Waters of the United States/Sackett v. US. Environmental Protection Agency: National Association of Clean Water Agencies/Waterkeeper Alliance File U.S. Supreme Amicus Briefs

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07/01/2022

The National Association of Clean Water Agencies ("NACWA") and Waterkeeper Alliance ("Waterkeeper") each filed Amicus Briefs in the Supreme Court of the United States appeal styled:

Michael Sackett, et ux. v. U.S. Environmental Protection Agency, et al.

See no. 21-454.

The appeal addresses the Clean Water Act definition of Waters of the United States ("WOTUS").

NACWA describes itself as a nonprofit trade association representing more than 350 clean water agencies that own, operate, and manage publicly owned treatment works, wastewater and stormwater sewer systems, water reclamation districts and infrastructure relating to all aspects of wastewater collection, treatment, and disposal.

Waterkeeper is described as 164 U.S. Waterkeeper organizations that rely on the Clean Water Act in their collective work to protect rivers, streams, lakes, wetlands, and coastal waters, and to aid people and communities that depend on clean water for drinking, sustenance fishing, recreation, livelihood, and survival.

Arkansas Ozark Waterkeeper based in Fayetteville, Arkansas, is one of the 164 affiliated Waterkeeper organizations.

The United States Supreme Court 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).

The Ninth Circuit utilized Justice Kennedy's significant "nexus test" in *Rapanos* in determining the Sacketts' property could constitute WOTUS. The Sacketts argued 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 definition of WOTUS is arguably one of the three critical jurisdictional terms of the Clean Water Act. Its importance is magnified since it is relevant to both National Pollutant Discharge Elimination ("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 a 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.

The NACWA brief does not address the issue of the correct "test" for determining what constitutes WOTUS. Instead, the two issues it briefs include:

- Opposes an argument raised by certain groups that the Clean Water Act constitutes an unconstitutional delegation of legislative authority
- Opposes arguments that EPA and the United States Army Corps of Engineers do not have the authority to exclude waters from Clean Water Act jurisdiction if doing so would serve environmental, regulatory, or efficiency objectives

Waterkeeper's brief argues that the Supreme Court should decline petitioners invitation to define the full scope of WOTUS under the Clean Water Act. It states in part:

There is no need in this case to reach out beyond the question presented, and there are good reasons to keep the holding limited to the category of wetlands at issue here: those adjacent to both a traditional navigable water and a jurisdictional non-navigable tributary to a traditional navigable water.

A copy of the NACWA brief can be found here and the Waterkeeper brief here.