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U.S. SUPREME COURT SET TO (FINALLY) RESOLVE CLEAN WATER ACT UNCERTAINTY?

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The U.S. Supreme Court recently agreed to review whether the Ninth Circuit applied the proper test for determining if given wetlands are "waters of the United States" under the Clean Water Act ("CWA"). The case has broad implications for developers and other private and public property owners in connection with how wetland impacts may be regulated and require approval under the CWA.

Section 404 of the CWA regulates the discharge of dredged or fill material into "waters of the United States," including wetlands. The definition of "waters of the United States" establishes the scope of jurisdiction under the CWA, i.e., whether a permit may be required for impacts to, among other things, wetlands. This definition is important because it determines whether a time-consuming and expensive permit is required and can impact the cost, timing, and design of developments.

The definition of "waters of the United States" has been the subject of litigation in the United States Supreme Court and lower federal courts for decades. The Court considered the issue in Rapanos v. United States in 2006. Unfortunately, the decision only added to the confusion regarding what wetlands fall within regulatory jurisdiction. Most notably, the Court did not reach a majority opinion. Rather, four of the Justices (written by Justice Scalia) concluded that waters of the United States "included only those relatively permanent, standing or continuously flowing bodies of water" such as streams, oceans, rivers, and lakes, rejecting the broader definition the Corps implemented. Justice Kennedy, on the other hand, issued a concurrence concluding a water need only have a "significant nexus" to traditional waterways. The lack of decisive guidance resulted in additional litigation and confusion as to the appropriate decision; and the EPA and Corps have spent the last several years revising the applicable rule and associated guidance, increasing uncertainty surrounding what are "waters of the United States."

The hope of those who seek to develop personal or private property is that the Court's acceptance of the Sackett case will finally resolve this uncertainty. The ultimate course the Court will take remains to be seen.

If you have any questions about this topic, please contact the authors Brooke E. Lewis & Sidney C. Bigham, III on our Government and Regulatory Team.

1. Sackett v. EPA, 2022 WL 199378 (January 24, 2022).

2. 33 U.S.C. § 1362(7).

3. CWA § 502(7).

*4. See, e.g., U.S. v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985); Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, 531 U.S. 159 (2001); Rapanos v. U.S., 547 U.S. 715 (2006); Pascua Yaqui Tribe v. EPA, 2021 WL 3855977, at *1 (D. Ariz. Aug. 30, 2021) (appeal pending).*

*5. See, e.g., Pascua Yaqui Tribe, 2021 WL 3855977, at *2.*

6. Rapanos, 547 U.S. at 716.

7. Rapanos, 547 U.S. at 759 (Kennedy, J., concurring).

8. https://www.epa.gov/wotus/about-waters-united-states#SCOTUS, last visited Jan. 27, 2022.

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