't be subject to the CWA. It will make it more difficult for the EPA or COE to assert regulatory control over private land under the CWA. This eliminates federal control under the CWA over private ponds, as well as ditches and streams where there is no continues flow into a WOTUS.

Also, farmers that are in the farm programs are subject to the Swampbuster rules. A "wetland" is defined differently under Swampbuster. There are two separate definitions. The one at issue

in *Sackett* involves "waters of the United States" contained in 33 U.S.C. Sec. 1362(7) which a "navigable water" must be. To have jurisdiction over those waters the Court is saying that the government must 1) establish that an adjacent water body is a relatively permanent body of water connected to interstate navigable water; and 2) such area has a continuous surface connection with that water making it difficult to determine where the water ends, and the wetland begins.

Swampbuster involves the definition of a wetland contained in 16 U.S.C. 3801(27). So, there are two different definitions of a "wetland" - one for CWA purposes - which ties into the "navigable waters of the United States" definition, and the other one for Swampbuster. This all means that a farmer may not have a wetland that the EPA/COE can regulate under the CWA, but might have a wetland that can't be farmed without losing farm program benefits.

Conclusion

The *Sackett* decision is a victory for property rights without any likely discernable impact on water quality. Ironically, if not for the EPA's belligerence in insisting on its position against the Sacketts and forcing the couple into a lawsuit, the "significant nexus" test would remain. That test has now been unanimously rejected. For once agriculture says, "thanks, EPA"!

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