High Court's Return To Wetlands Debate May Bring Clarity

By **Bryan Moore** (February 4, 2022)

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In the short term, the U.S. Supreme Court's recent decision to revisit the reach of the Clean Water Act compounds the confusion that has plagued jurisdictional wetlands determinations for decades.

But in the extended forecast, those clouds of uncertainty are likely to lift, to some degree, as this time around the court seems poised to impart some much-needed clarity to the definition of "waters of the United States," or WOTUS, that are subject to regulation under the act.

On Jan. 24, the Supreme Court granted the petition for a writ of certiorari in Sackett v. U.S. Environmental Protection Agency, limited to the following question: "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)."[1]

The wetlands test set forth by the U.S. Court of Appeals for the Ninth Circuit was the "significant nexus" test fashioned by then-Justice Anthony Kennedy in his concurring opinion in Rapanos v. U.S. in 2006. But the court's Rapanos decision was anything but a model of clarity.

Then-Justice Antonin Scalia's plurality opinion, which reasoned that the reach of the Clean Water Act is limited to waters that are "relatively permanent, standing or continuously flowing" and to wetlands that are immediately adjacent to such waters, was joined by three other justices.[2]

Justice Kennedy penned a partially concurring opinion that took a more expansive view of Clean Water Act jurisdiction, finding that federal "jurisdiction over wetlands depends upon the existence of a significant nexus between the wetlands in question and navigable waters in the traditional sense."[3]

The four remaining justices dissented, finding that both the plurality and Justice Kennedy failed to defer sufficiently to the regulating agency.[4] However, as between the two opinions, the dissenting justices found Justice Kennedy's approach to be "far more faithful to [the court's] precedents and to principles of statutory interpretation than is the plurality's."[5]

Over 15 years have elapsed since Rapanos was handed down, and in that time, the lower courts, regulators and project stakeholders have struggled to distill a consistent, transparent standard from the court's splintered holding. While no court has yet adopted Scalia's "relatively permanent" test exclusively, some — like the Ninth Circuit — have held that Kennedy's significant nexus test is controlling, while others have endorsed using either test.

The results have been mixed. The outcomes have rarely been certain from the outset. And the predominance of subjective considerations has stymied the courts' development of a clear precedential standard — or even a clear circuit split.

And the regulatory efforts to craft a durable WOTUS definition in the post-Rapanos era have

largely run aground in the absence of a clear judicial standard to guide those efforts. The Obama administration relied heavily on Justice Kennedy's significant nexus test when it promulgated its WOTUS rule, whereas the Trump administration's Navigable Waters Protection Rule, or NWPR, favored Justice Scalia's narrower approach.

Following the vacatur of the Trump rule by the federal courts, the Biden administration announced that it would no longer implement the NWPR, and would not rely on an approved jurisdictional determination issued under NWPR in making a new permit decision.[6]

In December 2021, the Biden administration proposed the first of a new two-part rule to define WOTUS in accordance with a collection of pre-2015 U.S. Army Corps of Engineers and EPA regulations amended to incorporate the agencies' interpretation of the limits on their statutory jurisdiction as set forth in intervening Supreme Court decisions, including Rapanos.[7]

Under Biden's proposed rule, waters that meet either the relatively permanent standard or the significant nexus standard would generally be classified as WOTUS.[8] Given that the Biden administration very publicly made known its intentions to undertake a new rulemaking with a formal rule proposal, it may be argued that the court should have passed on the Sackett case, in deference to the executive branch and the new administration's first attempt to crack the WOTUS code.

But others will argue that what's past is prologue, and by passing on Sackett the court would simply be delaying the inevitable high court showdown and prolonging the status quo of uncertainty. Certainly nothing in the long-running history of this issue suggests that Biden's WOTUS rule — if it goes forward — may escape judicial scrutiny.

It remains to be seen whether the Biden administration will continue to forge ahead with promulgating a new WOTUS rule in light of the Supreme Court's decision to revisit the issue. While the court's decision could render the administration's rulemaking moot, or at least send the regulators back to the drawing board, it seems unlikely that the administration will withdraw its rule proposal and thereby abandon the argument that the court should stand down in deference to a forthcoming final rule.

Rather, the year ahead is likely to see the WOTUS issue play out on parallel, but potentially conflicting, tracks, with the Supreme Court expected to cross the finish line first and issue an opinion that may cabin the Biden administration's two-part regulatory effort. The Sackett case is likely to be briefed and argued by the fall of 2022, opening the door for a decision by the end of the year or early 2023.

Thus, at least in the near term, the only certainty appears to be more uncertainty. But looking long-term, the Supreme Court has an opportunity here to bring some order to the chaos — some much-needed clarity on the proper test for determining which wetlands are WOTUS.

And this time around, given the high court's current makeup, such clarity is likely to come in the form of a majority opinion. Chief Justice John Roberts and Justices Clarence Thomas and Samuel Alito joined Scalia's plurality opinion in 2006, and remain on the court today.

And in a 2020 concurring opinion in another Clean Water Act case, County of Maui v. Hawaii Wildlife Fund, Justice Brett Kavanaugh noted approvingly that the majority's opinion adheres to Scalia's plurality opinion in Rapanos.[9] With four current justices now on record supporting Scalia's plurality opinion, getting to a majority in Sackett will likely require only

one of Trump's other two appointees — Justice Neil Gorsuch or Justice Amy Coney Barrett — to tip the scales.

No one should reasonably expect the court's forthcoming opinion in Sackett to appease all sides of the WOTUS debate. The debate will rage on — but the court can narrow the issues going forward by definitively resolving the most contentious, threshold issue: What is the proper test for determining whether wetlands are WOTUS?

With that question answered, the Biden administration can then finalize a durable WOTUS rule within the confines of the court's holding. Such judicial clarity is likely to come at a loss of some agency discretion — perhaps considerable — in the rulemaking process. But that loss must be weighed against the value of a durable WOTUS rule, and the cost of 15 years of regulatory uncertainty with no end in sight.

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[1] Sackett v. EPA, 8 F.4th 1075 (9th Cir. 2021), cert. granted, ___ U.S.L.W. ___, 2022 WL 199378 (U.S. Jan. 24, 2022) (No. 21-454), https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/21-454.html.

[2] Rapanos v. U.S. in 2006, 547 U.S. at 739 (4-1-4 decision) (plurality opinion).

[3] Id. at 770 (Kennedy, J., concurring).

[4] Id. at 809-10 (Stevens, J., dissenting).

[5] Id. at 788.

[6] U.S. Army Corps of Engineers, Navigable Waters Protection Rule Vacatur (Jan. 5, 2022), https://www.usace.army.mil/Media/Announcements/Article/2888988/5-january-2022-navigable-waters-protection-rule-vacatur/.

[7] 86 Fed. Reg. 69,372 (Dec. 7, 2021).

[8] See id. at 69,373.

[9] County of Maui v. Hawaii Wildlife Fund, 590 U.S. ___, 140 S.Ct. 1462, 1478 (2020) (Kavanaugh, J., concurring).