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***Sackett* and the Continued Atomization of the Clean Water Act**

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SACKETT AND
THE CONTINUED ATOMIZATION OF
THE CLEAN WATER ACT

Robert W. Adler[†]

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INTRODUCTION

When the U.S. Supreme Court issued its long-awaited decision in *Sackett v. EPA*,¹ Michael and Chantell Sackett won a long battle with federal regulators, allowing them to build a home on their Idaho property free from wetland protection requirements under the Clean Water Act (CWA).² This holding may allow thousands of other

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1. 143 S. Ct. 1322 (2023).

2. 33 U.S.C. §§ 1251–1389. Congress enacted the “modern” version in 1972 amendments to the Federal Water Pollution Control Act, Pub. L. No. 92-500, 86 Stat. 816, as amended, commonly known as the “Clean Water Act.” See Clean Water Act of 1977, Pub. L. No. 95-217, § 1, 91 Stat. 1566 (providing that “this Act may be cited as the ‘Clean Water Act of 1977’”). The principal federal agency charged with CWA implementation is the U.S. Environmental Protection Agency (EPA). 33 U.S.C. § 1251(d) (“Except as otherwise expressly provided . . . the Administrator of the Environmental Protection Agency . . . shall administer this [Act].”). The

landowners to avoid CWA restrictions as well, although the scope of the ruling may not be known for a long time.³ As a result, however, millions of other Americans may lose important protections for water resources and aquatic ecosystems.

The CWA is a long and complex statute, with many interconnected provisions. As such, one would have expected a ruling with such profound implications to analyze all relevant statutory provisions and how they fit together. Instead, each of the four opinions in the case⁴ is based largely or entirely on construction of a single word—“adjacent”—taken from an ancillary section of the statute added in 1977.⁵ None of the opinions paid more than rhetorical attention to the implications of their analysis for CWA implementation.

In two prior articles, I (and, in one article, a co-author) critiqued the Supreme Court’s past “atomization” in its interpretation of the CWA’s jurisdictional terms.⁶ By “atomization,” we meant a tendency to interpret individual statutory words or terms in isolation.⁷ Instead, we urged jurists to read the statute’s jurisdictional terms in light of the full statutory text, to ensure that the resulting interpretation matched the CWA’s operative provisions.⁸ Both articles clarified that this distinction draws on the basic tenet of textualism that appropriate

EPA shares responsibility for implementing the statute, however, particularly in several definitional respects addressed in this article, with the U.S. Army Corps of Engineers (ACE) through the Secretary of the Army. *See, e.g.*, § 1344.

3. *See infra* Part III.
4. Justice Alito wrote the majority opinion. *Sackett*, 143 S. Ct. at 1329. Justice Thomas penned a concurring opinion joined by Justice Gorsuch. *Id.* at 1344 (Thomas, J., concurring). Justice Kagan wrote an opinion concurring in the judgment joined by Justices Sotomayor and Jackson. *Id.* at 1359 (Kagan, J., concurring in the judgment). Justice Kavanaugh also wrote an opinion concurring in the judgment, joined by Justices Sotomayor, Kagan, and Jackson. *Id.* at 1362 (Kavanaugh, J., concurring in the judgment).
5. *See infra* Part II.
6. Robert W. Adler, *A Unified Theory of Clean Water Act Jurisdiction*, 73 CASE W. RES. L. REV. 235 (2022) [hereinafter Adler, *A Unified Theory*]; Robert W. Adler & Brian D. House, *Atomizing the Clean Water Act: Ignoring the Whole Statute and Asking the Wrong Questions*, 50 ENV’T L. 45 (2020) [hereinafter Adler & House, *Atomizing the Clean Water Act*].
7. *See* Adler, *A Unified Theory*, *supra* note 6, at 241; Adler & House, *Atomizing the Clean Water Act*, *supra* note 6, at 48–50, 52.
8. *See* Adler, *A Unified Theory*, *supra* note 6, at 253–65; Adler & House, *Atomizing the Clean Water Act*, *supra* note 6, at 67–95.

statutory construction requires attention to all relevant statutory language.⁹

To encourage a whole statute approach to the CWA's long-standing jurisdictional quagmire, in the last Volume of this journal I proposed a unified theory of Clean Water Act jurisdiction.¹⁰ That theory contended that Congress used a range of water body descriptors for different statutory purposes, with key ramifications for interpreting the breadth and meaning of "waters of the United States" (WOTUS), the pivotal term in *Sackett* and similar cases. I argued it was inappropriate to interpret the statute's jurisdictional terms, including WOTUS, in isolation from one another, and from other core statutory language.

Although the *Sackett* decision is certain to be analyzed at greater length by others, this brief follow-up to *A Unified Theory* evaluates the four opinions in the case through the lens of that theory. Part I provides the necessary background by summarizing the Supreme Court's three earlier major cases regarding the meaning of WOTUS, reiterating briefly the unified theory presented in my earlier article, and providing a short history of the *Sackett* litigation. Part II evaluates each of the four opinions relative to my analysis of CWA in *A Unified Theory*. Part III comments briefly on whether the case provides the certainty about the meaning of WOTUS and the scope of the CWA that prior Supreme Court opinions failed to delineate. The Conclusion summarizes how the four opinions in *Sackett* continue the Court's trend of atomizing the CWA, while failing to provide as much certainty about the scope of WOTUS as might be facially apparent.

I. BACKGROUND

A. *Sackett's SCOTUS Predecessors*

On three previous occasions, the Supreme Court decided cases regarding the meaning and scope of WOTUS. None resolved the issue clearly and definitively, instead leaving additional issues for subsequent litigation. One key issue in evaluating *Sackett*, therefore, is whether, correctly or incorrectly, it affords certainty about the meaning of WOTUS, which the prior decisions failed to provide.

In *United States v. Riverside Bayview Homes, Inc.*,¹¹ the Court ruled that WOTUS included wetlands that abutted on traditional

9. See Adler, *A Unified Theory*, *supra* note 6, at 236, 253, 266–68; Adler & House, *Atomizing the Clean Water Act*, *supra* note 6, at 68–78. See also, ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW* 56–58, 167–69 (2012) (explaining the canon of statutory construction, that the words of a governing text are paramount, but courts must rely on the whole text).

10. See Adler, *A Unified Theory*, *supra* note 6, at 260–65.

11. 474 U.S. 121 (1985).

navigable waters,¹² where the wetlands were inundated by groundwater sufficient to support wetlands vegetation.¹³ The Court left open, however, the applicability of the CWA to so-called nonadjacent wetlands.¹⁴

In *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers* (SWANCC),¹⁵ the Court adjudicated an agency decision to apply the CWA to ponds formed by precipitation into abandoned gravel pits, with no immediate connection to navigable or interstate waters.¹⁶ The U.S. Army Corps of Engineers (ACE) determined that the waters were part of WOTUS because they supported interstate migratory birds.¹⁷ The Court rejected this claim, asserting that it read the word “navigable” out of the statute entirely,¹⁸ and because it stretched the outer limits of Commerce Clause authority, requiring a clearer indication of legislative intent to go that far.¹⁹ Again, this litigation did not definitively resolve the question of WOTUS meaning and scope, because the decision’s broad rhetoric exceeded the relatively narrow question posed in the case: whether WOTUS included waters whose only connection to Commerce Clause authority was support of interstate migratory birds.²⁰

The uncertainty left after *SWANCC* prompted considerable additional litigation, leading to the third in the triad of pre-*Sackett* decisions, *Rapanos v. United States*.²¹ *Rapanos* consolidated several cases involving discharges that flowed into navigable waters through a range of intermediate channels.²² Rather than clarifying the long-standing WOTUS dispute, this case complicated matters further by generating a confusing 4-1-4 split. The plurality opinion written by Justice Scalia would have ruled that WOTUS includes only “relatively permanent, standing or continuously flowing bodies of water”²³ and

12. *Id.* at 131–35.

13. *Id.* at 129–30.

14. *See id.* at 131 n.8. For a more detailed analysis of *Riverside Bayview Homes*, see Adler, *A Unified Theory*, *supra* note 6, at 243–44.

15. 531 U.S. 159 (2001).

16. *Id.* at 165–67, 173–74.

17. *Id.* at 163–64.

18. *Id.* at 172.

19. *Id.* at 172–73.

20. For a more detailed analysis of *SWANCC*, see Adler, *A Unified Theory*, *supra* note 6, at 244–46.

21. 547 U.S. 715 (2006).

22. *Id.* at 720, 728–29, 759, 762–63 (reflecting varying characterizations of the waters in question by different Justices).

23. *Id.* at 739.

only wetlands “with a continuous surface connection to bodies that are [WOTUS] in their own right.”²⁴ Justice Kennedy’s opinion concurring in the judgment,²⁵ which the majority of lower courts treated as the controlling opinion because it was decided on the narrowest grounds,²⁶ asserted that WOTUS includes waters with a “significant nexus” to traditional navigable waters.²⁷

B. The Proposed Unified Theory of CWA Jurisdiction

In *A Unified Theory*, I characterized and critiqued Supreme Court opinions in each of these three prior cases.²⁸ Part of this analysis critiqued the Court’s tendency to base its opinion on individual statutory terms and phrases without considering how they fit into the overall statutory text and scheme, or “atomization,” of the statute. In addition, I posited a “unified theory” to explain not only the proper meaning of WOTUS, but also its relationship to other “scope terms” Congress used in the CWA.²⁹

I will not repeat that analysis here fully, but it forms the backdrop for the following assessment of *Sackett*. The unified theory posits that the term “WOTUS” nests within the Act’s broadest umbrella term, “the Nation’s waters,” and that Congress’s textual distinction between “WOTUS” and “navigable WOTUS” means that WOTUS transcends traditional navigable waters.³⁰ Moreover, to the extent that “waters” is undefined in the statute, statutory context and the need to fulfill all CWA goals and objectives suggest that it is used in its scientific sense.³¹ Therefore, the two expert agencies charged with the Act’s implementation have discretion to define the term in ways that effectuate those goals and objectives, i.e., that incorporate all hydrological

24. *Id.* at 742.

25. *Id.* at 759–87.

26. See Adler, *A Unified Theory*, *supra* note 6, at 251 n.81.

27. 547 U.S. at 779. The Ninth Circuit adopted and applied Justice Kennedy’s test in its review of the *Sackett* case. *Sackett v. U.S. EPA*, 8 F.4th 1075, 1087–91 (9th Cir. 2021). The Supreme Court’s majority opinion, however, asserts that none of the *Rapanos* opinions control. *Sackett v. EPA*, 143 S. Ct. 1322, 1329 n.3.

28. Adler, *A Unified Theory*, *supra* note 6, at 243–52.

29. *Id.* at 252–65. Although I argued that the unified theory made sense based on a purely textual analysis of the statute, the article also tested the theory against the CWA’s main substantive objectives, goals, and structure, *id.* at 266–80, and its ability to shed light on the multiple, fragmented lines of CWA scope cases. *Id.* at 280–91.

30. *Id.* at 260–62.

31. *Id.* at 290.

components of aquatic ecosystems that support traditional navigable waters.³²

C. The Sackett Litigation

Sackett involved what the Ninth Circuit characterized as “a soggy residential lot” purchased by the Sacketts near the shore of Priest Lake in Idaho, on which they wanted to build a residence.³³ After the Sacketts began to fill the lot in preparation for construction, the U.S. Environmental Protection Agency (EPA) issued an administrative compliance order to cease the work and to remove the fill from what the agency characterized as wetlands protected under the CWA.³⁴ The Sacketts sued to challenge EPA’s jurisdiction.³⁵ Ultimately, the district court and the Ninth Circuit affirmed EPA’s assertion of jurisdiction.³⁶

The Sacketts’ property was within 300 feet of Priest Lake, one of the largest lakes in Idaho, but was separated from the lake by a road and a row of other private parcels with houses.³⁷ The wetlands on the property had no direct surface connection to the lake or to waters that flowed into the lake. Rather, across the street from the Sacketts’ property sits a large fen wetland complex that flows into tributaries to the lake.³⁸ The wetlands themselves are not a traditional navigable water, nor do they flow directly into or abut a traditional navigable water. Rather, they connect to Priest Lake hydrologically through groundwater, a non-navigable tributary, and a wetlands complex that abuts the lake.³⁹

The district court rejected the Sacketts’ claim that EPA’s compliance order was arbitrary and capricious, and granted summary

32. *See id.* at 265.

33. *Sackett v. U.S. EPA*, 8 F.4th 1075, 1079 (9th Cir. 2021). The Supreme Court and Ninth Circuit opinions include more detailed recitations of the facts. *Sackett*, 143 S. Ct. at 1331–32; *Sackett*, 8 F.4th at 1079–82.

34. *Sackett*, 8 F.4th at 1079.

35. *See id.* For a description of the lengthy procedural history, see *id.* at 1081–82. The Supreme Court had ruled on another aspect of the case earlier, holding that EPA’s compliance order constituted a final agency action subject to judicial review even absent agency enforcement of the order. *Sackett v. EPA*, 566 U.S. 120, 131 (2012). The EPA also attempted to withdraw the compliance order that prompted the litigation and then argued that the case was moot, a proposition the Ninth Circuit rejected. 8 F.4th at 1082–86.

36. *Id.* at 1079.

37. *Id.* at 1080–81.

38. *See id.* at 1081.

39. *See id.* at 1081, 1092–93, 1092 n.13.

judgment to EPA.⁴⁰ The Ninth Circuit affirmed,⁴¹ finding that the wetlands on the property were “adjacent” to non-navigable tributaries to Priest Lake, which in turn was a navigable water, for purposes of the applicable regulations.⁴² It also held that, under the applicable regulation, artificial barriers such as roads did not defeat this finding of adjacency.⁴³ Finally, expressly deferring to the agency’s scientific expertise, it agreed with EPA’s determination, under Justice Kennedy’s test, that the wetlands had a significant nexus to and, in combination with other adjacent wetlands, significantly affect the lake’s ecological integrity.⁴⁴

II. ASSESSING *SACKETT* THROUGH THE LENS OF THE UNIFIED THEORY

From the perspective of the result, the Supreme Court’s reversal of the Ninth Circuit’s analysis was unanimous. This deceptively suggests that the decision was uncontroversial and not worthy of significant scrutiny. To the contrary, the reasoning that underlies the four opinions differed significantly. Moreover, each of the opinions perpetuated the Supreme Court’s trend of atomizing the CWA, thereby truncating its scope in ways that will frustrate attainment of the statutory goals and objectives.

A. Justice Alito’s Majority Opinion

Justice Alito’s opinion generated the majority ruling that evaded the Court in *Rapanos*.⁴⁵ The opinion framed the issue in broad terms and couched the ruling in equally broad language. Yet the facts of the case pose a much narrower issue relative to the CWA’s definitional terms, and the majority opinion turned largely on interpretation of a single word—“adjacent”—that appears in the agency regulations⁴⁶ and in a tangential provision of the statute that applies only to section 404

40. *Id.* at 1082.

41. *Id.* at 1093.

42. *Id.* at 1092 (citing 33 C.F.R. § 328.3(a)(1), (5), (7) (2008)).

43. *Id.*

44. *Id.* at 1092–93.

45. *See supra* Part I.A.

46. 40 C.F.R. § 230.3(s)(3), (7) (2008) (defining WOTUS to include all waters that “could affect interstate or foreign commerce” and wetlands “adjacent to” those waters). I cite to the version of the regulations interpreted by the Court because they were the prevailing version applied to the Sacketts’ property.

permits⁴⁷ rather than the definitional provisions themselves. In addition to providing yet another example of statutory atomization, this leads to significant questions about how the *Sackett* decision should, and will, be applied in future cases.

Justice Alito begins by stating that the “case concerns a nagging question about the *outer reaches*” of the CWA,⁴⁸ but restates the question with a hint of sarcasm:

The Act applies to “the waters of the United States,” but what does that phrase mean? Does the term encompass any backyard that is soggy enough for some minimum period of time? Does it reach “mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, [or] playa lakes?” How about ditches, swimming pools, and puddles?⁴⁹

He then asserts that the Court’s goal in the case is to “attempt to identify with greater clarity what the Act means by [WOTUS].”⁵⁰

EPA asserted jurisdiction over the *Sackett* property because the regulatory definition of WOTUS included “wetlands adjacent” to waters that could affect interstate or foreign commerce.⁵¹ The regulation defined “adjacent” as including wetlands “bordering,” “contiguous,” or “neighboring,” and agency guidance clarified that such adjacency exists when the wetlands, alone or in combination with similarly situated areas, have a “significant nexus to a traditional navigable water” because they “significantly affect the chemical, physical, and biological integrity” of those waters.⁵² The significant nexus principle derives from Justice Kennedy’s opinion in *Rapanos*, which had its origin in Chief Justice Rehnquist’s decision in *SWANCC*.⁵³ Basing that test on the “chemical, physical, and biological integrity” of waters effectuates the central objective of the CWA.⁵⁴

47. 33 U.S.C. § 1344(g)(1) (providing for state assumption of section 404 permit programs except for waters “used, or are susceptible to use,” in interstate or foreign commerce, “including wetlands adjacent thereto”).

48. *Sackett v. EPA*, 143 S. Ct. 1322, 1329 (2023) (emphasis added).

49. *Id.* (quoting 40 C.F.R. § 230.3(s)(3) (2008)).

50. *Id.*

51. *Id.* at 1331 (quoting 40 C.F.R. § 230.3(s)(7) (2008)).

52. *Id.* at 1331–33 (quoting 40 C.F.R. § 230.3(b) (2008)); EPA & U.S. ARMY CORPS OF ENG’RS, CLEAN WATER ACT JURISDICTION 6–7 (2007)) (noting that the agency regulations included wetlands separated from covered waters by artificial dikes or barriers).

53. *See supra* Part I.A.

54. 33 U.S.C. § 1251(a); *see Adler, A Unified Theory*, *supra* note 6, at 267–68.

The *Sackett* majority rejected EPA's assertion of jurisdiction and adopted two significant limits on the scope of WOTUS proposed by Justice Scalia in *Rapanos*. First, it agreed with Justice Scalia's conclusion that "waters" include "only those relatively permanent, standing or continuously flowing bodies of water 'forming geographic[al] features' that are described in ordinary parlance as 'streams, oceans, rivers, and lakes.'"⁵⁵ The primary rationale for this limitation is the statute's use of the word "waters" rather than "water," which the majority interprets—based on lay dictionary definitions rather than scientific principles or sources—as only referring to commonly understood flowing water bodies, such as rivers, lakes, oceans, and the like,⁵⁶ and noting the Act's frequent use of "waters" in the context of open water bodies.⁵⁷

In *A Unified Theory*, I similarly noted the statutory distinction between "water" and "waters" and discussed the implications for the meaning of the Act's scope terms.⁵⁸ Also like Justice Alito, I surmised that the distinction means that "the term 'waters' refers to water bodies or waterways, whereas 'water' refers to the water that forms—or is one component part of—those waters."⁵⁹ I did not, however, similarly conclude that this limits the scope of "waters" (or water bodies) to those with "relatively permanent, standing or continuously flowing bodies of water,"⁶⁰ because there is no basis in the text of the statute for that limitation. Indeed, statutory terms specifying types of water bodies include—in addition to rivers, lakes, the ocean, and the like—other aquatic systems such as wetlands, salt marshes, and groundwaters.⁶¹ Thus, the question is not, as Justice Alito suggested, whether those aquatic ecosystems qualify as "waters," but whether they are included in the waters "of the United States."

Indeed, inconsistent with his initial statement that WOTUS cannot include wetlands, Justice Alito acknowledged that "statutory context shows that some wetlands qualify as [WOTUS]."⁶² If so, the entire first portion of Justice Alito's analysis is wrong, or it adds nothing to his analysis. For "some wetlands" to qualify as WOTUS, wetlands

55. *Sackett*, 143 S. Ct. at 1336 (quoting *Rapanos v. United States*, 547 U.S. 715, 739 (2006)).

56. *Id.* at 1336–37.

57. *Id.* at 1337–38.

58. Adler, *A Unified Theory*, *supra* note 6, at 254 fig.1, 256–58.

59. *Id.* at 256.

60. 143 S. Ct. at 1336 (quoting *Rapanos v. United States*, 547 U.S. 715, 739 (2006)).

61. Adler, *A Unified Theory*, *supra* note 6, at 254 fig.1.

62. *Sackett*, 143 S. Ct. at 1338–39.

generally must qualify as “waters.” That is consistent with the categorization of scope terms presented in *A Unified Theory*.⁶³

If wetlands are “waters” within the meaning of the CWA, and if at least some of those wetlands qualify as WOTUS, the broadest question the Court should have framed is which wetlands fall into that category. In the specific context of *Sackett*, the only real question—a relatively narrow one—was whether wetlands separated from tributaries to traditional navigable waters by artificial barriers (here, a road) qualify as WOTUS.

This question led to the majority’s second key limitation on the scope of the CWA. The Court held that WOTUS include only wetlands that “are indistinguishably part of a body of water that itself constitutes ‘waters’ under the CWA.”⁶⁴ Stated somewhat differently, to be regulated under the CWA, wetlands must have “a continuous surface connection to bodies that are [WOTUS] . . . so that there is no clear demarcation between ‘waters’ and wetlands.”⁶⁵

Boiled down to its essence, Justice Alito’s decision regarding this issue turned on the meaning of a single word: “adjacent.”⁶⁶ Narrow focus on this single word perpetuates the Court’s tendency toward atomization of a complex statute rather than focusing on how the Act’s definitions relate to its objectives, goals, and operative provisions. This is particularly so given that the term “adjacent” occurs not in the Act’s scope definitions, but in a later amendment governing when states can assume authority over the section 404 permit program.⁶⁷

More importantly, however, Congress’s use of “adjacent” in section 404(g)(1) does not, on its face, purport to modify or amend the meaning of WOTUS. Instead, section 404(g)(1) limits the potential scope of delegated state permitting programs under section 404 to a subset of waters governed by that provision:

[A]ny State desiring to administer its own . . . permit program for the discharge of dredged or fill material into the navigable waters (*other than* those waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce shoreward to their ordinary high water mark, including all waters which are subject to the ebb and flow of the tide shoreward to their mean high water mark, or mean higher high

63. Adler, *A Unified Theory*, *supra* note 6, at 254 fig. 1.

64. *Sackett*, 143 S. Ct. at 1339.

65. *Id.* at 1340 (quoting *Rapanos v. United States*, 547 U.S. 715, 742 (2006)).

66. *See id.* at 1339–41.

67. Clean Water Act of 1977, Pub. L. No. 95-217, § 404, 91 Stat. 1601 (codified at 33 U.S.C. § 1344(g)(1)).

water mark on the west coast, *including wetlands adjacent thereto*) within its jurisdiction may submit [a proposed program to EPA].⁶⁸

The most basic error in Justice Alito's analysis is that it rewrites the punctuation and similarly redrafts a key word in section 404(g)(1) in ways that fundamentally alter the provision's meaning. Justice Alito purported to restate this provision "[i]n simplified terms,"⁶⁹ but through this simplification he rewrote the provision's punctuation in a way that altered the meaning dramatically. He translates the provision to mean that states may exert jurisdiction over any WOTUS, *except* for traditional navigable waters, but *including* wetlands adjacent to WOTUS.⁷⁰ From this parsing of his rewritten statutory text, he concluded that states may not regulate discharges into traditional navigable waters, but they may regulate discharges into wetlands adjacent to WOTUS; therefore, some wetlands must be considered as parts of WOTUS, but not all wetlands.⁷¹ This freed Justice Alito to surmise that "adjacent" wetlands include only wetlands that are "indistinguishably part of a body of water that itself constitutes 'waters' under the CWA."⁷² He cited two reasons for this conclusion. First, by rewriting the word "including" to "included,"⁷³ he asserts that only wetlands "included" as part of traditional navigable waters are regulated as WOTUS. He bolsters this reading by citing lay dictionary definitions of the word "adjacent."⁷⁴

Reading section 404(g)(1) as it is drafted, rather than using Justice Alito's paraphrasing, produces a far different meaning. Section 404(g)(1) defines waters over which states may assume dredge and fill permit authority.⁷⁵ The parenthetical in the provision, which begins with "other than,"⁷⁶ is an exception identifying those waters over which a state may *not* exert such authority. The phrase "including wetlands adjacent thereto" is contained *within the parenthetical*, and therefore applies to the categories of exempted waters contained earlier in the parenthetical, i.e., to traditional navigable waters used or susceptible

68. 33 U.S.C. § 1344(g)(1) (emphasis added).

69. *Sackett*, 143 S. Ct. at 1339.

70. *Id.*

71. *Id.*

72. *Id.*

73. The opinion at least acknowledges this sleight of hand overtly by writing "includ[ed]." *Id.* (alteration in original).

74. *Id.* at 1339–40.

75. 33 U.S.C. § 1344(g)(1).

76. *Id.*

to use for commerce.⁷⁷ On its face, then, the exempted waters include “wetlands adjacent” to traditional navigable waters used or susceptible to use for commerce. That suggests the opposite conclusion from that reached by Justice Alito, i.e., that wetlands adjacent to traditional navigable waters are among, but not the only, wetlands included within WOTUS.

This reading makes sense given the early history of federal regulation of navigable waters to safeguard navigation. Justice Alito acknowledged that Congress enacted pre-1972 regulation of waterways to prevent obstruction of commerce.⁷⁸ This goal explains why Congress initially enacted the Rivers and Harbors Act of 1899,⁷⁹ in an era when water pollution was not yet a significant national concern. It also explains why Congress delegated that responsibility to ACE in the 1899 statute,⁸⁰ and why it maintained that authority in ACE in section 404 of the 1972 CWA with respect to the discharge of dredged or fill material into water bodies, which could continue to interfere with shipping and boating and other navigation.⁸¹ By contrast, Congress transferred authority over other water pollutant discharges to EPA via section 402, which governs the discharge of all other kinds of water pollutants.⁸²

Notably, both permitting provisions of the statute authorize permit-program delegation to individual states, with one key difference relevant here. Section 402 program delegation is not limited to any specific category of navigable waters.⁸³ By contrast, the provision relied on by the Supreme Court majority to truncate the meaning of WOTUS

77. *Id.*

78. *Sackett*, 143 S. Ct. at 1337–38; *see also, id.* at 1346–47 (Thomas, J., concurring) (discussing early legislation granting ACE authority to regulate obstructions affecting navigability).

79. *See generally* Ch. 425, §§ 10, 13, 30 Stat. 1121, 1151–52 (prohibiting unauthorized obstruction of navigable waters and authorizing the Secretary of War to “permit the deposit of any material . . . in navigable waters” with approval from the Chief of Engineers) (current version at 33 U.S.C. §§ 401, 403).

80. *Id.* at 1121.

81. Clean Water Act, Pub. L. No. 92-500, § 404, 86 Stat. 816, 884 (1972) (current version at 33 U.S.C. § 1344(d)).

82. 33 U.S.C. § 1342.

83. State authority under section 402 may apply, without qualification, to any “discharges into navigable waters within its jurisdiction.” *Id.* § 1342(b). A state may choose to apply for a partial permit program, but that is the state’s choice. *See id.* § 1342(n). Indeed, states are also free to go beyond the minimum CWA requirements, including requiring permits for discharges to waters (such as groundwater) that may be beyond the scope of WOTUS. *See id.* § 1370.

limits waters over which states may assume section 404 permit authority, leaving traditional navigable waters and wetlands “adjacent” to those waters, and thus that may similarly affect navigability, to regulation by ACE. Existing CWA provisions similarly retained ACE authority over navigability, as distinct from concerns about water pollution.⁸⁴ Likewise, section 404(t) of the CWA, added contemporaneously with section 404(g), retained state authority to implement its own controls over discharges of dredged or fill material into all navigable waters, without the limitations on adoption of section 404 program authority in section 404(g), so long as that regulation does not affect or impair ACE authority to “maintain navigation.”⁸⁵

Although this meaning of section 404(g)(1) seems crystal clear from the plain text of the statute (using the words Congress chose, not Justice Alito’s rewritten version), it is confirmed by the amendment’s legislative history. First, the 1977 House bill would have accomplished much of what Justice Alito alleged Congress did in the final bill, but the 1977 Conference Committee rejected that version of the legislation.⁸⁶ The House bill would have limited section 404 permitting to “navigable waters and adjacent wetlands.”⁸⁷ It would also have allowed regulation of discharges into non-navigable waters and wetlands adjacent thereto, but only if the Secretary of the Army and a state governor agreed such regulation was needed due to their ecological and environmental importance.⁸⁸ The Conference Committee, however, rejected those limitations, adopting a substitute provision instead.⁸⁹ Notably, however, even the more restrictive proposed House provision acknowledged that non-navigable waters, wetlands adjacent to non-navigable waters, and intrastate freshwater lakes were subject to CWA regulation, and therefore fell within the definition of WOTUS.⁹⁰

The Senate version of the 1977 legislation, also rejected in favor of the Conference Substitute, would have authorized state assumption of the entire section 404 permit program, but only for purposes of addressing environmental concerns.⁹¹ Under that version, ACE would have

84. *Id.* § 1371(a) (retaining ACE authority to maintain navigation under the 1899 statute); § 1371(b) (retaining ACE authority under existing legislation with respect to “effect[s] on navigation and anchorage”).

85. *Id.* § 1344(t) (originally enacted as Clean Water Act of 1977, Pub. L. No. 95-217, § 67, 91 Stat. 1566, 1606).

86. *See* H.R. REP. NO. 95-830, at 1 (1977) (Conf. Rep.).

87. *Id.* at 97.

88. *Id.* at 97–98.

89. *Id.* at 100–05.

90. *See id.* at 97–98.

91. *Id.* at 99.

retained authority over navigation protection under the 1899 Rivers and Harbors Act, as already reflected in section 511.⁹² The Conference Report states that the Conference Substitute version of section 404(g)(1) allowed states to assume permitting for all navigable waters except “traditionally navigable waters and adjacent wetlands.”⁹³ This simpler phrasing than included in the final version of section 404(g)(1) confirms that state program assumption was prohibited for traditionally navigable waters (those used or susceptible for use in interstate or foreign commerce) and wetlands adjacent thereto, but state assumption was allowed for other navigable waters (defined as WOTUS).

Justice Alito’s redrafted version of section 404(g)(1) would make sense only if the wetlands included in WOTUS were limited to those adjacent to traditional navigable waters. Using the actual text of that provision, however, only ACE may regulate discharges into wetlands adjacent to traditional navigable waters, while states may regulate other wetlands. Any other result would leave a nonsensical null set of wetlands over which states could assume permit authority. As I argued in *A Unified Theory*, given the complex hydrological and ecological issues surrounding which wetlands and other waters must be protected to meet the CWA’s goals of aquatic ecosystem integrity, those decisions should be left to the sound discretion of the agencies to which Congress delegated authority over CWA implementation, subject to ordinary rules of administrative law, to ensure that those decisions are reasoned and are based on a sufficient factual basis.⁹⁴

B. The Additional Opinions

Because Justice Alito’s opinion commanded the five votes that eluded the Court in *Rapanos*, it is obviously the most important focal point for analysis. For somewhat different reasons, however, it is also useful to scrutinize the other three opinions through the lens of *A Unified Theory*.

1. Justice Thomas’s Concurring Opinion

Justice Thomas joined “in full” with Justice Alito’s majority opinion but did not believe it went far enough in constraining agency authority under the CWA.⁹⁵ Rather, he believed the word “navigable” and the phrase “of the United States” provide additional grounds to restrict the scope of WOTUS, suggesting that CWA is limited to traditional navigable waters used in commerce, and only for purposes

92. *Id.*; see also *Sackett v. EPA*, 143 S. Ct. 1322, 1346–47 (2023) (Thomas, J., concurring).

93. See H.R. REP. NO. 95-830, at 104 (1977) (Conf. Rep.).

94. See Adler, *A Unified Theory*, *supra* note 6, at 243–44.

95. *Sackett*, 143 S. Ct. at 1344.

of protecting commercial navigation.⁹⁶ The Thomas opinion does have the value of deciding the issue based on more than the single word “adjacent” (although he did join in Justice Alito’s interpretation of that term and its significance to the case) and, thus, is modestly less atomistic in its approach. His reading of those selected words and phrases, however, is equally incorrect as a matter of basic statutory construction, and even more myopic in his view of how the CWA’s scope terms relate to the full statutory text.

Justice Thomas asserts repeatedly that the terms “navigable water,” “water of the United States,” and “navigable water of the United States” are synonymous because they were used interchangeably by Congress in previous statutes.⁹⁷ Particularly given his substitution of the statutory term “waters” with the singular “water” in all three cases, this makes no sense as a general matter of statutory construction, and in the specific context of the CWA. Courts presume that Congress uses different words intentionally, and seek to ascertain the reasons for, and the significance of, those intentional distinctions.⁹⁸ In *A Unified Theory*, I explained the logical nesting of the CWA terms “the Nation’s waters,” “WOTUS,” and “navigable WOTUS,” and their implications for statutory interpretation and implementation.⁹⁹ If Congress intended WOTUS to be identical to traditional navigable waters, why would it have bothered to define “navigable waters” as “the waters of the United States?”¹⁰⁰ Justice Thomas dismisses legislative history explaining that Congress redefined navigable waters as WOTUS expressly to clarify that it used the term “WOTUS” to reach to the farthest extent permissible consistent with the Commerce Clause.¹⁰¹ Yet that explanation makes far more sense than one in which Congress allegedly defined one term with another it believed to be synonymous under law to begin with. His analysis also ignores the fact that Congress added the word “navigable” to WOTUS in those cases expressly involving federal concern, clearly indicating an intentional distinction between WOTUS and “navigable WOTUS.”¹⁰²

In concert with this view of the CWA’s scope terms as being limited to the traditional test for navigability, Justice Thomas asserts that the purposes for which Congress sought to protect waterways in the CWA

96. *Id.* at 1344–45, 1349–50.

97. *Id.* at 1347.

98. See SCALIA & GARNER, *supra* note 9, at 174–79 (presenting the canon that all words in a text must be given effect).

99. See Adler, *A Unified Theory*, *supra* note 6, at 254–65.

100. 33 U.S.C. § 1362(7).

101. *Sackett*, 143 S. Ct. at 1353–56.

102. See Adler, *A Unified Theory*, *supra* note 6, at 258–60.

are limited to protection of navigation as a channel of interstate commerce, as it had in the Rivers and Harbors Act of 1899 and similar nineteenth-century laws.¹⁰³ Although Justice Thomas acknowledges at the outset that the Court in the New Deal era broadened the purposes of Commerce Clause regulation of navigable waters,¹⁰⁴ he simply ignored the broadly stated environmental goals Congress articulated not only in the opening section of the statute defining its goals and objectives,¹⁰⁵ but in many of its operative provisions as well.¹⁰⁶ It is a classic example of atomization in “interpreting” isolated statutory terms without any reference to the statutory provisions they were designed to effectuate. Moreover, it ignores the fact that most of the CWA’s substantive protections, such as effluent limitations governing discharges of toxic and other water pollutants,¹⁰⁷ and water quality standards designed to protect human health and aquatic ecosystems from dissolved and mostly invisible water pollutants,¹⁰⁸ have absolutely nothing to do with efforts to protect navigability from obstructions.

Finally, Justice Thomas justifies his myopic view of the CWA’s scope and purposes by invoking the traditional test of navigability the Court articulated in *The Daniel Ball*¹⁰⁹ and in other nineteenth-century and early twentieth-century navigability cases.¹¹⁰ Yet while admitting that cases such as *United States v. Appalachian Electric Power*¹¹¹ expanded the purposes for which Congress may assert Commerce Clause regulation over navigable waters,¹¹² he ignored the fact that the same case also expanded the scope of waters subject to Commerce Clause regulation to non-navigable tributaries and other waters—the use or impairment of which might affect interstate commerce. Thus, although Justice Thomas purported to join “in full” with the majority opinion, which acknowledged that at least some wetlands may fall

103. *Sackett*, 143 S. Ct. at 1346–47.

104. *Id.* at 1351.

105. § 1251(a); see generally Adler, *A Unified Theory*, *supra* note 6, at 266–80 (detailing seven core principles embedded in the CWA’s opening provision).

106. See, e.g., *id.* § 1311(b)(2)(A) (incorporating the Act’s zero discharge goal into required effluent limitations regulations); *id.* § 1313(c)(2)(A) (requiring water-quality standards to address a broad range of goals, including but not limited to navigation).

107. *Id.* §§ 1311, 1314(b).

108. *Id.* §§ 1313(c), 1314(a).

109. 77 U.S. 557, 563 (1870).

110. *Sackett v. EPA*, 143 S. Ct. 1322, 1349–51 (2023).

111. 311 U.S. 377, 428 (1940).

112. *Sackett*, 143 S. Ct. at 1337, 1351.

within WOTUS,¹¹³ Justice Thomas incorrectly implies that only those waters meeting the traditional test for navigability articulated in *The Daniel Ball* are subject to Commerce Clause authority.¹¹⁴

Thus, Justice Thomas's analysis not only perpetuates the atomization of the CWA, but it also continued the trend begun by Chief Justice Rehnquist in *SWANCC*¹¹⁵ and continued by Justice Kennedy in *Rapanos*,¹¹⁶ to apply the incorrect, unduly narrow definition of navigability for purposes of defining the potential reach of congressional Commerce Clause authority.

2. Opinions Concurring in the Judgment

Justices Kavanaugh and Kagan issued opinions concurring in the judgment, joined by a total of four Justices.¹¹⁷ Both opinions reflect the same basic approach to the case. Justice Kavanaugh's opinion is more detailed and referred to by Justice Kagan as the "principal concurrence."¹¹⁸ These opinions adopt a somewhat broader approach to statutory interpretation than the majority opinion, because they at least seek guidance in the CWA's stated underlying objectives. Both share the same atomistic approach as the majority opinion, however, in focusing largely on the single word "adjacent," read out of context with the purpose of the provision in which it appears.¹¹⁹ Neither opinion explains clearly why they concur in the judgment rather than dissent¹²⁰

113. See *supra* text accompanying note 71.

114. I am sadly bemused by the fact that Justice Thomas cited one of my articles in support of his overall analysis of the navigability issue, see *Sackett*, 143 S. Ct. at 1345, even though that article explained that the Supreme Court had adopted multiple tests for navigability for four separate constitutional purposes, and that navigability for purposes of Commerce Clause regulation was, in most respects, the broadest of those tests. See Robert W. Adler, *The Ancient Mariner of Constitutional Law: The Historical, Yet Declining Role of Navigability*, 90 WASH. U. L. REV. 1643, 1672–73, 1676 (2013).

115. See Adler, *A Unified Theory*, *supra* note 6, at 245–47.

116. See *id.* at 251–52.

117. Justices Sotomayor, Kagan, and Jackson joined Justice Kavanaugh's opinion. *Sackett*, 143 S. Ct. at 1362 (Kavanaugh, J., concurring in the judgment). Justices Sotomayor and Jackson joined Justice Kagan's opinion. *Id.* at 1359 (Kagan, J., concurring in the judgment).

118. *Id.* at 1359–62 (Kagan, J., concurring in the judgment). Justice Kagan's opinion reads like an opinion concurring in Justice Kavanaugh's opinion concurring in the judgment.

119. See *supra* Part II.A.

120. As discussed below, Justice Kavanaugh simply asserts without analysis or explanation that the Sackett wetlands do not fit within any of the regulatory categories covered in the applicable agency regulations, which he would have upheld. 143 S. Ct. at 1369 (Kavanaugh, J., concurring in

or, at a minimum, suggests that the case should be remanded to the agency for reconsideration based on a different standard for the meaning of WOTUS.

Justice Kavanaugh joined the majority in rejecting the “significant nexus” test urged by Justice Kennedy in *Rapanos*.¹²¹ *A Unified Theory* similarly critiqued the “significant nexus” test as judicially created,¹²² although it does require jurisdictional wetlands to support the statute’s core objective of chemical, physical, and biological integrity of the nation’s waters.¹²³ “Significant” is subjective rather than scientific, but had the test originated in agency regulations rather than judicial opinions, it might withstand *Chevron* analysis as a reasonable interpretation of an ambiguous statutory definition.¹²⁴

Consistent with this approach of rejecting judicially created addenda to statutory text, however, Justice Kavanaugh parted with the majority in rejecting its own extra-statutory tests taken from Justice Scalia’s plurality opinion in *Rapanos*, i.e., that to be included in WOTUS, wetlands must have a continuous surface connection to traditional navigable waters.¹²⁵ Justice Kavanaugh also explained the ways in which the “continuous surface connection” test would impede effectuation of statutory objectives¹²⁶ and would leave difficult, unscientific dividing lines for future statutory implementation.¹²⁷ As Justice White recognized in *Riverside Bayview Homes* and I argued in *A Unified Theory*, judges should not substitute their own scientific

the judgment). Justice Kagan does not address the issue at all, although by joining in Justice Kavanaugh’s opinion, presumably she consented in the same brief explanation. *See id.* at 1359–62 (Kagan, J., concurring in the judgment).

121. *Id.* at 1362 (Kagan, J., concurring in the judgment).

122. Adler, *A Unified Theory*, *supra* note 6, at 252.

123. 33 U.S.C. § 1251(a); *see Sackett*, 143 S. Ct. at 1359–60 (Kagan, J., concurring in the judgment).

124. *See Chevron U.S.A. Inc., v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984) (holding that agency regulations should be upheld if supported by unambiguous statutory language or a reasonable agency interpretation of ambiguous statutory text).

125. *Sackett*, 143 S. Ct. at 1362, 1366–67 (Kavanaugh, J., concurring in the judgment). *See also id.* at 1359 (Kagan, J., concurring in the judgment).

126. *Id.* at 1368 (Kavanaugh, J., concurring in the judgment); *see also id.* at 1360 (Kagan, J., concurring in the judgment) (noting that wetlands are integral parts of the aquatic environment).

127. *Id.* at 1368–69.

conjectures for the expertise of the agencies Congress delegated to make those judgments.¹²⁸

Despite these efforts to correct some of the main errors in the majority opinion, both Justice Kavanaugh and Justice Kagan fell into the trap of accepting that the key to the case was the single word “adjacent,” taken out of statutory context. To be sure, Justices Kavanaugh and Kagan disagreed with the majority’s construction of the term.¹²⁹ Justice Kavanaugh recognized Justice Alito’s error in ignoring the grammar of section 404(g),¹³⁰ explaining that wetlands adjacent to traditional navigable waters were included in the category of waters for which only ACE may issue section 404 permits.¹³¹ Both he and Justice Kagan also explained that Justice Alito ignored the plain meaning of “adjacent” as distinct from “adjoining.”¹³²

Yet, like Justice Alito, Justices Kavanaugh and Kagan misconstrued the role of section 404(g) relative to the full statutory text, thus continuing the tendency to atomize the CWA. Preliminarily, Justice Kavanaugh appears to have mistakenly believed that, in the 1977 amendments, Congress created a new permit program (section 404 permits for the discharge of dredged or fill material), and that states were eligible to assume responsibility for a portion of that new program.¹³³ Justice Kavanaugh correctly concludes that section 404(g) confirmed that the CWA’s regulatory reach extends to adjacent wetlands,¹³⁴ and that Congress rejected efforts to narrow the Act to exclude some or all wetlands.¹³⁵ The implication, however, is that Congress only intended in this amendment to clarify that adjacent

128. Adler, *A Unified Theory*, *supra* note 6, at 243–44 (citing *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 134 (1985)).

129. *Sackett*, 143 S. Ct. at 1363–64 (Kavanaugh, J., concurring in the judgment); *id.* at 1360 (Kagan, J., concurring in the judgment).

130. *See supra* Part I.A.

131. *Sackett*, 143 S. Ct. at 1366–67. Justice Kavanaugh discredits Justice Alito’s “A minus B, which includes C” formulation, *id.* at 1366 (quoting *id.* at 1339 (majority opinion)), but does not clearly explain that this error resulted in a diametrically opposite—and incorrect—reading of the provision.

132. *Id.* at 1366; *id.* at 1359 (Kagan, J., concurring in the judgment).

133. *Id.* at 1366–67 (Kavanaugh, J., concurring in the judgment). I say “appears to have” because it is possible that Justice Kavanaugh recognized that Congress adopted the section 404 permit program in 1972, and the “new” permit program to which he refers was the state component. The language of the opinion is unclear in this respect.

134. *Id.* at 1363 (majority opinion); *id.* at 1367 (Kavanaugh, J., concurring in the judgment).

135. *Id.* at 1367 (Kavanaugh, J., concurring in the judgment).

wetlands are covered by the statute.¹³⁶ As discussed earlier, however, the much more logical and historically consistent view is that Congress adopted section 404(g) to authorize state administration of some, but not all, of the section 404 permit program.¹³⁷ The category of waters Congress exempted from state authority, logically to maintain ACE authority over traditional navigability protection, included waters used or susceptible for use for commercial navigation, and wetlands adjacent thereto.¹³⁸ Also as explained earlier, had Congress only intended to clarify that the Act covered wetlands adjacent to traditional navigable waters, that would have left an illogical null set of wetlands over which states could administer dredge and fill permits under the new state program assumption provision.¹³⁹ At a minimum, the Act also must include wetlands adjacent to other jurisdictional waters, such as tributaries to navigable waters. Yet other than signifying those minima, nothing in section 404(g) purports to amend the statute's definition of WOTUS or its potential application to other wetlands as necessary to meet the Act's stated goals and objective.

Thus, considering the full statutory scheme, Justices Kavanaugh and Kagan should have rejected outright Justice Alito's use of section 404(g) to limit the scope of WOTUS as a misapplication of a statutory amendment designed to accomplish something else entirely. At a minimum, after noting Justice Alito's grammatical error and articulating the plain meaning of the word "adjacent," they could have indicated that the only significance of the word "adjacent" in the context of this case was to confirm that WOTUS includes at least some adjacent wetlands. As such, the case could have been resolved on those narrow grounds, without the need to speculate about the full scope of WOTUS, as the majority did by proclaiming broadly that WOTUS includes only relatively permanent, continuously flowing waters and wetlands adjacent thereto.

Apparently, this continued atomization also led Justices Kavanaugh and Kagan to concur in the judgement rather than dissent. By simply asserting without clear explanation that the Sackett wetlands fell within none of the categories of water included in the definition of "adjacent" in the agency regulation,¹⁴⁰ Justice Kavanaugh assumed that section 404(g) "adjacency" was the only possible basis for regulating the Sackett wetlands. He also failed to explore, based on the

136. Justice Kagan fell further into Justice Alito's linguistic trap by accepting his redrafting of "including" to "includ[e]." *Id.* at 1359–60 (Kagan, J., concurring in the judgment); *see supra* Part II.A.

137. *See supra* Part II.A.

138. *See supra* Part II.A.

139. *See supra* Part II.A.

140. *See Sackett*, 143 S. Ct. at 1369 (Kavanaugh, J., concurring in the judgment).

administrative record, whether the agency decision was arbitrary and capricious or otherwise not in accordance with law¹⁴¹ under its applicable regulations (the basic meaning of which Justice Kavanaugh would have upheld). Indeed, he appears to have ignored entirely the Ninth Circuit's review of this issue, which cited the record evidence of the adjacency of, and hydrological connections between, the Sackett wetlands and the unnamed tributary to Kalispell Creek and, thereby, to Priest Lake.¹⁴² At a minimum, given his reading of the statute and applicable regulations, Justice Kavanaugh could have urged a remand seeking agency reconsideration or additional explanation consistent with his interpretation of the statute.

III. DOES *SACKETT* PROVIDE THE ELUSIVE CERTAINTY ABOUT THE MEANING OF WOTUS?

Although the four *Sackett* opinions continued the Supreme Court's trend of interpreting the CWA through an atomized, unduly narrow lens, the fact that this case—unlike *Rapanos*—generated a five-justice majority suggests that, at a minimum, it provided more future certainty about the meaning of the statutory scope term “WOTUS,” and therefore the waters and activities to which the Act's regulatory apparatus applies. This is true to some extent, but perhaps not as much as one might imagine.

To begin, the majority opinion in *Sackett* characterizes the issue before the Court in different ways in different parts of the opinion, leading to a range of potential holdings, from exceedingly broad to relatively narrow. At the outset, Justice Alito characterized the case very broadly, purporting to decide the meaning of the term “WOTUS” generally, rather than as it applied to the specific wetlands at issue in the case.¹⁴³ At the close of Part I of the opinion, he narrowed this somewhat to suggest the Court “granted certiorari to decide the proper test for determining whether wetlands are ‘waters of the United States.’”¹⁴⁴

Justice Alito's first stated holding in the case tracks this second formulation, but with an addendum suggesting a much broader reach:

In sum, we hold that the CWA extends to only those wetlands that are “as a practical matter indistinguishable from waters of the United States.” This requires the party asserting jurisdiction

141. 5 U.S.C. § 706. This was the approach to the case adopted by the Ninth Circuit. *See Sackett v. U.S. EPA*, 8 F.4th 1076, 1091–92 (9th Cir. 2021).

142. *Sackett*, 8 F.4th at 1092–93 & nn.13–14.

143. *Sackett*, 143 S. Ct. at 1329.

144. *Id.* at 1332 (quoting *Sackett v. EPA*, 8 F.4th 1075 (9th Cir. 2021)).

over adjacent wetlands to establish “first, that the adjacent [body of water constitutes] . . . ‘water[s] of the United States,’ (*i.e.*, a relatively permanent body of water connected to traditional interstate navigable waters); and second, that the wetland has a continuous surface connection with that water, making it difficult to determine where the ‘water’ ends and the ‘wetland’ begins.”¹⁴⁵

At the end of the opinion, however, he reverts to a somewhat narrower formulation: “In sum, we hold that the CWA extends to only those ‘wetlands with a continuous surface connection to bodies that are “waters of the United States” in their own right,’ so that they are ‘indistinguishable’ from those waters.”¹⁴⁶

In this case, EPA did not seek to regulate discharges into Priest Lake, its tributaries, or even the adjacent fen, but only the wetlands on the Sackett property separated from those other waters by artificial roads. Thus, if those wetlands could not qualify as WOTUS under Justice Alito’s analysis, it was not necessary to the decision to determine which tributary waters would have qualified as a sufficient “parent” to a wetland “adjacent” to that water body. Thus, any extension of the opinion beyond those wetlands is dictum. Justice Alito might have decided the decision in a broader way, by reasoning that even if the Sackett wetlands met the statutory adjacency test, the waters to which they were purportedly adjacent did not fall within what he viewed as sufficient, *i.e.*, to “a relatively permanent body of water connected to traditional interstate navigable waters.”¹⁴⁷ He did not, however, conduct that analysis based on the record of this case. Thus, based on the facts of the case and the grounds on which it was decided, the holding should logically be limited to mean that wetlands separated from another water body, even by an artificial barrier,¹⁴⁸ cannot qualify as part of WOTUS.

Adding to this uncertainty, in his concurring opinion, Justice Thomas suggested a much broader reach for the case. He argued that, in addition to the Sackett wetlands, WOTUS does not include the non-navigable tributaries adjacent to the Sackett parcel, to their connected

145. *Id.* at 1341 (citation omitted) (quoting *Rapanos v. United States*, 547 U.S. 715, 742 (2006)).

146. *Id.* at 1344 (quoting *Rapanos v. United States*, 547 U.S. 715, 742, 755 (2006)).

147. *See supra* note 145 and accompanying text.

148. Justice Alito did suggest one limitation to this principle in cases in which the party subject to regulation created the artificial barrier in a way subject to independent enforcement. *Sackett*, 143 S. Ct. at 1341 n.16. Among other problems, this formulation ignores all past artificial actions separating wetlands from other waters, even illegally. It also would allow Party A to create a new barrier so long as the party seeking to fill the now-separated wetland was different.

fens, or even to Priest Lake, which he asserted was a purely intrastate lake, without record support or analysis.¹⁴⁹ None of this was litigated in *Sackett*, leading to no record evidence one way or another, much less analyzed in Justice Thomas's opinion. A simple Google Map search shows that the outlet of Priest Lake, the Priest River, flows into the Pend Oreille River, which then crosses north into Canada and joins the Columbia River, which flows back into Washington and into the Pacific Ocean.¹⁵⁰ Moreover, like Justice Kavanaugh, Justice Thomas ignored the Ninth Circuit's recitation and review of record evidence establishing the hydrological connectivity of the waters in question.¹⁵¹

Justice Kavanaugh suggested that the majority opinion left troubling dividing lines for future statutory implementation and likely litigation. That is likely correct, but based on even the brief analysis above, it also likely understates the uncertainty left in the wake of *Sackett*.

CONCLUSION: SACKETT'S ATOMIZED YET UNCERTAIN TRUNCATION OF CWA JURISDICTION

In *Sackett*, both the majority and the Justices concurring and concurring in the judgment continued the Supreme Court's trend of atomizing the CWA by interpreting its key provisions by reference to individual words or phrases taken out of context from the whole statute. This is unfortunate both for the future of the CWA and for the integrity of the Court's methodology in construing complex regulatory statutes.

In theory, one saving grace of *Sackett* was that it generated a majority opinion that could have provided long-sought certainty regarding the meaning of WOTUS, whether correctly or not. Even in this regard, however, the decision fell short. The majority opinion left considerable room for dispute about the meaning and future application of its judicially created new test for WOTUS. This is predictable when judges, untrained in science, attempt to create ecological and hydrological distinctions best left to scientists trained in those fields, along with rational agency application of the relevant science to address the goals included in the statutory text. Moreover, given the wide gap between some of the majority opinion's rhetoric and the much narrower factual context of the case, it is unclear how much of the opinion is dictum rather than binding precedent.

149. *See id.* at 1357.

150. *See* Map of Priest Lake, GOOGLE MAPS, <https://www.google.com/maps/place/Priest+Lake/@48.1857161,-117.5490254,9z> [<https://perma.cc/MF8X-8NFN>].

151. *See supra* Part II.B.1 and text accompanying note 142.