Sackett v. EPA II: reading the tea leaves

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The Sacketts' property

Another view

The question presented

Did the Ninth Circuit set forth the proper test for determining whether wetlands are “waters of the United States” under the Clean Water Act, 33 U.S.C. § 1362(7)?

EPA's (and the Ninth Circuit's) test

Wetlands may be regulated if they, either alone **or in combination with similarly situated lands** *in the region*, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as navigable.

The Sacketts' framework

Step one, part one:

- is there a stream, ocean, river, lake, or similar hydrogeographic feature that in ordinary parlance would be called a "water"

Step one, part two:

- is the wetland connected to the "water" by means of a continuous surface connection, such that it is difficult to tell where the wetland ends and the "water" begins?

The Sacketts' framework, continued

- Step two: is the "water" among "the waters of the United States," *i.e.*, those waterbodies subject to Congress's authority over the channels of interstate commerce?

Justice Elena Kagan

Justice Brett M. Kavanaugh

Justice Kagan

Justice Neil M. Gorsuch

Justice Gorsuch

Justice Sonia Sotomayor

Key argument take-aways

- Not much sympathy for “significant nexus”
- Court unlikely to go beyond wetlands-as-waters step
- Justice Scalia’s view is still persuasive but not by itself determinative

Learn more on *Sackett v. EPA* at pacificlegal.org

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