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SACKETT V. EPA (WOTUS)

What happened?

Almost 20 years ago, Michael and Chantell Sackett began building a home near Priest Lake in Idaho. Soon after work began, the EPA halted construction, concluding the Sacketts were building in a Water of the United States (WOTUS), even though the Sacketts property lacked a surface connection to a nearby wetland that allegedly drained into a stream that fed into the lake. Years of litigation ensued and the Sacketts' case was recently heard by the Supreme Court. The question for the Justices: How far does EPA's regulatory authority under the Clean Water Act reach?

What did they decide?

On May 25, 2023, the Supreme Court issued its long-awaited ruling in Sackett v EPA. The Supreme Court ruled unanimously that EPA's expansive claim to regulate wetlands, streams, and even dry land in some cases was unconstitutional. North Carolina Farm Bureau has worked on the WOTUS issue for decades, and the Supreme Court decision is a big policy victory for our farmers and ranchers.

What does it mean?

In a practical sense, the Supreme Court's decision means that it will be much easier for farmers to determine if a regulated wetland or stream exists on their property, and it is now less likely that they will have to engage in an expensive permitting or mitigation processes. Wetlands that are directly adjacent to a surface water will still be a WOTUS, such as a wetland in the floodplain of a stream or river, or a wetland that has a clear outlet into a nearby stream. However, wetlands that are further removed and do not have a direct connection to another WOTUS will not be covered. The decision also means that ditches and very small streams that only carry water during rainfall will no longer be covered. Finally, the decision will have no impact on the exemptions for prior-converted cropland.

What happens next?

Keep in mind, that farmers who participate in USDA programs for crop insurance or conservation practice funding will still be subject to the wetland conservation compliance requirements (Swampbuster) for those programs. This applies to all wetlands, even those that may no longer be a WOTUS. EPA has announced that they will revise the WOTUS rule to match the Supreme Court's ruling, with final action expected by September.

NATIONAL PORK PRODUCERS COUNCIL V. ROSS (PROP 12)

What happened?

In 2018, California voters adopted Prop 12 through a referendum. The law prohibits the sale of non-California pork products that are derived from sows housed in areas that do not conform to certain size requirements. The Humane Society of the United States wrote Prop 12 and promoted it as a health and safety regulation, even though no scientific evidence supports that claim.

Pigs raised in North Carolina are bred for a national market, not a specific state. Thus, a pork chop from a pig raised on a Duplin County farm could eventually end up on a plate in San Francisco. As a result, North Carolina farmers will have to make substantial and costly changes to their production practices to comply with Prop 12.

What did they decide?

On May 11, 2023, the Supreme Court voted 5-4 to uphold Prop 12 in a "deeply splintered vote that did not break down on traditional ideological lines," according to Amy Howe of SCOTUSblog, an independent news outlet following the Supreme Court. The decision hinged on a discussion of the "dormant commerce clause," which is a legal argument that prohibits states from passing legislation that discriminates against or excessively burdens interstate commerce. In the majority opinion,

Justice Neil Gorsuch wrote that Prop 12 does not intentionally discriminate against out-of-state economic interests and that broadening the interpretation of the dormant commerce clause would call into question many existing state laws, such as state income tax laws, that are widely regarded as constitutional.

The Justices also disagreed over how the Court should weigh a state law's benefits to in-state residents against the costs imposed on out-of-state economic interests. Three additional opinions were written offering differing views on this issue, demonstrating the difficulty the Court had coming to agreement on this case.

A final, fifth opinion written by Justice Brett Kavanaugh raised the concern that California "has attempted, in essence, to unilaterally impose its moral and policy preferences for pig farming and pork production on the rest of the Nation," which he went on to suggest "could provide a blueprint for other States" to pass other laws to advance their policy preferences in the future. "That is not the Constitution the Framers adopted in Philadelphia in 1787," wrote Kavanaugh. In his opinion, Justice Kavanaugh cited a friend-of-the-court brief organized by North Carolina Farm Bureau, the North Carolina Pork Council, and the NC Chamber.

What does it mean?

Despite the lack of unanimity, the Courts decision to uphold Prop 12 means many hog farmers in North Carolina and across the United States will be face tough decision – make changes to their operations at significant costs to comply with Prop 12 or cease selling their product in the state comprising 15% of domestic pork sales.

Specifically, Prop 12 requires that enclosures be a minimum of 24 square feet and that a breeding pig be able to stand up, lie down, fully extend her limbs and turn around freely for the duration of its production cycle. "It's a minimum of 24 square feet, but the animal has to have enough room to completely turn around, so in effect that's at least 6'x6', 36 square feet," said Wayne County hog farmer Jan Archer.

What happens next?

There's been a fair amount of uncertainty around this question, but there are a few things that have come into focus in the past few weeks when the Superior Court for the County of Sacramento issued an order modifying Prop 12 implementation. National Pork Producers Council CEO Bryan Humphreys said, "What we have here is an extension of time for the sale of noncompliant, whole pork meat, provided that that meat was in the supply chain by July 1. If it's in the supply chain by July 1, that product can be sold in California until December

31. But anything harvested after July 1 to be sold in California will still have to be Prop 12 compliant. This change is not a delay of all of Prop 12."

The order also requires certification of pork producers by January 1, 2024. NPPC's Chief Legal Strategist Michael Formica noted, "If producers aren't Prop 12 compliant, they should be making plans to become Prop 12 compliant if they want to sell into California. If they are or think they are Prop 12 compliant, they can self-certify that they are and continue to sell into California. However, they would need to be certified by a CDEA-approved auditor by the end of the year."

Farmers and consumers should expect ripple effects as well. Here in North Carolina consumers may actually see more pork at lower prices, at least initially. Unfortunately for farmers that means they'll likely be paid less for their pork or in some cases they may have their contracts cut as the industry adjusts, threatening small farms and communities that depend on hog farming. Jan Archer noted, "We're going to see significant consolidation, and small farms like mine are going to go away. Small family farms are going to go away because we can't compete."

Ultimately, Prop 12 is about consumers in one state driving production practices throughout the nation regardless of sound science, and about removing protein from the plate. North Carolina Pork Council CEO Roy Lee Lindsey said, "Efforts like Prop 12 that are brought by animal rights extremists are only aimed at what goes on your plate and limiting the amount of meat that goes into our diets," he said. "We want to be as efficient as we can, and we can't do that if we aren't taking care of our animals."

