



Michael & Chantell Sackett (photo credit: eeneews.net)

This week the U.S. Supreme Court agreed to hear the case of *Sackett v. USEPA*, No. 21-454, an important appeal involving the scope of federal authority to regulate wetlands under the Clean Water Act.

If the *Sackett* litigation sounds familiar, it should: the case has been pending for well over a decade, and this is the Sacketts' second trip to the Supreme Court in that very same lawsuit.

Earlier this month, *Legal Planet* colleague Dan Farber wrote [a typically-thoughtful post on this site aptly titled, "The Quagmire of Clean Water Act Jurisdiction."](#) I won't retread that ground, except to note the following:

Congress is an un-indicted co-conspirator in this saga for having created the legal mess involving the jurisdictional boundaries of the CWA in the first place. In the CWA, Congress indicated that federal jurisdiction to protect water quality and wetlands in the U.S. is limited to "navigable waters." But it simply (and unhelpfully) defined "navigable waters" as "waters of the United States." Courts, federal regulators, states and members of the regulated community have all spent the last half-century struggling mightily to understand exactly what those terms mean, and how broadly or narrowly federal CWA authority extends.

The Supreme Court has addressed the proper interpretation of the CWA's jurisdictional scope in a number of decisions over the past 50 years. The most recent Supreme Court case on that issue in the wetlands context is the justices' infamous 2006 non-decision in [Rapanos v. United States](#). In a case involving the extent of the government's authority to regulate wetlands under section 404 of the CWA, the Court was unable to reach a decision on the merits. As Dan notes in his previous post, Justice Scalia wrote a plurality opinion in *Rapanos* arguing that CWA jurisdiction should only apply to relatively few wetlands, along

with major rivers, lakes and streams. The four progressive justices on the Court, by contrast, opined that the government's then-expansive interpretation of CWA permit jurisdiction passed legal muster. Justice Kennedy wrote his own opinion in *Rapanos* asserting that wetlands having a "significant nexus" to traditional navigable waters came within the fed's regulatory authority over wetlands.

Since then, most lower courts have relied on the Kennedy "significant nexus" test as the law of the land, figuring that if it seemed right to Kennedy and acceptable to the four progressive justices, that was good enough for them.

But there was one other opinion in *Rapanos* that bears mention: Chief Justice Roberts wrote in a concurring opinion that reviewing courts, members of the regulated community and environmentalists would all greatly benefit from a federal regulation that interprets and clarifies the CWA's vague "navigable waters" provision. Roberts practically begged the Executive Branch to promptly initiate a rulemaking process with that goal in mind.

No such luck. Dragging its feet, the George W. Bush administration belatedly commenced a CWA rulemaking proceeding, but let it die on the vine. President Obama's administration similarly delayed any action for years, only proposing its so-called "Waters of the United States" (WOTUS) CWA jurisdictional rule near the end of Obama's second term.

The WOTUS rule never went into effect. Multiple lawsuits were filed challenging it, and federal courts quickly enjoined the rule's implementation. That, in turn, prompted the Trump Administration's attempted repeal of the WOTUS rule, which Trump tried to replace with his own jurisdictional rule—one hewing to the narrow standard Justice Scalia proposed in *Rapanos*. The Trump rule, like the WOTUS rule before it, was promptly challenged in, and enjoined by, the courts. Now the Biden administration has issued a new order repealing the Trump rule, while delaying promulgation of its own regulation defining the CWA's jurisdictional reach. And so it goes.

The U.S. Supreme Court has apparently lost its patience in waiting for the Executive Branch to clarify the jurisdictional scope of the CWA. And that's where the *Sackett* litigation comes in.

Michael and Chantell Sackett are an Idaho couple who for years have been attempting to develop their rural Idaho property without having to obtain a federal dredge-and-fill permit under section 404 of the CWA. Government regulators assert that a portion of the Sackett's property contemplated for development is indeed wetlands requiring a CWA permit. When the Sacketts began some preconstruction work by filling their lot with dirt and rock, USEPA

officials issued an administrative “compliance order” directing them to remove the fill and restore the lot to its original condition, upon pain of civil penalties if they failed to do so. After the Sacketts sought and were denied an administrative hearing before the EPA, they filed a lawsuit against the government in federal court. There they claimed that EPA’s issuance of the compliance order was arbitrary and capricious and violated their right to due process. After the district court and Ninth Circuit Court of Appeals ruled against them, the Sacketts—represented by the Pacific Legal Foundation—sought and obtained review by the U.S. Supreme Court. The Court in 2012 ruled unanimously in favor of the Sacketts, finding that under the circumstances they were within their rights in filing a lawsuit challenging the propriety of EPA’s compliance order, and were not required to wait until the EPA pursued its own CWA enforcement action against them. The justices remanded the case back to the lower courts.

Over the following decade, the *Sackett* litigation has again slowly worked its way up the federal court ladder—this time on the merits of the Sacketts’ claim that their property does not contain wetlands under a proper application of the CWA. Last year, [the Ninth Circuit reached the merits](#) of the Sacketts’ case, relying on Justice Kennedy’s concurring opinion in *Rapanos* to conclude that the Sackett lot is indeed subject to EPA’s wetlands permit jurisdiction under the CWA.

Undeterred, the Sacketts and their PLF counsel again petitioned the Supreme Court for review, contending that the Scalia plurality view of CWA jurisdiction articulated in *Rapanos* represents the proper standard. The justices granted the Sacketts’ second petition on January 24th. The case is likely to be set for argument next fall, with a decision issued a few months later.

So what do these developments mean and portend for wetlands jurisdiction under the CWA?

First, it appears that Chief Justice Roberts—and his fellow justices—have grown impatient with the Executive Branch’s inability to issue and implement a regulation that provides affected parties clear direction as to the CWA’s jurisdictional limits. Exasperated with regulatory inaction, the justices have signaled their readiness to resolve the jurisdictional question themselves. They did so when they rewrote the “Question Presented” in the Sackett’s petition to frame the issue before them as: “[w]hether the Ninth Circuit set forth the proper test for determining whether wetlands are ‘waters of the United States’ under the Clean Water Act.”

Since the Supreme Court’s 4-1-4 vote in the 2006 *Rapanos* case, the makeup of the Court has changed dramatically—from an evenly-balanced group of conservative and progressive

justices to one reflecting a 6-3 majority of conservatives. The three justices who joined Scalia's *Rapanos* opinion in 2006 remain on the court. Meanwhile, three of the four progressive justices who dissented from Scalia's *Rapanos* opinion no longer there. And in a CWA jurisdiction case he ruled in while on the D.C. Circuit Court of Appeals, Justice Kavanaugh indicated that he agrees with the Scalia opinion.

As the adage goes, "the Supreme Court does not take cases to affirm" lower court decisions. In recent years, the justices have demonstrated particular antipathy towards the environmental rulings of the Ninth Circuit.

In sum, it seems likely the Supreme Court will reverse the Ninth Circuit and vote in favor of the Sacketts a second time. More importantly for the rest of us, the justices appear ready to fashion their own, definitive rule regarding the jurisdictional reach of the CWA. And that Court-crafted rule will most likely reduce dramatically the scope of the federal government's ability to protect the nation's wetlands and water quality in the future.