SCOTUS Takes up WOTUS... Again

By Christina D. Bonanni, Ian A. Shavitz

February 16, 2022 | **CLIENT ALERTS**

On Monday, January 24, 2022, the U.S. Supreme Court granted certiorari in the case of *Sackett v. U.S. Environmental Protection Agency,* 19-35469 to decide "[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, 33 U. S. C. §1362(7)." Because the term "waters of the United States" (WOTUS) is not defined under the Clean Water Act (CWA), this will be the fourth time that the Supreme Court has considered this issue.

Under the CWA, the U.S. Army Corps of Engineers and the U.S. Environmental Protection Agency have authority to regulate the discharge of pollutants to navigable waters from a point source (33 U.S.C. § 1362(12)), and the discharge of dredged or fill materials into navigable waters (33 U.S.C. § 1344). "Navigable waters" is then defined as "the waters of the United States, including the territorial seas." (33 U.S.C. § 1362(7)) (emphasis added). As such, the jurisdictional limits of the Corps and EPA over "navigable waters" under the CWA hinge on how WOTUS is defined.

In the most recent case on the issue, *Rapanos v. U.S.* from 2006, the Supreme Court failed to reach a majority opinion and instead, Justice Scalia wrote a plurality opinion and Justice Kennedy wrote a concurring opinion—both with different frameworks for defining WOTUS. Justice Kennedy's test, which has typically been applied, looked at whether the wetlands or non-navigable waterbodies bear a "significant nexus" to a traditional navigable waterway. Since *Rapanos*, lower courts have questioned how to apply the *Rapanos* decision to those waters, such as wetlands, that do not fit neatly within the definition of "waters of the United States."

The current Supreme Court case focuses on land in Idaho purchased by the Petitioners, the Sacketts, to build a home. When the Sacketts began filling in wetlands on their property, EPA issued an administrative compliance order that required the Sacketts to restore the property or face significant daily penalties, potentially upwards of $37,500 per day. Citing Justice Kennedy's "significant nexus" test, the Ninth Circuit found that EPA had regulatory authority over the wetlands on the Sackett's property due to the wetlands sharing a "significant nexus" with Priest Lake.

While the question of the extent of jurisdictional authority over WOTUS has slowly made its way through the court system, the past three Administrations have also sought to clear up the confusion. The Obama administration revised the definition of WOTUS to expand jurisdiction, calling it the Clean Water Rule. The Trump administration then sought to narrow the definition of WOTUS—calling such interpretation the Navigable Waters Protection Rule, which was vacated by the U.S. District Court for the District of Arizona . The Biden administration has begun efforts to re-establish the definition of WOTUS, and most recently issued a notice of proposed rulemaking on November 18, 2021. The implications of the Supreme Court's decision in the Sackett case on the Biden administration's current rulemaking remains to be seen.

For questions regarding this Client Alert, please contact Lippes Mathias' Environment & Energy Team Practice Leader, Ian Shavitz at ishavitz@lippes.com or Senior Associate, Christina Bonanni at cbonanni@lippes.com.

Related Team

Christina D. Bonanni
Partner

Ian A. Shavitz
Partner | Team Leader - Environment & Energy

Ian A. Shavitz
Partner | Team Leader - Environment & Energy