New Wetlands Rule Reflects the Supreme Court's Interpretation of WOTUS in *Sackett*

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In May 2023, the Supreme Court altered the interpretation of "waters of the United States" under the Clean Water Act in its landmark case, *Sackett v. Environmental Protection Agency*.[1] This alteration limits federal protection of wetlands. On August 29, 2023, the Environmental Protection Agency and the U.S. Army Corps of Engineers (the "agencies") issued a final rule that reflects the Supreme Court's decision in *Sackett*. By some estimates, this new rule could impact 63 percent of the nation's wetlands.[2] Despite the rule's stated intent to adhere to the Supreme Court's ruling, some organizations representing development and businesses still say the new rule is overly burdensome and doesn't do enough to limit federal authority over private land.[3] What does this new rule mean for the wetlands of Mississippi and Alabama? Does it change our landscape?

First, why does it matter how the Court defines "waters of the United States" (WOTUS)?[4] Congress passed the Clean Water Act (CWA) in 1972 to control pollution into "navigable waters."[5] The Act defines navigable waters as "the waters of the United States, including the territorial seas."[6] Therefore, the scope of the CWA is limited to WOTUS – but a definition for WOTUS was not provided in the Act itself.

Since its passage, WOTUS was mostly defined through regulations promulgated by the federal agencies charged with enforcement of the Act; however, the Supreme Court has some history of stepping in to place boundaries on its scope. One such occasion was in 2006 when the Supreme Court issued its plurality opinion regarding the definition of WOTUS in *Rapanos v. United States*.[7] Two definitions emerged from the case: Justice Scalia's opinion, which stated that isolated wetlands should not be considered protected under the Clean Water Act, and Justice Kennedy's concurrence, which created the "significant nexus" test.[8] Kennedy's nexus test required looking at the larger picture; if a wetland had a "significant nexus" to a neighboring navigable waterway, it should be protected.[9]

In January 2023, while a decision in the *Sackett* case was still pending, the agencies issued a final rule that revised the definition of WOTUS. The rule included the protection of "adjacent wetlands" in accordance with Kennedy's significant nexus test. In response, 27 states quickly sued, including Alabama and Mississippi, in multiple lawsuits asking the courts for injunctions to prohibit the agencies from enforcing their definition of WOTUS that included wetlands adjacent to navigable waters. In several separate opinions (hereafter referred to as the "States v. EPA Cases"), multiple lower courts granted the requested injunctions, thus requiring the agencies to apply a pre-2015 WOTUS rule in those 27 states.[10]

After *Sackett*, isolated wetlands are not protected under the CWA. To give effect to the Supreme Court's decision, the agencies updated their January 2023 WOTUS rule in August to reflect this change. Any mention of a significant nexus was removed from the rule, and wetlands must now have a continuous surface connection to navigable waters in order to be federally protected. However, the pre-*Sackett* injunctions from the States v. EPA Cases meant that neither the January nor August 2023 WOTUS rules promulgated by the Agencies can be enforced in the 27 states that are covered by those injunctions (including every state that borders the Gulf of Mexico). Instead, the 27 suing states are to continue following a pre-2015 WOTUS rule.

While the agencies distinguish between the states following the pre-2015 rule and those that will follow the amended January 2023 rule, both rules are in alignment with *Sackett*. In Alabama and Mississippi, the pre-2015 language dictating federal protection of wetlands states that "wetlands adjacent to waters . . . are not waters of the United States,"[11] following Scalia's definition from *Rapanos*.

Wetlands that are separated from navigable waters, meaning surface waters that are not visibly connected to another water body, will not be protected in any of the 50 states. Pending litigation in the 27 states that are following the pre-2015 WOTUS rule means that the matter is still in flux.

With each slight variation of WOTUS' definition, the fate of ecosystems, clean drinking water, farming, development, and businesses is altered. However complicated the implementation may seem, *Sackett*'s definition of WOTUS is now the law in all 50 states with the agencies' new regulation. Isolated wetlands, which may make up more than half of our nation's wetlands, are no longer protected under federal law.

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Endnotes

1. *Sackett v. Environmental Protection Agency*, 598 U.S. 651 (2023).
2. Allyson Chiu, *Biden's Rule, Heeding Supreme Court, Could Strip Over Half of U.S. Wetlands' Protections*, Wash. Post (Sept. 7, 2023).
3. *Impact*, Waters Advocacy Coalition (2023).
4. 33 U.S.C. §1251 et seq. (1972).
5. *Id.*
6. *Id.*
7. *Rapanos v. United States*, 547 U.S. 715 (2006).
8. *Id.*
9. *Id.* at 798.
10. *Texas v. United States Env't Prot. Agency*, No. 3:23-CV-17, 2023 WL 2574591 (S.D. Tex. Mar. 19, 2023). *W. Virginia v. U.S. Env't Prot. Agency*, No. 3:23-CV-032, 2023 WL 2914389 (D.N.D. Apr. 12, 2023). (24 states joined this case as co-plaintiffs, including Mississippi and Alabama.) *Kentucky v. United States Env't Prot. Agency*, No. 3:23-CV-00007-GFVT, 2023 WL 3326102 (E.D. Ky. May 9, 2023).
11. 40 CFR 230.3(s).