WATER (including WOTUS)

Sackett v. U.S. Environmental Protection Agency

The U.S. Supreme Court addressed the definition of "waters of the United States" (WOTUS) under the Clean Water Act (CWA) in *Sackett v. EPA*. The geographic limits of the EPA's and Corps of Engineers' authority to regulate streams, wetlands, and other waterbodies under the CWA depends upon the definition of WOTUS. The Supreme Court's 2006 plurality decision in *Rapanos v. United States*,[1] resulted in two different standards—Kennedy's "significant nexus" standard and Scalia's "relatively permanent" standard. In the most recent rulemakings to define WOTUS, the Trump administration adopted the "relatively permanent" test in the 2020 Navigable Waters Protection Rule, while the Biden administration based its 2023 rule on both relative permanence and the "significant nexus" test.

The Sackett dispute began in 2004 when EPA asserted jurisdiction over wetlands on their property, reasoning that the wetlands were near a ditch that fed into a creek that in turn fed into a navigable, intrastate lake. According to EPA, the wetlands on the Sackett's property was "adjacent" to an unnamed tributary on the other side of a 30 foot road, and relied on a "significant nexus" to a nearby wetlands complex.

In *Sackett*, all nine justices agreed EPA overstepped its authority in asserting jurisdiction over the Sackett's property, and unanimously rejected the "significant nexus" standard. However, the justices disagreed over the standard for asserting jurisdiction over an adjacent wetland. Justice Alito, writing for a majority of 5, essentially adopted the "relatively permanent" test. Thus, in order to assert jurisdiction, the agency must first establish that the adjacent water body is a "relatively permanent body of water connected to traditional interstate navigable waters," and second, establish "that the wetland has a continuous surface connection with that water, making it difficult to determine where the 'water' ends and the 'wetland' begins." In other words, "the CWA extends to only wetlands that are as a practical matter indistinguishable from waters of the United States." However, it recognized that "temporary interruptions" may occur due to "phenomena like low tides or dry spells." The decision reflects a growing trend in statutory interpretation of requiring clear congressional authorizations.

Even though the 2023 WOTUS rule was not technically before the Court, it effectively struck down the rule by refusing to defer to EPA's interpretation of WOTUS based upon the "significant nexus" test. Currently, there are three pending federal cases challenging the 2023 WOTUS rule, and rulings in those cases have enjoined its application in 27 states.

The first injunction against the 2023 WOTUS rule occurred on March 19, 2023 in *State of Texas v. EPA*, the day before the rule went into effect. In that ruling the court determined that the plaintiffs were likely to succeed on the merits of their claim that the rule exceeded EPA's authority under the CWA, the rule violates the Tenth Amendment which delegates the power to regulate land and water resources to the states, and that Congress had not given EPA clear authority to adopt the rule. According to this decision, the 2023 rule "ebbs beyond" the

[1] 547 U.S. 715 (2006).

significant nexus test established by Kennedy, and it read navigability out of the WOTUS definition. The court further determined that unless the rule were enjoined, the plaintiffs would suffer irreparable harm by taking on costs to comply with the new rule, and that the harm outweighed any harm to defendants because plaintiffs would have to spend unrecoverable costs to comply while defendants would suffer no harm waiting for the litigation to proceed. Finally, the court ruled that the injunction was in the public interest because there was little public interest or efficiency gained by implementing a rule likely to be invalidated. The injunction applied to Texas and Idaho.

A second injunction issued on April 12, 2023 in *State of West Virginia v. EPA*, shortly after President Biden vetoed a bipartisan resolution under the Congressional Review Act to block the 2023 WOTUS rule on April 6, 2023. The analysis in this case offered a similar analysis to the *Texas* decision as to the likelihood of success on the merits, and also found that the 2023 WOTUS rule raised "a litany of other statutory and constitutional concerns." In determining irreparable harm, the court relied on numerous infrastructure projects that would incur additional costs if the states were required to make a jurisdictional wetlands determination under the 2023 WOTUS rule. Similar to the *Texas* decision, the court found defendants would suffer no actual harm by enjoining the rule, and that it would be in the public interest to avoid enforcement of a rule likely to be found invalid. The injunction applies to 24 states, specifically: Alabama, Alaska, Arkansas, Florida, Georgia, Indiana, Iowa, Kansas, Louisiana, Mississippi, Missouri, Montana, Nebraska, New Hampshire, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Utah, Virginia, West Virginia, and Wyoming.

In the third case, *Commonwealth of Kentucky v. EPA*, the district court not only declined to issue an injunction, but also dismissed the case as not ripe for review. On appeal, May 10, 2023, the Sixth Circuit found that the district court erred in dismissing the case, and granted the plaintiffs' motion for an injunction pending appeal barring enforcement of the 2023 WOTUS rule in Kentucky and against the Chamber of Commerce's members. Then on July 3, 2023, the Circuit issued an order at DOJ's request holding the appeal in abeyance pending a new WOTUS rule to be issued by September 1, 2023.

Bayou City Waterkeeper v. U.S. Army Corps of Engineers,[2] involved a challenge to a 2019 jurisdictional determination by the Corps that a property contained 3.03 acres of WOTUS, and plaintiff argued that an additional 8.77 acres of wetlands should have been recognized as WOTUS. The district court found that the plaintiff challenged the weight the Corps gave to the evidence before it. The court held that "the Corps applied its regulations, reviewed the relevant data, conducted its own independent investigations, and reasonably concluded that the property contained 3.03 acres of waters" subject to the CWA. In reaching its conclusion, the court clarified its role as evaluating whether the Corps considered the relevant factors and whether there had been a clear error in judgment.

[2] No. 3:20-cv-00255, 2022 WL 4084427 (S.D. Tex. Sept. 6, 2022).

Similarly, in *O'Reilly v. U.S. Army Corps of Engineers*,[3] the plaintiff challenged the Corps' approval of two Section 404 dredge-and-fill permits related to 40 acres of forested wetlands. The plaintiff asserted that the Corps failed to consider the cumulative impacts of these two permits "in light of all of the other permits issued in that region." The court ultimately found that the Corps reasonably approved the permits after reviewing all evidence before it as required by the CWA, including mitigation and potential alternatives.

In *Red Lake Band of Chippewa Indians v. U.S. Army Corps of Engineers*,[4] Plaintiffs asserted that the Corps' decision to issue permits for replacement of pipeline sections violated the CWA. The court found that the Corps performed an independent assessment of the project's need and that its discussion of alternatives "was reasonable and appropriate under the circumstances." Further, in order to sufficiently evaluate the potential degradation of WOTUS, the Corps was not required to assess potential oil spills that may result from the project, and the Corps appropriately weighed public interest factors based on the facts. Therefore, the court granted summary judgment in the Corps' favor on the CWA claims.

AIR

A. New Source Review, Prevention of Significant Deterioration, New Source Performance Standards & Title V Permitting

Boerne to Bergheim Coalition for Clean Environment v. Texas Commission on Environmental Quality[5] involved TCEQ's approval of a standard permit for a concrete batch plant with enhanced controls (CBPEC) located approximately 2,000 feet from a school. In the decision, the Court of Appeals for the Eighth District of Texas affirmed a trial court's judgment upholding TCEQ's approval. Nineteen specific requirements must be met for a Standard Permit for CBPEC to be issued.[6] In addition, the TCEQ is required to "consider possible adverse short-term or long-term effects of air contaminants or nuisance odors from the facility on the individuals attending the school facilities" for permits to construct a facility within 3,000 feet of a school.[7] The appeal focused upon whether this provision applied to Standard Permits for CBPEC. In upholding TCEQ's approval of the permit, the court concluded that the nineteen specific requirements sufficiently took impacts to the school into account.

Voigt v. EPA[8] involved EPA's renewal of a Title V operating permit issued by the North Dakota Department of Health (NDDOH) for a nearby coal-fired electric generating plant supplied by an adjacent coal-mine. The Voigts filed a petition with EPA contesting a permit proposed for a generating station adjacent to their ranch, asserting that the generating station and a nearby mine supplying the generating station via a conveyer belt between the two constituted a single source, and that the proposed permit did not properly account for emissions from the mine. EPA denied the Voigts' petition. On appeal, the Eighth Circuit upheld EPA's decision, finding that the Voigts

[3] No. 21-1027, 2022 WL 3356347 (E.D. La. Aug. 15, 2022).
[4] No. 20-3817, No. 21-0189, 2022 WL 5434208 (D.C. Cir. Oct. 7, 2022).
[5] 657 S.W.3d 382 (Tex. App. 2022).
[6] TEX. HEALTH & SAFETY CODE ANN. § 382.05198.
[7] TEX. HEALTH & SAFETY CODE ANN. § 382.052.
[8] 46 F.4th 895 (8th Cir. 2022).

failed to demonstrate that the two facilities were a single source. The court found EPA reasonably concluded that Voigts failed to meet their burden by not providing "adequate references, legal analysis, or evidence in support of [their] general assertions," and that the Voigts failed to preserve the issue regarding the lack of notice and comment by not identifying that as a basis for an objection in the 2020 permit.

In *Rise St. James v. Louisiana Department of Environmental Quality*,[9] the court reversed the Louisiana Department of Environmental Quality's (LDEQ) Prevention of Significant Deterioration (PSD) permit and vacated all permits that together would have allowed for the construction of a new chemical manufacturing complex. Plaintiffs alleged the proposed complex would have emitted air pollutants, harming the adjacent town of Welcome, with a 99% percent minority population. The court found LDEQ was not entitled to deference in interpreting its regulations where the state regulations merely transposed the statutory text of the federal Clean Air Act (CAA), and that that LDEQ should have denied the permit application because modeling for the proposed complex showed it would contribute to violations of the CAA's National Ambient Air Quality Standards (NAAQS). In addition, the court found that LDEQ's environmental justice analysis was arbitrary and capricious because the cost/benefit analysis gave insufficient weight to environmental costs, and did not comply with the agency's public trustee duties enshrined in the Louisiana Constitution. The court then held the environmental justice analysis was mandatory under a Louisiana Supreme Court decision,[10] and that "'individualized consideration' . . . is uniquely important when addressing environmental justice issues presented by a project," such that an agency cannot rely on region wide emission trends "to dismiss local concerns and localized disproportionality."

B. Title II - Mobile Sources & Fuel

Suncor Energy (U.S.A.), Inc. v. EPA,[11] involved a challenge to EPA's denial of petitions for hardship relief under the Renewable Fuel Standard (RSF) Program for the 2018 compliance year for two refineries. In denying the petitions, EPA concluded the refineries' operations were sufficiently integrated and their throughputs should be aggregated, putting them over the 75,000-bpd threshold, and therefore, ineligible for the exemption. The Tenth Circuit granted a petition for review, vacated EPA's decision, and remanded to the agency for further proceedings. The court noted that EPA's failure to consider its definition of "facility" contained in the "Definitions" section of its RFS regulations was "not in accordance with law." Despite recognizing that "this reason alone would justify" reversal and remand, the Court went on to address whether EPA's interpretation of "refinery" was arbitrary and capricious. Then, applying *Skidmore* deference, the court concluded that EPA's decision lacked sufficient clarity. On remand, the court directed EPA to apply the ignored definition of "facility" or explain why that definition is not relevant, and to provide guidance on its analysis of the degree of integration between the refineries while avoiding considering the company's management structure and

[9] Docket No. 694,029, 19th Judicial District Court Parish of East Baton Rouge (Sept. 8, 2022).
[10] *Save Ourselves, Inc. v. La. Env't Control Comm'n*, 452 So.2d 1152, 1159 (La. 1984)
[11] 50 F.4th 1339 (10th Cir. 2022).

public statements, unless shown to be consistent with the statutory and regulatory definitions of "refinery."

ENERGY & NATURAL RESOURCES

On August 17, 2022, the Fifth Circuit vacated a district court injunction in *Louisiana v. Biden*, a case brought by 13 states challenging the Biden administration's moratorium on federal leasing. The Fifth Circuit stated that the lower court failed to define its terms with sufficient precision, and therefore could not meet the requirements of Federal Rule of Civil Procedure 65(d). In relevant part, Rule 65(d) states that an injunction must "describe in reasonable detail . . . the act or acts restrained," and remanded the case for further proceedings consistent with its order. The following day, on remand, the district court issued a new permanent injunction.[12] In addressing the Fifth Circuit's statement that the original order—and the injunction therein—was impermissibly vague, the district court clarified that the "pause" at issue "referred to the temporary stop" required by Executive Order 14008. The district court further stated that DOI advanced an "unwritten policy to 'stop' the onshore and offshore leasing process [under OCSLA and the MLA] by calling the stopping a 'pause.'" In sum, the district court rejected DOI's assertion that it had not adopted a "blanket policy" pausing or stopping leasing, reasoning that the evidence did not support the statement. The court concluded "[t]he Executive Branch does not have the authority to stop the process under the Mineral Leasing Act (MLA) or the Outer Continental Shelf Lands Act (OCSLA) while a review is taking place," finding that the "power to pause and/or stop the federal leasing process lies solely with Congress." Therefore, "Section 208 of EO 14008 is ultra vires . . . and in violation of the OCSLA and the MLA." The states also prevailed on their eight Administrative Procedure Act (APA) claims for similar reasons. Specifically, while DOI enjoys some discretionary authority to cancel or suspend specific lease sales, it could not do so in order to comply with the comprehensive review laid forth in Executive Order 14008—because any such action is an unconstitutional exercise of legislative power by the executive branch. Moreover, the actions related to Lease Sales 257 and 258—as well as the onshore quarterly lease sales for March and April 2021—were arbitrary and capricious because the agency failed to provide a rational explanation. Ultimately, the court issued a new injunction limited to any lease sales canceled or postponed prior to March 24, 2021 (the date upon which the States filed their suit), but denied any relief for sales thereafter.

On September 2, 2022, the federal district court in Wyoming in *Western Energy Alliance v. Biden*, issued a judgment finding that by pausing the 2021 first quarter lease sales, DOI did not violate the MLA. Citing to *Louisiana v. Biden*, the Wyoming district court found the parties lacked standing to challenge any agency action that occurred after the lawsuit was filed. In this matter, industry plaintiffs filed suit on January 27, 2021, the day President Biden signed Executive Order 14008 into law, while Wyoming filed on March 24, 2021, *after* DOI had begun cancelling and postponing quarterly lease sales in response to the executive order. The difference in filing dates proved crucial, because the district court ruled that Wyoming has standing to challenge only the 2021 first-quarter lease sale postponements, while industry petitioners lack standing to challenge both the first and second-quarter lease sale postponements and

[12] Louisiana v. Biden, No. 2:21-cv-00778, slip op. at 1 (W.D. La. Aug. 18, 2022).

cancellations. In turning to the sole remaining issue—Wyoming's challenge to first-quarter lease sale postponements under the MLA—the court found that the administrative record supported postponing the lease sales to ensure compliance with the National Environmental Policy Act (NEPA). The court further reasoned that the postponements did not violate the MLA's quarterly leasing requirement because the involved lands were not "available" due to the determination by the Assistant Secretary for Land and Mineral Management that additional environmental review, and possible revision of the environmental analysis, was necessary to ensure compliance with NEPA. Thus, "the federal lands tentatively set for lease through [the first quarter lease sales] had not satisfied all statutory requirements." Also, despite the court's holding in *Louisiana v. Biden*, the Wyoming court found that the administrative record did not support the conclusion that the postponements resulted from a decision "to stop holding all quarterly lease sales pursuant to EO 14008," or any sort of "blanket policy" to stop leasing. Similarly, the court also found that DOI was within its discretion to postpone the lease sales so that it could ensure NEPA compliance, and that this stated reason proved sufficient to establish that DOI's decision was not arbitrary, capricious or otherwise an abuse of discretion. The court then rejected all remaining statutory challenges on similar grounds.

On April 28, 2023, the DC Circuit in *Friends of Earth v. Haaland* vacated the district court's January 27, 2022 order vacating offshore Lease Sale 257, and remanded the case with instructions to dismiss as moot. The district court had previously found fault with DOI's analysis of climate impacts under NEPA, and vacated Lease Sale 257 in the Gulf of Mexico that resulted in 308 tracts being leases for a total of nearly $200 million. DOI did not appeal, but the American Petroleum Institute (API) and the State of Louisiana both appealed the decision in February 2022. On March 8, 2022, the D.C. Circuit denied API's emergency motion to expedite the appeal because all parties agreed the DOI could still award leases pursuant to the lease sale if the circuit court reversed the district court's vacatur of the lease sale. While that decision was on appeal, Congress passed the Inflation Reduction Act on August 16, 2022, which included provisions that DOI accept the highest bids from Lease Sale 257, which DOI accepted on September 14, 2022. Subsequently, DOI sent lease forms to the winning bidders so that the bidders could execute and return these forms. The following day DOI notified the D.C. Circuit of the lease issuances pursuant to the IRA. DOI, API and Louisiana then moved to dismiss the case on mootness grounds on September 16, 2022, while environmental appellees filed their merits brief the same day asserting DOI was still required to conduct additional NEPA analysis. Ultimately, the DC Circuit rejected the environmental group's arguments that a live controversy remained, and followed the "established practice" of vacating a district court decision and remand with instructions to dismiss when a legislative act moots a case.

Gulf Restoration Network v. Haaland, involved another case brought by environmental groups seeking to throw out 2018 Lease Sales 250 and 251, which encompassed more than 150 million acres in the Gulf of Mexico. On August 30, 2022, the DC Circuit determined that DOI needs to more closely examine oil spills and other safety risks from auctioning off parts of the Gulf of Mexico for offshore drilling before doing so. However, the D.C. Circuit rejected environmentalists' arguments that DOI failed to properly evaluate the potential benefits of postponing these auctions and unreasonably refused to consider possible future changes to safety

regulations. Overall, the court found that DOI's mistaken NEPA analysis could be corrected, and that even partial injunctive relief would be disruptive as the lessees would risk forfeiting their leases if they cannot timely meet certain obligations. The D.C. Circuit, therefore, remanded the case to the district court with instructions to remand the decision back to DOI for further consideration.

ENDANGERED SPECIES

Maine Lobstermen's Association, Inc. v. National Marine Fisheries Service,[13] involved a challenge to a BiOp issued by NMFS, that plaintiffs argued made scientific errors that caused it to overestimate the lobster fishery's effects on the North Atlantic right whale (NARW). The district court ruled in favor of NMFS, finding that NMFS's judgment calls in favor of the NARW did not violate the requirement of using the best data available and that NMFS adequately justified allocations of NARW entanglements with fishing gear. NMFS considered the data available and reasonably explained its scientific conclusions by supplementing the data in cases where ambiguous or incomplete information required the agency to side with a judgement that would lead to conclusions of higher, rather than lower, risk to endangered or threatened species. NMFS "did not use a substantive presumption to displace scientific judgment." Instead, NMFS purported only to resolve uncertainty when the best science left it a range of possible options. Therefore, the agency's approach was rational and passed muster under the arbitrary-and-capricious standards of review. As to the entanglement argument, the court determined that NMFS appropriately concluded that NARW were disproportionately impacted due to fishing gear. The court noted that although the plaintiffs objected to NMFS's approach in reaching this conclusion, plaintiffs were "unable to identify specific reliable data that the agency overlooked or other material gaps in its reasoning."

In Center for Biological Diversity v. NOAA Fisheries,[14] environmental plaintiffs challenged the NMFS' issuance of a BiOp on the Coast Guard action of "codifying shipping lanes that vessels use to approach ports" in California, arguing that NMFS failed to "properly evaluate the impacts of shipping lane designations on endangered whales and sea turtles" and provide an ITS with the BiOp. The court disagreed with NMFS' assertion that incidental take was not reasonably certain to occur, and held that NMFS' decision to not issue an ITS was arbitrary and capricious. The court took issue with NMFS' assumption that there would be fewer ship strikes with designated lanes as compared to a hypothetical no-lane scenario to reach the BiOp's conclusion that no ITS was necessary. Therefore, plaintiffs prevailed on summary judgment on the grounds that an ITS should have been issued and the court vacated the BiOp.

Center for Food Safety v. Regan,[15] concerned EPA's amendments to the registration for the pesticide sulfoxaflor. Plaintiffs alleged a violation of the ESA due to EPA's failure to consult under section 7 when making the decision. EPA defense rested upon an argument that it lacked the resources to consult. The Ninth Circuit rejected this argument stating that "EPA cannot flout the will of Congress—and of the people—just because it thinks it is too busy or understaffed."

[13] No. 21-2509 (JEB), 2022 WL 4392642 (D.D.C. Sept. 8, 2022).
[14] No. 4:21-cv-00345-KAW, 2022 U.S. Dist. LEXIS 220920, at *1 (N.D. Cal. Dec. 7, 2022).
[15] 56 F.4th 648 (9th Cir. 2022)

The court found EPA violated the ESA by failing to first determine whether the registration of sulfoxaflor may affect endangered species, and if so, to consult with the appropriate wildlife agencies. However, the court "reluctantly" remanded without vacatur for EPA to complete section 7 consultation within 180 days, stating, "despite our serious concern that EPA has continued to flout the ESA, we ultimately conclude that EPA could maintain the same registration decision once it makes an effects determination and engages in any required consultation."

Center for Biological Diversity v. Little,[16] involved a diverse group of environmental and animal welfare groups alleging that Idaho officials implemented a regulatory scheme to trap and snare gray wolves that would ultimately result in unlawful take of grizzly bears and Canada lynx in violation of section 9. The Idaho federal district court denied the plaintiffs' motion for a temporary restraining order and preliminary injunction. The court held that plaintiffs, were not likely to succeed on the merits of their claim, and noted that the plaintiff's reliance on these two incidents involving grizzly bears did not amount to enough "evidence that either bear was snared by a lawful wolf snare or trap set in compliance with Idaho's regulatory scheme." The appliable test required plaintiffs to show a likelihood of harm, not just a possibility of harm to an endangered species. The plaintiffs failed to meet this requirement because they did not establish on the record that the lawful placement of wolf traps and snares was reasonably likely to result in the future take of grizzly bears.

[16] No. 1:21-CV-00479-CWD, 2022 WL 3585727 (D. Idaho Aug. 22, 2022).