



## THE FALLOUT OF CLEAN WATER ACT ADMINISTRATION IN A POST-SACKETT REGULATORY LANDSCAPE

An Issue Paper Update by the Tulane Institute on Water Resources Law & Policy<sup>1</sup>

October 2023

---

### OVERVIEW

On May 25, 2023, the U.S. Supreme Court fundamentally altered the scope of the Clean Water Act (“CWA”) in deciding the landmark case, *Sackett v. Environmental Protection Agency*. The holding significantly limits federal jurisdiction over wetlands and other waters, marking a major departure from decades of CWA administrative practice. As a result, the future of wetland protection, and more broadly the protection of the nation’s water resources, hangs in the balance. In anticipation of the Supreme Court’s ruling in *Sackett*, the Institute published an issue paper analyzing the potential consequences for federal and state regulatory programs as well as broader impacts of deregulation.<sup>2</sup> The paper, titled “Supreme Consequences: Anticipating Barriers to Clean Water Act Administration at the Federal and State Levels Following *Sackett v. EPA*,” laid out the potential impacts that a restrictive ruling would bring. As predicted by legal observers and discussed in the paper, the Supreme Court greatly limited the scope of wetlands protections. Given the major changes ahead, both from environmental and governance perspectives, this

---

<sup>1</sup> Principal Author: Haley Gentry, William B. Wiener, Jr. Research Fellow. Special acknowledgements are also due to: Jimmy Nieset, Consulting Advisor; Ximena de Obaldía, William B. Wiener, Jr. Research Fellow; Christopher Dalbom, Director, Tulane Institute on Water Resources Law and Policy; and Mark Davis. Additional thanks to Allison Moskowitz, student researcher, for editorial and research contributions. The Institute also thanks the Walton Family Foundation and William B. Wiener, Jr., Foundation for their support.

<sup>2</sup> Haley Gentry, *Supreme Consequences: Anticipating Barriers to Clean Water Act Administration at the Federal and State Levels Following Sackett v. EPA*, An Issue Paper by the Tulane Institute on Water Resources Law and Policy. Jan. 2023, available at [https://www.tulanewater.org/files/ugd/32079b\\_63f3e5c5655b4cbf9b6f644d2e5f2aad.pdf](https://www.tulanewater.org/files/ugd/32079b_63f3e5c5655b4cbf9b6f644d2e5f2aad.pdf).

addendum updates the Institute’s previous publication in light of the *Sackett* ruling and resultant changes to jurisdictional standards under the CWA. Part I analyzes the *Sackett* decision, changes to CWA standards and administration, and impacts to other regulatory programs. Part II discusses what the future of water protection, and environmental law more broadly, may look like in the current judicial and political climate. Finally, Part III briefly concludes.

## I. MAJOR RESTRICTIONS TO CLEAN WATER ACT JURISDICTION

Despite all the litigation over the CWA’s scope in the past several decades, the law itself has not substantively changed since 1977.<sup>3</sup> Federal jurisdiction under the CWA depends on the definition of Waters of the United States (“WOTUS”), implemented by Environmental Protection Agency (“EPA”) and Army Corps of Engineers (“Army Corps”) regulations. WOTUS covers a wide range of navigable waterbodies, but it also extends to wetlands that are adjacent to such waters.<sup>4</sup> Defining the scope of wetlands protections under the CWA has been the subject of controversy for decades, but generally, a holistic approach has been taken to determine what wetlands are subject to federal jurisdiction in keeping with the goals of the CWA.<sup>5</sup> In *Sackett v. EPA*, the Supreme Court put forth an extremely narrow reading of the terms WOTUS and “adjacent wetlands,” ignoring long-accepted CWA standards and jurisprudence. To conform with the decision, the EPA and Army Corps (“Agencies”) had to make changes to the WOTUS Rule that went into effect early 2023. The following Part breaks down the holding, explains changes to WOTUS, and analyzes impacts CWA administration going forward.

---

<sup>3</sup> Various amendments have impacted certain programs and related grants but have not altered the scope of protected waters. See Env’t Prot. Agency, *History of the Clean Water Act*, [https://www.epa.gov/laws-regulations/history-clean-water-act#:~:text=As%20amended%20in%201972%2C%20the,Clean%20Water%20Act%20\(CWA\)](https://www.epa.gov/laws-regulations/history-clean-water-act#:~:text=As%20amended%20in%201972%2C%20the,Clean%20Water%20Act%20(CWA).). (last visited Oct. 17, 2023).

<sup>4</sup> See *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985).

<sup>5</sup> The overarching policy of the CWA is to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251.

### a. Unpacking *Sackett v. EPA*

While the *Sackett* case arose from an individual landowner’s jurisdictional dispute under Section 404 of the CWA, the underlying controversy ultimately morphed into a much larger challenge to the CWA’s jurisdictional reach. The question on appeal from the Ninth Circuit asked the Supreme Court to decide the proper test for wetland jurisdiction under the CWA.<sup>6</sup> In its decision, the Supreme Court held that only wetlands with a “continuous surface connection to bodies that are ‘waters of the United States’ in their own right so that they are ‘indistinguishable’ from those waters are protected by the CWA.”<sup>7</sup> It boils down to a two-part test: 1) Whether the wetland is inseparably bound up with a waterbody so that it is difficult to say where the wetland ends and the waterbody begins, and 2) Is that particular waterbody a “water of the United States” or, in other words, subject to Congress’s commerce power over navigation.<sup>8</sup>

The holding adopted the approach put forth by Justice Scalia in *Rapanos v. United States*, a case on the WOTUS issue in which no majority was reached.<sup>9</sup> The four-justice plurality opinion in *Rapanos* formed the basis of the *Sackett* ruling, but the current Court arguably went further in its restriction of WOTUS standards. This interpretation goes against decades of wetland regulation under the CWA. Before *Sackett*, the Agencies employed the significant nexus standard for determining CWA jurisdiction over wetlands, which came from Justice Kennedy’s concurring opinion in *Rapanos*.<sup>10</sup> This multi-factored approach analyzed wetlands and other waters by their hydrologic connection to traditional navigable waters.<sup>11</sup> Though the significant

---

<sup>6</sup> Petition for Writ of Certiorari, *Sackett v. Env’t Prot. Agency*, 598 U.S. 651 (2023) (No. 21-454).

<sup>7</sup> *Sackett v. Env’t Prot. Agency*, 598 U.S. 651, 678 (2023) (citing *Rapanos v. United States*, 547 U.S. 715, 742, 755 (plurality opinion)).

<sup>8</sup> Reply of Petitioners at 1, *Sackett v. Env’t Prot. Agency*, 598 U.S. 651 (2023) (No. 21-454).

<sup>9</sup> See *Rapanos v. United States*, 547 U.S. 715 (2006).

<sup>10</sup> *Id.* at 759 (Kennedy, J., concurring). The four dissenting justices also embraced the significant nexus standard but believed that the CWA’s jurisdiction was even more far reaching.

<sup>11</sup> *Id.* at 780 (“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’”).

nexus standard gained traction in this concurring opinion, this type of multi-faceted approach long predated the 2006 case. Dating back to the 1970s, the Army Corps took a broad, inclusive approach to wetland regulatory jurisdiction, understanding that wetlands are not defined by the constant presence of water or a continuous surface connection to a river, and that these were critical parts of the hydrologic cycle.<sup>12</sup> The term “significant nexus” briefly appeared in a 2001 decision in which the Supreme Court reasoned that “[i]t was the significant nexus between the wetlands and ‘navigable waters’ that informed our reading of the CWA in *Riverside Bayview Homes*.”<sup>13</sup> In *Riverside Bayview*, the Supreme Court upheld the Army Corps’ definition of adjacent wetlands, noting the “inherent difficulties of defining precise bounds to regulable waters.”<sup>14</sup>

While the *Sackett* decision was unanimous on the actual dispute in question – whether the Sacketts’ property contained a WOTUS – several justices expressed disagreement on the proper standard for adjacent wetlands. In a concurring opinion joined by Justices Jackson, Kagan, and Sotomayor, Justice Kavanaugh noted that the Court’s ruling departed from forty-five years of consistent agency interpretation.<sup>15</sup> Justice Kavanaugh expressed concern that the limited definition of adjacent wetlands “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.”<sup>16</sup> To warn of the severe impacts that the majority’s standard could bring, his concurrence observed, with respect to the Mississippi River system, “[u]nder the Court’s ‘continuous surface connection’ test, the presence of those levees (the

---

<sup>12</sup> *United States v. Riverside Bayview Homes*, 474 U.S. 121, 123-24 (1985) (citing 40 Fed. Reg. 31320 1975)).

<sup>13</sup> *Solid Waste Agency of Northern Cook Cty. v. Army Corps of Eng’rs*, 531 U.S. 159, 167 (2001).

<sup>14</sup> *United States v. Riverside Bayview Homes*, 474 U.S. 121, 134 (1985).

<sup>15</sup> *Sackett v. Env’t Prot. Agency*, 598 U.S. 651, 716 (2023) (Kavanaugh, J., concurring).

<sup>16</sup> *Id.*

equivalent of a dike) would seemingly preclude Clean Water Act coverage of adjacent wetlands on the other side of the levees, even though the adjacent wetlands are often an important part of the flood-control project.”<sup>17</sup> Justice Kagan also wrote a concurring opinion, joined by Justices Jackson and Sotomayor, citing similar concerns. In her concurrence, Justice Kagan expressed her disagreement with recent decisions by the Supreme Court in the environmental realm, noting that “the majority ‘substitutes its own ideas about policymaking for Congress’s.’”<sup>18</sup>

In contrast, Justice Thomas filed a separate concurrence in which he called into question the scope of the CWA itself, arguing that it extended “only to the limits of Congress’s traditional jurisdiction over navigable waters.”<sup>19</sup> Going a step further than the majority, he argued that the CWA employs a definition of navigable waters akin to the Rivers and Harbors Act.<sup>20</sup> His approach would limit the CWA’s reach to cover only navigable waters that serve as highways of interstate or foreign commerce. While this concurring opinion does not have legal force on its own with respect to the *Sackett* holding and resultant CWA changes, it serves as a warning to other federal regulatory programs, which is briefly explored in Part II.

#### **b. Conforming 2023 WOTUS Rule**

As mentioned above, the *Sackett* ruling invalidated the significant nexus standard that formed the basis of the WOTUS rule promulgated earlier this year (“Old WOTUS Rule”). The Old WOTUS Rule, which went into effect in March 2023, was the subject of legal challenges from the onset.<sup>21</sup> Ahead of the *Sackett* decision, it had already been enjoined in roughly half of

---

<sup>17</sup> *Id.* at 726 (Kavanaugh, J., concurring) (citing Brief for Respondents at 30, *Sackett v. Env’t Prot. Agency*, (No. 21-454)).

<sup>18</sup> *Id.* at 715 (Kagan, J., concurring) (citing *West Virginia v. Env’t Prot. Agency*, 142 S.Ct. 2587, 2863 (Kagan, J., dissenting)).

<sup>19</sup> *Id.* at 709-10 (Thomas, J., concurring).

<sup>20</sup> *Id.* at 688 (Thomas, J., concurring).

<sup>21</sup> Pamela King & Ellie Borst, *‘It’s Time to Start Suing’: States Tee Up Next WOTUS War*, E&E NEWS (Jan. 18, 2023), <https://www.eenews.net/articles/its-time-to-start-suing-states-tee-up-next-wotus-war/>.

the states.<sup>22</sup> In late August, following the Court’s decision in *Sackett*, the Agencies released an amended version of the rule (“Conforming WOTUS Rule”) that made several major changes.<sup>23</sup> Pursuant to the Administrative Procedure Act, the Agencies found good cause to promulgate the updated rule without the typical notice and comment period, making it immediately effective.<sup>24</sup>

The Conforming WOTUS Rule makes several key changes to the operating WOTUS definition. First, it defines adjacent as having “a continuous surface connection,” removing protections for wetlands that are separated from traditional navigable waters by natural or manmade structures, in accordance with the *Sackett* majority.<sup>25</sup> Next, it eliminates the significant nexus standard as a basis for establishing jurisdiction for adjacent wetlands and tributaries.<sup>26</sup> For the provision on determining jurisdiction for intrastate lakes, ponds, and streams, the Conforming WOTUS Rule removes the significant nexus standard and requires that those intrastate waters be connected to a traditional navigable water.<sup>27</sup> Finally, the Conforming WOTUS Rule omits “interstate wetlands” as a standalone jurisdictional basis, now requiring that they have a continuous surface connection to a navigable water.<sup>28</sup> In practice, this continuous surface connection requirement eliminates protections for wetlands outside of floodplains, wetlands connected to ephemeral streams, and wetlands that only have a groundwater connection to a navigable water.<sup>29</sup> This means that a wetland separated from river or tributary merely by the

---

<sup>22</sup> See Order Granting Plaintiffs’ Motion for Preliminary Injunction, *West Virginia et. al. v. Env’t Prot. Agency* (Dis. N.D. 2023), available at <https://ago.wv.gov/Documents/WOTUS%20Preliminary%20Injunction%20Granted.pdf>; see also Memorandum Opinion and Order Granting Preliminary Injunction, *Texas v. Env’t Prot. Agency* (S.D. Tex. 2023), available at <https://www.fb.org/files/texas-v-epa-memorandum-opinion-and-order-granting-preliminary-injunction.pdf>.

<sup>23</sup> The amended rule went into effect on September 8, 2023. See Revised Definition of “Waters of the United States;” Conforming, 88 F.R. 61964 (codified at 33 C.F.R. § 328.3; 40 C.F.R. § 120.2).

<sup>24</sup> 5 U.S.C. §§ 553(b)(B), (d)(3).

<sup>25</sup> 33 C.F.R. § 328.3(c)(2); 40 C.F.R. § 120.2(c)(2).

<sup>26</sup> 33 C.F.R. § 328.3(a)(3)-(4); 40 C.F.R. § 120.2(a)(3)-(4).

<sup>27</sup> 33 C.F.R. § 328.3(a)(5); 40 C.F.R. § 120.2(a)(5).

<sup>28</sup> 33 C.F.R. § 328.3(a)(1)(iii); 40 C.F.R. § 120.2(a)(1)(iii).

<sup>29</sup> Royal C. Gardner, *The US Supreme Court has Gutted Federal Protection for Wetlands—Now What?* 618 NATURE 215 (June 8, 2023).

presence of levees and other manmade structures is non-jurisdictional. It also leaves most ephemeral streams and intermittent streams unprotected, which will certainly create issues for state and local water managers across the country.<sup>30</sup>

Despite the *Sackett* majority championing a clear and concise jurisdictional standard for WOTUS, the standard announced leaves open considerable uncertainties.<sup>31</sup> First, the Supreme Court’s holding dictates that wetlands must be “indistinguishable” from traditional navigable waters, yet this word has no legal definition.<sup>32</sup> Interestingly, “indistinguishable” does not appear in the Conforming WOTUS Rule, which may leave it open to legal challenge. Next, while the Agencies made substantive changes in response to the *Sackett* decision, there is still a body of valid Supreme Court case law on WOTUS for the Agencies to rely on that might raise questions on future CWA implementation. Further, *Sackett* offers no insight as to how extreme drought and other weather conditions will impact the continuous surface connection test. While the impacts from the Conforming WOTUS Rule are only beginning to materialize, this standard goes further than the WOTUS rule restrictions promulgated during President Trump’s administration.<sup>33</sup> EPA estimates that the Conforming WOTUS Rule will remove protection for sixty-three percent of wetlands previously subject to CWA jurisdiction.<sup>34</sup>

### **c. Impacts to Clean Water Act Programs**

Beyond changes to the WOTUS definition, the *Sackett* decision will have considerable impacts on other CWA programs and related federal water policies. With respect to Section 404,

---

<sup>30</sup> Richard J. Lazarus, *Judicial Destruction of the Clean Water Act: Sackett v. EPA*, U. CHI. L. REV. ONLINE, available at <https://lawreview.uchicago.edu/judicial-destruction-clean-water-act-sackett-v-epa>.

<sup>31</sup> See *Sackett v. Env’t Prot. Agency*, 598 U.S. 651, 659 (2023).

<sup>32</sup> *Id.* at 678.

<sup>33</sup> See E.A. Crunden, *Post-Sackett, Chaos Erupts for Wetlands Oversight*, E&E NEWS (June 2, 2023), <https://www.eenews.net/articles/post-sackett-chaos-erupts-for-wetlands-oversight/#:~:text=While%20the%20exact%20effects%20of,51%20percent%20of%20U.S.%20wetlands>.

<sup>34</sup> Allyson Chiu, *Biden Rule, Heeding Supreme Court, Could Strip Over Half of U.S. Wetlands’ Protections*, WASH. POST (Aug. 29, 2023), <https://www.washingtonpost.com/climate-environment/2023/08/29/epa-new-wetland-rule/>.

which regulates the discharge of dredged and fill materials into a WOTUS, administered by the Army Corps, several questions arise beyond jurisdictional determinations. Section 404 permits come with a binding obligation that requires an applicant to avoid, minimize, and compensate for losses to aquatic resources that would result from dredge and fill development.<sup>35</sup> There are several ways to fulfill the mitigation requirement, including permittee-responsible mitigation, in lieu fee program mitigation, and compensatory mitigation.<sup>36</sup> Compensatory mitigation, a frequent option, gave rise to private sector demand for wetland building and restoration credits, which led to a growth in the number of companies providing ecosystem services. These companies create and restore wetlands, then sell credits in mitigation “banks” that Section 404 permittees can purchase to satisfy the CWA’s regulatory requirements.<sup>37</sup> While the use of mitigation banking is often criticized by both the regulated community and environmentalists, it plays a role in preventing water quality degradation and ensuring maintenance of local drainage and flood retention capacity. Further, the status of existing permit obligations for compensatory mitigation are uncertain, as challenges to jurisdictional determinations begin to unfold.<sup>38</sup>

These changes do not operate in a vacuum. WOTUS also applies to Section 402’s National Pollutant Discharge Elimination System (“NPDES”), which regulates point source pollutant discharges.<sup>39</sup> The implementation of the Conforming WOTUS Rule raises questions concerning the future administration of NPDES permitting. Does this mean harmful pollutants can be discharged into a wetland that is a mere twenty feet from traditionally navigable waters

---

<sup>35</sup> See generally 33 C.F.R. § 332.

<sup>36</sup> Env’t L. Inst., *Background on Compensatory Mitigation*, <https://www.eli.org/compensatory-mitigation/background-compensatory-mitigation> (last visited Oct. 10, 2023).

<sup>37</sup> Env’t Prot. Agency, *Mitigation Banking Under CWA Section 404*, <https://www.epa.gov/cwa-404/mitigation-banks-under-cwa-section-404> (last visited Sept. 12, 2023).

<sup>38</sup> See Josh Numainville, *Army Corps to Revisit Wetlands Jurisdiction Following SCOTUS Ruling: Lewis v. Army Corps of Engineers*, 44 No. 05 WESTLAW J. ENV’T 11 (June 23, 2023).

<sup>39</sup> 33 U.S.C. § 1342.



but presently lacks a surface connection? While the answer is unclear, a Supreme Court decision from several years back might afford additional protection, at least for Section 402.<sup>40</sup> In *County of Maui v. Hawaii Wildlife Fund*, the Court held that Section 402 applies to point source discharges “of pollutants that reach navigable waters after traveling through groundwater if that discharge is the functional equivalent of a direct discharge from the point source into navigable waters.”<sup>41</sup> This functional equivalence standard could be crucial to prevent regulatory gaps in Section 402 protections. It also has support in the *Rapanos* plurality, which informed the *Sackett* majority.<sup>42</sup> Justice Scalia, in *Rapanos*, observed that the CWA “categorizes the channels and conduits that typically carry intermittent flows of water separately from ‘navigable waters,’ by including them in the definition of ‘point source.’”<sup>43</sup> Given the definition employed by the CWA, lower courts have continually found that “the discharge into intermittent channels of any pollutant that naturally washes downstream likely violates [the Act], even if the pollutants discharged from a point source do not emit ‘directly into’ covered waters, but pass ‘through conveyances’ in between.”<sup>44</sup> However, this still leaves issues with locating points of discharge and regulatory enforcement unresolved.

While Section 402 administration may be largely unchanged under the Conforming WOTUS Rule, the narrowing jurisdictional standard for wetlands will impact Section 401 of the CWA.<sup>45</sup> Before a CWA permit can be issued, Section 401 requires a water quality certification from the state or tribe where the discharge or water quality impacts will occur.<sup>46</sup> Given the

---

<sup>40</sup> 140 S.Ct. 1462 (2020).

<sup>41</sup> *Id.* at 1477.

<sup>42</sup> See *Sackett v. Env’t. Prot. Agency*, 598 U.S. 651, 671-76 (2023).

<sup>43</sup> *Rapanos v. United States*, 547 U.S. 715, 735 (2006) (citing 33 U.S.C. § 1362(14)).

<sup>44</sup> *Id.* at 743.

<sup>45</sup> Env’t Prot. Agency, *Clean Water Act Programs Utilizing the Definition of WOTUS*, <https://www.epa.gov/wotus/clean-water-act-programs-utilizing-definition-wotus> (last visited Sept. 20, 2023).

<sup>46</sup> 33 U.S.C. § 1341(a)(1).

Conforming WOTUS Rule’s exclusion of interstate wetlands and other intrastate waterbodies lacking a continuous surface connection to traditional navigable waters, those states wanting to maintain certain water quality and drainage functions will have fewer opportunities to review federal permits. While EPA’s new Section 401 certification rule, effective in November 2023, aims to strengthen state and tribal authority in federal permitting decisions—actually a reversion to a pre-Trump rule approach—the significant rollback of WOTUS reduces the amount of waters subject to this oversight.<sup>47</sup> Similarly, the scope of CWA Section 311, which covers oil spill prevention and preparedness, and CWA Section 303, which deals with setting water quality standards and identifying impaired waters, will scale back under the new standards.<sup>48</sup>

#### **d. Impacts to Related Federal Programs**

Finally, federal jurisdiction pursuant to the CWA affects other federal environmental policies. For example, the National Environmental Policy Act (“NEPA”) requires a detailed environmental review of major federal actions “significantly affecting the quality of the human environment.”<sup>49</sup> Due to the dramatic reduction of federal CWA jurisdiction, many projects in wetlands or other non-jurisdictional waters will no longer trigger federal involvement, rendering NEPA inapplicable in the absence of other federal agency actions. The same goes for wildlife protections pursuant to the federal Endangered Species Act (“ESA”). Under the ESA, federal agencies must consult with the U.S. Fish and Wildlife Service (“FWS”) on impacts to species arising from federal activities.<sup>50</sup> Since the Army Corps no longer has regulatory jurisdiction over ephemeral streams, in many instances there will not be a basis for consultation with the FWS on

---

<sup>47</sup> See Env’t Prot. Agency, *Final 2023 CWA Section 401 Water Quality Certification Improvement Rule*, <https://www.epa.gov/cwa-401/final-2023-cwa-section-401-water-quality-certification-improvement-rule> (last visited Oct. 27, 2023).

<sup>48</sup> Env’t Prot. Agency, *Clean Water Act Programs Utilizing the Definition of WOTUS*, <https://www.epa.gov/wotus/clean-water-act-programs-utilizing-definition-wotus> (last visited Sept. 20, 2023).

<sup>49</sup> 42 U.S.C. § 4332(2)(C).

<sup>50</sup> 16 U.S.C. § 1536(a).

species-related issues in these habitat areas when they are subject to development or other alteration.<sup>51</sup>

There may also be impacts to the administration of the National Flood Insurance Program (“NFIP”). Because development within floodplains increases flood vulnerabilities, measures to address wetland protection should be prioritized at all levels of government. While NFIP is a federal program, it is administered at the community level, and insurance premiums vary based on location and the community’s flood management standards.<sup>52</sup> Floodplain landscapes will certainly change, especially given that the restrictive definition of adjacent wetlands means that many wetlands not directly connected to their river systems will lose federal protection, leaving riverine and downstream communities without sufficient regulatory oversight. Recent changes to premium pricing under NFIP have been geared towards more accurately pricing an individual property’s flood risk.<sup>53</sup> However, this has sparked an insurability crisis in flood-prone, low-income communities where previous rates have not fully reflected flood risks.<sup>54</sup> If there is more development within previously jurisdictional floodplain wetlands without sufficient state and local oversight or mitigation measures, it could drive up flood risks in a community and even jeopardize a community’s eligibility to participate in NFIP.<sup>55</sup> This development threat is not mere conjecture. In reacting to *Sackett*, the National Association of Home Builders praised the

---

<sup>51</sup> See Pamela King, *Supreme Court Water Ruling Could Transform NEPA, ESA*, E&E NEWS (June 15, 2023), <https://www.eenews.net/articles/supreme-court-water-ruling-could-transform-nepa-esa/>.

<sup>52</sup> Fed. Emergency Mgmt. Agency, B573, *Community Rating System: A Local Official’s Guide to Saving Lives, Preventing Property Damage, and Reducing the Cost of Flood Insurance*, (Mar. 2023), available at [https://www.fema.gov/sites/default/files/documents/fema\\_crs-brochure\\_032023.pdf](https://www.fema.gov/sites/default/files/documents/fema_crs-brochure_032023.pdf)

<sup>53</sup> Fed. Emergency Mgmt. Agency, *NFIP’s Pricing Approach*, <https://www.fema.gov/flood-insurance/risk-rating> (last visited Oct. 16, 2023).

<sup>54</sup> Mike Smith, *Sharp Flood Insurance Hikes Across South Louisiana Detailed in New Data*, NOLA.COM (Apr. 23, 2023), [https://www.nola.com/news/environment/data-details-flood-insurance-hikes-across-south-louisiana/article\\_f18a9e48-dfb9-11ed-a40c-4b78579baecb.html](https://www.nola.com/news/environment/data-details-flood-insurance-hikes-across-south-louisiana/article_f18a9e48-dfb9-11ed-a40c-4b78579baecb.html).

<sup>55</sup> Diane P. Horn & Baird Webel, CONG. RESEARCH SERV., CRS R44593, INTRODUCTION TO THE NATIONAL FLOOD INSURANCE PROGRAM 21-22 (Jan. 6, 2023), available at <https://crsreports.congress.gov/product/pdf/R/R44593>.

decision for removing barriers and delays to project permitting, which would help ease housing shortages.<sup>56</sup> Until states and localities implement protections for formerly WOTUS wetlands, the loss of federal protection and mitigation could in turn drive up NFIP costs even further.

## **II. THE UNCERTAIN FUTURE OF WATER PROTECTION**

The long, slow retreat of the CWA's reach hopefully culminated in the *Sackett v. EPA* decision, which fundamentally changes the landscape of water protection and management. While the *Sackett* majority framed Section 404 as an overstep of federal power and an unacceptable intrusion on private property rights, it made no mention of the fundamental reasons as to why this regulatory program exists in the first place. Beyond the benefits wetlands provide to water quality, they are critically important for local drainage and managing flood risk.<sup>57</sup> The loss of regulatory protection and compensatory mitigation will leave communities more vulnerable to flood risk, compounding water quality, insurance, and infrastructure issues. How and in what manner states, localities, and tribes respond in the coming months will be of critical importance.

### **a. State-Level Changes**

Near the close of the *Sackett* majority opinion, Justice Alito, referring to a Farm Bureau brief, wrote "States can and will continue to exercise their primary authority to combat water pollution by regulating land and water use."<sup>58</sup> This is incredibly disconnected from the reality of CWA administration and the capacities of states. As discussed in Part I, the Army Corps administers Section 404 and EPA administers Section 402. Almost all states have assumed

---

<sup>56</sup> See Nat'l Ass'n of Home Builders, *NAHB Commends Supreme Court Ruling in Sackett v. EPA*, (May 25, 2023), <https://www.nahb.org/news-and-economics/press-releases/2023/05/nahb-commends-supreme-court-ruling-in-sackett-v-epa>.

<sup>57</sup> See Env't Prot. Agency, *Wetland Functions and Values*, available at <https://www.epa.gov/sites/default/files/2016-02/documents/wetlandfunctionsvalues.pdf>.

<sup>58</sup> *Sackett v. Env't Prot. Agency*, 598 U.S. 651, 683 (2023).

responsibility of the 402 program, but only three states have assumed administration of the Section 404 dredge and fill program.<sup>59</sup> Of those three states, Michigan and Florida tie their programs to WOTUS, and New Jersey provides limited wiggle room with state wetland programs.<sup>60</sup> Beyond political considerations, many state environmental agencies do not have the funding, capacity, and technical expertise to administer a dredge and fill program.<sup>61</sup> Faced with the significant restriction of WOTUS and Section 404 from *Sackett*, many states will not step up to fill in the gaps. What will happen is the shifting of burdens and costs, whether they will ultimately be borne by state agencies and local governments, or if gaps are not addressed, by communities that will experience increased flooding and water quality issues. Though the Army Corps recently announced it will be updating 404 assumption requirements with an aim to support state and tribal agencies, it is unclear how these changes will impact wetlands programs or provide more expansive regulatory oversight.<sup>62</sup>

Due to the relationship between state and federal water quality laws and regulations, many states will follow the changes in federal jurisdiction under the CWA. Roughly half of the states tie their CWA permitting programs and standards to WOTUS.<sup>63</sup> Several states even prohibit more stringent water quality regulations than the CWA, including Idaho, Mississippi, and South

---

<sup>59</sup> Env't Prot. Agency, *NPDES State Program Authority*, <https://www.epa.gov/npdes/npdes-state-program-authority> (last visited Sept. 12, 2023); Env't Prot. Agency, *U.S. Interactive Map of State and Tribal Assumption under CWA Section 404*, <https://www.epa.gov/cwa404g/us-interactive-map-stateand-tribal-assumption-under-cwa-section-404> (last visited Sept. 12, 2023).

<sup>60</sup> FLA. STAT. § 373.4146; MICH. COMP. L. § 324.30328; N.J. STAT § 13:9B-27. New Jersey also administers Section 404 but has a broader regulatory definition for wetlands. N.J. ADMIN. CODE §§ 7:7A-1:3, 2:1.

<sup>61</sup> Alex Brown, *More States Want Power to Approve Wetlands Development*, PEW STATELINE (May 11, 2022), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2022/05/11/more-states-want-power-to-approve-wetlands-development> (Indiana, Oregon, and Arizona have all backed off efforts to assume section 404 programs within the last five years).

<sup>62</sup> Clean Water Act Section 404 Tribal and State Program Regulation, 88 Fed. Reg. 66276 (proposed Aug. 14, 2023) (to be codified at 40 C.F.R. pts. 123, 124, 232, 233).

<sup>63</sup> The states that utilize the federal WOTUS standard are Alabama, Alaska, Colorado, Delaware, Georgia, Hawaii, Idaho, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, South Carolina, South Dakota, Texas, and Utah. James McElfish, *State Protection of Nonfederal Waters: Turbidity Continues*, 52 ENV'T L. INST. 10679, 10686 (2022).

Dakota.<sup>64</sup> States with less expansive stringency limitations are Arizona, Ohio, Indiana, Kentucky, and Wisconsin.<sup>65</sup> Moreover, roughly fifteen states have constraints limiting when their water quality agency can adopt more expansive or stringent standards than the federal government.<sup>66</sup> It will be important to watch how states that currently follow federal standards, but do not impose stringency limitations, respond to WOTUS changes, if at all. Some of these states may choose to pass legislation and expand their clean water programs in response to the *Sackett* decision. For example, just days after *Sackett* came down, the Governor of New Mexico called upon her administration to take action to fill regulatory gaps in state waters left by the Supreme Court ruling.<sup>67</sup> She contends that the new standard will leave up to ninety percent of New Mexico's waters, which largely comprises fragmented rivers and streams, without federal protection.<sup>68</sup> Others may respond in the opposite manner. For example, North Carolina just passed legislation restricting the state's water and wetlands program to WOTUS, precluding any opportunity to fill in the gap.<sup>69</sup>

#### **b. Putting *Sackett* in Context with Emerging Judicial Trends**

Beyond the holding itself, the underlying views advanced by the *Sackett* majority are symptomatic of a larger anti-regulatory and anti-deference movement in the federal courts. While the extent of judicial deference to an agency's interpretation of law has long been debated, recent rulings demonstrate how some conservative members of the Supreme Court are more than

---

<sup>64</sup> *Supreme Consequences*, *supra* note 1, at 12-16.

<sup>65</sup> *Id.* at 13-16.

<sup>66</sup> See Brief for States of New York et. al. as Amici Curiae in Support of Respondents, *Sackett v. Env't Prot. Agency*, 598 U.S. 651 (2023) (No. 21-454) 22-23 (Colorado, Florida, Iowa, Maine, Michigan, Montana, North Dakota, Oklahoma, Oregon, Tennessee, Texas, Utah, Virginia, and West Virginia).

<sup>67</sup> Adrian Hedden, *Gov. Lujan Grisham Calls out Supreme Court Decision as 'Devastating' to NM's Waters* CARLSBAD CURRENT – ARGUS (May 31, 2023), <https://www.currentargus.com/story/news/2023/05/31/new-mexico-leaders-criticize-us-supreme-court-ruling-on-federal-water-drought-law/70262195007/>.

<sup>68</sup> *Id.*

<sup>69</sup> 2023 N.C. Sess. Laws 2023-63 (amending 15A N.C. ADMIN. CODE 2B.0202 (2023)), available at <https://www.ncleg.gov/EnactedLegislation/SessionLaws/PDF/2023-2024/SL2023-63.pdf>.

willing to overturn long-established environmental regulatory schemes. The extensive legislative history on Army Corps authority under Section 404 and the failure of numerous legislative proposals to restrict CWA wetlands protections over the years did not seem to matter in the *Sackett* majority opinion.<sup>70</sup> In *West Virginia v. Environmental Protection Agency*, a decision from 2022, the Court invalidated regulations pursuant to the Clean Air Act on the basis of the major questions doctrine, a principle which directs courts to avoid giving deference to federal agencies on questions of vast economic importance.<sup>71</sup> While the Supreme Court has employed similar arguments to invalidate agency claims of regulatory authority over the past couple decades, *West Virginia* was the first time this doctrine had been explicitly referenced by the Supreme Court.<sup>72</sup> It has been asserted repeatedly in federal district court complaints against the EPA just in the last year.<sup>73</sup> Moreover, this term, the Supreme Court will decide whether to overturn agency deference entirely (often referred to as *Chevron* deference), which would severely impact not only the EPA and Army Corps, but all federal agencies.<sup>74</sup>

Furthermore, the emergence of the doctrine of lenity in *Sackett* raises concerns. The rule of lenity posits that criminal statutes shall be construed narrowly in favor of the defendant.<sup>75</sup> While this principle serves incredibly important functions, its use by the Supreme Court in modern times has very real potential to continue undermining federal environmental laws. The

---

<sup>70</sup> See *Sackett v. Env't Prot. Agency*, 598 U.S. 651, 681-82 (2023).

<sup>71</sup> 142 S.Ct. 2587, 2614 (2022).

<sup>72</sup> Kate R. Bowers, CONG. RES. SERV., IF12077, THE MAJOR QUESTIONS DOCTRINE 2 (Nov. 2, 2022), available at <https://crsreports.congress.gov/product/pdf/IF/IF12077>.

<sup>73</sup> For example, the lawsuit filed by Texas to enjoin the WOTUS rule put forth a major questions argument. Memorandum Opinion and Order Granting Preliminary Injunction, *Texas v. Env't Prot. Agency* at 23 (S.D. Tex. 2023), available at <https://www.fb.org/files/texas-v-epa-memorandum-opinion-and-order-granting-preliminary-injunction.pdf>.

<sup>74</sup> Petition for Writ of Certiorari, *Loper Bright Enterprises v. Raimondo* (No. 22-451). *Loper v. Raimondo* was consolidated with a similar case after Justice Jackson recused herself so that all Justices could participate. Zach Schonfeld, *Supreme Court Adds Second Case in Battle Over Chevron Doctrine*, The Hill (Oct. 13, 2023), <https://thehill.com/regulation/court-battles/4254920-supreme-court-adds-second-case-in-battle-over-chevron-doctrine/>.

<sup>75</sup> *United States v. Bass*, 404 U.S. 336, 347 (1971) (quoting *Rewis v. United States*, 401 U.S. 808, 812 (1971)).

majority overly emphasized the role of criminal penalties used in CWA enforcement, stating that the law “can sweep broadly enough to criminalize mundane activities like moving dirt. . .” and that landowners are constantly at risk of criminal prosecution.<sup>76</sup> This mischaracterizes CWA enforcement practices, which primarily occur in the civil realm, with criminal penalties reserved for egregious circumstances. That said, the criminal penalties do exist, and the existence of prosecutorial discretion in criminal matters undeniably raises questions about enforcement and due process. Unfortunately, the *Sackett* majority frames the CWA as a harsh criminal statute waiting to be used to imprison individual property owners for minor infractions. This could be a warning for the future of other federal regulatory schemes.

### III. CONCLUSION

*Sackett v. EPA* has fundamentally changed the scope and application of the Clean Water Act, threatening the future of water protection in the United States. Up to sixty-three percent of wetlands lost federal protection as a direct result, and unless other governmental entities step up, they will remain unprotected and vulnerable. Without a robust regulatory framework or administrative oversight, emerging conflicts over wetland development and drainage issues will have to be resolved through private law and dispute resolution. As federal jurisdiction retreats, state, local, and tribal governmental entities may utilize different approaches, either via legislation, ordinances, or voluntary partnerships to address gaps left by the Conforming WOTUS Rule.<sup>77</sup> States may consider expanding protections for wetlands under existing environmental authorities, and localities may move to implement zoning changes that restrict development or create conservation districts that protect wetland areas to maintain drainage for

---

<sup>76</sup> *Sackett v. Env’t Prot. Agency*, 598 U.S. 651, 670-71 (2023).

<sup>77</sup> For a more thorough discussion, see *Filling the Gaps: Strategies for States/Tribes for Protection of Non-WOTUS Waters*, ENV’T L. INST. (May 2023).



stormwater management.<sup>78</sup> Regardless of the pathway or government entity involved, these critically important waters and wetlands must be given protection before the impacts are irreversible.

---

<sup>78</sup> See *e.g.*, Atlanta Code of Ordinance § 74-303.