



Returning to Troubled Waters, Part 2: The Supreme Court's Path Begins

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November 17, 2022

farmdoc daily (12): 174

Gardner Policy Series

Recommended citation format: Coppess, J. "Returning to Troubled Waters, Part 2: The Supreme Court's Path Begins." *farmdoc daily* (12): 174, Department of Agricultural and Consumer Economics, University of Illinois at Urbana-Champaign, November 17, 2022.

Permalink: <https://farmdocdaily.illinois.edu/2022/11/returning-to-troubled-waters-part-2-the-supreme-courts-path-begins.html>

The Supreme Court is considering the Clean Water Act's troubled definition of navigable waters in the case, *Sackett v. Environmental Protection Agency* (Docket No. 21-454; Gerstein, [October 3, 2022](#)). As discussed previously, the case represents yet another attempt by the Supreme Court to interpret the Clean Water Act in a dispute involving wetlands (*farmdoc daily*, [October 13, 2022](#)). This article looks at the progression of Supreme Court decisions on defining the term "navigable waters" in the statute, adding to previous reviews of the Clean Water Act (see e.g., *farmdoc daily*, [April 3, 2019](#); [March 21, 2019](#); [April 6, 2017](#); [February 9, 2017](#); [March 24, 2016](#)).

Background

In brief review, the Sacketts, who operate a commercial construction and excavation business, purchased a vacant lot (0.63 acres) in a residential subdivision of Priest Lake, in 2004. Prior to their purchase, the Army Corps of Engineers (the Corps) had determined that the property contained wetlands that were subject to Clean Water Act jurisdiction and informed the owner of the property. In 2007, the Sacketts began to fill the wetlands to prepare the lot for construction without a permit and then sued EPA in 2008. The district court granted EPA's motion to dismiss the lawsuit, which was affirmed by the Ninth Circuit Court of Appeals but reversed by the Supreme Court. The Supreme Court remanded the case back to the district court in 2012 and the parties litigated the matter for the next seven years. In 2019, the district court entered summary judgment for EPA, the Sacketts appealed to the Ninth Circuit, which affirmed the district court's decision (see, *Sackett v. EPA*, 566 U.S. 120 (2012); *Sackett v. EPA*, 8 F.4th 1075 (9th Circuit, 2021)). It is that decision that is before the Supreme Court for the second time in more than a dozen years of litigation (*farmdoc daily*, [October 13, 2022](#)).

Discussion

One of the earliest cases on the definition of navigable waters was in a lawsuit against the Army Corps of Engineers over the early regulation. The D.C. District Court found that the Corps had impermissibly

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limited the term. In a very brief decision, the court explained that the term navigable waters “asserted federal jurisdiction over the nation’s waters to the maximum extent permissible under the Commerce Clause of the Constitution.” The court added that the term was “not limited to the traditional tests of navigability” (*Natural Resources Defense Council, Inc. v. Callaway*, 392 F.Supp. 685 (D.C. Dist., 1975)).

A decade later the question made it to the Supreme Court in a dispute over wetlands. The Court began by noting the regulatory history. After the 1972 Clean Water Act, the Army Corps had initially read the Clean Water Act definition as covering only those waters that were navigable in fact. In 1975, the Corps revised the regulations to include waters navigable in fact as well as the tributaries of such waters and other “nonnavigable intrastate waters whose use or misuse could affect interstate commerce” (*United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 123 (1985)). The Corps also included freshwater wetlands that were adjacent to covered waters and updated the definition of wetlands in 1977 and 1982. Figure 1 is the Corps’ definition of wetlands as quoted by the Court.



The landowners in the case owned 80 acres of what the Court described as “low-lying, marshy land near the shores of Lake St. Clair, Macomb County, Michigan” (*Id.*, at 124). The landowners had discharged fill material without the permit required by the Army Corps of Engineers to prepare the construction of a housing development. The Corps determined it was wetlands adjacent to covered waters and filed suit to prevent the landowners from further conversion of the wetlands. The district court found it to be a wetland and subject to permitting, but the Sixth Circuit Court of Appeals reversed that decision and questioned whether the Clean Water Act covered wetlands.

A unanimous Supreme Court found that “the breadth of federal regulatory authority contemplated by the Act itself and the inherent difficulties of defining precise bounds to regulable waters, the Corps’ ecological judgment about the relationship between waters and their adjacent wetlands provides an adequate basis for a legal judgment that adjacent wetlands may be defined as waters under the Act” (*United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 134 (1985)). The Court recognized that Congress had intended a broad regulatory scope to achieve the goal of cleaning up the Nation’s waters. The realities of water, however, made it nearly impossible to draw or define exact legal boundaries and the Court left such a technical, scientific issue to the Army Corps. The agency needed to prove the ecological judgment it was making, but the courts were not to second guess that scientific conclusion. Accordingly, the Court accepted a definition of waters of the U.S. that included “all wetlands adjacent to other bodies of water over which the Corps has jurisdiction” (*Id.*, at 135).

One notable portion of the Court’s decision was its review of the Congressional effort to amend the Clean Water Act in 1977. According to the Court, that debate featured objections to the broad interpretation of the term. The House agreed to an amendment that narrowed the definition, but the Senate defeated a similar amendment. The conference agreement adopted the Senate position. Based on this, the Court stated that “a refusal by Congress to overrule an agency’s construction of legislation is at least some

evidence of the reasonableness of that construction, particularly where the administrative construction has been brought to Congress' attention through legislation specifically designed to supplant it" (Id., at 137). The unanimous Court concluded that the Corps' definition was reasonable and upheld the Clean Water Act as requiring "permits for the discharge of fill material into wetlands adjacent to the 'waters of the United States'" (Id., at 139).

Concluding Thoughts

An important discussion in the Court's decision explained that "[o]n a purely linguistic level, it may appear unreasonable to classify 'lands,' wet or otherwise, as 'waters.' Such a simplistic response, however, does justice neither to the problem faced by the Corps in defining the scope of its authority [under the Act] nor to the realities of the problem of water pollution that the Clean Water Act was intended to combat" (*Riverside Bayview Homes*, 474 U.S. at 132). The Court's first decision was relatively clear for a difficult matter. Congress intended to address water pollution and water quality; Congress was not undertaking an exercise on linguistics or the meaning of the words navigable and waters. The Court endorsed the hydrologic and aquatic system approaches, as well as the technical expertise, of the Agencies delegated by Congress to clean up the Nation's waters. The decision charted a course for Clean Water Act regulation based on Congressional intent as embodied in the statute and scientific understanding of water. The next article in this series will review where and how matters veered off course.

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