Are Wetlands the Next Target on the Supreme Court's Radar?

July 20, 2022, 3:00 AM

The Supreme Court will soon hear arguments in a case that could reshape how wetlands are defined under the Clean Water Act. Balch & Bingham partner Steven Burns and law student Kenadi Mitchell discuss several approaches available to the court and the implications of each.

Almost 20 years after buying two-thirds of an acre near Priest Lake in Idaho, will the US Supreme Court finally let Chantell and Michael Sackett build their vacation home?

More importantly for the rest of us, how will the court's resolution of *Sackett v. EPA* affect the federal wetlands program?

What's the Legal Question?

The stakes are high. The US Army Corps of Engineers began issuing permits for filling wetlands in 1975, but the Clean Water Act's coverage of marshy land has been controversial ever since. The timing of the Sacketts' case is favorable to them. The scope of the Corps' wetlands jurisdiction has never come before a court as skeptical of federal regulation as this one.

Wetlands are areas where water saturates the soil, permanently or seasonally, and they typically host plant species that thrive under those conditions. The question before the court is this: Where a wetland exists, what kind of connection to a water that is "navigable" in the traditional sense is necessary to invoke the permitting requirement?

As a practical point of reference, the Sackett's lot is about 300 feet from the lake, but it does not drain directly into it. It is close to wetlands that do have a direct surface connection to the lake, and shallow groundwater may provide a subsurface connection to both.

The most recent Supreme Court case addressing the issue, *Rapanos,* gave us two different tests. Without rehashing all the confusion that followed that 2006 case, five justices agreed to set new limits on the program but disagreed on how. Justice Anthony Kennedy said there must be a "significant nexus" to a navigable-in-fact water, but the

other four, led by Justice Antonin Scalia, said there must be a “continuous surface connection.”

Some federal courts apply only the Kennedy test, while others allow jurisdiction under either one.

How Will the Current Court Answer?

Here’s a take on approaches available to the court and implications of each.

Status Quo

The court could simply affirm the Kennedy concurrence, possibly in conjunction with some iteration of the Scalia test. This outcome would be closest to the status quo. However, a resolution on this narrow ground seems unlikely. The fact that the court took the case suggests a desire to reconsider wetlands jurisdiction.

Continuous Surface Connection

The court could hold that the Scalia test provides the exclusive basis for jurisdiction. Though limited, this would still represent a major change in the program. Today, for example, a wetland separated from a traditional water only by a natural or artificial berm is typically jurisdictional. That could change under the Scalia test.

Continuous Surface Connection ‘Plus’

The Sacketts argued that even with a direct surface connection, a wetland should be jurisdictional only if it is also “subject to Congress’s authority over the channels of interstate commerce,” meaning traditionally navigable waters. The Sacketts agreed that the Clean Water Act could cover non-navigable waters such as tributaries, but only if there was some impact on the traditional water. Under this test, the surface connection is only the first step. The second would require identification of some discernible impact.

A Broader Reconsideration

Finally, the court could reconsider whether Congress intended to regulate wetlands at all. The Clean Water Act includes a few scattered references to wetlands, but the permitting requirement applies specifically to “navigable waters,” which are defined only as “waters of the United States.”

The statute does not define that vague phrase any further. Following an analysis that emphasized the statutory text, the court could construe the act's many instances of the word "navigable" as indicating what kinds of "waters" it intended to regulate, particularly compared to the statute's very limited discussion of wetlands as such.

If you're placing bets, at least two factors weigh against the broader approach.

First, a unanimous court previously upheld the regulation of wetlands adjacent to traditional waters in the 1985 case of *Riverside Bayview.* That case included an extensive review of the legislative and regulatory history, and it found ample evidence supporting expansive wetlands jurisdiction. Second, even the Sacketts did not request this outcome.

On the other hand, the recent *Dobbs* case on abortion rights shows this court does not view itself as entirely constrained by precedent—even those thought to be long settled.

Implications for Environmental and Administrative Law

Anything other than the relatively unlikely status quo outcome would represent a major change for the wetlands program, though some possibilities are more significant than others. However, the case is not an obvious candidate for sweeping pronouncements extending beyond the Clean Water Act.

That said, any current case involving statutes and regulations bears watching for discussion of how much the courts should defer to agency interpretations. For example, the case could have implications for the *Chevron* doctrine, which grants agencies significant leeway if the court deems the statute to be ambiguous. Recent cases suggest a trend away from judicial deference and toward heightened scrutiny of agency actions and regulations.

Oral argument is scheduled for Oct. 3.

Author Information

Steven Burns is a partner at Balch & Bingham. He advises clients on coal ash, waste and contamination, waterways, wildlife management, air and water quality, and natural resources. He serves as counsel and secretary to the National Waterways Conference, a trade association focused on water resource infrastructure, as well as chair of the association's Legislative Policy Committee.

Kenadi Mitchell is a May 2024 Juris Doctorate candidate at the Howard University School of Law.