Waters of the United States/Clean Water Act: Federal Court Addresses Request to Vacate Consent Decree Based on Sackett

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A United States District Court (W.D. Washington) ("Court") addressed in a December 8th Order a request by Defendants Bobby Wolford Trucking & Salvage, Inc. ("Wolford Trucking") and Karl Frederick Klock Pacific Bison, LLC ("KFKPB") to modify or vacate a Consent Decree ("CD") entered into in 2020 with the United States ("U.S.") addressing an alleged Clean Water Act violation. See *United States of America, et al. v. Bobby Wolford Trucking & Salvage, Inc., et al.,* 2023 WL 8528643.

The Defendants' request was based on the argument that the United States Supreme Court in *Sackett v. the Environmental Protection Agency, et al.*, 598 U.S. 651 (2023) rendered the Clean Water Act inapplicable to the relevant wetlands and streams on their property.

The United States initiated a Clean Water Act enforcement action against the Defendants in 2018 for allegedly discharging dredged or fill material into navigable waters of the United States without the required permit.

The property (located in the State of Washington) is described as involving 365 acres which is:

. . . bounded on the south by Ben Howard Road and on the north and east by the Skykomish River, and which is transected by an oxbow channel.

The Tulalip Tribes of Washington ("Tribes") intervened in the action.

The parties subsequently entered into a CD which is described as operating as a:

. . . a complete and final settlement of the United States' claims under the Clean Water Act.

The Defendants motion to modify or vacate the CD and be relieved of any obligation to comply with the terms is based on the argument that *Sackett* rendered the Clean Water Act inapplicable to the wetlands and streams within the oxbow region of their property.

The U.S. responded that *Sackett:*

. . . merely adopted the definition of "navigable waters" that had been applied in this matter prior to the entry of the Consent Decree, and that *Sackett* did not affect the Court's jurisdiction under the Clean Water Act.

The majority opinion in *Sackett* did significantly narrow the scope of what constitutes a navigable water (i.e., waters of the United States ["WOTUS"]) for purposes of the Clean Water Act.

A two-part process for determining a WOTUS was articulated:

1. The Clean Water Act's use of "waters" in §1362(7) refers only to "geographic[al] features that are described in ordinary parlance as 'streams, oceans, rivers, and lakes' " and to adjacent wetlands that are "indistinguishable" from those bodies of water due to a continuous surface connection.

2. To assert jurisdiction over an adjacent wetland under the Clean Water Act, a party must establish "first, that the adjacent [body of water constitutes] . . . 'water[s] of the United States' (i.e., a relatively permanent body of water connected to traditional interstate navigable waters); and second, 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 addressing the Defendants' motion, the Court stated that the parties seeking modification of a CD bears the burden of establishing that a significant change in the circumstances warrants its revision. Further, if the moving party meets the standard, the Court is required to determine whether the proposed modification is suitably tailored to the changed circumstances.

An example of "change in circumstances" is stated to include when the statutory or decisional law has changed to make legal what the decree was designed to prevent. However, it further clarified that the modification of a CD should not be granted when any intervening jurisprudence:

. . . merely clarified, as opposed to altered, the law.

The Court noted that the U.S. moved for partial summary judgment against Wolford Trucking a year before the entry of the CD, citing both the *Rapanos v. the United States* plurality test and Justice Kennedy's significant nexus approach in arguing that the wetlands and streams within their property constituted navigable waters.

Wolford Trucking is stated to have offered no expert testimony to rebut the opinions offered by the U.S. nor challenged the analysis performed pursuant to the *Rapanos* plurality standard. The standard is stated by the Court to have been "embraced" by *Sackett.*

As a result, the Court had concluded that the U.S. had established as a matter of law that:

. . . the portions of the property into which dredged or fill material was discharged were, at the time of the discharge, wetlands and streams constituting navigable waters of the United States.

The Court also cites Defendants' failure to contest the decision during the year after the prior Order and before the CD was presented for approval.

Defendants are held to have not made the requisite showing that a significant change in circumstances warrants revision of the CD.

The Court also concludes that even if *Sackett* was deemed to have an intervening impact on the applicable law, the result would be the same. This is based on the Court's view that *Rapanos* can be differentiated. The wetlands in *Rapanos* are stated to have been a substantial distance (11 to 20 miles) away from traditional navigable waters.

The current dispute is stated to be unlike *Sackett* in which the wetlands were:

. . . near, but separated by a 30-foot road from, an unnamed tributary, which fed a non-navigable creek, which ran into Priest Lake, an intrastate (as opposed to interstate) body of water.

The CD is noted to address not only wetlands but perennial streams that are characterized by the Court as not merely "nearby or neighboring," but rather within an oxbow channel that abuts (i.e., is adjacent) to, and is hydrologically connected to, and/or remains a part of the Skykomish River, which is traditionally navigable.

The Court also rejects the argument that the U.S. experts did not use the phrase “continuous surface connection” to describe the relationship between the wetlands and stream in the oxbow channel and the Skykomish River. Defendants argued the U.S. experts’ opinions do not support the conclusion that the wetlands and streams are WOTUS.

The Court rejects this argument on the basis that this phrase was articulated by Justice Scalia in *Rapanos*. Therefore, Defendants should have attacked the U.S. experts before partial summary judgment was granted in 2019.

A declaration submitted by the Defendants from a member of KFKPB Limited Liability Company stating there was no continuous flow of water between the oxbow and the river was also rejected. The member was deemed by the Court as not having personal knowledge or a reliable recollection regarding the relevant facts associated with the issue.

The Court also noted that the declaration failed to address the extent to which discharges of fill material may have contributed to any noncontinuity between the north oxbow region and the Skykomish River. *Sackett* was cited for the proposition that a landowner cannot carve out wetlands from federal jurisdiction by illegally constructing a barrier on wetlands otherwise covered by the Clean Water Act.

A copy of the Order can be downloaded here.