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SUPREME COURT TAKES UP CLEAN WATER ACT CASE, MAY SETTLE 'WOTUS' DEFINITION

By Dietrich Hoefner and James Voyles on 01/26/2022
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On January 24th, the U.S. Supreme Court granted Certiorari in ***Sackett, Michael, et ux. v. EPA, et al.*** on the limited question of "[w]hether the Ninth Circuit set forth the proper test for determining whether wetlands are 'waters of the United States' under the Clean Water Act."

The Sackett case arises out of an Idaho family's attempt to build a home on land that federal regulators determined to be wetlands under the Clean Water Act ("CWA"). The case began in 2007 when the Environmental Protection Agency ("EPA)") issued the Sacketts an administrative compliance order to restore land they were preparing for home construction. The subject property is less than an acre, the home would be built between a lake and a tributary creek, and subsurface water flows connect the lake and creek.

The Sacketts' are **asking** the Court to revisit its 2006 decision in Rapanos v. United States that yielded plurality and concurring opinions advancing different legal standards for determining what are and are not jurisdictional waters under the CWA's definition of "waters of the United States" ("WOTUS"). EPA **argued** unsuccessfully against Supreme Court review of this case on the grounds that the Ninth Circuit **decision** used the proper standard and that existing law is "clear" on this issue.

In Rapanos, Justice Scalia authored a plurality opinion joined by three other justices that defined WOTUS as (1) "only those relatively permanent, standing or continuously flowing bodies of water forming geographic features that are described in ordinary parlance as streams, oceans, rivers, and lakes" and (2) as "only those wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between waters and wetlands, are adjacent to such waters and covered by the CWA."

Justice Kennedy issued a separate concurring opinion agreeing with the result reached by the plurality but disagreeing with their reasoning and instead describing a broader scope of federal jurisdiction that allows for regulation of wetlands that are "isolated, or adjacent only to a non-navigable tributary of a navigable waterway," so long as the wetlands have a "significant nexus" to a "navigable waterway."

Most federal appellate courts that have considered the Rapanos decision have found that Justice Kennedy's concurring opinion is controlling, leading to significant debate and litigation as to what constitutes a "significant nexus" under that standard. The differences between Justice Scalia's "relatively permanent and continuous surface connection" standard and Justice Kennedy's "significant nexus" standard have also been the subject of three EPA rulemakings attempting to

define WOTUS since 2015, one of which is currently ongoing. Trade groups who urged the Court to take up this case did so to give the regulated community regulatory certainty and a durable definition of what constitutes WOTUS under the CWA.

The Court may elect to hear this case prior to its summer recess or in October when its next term begins.

For additional information about the *Sackett* case or Clean Water Act, please contact James Voyles at **jvoyles@lewisroca.com** or Dietrich Hoefner at **dhoefner@lewisroca.com**.

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