



**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 Policy¹

January 2023

ABSTRACT

On October 3, 2022, the U.S. Supreme Court began its latest term with oral arguments for *Sackett v. Environmental Protection Agency*, a case challenging federal authority to regulate certain waters and wetlands under the Clean Water Act (“CWA”).² This litigation, twelve years in the making, has implicated myriad legal topics on its way through the courts, from toxic pollution to states’ authority over land use to commercial development. Soon, the Supreme Court will again weigh in on what constitutes “Waters of the United States” (“WOTUS”) and thus what can be regulated by the federal government. If the Court’s decision in *Sackett* curtails federal jurisdiction, which is an anticipated outcome, states would be tasked with greater responsibility to regulate wetlands and streams. This paper aims to highlight the existing shortcomings and future challenges to water quality management in the event of federal deregulation. Part I walks through the history of WOTUS and its significance in the CWA. Parts II and III build on this history and explore how *Sackett* encompasses longstanding debates, how the Court might rule,

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² Petition for Writ of Certiorari, *Sackett v. EPA* (No. 21-454).

and why states have cause for concern. Part IV walks through state laws that would retract along with the CWA. Finally, Part V identifies related issues that could arise further down the road.

I. THE MUDDY HISTORY BEHIND WOTUS

Today's iteration of the CWA took decades to reach its final form. Congress first addressed water quality with the 1948 Federal Water Pollution Control Act ("FWPCA"), which promoted research and provided guidance and financial resources to states for water quality management, planning, and treatment.³ In defining its scope, the FWPCA used the phrase "interstate waters," which meant "all rivers, lakes, and other waters that flow across, or form part of, State boundaries."⁴ That only covered about one-seventh of waters across the country.⁵ Because this law left most authority to the states, it was largely ineffective in achieving holistic pollution abatement. Subsequent amendments in the 1960s focused on creating enforceable standards and expanding protected classes of waters.⁶ However, the FWPCA's framework did not lend itself to achieving those ends. Senate Committee reports leading up to the CWA even noted that "[t]ime schedules for abatement are slipping away because of failure to enforce, lack of effluent controls, and disputes over Federal-State standards."⁷ Unsurprisingly, the coming legislative changes would increase federal involvement and strengthen regulatory standards.

To overcome FWPCA issues, Congress enacted the modern CWA in 1972 with the policy to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."⁸ The statute does not define "waters" within the context of the CWA, instead defining

³ Federal Water Pollution Control Act, Pub. L. No. 80-845 (1948).

⁴ *Id.* at § 10(e).

⁵ N. William Hines, *History of the 1972 Clean Water Act: The Story Behind How the 1972 Act Became the Capstone on a Decade of Extraordinary Environmental Reform*, 4 J. OF ENERGY & ENV'T L. 81, 91 (2013).

⁶ *See id.*

⁷ S. Rep. No. 92-414, p. 8 (1971).

⁸ 33 U.S.C. § 1251.

only “navigable waters” as “Waters of the United States” (WOTUS).⁹ What seems like a small detail has had massive implications, as the governing interpretation of WOTUS controls what waters can be federally regulated under the CWA. In using a broad term, Congress left discretion to the Environmental Protection Agency (“EPA”) and U.S. Army Corps of Engineers (“Army Corps”) to define WOTUS via rulemaking.

Permitting is the CWA’s primary mechanism to regulate water quality. Essentially, it is unlawful to discharge pollutants from a point source, such as an industrial facility, into a WOTUS without first obtaining a permit. The EPA administers the section 402 National Pollutant Discharge Elimination System (“NPDES”), which regulates point source pollutant discharges.¹⁰ Similarly, the Army Corps administers the dredge and fill program under section 404, a provision added to the CWA in amendments from 1977.¹¹ While these programs address different types of pollution, their scopes are tied to WOTUS. The Army Corps first defined WOTUS to include traditional navigable waters and their adjacent wetlands.¹² In 1985, the U.S. Supreme Court upheld this interpretation of WOTUS in *United States v. Riverside Bayview*.¹³ While the decision affirmed that the CWA applied to adjacent wetlands and protected them, it left a looming question unanswered: what did “adjacency” entail? The debate goes on to this day.

Federal authority to regulate wetlands has sparked innumerable legal challenges. The first notable judicial limitation of WOTUS came in 2001—until then, the CWA had been applied fairly broadly.¹⁴ In *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of*

⁹ 33 U.S.C. § 1362(7).

¹⁰ 33 U.S.C. § 1342.

¹¹ 33 U.S.C. § 1344.

¹² 33 C.F.R. § 209 (1974).

¹³ The Court held that the Army Corps may regulate “wetlands adjacent to but not regularly flooded by rivers, streams, and other hydrographic features more conventionally identifiable as ‘waters.’” 474 U.S. 121, 131 (1985).

¹⁴ Stephen P. Mulligan, CONG. RESEARCH SERV., R44585, EVOLUTION OF THE MEANING OF “WATERS OF THE UNITED STATES” IN THE CLEAN WATER ACT 4-5 (2019).

Engineers (“*SWANCC*”), the Supreme Court held that the Army Corps could not use migratory bird habitat as a basis to establish jurisdiction over isolated wetlands.¹⁵ But the preeminent WOTUS case came in 2006 when the United States brought suit against a real estate developer, resulting in a split decision still hotly contested today.¹⁶ In *Rapanos v. United States*, the Court considered whether section 404 jurisdiction extended to wetlands that were neither navigable nor adjacent to a navigable water.¹⁷ The Justices failed to reach a majority, and the resulting opinions from Justices Kennedy and Scalia proposed notably different standards for jurisdiction over wetlands.¹⁸ Justice Scalia, writing for the plurality, argued only wetlands with a “continuous surface connection” could be regulated.¹⁹ Justice Kennedy wrote a concurring opinion which argued that WOTUS included wetlands with a “significant nexus” to a traditionally navigable or interstate.²⁰ The significant nexus standard invites a fact-specific analysis for waters that, by themselves or in concert with similarly situated features, significantly affect the chemical, physical, or biological integrity of downstream traditional navigable waters.²¹ However, the significant nexus standard has drawn criticism because it cannot be clearly defined and, until very recently, lacked regulatory basis.²²

Over the past decade, the Army Corps and EPA (“Agencies”) have also struggled to define WOTUS. First, in 2015, under the Obama Administration, the Agencies promulgated the Clean Water Rule, which sought to clarify the significant nexus standard and extend protections

¹⁵ 531 U.S. 159, 174 (2001).

¹⁶ *United States v. Rapanos*, 547 U.S. 715 (2006).

¹⁷ *Id.* at 730-31 (Scalia, J., plurality).

¹⁸ *See id.*

¹⁹ *Id.* at 742.

²⁰ *Id.* at 759 (Kennedy, J., concurring).

²¹ EPA, CLEAN WATER ACT JURISDICTION FOLLOWING THE U.S. SUPREME COURT’S DECISION IN *RAPANOS V. UNITED STATES & CARABELL V. UNITED STATES*, (June 5, 2007), available at <https://www.epa.gov/sites/default/files/2016-04/documents/rapanosguidance6507.pdf>.

²² Revised Definition of “Waters of the United States,” (proposed Dec. 30, 2022) (to be codified at 33 C.F.R. pt. 328 and 40 C.F.R. pt. 120).

for wetlands and ephemeral streams.²³ Twenty-eight states sued to stop implementation of the Clean Water Rule; thus, it only went into effect in twenty-two states.²⁴ Next, in 2019, pursuant to Trump Administration guidance, the Agencies repealed the Clean Water Rule.²⁵ In its place, the Agencies issued the Navigable Water Protection Rule (“NWPR”), which excluded a considerable number of waters from WOTUS, closely resembling Justice Scalia’s *Rapanos* opinion.²⁶ The NWPR had a short run as well. In 2021, a federal district court vacated the NWPR, citing serious flaws in its enactment and a request from Biden-appointed EPA officials for remand.²⁷ Since then, the Agencies have followed pre-2015 regulatory guidance, which tracks the 1986 WOTUS definition with incorporation of *Rapanos* standards.²⁸ However, federal courts disagree on the proper test, resulting in the application of different standards.²⁹ The lack of a WOTUS rule and inconsistent judicial application across the country frame wider issues in *Sackett*.

After President Biden took office, the Agencies initiated a rulemaking process to address the confusion following the Obama- and Trump-era rules and litigation. In December 2022, the Agencies announced the final WOTUS rule, reflecting long-standing efforts to restore previous protections from the 1986 regulations and incorporate language from *Rapanos*.³⁰ The release of

²³ CONG. RESEARCH SERV., R46927, “WATERS OF THE UNITED STATES” (WOTUS): CURRENT STATUS OF THE 2015 CLEAN WATER RULE 2-3 (2018).

²⁴ See *id.* at 6-7.

²⁵ *Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing ‘Waters of the United States,’* 82 Fed. Reg. 12497 (Mar. 3, 2017); Lisa Friedman & Coral Davenport, *Trump Administration Rolls Back Clean Water Protections*, N.Y. TIMES (Sep. 19, 2019), <https://www.nytimes.com/2019/09/12/climate/trump-administration-rolls-back-clean-water-protections.html>.

²⁶ Navigable Waters Protection Rule, 85 Fed. Reg. 22250 (June 26, 2020).

²⁷ *Pascua Yaqui Tribe v. EPA*, 557 F.Supp. 3d 949 (2021).

²⁸ EPA, *Current Implementation of Waters of the United States*, <https://www.epa.gov/wotus/current-implementation-waters-united-states> (last visited Jan. 3, 2022).

²⁹ See Aaron Aber et. al., *SCOTUS and WOTUS: Is Sackett Case the Final Chapter?* JDSUPRA (Jan. 28, 2022), <https://www.jdsupra.com/legalnews/scotus-and-wotus-is-sackett-case-the-3160627/>.

³⁰ News Release, EPA, *EPA and Army Finalize Rule Establishing Definition of WOTUS and Restoring Fundamental Water Protections*, (Dec. 30, 2022), <https://www.epa.gov/newsreleases/epa-and-army-finalize-rule-establishing-definition-wotus-and-restoring-fundamental> [hereinafter EPA News Release].

this rule just ahead of the *Sackett* decision raises interesting questions on its implementation, which will be explored further in the following Part.

II. NARROW CONTROVERSEY, WIDESPREAD IMPACTS

The *Sackett v. EPA* battle began in Idaho in a residential subdivision next to Priest Lake. A couple had begun developing a parcel of property by filling wetlands within the property bounds. EPA, alleging the wetlands were a WOTUS, ordered the Sacketts to restore the property and obtain a section 404 permit.³¹ Instead of complying, the Sacketts challenged EPA's authority to enforce the order and assess penalties.³² This challenge went all the way up to the U.S. Supreme Court, which unanimously held that citizens have the immediate right to challenge a final government order in court.³³ Fifteen years later, this narrow section 404 dispute has worked its way back through the courts.

Now before the Supreme Court is the Sacketts' appeal from the Ninth Circuit decision finding their property was a WOTUS.³⁴ The question presented to the Court asks whether the Ninth Circuit, in applying the significant nexus standard, used the proper test to determine jurisdiction over wetlands under the CWA.³⁵ In their argument, the Sacketts propose an alternative two-part test for determining when a wetland is a WOTUS: 1) whether the wetland is inseparably bound up with a waterbody so that it is difficult to say where the wetland ends and the water begins, and 2) is that particular water "of the United States" or, in other words, subject to Congress's commerce power over navigation.³⁶

³¹ See *Sackett v. EPA*, 566 U.S. 120 (2012).

³² Lyle Denniston, *Opinion Recap: Taking EPA to Court*, SCOTUSBLOG (Mar. 21, 2012), <https://www.scotusblog.com/2012/03/opinion-recap-taking-epa-to-court/>.

³³ See *Sackett v. EPA*, 566 U.S. 120 (2012).

³⁴ *Sackett v. EPA*, 8 F.4th 1075 (9th Cir. 2021).

³⁵ Petition for Writ of Certiorari at 3-4, *Sackett v. EPA* (No. 21-454).

³⁶ Reply of Petitioners at 1, *Sackett v. EPA* (No.21-454).

Even with a seemingly minor dispute at the foundation of *Sackett*, the challenge gives the Court a chance to revisit WOTUS and possibly alter the CWA in its entirety. Besides permitting, several other CWA sections utilize the WOTUS definition—water quality standard setting in section 303, water quality certification in section 401, and oil spill prevention programs in section 311.³⁷ On top of that, while wetlands are the primary focus of *Sackett*, other WOTUS classifications, such as impoundments and ephemeral streams, are at risk.³⁸ Roughly fifty-nine percent of ephemeral streams and fifty percent of wetlands in the lower forty-eight states could lose federal protection with the Sackett’s proposed test.³⁹ While protection of traditional navigable waters, territorial seas, and interstate wetlands, are not at risk of losing WOTUS status, their quality and flows could be impaired due to deregulation of hydrologically connected water features.⁴⁰

Additionally, hearing the *Sackett* appeal jeopardizes ongoing efforts to clarify WOTUS. As discussed above, the Agencies released a new WOTUS rule before the Court could weigh in.⁴¹ This strategic move allowed the Agencies to draft the rule without being legally constrained by the Court. Nevertheless, the new rule, which heavily relies on the significant nexus standard for wetlands, tributaries, and impoundments, would be subject to limitations based on the *Sackett* decision.⁴² If the Court narrowly decides the case without touching CWA

³⁷ EPA, *Clean Water Act Programs Utilizing the Definition of WOTUS*, <https://www.epa.gov/wotus/clean-water-act-programs-utilizing-definition-wotus> (last visited Nov. 14, 2022).

³⁸ Impoundments are accumulations of water created by a dam or other control structure; ephemeral streams (sometimes referred to as intermittent) have flowing water only part of the year.

³⁹ *In Sackett v. EPA, the U.S. Supreme Court Could Soon Gut the Clean Water Act at Polluter’s Request*, EARTHJUSTICE (Oct. 3, 2022), <https://earthjustice.org/features/sackett-epa-supreme-court-water#:~:text=With%20Sackett%20v.,their%20Clean%20Water%20Act%20protections.>

⁴⁰ Because of the variety of important functions wetlands provide to downstream waters and surrounding ecosystems, an increase in pollutant discharges and fill material to wetlands could have vast repercussions.

⁴¹ See News Release, *supra* note 30.

⁴² See Jim Salter & Michael Phillis, *EPA Finalizes Water Rule that Repeals Trump-Era Changes*, ASSOCIATED PRESS (Dec. 30, 2022), <https://apnews.com/article/biden-politics-arizona-state-government-donald-trump-8d46b14c20cb0effcb52ace48220dccc>.

standards or agency authority, there is a stronger likelihood the rule would stand. However, if the Court abandons significant nexus in favor of a more restrictive interpretation, the new WOTUS rule could be severely undermined and vulnerable to legal challenge.⁴³

There are multiple approaches the *Sackett* Court might take. First, it could simply rule against the Sacketts and leave the significant nexus standard untouched. Second, it could attempt to craft a compromise between the Sacketts' proposal and EPA's significant nexus standard. Third, it could go as far as adopting the Sacketts' proposed test. And finally, the Court could invoke the major questions doctrine, a concept which provides that courts should not defer to agency interpretations on questions of vast national economic significance.⁴⁴ In *West Virginia v. EPA*, the Court, relying on the major questions doctrine, held that Congress did not grant EPA the authority to establish carbon emissions caps using a generation-shifting approach.⁴⁵ The six justices who formed the *West Virginia* majority will be part of the *Sackett* decision.

During oral arguments, the Justices seemed to agree that the Sacketts' property was subject to the CWA, as the wetland at issue is adjacent to a traditional WOTUS (here, Priest Lake). Nevertheless, their questions focused on the Agencies' use of the significant nexus standard, indicating skepticism of its legitimacy.⁴⁶ Given recent judicial decisions and regulatory pushback in the United States, observers predict that the Court will use *Sackett* to address the scope of WOTUS—why else would it take a case where it has indicated the Sacketts are unlikely to succeed on their individual claim? Several Justices appeared to search for a middle ground between the proposed test and existing practice to clearly delineate federal jurisdiction.⁴⁷ History

⁴³ *See id.*

⁴⁴ *See* Nathan Richardson, *Antideference: COVID, Climate, and the Rise of the Major Questions Canon*, 108 VA. L. REV. ONLINE 174 (2022).

⁴⁵ 142 S.Ct. 2587 (2022).

⁴⁶ *See* Transcript of Oral Argument at 69, 81-82, 100, *Sackett v. EPA*, (No. 21-454).

⁴⁷ *See id.* at 45-46.

shows, however, that a clear-cut test is unfeasible given the complexity of wetlands and their hydrologic functions, yet the Court appears motivated to try again. Assuming the Court adopts a more restrictive WOTUS standard in *Sackett*, there will be substantial gaps in water and wetlands regulation at the federal level. Thus, an understanding of states' water pollution laws and their relationship to the CWA helps predict how non-WOTUS waters would be treated if *Sackett* restricts the standard.

III. *SACKETT*, WOTUS, AND STATE CONCERNS

A major concern is that redrawing CWA jurisdiction would significantly limit, rather than realign, the regulatory scheme. Supporters of the *Sackett* position argue that states should be given more authority over land use and water quality management. The CWA delegates certain things to the states, including the authority to set their own water quality standards, identify impaired waters, certify federal permits, and a framework to assume permitting authority over sections 402 and 404.⁴⁸ While its implementation demands some state and federal cooperation, certain provisions of the CWA have developed with heavy reliance on federal administration. To illustrate, consider the contrasts in state assumption of permit programs. Forty-seven states have assumed NPDES authority and run their own section 402 programs.⁴⁹ Conversely, only three states have assumed permitting authority for section 404.⁵⁰ Most states that have explored section 404 assumption from the Army Corps found that administrative capacity and high costs

⁴⁸ 33 U.S.C. §§ 1342-44, 1370; 40 C.F.R. § 130.7(b)(4).

⁴⁹ Massachusetts, New Hampshire, and New Mexico are the only states who have not assumed their Section 402 program. EPA, *NPDES State Program Authority*, <https://www.epa.gov/npdes/npdes-state-program-authority> (last visited Oct. 11, 2022).

⁵⁰ Michigan, New Jersey, and Florida are the only states who run section 404 programs. EPA, *U.S. Interactive Map of State and Tribal Assumption under CWA Section 404*, <https://www.epa.gov/cwa404g/us-interactive-map-state-and-tribal-assumption-under-cwa-section-404> (last visited Oct. 12, 2022).

would be too difficult to overcome.⁵¹ So, a push for states to take the lead on regulating wetlands appears to be more of a push for the deregulation.

States would have the opportunity to regulate more waters and wetlands; the question is if they would take such steps. Whether it be lack of resources or political will, many states do not regulate water quality more expansively than the CWA requires. Limiting WOTUS would exacerbate an already-inconsistent patchwork of non-WOTUS protections across the country. Only nineteen states have separate regulatory programs for wetlands and other non-WOTUS bodies.⁵² In those states, rather than a loss of protection, regulatory authority over those waters and wetlands would theoretically shift from federal to state level—but the logistics of how such a shift occurs are uncertain.⁵³ On the other hand, twenty-four states rely on the scope of WOTUS for their water quality programs.⁵⁴ The remaining states fall somewhere in between, regulating only some non-WOTUS bodies.⁵⁵ While a narrower definition of WOTUS could benefit landowners in some states, it would cause tremendous confusion across the country. Each state follows its own procedure for environmental regulations, potentially resulting in a regulatory nightmare of up to fifty different rules for non-WOTUS waters. Companies that do business in multiple states could face a patchwork of regulatory regimes that would be difficult and expensive to navigate.

⁵¹ 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.)

⁵² James McElfish, *State Protection of Nonfederal Waters: Turbidity Continues*, 52 ENV'T L. INST. 10679, 10686 (2022) (California, Connecticut, Florida, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Hampshire, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, Tennessee, Vermont, Virginia, Washington, and Wisconsin have separate programs).

⁵³ *Id.* at 10686.

⁵⁴ *Id.* at 10684-85 (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).

⁵⁵ *Id.* at 10685.

To briefly illustrate these concerns, consider how a restrictive holding in *Sackett* would likely unfold in Louisiana. State law does not restrict what state agencies can regulate for CWA purposes. However, it ties its water quality program to WOTUS.⁵⁶ Beyond Louisiana’s section 401 water quality certification, there is no statewide program for wetlands or other isolated waters. A WOTUS limitation would mean loss of protection for a substantial portion of waters and streams across the state. Consequently, fewer permits would mean a reduction of compensatory mitigation obligations under section 404, likely shrinking the markets that have grown around it.⁵⁷ Louisiana does have a program for wetlands within its coastal zone, housed under its Department of Natural Resources.⁵⁸ However, a coastal use permit (“CUP”) operates differently than section 404, as CUPs are not administered by the agency that regulates water quality, have different permit exemptions, and CUP mitigation requirements have different aims.⁵⁹ To further explore state-level implications, the following Part discusses what might happen in states that prohibit water quality regulations that go beyond CWA requirements.

IV. TRIGGERS AT THE STATE LEVEL

If the Court strikes down the significant nexus standard, federal protection of the nation’s wetlands and streams would be greatly diminished. Despite all the uncertainties, some state-level outcomes would take shape almost automatically. Recall that twenty-four states rely on WOTUS for their water quality programs, with no state-level protection beyond the CWA.⁶⁰ In those states, *Sackett*’s outcome would result in the loss of protection for wetlands and streams unless

⁵⁶ *Id.*

⁵⁷ See Sara Pagonis, *Wetland Banks Play Sometimes Controversial Role in St. Tammany’s Development Boom*, NOLA.COM (Oct. 9, 2022), https://www.nola.com/news/northshore/article_a83e5b20-4424-11ed-9793-33a547757fc5.html.

⁵⁸ La. R.S. § 49:214. The purpose of the program is to ensure that activities in the Louisiana coastal zone are consistent with “Coastal Use Guidelines.”

⁵⁹ See La. R.S. § 49:214.30.

⁶⁰ McElfish, *supra* note 52, at 10684.

those states took affirmative steps to expand protection. However, some states' laws explicitly prohibit regulating beyond the CWA's baseline requirements, precluding any effort to protect non-WOTUS waters or impose stricter standards without accompanying legislative action. These laws, classified as "triggers" for purposes of discussion, either limit what waters and wetlands a state can regulate or prohibit the adoption of more stringent water quality standards in some way. Practical effects are difficult to gauge, as a law framed in terms of stringency limitations related to water quality could ultimately hinder efforts to protect a wider range of non-WOTUS waters and wetlands.⁶¹ The following Part gives a brief overview of trigger laws that limit state authority in CWA administration and how they might function after *Sackett*.

a) Idaho

Idaho, home of the Sacketts, has a broad trigger law that prohibits its environmental department from both regulating beyond WOTUS and more stringently than federal law.⁶² As it pertains to water quality, state law and regulations apply only to "the navigable waters of the United States as defined in the federal clean water act."⁶³ This essentially prohibits the state from protecting non-WOTUS waters or setting stricter pollutant standards.⁶⁴ As to wetlands, there is no state-level program beyond the CWA.

⁶¹ ENV'T L. INST., STATE CONSTRAINTS: STATE-IMPOSED LIMITATIONS ON THE AUTHORITY OF AGENCIES TO REGULATE WATERS BEYOND THE SCOPE OF THE FEDERAL CLEAN WATER ACT 17 (May 2013) ("[t]he definitive meaning—and reach—of the word "stringent" with respect to additional categories of waters is ultimately one that has to be determined in each instance under state law. . . most state agencies weighing the merits of protecting new classes of waters—faced with political pressure and budgetary constraints—seem unlikely to gamble that a state court will eventually interpret a potentially applicable statutory stringency limitation in the agency's favor.")

⁶² IDAHO CODE ANN. § 39-107D(6).

⁶³ IDAHO CODE ANN. § 39-3602(34).

⁶⁴ IDAHO CODE ANN. § 39-3601 ("It is the intent of the legislature that the state of Idaho fully meet the goals and requirements of the federal clean water act and that the rules promulgated under this chapter [do] not impose requirements beyond those of the federal clean water act.")

b) Mississippi

Mississippi's trigger law prohibits its environmental agencies from regulating beyond federal standards with respect to all pollution control programs. Specifically, it provides that standards, rules, and regulations pertaining to water quality or pollutant discharges promulgated by the commission "shall not exceed the requirements of federal statutes and federal regulations, standards, criteria and guidance relating to air quality, water quality or air emission or water discharge standards" adopted pursuant to federal procedure.⁶⁵ Lakes, ponds, and other surface waters that are privately owned and not WOTUS are excluded from state regulation.⁶⁶ As to the state's extensive network of wetlands, Mississippi relies primarily on section 401 certification for regulation, meaning it is tied to WOTUS.⁶⁷ Moreover, the state's coastal management program addresses wetlands in a limited capacity, regulating only state-owned wetlands.⁶⁸

c) South Dakota

South Dakota's law prohibits its environmental department from promulgating any rule more stringent than a corresponding federal law or regulation.⁶⁹ This is one of the broadest state-level limitations, essentially restricting any administrative action that differs in substance or scope from its federal counterpart.⁷⁰ Further, protection for wetlands does not extend beyond the base standards under federal law.⁷¹ South Dakota defers to the federal definition for wetlands, relying on section 401 certification to regulate wetlands.⁷²

⁶⁵ MISS. CODE ANN. § 49-17-34(2).

⁶⁶ MISS. CODE ANN. § 49-17-5(1)(f).

⁶⁷ 11-6 MISS. CODE R. § 1.3.1(7).

⁶⁸ MISS. CODE ANN. § 49-27-5.

⁶⁹ S.D. CODIFIED LAWS § 1-41-3.4.

⁷⁰ McElfish, *supra* note 52, at 10687.

⁷¹ S.D. ADMIN. R. 74:51:01:11.

⁷² *See id.*

d) Arizona

Arizona law restricts its Department of Environmental Quality (“ADEQ”) from adopting more stringent regulations than federal law “unless specifically authorized by the legislature.”⁷³ It prohibits ADEQ from setting water quality standards for state-assumed WOTUS-based programs that are more stringent than CWA requirements.⁷⁴ However, in 2021, the state legislature passed a bill giving ADEQ authority to regulate certain non-WOTUS surface waters.⁷⁵ This new program allows such waters to be protected under its state-level NPDES program but does not authorize a dredge-and-fill program.⁷⁶ However, the impacts of these exclusions could be minimal, as there are not many section 404 permits issued in the state.⁷⁷ Arizona’s new program shows that “trigger” law states may still be able to protect some non-WOTUS waters. Statutory language allowing the legislature to specifically authorize more stringent regulation was essential in working around the limitation.

e) Indiana

Indiana administered a fairly comprehensive program for non-WOTUS wetlands for almost 20 years. In 2003, after the *SWANCC* decision limited WOTUS coverage of isolated wetlands, Indiana enacted its own program to protect these waters.⁷⁸ Yet, the Indiana legislature

⁷³ ARIZ. REV. STAT. ANN. § 49-104(A)(16) (“[s]tate laws, rules, standards. . . are adopted and construed to be consistent with and no more stringent than the corresponding federal law that addresses the same subject matter.”)

⁷⁴ ARIZ. REV. STAT. ANN. § 49-203(A)(2).

⁷⁵ ARIZ. REV. STAT. ANN. § 49-221 (groundwater, most ephemeral waters, and waters for irrigation and mining may not be protected under this new program); *Arizona Surface Water Protection Program Rulemaking*, ARIZ. DEPT. ENV’T QUALITY, <https://azdeq.gov/node/8601>.

⁷⁶ ARIZ. REV. STAT. ANN. §§ 49-255.04(E) (still with stringency prohibition).

⁷⁷ ARIZ. REV. STAT. ANN. § 49-256.01; *see also* U.S. ARMY CORPS OF ENGINEERS JURISDICTIONAL DETERMINATIONS AND PERMIT DECISIONS, <https://permits.ops.usace.army.mil/orm-public#> (last visited Jan. 11, 2022).

⁷⁸ *Indiana’s Isolated Wetlands*, Hoosier Env’t Council, <https://www.hecweb.org/indiana-isolated-wetlands/#:~:text=There%20are%20many%20types%20of,protection%20for%20Indiana's%20isolated%20wetlands> (last visited Nov. 29, 2022).

recently limited protections previously afforded to non-WOTUS wetlands.⁷⁹ It carved out new exemptions for isolated wetlands that were voluntarily created, incidental structures on private property, or certain wetlands categorized as “Class I.”⁸⁰ Thus, some non-WOTUS wetlands would still be protected after *Sackett*.

f) Ohio

Until recently, Ohio administered a comprehensive water quality program. Twenty years ago, the state implemented a permitting scheme for isolated non-WOTUS waters and wetlands to address the rollback of federal jurisdiction post-*SWANCC*.⁸¹ However, despite ongoing clean water initiatives in the state, Ohio has taken legislative action to limit its protections for non-WOTUS waters.⁸² In May, the legislature passed a bill that eliminated protection to ephemeral waters not protected by the CWA.⁸³ This effectively excludes smaller streams and wetlands from state regulation.

g) Kentucky

Kentucky’s administrative law has a policy limiting state agencies from adopting rules that are more stringent than federal standards.⁸⁴ With respect to water quality, the law prohibits its environmental agency from imposing any standards or conditions on permits that would otherwise not be required under federal law.⁸⁵ Thus, the limitation applies only to pollutant

⁷⁹ IND. CODE ANN. § 13-11-2-265(b) (“waters” subject to state regulation no longer includes “exempt isolated wetlands”); Jennifer C. Baker & Joel T. Bowers, *Big Changes to Indiana’s State-Regulated Isolated Wetlands Program*, 11 NAT’L L. REV. (May 6, 2021), <https://www.natlawreview.com/article/big-changes-to-indiana-s-state-regulated-isolated-wetlands-program>.

⁸⁰ IND. CODE §§ 13-11-2-25.8(1), 13-11-2-74.5(a)(5) (Class I means 50% of the wetland was affected by human activity or development that altered its natural vegetation or hydrology.)

⁸¹ Jeanne Christie & Scott Hausmann, *Various State Reactions to the SWANCC Decision*, 23 WETLANDS 653, 659 (2003).

⁸² See George A. Elmaraghy, *Why Would Gov. DeWine Sign into Law A Bill That Undercuts His H2Ohio Initiative?* Cleveland.com (May 13, 2022), <https://www.cleveland.com/opinion/2022/05/why-would-gov-dewine-sign-into-law-a-bill-that-undercuts-his-h2ohio-initiative-george-a-elmaraghy.html>.

⁸³ H.B. 175, 134th Gen. Assemb. (Ohio 2022).

⁸⁴ KY. REV. STAT. ANN. § 13A.120(1).

⁸⁵ 401 KY. ADMIN. REG. 5:050.

discharges permits under section 402 rather than restricting which waters and wetlands can be subject to regulation.⁸⁶ How this would affect efforts to expand non-WOTUS protections is unclear.⁸⁷

h) Wisconsin

Wisconsin's law precludes its environmental department from promulgating rules that are more stringent than federal law with respect to "point source discharges, effluent limitations, municipal monitoring requirements, standards of performance for new sources, toxic effluent standards or prohibitions and pretreatment standards."⁸⁸ Wisconsin has state-level water quality regulations for certain non-WOTUS wetlands, but they do not deal directly with CWA programs.⁸⁹ Moreover, Wisconsin joined New York's amicus brief supporting EPA's position in *Sackett*, possibly indicating the state's intent to continue protection for wetlands.⁹⁰

V. POTENTIAL RESPONSES AND THE ROAD AHEAD

Beyond existing triggers at the state level, broad concerns over long-term effects of a restrictive *Sackett* decision come into play. Many states are silent on the matter of non-WOTUS coverage and stringency levels, but a review of the amicus briefs filed prior to oral arguments shed light on potential responses (or lack thereof). Twenty-five states⁹¹ joined West Virginia's amicus brief supporting the Sacketts, arguing that the significant nexus standard offends traditional state authority, is unsupported by the CWA's text, stretches limits of the commerce

⁸⁶ KY. REV. STAT. ANN. § 224.16-050.

⁸⁷ It is worth mentioning that Kentucky does not have wetland protections beyond the CWA. *See* 401 KY ADMIN. REG. 9:010.

⁸⁸ WIS. STAT. ANN. § 283.11(2)(A).

⁸⁹ WIS. STAT. ANN. § 281.36(3n); WIS. ADMIN. CODE § NR 103.01.

⁹⁰ *See infra* § III.

⁹¹ *See* Brief of Amici Curiae State of West Virginia and 25 Other States in Support of Petitioners, *Sackett v. EPA* (No. 21-454), available at https://www.supremecourt.gov/DocketPDF/21/21-454/221226/20220418105608966_Final%20Sackett%20v.%20EPA%20Amicus%20Brief-c1.pdf.

clause, and burdens the states and public.⁹² Alaska filed a separate brief advancing a similar position.⁹³ Of these states, Arizona, Florida, Idaho, Indiana, Ohio, New Hampshire, Virginia, Tennessee, West Virginia, and Wyoming all protect some non-WOTUS waters.⁹⁴ These programs would retract along with federal jurisdiction, with outcomes likely similar to those in trigger states. On the other side, sixteen states⁹⁵ joined New York's brief supporting EPA and expansive federal authority to further CWA goals.⁹⁶ Colorado filed a separate brief also supporting EPA's position and the significant nexus standard.⁹⁷ Many of these states already regulate some non-WOTUS waters. Of this group, Delaware, Hawai'i, and New Mexico do not have state-level programs that regulate beyond WOTUS.⁹⁸ Thus, most of these states will likely not see a dramatic change, but more of a shift, and those states that do not regulate any or many non-WOTUS waters might step up to fill the gaps.

Depending on the *Sackett* outcome, stakeholders might begin looking for other mechanisms that may be utilized to maintain water quality. A legislative approach could be an option in some states. Following the Trump Administration's attempt to curtail WOTUS, several states took action to enhance and expand water pollution regulation in the event that federal protection retracts. For example, New York recently passed a law expanding protection to more

⁹² *Id.* at 4-5.

⁹³ Brief of Amicus Curiae State of Alaska in Support of Petitioners, *Sackett v. EPA* (No. 21-454), available at https://www.supremecourt.gov/DocketPDF/21/21-454/221252/20220418130854024_21-454%20tsac%20Alaska.pdf.

⁹⁴ McElfish, *supra* note 52, at 10685.

⁹⁵ California, Connecticut, Delaware, Hawai'i, Illinois, Maine, Maryland, Massachusetts, Minnesota, New Jersey, New Mexico, North Carolina, Oregon, Vermont, Washington, and Wisconsin.

⁹⁶ See Brief for States of New York et. al. as Amici Curiae in Support of Respondents, *Sackett v. EPA* (No. 21-454), available at https://www.supremecourt.gov/DocketPDF/21/21-454/228385/20220617193111719_No.%2021-454%20Br%20for%20NY%20et%20al%20as%20Amici%20Curiae%20for%20Resps.pdf [hereinafter New York Brief].

⁹⁷ Brief of Amicus Curiae State of Colorado in Support of Respondents, *Sackett v. EPA* (No. 21-454), available at https://www.supremecourt.gov/DocketPDF/21/21-454/228385/20220617193111719_No.%2021-454%20Br%20for%20NY%20et%20al%20as%20Amici%20Curiae%20for%20Resps.pdf.

⁹⁸ McElfish, *supra* note 52, at 10685.

waters and setting stricter standards for freshwater wetlands.⁹⁹ Some states have nontidal wetland and freshwater programs and other rules that allow for protection of non-WOTUS wetlands.¹⁰⁰ Alternatively, there might be a potential for enforceability of more stringent standards or expansive state coverage through interstate water compacts that deal with pollution control. The following section explores other issues that would likely arise as states and the federal government alter their approach to water quality management.

a) Barriers to Non-WOTUS Protection

Roughly fifteen states have procedural constraints that limit circumstances in which the state environmental agency may adopt more stringent or expansive water standards.¹⁰¹ Examples of limitations include requirements that the agency make scientific findings, impose additional public comment periods, or engage in economic analyses of existing regulations compared with additional costs of adopting regulations that exceed federal requirements.¹⁰² Moreover, other problems could arise from conflicting authorities within state governments. Consider North Carolina, which supports EPA's position in *Sackett*.¹⁰³ In 2020, North Carolina passed a temporary rule to protect isolated wetlands and other waters that would no longer be regulated under the CWA.¹⁰⁴ However, recent efforts by its Environmental Management Commission to create a program to protect non-WOTUS waters faced opposition by the state's Rules Review Commission on the grounds that it did not hold such regulatory authority.¹⁰⁵ This demonstrates

⁹⁹ N.Y. ENV'T CONSERV. LAW §§ 43B,24-0101 et. seq.

¹⁰⁰ Examples of robust wetland programs can be found in California, Connecticut, Maine, New Hampshire, and New York, and Washington.

¹⁰¹ Colorado, Florida, Iowa, Maine, Michigan, Montana, North Dakota, Oklahoma, Oregon, Tennessee, Texas, Utah, Virginia, and West Virginia have additional procedural requirements.

¹⁰² See New York Brief, *supra* note 96, at 22-23.

¹⁰³ See *id.*

¹⁰⁴ Jennifer Allen, *Final Review Ahead for Wetland Rules to Fill Permitting Gap*, CoastalReview.org (Jan. 28, 2022), <https://coastalreview.org/2022/01/review-ahead-for-wetland-rules-addressing-regulatory-gap/>.

¹⁰⁵ *Id.*

just one of the barriers that states may have to confront if the Court limits WOTUS in *Sackett*. Even in states where the environmental agency intends to expand or enhance regulation, those efforts could be precluded by other political or legal barriers.

b) Existing Permits and Jurisdictional Determinations

Another substantial concern regards active section 404 permits, jurisdictional determinations (“JDs”), and mitigation requirements in waters that could soon lose WOTUS status. Typically, the rules on the date of an agency decision apply to JDs and permit issuances, meaning that subsequent regulatory changes should not alter existing obligations.¹⁰⁶ In response to the vacatur of the Trump-era WOTUS rule, the Army Corps indicated that no previously approved JDs would be affected by subsequent changes of law.¹⁰⁷ JDs are typically valid for five years unless “new information warrants revision prior to that date.”¹⁰⁸ However, disputes arising from the vacatur, and validity of previous JDs, are just now finding their way to court.¹⁰⁹ While *Sackett* does not directly implicate the issue of retroactivity, it could very well come up later. It may also be exacerbated by the issuance of the new WOTUS rule if the Court retracts the CWA’s reach.

This concern over *Sackett*’s potential to invalidate previous JDs or permitting decisions also extends to mitigation requirements. As part of its section 404 regulations, the Army Corps requires permit holders to mitigate losses of aquatic resources from dredge and fill activities.¹¹⁰

¹⁰⁶ See NAVIGABLE WATERS PROTECTION RULE VACATUR, HQ USACE REGULATORY (Jan. 5, 2022), <https://www.usace.army.mil/Media/Announcements/Article/2888988/5-january-2022-navigable-waters-protection-rule-vacatur/>.

¹⁰⁷ See *id.*

¹⁰⁸ U.S. ARMY CORPS OF ENGINEERS, REGULATORY GUIDANCE LETTER NO. 05-02 (June 2005), <https://usace.contentdm.oclc.org/utis/getfile/collection/p16021coll9/id/1246>.

¹⁰⁹ Complaint, National Wildlife Refuge Assn v. U.S. Army Corps of Engineers, No. 1:22-cv-03498, (D.D.C. filed Nov. 15, 2022) available at <https://www.southernenvironment.org/wp-content/uploads/2022/11/National-Wildlife-Refuge-Association-v.-USACE.pdf>.

¹¹⁰ See generally 33 C.F.R. § 332.

Costs assessed to permit holders, whose land may not be subject to federal jurisdiction after *Sackett*, could become an issue. What’s more, a large, private market has developed around mitigation banking and ecosystem services that arose with section 404 permitting.¹¹¹ The loss of compensatory mitigation would have further adverse effects on water quality.

c) Other Effects on Water Quality Standards

Because states could have more authority over water quality matters after *Sackett*, there is concern that they would take vastly different approaches to non-WOTUS waters. This could lead to potential conflicts between upstream and downstream states and among bordering states.

Would states setting stricter standards have to have their own mechanism to enforce them against other states? Would the CWA provide protection for those stringent standards? As referenced above, Idaho has a “trigger” law; however, in a separate section, that law also provides that “[a]ll waters shall maintain a level of water quality at their pour point into downstream waters that provides for the attainment and maintenance of the water quality standards of those downstream waters, including waters of another state or tribe.”¹¹² A related concern is if a substantial percentage of wetlands and streams that filter navigable water lose protection, state water quality standards might become more difficult to achieve. Given the vastly different hydrological makeup of states, the practical effects would vary greatly depending on the number of regulated waters and section 404 permits issued in those states.¹¹³

State and tribal water quality certification under section 401 is also tied to WOTUS. A federal permit cannot be issued without first obtaining a certification from the state where the

¹¹¹ Authorization for mitigation banks is found in 33 C.F.R. § 332.8.

¹¹² IDAHO ADMIN. CODE R. 58.01.02.070(08).

¹¹³ See U.S. ARMY CORPS OF ENGINEERS JURISDICTIONAL DETERMINATIONS AND PERMIT DECISIONS, <https://permits.ops.usace.army.mil/orm-public#> (last visited Jan. 11, 2022).

discharge or affected water quality will occur.¹¹⁴ This authority only kicks in for federal permits, so it has big implications, as section 404 is primarily run by the Army Corps.¹¹⁵ With a decline in federal protections and thus activities requiring permits, states would have less authority to impose conditions or block major projects, such as interstate pipelines and mining projects.

VI. CONCLUDING THOUGHTS

Heightened concerns over the effects of climate change, from natural disasters to water supply to public health, play a central role in the issues surrounding *Sackett*. Due to the wide variety of state approaches to water quality regulations, multiple questions could arise in the immediate aftermath of a *Sackett* decision that shrinks the scope of WOTUS. First, there is the issue of how the new WOTUS rule would be affected, especially regarding its reliance on the significant nexus standard. If the Court announces an opinion inconsistent with the rule, it would almost certainly be challenged by a coalition of states and regulated industries. Second, political approaches and responses will vary by state and branch of state government, as evidenced by competing views among governors, legislators, and agency leadership. Further, any action taken, whether it be protective legislation, assumption of federal programs, or a reduction in water quality protection, would create different outcomes both within states and across watersheds.

With the possibility of dramatic regulatory change on the horizon, understanding states' self-imposed restrictions on water regulation and how these interact with the CWA is valuable for future legislative efforts. The question of how to protect non-WOTUS waters and wetlands will remain important. Regardless of the outcome, the coming decision will affect state and federal governments' ability to plan for a future riddled with environmental uncertainty.

¹¹⁴ 33 U.S.C. § 1341(a)(1).

¹¹⁵ Laura Gatz & Kate R. Bowers, CONG. RESEARCH SERV., R46615, CLEAN WATER ACT SECTION 401: OVERVIEW AND RECENT DEVELOPMENTS 3 (2022).