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## Waters of the United States/Clean Water Act: U.S. Supreme Court Grants Certiorari in Sackett v. U.S. Environmental Protection Agency

01/25/2022

The United States Supreme Court ("SCT") issued an order on January 24th granting a petition for a writ of certiorari to address the following question:

Whether the Ninth Circuit set forth the proper test for determining whether wetlands are "waters of the United States" under the Clean Water Act, 33 U.S.C. § 1362(7).

See *Sackett, Michael, et ux. V. EPA, et al.*, 21-454.

The Sacketts own a vacant lot near Priest Lake, Idaho. The United States Environmental Protection Agency ("EPA") in 2007 sent the Sacketts an Administrative Compliance Order determining that their home construction violated the Clean Water Act because the lot contained jurisdictional wetlands (i.e., waters of the United States ["WOTUS"]).

The Sacketts in 2012 had successfully argued before the SCT that landowners had legal standing to challenge EPA's wetland determination. The SCT held in that decision that property owners may appeal directly to federal courts from a Clean Water Act wetlands "compliance order" issued by the federal government.

The Sacketts are now before the SCT arguing that the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit") applied the incorrect jurisdictional test for determining WOTUS. They argued in their petition for certiorari that the previous SCT decision in *Rapanos v. United States* should be "revisited" to:

... adopt the plurality's test for wetland jurisdiction under the Clean Water Act?

The Ninth Circuit utilized Justice Kennedy's significant "nexus test" in determining that the Sacketts' property could constitute WOTUS. The Sacketts argue that the plurality opinion authored by Justice Scalia and three other Justices should be adopted as the relevant test. The plurality test holds that only those wetlands that have a continuous surface water connection to regulated waters may be regulated.

The Biden Administration EPA opposed the Sacketts' petition framing the question as:

Whether the court of appeals correctly upheld the Environmental Protection Agency's determination that the wetlands on petitioners' property constitute "waters of the United States" under the Clean Water Act, 33 U.S.C. 1362(7), because the wetlands were adjacent to a tributary of a traditional navigable water.

EPA argued that the Ninth Circuit's opinion does not conflict with any decision of the SCT or other court of appeals. The federal agency states in part:

But every court of appeals to resolve the question has determined, consistent with the decision below, that at least those wetlands satisfying the "significant nexus" test set forth in Justice Kennedy's Rapanos concurrence may be treated as "waters of the United States" under the CWA, 33 U.S.C. 1362(7).

The SCT's acceptance of the Sackett petition will be closely watched.

The definition of WOTUS is arguably one of the three critical jurisdictional terms in the Clean Water Act. Its importance is magnified since it is relevant to both National Pollution Discharge Elimination System ("NPDES") permitting and non-NPDES programs such as:

- Section 404 of the Clean Water Act wetland permits
- Section 311 oil/hazardous substances release requirements
- Clean Water Act spill prevention control and countermeasure regulations

As result, the scope of the definition of WOTUS has been the subject of frequent litigation, legislative oversight, rulemakings and public policy debate since the enactment of the modern version of the Clean Water Act in 1972.

A copy of the SCT order can be found [here](#), the Sackett Petition [here](#), and EPA's brief in response [here](#).