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## **Sackett v. EPA**—Ninth Circuit upholds EPA’s 2008 compliance WOTUS orders under Justice Kennedy’s reasoning in *Rapanos*

This dispute began in 2008 when the Environmental Protection Agency issued a compliance order under the Clean Water Act directing Michael and Chantell Sacket to comply with the agency’s restoration work plan developed for wetlands adjacent to Priest Lake in northern Idaho. The order was issued in response to the Sacketts’ placing sand-and-gravel fill on a half-acre of their property where they planned to build a residence. The couple filed suit challenging the order, and approximately two weeks later an EPA ecologist reinspected the property and drafted a jurisdictional determination memorandum concluding “that the Sacketts’ lot contained wetlands subject to regulation under the CWA.” The EPA followed up with an amended order that extended the compliance deadline but otherwise did not alter the order at issue in the Administrative Procedure Act proceeding. The district court and the Ninth Circuit thereafter dismissed the action on the ground that the original compliance order did not constitute a final agency action subject to APA judicial review, only to be reversed by the Supreme Court in *Sackett v. EPA*, 566 U.S. 120 (2012).

After seven years of remand proceedings, the district court granted summary judgment to EPA. The Sacketts appealed, but in March 2020 the agency “sent the Sacketts a two-paragraph letter in March 2020, withdrawing the amended compliance order issued twelve years prior” and “explain[ing] that ‘several years ago EPA decided to no longer enforce the [order] against you.’” The letter assured the Sacketts that ‘EPA does not intend to issue a similar order to you in the future for this Site.’” The motions panel denied EPA’s motion to dismiss the appeal on mootness grounds, which the Sacketts opposed, without prejudice to renewal before the merits panel.

The Ninth Circuit affirmed the district court’s judgment on the merits. *Sackett v. USEPA*, No. 35469, 2021 WL 3611779 (9th Cir. Aug. 16, 2021). The panel agreed with the Sacketts on the mootness issue that EPA had not carried its burden of establishing that it is “‘*absolutely clear* that the allegedly wrongful behavior could not reasonably be expected to recur[:].’”

EPA’s stated intention not to enforce the amended compliance order or issue a similar one in the future does not bind the agency, and EPA could potentially change positions under new leadership. Further, the letter did nothing to alter EPA’s position throughout this litigation that it has authority to regulate the Sacketts’ property. Indeed, during oral argument, counsel for the agency was unwilling to represent that the agency lacked authority over the property and, even after more than a decade of litigation, could not answer questions about whether the Sacketts could develop their land. The agency could have disavowed the JD, but it declined to do so.

Thus, “[a]s long as EPA avoids disclaiming authority to regulate the Sacketts’ property, the core of this dispute is alive and well.”

On the merits, the panel first discussed the differing views concerning the scope of wetlands for CWA purposes in Justice Scalia's four-Justice plurality opinion in *Rapanos v. United States*, 547 U.S. 715 (2006), and Justice Kennedy's concurrence. The latter Justice

accepted the regulatory definition of adjacency, ... but he rejected the Corps' position that wetlands are necessarily "waters of the United States" any time they are "bordering, contiguous [with], or neighboring" a tributary, 33 C.F.R. § 328.3(c) (2008), "however remote and insubstantial, that eventually may flow into traditional navigable waters." ... Justice Kennedy interpreted the CWA as imposing an additional requirement for regulatory jurisdiction over wetlands: "jurisdiction over wetlands depends upon the existence of a significant nexus between the wetlands in question and navigable waters in the traditional sense." ... This "significant nexus" inquiry would turn on whether the wetlands, "either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'"

A prior decision, *Northern California River Watch v. City of Healdsburg*, 496 F.3d 993 (9th Cir. 2007), ... [had] concluded that 'Justice Kennedy's concurrence provides the controlling rule of law' from *Rapanos*[,] and the panel held that *Healdsburg* remained binding law of the circuit. In so holding, the panel rejected the Sacketts' position that *Healdsburg*'s application of the fractured opinion rule announced in *Marks v. United States*, 430 U.S. 188 (1977), had been superseded by the en banc opinion in *United States v. Davis*, 825 F.3d 1014 (9th Cir. 2016).

The panel turned then to the question "whether EPA has jurisdiction to regulate the Sacketts' property" under "Justice Kennedy's 'significant nexus' inquiry." On this point, the panel found it "clear" that "the requirements of the Kennedy concurrence and the applicable regulations are satisfied" given applicable APA review standards. First,

[a]t the time of the challenged compliance order, artificial barriers did not defeat adjacency. ... EPA therefore properly concluded that the wetlands on the Sacketts' lot were adjacent to the unnamed tributary to Kalispell Creek thirty feet away, notwithstanding that Kalispell Bay Road lies in between the property and the tributary. Officials from the site visit also observed that the tributary is "relatively permanent" based on U.S. Geological Survey mapping as well as its flow, channel size, and form. Moreover, because this unnamed tributary eventually flows into Priest Lake, a traditional navigable water, via Kalispell Creek, the tributary is jurisdictional—that is, it is itself a water of the United States.

Second,

[a]t the time of the amended compliance order, EPA had explained that "[s]imilarly situated' wetlands include all wetlands adjacent to the same tributary." ... Here, EPA appropriately concluded based on the observations from the site visit and maps of the area that, like the Sacketts' wetlands, the Kalispell Bay Fen is adjacent to the unnamed tributary to Kalispell Creek. Therefore, the Sacketts' wetlands and the Fen are similarly situated for purposes of evaluating whether they have a significant nexus to Priest Lake.

Third, "[t]he record further supports EPA's conclusion that these wetlands, in combination, significantly affect the integrity of Priest Lake" because "[w]ater from these wetlands makes its way into Priest Lake via the unnamed tributary and Kalispell Creek." The panel thus held that "[t]he agency's conclusion that the Sacketts' wetlands, combined with the similarly situated Fen,

‘significantly affect the chemical, physical, and biological integrity of’ Priest Lake was a reasonable one which we will not second-guess.”

Decision link: <https://cdn.ca9.uscourts.gov/datastore/opinions/2021/08/16/19-35469.pdf>