

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

BY
PATRICK PARENTEAU*

The Supreme Court has agreed to review the decision of the Ninth Circuit in Sackett v. Environmental Protection Agency. As framed by the Court, the Question Presented is: “Whether the Ninth Circuit set forth the proper test for determining whether wetlands are ‘waters of the United States’ under the Clean Water Act.” Oral argument is set for the October 2022 term.

The grant of review is surprising for many reasons. No constitutional issue is presented. There is no conflict among the courts of appeal requiring intervention by the Court. The Ninth Circuit, like every other circuit that has considered the question, looked to the “significant nexus” test under Justice Kennedy’s concurring opinion in the famously fractured decision in Rapanos v. United States. Petitioners argue that this was an error and that the Ninth Circuit should have applied the test articulated by the late Justice Scalia in the plurality opinion in Rapanos, requiring that there be a “continuous surface connection” between a wetland and “a relatively permanent body of water.” However, none of the circuit courts have ruled that the “Scalia test” is controlling. Rather they have viewed the

*Patrick A. Parenteau is Professor of Law and Senior Counsel in the Environmental Advocacy Clinic at Vermont Law School. He previously served as Director of the Environmental Law Center and was the founding director of the Environmental and Natural Resources Law Clinic. Professor Parenteau has an extensive background in environmental and natural resources law. His previous positions include Vice President for Conservation with the National Wildlife Federation in Washington, D.C.; Regional Counsel to the New England Regional Office of the EPA; Commissioner of the Vermont Department of Environmental Conservation; and Of Counsel with the Perkins Coie law firm in Portland, Oregon. Professor Parenteau has been involved in drafting, litigating, administering, teaching, and writing about environmental law and policy for over four decades. His current focus is on confronting the twin challenges of climate disruption and biodiversity conservation through his teaching, writing, public speaking, and advocacy. Professor Parenteau is a Fulbright U.S. Scholar and a Fellow in the American College of Environmental Lawyers. He is the recipient of the Kerry Rydberg Award for excellence in public interest environmental law and the National Wildlife Federation’s Conservation Achievement Award. Professor Parenteau holds a B.S. from Regis University, a J.D. from Creighton University, and an L.L.M. in Environmental Law from the George Washington University.

Scalia test as providing an additional basis for CWA jurisdiction in the event the Kennedy significant nexus test was not met.

Moreover, the responsible agencies, EPA and the Corps of Engineers, are presently engaged in a two-step rulemaking process to develop a new definition of “Waters of the United States.” Normally, the Court would await the outcome of a rulemaking before intervening and issuing an opinion on the scope of an agency’s authority before the agency has adopted a final rule, based on a fully developed administrative record.

Finally, petitioners are not facing any enforcement action and cannot point to any imminent threat of harm. EPA withdrew the compliance order that gave rise to the original controversy and has represented that it has no intention of taking any enforcement action. The Ninth Circuit ruled that the case was not moot because EPA might change its mind. What an agency might do in the future hardly meets the strict standards for Article III standing, and such a ruling raises questions about whether the case is even justiciable at this stage.

Now that the Court has taken jurisdiction and is unlikely to dismiss the petition as improvidently granted, the question is: what will it do? It is safe to assume that it will reverse the Ninth Circuit and reject the significant nexus test for determining what constitutes a water of the United States. How much further it goes in limiting the geographic scope of the CWA is an open question. Conventional wisdom suggests the conservative majority will adopt Justice Scalia’s test and thereby significantly shrink the scope of the Act.

Other possibilities include a narrow, fact-based decision that sends the case back to the lower courts with instructions to reconsider the question based on several factors similar to what the Court did in the County of Maui v. Hawai’i Wildlife Fund case in 2020.

Alternatively, should the Court adopt the Scalia test as the only permissible interpretation of the statute, what would be the consequences for water quality across the country? Some argue that the states will simply fill the gap. But the evidence is to the contrary. Over half of the states have laws on the books that prohibit regulations that are stricter than what federal law requires. There is no reason to think these states, many of whom have filed amicus briefs in support of petitioners’ position that federal jurisdiction should be radically reduced, will suddenly have a change of heart and move quickly to change their laws and make the substantial investments required to replace the regulatory framework that EPA and the Corps have administered over the past 50 years.

To the contrary, the loss of federal protection for as much as a third of the nation’s headwater streams and over half of the remaining wetlands will mean little or no regulatory protection for these vital resources and make it virtually impossible to achieve the

CWA’s objective to “restore and maintain the chemical, physical and biological integrity of the nations’ waters.”

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I. BACKGROUND: HOW DID IT COME TO THIS?

Much to the surprise of legal pundits, the U.S. Supreme Court has agreed to review the decision of the Ninth Circuit¹ finding that the wetland on Michael and Chantelle Sackett’s property is covered by the Clean Water Act (CWA)² and therefore a § 404 permit is required to build their long-desired dream home next to Priest Lake in Idaho.³ 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*.⁴

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?”⁵ The Court reframed the question more generally as: “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).”⁶ The reframing could signal that the choice is not simply “Scalia or Kennedy”—neither of whom remain on the Court—but conventional wisdom suggests an outcome much closer to the former than the latter.

The grant of certiorari is surprising for several reasons. First, the case does not present any constitutional issues. Petitioners have alleged neither a violation of their property rights under the Fifth Amendment nor that the case presents a serious question regarding Congress’s exercise of its Commerce Clause authority.⁷ Rather, the case presents a

¹ *Sackett v. U.S. Env’t Prot. Agency (Sackett II)*, 8 F.4th 1075 (9th Cir. 2021) *cert. granted*, 142 S. Ct. 896 (2022) (No. 21-454).

² Federal Water Pollution Control Act, 33 U.S.C. §§ 1251–1387 (2018).

³ See *infra* Appendix A–C (showing photos of the Sackett property).

⁴ 547 U.S. 715, 758 (2006); *Sackett II*, 8 F.4th at 1091.

⁵ Petition for Writ of Certiorari at i, *Sackett v. U.S. Env’t Prot. Agency (Sackett II)*, 142 S. Ct. 896 (2022) (No. 21-454).

⁶ *Sackett II*, 142 S. Ct. at 896.

⁷ See *cf.* *Solid Waste Agency of N. Cook Cnty v. U.S. Army Corps of Eng’rs (SWANCC)*, 531 U.S. 159, 173 (2001) (invoking the doctrine of constitutional avoidance as a reason for

seemingly straightforward question regarding the term “navigable waters” as defined to mean the “waters of the United States, including the territorial seas” (WOTUS).⁸ WOTUS has been the subject of many administrative interpretations over the years. As discussed below, the Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers (Corps) are currently using the “pre-2015” definition with some additional guidance.⁹

The Supreme Court has wrestled with this question three times. In *United States v. Riverside Bayview Homes Inc. (Riverside Bayview)* a unanimous Court ruled that a wetland “adjacent to” but not directly abutting a navigable tributary of Lake Saint Clair was jurisdictional under the CWA.¹⁰ In *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC)*, a divided Court (5-4) ruled that the Corps’s use of the so-called “Migratory Bird Rule” to regulate a “nonnavigable, isolated, intrastate” waterbody (an abandoned sand and gravel pit) exceeded its statutory authority.¹¹ In *Rapanos*, 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.¹²

interpreting a narrow interpretation of the term waters of the United States, Chief Justice Rehnquist stated, “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.”)

⁸ 33 U.S.C. § 1362(7).

⁹ See *infra* text accompanying note 21.

¹⁰ *United States v. Riverside Bayview Homes Inc. (Riverside Bayview)*, 474 U.S. 121, 139 (1985). Justice White’s opinion in *Riverside 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.” *Id.* at 132–35 (quoting 33 U.S.C. § 1251(a)).

¹¹ *SWANCC*, 531 U.S. at 169, 174. 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. *Id.* at 164, 164 n.1; see JON KUSLER & JEANNE CHRISTIE, COMMON QUESTIONS: THE SWANCC DECISION; ROLE OF THE STATES IN FILLING THE GAP, 2 (2006) <https://perma.cc/RD4J-KSEY> (discussing history of the migratory bird rule). The presence of migratory bird habitat was a proxy for the significant economic benefits that wetlands provide, estimated at over 40 billion dollars annually. *Cf. SWANCC*, 531 U.S. at 194–95 (Stevens, J., dissenting) (discussing connection between bird habitat and economics); U.S. ENV’T PROT. AGENCY, EPA843-F-06-004, ECONOMIC BENEFITS OF WETLANDS (2006) (noting estimated “\$14.9 trillion” worldwide value of wetlands, and discussing various economic values of wetlands in the United States totaling in the billions of dollars).

¹² *Rapanos*, 547 U.S. 715, 729, 757 (2006) (“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.”). *Id.* at 729. Ultimately, Mr. Rapanos agreed to pay a civil penalty and re-create approximately 100 acres of wetlands and buffer areas to settle the case. U.S. DEPT OF JUSTICE, 08-1152, JOHN RAPANOS AGREES TO PAY FOR CLEAN WATER ACT VIOLATIONS (Dec. 29, 2008), <https://perma.cc/TK43-UVLQ>.

Second, there is no circuit split on which test is controlling under *Rapanos*.¹³ Every court of appeals that has addressed the question, has held that 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.¹⁴ No circuit court 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 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.¹⁵

Third, 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 that it has no plan to initiate a new enforcement action.¹⁶ Notwithstanding this representation, the Ninth Circuit ruled that the case was not moot because EPA might change its mind, but that is a slim read on which to rest Supreme Court review at this juncture.

¹³ 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”) (internal quotation marks omitted). Lower courts have struggled with how to apply the *Marks* rule to the splintered result in *Rapanos*. See, e.g., *United States v. Johnson*, 467 F.3d 56, 62–66 (1st Cir. 2006) (highlighting the diverging opinions from *Rapanos*). After an extensive analysis of *Marks*, and later decisions analyzing *Marks*, the First Circuit in *Johnson* 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. *Id.* Instead, the *Johnson* court decided to take Justice Stevens’s advice in his dissent in *Rapanos* and find jurisdiction if either the plurality’s or Justice Kennedy’s tests were met. *Id.* at 60. The Third and Eighth Circuits have followed the First Circuit’s reasoning. *United States v. Donovan*, 661 F.3d 174, 182 (3d Cir. 2011); *United States v. Bailey*, 571 F.3d 791, 799 (8th Cir. 2009).

¹⁴ See *Donovan*, 661 F.3d at 182, *cert. denied*, 566 U.S. 990 (2012); *Bailey*, 571 F.3d at 799; *United States v. Robison*, 505 F.3d 1208, 1221–22 (11th Cir. 2007), *cert. denied*, 555 U.S. 1045 (2008); *United States v. McWane*, 555 U.S. 1045 (2008); *N. Cal. River Watch v. City of Healdsburg*, 496 F.3d 993, 999–1000 (9th Cir. 2007), *cert. denied*, 552 U.S. 1180 (2008); *Johnson*, 467 F.3d at 64–66, *cert. denied*, 552 U.S. 948 (2007); *United States v. Gerke Excavating*, 464 F.3d 723, 724–25 (7th Cir. 2006) (per curiam), *cert. denied*, 552 U.S. 810 (2007); cf. *United States v. Cundiff*, 555 F.3d 200, 210–13 (6th Cir. 2009) (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. 2008) (“[T]he evidence presented at trial supports all three *Rapanos* standards”), *cert. denied*, 555 U.S. 822 (2008).

¹⁵ Brief for the Respondents in Opposition to Petition for Certiorari at 16, *Sackett II*, 142 S. Ct. 896 (2021) (No. 21-454), 2021 WL 5567744, at *16.

¹⁶ *Id.* at *11.

Finally, and most importantly, EPA and the Corps are in the midst of a two-step rulemaking¹⁷ to develop a revised definition of the vexed term “waters of the United States” to replace the “Navigable Waters Protection Rule” (NWPR)¹⁸ adopted by the previous administration. Two different District Courts have vacated and remanded the NWPR.¹⁹ In compliance with those decisions, EPA and the Corps have announced that they will not use the NWPR in making jurisdictional determinations, pending the outcome of their rulemaking.²⁰

In their Phase I rulemaking, the agencies have proposed to restore the pre-2015 definition of WOTUS, updated to reflect consideration of Supreme Court decisions in *SWANCC* and *Rapanos*.²¹ The agencies believe this longstanding approach would support a stable implementation of WOTUS while the agencies continue developing a new rule in consultation with states, tribes, local governments, and a broad array of other stakeholders.²² The proposed rule was published in the Federal Register on December 7, 2021.²³ The public comment period closed on February 7, 2022.²⁴

The Court will not hear oral arguments until the Fall term.²⁵ Despite pressure from some members of Congress and environmental groups to publish a proposed rule before the Court hears argument in October, the agencies have opted to delay publication until November 2023.²⁶ Though this may be viewed as a prudent move to await the outcome in *Sackett II*, it could prove to be a mistake.

The agencies would be in a stronger position with a carefully crafted proposal for a revised definition of WOTUS, rather than trying to defend

¹⁷ Revised Definition of “Waters of the United States,” 86 Fed. Reg. 69,372 (proposed Dec. 7, 2021) (to be codified at 33 C.F.R. pt. 328, 40 C.F.R., pt. 120).

¹⁸ The Navigable Waters Protection Rule: Definition of “Waters of the United States,” 85 Fed. Reg. 22,250 (Apr. 21, 2020) (to be codified at 33 C.F.R. pt. 382, 40 C.F.R. pts. 110, 112, 116, 117, 120, 122, 230, 232, 300, 302, 401).

¹⁹ *Navajo Nation v. Regan*, No. 20-CV-602, 2021 WL 4430466, at *5 (D.N.M. Sept. 27, 2021); *Pascua Yaqui Tribe v. U.S. Env’t Prot. Agency*, 557 F. Supp. 3d 949, 957, 2021 WL 3855977, at *6 (D. Ariz. Aug. 30, 2021) *appeal dismissed sub nom.*, *Pascua Yaqui Tribe v. Ariz. Rock Prods. Ass’n*, No. 21-16791 (9th Cir. 2022).

²⁰ *Current Implementation of Waters of the United States*, U.S. ENV’T PROT. AGENCY <https://perma.cc/8ZXP-WTNT> (Dec. 20, 2021).

²¹ See *Revising the Definition of “Waters of the United States,”* U.S. ENV’T PROT. AGENCY, <https://perma.cc/HN2T-B5AJ> (Feb. 14, 2022) (“The agencies propose to put back into place the pre-2015 definition of ‘waters of the United States,’ updated to reflect consideration of Supreme Court decisions.”).

²² *Id.*

²³ Revised Definition of “Waters of the United States,” 86 Fed. Reg. 69,372 (proposed Dec. 7, 2021) (to be codified at 33 C.F.R. pt. 328, 40 C.F.R., pt. 120).

²⁴ *Revising the Definition of “Waters of the United States,”* *supra* note 21.

²⁵ See James M. Auslander et al., *U.S. Supreme Court Positioned to Finally Resolve Scope of Federal Jurisdiction Over Remote Wetlands*, NAT’L L. REV. (Jan. 25, 2022), <https://perma.cc/83FZ-9FTN> (predicting that oral arguments will likely happen in Fall 2022 or early 2023).

²⁶ Hannah Northey & Sean Reilly, *EPA’s WOTUS overhaul will trail Supreme Court ruling*, GREENWIRE (June 22, 2022), <https://perma.cc/ELP7-2GHM>.

the messy status quo. The Court needs to see something more concrete than the current placeholder rule, which merely reinstates 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. This is surely a difficult task, and one that entails shrinking the historic reach of the CWA, or in other words, triage.

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, 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?

The answer to that question 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.²⁷ Assuming Chief 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), it is more likely that he will assign it to another Justice.²⁸ 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.²⁹ He also dissented in *County of Maui v. Hawai'i Wildlife Fund (Maui)*, discussed further below, which represents a rare win for the environmental side in a CWA case.³⁰

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 *Maui*.

The Article concludes with some observations on what the various outcomes might mean for the future of the CWA.

²⁷ Richard J. Lazarus, *Back to "Business" at the Supreme Court: The "Administrative Side" of Chief Justice Roberts*, 129 HARV. L. REV. FORUM 33, 46–47 (2015).

²⁸ *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 980 F.3d 157 (1st Cir. 2020), cert. granted, 142 S. Ct. 895 (2022) (20-1199).

²⁹ *Sackett v. U.S. Env't Prot. Agency (Sackett I)*, 566 U.S. 120, 132 (2012) (Alito, J., concurring).

³⁰ 140 S. Ct. 1462, 1482 (2020) (Alito, J., dissenting).

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 2004.³¹ In 2007, petitioners trucked in a load of gravel and sand and began filling the wetlands.³² 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.³³ For unknown reasons, the Sacketts did not act on this advice.³⁴

EPA officers conducted a site investigation on May 3, 2007, advised the Sacketts that the property contained jurisdictional wetlands, and directed the Sacketts to stop work on the home until they obtained a permit from the Corps.³⁵ 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 directed petitioners to remove the fill material and restore the wetlands.³⁶

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.”³⁷ 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.³⁸ The Ninth Circuit affirmed.³⁹

The Supreme Court granted review and held that the compliance order was a “final agency action” subject to APA review.⁴⁰ The Court

³¹ Petition for Writ of Certiorari at 7, *Sackett II*, 142 S. Ct. 896 (2021) (No. 21-454).

³² *Sackett v. U.S. Env’t Prot. Agency (Sackett I)*, 622 F.3d 1139, 1141 (9th Cir. 2010), *rev’d*, 566 U.S. 120 (2012).

³³ Brief for Nat. Res. Def. Council et al. as Amici Curiae in Support of Respondents at 7–8, *Sackett v. U.S. Env’t Prot. Agency*, 565 U.S. 1103 (2012) (No. 10-1062), 2011 WL 8473188 at *7–8.

³⁴ Ironically, had the Sacketts 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 (LOP) in lieu of an individual permit. LOPs “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 encounter no appreciable opposition.” See *U.S. Army Corps of Engineers Permitting Process Information*, U.S. ARMY CORPS OF ENG’RS, <https://perma.cc/8MJN-YJZB> (last visited Apr. 2, 2022).

³⁵ *Sackett v. U.S. Env’t Prot. Agency (Sackett II)*, No. 08-CV-00185, 2019 WL 13026870, at *1 (D. Idaho 2019).

³⁶ *Id.* at *2.

³⁷ *Sackett II*, 8 F.4th 1075, 1081 (9th Cir. 2021), *cert. granted*, 142 S. Ct. 896 (2022) (No. 21-454).

³⁸ *Sackett v. U.S. Env’t Prot. Agency*, No. 08–CV–185–N, 2008 WL 3286801, at *2 (D. Idaho 2008).

³⁹ *Sackett I*, 622 F.3d 1139, 1147 (9th Cir. 2010), *rev’d*, 566 U.S. 120 (2012).

⁴⁰ *Sackett I*, 566 U.S. 120, 131 (2012).

reversed the judgment of the court of appeals and remanded for further proceedings.⁴¹

On remand, the district court granted summary judgment to EPA.⁴² The court found that substantial evidence supported EPA's determination that petitioners' property contained wetlands "adjacent" to a traditionally navigable water, namely Priest Lake.⁴³ More specifically, the court found that the wetlands on petitioners' property were (1) connected by a "shallow subsurface" flow to Priest Lake, (2) "only 300 feet away" from Priest Lake, and (3) separated from Priest Lake by "man-made barriers" without which "water would flow from the property directly into Priest Lake."⁴⁴

The court further found that the wetlands on the property were once part of the Kalispell Bay Fen, a unified wetlands complex hydrologically and ecologically connected to Priest Lake.⁴⁵ Applying Justice Kennedy's significant nexus test,⁴⁶ the court found that this particular wetland community "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."⁴⁷

Alternatively, the district court found that petitioners' property was "adjacent" to an unnamed stream that itself could be considered a jurisdictional tributary.⁴⁸ The administrative "record show[ed] evidence of hydrological and ecological connections between [the Sacketts'] property, the surrounding wetlands, and the tributary which [the court found] support[ed] EPA's conclusions of adjacency and similarly situated wetlands."⁴⁹

On appeal, the Ninth Circuit held that the case was not moot even though EPA had withdrawn the amended compliance order while the appeal was pending.⁵⁰ Despite EPA's representation that it did not intend

⁴¹ *Id.*

⁴² *Sackett II*, No. 08-CV-00185, 2019 WL 13026870, at *13 (D. Idaho 2019).

⁴³ *Id.* at *11.

⁴⁴ *Id.* at *10–11.

⁴⁵ *Id.*

⁴⁶ *Rapanos*, 547 U.S. 715, 780 (2006) (Kennedy, J., concurring in the judgment) (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.'").

⁴⁷ *Sackett II*, 2019 WL 13026870, at *11.

⁴⁸ *Id.* 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." *Id.* at *10.

⁴⁹ *Id.*

⁵⁰ *Sackett II*, 8 F.4th 1075, 1082–83 (9th Cir. 2021), *cert. granted*, 142 S. Ct. 896 (2022) (No. 21-454).

“to enforce the amended compliance order or issue a similar one in the future,” the court reasoned that “EPA could potentially change position under new leadership.”⁵¹

On the merits, the Ninth Circuit held that “[t]he record plainly supports EPA’s conclusion that the wetlands on the Sacketts’ 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.”⁵²

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 the Ninth Circuit noted, the evidence in the administrative record showed the unnamed tributary is a “relatively permanent” water body that is “in itself a water of the United States.”⁵³

In *Riverside Bayview*, the Court held that wetlands adjacent to an unnamed, navigable creek flowing into the nearby Lake St. Clair were jurisdictional.⁵⁴ Writing for a unanimous court, Justice White described at great length 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.⁵⁵

The *Rapanos* plurality reasoned that to be jurisdictional, the wetland must be adjacent to a water body that is a “relatively permanent body of water connected to traditional interstate navigable waters.”⁵⁶ As found by the court of appeals, the Sackett wetland is “adjacent” to a tributary characterized by the U.S. Geological Survey as “relatively permanent” and directly connected to Priest Lake, a “traditionally navigable water.”⁵⁷

The only factual difference between *Sackett* and *Riverside Bayview* is the existence of a road between the wetland and the jurisdictional tributary.⁵⁸ The regulations existing at the time EPA issued the compliance order provided that the existence of man-made barriers would

⁵¹ *Id.* at 1083.

⁵² *Id.* at 1092.

⁵³ *Id.* (internal citation omitted).

⁵⁴ *Riverside Bayview*, 474 U.S. 121, 124, 131, 135 (1985) (explaining that the property was an “adjacent wetland,” per the 1975 regulatory definition of WOTUS, to the navigable waterway of Lake St. Clair and that the Corps’s interpretation of its jurisdiction over such bodies of water was permissible such that they could assert jurisdiction over the unnamed navigable creek that flowed into Lake St. Clair).

⁵⁵ *Id.* at 132, 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.”).

⁵⁶ *Rapanos*, 547 U.S. at 742.

⁵⁷ *Sackett II*, 8 F.4th at 1092.

⁵⁸ *Id.* at 1080–81 (explaining that *Riverside Bayview* regarded a property which actually abutted a traditional navigable waterway while *Sackett* regarded a property “bounded by roads”).

not defeat the definition of adjacency.⁵⁹ Thus, the dispute here could come down to the narrow question of whether a barrier between a wetland and a “relatively permanent” (that is, 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.⁶⁰

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.⁶¹ 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 for many years.⁶² 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,”⁶³ which it just used to strike down EPA’s Clean Power Plan,⁶⁴ and hints of reviving the “nondelegation doctrine” to question Congress’s power to delegate broad authority to agencies

⁵⁹ *Sackett II*, No. 08-CV-00185, 2019 WL 13026870, at *1 (D. Idaho 2019) (“On November 26, 2007, the EPA issued its initial Administrative Compliance Order”); See 33 C.F.R. § 328.3(c) (2007) (“Wetlands separated from other waters of the United States by man-made dikes or barriers . . . and the like are ‘adjacent wetlands.’”).

⁶⁰ *Riverside Bayview*, 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.”).

⁶¹ See *generally About Waters of the United States*, U.S. ENV’T. PROT. AGENCY, <https://perma.cc/UT6P-WR7H> (Dec. 20, 2021) (describing numerous court cases that have rejected agency interpretations of the CWA).

⁶² See CONG. RSCH. SERV., EVOLUTION OF THE MEANING OF “WATERS OF THE UNITED STATES” IN THE CLEAN WATER ACT 34 (2019), <https://perma.cc/7G9F-MQ6B> (indicating that the “Supreme Court’s inability to identify a unified rationale in *Rapanos* has caused significant confusion and debate over the outer [jurisdictional] reaches of the Clean Water Act”).

⁶³ The Court has not defined exactly what “major” means but has said: “We expect Congress to speak clearly if it wishes to assign an agency decisions of vast ‘economic and political significance.’” *Util. Air Regul. Grp. v. Env’t. Prot. Agency*, 573 U.S. 302, 324 (2014) (quoting *Food & Drug Admin. 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. Env’t. Prot. Agency* on February 28, 2022, involving a challenge to the Obama-era Clean Power Plan. See *generally* Transcript of Oral Argument, *West Virginia v. Env’t. Prot. Agency*, 142 S. Ct. 420 (2021) (No. 20–1530), 2022 WL 597457 (arguing whether the case falls under the major question doctrine); See Amy Howe, *In Climate-change Case, Justices Grapple with EPA’s Role, Congressional Intent, and Their Own Jurisdiction*, SCOTUSBLOG (Feb. 28, 2022), <https://perma.cc/GYL2-74YY> (discussing oral arguments regarding the EPA’s power to regulate greenhouse gases based on the major question doctrine).

⁶⁴ *West Virginia v. Env’t Prot. Agency*, 142 S. Ct. 2587 (2022). For a brief description of the decision see Amy Howe, *Supreme Court curtails EPA’s authority to fight climate change*, SCOTUSBLOG (Jun 30, 2022), <https://perma.cc/9MN5-SB2W>.

without clearly articulated “intelligible principles” that sharply limit agency “freelancing.”⁶⁵

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? The answer lays not in the text, context, purposes, or history of the Act, nor in the ways that it had been interpreted by the courts or applied by the agencies for over four decades, but rather in the 1954 edition of Webster’s International Dictionary.⁶⁶ This led Justice Scalia 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.’”⁶⁷ Further, the term does not include “intermittent or ephemeral flows of water” and

⁶⁵ See *Gundy v. United States*, 139 S. Ct. 2116, 2119, 2129 (2019) (narrowly upholding a rule adopted by the Attorney General under the Sex Offender Registration and Notification Act (SORNA) 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.” *Id.* at 2129. Citing the unanimous decision in *Whitman v. Am. Trucking Assn.*, 121 S. Ct. 903, 913 (2001), Justice 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.’” *Gundy*, 139 S. Ct. at 2129. 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 (Gorsuch, J., dissenting). 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 2131 (Alito, J., concurring in the judgment); See also *Paul v. United States*, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., statement respecting the denial of certiorari) (endorsing the idea that the nondelegation doctrine should be reconsidered and Justice Gorsuch’s “scholarly analysis of the Constitution’s nondelegation doctrine in his *Gundy* dissent”).

⁶⁶ *Rapanos*, 547 U.S. 715, 732 (2006):

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.”

(quoting Webster’s New International Dictionary 2882 (2d ed. 1954)).

⁶⁷ *Id.* at 739.

includes “only those wetlands with a continuous surface connection to bodies that are waters of the United States in their own right.”⁶⁸

Scalia did add this caveat in a footnote: “By describing ‘waters’ as ‘relatively permanent,’ we do not necessarily exclude *seasonal* rivers, which contain continuous flow during some months of the year but no flow during dry months.”⁶⁹

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.⁷⁰ The opening lines of the statute capture Senator Muskie’s vision: “The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”⁷¹ Scholars have written volumes 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 needed to provide a floor of protection across the country, while preserving the authority of the states to set stricter standards.⁷²

Application of the Scalia test at this late date would not only throw the entire CWA regulatory program out of whack, but it would also render the CWA inapplicable throughout large portions of the country and defeat Congress’s avowed goals of keeping waters healthy and restoring those that are impaired.⁷³ In the desert southwest, for example, most rivers and streams would be considered ephemeral.⁷⁴ 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*.⁷⁵

⁶⁸ *Id.* at 739, 742.

⁶⁹ *Id.* at 732 n.5.

⁷⁰ *Clean Water: Muskie and the Environment*, ME. HIST. ONLINE, <https://perma.cc/78KP-2QT5> (last visited Apr. 5, 2022).

⁷¹ 33 U.S.C. § 1251(a).

⁷² See OLIVER A. HOUCK, CLEAN WATER ACT TMDL PROGRAM: LAW, POLICY, AND IMPLEMENTATION 1 (2d ed. 1999) (a hornbook on the TMDL program, explaining the requirements of clean water legislation for industries, states, and local agencies).

⁷³ According to the U.S. 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 Tribes. According to the [EPA], there are more than 20,000 impaired water bodies.” Allison Shipp & Gail E. Cordy, *The USGS Role in TMDL Assessments*, U. S. GEOLOGICAL SURV. (2014), <https://perma.cc/Z9Z4-YH8A>.

⁷⁴ See LAINIE R. LEVICK, ET AL., U.S. ENV’T PROT. AGENCY, THE ECOLOGICAL AND HYDROLOGICAL SIGNIFICANCE OF EPHEMERAL AND INTERMITTENT STREAMS IN THE ARID AND SEMI-ARID AMERICAN SOUTHWEST, 1, 5, 48 (2008) (explaining that 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).

⁷⁵ Ariel Wittenberg & Kevin Bogardus, *EPA falsely claims ‘no data’ on waters in WOTUS rule*, GREENWIRE (Dec. 11, 2018), <https://perma.cc/8K7F-FJSA> (“[A] 2017 slideshow

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.”⁷⁶ Twenty-eight states have laws “no more stringent than” federal provisions that could either prohibit state agencies from regulating waters more stringently than the CWA, or significantly limit their authority to do so.⁷⁷ Indeed, after promulgation of the NWPR, Indiana and Ohio actually reduced protections for wetlands.⁷⁸

Further, according to a study by the National Association of State Wetland Managers, only twenty-three states have laws that comprehensively regulate activities that alter or damage wetlands; many of those states rely on use of the § 401 water quality certification provision⁷⁹ of the CWA, which only applies where a federal permit or license is required.⁸⁰ To remove CWA jurisdiction is to 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 investment in restoring impaired waters. Downstream states are powerless to compel their upstream neighbors to stop polluting shared rivers and lakes.⁸¹ The Supreme Court ruled long ago that the CWA entirely displaced federal common law.⁸² The only recourse for a downstream state is to seek EPA intervention.⁸³ 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.⁸⁴

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].”)

⁷⁶ ENV'T L. INST., STATE CONSTRAINTS STATE-IMPOSED LIMITATIONS ON THE AUTHORITY OF AGENCIES TO REGULATE WATERS BEYOND THE SCOPE OF THE FEDERAL CLEAN WATER ACT 1 (2013), <https://perma.cc/KV98-RA5U>.

⁷⁷ *Id.*

⁷⁸ U.S. ENV'T PROT. AGENCY & U.S. ARMY CORPS OF ENGRS, ECONOMIC ANALYSIS FOR THE PROPOSED ‘REVISED DEFINITION OF ‘WATERS OF THE UNITED STATES’ RULE 49 (Nov. 17, 2021).

⁷⁹ 33 U.S.C. §1341; *see also* PUD No. 1 of Jefferson Cnty. v. Wash. Dep’t of Ecology, 511 U.S. 700, 703, 723 (1994) (upholding state authority to condition federal license on measures to require minimum flows to protect habitat of Pacific salmon).

⁸⁰ ASS’N OF STATE WETLAND MANAGERS, STATUS AND TRENDS REPORT ON STATE WETLAND PROGRAMS IN THE UNITED STATES, 12 (2015), <https://perma.cc/GW3Z-DTNZ>.

⁸¹ *See* Arkansas v. Oklahoma (*Illinois River Case*), 503 U.S. 91, 100 (1992) (stating that under the CWA downstream states do not have the authority to block point-source permits in upstream states).

⁸² *City of Milwaukee v. Illinois*, 451 U.S. 304, 317 (1980); *Middlesex Cnty. Sewerage Auth. v. Nat’l Sea Clammers Ass’n.*, 453 U.S. 1, 11 (1981).

⁸³ *Illinois River Case*, 503 U.S. at 100.

⁸⁴ *See* William L. Andreen & Shana Campbell Jones, *The Clean Water Act: A Blueprint for Reform* 11 (Ctr. for Progressive Reform, White Paper No. 802, 2008),

V. COMPROMISE: A MAUI MULTI-FACTOR DECISION

The issue in *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.”⁸⁵ 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.”⁸⁶ Justice Breyer set forth seven “nonexclusive” factors that courts should consider in evaluating whether the pollution meets the functional equivalent test.⁸⁷ Justice Breyer noted that “[t]ime and distance will be the most important factors in most cases, but not necessarily every case.”⁸⁸

In his concurring opinion, Justice Kavanaugh cited the plurality in *Rapanos*, observing: “[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 the Clean Water Act’s permitting requirement for point sources.”⁸⁹ 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. The source of the vagueness is Congress’ statutory text, not the Court’s opinion.”⁹⁰ Justice Kavanaugh concluded that the Court’s

<https://perma.cc/9849-PVHG> (describing the failures of state and local water pollution control pre-CWA).

⁸⁵ *Maui*, 140 S. Ct. 1462, 1468 (2020) (internal quotation marks omitted). 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 of effluent per day that then travels about a half mile through groundwater into the Pacific Ocean. *Id.* at 1466; *Id.* at 1478 (Kavanaugh, J., concurring).

⁸⁶ *Id.* at 1468 (majority opinion). The Court went on to say:

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.

Id. at 1476.

⁸⁷ *Id.* at 1476–77. The factors listed 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, [and] (7) the degree to which the pollution (at that point) has maintained its specific identity.

Id.

⁸⁸ *Id.* at 1477.

⁸⁹ *Id.* at 1478 (Kavanaugh, J., concurring).

⁹⁰ *Id.*

opinion in *Maui* “seeks to translate the vague statutory text into more concrete guidance.”⁹¹

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”⁹² when it comes to defining the equally vague statutory term “waters of the United States.” 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.⁹³
- 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.⁹⁴
- 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 human activities have modified.⁹⁵
- Allowing the agencies to consider the aggregate effects of regulating activities that damage wetlands to show a substantial impact on interstate commerce and would therefore be within Congress’ commerce clause authority.⁹⁶ The conference report accompanying the Federal Water Pollution Control Act Amendments of 1972 contained this statement: “[T]he conferees

⁹¹ *Id.* On remand, the Hawai’i District Court granted summary judgment for the plaintiffs and ordered the County to apply for a NPDES permit. *Haw. Wildlife Fund v. County of Maui*, 550 F. Supp. 3d 871, 872 (D. Haw. 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. *Id.* at 893.

⁹² *Haw. Wildlife Fund*, 550 F. Supp. at 893.

⁹³ *Rapanos*, 547 U.S. 715, 732 n.5 (2006).

⁹⁴ Revised Definition of “Waters of the United States,” 86 Fed. Reg. 69,372, 69,389 (proposed Dec. 7, 2021) (to be codified at 33 C.F.R. pt. 328, 40 C.F.R. pt. 120).

⁹⁵ *Id.* at 69,381.

⁹⁶ See *People for the Ethical Treatment of Prop. Owners v. U.S. Fish & Wildlife Serv.*, 852 F.3d 990, 994, 1001 (10th Cir. 2017), *cert. denied*, 138 S. Ct. 649 (2019) (upholding regulation of local activities that “take” purely intrastate endangered species, and simply asking “whether Congress had a rational basis to find that the regulated activity, taken in the aggregate, would substantially affect interstate commerce.”); *Cf. Gonzales v. Raich*, 545 U.S. 1, 17 (2005) (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.”).

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 purposes.”⁹⁷ 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 main streams and their tributaries, for water quality purposes.”⁹⁸ Though legislative history plays a smaller 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.⁹⁹ Headwater streams are where rivers begin.¹⁰⁰ Small and easily overlooked, these streams represent 79% of the overall river network in the United States and drain 70% of the land.¹⁰¹ Headwater streams have important economic and ecosystem values. A 2007 assessment estimated the economic value of headwaters in the conterminous United States and Hawai‘i to be \$15.7 trillion.¹⁰²

In 2015, EPA undertook the most comprehensive study of the “state of science” on the connectivity and isolation of waters in the United States.¹⁰³ The report, entitled *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, 2015.¹⁰⁴ The Report reviewed more than 1,200 peer-reviewed publications and summarized current scientific understanding about the connectivity and mechanisms by which streams and wetlands, singly or in the aggregate, affect the physical, chemical, and biological integrity of downstream waters.¹⁰⁵ The Report focused on surface and shallow subsurface connections, by which

⁹⁷ S. REP. NO. 92-1236, at 144 (1972) (Conf. Rep.).

⁹⁸ 118 CONG. REC. 33,757 (1972) (statement of Rep. John Dingell).

⁹⁹ S. Mažeika P. Sullivan et al., *The Proposed Change To The Definition Of “Waters Of The United States” Flouts Sound Science*, 116 PNAS 11558, 11558–11561 (2019).

¹⁰⁰ *Headwater Streams Studies*, U.S. ENV’T PROT. AGENCY (March 8, 2022), <https://perma.cc/9L8X-UCK5>.

¹⁰¹ Susan A. R. Colvin et. al., *Headwater Streams And Wetlands Are Critical For Sustaining Fish, Fisheries, And Ecosystem Services*, 44 FISHERIES 73, 74 (2019).

¹⁰² *Id.*

¹⁰³ U.S. ENV’T PROT. AGENCY, *CONNECTIVITY OF STREAMS AND WETLANDS TO DOWNSTREAM WATERS: A REVIEW & SYNTHESIS OF THE SCIENTIFIC EVIDENCE*, ES-1 (Jan. 2015).

¹⁰⁴ *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*, 80 Fed. Reg. 2,100 (Jan. 15, 2015).

¹⁰⁵ U.S. ENV’T PROT. AGENCY, *supra* note 103, at ES-1 to ES-2.

small or temporary streams, nontidal wetlands, and open waters affect larger waters such as rivers, lakes, reservoirs, and estuaries.¹⁰⁶

The Report concluded that the scientific literature unequivocally demonstrated that streams, regardless of their size or frequency of flow, are connected to downstream waters and strongly influence their function.¹⁰⁷

While 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 *Sackett* 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 were that perhaps a fifth of the tributaries and over half of the wetlands in the United States would no longer enjoy federal protection and be left to the vagaries of state law as mentioned.¹⁰⁸ 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,¹⁰⁹ the agencies reviewed Approved Jurisdictional Determinations (AJDs) for 40,211 individual aquatic resources or water features under the NWPR between "June 22, 2020, and April 15, 2020."¹¹⁰ The Corps found that approximately 76% were non-jurisdictional.¹¹¹ Specifically, the Corps found that 69% of streams and wetlands were non-jurisdictional, including 9,548 ephemeral features (mostly streams) and 12,895 wetlands, that did not meet the NWPR's revised adjacency criteria.¹¹² Some 3,849 ditches, many that were former streams that had been channelized, were excluded.¹¹³

Importantly, the survey revealed the dramatic impact that the NWPR's narrow definition of WOTUS was having on arid regions of the

¹⁰⁶ *Id.* at ES-1.

¹⁰⁷ *Id.* at ES-2.

¹⁰⁸ James R. Mihelcic & Mark Rains, *Where's the Science? Recent Changes to Clean Water Act Threatens Wetlands and Thousands of Miles of Our Nation's Rivers and Streams*, 37 ENV'T ENG'G SCI. 173, 173 (2020) (noting changes by the EPA and Army Corps has removed protection for "over half of wetlands and 20% of streams.") (internal citation omitted).

¹⁰⁹ Exec. Order No. 13990, 86 Fed. Reg. 7,037 (Jan. 20, 2021).

¹¹⁰ Memorandum from U.S. Env't Prot. Agency & U.S. Army Corps of Eng'rs 2 (June 8, 2021), <https://perma.cc/DGR3-4MTS>.

¹¹¹ *Id.* at 2-3.

¹¹² *Id.* at 3.

¹¹³ *Id.*; James T. Robb, Clean Water Act Jurisdiction- Navigable Waters Protection Rule, Army Corps of Eng'rs 9 (Feb. 20, 2020), <https://perma.cc/T8PY-YRF3>.

country. The Corps's data showed that in New Mexico, of the 258 streams assessed in AJDs, 100% were non-jurisdictional ephemeral resources.¹¹⁴ In Arizona, of the 1,284 streams assessed in AJDs, 99.6% were non-jurisdictional ephemeral resources.¹¹⁵ The fact that eliminating ephemeral streams from jurisdiction under the NWPR typically eliminates jurisdiction over any nearby wetlands further damages the overall aquatic resource.¹¹⁶

Finally, 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.¹¹⁷ Congress has not updated the CWA since 1987.¹¹⁸ Given the bitterly partisan environment in Congress, the prospects for a compromise to end the WOTUS Wars appear dim.¹¹⁹ The CWA needs updating, 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 the states will also need a strong EPA to back up their efforts to control interstate pollution—like in 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 forever chemicals and the compounding effects of climate disruption.¹²⁰

Congress conceived the CWA as a model of “cooperative federalism.”¹²¹ The original idea was that the federal government would set national environmental standards, and the states would implement them within their borders.¹²² That original understanding has undergone significant change as states have become more politically divided. Two dozen states sued to enjoin the Obama Era WOTUS rule.¹²³ Seventeen states sued to enjoin President Trump's repeal of the Obama rule.¹²⁴ That

¹¹⁴ Memorandum from U.S. Env't Prot. Agency & U.S. Army Corps of Eng'rs, *supra* note 110, at 3.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ CONG. RSCH. SERV., *supra* note 62, at 24.

¹¹⁸ CONG. RSCH. SERV., CLEAN WATER ACT: A REVIEW OF ISSUES IN THE 109TH CONGRESS 2 (2007), <https://perma.cc/F7AC-DTEJ>.

¹¹⁹ Cf. Wesley Lowery, *How Congress Became So Partisan, in 4 Charts*, WASH. POST (Apr. 14, 2014), <https://perma.cc/ZLP6-DNHZ> (describing the division in the legislative branch).

¹²⁰ *What Is A Dead Zone?*, NAT'L OCEANIC & ATMOSPHERIC ADMIN., <https://perma.cc/5NA3-VHJZ> (Aug. 3, 2021).

¹²¹ Dave Ross & Anna Wildeman, *EPA Moves to Elevate Tribal Rights in Water Quality: Changes Could Modify CWA Implementation*, ENV'T L. & POL'Y MONITOR (Oct. 4, 2021), <https://perma.cc/P68G-NQVF>.

¹²² CONG. RSCH. SERV., *supra* note 118, at 1.

¹²³ Press Release, Att'y Gen. of Tex., AG Paxton Wins Major Court Victory to End Unlawful Obama-Era “Waters of the United States” Rule (May 29, 2019), <https://perma.cc/3S8G-DVFD>.

¹²⁴ Nicholas Iovino, *States Sue EPA Over Rollback of Clean Water Rules*, COURTHOUSE NEWS SERV. (May 1, 2020), <https://perma.cc/F45C-RFDT>.

sharp division remains today.¹²⁵ It will take some artful diplomacy to overcome this political divide.

¹²⁵ See A. S. Ward & R. Walsh, *New Clean Water Act Rule Leaves U.S. Waters Vulnerable*, EOS (Feb. 11, 2020), <https://perma.cc/H2L6-YS3T> (describing the ongoing debate over the definition of WOTUS).

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.
