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Center for Agricultural and Shale Law

U.S. Supreme Court Deep Dive: Searching for Clarity in WOTUS and the Dormant Commerce Clause

2023 Pennsylvania Farm Show I Agricultural Law Symposium

Presented by

Chloe Marie, Research Specialist

Audry Thompson, Staff Attorney

January 10, 2023, at 2:15pm (EST)

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The Waters of the United States
Sackett v. EPA

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U.S. Supreme Court's prior interpretations of Clean Water Act (CWA) jurisdiction

- ***United States v. Riverside Bayview Homes, Inc.* 474 U.S. 121 (1985)**
  - The U.S. Supreme Court found the Corps' conclusion that "adjacent wetlands are inseparably bound up with the 'waters' of the United States" reasonable.
- ***Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001)**
  - The U.S. Supreme Court held that nonnavigable, isolated, intrastate wetlands that serve as migratory bird habitats do not fall under the definition of "waters" of the United States; "the term 'navigable' has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made."
- ***Rapanos v. United States,* 574 U.S. 715 (2006)**
  - In a plurality opinion, U.S. Supreme Court Justices expressed their views on whether Clean Water Act jurisdiction includes "adjacent" wetlands and could not agree on a ruling standard.

Different administration, different definition

- **Under the Obama administration**
  - The U.S. EPA and the Corps published in June 2015 the *Clean Water Rule: Definition of Waters of the United States* with an effective date set on August 28, 2015.
- **Under the Trump administration**
  - President Donald Trump signed in February 2017 Executive Order 13778, directing review and revision or repeal of the Clean Water Rule.
  - The U.S. EPA and the Corps officially repealed in September 2019 the Clean Water Rule
  - The U.S. EPA and the Corps published in April 2020 *the Navigable Waters Protection Rule: Definition of Waters of the United States*, with an effective date set on June 22, 2020.
- **Under the Biden administration**
  - President Joe Biden signed in January 2021 Executive Order 13990, directing agency heads to immediately review the 2020 Navigable Waters Protection Rule
  - The U.S. EPA and the Corps published in December 2021 a proposed rule, titled *Revised Definition of Waters of the United States* consistent with the pre-2015 regulatory regime.

The *Rapanos* Case and two standard approaches

- **Justice Antonin Scalia's Surface-Water-Connection Test**
  - In a four-justice plurality opinion, Justice Scalia held that "waters" of the United States include "**only relatively permanent, standing or flowing bodies of water**, and does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall; **only those wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right**, so that there is no clear demarcation between 'waters' and wetlands, are 'adjacent to' such waters and covered by the CWA …"

- **Justice Anthony Kennedy's "Significant Nexus" Test**
  - In a concurring opinion, Justice Kennedy found that wetlands are "waters of the United States" when they "**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'."

Sackett v. EPA – Historical legal background

April 28, 2008 – The Sacketts filed a lawsuit against U.S. EPA, arguing that wetlands located on their property lot are not subject to the Clean Water Act.

August 7, 2008 – The federal district court sided in favor of EPA, holding that the property lot contained jurisdictional wetlands.

September 17, 2010 – The Ninth Circuit Court affirmed the federal district court's decision.

March 21, 2012 – The U.S. Supreme Court reversed the Ninth Circuit Court's judgment and remanded the case for further proceedings.

March 31, 2019 – On remand, the federal district court concluded that wetlands on the Sacketts' property were subject to EPA jurisdiction under the Clean Water after finding that the Sacketts' property, adjacent tributary, and the similarly situated wetlands have a "significant nexus" to Priest Lake.

August 16, 2021 – The Ninth Circuit Court affirmed the federal district court's decision in favor of EPA, relying upon the "significant nexus" test.

September 22, 2021 – The Sacketts filed a petition for writ of certiorari asking the U.S. Supreme Court to revisit the *Rapanos* case and provide a clear controlling rule of law governing the CWA regulation of wetlands. The U.S. Supreme Court agreed to hear the case and answer whether the "significant nexus" test is the right method used when it comes to wetlands.

Sackett v. EPA, U.S. Supreme Court, No. 21-454

Petitioners' arguments; Petitioners' brief on the merits (April 6, 2022)

- A proposed two-step approach for determining EPA's jurisdictional authority over wetlands
  - Step 1: "Is there a continuous surface-water connection to a 'water' such that it is difficult to say where the 'water' ends and the wetland begins?"
  - Step 2: "Is the wetland among 'the waters of the United States,' i.e., subject to Congress' authority over the channels of commerce?"
- The "significant nexus" test expands the jurisdictional scope of the Clean Water Act beyond the limits intended by Congress under the Commerce Clause, and "should be abandoned."
- Wetlands may be governed by the Clean Water Act only if there is a direct, physical connection with waters of the United States.
- The "significant nexus" test allows the federal government to regulate "any and all waters and wetlands" while Congress never show its intent to regulate beyond its channels of commerce power; thus, raising Tenth Amendment concerns.
- The "significant nexus" test fails the property and due process rights of private landowners due to its vagueness.

Sackett v. EPA, U.S. Supreme Court, No. 21-454

Respondents' arguments; Brief for the Respondents (June 10, 2022)

- The "waters of the United States" definition includes adjacent wetlands since the Clean Water 1977 amendments.
- The mere presence of a natural or artificial barrier does not prevent the regulation of adjacent wetlands under the Clean Water Act as long as there is a "significant nexus" between the wetland and the "water."
  - "Wetlands play an essential role in protecting the chemical, physical, and biological integrity of neighboring waterways, including by filtering pollutants, storing water, and providing floor control. Leaving those wetlands unprotected would thwart the CWA's comprehensive scheme and seriously compromise its protection of traditional navigable waters."
- Petitioners' "continuous-surface-connection requirement" for adjacent wetlands is too "rigid" and could lead to "arbitrary and illogical results"
  - "… it would categorically exclude wetlands separated from covered waters by a berm, dike, sand dune, or other natural or manmade barrier, even if they are closely connected by subsurface flow or periodic floods – and regardless of such wetland's ecological importance to covered waters nearby and downstream."

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Sackett v. EPA, U.S. Supreme Court, No. 21-454

Oral arguments held on October 3, 2022; transcript & audio files

CHIEF JUSTICE ROBERTS: Okay. So they know it's not a bright-line rule, but they have to figure out -- if a certain amount of whatever kind of tracing thing you use is deposited in the wetlands, they then have to figure out if that makes it all the way to the lake, no matter how far away it is.

JUSTICE KAVANAUGH: And then, I mean, to state the obvious, that negligent provision is a red flag, so what -- what do you have to

JUSTICE SOTOMAYOR: Just one last question, and borrowing from Justice -- what Justice Kagan did before, as you can probably tell, some of my colleagues are dubious that this is precise enough definition, adjacency, to survive.

So is there another test? Not the Rapanos test, not the adjacency test, not the significant nexus test. But is there another test that could be more precise and less open-ended than the adjacency test or the significant nexus test that you use? Is there some sort of connection that could be articulated?

JUSTICE KAGAN: Mr. Schiff, do you think there's any third position? I mean, I -- I understand that you don't like the significant nexus test, but I'm going back really to Justice Kavanaugh's point about, you know, take something like you just create a dam so that -- and the dam breaks up any idea that there is a continuous surface connection.

So, if I think, well, in that kind of situation, it just -- it just can't -- you can't be right, but I also understand some of your points about the significant nexus test, is there anything in the middle?

Revised definition of ”Waters of the United States

December 30, 2022 – The U.S. EPA and the Corps announced the pre-publication of the final “Revised Definition of ‘Waters of the United States’” rule.

- “The rule returns to a reasonable and familiar framework founded on the pre-2015 definition with updates to reflect existing Supreme Court decisions, the latest science, and the agencies’ technical expertise” – EPA Press Release (Dec. 30, 2022)

Additional information

- EPA Webpage – Revising the Definition of “Waters of the United States”
- Pre-Publication Final Rule Notice: Revised Definition of “Waters of the United States”
- Agricultural Community Fact Sheet
- Landowners Guide Fact Sheet
- Public Fact Sheet

Revised definition of ”Waters of the United States

Statutory Exemptions --

The following agricultural activities **remain exempt** from Section 404 permitting requirements:

- Normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices;
- Maintenance of dikes, levees, groins, riprap, and transportation structures;
- Construction of farm or stock ponds or irrigation ditches, or the maintenance of drainage ditches, and
- Construction of farm roads, in accordance with best management practices.

Revised definition of ”Waters of the United States

Regulatory Exclusions --

The new rule codifies certain exclusions, including the exclusion for **prior converted cropland “as long as it is available for agricultural commodity production.”**

The new rule adds **six new exclusions** from the definition of “waters of the United States:”

- “Certain ditches
- Artificially irrigated areas that would revert to dry land should application of water to that area cease;
- Artificial, constructed lakes and ponds created in dry land such as farm and stock watering ponds, irrigation ponds, settling basins, fields flooded for rice growing, log cleaning ponds, or cooling ponds;
- Artificial reflecting pools or swimming pools created in dry land; small ornamental waters created in dry land;
- Water-filled depressions created in dry land incidental to mining or construction activity, including pits excavated for obtaining fill, sand, or gravel that fill with water; erosional features, including gullies, rills, and other ephemeral features that do not meet the definition of tributary, non-wetland swales, and lawfully constructed grassed waterways;
- And certain Swales and erosional features.”

Revised definition of ”Waters of the United States

“Significant nexus” standard --

- “Consistent with the plain meaning of the term and the agencies’ 45-year-old definition of ‘adjacent,’ the rule requires that an **’adjacent wetland’** be **‘bordering, contiguous, or neighboring,’** to another covered water … But where a wetland is adjacent to a covered water that is *not* a traditional navigable water, the territorial seas, or an interstate water, such as a tributary, this rule requires an additional showing for that adjacent wetland to be covered: **the wetland must satisfy either the relatively permanent standard or the significant nexus standard.”**
- “This rule defines the term **”significantly affect”** for purposes of determining whether a water meets the significant nexus standard to mean **”a material influence on the chemical, physical, or biological integrity of”** waters of the United States.
- In order to define material influence, the following factors can be considered:
  - “Hydrologic factors, such as the frequency, duration, magnitude, timing, and rate of hydrologic connections, including shallow subsurface flow;
  - The size, density, or number of waters that have been determined to be similarly situated;
  - Landscape position and geomorphology;
  - Climatological variables, such as temperature, rainfall, and snowpack.”

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Bringing Home the Prop 12-Compliant Bacon: *National Pork Producers Council v. Ross*

2023 Pennsylvania Farm Show I Agricultural Law Symposium

Presented by Audry Thompson, Staff Attorney
Tuesday, January 10, 2023, 2:15pm (EST)

History—Proposition 12

- 2008—Proposition 2
  - Established the "stand-up, turn-around" requirement (for in-state producers)
    - *Cramer v. Harris*, 591 F. App'x 634 (9th Cir. 2015) (C.D. Cal., No. 2:12-cv-03130)
    - "too vague"
- 2010—AB 1437
  - Applies stand-up, turn-around requirement to in-state egg sales beginning January 1, 2015
  - CDFA regulation: 116 sq. inches/bird
    - *Mo. ex rel. Koster v. Harris*, 847 F.3d 646 (9th Cir. 2017) (E.D. Cal, No. 2:14-cv-00341), *cert. denied sub nom.*, *Mo. ex rel. Hawley v. Becerra*, 137 S. Ct. 2188 (2017) (No. 16-1015)
    - Commerce Clause violation challenge

Proposition 12, "Farm Animal Confinement Initiative"

- November 2018—Proposition 12
  - 63% voter approval
- Phased in new space requirements
- Prohibited the "knowing" sale of products derived from animals not raised in the space requirements
  - $1,000 fine and imprisonment up to 180 days
    - Cal. Health & Safety Code Chapter 13.8, §§ 25990(b)(1)–(4), 25993(b)
- Charged CDFA with implementing regulations

Figure 1

Minimum Space Requirements Under Current Law and Proposition 12

Square Footage Per Animal

Farm Animal	Current Law[a]	Proposition 12[a]	
		Starting in 2020	Starting in 2022
Egg-laying hen	Must be able to turn around freely, lie down, stand up, and fully extend their limbs.[b]	1 square foot of floor space	Cage-free housing[c]
Breeding pig		—	24 square feet of floor space
Calf raised for veal		43 square feet of floor space	Unchanged (43 square feet)

[a] Current law and Proposition 12 both include some exceptions to minimum space requirements.

[b] State regulations generally require 0.8 square feet of floor space per egg-laying hen. There are no similar regulations for breeding pigs or calves raised for veal.

[c] Cage-free includes indoor housing systems that provide 1 to 1.5 square feet of floor space per hen and allow hens to move around inside a building.

Source: California Legislative Analyst's Office, "Propositioin 12," https://lao.ca.gov/BallotAnalysis/Proposition?number=12&year=2018

CDFA Regulations

- Applies to
  - Whole, uncooked cuts of pork
  - Bacon
- Does not apply to
  - Cooked/Ready-to-Eat products
  - Ground products
  - “Combination food products”
    - “soups, sandwiches, pizzas, hotdogs, or similar processed or prepared food products, that are comprised of more than pork meat, seasoning, curing agents, coloring, flavoring, preservatives, and similar meat additives.”
  - Pork not intended for sale in California
    - Entering state for export or USDA processing/inspection

CDFA Regulations

- Not initially issued timely
- *California Hispanic Chambers of Commerce v. Ross*, Cal. Sup. Ct. No. 34-2021-80003765
  - Feb. 2022—Order and prohibitory writ of mandate issued Feb. 2022, prohibiting enforcement until 180 days after regulations issued.
  - Sept. 1, 2022—CDFA issued final regulations
    - **3 CCR § 1320-1326**
    - Started 180-day clock (Feb. 28, 2023)
  - Nov. 28, 2022—Joint stipulation and order issued
    - Extended injunction against enforcement until July 1, 2023

Quick Review: Dormant Commerce Clause

- U.S. Const., Art. I, § 8, cl. 3. grants Congress the power to "regulate Commerce . . . among the several states."
- But—States have the power to regulate within their own borders as long as they do not discriminate.

Quick Review: Dormant Commerce Clause

Many in-state regulations upheld:

- Ability of vertically integrated firms to operate their retail outlets
  - *Exxon Corp. v. Governor of Md.*, 437 U.S. 117 (1978) (holding that Maryland statute prohibiting petroleum refiners from also operating retail gas stations did not violate the Commerce Clause).
- Amount of renewable energy in-state electricity providers must offer
  - *Energy & Env't Legal Inst. v. Epel*, 793 F.3d 1169 (10th Cir. 2015) (holding that a Colorado statute requiring that 20% of electricity sold to Colorado consumers be from renewable sources did not have disproportionate effects on out-of-state producers)
- Labels and specifications on products offered for in-state sale
  - *Int'l Dairy Foods Ass'n v. Boggs*, 622 F.3d 628 (6th Cir. 2010) (upholding an Ohio law regulating statements about the non-use of artificial hormones on dairy products and requiring disclaimers about artificial hormone use).

Dormant Commerce Clause Analysis

Two main questions:

1. **Does the law <u>discriminate</u> against out of state commerce?**
   - Yes—likely a violation, some deference given for safety/health
   - No—*Pike* balancing test:
     - Local benefit vs. burden on interstate commerce
     - Law invalidated if it places an "<u>undue burden</u>" on interstate commerce
       - *Pike v. Bruce Church*, 397 U.S. 137 (1970)
2. **Does the law <u>regulate extraterritorially</u>?**
   - Law invalidated if it "has the 'practical effect' of regulating commerce occurring wholly outside that State's borders"

Dormant Commerce Clause Analysis

Extraterritorial Principle Used 3 Times to Invalidate a State Law:

1. *Baldwin v. G. A. F. Seelig, Inc.*, 294 U.S. 511 (1935)
   - NY law regulating minimum prices dealers must pay to producers
2. *Brown-Forman Distillers Corp. v. N.Y. State Liquor Authority,* 476 U.S. 573 (1986)
   - NY law requiring liquor producers to sell to in-state wholesalers at their lowest price nationally
3. *Healy v. Beer Institute*, 491 U.S. 324, (1989)
   - CT law requiring out-of-state beer shippers to affirm their prices were the lowest among other border states

Proposition 12 Challenges

- ***North American Meat Institute (NAMI) v. Becerra*** (filed Oct. 2019)
  - Claimed Proposition 12
    1. discriminated against out-of-state pork producers,
    2. regulated extraterritorially, and
    3. placed a substantial burden on interstate commerce
       - 420 F. Supp. 3d 1014 (C.D. Cal. 2019) No. 2:19-cv-08569
  - Dismissed, Upheld by 9th Circuit
    - *N. Am. Meat Inst. v. Becerra*, 825 F. App'x 518 (9th Cir. 2020), *cert. denied sub. nom.*, *N. Am. Meat Inst. v. Bonta*, 141 S. Ct. 2854 (2021) (No. 20-1215).
- ***National Pork Producers Councill (NPPC) v. Ross*** (filed Dec. 2019)
  - 456 F. Supp. 3d 1201 (S.D. Cal 2020) No. 3:19-cv-02324
  - 6 F.4th 1021 (9th Cir. 2021) No. 20-55631
  - U.S. Supreme Court, No. 21-468

NPPC's Complaint

- Complaint
  - Prop 12 violates the extraterritoriality doctrine and burdens commerce
  - Includes stats on hogs raised in California vs. other states
  - CA reliant on out-of-state hog production:
    - Only 1,500 commercial breeding sows in CA
    - CA has 65,000 commercial breeding hog finishing spaces
    - CA pork consumption is 13% of national market
    - CA needs offspring of 673,000 sows to satisfy current market demand
- California:
  - Prop 12 only applies to in-state sales
  - Not a burden on commerce
- Dismissed by District Court & Ninth Circuit
  - Extraterritoriality only applies to price affirmation statutes (*Baldwin*, *Brown-Forman*, & *Healy*)

Questions Presented—NPPC Pet. Writ/Brief

NPPC Petition for Writ Certiorari

- Whether allegations that California's Proposition 12 has **dramatic economic effects largely outside of the State** and **requires pervasive changes** to an **integrated nationwide industry** state a violation of the dormant Commerce Clause, ***or whether the extraterritoriality principle described in this Court's decisions is now a dead letter***.
- Whether such allegations, concerning a law that is based solely on preferences regarding out-of-state housing of farm animals, **state a claim under *Pike v. Bruce Church.***

NPPC Brief

- Whether allegations that California's Proposition 12 has **dramatic economic effects largely outside of the State** and **requires pervasive changes** to an **integrated nationwide industry** state a violation of the dormant Commerce Clause.
- Whether such allegations, concerning a law that is based solely on preferences regarding out-of-state housing of farm animals, **state a claim under *Pike v. Bruce Church***.

California Question Presented (Brief)

- Whether **petitioners stated a claim** that Proposition 12's restrictions on in-state sales of certain pork products violate the Commerce Clause of the federal Constitution.

Oral Argument—Oct. 11, 2022

- Morality—raised by several justices
  - Roberts: “Does a state’s health & safety interest extend to moral values?”
  - Kagan: Are moral interests sufficient to justify a state’s conduct under *Pike* balancing?
  - Barret: Should morality be considered as a state interest in *Pike* balancing?
  - Alito: Should a state’s safety interest be treated differently than moral interests?
  - Thomas: How broadly should “immoral” be construed/defined

Oral Argument—Oct. 11, 2022

- Also raised numerous times—what issues go to the "morality" of production:
  - Union rights
  - Minimum wage requirements
  - Health care benefits
  - Employees being in country legally

Oral Argument—Oct. 11, 2022

- Could a product ban be in compliance with the Commerce Clause if extraterritoriality expanded?
  - Justice Kagan
- "Choice"/market decision angle counter to NPPC's argument
  - Justice Sotomayor
- Counter to "market decision"—potential back and forth between states
  - Justice Alito
- Narrowing the extraterritoriality rule, considering whether there is a less burdensome way to accomplish a state's moral goals—labeling
  - Justice Jackson
- Why are label requirements not out-of-state regulation?
  - Justice Barrett
- Size of state/industry
  - Justices Roberts & Alito
- Isn't this Congress's job?
  - Justices Kavanaugh/Gorsuch/Alito

Final Rebuttal from NPPC counsel

- The purpose of the Commerce Clause—to prevent balkanization and unify the states—justifies a finding that the extraterritoriality doctrine should be interpreted to include Prop 12's in-state sales restrictions as a violation the clause.
- NPPC has thus stated a claim.
- This case is only at the motion to dismiss stage and should be heard on the merits

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Agricultural Law Symposium Day 2
Thursday, January 12, 2023

- 1:00–2:00pm—Agricultural Antitrust: Protein Sector Spotlight
- 2:15–3:15pm—Agriculture & the Environment: 2022 in Pesticides & the Chesapeake Bay

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