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NOTE

SACKETT V. EPA: WHEN “ADJACENT” MEANS “CONTIGUOUS” AND PROPERTY RIGHTS ECLIPSE CLEAN WATER ACT PROTECTIONS

JO VONDERHORST*

“When I use a word,” Humpty Dumpty said in rather a scornful tone, “it means just what I choose it to mean — neither more nor less.”
- Lewis Carroll¹

In Sackett v. EPA,² the United States Supreme Court sought to delineate the bounds of federal authority under the Clean Water Act (“CWA” or “Act”) by clarifying the scope of the jurisdictional term “waters of the United States” (“WOTUS”) and by identifying the proper test for determining when wetlands constitute WOTUS.³ Justice Alito, writing for the Court, held that WOTUS encompass only relatively permanent bodies of water, such as rivers and lakes, and wetlands with a continuous surface connection to such waters.⁴ Adopting the continuous surface connection test announced in Justice

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3. Id. at 1329, 1332 (quoting 33 U.S.C. § 1362(7)).
4. Id. at 1341, 1344. Under the continuous surface connection test, for a wetland to constitute WOTUS, it must have a physical surface connection with a “traditional navigable water,” such as a river or lake, and be physically indistinguishable from that water. Id. at 1340–41, 1344.
Scalia’s plurality opinion in *Rapanos v. United States*, the Court endorsed the misinterpretation of precedent upon which that opinion rested and flouted the unambiguous intent of Congress by misreading the language of the CWA. In so doing, the Court imposed on the agencies responsible for enforcing the Act its policy judgment that the breadth of congressionally sanctioned regulatory power was too great and eviscerated federal protections for wetlands adjacent to WOTUS without regard for the consequences.

I. THE CASE

In *Sackett v. EPA*, the Supreme Court held that the only waters subject to federal protection under the CWA are relatively permanent water bodies such as rivers, lakes, and oceans and wetlands with a continuous surface connection to such waters. This holding curtailed the power of the federal government to preserve the integrity of America’s waters under the Act as Congress intended.

In 1972, Congress passed the CWA with the ambitious goal of “restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation’s waters.” The Act prohibits “the discharge of any pollutant” into “navigable waters” without a permit. “Pollutant[s],” as defined by the Act, range from contaminants like “chemical wastes” to materials like “rock, sand” and “cellar dirt.” The Act broadly defines “navigable waters” as the “waters of the United States ["WOTUS"], including the territorial seas.”

The Environmental Protection Agency (“EPA”) and Army Corps of Engineers (“Corps”) jointly enforce the CWA. The EPA is charged with enforcing the Act, a function the agency fulfills either by issuing compliance orders directing violators to halt illegal discharges or by bringing civil enforcement actions in federal district court. The Corps oversees the

6. See infra Section IV.A.
7. See infra Section IV.B.
8. See infra Section IV.C.
10. Id. at 1344.
11. See infra Section II.A.
13. Id. §§ 1311(a), 1362(12)(A).
14. Id. § 1362(6).
15. Id. § 1362(7).
16. Sackett v. EPA (Sackett III), 143 S. Ct. 1322, 1330 (2023)
permitting process for discharges of dredged or fill material into WOTUS under § 404 of the CWA. Violators of the CWA may face criminal and civil penalties.

The controversy in Sackett arose out of a decades-long dispute over how to properly define when wetlands are WOTUS subject to federal regulation. In 2004, Michael and Chantell Sackett purchased a two-thirds acre residential lot in Bonner County, Idaho. The lot is situated 300 feet north of Priest Lake, one of Idaho’s biggest lakes. Between the Sacketts’ property and Priest Lake lie a road and a row of homes. To the north of the lot, across another road, is a sizeable wetlands complex known as the Kalispell Bay Fen, which drains into an unnamed tributary. This unnamed tributary flows into Kalispell Creek, which runs southwest of the Sacketts’ lot and empties into Priest Lake.

The Sacketts began backfilling their lot with sand and gravel in 2007 in preparation to build a home. Soon after, officials from the EPA and the Corps visited the property. The officials believed the lot contained wetlands potentially covered by the CWA and suggested the Sacketts halt the project until they obtained a discharge permit from the Corps. By this time, following a split decision in Rapanos v. United States where the Court failed to agree on a test to determine when wetlands fall under WOTUS, relevant regulations defined WOTUS to include wetlands adjacent to traditional navigable waters and tributaries of such waters. Regulations at 33 C.F.R. § 328.3(c) defined “adjacent” as “bordering, contiguous, or neighboring” and stated that adjacent wetlands included those separated from other WOTUS by artificial barriers. Agency guidance continued to encourage case-by-case determinations for wetlands adjacent to non-

18. Sackett III, 143 S. Ct. at 1331 (citing 33 U.S.C. § 1344(a)).
19. Id. at 1330 (citing 33 U.S.C. § 1319(c)–(d)). A violator against whom the EPA prevails in a civil action may face up to $37,500 in fines per day per violation. Sackett v. EPA (Sackett I), 566 U.S. 120, 123 (2012) (citing 33 U.S.C. § 1319(d)). When the EPA prevails in a civil action against a violator who was issued a compliance order but has failed to comply, these fines can increase to up to $75,000 per day per violation. Id.
20. Sackett III, 143 S. Ct. at 1329.
22. Sackett II, 8 F.4th at 1081.
23. Id.
24. Id.
25. Id.
26. Id.
27. Id.
28. Id.
29. 547 U.S. 715 (2006); see infra Section II.C.
30. Sackett II, 8 F.4th at 1080 (quoting 33 C.F.R. § 328.3(a)(1), (5), (7) (2008)).
31. Id. (quoting 33 C.F.R. § 328.3(c)).
navigable tributaries of navigable waters based on various ecological and hydrological factors indicating a significant nexus between the wetland, the tributary, and the navigable water.\textsuperscript{32}

Despite the EPA’s warning, the Sacketts continued backfilling the lot, and six months later the EPA issued them an administrative compliance order.\textsuperscript{33} The order conveyed the EPA’s finding that the lot contained wetlands covered by the CWA and explained that the Sacketts had violated the Act by discharging fill material into those wetlands without a permit.\textsuperscript{34} It instructed them to immediately begin site restoration, to be completed within five months, pursuant to a Restoration Work Plan provided by the EPA.\textsuperscript{35} The order further notified the Sacketts that if they did not comply with its terms, they would face over $40,000 per day in penalties.\textsuperscript{36}

Fifteen years of litigation followed, beginning in 2008 when the Sacketts sued the EPA under § 706(2) of the Administrative Procedure Act (“APA”).\textsuperscript{37} The Sacketts, seeking declaratory and injunctive relief, alleged that the EPA’s issuance of the compliance order was arbitrary and capricious because it exceeded the scope of the EPA’s jurisdiction under the CWA.\textsuperscript{38} The EPA moved to dismiss, arguing that the order was not subject to judicial review because it was not a final agency action under the APA.\textsuperscript{39} The district court granted the EPA’s motion and the Ninth Circuit affirmed,\textsuperscript{40} but the Supreme Court granted certiorari and reversed in 2012, holding that the compliance order was a final agency action subject to judicial review.\textsuperscript{41}

\begin{footnotesize}
\begin{enumerate}
\item The “significant nexus” language was a reference to the test announced in Justice Kennedy’s opinion in \textit{Rapanos} for determining when wetlands are WOTUS. 547 U.S. at 779 (Kennedy, J., concurring in judgment); see infra Section II.C.
\item\textit{Sackett II}, 8 F.4th at 1081.
\item Id.
\item Id.
\item Id. In May 2008, the EPA issued the Sacketts an amended compliance order. Id. The amended order extended the deadlines for compliance but was otherwise identical to the original. Id.
\item Id.
\item Id. The Sacketts also alleged that the issuance of the order deprived them of their Fifth Amendment rights to “life, liberty, or property, without due process of law.” \textit{Sackett I}, 566 U.S. 120, 125 (2012). However, on remand by the Supreme Court following its decision on the threshold issue of whether the order was subject to review the Sacketts amended their Complaint to challenge the amended compliance order and dropped their due process claims. \textit{Sackett II}, 8 F.4th at 1082 n.3.
\item Id. at 1081–82.
\item Id. at 1082.
\item \textit{Sackett I}, 566 U.S. at 131. Subsequently, in 2015, the Obama administration issued a rule categorically asserting jurisdiction over waters and wetlands within 1,500 feet of interstate or traditional navigable waters and subjecting a broader range of waters to case-by-case significant nexus determinations. 80 Fed. Reg. 37116–17 (June 29, 2015). This rule formally adopted the significant nexus approach formulated by Justice Kennedy in his opinion in \textit{Rapanos v. United States}, previously applied by the EPA and the Corps under informal agency guidance. 547 U.S. 715, 779 (2006) (Kennedy, J., concurring in judgment); see supra note 32. However, the Trump
\end{enumerate}
\end{footnotesize}
Seven years later, in 2019, the district court granted summary judgment for the EPA on the merits, holding that its issuance of the compliance order was not arbitrary or capricious.\(^42\) The Sacketts appealed, arguing that under the legal standard provided by Justice Scalia’s plurality opinion in *Rapanos v. United States*, they were entitled to prevail as a matter of law because the wetlands on their lot were not WOTUS over which the EPA had jurisdiction under the CWA.\(^43\) The Ninth Circuit affirmed the judgment of the district court.\(^44\) Following its own precedent, the Ninth Circuit applied the significant nexus test announced in Justice Kennedy’s concurrence in *Rapanos*.\(^45\) It found that the EPA reasonably concluded that the Sacketts’ lot contained wetlands adjacent to a jurisdictional tributary and that those wetlands shared a significant nexus with Priest Lake, such that the lot was under the EPA’s CWA jurisdiction.\(^46\) The Sacketts again appealed, and the Supreme Court granted certiorari to clarify the definition of WOTUS, thereby establishing the geographic scope of federal regulatory authority under the CWA, and to identify the proper test for determining when a wetland is a WOTUS.\(^47\)

II. LEGAL BACKGROUND

Understanding the Supreme Court’s holding in *Sackett v. EPA*\(^48\) and its attendant missteps requires knowledge of precedent affirming Congress’s intent to establish a broad regulatory framework under the CWA;\(^49\) the development of precedent defining the scope of federal jurisdiction over

\(^{42}\) *Sackett II*, 8 F.4th at 1082.

\(^{43}\) *Id*. at 1088 (citing *Rapanos*, 547 U.S. at 739, 742).

\(^{44}\) *Id*. at 1093. The court first held that a letter sent by the EPA apprising the Sacketts of the agency’s intent to withdraw the compliance order did not moot the case. *Id*. at 1079, 1082. Because the EPA was not bound by the letter and could not state conclusively that it lacked jurisdiction over the Sacketts’ lot, the court found the central issue of the case to be unresolved. *Id*. at 1084, 1086.

\(^{45}\) *Id*. at 1089, 1093 (citing *Rapanos*, 547 U.S. at 779 (Kennedy, J., concurring in judgment)); see *infra* Section II.C. Prior Ninth Circuit cases held that under *Marks v. United States*, 430 U.S. 188 (1977), Kennedy’s concurrence provided the governing rule from *Rapanos* because it was “the narrowest ground to which a majority of the Justices would assent.” *Sackett II*, 8 F.4th at 1088 (quoting N. Cal. River Watch v. City of Healdsburg, 496 F.3d 993, 999 (9th Cir. 2007)).

\(^{46}\) The court found that in combination, the wetlands on the Sacketts’ lot and the similarly situated Kalispell Bay Fen significantly affected the integrity of Priest Lake, improving the lake’s water quality and the health of the ecosystem. *Id*. at 1093.

\(^{47}\) *Sackett III*, 143 S. Ct. 1322, 1329, 1332 (2023).

\(^{48}\) 143 S. Ct. 1322 (2023).

\(^{49}\) See *infra* Section II.A.
adjacent wetlands; the split opinion of the Court in Rapanos; and the Court’s recent shift away from the Chevron deference doctrine.

A. The Broad Scope of Federal Jurisdiction Under the CWA

Congress, in passing the CWA, intended to grant the federal government expansive jurisdiction to regulate discharges of pollutants into practically all of the nation’s waters. The ability to regulate discharges into wetlands adjacent to traditional navigable water bodies is crucial to Congress’s goal of restoring and maintaining the integrity of the Nation’s waters. Wetlands provide vital ecological benefits, from filtering and purifying water draining into adjacent water bodies to slowing the rate at which surface runoff enters those bodies, and also enhance flood control. Even wetlands separated from adjacent water bodies by natural or artificial barriers provide these benefits, as such barriers neither block all water flow nor sever the watershed connection between wetlands and adjacent waters.

The Supreme Court first recognized the breadth of federal regulatory power under the CWA in 1975 in Train v. New York. In Train, the Court indicated that Congress’s intent in enacting the CWA was to create a comprehensive scheme for controlling water pollution. Six years later, in 1981, the Court reinforced this understanding of the CWA’s scope in Milwaukee v. Illinois. In Milwaukee, the Court declared that the CWA, unlike its predecessors, is not merely a law “touching interstate waters.”

50. See infra Section II.B.
51. See infra Section II.C.
52. See infra Section II.D.
53. See Milwaukee v. Illinois, 451 U.S. 304, 318 (1981) (“Congress’ intent in enacting the CWA was clearly to establish an all-encompassing program of water pollution regulation. Every point source discharge is prohibited unless covered by a permit, which directly subjects the discharger to the administrative apparatus established by Congress to achieve its goals.”).
55. Id.
56. Id. at 1368 (Kavanaugh, J., concurring in judgment).
58. Id. at 37.
60. Id. at 317 (quoting Illinois v. Milwaukee, 406 U.S. 91, 101 (1972)). Prior to the passage of the CWA in 1972, the federal government utilized ambient water quality standards under the Federal Water Pollution Control Act as its primary pollution control mechanism. EPA v. Cal. ex rel. State Water Res. Control Bd., 426 U.S. 200, 202 (1976). These standards proved ineffective, as although they provided a cause of action for the government to bring suit if pollution in certain interstate navigable waters exceeded permissible levels, they did not provide a vehicle through which the government could eliminate pollution at its individual sources. Id. By contrast, the CWA sets maximum effluent limitations for individual point sources rather than holistically measuring the performance of polluters based on a shared standard. Id. at 204–05. These limitations, in combination with the Act’s extensive permitting program, make it easier for the government to
Rather, it is an all-encompassing regulatory mechanism enacted to achieve the complete elimination of water pollution in the United States.\textsuperscript{61} To demonstrate how comprehensive Congress’s assertion of regulatory authority under the CWA truly was, the Court emphasized that under the Act, the federal government is empowered to require polluters to obtain a permit for every discharge of a pollutant from a point source into navigable waters.\textsuperscript{62} Finally, in 1987, in \textit{International Paper Co. v. Ouellette},\textsuperscript{63} the Court observed that in addition to covering all point sources, the CWA also applies to “virtually all bodies of water.”\textsuperscript{64} Based on this caselaw, Congress intended the CWA to apply broadly and comprehensively.

The EPA and the Corps initially settled on different definitions of WOTUS, the jurisdictional term used to define “navigable waters” under the CWA and, accordingly, to establish the scope of federal regulatory authority under the Act.\textsuperscript{65} The EPA broadly defined WOTUS to encompass bodies like intrastate lakes used by interstate travelers, while the Corps adopted a narrower definition limiting its jurisdiction to traditional navigable waters.\textsuperscript{66} A month after the Supreme Court’s holding in \textit{Train}, in 1975, a D.C. district court in \textit{Natural Resources Defense Council, Inc. v. Callaway}\textsuperscript{67} struck down the Corps’s definition.\textsuperscript{68} In its order, the court maintained that by defining navigable waters as the waters of the United States in the text of the CWA, Congress claimed federal jurisdiction over the nation’s waters to the maximum extent of its constitutional power under the Commerce Clause.\textsuperscript{69} By attempting to limit the expansive jurisdiction asserted by Congress, according to the court, the Corps had impermissibly altered the meaning of “waters of the United States” in contravention of Congress’s intent.\textsuperscript{70} The decisions of D.C. district courts are not binding precedent.\textsuperscript{71} However, the D.C. Circuit nevertheless plays a unique role in the realm of environmental enforce the Act against individual polluters and to more effectively limit and control water pollution.

\textit{Id.}  
\textsuperscript{61} \textit{Milwaukee}, 451 U.S. at 318 (citing S. Rep. No. 92-414, at 95 (1971)).  
\textsuperscript{62} \textit{Id.}  
\textsuperscript{63} 479 U.S. 481 (1987).  
\textsuperscript{64} \textit{Id.} at 492. The Court did not elaborate on what it meant by “virtually all bodies of water,” and so the phrase is best taken to mean exactly what it says. \textit{Id.}  
\textsuperscript{65} \textit{Sackett III}, 143 S. Ct. 1322, 1332 (2023).  
\textsuperscript{66} \textit{Id.} (first citing 38 Fed. Reg. 13529 (May 22, 1973); and then citing 39 Fed. Reg. 12119 (Apr. 3, 1974)).  
\textsuperscript{68} \textit{Id.} at 686 (asserting that “as used in the [Clean] Water Act, the term [WOTUS] is not limited to the traditional tests of navigability”).  
\textsuperscript{69} \textit{Id.}  
\textsuperscript{70} \textit{Id.}  
regulation, as the D.C. Circuit has exclusive venue over challenges to regulations promulgated under many environmental statutes, including the CWA.\textsuperscript{72}

In 1977, following \textit{Callaway}, the Corps embraced a definition that expanded its CWA authority to the limits of Congress’s constitutional power under the Commerce Clause, and in the 1980s, the agencies finally promulgated functionally equivalent definitions of WOTUS encompassing “‘[a]ll . . . waters’ that ‘could affect interstate or foreign commerce.’”\textsuperscript{73}

\textbf{B. Jurisdiction Over Adjacent Wetlands}

Since the 1980s, the Court has made several attempts to clarify the definition of WOTUS as it relates to federal jurisdiction over wetlands.\textsuperscript{74} The Corps promulgated the first regulations interpreting WOTUS “to include wetlands ‘adjacent to other navigable waters’” in 1975.\textsuperscript{75} Two years later, in 1977, Congress amended the CWA to add § 1344(g)(1), which allows States to apply for permission from the EPA to administer § 404 permitting programs and specifically indicates that WOTUS includes certain wetlands.\textsuperscript{76} Under § 1344(g)(1), States can regulate discharges of dredged or fill material into any WOTUS except traditional navigable waters,\textsuperscript{77} “including wetlands adjacent thereto,”\textsuperscript{78} over which the Federal Government exercises exclusive regulatory authority.\textsuperscript{79} In subsequent rulemakings during the Carter


\textsuperscript{75} \textit{Sackett III}, 143 S. Ct. at 1363 (Kavanaugh, J., concurring in judgment) (quoting 40 Fed. Reg. 31324 (July 25, 1975)). Corps regulations define “wetlands” as “areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions.” \textit{Id.} at 1333 (majority opinion) (quoting 40 C.F.R. § 230.3(t)).

\textsuperscript{76} \textit{Id.} at 1339.

\textsuperscript{77} Traditional navigable waters include lakes, streams, and similar water bodies, which cannot be regulated by states under 33 U.S.C. § 1344(g)(1). However, under § 1344(g)(1), all other waters which are not “tidal waters and their adjacent wetlands” or “waters used as a means to transport interstate or foreign commerce and their adjacent wetlands” are considered non-navigable and can be regulated by states. \textit{State or Tribal Assumption of the CWA Section 404 Permit Program}, EPA (Oct. 31, 2023), https://www.epa.gov/cwa-404/state-or-tribal-assumption-cwa-section-404-permit-program#:~:text=Which%20Waters%20Can%20States%20Tribes%20Administer%20under%20The%20Section,intestate%20or%20foreign%20commerce%20and%20their%20adjacent%20wetlands.

\textsuperscript{78} \textit{Sackett III}, 143 S. Ct. at 1339 (quoting 33 U.S.C. § 1344(g)(1)).

\textsuperscript{79} \textit{Id.} at 1363 (Kavanaugh, J., concurring in judgment).
administration, the EPA and the Corps specified that “adjacent” wetlands included those “separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like.”\textsuperscript{80} This definition of “adjacent” stood from the Reagan administration through the end of the Obama administration.\textsuperscript{81}

The Court’s expedition to elucidate the scope of the power of the EPA and the Corps to regulate wetlands under the CWA began with United States v. Riverside Bayview Homes, Inc.,\textsuperscript{82} in 1985. Writing for a unanimous Court, Justice White held that the Corps had reasonably interpreted the language of the CWA “to require permits for the discharge of fill material into wetlands adjacent to” WOTUS.\textsuperscript{83} He professed that while it may appear unreasonable to classify any lands as WOTUS, to find that the federal government lacks the authority to regulate wetlands based on semantics would oversimplify the issue of water pollution and ignore the reality that land and water often form a continuum, making a stark line between the two often impossible to draw.\textsuperscript{84} The Court found support for the Corps’s decision to draw the jurisdictional line where it did based on the legislative history and policies underlying the CWA, which indicated a deliberate decision by Congress to take a broad, systematic approach to improve water quality by restoring and maintaining the integrity of entire aquatic ecosystems.\textsuperscript{85} Further, the Court determined that by amending § 404 of the CWA in 1977 to include adjacent wetlands within WOTUS, Congress acquiesced to the scope of the Corps’s asserted jurisdiction.\textsuperscript{86} Thus, the Corps, based on its technical expertise, reasonably concluded that wetlands adjacent to navigable waters are inseparably connected to those waters, such that the ability to regulate adjacent wetlands is integral to maintaining the integrity of WOTUS.\textsuperscript{87} Finally, the Court held

\begin{itemize}
\item \textsuperscript{80} \textit{Id.} at 1365 (first quoting 42 Fed. Reg. 37144 (July 19, 1977); and then quoting 45 Fed. Reg. 85345 (Dec. 24, 1980)).
\item \textsuperscript{81} \textit{Id.}; see 51 Fed. Reg. 41210, 41251 (Nov. 13, 1986); 33 C.F.R. § 328.3(c) (1991); 40 C.F.R. § 230.3(b) (1991); 33 C.F.R. § 328.3(c) (1998); 40 C.F.R. § 230.3(b) (1998); 33 C.F.R. § 328.3(c) (2005); 40 C.F.R. § 230.3(b) (2005); 33 C.F.R. § 328.3(c) (2010); 40 C.F.R. § 230.3(b) (2010); 80 Fed. Reg. 37,105, 37,116 (June 29, 2015).
\item \textsuperscript{82} 474 U.S. 121 (1985).
\item \textsuperscript{83} \textit{Id.} at 139. The Court noted that its inquiry was restrained by the holding in \textit{Chevron, U.S.A., Inc. v. NRDC}, 467 U.S. 837 (1984), and limited its review to the question of whether the Corps’s definition of WOTUS to include adjacent wetlands was reasonable considering "the language, policies, and legislative history" of the CWA. \textit{Riverside Bayview}, 474 U.S. at 131.
\item \textsuperscript{84} \textit{Riverside Bayview}, 474 U.S. at 132 (recognizing existence of marshes, mudflats, swamps, bogs, and other features that can neither be considered fully aquatic ecosystems nor dry land).
\item \textsuperscript{85} \textit{Id.} at 132–33.
\item \textsuperscript{86} \textit{Id.} at 137.
\item \textsuperscript{87} \textit{Id.} at 134–35. The Court rejected the requirement imposed by the Court of Appeals that to be regulable under the CWA, a wetland must be inundated or frequently flooded by adjacent navigable waters. \textit{Id.} at 129–30. According to the Court, the Corps reasonably found that wetlands inundated by groundwater also share an inseparable connection with such waters. \textit{Id.} at 129–31,
that the property at issue, which “actually abut[ted] on a navigable waterway,” was an adjacent wetland subject to the Corps’s permitting authority. 88

Fifteen years later, in Solid Waste Agency v. United States Army Corps of Engineers (“SWANCC”), 89 the Court held that the Corps’s jurisdiction under the CWA could not permissibly extend to an abandoned mining pit that seasonally ponded and had developed natural features. 90 Invalidating the Corps’s recently issued Migratory Bird Rule, which asserted jurisdiction over intrastate waters that provided habitat for migratory birds or endangered species, the Court reasoned that to include such isolated intrastate waters within WOTUS would be to impermissibly read the word navigable out of the Act. 91 Further, unlike the wetlands at issue in Riverside Bayview, the isolated pond at issue in SWANCC did not have a “significant nexus” with navigable waters and thus did not fall within the Corps’s jurisdiction under the CWA. 92 Following SWANCC, a lengthy period of regulatory uncertainty ensued, with the agency issuing guidance instructing field agents merely to exercise jurisdiction over non-isolated waters under the CWA “to the full extent of their authority.” 93 This vagueness resulted in assessments of jurisdiction over wetlands through case-by-case evaluations based on localized practices. 94

While the cases described above deal exclusively with the scope of the Corps’s authority to regulate discharges of dredged or fill material into wetlands pursuant to Section 404 of the CWA, the same definition of “navigable waters” as “waters of the United States” determines the scope of the EPA’s jurisdiction under the Section 402 permitting program. 95 Thus, to the extent that these decisions purport to delineate the scope of WOTUS, they

134. The Court also rejected the Appeals Court’s conclusion that it was necessary to read the Corps’s jurisdiction under the CWA narrowly to avoid a takings problem, finding that the potential of a regulatory program to result in a taking of individual property does not justify narrowing its reach when just compensation is available. Id. at 128.

88. Id. at 135.
89. 531 U.S. 159 (2001).
90. Id. at 162–64, 166.
91. Id. at 171–72. The Corps’s reading of the statute, according to the Court, would impinge on the traditional power of States as the primary regulators of land and water use. Id. at 174. In his dissent, Justice Stevens argued that Congress itself read the word navigable out of the statute when it specifically deleted it from the definition of navigable waters under § 502(7), thereby giving the term its broadest possible constitutional meaning. Id. at 180–81 (Stevens, J., dissenting).
92. Id. at 167–68 (majority opinion) (citing Riverside Bayview, 474 U.S. at 131–32 n. 8).
93. Sackett III, 143 S. Ct. 1322, 1333 (2023) (quoting Memorandum on Supreme Court Ruling Concerning CWA Jurisdiction Over Isolated Waters from Gary Guzy, General Counsel, EPA & Robert M. Anderson, Chief Counsel, U.S. Army Corps of Eng’rs, at 3 (Jan. 1, 2001)).
94. Id.
determine the breadth of regulatory authority that both the EPA and the Corps may exercise under the CWA, including over wetlands.

C. The Two Tests of Rapanos

Six years after SWANCC, the Court once again attempted to define the scope of the Corps’s jurisdiction over wetlands in *Rapanos v. United States*.96 However, the Court could not agree on a test, and no opinion received majority support.97 At issue were developer John A. Rapanos’s efforts to backfill wetlands on fifty-four acres of Michigan property, which were situated eleven to twenty miles from the closest body of navigable water.98 Regulators determined that Mr. Rapanos’s land contained WOTUS, which he could not fill without a Section 404 permit.99 Mr. Rapanos contested the Government’s determination, and litigation followed.100

Writing for a plurality of the Court, Justice Scalia held that only wetlands with a continuous surface connection to bodies of water considered WOTUS in their own right are covered by the CWA.101 He articulated a test requiring the Corps to first establish that a wetland is adjacent to a covered WOTUS, and then to establish that the wetland has a continuous surface connection with that WOTUS.102 In Scalia’s view, this test placed a necessary limitation on what he perceived to be sweeping assertions of jurisdiction by the Corps following SWANCC, which threatened to contravene Congress’s stated policy under the CWA that the States retain primary authority to regulate land and water use.103

Justice Kennedy, in his opinion concurring in the judgment, adopted a different test that, consistent with SWANCC, would base the Corps’s jurisdiction over wetlands on the existence of a significant nexus with

97. Id. In his concurring opinion, Chief Justice Roberts lamented that the inability of the Court to reach a majority consensus regarding the limits of congressional power under the CWA would result in lower courts and regulated entities having to “feel their way on a case-by-case basis” with little guidance. *Id.* at 758 (Roberts, C.J., concurring).
98. *Id.* at 719–20 (plurality opinion).
99. *Id.* at 720–21.
100. *Id.* at 721.
101. *Id.* at 742. According to Justice Scalia, wetlands were only adjacent to WOTUS when there was no way to clearly discern where one ended and the other began, implicating the boundary-drawing problem described by the Court in *Riverside Bayview*. *Id.* (citing 474 U.S. 121 (1985)). Absent such a connection, wetlands lacked a significant nexus with covered waters. *Id.*
102. *Id.* Justice Scalia defined a covered WOTUS as a “relatively permanent body of water connected to traditional interstate navigable waters.” *Id.* This definition includes bodies such as streams, oceans, rivers, lakes, and other bodies with a permanent rather than an ephemeral flow of water. *Id.* at 732–33.
103. *Id.* at 726, 737.
traditional navigable waters.\textsuperscript{104} Under this test, wetlands that either alone or in combination with similarly situated wetlands substantially affect the physical, chemical, and biological integrity of traditional navigable waters would be subject to CWA regulation.\textsuperscript{105} For wetlands adjacent to navigable-in-fact waters,\textsuperscript{106} including those lacking a continuous surface connection to such waters, adjacency alone would suffice to establish jurisdiction.\textsuperscript{107} Wetlands adjacent to non-navigable tributaries of navigable-in-fact waters would also be regulable under the significant nexus test, subject to case-by-case determinations that such wetlands possess the requisite nexus to the navigable-in-fact waters.\textsuperscript{108} In Justice Kennedy’s view, the significant nexus test was more consistent with Supreme Court precedent and the CWA’s language and purpose.\textsuperscript{109}

Following Rapanos, a majority of circuits either adopted Justice Kennedy’s significant nexus test or concluded that either Justice Kennedy’s test or the test announced by the plurality would establish jurisdiction if satisfied.\textsuperscript{110}

\textbf{D. The Shift Away from Chevron Deference}

The Court’s recent shift away from the doctrine announced in \textit{Chevron, U.S.A., Inc. v. NRDC},\textsuperscript{111} evinces the Court’s waning readiness to defer to agency expertise.\textsuperscript{112} In \textit{Chevron}, the Court announced a test for deciding

\begin{itemize}
  \item \textsuperscript{104} \textit{Id.} at 779 (Kennedy, J., concurring in judgment).
  \item \textsuperscript{105} \textit{Id.} 779–80. Justice Kennedy found it significant that thirty-three states and the District of Columbia filed an \textit{amicus} brief in the litigation defending the importance of the CWA to their own water policies. \textit{Id.} at 777.
  \item \textsuperscript{106} Navigable-in-fact waters include “rivers, streams, and other hydrographic features more conventionally identifiable as ‘‘waters.’’” \textit{Id.} at 734 (plurality opinion) (quoting United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 131 (1985)).
  \item \textsuperscript{107} \textit{Id.} at 782 (Kennedy, J., concurring in judgment).
  \item \textsuperscript{108} \textit{Id.}
  \item \textsuperscript{109} \textit{Id.} at 776.
  \item \textsuperscript{110} \textit{See, e.g., United States v. Johnson, 467 F.3d 56 (1st Cir. 2006) (significant nexus or plurality); United States v. Donovan, 661 F.3d 174 (3d Cir. 2011) (significant nexus or plurality); Precon Dev. Corp. v. U.S. Army Corps of Eng’rs, 633 F.3d 278 (4th Cir. 2011) (significant nexus); United States v. Gerke Excavating, Inc., 464 F.3d 723 (7th Cir. 2006) (significant nexus); United States v. Bailey, 571 F.3d 791 (8th Cir. 2009) (significant nexus or plurality); N. Cal. River Watch v. City of Healdsburg, 496 F.3d 993 (9th Cir. 2007) (significant nexus); United States v. Robison, 505 F.3d 1208 (11th Cir. 2007) (significant nexus). In 2021, the U.S. District Court for the District of Arizona struck down a Trump administration regulation adopting the plurality approach. See Pasqua Yaqui Tribe v. EPA, 557 F. Supp. 3d 949, 956 (D. Ariz. 2021) (finding that serious agency error in adopting the rule and the possibility of serious environmental harm if the rule remained in place weighed in favor of vacatur).
  \item \textsuperscript{111} \textit{See, e.g., United States v. Johnson, 467 F.3d 56 (1st Cir. 2006) (significant nexus or plurality); United States v. Donovan, 661 F.3d 174 (3d Cir. 2011) (significant nexus or plurality); Precon Dev. Corp. v. U.S. Army Corps of Eng’rs, 633 F.3d 278 (4th Cir. 2011) (significant nexus); United States v. Gerke Excavating, Inc., 464 F.3d 723 (7th Cir. 2006) (significant nexus); United States v. Bailey, 571 F.3d 791 (8th Cir. 2009) (significant nexus or plurality); N. Cal. River Watch v. City of Healdsburg, 496 F.3d 993 (9th Cir. 2007) (significant nexus); United States v. Robison, 505 F.3d 1208 (11th Cir. 2007) (significant nexus). In 2021, the U.S. District Court for the District of Arizona struck down a Trump administration regulation adopting the plurality approach. See Pasqua Yaqui Tribe v. EPA, 557 F. Supp. 3d 949, 956 (D. Ariz. 2021) (finding that serious agency error in adopting the rule and the possibility of serious environmental harm if the rule remained in place weighed in favor of vacatur).
  \item \textsuperscript{112} The Supreme Court has granted petitions for writ of certiorari in the cases of \textit{Loper Bright Enterprises v. Raimondo}, 143 S. Ct. 2429 (2023), and \textit{Relentless, Inc. v. U.S. Department of Commerce}, 144 S. Ct. 325 (2023), to settle the issue of whether \textit{Chevron} should be overruled.
when courts should defer to agencies’ interpretations of the statutes they are tasked with enforcing. First, the court must determine if Congress has spoken directly to the question at issue.\textsuperscript{113} If Congress has clearly and unambiguously expressed an intent in relation to the question, then the court and the agency must give effect to that intent, ending the inquiry.\textsuperscript{114} However, if Congress has not spoken directly to the question at issue and the statute is silent or ambiguous as to any relevant intent, the court should determine whether the agency’s interpretation is based on a permissible construction of the statute.\textsuperscript{115} If so, then the court should defer to the agency’s construction rather than imposing its own interpretation.\textsuperscript{116} In this respect, \textit{Chevron} reflected a seemingly bygone era of deference to agency interpretation.

In 2022, the Court decided \textit{West Virginia v. EPA.}\textsuperscript{117} In \textit{West Virginia}, the Court announced a new test for evaluating the legality of agency actions, stating that under circumstances involving what it described as “extraordinary grants of regulatory authority,” courts should apply a different, less deferential test, referred to as the “major questions doctrine” (“MQD”).\textsuperscript{118} Under this test, if any agency asserts statutory power over private activities in a manner the court perceives will have a significant impact on the national economy, that agency must provide clear evidence that Congress has authorized it to exercise the asserted power.\textsuperscript{119} The antithesis of the deferential \textit{Chevron} standard, the MQD, with its poorly-defined contours, essentially strips expert agencies of their ability to exercise the power granted them by Congress under their authorizing statutes to respond

\begin{itemize}
\item \textsuperscript{113} \textit{Chevron}, 467 U.S. at 865.
\item \textsuperscript{114} \textit{Id}.
\item \textsuperscript{115} \textit{Id}.
\item \textsuperscript{116} \textit{Id}. The \textit{Chevron} Court explained that agencies’ technical expertise in the fields in which they operate makes them better positioned than federal judges, who lack such expertise, to make the complex policy judgments needed to effectively enforce federal statutes. \textit{Id}.
\item \textsuperscript{117} 142 S. Ct. 2587 (2022).
\item \textsuperscript{118} \textit{Id}. at 2609.
\item \textsuperscript{119} \textit{Id}. The Court used the MQD to limit the EPA’s authority in issuing best standards of emissions reduction (“BSERs”) for coal-fired power plants. \textit{Id}. The EPA, in 2015, issued the Clean Power Plan (“CPP”), a Clean Air Act (“CAA”) regulation with a provision allowing a plant to limit emissions through generation shifting to cleaner, renewable energy sources as an alternative to making physical alterations to its facilities. \textit{Id}. at 2601. Although the EPA repealed the CPP under the Trump administration and did not reinstate it under the Biden administration, the Court heard the case and found that the generation-shifting provision constituted an impermissible assertion of regulatory authority under the CAA. \textit{Id}. at 2604–05, 2616. The Court first found that the provision was an improper reading of the phrase “systems of emissions reduction,” by which it determined that Congress intended the EPA to take a technology-based approach to regulation that did not extend beyond physical improvements to facilities. \textit{Id}. at 2611. Further, the Court found it unlikely that Congress would grant the EPA what it perceived to be the authority to balance vital considerations of national policy that could potentially impact the energy industry to the tune of multiple billions of dollars. \textit{Id}. at 2605.
\end{itemize}
to new and unexpected challenges.\textsuperscript{120} Instead of cautioning courts not to impose their own judgment in place of an expert agency’s interpretation when the language of a statute confers a broad, ambiguous grant of authority, as in \textit{Chevron}, the MQD allows courts to “substitute[] [their] own ideas about policymaking for Congress’s,” and to “decide how much regulation is too much.”\textsuperscript{121} In the environmental context specifically, the MQD robs from the EPA the power delegated to it by Congress “to respond to ‘the most pressing environmental challenge of our time.’”\textsuperscript{122}

III. THE COURT’S REASONING

The \textit{Sackett} Court, despite issuing a unanimous judgment that the wetlands on the Sacketts’ property were not WOTUS, spoke with four distinct voices, each expressing a different interpretation of the scope of federal regulatory authority under § 404 of the CWA.\textsuperscript{123} Writing for the Court, Justice Alito first expressed concern over the broad scope of the most recent definition of WOTUS promulgated by the EPA and the Corps.\textsuperscript{124} Under that rule, WOTUS included traditional navigable waters, interstate waters, and the territorial seas, as well as tributaries of, and wetlands adjacent to, such waters.\textsuperscript{125} It also included wholly intrastate features like lakes, ponds, streams, and wetlands, provided such features had either a continuous surface connection or a significant nexus to interstate or traditional navigable waters.\textsuperscript{126} Justice Alito found the EPA’s admission that under the significant nexus test virtually any water or wetland was potentially regulable\textsuperscript{127} to be prejudicial to the rights of property owners who would have to hire private
consultants at considerable expense to determine whether a particular piece of property contained WOTUS.\textsuperscript{128}

Looking to the text of the CWA, Justice Alito found that the plurality in \textit{Rapanos} provided the correct definition of WOTUS.\textsuperscript{129} Under this definition, WOTUS encompasses only geographic features such as oceans, lakes, rivers, and streams that constitute fairly permanent or constantly flowing water bodies.\textsuperscript{130} According to Justice Alito, the definition accepted by the \textit{Rapanos} plurality was consistent with Congress’s use of the plural “waters,” which generally refers to relatively permanent bodies of water, not inclusive of wetlands.\textsuperscript{131} Moreover, he stated that this reading aligned the meaning of WOTUS with the meaning of “navigable waters,” \textsuperscript{132} the statutory history of the CWA,\textsuperscript{133} and prior opinions of the Court.\textsuperscript{134}

Despite noting that wetlands do not fall into traditional notions of waters, Justice Alito reasoned that when placed in its statutory context, WOTUS includes some wetlands.\textsuperscript{135} To Justice Alito, the 1977 Amendments authorizing states to regulate discharges into any WOTUS except traditional navigable waters, “including wetlands adjacent thereto,”\textsuperscript{136} indicated that adjacent wetlands are part of WOTUS.\textsuperscript{137}

\textsuperscript{128} Id. at 1335–36 (citing United States Army Corps of Eng’rs v. Hawkes Co., 578 U.S. 590, 594 (2016)). Justice Alito was further troubled by the Corps’s assertion that it was not obligated to provide jurisdictional determinations upon request and by the potential that the costs associated with obtaining a discharge permit from the Corps combined with the possibility of civil and criminal penalties would cause many landowners to forego building anything. Id. at 1336.

\textsuperscript{129} Id. (citing \textit{Rapanos} v. United States, 547 U.S. 715, 739 (2006)).

\textsuperscript{130} Id. (quoting \textit{Rapanos}, 547 U.S. at 739).

\textsuperscript{131} Id. at 1336–37.

\textsuperscript{132} Id. at 1336–37 (quoting 33 U.S.C. § 1362(7)) (“Although we have acknowledged that the CWA extends to more than just traditional navigable waters, we have refused to read ‘navigable’ out of the statute, holding that it at least shows that Congress was focused on ‘its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made.’” (quoting SWANCC v. U.S. Army Corps of Eng’rs, 531 U.S. 159, 172 (2001))). Justice Alito also stated that his reading accords with the use of “waters” by Congress in other sections of the CWA and in other laws in contexts referring to open bodies of water. Id. at 1337.

\textsuperscript{133} Id. The statute that preceded the CWA applied to “interstate or navigable waters.” Id. (quoting 33 U.S.C. § 1160(a) (1970 ed.)). It defined “interstate waters” as “all rivers, lakes, and other waters that flow across or form a part of State boundaries.” Id. (quoting 33 U.S.C. § 1173(e)).

\textsuperscript{134} Id. at 1338. In \textit{Riverside Bayview}, the Court acknowledged that “traditional notions of ‘waters’ do not include wetlands.” 474 U.S. 121, 133 (1985). Moreover, in SWANCC, the Court suggested that WOTUS primarily refers to traditional navigable waters, 531 U.S. at 168–69, 172.

\textsuperscript{135} \textit{Sackett III}, 143 S. Ct. at 1338–39.

\textsuperscript{136} Id. at 1339 (quoting 33 U.S.C. § 1344(g)(1)).

\textsuperscript{137} Id. To arrive at this conclusion, the Court reasoned that under the language of § 1344(g)(1), adjacent wetlands (category C) were included in traditional navigable waters (category B), which in turn were part of WOTUS (category A). Id.
To be included within WOTUS, however, Justice Alito concluded that adjacent wetlands must qualify as WOTUS in their own right.\(^{138}\) This meant that they must be indistinguishable from a body constituting waters under the CWA.\(^ {139}\) Thus, Justice Alito held that the CWA only extends to wetlands adjoining traditional interstate or navigable waters.\(^ {140}\) In his view, adopting a broader interpretation would flout the requirement for Congress to use “exceedingly clear language” if it intends to significantly shift the balance between state and federal governance of private property.\(^ {141}\) Accordingly, Justice Alito adopted the test of the plurality in \textit{Rapanos} to govern when adjacent wetlands constitute WOTUS.\(^ {142}\) This test requires the agency asserting jurisdiction to establish that (1) the adjacent body of water is a WOTUS and (2) the wetland has a continuous surface connection with that WOTUS, such that it is “difficult to determine where the ‘water’ ends and the ‘wetland’ begins.”\(^ {143}\)

Justice Thomas concurred, adding that he would further limit the reach of the CWA based on the jurisdictional terms “navigable waters,” “navigable waters of the United States,” and “waters of the United States.”\(^ {144}\) Justice Kavanaugh, in an opinion concurring in the judgment, agreed with Justice Alito’s refusal to adopt the significant nexus test.\(^ {145}\) However, he disagreed with Justice Alito’s conclusion that the test announced by the \textit{Rapanos} plurality was the proper one for determining when wetlands are WOTUS, stating that the test departed from the text of the statute, over four

\(^{138}\) \textit{Id.}  \\
\(^{139}\) \textit{Id.}  \\
\(^{140}\) \textit{Id.} at 1340. While recognizing that “adjacent” may mean either “contiguous” or “near,” Justice Alito reasoned that nearby wetlands that are separated from traditional navigable waters cannot be considered part of those waters. \textit{Id.} at 1339 (quoting \textit{RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE} (2d ed. 1987)). However, he acknowledged that phenomena such as dry spells and low tides can temporarily interrupt surface connection and further warned that landowners cannot remove wetlands from federal jurisdiction by illegally constructing a barrier to separate wetlands otherwise covered by the CWA from adjacent WOTUS. \textit{Id.} at 1341 n.16. \\
\(^{141}\) \textit{Id.} at 1341 (quoting \textit{U.S. Forest Serv. v. Cowpasture River Pres. Ass’n}, 140 S. Ct. 1837, 1850 (2020)). \\
\(^{142}\) \textit{Id.} Justice Alito declined to defer to the EPA’s understanding of the jurisdictional scope of the CWA, stating that the significant nexus test including wetlands separated from traditional navigable waters by dry land was inconsistent with the text and structure of the statute. \textit{Id.} This test would assertedly impinge on the authority of States to regulate land and water use, while under the Court’s approach, States would “continue to exercise their primary authority to combat water pollution.” \textit{Id.} at 1344. Justice Alito further reasoned that the EPA’s interpretation created vagueness concerns, as it required a case-by-case determination predicated on several open-ended factors that would provide landowners inadequate notice of their CWA obligations in the face of criminal sanctions. \textit{Id.} at 1342. Finally, Justice Alito rejected the EPA’s argument that Congress acquiesced to the EPA’s interpretation of adjacent wetlands when it enacted § 1344(g)(1). \textit{Id.} \\
\(^{143}\) \textit{Id.} at 1340 (quoting \textit{United States v. Rapanos}, 547 U.S. 715, 742 (2006)). \\
\(^{144}\) \textit{Id.} at 1345 (Thomas, J., concurring). \\
\(^{145}\) \textit{Id.} at 1362 (Kavanaugh, J., concurring in judgment).
decades of agency practice, and Supreme Court precedent.\textsuperscript{146} Looking to the
text of the CWA, Justice Kavanaugh focused primarily on the distinction
between “adjoining” and “adjacent.”\textsuperscript{147} He noted that while “adjoining”
refers only to wetlands bordering or contiguous to a WOTUS, “adjacent”
embraces adjoining wetlands \textit{and} those separated from covered waters by
man-made or natural barriers.\textsuperscript{148} Accordingly, “adjacent” unambiguously
covers a wider range of wetlands than “adjoining.”\textsuperscript{149} Based on this
distinction and longstanding recognition by both Congress and the Court that
jurisdiction under the CWA extends to wetlands adjacent to covered waters,
Justice Kavanaugh concluded that the plain meaning of the statutory text
rejects the continuous surface connection requirement and that the Court had
manufactured ambiguity in an unambiguous statute.\textsuperscript{150} Finally, Justice
Kavanaugh found that by greatly narrowing the scope of federal authority
over wetlands under the CWA, Justice Alito’s opinion ignored Congress’s
intent\textsuperscript{151} and failed to recognize the potential consequences of its holding.\textsuperscript{152}
These consequences include removing long-regulated wetlands from federal
jurisdiction\textsuperscript{153} and creating regulatory uncertainty.\textsuperscript{154}

\begin{footnotes}
\item[146] Id.
\item[147] Id. (quoting 33 U.S.C. §§ 1344(g), 1362(7)).
\item[148] Id. at 1364 (“As applied to wetlands, a marsh is adjacent to a river even if separated by a
levee, just as your neighbor’s house is adjacent to your house even if separated by a fence or an
alley.”). Moreover, Justice Kavanaugh recognized that Congress expressly used the term
“adjoining” in other provisions of the CWA and that the Court has recognized the distinction
between “adjoining” and “adjacent” in other contexts. Id. at 1364 (finding that under a federal
statute, timber could be taken from land adjacent to a railroad right of way but not land “contiguous
to or actually touching” the right of way (quoting United States v. Saint Anthony R.R. Co., 192 U.S.
524, 538 (1904))).
\item[149] Id. at 1367.
\item[150] Id. at 1364, 1367. Justice Kavanaugh further noted that since the 1977 Amendments to the
CWA, across eight administrations with markedly different stances on environmental regulation,
the EPA and the Corps have maintained that adjacent wetlands include those separated from covered
waters by natural or artificial barriers. Id. at 1365. This consistency reinforced Justice Kavanaugh’s
interpretation of the plain meaning of the text of the CWA. Id.
\item[151] Id. at 1367. Unlike Justice Alito, Justice Kavanaugh saw the 1977 Amendments as
Congress’s acquiescence to the Corps’s assertion of jurisdiction over adjacent wetlands. Id. (quoting
United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 137 (1985)).
\item[152] Id. at 1368.
\item[153] Id. Removing such wetlands from the EPA and the Corps’s CWA jurisdiction, in turn, will
have negative impacts on the quality of neighboring and downstream WOTUS due to decreased
pollution filtration, water storage, and flood control. Id.
\item[154] Id. According to Justice Kavanaugh, the Court’s test raised troublesome questions likely to
produce arbitrary results. Id. These questions include how difficult it needs to be to discern the
boundary between a water and a wetland for the two to be considered contiguous, and how
temporary an interruption in surface connection needs to be to not disqualify a wetland from
coverage. Id.
\end{footnotes}
Justice Kagan authored a separate opinion concurring in the judgment, in part echoing the conclusions reached by Justice Kavanaugh. Like Justice Kavanaugh, she maintained that the test adopted by Justice Alito for determining when wetlands are WOTUS contravened the intent of Congress, which “wrote the statute it meant to” in 1972 to address a major, national water quality crisis. To address this problem and achieve its goal of restoring and maintaining the integrity of WOTUS, Congress needed an expansive program. An integral part of this program was regulating and protecting wetlands, both those contiguous to and nearby covered waters. Justice Kagan further criticized Justice Alito for manufacturing a clear statement rule to support his holding that only wetlands adjoining traditional navigable waters are WOTUS. She asserted that this rule, by impairing the EPA’s ability to regulate a majority of the nation’s wetlands, served to prevent the agency from fulfilling its congressional mandate to preserve the health of WOTUS.

IV. ANALYSIS

The Supreme Court, in Sackett v. EPA, held that only those adjacent wetlands with a continuous surface connection to traditional navigable waters

155. Id. at 1359 (Kagan, J., concurring in judgment).
156. Id. This problem was characterized by a fire on Ohio’s Cuyahoga River, which was contaminated by oil and “other industrial wastes;” “[r]ivers, lakes, and creeks across the country” that were “unfit for swimming;” drinking water “full of hazardous chemicals;” and fish that were “dying in record numbers” and were “too contaminated to eat.” Id. (quoting ROBERT W. ADLER ET AL., THE CLEAN WATER ACT: 20 YEARS LATER 5 (1993)).
157. Id. at 1359–60 (citing 33 U.S.C. § 1251(a)). Therefore, Congress intended the CWA to be a comprehensive, all-encompassing program for regulating water pollution that totally restructured and rewrote existing water pollution law. Id. (quoting Milwaukee v. Illinois, 451 U.S. 304, 317 (1981)).
158. Contiguous wetlands and those separated from covered waters by natural or artificial barriers serve the same vital functions in aquatic environments. See id. at 1368 (Kavanaugh, J., concurring in judgment).
159. Id. at 1360–62 (Kagan, J., concurring in judgment).
160. Id. at 1360–61. Justice Kagan drew parallels between Justice Alito’s opinion and the Court’s holding in West Virginia v. EPA. Id. at 1361 (citing West Virginia v. EPA, 142 S. Ct. 2587, 2599–600, 2609 (2022)). Just as the West Virginia Court used the major questions doctrine to narrow the scope of an unambiguously broad term, here, Justice Alito used the clear statement rule to narrow the scope of “adjacent,” an expansive term unambiguously employed by Congress. Id. In doing so, Justice Alito improperly rewrote a plain Congressional mandate and appointed himself “as the national decision-maker on environmental policy.” Id. at 1362. Thus, according to Justice Kagan: “[T]he Court substitutes its own ideas about policymaking for Congress’s. The Court will not allow the Clean Water Act to work as Congress instructed. The Court, rather than Congress, will decide how much regulation is too much.” Id. (citing West Virginia, 142 S. Ct. at 2643 (Kagan, J., dissenting)).
161. 143 S. Ct. 1322 (2023) (majority opinion).
are subject to the Corps’s jurisdiction under § 404 of the CWA. In so holding, the Court adopted the jurisdictional test announced by the plurality opinion in *Rapanos v. United States*, which was grounded in a misinterpretation of precedent and a misreading of statutory language. The Court’s focus on federalism and property rights improperly shifted the relevant inquiry away from the protection of the integrity of the nation’s waters, foregoing the true intent behind the enactment of the CWA and imposing the Court’s own policy judgments in place of those of Congress. Finally, the Court, in adopting its continuous surface connection test, failed to consider the far-reaching consequences of its holding, which has opened the door for extensive degradation of the nation’s water quality.

A. The Sackett Court Misinterpreted Precedent and Engaged in a Deliberate Misreading of Statutory Language

The “continuous surface connection test” adopted by the *Sackett* Court was first articulated by Justice Scalia in his plurality opinion in *Rapanos*. The test originated from a series of misinterpretations of Supreme Court precedent defining the scope of the Corps’s jurisdiction under § 404 of the CWA. In adopting the continuous surface connection test, the *Sackett* Court adopted these flawed interpretations, embracing a standard that is contrary to law and to science. First, the continuous surface connection test mischaracterizes the line-drawing problem identified by the Court in *Riverside Bayview*, thereby limiting the ability of the EPA and the Corps to make expert determinations regarding the ecological linkages between wetlands and adjacent WOTUS. Second, the test disregards the *Riverside Bayview* Court’s recognition that even wetlands not created by flooding or permeation from adjacent streams, rivers, and lakes can constitute WOTUS and places undue weight on *Riverside Bayview*’s holding that actual abutment upon a navigable water was sufficient (rather than necessary) to create jurisdiction over an adjacent wetland. Third, the test, as articulated by the *Rapanos* plurality, improperly treats SWANCC, a case involving completely isolated water bodies lacking any connection to a covered WOTUS, as a limitation on federal authority to regulate wetlands adjacent to traditional aquatic areas.

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162. *Id.* at 1341 (majority opinion).
163. *See infra* Section IV.A.
164. *See infra* Section IV.B.
165. *See infra* Section IV.C.
166. 547 U.S. at 742.
168. *See infra* notes 172–177 and accompanying text.
Finally, in interpreting the language of the CWA, the Sackett Court, justifying its adoption of the continuous surface connection test, disregarded the plain meaning of the term “adjacent,” instead applying a newly identified “clear statement rule” to create ambiguity in an unambiguous term employed by Congress to enact a broad grant of regulatory authority.171

The Rapanos plurality misconstrued the line-drawing problem recognized by the unanimous Court in Riverside Bayview.172 In Riverside Bayview, the question before the Court was whether the CWA conferred jurisdiction on the Corps to regulate wetlands adjacent to navigable bodies of water and their tributaries.173 Justice White, writing for the Court, described a continuum of wetness with aquatic areas on one end, dry land on the other, and features such as “shallows, marshes, mudflats, [and] bogs” falling in between.174 The line-drawing problem facing the Riverside Bayview Court involved determining where on that continuum to draw the theoretical “line” demarcating the outer limits of federal jurisdiction to regulate WOTUS, and whether wetlands, as a class, fell within that line.175 It did not, as the Rapanos plurality suggests, involve determining whether a specific, individual wetland is jurisdictional based on the Corps’s inability to physically distinguish it from a covered WOTUS.176 Moreover, noting the challenges inherent in drawing the line demarcating the outer limits of federal jurisdiction to regulate WOTUS and the agency’s expertise on the ecological linkages between wetlands and adjacent waters, the Court deferred to the Corps’s decision to regulate wetlands adjacent to traditional navigable waters and their tributaries.177 Thus, the Rapanos plurality erred in construing a decision recognizing the breadth of the Corps’s authority under the CWA as a limitation on that authority.

Additionally, the continuous surface connection test attributes undue significance to the Riverside Bayview Court’s finding that the wetland at

170. See infra notes 182–189 and accompanying text.
171. See infra notes 190–204 and accompanying text.
174. Id. at 132.
175. Brief for Respondents, supra note 172, at 26 (quoting Riverside Bayview, 474 U.S. at 132).
176. Brief for the Respondents, supra note 172, at 26. This characterization is consistent with science, as experts state that it is almost always possible for wetlands researchers to discern where a water body physically ends and a wetland begins. Royal C. Gardner, The US Supreme Court Has Gutted Federal Protection for Wetlands—Now What?, NATURE (June 5, 2023), https://www.nature.com/articles/d41586-023-01827-y (noting that wetland vegetation typically “begins at a certain water depth, easily visible to wetland scientists and consultants”). In other words, the boundary-drawing problem noted by the Rapanos plurality has no basis in scientific reality.
177. Riverside Bayview, 474 U.S. at 134.
issue was jurisdictional because it “actually abut[ted]” on navigable waters. This finding followed the Court’s acknowledgement that even wetlands not created by flooding or permeation from adjacent streams, rivers, and lakes can be defined as WOTUS under the CWA based on the Corps’s conclusion that such wetlands may still affect the water quality of these adjacent bodies. Thus, the Court upheld the Corps’s conclusion that the wetland at issue was jurisdictional based on the intuition that the agency could reasonably find that a wetland directly abutting a WOTUS would affect that WOTUS’s water quality. Stated differently, the Riverside Bayview Court viewed a continuous surface connection with a covered WOTUS as sufficient, rather than necessary, to create jurisdiction over an adjacent wetland under the CWA.

Consequently, the Rapanos plurality was further mistaken in interpreting the decision in SWANCC as standing for the proposition that Riverside Bayview limited the Corps’s jurisdiction over adjacent wetlands to those with a continuous surface connection to a covered WOTUS. In SWANCC, the Court reviewed the Corps’s assertion of jurisdiction over isolated, seasonal ponds that were not adjacent to any traditional navigable waterway or its tributaries. The SWANCC Court distinguished these ponds from adjacent wetlands as a class on the basis that assertion of jurisdiction over the latter was consistent with Congress’s intent to protect water quality by regulating wetlands “inseparably bound up” with WOTUS, while assertion of jurisdiction over the former was not. The SWANCC Court did recognize that the Riverside Bayview Court upheld the Corps’s assertion of § 404 jurisdiction over wetlands that abutted on traditional navigable waters. However, according to the SWANCC Court, it was the significant nexus between adjacent wetlands and covered WOTUS—rather than the inability to physically determine where a WOTUS ends and a wetland begins—that informed the Riverside Bayview Court’s reading of the CWA. It was the lack of such a significant nexus that removed the ponds at issue in SWANCC.

178. Id. at 135.

179. Id. at 134.

180. Id. at 135.

181. Id.


184. Riverside Bayview, 474 U.S. at 134. By referring to wetlands “inseparably bound up” with WOTUS, the Riverside Bayview Court meant those wetlands that, in the Corps’s opinion, formed part of the aquatic system of other WOTUS because they either bordered or were in reasonable proximity to those WOTUS. Id. at 134 (quoting 42 Fed. Reg. 37128 (July 19, 1977)).

185. SWANCC, 531 U.S. at 167.

186. Id.

187. Id. at 168.
from federal jurisdiction under the Act. Therefore, SWANCC does not support the Rapanos plurality’s contention that § 404 jurisdiction over wetlands under Riverside Bayview turns on the existence of a continuous surface connection.

In adopting a test grounded in an improper reading of the Court’s own precedent, the Sackett Court also impermissibly altered the meaning of the term “adjacent” and misconstrued the language of the 1977 Amendments to the CWA to support its own policy judgment that the scope of the Act should be narrower than intended by Congress. To begin, Justice Alito’s statement that “‘adjacent’ may mean either ‘contiguous’ or ‘near’” performs a linguistic sleight of hand, a subtle manipulation of the term’s dictionary definition. He derives support for his conclusion that only a subset of adjacent wetlands are regulable under the CWA by treating the word “contiguous” (or “adjoining”) as separate from—rather than encompassed by—the term “near,” which is the primary definition of “adjacent.”

However, as Justice Kavanaugh notes in his opinion concurring in the judgment, Black’s Law Dictionary defines “adjacent” as “[l]ying near or close to” and specifies that adjacent bodies need not actually touch. A more correct statement of the definition, then, is that contiguity is sufficient, but not necessary, to establish adjacency or nearness. Contrary to Justice

188. Id.
190. See Sackett III, 143 S. Ct. 1322, 1360–61 (2023) (Kagan, J., concurring in judgment) (“[T]he majority shelves the usual rules of interpretation—reading the text, determining what the words used there mean, and applying that ordinary understanding even if it conflicts with judges’ policy preferences.”).
191. Id. at 1339–40 (majority opinion) (emphasis added).
192. Id. at 1339.
193. Id. at 1363–64 (Kavanaugh, J., concurring in judgment) (quoting BLACK’S LAW DICTIONARY (4th ed. rev. 1968)). Black’s Law Dictionary’s definition of “adjacent” has remained the same since 1968. See Adjacent, BLACK’S LAW DICTIONARY (4th ed. 1968) (“Lying near or close to; sometimes, contiguous; neighboring.”); Adjacent, BLACK’S LAW DICTIONARY (11th ed. 2019) (“Lying near or close to, but not necessarily touching.”). In 1977, Black’s Law Dictionary specifically distinguished “adjoining” from “adjacent.” See Adjoining, BLACK’S LAW DICTIONARY (4th ed. 1968) (“The word in its etymological sense, means touching or contiguous, as distinguished from lying near to or adjacent.”). Further, the 1977 definition of “adjacent” explains that “[a]djacent implies that the two objects are not widely separated, though they may not actually touch... while adjoining imports that they are so joined or united to each other that no third object intervenes.” Adjacent, BLACK’S LAW DICTIONARY (4th ed. 1968) (first citing Harrison v. Guilford County, 12 S.E.2d 269 (N.C. 1940); then citing Wolfe v. Hurley, 46 F.2d 515, 521 (W.D. La. 1930)). This supports the intuition that adjacent bodies may be separated by an intervening object. See also Sackett III, 143 S. Ct. at 1363–64 (“As applied to wetlands, a marsh is adjacent to a river even if separated by a levee, just as your neighbor’s house is adjacent to your house even if separated by a fence or an alley.”).
194. See id. at 1364 (“‘Adjacent’ includes ‘adjoining’ but is not limited to ‘adjoining.’”); United States v. St. Anthony R.R. Co., 192 U.S. 524, 533 (1904) (stating that “adjacent” is almost but not
Alito’s opinion, accepting that Congress meant what it said when it used the term adjacent instead of adjoining is not “an exercise in ascertaining ‘the outer limits of a word’s definitional possibilities.’”\textsuperscript{195} Rather, it adheres to the principle that “[i]f the intent of Congress is clear . . . the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”\textsuperscript{196}

Section 404 of the CWA provides that states may regulate discharges into (1) any WOTUS, (2) except for traditional navigable waters, (3) including adjacent wetlands.\textsuperscript{197} This is a clear statement that wetlands adjacent to traditional navigable waters are themselves WOTUS.\textsuperscript{198}

Justice Alito reasons in his opinion that “Congress does not ‘hide elephants in mouseholes’”\textsuperscript{199} and that reading § 404 to mean that navigable entirely synonymous with “contiguous” and “adjoining” and that adjacent objects “need not be adjoining or actually contiguous”).

\textsuperscript{195} Sackett III, 143 S. Ct. at 1340 (quoting FCC v. AT&T Inc., 562 U.S. 397, 407 (2011)). The FCC Court used this language to support its refusal to disregard the plain meaning of “personal privacy” under Exemption 7(C) of the Freedom of Information Act, 5 U.S.C. § 552(b)(7)(C), by finding that the exemption applied to corporations, which would contravene Congress’s intent. 562 U.S. at 407–09. By contrast, in Sackett III, the Court cited FCC in support of its decision to disregard the ordinary meaning of adjacent, thereby contravening, rather than upholding, the intent of Congress. 143 S. Ct. at 1340 (citing FCC, 562 U.S. at 407)).

\textsuperscript{196} Chevron, U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837, 842–43 (1984). Although Chevron has fallen out of favor with the Court, see supra Section II.D, prior decisions by Justices Alito and Scalia cite to its mandate that agencies must adhere to Congressional intent. See, e.g., Nat’l Ass’n of Home Builders v. Defs. of Wildlife, 551 U.S. 644, 665 (2007) (quoting Chevron, 467 U.S. at 842–43) (“If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”); Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 326 (2014) (quoting Nat’l Ass’n of Home Builders, 551 U.S. at 665) (“Agencies exercise discretion only in the interstices created by statutory silence or ambiguity; they must always ‘give effect to the unambiguously expressed intent of Congress.’”).

\textsuperscript{197} 33 U.S.C. § 1344(g)(1). The statute states:

The Governor of any State desiring to administer its own individual and general permit 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 in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce shoreward to their ordinary high water mark, including all waters which are subject to the ebb and flow of the tide shoreward to their mean high water mark, or mean higher high water mark on the west coast, including wetlands adjacent thereto) within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact.

\textsuperscript{Id.}

\textsuperscript{198} Sackett III, 143 S. Ct. at 1360 (Kagan, J., concurring in judgment) (citations omitted) (“As the majority concedes, the statute ‘tells us that at least some wetlands must qualify as “waters of the United States.”’ More, the statute tells us what those ‘some wetlands’ are: the ‘adjacent’ ones. And again, as Justice Kavanaugh shows, ‘adjacent’ does not mean adjoining.”).

\textsuperscript{199} Id. at 1340 (majority opinion) (quoting Whitman v. Am. Trucking Ass’ns, Inc., 531 U.S. 457, 468 (2001)). The Court’s citation to Whitman for support is misplaced. In Whitman, the Court used this principle not to invalidate a clear delegation of authority by Congress to an agency, but to
waters include WOTUS and adjacent wetlands that are not indistinguishably part of other covered WOTUS would impermissibly broaden the scope of the Corps’s jurisdiction under the CWA. However, that is exactly the reading that Congress intended when it adopted the 1977 Amendments and thereby acquiesced to the EPA and the Corps’s decades-long practice of defining adjacent wetlands as those contiguous with traditional navigable waters and those separated from such waters by a natural or artificial barrier. Use of the word “including” in the 1977 Amendments conveys Congress’s intent that not some but all wetlands adjacent to covered WOTUS should be considered WOTUS in their own right. Due to the potential of all wetlands, even those separated from covered WOTUS by natural or manmade barriers, to impact the quality of adjacent WOTUS, this reading of the intent behind § 404 is consistent with the CWA’s overall goal of eliminating water pollution in the United States.

B. The Court’s Focus on Federalism and Property Rights Improperly Shifted the Focus of the Inquiry Away from the True Congressional Intent Behind the CWA.

Since the CWA was enacted in 1972, the § 404 permitting program has faced criticism for its tendency to interfere with the development of private property. Consequently, Sackett reflects how the framing of litigation over invalidate the automobile industry’s contention that unambiguous language in the CAA stating that the EPA could only consider effects on public health or welfare when setting national ambient air quality standards did not prohibit the agency from considering cost. 531 U.S. at 468–69. 200. Sackett III, 143 S. Ct. at 1360. 201. See also United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 136 (1985) (“Congress acquiesced in the administrative construction.”). 202. 33 U.S.C. § 1344(g)(1). 203. Although Justice Alito reasoned, without support, that by using the word “including,” Congress made clear that it did not intend to regulate wetlands that do not adjoin traditional navigable waters, Sackett III, 143 S. Ct. at 1340, the language of § 404 is plainly read to mean that adjacent wetlands are definitionally part of WOTUS as a class, not that only wetlands that are indistinguishably part of WOTUS in the physical sense are jurisdictional under § 404. 204. Milwaukee v. Illinois, 451 U.S. 304, 318 (1975) (citing S. Rep. No. 92-414, at 95 (1971)). Further, Justice Alito’s reading of § 404 contradicts the rule against surplusage. See VALERIE C. BRANNON, CONG. RSCH. SERV., R45153, STATUTORY INTERPRETATION: THEORIES, TOOLS, AND TRENDS 59 (2018). Wetlands that are physically indistinguishable from other covered WOTUS would presumably be jurisdictional as an extension of those WOTUS without a provision specifically extending jurisdiction to adjacent wetlands. Moreover, Justice Alito’s failure to apply the rule against surplusage in Sackett is somewhat disingenuous. Writing for the Court in City of Chicago v. Fulton two years prior to the Sackett III decision, he utilized this canon in interpreting § 362(a)(3) of the Bankruptcy Code. 141 S. Ct. 585, 591 (2021) (“Reading § 362(a)(3) to cover mere retention of property, as respondents advocate, would . . . render the central command of § 542 largely superfluous.”). 205. Robin Kundis Craig, There Is More to the Clean Water Act Than Waters of the United States: A Holistic Jurisdictional Approach to the Section 402 and Section 404 Permit Programs, 73
the scope of the CWA has shifted from preserving the EPA’s and the Corps’s authority to protect national water quality to addressing federalism concerns and protecting private property rights. Concurrently, perceptions of the EPA and the Corps have shifted in the realm of CWA regulation from celebrating the agencies as stewards of the nation’s waters to condemning them as power-hungry villains seeking to expand their regulatory powers at the expense of defenseless landowners.

Congress enacted the CWA with the goal of creating a comprehensive scheme for regulating water pollution. Under this scheme, Congress’ primary goal was to solve what had become a national water pollution crisis by eliminating water pollution in the United States. The Court, recognizing that such a broad goal would require the EPA and the Corps to exercise expansive regulatory authority, initially emphasized that the agencies were empowered to require permits for every discharge of a pollutant from a point source into practically any body of water. The Supreme Court’s holding in Riverside Bayview acknowledged this broad grant of authority by deferring to the agencies’ decision to regulate all wetlands adjacent to covered WOTUS due to the potential impact of such wetlands on national water quality.

According to Justice Alito, interpreting WOTUS as encompassing wetlands not adjoining traditional navigable waters would be contrary to the CWA’s express goal of preserving the primary authority of the states to regulate land and water use, as such an interpretation would impinge on that authority. This conclusion is irrespective of the fact that the federal government has regulated the discharge of pollutants into jurisdictional wetlands under § 404 for decades.

CASE W. RSRV. L. REV. 349, 378–79 (2022) (“[I]t is no accident that almost all constitutional takings litigation that the Clean Water Act has generated comes out of the section 404 permit program.”).

206. Id. at 379.
207. See Brief of Amicus Curiae Americans for Prosperity Foundation in Support of Petitioners at 2, Sackett III, 143 S. Ct. 1322 (No. 21-454) (criticizing the “EPA’s longstanding efforts to circumvent statutory and constitutional limits on its regulatory power under the CWA by reimagining the statutory phrase ‘waters of the United States’ to encompass, among other things, parcels of land suitable for homebuilding”).
208. Train v. New York, 420 U.S. 35, 37 (1975); see supra Section II.A.
210. Id.
214. Brief for the Respondents, supra note 172, at 3 (“For more than four decades, the expert agencies charged with administering the Act . . . have interpreted the ‘waters of the United States’ to include wetlands adjacent to other covered waters.”).
More recently, the Court has expressed concern regarding the difficulty property owners face in determining whether a particular piece of property falls under the scope of § 404 and the steep criminal and civil penalties that accompany violations of the Act. The decision in Sackett is representative of this trend, but the Sackett Court’s concerns over penalties for violations of the Act are overstated, as property owners have several avenues for avoiding such penalties. First, they can request a jurisdictional determination ("JD") from the Corps at no cost. While property owners may retain expert consultants at some personal expense to contest a JD finding that their property does contain jurisdictional wetlands, this is not required under the Act. Second, if the costs and time required to obtain an individualized, site-specific permit are prohibitive, property owners can obtain authorization to build under a general, nationwide permit under § 404(e), which typically do not require an application. Third, if even the costs of a nationwide permit are too prohibitive, property owners can simply not build and bring a suit for just compensation under the Takings Clause. While this may not be landowners’ preferred outcome, Congress was

215. See, e.g., U.S. Army Corps of Eng’rs v. Hawkes Co., 578 U.S. 590, 594 (2016) (citing 33 U.S.C. §§ 1311(a), 1319(c)–(d), 1344(a)) ("It is often difficult to determine whether a particular piece of property contains waters of the United States, but...the Clean Water Act imposes substantial criminal and civil penalties for discharging any pollutant into waters covered by the Act without a permit from the Corps.").

216. Sackett III, 143 S. Ct. at 1330 (quoting Hawkes Co., 578 U.S. at 602 (Kennedy, J., concurring)) ("The CWA is a potent weapon. It imposes what have been described as ‘crushing’ consequences ‘even for inadvertent violations.’").

217. Brief for Respondents in Opposition at 20–21, Sackett III, 143 S. Ct. 1322 (No. 21-454).

218. Id. at 20. Although the Corps is not required to provide a JD, it is the practice of the Corps to provide them under appropriate circumstances when requested. U.S. Army Corps of Eng’rs, Regulatory Guidance Letter No. 16-01 on Jurisdictional Determinations 1 (Oct. 2016). Notably, federal officials apprised the previous owners of the Sackett property that it contained wetlands subject to CWA regulation. Brief for Respondents in Opposition, supra note 217, at 4.

219. Sackett III, 143 S. Ct. at 1336.

220. Brief for Respondents, supra note 172, at 37. According to the Corps, the average processing time in 2018 for general nationwide permits that did require advance notice was 45 days, as opposed to 264 days for an individualized, site-specific permit. Reissuance and Modification of Nationwide Permits, 86 Fed. Reg. 73522, 73523 (Dec. 27, 2021). Additionally, the average cost for such permits in 2019 was between $4,412 and $14,705, as compared to $17,646 to $35,293 for a specific permit for a proposed activity affecting up to three acres of wetlands. Id. at 73569. While more than 50% of general permits require applicants to notify the Corps and receive written verification by the agency prior to engaging in some or all covered activities, nineteen application types allow applicants to proceed without such notification. Cong. Rsch. Serv., The Army Corps of Engineers’ Nationwide Permits Program: Issues and Regulatory Developments 2 (2017).

undoubtedly aware when enacting the 1977 Amendments to the CWA allowing for the regulation of adjacent wetlands that it would impact property rights, and yet still chose to grant the Corps broad authority to regulate such wetlands to preserve the integrity of the nation’s waters.222

Further, the Sackett Court, expressing federalism concerns and asserting that property rights have traditionally been left to regulation by states, applied the rule that Congress must “enact exceedingly clear language if it wishes to significantly alter the balance between federal and state power and the power of the Government over private property.”223

The “exceedingly clear language” rule is the second in a series of clear statement rules—the first being the MQD announced in West Virginia v. EPA224—applied by the current Court to limit the ability of administrative agencies to exercise their Congressionally delegated authority to regulate activities with the potential to harm our nation’s environment.225 In West Virginia, the Court narrowed Congress’s express grant of authority to the EPA to set standards of performance for new and existing power plants that reflect the “best system of emission reduction” (“BSER”) under the Clean Air Act.226 Similarly, in Sackett, the Court limited the Corps’s jurisdiction to

222. See H.R. REP. NO. 95-139, at 2 (1977) (noting that the CWA’s massive, complex regulatory scheme was adopted “in full recognition of the burdens to be imposed on industry and the nation’s communities [and] the costs in private and public terms” and that these costs “were and are justified to the extent that they advance the goal of water quality”). Congress passed the Amendments despite assertions made by Secretary of Agriculture Earl Butz in letters to the Senate and House agriculture committee chairmen that “[e]xpansion of Federal authority over dredged and fill material in U.S. waters would be ‘a dangerous extension of the long hand of the Federal Government into the affairs of private citizens.’” Id. at 69. See also Brief for Respondents, supra note 172, at 37 (“Those costs to individual dischargers are far outweighed by the public benefits that result from the CWA’s protection of wetlands.”).


224. 142 S. Ct. 2587 (2022).

225. Sackett III, 143 S. Ct. at 1362 (Kagan, J., concurring in judgment) (“The Court will not allow the Clean [Water] Act to work as Congress instructed. The Court, rather than Congress, will decide how much regulation is too much.”) (quoting West Virginia, 142 S. Ct. at 2643 (Kagan, J., dissenting)). This limitation appears to be in stark contrast to the Court’s most recent major CWA decision in County of Maui v. Hawaii Wildlife Fund, which adopted an expansive reading of the jurisdictional term “point source” in holding that the EPA could require a Section 402 permit “if the addition of the pollutants through groundwater is the functional equivalent of a direct discharge from the point source into navigable waters.” 140 S. Ct. 1462, 1468 (2020). The interplay between the Court’s decisions in Sackett III and County of Maui remains to be seen, although it is possible that under the latter, a discharge of fill material into a wetland not considered a WOTUS could still be considered a discharge from a point source into navigable waters under Section 404 if some of the fill material were to travel downstream and enter a WOTUS. Robin Kundis Craig, Does Sackett Bring Clarity to “Waters of the United States”? , AM. BAR ASS’N (June 30, 2023), https://www.americanbar.org/groups/environment_energy_resources/publications/trends/2022-2023/july-aug-2023/does-sackett-bring-clarity-to-waters-of-the-united-states/.

226. West Virginia, 142 S. Ct. at 2628 (Kagan, J., dissenting) (quoting 42 U.S.C. § 7411(a)(1)).
regulate wetlands under the CWA despite an express grant of authority by Congress to regulate all wetlands adjacent to WOTUS. In so doing, the Court has not “merely asked Congress to make policy clearly,” but rather has once again “appoint[ed] . . . itself as the national decision-maker on environmental policy.” Justice Alito’s opinion, by prioritizing property rights and federalism concerns over preserving the authority of the Corps to regulate any discharges that may affect the integrity of the nation’s waters, essentially rewrites the CWA to reflect the policy judgments of a majority of the Court.

C. The Court Showed Complete Disregard for the Consequences of Its Holding.

The Court’s adoption of the continuous surface connection test in *Sackett* has dramatically decreased the number of wetlands regulable under the CWA, which, in turn, will bring about a decline in the health and integrity of the nation’s waters as more wetlands are filled and their ecological benefits are lost. Under the EPA’s rule codifying *Sackett*, WOTUS covered under the CWA now include only those wetlands that are adjacent to “relatively permanent, standing or continuously flowing bodies of water,” and have a continuous surface connection to such waters. Under this rule, more than half of the wetlands protected by prior rules applying the significant nexus test are now vulnerable.

227. See supra Section IV.A. Curiously, the case the *Sackett* majority relied upon in imposing its new exceedingly clear language rule depended on an assertion of administrative authority as to which the applicable statutes were silent. See *Cowpasture River Pres. Ass’n*, 140 S. Ct. at 1843 (“Though the Act is silent on the issue of delegation, the Department of the Interior has delegated the administrative responsibility over each of those trails to either the National Park Service or the Bureau of Land Management, both of which are housed within the Department of the Interior.”).


230. Id. at 1361.


232. 40 C.F.R. § 120.2 (2023). “[R]elatively permanent, standing, or continuously flowing bodies of water” include (1) waters currently or previously susceptible to use in foreign or interstate commerce; (2) the territorial seas; and (3) interstate waters. Id.

In specific numerical terms, this means that 90 million acres of wetlands are no longer protected. According to the Chesapeake Bay Foundation, this number includes the hundreds of bogs and seasonal freshwater wetlands—known as pocosins and Delmarva bays—that are vital to restoring the health of the Chesapeake Bay and many wetlands in Florida’s Everglades, including an estimated 81% of wetlands in the Big Cypress Watershed. The Sackett decision also has major implications for the National Park System. For example, 86% of wetlands in just one watershed within Indiana Dunes National Park will now likely be unprotected. This foreshadows grim consequences for Indiana Dunes’s Great Marsh, one of the nation’s most biodiverse areas and home to over 1,500 species of animals and plants. Similar losses of protection will likely affect the Great Smoky Mountains National Park, among others.

The Sackett ruling will have disastrous consequences not only for previously regulated wetlands, but for all waters adjacent to but lacking a continuous surface connection with such wetlands. Wetlands provide a variety of benefits, both ecological and anthropogenic, aside from the water quality concerns that motivated Congress to regulate them under the CWA. These benefits include but are not limited to providing vital habitat for over one third of the nation’s threatened and endangered species as well as many

https://www.npr.org/2023/08/30/1196875240/more-than-half-of-wetlands-no-longer-have-epa-protections-after-supreme-court-ruling ("More than half the wetlands in the U.S. no longer have federal protections under the EPA."). The current rule reverts to the level of wetlands protection afforded under the Trump administration Navigable Waters Protection Rule, which was struck by the District of Arizona for impermissibly narrowing the regulatory authority of the Corps. See Pasqua Yaqui Tribe v. EPA, 557 F. Supp. 3d 949, 967 (D. Ariz. 2021).

236. Id.
237. Id.
238. Id.
239. Id.
240. See Brief for Respondents, supra note 172, at 24 ("Allowing wetlands to be filled without any permitting requirement would . . . threaten the integrity of traditional navigable waters.").
242. Id. This provides a glimmer of hope to the effect that some wetlands no longer regulated under the CWA could still be regulable under the Endangered Species Act, which protects “critical habitat” of endangered species from adverse government action. 16 U.S.C. §§ 1532(5)(A), 1536(a)(2). While such protections would not apply to private actors, the “take” provisions under § 9(a)(1)(B), which do apply to private actors, would potentially be triggered under the Court’s decision in Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon if the act of filling
non-endangered species of birds and mammals that depend on wetlands for survival; providing flood protection, including in the event of severe storms; and sequestering massive amounts of carbon, a crucial method of mitigating climate change impacts. One 2017 study estimates that during Hurricane Sandy alone, wetlands in the Northeastern United States were responsible for mitigating $625 million in direct flood damages. The same study noted that mangrove wetlands reduced storm surge heights by up to 9.4 cm/km inland during hurricanes Katrina and Wilma in 2005, and a 2023 study found that tidal wetlands in Galveston Bay, Texas, notably reduced flood elevation during Hurricane Ike, protecting over 18,000 people. Under Sackett and the new EPA rule, these irreplaceable functions are in danger of being lost, posing great environmental and ecological risks, as well as risks to human health and safety.

A wetland caused actual harm to an endangered species. 515 U.S. 687, 708 (1995) (holding that the Secretary of the Interior reasonably defined “harm” under Section 9 of the Endangered Species Act to include “significant habitat modification or degradation that actually kills or injures wildlife.”).


244. See Melanie Sturm, Stewardship of Wetlands and Soils Has Climate Benefits, NRDC (Sept. 30, 2019), https://www.nrdc.org/bio/melanie-sturm/stewardship-wetlands-and-soils-has-climate-benefits (“Most wetland area in the U.S. is freshwater inland wetlands, comprising 95% of all wetlands in the country. . . . Freshwater inland sites store 10.7 billion of the estimated 11.5 billion [megatons] of wetland soil carbon in the U.S.”).

245. Siddharth Narayan et al., The Value of Coastal Wetlands for Flood Damage Reduction in the Northeastern USA, SCI. REPS., Aug. 31, 2017, at 1, 2, https://www.nature.com/articles/s41598-017-09269-z.

246. Id.


248. See Jeff Turrentine, What the Supreme Court’s Sackett v. EPA Ruling Means for Wetlands and Other Waterways, NRDC (June 5, 2023), https://www.nrdc.org/stories/what-you-need-know-about-sackett-v-epa (“[A] majority of the Supreme Court has decided that it knows better than scientists, the EPA, and Congress. Our country’s wetlands, the waterways that are intrinsically connected to them, and the people who rely on them will suffer as a result.”). It is uncertain how the EPA and the Corps will proceed with evaluating future permit applications and re-evaluating existing permits after Sackett. See James Rusk et al., Supreme Court Narrows Scope of Waters Protected by the Clean Water Act in Sackett v. EPA, NAT’L L. REV. (June 1, 2023), https://www.natlawreview.com/article/supreme-court-narrows-scope-waters-protected-clean-water-act-sackett-v-epa (“The agencies may delay processing of jurisdictional determinations and permit applications for some projects. Project proponents also may have questions about the status of existing jurisdictional determinations and the need for a CWA permit going forward.”); Crunden, supra note 235 (noting the Corps “has placed a pause on key wetlands determinations pending the release of guidance explaining the impact of the Sackett ruling”). The decision may precipitate a flood of litigation by developers required to obtain § 404 permits under the significant nexus test who may choose to challenge such determinations by the EPA and the Corps under the Administrative Procedure Act’s judicial review provisions, 5 U.S.C. §§ 702, 706, arguing that the
Equally as important and especially pertinent to the goals of the CWA are the impact of wetlands, even those lacking a continuous surface connection to WOTUS, on the quality of the nation’s waters.\textsuperscript{249} According to the Biden Administration’s initial proposed rule to revise the definition of WOTUS, adjacent wetlands affect the chemical, physical, and biological integrity of downstream waters in several ways.\textsuperscript{250} These include interruption of the transport of water-borne contaminants and sediment and the mitigation of contaminants in drinking water.\textsuperscript{251} Wetlands separated from adjacent WOTUS by natural or man-made barriers serve these important water-quality functions, including the trapping of sediments and contaminants, in the same manner as those with a continuous surface connection to such WOTUS.\textsuperscript{252} These barriers generally do not entirely block the flow of water between the wetlands and WOTUS because the water can flow over or beneath them.\textsuperscript{253} Additionally, filling in these separate-but-still-adjacent wetlands can cause the contaminants trapped within them to flow out into major WOTUS, further degrading the quality of those WOTUS.\textsuperscript{254}

Furthermore, although being celebrated as a victory for federalism and private property rights,\textsuperscript{255} the Court’s holding in \textit{Sackett} will place a heavy burden on states without independent permitting programs to adopt such programs if they want to maintain the same level of jurisdiction to protect wetlands within their borders from degradation.\textsuperscript{256} Of the fifty United States, twenty-four do not operate independent permitting programs regulating wetlands that do not constitute WOTUS,\textsuperscript{257} making wetlands in these states on their property are no longer jurisdictional under \textit{Sackett’s} continuous surface connection test. Developers who have not yet applied for discharge permits may simply choose to develop, anticipating regulatory gridlock and increased litigation burdens on the agencies that may inhibit their ability to bring enforcement actions under § 404.

\textsuperscript{249} See Brief for Respondents, supra note 172, at 24.
\textsuperscript{251} Id.
\textsuperscript{252} Id. at 69429.
\textsuperscript{253} Id. at 69421, 69429.
\textsuperscript{254} Brief for Respondents, supra note 172, at 24.
\textsuperscript{255} Jonathan H. Adler, \textit{In Sackett v. EPA, the Supreme Court Cuts Back Federal Regulatory Authority Over Wetlands}, \textit{REASON: THE VOLOKH CONSPIRACY} (May 25, 2023, 4:33 PM), https://reason.com/volokh/2023/05/25/in-sackett-v-epa-the-supreme-court-cuts-back-federal-regulatory-authority-over-wetlands/ (“Under this decision, it will be significantly more difficult for the EPA or Army Corps of Engineers to assert federal regulatory authority over private land under the CWA. Landowners like the Sacketts will thus be able to make use of and develop their lands without worrying so much about \textit{federal regulators.”}).
\textsuperscript{256} James McElfish et al., \textit{Analyzing the Consequences of Sackett v. EPA}, 53 \textit{ENV’T L. REP.} 10693, 10698 (2023).
especially vulnerable after *Sackett*. Of the nineteen states that have comprehensive permitting programs for regulating non-WOTUS wetlands, some have important limitations. For example, New York’s program only covers wetlands larger than 12.4 acres or those of “unusual importance.” Thus, the argument that landowners will still be subject to significant state and local wetlands regulations may, depending on the location, have a limited basis in reality.

As noted by Justice Kavanaugh, the new test will also raise a host of questions about the boundary between a water and a wetland. How difficult must it be to discern the boundary between a water and a wetland for the two to be considered “contiguous”? How temporary must “‘interruptions in surface connection’” be to not disqualify wetlands from coverage? Consequently, despite demanding “exceedingly clear language” from Congress, and despite purporting to clarify the meaning of WOTUS under the CWA, the Court’s opinion performs the great irony of doing just the opposite. Particularly troubling in this regard is the reality that it is almost always possible for scientists to tell where water ends and a wetland begins. Opinions like *Sackett*, which impose legal tests completely divorced from science, are prime illustrations of the wisdom behind *Chevron* doctrine and why deference to agency experts on matters of great scientific or complexity is still as vitally important today as it was in 1984 when *Chevron* was decided.

D. The Court Could Have Avoided Uncertainty by Adopting the Significant Nexus Test Long Applied by Lower Federal Courts.

The Court could have avoided the uncertainty surrounding the proper application of the continuous surface connection test by affirming the judgment of the Ninth Circuit that the significant nexus test is the proper test for determining whether a wetland is jurisdictional under the CWA. All federal courts to address the scope of federal jurisdiction over adjacent

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258. McElfish et al., supra note 256, at 10698.
259. Id. at 10699 (citing N.Y. ENV’T. CONSERV. LAW §§ 24-0101 et seq. (McKinney 2022)).
260. Id. New York has amended its rule to reduce the size of regulated wetlands to 7.4 acres. Id.
261. See Adler, supra note 255 (“[Landowners] will still be subject to state and local regulation, however, and in many places such regulatory restrictions may remain significant.”).
263. Id.
264. Id. at 1368–69.
265. Id. at 1328, 1341 (quoting U.S. Forest Serv. v. Cowpasture River Pres. Ass’n, 140 S. Ct. 1837, 1849–50, 1861 (2020)).
266. Gardner, supra note 176.
wetlands after *Rapanos* adopted the significant nexus test, and as a result, have experience applying this test.\footnote{268} Further, for those courts that have not yet had reason to use the test, the EPA has promulgated extensive guidance explaining how to apply it.\footnote{269} True, the significant nexus test creates its own form of uncertainty due to its dependence on case-by-case determinations to ascertain when individual wetlands constitute WOTUS.\footnote{270} However, the continuous surface connection test rests upon a scientific fiction and will inevitably lead to confusion amongst both regulated entities and expert regulators.\footnote{271} The significant nexus test, to the contrary, relies on fact-driven assessments that evaluate the interrelatedness between traditional navigable waters and their tributaries and adjacent WOTUS based on proven scientific factors.\footnote{272} With time and continuous application, the contours of this test, based in scientific reality, can be refined to provide clearer guidance to the regulated and the regulators alike, allowing EPA and the Corps to utilize their expertise in the manner Congress intended.\footnote{273}

Justice Alito’s opinion erred in construing the significant nexus test as an impermissible broadening of federal jurisdiction.\footnote{274} Rather than an expansive reading of regulatory authority under the CWA, the test is in fact a limiting construction including only a subset of wetlands adjacent to traditional navigable waters: those that “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.’”\footnote{275} Despite this, it better comports with the purpose of the CWA to protect the nation’s waters than does the continuous surface connection test, which emphasizes the proximity of a wetland to nearby WOTUS over its impact on the health of such waters, which is the

\footnote{268} Brief for Respondents in Opposition, \textit{supra} note 217, at 17.\footnote{269} See Memorandum on Clean Water Act Jurisdiction Following the U.S. Supreme Court’s Decision in *Rapanos v. United States* & *Carabell v. United States* from Benjamin H. Grumbles, Assistant Adm’r for Water, EPA & John Paul Woodley, Jr., Assistant Sec’y of the Army, Civil Works, Dep’t of the Army, at 8 (June 5, 2007), https://www.epa.gov/sites/default/files/2016-04/documents/rapanosguidance6507.pdf [hereinafter EPA & Corps Memorandum].\footnote{270} The Fourth Circuit Wades In—Applying the Rapanos ‘Significant Nexus’ Test for Clean Water Act Jurisdiction To Wetlands Adjacent to Nonnavigable Tributaries, E. WATER L. & POL’Y REP., Mar. 2011, at 76, 78.\footnote{271} See \textit{supra} text accompanying note 266.\footnote{272} See generally EPA & Corps Memorandum, \textit{supra} note 269.\footnote{273} See \textit{supra} Section II.A.\footnote{274} Sackett III, 143 S. Ct. 1322, 1342 (2023).\footnote{275} EPA & Corps Memorandum, \textit{supra} note 269, at 8 (quoting Rapanos v. United States, 547 U.S. 715, 779–80 (2006)). While neither opinion concurring in the judgment clearly articulates a reason for rejecting the significant nexus test, the limiting nature of the test in comparison with the language of is one potential reason underlying their refusal to advocate for its adoption by the Court.
relevant inquiry under the CWA.\footnote{276 United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 132 (1985) (noting that Congress’s purpose in enacting the CWA was to improve water quality by restoring and maintaining the integrity of entire aquatic ecosystems).} In addition, what is lost due to the significant nexus test’s slight limitation on the breadth of the Corps’s regulatory power is made up in regulatory and judicial efficiency resulting from experience that courts, the Corps, and the EPA have gained in applying the test over the last several decades.\footnote{277 See Brief for Respondents in Opposition, supra note 217, at 17. Moving forward, states that lack comprehensive permitting programs can potentially take cues from the significant nexus test if and when they decide to adopt more protective regulatory standards for wetlands.}

CONCLUSION

In \textit{Sackett v. EPA},\footnote{278 143 S. Ct. 1322 (2023).} the United States Supreme Court held that federal regulatory authority under § 404 of the CWA extends only to relatively permanent bodies of water and those wetlands with a continuous surface connection to such waters.\footnote{279 \textit{Id.} at 1341, 1344.} The Court’s opinion, authored by Justice Alito, gave undue credence to Justice Scalia’s plurality opinion in \textit{Rapanos v. United States},\footnote{280 547 U.S. 715 (2006).} which, with its continuous surface connection test, misconstrued precedent and misinterpreted unambiguous language in 33 U.S.C. § 1344(g)(1).\footnote{281 See supra Section IV.A.} By elevating property rights and federalism concerns above Congress’s clearly expressed goal of preserving the integrity of the nation’s waters, the Court imposed its own policy judgments regarding the proper scope of regulatory authority under the CWA upon the EPA and the Corps\footnote{282 See supra Section IV.B.} and eviscerated protections for wetlands without considering the consequences of its holding.\footnote{283 See supra Section IV.C.}