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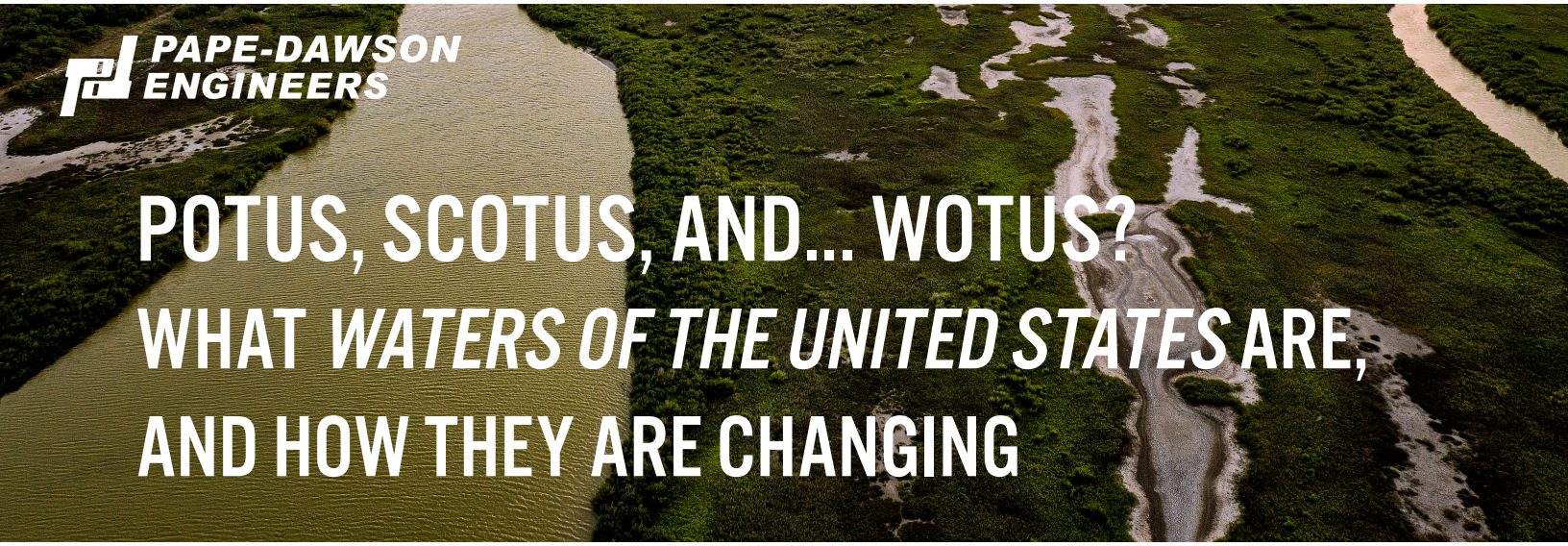

POTUS, SCOTUS, AND... WOTUS? WHAT *WATERS OF THE UNITED STATES* ARE, AND HOW THEY ARE CHANGING

by Pape-Dawson Engineers, LLC **OCTOBER 2023**

You probably know the President and Supreme Court are sometimes known by their acronyms, POTUS and SCOTUS. Although the U.S. Constitution does not use those acronyms, it pins down their responsibilities and jurisdiction.

Waters of the United States, or WOTUS, are less well known. For most of our nation's history, lakes, rivers, streams, marshes, and the like fell under the jurisdiction of states or lower-level entities. The Federal Water Pollution Control Act, enacted in 1948, was the first major piece of federal legislation that addressed water pollution. Due to growing unbridled use of polluting chemicals during the 20th century, Congress made significant changes to the Federal Water Pollution Control Act in 1972, wherein the law became more commonly known as the Clean Water Act (CWA). Under the CWA, Congress established federal jurisdiction over "navigable waters," which were defined as WOTUS, and subjected WOTUS to regulation. The CWA also placed administration of the CWA – including the definition of WOTUS – to the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (USACE). Over the years, the agencies have defined (and redefined) WOTUS and the geographical application of the law has grown immeasurably. During that time, a central question has remained: what, precisely, should count as WOTUS (and falls under federal jurisdiction) and what shouldn't (and be subject to state regulation, which is often less strict)?

The issue reached a significant turning point earlier this year when the Supreme Court ruled on Sackett v. EPA. The case involved Michael and Chantell Sackett, who had bought property in a subdivision near Priest Lake, Idaho. After they began backfilling the land with dirt for home construction, EPA representatives ordered them to stop, claiming the couple's work violated the CWA prohibition on discharging pollutants into WOTUS. Because their land drained into a ditch that fed into a creek that emptied into the lake (which is a navigable, intrastate lake), the EPA said the work was subject to the CWA, prohibiting its continuation without a permit. EPA maintained that the Sacketts' land contained "wetlands" constituting WOTUS. The question at stake: did this dry ground fall under federal authority or not?

After a 16-year legal battle and two trips to SCOTUS, the high court ruled unanimously that it did not, with Justice Samuel Alito writing in his Opinion that "the use of waters … may be fairly read to include only wetlands that are 'indistinguishable from waters of the United States.' This occurs only when wetlands have 'a continuous surface connection to bodies that are [WOTUS] in their own right, so that there is no clear demarcation between waters and wetlands.'" While SCOTUS unanimously agreed that the wetlands on the Sackett's property were not WOTUS, the justices did not agree what test should be applied to waters to determine whether they are WOTUS subject to regulation under the CWA.

"Although the Supreme Court decision originated specifically with regard to the Sackett case, it has nationwide repercussions," says Valerie Collins, AICP, Vice President at Pape-Dawson Engineers, LLC. In

Texas, it means that land (plots containing or adjacent to intermittent streams, for example) that previously may have been subject to CWA jurisdiction may no longer be. These kinds of waters will be left to the states to regulate (in Texas, the Texas Commission on Environmental Quality (TCEQ)), rather than being regulated by the EPA and USACE. Should Texas be interested in increasing their regulation of dredge or fill in waters of the state, the applicable rules, then, would be different—and landowners and land developers with significant investments at stake would need to be aware of the differences.

"Previous Supreme Court decisions muddied the waters, no pun intended," admits Valerie. "In fact, there have been four different SCOTUS decisions addressing the definition of WOTUS and multiple iterations of the WOTUS definition promulgated by the EPA and USACE. Until the Sackett decision, there had to be a 'significant nexus' tying a body of water to waters that are or were navigable in fact for it to fall under CWA jurisdiction. But the question remained: how do you define a 'significant nexus'?" Although this year's ruling gives some clarity for developers and landowners, the saga will continue. In fact, the EPA recently relinquished jurisdiction over much of the nation's wetlands in response to the Sackett decision.

"We're certainly paying very close attention to these issues," says Valerie, "and most of the developers we work with have been paying attention to them, too." In fact, she has set up a war room in her office where her staff works through the ramifications for clients, and she works closely with some of the top environmental attorneys in the nation. "It is our job to try to eliminate risk for our clients as much as we can. In some cases, even with our respected relationships with the agencies, we must make the best prediction we can with the information we have." Such is the case with the current definition of WOTUS. Despite the newly released final rule conforming the definition of WOTUS to the U.S. Supreme Court's May 25, 2023, decision in the Sackett case, ongoing litigation leaves the agencies in Texas interpreting "Waters of the US" consistent with a combination of previous guidance and interpretation of the Supreme Court's Sackett decision until further notice. As informal guidance trickles down from USACE headquarters, Valerie's team works tirelessly to make navigating environmental regulation as easy as possible. Employing the best current understanding of the law helps clients understand the risks associated with development and instills trust.

That trust is crucial, she says, because the risks of running afoul of environmental regulation can be significant, ranging from extra paperwork and injunctions to fines and even jail time. When the regulation of a tract is questionable, a potential buyer will want to approach the prospect with a realistic view of the risks in mind. "Being honest with clients about what we know allows them to understand relevant regulatory risks. They can then make their own decision, based on the risks we and the best environmental attorneys have explained to them."