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Sackett v. EPA: A United (but Divided) Court Narrows CWA Scope

Reflections on Water

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The U.S. Supreme Court just issued its long-awaited Sackett decision in which it significantly narrowed the scope of federal jurisdiction over "waters of the U.S." under the Clean Water Act. Written by Justice Alito (with four other justices joining him), the decision contained three separate concurring opinions, with its operative holding as follows:

1. The CWA extends to only those "wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right," so they are "indistinguishable" from those waters.
2. This requires the party asserting jurisdiction over adjacent wetlands to establish "first, that the adjacent [body of water constitutes] … 'water[s] of the United States,' (*i.e.,* a relatively permanent body of water connected to traditional interstate navigable waters); and second, that the wetland has a continuous surface connection with that water, making it difficult to determine where the 'water' ends and the 'wetland' begins."

The court squarely rejected EPA's :significant nexus" approach as inconsistent with both the text and structure of the statute. Significantly, the decision is 9-0 on the absence of EPA jurisdiction over the Sackett's property, but 5-2-4-3 on the reasoning for why EPA lacked jurisdiction.

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