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Legal Sidebar

Supreme Court Revisits Scope of "Waters of the United States" (WOTUS) Under the Clean Water Act

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On January 24, 2022, the Supreme Court agreed to review *Sackett v. EPA*, a long-running dispute regarding whether certain wetlands are "waters of the United States" (WOTUS) subject to protection under the Clean Water Act (CWA). In *Sackett*, the U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit) upheld the U.S. Environmental Protection Agency's (EPA's) assertion of jurisdiction over certain wetlands because the wetlands are WOTUS under a standard described in a prior Supreme Court decision. The precise definition of WOTUS is important because it determines which waters are subject to federal government regulations and protections. The U.S. Army Corps of Engineers (Corps) and EPA—the two agencies tasked with implementing the CWA—use the definition of WOTUS to determine which water bodies are subject to a variety of requirements under the statute, including coverage in CWA permitting programs.

The Corps and EPA are also currently undertaking an administrative process to redefine WOTUS through two rulemakings. (See this report for an in-depth discussion of the history and evolution of WOTUS, and this report for a discussion of regulatory actions in the Trump Administration and the early part of the Biden Administration.) Depending on its timing and scope, the *Sackett* ruling could affect how the agencies shape those regulations. This Sidebar discusses the history of Supreme Court litigation addressing the definition of WOTUS, examines potential implications of the Supreme Court's ruling in *Sackett*, and reviews legislative and executive branch efforts to define WOTUS.

Prior Supreme Court Rulings Regarding WOTUS

The Clean Water Act prohibits discharging certain pollutants into navigable waters, defined as "the waters of the United States, including the territorial seas" without a permit. The statute does not define WOTUS. For decades, Congress, the courts, stakeholders, and the Corps and EPA have debated how to define the term, and how to interpret the scope of waters that are federally regulated.

The Supreme Court has considered the scope of WOTUS in three cases. In 1985, the Court in *United States v. Riverside Bayview Homes, Inc.* upheld the Corps' interpretation that CWA jurisdiction extended

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to certain wetlands that were adjacent to other jurisdictional waters. In 2001, the Court in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers (SWANCC)* rejected the Corps' interpretation and held that the use of isolated ponds by migratory birds could not form the basis of CWA jurisdiction over those ponds.

In 2006, the Supreme Court decided *Rapanos v. United States*, a pair of consolidated cases that concerned the extent of CWA jurisdiction over wetlands near ditches or man-made drains that emptied into traditional navigable waters. The Sixth Circuit had approved of the Corps' assertion of jurisdiction under the then-current regulatory definition of WOTUS, which included wetlands that were "adjacent" to a body of water that fed into a traditional navigable water. Some had hoped that *Rapanos* would provide clarity on jurisdictional questions that lingered after *SWANCC*. Instead, the Court rejected the Corps' assertion of jurisdiction, but issued a fractured 4-1-4 decision with two different standards and no majority opinion providing a rationale indicating how to determine whether a particular waterbody is a water of the United States.

Writing for a four-Justice plurality, Justice Scalia articulated a bright-line rule holding that WOTUS includes only "relatively permanent, standing or continuously flowing bodies of water," such as streams, rivers, or lakes; and wetlands that have a "continuous surface connection" to other waters subject to the CWA. In a concurring opinion joined by no other Justice, Justice Kennedy wrote that the Corps should determine on a case-by-case basis whether wetlands have a "significant nexus" to traditionally navigable waters. Justice Kennedy further wrote that a significant nexus exists when the wetland, either alone or in connection with similarly situated properties, significantly impacts the chemical, physical, and biological integrity of a traditionally navigable water. Justice Stevens, joined by three Justices, dissented and would have upheld the Corps and EPA's assertion of jurisdiction.

Following *Rapanos*, lower courts have considered which Justice's opinion should apply. Under a framework referred to as the *Marks* analysis, when a majority of the Court agrees only on the outcome of a case and not on the basis for that outcome, courts are instructed to apply the holding that "may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." The Supreme Court has not defined or identified how lower courts should determine the "narrowest grounds" on which a judgment rests, however. Every court of appeals to consider the two standards has held either that Justice Kennedy's significant nexus standard is controlling, or that jurisdiction may be established under either standard. Some courts have declined to identify which opinion is controlling, either because the parties stipulated that the significant nexus standard applied or because both tests had been met. The Ninth Circuit held in 2007 that Justice Kennedy's concurrence "is the narrowest ground to which a majority of the Justices would assent if forced to choose in almost all cases," and therefore provided the controlling standard for cases within its circuit.

Sackett Litigation History

The petitioners, Chantell and Michael Sackett, own a parcel of land in Idaho, near Priest Lake and across the road from a wetlands complex that drains into an unnamed tributary of a creek that in turn feeds into the lake. As detailed in the Ninth Circuit opinion, the Sacketts' efforts to build on the parcel have been the focus of a long-running dispute with the Corps and EPA. In 2007, after they began backfilling the property with sand and gravel, EPA issued a compliance order directing them to restore the site. In 2008, the Corps issued a jurisdictional determination (JD) concluding that the property contained wetlands subject to regulation under the CWA, after which EPA issued an amended compliance order that extended the compliance deadlines. The Sacketts sued EPA, arguing that the compliance order was arbitrary and capricious because its underlying jurisdictional basis was flawed. (In an earlier decision, the Supreme Court held in 2012 that the compliance order constituted a "final agency action" for purposes of the Administrative Procedure Act and that the Sacketts could challenge the compliance order before EPA brought an enforcement action against them.) The district court granted summary judgment in favor of

EPA, ruling that the Sacketts' property contained jurisdictional wetlands. In March 2020, while the Sacketts' appeal was pending, EPA withdrew the amended compliance order, but not the JD.

The Ninth Circuit affirmed the district court's grant of summary judgment in EPA's favor. The court held that, contrary to EPA's assertion, its withdrawal of the amended compliance order did not moot the dispute because EPA had not disclaimed its authority to regulate the Sacketts' property. On the merits, the court held that it was bound by its precedent to apply as the controlling opinion Justice Kennedy's concurrence in *Rapanos*. Applying Justice Kennedy's significant nexus test, and looking to the regulations that were in effect when EPA issued the amended compliance order, the court held that the record "plainly supports" EPA's conclusion that the wetlands on the Sacketts' property were adjacent to a jurisdictional tributary. The court also upheld EPA's conclusion that those wetlands, together with the similarly situated wetlands complex across the road, had a significant nexus to Priest Lake, a traditional navigable water. The court thus concluded that EPA reasonably determined that the Sacketts' property was subject to federal jurisdiction under the CWA and the relevant regulations.

Supreme Court Review in *Sackett v. EPA*

Describing the post-*Rapanos* landscape as "[f]ifteen years of fruitless confusion, conflict, and litigation," the Sacketts urged the Supreme Court in their petition to revisit *Rapanos* and adopt Justice Scalia's plurality test. The Sacketts' petition for certiorari did not ask the Court to review the Ninth Circuit's application of the significant nexus standard to the jurisdictional question in their case, but instead focused on whether that standard should be the controlling rule. The petition asserted that review was appropriate in light of conflicts among the lower courts in applying *Rapanos*, the Corps and EPA's failure to implement a workable and legally sound interpretation of that case, and the costs to regulated entities associated with resolving jurisdictional issues. Several groups, including a coalition of 21 states, filed amicus briefs in support of the Sacketts' petition.

EPA argued in its response that review was unnecessary to resolve a purported conflict among the circuits because every circuit court to decide the issue has held at a minimum that the significant nexus standard could be used to establish jurisdiction. According to EPA, the interpretation of adjacency arising out of that standard is consistent with the language and purpose of the CWA. EPA further argued that the Ninth Circuit correctly applied that standard in holding that the Sacketts' property contained jurisdictional wetlands. EPA also argued that review was premature because the rulemaking process to revise the regulatory definition of WOTUS is still underway; according to the agency, allowing it to complete that process would place the Court in a better position to evaluate the scope of the agencies' authority under the CWA. Finally, EPA argued that this case did not present an opportunity for the Court to provide "substantial guidance" regarding the scope of WOTUS because of the narrowness of the facts underlying the jurisdictional question, the low likelihood of future enforcement action based on the Sacketts' earlier conduct, and the fact that any enforcement action based on a future violation of the CWA would be governed by the revised definition of WOTUS that results from the agencies' rulemaking process.

The implications of the Supreme Court's decision in *Sackett* depend on the scope of the Court's ruling. In *Rapanos*, Chief Justice Roberts issued a short concurring opinion in which he cautioned that, in light of the lack of a controlling majority opinion, "[l]ower courts and regulated entities will now have to feel their way on a case-by-case basis." The Supreme Court could use this case as an opportunity to provide a majority opinion for a definition of WOTUS. While the Sacketts' petition stated the question presented as whether "*Rapanos* [should] be revisited to adopt the plurality's test for wetlands jurisdiction under the Clean Water Act," the Court's grant of certiorari specified that review would be limited to "whether the Ninth Circuit set forth the proper test for determining whether wetlands are 'waters of the United States' under the Clean Water Act." While the significance of the Court's decision to reword the question presented is uncertain, it does not foreclose the *de novo* consideration of jurisdictional standards that were not articulated in *Rapanos*.

More narrowly, the Court could consider whether one or both of the *Rapanos* tests provides a meaningful legal standard that can be applied. Changes in the Court's composition could be relevant to the application or potential reconsideration of *Rapanos*. While Justice Scalia died in 2016 and Justice Kennedy retired in 2018, the three Justices who joined Justice Scalia's opinion (Thomas, Alito, and Chief Justice Roberts) remain on the Court. The five Justices who joined the Court since *Rapanos* was decided—or six, if a nominee to replace Justice Breyer is confirmed before the Court hears *Sackett*—could provide a majority for a single standard to govern jurisdictional analyses under the CWA.

It is also not clear whether the Court will articulate principles that could apply to the definition of WOTUS more broadly, or focus on the narrower question of when wetlands—or "adjacent" wetlands, as on the Sacketts' property—constitute WOTUS. The latter approach would more closely parallel the question on which the Court granted certiorari, and the Court's decisions in *SWANCC* and *Rapanos*, which considered jurisdiction with respect to specific categories of waters, and would leave unresolved jurisdictional questions as to other categories. Apart from considering questions of CWA jurisdiction, the Court could provide guidance about how lower courts should undertake a *Marks* analysis when it is not clear which opinion in a fractured ruling provides the narrowest grounds for the majority's holding.

Finally, the Court's ruling could affect the regulatory effort currently underway to develop a definition of WOTUS. The Obama and Trump Administrations both issued comprehensive regulations to define the term—the Clean Water Rule in 2015, and the Navigable Waters Protection Rule in 2020—but those regulations are no longer in effect. In June 2021, the Corps and EPA announced that they intended to revise the definition of WOTUS, first by a rule to "[restore] the protections in place prior to [the agencies' 2015 Clean Water Rule]," and then by developing a new regulatory definition. In August 2021, a district court remanded and vacated the 2020 Navigable Waters Protection Rule, leading the agencies to announce that they were interpreting WOTUS "consistent with the pre-2015 regulatory regime until further notice."

On December 7, 2021, the Corps and EPA issued a proposed rule that would codify the pre-2015 regulatory framework, consisting of regulations from the 1980s with amendments to reflect the agencies' interpretation of intervening case law. Prior to the grant of certiorari in *Sackett*, EPA stated that it intended to propose a new definition of WOTUS later in 2022. The agencies have not indicated whether they plan to alter their rulemaking timeline in light of the pending Supreme Court proceedings. But in another case this Term in which the Court has agreed to review questions in an area of active regulation, EPA officials indicated that they intended to continue moving forward with the regulatory process. If the Court opines on relevant statutory language in *Sackett* before the Corps and EPA finalize a new definition of WOTUS, the agencies may need to consider the Court's interpretation in their regulations.

The Sacketts' opening brief is due by April 11, and the deadline for EPA's brief is June 10. Oral argument has not yet been scheduled, but is expected to take place in the next term, which begins in October 2022.

Considerations for Congress

Congress could consider proposing legislation to amend the CWA to provide a definition of WOTUS or to provide more specific instruction to the Corps and EPA, regulated parties, and the courts as to the interpretation of the statute. Some Members have already introduced a number of bills in the 117th Congress that would codify various definitional text.

Congress could also conduct oversight over the Corps and EPA's rulemaking process to redefine WOTUS. Some Members in the House and Senate have called on the agencies to halt that process while *Sackett* is pending before the Supreme Court. Others have argued that the agencies should continue to move forward with their regulatory efforts.

Members of Congress could consider participating in the litigation by submitting an *amici curiae* brief expressing their views on these legal issues. Some Members of Congress filed *amici curiae* briefs in

Rapanos, and more recently in the litigation challenging the Clean Water Rule and the Navigable Waters Protection Rule.

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