

Venable Files Amicus Brief on Behalf of Association of American Railroads Urging Supreme Court to Clarify Scope of WOTUS

Venable filed an amicus brief on behalf of the Association of American Railroads (AAR) in support of petitioners in *Sackett v. Environmental Protection Agency*, a pending case before the U.S. Supreme Court. The case concerns whether the U.S. Court of Appeals for the Ninth Circuit set forth the proper test for determining whether wetlands are “waters of the United States” (WOTUS) under the Clean Water Act.

One of 28 entities that filed an amicus brief in support of the petitioners, AAR focuses its brief on the ongoing difficulties that the industry has faced with inconsistent interpretations of WOTUS regarding manmade railroad ditches. The brief urges the Court to clarify the scope of WOTUS, given the confusion resulting from the “significant nexus” test established by *Rapanos v. United States*. At a minimum, the brief points out that these manmade safety features, essential to the operation of our nation’s rail system, do not qualify as jurisdictional water features.

“Though railroad ditches are vital to rail operations, agency interpretations of the Clean Water Act have left them in a constant state of regulatory flux,” the brief states. “As the relevant rules—and the people interpreting them—have changed, the number of railroad ditches that qualify as ‘waters of the United States’ has changed too. But the text of the Clean Water Act has not changed. It says that ditches are point sources and that point sources are not navigable waters. As

the Court considers the proper test for identifying waters of the United States, that distinction should anchor its interpretation.”

The AAR is the world’s leading railroad policy, research, and technology organization focusing on the safety and productivity of rail carriers. AAR members include the major freight railroads of the United States, Canada, and Mexico, as well as Amtrak.

The Venable team included Fred Wagner and Jay Johnson.