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Sackett II Me: Breaking Down the Arguments in Sackett v. EPA

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In this episode of the Environmental Law Monitor, Bracewell partners ***Ann Navaro*** and ***Sara Burgin*** join host ***Daniel Pope*** for a closer look at the US Supreme Court's hearing of oral argument in *Sackett v. EPA*, the outcome of which could have significant impacts on the scope of the Clean Water Act's jurisdiction.

So why are the circuits at the Supreme Court now?

The circuits are back following the August 2000/2001 decision by the Ninth Circuit, this time on the substantive issue of whether the wetland on their property is subject to jurisdiction under Section 404 of the Clean Water Act. They're finally getting around to the actual jurisdictional substance issue.

The district court held that the wetland is subject to jurisdiction and that they should begin removing the filth that they've already placed on the property. The Ninth Circuit upheld the district court's decision. Before the Ninth Circuit, the circuits argued that the Scalia plurality and response provides the governing legal standard because a wetland on their property does not have a continuous surface connection to water to the US. The wetland on their property isn't jurisdictional. The Ninth Circuit held that the wetland is jurisdictional because the correct governing legal standard is Justice Kennedy's significant nexus test. So, the Ninth Circuit decision is based on significant nexus, and that is what's before the Supreme Court.

One of the things that the circuit's raised in their argument, and was picked up by some of the justices in questioning the government's position, is that it's one thing to have a phrase like "what is the United States?" that's going to require an agency to come in and through rulemaking and guidance say this is what we think that phrase means. What do you think of some of those arguments?

Those concerns are for where an environmental statute reaches so far into the lives of everyday people and doesn't just affect the operation of the plant down the road or something like that. Certainly, the concerns are very meaningful and I think the government was very respectful of that in the argument and it's probably not much so far. But what the government said in the argument is probably the case, which is in terms of criminal penalties, it would be highly unusual for the government to go that far unless somebody really doesn't want to work with the government. Again, there are going to be plenty of people out there who say the act reaches too far.

What arguments did the EPA advance before the court trying to bolster their position?

The first question was the definition of adjacency. That definition in its currently codified form, which includes wetlands that are separated by a physical feature like a bank or berm, is that reasonable under the Clean Water Act? And obviously the government's position is that's been the definition for decades, ever since the Corps got roundly chided for trying a much narrower definition and not only has it been the definition for decades, but it furthers the purpose of the Act. Some folks don't think the purpose of the Act should have much role in statutory interpretation but furthers the purpose of the Act by affording protections to waters that themselves protect and enhance traditional navigable waters. Then there's Section 404(g) of the Act, and there was a lot of discussion on that. A number of justices seem to think that creates real problems for the circuits and their position on adjacency. But in relevant part, it reserves part of the authority to the Corps of Engineers to the extent traditional navigable waters are involved.

Have questions about *Sackett v. EPA*? Contact ***Daniel Pope***, ***Ann Navaro*** and ***Sara Burgin*** with your questions.

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