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US Supreme Court Upends Wetlands Regulatory Regime

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The U.S. Supreme Court issued its long-awaited decision yesterday in the case of *Sackett v. EPA*, upending wetland regulation nationwide and dealing a significant blow to the Biden Administration's rulemaking to define the jurisdictional reach of the Clean Water Act (CWA). The Court reversed and remanded the Ninth Circuit's decision regarding the U.S. Environmental Protection Agency's (EPA) and Army Corps of Engineers' (Corps) application of the "significant nexus test" to assert jurisdiction over adjacent wetlands.

Although the Court unanimously agreed that the wetlands located on the Sacketts' property are not jurisdictional, the justices were significantly divided on the legal reasoning and breadth of that decision. The majority (controlling) opinion drafted by Justice Alito held that only adjacent wetlands that are "as a practical matter indistinguishable" from jurisdictional rivers and lakes *due to a continuous surface water connection* are subject to protections under the Clean Water Act. We will provide more in-depth analysis over the coming weeks, but here are the key takeaways from the decision:

1. **New Test for Wetlands** - The majority opinion announces a new test for defining jurisdictional wetlands under the CWA: (1) is the wetland adjacent to a jurisdictional water (stream, river or lake)? and if so, (2) does the wetland have a continuous surface connection to that water, "making it difficult to determine where the 'water' ends and the 'wetland' begins[?]" The opinion relies on the reasoning from the Scalia (non-controlling) opinion in *Rapanos*. Only if both prongs of the test are met is a wetland covered under the CWA. This will almost certainly leave a significant percentage of wetlands, particularly in the arid west, without federal protection.
2. **Rejection of the Significant Nexus Test** – The Court rejected the Ninth Circuit's application of the "significant nexus" test from *Rapanos* to find the wetlands at issue jurisdictional. Instead, the majority concludes that the Clean Water Act extends to only those wetlands that are "as a practical matter indistinguishable from waters of the United States."
3. **Affront to Biden Rule** – By rejecting the "significant nexus" test, the majority opinion directly targets the Biden Administration's recently finalized rule defining "waters of the United States." This ruling will come into play in the ongoing litigation over the Biden Rule and could form the basis for remand.
4. **Applicability to Wetlands Only** – While the majority refers generally to waters of the United States narrowly (i.e., as relatively

permanent bodies of water connected to traditional navigable waters), it is important to note that the holding in the case *only applies to wetlands*.

5. **Divided Court** – In addition to the majority opinion, three separate opinions were filed that concurred in judgment but set forth different views on how broadly to interpret “adjacent wetlands.” Notably, the concurring opinions drafted by Justice Kavanaugh and Justice Kagan both read more like dissents—the Justices expressed significant concern with the majority's interpretation of the text of the CWA.

The majority and concurring opinions are lengthy and multifaceted, and it will take time to fully understand the implications of this case. That said, for projects facing wetland permitting issues, it will almost certainly warrant immediate consideration in overall permitting strategy.

The Court's decision is available here.

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