The Daily Dish

A Muddy SCOTUS Decision on WOTUS

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AAF loves every policy issue. But there is evidently a special place in its (cold, analytic) heart for the Waters of the United States (WOTUS) rule. A search of the AAF website yielded 44 pieces on the issue, ranging from Waters of the United States Generates Controversy on October 27, 2014, to yesterday's Week in Regulation by Dan Goldbeck that featured an analysis of the most recent ruling by the Supreme Court of the United States (SCOTUS).

Recall that the WOTUS rule is an Environmental Protection Agency (EPA) (and Army Corps of Engineers) rule that defines the waters it would regulate under the Clean Water Act of 1972. Over the years, there have been many WOTUS rules that have featured expansive and vague definitions during the Obama years and more targeted definitions during the Trump Administration.

The petitioners in the case, Michael and Chantell Sackett, asked the court to revisit the 2006 *Rapanos* decision, which produced two different standards for deciding what constituted WOTUS. A plurality of four judges, led by the late Justice Scalia, concluded that navigable waters and wetlands with a "continuous surface connection" should be subject to regulation. Justice Kennedy, however, wrote a separate concurring opinion indicating that wetlands should be regulated if they have a "significant nexus" to navigable waters, and such regulations would govern them, even if they aren't directly connected. These multiple standards permitted the wide range of rules under the administrations since the *Rapanos* case.

As Goldbeck reports: "Last Thursday, SCOTUS finally released its 9-0 opinion of the Court that ruled in favor of the Sackett family in their long-running legal dispute with EPA (and, by extension, its partnering agency on this issue: the Army Corps of Engineers) over the issue of whether a patch of wetlands on their property constituted WOTUS." Unfortunately, while the Court could agree that the Sackett property was not a wetland to be regulated by EPA, it could not come to agreement on a general rule to be used to identify such wetlands. The muddiness of the outcome is reflected in the variety of opinions on the case:

> "ALITO, J., delivered the opinion of the Court, in which ROBERTS, C. J., and THOMAS, GORSUCH, and BARRETT, JJ., joined. THOMAS, J., filed a concurring opinion, in which GORSUCH, J., joined. KAGAN, J., filed an opinion concurring in the judgment, in which SOTOMAYOR and JACKSON, JJ., joined. KAVANAUGH, J., filed an opinion concurring in the judgment, in which SOTOMAYOR, KAGAN, and JACKSON, JJ., joined."

In short, there will have to be yet another WOTUS rulemaking, which will likely produce another round of litigation. This is a real disservice to the public. As AAF put it a few years ago: "Congress should work to end decades of uncertainty, wasted resources, and perplexing litigation by crafting a definition that can become law and provide the needed clarity to landowners, developers, environmentalists, and everyone in between. Leaving the decision to regulators has proven unworkable."