REFLECTIONS ON WATER – S01 EP08, REFLECTIONS ON *SACKETT*
RECORDED OCTOBER 2022

Dave Ross:

Welcome to Reflections on Water. I'm Dave Ross.

Anna Wildeman:

And I'm Anna Wildeman. Today, we're bringing you a special edition of Reflections on Water interrupting our regularly scheduled podcast to bring you our reactions to the Supreme Court's oral argument on *Sackett v. EPA*. Dave, this is obviously a newsworthy event in the world of water policy. I'll ask you the first question. Did you watch it?

Dave Ross:

I think there's a new recognized medical condition called WOTUS fatigue. I was able to get past that, and yes, I did watch it. It is a really important issue right now in environmental law and policy. I watched it, and overall I think the reaction is there's no clear signal to folks who dialed in and wanted a clear signal from the justices. Yeah, I don't think you got one way or the other than I think you saw that there was some discomfort with the lack of predictability in the current framework, particularly as it applies to adjacent wetlands.

And so I think you had multiple justices from both sides of the spectrum who were expressing concern about that. I do think that we also saw a hesitation and certainly not a lot of interest in adopting what I think the plaintiffs were going after, which is a pretty bright-line test about how would you disconnect an adjacent wetland and cutting off sort of that neighboring concept. I'd be surprised if we saw a bright-line rule there, but anybody who's predicting how this is going to come out right now, I think it's just pure speculation at this point.

So Anna, given that speculation or given the lack of clarity that came out of the argument, you ran several significant rulemaking teams in your tenure at EPA, managed some really large teams, complicated issues, what do you think EPAs thinking right now, that WOTUS team who's been at this for quite some time?

Anna Wildeman:

Well, I think that they're probably most definitely suffering from WOTUS fatigue in its most clinical fashion. But from a real rulemaking nuts-and-bolts perspective, they've got their initial rule over at OMB for a final sort of interagency review, and this is the rule that they have characterized as codifying the 86 Regs plus the Rapanos Guidance, and it's in final form. It's over at OMB. It's going through those last channels of review. And listening to the argument, there wasn't anything in there that I think would derail that process at this point.

If the justices had given a strong signal or if there was a strong majority that appeared to want to kill the significant nexus test, I think that there would be a little bit of a pause in the process, and EPA would want to take a close look at that and maybe revisit what's in their final rule. But that didn't really happen during the oral argument this week. So I don't think that's going to change their schedule for getting that first rule out the door sometime this fall. But they might have a team working on the second rule that they've promised.

And that team might have listened very carefully to the oral argument and tried to glean what they could from what might be an acceptable test going forward as we envision yet another definition of “waters of the United States” and another round of litigation that may or may not make it to the Court for final adjudication. So that's my take on where I think EPA is probably at with the *Sackett* case. But I want to get a little bit into the weeds if we can, because the Court certainly got right into the weeds as soon as this session was opened.

Questions were coming fast and furious, and there was a lot of discussion during the argument about Clean Water Act section 404G. It was a major part of the dialogue amongst the justices in both parties. A lot of questions. What does it mean? How does it inform the definition of waters of the United States? And I think for a lot of folks, I call them water nerds, I think there was some frustration listening to that dialogue. And I think that I'd love to hear your thoughts about how 404 fits into this analysis, if at all, and what your reaction was listening to that discussion.

Dave Ross:

Yeah. Actually, to me, that was, I think, probably the most surprising aspect of the argument and perhaps maybe it is. I'm guilty of being the water nerd, and I picked it up on it, but 404G is important if you were someone that's not significantly, my guess, educated in this argument or in this space, you would've thought that it was a major, major provision. And by the time you get to the end of the argument, you're like, wow, that must be a fairly significant source of authority. And it's just not. There was a federal advisory committee that was put together by EPA called the Assumable Waters Committee that looked at what actually is the meaning of 404G.

And it was formulated around why are not more states taking the 404G program, the permitting program from the Corps of Engineers. But literally, the charge of the subcommittee was to take a look at the parenthetical that was the focus of so much conversation in the argument and try to figure out its meaning. And at the base, the subcommittee made several findings. And by the way, it's a really important report. I think it was transmitted to the EPA administrator in 2017. There are several pages on this exact topic, including a full appendix that takes a deep look at the legislative history of this particular provision.

And what the subcommittee found is that at first, what the parenthetical that includes the phrase “adjacent wetlands,” that is referring to the waters that the Corps of Engineers retains if EPA grants the state authority to run the 404 program, that the waters reference in that parenthetical are the Section 10 waters, the Rivers and Harbors Act section 10 waters. Think about the traditional navigable, in fact, the you run commerce on style waters that the Corps has jurisdiction over under the Rivers and Harbors Act. And then that phrase in wetlands adjacent there too.

So it's important in that Congress in 1977 recognized adjacent wetlands as part of the regulatory construct, and they clearly have an important role in the navigable waters under Section 10 that is so important that the Corps would retain an authority for it. But the federal subcommittee looked at the meaning of “adjacent” and tried to tease out what that meant because the committee was trying to make a recommendation to EPA as to what portions of those wetlands can the states take authority over and what portions must stay with the federal government.

And the subcommittee found that there just wasn't any guidance in the legislative history on that issue. And so I think to the extent that people are saying that the 404G provides some broad authority for the significant Nexus test or some clarity as to what we mean by adjacent, I think that's probably in the creative lawyering category. But anyway, so I do actually encourage

people to go grab that report, and I think it's pretty illustrative of this issue, and I suspect some of the Supreme Court clerks will probably find it.

Anna Wildeman:

So Dave, if I'm hearing you right, 404G is not a provision that actually interprets the definition of waters of the United States. Now if you listen to the Supreme Court's argument on Monday, you would surely think that 404G was an integral part of the definition of waters of the United States. But I'm hearing you say that's not the purpose of 404G.

Dave Ross:

No, not at all. It's very clear from the legislative history, that is definitely not why it was created. It was created to provide guidance as to what water states can take if they assume authority for the 404 program and what waters the Corps of Engineers retains.

Anna Wildeman:

Got you. That's helpful. Thanks for that clarification.

Dave Ross:

Yeah. And the 404 space, Anna, I know you do a lot of work in the wetland permitting and compensatory mitigation. I was surprised by the conversation about cost and the impact and the difficulty of getting 404 permits. What was your reaction to some of the numbers that were being thrown around?

Anna Wildeman:

I've actually spoken to a couple of people who do a lot of work in this space. We're lawyers, so we do the lawyer side of it, but consultants do a lot of work day-to-day out there in the field, and they do a lot of work securing compensatory mitigation credits and projects for mitigation, and things like that. And I think there were a few people out there who work in this space who are surprised to hear that the Army Corps will provide a JD for free if you ask for it, and that perhaps an individual permit might only cost $35,000.

Because I think to get a JD, you have to hire a consultant first to do the delineation work that you then submit as part of your JD request. And I think that Sackett's attorney made a really interesting point, and I think it was a good point, on rebuttal in response to the government's cost claims of around $35,000. Even if it only costs $35,000 to get an individual permit, the government didn't acknowledge that there's a huge cost associated with the compensatory mitigation that would be required as part of any individual permit.

And as part of some nationwide permit project, we've worked with folks who have seen costs in the millions, tens of millions of dollars or more, for compensatory mitigation related to an individual permit. So I was glad to hear that at least that information was presented during the arguments before the justices this week. And we know that there's information in the record, amicus briefs were filed directly on point to the costs. What has it cost on the ground? How are landowners really affected by this permit program and this regulatory program?

So yeah, I think it was an interesting part of the discussion. I was glad to see that compensatory mitigation made it into the discussion. So Dave, let's wrap this thing up. What's your prediction? How does this thing shake out?

Dave Ross:

Hey, look, if they did a live poll of the justices in the moment, I would not be surprised if the initial poll for how a case like this would come out, we'd be looking at another plurality. I see sort of a 4-3-2 break around Alito and Thomas together on one side, Jackson, Sotomayor and Kagan on the other, and then I think Roberts and Barrett and Gorsuch and Kavanaugh somewhere in the middle. So that should terrify people to hear the word plurality again.

Anna Wildeman:

I'm terrified.

Dave Ross:

Yeah.

Anna Wildeman:

I'm terrified. This whole thing is supposed to resolve the last plurality that the court laid upon all of us in the *Rapanos* case.

Dave Ross:

Yeah. If that's what actually happens in an opinion, it'll be an absolute train wreck. And so I don't think the justices, particularly the chief justice, allows that to happen, and so I think there'll be some deal-finding. Whether or not that drifts the middle four to the left or the right, I think is an interesting question. But I think they'll avoid, try to avoid another plurality situation at all costs, and there'll be some deal-cutting. But anybody who thinks or can predict how that comes out right now with any certainty, it's just not there.

I don't think we had enough clarity in the argument, so we'll just have to wait.

Anna Wildeman:

All right. I'm glad we had a chance to have this quick chat about it. We apologize for interrupting your regularly scheduled Reflections on Water Podcast, and we'll get back to normal programming next week.