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Examining the Implications of Sackett v. U.S. Environmental Protection Agency for Clean Water Act Protections of Wetlands/Streams: U.S. Senate Committee on Environment & Public Works Hearing

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The United States Senate Committee on Environment & Public Works held an October 18th hearing titled:

Examining the Implications of Sackett v. U.S. Environmental Protection Agency for Clean Water Act Protections of Wetlands and Streams ("Hearing")

Committee Chairman Tom Carper of Delaware described the *Hearing* purpose as to:

... examine the implications of the Supreme Court's decision in *Sackett v. Environmental Protection Agency* for our nation's wetlands and streams.

The Chairman further stated:

While the Clean Water Act has been immensely successful at cleaning up our country's waters and slowing the loss of wetlands, the *Sackett* decision has jeopardized nearly a half-century of progress under this bedrock environmental law.

The United States Supreme Court issued an Opinion on May 25th in *Sackett v. EPA, et al.* addressing the scope of the Clean Water Act definition of "waters of the United States" ("WOTUS"). A Petition for Writ of Certiorari had been granted to address the following question:

Whether the Ninth Circuit set for 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 Supreme Court Majority Opinion significantly narrowed the scope of what constitutes a WOTUS for purposes of the Clean Water Act.

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

1. The CWA's use of "waters" in §1362(7) refers only to "geo-graphic[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 CWA, 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 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.

The Opinion rejected the United States Environmental Protection Agency’s (“EPA”) request that the Supreme Court defer to the agency’s most recent rule which utilized the significant nexus test.

Because of the *Sackett* decision, the EPA and the United States Corps of Engineers issued a pre-Federal Register publication 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.

Witnesses at the October 18th *Hearing* included:

- Mažeika Patricio Sulliván, Ph.D. Director, Professor, Baruch Institute of Coastal Ecology and Forest Science, Department of Forestry and Environmental Conservation, Clemson University
- Kourtney Revels, Water Justice Organizer, Bayou City Waterkeeper
- Susan Bodine, Partner, Earth & Water Law

A link to the witnesses written statements and the Hearing proceedings [can be found here](#).