Case Western Reserve Law Review

Volume 74 | Issue 3 Article 8

2024

The Cost of Clarity: Closing the Floodgates on WOTUS Ambiguity and the Bleak Future of Wetlands Protections

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— Comment —

The Cost of Clarity: Closing the Floodgates on WOTUS Ambiguity and the Bleak Future of Wetlands Protections

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Introduction

What are "waters of the United States"?[1] To ask a legal professional this question is to open the floodgates to a lengthy, perplexing discussion. It is a question Justice Alito has described as "nagging" and "frustrating."[2] Professionals and courts have attempted to establish a

1. 33 U.S.C. § 1362(7).

2. Sackett v. EPA, 143 S. Ct. 1322, 1329, 1336 (2023).

solution to the question for the past fifty years—since the very enactment of the Clean Water Act (CWA) in 1972.[3] This million-dollar question arose after the CWA established federal jurisdiction over "navigable waters,"[4] which Congress then defined as "waters of the United States."[5] Unfortunately, Congress did not provide additional information on what it meant by "waters of the United States" (WOTUS). Rather, it was left to the Environmental Protection Agency (EPA) and the Army Corps of Engineers (Corps) to attempt to add clarification by defining "WOTUS" through various regulations.[6]

Without a clear definition of what constitutes WOTUS, courts were left to develop their own determinations of the CWA's jurisdictional reach. While some bodies of water distinctly fall under CWA jurisdiction (e.g., rivers, lakes, and streams), the decision for other water bodies is not so clear-cut. Thus, at the center of the contentious WOTUS debate are wetlands—specifically, wetlands *adjacent* to a traditional navigable water.[7] Although wetlands themselves are frequently unnavigable "shallow, boggy patches of moist ground," the CWA's statutory language often leads federal courts to rule that adjacent wetlands are within the meaning of "WOTUS."[8] This statutory language includes the CWA's overall mission to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[9]

The Supreme Court's interpretation of "WOTUS" and what wetlands are subject to CWA protections has evolved over time.[10] These rulings have oscillated between both strict and broad WOTUS interpre-

3. Pub. L. No. 92-500, 86 Stat. 816 (1972) (codified as amended at 33 U.S.C. §§ 1251–1389); Jesse J. Richardson, Jr., Tiffany Dowell Lashmet & Gatlin Squires, *Turtles All the Way Down: A Clearer Understanding of the Scope of Waters of the United States Based on the U.S. Supreme Court Decisions*, 46 WM. & MARY ENV'T L. & POL'Y REV. 1, 1 (2021).

4. 33 U.S.C. § 1251(a)(1); *About Waters of the United States*, EPA, https://www.epa.gov/wotus/about-waters-united-states [https://perma.cc/PZ3F-JE3S] (Oct. 10, 2023).

5. 33 U.S.C. § 1362(7).

6. *About Waters of the United States*, *supra* note 4; *see* Definition of Waters of the United States, 40 C.F.R. § 120.2 (2023); *see also Pre-2015 Regulatory Regime*, EPA, https://www.epa.gov/wotus/pre-2015-regulatory-regime [https://perma.cc/39E5-66C2] (Feb. 14, 2024).

7. Richardson et al., *supra* note 3, at 1; 40 C.F.R. § 120.2(a)(4)(ii) (2023).

8. Clifton Cottrell, *The "Wetlands Adjacent to Non-Navigable Waters" Less Traveled: Clean Water Act Jurisdiction and the Fifth Circuit*, 43 TEX. ENV'T L.J. 19, 19 (2012).

9. 33 U.S.C. § 1251(a).

10. *See infra* Part I.

tations.[11] Litigants advocating for a broad WOTUS interpretation have argued that even wetlands adjacent to nonnavigable waters (e.g., ditches, drains, or creeks) can be subject to CWA protections if those nonnavigable waters eventually flow into a navigable water, regardless of how indirect the path.[12] This stance has been met with opposing arguments that an overly broad interpretation alters "the balance between federal and state power and the power of the Government over private property."[13]

The most recent Supreme Court ruling on WOTUS was *Sackett v. Environmental Protection Agency*[14] in late May 2023. The controversial and much-anticipated decision greatly narrowed the meaning of "WOTUS," restricting EPA's and Corps's regulatory authority under the CWA.[15] In the opinion written by Justice Alito, the Court held that the CWA only extends to "wetlands with a continuous surface connection to bodies that are [WOTUS] in their own right."[16]

The 2023 *Sackett* decision sparked mass outrage regarding the strength of the CWA and its ability to effectively protect wetlands.[17] A prominent CWA scholar deemed it "unusually lawless."[18] Former EPA Administrator Carol Browner described the decision as "a major blow to the landmark Clean Water Act and the federal government's ability to protect our people from pollution and its negative health side effects."[19] President Joe Biden released a statement following the

11. *See infra* Part I.

12. Richardson et al., *supra* note 3, at 1.

13. *Sackett*, 143 S. Ct. 1322, 1341 (2023) (quoting U.S. Forest Serv. v. Cowpasture River Pres. Ass'n, 140 S. Ct. 1837, 1849–50 (2020)).

14. 143 S. Ct. 1322 (2023).

15. Patrick J. Paul, *Relative Permanence—the New WOTUS Test*, 38 NAT. RES. & ENV'T 52, 52 (2023).

16. *Sackett*, 143 S. Ct. at 1344 (quoting Rapanos v. United States, 547 U.S. 715, 742 (2006)).

17. *See Supreme Court Catastrophically Undermines Clean Water Protections*, EARTHJUSTICE (May 25, 2023), https://earthjustice.org/brief/2023/supreme-court-sackett-clean-water-act [https://perma.cc/5SAE-V77F]; Amy Howe, *Supreme Court Curtails Clean Water Act*, SCOTUSBLOG (May 25, 2023, 11:40 AM), https://www.scotusblog.com/2023/05/supreme-court-curtails-clean-water-act/ [https://perma.cc/WX5M-S5RY]; *Statement from President Joe Biden on Supreme Court Decision in* Sackett v. EPA, WHITE HOUSE (May 25, 2023), https://www.whitehouse.gov/briefing-room/statements-releases/2023/05/25/statement-from-president-joe-biden-on-supreme-court-decision-in-sackett-v-epa/ [https://perma.cc/YJ46-2GQC].

18. William W. Buzbee, *The Lawlessness of* Sackett v. EPA, 74 CASE W. RSRV. L. REV. 317, 318 (2023).

19. Nina Totenberg, *The Supreme Court Has Narrowed the Scope of the Clean Water Act*, NPR (May 25, 2023, 4:25 PM), https://www.npr.org/2023

decision, stating that it "upends the legal framework that has protected America's waters for decades . . . [and] defies the science that confirms the critical role of wetlands."[20] It is estimated that the decision eliminated CWA protections for as many as half of the 118 million acres of wetlands in the United States.[21]

This new limitation on wetlands protection is especially concerning given the crucial role wetlands serve within ecosystems. For example, wetlands "filter and purify water and act as flood and erosion barriers by slowing the rate at which surface runoff enters streams, rivers, and lakes."[22] By improving the water quality of nearby rivers and streams, they also have "considerable value as filters for future drinking water."[23] The productivity of wetlands even rivals that of rainforests and coral reefs.[24]

With the Supreme Court's current strict interpretation of "WOTUS," the future of wetlands protections is left to the states. The CWA specifically preserves state authority to regulate waters under their own laws.[25] Non-WOTUS waters, thus, can still be protected by the laws of the state in which they are located. While this provides a source of hope for wetlands, it places a "substantial burden upon state regulators and legislators."[26] Due to this burden, nearly half of states simply tailor their regulations to the CWA's WOTUS scope, rather than adopting their own, unique regulatory programs.[27] Some states

/05/25/1178150234/supreme-court-epa-clean-water-act [https://perma.cc/Z4ES-LPEA].

20. *Statement from President Joe Biden on Supreme Court Decision in* Sackett v. EPA, *supra* note 17.

21. Kirti Datla, *What Does* Sackett v. EPA *Mean for Clean Water?*, EARTHJUSTICE (May 26, 2023), https://earthjustice.org/article/what-does-sackett-v-epa-mean-for-clean-water [https://perma.cc/KC9Q-EUP4].

22. Cottrell, *supra* note 8, at 19.

23. OFF. OF WATER, EPA, EPA843-F-06-004, ECONOMIC BENEFITS OF WETLANDS (2006), https://www.epa.gov/sites/default/files/2021-01/documents/economic_benefits_of_wetlands.pdf [https://perma.cc/K47R-YG5N].

24. *Why Are Wetlands Important?*, EPA, https://www.epa.gov/wetlands/why-are-wetlands-important [https://perma.cc/294S-V283] (Mar. 22, 2023).

25. 33 U.S.C. § 1370 ("[N]othing in this chapter shall . . . preclude or deny the right of any State . . . to adopt or enforce . . . any standard or limitation respecting discharges of pollutants, or . . . be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.").

26. James McElfish, *State Protection of Nonfederal Waters: Turbidity Continues*, 52 ENV'T L. REP. 10679, 10679 (2022).

27. *Id.* at 10681, 10684.

even have statutes that expressly prohibit agencies from adopting regulations that are more stringent than the corresponding federal law.[28]

Luckily not all states have limited their wetlands regulatory authority to the CWA's scope. In 2001, Ohio enacted an isolated wetlands permitting program to protect non-WOTUS wetlands.[29] The program requires "[a]nyone who wishes to discharge dredged or fill material into isolated wetlands in Ohio [to] obtain an Isolated Wetland Permit from Ohio EPA."[30] The statute specifically defines isolated wetlands as wetlands that are not subject to the CWA.[31] While Ohio's isolated wetlands permitting program may not be perfect, it is useful as a realistic example to states that still depend on the federal government's interpretation of "WOTUS" to regulate their wetlands.

To fully understand the controversy surrounding wetlands protections and the current need for drastic state action, Part I of this Comment will dive into a detailed, yet relatively brief, judicial history of the interpretation of "WOTUS" in regard to wetlands.[32] This Part will make it clear why the Supreme Court was so determined in *Sackett* to finally clarify the meaning of "WOTUS," no matter the cost. Part II will then discuss the majority opinion in *Sackett*—the Supreme Court's current ruling on the inclusion of wetlands within the meaning of "WOTUS." Part III will explain how the *Sackett* decision shifts the responsibility of wetlands protections from the federal government to the states. Part IV will then outline Ohio's isolated wetlands permitting program to provide an example for how states can still protect wetlands that are no longer subject to CWA protections. Finally, Part V will highlight the bleak position in which *Sackett* has left the nation's wetlands and argue why it is so dire for states to take action.

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28. *See, e.g.*, S.D. CODIFIED LAWS § 1-41-3.4 (2021) ("No rule . . . may be more stringent than any corresponding federal law, rule, or regulation governing an essentially similar subject or issue."); IDAHO CODE § 39-3601 (2011) ("It is the intent of the legislature that the state of Idaho fully meet the goals and requirements of the federal clean water act and that the rules promulgated under this chapter not impose requirements beyond those of the federal clean water act.").

29. McElfish, *supra* note 26, at 10683; *see* OHIO REV. CODE ANN. §§ 6111.02–6111.28 (West 2022).

30. *Water Quality Certification and Isolated Wetland Permits*, OHIO EPA, https://epa.ohio.gov/divisions-and-offices/surface-water/permitting/water-quality-certification-and-isolated-wetland-permits [https://perma.cc/S5D2-S6TS].

31. OHIO REV. CODE ANN. § 6111.02(F) (West 2022).

32. The history of WOTUS interpretations could be, and is, an entire article in of itself. *See generally* Richardson et al., *supra* note 3. This Comment discusses only the most notable shifts in judicial interpretation.

I. A RELATIVELY BRIEF JUDICIAL HISTORY OF WOTUS

A. United States v. Riverside Bayview Homes, Inc.

Countless court cases have addressed the scope of WOTUS, but the Supreme Court has only examined the issue a handful of times.[33] One of the earliest of these critical cases is *United States v. Riverside Bayview Homes, Inc.*[34] In *Riverside Bayview Homes*, the Court considered "whether the [CWA] authorize[d] the Corps to require landowners to obtain permits . . . before discharging fill material into wetlands adjacent to navigable bodies of water."[35] The issue arose after Riverside Bayview Homes, Inc., (Riverside Bayview) began filling wetlands on its property in preparation for a housing development.[36] At the time, the Corps construed the CWA's jurisdiction to cover freshwater wetlands that were adjacent to navigable waters.[37] The Corps then, believing the property was an "adjacent wetland," filed suit seeking to enjoin Riverside Bayview from illegally filling the property without a permit.[38]

The U.S. District Court ruled that the adjacent wetlands constituted WOTUS and enjoined Riverside Bayview from filling the wetlands without a permit.[39] On appeal, the Sixth Circuit reversed, holding that the wetlands were excluded from the meaning of "WOTUS" since the wetlands were not subject to frequent flooding by the adjacent navigable waters.[40] The Sixth Circuit doubted that Congress intended to give the Corps authority to regulate wetlands that were not the result of flooding of nearby navigable waters.[41]

The Supreme Court was challenged with deciding the proper interpretation of the Corps's inclusion of adjacent wetlands as WOTUS[42] and the reasonable scope of the Corps's CWA authority.[43] In a unanimous decision, the Court first focused on whether the wetland

33. Richardson et al., *supra* note 3, at 11.

34. 474 U.S. 121 (1985).

35. *Id.* at 123.

36. *Id.* at 124.

37. *Id.*

38. *Id.*

39. *Id.* at 125.

40. *Id.*

41. *Id.*

42. *See* 33 C.F.R. § 323.2(c) (1985).

43. *Riverside Bayview Homes*, 474 U.S. at 126.

at issue was actually *adjacent* to a navigable water.[44] The Court rejected the Sixth Circuit's notion that, to be sufficiently adjacent, a wetland must result from frequent flooding of a nearby navigable water.[45] Rather, according to its regulatory definition, an adjacent wetland could result from flooding from either surface water or *groundwater*.[46] Additionally, the Court stated that the Sixth Circuit "fashion[ed] its own requirement of 'frequent flooding,'" for regulations that only required flooding sufficient to support wetland vegetation.[47]

Given this interpretation, the Court ruled that the wetlands on Riverside Bayview's property were indeed adjacent wetlands subject to CWA protections.[48] It was determined that the source of the wetlands' saturation was groundwater flowing from Black Creek, a navigable waterway.[49] Moreover, the Court noted that because wetland vegetation extended beyond the property line and into Black Creek, the wetland was not only adjacent to a navigable water but "actually abuts on a navigable waterway."[50]

Having found that the property was a wetland adjacent to a navigable waterway and, thus, covered under "WOTUS," the Court then had to decide whether the Corps's decision to include adjacent wetlands as WOTUS was reasonable.[51] In their analysis, the Court "explicitly applied *Chevron* deference."[52] Looking at the legislative history, the Court reasoned that Congress intentionally chose to define "WOTUS" broadly, and that the meaning of the term "navigable" was "of limited import."[53] The Court acknowledged the difficulty that the Corps unavoidably faced when deciding the point at which water ends and land begins, as the transition is not typically abrupt.[54] Ultimately, the Court ruled that the Corps's interpretation of WOTUS as encompassing adjacent wetlands was reasonable due to the "evident

44. *Id.*

45. *Id.* at 129–30.

46. *Id.*; 33 C.F.R. § 323.2(c) (1985).

47. *Riverside Bayview Homes*, 474 U.S. at 129–30.

48. *Id.* at 130–31.

49. *Id.*

50. *Id.* at 135.

51. *Id.* at 131.

52. Richardson et al., *supra* note 3, at 13; *see Riverside Bayview Homes*, 474 U.S. at 131 (citing Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–45 (1984)).

53. *Riverside Bayview Homes*, 474 U.S. at 133.

54. *Id.* at 132. This common difficulty is later referred to as the boundary-drawing problem of *Riverside Bayview Homes*.

breadth of congressional concern for protection of water quality and aquatic ecosystems."[55] The Court felt that the Corps's ecological expertise provided an "adequate basis" for its interpretation.[56]

The *Riverside Bayview Homes* opinion laid the groundwork for the Supreme Court's dynamic analysis of WOTUS.[57] Later cases have used varying interpretations of the *Riverside Bayview Homes* opinion to support their arguments. Some used the holding to argue that WOTUS includes wetlands adjacent to tributaries.[58] Others used the holding to argue the Corps only had jurisdiction over "wetlands that actually abutted on a navigable waterway."[59] Thus, *Riverside Bayview Homes* was only the beginning of a long chain of judicial opinions that, in attempting to clarify the meaning of "WOTUS," only added more uncertainty to the issue.

B. Solid Waste Agency of Northern Cook County v. Army Corps of Engineers *("*SWANCC*")*

The next critical Supreme Court decision analyzing WOTUS occurred in 2001 with *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers* (*SWANCC*).[60] Prior to the case, the Corps, in another attempt to clarify WOTUS, stated that it had jurisdiction over waters "[w]hich are . . . used as habitat by birds protected by Migratory Bird Treaties."[61] Meanwhile, the Solid Waste Agency of Northern Cook County (SWANCC) was planning to develop a disposal site for solid waste on such a site.[62] Because the operation required filling various permanent and seasonal ponds, SWANCC contacted the Corps to determine if it was required to obtain a permit under to CWA.[63] After the Corps learned that 121 migratory bird species had been observed at the site, it decided that the site required a permit because it qualified as WOTUS under the Migratory Bird Rule.[64]

55. *Id.* at 133–35.

56. *Id.* at 134.

57. Richardson et al., *supra* note 3, at 14.

58. *See* Rapanos v. United States, 547 U.S. 715, 792–93 (2006) (Stevens, J., dissenting).

59. Solid Waste Agency of N. Cook Cnty. v. Army Corps of Eng'rs (*SWANCC*), 531 U.S. 159, 167 (2001).

60. 531 U.S. 159 (2001).

61. Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. 41206, 41217 (Nov. 13, 1986) (to be codified at 33 C.F.R. pt. 328).

62. *SWANCC*, 531 U.S. at 162–63.

63. *Id.* at 163.

64. *Id.* at 164.

After the Corps subsequently refused to grant SWANCC a permit, SWANCC filed suit under the Administrative Procedure Act (APA).[65] The Seventh Circuit held that the Migratory Bird Rule was a reasonable interpretation of the CWA; however, the Supreme Court reversed in a 5-4 decision.[66] In its opinion, the Supreme Court highlighted that "[i]t was the significant nexus between the wetlands and 'navigable waters' that informed" their ruling in favor of the Corps in *Riverside Bayview Homes*.[67] To rule in favor of the Corps in this situation, however, the Court would have to hold that WOTUS also extended to ponds that are *not* adjacent to open water—which the text of the CWA would not allow.[68] Although the Court stated in *Riverside Bayview Homes* that the term "navigable waters" was of "limited import," permitting the Corps to regulate *nonadjacent* ponds would give the term no effect whatsoever.[69] Therefore, the Court ruled that the Corps exceeded its CWA authority when it regulated nonadjacent, nonnavigable waters based solely on their use as habitat for migratory birds.[70]

In making this decision, the Supreme Court in *SWANCC* refused to expand the meaning of WOTUS beyond its ruling in *Riverside Bayview Homes*. While the *Riverside Bayview Homes* decision permitted the regulation of wetlands adjacent to or abutting on navigable waters, the *SWANCC* Court would not take that next step to permit regulation of nonnavigable, isolated wetlands based solely on the wetland's use for migratory birds.[71] The *SWANCC* Court believed that taking that next step "would result in a significant impingement of the States' traditional and primary power over land and water use"—a common argument for limiting the CWA's scope.[72] Despite not expanding upon the *Bayside Riverview Homes* holding, however, the effect of *SWANCC* was still much broader—it opened the gates to

65. *Id.* at 165.

66. *Id.* at 166.

67. *SWANCC*, 531 U.S. at 167. This was the first time the Court employed the term "significant nexus" in a CWA case. As evidenced in the rest of this Comment, the term became an important legal determination in future CWA cases.

68. *Id.* at 168.

69. *Id.* at 172 (quoting United States. v. Riverside Bayview Homes, Inc., 474 U.S. 121, 133 (1985)). "[I]t is one thing to give a word limited effect and quite another to give it no effect whatever." *Id.*

70. *Id.* at 174.

71. *Id.* at 171–72.

72. *Id.* at 174.

questioning just how far agencies could "assert jurisdiction over isolated, intrastate waters."[73]

C. Rapanos v. United States

Just five years after the *SWANCC* decision, the Supreme Court once again attempted to clarify the meaning of WOTUS in *Rapanos v. United States*.[74] Unfortunately, the case resulted in a 4-4-1 decision that, unsurprisingly, generated more confusion than clarification.[75] The case involves the filling of wetlands on three different sites,[76] with the closest body of navigable water being eleven to twenty miles away.[77] The main site at issue was comprised of wetlands that occasionally overflowed into a man-made ditch that emptied into a drain, which connected to a creek that flowed into Lake St. Clair.[78]

After being denied a permit to fill the wetlands at the main site, the property owners filed suit to challenge CWA jurisdiction over their property.[79] The district court ruled that the wetlands were within the CWA's scope because they were "adjacent to neighboring tributaries of navigable waters and ha[d] a significant nexus to [WOTUS]."[80] The Sixth Circuit affirmed the decision.[81] In a 4-4-1 decision, in which concurring Justice Kennedy joined with respect to the holding, the Supreme Court vacated and remanded the Sixth Circuit's judgment.[82]

1. Justice Scalia's Plurality Opinion

The plurality opinion reasoned that for a wetland to qualify as WOTUS, the wetland must (1) be adjacent to a "relatively permanent body of water connected to traditional interstate navigable waters"; and (2) have "a continuous surface connection with that water."[83] The

73. Henry Holmes, *Protecting Wetlands: Environmental Federalism and Grassroots Conservation in the Prairie Pothole Region*, 10 ARIZ. J. ENV'T L. & POL'Y 365, 376 (2020).

74. 547 U.S. 715 (2006).

75. Richardson et al., *supra* note 3, at 20.

76. *Id.* at 20–21.

77. Rapanos v. United States, 547 U.S. 715, 720 (2006).

78. *Id.* at 730.

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.* at 757, 759.

83. *Id.* at 742.

first requirement pertains to the meaning of "tributary," while the second requirement pertains to the meaning of "adjacent."[84]

The plurality determined that tributaries only include "relatively permanent . . . bodies of water [such] . . . as 'streams[,] . . . oceans, rivers, [and] lakes,' . . . [and] does not include channels through which water flows intermittently."[85] Given this notion, the plurality rejected the Corps's interpretation that man-made, *intermittently* flowing drains, ditches, and culverts constitute tributaries.[86] Rather, these systems are point sources that carry intermittent flows, which distinctly differ from navigable waters.[87] Only "relatively permanent" waters qualify as tributaries to WOTUS.[88]

Once the meaning of "tributary" was settled, the plurality moved to the meaning of "adjacent." Justice Scalia relied on his interpretation of the holding in *Riverside Bayview Homes*, that "adjacent" means "physically abutting," not simply "nearby."[89] The plurality concluded that "*only* those wetlands with a continuous surface connection to" WOTUS are adjacent and, thus, covered by the CWA.[90] The surface connection must be continuous enough to cause difficulty in marking where the water ends and the land begins (i.e., the boundary-drawing problem of *Riverside Bayview Homes*).[91] Consequently, if there is a clear barrier between the waters and wetlands, then the wetland is not adjacent or subject to the CWA.[92] Wetlands that only have "an intermittent, physically remote hydrologic connection" to waters lack a "significant nexus" to WOTUS.[93]

With the standards for "tributaries" and "adjacent" outlined in the plurality opinion, the Supreme Court remanded the case to the Sixth Circuit, instructing it to determine whether the ditches or drains near the wetlands maintained a relatively permanent flow (tributary) and whether the wetlands had a continuous surface connection to those ditches or drains (adjacent).[94]

84. Richardson et al., *supra* note 3, at 23.

85. *Rapanos*, 547 U.S. at 739 (quoting *Waters*, WEBSTER'S NEW INT'L DICTIONARY (2d ed. 1934)) (alterations in original).

86. *Id.* at 727–28, 732–39.

87. *Id.* at 735–36.

88. *Id.* at 739.

89. *Id.* at 748.

90. *Id.* at 742.

91. *Id.*

92. *Id.*

93. *Id.* (quoting *SWANCC*, 531 U.S. 159, 167 (2001)).

94. *Id.* at 757.

2. Justice Kennedy's Concurring Opinion: Significant Nexus

Justice Kennedy's concurrence established the test that is most commonly used from the *Rapanos* decision—the "significant nexus" test.[95] The test, which has also generated the most uncertainty,[96] granted the Corps jurisdiction over adjacent wetlands where a "significant nexus" existed between the wetlands and "navigable waters in the traditional sense."[97] Justice Kennedy felt that the plurality's requirement for a tributary to be a "permanent standing water" made "little practical sense."[98] Rather, the Corps could reasonably interpret the CWA to cover a strong "intermittent flow" that constitutes an "impermanent stream."[99]

Additionally, Justice Kennedy regarded the plurality's requirement for an adjacent wetland to have a continuous surface connection to other jurisdictional waters as "unpersuasive."[100] He disagreed with the plurality's opinion that wetlands are "*indistinguishable*" from waters with which they share a surface connection, even if the boundary is imprecise—a "swamp is different from a river."[101] Justice Kennedy felt that the plurality's confined reliance on *Riverside Bayview Homes* was "misplaced."[102] The *Riverside Bayview Homes* Court's statements on the difficulty in determining a wetland's end "cannot be taken to establish" that when there's an evidently clear boundary between the wetlands and traditional waters, that the wetlands fall outside the Corps's jurisdiction.[103] As follows, a continuous connection is not necessary for wetlands to result from flooding of traditional navigable waters, for the connection may only exist during intermittent flooding events.[104]

Overall, Justice Kennedy felt that the plurality's general tone and approach was "unduly dismissive" of the "[i]mportant public interests

95. Richardson et al., *supra* note 3, at 27.

96. *Id.*

97. *Rapanos*, 547 U.S. at 779 (Kennedy, J., concurring).

98. *Id.* at 769 ("The merest trickle, if continuous, would count as a 'water' subject to federal regulation, while torrents thundering at irregular intervals through otherwise dry channels would not.").

99. *Id.* at 770.

100. *Id.* at 772.

101. *Id.*

102. *Id.* at 771.

103. *Id.* at 773.

104. *Id.* at 773–74.

. . . served by the [CWA] . . . and by the protection of wetlands."[105] Kennedy instead believed that the determination of the Corps's jurisdiction over wetlands depended solely on "the existence of a significant nexus between the wetlands in question and navigable waters in the traditional sense."[106] He felt this test best served the goals of the CWA, was consistent with *SWANCC* and *Riverside Bayview Homes*, gave the term "navigable" meaning, and avoided the plurality's mistake of reading "nonexistent requirements" into the CWA.[107]

The determination of whether a wetland has a significant nexus must be assessed in terms of the CWA's goal to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[108] Wetlands possess the requisite significant nexus, and thus come within the meaning of WOTUS if they "significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'"[109] In contrast, when wetlands' effects on water quality are "speculative or insubstantial," they fall outside WOTUS and CWA jurisdiction.[110] In restricting federal jurisdiction to adjacent wetlands that have a significant effect on traditional navigable waters, Kennedy avoided an overly broad regulation of remote "drains, ditches, and streams . . . carrying only minor water volumes."[111]

3. Justice Stevens's Dissenting Opinion

The dissent, applying *Chevron*, believed it was reasonable for the Corps to include wetlands adjacent to tributaries of traditionally navigable waters within the meaning of "WOTUS."[112] Justice Stevens felt that this interpretation was reasonable because wetlands adjacent to tributaries of traditionally navigable waters "preserve the quality of our Nation's waters by, among other things, providing habitat for aquatic animals, keeping excessive sediment and toxic pollutants out of adjacent waters, and reducing downstream flooding by absorbing water at times of high flow."[113] Therefore, the Corps's interpretation advanced the "congressional concern for protection of water quality and aquatic

105. *Id.* at 777.

106. *Id.* at 779.

107. *Id.* at 778–79.

108. *Id.* at 779 (quoting 33 U.S.C. § 1251(a)).

109. *Id.* at 780.

110. *Id.*

111. *Id.* at 781.

112. *Id.* at 788, 793 (Stevens, J., dissenting).

113. *Id.* at 788.

ecosystems."[114] Accordingly, Justice Stevens criticized both the plurality and concurrence for failing to sufficiently defer to the Corps, given the "technical and complex character of the issues at stake" and the "nature of the congressional delegation to the agency."[115]

In sum, the plurality opinion interpreted "WOTUS" as only including wetlands that have a "continuous surface connection" to "relatively permanent, standing or continuously flowing bodies of water."[116] The concurring opinion, however, interpreted "WOTUS" as including wetlands that possess a "significant nexus" to traditionally navigable waters.[117] Finally, the dissenting opinion gave deference to the Corps's WOTUS interpretation, which included nonnavigable wetlands that are adjacent to a navigable body of water or a tributary of such a water body.[118]

In the "murky" *Rapanos* decision, the Supreme Court failed to clarify the conflicting interpretations of "WOTUS."[119] As a result, landowners were left to either (1) "conduct costly, independent, case-by-case ambiguous scientific analyses" to determine if they need a permit; or (2) "ignore the permitting requirements altogether . . . forcing the Corps to assume the costly burden of catching permit-dodgers."[120] Either option is bleak for wetlands and all parties involved. Eventually, this persistent debate and repeated need for clarification may have led the Supreme Court to desperately identify a bright-line definition of "WOTUS," even if the definition excluded a significant portion of previously regulated wetlands from regulation.

II. The Current State of WOTUS: *Sackett v. Environmental Protection Agency*

In the wake of the *Rapanos* decision, the scope of "WOTUS" consistently shifted, "resembling a game of ping pong between different

114. *Id.* at 793 (quoting United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 133 (1985)).

115. *Id.* at 788.

116. *Id.* at 739, 742 (majority opinion).

117. *Id.* at 779–80 (Kennedy, J., concurring).

118. *Id.* at 797 (Stevens, J., dissenting).

119. Brandee Ketchum, *Like the Swamp Thing: Something Ambiguous Rises from the Hidden Depths of Murky Waters—the Supreme Court's Treatment of Murky Wet Land in* Rapanos v. United States, 68 La. L. Rev. 983, 1008 (2008).

120. *Id.* at 1012.

Presidential Administrations."[121] In 2023, the Supreme Court finally had another opportunity to clarify the meaning of "WOTUS" in *Sackett v. EPA*.[122] The issue started two decades before, when the Sacketts bought and started "backfilling their property" in preparation for building a home.[123] Just a few months into this process, the Sacketts received a compliance order from the EPA, informing them that "because their property contained protected wetlands," the backfilling violated the CWA.[124] The EPA demanded the Sacketts restore the property and threatened to fine them "over $40,000 per day if they did not comply."[125]

Rattled by this steep penalty, the Sacketts filed suit against the EPA under the APA to challenge the compliance order.[126] This challenge led to the Sacketts' first appearance before the Supreme Court in 2012.[127] At issue was whether a private citizen could file a civil action under the APA to challenge the issuance of an EPA compliance order issued pursuant to the CWA.[128] Ruling in the Sacketts' favor, the Supreme Court "set[] the stage" for the 2023 decision.[129]

Once it was decided that the Sacketts could proceed under the APA, the Supreme Court, in 2023, could now focus its analysis on the meaning of "WOTUS." The majority opinion, delivered by Justice Alito on behalf of five Justices,[130] ruled that the CWA only applies to wetlands that have a "continuous surface connection" to WOTUS so

121. Norman M. Semanko, Sackett v. EPA*: North Idaho's Clean Water Act Wild Card*, 66 ADVOC. 24, 24 (2023) [hereinafter Semanko, *Wild Card*] (citing Norman M. Semanko, *Red Paddle-Blue Paddle: Clean Water Act Ping Pong*, 64 ADVOC. 22, 22–23 (2021)); *see also* The Obama Rule, 80 Fed. Reg. 37054, 37116 (June 29, 2015) (to be codified at 40 C.F.R. pt. 230.3); The Trump Rule, 85 Fed. Reg. 22250, 22340 (Apr. 21, 2020) (to be codified at 40 C.F.R. pt. 120.2); The Biden Rule, 88 Fed. Reg. 3004, 3142 (Jan. 18, 2023) (to be codified at 33 C.F.R. pt. 328).

122. *Sackett*, 143 S. Ct. 1322 (2023).

123. *Id.* at 1331.

124. *Id.*

125. *Id.*

126. *Id.* at 1332.

127. Sackett v. EPA, 566 U.S. 120 (2012).

128. *Id.* at 122.

129. Paul, *supra* note 15, at 52; *Sackett*, 566 U.S. at 131.

130. Semanko, *Wild Card*, *supra* note 121, at 25. The Supreme Court reversed and remanded the Ninth Circuit's decision, 9-0. However, concurring opinions were delivered by Justices Thomas, Kagan, and Kavanaugh. *Id.* at 25 n.15.

that the wetlands are "'indistinguishable' from those waters."[131] In making this ruling, the *Sackett* court expressly rejected Justice Kennedy's "significant nexus" test and adopted the *Rapanos* plurality opinion in its stead.[132]

Justice Alito reasoned that, given the ordinary dictionary meaning of "waters" ("streams, oceans, rivers, and lakes"[133] and "flowing water, or water moving in waves"[134]), it is "hard to reconcile with classifying 'lands,' wet or otherwise, as 'waters.'"[135] Alito acknowledged that the CWA's scope extends beyond merely traditional navigable waters; however, in accordance with *SWANCC*, Alito "refused to read 'navigable' out of the statute."[136] He opined that the word "navigable" signals that "WOTUS" principally referred to waterbodies such as "rivers, lakes, and oceans."[137] Alito argued that this exclusion of wetlands from traditional notions of WOTUS accords with the Court's previous understandings of WOTUS and with Congress's use of "the term 'waters' elsewhere in the CWA and in other laws."[138]

Yet, the Court held that the "ordinary meaning of 'waters'" does not exclude all wetlands from CWA jurisdiction.[139] Such an interpretation would run contrary to Congress's 1977 CWA amendments, which specifically authorized states to regulate discharges into any WOTUS, "*including wetlands adjacent thereto.*"[140] Because Congress included adjacent wetlands within WOTUS, such "wetlands must qualify as [WOTUS] in their own right"—they must be so adjacent that they are "indistinguishably part of" the waterbody "that itself constitutes" a traditional WOTUS.[141] If the amendment[142] was read to include as WOTUS wetlands that are separate from traditional navigable waters, even if they are located nearby, it would tuck an important expansion

131. *Sackett*, 143 S. Ct. at 1344 (quoting Rapanos v. United States, 547 U.S. 715, 742, 755 (2006)).

132. Semanko, *Wild Card*, *supra* note 121, at 25 (quoting *Sackett*, 143 S. Ct. at 1341–43).

133. *Sackett*, 143 S. Ct. at 1336 (quoting *Rapanos*, 547 U.S. at 739).

134. *Id.* at 1337 (quoting *Waters*, RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 2146 (2d ed. 1987)).

135. *Id.* (quoting *Rapanos*, 547 U.S. at 740).

136. *Id.*; *see SWANCC,* 531 U.S. 159, 172 (2001).

137. *Sackett*, 143 S. Ct. at 1337.

138. *Id.* at 1337–38.

139. *Id.* at 1338–39.

140. *Id.* at 1339 (emphasis added) (quoting 33 U.S.C. § 1344(g)).

141. *Id.*

142. 33 U.S.C. § 1344(g).

to the CWA's scope into a "relatively obscure provision."[143] Such an action would be "odd," for "Congress does not 'hide elephants in mouseholes.'"[144]

Accordingly, the majority opinion reasoned that wetlands are only indistinguishable from traditional WOTUS when they have "a continuous surface connection" to waterbodies that are WOTUS in their own right.[145] Therefore, to establish CWA jurisdiction over an adjacent wetland, a party must establish (1) that the waterbody adjacent to the wetland is, in its own right, a WOTUS ("a relatively permanent body of water connected to traditional interstate navigable waters") and (2) "that the wetland has a continuous surface connection" to that waterbody.[146]

III. *SACKETT*'S IMPACT ON WETLANDS PROTECTIONS

While *Sackett* was presumably successful in providing much-needed clarity to the meaning of "WOTUS,"[147] the clarity came at the price of the nation's wetlands. Now, wetlands "that lack a continuous surface connection with traditional navigable waters are no longer subject to" CWA permitting and protections.[148] Estimates show that "as many as half of the 118 million acres of wetlands in the [United States]" have lost protections due to the *Sackett* decision.[149] The decision "curtailed" the ability of the Corps and EPA to effectively regulate wetlands.[150] However, some argue that the ruling was a "rebuke" of the Corps's and EPA's overreach in its CWA implementation.[151] But given that the overarching goal of the CWA "is to improve the overall health of the

143. *Sackett*, 143 S. Ct. at 1340 (citing 33 U.S.C. § 1344(g)).

144. *Id.* at 1340 (quoting Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457, 468 (2001)).

145. *Id.* at 1341. The surface connection must be so continuous that it is "difficult to determine where the 'water' ends and the 'wetland' begins." *Id.* (quoting Rapanos v. United States, 547 U.S. 715, 742 (2006)).

146. *Id.*

147. Despite this presumed success in clarification, litigation on the scope of WOTUS is still "sure to continue." Semanko, *Wild Card*, *supra* note 121, at 25.

148. Paul, *supra* note 15, at 54.

149. Datla, *supra* note 21; *see also* Erin Fitzgerald, *Supreme Court Weakens Clean Water Act Protections*, EARTHJUSTICE (May 25, 2023), https://earthjustice.org/press/2023/supreme-court-weakens-clean-water-act-protections [https://perma.cc/KA7A-3ADY].

150. Paul, *supra* note 15, at 54.

151. *Id.* at 52.

Nation's waterways" and the ecological value of wetlands, a clear rule that results in "over-inclusiveness" seems to be a better manner of serving this goal while also still eliminating ambiguity.[152]

Despite this extreme limit on federal authority, the CWA "preserves the powers of state governments . . . to regulate water quality under their own laws."[153] Justice Alito specifically stated in *Sackett* that "[r]egulation of land and water use lies at the core of traditional state authority."[154] Thus, non-WOTUS wetlands can be "protected from discharges of pollutants" (including fill material) "only by the laws of the state . . . within which they are located."[155] Therefore, many wetlands will now only be protected "if state laws independently impose regulatory requirements."[156] Unfortunately, almost half (twenty-four) of the states do not have these independent protections, thus leaving the noncontinuous wetlands in those states entirely unregulated.[157]

Changes in the judicial interpretation of "WOTUS" places a "substantial burden" upon state regulators and legislators, who are then faced with difficult and complex decisions on how to proceed.[158] While the other twenty-six states and Washington D.C. have adopted broad "waters of the state" definitions (which include waters such as "groundwater, springs, wetlands, [and] watercourses"), few states have

152. Ketchum, *supra* note 119, at 1014.

153. McElfish, *supra* note 26, at 10681 (citing 33 U.S.C. § 1370); 33 U.S.C. § 1251(b) ("It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution . . . .").

154. *Sackett*, 143 S. Ct. 1322, 1341 (2023).

155. REBECCA KIHSLINGER, JAMES M. MCELFISH, JR., HEATHER LUEDKE, & GEORGIA RAY, ENV'T L. INST., FILLING THE GAPS: STRATEGIES FOR STATES/TRIBES FOR PROTECTION OF NON-WOTUS WATERS 2 (2023), https://www.eli.org/sites/default/files/files-pdf/Strategies%20for%20States-Tribes%20for%20Protection%20of%20non-WOTUS%20waters%201.2.pdf [https://perma.cc/WX32-QVJL].

156. James M. McElfish, Jr., *What Comes Next for Clean Water? Six Consequences of* Sackett v. EPA, ENV'T L. INST. (May 26, 2023), https://www.eli.org/vibrant-environment-blog/what-comes-next-clean-water-six-consequences-sackett-v-epa [https://perma.cc/88TD-WTEH].

157. McElfish, *supra* note 26, at 10681, 10684–85 ("The WOTUS-dependent state programs are in Alabama, Alaska, Arkansas, Colorado, Delaware, Georgia, Hawaii, Idaho, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, South Carolina, South Dakota, Texas, and Utah.") (footnotes omitted).

158. KIHSLINGER ET AL., *supra* note 155, at 2; McElfish, *supra* note 26, at 10679.

actually established specific "permitting programs for all such waters."[159] Additionally, even states that have established non-WOTUS permitting programs do so in varying degrees of scope and coverage.[160] For example, New York only protects wetlands "over a certain size,"[161] but Ohio's program can cover wetlands that are "0.5 acres or less."[162]

This is all to say that there needs to be vigorous state legislative action if there is any hope of restoring wetlands protections.[163] Even states that have broad "waters of the State" definitions or that have already enacted certain permitting programs should update their wetlands regulations to apply more extensively. However, the twenty-four states that limit their regulations to the scope of "WOTUS" especially need to consider new regulatory strategies after *Sackett* has so substantially narrowed the CWA's reach.[164] The following Part provides a detailed overview of one state's isolated wetlands permitting program that other states could use as a feasible example of how to better protect their own wetlands. The example could also be used as a model that advocates could present to their own state legislatures to encourage legislative action.

IV. OHIO'S ISOLATED WETLANDS PERMITTING PROGRAM

Although the Supreme Court's *Sackett* decision greatly limits CWA wetlands protections, many Ohio wetlands will still be regulated by the state due to Ohio's robust wetlands standards.[165] In 2001, the Ohio Legislature enacted an Isolated Wetlands Permitting Program following the *SWANCC* decision.[166] Prior to *SWANCC*, Ohio relied on the CWA to regulate isolated wetlands; however, following the decision, "many (if not all)" of Ohio's isolated wetlands were no longer subject to CWA

159. KIHSLINGER ET AL., *supra* note 155, at 2–3.

160. *Id.* at 3.

161. McElfish, *supra* note 156.

162. *Water Quality Certification and Isolated Wetland Permits*, *supra* note 30.

163. McElfish, *supra* note 156.

164. *Id.*

165. Zaria Johnson, *Ohio Is Set to Regulate Wetlands After U.S. Supreme Court Limits Federal Control*, IDEASTREAM PUB. MEDIA (July 10, 2023, 6:05 AM), https://www.ideastream.org/environment-energy/2023-07-10/ohio-is-set-to-regulate-wetlands-after-u-s-supreme-court-limits-federal-control [https://perma.cc/TD2M-4CFE].

166. McElfish, *supra* note 26, at 10683; *see* OHIO REV. CODE. §§ 6111.02–6111.28 (West 2022).

protections.[167] As a result, Ohio enacted its own isolated wetlands permitting program to fill the gap in protections left by the CWA.[168]

The permitting program requires "[a]nyone who wishes to discharge dredged or fill material into isolated wetlands in Ohio" to obtain a permit from Ohio EPA.[169] The statute specifically defines isolated wetlands as wetlands that are "not subject to regulation under the [CWA]."[170] Ohio EPA explains, "[i]solated wetlands are not connected to other surface waters. For this reason they are not classified as waters of the United States . . . . Nevertheless, they are waters of the State of Ohio and are therefore regulated by the Ohio EPA."[171]

A. Categorizing Isolated Wetlands

Under the program, isolated wetlands are classified into three permitting groups: category 1, category 2, and category 3.[172] Ohio EPA assigns a category based on the isolated wetland's "relative functions and services, sensitivity to disturbance, rarity, and potential to be adequately compensated for by wetland mitigation."[173] The category classification is necessary to determine the level of permit application review and the extent of mitigation requirements.[174] As follows, a key strength of the program is that, as a condition of obtaining the permit, the applicant must compensate for the degradation by replacing "the impacted wetland with an equivalent or higher quality wetland" located elsewhere within the watershed or at a mitigation bank.[175]

Category 1 wetlands "support minimal habitat" and do not contain or "provide critical habitat for threatened or endangered species."[176] Additionally, category 1 wetlands provide "minimal hydrological and recreational functions," may have low species diversity, and may have a "predominance of non-native species."[177] To permit the filling of a category 1 wetland, the applicant must demonstrate to Ohio EPA's satisfaction that the action

167. Darren Springer, *How States Can Help to Resolve the* Rapanos/Carabell *Dilemma*, 21 TUL. ENV'T L.J. 83, 96 (2007).

168. *Id.*

169. *Water Quality Certification and Isolated Wetland Permits*, *supra* note 30.

170. OHIO REV. CODE § 6111.02(F) (West 2022).

171. *Water Quality Certification and Isolated Wetland Permits*, *supra* note 30.

172. *Id.*

173. OHIO ADMIN. CODE 3745-1-54(B)(2)(a)(i) (2021).

174. *Id.*; *id.* 3745-1-54(E)(4).

175. *See id.* 3745-1-54(D)(1)(a)(iv), (D)(1)(b)(v), (D)(1)(c)(vii), (E)(4), (F)(4).

176. *Id.* 3745-1-54(C)(1)(a).

177. *Id.* 3745-1-54(C)(1)(a)–(b).

- has "no practicable alternative,"
- will be minimized by the installation of water quality controls, and
- causes no "significant degradation" to the ecosystem.[178]

Additionally, the applicant must replace the degraded wetland with a category 2 or 3 wetland at a mitigation bank.[179] The minimum mitigation ratio for degrading forested and nonforested category 1 wetlands is 1.5 to 1.[180] This means that for every one acre of wetlands that an applicant fills, they must replace it elsewhere with 1.5 acres of category 2 or 3 wetlands.

Category 2 wetlands "support moderate habitat" or provide moderate "hydrological or recreational functions."[181] Category 2 wetlands may also include "wetlands dominated by native species but generally without the presence of, or habitat for, rare, threatened or endangered species."[182] To permit the filling of a category 2 wetland, the applicant must demonstrate to Ohio EPA's satisfaction that

- the action has "no practicable alternative, based on technical, social and economic criteria";
- appropriate steps were "taken to minimize potential adverse impacts on the wetland ecosystem";
- the lowering of water quality is "necessary to accommodate important social or economic development"; and
- "water quality controls will be installed."[183]

Additionally, the applicant must compensate for their impact by replacing the degraded wetland with a category 2 wetland of equal or higher quality, or with a category 3 wetland.[184] The minimum mitigation ratio for degrading forested category 2 wetlands is 2.5 to 1.[185] The minimum mitigation ratio for degrading nonforested category 2 wetlands is 2 to 1.[186]

Finally, category 3 wetlands support "superior habitat, or hydrological or recreational functions."[187] They may contain high diversity

178. *Id.* 3745-1-54(D)(1)(a)(i)–(iii).

179. *Id.* 3745-1-54(D)(1)(a)(iv).

180. *Id.* 3745-1-54(E)(4).

181. *Id.* 3745-1-54(C)(2)(a).

182. *Id.* 3745-1-54(C)(2)(b).

183. *Id.* 3745-1-54(D)(1)(b)(i)–(iv).

184. *Id.* 3745-1-54(D)(1)(b)(v).

185. *Id.* 3745-1-54(E)(4).

186. *Id.*

187. *Id.* 3745-1-54(C)(3)(a).

levels, a large proportion of native species, or "high functional values."[188] To permit the filling of a category 3 wetland, the applicant must demonstrate to Ohio EPA's satisfaction that

- the action has "no practicable alternative, based on technical, social and economic criteria";
- appropriate steps were taken "to minimize potential adverse impacts on the wetland['s] ecosystem";
- the action is "necessary to meet a demonstrated public need";
- "the lowering of water quality is necessary to accommodate important social or economic development";
- "water quality controls will be installed"; and
- "[t]he wetland is not scarce regionally or statewide."[189]

Additionally, the applicant must compensate for their impact by replacing the degraded wetland with a category 3 wetland of equal or higher quality.[190] The minimum mitigation ratio for degrading forested category 3 wetlands is 3 to 1.[191] The minimum mitigation ratio for degrading nonforested category 3 wetlands is 2.5 to 1.[192]

Lastly, if Ohio EPA discovers that a property owner degraded a wetland without first obtaining a permit, then the degraded wetland is automatically considered category 3 for mitigation purposes.[193]

B. Obtaining a Permit

To avoid after-the-fact penalties, property owners should determine whether wetlands exist within a project site before conducting any filling activities. This is done by requesting a jurisdictional determination letter from the Corps.[194] This letter will determine "whether wetlands exist within a particular project site;" confirm "the number, boundaries, and acreage of those wetlands;" and determine "whether those wetlands are [WOTUS] or 'isolated.'"[195] Once the Corps

188. *Id.* 3745-1-54(C)(3)(b).

189. *Id.* 3745-1-54(D)(1)(c)(i)–(vi).

190. *Id.* 3745-1-54(D)(1)(c)(vii).

191. *Id.* 3745-1-54(E)(4).

192. *Id.*

193. *Id.* 3745-1-54(B)(6)(a).

194. *Level 1 Isolated Wetland Permitting*, OHIO ENV'T PROT. AGENCY, https://epa.ohio.gov/divisions-and-offices/surface-water/permitting/isolated-wetland-permitting-level-one-[https://perma.cc/5YES-5X39].

195. *Water Quality Certification and Isolated Wetland Permits*, *supra* note 30.

determines that an isolated wetland exists on the property, owners must submit a permit application to the Ohio EPA.[196]

There are "three levels of isolated permit application review," based on wetland category and acreage.[197] Each level has different standards for what needs to be included within the application.[198] To identify which level of application review applies to a project, property owners must determine the acreage and category of their isolated wetland by having a "wetland delineation performed in accordance with the most recent Corps wetland delineation manual."[199]

All three permit application levels require

- a completed application form,
- a copy of the Corps's jurisdictional determination letter,
- a "wetland delineation performed in accordance with the most recent Corps wetland delineation manual,"
- an Ohio Rapid Assessment Method (ORAM) wetland characterization form,
- a detailed description of the project,
- photos of "each isolated wetland . . . [and] a photograph location map,"
- an "acceptable mitigation proposal,"
- maps of the project footprint and wetlands, and
- applicable fees.[200]

Additionally, level 2 applications must include

- "[a]n analysis of practicable on-site alternatives to the proposed filling that would have less adverse impacts on the . . . ecosystem" and

196. OHIO REV. CODE § 6111.021(B) (West 2022); *see Level 1 Isolated Wetland Permitting*, *supra* note 194.

197. *Water Quality Certification and Isolated Wetland Permits*, *supra* note 30.

198. Level 1 review applies to category 1 or 2 wetlands that are 0.5 acres or less. Level 2 review applies to category 1 or 2 wetlands that are more than 0.5 acres but less than or equal to 3 acres. Lastly, Level 3 review applies to category 2 wetlands that are more than 3 acres and category 3 wetlands of any size. *Id.*

199. *Level 1 Isolated Wetland Permitting*, *supra* note 194.

200. *Level 1 Isolated Wetland Permitting*, *supra* note 194; *Level 2 Isolated Wetlands Permitting*, OHIO ENV'T PROT. AGENCY, https://epa.ohio.gov/divisions-and-offices/surface-water/permitting/level-2-isolated-wetland-permitting [https://perma.cc/V92Q-L8H5]; *Level 3 Isolated Wetlands Permitting*, OHIO ENV'T PROT. AGENCY, https://epa.ohio.gov/divisions-and-offices/surface-water/permitting/level-3-isolated-wetland-permitting [https://perma.cc/43AC-T5KQ] .

- "[i]nformation indicating whether high quality waters" would be "avoided by the proposed filling."[201]

Lastly, level 3 applications must also include

- "adequate documentation" that the applicant has "requested comments from the Ohio Department of Natural Resources and the United States Fish & Wildlife Service regarding" the presence or absence of critical habitat for threatened and endangered species, and
- descriptions and economic information for alternatives to the proposed filling activity.[202]

Once Ohio EPA sends an applicant a confirmation letter that the application is complete, the "permit review period begins."[203] The review period is 30 days for level 1 permits, 90 days for level 2 permits, and 180 days for level 3 permits.[204] During this period, public notice is required for level 2 and 3 permit reviews.[205] Level 3 permits for category 3 wetlands also require a public hearing.[206] In deciding whether to issue a permit and authorize the degradation of a wetland, the Ohio EPA Director "review[s] the technical details of the application."[207] The Director may also consider "the regional significance of the functions and services a wetland performs"[208] and other indirect environmental impacts.[209]

V. THE FUTURE OF WETLANDS PROTECTIONS

A. If Wetlands Can Still Be Subject to State Regulations, Then There's No Problem, Right?

One could argue that the *Sackett* decision has not completely gutted wetlands protections since they are still subject to state regulation; however, that conclusion is not accurate. With nearly half of the states only regulating waters in accordance with the WOTUS definition, half

201. *Level 2 Isolated Wetlands Permitting*, *supra* note 200 (citing OHIO ADMIN. CODE 3745-1-05(10) (2012)).

202. *Level 3 Isolated Wetlands Permitting*, *supra* note 200.

203. *Water Quality Certification and Isolated Wetland Permits*, *supra* note 30.

204. *Id.*

205. *Id.*

206. *Id.*

207. *Level 3 Isolated Wetlands Permitting*, *supra* note 200.

208. OHIO ADMIN. CODE 3745-1-54(B)(3) (2021).

209. *Id.* 3745-1-54(B)(5).

of the nation's wetlands are now at risk of degradation.[210] Additionally, many states appear to eschew wetlands protections for fear of driving away economic growth and development to other jurisdictions.[211] Some states even view the *Sackett* decision as "an opportunity for developers and industry."[212]

History also does not paint a pretty picture of state governments' ability to protect wetlands. Prior to the CWA, "regulation of water pollution was left almost entirely to the States."[213] The states' failure to adequately protect the nation's waters was "alarmingly evident"—e.g., the Cuyahoga River became so polluted that it caught fire, Lake Erie was almost deemed "biologically dead," inland waterways were reduced to "nothing more than sewage receptacles," and the rate of wetlands loss "was approximately 450,000 acres per year."[214] Leaving the problem to individual states was failing and there was "clearly a need for a broader federal role."[215] "Public outcry demanded a strong response from Congress," and Congress responded by enacting the 1972 CWA.[216] Now, because of *Sackett*, states once again have the primary responsibility to protect wetlands. The majority in *Sackett* was convinced that "[s]tates *can and will* continue to exercise their primary authority to combat water pollution by regulating land and water use."[217] The nation can only hope that the states "can and will" rise to the challenge this time around.[218]

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210. McElfish, *supra* note 26, at 10684.

211. BLAKE HUDSON, CONSTITUTIONS AND THE COMMONS: THE IMPACT OF FEDERAL GOVERNANCE ON LOCAL, NATIONAL, AND GLOBAL RESOURCE MANAGEMENT 95 (2014).

212. Alex Brown, *States Will Need Millions to Protect Affected Wetlands*, GOVERNING (Dec. 29, 2023), https://www.governing.com/climate/states-will-need-millions-to-protect-affected-wetlands [https://perma.cc/7Q6W-AFNZ].

213. *Sackett*, 143 S. Ct. 1322, 1330 (2023). The Federal Water Pollution Control Act of 1948, Pub. Law 80-845, 62 Stat. 1155, authorized the federal government "to seek judicial abatement of pollution in interstate waters," but "it imposed high hurdles, such as requiring the consent of the State where the pollution originated," and few actions were ever brought under the Act. *Id.*

214. Jon Devine et al., Comment Letter on Draft Guidance on Identifying Waters Protected by the Clean Water Act 3 (Aug. 1, 2011), https://downloads.regulations.gov/EPA-HQ-OW-2011-0409-3608/attachment_2.pdf [https://perma.cc/9WXS-ZBVY].

215. *Id.*

216. *Id.* at 3–4.

217. *Sackett*, 143 S. Ct. at 1343–44 (emphasis added).

218. *Id.* at 1344.

Despite the bleak future of wetlands protections, there is still hope that states will take action. However, any strides to increase state wetlands protections will require extensive advocation, time, and money.[219] States already do not have enough funding for their current regulatory programs, let alone enough to fund additional programs.[220] Despite these obstacles, the *SWANCC* decision[221] sparked twenty-six states and Washington D.C. to implement some form of additional wetlands protections in 2001; so perhaps the *Sackett* decision will now call the remaining twenty-four to action.[222] Unfortunately, this author is not naïve enough to think that this spark will occur anytime soon or without substantial effort and mass public outcry.

An alternative solution to this problem could potentially be found in dynamic federalism (a concept that the *Sackett* Court, in regard to wetlands protections, arguably turned its back on). Accordingly, "interaction among federal, state, and local governments is greatly needed to address threats to isolated wetlands."[223] For example, rather than completely leaving the implementation of isolated wetlands permitting up to the states, perhaps the federal government could establish a minimum-standard framework for state isolated wetlands permitting programs.[224] The action would be especially exigent if state governments continue to neglect their responsibility to protect isolated wetlands.[225] This dynamic solution would facilitate the widespread enactment of state isolated wetlands permitting programs while also maintaining a clear WOTUS interpretation and respecting the Supreme Court's concern for preserving state authority.

B. Are Isolated Wetlands Even Worth the Hassle?

Amid the mess that is the WOTUS debate, one may wonder whether these seemingly small, isolated wetlands are worth all the trouble. The truth is that wetlands in the United States cover an area "greater than the combined surface area of California and Texas."[226] Additionally, "[w]etlands provide a number of important ecosystem

219. *See* Brown, *supra* note 212.

220. *Id.*

221. *SWANCC*, 531 U.S. 159, 171–72 (2001) (holding that the term WOTUS excludes "isolated ponds").

222. *See* KIHSLINGER ET AL., *supra* note 155, at 3–6.

223. Blake Hudson & Mike Hardig, *Isolated Wetland Commons and the Constitution*, 2014 BYU L. REV. 1443, 1448.

224. *Id.* at 1477, 1488.

225. *Id.*

226. *Sackett*, 143 S. Ct. at 1341.

services."[227] Wetlands provide critical habitats for diverse species, housing 31 percent of the country's plant species and over one-third of the country's endangered or threatened species.[228] Wetlands have been described as being "among the country's most significant resources in terms of biological diversity."[229]

In addition to the environmental intrinsic value of wetlands, wetlands also provide environmental benefits to humans. Wetlands act as flood barriers and reduce associated damages.[230] "[A] watershed containing at least 30% wetlands" can protect property owners and industries by reducing "flooding by 60% to 80%."[231] Similarly, wetlands protect surrounding properties from erosion by "slowly absorbing and releasing water from and into the soil."[232] Wetlands also perform important water-quality purification services by filtering out potentially harmful nutrients such as nitrogen, phosphorus, and organic pollutants.[233] They have "considerable value as filters for" healthier drinking water.[234] Additionally, wetlands provide vast recreational opportunities.[235] For example, wetlands provide recreation for "approximately two million waterfowl hunters who spent approximately $638 million in 1980."[236] Finally, wetlands play a valuable role in mitigating climate change due to their ability to absorb and "store vast quantities of carbon" from the atmosphere.[237]

If these environmental and human benefits are not convincing enough, states also must take action because they have a duty to

227. Hudson & Hardig, *supra* note 223, at 1450 (citing Karen Cappiella & Lisa Fraley-McNeal, *The Importance of Protecting Vulnerable Streams and Wetlands at the Local Level*, WETLANDS & WATERSHEDS, Aug. 2007, at 9–11).

228. *Why Are Wetlands Important?*, *supra* note 24; Rachel Rhode, *Six Reasons Why Wetlands Are Vital Every Month of the Year*, ENV'T DEF. FUND (May 31, 2022), https://blogs.edf.org/growingreturns/2022/05/31/six-reasons-why-wetlands-are-vital-every-month-of-the-year/ [https://perma.cc/4UL6-NVSD].

229. Cappiella & Fraley-McNeal, *supra* note 227, at 11.

230. Hudson & Hardig, *supra* note 223, at 1450.

231. *Id.*

232. *Id.*

233. *Id.*

234. OFF. OF WATER, *supra* note 23, at 1.

235. Hudson & Hardig, *supra* note 223, at 1450.

236. Carey Schmidt, *Private Wetlands and Public Values: "Navigable Waters" and the* Significant Nexus Test *Under the Clean Water Act*, 26 PUB. LAND & RES. L. REV. 97, 116 (2005).

237. Hudson & Hardig, *supra* note 223, at 1450.

Congress and to their constituents to protect wetlands. Congress expressly gave states the responsibility "to prevent, reduce, and eliminate pollution" and "to plan the development and use (including restoration, preservation, and enhancement) of land and water resources" within their borders.[238] By failing to protect such critical resources, states have neglected this responsibility.

Additionally, preventing wetland degradation serves a critical public policy goal.[239] People depend on and deserve access to clean water.[240] "They should have confidence that the streams feeding their drinking water supplies will not be . . . polluted or destroyed."[241] When people swim, they should feel safe from contracting water-borne illnesses.[242] People should have access to waters that contain "abundant fish that are safe to eat, and they should be able to boat without fighting through rafts of disgusting, sometimes toxic, algae."[243]

While "there are undoubtedly instances where" permit requirements for certain isolated wetlands appear unfair to an individual property owner, the overall importance of wetland ecosystem services and the need for mitigation programs is "the purview of Congress and the regulatory agencies, not the courts."[244] And Congress and the agencies have made their goal clear, "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[245] States must now carry out this goal and act as the sole stewards of their wetlands by enacting adequate protections.[246]

CONCLUSION

During the last century, "over half of all wetlands in North America" have been degraded by development.[247] Thus, at a time when increased wetlands protections were needed more than ever, the

238. 33 U.S.C. § 1251(b).

239. Schmidt, *supra* note 236, at 98.

240. Devine et al., *supra* note 214, at 1.

241. *Id.*

242. *Id.*

243. *Id.*

244. Schmidt, *supra* note 236, at 116.

245. 33 U.S.C. § 1251(a).

246. Springer, *supra* note 167, at 97.

247. Hudson & Hardig, *supra* note 223, at 1450 (citing David Mareno-Mateos, Mary E. Power, Francisco A. Comin & Roxana Yockteng, *Structural and Functional Loss in Restored Wetland Ecosystems*, 10 PLOS BIOLOGY 1, 1 (2012)).

Supreme Court took them away.[248] With the complex and ambiguous judicial history of WOTUS interpretation, the *Sackett* Court's main priority was achieving WOTUS clarification rather than carrying out the purpose of the CWA and protecting the nation's wetlands. The Court now has its clarity, but how much longer will the nation have its wetlands?

With its decision, the *Sackett* Court has shifted the burden of answering this question onto the states. To ensure that the states' role in regulating their own water resources was "primary," *Sackett* left the implementation of isolated wetlands permitting entirely up to individual states.[249] With almost half of the states only regulating waters that fall under the meaning of "WOTUS," it is estimated that protections for as many as half of the nation's wetlands have been eliminated.[250] States could avoid these losses if they put time, money, and effort into implementing their own wetland protection programs. Ohio's Isolated Wetlands Permitting Program shows that the necessary state action is possible. Other states should use Ohio's program as a guide and tailor it to specifically meet the needs of the isolated wetlands located within their borders. In the aftermath of *Sackett*, it is more dire than ever for states to take action.

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248. *See Supreme Court Catastrophically Undermines Clean Water Protections*, *supra* note 17; *see also* Howe, *supra* note 17.

249. *Sackett*, 143 S. Ct. 1332, 1338 (2023).

250. Datla, *supra* note 21.

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