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Waters of the United States/Sackett v. U.S. Environmental Protection Agency: Southern Environmental Law Center/Natural Resources Defense Council File U.S. Supreme Court Amicus Brief

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The Southern Environmental Law Center and Natural Resources Defense Council (collectively, “SELC”) filed a joint *Amicus* brief 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.

The brief is filed on behalf of what are described as 114 environmental and community non-profit organizations listed in the Appendix to the brief that are stated to:

... reply on the Clean Water Act and its comprehensive water-quality protections to help protect public health and the environment.

The list of organizations includes the Arkansas-based Buffalo River Watershed Alliance.

SELC further states in the brief that they have:

... an interest in ensuring that the Act is interpreted consistently with Congress’s stated objective to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters. . .

The United States Supreme Court entered 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 whether 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 SELC brief argues by way of introduction that the objective of the Clean Water Act (i.e., restoration and maintenance of the chemical, physical, and biological integrity of the Nation’s waters) can only be achieved if both navigable waters and the inter-connected wetlands and tributaries that significantly affect them are protected. Their brief encompasses the following arguments:

- The text and structure of the Clean Water Act confirm Congress’s water-quality objective
- The Clean Water Act comprehensively protects water quality by expanding earlier navigation- and state-based efforts
- The Supreme Court’s decisions recognize the Clean Water Act’s broad jurisdiction and water-quality objective
- The Clean Water Act does not require a continuous surface connection or “relatively permanent” flow
- The Clean Water Act applies to more than traditional navigable waters
- Regulating discharges “indirectly” does not close the loopholes opened by petitioners’ approach

A copy of the SELC brief can be downloaded [here](#).