



PACIFIC LEGAL
FOUNDATION

January 9, 2023

Honorable Scott S. Harris
Clerk
Supreme Court of the United States
1 First Street N.E.
Washington, D.C. 20543

Re: *Sackett v. EPA*, No. 21-454

Dear Mr. Harris:

On December 30, 2022, the Acting Solicitor General submitted a letter to the Court announcing the availability of the pre-publication version of a new rule from Respondent EPA and the Army Corps of Engineers interpreting the term “the waters of the United States,” as used in the Clean Water Act. The letter also drew the Court’s attention to the new rule’s preamble, which purportedly provides “additional guidance on the agencies’ views about which adjacent wetlands qualify as waters of the United States covered by the Act,” “including [in] Part IV.C.5” of the preamble. Presumably part of that guidance is the preamble’s discussion of Section 404(g)(1)’s reference to “wetlands adjacent thereto,” as well as the legislative history of the 1977 amendments to the Act that added Section 404(g)(1)—all of which the agencies contend support their view of the Act’s wetlands jurisdiction. *See* Preamble Part IV.A.2.b.ii, at 83-88. *Cf.* Preamble Part IV.C.5.b.i, at 315-16 (“Section IV.A of this preamble provides additional information about the legal basis for the agencies’ conclusions in this rule and the scientific support for the rule’s provisions regarding adjacent wetlands.”).

Omitted from the preamble’s discussion, however, is an important contrary indicator of Congressional intent. During the House floor debate on the 1977 conference report, Representative Bauman noted that “there has been some controversy as to exactly how this new legislation will be applied,” adding that it was his understanding that “the Federal Government will retain through the Corps of Engineers jurisdiction over navigable waters.” 123 Cong. Rec. 38924, 38972 (1977). He then went on to inquire of the conference report managers:

[B]ut what does “adjacent wetlands” mean? How far will that go? I represent counties where when the tide comes up, a third of those countries [sic] could suddenly be adjacent wetlands. I would hope that

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the States would be able to have delegated to them control over such areas.

Id. In response, Representative Clausen (who managed the conference report for the minority, *see id.* at 38952) stated: “I would interpret the word ‘adjacent’ to mean immediately contiguous to the waterway.” *Id.* at 38972.

I would appreciate it if you would circulate this letter to the Members of the Court.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "D. Schiff", written over a horizontal line.

Damien M. Schiff
Counsel of Record for Petitioners

cc: All Counsel