

IN THE WAKE OF *SACKETT*: UNPACKING THE SUPREME COURT’S LATEST DEFINITION OF “WATERS OF THE UNITED STATES”

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Abstract	282
I. Introduction.....	282
II. Wetlands: Nature’s Hidden Gems	284
A. What Exactly Is a Wetland?	284
B. The Indispensable Values of Wetlands.....	285
III. Turning the Tide for Clean Water	287
A. Pre-Clean Water Act.....	287
B. The Clean Water Act	288
IV. Watershed Decisions on WOTUS.....	290
A. <i>United States v. Riverside Bayview Homes, Inc.</i>	290
B. <i>Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers</i>	291
C. <i>Rapanos v. United States</i>	293
V. <i>Sackett v. EPA</i> : Clarity or Confusion?.....	295
A. The Sacketts.....	295
B. <i>Sackett v. EPA</i>	297
1. The Continuous Surface Connection Test.....	298
2. Justice Thomas’s Concurring Opinion	299
3. Justice Kagan’s Opinion, Concurring in the Judgment	300
4. Justice Kavanaugh’s Opinion, Concurring in the Judgment	300
C. Post- <i>Sackett</i> Response	301
VI. Unpacking the New WOTUS Test.....	302
A. Clean Water Act Principles Disregarded	303
B. WOTUS Defined?.....	304
C. A Host of Thorny Questions	305
1. What Constitutes a “Continuous Surface Connection”?	306
D. Effects on Compensatory Mitigation.....	308
E. It’s Up to the States.....	311
VII. Conclusion	312

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ABSTRACT

The Clean Water Act (CWA) stands as one of the most successful environmental laws ever enacted by Congress to protect water quality in the United States. Yet, despite its success, the ambiguous meaning of “waters of the United States” (WOTUS), as used to define “navigable waters” in the CWA, has repeatedly frustrated the Act’s implementation over the last 50 years. Neither agency regulations nor Supreme Court jurisprudence have offered a clear or lasting definition. The Supreme Court’s 2023 decision in Sackett v. EPA once again redefined the meaning of WOTUS and significantly narrowed the CWA’s jurisdiction with the adoption of the “continuous surface connection” test. This new test effectively removes federal protections from many wetlands previously regulated under the CWA. While the decision is hailed by some as a restraint on federal overreach, it ultimately prolongs the uncertainty surrounding WOTUS, leaving critical ecological and legal questions unanswered. To avoid another 50 years of uncertainty, Congress must amend the CWA and precisely define “waters of the United States.”

I. INTRODUCTION

The Clean Water Act (CWA) stands as one of the most successful, environmental laws enacted by Congress to protect water quality in the history of the United States.¹ Without the enactment of the CWA in 1972, one could only imagine what the nation’s waters would be like today. At a time when rivers were catching on fire and water was un-swimmable, the CWA established a turning point in the way the nation viewed, used, and managed its water resources.² The CWA comprehensively and effectively reduced the massive, wide-scale pollution entering the many waters flowing across the nation.³ Thanks to the CWA, the “chemical, physical, and biological integrity” of America’s waters remain preserved.⁴

1. Sackett v. Env’t Prot. Agency, 598 U.S. 651, 658 (2023).

2. See Lorraine Boissoneault, *The Cuyahoga River Caught Fire at Least a Dozen Times, but No One Cared Until 1969*, SMITHSONIAN MAG. (June 19, 2019), <https://www.smithsonianmag.com/history/cuyahoga-river-caught-fire-least-dozen-times-no-one-cared-until-1969-180972444/> [https://perma.cc/V4WW-4LNB].

3. See, e.g., Kara Manke, *Clean Water Act Dramatically Cut Pollution in U.S. Waterways*, UC BERKELEY NEWS (October 8, 2018), <https://news.berkeley.edu/2018/10/08/clean-water-act-dramatically-cut-pollution-in-u-s-waterways/> [https://perma.cc/XZ5E-FPNM].

4. See 33 U.S.C. § 1251(a).

Despite its overall success, one aspect of the CWA has plagued federal agencies, courtrooms, industries, and landowners for the last 50 years.⁵ The meaning of “waters of the United States” (WOTUS), as used to define “navigable waters” in the CWA, has been a constant bur in the side of everyone operating under the regulatory environment of the CWA.⁶ Particularly, the debate over which wetlands fall within WOTUS jurisdiction has frustrated the implementation of the CWA with no clear answer having been offered in either agency regulations or Supreme Court jurisprudence.⁷

The recent United States Supreme Court decision in *Sackett v. EPA* once again redefined the meaning of WOTUS.⁸ *Sackett* narrowly defined WOTUS and significantly reduced the “waters,” specifically wetlands, previously considered jurisdictional under the CWA.⁹ Many celebrate the decision as a restriction of the heavy hand of federal regulation.¹⁰ However, the Court’s new definition brings more confusion than clarity. The boundaries marking the extent of the CWA’s jurisdiction remain blurry, leaving the WOTUS debate wide open.

This Article identifies the legal and ecological impacts of the Court’s decision, as well as important questions that remain unanswered by the “continuous surface connection” test.¹¹ Part II provides a general overview of the form and function of wetlands and their value to the environment and society.¹² Part III reviews the history, background, and evolution of the CWA, describing a transition in focus from “commerce to conservation.”¹³ Part IV examines United

5. See Jesse J. Richardson Jr. et al., *Turtles All the Way Down: A Clearer Understanding of the Scope of Waters of the United States Based on the U.S. Supreme Court Decisions*, 46 Wm. & Mary Env’t. L. & Pol’y Rev. 1, 1 (2021).

6. See, e.g., *Rapanos v. United States*, 547 U.S. 715, 722 (2006); *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng’rs*, 531 U.S. 159, 172 (2001); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 131 (1985).

7. See Richardson et al., *supra* note 5, at 1.

8. *Sackett v. Env’t Prot. Agency*, 598 U.S. 651, 678–79 (2023).

9. *Id.*

10. See generally Press Release, Cong. W. Caucus, Western Caucus Celebrates Unanimous WOTUS Decision (May 26, 2023), <https://westerncaucus.house.gov/news/documentsingle.aspx?DocumentID=4306> [<https://perma.cc/3UNV-YL74>]; *NAHB Commends Supreme Court Ruling in Sackett v. EPA*, Nat’l Ass’n of Home Builders (May 25, 2023), <https://www.nahb.org/news-and-economics/press-releases/2023/05/nahb-commends-supreme-court-ruling-in-sackett-v-epa> [<https://perma.cc/SLR2-8A5M>].

11. *Sackett*, 598 U.S. at 684.

12. See discussion *infra* Part II.

13. See discussion *infra* Part III; Sam Kalen, *Commerce to Conservation: The Call for a National Water Policy and the Evolution of Federal Jurisdiction Over Wetlands*, 69 N.D. L. Rev. 873, 873 (1993).

States Supreme Court case law interpreting the meaning of WOTUS.¹⁴ Part V discusses the facts, procedural posture, and opinion of *Sackett v. EPA* as well as recent post-decision action by states and the EPA.¹⁵ Part VI identifies the impacts and lingering questions left by the *Sackett* decision.¹⁶ The greatest impact of the Court's new WOTUS test is that it removes federal jurisdiction from most wetlands previously regulated under the CWA, giving the majority of wetland regulation to the states.¹⁷ Instead of bringing clarity, the continuous surface connection test raises numerous questions, leaving the WOTUS debate unresolved.¹⁸ This paper concludes by urging Congress to take action and amend the CWA to precisely define "waters of the United States."¹⁹

II. WETLANDS: NATURE'S HIDDEN GEMS

The *Sackett* decision is better understood by first understanding the physical form, ecological function, and diverse values of wetlands. Defining a wetland can be troublesome as wetlands exist across a wide variety of temporal and spatial spectrums.²⁰ However, such definitional difficulties are worth navigating as wetlands provide numerous values and "ecosystem services" to society.²¹

A. What Exactly Is a Wetland?

Wetlands are semi-aquatic land features that perform a wide variety of functions critical to society and the environment in terms of hydrology, biology, and ecology.²² Wetlands are defined as:

14. See discussion *infra* Part IV.

15. See discussion *infra* Part V.

16. See discussion *infra* Part VI.

17. *Sackett v. Env't Prot. Agency*, 598 U.S. 651, 716 (2023) (Kavanaugh, J., concurring); see also James Doubek, *The EPA Removes Federal Protections for Most of the Country's Wetlands*, NPR (Aug. 29, 2023, at 19:40 ET), <https://www.npr.org/2023/08/29/1196654382/epa-wetlands-waterways-supreme-court> [<https://perma.cc/8DHQ-N6SB>].

18. See discussion *infra* Part VI.

19. See discussion *infra* Part VII.

20. See generally LEWIS COWARDIN ET AL., U.S. DEP'T OF THE INTERIOR FISH & WILDLIFE SERV., OFF. OF BIOLOGICAL SERVS., CLASSIFICATION OF WETLANDS AND DEEPWATER HABITATS OF THE UNITED STATES, FWS/OBS-79/31 (1979), https://www.epa.gov/sites/default/files/2017-05/documents/cowardin_1979.pdf [<https://perma.cc/L5FN-Z6V7>].

21. See generally William J. Mitsch & James G. Gosselink, *The Value of Wetlands: Importance of Scale and Landscape Setting*, 35 ECOLOGICAL ECON. 25, 25–33 (2000).

22. See generally RALPH E. HEIMLICH ET AL., WETLANDS AND AGRICULTURE: PRIVATE INTERESTS AND PUBLIC BENEFITS, AGRIC. ECON. REP. NO. 765, RES. ECON. DIV., ECON. RSCH

[L]ands transitional between terrestrial and aquatic systems where the water table is usually at or near the surface or the land is covered by shallow water. For purposes of this classification wetlands must have one or more of the following three attributes: (1) at least periodically, the land supports predominantly hydrophytes; (2) the substrate is predominantly undrained hydric soil; and (3) the substrate is [non-soil] and is saturated with water or covered by shallow water at some time during the growing season of each year.²³

Wetlands include swamps, marshes, vernal pools, playa lakes, bogs, fens, pocosins, bottomlands, and prairie potholes.²⁴ These wetlands occur in many kinds of hydrologic systems including marine, estuarine, riverine, lacustrine, and palustrine systems.²⁵

Defining a wetland is a complicated endeavor, even for natural resource professionals.²⁶ Unlike linear streams, creeks, and rivers and geometrically identifiable bodies of water like ponds and lakes, wetlands rarely exist in such a simplified manner.²⁷ Discerning the spatial and temporal distribution of wetlands is an ever-changing task depending on climate, seasons, and ecological disturbances.²⁸ Like most issues in both law and ecology, the answer to defining a wetland is often “it depends.”

B. The Indispensable Values of Wetlands

Wetlands are indispensable ecosystems that benefit the health and wellbeing of the world’s biomes and human society.²⁹ Parties who benefit from wetland ecosystem services include hunters, anglers, boaters, bird watchers, downstream property owners, public water supply and flood control authorities, timber companies, farmers, etc.³⁰ Ecosystem services provided by wetlands have been estimated to be 75% more valuable than lakes and rivers, 15 times more valuable

SERV., U.S. DEP’T OF AGRIC. (Sept. 1998), https://ers.usda.gov/sites/default/files/_laserfiche/publications/40845/32664_aer765_002.pdf?v=44667 [<https://perma.cc/3SYH-ETG3>].

23. COWARDIN ET AL., *supra* note 20, at 3. The U.S. Army Corps of Engineers and the EPA use a more vague but similar definition that differs in wording but not in substance. *See* 33 C.F.R. § 328.3(c)(1).

24. *See* COWARDIN ET AL., *supra* note 20, at 4–21.

25. *Id.* at 5.

26. *Id.* at 3.

27. *See id.*

28. *Id.* at 3.

29. *See* Mitsch, *supra* note 21, at 25–33.

30. HEIMLICH ET AL., *supra* note 22, at 1–2.

than forests, and 64 times more valuable than grasslands and rangelands.³¹ Wetland ecosystem services have been valued at up to \$8,800 per acre per year in the United States,³² and globally at \$47 trillion per year.³³

The anaerobic processes, deposition and retention of nutrients, breakdown of organic matter, etc. at work in wetlands all play an immense role in the ecology of plants, wildlife, and the hydrologic cycle.³⁴ Wetlands are critical tools for water filtration and flood retention.³⁵ As water passes through wetlands, sediment is removed from the water column and deposited in the wetland thus purifying the water and reducing siltation of rivers, lakes, and streams.³⁶ Additionally, wetlands act as a natural sponge by absorbing large volumes of flood water and releasing it slowly, thereby reducing runoff and flood damage.³⁷

Wetlands are indispensable to thousands of different species of flora and fauna, especially those that are endangered.³⁸ The biological productivity of wetlands rival that of rainforests and are considered major biodiversity hotspots.³⁹ Thousands of different species of mammals, birds, reptiles, amphibians, fish, insects, and plants rely on wetlands for all or at least part of their existence.⁴⁰ More than half of the species listed under the Endangered Species Act rely on wetlands for essential habitat.⁴¹ The moist habitats, highly fertile soils, and typically warm and humid environments allow wetlands to be the most biologically productive

31. Mitsch, *supra* note 21, at 30.

32. Molly Ingraham & Shonda Foster, *The Value of Ecosystem Services Provided by the U.S. National Wildlife Refuge System in the Contiguous U.S.*, 67 ECOLOGICAL ECON. 608, 613 (2008).

33. N. Davidson et al., *Worth of Wetlands: Revised Global Monetary Values of Coastal and Inland Wetland Ecosystem Services*, 70 MARINE & FRESHWATER RSCH. 1189, 1191 (2019).

34. See HEIMLICH ET AL., *supra* note 22, at 1.

35. *Id.* at 1, 14.

36. *Id.* at 1.

37. *Id.*

38. See JAMES D. WILLIAMS & C. KENNETH DODD, JR., AM. WATER RES. ASS'N, IMPORTANCE OF WETLANDS TO ENDANGERED AND THREATENED SPECIES 565-66 (1978), <https://www.nativefishlab.net/library/textpdf/12005.pdf> [<https://perma.cc/78EG-44GY>].

39. *Why Are Wetlands Important?*, U.S. ENV'T PROT. AGENCY (Feb. 18, 2025), <https://www.epa.gov/wetlands/why-are-wetlands-important> [<https://perma.cc/W48N-RHXA>].

40. See HEIMLICH ET AL., *supra* note 22, at 1.

41. Press Release, U.S. Dep't of the Interior, Interior Department Announces More Than \$87 Million for Wetland Conservation Projects and National Wildlife Refuges (May 8, 2024), <https://www.doi.gov/pressreleases/interior-department-announces-more-87-million-wetland-conservation-projects-and> [<https://perma.cc/79GB-MRPY>].

and biodiverse ecosystems in the world.⁴² Legal protections of wetlands ensure the ecological and economic prosperity of nature and society, but obtaining such protections has been a battle.⁴³

III. TURNING THE TIDE FOR CLEAN WATER

Federal legislation protecting the nation's waters was initially motivated by commercial interests rather than for ecological or environmental reasons.⁴⁴ Rampant pollution concerns across the nation during the 20th century created a need for an effective federal pollution control program in order to curb the growing water quality issues.⁴⁵ The passing of the CWA established strict, enforceable pollution prevention measures,⁴⁶ but it also created legal challenges of its own.⁴⁷

A. Pre-Clean Water Act

The first federal legislation that dealt with navigable waters was the Rivers and Harbors Act of 1899 (RHA).⁴⁸ The RHA prohibited obstruction of the nation's navigable waterways as a response to state interference with interstate commerce.⁴⁹ Albeit initially for commercial reasons, this piece of legislation laid the foundation for what evolved into a series of water protection laws designed to protect the ecological and environmental integrity of the nation's waters.⁵⁰

Section 13 of the RHA, also known as the "Refuse Act",⁵¹ was the first pollution prevention statute to evolve from the act.⁵² This section prohibited the discharge of refuse into any navigable water or tributary thereof, as well as the deposit of material on the bank of a navigable waterway to the effect that it might impede or obstruct navigation.⁵³ However, a permit to discharge refuse or deposit

42. *Why Are Wetlands Important?*, *supra* note 39.

43. Kalen, *supra* note 13, at 875.

44. *Id.* at 879.

45. See LAURA GATZ, CONG. RSCH. SERV., RL30030, CLEAN WATER ACT: A SUMMARY OF THE LAW 2 (2016).

46. *Id.*

47. Richardson et al., *supra* note 5, at 1.

48. Rivers and Harbors Act of 1899, ch. 425, 30 Stat. 1121.

49. *Id.*

50. See Kalen, *supra* note 13, at 879–83.

51. Rivers and Harbors Act § 13, 30 Stat. at 1152 (codified as amended at 33 U.S.C. § 407).

52. Kalen, *supra* note 13, at 880–81.

53. *Id.* at 880.

material in navigable waters could be obtained from the Secretary of the Army.⁵⁴ As awareness for the need of effective pollution control increased, two United States Supreme Court decisions officially approved the application of the Refuse Act to pollutants, finding that: (1) solid waste constituted an obstruction to waterways,⁵⁵ and (2) the term “refuse” included substances harmful to waterways such as pollutants.⁵⁶

As environmental awareness continued to rise post-World War II, Congress passed the Federal Water Pollution Control Act of 1948.⁵⁷ This was the first comprehensive assertion of federal interest in clean water programs, specifically providing technical assistance funds to state and local governments for water pollution issues.⁵⁸ However, the act did little to curb the ongoing, rampant water pollution due to enforcement issues.⁵⁹ The act was amended four different times in the late 1950s and early 1960s to better address the water pollution problem, but to no avail.⁶⁰ Meanwhile, pollution of the nation’s waters was wreaking havoc on both the economy and the environment.⁶¹ Fisherman in the Chesapeake Bay area lost millions of dollars in revenue due to water quality issues; pollution in the Hudson Bay spiked at 170 times the legal limit; and effluence in a Florida lake killed 26 million fish, the largest fish kill ever recorded.⁶² The water quality crisis peaked in 1969 when the Cuyahoga River in Ohio burst into flames for the 12th time after an oil slick ignited, catching logs, trash, and other debris in the river on fire.⁶³

B. The Clean Water Act

Surmounting pollution issues and the inadequacy of prior legislation to address them motivated Congress to completely revise the Federal Water Pollution

54. 33 U.S.C. § 407.

55. *United States v. Republic Steel Corp.*, 362 U.S. 482, 485, 488–89 (1960).

56. *United States v. Standard Oil Co.*, 384 U.S. 224, 229–30 (1966); Richardson et al., *supra* note 5, at 3.

57. Federal Water Pollution Control Act of 1948, Pub. L. No. 80-845, 62 Stat. 1155 (1948).

58. GATZ, *supra* note 45, at 2.

59. *Id.*

60. *Id.*

61. *See Clean Water Act Becomes Law*, HISTORY (April 7, 2020), <https://www.history.com/this-day-in-history/clean-water-act-becomes-law> [https://perma.cc/58E3-ZEWP].

62. *Id.*

63. Boissoneault, *supra* note 2.

Control Act of 1948 in 1972.⁶⁴ What ultimately passed became known as the CWA.⁶⁵ The amendments to the 1948 statute aimed to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”⁶⁶ The 1972 amendments also authorized a permitting program for discharge of dredge and fill material into navigable waters under Section 404.⁶⁷

The term “waters of the United States, including the territorial seas” was used for the first time in the CWA to define “navigable waters” as the act’s jurisdictional extent.⁶⁸ Congress included this term of art to reflect the intent that the CWA should not be limited to traditionally navigable waters.⁶⁹ The basis for the regulation of navigable waterways had finally moved from protection of interstate commerce, to protection of the quality and integrity of America’s waters.⁷⁰

The CWA was amended again in 1977,⁷¹ altering the Section 404 program in three main ways.⁷² The first alteration was an authorization to issue “‘general permits’ on a national, regional or state-wide basis.”⁷³ The second provided a series of exemptions from the program namely for normal farming, ranching, and silviculture activities.⁷⁴ The third alteration added Section 404(g) which authorized states to administer their own permit programs for discharge of dredge or fill material.⁷⁵ The legislative debates over these amendments clearly demonstrate Congress’s desire to protect wetlands and its intention to expand the meaning of navigable waters beyond those which are only navigable-in-fact.⁷⁶

Although addressing many ecological and environmental issues, the CWA created several legal challenges of its own which have inhibited its

64. See generally Federal Water Pollution Control Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816 (codified as amended 33 U.S.C. §§ 1251–1376).

65. See Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566 (codified as amended at 33 U.S.C. §§ 1251–1375).

66. 33 U.S.C. § 1251(a).

67. See Federal Water Pollution Control Amendments § 404.

68. 33 U.S.C. § 1362(7).

69. See Kalen, *supra* note 13, at 898.

70. *Id.*

71. See generally Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566 (codified as amended at 33 U.S.C. §§ 1251–1375).

72. Kalen, *supra* note 13, at 898.

73. *Id.*

74. *Id.*

75. *Id.*

76. See *id.* at 897–905.

implementation.⁷⁷ The meaning of WOTUS has been the subject of an endless debate and whose meaning changes with every presidential administration and Supreme Court decision.⁷⁸ In addition to confusing attorneys and judges, the term also befuddled the very agencies tasked with its implementation.⁷⁹ Proposed and finalized regulations from the EPA and United States Army Corps of Engineers (Corps) have attempted to define WOTUS over the years with little success or consistency.⁸⁰

IV. WATERSHED DECISIONS ON WOTUS

The Supreme Court has examined the WOTUS issue three times since the CWA passed in 1972.⁸¹ Due to the complexity of the issues and the narrowness of the holdings, the Court's WOTUS jurisprudence was not particularly enlightening for any of the parties involved.⁸² The definition of WOTUS never seemed fully answered. As demonstrated in the aftermath of *Rapanos v. United States*, the turbidity around its meaning only increased as the years passed.⁸³

A. United States v. Riverside Bayview Homes, Inc.

The WOTUS debate first reached the Supreme Court in 1985 in *United States v. Riverside Bayview Homes, Inc. (Riverside Bayview)*.⁸⁴ The issue was whether Riverside Bayview Homes, Inc. (Riverside Bayview) was required to obtain a permit to discharge fill material into wetlands adjacent to navigable waters of Lake St. Clair, Michigan and its tributaries.⁸⁵ The Corps determined that Riverside Bayview's construction actions impacted jurisdictional waters.⁸⁶ The District Court found jurisdiction, but the Sixth Circuit Court of Appeals reversed, finding no jurisdiction under the CWA.⁸⁷

77. Richardson et al., *supra* note 5, at 1.

78. *Id.* at 1–2.

79. *See id.* at 3–11.

80. *See id.*

81. *See Rapanos v. United States*, 547 U.S. 715, 730 (2006); *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 162–64 (2001); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 123 (1985).

82. Richardson et al., *supra* note 5, at 14–15.

83. *See id.* at 20, 33.

84. *Riverside Bayview*, 474 U.S. at 126.

85. *Id.* at 124; *see Richardson et al.*, *supra* note 5, at 11–12.

86. Richardson et al., *supra* note 5, at 12.

87. *Id.* at 12.

In its only unanimous decision on WOTUS, the Court reversed the decision of the Sixth Circuit Court of Appeals,⁸⁸ ruling that the wetland at issue was in fact “adjacent” to a navigable water, thus requiring *Riverside Bayview* to obtain a permit.⁸⁹ The Court found adjacency since “the area characterized by saturated soil conditions and wetland vegetation extended beyond the boundary of [the] property to Black Creek, a navigable waterway.”⁹⁰ Thus, because the “property [was] a wetland adjacent to a navigable waterway,” it was therefore “part of ‘waters of the United States.’”⁹¹

Riverside Bayview had a very limited holding even though it was the original case in the WOTUS debate.⁹² The decision focused only on whether wetlands adjacent to navigable waterways constituted WOTUS.⁹³ The opinion never discussed whether wetlands adjacent to tributaries of navigable waterways should be considered WOTUS. The facts of *Riverside Bayview* involved only a wetland adjacent to waters navigable-in-fact (Lake St. Clair).⁹⁴ Many questions regarding the role of non-navigable tributaries and their hydrological connections to navigable waters were left unanswered.

B. Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers

In 2001, the WOTUS issue once again reached the Supreme Court in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers* (*SWANCC*).⁹⁵ The question in *SWANCC* examined whether the Corps, had jurisdiction over abandoned sand and gravel pits that had evolved into scattered seasonal and permanent ponds.⁹⁶ The Solid Waste Agency purchased the tract of land and sought the necessary permits from the Corps for waste disposal.⁹⁷

After originally denying jurisdiction over the isolated ponds, the Corps retracted its finding and asserted jurisdiction under the EPA’s 1986 “Migratory

88. *Riverside Bayview*, 474 U.S. at 139.

89. *Id.*

90. *Id.* at 131.

91. *Id.*

92. Richardson et al., *supra* note 5, at 14.

93. *Riverside Bayview*, 474 U.S. at 135.

94. Richardson et al., *supra* note 5, at 14.

95. *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng’rs*, 531 U.S. 159, 159 (2001).

96. *Id.* at 162–63.

97. *Id.* at 163.

Bird Rule.”⁹⁸ The 1986 Migratory Bird Rule gave the Corps jurisdiction over any water which could be used as habitat by migratory birds.⁹⁹ In its reversal, the Corps found that “the seasonally ponded, abandoned gravel mining depressions located on the project site, while not wetlands, did qualify as ‘waters of the United States.’”¹⁰⁰ The Corps subsequently denied the Solid Waste Agency’s permit.¹⁰¹ The Solid Waste Agency brought suit to challenge the Corps’ jurisdiction and permit denial.¹⁰² The Seventh Circuit Court of Appeals ruled for Corps, finding that the Migratory Bird Rule was a reasonable interpretation of the CWA.¹⁰³

In a split 5–4 decision, the Supreme Court reversed the decision of the Seventh Circuit Court of Appeals.¹⁰⁴ The majority held that the Migratory Bird Rule was not a reasonable interpretation by the Corps and that it was not supported by the CWA.¹⁰⁵ The Court recalled that Congress’s intent was to regulate wetlands “inseparably bound up with the ‘waters’ of the United States,”¹⁰⁶ hence the inclusion of the word “adjacent” in the 1977 amendments.¹⁰⁷ They acknowledged Congress’s reason for doing so was out of concern for the protection of water quality and aquatic ecosystems.¹⁰⁸ However, the Court refused to extend the Corps’ jurisdiction to “ponds that [were] *not* adjacent to open water.”¹⁰⁹

Like *Riverside Bayview*, the *SWANCC* opinion was also narrow in its holding.¹¹⁰ While it held that *isolated* wetlands were not jurisdictional and consequently that wetlands must be *adjacent* to be jurisdictional, *SWANCC* did not describe which types of waters would qualify as adjacency for wetlands (e.g., tributaries, open water, navigable-in-fact water, etc.).¹¹¹ The terms “open water” and “navigable water” were only used to qualify isolated wetlands as not

98. See Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. 41206, 41217 (Nov. 13, 1986).

99. *Id.*

100. *Solid Waste Agency*, 531 U.S. at 164.

101. *Id.* at 165.

102. *Id.*

103. *Id.*; see Richardson et al., *supra* note 5, at 15.

104. Richardson et al., *supra* note 5, at 16.

105. *Solid Waste Agency*, 531 U.S. at 167; see Richardson et al., *supra* note 5, at 16.

106. *Solid Waste Agency*, 531 U.S. at 167 (citing *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 134).

107. See Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566, 1601 (1977) (codified as amended at 33 U.S.C. §§ 1251–1375).

108. *Solid Waste Agency*, 531 U.S. at 167.

109. *Id.* at 168.

110. See *id.*

111. Richardson et al., *supra* note 5, at 17.

jurisdictional.¹¹² The term “adjacent” remained undefined.¹¹³ Unanswered questions regarding the role of tributaries in determining adjacency lingered.¹¹⁴ The limited holdings in *Riverside Bayview* and *SWANCC* set the stage for the landmark decision in 2006 that attempted to end the vagaries of WOTUS.¹¹⁵

C. Rapanos v. United States

Just five years after *SWANCC*, the Supreme Court faced a WOTUS issue that had not yet been brought before the Court.¹¹⁶ *Rapanos v. United States* (*Rapanos*) considered whether wetlands adjacent to a tributary of a navigable water constituted WOTUS.¹¹⁷ *Rapanos* was a consolidated case dealing with a series of wetlands at different sites in Michigan that all shared a similar trait: the only connection between the wetland and the navigable waterway was via a tributary. Each case consolidated in *Rapanos* involved landowners filling or attempting to fill wetlands adjacent to some kind of tributary.¹¹⁸ While *Riverside Bayview* addressed the jurisdiction of wetlands adjacent to navigable waters,¹¹⁹ *Rapanos* attempted to address whether wetlands adjacent to tributaries of navigable waters constituted WOTUS.¹²⁰

In a divisive and confusing 4–1–4 decision, the Court vacated the judgment of the Sixth Circuit Court of Appeals and remanded for further proceedings.¹²¹ The plurality opinion, written by the late Justice Scalia, posited a two-part test for determining whether a wetland was jurisdictional:

[F]irst, that the adjacent channel contains a ‘wate[r] 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.¹²²

112. *Solid Waste Agency*, 531 U.S. at 167–68.

113. Richardson et al., *supra* note 5, at 17.

114. *See id.* at 18.

115. *Solid Waste Agency*, 531 U.S. at 174.

116. *See* Richardson et al., *supra* note 5, at 20.

117. *Rapanos v. United States*, 547 U.S. 715, 724 (2006); *see* Richardson et al., *supra* note 5, at 20.

118. Richardson et al., *supra* note 5, at 20–21.

119. *See* *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 124–125.

120. Richardson et al., *supra* note 5, at 20.

121. *Rapanos*, 547 U.S. at 757.

122. *Id.* at 742.

Under the plurality's definition, a wetland may be considered jurisdictional only when it has continuous surface connection with a relatively permanent, standing or flowing body of water.¹²³ The plurality defined the "adjacent channel" or "tributary" in their test as only those waters that have "a continuous flow of water in a permanent channel" (i.e. perennial flow), specifically excluding intermittent and ephemeral streams and transitory puddles.¹²⁴ The plurality thus defined WOTUS as including "only relatively permanent, standing or flowing bodies of water."¹²⁵ The plurality effectively removed the adjacency requirement and replaced it with an "abutting requirement," using the holding in *Riverside Bayview* as their basis.¹²⁶

Concurring in the judgement only, Justice Kennedy formulated a different test which has been the source of massive confusion.¹²⁷ Justice Kennedy's formulation has also been the test used by the EPA and Corps post-*Rapanos*.¹²⁸ The infamous "significant nexus" test granted jurisdiction to the Corps over wetlands with "a significant nexus between the wetlands in question and navigable waters in the traditional sense."¹²⁹ Justice Kennedy recognized that "Congress enacted the law to 'restore and maintain the chemical, physical, and biological integrity of the Nation's waters,' . . . and it pursued that objective by restricting dumping and filling in 'navigable waters.'"¹³⁰ A significant nexus is found "if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'"¹³¹ A significant nexus does not exist when the "wetlands' effects on water quality are speculative or insubstantial."¹³²

123. *Id.*

124. *Id.* at 733–34.

125. *Id.* at 732.

126. *Id.* at 748.

127. Richardson et al., *supra* note 5, at 27.

128. See generally Memorandum from Benjamin H. Grumbles, Assistant Adm'r for Water, U.S. Env't Prot. Agency, & John P. Woodley, Jr., Assistant Sec'y of the Army (Civ. Works), Dep't of the Army, on Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States* & *Carabell v. United States* 9-10 (Dec. 2, 2008) (on file with the EPA).

129. *Rapanos*, 547 U.S. at 779 (Kennedy, J., concurring).

130. *Id.* (internal citations omitted).

131. *Id.* at 780.

132. *Id.*

The fractured opinion in *Rapanos* plagued landowners, industries, agencies, and courtrooms across the nation for years following the decision.¹³³ Far from ending the vagaries surrounding the WOTUS controversy, the decision only increased the debates, further confused the parties involved, and frustrated the implementation of the CWA.¹³⁴ The Supreme Court would not revisit the WOTUS debate until the 2022 term.¹³⁵

V. *SACKETT V. EPA*: CLARITY OR CONFUSION?

Sixteen years after *Rapanos*, the WOTUS issue once again reached the Supreme Court.¹³⁶ It was the second time the petitioners stood before the Court seeking to overturn a jurisdictional finding by the EPA that claimed their property held WOTUS.¹³⁷ In a watershed decision, the Court affirmatively rejected the significant nexus test and established a new standard for determining federal jurisdiction over wetlands.¹³⁸ This new standard significantly reduces federal jurisdiction over wetlands but leaves many lingering questions regarding its implementation.¹³⁹

A. *The Sacketts*

Michael and Chantell Sackett were the owners of a 0.63-acre undeveloped lot near Priest Lake in Idaho.¹⁴⁰ The lot contained flooded soils and wetland vegetation characterizing it as a definitional wetland.¹⁴¹ The Sacketts' property laid on the south side of the 30-foot-wide Kalispell Bay Road.¹⁴² The Kalispell Bay Fen, a large wetlands complex, laid on the north side of the road.¹⁴³ In preparation to build a house, the Sacketts began back-filling the lot with dirt and rock in April and May of 2007.¹⁴⁴ In November of 2007, the EPA sent a compliance order to the Sacketts alleging that they were violating the CWA by discharging dredge or fill

133. See Richardson et al., *supra* note 5, at 20, 33.

134. See *id.*

135. See *Sackett v. Env't Prot. Agency*, 598 U.S. 651, 657–58 (2023).

136. See *id.*

137. See *id.* at 663.

138. *Id.* at 680, 684.

139. See *id.* at 727 (Kavanaugh, J., concurring).

140. *Sackett v. Env't Prot. Agency*, 622 F.3d 1139, 1141 (9th Cir. 2010).

141. See *Sackett v. Env't Prot. Agency*, 8 F.4th 1075, 1081 (9th Cir. 2021) (describing an EPA memorandum written by wetland ecologist John Olsen following his jurisdictional determination).

142. *Id.*

143. *Id.*

144. *Sackett*, 622 F.3d at 1141.

material into WOTUS without first obtaining a permit.¹⁴⁵ The order required the Sacketts to remove the fill material and to restore the lot to its previous, undeveloped condition.¹⁴⁶ Failure to comply with the order would result in civil and administrative penalties of up to \$40,000 per day.¹⁴⁷

Using the significant nexus test, the EPA determined the Sacketts' lot was part of the Kalispell Bay Fen and that the fen was adjacent to an unnamed tributary on the north side of the Kalispell Bay Road which fed into the non-navigable Kalispell Creek that in turn fed into the navigable Priest Lake.¹⁴⁸ More plainly, the Sacketts' lot was a wetland adjacent to a tributary of a tributary of a navigable-in-fact water.¹⁴⁹ The EPA determined that the Sacketts' lot significantly affected the ecology of Priest Lake and the dumping of dirt and rocks on their property was a violation of the CWA.¹⁵⁰ The unnamed tributary on the north side of the road was a mere drainage ditch that would not have existed but for the road.¹⁵¹

Fifteen years of litigation followed the EPA's jurisdictional determination.¹⁵² The Sacketts first filed suit in the United States District Court for the District of Idaho in 2008 to challenge the decision.¹⁵³ After the District Court granted the EPA's Federal Rules of Civil Procedure 12(b)(1) motion to dismiss, the Sacketts appealed in the Ninth Circuit Court of Appeals which upheld the District Court's decision to dismiss the case for lack of subject-matter jurisdiction.¹⁵⁴ What initially started as a case about CWA jurisdiction turned into a procedural and constitutional battle under the Administrative Procedures Act (APA).¹⁵⁵ In 2012, the Supreme Court granted certiorari for the case and reversed the Ninth Circuit's decision, ruling unanimously that the compliance order was a final agency action for which there was no adequate remedy other than APA review and that the CWA did not preclude judicial review.¹⁵⁶

145. *Id.*

146. *Id.*

147. *Sackett*, 8 F.4th at 1081.

148. *Id.*

149. *Id.*

150. *Sackett*, 598 U.S. at 663.

151. *See id.* at 707 (Thomas, J., concurring).

152. *See id.* at 663 (majority opinion).

153. *Sackett*, 8 F.4th at 1079; *Sackett v. U.S. Env't Prot. Agency*, 622 F.3d 1139, 1141 (9th Cir. 2010).

154. *Sackett*, 622 F.3d at 1147.

155. *Sackett v. Env't Prot. Agency*, 566 U.S. 120, 122 (2012).

156. *Id.* at 131.

On remand, the District Court entered summary judgment for the EPA, finding that the Sacketts' property constituted WOTUS and that the EPA had jurisdiction under the CWA.¹⁵⁷ While the case was on appeal to the Ninth Circuit Court of Appeals, the EPA withdrew its compliance order against the Sacketts.¹⁵⁸ The EPA then moved to dismiss the case as moot but the motion was denied by the Ninth Circuit Court because it was not absolutely clear that the EPA would not either reinstate the amended compliance order or issue a new one.¹⁵⁹ Neither did the withdrawal of the compliance order do anything to alter the subject of the litigation—whether the EPA had authority to regulate the Sacketts' property.¹⁶⁰ However, the Ninth Circuit affirmed the District Court's summary judgment in the EPA's favor.¹⁶¹ The Sacketts once again appealed to the Supreme Court and certiorari was granted for the 2022 term.¹⁶²

B. Sackett v. EPA

The question before the Court in *Sackett* was whether the wetlands on the Sacketts' property constituted WOTUS.¹⁶³ The Court released an awkward 9–0 or 5–4 decision, depending on the context, in May of 2023.¹⁶⁴ The majority opinion was authored by Justice Alito, joined in full by four other justices, while Justices Kavanaugh, Kagan, Sotomayor, and Jackson concurred in the judgment only.¹⁶⁵ The Court unanimously agreed that the wetlands on the Sacketts' property were not jurisdictional under the CWA.¹⁶⁶ However, the split among the justices arose over the majority's establishment of the new (or old) continuous surface connection test.¹⁶⁷

157. *Sackett*, 8 F.4th at 1079.

158. *Id.*

159. *Id.* at 1083.

160. *Id.*

161. *Id.* at 1093.

162. *Sackett v. Env't Prot. Agency*, 8 F.4th 1075 (9th Cir. 2021), *cert. granted*, 142 S. Ct. 896 (U.S. Jan. 24, 2022) (No. 21-454).

163. *Sackett v. Env't Prot. Agency*, 598 U.S. 651, 659 (2023).

164. *See id.* at 651 (9–0 decision).

165. *See id.*

166. *Id.* at 684.

167. *See generally id.* at 684–710 (Thomas, J., with Gorsuch, J., concurring), 710–15 (Kagan, J., with Sotomayor and Jackson, JJ., concurring in the judgment), 715–28 (Kavanaugh, J., with Sotomayor, Kagan, and Jackson, JJ., concurring in the judgment).

1. The Continuous Surface Connection Test

The majority opinion rejected the significant nexus test and returned to the continuous surface connection test described in *Rapanos*.¹⁶⁸ Unlike the plurality opinion in *Rapanos*, the continuous surface connection test garnered a fifth vote, firmly establishing it as the new jurisdictional test.¹⁶⁹ This new test majorly reduces federal jurisdiction over most wetlands and significantly limits both the EPA's and Corps' ability to implement the CWA.¹⁷⁰

Justice Alito began his analysis by attempting to define "waters" as used in both the terms "navigable waters" and "waters of the United States".¹⁷¹ Quoting from the *Rapanos* plurality, he defined "waters" as streams, oceans, rivers, and lakes.¹⁷² Although acknowledging that the "CWA extends to more than traditional navigable waters," he noted the inclusion of the word "navigable" to waters indicates that it only refers to oceans, rivers, and lakes—not necessarily to streams or wetlands.¹⁷³ However, he firmly states that "waters" does not exclude all wetlands and that "statutory context shows that some wetlands qualify as 'waters of the United States.'"¹⁷⁴

The majority cited 33 U.S.C. § 1344(g)(1), which authorizes state permitting programs to regulate discharges into "(1) any waters of the United States, (2) except for traditional navigable waters, (3) 'including wetlands adjacent thereto.'"¹⁷⁵ Justice Alito then used § 1344(g)(1) to opine that because only adjacent wetlands are "'includ[ed]' within 'the waters of the United States,' these wetlands must qualify as 'waters of the United States' in their own right."¹⁷⁶ In other words, "they must be indistinguishably part of a body of water that itself constitutes 'waters' under the CWA."¹⁷⁷ Justice Alito further limited the word "adjacent" by excluding other definitions of the terms such as "near" and "neighboring," concluding that "[w]etlands that are separate from traditional navigable waters cannot be considered part of those waters, even if they are located nearby."¹⁷⁸ This literary gerrymandering of the word "adjacent" was the main focal

168. See *id.* at 680–84 (majority opinion).

169. *Id.* at 684–85 (Thomas, J., with Gorsuch, J., concurring).

170. See *id.* at 683–84 (majority opinion).

171. *Id.* at 671–72.

172. *Id.* at 671.

173. *Id.* at 672.

174. *Id.* at 674–75.

175. *Id.* at 675; see also 33 U.S.C. § 1344(g)(1).

176. *Sackett*, 598 U.S. at 676.

177. *Id.*

178. *Id.*

point of Justices Kagan and Kavanaugh’s opinions, concurring in the judgment only.¹⁷⁹

By this reasoning, Justice Alito returned to the *Rapanos* plurality that included only those wetlands that are “‘as a practical matter indistinguishable from waters of the United States,’ such that it is ‘difficult to determine where the “water” ends and the “wetland” begins.’”¹⁸⁰ Further quoting the *Rapanos* plurality, the majority held that this natural phenomenon only occurs when “wetlands have ‘a continuous surface connection to bodies that are “waters of the United States” in their own right, so that there is no clear demarcation between “waters” and wetlands.’”¹⁸¹ In doing so, the majority held that the new jurisdictional test used by the EPA and Corps must establish “first, that the adjacent [body of water constitutes] . . . ‘water[s] of the United States,’ . . . 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.”¹⁸²

2. Justice Thomas’s Concurring Opinion

Justice Thomas, joined by Justice Gorsuch, expanded the scope of the majority’s opinion to address another question: how do the terms “navigable” and “of the United States” limit the jurisdictional reach of the CWA.¹⁸³ He delivered a 26-page soliloquy regarding the CWA’s jurisdictional extent under the Commerce Clause.¹⁸⁴ He focused on defining the terms “navigable waters” and “waters of the United States” by providing a historical context of how Congress used the terms prior to the passage of the CWA.¹⁸⁵

Justice Thomas strictly limited the CWA’s jurisdiction to only those activities that Congress may regulate under the Commerce Clause.¹⁸⁶ The crux of Justice Thomas’s argument was that navigable waters only include waters that “are, were, or could be used as highways of interstate or foreign commerce.”¹⁸⁷ Justice Thomas appeared to disregard the well-established notion that the CWA

179. See *id.* at 710–15 (Kagan, J., concurring), 715–28 (Kavanaugh, J., concurring).

180. *Id.* at 678 (majority opinion) (quoting *Rapanos v. United States*, 547 U.S. 715, 755 (2006)).

181. *Id.*

182. *Id.* at 678–79.

183. *Id.* at 685 (Thomas, J., concurring).

184. *Id.* at 685–710.

185. *Id.*

186. See *id.* at 707–08.

187. *Id.* at 698.

extends to more than traditional navigable waters.¹⁸⁸ Justice Thomas's concurrence turned more into an argument over Congress's Commerce Clause powers and a rebuke of the Court's Commerce Clause jurisprudence rather than truly defining WOTUS.¹⁸⁹ While such Commerce Clause arguments may be of merit, such issues were not before the Court in *Sackett*.

3. Justice Kagan's Opinion, Concurring in the Judgment

Justice Kagan, joined by Justices Sotomayor and Jackson, concurred in the judgment only, while rejecting the Court's continuous surface connection test.¹⁹⁰ Justice Kagan noted the importance of the CWA as "a landmark piece of environmental legislation" and that wetlands were vital to the CWA's goal of protecting the chemical, physical, and biological integrity of the nation's waters.¹⁹¹ Much of Justice Kagan's opinion simply agreed with Justice Kavanaugh regarding the meaning of "adjacent."¹⁹² In vigorously defending the CWA's inclusion of the word "adjacent," she stated, "That congressional judgment is as clear as clear can be—which is to say, as clear as language gets. And so a clear-statement rule must leave it alone."¹⁹³

4. Justice Kavanaugh's Opinion, Concurring in the Judgment

Justice Kavanaugh's opinion concurring in the judgement came as a surprising split from his fellow conservative justices.¹⁹⁴ Interestingly, Justice Kavanaugh agreed with the majority in: (1) the reversal of the Ninth Circuit's decisions; (2) the rejection of the significant nexus test; and (3) the "Court's bottom-line judgment that the wetlands on the Sacketts' property are not covered by the Act and are therefore not subject to permitting requirements."¹⁹⁵ However, his main issue was with the majority's continuous surface connection test for wetlands.¹⁹⁶

Specifically, Justice Kavanaugh disagreed with the majority's redefining of the word "adjacent" to mean *adjoining*.¹⁹⁷ He noted that by narrowing the CWA's

188. See *id.* at 672 (majority opinion).

189. See *id.* at 708 (Thomas, J., concurring).

190. See *id.* at 710–15 (Kagan, J., concurring).

191. *Id.* at 711.

192. See *id.* at 710–715.

193. *Id.* at 713.

194. See *id.* at 716 (Kavanaugh, J., concurring).

195. *Id.* at 715–16.

196. *Id.* at 716.

197. *Id.*

coverage to only adjoining wetlands, “the Court’s new test will leave some long-regulated adjacent wetlands no longer covered by the Clean Water Act, with significant repercussions for water quality and flood control throughout the United States.”¹⁹⁸ Justice Kavanaugh illustrated the negative impacts of the continuous surface connection test on both the Mississippi River system and the Chesapeake Bay if fill material could be dumped into wetlands that are “adjacent to (but not adjoining)” those systems and their covered tributaries.¹⁹⁹ He recognized that adjacent wetlands filter pollutants, store water, and provide flood control in many of the same ways that adjoining wetlands do.²⁰⁰

Beyond the hydrological and ecological ramifications, Justice Kavanaugh opined that the continuous surface connection test would only “create regulatory uncertainty for the Federal Government, the States, and regulated parties.”²⁰¹ In closing, Justice Kavanaugh wrote, “[t]here can be no debate, in my respectful view, that the key statutory term is ‘adjacent’ and that adjacent wetlands is a broader category than adjoining wetlands. To be faithful to the statutory text, we cannot interpret ‘adjacent’ wetlands to be the same thing as ‘adjoining’ wetlands.”²⁰²

C. Post-Sackett Response

Following the Court’s decision on May 25, 2023, the EPA revised its WOTUS rule to conform with the *Sackett* holding.²⁰³ The revised rule removed the significant nexus standard from all relevant sections and amended its definition of adjacent to mean “having a continuous surface connection.”²⁰⁴ The revised rule went into effect on September 8, 2023.²⁰⁵ However, as a result of successful litigation, the revised 2023 WOTUS rule was enjoined in 27 states as of the date the final rule was signed.²⁰⁶ Due to the injunctions, 26 states are currently still

198. *Id.*

199. *Id.*

200. *Id.* at 726–27.

201. *Id.* at 727.

202. *Id.* at 728.

203. Revised Definition of “Waters of the United States”; Conforming, 88 Fed. Reg. 61964, 61964 (Sep. 8, 2023) (to be codified at 33 C.F.R. pt. 328 and 40 C.F.R. pt. 120).

204. *Id.* at 61966, 61968–69.

205. *Id.* at 61964.

206. *Id.* at 61965, n. 1.; *see also* Texas v. EPA, 662 F.Supp.3d 739, 759 (S.D. Tex. 2023); West Virginia v. EPA, 669 F.Supp.3d 781, 819 (D.N.D. 2023); Commonwealth of Kentucky v. EPA, 2023 U.S. App. LEXIS 11517, at *9 (6th Cir. May 10, 2023).

operating under the pre-2015 WOTUS rule while the other 24 states are now operating under the final 2023 WOTUS rule.²⁰⁷

VI. UNPACKING THE NEW WOTUS TEST

The full legal, economic, and ecological effects of *Sackett* will take time to play out, but some immediate repercussions of the decision are already being felt.²⁰⁸ Many claim that *Sackett* improved clarity and reduced confusion over WOTUS.²⁰⁹ In several aspects, the majority opinion in *Sackett* is clear and straightforward—reject the significant nexus test and establish the continuous surface connection test as the new standard.²¹⁰ In other ways, the waters remain as murky as they were post-*Rapanos*.²¹¹ Only time and substantial litigation will clarify the debate.

The most direct result of *Sackett* is the removal of most wetlands from CWA jurisdiction.²¹² The ecological and hydrological ramifications of this could be immense unless states fill the gap left behind by *Sackett*.²¹³ Should states fail to act, many wetlands previously protected by the CWA are now vulnerable to dredge and fill activities, leaving downstream waters to pay the price of upstream development.²¹⁴ Without adequate protection of wetlands, society will suffer through the loss of valuable ecosystem services such as flood control, water filtration, biodiversity, and species conservation.²¹⁵

207. Definition of “Waters of the United States”: Rule Status and Litigation Update, U.S. ENV’T PROT. AGENCY (Oct. 21, 2024), <https://www.epa.gov/wotus/definition-waters-united-states-rule-status-and-litigation-update> [<https://perma.cc/3N8L-A5RV>].

208. See generally Cale Jaffe, *Sackett and the Unravelling of Federal Environmental Law*, 53 Env. L. Rep. 10801 (2023).

209. See, e.g., Rafe Petersen & Alexandra E. Ward, *Sackett Decision Provides Clarity, Substantially Restricts Clean Water Act Jurisdiction Scope*, HOLLAND & KNIGHT (May 26, 2023), <https://www.hklaw.com/en/insights/publications/2023/05/sackett-decision-provides-clarity-substantially> [<https://perma.cc/5DPF-W5PA>].

210. *Sackett v. Env’t Prot. Agency*, 598 U.S. 651, 680, 684 (2023).

211. See *id.* at 727 (Kavanaugh, J., concurring).

212. *Id.* at 716.

213. See Alejandro Davila et al., PROTECT OUR WATERS, CLEAN WATER FOR ALL COAL., ADVOCACY IN ACTION *SACKETT V. EPA: THE STATE OF OUR WATERS ONE YEAR LATER* 6 (2024), https://protectcleanwater.org/wp-content/uploads/2024/05/CW4A_SvE_05.21.24d.pdf [<https://perma.cc/4MVW-STBB>].

214. *Id.* at 4.

215. See discussion *supra* Section II.B.

A. Clean Water Act Principles Disregarded

The majority opinion in *Sackett* disregarded several fundamental principles of the CWA when they completely dismissed all ecological considerations and consequences of a continuous surface connection test.²¹⁶ The majority stated that “the CWA does not define the EPA’s jurisdiction based on ecological importance, and we cannot redraw the Act’s allocation of authority.”²¹⁷ This is completely opposite of why the CWA was passed—to protect water quality!²¹⁸ Additionally, the guiding principles of the CWA are to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters,”²¹⁹ each of which relate directly to ecology and the environment. Justice Alito even acknowledged that “the CWA extends to more than traditional navigable waters.”²²⁰ The Court, however, appeared to offer only lip service to congressional intent in favor of a preferred interpretation of the text.²²¹

The Court also disregarded the plain text of the CWA and “essentially [read] ‘adjacent’ to mean ‘adjoining.’”²²² Just as the plurality did in *Rapanos*, the majority replaced the adjacency requirement with an “adjoining” or “abutting” requirement. In doing so, “the Court [imposed] a restriction nowhere to be found in the text.”²²³ To read “adjacent” as meaning “adjoining” is to define “near” as “touching.”²²⁴ The Court’s definition of “adjacent” cannot be squared with the plain, ordinary English meaning of the term.²²⁵ This literary twisting of the word “adjacent” provides an unfortunate example to lower courts—in viewing the Court’s supreme example, may lower courts now disregard the plain, ordinary English meaning of statutory terms to fit their own view of how a statute should be interpreted? This poor example of statutory interpretation combined with the recent overruling of the *Chevron* deference provides an ominous outlook into future statutory and regulatory interpretation.²²⁶

216. *Sackett*, 598 U.S. at 683.

217. *Id.*

218. See Kalen, *supra* note 13, at 898–905.

219. 33 U.S.C. § 1251(a).

220. *Sackett*, 598 U.S. at 672.

221. See *id.*

222. *Id.* at 722 (Kavanaugh, J., concurring).

223. *Id.* at 723.

224. See *id.* at 716.

225. *Id.* at 710 (Kagan, J., concurring), 722 (Kavanaugh, J., concurring).

226. See generally *Loper Bright Enter. v. Raimondo*, 603 U.S. 369 (2024).

B. WOTUS Defined?

The stated objective of the *Sackett* opinion was an “attempt to identify with greater clarity what the Act means by ‘the waters of the United States.’”²²⁷ However, the entire scope of the opinion focused only on whether the *wetlands* on the Sacketts’ property constituted WOTUS.²²⁸ In answering this question, the bulk of the majority opinion focused only on what qualified a wetland as jurisdictional.²²⁹ Very little was said about intermittent or ephemeral streams.²³⁰

The Court missed a unique opportunity in *Sackett* to settle the jurisdictional confusions of both streams and wetlands, particularly as to how they relate to one another. The wetland on the Sackett’s property was part of the Kalispell Bay Fen which was adjacent to an unnamed tributary which fed into the non-navigable Kalispell Creek which in turn fed into the navigable Priest Lake.²³¹ The Court could have easily addressed the two non-navigable tributaries that connected the Kalispell Bay Fen to Priest Lake, but since the Court only focused on the wetland aspect of the Sackett issue, federal jurisdiction of intermittent and ephemeral streams remains undetermined.²³²

Aspects of Justice Alito’s majority opinion and Justice Thomas’s concurring opinion allude to skepticism over whether streams are considered WOTUS.²³³ In quoting *Rapanos*, Justice Alito stated that the CWA’s use of the word “waters” refers to “only those relatively permanent, standing or continuously flowing bodies of water ‘forming geographic[al] features’ that are described in ordinary parlance as ‘streams, oceans, rivers, and lakes.’”²³⁴ Justice Alito then opined that by adding the word “navigable” to “waters,” the definition “[a]t a minimum . . . principally refers to bodies of navigable water like rivers, lakes, and oceans.”²³⁵ Justice Alito specifically excluded streams, both intermittent and ephemeral and maybe even perennial, from the legal definition of “navigable waters” and thus from

227. *Sackett*, 598 U.S. at 659.

228. *Id.* at 662–63.

229. James M. McElfish Jr., *What Comes Next for Clean Water? Six Consequences of Sackett v. EPA*, ENV’T L. INST. (May 26, 2023), <https://www.eli.org/vibrant-environment-blog/what-comes-next-clean-water-six-consequences-sackett-v-epa> [<https://perma.cc/88VW-AER6>].

230. *Id.*

231. *Sackett v. Env’t Prot. Agency*, 8 F.4th 1075, 1081 (9th Cir. 2021).

232. See McElfish, *supra* note 229.

233. See *Sackett v. EPA*, 598 U.S. 651, 672 (majority opinion), 685 (Thomas J., concurring) (2023).

234. *Id.* at 671 (majority opinion) (quoting *Rapanos v. United States*, 547 U.S. 715, 739 (2006)).

235. *Id.* at 672.

WOTUS.²³⁶ In Justice Thomas’s concurring opinion, streams would not be jurisdictional unless they could be “used as a highway for interstate or foreign commerce.”²³⁷

Determining federal jurisdiction over intermittent and ephemeral streams is just as, if not more, important than determining jurisdiction over wetlands.²³⁸ All tributaries, including intermittent and ephemeral streams, connect to navigable water at some point through the watershed network.²³⁹ Thus, if all tributaries, including intermittent and ephemeral streams, are still considered WOTUS, and wetlands have a continuous surface connection with those tributaries, then many wetlands may still be considered jurisdictional.²⁴⁰ Without determining which tributaries are jurisdictional under the CWA, the reach of WOTUS could extend almost as far as it did under the significant nexus test.²⁴¹

C. A Host of Thorny Questions

The continuous surface connection test raises “a host of thorny questions” surrounding WOTUS and the implementation of the CWA.²⁴² Some of these include:

[H]ow difficult does it have to be to discern the boundary between a water and a wetland for the wetland to be covered by the Clean Water Act? How does that test apply to the many kinds of wetlands that typically do not have a surface water connection to a covered water year-round—for example, wetlands and waters that are connected for much of the year but not in the summer when they dry up to some extent? How “temporary” do “interruptions in surface connection” have to be for wetlands to still be covered? . . . How does the test operate in areas where storms, floods, and erosion frequently shift or breach natural river berms? . . . The list goes on.²⁴³

As Justice Kavanaugh pointed out, the continuous surface connection test “is sufficiently novel and vague (at least as a single standalone test) that it may create

236. *Id.*

237. *Id.* at 685 (Thomas, J., concurring).

238. *See, e.g.*, LAINIE LEVICK ET AL., U.S. ENV’T PROT. AGENCY, EPA/600/R-08/134, ARS/233046, THE ECOLOGICAL AND HYDROLOGICAL SIGNIFICANCE OF EPHEMERAL AND INTERMITTENT STREAMS IN THE ARID AND SEMI-ARID AMERICAN SOUTHWEST 1 (2008), https://www.epa.gov/sites/default/files/2015-03/documents/ephemeral_streams_report_final_508-kepner.pdf [<https://perma.cc/M4X2-GW7L>].

239. *Id.* at 24.

240. *See id.*

241. *See Rapanos v. United States*, 547 U.S. 715, 782 (2006) (Kennedy, J., concurring).

242. *Sackett*, 598 U.S. at 727 (Kavanaugh, J., concurring).

243. *Id.*

regulatory uncertainty for the Federal Government, the States, and regulated parties.”²⁴⁴

The continuous surface connection test was meant, in part, to simplify where federal jurisdiction ended and to provide more clarity to landowners on which mundane activities would trigger CWA violations.²⁴⁵ It is doubtful that the new test accomplishes either of those goals. The continuous surface connection test is simpler than the significant nexus test in one regard: it replaces the complex ecological factors of a significant nexus with a physical, observable connection requirement.²⁴⁶ But the new requirement is deceiving. The continuous surface connection test may be easier to understand legally but it does not factor landscape and hydrological realities of wetlands and the water cycle.²⁴⁷ Without incorporating hydrological factors, the EPA and Corps are left with a confusing and impractical hydrological standard as they try to protect the quality of the nation’s waters.²⁴⁸ Landowners too received little clarity with only a foggy assurance that their actions are less likely to be penalized hereafter.²⁴⁹ All these and many more questions will continue to arise moving forward, further continuing the struggles in implementing the CWA.²⁵⁰

1. What Constitutes a “Continuous Surface Connection”?

The Court leaves out an important distinction in what constitutes a “continuous surface connection.” The two-part test requires that for a wetland to be jurisdictional, the EPA and Corps must prove:

[F]irst, 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

244. *Id.*

245. *See id.* at 659, 669–70 (majority opinion).

246. *Compare Sackett*, 598 U.S. at 678–79 (continuous surface connection test), *with* *Rapanos v. United States*, 547 U.S. 715, 780 (2006) (Kennedy, J., concurring) (significant nexus test).

247. *See Sackett*, 598 U.S. at 727 (Kavanaugh, J., concurring).

248. *Cf. Coastal Oil & Gas Corp. v. Garza Energy Tr.*, 268 S.W.3d 1, 30 (Tex. 2008) (Willet, J., concurring) (noting that allowing trespass torts for water-fracking would be “tak[ing] a meat-ax approach to a task that demands scalpel-like precision . . .”).

249. *See Sackett*, 598 U.S. at 727 (Kavanaugh, J., concurring) (describing the “thorny questions” left by the new test).

250. *See id.*

surface connection with that water, making it difficult to determine where the ‘water’ ends and the ‘wetland’ begins.”²⁵¹

Nowhere in the test does it require the *water* in the wetland to have continuous surface connection with WOTUS.²⁵² The test only requires the *wetland* to have the continuous surface connection.²⁵³ This allows many wetlands to remain jurisdictional without having any continuous surface-water connection to a water of the United States.²⁵⁴

Presumably, the Court was intending the continuous surface connection test to be read as a continuous surface-water connection.²⁵⁵ However, the new test simply does not require such a hydrological phenomenon.²⁵⁶ The test merely requires the wetland itself to be the conduit of the continuous surface connection.²⁵⁷ The Court reaffirms this by stating that it must be “difficult to determine where the ‘*water*’ ends and the ‘*wetland*’ begins.”²⁵⁸ It does not say that it must be difficult to determine where the water ends and the water in the wetland begins.²⁵⁹ As can be seen from Cowardin’s definition of a wetland above, standing or surface water is not the sole defining attribute of a wetland.²⁶⁰ To be a definitional wetland, the area must have at least one of the following characteristics: (1) support hydrophytes at least periodically; (2) be predominantly undrained hydric soil; and (3) be saturated with water or covered by shallow water at some time during the growing season of each year.²⁶¹ As long as a portion of land meeting one or more of the above three requirements has a continuous surface connection with WOTUS, it is jurisdictional.²⁶²

Many wetlands lack both standing water and waterlogged soils during at least part of the growing season, and even most of the year.²⁶³ Wetlands simply are

251. *Id.* at 678–79.

252. *Id.*

253. *Id.*

254. *See id.*

255. *See id.* at 677–78.

256. *Id.* at 678–79.

257. *Id.*

258. *Id.* at 678 (emphasis added).

259. *See id.*

260. *See* COWARDIN ET AL., *supra* note 20, at 3.

261. *Id.*

262. *Sackett*, 598 U.S. at 678–79.

263. *See* COWARDIN ET AL., *supra* note 20, at 3.

not always wet!²⁶⁴ But even if a wetland has only waterlogged soils, but no surface water, at some time during the growing season (i.e., summer), it still may be considered jurisdictional as long as the boundaries of the definitional wetland meet the requirements of the continuous surface connection test.²⁶⁵ Thus, what seems like a simple jurisdictional test on paper may still be just as confusing to the untrained eye. Regulated parties may still violate the CWA even though the wetland they are filling or dredging has no visible water connection to a water of the United States.²⁶⁶

D. Effects on Compensatory Mitigation

Section 404 of the CWA requires a permit to discharge dredge or fill material into WOTUS²⁶⁷ Section 404(b)(1) authorizes the EPA to promulgate guidelines (i.e., regulations) concerning the issuance of dredge and fill permits.²⁶⁸ Regulations promulgated by the EPA may require compensatory mitigation for unavoidable impacts “to ensure that an activity requiring a section 404 permit complies with the Section 404(b)(1) Guidelines.”²⁶⁹ Parties required to offset their unavoidable impacts may either complete their own mitigation projects or purchase mitigation “credits” from third-party entities.²⁷⁰ Through these legal mediums, a multi-billion dollar industry has developed for permittee-responsible mitigation, mitigation banking, and in-lieu fee mitigation.²⁷¹

The Court’s new test will have immense economic and ecological ramifications for the compensatory mitigation industry.²⁷² The ruling in *Sackett* significantly reduces the opportunities for mitigation by reeling back federal jurisdiction over wetlands.²⁷³ Without federal jurisdiction over many historically regulated wetlands, regulated parties no longer need a Section 404 permit to

264. *How Wetlands are Defined and Identified Under CWA Section 404*, ENV’T PROT. AGENCY (July 1, 2024), <https://www.epa.gov/cwa-404/how-wetlands-are-defined-and-identified-under-cwa-section-404> [<https://perma.cc/Y3WS-GVC5>].

265. *See Sackett*, 598 U.S. at 678–79.

266. *See id.*

267. 33 U.S.C. § 1344(a).

268. *See* 33 U.S.C. § 1344(b)(1).

269. 40 C.F.R. § 230.91(c)(3) (2025).

270. *See id.* § 230.93.

271. *See generally* Todd K. BenDor, et al., *Assessing the Size and Growth of the US Wetland and Stream Compensatory Mitigation Industry*, PLOS ONE (Sept. 27, 2023), <https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0285139> [<https://perma.cc/G5KT-B3S4>].

272. *See* McElfish, *supra* note 229.

273. *See id.*

conduct dredge and fill activities in such wetlands.²⁷⁴ Without the need for a permit, a necessary trigger of compensatory mitigation, the need for any mitigation is also eliminated.²⁷⁵ Absent mitigation, environmental impacts will not be offset and credit markets will crumble for participating entities.²⁷⁶

Additionally, the continuous surface connection test has caused significant uncertainty within the mitigation industry regarding the compliance status of existing mitigation banks.²⁷⁷ Some Corps districts require mitigation banks to first be jurisdictional before any credits may be released.²⁷⁸ Many banks in these Corps districts have released credits based on their jurisdictional status under the significant nexus test.²⁷⁹ However, under the continuous surface connection test, these banks may lose current or future credits for failing to meet the new jurisdictional requirements.²⁸⁰ Substantial investments of both time (years) and money (millions of dollars) have been poured into mitigation projects and bank development.²⁸¹ With the sudden loss of federal jurisdiction over these banks, all such investments may be lost along with any expected revenue from credit sales.²⁸² The ruling in *Sackett* not only reduces opportunities for future mitigation of environmental impacts, but also might turn highly lucrative environmental offset projects into wasted financial investments.²⁸³

274. *See id.*; *see also* 33 U.S.C. § 1344(a).

275. *See* 40 C.F.R. § 230.91(a)(1).

276. *See generally id.* § 230.93.

277. Brandon Tuck et al., *Sackett v. EPA: The Supreme Court Clarifies Clean Water Act Jurisdiction*, VINSON & ELKINS (May 30, 2023), <https://www.velaw.com/insights/sackett-v-epa-the-supreme-court-clarifies-clean-water-act-jurisdiction/> [<https://perma.cc/P5JR-3KPQ>].

278. *See e.g.*, U.S. ARMY CORPS OF ENG'RS, FORT WORTH DISTRICT MITIGATION BANKING GUIDELINES COMPILATION (2025), <https://www.swf.usace.army.mil/Portals/47/docs/regulatory/Permitting/MitigationTemplates/GuidelinesCompilation.pdf> [<https://perma.cc/9MMR-CJJV>].

279. *Cf.* Memorandum from Benjamin H. Grumbles, *supra* note 128, at 8–12 (explaining that agencies assert jurisdiction over adjacent wetlands that have a significant nexus to a traditional navigable water).

280. *Cf.* *Sackett v. Env't Prot. Agency*, 598 U.S. 651, 678 (2023); *see also* Bridgit Rollins, *WOTUS Update: 2023 Rule Enjoined in 27 States*, NAT'L AGRIC. L. CTR. (Apr. 27, 2023), <https://nationalaglawcenter.org/wotus-update-2023-rule-enjoined-in-27-states/> [<https://perma.cc/536K-8NBZ>] (explaining that mitigation banks in the states still operating under the pre-2015 WOTUS rule may still be in-compliance under the significant nexus test as long as injunctions last against the EPA's latest WOTUS rule).

281. *See* McElfish, *supra* note 229.

282. *See id.*

283. *See id.*

However, in March 2024, the Assistant Secretary of the Army released a guidance memo for the Corps describing, among other things, the agency's post-*Sackett* compensatory mitigation policy.²⁸⁴ The memo states that "[a]s provided in the 2008 Mitigation Rule . . . jurisdictional status is not determinative for whether aquatic resources can serve as compensatory mitigation for the unavoidable impacts to waters of the United States authorized by Corps permits."²⁸⁵ According to the Assistant Secretary, "The definition of 'waters of the United States' is limited to the question of Clean Water Act jurisdiction, not for deciding what categories of resources can be restored, enhanced, established, or preserved to provide compensatory mitigation."²⁸⁶ The memo explains that both jurisdictional and non-jurisdictional wetlands may serve as compensatory mitigation under the watershed-based approach of the 2008 Mitigation Rule.²⁸⁷ According to the memo, "Non-jurisdictional aquatic resources may be even more valuable as compensatory mitigation after the *Sackett* decision as they are currently without federal protection under the Clean Water Act."²⁸⁸ Thus, the Corps may approve the use of non-jurisdictional wetlands to provide compensatory mitigation for Section 404 permits.²⁸⁹

Nonetheless, the memo indicates that, as described above, not all Corps districts may be following the 2008 Mitigation Rule and its watershed mitigation approach.²⁹⁰ The memo states:

The Corps is directed to report back within 120 days of the date of this memorandum on compliance status across Corps districts with this mitigation policy; to include how many Corps districts have been following this policy since the issuance of the 2008 Mitigation Rule; if Corps districts have not been following the policy what next steps should occur to achieve compliance; and the number and locations of existing mitigation banks and in lieu fee projects.²⁹¹

284. See Memorandum from Michael L. Connor, Assistant Sec'y of the Army, on Civil Works Actions to Sustain and Advance the Nation's Waters and Wetlands After the *Sackett* Decision (Mar. 22, 2024) (on file with the Department of the Army, Office of the Assistant Secretary).

285. *Id.* at 3.

286. *Id.* at 4.

287. *Id.*

288. *Id.*

289. *Id.*

290. See *id.*

291. *Id.*

Given that the Corps' mitigation rule has been in effect since 2008, it is unclear whether Corps districts will change to allowing non-jurisdictional wetlands to serve as mitigation banks, even in the face of the Assistant Secretary's memo.

E. It's Up to the States

Prior to *Sackett*, many states relied on federal WOTUS coverage to regulate and protect their waters.²⁹² Under the CWA, states maintain the power to continue regulating water quality under their own laws as long as they are not less stringent or inconsistent with the CWA.²⁹³ Additionally, federal permitting programs, such as the National Pollutant Discharge Elimination System, are delegated to the states that meet requirements of federal programs which regulate discharges into WOTUS.²⁹⁴ However, regulatory programs to protect non-WOTUS waters have not been enacted by many states which have instead relied on the CWA to define the scope of their regulatory programs.²⁹⁵ As of 2022, only 25 states regulated waters beyond the scope of pre-2015 WOTUS coverage.²⁹⁶ The other half of the states rely entirely on federal WOTUS definitions to determine the scope of their authority.²⁹⁷

The extreme rollback of federal WOTUS jurisdiction in *Sackett* essentially dumped the responsibility on states to regulate the majority of wetlands in their own way.²⁹⁸ Not all states have had the same reaction.²⁹⁹ States have been confronted with three different options in the wake of *Sackett*: (1) increase or strengthen water protections, (2) decrease or rollback water protections, or (3) do nothing.³⁰⁰ The direction taken by each state largely depends on the status of their regulatory programs (i.e. more or less coverage than WOTUS) and their

292. James McElfish, *State Protection of Nonfederal Waters: Turbidity Continues*, 52 Env. L. Rep. 10679, 10684 (2022).

293. See 33 U.S.C. § 1370; see also McElfish, *supra* note 292, at 10681.

294. 33 U.S.C. §§ 1342(b), 1344(g); see also McElfish, *supra* note 292, at 10681.

295. McElfish, *supra* note 292, at 10681.

296. U.S. ENV'T PROT. AGENCY & DEPT. OF THE ARMY, ECONOMIC ANALYSIS FOR THE PROPOSED "REVISED DEFINITION OF 'WATERS OF THE UNITED STATES'" RULE 45–51(2021), https://www.epa.gov/system/files/documents/2021-11/revised-definition-of-wotus_nprm_economic-analysis.pdf [<https://perma.cc/N5UV-ALDM>].

297. McElfish, *supra* note 292, at 10684.

298. See *Sackett v. Env't Prot. Agency*, 598 U.S. 651, 683 (2023).

299. Davila et al., *supra* note 213, at 6–11.

300. See *id.*

environmental culture and awareness (i.e. public and social perception of wetlands).³⁰¹

Fifteen states have taken some kind of action to address the change in WOTUS jurisdiction since the decision in May 2023.³⁰² Washington, California, New Mexico, Wisconsin, Maryland, and Delaware have all passed or introduced legislation to strengthen water quality protections.³⁰³ Colorado and Illinois have passed or introduced legislation to create state permitting programs.³⁰⁴ Missouri, Louisiana, Tennessee, Florida, and South Carolina have introduced, but not passed, legislation reducing wetland and water quality protections.³⁰⁵ The North Carolina legislature passed a bill over the governor's veto to preclude the state from regulating wetlands beyond those covered by federal WOTUS jurisdiction.³⁰⁶ However, the governor signed an executive order directing state agencies to prioritize conserving and restoring wetlands in the state.³⁰⁷ Indiana passed rollbacks to wetland protections while at the same time passing property tax breaks for voluntary wetland preservation.³⁰⁸ Action from the rest of the states remains to be seen.³⁰⁹

VII. CONCLUSION

In closing his majority opinion, Justice Alito held that “States can and will continue to exercise their primary authority to combat water pollution by regulating land and water use.”³¹⁰ Until congressional action is taken, states must now shoulder the complicated but important task of regulating and protecting wetlands.³¹¹ For some states this will be easy due to already existing regulatory programs.³¹² However, for many other states, the decision in *Sackett* came as a surprise, leaving a significant gap in the protection of their water resources.³¹³ These states must respond quickly with legislative and executive action if wetlands are to be protected and conserved.

301. *See id.*

302. *Id.* at 7–10.

303. *Id.* at 9–10.

304. *Id.* at 7–8.

305. *Id.* at 11.

306. *Id.* at 10.

307. *Id.*

308. *Id.*

309. *Id.* at 7.

310. *Sackett v. Env't Prot. Agency*, 598 U.S. 651, 683 (2023).

311. *See id.*

312. *See Davila et al., supra* note 213, at 7–10.

313. *See id.* at 7.

It has been 53 years since the CWA was passed in 1972.³¹⁴ In those 53 years, Congress has remained utterly silent in the face of the WOTUS debate.³¹⁵ Congress has failed to amend the CWA and clarify what exactly it meant by WOTUS despite the mountain of litigation and confusion caused by the strange term of art.³¹⁶ The WOTUS issue has now reached the United States Supreme Court four times with little to show for it in the way of clarity.³¹⁷ With half a century of litigation and multiple different federal rules attempting to define the statute, it is time for Congress to amend the CWA and precisely define “waters of the United States.”

314. Federal Water Pollution Control Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816.

315. See Richardson et al., *supra* note 5, at 1–2.

316. See 33 U.S.C. § 1362(7).

317. See *Sackett v. Env’t Prot. Agency*, 598 U.S. 651, 684 (2023); *Rapanos v. United States*, 547 U.S. 715, 742 (2006); *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng’rs*, 531 U.S. 159, 168 (2001); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 130–33 (1985).