Waters of the United States/Clean Water Act: U.S. House of Representatives Democrats Introduce Legislation Addressing U.S. Supreme Court Sackett Decision

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One hundred eighteen Democratic members of the United States House of Representatives ("House") introduced legislation titled:

Clean Water Act of 2023(H.R. 5983)

The stated purpose of H.R. 5983 is to address the impact on the Clean Water Act definition of "waters of the United States" ("WOTUS") that flowed from the United States Supreme Court decision in *Sackett*.

The United States Supreme Court issued an Opinion on May 25th in the *Sackett* case addressing the scope of the Clean Water Act definition of WOTUS.

The Supreme Court Majority articulated a two-part process for determining a WOTUS:

1. The Clean Water Act's use of "waters" in §1362(7) refers only to "geographic[al] features that are described in ordinary parlance as 'streams, oceans, rivers, and lakes' " and to adjacent wetlands that are "indistinguishable" from those bodies of water due to a continuous surface connection.

2. To assert jurisdiction over an adjacent wetland under the Clean Water Act, a party must establish "first, that the adjacent [body of water constitutes] . . . 'water[s] of the United States' (i.e., a relatively permanent body of water connected to traditional interstate navigable waters); and second, that the wetland has a continuous surface connection with that water, making it difficult to determine where the 'water' ends and the 'wetland' begins."

The definition of WOTUS is arguably one of the three critical jurisdictional terms of the Clean Water Act. 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.

Because of the *Sackett* decision, the United States Environmental Protection Agency ("EPA") and the United States Corp of Engineers issued a final rule on August 29th revising the Clean Water Act definition

of WOTUS. The rule significantly narrowed the scope of what constitutes a WOTUS for purposes of the Clean Water Act.

In announcing the final rule, EPA stated that it:

. . . conforms the definition of "waters of the United States" to the U.S. Supreme Court's May 25, 2023, decision in the case of *Sackett v. Environmental Protection Agency*.

EPA acknowledged that parts of its previously promulgated definition of WOTUS were invalid under the United States Supreme Court's interpretation of the Clean Water Act in the *Sackett* decision.

The Democratic House sponsors of H.R. 5983 argue that the United States Supreme Court:

. . . judicially rewrote the tests for determining what rivers, streams and wetlands retain a minimum standard of federal protection and created new criteria – with no precedent and statute or in the decades-long, bipartisan agency interpretation of the Clean Water Act.

The sponsors point to a "roundtable" they held in July to discuss the potential impacts on water quality, human and environmental health, and local economies resulting from the *Sackett* decision.

A report derived from that roundtable titled "Murky Waters: Navigating a Post-Sackett World" is stated to outline:

. . . the real world impacts of the Sackett decision and identify critical waterbodies that are now at risk of degradation or destruction.

The "Purposes" section of H.R. 5983 states the legislation is intended:

1. To reaffirm the commitment of Congress to restore and maintain the chemical, physical, and biological integrity of the Nation's protected water resources.
2. To clearly define the Nation's protected water resources that are subject to the Federal Water Pollution Control Act (33 U.S.C. 1252 et seq.) (commonly known as the ''Clean Water Act'') based on the best available scientific evidence and decades of partnership between the Federal, State, and Tribal governments to protect water quality.
3. To eliminate the confusion initiated by the Supreme Court's overly narrow interpretation of the term ''navigable waters'' and to reestablish the comprehensive authority necessary to meet the codified objective of the Clean Water Act.
4. To restore a national minimum standard of protection of the Nation's protected water resources to the fullest extent of the legislative authority of Congress under the Constitution.

The "Findings" section provides the sponsors' view of the importance of water and waterbodies along with the potential impacts of the narrowing of the Clean Water Act definition of WOTUS.

Key definitions and/or provisions in H.R. 5983 include:

- Definition of "Protected water resources"
- Certain required reviews by the EPA Administrator
- Modification, removal, and exclusion process addressing certain waterbodies or features
- Definition of "wetlands"

The House's passage during the first session of the 118th Congress is highly unlikely in view of the Republicans' control of that body.

A copy of H.R. 5983 can be downloaded here.