

# Huge WOTUS decision coming from SCOTUS

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The Supreme Court of the United States (SCOTUS) began its session last week with a huge case for the ag sector.

## First up: Challenge to Clean Water Act (CWA)

The CWA was passed in 1972 to protect all “waters of the United States” (WOTUS), including streams, rivers, lakes and wetlands, from harmful pollution. The case, *Sackett v. Environmental Protection Agency*, centers on a long-running dispute involving an Idaho couple — Chantell and Michael Sackett. The couple began their lengthy legal battle in 2007, when they tried to build a home on their land near Idaho’s Priest Lake.

## Key WOTUS issue

Business groups and home builders argue legal confusion over the definition of WOTUS has created regulatory chaos for businesses and property owners. “Without clear guidance from this Court, the Chamber’s members will continue to endure an expensive, vague, and time-consuming process whenever they need to determine whether a project or activity will impact waters subject to federal jurisdiction,” the U.S. Chamber of Commerce said.

## Lengthy challenge will finally get a ruling

EPA said the Sackett property contained a wetland, and that the couple needed to obtain a CWA permit or face heavy fines. Their land contains no body of water, and the law authorizes EPA to regulate only “navigable waters” in interstate commerce. EPA still ordered construction work halted.

EPA argues the Sacketts’ lot was connected to a wetland though separated by a 30-foot paved road, and that wetland was connected to a man-made ditch connected to a non-navigable creek that was connected to Priest Lake, which was navigable. The Sacketts, represented by the conservative Pacific Legal Foundation, want the justices to significantly narrow the definition of WOTUS.

## When will SCOTUS ruling come?

The mean time from oral argument to decision is 83.6 days (the median is 75), with a standard deviation of 46.2. This holds for 99% of the cases. Only reargued cases are held over. So there is no set timing rule, but SCOTUS generally releases the majority of its decisions in mid-June, just before the end of the term.

## Outlook for WOTUS ruling

The Oct. 3 session saw the court not signaling a clear outcome during its questioning. The current court has a history of looking skeptically at the federal government’s claim of regulatory authority over the environment when its powers are not clearly defined by law. The three most conservative justices seemed to want to pare back the government’s environmental authority, while the court’s three more liberal members appeared to favor an expansive view. Some of the other justices sent mixed signals.

Damien Schiff, a senior attorney at the Pacific Legal Foundation, noted that Chief Justice John Roberts signed late Justice Antonin Scalia’s opinion in *Rapanos vs EPA*, while Justice Neil Gorsuch signaled he is “skeptical of broad EPA interpretations of statutes.”

Jon Devine, who leads the Natural Resources Defense Council’s federal water policy team, said the adoption of Scalia’s narrow test could remove CWA protections for roughly 19% of streams and 51% of wetlands in the country. “That would be catastrophic,” he said, “for the water quality purposes of the act.”

## What an ag industry lawyer told Pro Farmer

The lawyer said, “The Supreme Court will rule against EPA and for the plaintiffs. The case reminds me of *Rapanos*. In that case, with similar facts, Scalia, [Clarence] Thomas, [Samuel] Alito, and [John] Roberts ruled that such an attenuated connection to a navigable interstate water was insufficient to be covered by the Clean Water Act. It was due to [former Justice Anthony] Kennedy’s concurring opinion that we got the confused mess. He wrote about EPA being able to demonstrate a significant nexus between some remote water and a water clearly within the reach of the CWA. Hence the Obama and Biden administrations have sought to implement regulations that meet that test — a test by the way that most appellate courts adopted because there was no clear announcement from the high court. I believe six of the current justices will provide clarity and stick to what the law allows: Navigable and interstate waters and immediately adjacent wetlands.”

Some news reports suggest EPA will win. But the ag sector lawyer told us, “That would mean that Roberts would have done an about face from *Rapanos* and persuaded one other to join him. We shall see.”