Environmental Law & Agriculture Industry Before the United States Supreme Court

Tim Bishop,
Partner, Mayer Brown

Table of Contents

What's Cooking with Prop 12?: SCOTUS Decision

Elizabeth Rumley,
Senior Staff Attorney, National Agricultural Law Center

After considering a constitutional challenge to a California ballot initiative regulating space requirements for farm animals, the Supreme Court of the United States ("SCOTUS") ruled on May 11th in favor of the state of California, allowing the law to stand. The proposal, known as "Prop 12," set conditions on the sale of pork meat in California- regardless of where it was produced. It required, among other things, that all products be from pigs born to a sow housed in at least 24 square feet of space. This effectively imposed Prop 12's animal housing standards on any producer, no matter the location, who wished to sell products to residents of California. This part of the law was promptly challenged and eventually heard by the Supreme Court.

The case, *National Pork Producers Council v. Ross ("NPPC")* considered whether Prop 12's regulation of the out-of-state production of products to be sold within state boundaries is a permitted action under a legal doctrine known as the dormant Commerce Clause. In other words, under what circumstances can a state government pass laws that primarily affect the actions of people in other states? SCOTUS agreed to consider the case, and oral arguments were heard last October. Many of the arguments centered on whether the law met the provisions of the "*Pike* balancing test," which compares local benefits of a law to the burden that it places on out-of-state commerce to determine if the burden is clearly excessive.

NPPC Ruling

While parts of this ruling were agreed upon by all justices, the foundational legal analysis was a split decision, with several justices agreeing and disagreeing as to various parts. Ultimately, a plurality of the court held that Prop 12 was constitutional and enforceable by California. A minority of justices would have sent the case back to the district court for further consideration. The opinion of the Court (joined by the largest number of justices), was written by Justice Gorsuch.

In the initial, unanimously agreed upon, sections of the opinion, Gorsuch focuses on the "antidiscrimination principle" that "lies at the 'very core'" of dormant commerce clause jurisprudence. In the clearest situations, this happens if a state set different standards for out-of-state businesses vs in-state businesses (for example, if Prop 12 had required Kansas

producers to give pigs more space, but allowed California producers to confine animals in smaller pens). However, Gorsuch does not apply this principle, instead pointing to a concession by the Pork Producers Council that producers are treated similarly regardless of geography. Gorsuch then moves on to consider the constitutionality of a law that is not facially discriminatory (as in the hypothetical example above), but has a disproportionate effect on out-of-state businesses. While the court did not specify whether Prop 12 would fall into this category, it would have ultimately made no difference. Gorsuch refused to find such a law unconstitutional, writing that "[i]n our interconnected national marketplace, many (maybe most) state laws have the 'practical effect of controlling' extraterritorial; behavior."

Next, Gorsuch considers the *Pike* balancing test in a series of sections where some justices join in his analysis while others do not. *Pike* asks the court to weigh local benefits of a law against the burden it places on out-of-state commerce. Again, Gorsuch returns to what he sees as an underlying requirement of discriminatory intent, even in the cases decided using the *Pike* analysis. He rules, in a section joined by Justice Thomas and Justice Barrett, that the cost/benefit analysis that Plaintiffs argued was not an integral part of the original *Pike* analysis, and that *Pike* does not authorize judges to "strike down duly enacted state laws… based on nothing more than their own assessment of the relevant law's 'costs' and 'benefits'". He further highlights the perceived difficulty in doing so as a judicial body; "[h]ow is a court supposed to compare or weigh economic costs (to some) against noneconomic benefits (to others)? No neutral legal rule guides the way. The competing goods before us are insusceptible to resolution by reference to any judicial principle." Instead, he disclaims that cost/benefit role, arguing that the responsibility is better given to those with "the power to adopt federal legislation that may preempt conflicting state laws."

Gorsuch also considers a framing of *Pike* that "requires a plaintiff to plead facts plausibly showing that the challenged law imposes 'substantial burdens' on interstate commerce before a court may assess the law's competing benefits or weigh the two sides against each other." In a section joined by Justices Thomas, Sotomayor and Kagan, Gorsuch finds that under the facts presented in the complaint, a "substantial harm to interstate commerce remains nothing more than a speculative possibility."

It's important to note that the sections of the opinion addressing the *Pike* test were not adopted by the majority. While Gorsuch wrote the opinion of the court, his reasoning was not adopted by the entire bench. In fact, several justices (Sotomayor, joined by Kagan and Roberts, joined by Alito, Kavanaugh & Jackson) also wrote or signed onto dissents outlining their disagreements with specific elements of Gorsuch's reasoning. These justices agree that courts can still consider *Pike* claims and balance a law's economic burdens against its noneconomic benefits, even if the challengers do not argue that the law has a discriminatory purpose. Much like the *Rapanos* case of WOTUS fame, this case did not result in clearly defined legal doctrine.

Justice Kavanaugh wrote as well, concurring in part and dissenting in part. He highlighted concerns about the constitutionality of statutes like Prop 12, "not only under the Commerce

Clause, but also under the Import-Export Clause, the Privileges and Immunities Clause, and the Full Faith and Credit Clause."

NPPC: What Happens Next?

At least theoretically, other challenges to Prop 12 might be filed on dormant Commerce Clause grounds with more facts presented in the complaint. This would be possible because a plurality of Justices agreed that the Plaintiffs did not allege facts that would constitute a "substantial harm". New complaints, however, might allege facts sufficient to meet that burden. Those hypothetical challenges may or may not also include some of the additional legal grounds identified in Kavanaugh's opinion. But as of right now- and for the foreseeable future- Prop 12 is constitutional. However, there are other court cases pending that impact the immediate enforceability of Prop 12 and similar laws.

Enforceability

In *California Hispanic Chamber of Commerce v. Ross,* retailers asked for an extension of time to come into compliance with Prop 12 regulations for the sale of pork, which was granted by the court. For retailers selling "whole pork meat," the regulations may not be enforced until July 1, 2023. For retailers selling veal and egg products, the regulations are currently effective.

Massachusetts Restaurant Association v. Healey addresses a 2016 Massachusetts law, similar to Prop 12. The MA law was challenged on dormant Commerce Clause grounds, and the parties agreed to prevent enforcement of the portions of the law relevant to the sale of pork products until 30 days after the NPPC decision was issued by the USSC. The portions relevant to the sale of egg and veal products are currently effective.

WOTUS Update: U.S. Supreme Court Revisits Wetlands Jurisdiction Under the CWA

Brigit Rollins,
Staff Attorney, National Agricultural Law Center

On May 25, 2023, the United States Supreme Court released their highly-anticipated opinion in ***Sackett v. EPA*, U.S. (2023)**, a lawsuit concerning the scope of wetlands jurisdiction under the Clean Water Act ("CWA"). The decision comes months after the Environmental Protection Agency ("EPA") released a new definition of the key CWA term "waters of the United States" ("WOTUS") which determines which waterbodies receive CWA protection. The degree to which wetlands should be protected under the CWA has been a challenge for policymakers since the Act was first passed in 1972. This latest decision from the Court is intended to clarify when wetlands may be considered a water of the United States.

Background

The CWA is the primary federal statute regulating water pollution in the United States. The goal of the Act is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). To achieve that goal, the CWA makes it illegal to discharge any pollutant from a discernable, concrete source into "navigable waters" without the appropriate permit. 33 U.S.C. § 1342. Although the traditional legal definition of "navigable waters" refers to those waters that can or may be used to facilitate foreign or interstate commerce, under the CWA "navigable waters" is defined under the CWA as "the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7). The term is critical for CWA implementation because only those waters that meet the definition of WOTUS receive CWA protection. Congress chose not to further define the term "waters of the United States," instead leaving it up to EPA and the United States Corps of Engineers ("the Corps"), the two agencies responsible for administering the CWA, to craft a definition.

Since the time the CWA was first passed, policymakers and courts have struggled to determine what degree of protection wetlands should receive under the Act. While courts have generally agreed that at least some wetlands are included in the definition of WOTUS, the different definitions of that have been promulgated over the years have taken both broad and narrow approaches to wetlands jurisdiction. However, almost every WOTUS definition since 1977 has considered "adjacent wetlands" to be jurisdictional. From 1977 to the present day, most WOTUS definitions have defined "adjacent wetlands" to include those wetlands that are "separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like." 42 Fed. Reg. 37144; 45 Fed. Reg. 85345; 51 Fed. Reg. 41251; 80 Fed. Reg. 37116; 88 Fed. Reg. 3143-3144.

In 2006, the Supreme Court issued the landmark decision ***Rapanos v. U.S.*, 547 U.S. 715 (2006)**. There, the Court was asked to consider whether CWA jurisdiction extended to wetlands that did not directly "abut" a recognized WOTUS. In other words, the Court considered whether wetlands that were separated from a recognized WOTUS by a natural or man-made barrier fell under CWA jurisdiction. The Court failed to reach a majority opinion, instead producing a four-justice plurality opinion authored by Justice Scalia, and a concurrence authored by Justice Kennedy writing for himself. In the plurality opinion, the justices concluded that the definition of WOTUS should only include those waters that are "relatively permanent, standing, or continuous flowing" such as streams, rivers, and lakes. Then, only those wetlands that shared a continuous surface connection with such waters could fall under CWA jurisdiction. In contrast, Justice Kennedy concluded that wetland jurisdiction should be determined on a case-by-case basis, based on whether the wetland possessed a "significant nexus" to a recognized WOTUS. According to Justice Kennedy, a significant nexus exists when a wetland "either alone or in combination with similarly situated lands in the region, significantly affect[s] the chemical, physical, and biological integrity of other covered waters[.]"

Following the *Rapanos* decision, courts and EPA tended to apply Justice Kennedy's significant nexus test either on its own or in conjunction with the plurality opinion. In the years since, different administrations have proposed regulations attempting to further define the term. Most recently, in March 2023, EPA established new regulations adopting both the significant nexus and continuous surface connection tests proposed by the *Rapanos* plurality.

As EPA was in the process of drafting its 2023 rule, the Supreme Court agreed to take up the fifteen-year long dispute, *Sackett vs. EPA*. The plaintiffs in the case originally filed suit against EPA in 2008, challenging the EPA's conclusion that they had violated the CWA by backfilling a wetland located on their property. According to EPA, the wetland in question shared a significant nexus with Priest Lake, a WOTUS that was separated from the plaintiffs' property by a 30-foot road. The plaintiffs disagreed with EPA's conclusion, arguing that the wetland should not fall under WOTUS jurisdiction because it did not share a surface connection with Priest Lake or any other recognized WOTUS. The Supreme Court heard oral argument in the case in October 2022, where the plaintiffs asked the Court to revisit *Rapanos* and formally adopt the plurality's decision.

On May 25, the Supreme Court returned a decision in favor of the plaintiffs, officially adopting the plurality's continuous surface water connection test, and overturning Justice Kennedy's significant nexus approach.

The Court's Decision

In a 9-0 opinion authored by Justice Alito with five justices joining in the majority and four justices concurring in the outcome, the Supreme Court in *Sackett v. EPA* held that the use of the word "waters" in "waters of the United States" refers only to geographic features that are "described in ordinary parlance" as streams, oceans, rivers, and lakes, and that only those adjacent wetlands that are "indistinguishable" from such bodies of water due to a "continuous

surface connection" fall under CWA jurisdiction. The Court relied on two provisions of the CWA to reach its conclusion.

First, the Court turned to section 1362(7) and focused on the term "waters of the United States" itself. Specifically, the Court examined the word "waters" itself, relying on various dictionaries to conclude that it is commonly understood "waters" refers to "flowing waters" or "bod[ies] of water[s], such as a river, a lake, or an ocean[.]" The Court noted that the plurality in *Rapanos* relied on the same reasoning to conclude that the word "waters" in "waters of the United States" refers to "streams, oceans, rivers, and lakes." The Court also agreed with the plurality in *Rapanpos* that the ordinary meaning of "waters" made it difficult to "reconcile with classifying lands, wet or otherwise, as waters."

The Court went on to note that limiting the definition of "waters" to open, flowing bodies of water aligned the definition of WOTUS with the term it is defining – "navigable waters." While courts and policymakers have long acknowledged that CWA jurisdiction extends beyond the traditional navigable waters to which the term "navigable waters" typically refers, previous Supreme Court decisions have clarified that the term "navigable" should not be "read out of the statute." According to the Court, the CWA's use of the word "navigable" indicates that the definition of WOTUS "principally refers to bodies of navigable water like rivers, lakes, and oceans."

After concluding that the "waters" in "waters of the United States" refers to open, flowing bodies of waters like rivers, lakes, and streams, the Court turned to section 1344(g)(1) which Congress added to the CWA in 1977. That provision of the Act allows states to apply to EPA for permission to issue permits for the discharge of dredged or fill material – typically silt, sediment, or soil – into some bodies of water. Specifically, the provision allows states to regulate discharges of dredge and fill material into "waters of the United States," except for those traditionally navigable waters that can be used to facilitate interstate or foreign commerce, and those "wetlands adjacent thereto." 33 U.S.C. § 1344(g)(1). Because section 1344(g)(1) specifies that there are some adjacent wetlands which states may not regulate, the Court concluded that therefore some wetlands must fall under the definition of WOTUS.

However, the Court determined that the question of which wetlands may be regulated by the CWA cannot be answered by section 1344(g)(1) alone. Instead, the Court determined that section 1344(g)(1) had to be read in combination with the term "waters of the United States." According to the Court, the adjacent wetlands referred to in section 1344(g)(1) must be "included" within the definition of "waters of the United States." Because the Court had already concluded that the use of the word "waters" refers to open, flowing bodies of water, the Court then reasoned that any wetlands included in the definition of WOTUS must be "indistinguishably part of a body water that itself constitutes 'waters' under the CWA." According to the Court, a wetland will be considered "indistinguishable" from a recognized WOTUS if it is "difficult to determine where the 'water' ends and the 'wetland' begins." That occurs when a wetland shares a "continuous surface connection" with a recognized WOTUS.

Therefore, the Court held that CWA jurisdiction only extends to those wetlands that are "indistinguishable" from a recognized WOTUS due to a continuous surface connection.

The Court's overall conclusion in *Sackett v. EPA* is that the definition of WOTUS under the CWA includes open, flowing bodies of water such as streams, rivers, lakes, and the ocean, and those wetlands that share a continuous surface connection with such bodies of water.

Concurrences

While all nine justices joined in the outcome of the *Sackett* decision, only five justices joined in the majority opinion. Justice Thomas, Justice Kagan, and Justice Kavanaugh each authored concurring opinions.

Although Justice Thomas agreed with the overall outcome of the *Sackett* opinion, he authored his own opinion to forward his view that the definition of WOTUS should be limited to traditionally navigable waters. According to Justice Thomas, the CWA's use of the term "navigable waters" throughout its text suggests that Congress intended for CWA jurisdiction to extend only to those waters that could be used as highways of interstate or foreign commerce. To date, no court has fully endorsed this definition of "waters of the United States." The concurrences authored by Justices Kagan and Kavanaugh take a broader approach. Both Justices argue that the word "adjacent" means more than just "abutting" or "adjoining." According to Justices Kagan and Kavanaugh, the definition of "adjacent" includes "neighboring" and "nearby." While neither Justice would preserve the significant nexus standard authored by Justice Kennedy in *Rapanos*, both argue that the definition of "adjacent" adopted by the majority in *Sackett* is more narrow than the usual definition of "adjacent" suggests. Justice Kavanaugh points out that almost since the CWA was first passed, it has been accepted that "adjacent wetlands" include those wetlands that are nearby a recognized WOTUS, but do not share a continuous surface connection due to either a natural or man-made barrier. According to Justice Kavanaugh, the word "adjacent" is broader than the continuous surface connection requirement put forward by the majority. Additionally, Justice Kavanaugh raised questions about where the majority's opinion leaves wetlands like the ones located along the Mississippi River which would share a continuous surface connection with the river if not for man-made levees installed for flood control purposes. Both Justices Kagan and Kavanaugh would have adopted a broader definition of "adjacent wetlands" than the one outlined by the majority.

Looking Forward

The decision reached by the Supreme Court is at odds with the 2023 WOTUS rule that went into effect earlier this year. While it is still unclear how EPA intends to interpret WOTUS following this ruling, the Court's decision appears to overrule the portions of the 2023 rule that extend jurisdiction to any bodies of water that are not open, flowing "streams, oceans, rivers and lakes," and that extend jurisdiction to any wetlands that do not share a continuous surface connection with such bodies of water, including wetlands that are separated from a recognized WOTUS by a natural or man-made barrier. Additionally, the ruling from the Court appears to

overturn all of the “significant nexus” language included in the 2023 rule. It is currently unclear how EPA will respond to the ruling, although it is possible that the Agency will initiate another rulemaking to bring the definition of WOTUS inline with the Supreme Court’s decision.

Currently, there are three lawsuits challenging the legality of EPA’s 2023 WOTUS rule. As a result of those lawsuits, the 2023 rule is enjoined in 28 states. Instead of interpreting WOTUS according to the 2023 rule, the states where the rule is enjoined interpret WOTUS according to the pre-2015 regime which includes the 1980s definition of WOTUS, and memoranda from EPA outlining how to determine wetlands jurisdiction post-*Rapanos*. Along with including guidance on how to implement the significant nexus test, the pre-2015 regime also extends CWA jurisdiction to some wetlands that do not share a continuous surface connection with a recognized WOTUS. It is currently unclear how WOTUS will be interpreted in those states following the Supreme Court’s *Sackett* decision.

While all three lawsuits are currently on-going, it is unclear how the *Sackett* decision will impact future litigation. As of May 30, 2023, none of the plaintiffs have asked for a nationwide injunction. At the moment, it appears that all parties are in the process of determining how to proceed.