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MY OWN PRIVATE IDAHO WETLAND: WHAT WILL THE COURT DO WITH THE *SACKETT* CASE

BY

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Abstract

I. BACKGROUND- HOW DID IT COME TO THIS?

Much to the surprise of legal pundits, the US Supreme Court has agreed to review the decision of the Ninth Circuit finding that the wetland on Michael and Chantelle Sackett's property is covered by the Clean Water and therefore a section 404 permit is required to build their long desired "dream home" next to Priest Lake in Idaho.[1] In accordance with the controlling authority in the Ninth Circuit and Courts of Appeal across the country the Sackett panel applied the "significant nexus" test from Justice Kennedy's concurring opinion in the famously fractured decision in *Rapanos v United States*.[2]

As framed in the petition for certiorari prepared by the Pacific Legal Foundation, the question presented was: "Should *Rapanos* be revisited to adopt the plurality's test for wetlands jurisdiction under the Clean Water Act?" The Court reframed the question more generally as:

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[1] See photos of the Sackett property in Appendix.

[2] 547 U.S. 715 (2006) (Hereafter *Rapanos*).

"Whether the Ninth Circuit set forth the proper test for determining whether wetlands are 'waters of the United States' under the Clean Water Act, 33 U.S.C. § 1362(7)." The reframing could signal that the choice is not simply "Scalia or Kennedy"—neither of whom are still on the Court—but conventional wisdom suggests an outcome much closer to the former than the latter.

The grant of cert is surprising for several reasons. First the case does not present any constitutional issues. Petitioners have not alleged violation of their property rights under the Fifth Amendment or that the case presents a serious question regarding Congress' exercise of its Commerce Clause authority.[3] Rather the case presents a seemingly straightforward question regarding the term "navigable waters" as defined to mean the "waters of the United States, including the territorial seas." 33 USC 1362(7) (hereafter "WOTUS"). WOTUS has been the subject of many administrative interpretations over the years. As discussed below the Environmental Protection (EPA) and US Army Corps of Engineers ("Corps") are currently using the "pre-2015" definition with some additional guidance.[4]

The Supreme Court has wrestled with this question three times. In *United States v Riverside Bayview* (*Riverside Bayview*) a unanimous Court ruled that a wetland "adjacent to" but not directly abutting a navigable tributary of Lake St Clair was jurisdictional.[5] In *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers,* a divided Court (5-4) ruled that the Corps' use of the so-called "migratory bird rule" to regulate an "intrastate, non-navigable, isolated" water body (an abandoned sand and gravel pit) exceeded its statutory authority.[6] And in *Rapanos* the

[3] In Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, 531 U.S. 159, 172 (2001) (SWANCC) Chief Justice Rehnquist invoked the doctrine of "constitutional avoidance" as a reason for interpreting a narrow interpretation of the term waters of the United States stating, "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress."

[4] See infra at __.

[5] 474 U.S. 121 (1985). Justice White's opinion in *Bayview* went to considerable lengths describing the ecological importance of wetlands to water quality and the broad intent of Congress in enacting the CWA to "restore and maintain the chemical, physical and biological integrity of the nation's waters." 33 USC 1251 (a).

[6] SWANCC supra n 2 at __The migratory bird rule was not a rule at all. It was a shorthand way of describing the test the Corps used under the 1986 regulations to determine whether there was a sufficient nexus to interstate commerce to justify federal regulation. The presence of migratory bird habitat was a proxy for the significant economic benefits that wetlands provide, estimated at over 40 billion dollars annually. See Jon Kusler and Jeanne Christie, "The

Court was unable to agree on a test for determining whether the wetland in question which was adjacent to a ditch many miles from the nearest navigable river was jurisdictional and simply remanded the case for further developments.[7]

Second there is no circuit split on which test is controlling under *Rapanos*.[8] Every court of appeals that has addressed the question has held that the EPA and the Corps may assert CWA jurisdiction over wetlands that satisfy the "significant nexus" test in Justice Kennedy's concurring opinion, and the Supreme Court has repeatedly declined to review those decisions.[9] None of circuit courts has ruled that the plurality opinion in *Rapanos* is controlling.

Thus, under the current state of the law the only question is whether the test set forth in Justice Scalia's plurality opinion provides an additional basis for asserting regulatory authority over wetlands and other waters in those circumstances where Justice Kennedy's test is not

SWANCC Decision: The Role of the States in Filling the Gap," Association of State Wetland Managers June 2002; https://www.nawm.org/pdf_lib/CQ_swancc_6_26_06.pdf.

[7] Rapanos 547 U.S. at 729 ("In these consolidated cases, we consider whether four Michigan wetlands, which lie near ditches or man-made drains that eventually empty into traditional navigable waters, constitute 'waters of the United States' within the meaning of the Act.") Ultimately Mr. Rapanos agreed to pay a civil penalty and recreate approximately 100 acres of wetlands and buffer areas to settle the case Se Department of Justice Press Release December 29, 2008; https://www.justice.gov/archive/opa/pr/2008/December/08-enrd-1152.html.

[8] See Marks v United States 430 U.S. 188, 193 (1977) establishing the principle that when a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." The lower courts have struggled with how to apply the *Marks* rule to the splintered result in *Rapanos*. After an extensive analysis of *Marks* and later decisions analyzing *Marks*, the First Circuit in *United States v Johnson*, 467 F.3d 56, 64-66 (1st Cir. 2006) noted that the Supreme Court had "moved away from *Marks*" and determined that neither the plurality nor Justice Kennedy's concurrence constituted the "narrowest grounds" for defining the reach of the CWA. Instead, the *Johnson* court decided to take Justice Stevens advice in his dissent in *Rapanos* and find jurisdiction if either the plurality's or Justice Kennedy's tests were met. The Third and Eighth Circuits have followed the First Circuit's reasoning. United States v. Donovan, 661 F.3d 174, 183 (3rd Cir. 2011); United States v. Bailey, 571 F.3d 791, 799 (8th Cir. 2009).

[9] See United States v. Donovan, 661 F.3d 174, 183-184 (3d Cir. 2011), cert. denied, 566 U.S. 990 (2012); United States v. Bailey, 571 F.3d 791, 799 (8th Cir. 2009); United States v. Robison, 505 F.3d 1208, 1221-1222 (11th Cir. 2007), cert. denied, 555 U.S. 1045 (2008); Northern Cal. River Watch v. City of Healdsburg, 496 F.3d 993, 999 (9th Cir. 2007), cert. denied, 552 U.S. 1180 (2008); United States v. Johnson, 467 F.3d 56, 64-66 (1st Cir. 2006), cert. denied, 552 U.S. 948 (2007); United States v. Gerke Excavating, Inc., 464 F.3d 723, 724-725 (7th Cir. 2006) (per curiam), cert. denied, 552 U.S. 810 (2007); cf. United States v. Cundiff, 555 F.3d 200, 210-213 (6th Cir.) (declining to decide which opinion in Rapanos controls because "jurisdiction [was] proper * * * under both Justice Kennedy's and the plurality's tests"), cert. denied, 558 U.S. 818 (2009); United States v. Lucas, 516 F.3d 316, 327 (5th Cir.) (similar), cert. denied, 555 U.S. 822 (2008).

satisfied. Since petitioners do not dispute that Justice Kennedy's test is satisfied there is no conflict in the lower courts requiring Supreme Court intervention.[10]

Third, the Environmental Protection Agency (EPA) has withdrawn the compliance order issued against the Sacketts in 2007 that ignited this controversy, and the Biden Administration has made it clear in court filings it has no plan to initiate a new enforcement action.[11] Notwithstanding this representation the Ninth Circuit ruled that the case was not moot because EPA might change its mind but that is a slim reed on which to rest Supreme Court review at this juncture.

Finally, and most importantly EPA and the Corps of Engineers are in the midst of a two-step rulemaking[12] to develop a revised definition of the vexed term "waters of the United States" to replace the "Navigable Waters Protection Rule" (NWPR) adopted by the previous administration. The NWPR has been vacated and remanded by two different District Courts.[13] In compliance with those decisions EPA and the Corps have announced that the NWPR will not be used in making jurisdictional determinations pending the outcome of the rulemaking.[14]

In their Phase I rulemaking the agencies have proposed to restore the pre-2015 definition of "waters of the United States," updated to reflect consideration of Supreme Court decisions in *SWANCC* and *Rapanos*.[15] The agencies believe this longstanding approach would support a stable implementation of "waters of the United States" while the agencies continue developing a new rule in consultation with states, tribes, local governments, and a broad array of stakeholders. The proposed rule was published in the Federal Register on December 7, 2021.[16] The public comment period closed on February 7, 2022.

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[10] Sacket v EPA, No. 21-454, Brief of Respondents in Opposition to Petition for Certiorari, at 16.

[11] *Id*. at 11.

[12] Corps & EPA, Pre-Publication Notice, Proposed Rule, Revised Definition of "Waters of the United States," (Nov. 18, 2021), https://go.usa.gov/xeNBV (2021 11 Notice).

[13] See Navajo Nation v. Regan, No. 20-cv-602, 2021 WL 4430466, at *5 (D.N.M. Sept. 27, 2021); Pascua Yaqui Tribe v. EPA, No. 20-cv-266, 2021 WL 3855977, at *6 (D. Ariz. Aug. 30, 2021).

[14] EPA, Current Implementation of Waters of the United States; https://www.epa.gov/wotus/current-implementation-waters-united-states.

[15] EPA, Revising the Definition of "Waters of the United States; https://www.epa.gov/wotus/revising-definition-waters-united-states.

[16] Revised Definition of ''Waters of the United States'' 88 Fed Reg 69372 (Dec 7, 2021); https://www.epa.gov/system/files/documents/2021-12/revised-definition-of-wotus_nprm_december2021.pdf.

The Court will not hear oral arguments until the Fall term. There is considerable speculation about what the agencies will do in the meantime. Republicans in Congress have urged the Biden Administration to hold off on any further rulemaking pending further "guidance" from the Court."[17] Democrats on the other hand with support from the environmental community are urging EPA and the Corps to move ahead and publish a proposed rule as soon as practicable.[18]

The agencies would be in a stronger position with a carefully crafted proposal for a revised definition of WOTUS rather than trying to defend the messy status quo. The Court needs to see something more concrete than the current "placeholder" rule reinstating the 1986 definition with a vague nod to the Court's decisions in *SWANCC* and *Rapanos*.

There is no chance the Court is going to simply uphold the Ninth Circuit. The only hope, and it is a slim one, for a delay to allow the agencies to complete their rulemaking lies in convincing the Court that the agencies are engaged in a serious effort to redraw the boundaries of federal jurisdiction under the CWA. A difficult task to be sure and one that entails shrinking the historic reach of the CWA. Triage in other words.

II. WHAT HAPPENS NOW?

With only the factual context of the Sackett case before it and no final revised WOTUS rule to review what will the Court do? With a commanding 6-3 conservative majority in charge, it is safe to assume that the Court will overturn the Ninth Circuit and perhaps scrap the significant nexus test altogether but then what? How far will the Court go in limiting the agencies discretion to craft a new rule?

That will depend in part on who is assigned to write the opinion. As Professor Richard Lazarus has written there are established patterns for how opinions are assigned.[19] Assuming Chief

[17] Hannah Northey, "EPA rule in the crosshairs as Clean Water Act heads to court," Greenwire (January 25, 2020).

[18] House Natural Resources Committee Press Release, "Committee Chairs DeFazio, Napolitano, and Beyer Lead 117 House Colleagues in Urging the Biden Administration to Finalize Science-Based Clean Water Rule," (February 08, 2022); https://transportation.house.gov/news/press-releases/chairs-defazio-napolitano-and-beyer-lead-117-house-colleagues-in-urging-the-biden-administration-to-finalize-science-based-clean-water-rule.

[19] Richard J. Lazarus, "Back to 'Business' at the Supreme Court: The Administrative Side of Chief Justice Roberts," 129 Harvard Law Review Forum, 33 (2015).

Justice Roberts is in the majority he could take the opinion himself but because there are other big cases on the docket like the Harvard affirmative action case[20] it is more likely he will assign it to another Justice. The most likely candidate is Justice Alito who is now second in seniority behind Justice Thomas and who wrote a concurring opinion in the original Sackett case.[21] He also dissented in *County of Maui v Hawaii Wildlife Fund*, discussed further below, which represents a rare win for the environmental side in a Clean Water Act case.[22]

There are many possible outcomes, but it may be helpful to group them under three general headings as discussed below. The options range from a best-case narrow decision based on the unique facts in Sackett to a worst-case wholesale adoption of the plurality opinion in *Rapanos* with a possible compromise based on the multi-factor test adopted in the *Maui* case.

The Essay concludes with some observations on what the various outcomes might mean for the future of the Clean Water Act.

III. BEST CASE: A NARROW FACT-BASED DECISION

A brief chronology is helpful to understand the current posture of the case. Petitioners purchased the property in 2004.[23] Eight years earlier, the Corps had determined that the property contains jurisdictional wetlands.[24] In 2007, petitioners trucked in a load of gravel and sand and began filling the wetlands. The Sacketts hired their own wetlands consultant who told them that the "site is part of a wetland," that it "is not an isolated wetland" but rather "joins a wetland" across the road, and that petitioners should cease construction activity and consult further with the Corps.[25] For whatever reason the Sacketts did not act on this advice.[26]

[20] Students for Fair Admissions Inc. v. President & Fellows of Harvard College Docket No 20-1199.
[21] 132 S. Ct. 1367 (2012).
[22] 140 S. Ct. 1462, 1470 (2020).
[23] Petition for Certiorari Appendix A8 ("Pet. App.").
[24] Administrative Record 92-95 ("AR").
[25] Court of Appeals Excerpt of Record, 135.
[26] Ironically, had the Sackett's followed this advice and talked to the Corps they might well have built their dream home by now. Given the small size of the project (0.63-acre lot) they might have qualified for a Letter of Permission in lieu of an individual permit. LOP's may be used where, in the opinion of the district engineer, the proposed work would be minor, would not have significant individual or cumulative impacts on environmental values, and should

EPA Region X conducted a site investigation on May 3, 2007 and advised the Sacketts that the property contained jurisdictional wetlands and directed that work on the home stop until a permit was obtained from the Corps.[27] In November 2007, EPA issued an administrative compliance order finding that petitioners had violated the CWA by discharging fill material into the wetlands without a permit and directing petitioners to remove the fill material and restore the wetlands.[28]

In 2008, petitioners brought an action under § 706(2) of the Administrative Procedure Act (APA) contending that EPA's initial administrative compliance order was "premised on an erroneous assertion of jurisdiction under the CWA." [29] Following a long line of precedents in several circuits, the Idaho District Court concluded that the CWA precludes "pre-enforcement" judicial review of administrative compliance orders and dismissed the complaint.[30] The Ninth Circuit affirmed.[31]

The Supreme Court granted review and held that the compliance order was a "final agency action" subject to APA review.[32] The Court reversed the judgment of the court of appeals and remanded for further proceedings.

On remand the district court granted summary judgment to EPA. The court found that substantial evidence supported the EPA's determination that petitioners' property contains wetlands that were "adjacent" to a traditionally navigable water, namely Priest Lake.[33] More specifically, the court found that the wetlands on petitioners' property are connected by a "shallow subsurface" flow to Priest Lake; that the wetlands were "only 300 feet away" from Priest Lake;

encounter no appreciable opposition. See "U.S. Army Corps of Engineers Permitting Process Information;" https://www.lrl.usace.army.mil/Portals/64/docs/regulatory/Permitting/PermittingProcessInformation.pdf.

[27] Sackett v USEPA, 2019 WL 13026870, *1 ("Sackett Remand").

[28] Pet. App. D6-D7.

[29] Pet. App. A9.

[30] Sacket v EPA, 2008 WL 3286801, at *2 (2008).

[31] Sackett v EPA, 622 F.3d 1139, 1147 (9th Cir. 2009).

[32] Sackett v EPA, 566 U.S. 120, 131 (2012).

[33] Sackett Remand, *supra* note 25, at *9.

and that the wetlands are separated from Priest Lake by "man-made barriers" without which "water would flow from the property directly into Priest Lake."[34]

The court further found that the wetlands on the property were once part of the Kalispell Bay Fen, a unified wetlands complex that was hydrologically and ecologically connected to Priest Lake. Applying Justice Kennedy's significant nexus test,[35] the court found: "The Kalispell Bay Fen wetland complex, which Plaintiffs' property was historically part of and remains connected to, is rare in northern Idaho and provides significant hydrological, biological, and ecological influences on Priest Lake by contributing to base flow; providing flow augmentation and flow attenuation; improving water quality through sediment retention which benefits fish; providing invertebrate inputs supporting fish and wildlife species; and improving fish movement."[36]

Alternatively, the district court found that petitioners' property was "adjacent" to an unnamed stream that itself could be considered a jurisdictional tributary.[37] The administrative record showed evidence of hydrological and ecological connections between the Sacketts' property, the surrounding wetlands, and the tributary which the court found supported the EPA's conclusions of adjacency and similarly situated wetlands.[38]

On appeal, the Ninth Circuit held that the case was not moot even though the EPA had withdrawn the amended compliance order while the appeal was pending.[39] Despite EPA's representation that it did not intend "to enforce the amended compliance order or issue a similar one in the future," the court reasoned that the "EPA could potentially change position under new leadership."[40]

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[34] *Id.* at * 10.

[35] *Rapanos, supra* note 2, 547 U.S. at 779 [A] significant nexus exists "if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.' When, in contrast, wetlands' effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term 'navigable waters."

[36] Sackett Remand at *11.

[37] *Id.* at * 11 The court found that the property is physically separated from the tributary to the north by Kalispell Bay Road but is "reasonably close" in proximity being only thirty feet away.

[38] *Id.* at * 10.

[39] Sackett v USEPA, 8 F.4th 1075, (9th Cir. 2020).

[40] *Id.* at 1083.

On the merits the Ninth Circuit held that "[t]he record plainly supports EPA's conclusion that the wetlands on [petitioners'] property are adjacent to a jurisdictional tributary and that, together with the similarly situated Kalispell Bay Fen, they have a significant nexus to Priest Lake, a traditional navigable water."[41]

Given these facts it is hard to see how this case presents a vehicle for a sweeping interpretation of the jurisdictional scope of the CWA. Indeed, the facts are closer to *Riverside Bayview* than they are to *Rapanos*. As noted by the Ninth Circuit the evidence in the administrative record showed the unnamed tributary is "relatively permanent" based on U.S. Geological Survey mapping as well as its flow, channel size, and form.[42] Moreover, "because this unnamed tributary eventually flows into Priest Lake, a traditional navigable water, via Kalispell Creek, the tributary is jurisdictional—that is, it is itself a water of the United States."[43]

In *Riverside Bayview* the Court held that wetlands adjacent to an unnamed navigable creek flowing into the nearby Lake St Clair were jurisdictional. Writing for a unanimous Justice White went to great lengths describing the broadly remedial purposes of the CWA to "restore and maintain the chemical, physical, and biological integrity of the nation's waters" with particular emphasis on the importance of wetlands in fulfilling that statutory objective.[44]

The *Rapanos* plurality said that that to be jurisdictional the wetland must be adjacent to a water body that is a "relatively permanent body of water connected to traditional navigable waters."[45] As found by the district court the Sackett wetland is "adjacent" to a tributary characterized by the USGS as "relatively permanent" which is directly connected to a "traditionally navigable water," namely Priest Lake.

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[41] *Id*. at 1092.
[42] *Id.*
[43] *See* 33 C.F.R. § 328.3(a)(5) (explaining that tributaries to jurisdictional waters are themselves jurisdictional).
[44] 474 U.S. at 135 ("[W]e therefore conclude that a definition of 'waters of the United States' encompassing all wetlands adjacent to other bodies of water over which the Corps has jurisdiction is a permissible interpretation of the Act.").
[45] Rapanos, *supra* note 2, 547 U.S. at 742.

The only factual difference between *Sackett* and *Riverside Bayview* is the existence of a road between the wetland and the jurisdictional tributary. The regulations existing at the time EPA issued the compliance order provided that the existence of man-made barriers would not defeat the definition of adjacency.[46] Thus, the dispute here could come down to the narrow question whether a barrier between a wetland and a "relatively permanent" (i.e., jurisdictional) tributary categorically precludes CWA coverage of the wetland.

Alternatively, the question could be whether a wetland in close proximity and hydrologically connected to a traditionally navigable water by means of a shallow subsurface flow meets the *Riverside Bayview* test for a wetland "inseparably bound up with" the Lake.[47]

Though plausible this mode of nuanced analysis is probably a long shot. It is unlikely the Court took the case to nibble away at the edges of CWA coverage. The Court has been signaling for some time that it is unhappy with the way the agencies are implementing the CWA. The calls for a definitive ruling to settle "once and for all" the question of where federal jurisdiction ends, and state sovereignty begins have been growing form many quarters. Whether such a ruling is possible is very much an open question, but the newly constituted Court is flexing its muscles with the "major question doctrine"[48] to strike down agency rules perceived as "overreach"[49] and hints of reviving the "nondelegation doctrine" to question Congress' power to delegate broad authority

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[46] *See* 33 CFR § 328.3(c) ("Wetlands separated from other waters of the United States by man-made dikes or barriers ... and the like are 'adjacent wetlands.'").

[47] Riverside Bayview, *supra* note 3, 474 U.S at 134 ("We cannot say that the Corps' conclusion that adjacent wetlands are inseparably bound up with the 'waters' of the United States—based as it is on the Corps' and EPA's technical expertise—is unreasonable.").

[48] The Court has not defined exactly what "major" means but has said: "We expect Congress to speak clearly when authorizing an agency to exercise powers of 'vast economic and political significance.'" Cf Utility Air Regulatory Group v. EPA, 573 U.S. 302, 324, (2014) (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 160, (2000)). The imprecision of the major question doctrine was the subject of the two-hour oral argument in West Virginia v EPA on February 28 2022 involving a challenge to the Obama era Clean Power Plan. *See* Amy Howe, "In climate-change case, justices grapple with EPA's role, congressional intent, and their own jurisdiction," SCOTUSblog (February 28, 2022).

[49] *See* Alabama Assn. of Realtors v Department of Health and Human Services, 141 S.Ct. 2485 (2021) (Striking down the eviction moratorium imposed by the Centers for Disease Control in response to the Covid pandemic); National Federation of Business v Department of Labor, 142 S.Ct. 661 (Striking down an OSHA rule requiring employers with more than 100 employees require the employees to undergo COVID-19 vaccination or take weekly COVID-19 tests at their own expense and wear a mask in workplace.).

to agencies without clearly articulated "intelligible principles" that sharply limit agency "freelancing."[50]

All of which leads to the next potential worst-case outcome.

IV. WORST CASE: ADOPTION OF THE *RAPANOS* PLURALITY OPINION

For Justice Scalia the whole issue of the geographic scope of the CWA, and with it the entire regulatory, planning, and financial structure of the nation's premier water quality law, including liability for spills of oil and hazardous substances, came down to a single question: What does the word "waters" mean? And the answer as it turns out lay not in the text, context, purposes, or history of the Act, or in the ways that it had been interpreted by the courts or applied by the agencies for over four decades but in the 1954 edition of Webster's International Dictionary.[51] This led him to conclude: "In sum, on its only plausible interpretation, the phrase "the waters of the United States" includes only those relatively permanent, standing or continuously flowing bodies of water "forming geographic features" that are described in ordinary parlance as "streams[,] ... oceans, rivers, [and] lakes."[52] Further, the term "does not include intermittent or

[50] In Gundy v United States, 139 S.Ct. 2116 (2019) the Court narrowly upheld a rule adopted by the Attorney General under the Sex Offender Registration and Notification Act requiring pre-act sexual offenders to register. Justice Kagan's plurality opinion observed that "a delegation is constitutional so long as Congress has set out an "intelligible principle" to guide the delegee's exercise of authority." Citing the unanimous decision in Whitman v American Trucking Assn., 121 S.Ct. 903 (2001) Kagan noted: "[W]e have 'almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.'" Justice Gorsuch filed a lengthy dissent highly critical of the Court's lax approach to enforcing the intelligible principle rule and characterizing SORNA as "delegation running riot." *Id*. at 2148. Justice Alito filed a concurring opinion in which he stated: "If a majority of this Court were willing to reconsider the approach we have taken for the past 84 years, I would support that effort." *Id*. at 2130 Justice Kavanaugh has also endorsed the idea that the nondelegation doctrine should be reconsidered citing Justice Gorsuch's "scholarly analysis of the Constitution's nondelegation doctrine in his Gundy dissent." Paul v United States, 589 U. S. ____ (2019) (Statement of Justice Kavanaugh respecting the denial of certiorari).

[51] Rapanos, *supra* note 2, 547 U.S. at 731. Justice Scalia explained: "The Corps' expansive approach might be arguable if the CWA defined "navigable waters" as "water of the United States." But "the waters of the United States" is something else. The use of the definite article ("the") and the plural number ("waters") shows plainly that § 1362(7) does not refer to water in general. In this form, "the waters" refers more narrowly to water "[a]s found in streams and bodies forming geographical features such as oceans, rivers, [and] lakes," or "the flowing or moving masses, as of waves or floods, making up such streams or bodies." Webster's New International Dictionary 2882 **2221 (2d ed.1954).

[52] *Id.* at 739.

ephemeral flows of water" and includes "only those wetlands with a continuous surface connection to bodies that are waters of the United States in their own right."[53]

Scalia did add this caveat in a footnote:

> "By describing "waters" as "relatively permanent," we do not necessarily exclude streams, rivers, or lakes that might dry up in extraordinary circumstances, such as drought. We also do not necessarily exclude seasonal rivers, which contain continuous flow during some months of the year but no flow during dry months. Common sense and common usage distinguish between a wash and seasonal river."[54]

This blinkered view of the geographic scope of the CWA would come as quite a shock to its principal sponsor Senator Edmund Muskie of Maine who grew up along the banks of the highly polluted Androscoggin River in Rumford.[55] Muskie's vision is captured in the opening lines of the statute: "The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[56] Volumes have been written about the broadly remedial purposes of the CWA, how water moves in hydrologic cycles so that pollution must be controlled at its source, how the states had failed to arrest the degradation of the nation's waters, and how federal law was need to provide a floor of protection across the country while preserving the authority of the states to set stricter standards.[57]

Application of the Scalia test at this late date would not only throw the entire CWA regulatory program out of whack it would render the CWA inapplicable throughout large portions of the country and defeat Congress' avowed goals of keeping waters healthy and restoring those that are impaired.[58] In the desert southwest for example most rivers and streams would be

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[53] *Id*.

[54] *Id*. at 732.

[55] Clean Water: Muskie and the Environment, Maine History Online; https://www.mainememory.net/sitebuilder/site/330/slideshow/957/display?format=list.

[56] 33 USC 1251 (a).

[57] *See for example*, Oliver Houck, Clean Water Act TMDL Program: Law, Policy, and Implementation," 2d ed. Environmental Law Institute (1999).

[58] According to the US Geological Survey, "More than 218 million Americans live within 10 miles of a river, lake, or estuary that is considered impaired because it cannot fully support its aquatic biological communities or other designated uses or conform to fishable/swimmable water-quality standards set by the States, Territories, or authorized

considered ephemeral.[59] Well over half of the wetlands in the country would not meet the test of a "continuous surface connection" to a "relatively permanent body of water."[60]

Nor would the states be able or in some cases even be willing to fill the gaps. According to a study by the Environmental Law Institute: "Over two-thirds of U.S. states, 36 in all, have laws that could restrict the authority of state agencies or localities to regulate waters left unprotected by the federal Clean Water Act."[61] Twenty-eight states have "no stricter than federal" provisions that could either prohibit state agencies from regulating waters more stringently than the federal Clean Water Act, or significantly limit their authority to do so. Indeed, after promulgation of the NWPR Indiana and Ohio actually reduced protection for wetlands.[62]

Further, according to a study by the National Association of State Wetland Managers only 23 states have laws that comprehensively regulate activities that alter or damage wetlands and many of those rely on use of the section 401 water quality certification provision[63] of the CWA which only applies where a federal permit or license is required.[64] Remove CWA jurisdiction and you remove the 401 handle that states have come to rely on.

Even if the laggard states were to adopt laws to plug the gaps left by deregulation at the federal level, there is only so much an individual state can do to protect its waters and its

Tribes According to EPA, there are more than 20,000 impaired water bodies. The USGS Role in TMDL Assessments, USGS Fact Sheet FS-130-01; https://pubs.usgs.gov/fs/FS-130-01/.

[59] Ephemeral and intermittent streams make up approximately 59% of all streams in the United States (excluding Alaska), and over 81% in the arid and semi-arid Southwest (Arizona, New Mexico, Nevada, Utah, Colorado and California) according to the U.S. Geological Survey National Hydrography Dataset, "The Ecological and Hydrological Significance of Ephemeral and Intermittent Streams in the Arid and Semi-arid American Southwest," Abstract, U.S. Environmental Protection Agency Office of Research and Development (2008).

[60] Ariel Wittenberg, Kevin Bogardus, "EPA falsely claims 'no data' on waters in WOTUS rule," Greenwire (December 11, 2018) ("A 2017 slideshow prepared by EPA and Army Corps of Engineers staff shows that at least 18 percent of streams and 51 percent of wetlands nationwide would not be protected under the Navigable Waters Protection Rule.).

[61] State Constraints State-Imposed Limitations on the Authority of Agencies to Regulate Waters Beyond the Scope of the Federal Clean Water Act, 1, Environmental Law Institute 2013.

[62] See EPA and Corps, Economic Analysis fir the Proposed 'Revised Definition of Waters of the United States' Rule,"49 (Nov. 17, 2021).

[63] 33 USC 1341; *see also*, PUD No. 1 of Jefferson Cty. v. Washington Dept. of Ecology, 511 U.S. 700 (1994) (Upholding state authority to condition federal license on measures to require minimum flows to protect habitat of Pacific salmon).

[64] Status and Trends Report on State Wetland Programs in the United States, 12, National Association of State Wetlands Managers (2015).

investment in restoring impaired waters. Downstream states are powerless to compel their upstream neighbors to stop polluting shared rivers and lakes. The Supreme Court ruled long ago that federal common law has been entirely displaced by the CWA.[65] The only recourse for a downstream state is to seek intervention by EPA.[66] Thus in the absence of CWA jurisdiction we would be back to the bad old days of pollution havens and a race to the bottom.[67]

V. COMPROMISE: A *MAUI* MULTI-FACTOR DECISION

The issue in *County of Maui v Hawaii Wildlife Fund* (*Maui*) was whether the CWA "requires a permit when pollutants originate from a point source but are conveyed to navigable waters by a nonpoint source," here, "groundwater."[68] In an opinion by Justice Breyer the Court held (6-3) that a permit is required "if the addition of the pollutants through groundwater is the functional equivalent of a direct discharge from the point source into navigable waters."[69] Justice Breyer set forth seven "nonexclusive" factors that courts should consider in evaluating whether the functional equivalent test had been met.[70] Justice Breyer noted that "Time and distance will be the most important factors in most cases, but not necessarily every case."[71]

In his concurring opinion Justice Kavanaugh citing the plurality in *Rapanos* observed: "[U]nder Justice Scalia's interpretation in Rapanos, the fact that the pollutants from Maui's wastewater facility reach the ocean via an indirect route does not itself exempt Maui's facility from

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[65] Illinois v. City of Milwaukee, 406 U.S. 91 (1972); Middlesex County Sewerage Auth. v. Sea Clammers, 453 U.S. 1 (1981).

[66] Arkansas v. Oklahoma, 503 U.S. 91 (1992).

[67] William Andreen and Shana Campbell Jones, "The Clean Water Act A Blueprint For Reform," Center for Progressive reform," 2008.

[68] 140 S.Ct. 1462, 14 (2020). The case involved the Lahaina wastewater treatment plant which collects and treats sewage and then pumps the treated effluent through four wells hundreds of feet underground. The system produces 4 million gallons per day of effluent that then travels about a half mile through groundwater into the Pacific Ocean.

[69] *Id.* at 1476. "We think this phrase [functional equivalent] best captures, in broad terms, those circumstances in which Congress intended to require a federal permit. That is, an addition falls within the statutory requirement that it be "from any point source" when a point source directly deposits pollutants into navigable waters, or when the discharge reaches the same result through roughly similar means.

[70] *Id*. at 1476-77. The factors cited include: (1) transit time, (2) distance traveled, (3) the nature of the material through which the pollutant travels, (4) the extent to which the pollutant is diluted or chemically changed as it travels, (5) the amount of pollutant entering the navigable waters relative to the amount of the pollutant that leaves the point source, (6) the manner by or area in which the pollutant enters the navigable waters, (7) the degree to which the pollution (at that point) has maintained its specific identity.

[71] *Id*. at 1477.

the Clean Water Act's permitting requirement for point sources."[72] Justice Kavanaugh explained that "the statute does not establish a bright-line test regarding when a pollutant may be considered to have come 'from' a point source, and that the "source of the vagueness is Congress' statutory text, not the Court's opinion." Justice Kavanaugh concluded that the Court's opinion in *Maui* "seeks to translate the vague statutory text into more concrete guidance."[73]

This pragmatic approach to resolving a thorny legal question about the scope of the CWA's permit requirements could be a way to, in Justice Kavanaugh's words, "seek to translate the vague statutory text into more concrete guidance" when it comes to defining the equally vague statutory term "waters of the US." Relevant factors might include:

- Expanding the concept of "seasonal tributaries" noted in footnote 5 of the plurality opinion in *Rapanos* to include a broader category of intermittent and ephemeral streams with defined beds and banks that contribute significant flows to traditionally navigable waters especially in semi-arid states.
- Allowing the agencies to establish a close hydrological connection between wetlands and other jurisdictional waters by means of surface or subsurface flows. A science-based approach makes more sense than drawing arbitrary lines on a map.
- Allowing designation of artificial tributaries like canals and ditches that perform the same functions as natural streams. Many of these artificial tributaries were once natural streams that have been modified by human activities.
- Allowing the agencies to consider the aggregate effects of regulating activities that damage wetlands to show a substantial impact on interstate commerce and therefore within Congress' commerce clause authority.[74] The conference report accompanying the Federal Water Pollution Control Act Amendments of the 1972 contains this statement: "the conferees fully intend that the term 'navigable waters' be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative

[72] Maui, 140 S.Ct. at 1478.

[73] *Id*. at 1479. On remand the Hawaii district court granted summary judgment for plaintiffs and ordered the County to apply for a NPDES permit. Hawaii Wildlife Fund v County of Maui, 2021 WL 3160428 *18 (July 26, 2021). The court found that the "time and distance factors…as well as the relative-amount-of-pollution-entering-the-water and the specific-identity factors weigh in favor of applying the NPDES permit requirements." The court found that two other factors weighed against the permit, and another was neutral.

[74] *Cf* Gonzalez v Raich, 125 S.Ct. 2195, 2205 (Recognizing Congress' power to regulate purely local activities that are part of an economic "class of activities' that in the aggregate have a substantial effect on interstate commerce); People for the Ethical Treatment of Property Owners v US Fish and Wildlife Service, 852 F.3d 990, 1001 (10th Cir. 2017); cert den., 138 S.Ct. 649 (2019) (Upholding regulation of local activities that "take" purely intrastate endangered species. Test under the Commerce Clause is "whether Congress had a rational basis to find that the regulated activity, taken in the aggregate, would substantially affect interstate commerce.").

purposes."[75] As Representative John Dingell one of the conferees and the principal sponsor of the FWPCA in the House explained during debate on approving the conference report the WOTUS definition "clearly encompasses all water bodies, including streams and their tributaries, for water quality purposes."[76] Though legislative history plays less of a role in construing legislative intent these days these statements should be entitled to at least as much weight as a 1954 dictionary.

VI. THE IMPORTANCE OF HEADWATER STREAMS AND WETLANDS

Much of the controversy over the WOTUS definition has to do with headwater streams and their associated wetlands. Headwater streams are where rivers begin. Small and easily overlooked these streams represent 79% of the overall river network in the US and drain 70% of the land.[77]

Headwater streams have important economic and ecosystem values. A 2007 assessment estimated the economic value at $15.7 trillion for the conterminous United States and Hawaii.[78]

Before promulgating the controversial Clean Water Rule in EPA undertook the most comprehensive study of the "state of science" on the connectivity and isolation of waters in the US. The report "Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence" was published in the Federal Register on January 15, 2015.[79] The Connectivity Report reviews more than 1,200 peer-reviewed publications and summarizes current scientific understanding about the connectivity and mechanisms by which streams and wetlands, singly or in aggregate, affect the physical, chemical, and biological integrity of downstream waters. The Report focuses on surface and shallow subsurface connections by which small or temporary streams, nontidal wetlands, and open waters affect larger waters such as rivers, lakes, reservoirs, and estuaries.

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[75] S. REPT. NO. 92-1236, at 144 (1972) (Conf. Rep.).

[76] See 118 Cong. Rec. 33,757 (1972) (statement of Rep. Dingell).

[77] Colvin SAR, Sullivan SMP, Shirey PD, Colvin RW, Winemiller KO, Hughes RM, Fausch KD, Infante DM, Olden JD, Bestgen KR, Danehy RJ, Eby L. Headwater streams and wetlands are critical for sustaining fish, fisheries, and ecosystem services. Fisheries. 2019;44(2):73–91.

[78] Nadeau TL, Rains MC. Hydrological connectivity between headwater streams and downstream waters: How science can inform policy. JAWRA Journal of the American Water Resources Association. 2007; 43(1):118–133.

[79] U.S. EPA. Connectivity of Streams and Wetlands To Downstream Waters: A Review and Synthesis of the Scientific Evidence (Final Report). U.S. Environmental Protection Agency, Washington, DC, EPA/600/R-14/475F, 2015; 80 FR 2100; https://www.federalregister.gov/documents/2015/01/15/2015-00339/connectivity-of-streams-and-wetlands-to-downstream-waters-a-review-and-synthesis-of-the-scientific.

The Report concluded that: "The scientific literature unequivocally demonstrates that streams, regardless of their size or frequency of flow, are connected to downstream waters and strongly influence their function."

While it is true that science does not necessarily determine law or policy it would be a mistake to ignore the scientific reality that the chemical, physical, and biological integrity of the nation's waters depends to a very large degree on how broadly the Court chooses to interpret the geographic scope of the CWA.

VII. CONCLUSION

The Sacket case is a contrived controversy that the Court should have declined. But the fat is in the fire now and the stakes are incredibly high. We have already seen a preview of what might be in store for the nation's water resources during the relatively brief period that the NPWR was in effect. Preliminary estimates of what that rule would do to the historic jurisdiction of the CWA estimated that perhaps a fifth of the tributaries and over half of the wetlands in the US would no longer enjoy federal protection and be left to the vagaries of state law as mentioned.[80] Subsequently, however, when the Corps and EPA conducted a field study what they found was far more disturbing. In response to President Biden's Executive Order the agencies reviewed Jurisdictional Determinations for 40,211 individual aquatic resources or water features under the NWPR between June 22, 2020, and April 15, 2020.[81] Approximately 76% were found to be non-jurisdictional by the Corps. Specifically, 69% of streams and wetlands were found to be non-jurisdictional, including 9,548 ephemeral streams and 12,895 wetlands that did not meet the NWPR's revised adjacency criteria. Some 3,849 ditches were excluded, many that were formerly streams that had been channelized.

[80] American Association for Advancement of Science, "New Rule Threatens Environment, Puts U.S. Waters at Risk," (August 14, 2020).

[81] EPA and Corps, Memorandum for the Record: Review of U.S. Army Corps of Engineers ORM2 Permit and Jurisdictional Determination Data to Assess Effects of the Navigable Waters Protection Rule, June 8, 2021; file:///C:/Users/ppare/OneDrive/Desktop/Water%20Quality/EPA%20Corps%20Memo.pdf.

Importantly the survey revealed the dramatic impact the NWPR's narrow definition of waters of the US was having on arid regions of the country. The Corps' data show that in New Mexico, of the 258 streams assessed in AJDs, 100% were found to be non-jurisdictional ephemeral resources. In Arizona, of the 1,284 streams assessed in AJDs, 1,280, or 99.6%, were found to be non-jurisdictional ephemeral resources. Further, the damage to the overall aquatic resource is compounded by the fact that by eliminating ephemeral streams from jurisdiction under the NWPR that typically eliminates jurisdiction over any nearby wetlands.

The final point is that no one should expect that Congress will come to the rescue should the Court deal a devastating blow to the CWA. Myriad bills have been introduced to "fix" the *Rapanos* problem with no action taken for good or ill.[82] The Act itself has not been updated since 1987.[83] Given the bitterly partisan environment in Congress the prospects for a compromise to end the WOTUS Wars appear dim. The CWA needs to be updated and if the states are to assume a greater role in achieving its objectives, they will need stronger state laws and bigger budgets to take up the slack. But they will also need a strong EPA to back up their efforts to control interstate pollution like the dead zones affecting the Gulf of Mexico and the Great Lakes and to provide the technical support needed to keep pace with emerging threats like the forever chemicals and the compounding effects of climate disruption.

The CWA was conceived as a model of "cooperative federalism." Then original idea was that the federal government would set national environmental standards and the states would implement them within their borders. That original understanding has undergone significant change as states have become more divided politically between red and blue. Two dozen states sued to enjoin President Obama's Clean Water Rule.[84] Seventeen states sued to enjoin President's

[82] Congressional Research Service, Evolution of the Meaning of "Waters of the United States" in the Clean Water Act (March 5, 2019).

[83] Congressional Research Service, Clean Water Act: A Review of Issues in the 109th Congress,2 (January 4, 2007).

[84] Ken Paxton, Attorney General of Texas, Press Release, "AG Paxton Wins Major Court Victory to End Unlawful Obama-Era 'Waters of the United States' Rule," (May 29, 2019); https://www.texasattorneygeneral.gov/news/releases/ag-paxton-wins-major-court-victory-end-unlawful-obama-era-waters-united-states-rule.

Trump' repeal of the Obama rule.[85] That sharp division remains today. It will take some artful diplomacy to overcome this political divide.

[85] Courthouse News Service, "States Sue EPA Over Rollback of Clean Water Rules," (May 1, 2020); https://www.courthousenews.com/states-sue-epa-over-rollback-of-clean-water-rules/.

APPENDIX

A View south from Kalispell Bay Road along east edge of Sackett property, taken during 2008 site visit.

B View north from Old Schneiders Road of south and west edges of property, taken during 2008 site visit.

C East side of the lot showing strip of excavated ground that was being filled with EPA officials arrived, taken during 2007 site visit.

Photos and captions from the appendix of the Ninth Circuit's *Sackett* opinion.