ENVIRONMENTAL LAW – WATERS PROTECTED: GEOGRAPHIC SCOPE OF THE CLEAN WATER ACT

Sackett v. EPA, 598 U.S. 651 (2023).

ABSTRACT

In 2023, the United States Supreme Court rendered a pivotal decision in *Sackett v. EPA*, determining the geographical extent of the Clean Water Act. The Act is the primary source regulating water pollution, and it applies to all "waters of the United States." The problem with the statute's language is: what does this exactly mean? Does it include swimming pools, puddles, or, in the words of the Court, "any backyard that is soggy enough for some minimum period of time?" The Court has tried three times to clarify the meaning, and yet, enforcing agencies have struggled with interpretation for over half a century. With harsh penalties for violators, the Act prohibits the discharge of pollutants into "the waters of the United States." The EPA and the Army Corps of Engineers jointly enforce the Act, and attention is directed toward the Act's geographic scope.

After Michael and Chantell Sackett spent over a decade in federal court over the Act's jurisdiction on their property in Idaho, the Court decided the geographic scope needed review once again. The Court *held* that under the Clean Water Act "the waters of the United States" refers only to streams, oceans, rivers, lakes, and adjacent wetlands that are "indistinguishable" from said bodies of water due to a continuous surface connection. The Court's decision rested on statutory interpretation. Several concurring opinions noted concerns about the opinion's impact on once-covered wetlands that are now beyond the scope of jurisdiction. With the Act's jurisdiction narrowed, it is unclear whether states will enact additional legislation to protect wetland areas. *Sackett* provides practitioners with the clarified geographical extent of the Clean Water Act, which helps determine waters that fall under its jurisdiction.

I. FACTS

Plaintiffs Chantell and Michael Sackett ("the Sacketts") owned an undeveloped dirt lot near Priest Lake, Idaho, which they filled with dirt and gravel in preparation for building a house.[1] In the midst of prepping the lot, EPA officers claimed the site contained wetlands protected by the Clean Water Act ("CWA") and the Sacketts had illegally deposited fill material on the property.[2] The EPA ordered the Sacketts to remove the material and restore the original soil, noting failure to comply could result in "administrative and civil penalties of up to $11,000 and $32,500 per day, respectively."[3] In response, the Sacketts filed a federal lawsuit in Idaho to

1. Sackett v. EPA, No. 2:08-cv-00185-EJL, 2019 WL 13026870, at *1 (D. Idaho Mar. 31, 2019), *aff'd*, 8 F.4th 1075 (9th Cir. 2021), *rev'd*, 598 U.S. 651 (2023).
2. *Id.*
3. *Id.*

challenge the EPA's determination that the property contained a wetland protected by the CWA.[4]

The EPA has jurisdiction over "navigable waters" under the CWA, which the CWA defines as "waters of the United States."[5] This jurisdiction includes "wetlands *adjacent to* traditional navigable waters."[6] Priest Lake is a navigable water under the CWA.[7] At the district court level, the Sacketts argued their wetlands were not adjacent to Priest Lake because "dry land containing a road and a developed residential neighborhood" separates the two, meaning the EPA did not have jurisdiction over their property.[8]

Nonetheless, the district court granted summary judgment in favor of the EPA.[9] The court concluded the Sacketts' wetlands were protected by the CWA because they were adjacent to and had a "significant nexus" with Priest Lake.[10] The court noted three criteria in support of its conclusion: (1) the Sacketts' wetlands had a shallow sub-surface connection to Priest Lake, (2) the Sacketts' wetlands were only separated from Priest Lake by man-made barriers, and (3) the Sacketts' wetlands were only three hundred feet from Priest Lake, meaning the proximity gave rise to a "science-based inference that [the Sacketts'] wetlands ha[d] an ecological interconnection with . . . Priest Lake."[11]

The court used the "significant nexus" test to determine whether the Sacketts' adjacent wetlands constituted "waters of the United States."[12] For the wetlands to fall under CWA jurisdiction, the test needed to show that the wetlands "significantly affect[ed] the chemical, physical, and biological integrity of" the lake.[13] The court determined the record provided such evidence, namely in the form of impacts on water quality, water flow, fish, and other wildlife species.[14] This evidence supported the conclusion that there was a significant nexus between the Sacketts' property and Priest Lake, meaning the property was under CWA jurisdiction.[15]

After the district court granted summary judgment for the EPA, the Sacketts appealed to the Ninth Circuit, where the appellate court affirmed the

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4. *Id.*
5. 33 U.S.C. § 1362(7) ("The term 'navigable waters' means the waters of the United States, including the territorial seas.").
6. *Sackett*, 2019 WL 13026870, at *7 (emphasis added) (citing 33 C.F.R. § 328.3(a)(1)-(7); 40 C.F.R. § 230.3).
7. *Id.* at *8.
8. *Id.* at *9.
9. *Id.* at *13.
10. *Id.* at *9-11.
11. *Id.* at *9-10.
12. *Id.* at *11.
13. *Id.* (quoting N. Cali. River Watch v. Healdsburg, 496 F.3d 993, 1000 (9th Cir. 2007)).
14. *Id.* at *11-12.
15. *Id.* at *12.

district court's decision.[16] The United States Supreme Court granted certiorari.[17] The single issue on appeal concerned which test should be used to determine if adjacent wetlands are "waters of the United States" and, therefore, under CWA jurisdiction.[18] The Court held the proper test is whether the wetlands have a "continuous surface connection to bodies that are 'waters of the United States so that they are "indistinguishable" from those waters.'"[19] For the Sacketts, this holding meant a reversal in their favor, as the wetlands on their property were "distinguishable from any possibly covered waters" due to the lack of a continuous surface connection.[20]

II. LEGAL BACKGROUND

A. THE CLEAN WATER ACT'S DEVELOPMENT AND PURPOSE

Before the CWA, the waters of the United States did not fare well as severe pollution contaminated many American lakes, rivers, and streams.[21] Federal legislation was passed to counteract the damage, like the Federal Water Pollution Control Act of 1948, which proved to be wholly insufficient.[22]

Water pollution first began to rapidly increase due to issues like population growth and industrial production, worsening both pollution's "quantity and toxicity."[23] States primarily regulated their own water pollution but transitioned towards regulatory agency enforcement.[24] At the time, federal regulation was limited to protecting only "traditional navigable waters" defined as "interstate waters . . . either navigable in fact and used in commerce or readily susceptible of being used in this way."[25]

One such example of federal regulation was the 1899 Rivers and Harbors Appropriation Acts, which resulted in the prohibition of pollutant disposal into navigable waters in order to facilitate continued navigability for commerce.[26] Targeting pollution specifically, "the Federal Water Pollution Control Act of 1948 allowed federal officials to seek judicial abatement of pollution in interstate waters."[27] However, actions under this act were not

16. Sackett v. EPA, 8 F.4th 1075, 1093 (9th Cir. 2021), *rev'd*, 598 U.S. 651 (2023).
17. Sackett v. EPA, 598 U.S. 651, 663 (2023).
18. *Id.*
19. *Id.* at 684 (quoting Rapanos v. United States, 547 U.S. 715, 755 (2006) (plurality opinion)).
20. *Id.*
21. *Id.* at 658.
22. *Id.* at 658-60.
23. *Id.* at 659.
24. *Id.*
25. *Id.*
26. Nathan E. Vassar, *Within the Flood Plain? An Analysis of the New "Waters of the United States" Rule in the Context of History and Existing Regulations*, 46 TEX. ENV'T L.J. 1, 5-6 (2016).
27. *Sackett*, 598 U.S. at 660.

easily executable and required the polluting state's consent before moving forward.[28]

In due course, Congress replaced the Federal Water Pollution Control Act with the Clean Water Act of 1972.[29] The CWA, which prohibits discharging pollutants into "navigable waters,"[30] specifies that "pollutant" can mean anything from "chemical wastes" to "rock, sand," and "cellar dirt."[31] The CWA's primary goal is—perhaps obviously—to eliminate "the discharge of pollutants into navigable waters."[32] The CWA's secondary goal is to increase water quality in order to safeguard fish and wildlife populations, in addition to maintaining water recreation opportunities.[33]

B. THE MURKINESS OF THE CWA'S GEOGRAPHIC REACH AND THE EXPANSIVE AUTHORITY OF AGENCIES

The Court candidly admitted the "contentious and difficult task" that is assigning meaning to "the waters of the United States."[34] A "persistent problem" that has prompted decades of litigation, the phrase's interpretations are no stranger to ambiguity.[35]

Initially, the EPA and the Army Corps of Engineers (who jointly enforce the CWA) had different interpretations of "the waters of the United States" but later agreed on nearly identical definitions.[36] These definitions were broad and included "'[a]ll . . . waters' that 'could affect interstate or foreign commerce.'"[37] The agencies also had a broad view of the CWA's application to "adjacent" wetlands.[38] They defined "adjacent" as "bordering, contiguous, or neighboring" and noted such wetlands could include those separated from covered waters "by man-made dikes or barriers, natural river berms, beach dunes and the like."[39] A one-hundred-forty-three-page wetlands manual helped officers determine whether any given piece of property met the standard for CWA jurisdiction.[40]

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28. *Id.*
29. *Id.*
30. *Id.* (quoting 33 U.S.C. §§ 1311(a), 1362(12)(A)).
31. *Id.* (quoting 33 U.S.C. § 1362(6)).
32. Lauren Kalisek, *Clean Water Act Overview*, 45 TEXAS PRACTICE, ENVIRONMENTAL LAW § 6:6 (2d ed.), Westlaw (database updated Jan. 2024).
33. *Id.*
34. *Sackett*, 598 U.S. at 663 (quoting Nat'l Ass'n of Mfrs. v. Dep't of Def., 583 U.S. 109, 113-14 (2018)).
35. *Id.* at 661, 663.
36. *Id.* at 664.
37. *Id.* (quoting 40 C.F.R. § 230.3(s)(3) (2008)).
38. *Id.* (quoting 40 C.F.R. § 230.3(s)(7) (2008)).
39. *Id*. (quoting 40 C.F.R. § 230.3(b) (2008)).
40. *Id.* at 664-65.

The Supreme Court first addressed the definition of "the waters of the United States" in *United States v. Riverside Bayview Homes, Inc*. in 1985.[41] There, the wetlands actually bordered a navigable waterway, but the Court showed concern that the wetlands were perhaps outside the scope of "the waters of the United States."[42] Nonetheless, the Court deferred to the Army Corps of Engineers.[43] The agency's response to the decision was one of expansion and included the notable "migratory bird rule," which extended CWA jurisdiction to any wetlands used by migratory birds or endangered species as a habitat.[44] The Army Corps of Engineers later admitted that under the rule "nearly all waters were jurisdictional."[45]

The Supreme Court rejected the migratory bird rule in *Solid Waste Agency of Northern Cook City v. Army Corps of Engineers* in 2001.[46] In response, the agencies minimized the Court's decision by directing local agents to make case-by-case jurisdiction decisions.[47] The Court described the ensuing system as "'vague' rules that depended on 'locally developed practices.'"[48] District courts continued to grant expansive interpretations of the CWA's reach, one example being *United States v. Deaton*, where a court found a property owner in violation of the CWA for soil piling close to a ditch that was thirty-two miles away from a navigable waterway.[49] In the following years, the EPA and the Army Corps of Engineers interpreted CWA jurisdiction to encompass two hundred seventy to three hundred million acres of wetlands and essentially any piece of land "through which rainwater or drainage may occasionally or intermittently flow."[50]

C. THE RAPANOS CASE AND ITS AGENCY REPERCUSSIONS

After the above developments, the Court granted review in *Rapanos v. United States* in 2006.[51] In that case, the district court held the CWA had jurisdiction over wetlands near ditches that drained into navigable waters eleven miles away.[52] The Court vacated the decision but failed to come to a

41. *See* 474 U.S. 121 (1985).
42. *Id.* at 133-34.
43. *Id.* at 139.
44. *Sackett*, 598 U.S. at 665.
45. *Id.*
46. 531 U.S. 159, 174 (2001).
47. *Sackett*, 598 U.S. at 666.
48. *Id.* (quoting U.S. Gen. Accounting Office, GAO-04-297, *Waters and Wetlands: Corps of Engineers Needs to Evaluate Its District Office Practices in Determining Jurisdiction* 26 (2004), https://www.gao.gov/assets/gao-04-297.pdf [https://perma.cc/ET5K-57MW]).
49. 332 F.3d 698, 702 (4th Cir. 2003).
50. *Sackett*, 598 U.S. at 666 (quoting Rapanos v. United States, 547 U.S. 715, 722 (2006) (plurality opinion)).
51. 547 U.S. at 730.
52. *Sackett,* 598 U.S. at 666 (citing *Rapanos*, 547 U.S. at 720, 729).

majority.[53] Four justices explained they would have deferred to the agency's determination that the CWA covered the wetlands at issue.[54] Four others "concluded that the CWA's coverage did not extend beyond two categories: first, . . . relatively permanent bodies of water connected to . . . navigable waters and, second, wetlands with such a close physical connection to those waters that they were 'as a practical matter indistinguishable from waters of the United States.'"[55] Lastly, Justice Kennedy thought CWA jurisdiction "require[d] a 'significant nexus' between wetlands and navigable waters," which could be demonstrated by showing the wetlands "significantly affect[ed] the chemical, physical, and biological integrity" of covered waters.[56]

Following *Rapanos*, the EPA and Army Corps of Engineers called for fact-intensive determinations based on "the presence of a significant nexus."[57] Officials were required to weigh a list of ecological and hydrological factors.[58] Again, the agencies admitted nearly all U.S. wetlands and waters could be jurisdictional based on the standard.[59] As an illustration, the Army Corps of Engineers once found a "significant nexus" between Minnesota wetlands and a river approximately one hundred twenty miles away.[60]

Most recently, the agencies released a rule that defined "waters of the United States" as encompassing "traditional navigable waters, interstate waters, and the territorial seas, as well as their tributaries and adjacent wetlands."[61] It also included wetlands "that either have a continuous surface connection to categorically included waters or have a significant nexus to interstate or traditional navigable waters."[62] The "significant nexus" requirement still prompted "consideration of a list of open-ended factors."[63] Lastly, the rule incorporated the broad definition of "adjacent" and directed local agents to reference the one-hundred-forty-three-page wetlands manual to determine jurisdiction.[64]

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53. *Id.*
54. *Id.* at 667 (citing *Rapanos*, 547 U.S. at 788 (Stevens, J., dissenting)).
55. *Id.* (quoting *Rapanos*, 547 U.S. at 742).
56. *Id.* (quoting *Rapanos*, 547 U.S. at 779-80 (Kennedy, J., concurring in the judgment)).
57. *Id.* at 667.
58. *Id.*
59. *Id.*
60. U.S. Army Corps of Eng'rs v. Hawkes Co., Inc., 578 U.S. 590, 596 (2016).
61. *Sackett*, 598 U.S. at 668 (citing Revised Definition of "Waters of the United States," 88 Fed. Reg. 3143 (Jan. 18, 2023) (to be codified at 33 C.F.R. pt. 328; 40 C.F.R. pt. 120)).
62. *Id.* at 668-69 (quoting Revised Definition of "Waters of the United States," 88 Fed. Reg. 3006, 3143 (Jan. 18, 2023) (to be codified at 33 C.F.R. pt. 328; 40 C.F.R. pt. 120)).
63. *Id.* at 669.
64. *Id.*

D. THE PITFALLS OF THE CURRENT STANDARD AND WHY THE CWA NEEDED REVIEW

Congress implemented the CWA over fifty years ago.[65] The EPA and the Army Corps of Engineers continued to assert that the "significant nexus" test was adequate to establish CWA jurisdiction over adjacent wetlands, even though the EPA fully admitted nearly all waters and wetlands were at risk of regulation.[66] The real parties at risk, though, were property owners. It was a challenge in and of itself to even determine if property contained "waters of the United States."[67] Even when land appeared dry, the wetlands manual was the final authority on whether a property actually contained wetlands.[68] More drastically, expert consultants were sometimes required to aid in the jurisdictional determination.[69] In the words of the Court, "because the CWA can sweep broadly enough to criminalize mundane activities like moving dirt, . . . a staggering array of landowners are at risk of criminal prosecution or onerous civil penalties."[70]

The CWA imposes harsh consequences "even for inadvertent violations."[71] For the negligent discharge of pollutants, property owners face staggering criminal penalties in addition to imprisonment.[72] "Knowing" violations result in harsher penalties, with civil violations imposing "over $60,000 in fines per day for each violation."[73] And, because the CWA has a five-year statute of limitations, civil penalties can be just as harsh as the criminal penalties.[74]

III. ANALYSIS

A. MAJORITY OPINION

In *Sackett*, the United States Supreme Court majority held the CWA extends only to wetlands that are "as a practical matter indistinguishable from

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65. *Id.*

66. *Id.* (quoting Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37056 (June 29, 2015) (to be codified at 40 C.F.R. pts. 110, 112, 116, 117, 122, 230, 232, 300, 302, 401)).

67. *Id.* (quoting U.S. Army Corps of Eng'rs v. Hawkes Co., Inc., 578 U.S. 590, 594 (2016)).

68. *Id.*

69. Hawkes Co., Inc. v. U.S. Army Corps of Eng'rs, 782 F.3d 994, 1003 (8th Cir. 2015) (Kelly, J., concurring) ("This is a unique aspect of the CWA; most laws do not require the hiring of expert consultants to determine if they even apply to you or your property."), *aff'd sub nom. Hawkes*, 578 U.S. 590 (2016).

70. *Sackett*, 598 U.S. at 669-70.

71. *Id.* at 660 (quoting *Hawkes*, 578 U.S. at 602 (Kennedy, J., concurring)).

72. *Id.* (citing 33 U.S.C. § 1319(c)).

73. *Id.*

74. *Id.*

waters of the United States."[75] The Court stated a party wishing to assert CWA jurisdiction over adjacent wetlands must establish:

> First, that the adjacent [body of water constitutes] . . . "water[s] of the United States," (*i.e.*, a relatively permanent body of water connected to traditional interstate navigable waters); and second, that the wetland has a continuous surface connection with that water, making it difficult to determine where the "water" ends and the "wetland" begins.[76]

The Court's decision rested upon statutory interpretation of the meaning of "waters."[77]

1. Statutory Interpretation of "Waters of the United States"

In its analysis, the Court began "with the text of the CWA."[78] Specifically, the Court looked to 33 U.S.C. Section 1362(7), the statutory provision that defines the CWA's geographical reach.[79] The provision states the Act applies to "navigable waters" defined as "the waters of the United States."[80] The *Sackett* Court found that the *Rapanos* Court correctly defined this provision's use of "waters": "waters" are "only those relatively permanent, standing or continuously flowing bodies of water . . . described in ordinary [terms like] streams, oceans, rivers, and lakes."[81] "[L]ands, wet or otherwise," are hard to square with this meaning.[82] Going back even to *Gibbons v. Ogden* in 1824, the Court used "waters of the United States" in reference to open bodies of water, usually in connection to ships.[83] Congress also used the term "waters" to describe open bodies of water elsewhere in CWA provisions and in other laws.[84]

Although the Court stated the meaning of "waters" in Section 1362(7) appeared to exclude all wetlands, statutory context—specifically, Section 1344(g)(1)—showed that some wetlands qualify as "waters of the United

75. *Id.* at 678 (quoting Rapanos v. United States, 547 U.S. 715, 755 (2006) (plurality opinion)).
76. *Id.* at 678 (alteration in original) (quoting *Rapanos*, 547 U.S. at 742).
77. *Id.* at 671.
78. *Id.* (citing Bartenwerfer v. Buckley, 598 U.S. 69, 74 (2023)).
79. *Id.*; 33 U.S.C. § 1362(7).
80. 33 U.S.C. § 1362(7).
81. *Sackett*, 598 U.S. at 671 (internal punctuation omitted) (quoting *Rapanos*, 547 U.S. at 739).
82. *Id.* at 672 (internal punctuation omitted) (quoting *Rapanos*, 547 U.S. at 740).
83. *Id.* at 673 (citing Gibbons v. Ogden, 22 U.S. 1, 29 (1824)).
84. *Id.* at 672.

States."[85] Congress added Section 1344(g)(1) in 1977.[86] The section specifies that state programs

> may regulate discharges into (1) any waters of the United States, (2) except for traditional navigable waters, (3) "including wetlands adjacent thereto." . . . If []adjacent wetlands[] were not part of . . . []"waters of the United States"[] and therefore subject to CWA regulation, there would be no point in excluding them from that category.[87]

So, the Court concluded, some wetlands could be "waters of the United States."[88]

However, the Court could not use Section 1344(g)(1) "alone because it is not the provision that defines the Act's reach."[89] Instead, the Court needed to ensure the "adjacent wetlands" in Section 1344(g)(1) and "the waters of the United States" in Section 1362(7) could be interpreted harmoniously, and the Court reasoned only one interpretation produced a result "compatible with the rest of the law."[90]

> [B]ecause the adjacent wetlands in § 1344(g)(1) are "include[ed]" within "the waters of the United States," these wetlands must qualify as "waters of the United States" in their own right. . . . [T]hey must be indistinguishably part of a body of water that itself constitutes "waters" under the CWA.[91]

The Court also followed the *Rapanos* opinion's rationale for when adjacent wetlands indistinguishably part of a body of water that constitutes "waters" under the CWA.[92] Adjacent wetlands are indistinguishably part of "waters of the United States" when they 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."[93] The Court also acknowledged that "temporary interruptions in surface connection

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85. *Id.* at 674-76; 33 U.S.C. § 1344(g)(1) ("The Governor of any State desiring to administer its own . . . program for the discharge of dredged or fill material into the navigable waters (other than those waters which are presently used, or are susceptible to use . . . as a means to transport interstate or foreign commerce . . . including wetlands adjacent thereto) within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish . . . .").

86. *Sackett*, 598 U.S. at 675 (quoting 33 U.S.C. § 1334(g)(1)).

87. *Id.* at 675-76.

88. *Id.* at 676.

89. *Id.*

90. *Id.* (quoting United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd., 484 U.S. 365, 371 (1988)).

91. *Id.*

92. *Id.* at 678.

93. *Id.* (quoting Rapanos v. United States, 547 U.S. 715, 742 (2006)).

may sometimes occur because of phenomena like low tides or dry spells."[94] Thus, as applied to the Sacketts' case, their wetlands were not within the CWA's jurisdiction due to the lack of a continuous surface connection to any covered body of water.[95]

2. Significant Nexus Analysis

The Court addressed the previous "significant nexus" test in response to the EPA's request for deference on the matter.[96] The test, originating from Justice Kennedy's *Rapanos* concurrence, provided that adjacent wetlands could be within the CWA's jurisdiction if they possessed a "significant nexus" to traditional navigable waters, again requiring consideration of hydrological and ecological factors.[97] The EPA also interpreted "adjacent" to mean neighboring, even when separated by dry land.[98]

The Court found several issues with the "significant nexus" test. First, the interpretation was "inconsistent with the [CWA's] text and structure" and clashed with statutory interpretation principles of construction.[99] The Court noted that traditional state authority involves the ability to regulate land and water use.[100] Because an "overly broad" interpretation of the CWA could impinge on that authority, and because the CWA itself has an express policy to preserve that authority for states, the Court required "exceedingly clear language [by Congress] if it wishe[d] to significantly alter the balance between federal and state power and the power of the [g]overnment over private property."[101]

The EPA, though, did not present evidence to meet this standard.[102] First, the EPA went so far as to suggest that, if viewed in isolation, the meaning of "'the waters of the United States' . . . would extend to all water in the United States."[103] As already discussed, the Court reads "waters" much more narrowly.[104] Second, the Court noted the EPA's "significant nexus" test gave rise to weighty vagueness concerns as a result of the CWA's potential criminal penalties.[105] Due process requirements, which require Congress to

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94. *Id.* at 678.
95. *Id.* at 684.
96. *Id.* at 679.
97. *See id*; *see also Rapanos*, 547 U.S. at 759 (Kennedy, J., concurring in the judgment).
98. *Sackett*, 598 U.S. at 679.
99. *Id.* (quoting Bond v. United States, 572 U.S. 844, 857 (2014)).
100. *Id.*
101. *Id.* 679-80 (quoting U.S. Forest Serv. v. Cowpasture River Pres. Ass'n, 140 S. Ct. 1837, 1849-50 (2020)).
102. *Id.* at 680.
103. *Id.* (quoting Brief for the Respondents at 32, *Sackett*, 598 U.S. 651 (No. 21-454)).
104. *Id.*
105. *Id.* at 680.

"define penal statutes 'with sufficient definiteness that ordinary people can understand what conduct is prohibited,'" would not be compatible with the EPA's vague "significant nexus" interpretation.[106] The Court noted the distinction between a "significant" and an "insignificant" nexus was beyond ambiguous and provided scant notice to property owners regarding potential CWA jurisdiction over their land.[107]

As far as the EPA's interpretation of "adjacent," which it construed to mean "neighboring," the agency claimed that Congress ratified that interpretation when it added Section 1344(g)(1) to the CWA in 1977.[108] The EPA contended that the term and interpretation of "adjacent" was transplanted from regulations that the Army Corps of Engineers had put into effect before Congress amended the CWA.[109] But, the Court noted, inferring "that a term was 'transplanted from another legal source'" could only happen if the "term's meaning was 'well-settled' before the transplantation."[110] Here, "the [Army] Corps' definition was promulgated mere months before the CWA became law," and even the Army Corps itself admitted at the time that its regulatory programs were "rapidly changing."[111] Further, the Court noted the EPA also chose not to "adopt that definition for several more years."[112] This scenario was far removed from finding ratification.[113]

As to the EPA's policy argument that a narrower scope of the CWA would have ecological consequences, the Court responded, "[T]he CWA does not define . . . jurisdiction based on ecological importance."[114] Instead, it aims for "a partnership between the States and the Federal Government"[115] where states "will continue to exercise their primary authority to combat water pollution by regulating land and water use."[116]

B. CONCURRING OPINIONS

1. Justice Kavanaugh

Justice Kavanaugh agreed with the majority opinion on several fronts. First, he agreed the Court should not adopt the "significant nexus" test for

106. *Id.* at 680-81 (quoting McDonnell v. United States, 579 U.S. 550, 576 (2016)).
107. *Id.* at 681.
108. *Id.* at 681-82.
109. *Id.* at 682.
110. *Id.* at 683 (quoting Kemp v. United States, 596 U.S. 528, 539 (2022)).
111. *Id.* (quoting Regulatory Programs of the Corps of Engineers, 42 Fed. Reg. 37122 (July 19, 1977) (to be codified at 33 C.F.R. pts. 209, 320-29)).
112. *Id.*
113. *Id.*
114. *Id.*
115. *Id.* (quoting Arkansas v. Oklahoma, 503 U.S. 91, 101 (1992)).
116. *Id.*

determining wetland jurisdiction under the CWA.[117] Second, he agreed with the final determination that the Sacketts' wetlands were not covered under the CWA.[118]

However, Justice Kavanaugh disagreed with the new "continuous surface connection" test, noting the majority seemed to substitute "adjacent" wetlands for "adjoining" wetlands, which have different meanings.[119] Justice Kavanaugh stated the "continuous surface connection" test by the majority "depart[ed] from the statutory text, from 45 years of consistent agency practice, and from th[e] Court's precedents."[120]

2. Justice Kagan

Justice Kagan's concurrence largely agreed with Justice Kavanaugh. Justice Kagan focused on the language of Section 1344(g)(1), which includes "adjacent wetlands" in the scope of "the waters of the United States."[121] Because that provision provides that "adjacent wetlands" are included in "the waters of the United States," Justice Kagan opined the CWA must extend to those "adjacent wetlands."[122] Like Justice Kavanaugh, Justice Kagan took issue with the majority's departure from the ordinary meaning of "adjacent."[123]

Further, Justice Kagan opined that the majority's use of the clear-statement rule was not proper in this case.[124] The clear-statement rule operates "to resolve ambiguity or clarify vagueness."[125] Justice Kagan noted that neither was present here: Congress's use of "adjacent" was "as clear as language gets."[126]

3. The Majority's Response to the Concurring Opinions

In responding to the concurrences, the Court first noted that none of the concurring analysis undermined the majority opinion.[127] "[T]he separate opinions pay no attention whatsoever to § 1362(7), the key statutory provision that limits the CWA's geographic reach to 'the *waters* of the United

117. *Id.* at 715-16 (Kavanaugh, J., concurring in the judgment).
118. *Id.* at 716.
119. *Id.*
120. *Id.*
121. *Id.* at 710 (Kagan, J., concurring in the judgment) (quoting 33 U.S.C. §§ 1362(7), 1344(g)(1)).
122. *Id.*
123. *Id.*
124. *Id.* at 713.
125. *Id.*
126. *Id.*
127. *Id.* at 683 (majority opinion).

States.'"[128] Neither concurrence "even attempt[ed] to explain how the wetlands" in their analysis were included within "waters" in Section 1362(7).[129] In the words of the majority, "[t]extualist arguments that ignore the operative text cannot be taken seriously."[130]

IV. IMPACT

Sackett narrowed the scope of wetlands under which the CWA has jurisdiction.[131] By rejecting the previous "significant nexus" rule used by the EPA and the Army Corps of Engineers and replacing it with the "continuous surface connection" requirement, many wetlands may now be outside of CWA jurisdiction.[132] When the "significant nexus" test was in place, the EPA and the Army Corps of Engineers had considerable flexibility to make jurisdictional determinations on almost all U.S. wetlands and waters.[133] Now, unless the EPA or Army Corps of Engineers can show a "continuous surface connection" between wetlands and a body of water that constitutes "waters of the United States" in its own right, CWA jurisdiction will not stand.[134]

First, any wetlands cut off from covered bodies of water will no longer be within the CWA's jurisdiction.[135] This does not necessarily mean these wetlands will be completely unprotected; they will continue to have protection from pollutants "only if state laws independently impose regulatory requirements."[136] About half of states rely entirely on the CWA for wetland protection.[137] A smaller number of states have laws that protect a large number of their wetlands, and an even smaller number have laws that protect only some wetlands.[138]

The United States has over two hundred seventy million acres of wetlands.[139] Considering this large prevalence of wetlands, there are several notable and concrete examples of the impact of *Sackett* that members of the Supreme Court described. Justice Kavanaugh's concurrence mentioned the Mississippi River, where much of the river is bordered by levees with

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128. *Id.* at 684.
129. *Id.*
130. *Id.*
131. *See id.* at 716 (Kavanaugh, J., concurring in the judgment).
132. *Id.*
133. *Id.* at 667-68 (majority opinion).
134. *Id.* at 678-79.
135. James M. McElfish, Jr., *What Comes Next for Clean Water? Six Consequences of* Sackett v. EPA, ENV'T L. INST.: VIBRANT ENV'T BLOG (May 26, 2023), https://www.eli.org/vibrant-environment-blog/what-comes-next-clean-water-six-consequences-sackett-v-epa [https://perma.cc/88GH-UHCW].
136. *Id.*
137. *Id.*
138. *Id.*
139. *See Sackett*, 598 U.S. at 666.

wetlands on the outer sides.[140] The new "continuous surface connection" test will preclude CWA coverage over these wetlands, even though they are "an important part of the flood-control project."[141] Justice Kavanaugh also mentioned the Chesapeake Bay area could be at risk of an adverse impact due to the non-connecting wetlands nearby.[142]

Another consideration in terms of *Sackett*'s impact is the uncertainty surrounding the "continuous surface connection" test. Just how challenging does it need to be to pinpoint the line between a covered water and a wetland?[143] How strong must the surface connection be? How does the test apply to seasonally connected wetlands that dry up in the summer months?[144] "How 'temporary' do 'interruptions in surface connection' [need] to be for wetlands to still be covered?"[145] Here, perhaps the only certainty is that more uncertainty is likely to follow in *Sackett*'s wake.

For some industries, though, the *Sackett* decision will make operations easier, clearer, and *less* ambiguous. Specifically for the construction industry, the process of permitting to build will be "much more straightforward, as the boundary line between those wetlands that are within the geographical scope of the CWA, and those that are not, is much clearer."[146] Other industries, perhaps like the agriculture industry, may find use of more farmable land now that the percentage of lands—wet or otherwise—covered by the CWA is narrowed.

In terms of the impact of *Sackett* on North Dakota, more uncertainty may follow. North Dakota has over one million wetlands and lake basins, with some areas containing "densities of more than 150 wetlands per square mile."[147] The North Dakota Game and Fish Department has already acknowledged that "the complete destruction and alternation of wetlands . . . is widespread."[148] "Lakes in North Dakota are particularly susceptible to non-point source pollution" from herbicides, pesticides, and fertilizers.[149] North Dakota wetlands have a large role in filtering clean water and supporting

140. *Id.* at 726 (Kavanaugh, J., concurring in the judgment).
141. *Id.*
142. *Id.*
143. *Id.* at 727.
144. *Id.*
145. *Id.*
146. *U.S. Supreme Court Limits Reach of the Clean Water Act to Wetlands that Are, as a Practical Matter, Indistinguishable from Navigable Waters of the United States,* 44 CONSTR. LITIG. REP., no. 7-8, 2023.
147. *Wetlands and Lakes*, N.D. GAME & FISH DEP'T, https://gf nd.gov/wildlife/habitats/wetlands-lakes [https://perma.cc/Y2KD-CWVW] (last visited Nov. 7, 2023).
148. *See id.*
149. *Id.*

crucial wildlife habitats.[150] The long-term impacts of the *Sackett* decision on the wetlands of North Dakota are unclear. Additional state legislation may be needed in order to safeguard North Dakota's densely packed wetland areas.

The state of North Dakota, though, appears unfazed by the Court's ruling in *Sackett*, and perhaps seems even more confident that it can do a better job of promoting clean water than the CWA's previous "significant nexus" rule ever did. The North Dakota Water Commission noted that the old "significant nexus" rule created issues in the State's prairie pothole region due to the temporary nature of wetlands in the area.[151] The Commission also noted that North Dakota's "experts have a deep understanding of the complexities of North Dakota's unique hydrological landscape, and . . . [the state] know[s] how to successfully protect water and, at the same time, support responsible use by agriculture, oil and gas, and other key economic drivers."[152] Monitoring the state's efforts to protect these wetland areas, in addition to monitoring judicial interpretation of the CWA's new "continuous surface connection" test, will be crucial for North Dakota litigators in determining how clients can use their properties moving forward.

V. CONCLUSION

In *Sackett* the U.S. Supreme Court struck down the previous "significant nexus" rule for determining when "adjacent wetlands" are "waters of the United States" and under CWA jurisdiction.[153] The "significant nexus" rule required enforcing agencies to consider hydrological and ecological factors in determining CWA jurisdiction and had the potential to result in a jurisdictional determination in nearly every case.[154] The new rule for determining whether wetlands are a part of the CWA is if they have a "continuous surface connection" to a "water[] of the United States."[155] In narrowing the geographic scope of the CWA, a large amount of once-covered wetlands in the United States are no longer subject to CWA jurisdiction. Whether states will create new legislation to protect the vulnerable areas remains undetermined, but North Dakota appears confident that the narrowing of CWA jurisdiction will create more opportunities for the state to

150. *Id.*

151. *Supreme Court's Sackett Ruling Will Free States to Deliver Clean Drinking Water*, N.D. DEP'T WATER RES., https://www.dwr nd.gov/pdfs/supreme_court%27s_sackett_ruling_will_free_states_to_deliver_clean_drinking_water.pdf [https://perma.cc/N66F-TUTW] (last visited Jan. 13, 2024).

152. *Id.*

153. *See* Sackett v. EPA, 598 U.S. 651, 684 (2023).

154. *Id.* at 666-67.

155. *Id.* at 678 (quoting Rapanos v. United States, 547 U.S. 715, 742 (2006)).

craft localized initiatives and protections.[156] In any event, *Sackett v. EPA* is a monumental decision impacting the future of many U.S. wetlands.

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156. N.D. DEP'T WATER RES., *supra* note 151.

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