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Waters of the United States Implementation Post-Sackett Decision/Experiences and Perspectives: U.S. House of Representatives Transportation and Infrastructure Committee Hearing

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The Subcommittee on Water Resources and Environment of the United States House of Representatives Transportation and Infrastructure Committee held a September 11th hearing titled:

Waters of the United States Implementation Post-Sackett Decision: Experiences and Perspectives (“Hearing”).

The Subcommittee is chaired by Congressman David Rouzer (North Carolina).

The United States Supreme Court (“SCT”) issued an opinion on May 25th in *Sackett v. Environmental Protection Agency et al.*, addressing the scope of the Clean Water Act definition of “Waters of the United States” (“WOTUS”). The SCT had granted a petition for writ of certiorari to address the following question:

- Whether the 9th Circuit set for the proper test for determining whether wetlands are “WOTUS” under the Clean Water Act, 33 U.S.C. § 1362(7).

The SCT majority opinion significantly narrows the scope of what constitutes WOTUS for the Clean Water Act.

The majority articulates a two-part process for determining a WOTUS:

1. The Clean Water Act’s use of “waters” in §1362(7) refers only to geographical features that are describes 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. *Rapanos v. United States*, 547 U.S. 715.
2. To assert jurisdiction over an adjacent wetland under the Clean Water Act, a party must first establish that the adjacent body of water constitutes WOTUS (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 Corps of Engineers (“Corps”) 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.

Nevertheless, some states, developers, agricultural interests, and others have argued that EPA and the Corps are still interpreting the definition of WOTUS too broadly. In contrast, some states, environmental organizations, and others both oppose the *Sackett* decision and believed it should be construed narrowly.

The Subcommittee Chairman in opening remarks at the hearing argues:

- Protecting the environment should not unnecessarily hamper economy and private property rights.
- The role of the federal government should be balanced with that of the states and municipalities.
- Opposition to what he characterizes as “meaningless delays” on critical infrastructure project.
- Regulations should be simple and easy to follow and enforce.
- There should be no subjectivity for any bureaucrat to substitute their own biases or interpretations.
- There is bureaucratic overreach involved in complying with and understanding the definition of WOTUS.

Witnesses at the hearing included:

- Ms. Emma Pokon, Commissioner, Alaska Department of Environmental Conservation.
- Ms. Nicole Rowan, Director, Water Quality Control Division, Colorado Department of Public Health and Environment.
- Ms. Courtney Briggs, Chairman, Waters Advocacy Coalition, on behalf of the American Farm Bureau Federation.
- Mr. Vincent E. Messerly, P.E., President, Stream and Wetlands Foundation, on behalf of the National Association of Home Builders.

A link to the hearing testimonies, witness list, and summary can be found [here](#).