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The Significant Nexus Inquiry: Assessing the EPA's Jurisdiction Over Navigable Waters: *Sackett v. U.S. Environmental Protection Agency*

I. INTRODUCTION

For thirteen arduous years, the maintenance of a 0.63-acre lot in Idaho was a point of contention that wound its way through the United States court system, ultimately ending in August of 2021.[1] In 2004, Chantell and Michael Sackett sought to become homeowners near Priest Lake in northern Idaho.[2] Upon purchasing the property, the Sacketts obtained building permits from their county and began the construction process by filling the lot with sand and gravel.[3] No sooner had they begun than the project come to a screeching halt as the Environmental Protection Agency (EPA) visited the property and warned the Sacketts that the property may contain wetlands. The EPA instructed the Sacketts to temporarily stop the construction because they had not obtained a permit from the U.S. Army Corps of Engineers (ACOE).[4] Six months went by before the EPA issued the Sacketts an administrative compliance order.[5] When it was finally issued, the EPA affirmed that the agency had jurisdiction over the property under the Clean Water Act (CWA) because the lot contained wetlands that fed into Priest Lake, a navigable body of

1. Sackett v. U.S. Env't Prot. Agency, 8 F.4th 1075 (9th Cir. 2021).
2. *Id.* at 1080-81.
3. *Id.* at 1081.
4. *Id.*
5. *Id.*

water.[6] The order stated that the property must be restored to its natural state.[7] Failure to comply with the order would result in civil action against the Sacketts, resulting in fines exceeding $40,000 per day if they did not remove the sand and gravel from the property.[8]

In 2008, the Sacketts sued the EPA in federal district court, challenging the agency's jurisdiction over their property under the CWA.[9] That same year, the EPA issued a report, known as a jurisdictional determination, on their findings after surveying the land, concluding that the Sacketts's property did in fact contain wetlands that were subject to the scope of the Clean Water Act.[10] The case eventually made its way to the United States Supreme Court in 2011, where the Court reversed and remanded the Ninth Circuit, holding that the Clean Water Act precluded pre-enforcement judicial review of compliance orders.[11] On remand, the district court entered summary judgment for the EPA holding that the amended EPA compliance order was not arbitrary or capricious.[12] At the time the parties were submitting their briefs on this appeal, the EPA withdrew their compliance order.[13] The EPA further explained in the letter withdrawing the compliance order that the EPA had decided multiple years prior to stop enforcing the order against the Sacketts.[14] Moreover, the EPA's letter expressly stated that the Sacketts had no reason to fear future similar action regarding the property.[15] The United States Court of Appeals for the Ninth Circuit *held* that the case was not moot due to the voluntary cessations lack of permanence in addition to the EPA having jurisdiction over the Sacketts's property because the property contained wetlands that shared a significant nexus with a navigable body of water situated in close proximity to wetlands. *Sackett v. U.S. Env't Prot. Agency*, 8 F.4th 1075 (9th Cir. 2021).

II. HISTORICAL BACKGROUND

The Clean Water Act was enacted by Congress "to restore and maintain the chemical, physical, and biological integrity of the Nation's

6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.* at 1082.
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*

waters."[16] The CWA extends to any navigable bodies of water in the United States, including territorial seas.[17] In order to achieve this objective, the EPA routinely issues administrative compliance orders to those individuals who discharge pollutants, including rocks and sand, into U.S. waters.[18] This compliance tool puts the polluter on notice of their violations and requires them to cease their unlawful polluting at the risk of action being brought against them in federal district court.[19]

Since its enactment, the CWA's language defining "waters of the United States" has caused confusion regarding the EPA's jurisdictional authority.[20] In the early 1970s, the ACOE defined the phrase to mean only waters that were navigable in fact.[21] However, the ACOE later expanded the regulatory definition to include wetlands that are adjacent to traditional navigable waters and their tributaries.[22] In concluding whether a property falls under the EPA's jurisdiction, the agency conducts a survey of the property in question and its surrounding area, resulting in the issuance of a jurisdictional determination (JD).[23]

The Supreme Court has also addressed the definition of "waters of the United States."[24] The Court has held that wetlands that are not navigable, but that "actually abutted on" navigable waterways, are properly included in the CWA's scope.[25] However, the Court has also rejected attempts to place properties that "seasonally ponded" as regulable since the definition does not extend to "nonnavigable, isolated, intrastate waters."[26] In *Rapanos v. United States*,[27] the Court vacated two lower court holdings that included wetlands connected to distant navigable waters via ditches and artificial drains within the CWA.[28] There, Justice Scalia's

16. 33 U.S.C. § 1251.

17. *Id.* The term "territorial seas" is defined as "the belt of the seas measured from the line of ordinary low water along the portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters, and extending seaward a distance of three miles." 33 U.S.C. 1362.

18. *See* 33 U.S.C 1311.

19. 33 U.S.C. § 1319 (a) and (b).

20. United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 123 (1985).

21. *Id.;* When the U.S. Army Corps of Engineers (Corps) is the permitting authority, EPA and the Corps share Section 404 enforcement authority. Enforcement Under CWA Section 404, epa.gov available at https://www.epa.gov/cwa-404/enforcement-under-cwa-section-404.

22. *See* 33 C.F.R. § 328.3(b)(1), (b)(5), (b)(7) (2008).

23. 33 U.S.C. § 1344(g)(1).

24. *See* Rapanos v. United States, 547 U.S. 715 (2006).

25. *See* United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, (1985).

26. *See* Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, 531 U.S. 159, 160, 164 (2001).

27. *Rapanos*, 547 U.S. at 715.

28. *See id.*

plurality opinion and Justice Kennedy's concurrence, respectively, provided two tests for determining whether wetlands can be regulated under the CWA.[29]

A. The EPA's Jurisdictional Authority and the "Significant Nexus" Inquiry

To determine the controlling holding from a fractured decision, courts look to see which opinion is "the narrowest grounds to which a majority of the Justices would assent if forced to choose in almost all cases."[30] In *Rapanos*, the Supreme Court analyzed a district court holding that a property with ditches near wetlands that fed into a navigable body of water was considered within the meaning of "waters of the United States" for purposes of the CWA.[31] The Court held that the Sixth Circuit applied the wrong legal standard in their evaluation of the wetlands in accordance with the CWA.[32] Although the court agreed on the outcome, there was no consensus on the rationale and thus Justice Scalia wrote a plurality opinion rejecting the CWA's definition of adjacency, which stated that the phrase "waters of the United States" only extends to "relatively permanent standing or flowing bodies of water," and waters with a continuous surface connection to those permanent waters.[33] Justice Kennedy then wrote a concurrence accepting the regulatory definition of adjacency as well as construing the CWA as adding a further requirement for jurisdictional claims over wetlands.[34] Justice Kennedy noted that the "jurisdiction over wetlands depends upon the existence of a significant nexus between the wetlands in question and navigable waters in the traditional sense."[35] Subsequently known as the "significant nexus inquiry," Justice Kennedy's interpretation relied on the question of "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.'"[36]

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29. *See id.*
30. Northern California River Watch v. City of Healdsburg, 396 F.3d 993, 999 (9th Cir. 2007) ; *see also* Marks v. United States, 430 U.S. 188 (1977).
31. *See* Rapanos v. United States, 547 U.S. 715 (2006).
32. *Id.* at 757.
33. *Id.* at 739.
34. *Id.* at 779.
35. *Id.*
36. *Id.* at 755.

In *Northern California River Watch v. City of Healdsburg*, the Ninth Circuit concluded that Justice Kennedy's concurrence in *Rapanos* was the "controlling rule of law."[37] The court relied on the "narrowest ground" inquiry from *Marks v. U.S.* as well as the United States Court of Appeals for the Seventh Circuit's application of *Marks* in *United States v. Gerke Excavating, Inc.*[38] in coming to this conclusion.[39] In *Gerke*, the Seventh Circuit was faced with a challenge by the United States Department of Justice against a contractor who they alleged was discharging pollutants into a navigable river without permission from the ACOE.[40] The court remanded the case to the district court with directions on how to determine whether the wetlands possessed a significant nexus to a navigable body of water using Justice Kennedy's *Rapanos* concurrence.[41]

The Ninth Circuit in *United States v. Davis*[42] explained their use of the *Marks* analysis to interpret decisions that garnered no majority.[43] The court explained that there are two approaches to applying *Marks*: a reasoning-based approach and a results-based approach.[44] In a reasoning-based approach, courts look to concurring opinions that "set[] forth a rationale that is the logical subset of the other, broader opinions."[45] Conversely, in a results-based approach to a fractured opinion, the controlling holding is the one that "would necessarily produce results with which a majority of the justices from the controlling case would agree."[46] The en banc court in *Davis* concluded that the reasoning based approach is the correct analysis of *Marks*.[47] Subsequently, the Ninth Circuit has based their analyses of fractured decisions on the narrowest concurring opinion, which is the "common denominator of the Court's reasoning."[48]

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37. Northern California River Watch v. City of Healdsburg, 396 F.3d 993, 999-1000 (9th Cir. 2007).
38. United States v. Gerke Excavating, Inc., 464 F.3d 723 (7th Cir. 2006).
39. *Healdsburg*, 396 F.3d at 999-1000.
40. *Gerke*, 464 F.3d at 723.
41. *Id.* at 724.
42. United States v. Davis, 825 F.3d 1014 (9th Cir. 2016) (en banc).
43. *See id.*
44. *Id.* at 102 (quoting Nichols v. United States, 511 U.S. 738, 746 (1994)).
45. *Id.* at 1028.
46. *Id.* at 1021 (quoting Planned Parenthood of Se. Pa. v. Casey, 947 F.2d 682, 694 (3d Cir. 1991), *aff'd in part, rev'd in part*, 505 U.S. 833 (1992)).
47. United States v. Davis, 825 F.3d 1014, 1028 (9th Cir. 2016) (en banc).
48. *Id.*

B. A Case is Not Moot Merely by Voluntary Cessation of a Compliance Order

If a party to a suit voluntarily ceases their challenge, mootness occurs "if subsequent events [make] it *absolutely* clear that the allegedly wrongful behavior could not be reasonably expected to recur."[49] In *Porter v. Bowen*,[50] the Ninth Circuit reversed a district court decision that a case was moot because the defendant, the California Secretary of State, sent a letter stating they there would be no prosecutions until a law was clarified by the California State Assembly.[51] The Ninth Circuit explained that the Secretary had not met the heavy burden of establishing that the intent to not prosecute was binding and charges would not be brought again in the future.[52] Thus, for a case to be considered moot, the party voluntarily ceasing their challenge must show that it is "absolutely clear" that they will not reinstate action against the opposing party on that issue.[53]

Expanding on the *Porter* holding, the Ninth Circuit again reversed a district court decision to dismiss a case as moot when the defendants, the Federal Bureau of Investigation (FBI), reinstated an individual's right to fly after being placed on the No Fly List.[54] There, the agency contended that as a government entity, they deserved a presumption of good faith with their policy change. However, the Ninth Circuit reasoned that the government agency must prove that their action is "entrenched or permanent" to moot a case.[55] Further, the court explained that because there were no procedural hurdles preventing the FBI from placing the plaintiff back on the No Fly List, the case was not moot.[56] Thus, to establish a case as moot after voluntary cessation of a challenge, the party must show that they are *permanently* ceasing their action against the opposing party.[57]

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49. Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc., 528 U.S. 167, 189 (2000) (emphasis added) (quoting United States v. Concentrated Phosphate Exp. Ass'n, 393 U.S. 199, 203 (1968)).

50. Porter v. Bowen, 496 F.3d 1009, 1027 (9th Cir. 2007).

51. *Id.* at 1016.

52. *Id.* at 1017.

53. *Id.*

54. *See* Fikre v. Federal Bureau of Investigation, 904 F.3d 1033, 1035 (9th Cir. 2018).

55. *Id.* at 1037.

56. *Id.* at 1040-41.

57. *See* Fikre v. Federal Bureau of Investigation, 904 F.3d 1033, 1037 (9th Cir. 2018) (explaining that, when asserting mootness due to voluntary cessation, the government must "demonstrate that the change in its behavior is 'entrenched' or 'permanent'") (quoting McCormack v. Herzog, 788 F.3d 1017, 1025 (9th Cir. 2015)).

III. COURT'S DECISION

In the noted case, the Ninth Circuit followed the guidance set forth by the Supreme Court in *Friends of the Earth, Inc. v. Laidlaw Env't Services* in determining if the case was moot and followed Justice Kennedy's concurrence in *Rapanos v. United States* in determining if the EPA had jurisdictional authority over the Sacketts's wetlands.[58] First, the court held that the EPA's withdrawal of the CWA compliance order did not make the case.[59] Second, the court concluded that the district court acted within its discretion by refusing to strike a wetlands ecologist's memo from the administrative record that postdated the compliance order in the administrative record.[60] Third, the court asserted that substantial evidence supported the EPA's conclusion that the lot contained wetlands.[61] Finally, the court held that substantial evidence supported the EPA's conclusion that wetlands shared significant nexus with lakes.[62]

First, the court concluded that the EPA's withdrawal of the Clean Water Act compliance order was not enough to moot the case.[63] The court looked to the decision in *Porter v. Bowen* in deciding whether the EPA met its burden of establishing that its letter withdrawing the amended compliance order mooted the case.[64] The court reasoned that the EPA's stated intent not to enforce the compliance order was not "final agency action" and thus did not bar them from reissuing the order under new leadership.[65] Furthermore, the court rejected the EPA's argument that the Sacketts received full relief by the withdrawal of the compliance order.[66] The court reasoned that if they were to find the case moot, the Sacketts would be stuck in the same situation they had been in the previous thirteen years, fearing that the agency would reissue the compliance order.[67] The court continued by rejecting the EPA's presumption of good faith argument based on a previous Ninth Circuit decision, *Fikre v. Federal Bureau of Investigation*.[68] Based on *Fikre*, the court reasoned that, although government agencies benefit from a presumption of good faith, they "must

58. Sackett v. U.S. Env't Prot. Agency, 8 F.4th 1075, 1083, 1091. (9th Cir. 2021).
59. *Id.* at 1079.
60. *Id.* at 1086.
61. *Id.* at 1091.
62. *Id.* at 1092.
63. *Id.* at 1083.
64. *Id.*
65. *Id.* at 1083-84.
66. *Id.* at 1084.
67. *Id.*
68. *Id.* at 1085.

still demonstrate that the change in [their] behavior is 'entrenched' or 'permanent' to moot a case."[69]

Next, the court examined the district court's decision to include an ecologist's memorandum finding that the Sacketts's land was wetlands.[70] The court reasoned that the district court did not abuse its discretion in permitting the memo to be included in the administrative record since the memo only demonstrated what the agency officials had previously concluded.[71] The court relied on *Thompson v. United States Department of Labor*[72] in making this conclusion, noting that the memo conveyed "the same information that the agency considered and relied on in issuing the amended compliance order."[73]

Then, the court relied upon Justice Kennedy's concurrence in *Rapanos* to affirm that the Sacketts's lot contained wetlands.[74] The court reasoned that Justice Kennedy's significant nexus inquiry was the correct legal standard, based on previous Ninth Circuit precedent, in which the court employed the "narrowest ground" approach.[75] Under this approach, the Court affirmed that the "controlling holding of a fractured decision is 'the narrowest ground to which a majority of the Justices would assent if forced to choose in almost all cases"[76] and was adopted by the Seventh Circuit in *Gerke* to determine that Justice Kennedy's *Rapanos* concurrence governed.[77] The court rejected the Sacketts's argument that a Ninth Circuit decision in *Davis* overturned *Healdsburg*.[78] The court reasoned that in the Ninth Circuit, "a three-judge panel may abandon the holding of a prior panel only when intervening higher authority is 'clearly irreconcilable' with that earlier panel opinion."[79]

Finally, the court, based on Justice Kennedy's concurrence, found substantial evidence that the Sacketts's wetlands shared a "significant nexus with Priest Lake."[80] Justice Kennedy's inquiry asks whether the

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69. *Id.* (quoting Fikre v. Federal Bureau of Investigation, 904 F.3d 1033, 1037 (9th Cir. 2018)).
70. Sackett v. U.S. Env't Prot. Agency, 8 F.4th 1075, 1086 (9th Cir. 2021).
71. *Id.*
72. 885 F.2d 551, 555 (9th Cir. 1989).
73. *Sackett*, 8 F.4th at 1087.
74. *Id.* at 1088.
75. Northern California River Watch v. City of Healdsburg, 496 F.3d 993, 999-1000 (9th Cir. 2007).
76. *Id.* at 999.
77. *See* United States v. Gerke Excavating, Inc., 464 F.3d 723, 725 (7th Cir. 2006).
78. Sackett v. U.S. Env't Prot. Agency, 8 F.4th 1075, 1089 (9th Cir. 2021).
79. *Id.*
80. *Id.* at 1092.

wetlands in question have a "significant nexus" to a navigable body where they could affect that body's water quality.[81] Following the regulatory definition in tandem with the significant nexus inquiry, the court found that the lot's wetlands ran adjacent to a tributary feeding directly into the navigable waters of the lake.[82] The court found that the wetlands on the property filter into an unnamed tributary and Kalispell Creek that flowed into the lake.[83] Thus, the Ninth Circuit found that the "wetlands provide important ecological and water quality benefits" to Priest Lake.[84]

IV. ANALYSIS

The court's decision is a significant step in further determining the EPA's regulatory jurisdiction over water pollution from property adjacent to waters of the United States. In using the significant nexus inquiry from *Rapanos*, the Ninth Circuit gives credence to a regulatory standard that could shape the future of water pollution management. First, the court's use of the significant nexus inquiry widens the already open door for future courts to have a tool at their disposal in deciding water pollution cases. Second, the court's holding has the capability to give further legal backing to the EPA to enforce compliance orders on properties containing wetlands.

The court's application of Justice Kennedy's significant nexus inquiry as the legal standard is consistent with prior jurisprudence and advances the law on fractured decisions in a slight but notable way. First, following their own decision from *Healdsburg*, the court bolstered the significant nexus test's place as the right measure to conduct water pollution jurisdictional challenges. In doing so, the court recognized that the "narrowest ground to which a majority of the Justices would assent"[85] remains the way the Ninth Circuit deals with fractured decisions like in *Rapanos*. As noted, the narrowest ground inquiry has "baffled and divided the lower courts."[86] Here, however, the court sets out a path to cease any confusion for lower courts that is also consistent with the Seventh Circuit's own practices.[87] The reinforcement of the narrowest ground approach

81. *Id.* at 1088 (quoting Rapanos v. United States, 547 U.S. 715, 755 (2006)).
82. *Id.* at 1092.
83. *Id.*
84. Sackett v. U.S. Env't Prot. Agency, 8 F.4th 1075, 1093 (9th Cir. 2021).
85. Northern California River Watch v. City of Healdsburg, 496 F.3d 993, 999 (9th Cir. 2007).
86. United States v. Davis, 825 F.3d 1014, 1021 (9th Cir. 2016) (en banc).
87. *See* United States v. Gerke Excavating, Inc., 464 F.3d 723, 724 (7th Cir. 2006).

strengthens the significant nexus inquiry as the bright line test for contested EPA jurisdiction over wetlands.

The court's holding that the Sacketts's property contained wetlands subject to the EPA's jurisdiction despite the EPA's withdrawal of the compliance order is a significant step in the bolstering of the agency's authority. The court's decision not to moot the case following this withdrawal afforded the court the opportunity to decide the case on its merits. The EPA is tasked with the critical responsibility of keeping pollutants out of the nation's waterways and in doing so, must rely on not only statutes, but also case law in supporting their jurisdictional authority. Had the Ninth Circuit mooted this case, the EPA would be worse off for not having a holding on which to base future compliance orders. Further, the court's holding is significant for maritime companies operating onshore properties near wetlands and navigable waters. Without proper permits, these companies would be destined to the same fate as the Sacketts under the CWA.[88] As such, this holding doubles as both a playbook for companies and individuals developing land near navigable bodies of water and a tool to regulate those in noncompliance.

Aside from how the court reached its holding, the decision is consistent with the purpose of the CWA. Congress's intention with the CWA is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[89] Although the EPA withdrew their compliance order before the conclusion of this case, the court correctly maintained the jurisdictional authority of the EPA over the wetlands in question. In doing so, the court emboldened the EPA to continue the work the agency was established to do. Pollution and pollution control are hot button issues in today's world and as such, the significant nexus inquiry is an effective tool for courts to use in determining if a certain property will have an adverse effect on the nation's waters.

V. CONCLUSION

The CWA regulation of wetlands near "waters of the United States"[90] ultimately falls into the hands of the EPA.[91] With that authority, the EPA must have clear and effective guidance from courts when challenges present themselves on the enforcement of the CWA. In the noted case, the

88. 33 U.S.C. § 1311(a).
89. 33 U.S.C. § 1251(a).
90. 33 U.S.C. § 1344(g)(1).
91. 33 U.S.C. § 1361(f).

court gives the EPA and property owners just that.[92] In basing their holding on Justice Kennedy's significant nexus inquiry, the court lays out that the wetlands themselves are in close connection to a navigable body of water as to "significantly affect the chemical, physical, and biological integrity of other covered waters" are subject to the EPA's jurisdiction.[93] Moreover, the court came to this conclusion on the merits of property in contest rather than through mooting a case thirteen years in the making based on a last minute withdrawal of the compliance order by the EPA. In doing so, the court expanded the EPA's jurisdictional authority while giving deference to prior Seventh Circuit and Ninth Circuit jurisprudence.

The legal landscape surrounding CWA enforcement is always developing. However, the current legal standard in jurisdictional challenges of regulating wetlands stands firm in the Kennedy concurrence from *Rapanos*.[94] This standard, relied on by multiple circuits and fostered by the Supreme Court,[95] gives future courts a roadmap that they can use to assess facts before them. Water pollution matters are of vital importance to the health and safety of not only humans but of animals and the environment. Thus, environmental regulation must come with clear cut rules and sound case law so that the EPA may effectively combat the ill effects of pollution. In sum, the Ninth Circuit's decision places the EPA in a better position to regulate unlawful activity while also embracing a bright line test that has the possibility to reduce confusion in the future regarding the EPA's jurisdictional authority.

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92. Sackett v. U.S. Env't Prot. Agency, 8 F.4th 1075, 1091-92 (9th Cir. 2021).
93. *Id.* at 1088.
94. Rapanos v. United States, 547 U.S. 715, 779 (2006).
95. United States v. Gerke Excavating, Inc., 464 F.3d 723, 724 (7th Cir. 2006).

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