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# WOTUS V. SCOTUS: THE IMPLICATIONS OF *SACKETT* ON INTERSTATE ENERGY INFRASTRUCTURE AND THE ENVIRONMENT

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## I. INTRODUCTION

On May 25, 2023, the United States Supreme Court clarified lingering ambiguities in the definition of "waters of the United States."[1] The Supreme Court further clarified the authority of the United States Army Corps of Engineers ("Corps") and the Environmental Protection Agency ("EPA") to regulate wetlands under the Clean Water Act ("CWA").[2] The difficulties associated with interpreting "waters of the United States" directly result from the absence of a definition in the CWA.[3] In *Sackett v. EPA*, the Court concluded that the Corps and EPA have jurisdiction over adjacent wetlands only if the body of water adjacent to the wetland falls under the definition of "waters of the United States" and the wetland has a "continuous surface connection with that water."[4]

1. Sackett v. EPA, 143 S. Ct. 1322 (2023).
2. *Id*.
3. Stephen P. Mulligan, CONG. RSCH SERV., R44585, EVOLUTION OF THE MEANING OF "WATERS OF THE UNITED STATES" IN THE CLEAN WATER ACT 1 (2019), https://sgp.fas.org/crs/misc/R44585.pdf.
4. *Sackett II*, 143 S. Ct. 1322.

In 2004, Michael and Chantell Sackett purchased a small plot of land near Priest Lake, Idaho and began backfilling the land in preparation to build a family home.[5] Shortly after, the EPA informed the Sacketts that their land contained federally protected wetlands, and they were in violation of the CWA due to the backfilling work.[6] This kickstarted an intense legal battle that spanned almost two decades and resulted in a landmark decision with major implications for both the environment and energy industry.[7]

This case note contains a background discussion of the history of federal water pollution legislation, the varying interpretations of "waters of the United States" since the CWA's inception, and the characteristics and benefits of wetlands.[8] Additionally, this case note will examine both times the Sacketts have challenged the EPA in front of the Supreme Court. The facts, the procedural history, the main issues addressed by the Court, and the Court's conclusions and reasoning will be analyzed.[9] Furthermore, this case note will address the future implications of the Court's decision for both the environment and energy industry.[10]

## II. BACKGROUND

### A. *Federal Water Pollution Legislation*

While the Clean Water Act of 1972 ("CWA") is commonly referred to as the United States' most successful environmental legislation, it was not the first.[11] The Rivers and Harbors Appropriations Act of 1899 ("RHA") first attempted to protect water on a federal level.[12] In essence, the RHA made it unlawful for any person or corporation to discharge pollutants into the "navigable waters of the United States."[13] Additionally, the RHA criminalized the discharge of pollutants into tributaries of the "navigable waters of the United States."[14] Moreover, criminalization resulted if discharged pollutants onto the banks of waterways could be washed into the waterway through floods, storms, or high tides.[15]

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5. *Id.* at 1331.

6. *Id.*

7. Sackett v. EPA, 566 U.S. 120 (2012); *Sackett II*, 143 S. Ct. 1322.

8. Mulligan, *supra* note 3; Claudia Copeland, CONG. RSCH SERV., RL30030, CLEAN WATER ACT: A SUMMARY OF THE LAW 1 (2019), https://sgp.fas.org/crs/misc/RL30030.pdf; *Why Are Wetlands Important?*, NAT'L PARK SERV. (May 5, 2016), https://www.nps.gov/subjects/wetlands/why.htm.

9. *Sackett I*, 566 U.S. 120; *Sackett II*, 143 S. Ct. 1322.

10. *Streamlining Energy Infrastructure Permitting*, AM. PUB. ASS'N (June 2023), https://www.publicpower.org/system/files/documents/70%202023%20PMC%20Issue%20Briefs_PPPermitti%20Reform_FINAL.pdf; Miranda Wilson, *Does Sackett Clip EPA's Wings on Permits, Water Rules?*, E&E News: GREENWIRE (Jan 19. 2024), https://www.eenews.net/articles/does-sackett-clip-epas-wings-on-permits-water-rules/.

11. Richard Lazarus, *Judicial Destruction of the Clean Water Act: Sackett v. EPA*, U. CHI. L. REV. ONLINE (Aug. 11, 2023), https://lawreview.uchicago.edu/judicial-destruction-clean-water-act-sackett-v-epa.

12. Andrew Franz, *Crimes Against Water: The Rivers and Harbors Act of 1899*, 23 TUL. ENV'T L.J. 255 (2010).

13. 33 U.S.C. § 407 (1899).

14. *Id.*

15. *Id.*

Sections 9 and 10 of the RHA granted the Secretary of the Army the authority to regulate the discharge of pollutants into "navigable waters."[16] The phrase "navigable waters of the United States" referred only to waters that were "navigable-in-fact."[17] However, the legislation ultimately failed at addressing water pollution due to the RHA's primary focus to prevent the dumping of materials that impede navigation.[18]

In order to address water pollution, Congress passed the Federal Water Pollution Control Act of 1948 ("the FWPCA").[19] The FWPCA laid the framework for future water pollution legislation, granted the rights and responsibilities in water pollution control to the states, and encouraged interstate cooperation.[20] The FWPCA criminalized the pollution of "interstate waters" and defined the phrase as "all rivers, lakes, and other waters that flow across, or form a part of, State boundaries."[21] Pollution that travelled through tributaries to reach interstate waters fell within the scope of the FWPCA.[22]

While the FWPCA was a monumental step to combat water pollution, the FWPCA faced numerous restrictions and limitations.[23] For instance, pollution was only subject to the Act's penalties if the pollution caused an injury to the "health or welfare of persons" in a different state than the one in which the pollution originated.[24] Additionally, polluters had several opportunities to avoid legal action.[25] The FWPCA granted the Surgeon General the authority to issue formal notice, recommend measures to diminish the pollution, and establish a reasonable timeline for compliance if a polluter was found to have polluted interstate waters in a manner that harmed the health and welfare of people in another state.[26] The Surgeon General was also required to give notice to the agency that controlled water pollution in the state in which the pollution originated.[27] If a polluter did not comply with the Surgeon General's recommendations within the established timeline, the Surgeon General could issue a second notice to the polluter and state agency and recommend the state agency pursue legal action to abate the pollution.[28] If the polluter did not take action to abate the pollution and the state agency did not file suit within a reasonable time after the second notice, the Federal Security Administrator had the authority to appoint a board to review the evidence and recommend "reasonable and equitable" measures to abate the pollution.[29] If the polluter did

16. 33 U.S.C. §§ 401, 403 (1899).

17. The Daniel Ball, 77 U.S. 557, 563 (1870).

18. Franz, *supra* note 12, at 24.

19. Frank J. Barry, *The Evolution of the Enforcement Provisions of the Federal Water Pollution Control Act: A Study of the Difficulty in Developing Effective Legislation*, 68 MICH. L. REV. 1103, 1104 (1970).

20. *Id.*

21. *Id*.

22. *Id*. at 1104.

23. Barry, *supra* note 19, at 1105.

24. *Id*.

25. *Id*.

26. *Id.*

27. Barry, *supra* note 19, at 1106.

28. *Id*.

29. *Id*. at 1105-06.

not comply with these recommendations within a reasonable time, the Attorney General was permitted to sue the polluter on behalf of the United States.[30] In general, the FWPCA can best be characterized as a failure;[31] not a single lawsuit was filed under the FWPCA's authority, and the limitations and restrictions did not deter pollution.[32]

Although Congress amended the FWPCA numerous times between 1948 and 1972, the amendments did not further the FWPCA's success as a pollution deterrent.[33] Finally in the 1960s, the demand for water protection and pollution control gained national support.[34] This rise in support can be credited to major environmental disasters, including the Cuyahoga River fires.[35] The Cuyahoga River fires were a series of three fires on the Cuyahoga River near downtown Cleveland.[36] Backed by national support, Congress significantly amended the FWCPA,[37] and the comprehensive amendments became colloquially known as the Clean Water Act of 1972 ("CWA").[38]

The CWA was approved with overwhelming bipartisan support.[39] The CWA passed through the Senate unanimously and the House of Representatives with a 366 to 11 vote.[40]

The CWA is the principal law governing water pollution in the United States.[41] Its objective is to "prevent, reduce, and eliminate pollution" in order to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[42] The CWA initially had two primary goals: eliminate the discharge of pollutants by 1985 and achieve "fishable" and "swimmable" water quality by 1983.[43] To achieve these goals, the CWA prohibits the unauthorized discharge of pollutants into "navigable waters" through the National Permit Discharge Elimination System ("NPDES") permit program.[44] The CWA vaguely defines "navigable waters" as "waters of the United States, including the territorial seas."[45] Under the CWA, the Environmental Protection Agency ("EPA") and the

30. *Id*.
31. Barry, *supra* note 19, at 1106.
32. *Id*. at 1107.
33. *History of the Clean Water Act*, TUL. UNIV. L. SCH. (June 15, 2021), https://online.law.tulane.edu/blog/clean-water-act-history.
34. *Id*.
35. *Id*.
36. *Id*.
37. *History of the Clean Water Act*, *supra* note 33.
38. *Id.*
39. Lazarus, *supra* note 11.
40. *Id*.
41. *Id*.
42. Clean Water Act of 1972 § 101, 33 U.S.C. § 1251.
43. *Id*. § 101(a)(1)-(2).
44. *Id*. § 402.
45. Clean Water Act § 502(7).

U.S. Army Corps of Engineers ("Corps") jointly have the authority to enforce violations and the responsibility to interpret "waters of the United States," a phrase that is not explicitly defined in the CWA's statutory text.[46]

### *B. Establishing the Clean Water Act's Jurisdictional Reach*

Since the CWA's inception, all three branches of government have struggled to clearly establish the CWA's jurisdictional reach and interpret the meaning of "waters of the United States."[47] The ambiguities associated with "waters of the United States" are a direct consequence of the CWA not defining the phrase.[48] In the over fifty years since Congress enacted the CWA, the interpretation of "waters of the United States" has greatly evolved.[49] Pursuant to section 404 of the CWA, the Corps and EPA have the administrative responsibility to define the phrase through agency guidance and regulations.[50]

In 1973, the EPA first attempted to establish the scope of its jurisdictional power under the CWA when implementing the NPDES permit program.[51] The EPA's initial definition of jurisdictional waters was broad and extended its jurisdiction to include "all navigable waters of the United States."[52] The EPA's definition further extended to tributaries of navigable waters of the United States and certain interstate waters.[53] The Corps' initial definition was vastly different than the EPA's.[54] The Corps believed that its jurisdiction was constitutionally limited to waters it previously had the authority to regulate.[55] Therefore, the Corps limited its definition of "navigable waters" to "waters of the United States" subject to the "ebb and flow of the tides" and waters used for the "purposes of interstate or foreign commerce."[56] This definition lasted less than one year after the United States District Court for the District of Columbia issued a ruling in *Natural Resources Defense Council v. Callaway*.[57]

### *C. "Waters of the United States" & The Inclusion of Wetlands*

In *Natural Resources Defense Council*, the United States District Court for the District of Columbia ruled that the Corps' definition was too narrow and inconsistent with the CWA.[58] In response to this ruling, the Corps issued an interim final rule which expanded its interpretation of "waters of the United States" to

46. Clean Water Act § 404.
47. Mulligan, *supra* note 3, at 1.
48. *Id.*
49. *Id.* at 3.
50. *Id.* at 3.
51. Mulligan, *supra* note 3, at 3.
52. *National Pollutant Discharge Elimination System*, 38 Fed. Reg. 13,528, 13,529 (May 22, 1973).
53. *Id*.
54. *Permits for Activities in Navigable Waters or Ocean Waters*, 39 Fed. Reg. 12,115, 12,119 (Apr. 3, 1974).
55. *Id*.
56. *Id*.
57. Nat. Res. Def. Council, Inc. v. Callaway, 392 F. Supp. 685 (D.D.C. 1975).
58. *Id*.

include "wetlands, mudflats, swamps, marshes, and shallows" that are "contiguous or adjacent to other navigable waters" and "artificially created channels and canals used for recreational or other navigational purposes that are connected to other navigable waters."[59] In 1977, the Corps updated its interpretation of "waters of the United States" through regulations to include all waters that could affect interstate commerce.[60]

By 1982, the EPA and the Corps had come to an agreement on an interpretation of "waters of the United States."[61] Both agencies defined the phrase to include "all waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce."[62] If the potential for an interstate affect existed, the CWA's jurisdiction under this 1982 interpretation extended to "intrastate lakes, rivers, streams, mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds."[63] Additionally, the agencies expanded the CWA's applicability to "adjacent" wetlands by defining "adjacent" to mean "bordering, contiguous, or neighboring."[64] Furthermore, the EPA and Corps declared that "adjacent wetlands" include wetlands that are separated from traditionally covered waters by "manmade dikes or barriers, natural river berms, beach dunes and the like."[65]

Five years later, the Supreme Court reviewed a challenge to the Corps' interpretation of "waters of the United States."[66] In *United States v. Riverside Bayview Homes, Inc*., the Supreme Court reviewed the Corps' assertion that the CWA had jurisdiction over wetlands that "actually abutted on a navigable waterway."[67] Concerned that wetlands could not be deemed "traditional notions of 'waters,'" the Court deferred to the Corps because "the transition from water to solid ground is not necessarily or typically an abrupt one."[68] In response, the Corps and EPA expanded their interpretations of "waters of the United States."[69] In 1986, the agencies issued the Migratory Bird Rule, which extended CWA jurisdiction to all waters and wetlands that are used or may be used by migratory birds or endangered species.[70] Under the Migratory Bird Rule, the CWA had jurisdiction over nearly all waters.[71]

59. Proposed Policy, Practice and Procedure, *Permits for Activities in Navigable Waters or Ocean Waters*, 40 Fed. Reg. 19,766 (proposed May 6, 1975).

60. Final Rule*, Regulatory Programs of the Corps of Engineers*, 42 Fed. Reg. 37,122 (July 19, 1977).

61. 40 C.F.R. § 122.3 (1981); 33 C.F.R. § 323.2 (1983).

62. *Id*.

63. *Id*.

64. *Id*.

65. 40 C.F.R. § 122.3 (1981); 33 C.F.R. § 323.2 (1983).

66. United States v. Riverside Bayview Homes, Inc., 729 F.2d 391 (6th Cir. 1984).

67. *Id.*

68. *Id*. *See* Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc. 467 U.S. 837 (1984).

69. Final Rule, *Final Rule for Regulatory Programs of the Corps of Engineers*, 51 Fed. Reg. 41,206, 41,217 (Nov. 13, 1986).

70. *Id*.

71. *Id*.

The Supreme Court reviewed another challenge to the Corps' interpretation of "waters of the United States" in 2001.[72] In *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* ("SWANCC"), the Court invalidated the Migratory Bird Rule and held that the CWA does not "extend to ponds that are not adjacent to open water."[73] The Court concluded that the CWA did not grant the Corps the authority to regulate wetlands isolated from navigable waters.[74] Furthermore, the Court held that the CWA's jurisdiction only extends to non-navigable waters with a "significant nexus" to navigable waters.[75] In response, the agencies ordered their field agents to make decisions on a case-by-case basis.[76]

The Supreme Court granted certiorari in *Rapanos v. United States* after the Sixth Circuit Court of Appeals held that the CWA had jurisdiction over wetlands near drains that emptied into navigable waters more than eleven miles away.[77] While the Supreme Court vacated the Sixth Circuit's decision, a majority was unable to come to an agreement on a proper standard for future disputes over the CWA's jurisdictional reach.[78] Instead of issuing a majority opinion, the Court developed two competing standards for evaluating jurisdiction under the CWA.[79] The four-justice plurality led by Justice Scalia concluded that "waters of the United States" refers only to "relatively permanent, standing, or continuously flowing bodies of water."[80] Wetlands are only included in this interpretation of "waters of the United States" if they have a "continuous surface connection" to other "waters of the United States."[81] However, Justice Kennedy's concurrence concluded that CWA jurisdiction only extends to waters with a "significant nexus" to navigable waters.[82] Under Justice Kennedy's interpretation, wetlands satisfy the "significant nexus" test and fall under CWA jurisdiction if "the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of a traditionally navigable waterbody."[83]

In an effort to clarify the jurisdictional boundaries of the CWA, the Corps and EPA issued the Clean Water Rule ("CWR") in 2015.[84] The CWR separates water into three categories: (1) waters that are categorically "waters of the United States"; (2) waters that may be considered "waters of the United States" on a case-

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

73. *Id.*

74. *Id.*

75. *Id*.

76. Joint Memorandum from Gary S. Guzy, General Counsel, U.S. Envtl. Prot. Agency, and Robert M. Andersen, Chief Counsel, U.S. Army Corps of Eng'rs on Supreme Court Rule Concerning CWA Jurisdiction Over Isolated Waters (Jan. 19, 2001), https://www.environment.fhwa.dot.gov/ecosystems/laws_swepacoe.asp.

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

78. *Id.*

79. *Id.*

80. *Id.*

81. *Rapanos*, 547 U.S. 715.

82. *Id.*

83. *Id.*

84. Final Rule, *Clean Water Rule: Definition of "Waters of the United States"*, 80 Fed. Reg. 37,054 (June 29, 2015).

by-case basis if there is a significant nexus with other waters that fall under CWA jurisdiction; and (3) waters that are not "waters of the United States."[85] The CWR was highly controversial, widely unpopular, and the subject of numerous legal challenges.[86] In an attempt to block the CWR from implementation, both chambers of Congress passed a resolution of disapproval calling the rule an overregulation.[87] Over half of the states and fifty-three non-state plaintiffs filed suit challenging the CWR's legality.[88] The parties opposing the CWR argued that the rule overextended the EPA and Corps' statutory and constitutional authority.[89] Additionally, the opposition parties argued that the CWR violated the Administrative Procedures Act because the final rule was not a logical outgrowth of the proposed rule, regulated parties were not given a meaningful opportunity to comment, and the agencies did not consider or respond to significant comments.[90]

In the early days of the Trump Administration, President Trump issued Executive Order 13,778, which instructed the EPA and the Corps to rescind the CWR and clarify the definition of "waters of the United States."[91] The agencies approached this task with a two-step solution.[92] First, the agencies needed to rescind the CWR in its entirety.[93] Second, the agencies needed to redefine "waters of the United States."[94] Ultimately, the EPA and the Corps published the Navigable Waters Protection Rule ("NWPR").[95] Under the NWPR, "waters of the United States" included traditional navigable waters, tributaries, lakes, and adjacent wetlands.[96] The NWPR significantly reduced the number of wetlands that fell within the CWA's jurisdictional reach by clarifying the definition of "adjacent wetlands."[97] "Adjacent wetlands" were defined as wetlands that "abut covered waters, are flooded by those waters, or are separated from those waters by features like berms or barriers."[98]

Under the Biden Administration, the EPA and the Corps issued a new interpretation of "waters of the United States."[99] This new interpretation essentially

85. *Id.* at 37,073-95.

86. Mulligan, *supra* note 3, at 25-26.

87. S.J. Res. 22, 114th Cong. (2016).

88. *See* Ohio v. U.S. Army Corps of Eng'rs, 803 F.3d 804 (6th Cir. 2015).

89. Texas v. EPA, 389 F.Supp. 3d 497 (S.D. Tex. 2019).

90. *Id*. at 503.

91. Executive Order 13778, *Restoring the Rule of Law, Federalism and Economic Growth by Reviewing the "Waters of the United States" Rule*, 82 Fed. Reg. 12,497 (Feb2017).

92. Proposed Rule, *Definition of "Waters of the United States" – Recodification of Pre-Existing Rule*, 82 Fed. Reg. 34,899 (proposed July 27, 2017).

93. *Id.* at 34,901.

94. *Id.* at 34,906.

95. Final Rule, *The Navigable Waters Protection Rule: Definition of "Waters of the United States"*, 85 Fed. Reg. 22,250 (Apr. 21, 2020).

96. *Id*. at 22,340.

97. Kristine A. Tidgren, *Navigable Waters Protection Rule is Finalized*, IOWA STATE UNIV. CENTR. FOR AGRIC. L. & TAX'N (Feb. 6, 2020), https://www.calt.iastate.edu/blogpost/navigable-waters-protection-rule-finalized.

98. 85 Fed. Reg. 22,250, at 22,340.

99. Final Rule, *Revised Definition of "Waters of the United States"*, 88 Fed. Reg. 3,004 (Jan. 18, 2023).

mirrored the pre-CWR interpretation.[100] Two months after the enactment of the new interpretation, the Supreme Court decided *Sackett v. EPA*.[101]

### *D. Wetlands*

The EPA and Corps jointly define wetlands as "those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal conditions do support, a prevalence of vegetation typically adapted for life in saturated soil conditions."[102] Swamps, marshes, mangroves, billabongs, fens, lagoons, and bogs are all classified as wetlands.[103] Typically, wetlands are a transitional zone between dry land and submerged water bodies.[104] There are more than 290 million acres of wetlands in the United States;[105] however, it is estimated that more than half of the country's wetlands have been destroyed.[106]

Wetlands provide a wide range of beneficial services for people, wildlife, and the environment.[107] For instance, wetlands provide flood protection, combat coastal erosion, and naturally improve water quality and supply.[108] Additionally, wildlife rely on wetlands for survival and protection.[109] Nearly one-third of the country's endangered and threatened animals live exclusively in wetlands.[110] Wetlands are also essential for migratory and breeding bird populations.[111] Breeding birds such as ducks, geese, and hawks raise their nestlings in wetlands.[112] Migratory birds utilize wetlands for feeding, breeding, and nesting.[113] Moreover, wetlands provide a specialized habitat for plant species.[114] Thousands of plant species can only survive in wetland environments.[115] The benefits that wetlands provide to people, wildlife, and the environment are immense, which underscores the need for federal protections.

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100. *Id*.
101. Sackett v. EPA, 143 S. Ct. 1322 (2023).
102. 33 C.F.R. § 328.3(c)(1); 40 C.F.R. § 120.2(c)(1).
103. *Id*.
104. *Id.*
105. *Wetlands Most in Danger After the U.S. Supreme Court's Sackett v. EPA Ruling*, EARTHJUSTICE (June 21, 2023), https://earthjustice.org/feature/sackett-epa-wetlands-supreme-court-map#:~:text=The%20United%20States%20has%20at,loss%20of%20protections%20are%20incalculable.
106. *Why Are Wetlands Important?*, U.S. ENV'T PROT. AGENCY (Mar. 22, 2023), https://www.epa.gov/wetlands/why-are-wetlands-important [hereinafter EPA Wetlands].
107. *Id.*
108. *Why Are Wetlands Important?*, *supra* note 8.
109. *Id*.
110. *Id.*
111. *Id*.
112. *Why Are Wetlands Important?*, *supra* note 8.
113. EPA Wetlands, *supra* note 106.
114. *Id*.
115. *Id.*

## III. ANALYSIS

### A. *The Sacketts and Sackett I*

#### 1. The Sacketts

In 2004, Michael and Chantell Sackett purchased a small parcel of land near Priest Lake, Idaho.[116] Shortly after purchasing the property, the Sacketts began backfilling the lot with dirt and rocks in preparation to build a family home.[117] Through a compliance order, the EPA informed the Sacketts that their property contained protected wetlands.[118] Additionally, the Sacketts were informed that their backfilling violated the Clean Water Act ("CWA"), which prohibits the discharge of pollutants into "waters of the United States" without the proper permits.[119] The EPA ordered the Sacketts to immediately stop developing their property and threatened penalties of over $40,000 per day if the Sacketts did not comply.[120]

#### 2. Establishing Jurisdiction Under Rapanos

The EPA used the "significant nexus" standard established in *Rapanos* which interpreted "waters of the United States" to include all waters that "could affect interstate or foreign commerce."[121] Additionally, this interpretation included "wetlands adjacent" to those waters.[122] The EPA's definition of "adjacent" extended past "bordering" and "continuous" and included "neighboring" wetlands.[123] Moreover, the EPA claimed jurisdiction over wetlands "adjacent" to non-navigable waters when the wetlands had a "significant nexus to a traditional navigable water."[124] A "significant nexus" existed when wetlands "significantly affect the chemical, physical, and biological integrity" of a traditional navigable water.[125] When determining whether a "significant nexus" existed, EPA field agents were instructed to look at the wetland alone or in combination with other similarly situated lands, and consider an expansive list of ecological and hydrological factors.[126]

The EPA classified the wetlands on the Sacketts' land as "waters of the United States" because the wetlands are "adjacent" to an unnamed tributary.[127] The wetlands on the Sacketts' property and this tributary were separated by a thirty-foot road.[128] The unnamed tributary feeds into a non-navigable creek, which

116. Sackett v. EPA, 143 S. Ct. 1322, 1331 (2023).
117. *Id*.
118. *Id*.
119. Clean Water Act §§ 301, 502(12).
120. *Sackett II,* 143 S. Ct. at 1331.
121. *Id*.
122. 40 C.F.R. § 230.3(s)(3), (7) (2008).
123. 40 C.F.R. § 230.3(b).
124. *Sackett II*, 143 S. Ct. at 1331.
125. *Id*.
126. *Id*.
127. *Id*. at 1331.
128. *Sackett II*, 143 S. Ct. at 1331, 1332.

fed into Priest Lake, a traditionally navigable intrastate waterway.[129] The EPA claimed the existence of a "significant nexus" after the agency grouped the Sacketts' wetlands with the nearby Kalispell Bay Fern wetland complex.[130] The EPA concluded the two wetlands were "similarly situated" and "significantly affected" the ecology of Priest Lake;[131] therefore, the Sacketts violated the CWA by illegally dumping dirt and rocks into "the waters of the United States."[132]

3. The Supreme Court's Analysis in Sackett I

In 2008, the Sacketts filed suit challenging the EPA's interpretation of "waters of the United States."[133] This kick-started a lengthy legal battle which saw almost two decades of litigation with the United States Supreme Court granting certiorari twice.[134]

The Sacketts filed suit seeking declarative and injunctive relief and argued that the EPA's compliance order was arbitrary and capricious under the Administrative Procedure Act ("APA").[135] Additionally, the Sacketts argued that the compliance order deprived them of due process in violation of the Fifth Amendment.[136] The United States District Court for the District of Idaho ("District of Idaho") dismissed the Sacketts' case for lack of subject matter jurisdiction.[137] The court reasoned that the EPA's compliance order was not a final agency action;[138] therefore, the court did not have jurisdiction to review the case under the APA.[139] On appeal, the United States Court of Appeals for the Ninth Circuit affirmed the district court's decision holding that the CWA precluded pre-enforcement judicial review of compliance orders.[140] Moreover, the Ninth Circuit concluded that this preclusion did not violate Fifth Amendment due process.[141] The United States Supreme Court granted certiorari to review whether the Sacketts were permitted under the APA to challenge the EPA's compliance order.[142]

The Supreme Court held that the Sacketts were permitted under the APA to challenge the EPA's compliance order.[143] The APA provides judicial review of "final agency action for which there is no other adequate remedy in a court."[144] The court first looked at whether the EPA's compliance order was final agency

129. *Id*. at 1332.
130. *Id*.
131. *Id*.
132. *Sackett II*, 143 S. Ct. at 1332.
133. Sackett v. EPA, 566 U.S. 120, 120 (2012).
134. *Id*; *Sackett II*, 143 S. Ct. 1322.
135. *Sackett I,* 566 U.S. at 122.
136. *Id*.
137. *Id*.
138. *Id*. at 121.
139. *Sackett I*, 566 U.S. at 121.
140. *Id*.
141. *Id*. at 125.
142. *Id*. at 125.
143. *Sackett I*, 566 U.S. at 132.
144. 5 U.S.C.S. § 704 (1966).

action and concluded that the compliance order checks all the boxes of APA finality.[145] The Court reasoned that the compliance order was final agency action because the order contained a detailed list of alleged wrongdoings committed by the Sacketts[146] and provided legal consequences for failure to comply.[147] Additionally, the delivery of the compliance order signals the consummation of the EPA's decision-making.[148] Moreover, the compliance order exposed the Sacketts to double penalties for failure to comply in future enforcement proceedings[149] and severely limited their ability to obtain a permit from the Corps.[150] The Court next looked at whether the Sacketts had no other adequate remedy in a court.[151] The Court noted that a civil action brought by the EPA under the CWA provides judicial review; however, civil action could not be initiated by the Sacketts.[152] Moreover, bringing suit under the APA after the denial of a Corps permit does not constitute an adequate remedy;[153] therefore, the Court found that the Sacketts had no other adequate remedies in a court.[154] On the issue of whether the CWA precluded pre-enforcement judicial review of compliance orders, the Supreme Court concluded that the CWA was not a statute that precluded judicial review under the APA.[155] The Court reasoned that the CWA's statutory scheme does not preclude APA review,[156] and there is no indication that Congress sought to exclude compliance order recipients from initiating the judicial review process.[157] Ultimately, the Supreme Court reversed the Ninth Circuit's judgment and remanded the matter for future proceedings consistent with its opinion.[158]

### B. *The Supreme Court's Analysis in Sackett II*

On remand, the District of Idaho ruled in favor of the EPA and held that the Clean Water Act covers wetlands with a "significant nexus" to traditionally navigable waters.[159] The Ninth Circuit affirmed the district court's decision.[160] In May of 2023, the Supreme Court again granted certiorari.[161]

On review, all nine Supreme Court justices agreed that the EPA did not have the authority to assert jurisdiction over the Sacketts' wetlands because the wetlands do not have a continuous surface connection to any "waters of the United

145. *Sackett I*, 566 U.S. at 131.
146. *Id*.
147. *Id*.
148. *Id.* at 127.
149. *Sackett I*, 566 U.S. at 126.
150. *Id*.
151. *Id*. at 127.
152. *Id*.
153. *Sackett I*, 566 U.S. at 127.
154. *Id*.
155. *Id*.
156. *Id*. at 128.
157. *Sackett I*, 566 U.S. at 128
158. *Id*. at 131.
159. Sackett v. EPA, 143 S. Ct. 1322, 1332 (2023).
160. *Id.*
161. *Id*.

States."[162] The majority opinion discussed the aforementioned history of the CWA and analyzed the statutory text.[163] The Court concluded that the CWA accurately reflects Congress's assumption that certain "adjacent wetlands" are "waters of the United States."[164]

Next, the court addressed how to determine if a wetland is adjacent to traditionally navigable waters.[165] The Court concluded that the *Rapanos* plurality was correct in determining that the CWA's use of "waters" must be interpreted as only "relatively permanent, standing or continuously flowing bodies of water 'forming geographical features' that are described in ordinary parlance as 'streams, oceans, rivers, and lakes.'"[166] The Court reasoned that this was the proper interpretation based on the CWA's deliberate use of the plural term "waters."[167] Additionally, this interpretation best aligns "waters of the United States" and "navigable waters."[168] The Court also concluded that adjacent wetlands are only included in this interpretation if the wetlands satisfy a newly established two-pronged test.[169] To assert jurisdiction over an adjacent wetland under the CWA, the EPA or Corps must *first* establish that the adjacent body of water falls under the definition of "waters of the United States."[170] *Second*, the wetland must have a continuous surface connection with that body of water.[171] A continuous surface connection exists if it is difficult to define the end of the traditionally navigable water and the beginning of the wetland.[172] Essentially, the CWA extends only to wetlands that are practically indistinguishable from a traditionally navigable waterbody.[173] While the Court noted that a surface connection may face temporary interruptions due to low tides or dry spells, these exceptions are limited.[174]

1. Concurrences

Justice Thomas, joined by Justice Gorsuch, agreed with the Court's opinion in full. He utilized his concurring opinion to attack the CWA's other jurisdictional terms: "navigable" and "of the United States."[175] After a lengthy review of the relationship between federal water pollution control and the Commerce Clause, Thomas argued that the "[f]ederal [g]overnment's authority over certain navigable waters is granted and limited by the Commerce Clause."[176] The Commerce Clause grants Congress the authority to "regulate Commerce with foreign Nations, and

162. *Id*. at 1322.
163. *Sackett II*, 143 S. Ct. at 1335.
164. *Id*. at 1340.
165. *Id*. at 1336.
166. *Id*. (quoting Rapanos v. U.S., 547 U.S. 715 (2006)).
167. *Sackett II*, 143 S. Ct. at 1335.
168. *Id*. at 1337.
169. *Id*. at 1339, 1340.
170. *Id*. at 1339.
171. *Sackett II*, 143 S. Ct. at 1341.
172. *Id*.
173. *Id*.
174. *Id*. at 1340.
175. *Sackett II*, 143 S. Ct. at 1344 (Thomas, J., concurring).
176. *Id*. at 1345 (Thomas, J., concurring).

among the several States, and with the Indian Tribes."[177] Moreover, Congress's regulatory authority is limited to ensuring that instruments of commerce can navigate waters that are "channels of interstate commerce."[178] Since wetlands are not channels of interstate commerce, Thomas believes that Congress lacks the authority to regulate wetlands, specifically isolated wetlands.[179] When determining what constitutes "the waters of the United States," Thomas believes that courts must analyze "whether the water is within Congress' traditional authority over the interstate channels of commerce."[180] Relying on this analysis, Thomas concluded that the "Sacketts' land is not a water, much less a water of the United States."[181]

Justice Kavanaugh, joined by Justices Kagan, Sotomayor, and Jackson, agreed with the majority's judgment that the EPA did not have jurisdiction over the Sacketts' wetlands.[182] Kavanaugh also agreed with the Court's decision to reject the "significant nexus" test.[183] However, Kavanaugh disagreed with the newly established two-pronged test to determine when the CWA extends to wetlands.[184] In his opinion, the "continuous surface connection" test restricts the CWA's "coverage of 'adjacent' wetlands to mean only 'adjoining' wetlands."[185] Kavanaugh relied on dictionary definitions, statutory text, court precedent, and a long history of "consistent agency practice" to highlight the distinct meanings of "adjacent" and "adjoining."[186] Under Kavanaugh's interpretation, "adjacent" wetlands include "(i) those wetlands contiguous to or bordering a covered water, and (ii) wetlands separated from a covered water only by a man-made dike or barrier, natural river berm, beach dune, or the like."[187]

Justice Kagan, joined by Justice Sotomayor and Justice Jackson, agreed that the EPA did not have jurisdiction over the Sacketts' wetlands; however, she disagreed with the test adopted by the majority.[188] She argued that the "continuous surface connection" test too narrowly defines "adjacent" and disregards the ordinary meaning of the word.[189] According to Kagan, a wetland should be considered adjacent "not only when it is touching, but also when it is nearby" a covered water.[190] Furthermore, Kagan criticized the majority for acting "as the national decisionmaker on environmental policy."[191]

While Justice Kavanugh and Justice Kagan both took issue with the newly established "continuous surface connection" test and Justice Thomas expressed

177. U.S. CONST. art. I, § 8, cl. 3.
178. *Sackett II*, 143 S. Ct. at 1346 (Thomas, J., concurring).
179. *Id*. at 1357, 58 (Thomas, J., concurring).
180. *Id*. at 1357 (Thomas, J., concurring).
181. *Id* at 1357, 58 (Thomas, J., concurring) (emphasis omitted).
182. *Sackett II*, 143 S. Ct. at 1362 (Kavanaugh, J., concurring).
183. *Id*. (Kavanaugh, J., concurring).
184. *Id*. (Kavanaugh, J., concurring).
185. *Id*. (Kavanaugh, J., concurring).
186. *Sackett II*, 143 S. Ct. at 1363-66 (Kavanaugh, J., concurring).
187. *Id*. at 1369 (Kavanaugh, J., concurring).
188. *Id*. at 1359 (Kagan, J., concurring).
189. *Id*. (Kagan, J., concurring).
190. *Sackett II*, 143 S. Ct. at 1359 (Kagan, J., concurring).
191. *Id*. at 1362 (Kagan, J., concurring).

his desire to limit the CWA's jurisdiction, the *Sackett* decision provides certainty regarding the definition of "waters of the United States" and agency authority under the CWA to regulate wetlands. Since the enactment of the CWA in 1972, courts have failed numerous times to provide this much-needed certainty. Many thought that *Rapanos* would achieve this; however, the Court's decision and subsequent agency action only caused more uncertainty. The *Sackett* decision finally clarified the definition of "waters of the United States" and established a binding test to determine when agencies have authority under the CWA to regulate wetlands. While the "continuous surface connection" test has its critics, the current Supreme Court is unlikely to address the issue again. The test is binding and will be for the foreseeable future.

### *C. Implications of a Narrower Definition of "Waters of the United States"*

Hailed as the most important water-related Supreme Court decision in a generation, the *Sackett* decision has been met with support from the energy industry and opposition from environmentalists.[192] On one hand, the decision significantly limits the authority of the EPA to regulate waterways, specifically wetlands.[193] On the other hand, the decision provides energy industry actors the ability to more confidently plan infrastructure projects and avoid unexpected costs resulting from delays in obtaining permits.[194] Supporters of both sides should be pleased that the decision provided a much-needed clarification of the extent of the CWA's reach.

#### 1. Environmental Concerns

The *Sackett* decision leaves environmentalists with valid concerns regarding wetland protection; however, there is no need to panic.[195] On its face, the adverse impact of the decision on the environment appears significant due to the sheer acreage of wetlands that are no longer federally protected.[196] It is estimated that roughly sixty million acres of wetlands are no longer protected by the CWA.[197] Additionally, twenty-four states are entirely reliant on the CWA for protection of "waters of the United States" within their borders.[198] These states will need to take legislative action if they desire to restore protection of their waters to a pre-*Sackett* level.[199] The other twenty-six states independently protect waters that do not meet the definition of "waters of the United States"; however, the *Sackett* decision has

192. Jeff Turrentine, *What the Supreme Court's Sackett v. EPA Ruling Means for Wetlands and Other Waterways*, NRDC (June 5, 2023), https://www.nrdc.org/stories/what-you-need-know-about-sackett-v-epa.

193. *Id*.

194. *Streamlining Energy Infrastructure Permitting*, *supra* note 10.

195. Wilson, *supra* note 10.

196. 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.

197. *Id*.

198. 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.

199. *Id*.

left several states with waters that are not protected by the CWA or a state equivalent.[200] For instance, New York only protects wetlands over 12.4 acres[201] and will need to take legislative action to protect smaller wetlands that are no longer protected under the CWA.[202] The *Sackett* decision provides states with better clarity on which of its waters, specifically wetlands, are considered "waters of the United States" and federally protected under the CWA.[203] Before the Court's decision, there was uncertainty in many states on whether their wetlands were federally protected.[204] The clearer scope of the EPA and Corps' reach under the CWA established by the Court now provide states with the knowledge that certain wetlands are no longer federally protected and allows states to confidently take the necessary legislative actions to ensure protection.[205]

Additionally, the fact that a wetland is no longer federally protected under the CWA does not mean that the wetland is unprotected.[206] The decision will not result in a race of energy industry actors, or others, to damage wetlands that are no longer considered "waters of the United States."[207] The CWA is one of many hurdles that energy industry actors must overcome to construct energy infrastructure.[208] The National Environmental Policy Act of 1969 ("NEPA") and the Endangered Species Act ("ESA") are two examples of federal legislation that protect the environment.[209] NEPA requires the federal agency exercising jurisdiction over a proposed infrastructure project to take into consideration the environmental impact of the project.[210] The ESA prohibits proposed projects from harming threatened or endangered species or their critical habitats.[211] If a project crosses a wetland that is not protected, the project likely will be halted if the environmental impact is significant or construction would harm threatened or endangered species.[212] As a result of NEPA and the ESA, energy industry actors must strive to minimize their environmental impact to obtain the necessary permits for their infrastructure projects.[213]

2. Energy Industry Clarity

Energy infrastructure projects, specifically interstate pipeline construction and maintenance, are heavily regulated, and energy industry actors must obtain

200. *Id*.

201. N.Y. Env't Conserv. L. § 24-0105 (2008).

202. McElfish, Jr., *supra* note 198.

203. Brief for the Am. Petroleum Inst., et al. as Amicus Curiae, p. 5, Sackett v. EPA, 143 S. Ct. 1322 (2023).

204. *Id*.

205. *Id*.

206. Wilson, *supra* note 10.

207. *Id*.

208. William E. Bauer, *Pipeline Regulatory and Environmental Permits*, *in* PIPELINE PLANNING AND CONSTRUCTION FIELD MANUEL 57, 60 (2011).

209. *Id* at 60, 61.

210. *Id.*

211. *Id.* at 61.

212. Bauer, *supra* note 208, at 61.

213. *Id*.

several permits before the project can begin.[214] Obtaining the required permits is a long and expensive process.[215] The *Sackett* decision provided energy industry actors with better clarity to confidently plan and predict permit applications, which will speed up project timelines and allow industry actors to avoid unexpected costs that result from delays in permit approval.[216]

If a planned oil or natural gas pipeline crosses a waterway, an energy industry actor must obtain Corps permits before construction can commence.[217] Industry actors can either obtain a Nationwide Permit 12 ("NWP 12") or individual CWA section 404 permits for each water crossing.[218] The latter option is significantly more regulated, costly, and time consuming.[219] It can take up to 300 days to process an individual permit application.[220] Industry actors must obtain a water certification from each state and tribal government the project impacts.[221] Industry actors can obtain an NWP 12 for oil and natural gas pipeline projects that are "similar in nature" and only have minimal adverse environmental effects.[222] An NWP 12 application can be processed in as little as forty-five days.[223]

If every water crossing in an oil or natural gas pipeline project involves "waters of the United States," an energy industry actor can apply for an NWP 12.[224] If the project involves "waters of the United States" and waters not federally protected under the CWA, the industry actor must obtain individual permits for each water crossing.[225] This distinction is crucial when establishing a timeline for an oil or natural gas infrastructure project and avoiding unexpected costs caused by delayed permits.[226] The *Sackett* decision provides energy industry actors with a clearer definition of "waters of the United States."[227] The clearer definition is likely to result in Corps field offices issuing more consistent decisions regarding the scope of the CWA's authority.[228] Decisions on whether wetlands were considered "waters of the United States" and federally protected under the CWA used

214. Akriti Bhargava & Hannah Oakes Dobie, *Interstate Natural Gas Pipeline Permitting Process*, HARV. L. SCH.: ENV'T & ENERGY L. PROGRAM (June 8, 2023), https://eelp.law.harvard.edu/interstate-natural-gas-pipeline-permitting-process/.

215. *Id*.

216. *Id.*

217. *Id*.

218. Bhargava & Oakes Dobie, *supra* note 214.

219. Andrew J. Turner & Brian R. Levey, *Army Corps Finalizes Nationwide Permit Renewal for Expedited Clean Water Act Permitting*, HUNTON ANDREWS KURTH: THE NICKEL REP. (Jan. 7, 2022), https://www.huntonnickelreportblog.com/2022/01/army-corps-finalizes-nationwide-permit-renewal-for-expedited-clean-water-act-permitting/.

220. *Id*.

221. Turner & Levey, *supra* note 219.

222. Final Rulemaking, *Reissuance and Modification of Nationwide Permits*, 88 Fed. Reg. 73,522 (2021).

223. Turner & Levey, *supra* note 219.

224. Sierra Club v. U.S. Army Corps of Eng'rs, 803 F.3d 31, 38-40 (2015).

225. *Id*.

226. Brief for the Am. Expl. & Mining Ass'n, et al. as Amicus Curiae, p. 11, Sackett v. EPA, 143 S. Ct. 1322 (2023).

227. *Id*.

228. Bauer, *supra* note 208.

to vary greatly between field offices.[229] After *Rapanos*, if a pipeline crossed two similarly situated wetlands, it was likely that one field office would assert jurisdiction over the wetland in its territory, and the other would not.[230] When industry actors were forced to navigate the ambiguous interpretations of "waters of the United States," they faced significant uncertainty that impeded their ability to move forward with projects.[231] The *Sackett* decision allows energy industry actors to confidently predict which permits they are required to obtain and establish an accurate timeline.[232] The decision will not necessarily lead to reduction in the overall construction costs of necessary energy infrastructure; however, the decision will significantly reduce unexpected costs resulting in construction delays due to permitting issues.[233]

## IV. CONCLUSION

The *Sackett* decision provides much needed clarity on the scope of the CWA, specifically the meaning of "waters of the United States." This clarity is important for both the environment and energy industry. Having a better understanding of the meaning of "waters of the United States" will allow states the opportunity to take legislative action to ensure its waters that are not federally protected under the CWA are protected at the state level. The Court's clarification of "waters of the United States" is important for the energy industry because it allows industry actors to confidently plan and predict the outcomes and timelines of permit applications required for the interstate construction and maintenance of oil and gas pipelines. Allowing energy industry actors the opportunity to plan ahead will lead to significant reductions in unexpected costs resulting from construction delays due to permitting issues.

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229. *Id.*

230. *Id*.

231. Brief for the Am. Expl. & Mining Ass'n, et al. as Amicus Curiae, p. 11, Sackett v. EPA, 143 S. Ct. 1322 (2023).

232. *Id*.

233. *Id.*

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