The Daily Dish

WOTUS Meets SCOTUS

DOUGLAS HOLTZ-EAKIN | JANUARY 25, 2022

If you enter "WOTUS" into the search bar on the AAF website, as I am sure you do regularly, you will find that an impressive amount of (electronic) ink has been spilled on the subject of the Waters of the United States. This makes sense. WOTUS is the generic name for the rule defining the scope of the Clean Water Act of 1974. (1) This is complicated because it is a difficult – if not nearly metaphysical – question as to where water ends and land begins. (2) It is a critical rulemaking because it is tantamount to nationwide land-use regulation affecting the entire private sector. And, (3) because of (1) and (2) it is in a state of near-continuous litigation, leading to lots of policy uncertainty. It is prime fodder for AAF research.

Yesterday's news was that the Supreme Court of the United States (SCOTUS) agreed to hear a case centering on the appropriate scope of the Clean Water Act. Specifically, it will revisit the 2006 *Rapanos* decision, which produced two different standards for deciding what constituted WOTUS. A plurality of four judges, led by the late Justice Scalia, concluded that navigable waters and wetlands with a "continuous surface connection" should be subject to regulation. Justice Kennedy, however, wrote a separate concurring opinion indicating that wetlands should be regulated if they have a "significant nexus" to navigable waters, and would affect them, even if they aren't directly connected.

In the years between the *Rapanos* decision and the present, there was a massively expansive WOTUS regulation by the Obama Administration in 2015 based on the Kennedy "nexus" argument, that was stayed by the courts. The Trump Administration repealed the Obama-era rule. The Biden Administration's plan (see this piece by Dan Bosch) is to effectively reinstate the Obama rule and then expand the scope somewhat to encompass issues of environmental justice and the like.