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EXAMINING THE IMPLICATIONS OF SACKETT V. U.S. ENVIRONMENTAL PROTECTION AGENCY FOR CLEAN WATER ACT PROTECTIONS OF WETLANDS AND STREAMS

HEARING

BEFORE THE

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

UNITED STATES SENATE

ONE HUNDRED EIGHTEENTH CONGRESS

FIRST SESSION

OCTOBER 18, 2023

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COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

ONE HUNDRED EIGHTEENTH CONGRESS

FIRST SESSION

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C O N T E N T S

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WEDNESDAY, OCTOBER 18, 2023

U.S. SENATE,
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS,
Washington, DC.

The Committee met, pursuant to notice, at 10:03 a.m. in room 406, Dirksen Senate Office Building, Hon. Thomas R. Carper (Chairman of the Committee) presiding.

Present: Senators Carper, Capito, Cardin, Merkley, Markey, Fetterman, Cramer, Lummis, Mullin, and Boozman.

OPENING STATEMENT OF HON. THOMAS R. CARPER, U.S. SENATOR FROM THE STATE OF DELAWARE

Senator CARPER. I am pleased to call this hearing to order.

Two of our witnesses are actually here in person. We have another one who is joining us from the other side of the world, somewhere.

Ms. Revels, we are anxious to hear from you.

Susan, it is nice to see you.

Mr. Sulliván, is your family Spanish? Where are you guys from?

Mr. SULLIVÁN. We are a nice mixture. It is a long story, but we speak Spanish and Lithuanian at home.

Senator CARPER. OK. We mostly stick with English.

Mr. SULLIVÁN. I will keep it in English for today.

Senator CARPER. All right.

I am happy to call this hearing to order. We are here, as you know, to examine the implications of the Supreme Court's decision on Sackett v. Environmental Protection Agency for our Nation's wetlands and streams. Our hearing is timely, as today marks the 51st anniversary of the Clean Water Act.

Susan has been here more than a few times. We know her; she is part of the extended family here.

We especially welcome you today, and Mr. Sulliván and Ms. Revels, we are delighted that you could join us and for your contributions.

While the Clean Water Act has been immensely successful at cleaning up our country's waters and slowing the loss of wetlands, the Sackett decision, in my view, has jeopardized nearly a half-century of progress under this bedrock environmental law. To under-

stand the significance of this ruling, it is important for us to recall the state of our Nation's waterways in the early 1970s.

Before the Clean Water Act, our Nation's waters were subject to indiscriminate pollution and destruction. Our waters were so polluted that the Cuyahoga River in Cleveland, Ohio, just north of where I went to college in Columbus, Ohio, the Cuyahoga River caught on fire. That was the year after I graduated.

I think I was on my way to Southeast Asia for the Navy, and I remember reading about the Cuyahoga River catching on fire, and I thought, oh my God. That was a wakeup call, not just for me, but for a lot of people in our country and a lot of people who worked here in the House and the Senate.

As a result, Congress got to work. Thanks to champions like Senator Ed Muskie, a Democrat from Maine, whom many of us knew, and Senator Howard Baker, a Republican from Tennessee, whom many of us knew and respected both of them enormously, Congress enacted the Clean Water Act in 1972. In doing so, they made a bipartisan commitment to protecting and restoring our Nation's waterways. The law very clearly states that its objective is to restore and maintain the chemical, the physical, and the biological integrity of our Nation's waters.

Today, the science is clear: We simply cannot achieve that goal without protecting wetlands and streams. That is because the health of our waterways and the health of our wetlands and streams are inextricably linked.

Unfortunately, the Supreme Court failed to recognize this link in May of this year when the conservative majority upended more than four decades of agency practice and precedent based on the original intent of the law.

While we don't yet know the full extent of the damage from the Sackett decision, scientists estimate that more than half of our Nation's wetlands no longer have Clean Water Act protection. This loss of Federal protections could have disastrous consequences for our environment and our economy.

Why are wetlands so important? In addition to sequestering carbon, wetlands act as a natural sponge that traps, filters, and slowly releases water. They help provide us with clean drinking water and protect our property and infrastructure. In fact, wetlands can store more than a million gallons of floodwater per acre.

Let me just say that again. The first time I heard that, I didn't believe it, so let me say that again: Wetlands can store more than a million gallons of floodwater per acre. That is pretty amazing. They provide an estimated $1.2 trillion to $2.9 trillion in prevented National Flood Insurance Program claims each year in our country.

Why is that important? Because the National Flood Insurance Program is always running out of money, and the ability to actually save and preserve some money there in that fund is important.

Removing protection for wetlands is especially shortsighted as climate change continues to fuel more extreme weather events, which we witness almost daily. In Delaware, we have seen firsthand how wetlands can mitigate flood risk. After Hurricane Sandy a few years ago, we restored degraded wetlands in communities that had long flooded during storms. And since the completion of

that restoration project, many of those communities, thank God, no longer flood.

Wetlands also provide irreplaceable habitat for many wildlife species, especially birds and fish. At a time when habitat loss is one of the factors driving a global crisis of biodiversity loss, we should think long and hard before eliminating protections for more than half of our wetlands.

The Sackett decision increased the burden of wetlands management for States. Currently, 25 States do not have laws in lieu of the Clean Water Act to protect their wetlands. And even in States with wetlands protection laws, many regulators have said that they lack the capacity to issue permits for the wetlands and streams previously protected by Federal agencies.

Furthermore, watersheds span multiple States, which means that the actions in one State can often implicate neighboring States, like Delaware and Maryland, Delaware and Pennsylvania, Delaware and New Jersey, and so forth. But even if States quickly expand their capacity to protect waters and wetlands, a patchwork of State laws would result in confusion and regulatory uncertainty.

I talked with Susan a little bit about one of my goals, certainty and predictability, and hopefully, when all is said and done here, we can have more of that than we have right now. If States are left to conserve wetlands by themselves, the objective of the Clean Water Act would be unfulfilled.

What is more, wetlands are only one part of the impact of the Sackett decision. This ruling also likely means that more than a million miles of streams no longer have protection under the Clean Water Act. These streams provide over $15 trillion per year in ecosystem services, including protecting and filtering water supplies.

Streams that only flow for part of the year are especially vulnerable because of the Supreme Court's decision in Sackett. These types of streams play a key role in mitigating drought and protecting water supplies for communities in the western United States, particularly for tribal nations. Many of those communities are now rightfully concerned about their ability to protect these streams without Federal protection in place.

Let me just close by saying that the Sackett decision, in our view, ignores science and turned back the clock on protections for our wetlands and streams. This decision puts our health, it puts our environment, and our economy, really, at risk.

For more than 45 years, no less than eight consecutive Democrat and Republican administrations interpreted the Clean Water Act protections to be broader than they are following the Sackett decision. The need to make our Nation's waters safe for drinking, swimming, and fishing was obvious to Congress in the 1970s. Today, I believe the Supreme Court got it wrong, with all due respect, in the Sackett decision. And I know that many of our colleagues agree with that.

With that said, I also know there is a wide range of stakeholder perspectives on this topic. We look forward to hearing those views from our witnesses today.

Before we do, let me turn to Ranking Member Senator Capito for her opening statement.

Let me just say to our colleagues, we have all kinds of hearings going on, and votes and so forth this morning, so we will have people coming and going, as you know. Please bear with us.

If you would, Senator Capito.

OPENING STATEMENT OF HON. SHELLEY MOORE CAPITO, U.S. SENATOR FROM THE STATE OF WEST VIRGINIA

Senator CAPITO. Thank you, Mr. Chairman.

I thank the witnesses for being here today. It is the 51st anniversary of the Clean Water Act as we speak.

Thanks for holding this important hearing to discuss the scope and implications of the Biden administration's revised Waters of the U.S., or WOTUS, rule and its failure to fully implement the Supreme Court's recent Sackett versus EPA decision.

I fear this inability or unwillingness of the Biden EPA and the U.S. Corps of Engineers to follow the directions laid down by the Court sets up only more regulatory uncertainty for stakeholders and the promise of even more litigation.

On day one of this Administration, President Biden signed an Executive Order to once again reopen and expand the reach of Federal jurisdiction over waters of the United States. It was a solution in search of a problem, even after repeated requests that the EPA and the Corps could never identify specific examples of waters that were impaired as a result of the prior rule, and it took 2 years to finalize the new version. That is 2 years without clarity, even as Congress moved forward with infrastructure investments that would be held up by WOTUS jurisdictional determinations.

During that time, EPA Assistant Administrator for Water Radhika Fox repeatedly promised that the Biden administration's initial WOTUS proposal would balance elements of the prior two revisions, provide regulatory certainty, and perhaps, most importantly, be durable so that it could withstand legal scrutiny. The rule we ultimately got achieved none of those goals.

During those 2 years of rulemaking, the Sackett case was making its way up to the Supreme Court with every indication that a ruling would significantly affect any rule the EPA or the Corps of Engineers finalized.

The Administration ignored repeated admonitions from, certainly, me and others, as well as impacted property owners and stakeholders that the agency should wait until the Supreme Court acted to proceed so that they could follow the Court's directives. Ultimately, we were right, and they were wrong: The Biden administration wasted valuable time and resources prioritizing the promulgation of a rule that was unanimously rejected by the Supreme Court for its overreach.

The EPA has now done the bare minimum to revise its initial proposal in response to the Supreme Court's decision so that it could rush a direct to final rulemaking that avoids transparency and public input. The only reason I can see to take this path is to keep WOTUS alive as a political wedge issue and environmental activists engaged. I fear this is setting us up for a repeat of WOTUS whiplash.

To understand why, let's just go back a few months. The Supreme Court ruling in Sackett versus EPA handed down in May of

this year represented a crucial victory for the cause of cooperative federalism enshrined in the Clean Water Act. The Court correctly limited the scope of Federal authority over wetlands consistent with the text of the Clean Water Act, thus reestablishing the delicate equilibrium between Federal and State governments that Congress intended when it comes to safeguarding our precious water resources.

Supporters of expansive Federal regulation of WOTUS argue that the Court's decision leaves waters unprotected. The Chairman spoke to this. That is misleading. It is not only misleading, but it does a disservice to State and local governments who know their own local water issues best and have the most at stake in protecting them.

It is an argument we have heard repeatedly over the past decade as the Federal Government embarked on five separate attempts to create a WOTUS Rule, ramping up or scaling back the reach of Federal jurisdiction and the types of projects requiring Federal permits from Washington's broken regulatory apparatus.

The Supreme Court's decisive ruling in the Sackett case should have put an end to this back and forth; at least, that was our hope. Instead, on September the 8th, the agencies published the updated final WOTUS Rule amending the 2023 rule to allegedly conform to the Sackett decision. The agencies stated that the sole purpose of the rule was to conform to Sackett, and therefore used a procedural tactic that is supposed to apply only when an action allows no agency discretion and imposes no burdens on the regulated community. What that really results in is no public input or transparency into the rulemaking as it is announced in its final form.

The Supreme Court's decision in Sackett did more than just abandon the old significant nexus standard for determining the scope of Federal waters. The majority established a new test pulled from the Clean Water Act that fully accounts for the law's use of the term navigable waters. The agencies entirely ignored this direction, and so on both process and substance have opened themselves up, I believe, to more legal challenges, creating more uncertainty for businesses, landowners, and project sponsors, and prolonged for all of those involved the likelihood that it is going to necessitate yet another WOTUS rule in the future.

This new revision to WOTUS won't even be consistently applied across the country. The update does nothing to address other issues that prompted the rule to be stayed by District and Circuit Courts. In 27 States, and I have a little picture here, the purple are the 27 States, and as we sit here, it is your State, my State, and Senator Cramer's State, and those 27 States where the 2023 rule was enjoined, the agencies will interpret WOTUS consistent with the pre-2015 regulatory regime and the Sackett decision. The agencies, in response to questioning from my staff, could not really tell us how this will be implemented or even if or when guidance would come for those States so that people know the rules of the road.

For 23 States, and I believe that is your State, Mr. Chairman, and Washington, DC, where the 2023 rule has not been enjoined, the agencies will implement their revised rule. A patchwork of States with differing definitions of Federal jurisdiction is a regulatory nightmare for stakeholders, and you brought out a good

point in your statement. A lot of these waters cross over from different State to State and now have different regimes.

As it stands, without regulatory guidance from the agencies, no one has clarity on what either side of the bifurcated implementation scheme will mean for a given project in a given State. It is no wonder that everyone who wants to build something in this country, whether it is a road or a renewable energy project, a semiconductor facility, or a pipeline, everybody wants permitting reform. It is essential for policymakers and regulatory agencies to actually address these issues and ensure a transparent and inclusive decisionmaking when formulating these environmental regulations.

Only through a fair and transparent approach can we develop effective policies that protect our natural resources, our precious air and water, and have sustainable growth. The Supreme Court correctly applied the Clean Water Act in the Sackett case. Had the Administration faithfully followed the Court's decision, then perhaps we would have avoided this ongoing litigation and the patchwork regulatory standard that we see now exists. Instead, it is likely going to be up to the courts again to constrain administrative overreach or to give us some clarity.

Despite this summer's rulemaking, Sackett was a significant step forward in an effort to make permitting more efficient and in the effort to limit Federal agency authority to the parameters set by this Congress, or our Congress. Cooperative federalism enshrined in statute, when correctly applied, will protect our environment and our economy. The executive branch should follow these instructions from both Congress and the judiciary to move in that direction.

I thank you, Mr. Chairman.

Senator CARPER. Thank you very much for that opening statement.

Now, we are going to hear from our three witnesses, two in person, and one joining us remotely. First, Dr. Sulliván, who is a professor in the Department of Forestry and Environmental Conservation and the Director of the Baruch Institute for Coastal Ecology and Forest Science at Clemson University, the home of the Tigers.

Dr. Sulliván received a bachelor's degree in anthropology and Native American studies from Dartmouth College, and earned his master's degree in biology and Ph.D. in natural resources from the University of Vermont. After earning his Ph.D., Dr. Sulliván was a post-doctoral research fellow at the University of Idaho. He also served as faculty in the School of Environmental and Natural Resources at Ohio State from 2008 to 2022.

I mentioned earlier the Cuyahoga River catching on fire the year after I got into the Navy in 1969. That was long before you showed up on campus there to be a part of the faculty.

Dr. Sulliván has authored something like 81 peer reviewed publications on aquatic ecosystems and water body connectivity.

Is that correct?

Mr. SULLIVÁN. That is correct.

Senator CARPER. That is a lot. I thought maybe that was a typo, but all right.

Next, we are going to hear from Kourtney Revels. I just love that name. Isn't that a great name, Revels? She is the Water Justice

Organizer for Bayou City Waterkeeper in Texas. Ms. Revels in a community organizer and education justice advocate who works tirelessly for equity in underserved communities. She has advocated for structural improvements to drainage systems, equitable distribution of resources, and disaster preparedness in northeast Houston.

Last but not least, we are going to hear from Susan Bodine, who is a partner at Earth and Water Law.

Somebody came up with a term called Carpertown, people who worked with me in the Navy or Treasurer, Congressman, Governor, Senator, whatever. We consider you part of EPW Town. It is great to have you back, and thank you for joining us. We don't always agree on everything, but we respect you hugely, as you know, and welcome you warmly back to this hearing room.

Prior to enjoying E and W Law, Ms. Bodine served as the Assistant Administrator for the U.S. Environmental Protection Agency's Office of Enforcement and Compliance Assurance from 2017 to 2021.

From 2006 to 2009, you served as the Assistant Administrator for the Office of Solid Waste and Emergency Response, which is now called the Office of Land and Emergency Management.

Ms. Bodine also served as chief counselor for this Committee from 2015 to 2017. She is a graduate of Princeton University and the University of Pennsylvania's School of Law.

I don't know if Albert Einstein ever taught, I think we has a professor at either Dartmouth or Princeton, but I like to quote him every day: In adversity lies opportunity. There is some adversity here before us today, but I think we have some opportunity, as well. Shoutout to him.

Welcome, and thank you to each of you for your willingness to testify before our Committee today. We are now pleased to hear the testimony of all three of you, starting with Dr. Sulliván.

Dr. Sulliván, you are now recognized for 5 minutes. Please proceed.

STATEMENT OF MAŽEIKA PATRICIO SULLIVÁN, PH.D., DIRECTOR, BARUCH INSTITUTE OF COASTAL ECOLOGY AND FOREST SCIENCE, PROFESSOR, DEPARTMENT OF FORESTRY AND ENVIRONMENTAL CONSERVATION, CLEMSON UNIVERSITY

Mr. SULLIVÁN. Thank you very much.

Good morning, Chairman Carper, Ranking Member Capito, and members of the Committee. I appreciate the opportunity to stand before you today and discuss the implications of this case for our Nation.

As Senator Carper has said, I have authored 81 peer reviewed publications on aquatic ecosystems and water body connectivity, so I spent a lot of my career focused on these questions. In my capacity as a member of the American Fisheries Society and the Society for Freshwater Science, I contributed to an amicus brief to the U.S. Supreme Court in the Sackett versus Environmental Protection Agency. I have included the brief, as well as some key publications, in my written testimony.

As described by Justice Alito, Sackett concerns a nagging question about the outer reaches of the Clean Water Act, the principal Federal law regulating water pollution in the United States. These outer reaches, as he terms them, in fact, refer to our Nation's most vulnerable waters.

Sackett disregards the established science around these smaller and often nonperennial streams and wetlands, which shows that they maintain hydrological, chemical, and biological functions that are essential in sustaining human well being, ecological health, and the economy. For example, they are critically important for fisheries, flood control, drought mitigation, carbon storage, and biodiversity, including many endangered species, as well as recreational and commercially valuable fishes like salmon and herring.

I have a few slides here. We will be on the second one. Yes, so the decision is catastrophic for water protection across the United States. The U.S. Supreme Court declared that a wetland must have a continuous surface connection with a water of the United States to be afforded Federal Clean Water Act protection. By requiring adjoinment, Sackett sets a far more limited standard for jurisdiction than any prior agency rule. Please refer to the figure in the slide, which shows how the conforming rule strips protections from our Nation's waters.

This ruling removes the majority of U.S. wetlands from Federal protection. For example, nationwide, approximately 16.3 million acres of wetlands, or roughly the size of West Virginia, are nonfloodplain wetlands, meaning they are found outside of non-adjacent to streams or rivers, such as prairie potholes, and will not be federally protected. Next slide.

We must recognize that this historic loss of protections is occurring at a time when the United States has already lost vast amounts of wetlands. Twenty-two States have experienced a loss of wetland area greater than 50 percent. Many midwestern States have lost greater than 80 percent. Likewise, 5 million acres of wetlands existed at the time of California's statehood in 1850. Today, only 9 percent of those wetlands remain.

While the Court's opinion is focused on wetlands, it also jeopardizes headwater streams. Non-permanent, ephemeral, and intermittent streams represent 59 percent of all streams of the conterminous United States, and greater than 81 percent of streams in the arid and semi-arid Southwest. Across the Nation, at least 4.8 million miles of streams are ephemeral and are left without protection. Next slide.

Conservative estimates suggest that wetlands outside of floodplains, such as prairie potholes, provide $673 billion U.S.D. per year, whereas headwater streams, small streams at the upper ends of watersheds, contribute $15.7 trillion U.S.D. per year to the U.S. economy via the ecosystem services listed on the slide. If you can't see them, they are talking about water purification, recreation, climate regulation, and others.

Loss of protections for these waters creates a direct risk to human life and well being from flooding and drought, with marginalized communities most at risk. Wetlands are key players in reducing the number and severity of floods. On the flipside, wet-

lands protect against drought by storing water during times of high flows and releasing it slowly over time, returning it to the water table during times of scarcity. Next slide.

Sackett's inadequate protection of water resources on tribal lands leaves vast swaths of reservation streams and wetlands unprotected and does not uphold the U.S. trust responsibility to the Tribes. Hunting, gathering, and fishing from wetlands and headwater streams, for example, are critical for subsistence based economies of rural Alaskan Native peoples.

In this slide, you can see that ephemeral streams represent 90, 39, and 73 percent of reservation stream length on the Fort Apache Reservation in New Mexico and Arizona, Coeur d'Alene Reservation in Idaho, and Menominee Reservation in Wisconsin, respectively.

The Court describes non-navigable wetlands and streams as outer reaches, but this is akin to minimizing the importance of the network of capillaries and small veins to the functioning of our circulatory systems and overall condition. The Court's decision has significantly weakened water protection and gambled with environmental, human, and economic health at a time when protections should be strengthened. Climate change will only exacerbate this situation.

In closing, I remember meeting Wilma Mankiller when she was the principal Chief of the Cherokee Nation. She said that in Iroquois society, leaders are encouraged to remember seven generations in the past and consider seven generations in the future when making decisions that affect the people. Not only do I stand before you today as a scientist, but also as a father of four and a citizen. Water is a precious and finite resource. The information I have provided you today is based on science. It is not hyperbole. I urge you to value this science, consider the seven generations to come, and remedy this situation.

Thank you.

[The prepared statement of Mr. Sulliván follows:]

BARUCH INSTITUTE OF COASTAL
ECOLOGY AND FOREST SCIENCE
College of Agriculture, Forestry and Life Sciences

Testimony for the U.S. Senate Committee on Environment and Public Works:
Examining the Implications of Sackett v. U.S. Environmental Protection Agency for Clean Water Act Protections of Wetlands and Streams

18 October 2023

S. Mažeika Patricio Sulliván, Ph.D.

Thank you for the opportunity to provide testimony on the implications of *Sackett v. Environmental Protection Agency (EPA)* for federal water protection.

I have authored 81 peer-reviewed publications on aquatic ecosystems and waterbody connectivity. In my capacity as a member of the American Fisheries Society and the Society for Freshwater Science, I contributed to an amicus brief to the U.S. Supreme Court in *Sackett vs. Environmental Protection Agency* (EPA). I was also a member of the EPA's Science Advisory Board Panel (2013-2014) that reviewed the science around connectivity of streams and wetlands to downstream waters and the subsequent 2015 Clean Water Rule. I have included the amicus brief, as well as several relevant publications, in Appendix A of my written testimony (p. 14).

The mandate of the Clean Water Act is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. This objective can only be achieved with a definition of WOTUS grounded in sound science that recognizes the multiple dimensions of waterbody connectivity: physical/hydrological, chemical, and biological. More than a half century of scientific research demonstrates that the integrity of "traditionally navigable" waters fundamentally depends on tributaries – including headwater ephemeral, intermittent, and perennial streams – as well as many associated lakes, wetlands, and off-channel habitats (USEPA 2015). Aquatic ecosystems depend upon transfers of chemical components, organisms, sediment, and organic materials among waterbodies to support the life in and around their shores. Without the safeguards of the Clean Water Act for these streams and wetlands, the ability of these waters to convey nutrients, provide pathways for migrating organisms such as fish and wildlife, and mitigate floods and droughts is severely undermined.

The *Sackett* decision abandons scientific consensus at a time when protections are most needed. The United States has lost vast amounts of historic wetlands. Twenty-two states have

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experienced a loss of wetland area >50%. Many midwestern states have lost >80% (Dahl 1990). Likewise, ~5 million acres of wetlands existed at the time of California's statehood in 1850. Today, only 9% of these wetlands remain owing to conversion to intensive agriculture, urbanization, and channelization of rivers (see Sulliván and Gardner 2023 and references therein). Certain types of wetlands have been particularly affected. For instance, agricultural development led to the loss of 95% of non-floodplain wetlands in the U.S. Prairie Pothole Region between 1997-2009 (Dahl 2014). The situation for streams is also concerning: USEPA (2004) assessments indicate that 42% of US stream length is in poor biological condition. The current state of impairment of U.S. waters implies we should be buttressing water protections, not removing them.

As described by Justice Alito, "*Sackett concerns a nagging question about the outer reaches of the Clean Water Act (CWA), the principal federal law regulating water pollution in the United States.*" These "*outer reaches,*" in fact, refer to our Nation's most vulnerable waters (Creed et al. 2017). The established science around smaller and often non-permanent (i.e., those that flow in response to precipitation events [ephemeral] or flow seasonally [intermittent]) streams and wetlands shows that they maintain hydrological, chemical, and biological functions that are essential in sustaining human well-being, ecological health, and the economy (Cohen et al. 2016, Colvin et al. 2019). Conservative estimates suggest that wetlands outside of floodplains such as prairie potholes provide $673 billion USD per year, whereas headwater streams – small streams at the upper ends of watersheds – contribute $15.7 trillion USD per year to the US economy via a suite of services including water supply and purification, climate regulation, flood control, and recreation (Creed et al. 2017).

To conform with the *Sackett* decision, the EPA has recently amended the rule it finalized earlier in 2023, replacing it with the Supreme Court's restrictive interpretation and grossly scaling back protections of our Nation's waters (USEPA et al. 2023). Without scientific backing, the Court concluded that the significant nexus standard was "inconsistent with the text and structure of the [Clean Water Act]." *Id.* at 1341. Rather, the Court "conclude[d] that the *Rapanos* plurality was correct: the [Clean Water Act]'s use of 'waters' encompasses 'only those relatively permanent, standing or continuously flowing bodies of water "forming geographic[al] features" that are described in ordinary parlance as "streams, oceans, rivers, and lakes."' *Id.* at 1336 (quoting *Rapanos,* 547 U.S. at 739). The Court also "agree[d] with [the plurality's] formulation of when wetlands are part of 'the waters of the United States,'" *id.* at 1340–41: "when wetlands have 'a continuous surface connection to bodies that are "waters of the United States" in their own right, so that there is no clear demarcation between "waters" and wetlands.'" *Id.* at 1344 (citing *Rapanos,* 547 U.S. at 742, 755).

Sackett is likely to cause substantial and widespread harm to the Nation's waters. In the case of *Sackett*, the U.S. Supreme Court declared that a wetland, to be afforded CWA protection, must have a continuous surface connection with a "water of the United States" – an ocean, river,

stream, or lake – such that it is difficult to determine where the "water" ends and the "wetland" begins (i.e., adjoinment). This ruling removes the majority of U.S. wetlands from federal protection. Wetlands provide essential ecosystem services such as protection of drinking water quantity and quality; provisioning of flood storage; storm damage mitigation; resilience against sea level rise and drought; and essential fish, shellfish, waterfowl, and wildlife habitat (Creed et al. 2017, Sullivan et al. 2019).

The federal government has declined to make estimates at the national scale (USEPA and USDOA 2021), but data exist that point to severe loss of protections. Nationwide, at least 16.3 million acres of non-floodplain wetlands – roughly equivalent to the size of the state of West Virginia – will not be federally protected outright (Lane and D'Amico 2016), with an uncalculated number of additional floodplain wetland acres at risk.

In many states, loss of protections for wetlands could be staggering: e.g., 61% of wetlands in Montana (USDOI 2023) have no apparent surface water connection to any other waterbody and could lose protection (Vance 2009); up to 78% percent of headwater wetlands in coastal North Carolina could lose protection as well as the majority of basin, bog, bottomland hardwood forest, Carolina bay, floodplain pool, hardwood flat, headwater forest, non-riverine swamp forest, pine savanna, pocosin, and seep wetland types found in the state (Moffat and Nichol 2019); and more than 50% of Tennessee wetlands are potentially excluded from protection (Siedschlag et al. 2010). Modeling estimates indicate that more than 40% of wetland acres in some New Mexico watersheds will not be protected at the federal level (Meyer and Robertson 2019). Fewer than half of New York wetlands are located within 100 feet (~30 meters) of waterways (Wade et al. 2022). In the extensively drained midwestern Wabash River Basin, ~17% of current wetlands – which equates to about 3% of the historical wetland acres in the region, given that 80% have been lost since European colonization – are within 100 feet of waterways (Walsh and Ward 2002). In both the New York and Wabash River studies, 100 feet was used as the narrowest interpretation of prior CWA rules, although this interpretation was still much broader than the *Sackett* criterion for adjoinment via a continuous surface connection. With the more stringent requirement, only a fraction of these wetlands would be left with federal protections, representing the largest loss of wetland protections since they have been federally regulated (Walsh and Ward 2022).

While the Court's opinion is focused on wetlands, it also jeopardizes non-perennial streams. For context, ephemeral and intermittent streams represent 59% of all streams in the conterminous United States, and >81% of streams in the arid and semi-arid Southwest (Levick et al. 2008, Nadeau and Rains 2007). As such, ecosystem services of watersheds across the U.S. are threatened: water quality and quantity; flood protection and mitigation; and the maintenance of biodiversity, including many endangered species as well as recreationally and commercially valuable fishes like salmon and herring (Colvin et al. 2019). *Sackett* removes protections for all ephemeral streams, despite their importance and the risks associated with their impairment that have been widely recognized (Levick et al. 2008, Colvin et al. 2019) including by EPA: "*Despite*

their seasonal or temporary appearance on the landscape, seasonal and rain-dependent streams are critical to the health of river systems, are hydrologically and biologically connected to the downstream waters, and provide many of the same functions and values as rivers and larger streams" (USEPA 2023).

Whereas western states will experience a disproportionately greater loss in federal protection, all states will be significantly impacted. Across the nation, at least 4.8 million miles of streams will now be categorically unprotected under this ruling (Fesenmyer 2021). More than 40% of streams will not be federally protected in many watersheds of Virginia, North Carolina, South Carolina, and Georgia (Moffat and Nichol 2019). With ephemeral and intermittent streams making up over 81% of streams in the Southwest (Levick et al. 2008), loss of protections in arid and semi-arid regions will be extreme: modeling estimates indicate that greater than 85% of stream length in some New Mexico watersheds will be left without protection (Meyer and Robertson 2019).

Two key ecological functions that pose direct risk to human well-being are flooding and drought. In the U.S., flooding caused 4,586 fatalities from 1959-2005 (Ashley and Ashley 2008); from 1996-2015, flooding resulted in 1,563 deaths (Lim and Skidmore 2019). Floods during the 20-yr period from 1996-2015 led to more than $167 billion USD in damages in the U.S. (Lim and Skidmore 2019), with projections pointing to increasing frequency and magnitude of extreme weather events such as severe flooding (Milly et al. 2002). People most vulnerable to floods tend to have weaker economic and social bases, lower education levels, and poor housing quality (Lim and Skidmore 2019). Wetlands are key players in reducing the number and severity of floods, as well as in storing storm-water runoff and minimizing non-point source pollution (Acreman and Ferguson 2009). On the flip side of the coin, wetlands protect against drought by storing water during times of high flows and releasing it slowly over time, returning it to the water table during periods of scarcity. Some estimates suggest that adverse changes to wetlands – such as alterations in their capacity to mitigate drought – will cost more than $20 trillion USD in ecosystem services annually on a global scale (Costanza et al. 2014).

Many states and tribes rely on federal regulation for water protection, and absent comprehensive federal protection, most of their waterbodies are left unprotected or only weakly protected. Thirteen states have laws requiring that their regulations parallel federal regulations; 24 states have laws requiring proof of benefit before their regulations can be extended beyond federal requirements (USEPA and USDOA 2020). Despite the U.S. trust responsibility to protect tribal rights and resources, many tribes have found that federal protection of waters has been inadequate in providing sufficient protection, leading to impaired water quality and compromised public health on reservations (Sanders 2010). Furthermore, although tribal "treatment as a state" (TAS) provisions represent a mechanism to address these types of problems, the procedure for gaining TAS and securing appropriate funding and staffing to administer WQS programs have made pursuing this option impracticable for most tribes. As of 2018, only 54 of the roughly 330 federally recognized tribes that meet TAS eligibility requirements had received TAS status and only 44 of those had their WQS approved by the EPA (Diver 2018). *Sackett* fails to recognize

culturally-distinct uses of waters and account for place-based Indigenous knowledge. The inadequate protection of water resources on tribal lands leaves vast swaths of reservation streams and wetlands unprotected, threatening indigenous cultural, spiritual, and subsistence practices (Sulliván et al., *In press*).

Climate change will only exacerbate the situation. Aquatic resources in many states, particularly in the western U.S., are already stressed by overuse of water and extreme weather patterns. This reduction in groundwater has greatly impacted flow regimes, causing many streams to shift from perennial to intermittent or even ephemeral. Under *Sackett*, streams that were historically perennial, but may exhibit degraded flow conditions in the future, will fall out of protection. Although water rights and use largely fall outside the jurisdiction of the Clean Water Act, the negative impacts of unregulated dredge and fill within these streams would be additive to the current stressors faced by aquatic ecosystems and could further reduce potential for habitat recovery. Such cumulative impacts increase the likelihood of future species listings and risk of extinctions, further jeopardizing the ecological integrity and function of our waters (Sulliván et al. 2019).

The Court bludgeons science to render an opinion that is catastrophic for water protection across the United States. For example, the Court's primary conclusion requiring a permanent hydrological surface connection demonstrates a fundamental lack of understanding of how natural waters function and connect across space and time. Further, the Court perpetuates a sole reliance on physical connectivity of surface waterbodies and ignores chemical and biological connections in determining jurisdiction. The limited protections precipitated by *Sackett* threaten highly valued fishes, fisheries, ecosystem services, and the communities that rely on them (Colvin et al. 2019). *Sackett* eliminates protections for millions of miles of headwater streams and millions of acres of wetlands and could result in severe ecological and economic losses and cause irreparable cultural and social damage (Cohen et al. 2016; Fesenmyer et. al. 2021; Creed et. al. 2017; Sulliván Declaration 2020).

The standard established in *Sackett* establishes stricter protection than those in rules proposed by the Obama, Trump, and Biden administrations (Ward and Amos 2023) (Figure 1). In no prior agency rule, scientific report, opinion from a scientific agency, or Science Advisory Board recommendation has the notion of adjoinment been proposed (Jacobs 2020).

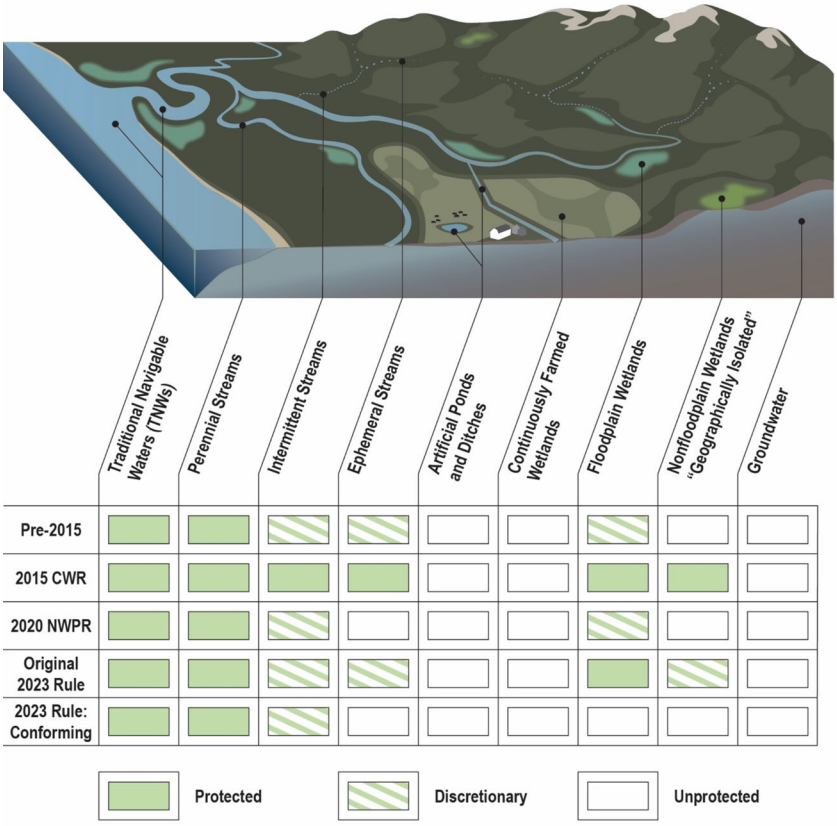

Figure 1. Multiple rule-making iterations have led to variable definitions of waters of the United States (WOTUS). The 2015 Clean Water Rule offered the most protection and was most aligned with scientific understandings of waterbody connectivity, permanence, and conservation. On the other hand, the 2023 *Sackett v. EPA* U.S. Supreme Court decision and subsequent Conforming Rule leaves most wetlands and non-permanent streams unprotected. CWR = Clean Water Rule;

NWPR = Navigable Waters Protection Rule. Discretionary = federal protection/jurisdiction of Clean Water Act determined on a case-by-case basis. From Sulliván et al. (*In preparation*).

The 2015 Clean Water Rule (CWR; USEPA et al. 2015) was based on the demonstrated importance of the many physical, chemical, and biological connections of headwaters to the ecological condition of downstream and downslope navigable waters and their biota. The 2015 CWR was informed by the best scientific information available as set forth in the comprehensive scientific report that accompanied the rule, i.e., the "*Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*." The Connectivity Report synthesized over 1,200 peer-reviewed publications and provided the technical basis for the 2015 CWR. In the intervening years, interdisciplinary scientific efforts have further demonstrated the importance of protecting non-permanent waterbodies, including intermittent and ephemeral headwater streams and wetlands that are hydrologically and biologically connected to navigable waters (e.g., Cohen et al. 2016, Rains et al. 2016, Fritz et al. 2018, Harvey et al. 2018, Leibowitz et al. 2018, Schofield et al. 2018, Colvin et al. 2019).

In contrast, the 2020 Navigable Waters Protection Rule (NWPR; USEPA et al. 2020) was not based on current science and reversed decades of protections that were put in place to ensure clean water would be available for future generations (Sulliván et al. 2019, Sulliván et al. 2020). The 2020 NWPR focused only on hydrological surface connections to establish jurisdiction. It ignored many key biological and chemical connections that are critical for fully functioning aquatic ecosystems. It only recognized a limited subset of connectivity conditions, and it relied on flow permanence and physical abutment as measures of jurisdiction. Hence, it arbitrarily ignored other ecologically critical aspects of physical connectivity such as bed, banks, and high-water marks, and chemical, biological and ecological connectivity that were incorporated in the 2015 CWR. The 2020 NWPR eliminated protections for a staggering number of headwater streams, which are broadly defined as portions of a river basin that contribute to the development and maintenance of downstream navigable waters including rivers, lakes, and oceans. Under the Court's reasoning, even the 2020 NWPR, which misinterpreted science and ignored the CWA's goals (Sulliván et al. 2019, Sulliván et al. 2020), protected *too* many waters.

The Court's description of the vast population of non-navigable wetlands and streams as "*outer reaches*" is akin to minimizing the importance of the network of capillaries and small veins to the functioning of our circulatory systems and overall condition. The Court's decision has significantly weakened water protection and gambled with environmental, human, and economic health at a time when protections should be strengthened. In addition to massive losses and impairment of aquatic resources nationwide, warmer temperatures and altered precipitation regimes associated with global climate change are expected to further accelerate wetland loss (Colvin et al. 2019, Millett et al. 2009). The impacts of this decision will ripple through our nation's waters with yet to be quantified, but assuredly long-lasting, detrimental effects (Sulliván and Gardner 2023).

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I have worked extensively at the interface of science and policy, and recognize the need to protect water while still allowing for reasonable uses. However, science cannot be side-stepped in the process. There are numerous options available for a durable WOTUS rule grounded in science that strikes the appropriate balance between conservation and effective use of water. For example, instead of simple binary (i.e., "protect or not") management of non-perennial headwaters and wetlands, a graded system dependent on the frequency of surface inundation, ecosystem services, and socioeconomic values should be, but has not, been considered (Sulliván et al., *In preparation*). The *Sackett* decision is not grounded in science, short-sighted, and runs counter to the intent of the CWA. I urge Congress to remedy this situation.

Thank you for the opportunity to comment. I am willing to assist should you need additional information or consultation.

Sincerely,

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Appendix A: Supporting Documents

A. Colvin, S. A. R., S. M. P. Sullivan, P. D. Shirey, R. W. Colvin, K. O. Winemiller, R. M. Hughes, K. D. Fausch, D. M. Infante, J. D. Olden, K. R. Bestgen, R. J. Danehy, and L. Eby. 2019. Headwater streams and wetlands are critical for sustaining fish, fisheries, and ecosystem services. Fisheries 44:73-91.

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D. Fesenmyer, K. A., H. M. Neville, S. J. Wenger, and D. Leigh. 2021. Large portion of USA streams lose protection with new interpretation of Clean Water Act. Freshwater Science 40: 252-258.

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Senate Committee on Environment and Public Works
Hearing Entitled *"Examining the Implications of* Sackett v. U.S. Environmental Protection Agency *for Clean Water Act Protections of Wetlands and Streams"*
October 18, 2023
Responses to Questions for the Record for Mažeika Patricio Sulliván

15 November 2023

S. Mažeika Patricio Sulliván, Ph.D.

Chairman Carper:

1. Congress has heard a lot of concerns from the agricultural community over the years about the implications of the Clean Water Act for farmers. However, many agricultural operations are heavily dependent on clean and reliable water supplies for irrigation. In 2017, farms with some form of irrigation accounted over half of the total value in U.S. crop sales. Farms may also rely on upstream wetlands for flood protection. Would you please explain why lost protections under the Clean Water Act may represent a short-term gain for farmers but a long-term loss?

Response: Lost protections under the *Sackett* decision and the Amended 2023 Rule put millions of acres of U.S. wetlands at risk. Although Ms. Bodine repeatedly pointed out that point-source pollution is still regulated, she seemed to conflate point-source pollution and the regulation of dredge and fill operations. The Amended 2023 Rule removes wetlands from protection that were protected from dredge and fill operations since at least 1987. The threat to wetlands without protection, thus, is very real.

Removing wetlands from agricultural landscapes may appear like an attractive option to farmers and ranchers. Yet, any short-term gains (i.e., increase in tillable land) are far outweighed by the long-term losses in flood control, irrigation capacity, nutrient removal, and other ecosystem services that wetlands (and streams) provide.

1. **Agricultural production is highly dependent on clean water**, and increasingly subject to risks associated with loss of water quality and quantity. Farmers and

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ranchers use water throughout their operations (e.g., irrigating crops, watering livestock, preventing frost damage, etc.).

2. **Dredging and filling wetlands permanently eliminates the capacity of wetlands to provide important ecosystem services to farming and ranching operations.**
3. **Wetland losses typically result in major hydrological shifts and species declines.** Common agricultural impacts include input of excess nutrients (nitrogen and phosphorus), sedimentation, pesticides, and bacteria, as well as altered flooding cycles. Healthy, functional wetlands remove pollutants from surface waters through nutrient trapping, nutrient removal, and chemical detoxification. Wetlands also serve as sources of pest control and pollination services. For example, many beneficial arthropods (e.g., ants, spiders, ground beetles, dragonflies), insectivorous birds and bats, and pollinators (bees and butterflies) use wetlands as habitat and move into croplands to forage. There, they control plant pests and pollinate crops. Pollinators contribute from 24-34B USD annually to the US economy (Jordan et al. 2021).
4. **Wetlands are key players in reducing the number and severity of floods**, which can lead to crop damage, contamination, soil erosion, spread of invasive species, and equipment and livestock loss. Conversely, wetlands protect against drought by storing water during times of high flows and releasing it slowly over time, returning it to the water table during periods of water scarcity.
5. **Recent disasters in the United States have underscored the importance of maintaining agricultural resilience to floods and droughts**, particularly in light of heightened risks from increases in the frequency and intensity of heavy rainfall/storm events and longer and more severe drought periods associated with the climate crisis. Among the key solutions are conservation practices that protect wetlands and nature-based solutions that restore and enhance floodplains (OECD-FAO 2021).
6. **The sustainability of natural wetlands (and streams) is intertwined with the sustainability of agro-ecosystems.** Removing or altering wetlands decreases or completely removes the long-term capacity of these ecosystems to provide clean, predictable water supplies to farmers and ranchers.

Normal farming and ranching – including activities like planting, harvesting, and moving livestock – have long been, and continue to be exempt under the Clean Water Act. “Prior converted cropland” and normal farming, silviculture, and ranging activities”, including maintenance of drainage ditches and irrigation infrastructure, are subject to long-standing exemptions. Farmers are only impacted if they decide to stop farming and develop their property for another purpose. Non-exempted activities on these lands (e.g., new construction, conversion of use) are subject to Clean Water Act protections. The 2023 Rule codifies certain exclusions, as well, including longstanding exclusions for prior converted cropland and waste treatment systems, and for features that were considered non-jurisdictional under the pre-2015 regulatory regime.

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2. The climate crisis is one of the greatest challenges facing our nation today. Weather is becoming more extreme, including increasing intensity and frequency of droughts and floods. Being resilient to climate change means having the ability to manage and mitigate the impacts of extreme weather, while doing all we can to prevent those impacts from getting worse over time. How do wetlands and streams – particularly those that will no longer be protected after the *Sackett* decision – help make communities resilient to climate change and mitigate the impacts of droughts and floods?

Response: Both wetlands and streams provide a suite of ecosystem services that buffer the effects of the climate crisis.

1. **Wetlands and streams increase resiliency to climate change** through maintaining water quality, providing erosion control, reducing flooding, safeguarding water supplies, and providing habitat for common to threatened species.
2. **Wetlands capture greenhouse gases such as carbon dioxide (i.e., carbon sequestration) by storing them in wetland soils and plants.** Wetlands store more carbon than any other ecosystem on Earth. For example, peatlands – a wetland type with no federal protection – store twice as much carbon as the world's forests (Crump 2017). Conversely, wetland drainage or destruction can cause significant carbon emissions. Thus, wetlands are crucial to our ability to combat climate heating.
3. **Wetlands are nature's disaster-management systems.** Wetlands help protect communities, infrastructure, agriculture, industry, and ecosystems from storms and flooding by absorbing water, and then releasing it slowly, recharging both streams and groundwater. With the *Sackett* decision, many urban wetlands that protect cities from storms, surges, and flooding are no longer afforded Clean Water Act protections. According to the U.S. EPA, U.S. flood damages average 2B USD annually (with the 30-yr average closer to 8B annually; USEPA 2006). Mangroves form a natural coastal barrier against increasingly frequent and intense hurricanes. Because of the storage-release function of wetlands, wetlands also mitigate against drought by supplying water during dry periods.
4. **Streams also protect against climate change.** In the same way as wetlands, healthy streams and their adjacent floodplains receive, store, and release water, mitigating against flooding and drought. Urban streams – many of which are headwater streams – function as blue-green infrastructures. As such, they are a nature-based solution to urban drainage systems, stormwater management, and flash flooding. Healthy stream-riparian corridors also mitigate the urban heat-island effect by functioning as thermal refuges, moderating extremes of local temperature variability. Many of these streams are now unprotected.
5. **Cool headwater streams also provide important thermal refuges to fish and other aquatic organisms**, particularly in regions with high sensitivity to climate heating, such as the desert Southwest and Intermountain West (Colvin et al. 2019). Mountain headwater streams provide important thermal refugia for many species of

conservation concern, such as Bull Trout and subspecies of Cutthroat Trout in the U.S. West (Isaak et al. 2016, Wenger et al. 2011). Large portions of these streams are also unprotected.

3. Could you please provide one or two real-world examples of streams or wetlands that are no longer protected after *Sackett*?

Response: Across our nation, non-perennial streams and wetlands – as well as many others – are now left unprotected. For reference, please see the finalized version of the figure that I presented during my 18 October 2023 testimony below overviewing waterbody protections (Figure 1).

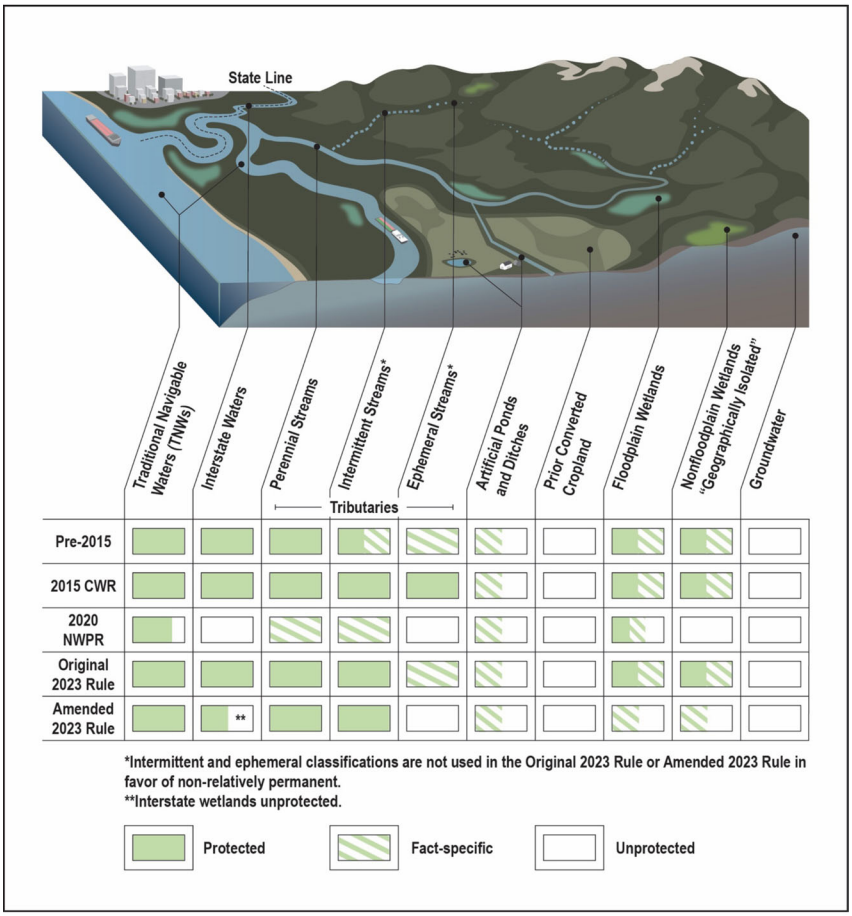

Figure 1. Multiple rule-making iterations and U.S. Supreme Court decisions have led to variable definitions of waters of the United States (WOTUS). The 2015 Clean Water Rule offered the most protection and was most aligned with scientific understanding of waterbody connectivity, permanence, and conservation. The *Sackett v EPA* U.S. Supreme Court decision omitted science by removing the significant nexus test and ignoring cumulate effects of wetlands and streams on downstream and

downslope waters. To comply with *Sackett*, the Amended 2023 Rule leaves most wetlands unprotected under federal jurisdiction, owing to the majority (5-4) decision's reliance on wetlands exhibiting a "continuous surface connection" to jurisdictional waters to come under federal jurisdiction under the Clean Water Act. In addition, protections for non-perennial streams are also weakened due to the majority's assertion that waters must be "relatively permanent, standing or continuously flowing bodies of water" to be waters of the United States. CWR = Clean Water Rule; NWPR = Navigable Waters Protection Rule. Fact-specific = federal protection/jurisdiction of Clean Water Act determined on a case-by-case basis. Split cells represent nuanced situations with mixed regulatory regimes. For example, in the 2015 Clean Water Rule, wetlands that met the definition of adjacency were afforded Clean Water Act protection (solid shading). Wetlands that did not exhibit adjacency were subject to fact-specific determinations of protection (hashed). For pre-2015 and the Original 2023 Rule, certain adjacent wetlands were afforded Clean Water Act protection (solid shading), while other adjacent wetlands and non-adjacent wetlands were subject to fact-specific determinations of protection (hashed).

Accordingly, real-world examples have now become prolific and ubiquitous across the U.S. I offer two examples – one for wetlands and one for streams – that offer on-the-ground examples of loss of protections under *Sackett* and the Amended 2023 Rule.

1. **Wetlands Boarding the Okefenokee Swamp**: As one of the largest remaining intact freshwater ecosystems in North America, Georgia's Okefenokee Swamp has tremendous ecological, cultural, and economic significance. The National Wildlife Refuge provides a broad array of ecosystem services including habitat for thousands of species, water purification, carbon sequestration, flood control, and recreational opportunities for birders, fishers, hikers, kayakers, photographers, and more. The refuge supports over 750 jobs and nearly $65 million in annual economic output per year. *Sackett* leaves almost 600 acres of wetlands on the doorstep of the Okefenokee National Wildlife Refuge without Clean Water Act Protections and vulnerable to strip-mining operations. These wetlands are connected to the Okefenokee Swamp through myriad physical, hydrological, biological, and chemical pathways. They are critical in supplying clean water to and maintaining the hydrological regime of the Okefenokee Swamp, as well as of the headwaters of the Suwannee and St. Mary's Rivers. Unfortunately, Georgia does not have wetland protections that compare to more rigorous previous federal Clean Water Act protections.

2. **Ephemeral Streams on Tribal Lands**: There does not appear to be any consideration afforded to Indigenous peoples and the unique context of water protection on reservations in *Sackett*, despite a 2022 detailed amicus brief on behalf of federally-recognized Indian tribes across the United States that outlined the threats of weaker water protections to cultural, religious, and subsistence activities on tribal lands (Menominee Indian Tribe of Wisconsin et al. 2022). *Sackett* does not adequately capture the importance of protecting vulnerable waters on tribal lands and, in fact, may erode tribal subsistence and cultural

practices that depend on these important water resources. In addition to spiritual uses, *in situ* uses of seasonal or non-permanent waters are essential for both subsistence and cultural elements of life on tribal lands. Many plants associated with wetlands are valued food and medicinal sources, and provide materials for traditional practices (e.g., household goods, building materials, tools, etc.) and spiritual ceremonies (Daigle et al. 2019). For instance, camas (*Camassia spp.*) is one of the most culturally important plants of tribes throughout many parts of the western and northwestern U.S. Camas is associated with vernal pools, seeps/wet meadows, and non-perennial streams that are wet in spring but dry by summer, yet none of these waters are WOTUS owing to their lack of a continuous hydrological surface connection with a Traditional Navigable Waterway.

Ephemeral streams provide critical services to tribal nations, including recharging water supplies and providing habitat for culturally-important fish, wildlife, and riparian plants. Although ephemeral streams can represent large proportions of catchments on U.S. Indian reservations, the *Sackett* decision and Amended 2023 Rule removes them from federal protection altogether. As shown in the figure below (Figure 2), by stream length, ephemeral streams represent, at a minimum, (A) 88.6% (14848 km) of Fort Apache Reservation watersheds (Arizona), (B) 38.6% (1380 km) of Coeur d'Alene Reservation watersheds (Idaho), and (C) 72.6% (1465 km) of Menominee Reservation watersheds (Wisconsin) (Sullivan et al. In press).

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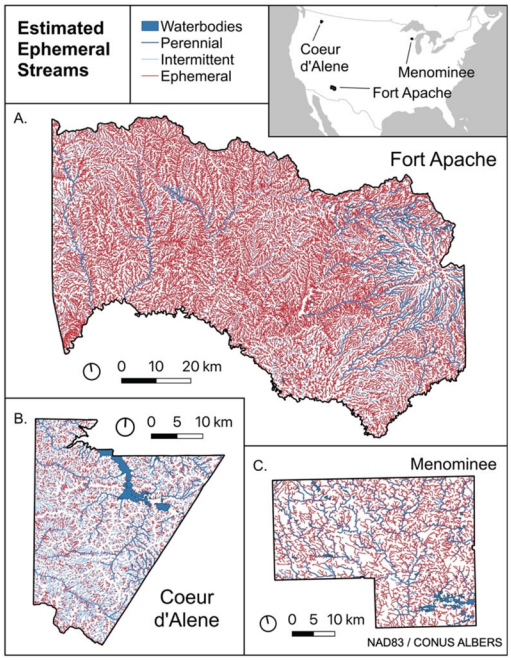

Figure 2. Perennial, intermittent, and ephemeral stream coverage of Fort Apache Reservation watersheds (Arizona), (B) Coeur d'Alene Reservation watersheds (Idaho), and (C) Menominee Reservation watersheds (Wisconsin). Ephemeral streams, which represent large percentages of stream length, are unprotected under *Sackett* and the Amended 2023 Rule.

I would further draw your attention to the cited article in the Appendix of my written testimony (Sulliván et al. In press). This article, coauthored by me and two tribal colleagues (Cherokee Nation of Oklahoma, Crow Tribe), focuses on the role of science in recognizing tribal values and Indigenous sovereignty in the U.S. relative to water protection. In this article, we propose that – to honor the U.S. trust responsibility to the tribes – policy should incorporate a parallel set (or sets, given the diversity of tribes) of scientific standards for determining WOTUS on tribal lands. These standards must recognize culturally-distinct uses of waters and account for place-based Indigenous knowledge. Ultimately, these decisions should be driven by the tribes.

4. Ms. Bodine's written testimony claims that the limitations to the Clean Water Act under *Sackett* are not catastrophic, and that this decision "does not mean all wetlands will be filled in or waterways will become polluted." We know from decades of experience, however, that without strong legal protections in place, we will continue to lose wetlands. And as wetlands vanish, our remaining wetlands become ever more valuable and necessary. Would you please describe what you know about historic wetland loss in our Nation and what the impact of that loss has been?
    a. Why should we be concerned about losing just a fraction of the wetlands that are no longer federally protected?

Response: Unfortunately, history tells a different story to Ms. Bodine's claim. Wetland loss has already happened at a massive scale. Drawing from my written testimony, the following bears repeating: "The *Sackett* decision abandons scientific consensus at a time when protections are most needed. The United States has lost vast amounts of historic wetlands. Twenty-two states have experienced a loss of wetland area >50%. Many midwestern states have lost >80% (Dahl 1990). Likewise, ~5 million acres of wetlands existed at the time of California's statehood in 1850. Today, only 9% of these wetlands remain owing to conversion to intensive agriculture, urbanization, and channelization of rivers (see Sullivan and Gardner 2023 and references therein). Certain types of wetlands have been particularly affected. For instance, agricultural development led to the loss of 95% of non-floodplain wetlands in the U.S. Prairie Pothole Region between 1997-2009 (Dahl 2014). The situation for streams is also concerning: USEPA (2004) assessments indicate that 42% of US stream length is in poor biological condition. The current state of impairment of U.S. waters implies we should be buttressing water protections, not removing them."

Dahl and Allord (1996) provide an excellent overview of the history of wetland loss in the U.S., from the 1600s through the late 20th century. The story is complex but underscored by a long, directed campaign to remove wetlands across the conterminous U.S. Even into the 1960s, the federal government encouraged land drainage and wetland destruction through legislation and policy. For instance, the Agricultural Conservation Program – which considered tile and open-ditch drainage to be conservation practices – led to 550,000 acres of wetland losses annually from the mid-1950's through the mid 1970's. The 1984 Wetland Status and Trends Report found that between this same period, wetland loss equaled an area about the size of New Jersey. Only policy and legislation have curtailed wetland loss. For instance, the 1989 U.S. federal policy of "No Net Loss" of wetlands significantly advanced wetland conservation. However, the Clean Water Act has long been the primary tool for wetland protection and restoring wetlands at a national scale.

Consequences of wetland losses are directly related to the services they provide. In brief, wetland destruction releases carbon dioxide into the atmosphere, fueling increased climate heating; worsens water quality for humans and wildlife; amplifies the effects of flooding and droughts, with significant consequences for ecosystems, human safety, and the economy; and threatens

long-term, sustainable water supplies. Conservative estimates suggest that non-floodplain wetlands alone provide $673 billion USD per year (also note that headwater streams contribute $15.7 trillion USD per year) to the US economy via a suite of services including water supply and purification, climate regulation, flood control, and recreation (Creed et al. 2017). Additional consequences can be found in my written testimony and above.

The majority of U.S. wetlands and streams now lack federal or state protections and are at-risk of unchecked dredging and filling. About half of U.S. states lack wetland protection programs independent of the Clean Water Act and a lesser number have established definitions for non-perennial waters. Moreover, many states are legislatively prohibited from having more-stringent state-level water resource protections than those afforded under the Clean Water Act, and many state and tribal natural resource agencies are increasingly underfunded and understaffed (Hughes et al. 2023 and references therein).

Without strong legal protections in place, we will continue to lose wetlands – of that, there is no question. We have already reached a point where we cannot afford to lose more wetland area. Each wetland altered or removed from the landscape means a reduction in the ecosystem services (described above, and in my written testimony) provided. Given the massive losses in the quantity and condition of wetlands (and streams), the effect of each additional loss is disproportionately great. Furthermore, the aggregate, or cumulative, effects of wetlands are weakened with each additional wetland destroyed. For example, the cumulative effects of unprotected, non-floodplain wetlands can strongly influence fluxes or transport of water, materials, and biota to downstream and downslope waters. As non-floodplain wetlands are lost across a watershed, so too are the collective, beneficial water purification and other services that are provided to the watershed, including drinking water. The economic costs are staggering. Freshwater pollution by phosphorus and nitrogen alone costs government agencies, drinking water facilities, and individual Americans in the US at least $4.3 billion annually (Kansas State University 2008). Wetlands clean our waters for free.

Thus, while the contribution of an individual wetland or stream to water quality may be small, the cumulative effects can be remarkable (Sullivan et al. 2019). With each additional wetland lost, we threaten these critical cumulative effects of wetlands within our watersheds.

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Senator CARPER. Dr. Sulliván, thank you very much for your testimony.

We are going to ask Ms. Revels to join us remotely.

Ms. Revels, you are recognized for 5 minutes. Once you complete your testimony, we will come back to Susan Bodine. Ms. Revels, please proceed.

STATEMENT OF KOURTNEY REVELS, WATER JUSTICE ORGANIZER, BAYOU CITY WATERKEEPER

Ms. REVELS. Thank you, Chairman Carper and Ranking Member Capito, for hosting this hearing to examine the implications of Sackett v. EPA for Clean Water Act's protections of wetlands and streams.

My name is Kourtney Revels, Water Justice Organizer for Bayou City Waterkeeper and a lifelong resident of Houston, Texas. Bayou City Waterkeeper is a Houston based organization that serves the lower Galveston Bay watershed with a focus on improving water quality, wetlands protection, and flood mitigation across our region while emphasizing climate resilience and environmental justice. I am also a member of the Northeast Action Collective, which organizes for drainage equity in northeast Houston.

My role within Bayou City Waterkeeper is to organize community members and shed light on experiences in communities most vulnerable to impacts on water pollution, system failures, underinvestment, and wetland development.

Water justice is a personal issue for me, because in my community in northeast Houston, I have experienced recurring flooding in the ditches near my home and my daughter's school. We are the communities on the frontlines of climate related changes and flooding. I am determined to fight for my community and the safety of my daughter. My journey in advocacy has been deeply rooted in the quest for flood mitigation, infrastructure enhancement, increasing community engagement, and bolstering community resilience.

Houston is emblematic of the struggle against climate change induced storm flooding. I have witnessed firsthand the devastating impact of these issues. The greater Houston region has repeatedly experienced floods and storm surges, including 2017's Hurricane Harvey that caused over 100 deaths and over $125 billion in damage.

In Houston, our watershed is home to some of the most unique and diverse wetlands in the world. These wetlands and others provide real services to our communities that often go unnoticed, like reduced costs to water treatment plants for purifying and filtering our drinking water, as well as soaking in and storing flood waters during heavy rainstorms. With climate change heightening the pressure on our infrastructure, the functions provided by healthy, natural water systems are even more critical.

Many of the wetlands in our region do not directly border or have continuous surface connections to another jurisdictional water, so they no longer qualify as Waters of the United States or for the Clean Water Act's protections, yet they have real connections to the way our ecosystems function, and refusing to protect them has consequences to our environment and communities.

The impact of less protective Federal regulations will likely hit frontline communities like mine the hardest. When we pave over wetlands, floodwaters that would normally be stored in soils flow quickly to communities downstream. This strains our infrastructure and exacerbates flooding that disproportionately impacts Black and lower income neighborhoods. The water is often polluted, not only from industrial waste, but also from sewer overflows during rain events, spewing untreated sewage into our neighborhoods, homes, and waterways.

This decision also emphasizes the need for local and regional policy solutions and investments that can preserve large ecosystems as a means for flood and climate protection. As our region grapples with how to address the intense storms and rising sea levels, it becomes more important to protect our remaining wetlands at the highest risk of loss due to development and other reasons.

Aging systems, ill equipped to cope with the surge in demand and impact of extreme weather events, puts immense strain on our communities, and these burdens disproportionately fall on marginalized communities, who lack the resources and political representation to address these issues.

Today, I lift up the urgency of protecting wetlands, not just as an issue of water conservation or water protection, but also as flood equity and ultimately as environmental justice. Together, with local organizations and communities, I am committed to working toward addressing these water justice crises, fostering resilience, and championing equity.

Our collective efforts are integral to forging a more sustainable and just future where no one is left behind in the face of water related challenges. We need everyone locally, in the States, and here in DC to understand that when we lose Clean Water Act protections, we are facing a water justice crisis.

Thank you guys for the opportunity to testify today.

[The prepared statement of Ms. Revels follows:]

Kourtney Revels Written Testimony

Thank you Chairman Carper and Ranking Member Capito for hosting this hearing to examine the implications of Sackett v. Environmental Protection Agency for the Clean Water Act's protection of wetlands and streams.

My name is Kourtney Revels, Water Justice Organizer for Bayou City Waterkeeper, and a lifelong resident of Houston, TX. BCWK is a Houston-based organization that serves the lower Galveston Bay watershed, a 10-county region that encompasses greater Houston, with a focus on improving water quality, wetlands protection, and flood mitigation across our region while emphasizing climate resilience and environmental justice. I am also a member of the Northeast Action Collective, which organizes for drainage equity in northeast Houston.

My role within Bayou City Waterkeeper is to help organize community members and help shed light on experiences in communities most vulnerable to impacts of water pollution, system failures, under investment, and wetland development, like the one that I live in, in NE Houston.

Water justice is a personal issue for me. In my community in northeast Houston, I have experienced recurring flooding in the ditches, near my home, and my daughters school in smaller rain events as well as larger disasters. We are on the frontlines of more flooding related to climate changes. I am determined to fight for my community and make it safe for my daughter. My journey in advocacy has been deeply rooted in the quest for flood mitigation, infrastructure enhancement, increasing community engagement, and bolstering community resilience.

In Houston, our watershed is home to some of the most unique and diverse wetlands in the world. These wetlands and others provide real services to our communities that often go unnoticed: reduced costs at water treatment plants for filtering and purifying our drinking water, as well as soaking in and storing flood waters during heavy rain events. With climate change heightening the pressure on our infrastructure, the functions performed by healthy natural water systems are even more critical.

Many of these wetlands do not directly border, nor do they have continuous surface connections to, another jurisdictional water, and so they no longer qualify as "waters of the United States." The impact of less protective federal regulations will likely hit frontline communities, like mine, hardest. When we pave over wetlands, floodwaters that would normally be stored in soils flow quickly to communities downstream, if onsite mitigation is inadequate. This strains our infrastructure and exacerbates flooding that disproportionately impacts Black and lower-income neighborhoods. To make matters worse, this water is often polluted, not only from industrial waste but also from sewer overflows during rain events — spewing untreated sewage into our neighborhoods, homes and waterways. At least one in ten sewage overflow events can be attributed to wet weather.

This decision emphasizes the need for local and regional policy solutions and investment that can preserve large ecosystems as a means of flood and climate protection. As our region grapples with how to address increasingly larger and more intense storms and rising sea levels, protecting our remaining wetland areas at the highest risk of loss due to development and other reasons, becomes ever more important. Aging systems, ill-equipped to cope with the surge in demand and the impact of extreme weather events, put immense strain on our communities and. The most distressing aspect is that these burdens disproportionately fall on marginalized communities, including Black, Brown, and Indigenous populations, who lack the resources and political representation to address these issues effectively.

Houston is emblematic of the struggle against climate change-induced storm flooding. I've witnessed firsthand the devastating impact of these issues. The greater Houston region has repeatedly experienced floods and storm surges, including 2017's Hurricane Harvey that caused more than 100 deaths and $125 billion in damage.

Today, I lift up the urgency of protecting wetlands not just as an issue of water conservation, or water protection but also flood equity and ultimately as environmental justice. Together with local organizations and communities, I'm committed to working towards addressing these water justice crises, fostering resilience, and championing equity. However, our collective efforts are integral to forging a more sustainable and just future, where no one is left behind in the face of water-related challenges. We need everyone locally, in states, and here in DC to understand that when we lose clean water act protections, we are facing a water justice crisis.

Thank you for the opportunity to testify today.

Additional Comments

1. Ensuring that Texas freshwater wetlands are protected by the CWA is especially important to the protection of the Lower Galveston Bay watershed because Texas does not have any laws in place to prevent or mitigate harm from wetland development. This has already caused the loss of as much as 29% of natural freshwater wetlands in some areas over an 18-year period. It is important to note that this was before the ruling and actually shows the necessity for increased protections and "WOTUS" definitions that would include more of our wetlands and streams.
2. Water infrastructure
    a. Texas has almost 3 billion dollars in applications for federal water infrastructure projects this past year. 375 million were funded. The need is huge. 3 billion is more than the EPA's total yearly funding for water infrastructure investment for the entire country in most years.

Senator CARPER. All right. We guys are happy.

[Laughter.]

Ms. REVELS. I mean Senators. I am so sorry. Thank you.

Senator CARPER. We are just regular guys and gals. Welcome. Thanks for that testimony, especially for your close.

Now, we are going to recognize not a stranger in this room, but one that we have worked with and admired for a long time, though we don't always agree, but we have great respect for her, Susan Bodine.

Susan, you are recognized, if you will, for 5 minutes. Please proceed.

STATEMENT OF SUSAN BODINE,
PARTNER, EARTH AND WATER LAW

Ms. BODINE. Thank you, Chairman Carper, Ranking Member Capito, and members of the Committee for inviting me to testify today on the Sackett decision.

I don't disagree that all water is connected. My children learned about the water cycle in the fourth grade, but the Committee needs to understand that the connectivity report that Dr. Sullivan talked about and worked on was written to support the notion of significant nexus. These connections create a significant nexus to a navigable water. It is important to recognize that all nine Supreme Court Justices held that significant nexus is not a valid basis for establishing Clean Water Act jurisdiction.

Further, the background of the 1972 amendments to the Clean Water Act make it clear that the relatively permanent waters test that was articulated in Rapanos, picked up on Sackett, is consistent with the text and legislative history of the Act.

As I discussed in my written testimony and in the article attached to that testimony, Senator Muskie's staff, and you recognized, Senator Carper, that he was one of the lead authors, they have talked about what they were trying to do in 1972. He said, at the time of the negotiations, the House and Senate staff believed that the scope of Federal jurisdiction that they authorized in the 1972 amendments were more constrained than the scope identified by the Supreme Court, in both the SWANCC decision on isolated waters and the Rapanos decision. So the Sackett case hasn't removed any Clean Water Act restrictions. It reaffirmed its original scope.

Despite Sackett, as I discussed in my written testimony, I am actually concerned about how the opinion will be implemented. In particular, I am worried about the position that has been taken in the preamble to the January 2023 rule that a continuous surface connection makes a wetland adjacent, and that it is just a physical connection, not a water connection, just a physical connection.

All features on the landscape are connected, just like all water is connected. And so under this interpretation, you could argue that all wetlands are connected, and that therefore, all wetlands are considered adjacent.

I am also worried about the test for relatively permanent waters that is articulated not in the regs, but in the preamble in January 2023, again, that you can say something is relatively permanent just if you see a bed and bank, just if you see wet leaves. That is

the same test that had been used in the past to identify a stream, even a stream or a channel that only has water when it rains. Again, the way they have interpreted Sackett is to retain and perhaps go back to the same issues that gave rise to these Supreme Court cases.

I also disagree that Sackett means we have lost a lot of authority. For example, referring to Ms. Revels' testimony, I worked on Corps of Engineers projects for Houston when I was in the Committee and in the House. I worked on the combined sewer overflow and sanitary sewer overflow, the sewer overflow consent decree for the city of Houston, when I was at EPA. Neither of those authorities are affected at all by Sackett. Both of those authorities can actually incorporate wetlands into their projects to achieve their goals.

Again, waterways are still protected based on the authority under point source. So if you have a ditch, if you have a channel, even if it is an ephemeral channel, that can be a point source. You can't dump pollutants into that channel. The channel itself isn't a Water of the United States, but it is a point source that, if it leads to a Water of the United States, results in a discharge into a Water of the United States, it is still regulated. You still need a permit.

Even if wetlands don't directly abut, although leaving aside the fact that the agencies think it is a physical connection only, but even if you don't directly abut, many wetlands are still going to be protected by other programs. The Fish and Wildlife Service has grants under the North American Wetlands Conservation Act. The Department of Agriculture protects wetlands through its conservation programs.

There are a lot of non-Federal partners. Ducks Unlimited, Nature Conservancy, many, many local watershed organizations, all working cooperatively with the private sector, with landowners, to conserve wetlands. States, too, have adopted their own definitions of Waters of the State, and about 26 of them have their own separate State programs to protect those waters.

The other 24 do rely on their 401 authority, which means that they can attach conditions to any kind of Federal spending or project if there is a discharge to something that is a WOTUS, but the way that has been interpreted in a recent rule by the Biden administration, you can then attach conditions whether or not. If all you need is one discharge, and then you can attach kind of whatever conditions you want. That authority is still there, too.

I do also want to emphasize that back in 1972, the staff was worried and the Senators were worried about federalism and constitutional limitations on their authority. As you look at this issue, I just ask you to keep that in mind.

Thank you.

[The prepared statement of Ms. Bodine follows:]

TESTIMONY OF SUSAN PARKER BODINE[1]
PARTNER
EARTH & WATER LAW
BEFORE THE SENATE COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS
HEARING ON SUPREME COURT'S RULING IN *SACKETT v. U.S. ENVIRONMENTAL PROTECTION AGENCY*

OCTOBER 18, 2023

On January 18, 2023, EPA and the Corps of Engineers published a final rule defining "waters of the United States" (WOTUS) under the Clean Water Act despite the fact that a case on that issue was pending on the Supreme Court's docket. The January rule adopted both a "significant nexus test" and a "relatively permanent waters" test for jurisdiction. That rule is the subject of numerous challenges and is stayed in 27 states.

On May 25, 2023, the Supreme Court addressed the scope of Clean Water Act jurisdiction in *Sackett v. EPA*. All nine justices agreed that "significant nexus" is not a legitimate basis for establishing Clean Water Act jurisdiction. All nine justices agreed that the Sackett's property in Idaho, at issue in the case, is not regulated by the Clean Water Act.

The Sackett property is separated from a large wetland to the north by a road and from Priest Lake to the south by dry land and a row of houses. If you considered groundwater to be a connection, the Sackett property would be connected to both the wetland and the lake. However, no justice argued the Sackett property was regulated on that or any other basis. Three Justices wrote concurring opinions.

In the majority opinion, Justice Alito (joined by Chief Justice Roberts and Justices Thomas, Gorsuch, and Barrett) held that only relatively permanent waters that

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[1] Former Senior Counsel and Subcommittee Staff Director, House Committee on Transportation and Infrastructure, Subcommittee on Water Resources and Environment; former Assistant Administrator, U.S. Environmental Protection Agency, Office of Solid Waste and Emergency Response (now Office of Land and Emergency Management); former Chief Counsel, Senate Committee on Environment and Public Works; former Assistant Administrator, U.S. Environmental Protection Agency, Office of Enforcement and Compliance Assurance. This testimony is on behalf of myself, not any organization.

are connected to traditional navigable waters are waters of the United States (WOTUS). The majority opinion also held that a wetland is regulated only if it has a continuous surface connection to a body of water that is a WOTUS.

Justice Kavanaugh (joined by Justices Sotomayor, Kagan, and Jackson) concurred in the judgment that significant nexus is not a valid test of jurisdiction and that the Sackett's property is not regulated. But his concurring opinion also says under the Clean Water Act jurisdiction extends to wetlands separated from a WOTUS by a man-made barrier or a natural berm, dune, or the like.

Although the liberal wing of the Court joined Justice Kavanaugh's opinion, Justice Kagan (joined by Justices Sotomayor, Kagan, and Jackson) wrote a separate concurring opinion to embrace the concept of jurisdiction over "neighboring" wetlands and to criticize recent opinions of the conservative justices, including the *West Virginia v. EPA* opinion from last term that articulated the "major questions" doctrine.

Justice Thomas wrote a concurring opinion (joined by Justice Gorsuch) to say that he interprets the terms "navigable" and "of the United States" to limit Clean Water Act jurisdiction to traditional navigable waters and wetlands directly abutting those waters, based on the limits of Congress' traditional "channels-of-commerce" navigation authority.

On September 8, 2023, EPA and the Corps of Engineers issued a direct final rule (no notice and comment) to respond to *Sackett*. The final rule revises the January 2023 WOTUS regulatory text to removal all language pertaining "significant nexus." It deletes interstate wetlands from the category of interstate waters. Finally, it amends the definition of "adjacent" to mean "having a continuous surface connection." The Biden Administration's rule is in effect in 23 states and the District of Columbia, where the January 2023 rule is not stayed. In the other 27 states, the agencies are saying that they will implement the pre-2015 regulatory regime as modified by the *Sackett* opinion.[2]

I wish to make four major points.

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[2] Given the January rule's reliance on case-by-case jurisdictional determinations, this distinction is unlikely to make a difference in implementation.

First, Supreme Court got it right in *Sackett.* A jurisdictional test based on "significant nexus" is not supported by the statute and therefore is not valid. Further, the background of the 1972 Clean Water Act makes it clear that the "relatively permanent waters" test from the plurality opinion in the 2006 case, *Rapanos v. U.S.*, which was adopted by the *Sackett* majority, is consistent with the text and legislative history of the Clean Water Act.

Second, the Biden Administration's September 2023 "conforming" rule fails to fully implement the *Sackett* decision.

Third, the sky is not falling. Recognizing the limits on Clean Water Act jurisdiction does not mean all wetlands will be filled in or waterways will become polluted. There are multiple tools available to protect wetlands. And the *Sackett* case did not change the fact that point sources are regulated. So, even if a ditch is not regulated as a WOTUS, if it discharges to a stream or lake or other WOTUS, it that discharge is still subject to the Clean Water Act.

Finally, amending the Clean Water Act to extend to isolated waters and wetlands could exceed Congress' authority under the Commerce Clause.

I. The Sackett Opinion is Consistent with the Text and Legislative History of the Clean Water Act.

The *Sackett* case adopts the view from the *Rapanos* decision that the term "waters" reaches "'only those relatively permanent, standing or continuously flowing bodies of water "'forming geographic[al] features'" that are described in ordinary parlance as "streams, oceans, rivers, and lakes."'" *Rapanos v. United States*, 547 U. S. 715, 739 (2006) (plurality opinion).

The historical context of the 1972 amendments makes it clear that this view of the scope of Clean Water Act jurisdiction is consistent with what the drafters of the Clean Water Act envisioned in 1972. This point is explained in detail in the attached article entitled "Examining the Term 'Waters of The United States' in Its Historical Context."

As I note in that article, the House and the Senate had different views on the Clean Water Act regulatory program and its reach. The House Public Works

Committee envisioned a program led by the Corps of Engineers while the Senate Public Works Committee wanted to give regulatory authority to the newly created Environmental Protection Agency. The compromise in the final bill was the § 402 program administered by EPA and authorized states and the § 404 program administered by the Corps. The House and Senate also disagreed over the scope of federal jurisdiction. Both limited the regulatory authority of the Act to "navigable waters." However, the House bill defined "navigable waters" as "the navigable waters of the United States." The Senate bill defined navigable waters as "the navigable waters of the United States, portions thereof, and the tributaries thereof, including the territorial seas and the Great Lakes."

The compromise language in the final bill defined "navigable waters" as "waters of the United States." The legislative history and historical background of the 1972 amendments to the Clean Water Act make it clear that both the House and Senate intended to go beyond administrative interpretations of the Corps' Rivers and Harbors Act jurisdiction (which included the so-called "Refuse Act" that prohibited dumping waste into navigable waterways without a permit that was a predecessor to the Clean Water Act). According to those Corps and EPA administrative interpretations, the term "navigable waters of the United States" is distinct from "navigable waters of the States" and therefore did not cover navigable waters that did not connect other navigable waters, forming a water highway for the interstate movement of goods. Members of Congress disagreed and did not want Clean Water Act jurisdiction to be so limited.

The definition of navigable waters in the Clean Water Act is famously ambiguous. It is silent on tributaries. It is silent on wetlands. However, it clearly is an exercise of Congress' authority over navigation as well as interstate commerce. As noted by the Supreme Court in the 2001 case, *Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers,* 531 U.S. 159, 172 (2001), you cannot read "navigable" out of the statute and regulate waters based wholly on Congress' Commerce Clause authority.

After the *Rapanos* case was decided in 2006, the Senate staff who worked on the 1972 Clean Water Act expressed the view that the decision was consistent with the intent of Congress. As Leon Billings, Senator Muskie's Democrat majority counsel for the Senate Public Works Committee, wrote in a 2015 Maine Law Review article honoring Senator Muskie: "the Supreme Court has acknowledged a

scope that is at least as far as we had imagined and, in my view, broader than we had reason to hope." In a 2015 interview with the Environmental Law Institute, Mr. Billings further said that at the time of their negotiations the House and Senate staff had believed that scope the federal jurisdiction authorized by the 1972 amendments was more constrained than the scope identified by the Supreme Court in both *SWANCC* and *Rapanos*.

In 1972, while giving the Clean Water Act a jurisdictional reach that exceeded contemporaneous agency interpretations of the Corps' Rivers and Harbors Act authority, at no time did Congress consider regulating isolated, non-navigable intrastate water, rainwater runoff and ephemeral flows, groundwater, or waters based solely on their use as wildlife habitat. In fact, the 1973 report issued by the congressionally chartered National Water Commission *after* the enactment of the current definition of "waters of the United States," recommended that states protect state-owned wetlands used by waterfowl. None of the water experts who served on the Commission suggested that those wetlands were already regulated by the federal government.

Consistent with the legislative history of the Act discussed above, the Commission described the jurisdictional expansion in the 1972 amendments as follows: "The water quality standards established in response to the 1965 Water Quality Act are retained as a floor under the new effluent limitations and are expanded to include all navigable waters." The Commission further noted that permits for dredging and channel alteration issued by the Corps of Engineers "are required only when the waters are navigable in interstate or foreign commerce, and no application for a Corps permit need be filed for those activities in other inland waters." As a result, the Commission made the following recommendation: "Since the States historically have been viewed as having regulatory jurisdiction over waters which are not navigable in interstate or foreign commerce, the Commission believes that the States should enact statutes which would provide adequate measures of protection to fish and wildlife values."

In *Sackett,* the Supreme Court has adopted a broader interpretation of Clean Water Act jurisdiction than identified by the National Water Commission in 1973. It also adopted a broader view of jurisdiction over wetlands than that articulated by the Commission.

While the *Sackett* majority interpreted "adjacent" to mean "abutting" it also upheld jurisdiction over wetlands that abut tributaries and other non-navigable waters if they are relatively permanent and are connected to a navigable water. This interpretation was not compelled by § 404(g), which was added to the Clean Water Act in 1977 to allow states to assume the § 404 permitting program. That section only says that regulation of discharges into traditional navigable waters and wetlands adjacent to traditional navigable waters must remain regulated by the Corps of Engineers and cannot be assumed by states. Section 404(g) is silent as to other wetlands and thus has no bearing on whether wetlands adjacent to non-navigable waters are regulated under § 404.

Further, jurisdiction over wetlands abutting non-navigable relatively permanent waters also was not compelled by the precedent set by the Supreme Court in *United States v. Riverside Bayview Homes, Inc.,* 474 U. S. 121 (1985). In *Riverside Bayview*, the Court deferred to a decision by the Corps that a wetland that actually abutted a traditional navigable water was jurisdictional, acknowledging the difficulties in discerning where land ends and water begins.

Thus, while it is certainly narrower than the ever-expanding jurisdiction claimed by EPA and the Corps, the *Sackett* opinion interprets the jurisdiction of the Clean Water Act broadly, while remaining true to both the text and the legislative history of the Act.

II. Biden Administration's September 2023 "conforming" rule fails to fully implement the *Sackett* decision.

The final rule issued in September 2023 to revise the January 2023 WOTUS rule to conform to the *Sackett* decision fails to fully implement that decision.

For example, EPA and the Corps left "interstate waters" as an independent category of jurisdictional waters, whether nor not such waters are navigable or relatively permanent and connected to an interstate navigable water. This decision fails to implement the following limitation in the *Sackett* opinion: "While its predecessor encompassed "interstate or navigable waters," 33 U. S. C. §1160(a) (1970 ed.), the CWA prohibits the discharge of pollutants into only "navigable waters," which it defines as "the waters of the United States, including the territorial seas," 33 U. S. C. §§1311(a), 1362(7), (12)(A) (2018 ed.)." Slip op. at

4. It is difficult to understand how defining WOTUS to include interstate waters as a separate category of jurisdictional waters fits into the holding of the *Sackett* Court that a water of the United States must be "a relatively permanent body of water connected to traditional interstate navigable waters." Slip op. at 22.

In addition, EPA and the Corps left untouched the expansive definitions of "tributary," "relatively permanent," and "continuous surface connection" found in the preamble to the January 2023 WOTUS rule.

According to the January 2023 preamble, to identify a tributary, all EPA and the Corps need to do is to "be able to trace evidence of a flowpath downstream." 88 Fed. Reg. at 3079. That flowpath does not need be a water of the United States. 88 Fed. Reg. at 3079, 3084. It can include ephemeral flows. 88 Fed. Reg. at 3084. "A tributary may flow through another stream that flows infrequently, and only in direct response to precipitation, and the presence of that stream is sufficient to demonstrate that the tributary flows to a paragraph (a)(1) water." Id. In fact, according to the preamble, "[t]ributaries are not required to have a surface flowpath all the way down to the paragraph (a)(1) water" and the flowpath may include subsurface flow. Id.

Once the agencies identify a tributary, they must then decide whether the tributary is "relatively permanent." According to the January 2023 preamble, this determination can be based on runoff from "a concentrated period of back-to-back precipitation events." 88 Fed. Reg. at 3086-87. The agencies also can determine that a stream is "relatively permanent" based on the identification of a bed and bank – *the same test that the agencies previously used to regulate ephemeral flows* -- or the presence of water-stained leaves, hydric soils, floodplains, algae, benthic macroinvertebrates, and other hydrologic and biologic indicators – *the same indicators used to identify wetlands*. 88 Fed. Reg. at 3087-88.

When you put it all together, EPA and the Corps are saying that if the upper reach of a stream is considered "relatively permanent" then they can regulate that upper reach as long as a flowpath (even if a dry channel or subsurface flow) extends to a "water of the United States." It is not outside the realm of possibility that they will try to regulate the entire "flowpath," even parts that are not "relatively permanent."

Further, it is remarkable that EPA and the Corps are continuing to claim that identification of an ordinary high-water mark is a basis for jurisdiction. That basis for jurisdiction was denounced by both the plurality decision in *Rapanos* and Justice Kennedy's decision.[3] It appears to have no grounding in the *Sackett/Rapanos* "relatively permanent waters" test.

The treatment of wetlands in the January 2023 preamble is similarly questionable. Following *Sackett,* it is clear that wetlands are not an independent category of "waters of the United States" and are regulated only when, as a result of a "continuous surface connection," the wetlands are indistinguishable from a "water of the United States." The rationale used in *Rapanos* and adopted by *Sackett* to support the regulation of wetlands is the recognition that the demarcation where water ends and land begins is not always clear. *Rapanos* at 742, 755; *Sackett*, slip op. at 21-22.

However, it appears that EPA and the Corps do not plan to implement that line-drawing exercise. Under their January 2023 rule preamble, a wetland can be clearly distinguishable from a "water of the United States" and still be regulated. The agencies will require only a physical connection between a wetland and a "water of the United States." That connection does not need to be a "water of the United States" itself. It can be a feature on the landscape identified by tools such as NRCS soil maps, LIDAR, and satellite imagery. It does not even need to be wet. 88 Fed. Reg. at 3095-96.

Based on that preamble language we may soon see the same expansive claims of jurisdiction we have seen in the past. For example, in a March 30, 2004, hearing of the Water Resources and Environment Subcommittee of the House Committee

[3] 547 U.S. at 725 (criticizing the Corps' use of an ordinary high water mark to establish jurisdiction noting that "[t]his interpretation extended 'the waters of the United States' to virtually any land feature over which rainwater or drainage passes and leaves a visible mark--even if only 'the presence of litter and debris'") (plurality opinion); 547 U.S. at 781 (criticizing use of an ordinary high water mark to delineate tributaries because "breadth of this standard--which seems to leave wide room for regulation of drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water volumes toward it--precludes its adoption as the determinative measure of whether adjacent wetlands are likely to play an important role in the integrity of an aquatic system comprising navigable waters as traditionally understood" (J. Kennedy, concurring).

on Transportation and Infrastructure on "Inconsistent Regulation of Wetlands and Other Water," one witness testified that a Corps official used a 25-year-old skidder rut that connected a wetland to a ditch to a stream to justify regulation. Under the preamble to the January 2023 rule, Corps officials would remain free to conclude that a skidder rut and a ditch together form a continuous surface connection that subjects a wetland to federal jurisdiction.

Given the fact that these interpretations are based on preamble language, not definitions in the rule itself, they might not be judicially reviewable until they are applied to a specific situation. If past is precedent, as EPA and the Corps make their case-by-case regulatory determinations we may end up seeing same regulatory creep, inconsistency, and confusion that we have seen before.[4]

EPA and the Corps did not take comment on their interpretation of the *Sackett* opinion, citing the APA "good cause" exception from the requirement for notice and comment where those procedures are unnecessary. This argument implies that the August rule is the only response they could have made. That assertion does not appear to be well-grounded.

III. Other Wetlands Protections.

The Sackett court's refusal to endorse broad claims of jurisdiction does not mean a fundamental shift in wetlands protections.

First, while claiming the authority to do so, EPA and the Corps have not attempted to assert jurisdiction over isolated waters and wetlands since the 2001 Supreme Court decision in *SWANCC*.[5] Clarifying that such waters are not regulated merely reflects the status quo. In fact, in 2014, the U.S. Fish and Wildlife Service acknowledged that 88% of prairie potholes are isolated and therefore not regulated. Instead of using regulatory authorities, they work with farmers

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[4] GAO, Corps of Engineers Needs to Evaluate Its District Office Practices in Determining Jurisdiction (Feb. 2004 (GAO-04-297) (identifying inconsistencies among Corps offices).
[5] 86 Fed. Reg. at 69,440 (Dec. 7, 2021) ("As a matter of practice since the issuance of the SWANCC Guidance [in 2003], the Corps has not asserted jurisdiction over such 'other waters'").

throughout the upper Midwest on cooperative conservation measures to address habitat.[6]

Second, the CWA includes nonregulatory programs that address waters that are not "waters of the United States" subject to federal regulation. In fact, the policies and goals listed in § 101(a) include "the national policy that areawide treatment management planning processes be developed and implemented to assure adequate control of sources of pollutants in each State," a provision of the Act that expressly addresses waters that are *not regulated* at the federal level.[7]

Third, there are many federal programs that protect habitat and wetlands. The Endangered Species Act protects endangered and threatened species and related critical habitat. 16 U.S.C. §§ 1531 et seq. The North American Wetlands Conservation Act authorizes a grant program to carry out projects to protect and manage wetland habitats for migratory birds and other wetland wildlife in the United States. 16 U.S.C. §§ 4401 et seq. The Department of Agriculture's conservation programs create incentives to protect wetlands.

Fourth, non-federal organizations play a strong role as well. Ducks Unlimited works with partners, including rice farmers, to protect waterfowl habitat. The Nature Conservancy buys land for conservation purposes. Numerous local watershed organizations work together to protect water quality, including promoting practices that protect shorelines.

Finally, states can adopt their own definitions of "waters of the state" and most have done so. A 2022 Environmental Law Reporter article reported that 26 states have adopted programs to protect those waters.[8] The other 24 states rely on their authority under § 401 authority to review federal actions and attach conditions to protect state waters.

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[6] See Dahl, T.E. 2014. Status and trends of prairie wetlands in the United States 1997 to 2009. U.S. Department of the Interior; Fish and Wildlife Service, Ecological Services, Washington, D.C., at 48.

[7] CWA § 101(a)(5), referring to § 208 of the Act, which encourages the development of plans to address "substantial water quality control problems," including identifying pollution problems associated with nonpoint sources, saltwater intrusion, and pollution of groundwater, all of which fall outside the regulatory reach of the Act. *See* CWA §§ 208(a)(1) and (b)(2)(F), (I), and (K).

[8] McElfish, J. "State Protection of Nonfederal Waters: Turbidity Continues," 52 ELR 10679 (2022).

IV. Amending the Clean Water Act to Encroach on Traditional State Authority May Exceed Congress' Commerce Clause Authority.

Just as happened after the *Rapanos* decision, the Biden Administration may ask Congress to amend the Clean Water Act to expand federal jurisdiction.[9] In response, some members of Congress introduced legislation to remove the term "navigable" from the CWA.[10] After that legislation failed to advance over the course of two Congresses, in 2011 the agencies changed their strategy and developed a draft guidance to reinterpret the *Rapanos* decision as an expansion, not a reduction, in federal authority.[11]

We may see an attempt to do that again. But in the unlikely event that Congress does pass legislation to revise the definition of waters of the United States, such a revision may not be constitutional. As noted by the Supreme Court in *SWANCC*, regulating intrastate activities based on a claim that they "substantially affect" interstate commerce is not firmly supported by the Commerce Clause and also raises federalism concerns.[12]

In 1972, members of this Committee had similar concerns. According to Leon Billings, Senator Muskie's staff, members of the Committee wanted to avoid claiming jurisdiction over isolated waters, due to concerns over constitutional limitations.

In sum, if this Committee wishes to aid the protection of isolated waters and wetlands, nonregulatory approaches may be more successful.

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[9] May 20, 2009, letter from CEQ Chairman Nancy Sutley, EPA Administrator Jackson, Acting Assistant Secretary of the Army Rock Salt, Agriculture Secretary Tom Vilsack, and Interior Secretary Ken Salazar to Senator Boxer.

[10] The Clean Water Restoration Act (HR 2421 and S. 1870 110th Congress; S. 787 111th Congress).

[11] EPA and Army Corps of Engineers Guidance Regarding Identification of Waters Protected by the Clean Water Act," 76 Fed. Reg. 24,479 (May 2, 2011). The 2011 guidance was the predecessor to the 2015 WOTUS rule.

[12] 531 U.S. at 173-74. In fact, such a statute could give Justice Thomas the opportunity to advance the position stated in his *Sackett* concurrence that "New Deal" expansion of Commerce Clause authority should be overturned.

Senator CARPER. Thank you for that testimony.

In fact, thanks to all of you for your testimonies this morning.

I have a couple of prepared questions I am going to ask, but I just want to start off and say, Dr. Sulliván, do you want to respond or comment on anything that Ms. Bodine has said, please?

Mr. SULLIVÁN. Yes, I do, and I appreciate the comments. I think that a few points.

One is, I think we need to ask the right questions. I am here as a scientist. And the first, the intent of the Clean Water Act, I think we can all agree, is to provide clean water. And it is expansive by definition. It wasn't called the Clean Large Rivers Act or the Clean Large Lakes Act. By the name alone, I think the intent is clear in terms of its understanding of protecting waters broadly.

I think that is an important point as we think about what the science tells us around protecting clean water. The connectivity report that Ms. Bodine referred to, the intent of that was to provide an exhaustive and comprehensive understanding of the literature around how upstream and upslope waters can relate or affect downstream and downslope waters.

It was not within the context explicitly; in fact, we were directed to focus on the science and not the policy. While it has implications for the significant nexus, it has equal implications for where we are today. That information is incredibly valuable.

What we have seen since that time in the science in the decades since that time is increased evidence that changes, alterations of upstream and upslope waters have significant effects on downstream and downslope waters. I think that report is meant to buttress the science and really show those important connectivity, how physical, chemical, biological connectivity is critical in maintaining clean drinking water, for example, for downstream waters. So I think those are really important points.

In terms of the programs, and perhaps we will talk about that later, I think a lot of the programs that Ms. Bodine mentioned, I agree those are excellent programs, but they are not a comprehensive national legislation that sets the bar for protection. Many of those are actually programs that are restoring, not conserving, and we know, from decades of research, that restoration, although very important, does not equal conservation.

I think we all know that from our own bodies. I injured my wrist a few years ago and had to have surgery. It works, right, it is restored, but it is not the same as the original condition. So a lot of those programs are actually meant toward restoring.

They are also patchy in their distribution. For example, the Clean Water Act is based on individual organisms and life history strategies. So species that have very small ranges, that is where that is limited to. It is not a comprehensive national legislation, and I think that is what we need to protect the science.

Senator CARPER. All right, thanks very much for that.

Let me yield to Senator Capito.

Senator CAPITO. Thank you. Thank you both, all three of you, for being here.

So, the Biden administration has come in and revised the rule as a reaction to the Sackett opinion. The Supreme Court found, unanimously, that, for different reasons, the mere presence of

water does not allow for Federal jurisdictions. They have removed the phrase "significant nexus" from the rule and kind of called it a day.

Ms. Bodine, would you describe the jurisprudence here, and am I right that mere deletions cannot satisfy the requirements that were laid out by our Supreme Court?

Ms. BODINE. Thank you, Senator Capito.

I am concerned, and I agree with you, and the reason is that when the Biden administration wrote their rule in January, knowing full well that the Sackett decision was pending, they hedged their bets, and so they wrote both on significant nexus and relatively permanent waters, but they didn't put the definitions of what they meant, going to Senator Carper's clarity point. They did not put it in rule language. I think they attempted to isolate it from judicial review by putting all of that in preamble language.

When they issued their conforming rule on September 7th, they excised "significant nexus" out of the rule language, but they left in all of their preamble language about what related to the Rapanos test. What is a relatively permanent connection, what does it mean to be relatively permanent, what is a continuous surface connection, all that is still there. They reaffirmed in a memo that they wrote on September 27th that that is controlling. So that January 23 language from the preamble is controlling the jurisdictional determinations in the field.

Senator CAPITO. I would say, to simplify there, what I am hearing is that we are going to be back at court, and this is going to be back up to the Supreme Court, the way the Administration has rewritten this rule.

Would that be a safe statement?

Ms. BODINE. Yes, I agree with you.

Senator CAPITO. OK.

Let me ask you this. I talked about the rulemaking process. They kind of skirted a little bit the rules there, in terms of public input, which is kind of ironic, because in this Committee, all we hear about is community input and how we need to make sure we are listening to communities, which I believe is extremely valuable, and we should be doing that. That is a big emphasis, but they didn't go through this. How is that going to hold up as we move forward legally here?

Ms. BODINE. I was very surprised they took that approach. There is an exemption in the Administrative Procedure Act, saying that if comment is unnecessary, then you don't need to go through notice and comment, but the only time comment is unnecessary is if Congress took away all the discretion from the agencies. If there is any discretion, then you have to take notice and comment, and there certainly is.

There are certainly questions that remain open based on the Sackett decision. In fact, there is a whole discussion about interstate waters in the Sackett decision that they didn't address at all, and then, of course, there is this whole issue of how they are going to implement it, which is in the preamble language.

Senator CAPITO. I think, also, to get to it, we have, as much as we might have a different approach to what we are trying to get here, one of the conforming themes, I think, that the Chairman

and I have, and all of us have, is some kind of consistency. So if we look at this map, we have the purple and the green. The purple is conforming to the 2015 rule; the green is to the new rule.

How in the world are farmers, or construction, anything, going to go forward, trying to figure this maze of regulatory mish mash? To me, that makes it even more difficult than it already is.

Ms. BODINE. I agree with you completely. The reason is that, the way they wrote the rule, again, not by creating definitions that could be challenged in court, but by essentially leaving everything to a case by case determination. So, those case by case determinations about how they are going to implement stuff on the ground, that is going to lead to inconsistency, and we have seen that before. There is a really interesting 2004 GAO report on how different Corps districts around the country took completely different interpretations, and we are going to be back to that.

Senator CAPITO. To simplify it, in regular terms, the whole Sackett case was about a couple trying to build a house near a lake. It is very granular. We are talking kind of big, bold definitions and how it is going to implement and everything, but basically, it is about homeowners, construction folks, farmers. It is the basic parts of our different States that are most equally affected.

I think I am out of time. I will turn it back to you, Mr. Chair.

Senator CARPER. Thanks for those questions.

Next, Senator Cramer, please. Thank you.

Senator CRAMER. Thank you, Mr. Chairman.

Thanks, Senator Capito, and to all of our witnesses.

I do think you are right. We are sort of arguing two things here. You are arguing that the science and the effects; you are arguing the law and the Constitution. For those of us that want to go back and forward seven generations, my sixth-great grandfather gave his life at Bunker Hill for the cause of liberty. And I believe if we are going to use broad definitions, that would be for the cause of federalism, not an the insignificant issue that we should ignore for the science.

I want to ask you, Ms. Bodine, earlier this year, in this Committee, Lieutenant General Spellmon, the head of the Corps of Engineers, testified. I gasped when he said it. He said it rather casually in the context of work force. He said that the Corps of Engineers considers about 80,000 Federal issues a year, 80,000 Federal decisions per year.

Do you believe that if there are 80,000 regulatory actions by the Corps of Engineers that the clarification, the simplification of Sackett, should reduce that workload for the Corps of Engineers, and perhaps there is some efficiency that we could actually gain from this?

Ms. BODINE. Unfortunately, I don't think we are ever going to see that, because the way they set it up, it is going to be case by case determinations instead of right definitions.

Senator CRAMER. Thank you. That is my concern. How much simpler could they make it? How much more prescriptive could they have been? I suppose you could say, we could be more prescriptive if we changed the Clean Water Act to the Navigable Waters Act, but we don't call the Endangered Species Act the

Every Species Act. Titles are one thing; definitions are another thing.

I want to ask you about permitting reform. Senator Capito referenced the importance of it. A lot of us on all sides of the issue are concerned about it and want some permitting reform. One of the things that I have emphasized throughout this debate is, it has become just as difficult to permit a wind farm or a solar panel farm or a transmission line as it is a fuel pipeline of some sort. Transmission lines and pipelines, and for that matter, interstate highways are long, linear, often, almost always, multi-State, multi-jurisdictional infrastructure.

Because of the complexity of this type of infrastructure, Congress established the Nationwide Permit Program to allow these projects to obtain one permit, as long as they are determined to have a minimal effect on the environment.

Can you discuss the importance of the nationwide permit, and maybe also considering both the efficiency of it, as well as the effectiveness, I guess, of a nationwide permit?

Ms. BODINE. Yes. The Corps of Engineers' nationwide permits is really the reason why we haven't completely stopped building infrastructure in this country, because it is a more efficient and truncated review based on minimal impacts. There has been a gradual narrowing of the nationwide permits, which means that more and more would be subject to the individual permits, which are what take years and years and years, and are subject to lawsuits.

If there isn't Federal jurisdiction, then you don't need to get the nationwide permit, but that question is going to be decided case by case, and it remains to be seen how that will be applied.

Senator CRAMER. It is hard for me as a former regulator to imagine multi-State, multi-jurisdictional, linear infrastructure that doesn't have a Federal nexus somewhere along the line, right, so it seems to me that. Anyway, that said, it is another part of the discussion I think we ought to get back to.

Let me ask, where do you see the legal fight coming? Obviously, two and a half pages of amendments to a 141 page rule in the context of a major Supreme Court decision isn't going to be adequate, it is certainly not adequate for the Prairie Pothole region that I come from. By the way, with all due respect, not federally protected does not mean not protected. In fact, I would submit that the mediocrity of the Federal Government is far, far worse for the protection of wetlands in North Dakota than what North Dakotans, for that matter, what farmers, how they protect their own wetlands.

Where do you see the legal fight coming in the next several months?

Ms. BODINE. I think, and again, I am not representing anybody in this, but what I have read and heard is that yes, there are groups that are going to challenge the September conforming rule based on both the issue of no notice and comment as well as the substance, and then the litigation over the January rule is ongoing.

That is why it is not in effect. That is why it is stayed in 26 States, and that litigation will go on. Yes, there will still be litigation.

Senator CRAMER. Let's face it, as long as there is chaos and uncertainty, there is going to be litigation and stays, and maybe that is a strategy in and of itself.

Thank you, Mr. Chairman.

Thank you.

Senator CARPER. Thank you, Senator.

We have been joined by Senator Merkley.

If you would like to jump in, you are next in line. Thanks for joining us.

Senator MERKLEY. Thank you very much, Mr. Chairman.

Senator CARPER. After you, if no one else shows up, Senator Mullin, you would be next, and then Senator Boozman.

Senator MERKLEY. Dr. Sulliván, it is well established, the connection between wetlands and the nesting and feeding habits of 50 percent of North American birds, 31 percent of plant species. These play a vital role in so many ways.

I wanted to ask you, though, about a particular angle. That is related to whether the loss of protection for wetlands impacts tribal communities. The wetlands are critical to sustain fish species, like the various protected species in Klamath Basin in Oregon, culturally significant plants and first foods.

Are some of these vital ecological and culture functions in jeopardy, and how will Sackett affect Tribes across the country?

Mr. SULLIVÁN. Thank you, Senator Merkley.

Yes, this is a critical issue, one which I work with many tribal partners myself addressing these sorts of questions.

I think we probably need to back up a step to fully understand the situation. One is, the key piece is that for the dispossession of land, when it is entered into the trust responsibility with the Tribes, and part of that trust responsibility was to protect natural resources, including water. That is a really critical piece that we have a burden of responsibility to protect water as well as other natural resources.

The other pieces of this is, and it is clear to understand, that we have a duty to protect tribal rights and resources that we don't shoulder with every other group. Although this was initially meant to serve as a protective role, that trust responsibility has morphed today into Federal authority that is considered plenary.

The reason that is important is the combination of limited tribal authority and plenary Federal authority has cause Tribes to rely heavily on Federal environmental legislation rather than their inherent sovereignty for environmental protections within tribal lands. That is one point I want to make.

The other is that, despite the trust responsibility, many Tribes have found that Federal protection of waters is insufficient, has been inadequate in providing sufficient protection, leading to impaired water quality, largely because of the TAS provisions, which is the Treatment as a State, and I want to make a point here. As of 2018, only 54 of the roughly 330 federally recognized Tribes that meet TAS eligibility requirements had received TAS status, and only 44 of those had their water quality standards approved by the EPA.

This leads us to a situation where Tribes are in limbo a little bit in terms of protecting water. To your point, these waters are crit-

ical. And I showed a map earlier of ephemeral streams across multiple reservations. Those were mapping that we did using the most advanced techniques to map ephemeral streams. Ephemeral streams and wetlands are critical for many tribal nations for a suite of different purposes, ranging from subsistence purposes, hunting, fishing, and gathering, to spiritual purposes.

A couple specific examples I could give is camas is a critical plant in the western United States in the Northwest. Where does it grow? It grows in areas around ephemeral streams and seasonal wetlands. These have been longstanding subsistence plants that are central to many tribal cultural practices and subsistence. So that is an example where those waters then lose protection.

Another point that I really want to make, and this is critical, is that on many reservations, due to the Allotment Act, the Dawes Act, which was essentially that even within reservation land, non-Indians were allowed to come in and purchase land. So that patchwork of jurisdiction on the reservations makes it very hard for the Tribes to do this themselves, and they need the Clean Water Act protections to protect those critical systems.

I think it is a critically important piece. I am actually working right now with the Coeur d'Alene Tribe where we are looking at wetlands and restoring wetlands to actually combat drought on the reservation. Critical question, absolute need for a consistent protection at the Federal level for wetlands, ephemeral streams, and to protect multiple uses, beneficial uses for Tribes.

Senator MERKLEY. Thank you very much.

My time is up, so I will just close with a comment, which is in Oregon, we have experienced intense droughts over the last few years. There is a lot more attention to the role of groundwater. Many ranchers are starting to ask for oversight of the control of groundwater for that reason, because if the level drops too low, you are in trouble. It is also drawing attention to the connection of the groundwater filtering and effect on cooling in terms of algae in the lakes and other factors, whether or not it is connected by surface water.

Thank you, Mr. Chairman.

Senator CARPER. You are welcome. Thank you, I know you have a lot on your table this morning. Thanks so much for making time to join us and for your questions.

Senator Mullin, you are next, please.

Senator MULLIN. Thank you, Mr. Chairman.

Is it Sulliván, is that right? Where do you live?

Mr. SULLIVÁN. South Carolina.

Senator MULLIN. City?

Mr. SULLIVÁN. It is a small village called McClellanville.

Senator MULLIN. How much time do you spend in Indian country?

Mr. SULLIVÁN. How much time do I spend doing what?

Senator MULLIN. How much time do you spend in Indian country?

Mr. SULLIVÁN. Quite a bit. I used to live in Idaho; I have projects. I was just out, actually.

Senator MULLIN. Are you tribal yourself?

Mr. SULLIVÁN. I am not tribal, no.

Senator MULLIN. You are not? I am Cherokee. I lived in tribal land my whole life, and I can tell you, we start talking about seven generations, my kids are probably close to that. We live in the Cherokee Nation inside the reservation, my whole life. You bring up Wilma Mankiller and talk about seven generations there, and you really bring up a lot of interesting points.

But you forget one thing, that Tribes have been fighting forever to get the government out of the way. We don't need more government involvement. In fact, that is what led us to Oklahoma to begin with. We have been fighting for water rights forever, and I can assure you that your definition is saying that all waters belong to the United States of America. Is that what you are saying?

Because that map you showed up said that everything flows, eventually, into what you consider a navigable body of water, and it is all connected, and so by your definition, you are saying that all waters belong to the Waters of the U.S. Right?

Mr. SULLIVÁN. I am going to back up a step there. First, all the——

Senator MULLIN. No, I don't need you to back up. I am just asking you, is that what your definition is?

Mr. SULLIVÁN. My definition is that Waters of the U.S.——

Senator MULLIN. All tied together. That is basically what you are saying?

Mr. SULLIVÁN. My definition, from a scientific perspective, waters are tied together. I am not——

Senator MULLIN. OK, so all waters belong to the U.S., so there is no private water rights. So all this land rights that we have been fighting for, farmers have been fighting for, Tribes have been fighting for, actually, it doesn't exist, because underneath your definition, it all belongs to the United States, and we should all ask permission to the United States before we can even water our cows in a pond.

Mr. SULLIVÁN. No, not at all, and I think you are misinterpreting what I am saying and the intent of what I am saying.

Senator MULLIN. Underneath your broadened definition, you are saying all waters belong to the Waters of the U.S.

Mr. SULLIVÁN. No, I am here as a scientist, saying waters are connected.

Senator MULLIN. Well, you are also giving your opinion, too.

Mr. SULLIVÁN. No.

Senator MULLIN. Well, when you start talking about Wilma Mankiller, and you are talking about seven generations, and you are doing all this, yes, you are. You are giving your opinion about this in a place that you haven't lived.

I take a little bit offense to it to some degree, because you keep talking about all this tribal like you are trying to protect tribal land, and you forget the simple fact that we have simply been fighting for water rights forever on our traditional lands, and we really don't want the Federal Government getting involved in it. That is not what we want. We want to be able to use our water without having to ask permission, and if you connect all the waters of the U.S. and you put it underneath a broad definition of saying that everything is tied into that, then that is exactly what it would lead to. It would exactly—if you say all of it belongs underneath

Waters of the U.S., everything we would do on tribal land from then on would be us requiring to have some type of permit from a big, overreaching Federal Government. Would that be fair to say?

Mr. SULLIVÁN. I am waiting for you to finish so I can respond.

Senator MULLIN. Go ahead.

Mr. SULLIVÁN. I think of a couple points to make. First of all, I absolutely respect where you are coming from. The work I am presenting today and as part of my written testimony, is with tribal partners who wrote these papers, and we are working together. You are talking about opinions, but these are points that we are deriving together in collaboration.

The position I have here is as a scientist understanding how these waters are connected and how alterations of that connectivity can impact waters on tribal lands.

Senator MULLIN. But you are saying that they are all connected.

Mr. SULLIVÁN. They are connected.

Senator MULLIN. Are you not afraid of the overreach of the Federal Government at this point, because I am very skeptical.

Mr. SULLIVÁN. My role here is as a scientist. I am not talking——

Senator MULLIN. Underneath the Clean Water Act, we originally said that it was navigable bodies of water. The reason why we said in the original navigable bodies of water, and we started talking about the 404 and the 402 permits was because we wanted to limit the scope and the reach of the Federal Government.

We came in and redefined that to the Waters of the U.S., and specifically said they were adjacent, because we were afraid of the Federal Government overreach of going too far in country.

Now, we are saying that everything is tied into. There are 72,000 farmers in Oklahoma, 72,000. I am one of them. My family has been raising cattle on the same land we have been to since we were forced to walk there in the mid-1830s. And it is very difficult to say that now, from now on—are you gaveling me down, and everybody else has went farther than me?

Senator CARPER. No, I did not go like that, OK? Just to remind you—excuse me—just to remind you that your time has expired. Continue. Continue, OK?

Senator MULLIN. I am good.

Senator CARPER. All right.

Please, go ahead. Thank you.

Senator LUMMIS. Welcome, witnesses.

Ms. Bodine, are you concerned that the wording of the 2023 rule will create uncertainty for landowners across the West, and particularly in Wyoming?

Ms. BODINE. Yes, Senator Lummis. I am very concerned about that. It has been set up as case by case jurisdiction, and as what we have seen before, that has led to regulatory expansion and inconsistencies.

Senator LUMMIS. During your time at the EPA, have you ever seen the Administration willfully ignore the Court's ruling, as they seem to be doing in Sackett?

Ms. BODINE. I have not.

Senator LUMMIS. What are they hanging their coat on, in terms of departing from what seemed to be a clear direction in Sackett, to get to where they are today?

Ms. BODINE. In their September 8th conforming rule, they excised significant nexus out of their regulations. And that is accurate. That reflects what the Sackett decision said.

But what they left was all of the interpretive language, which was in guidance in the preamble. They didn't put it in regs, and that makes it all case by case, but they left it all intact. They have said, this is what we are going to do on a case by case basis to follow it.

If you compare what they say, how they are going to interpret these terms with the opinion, they don't match. But we may end up having to litigate. People may end up having to litigate that on a permanent basis and not by challenging the rule. That remains to be seen.

Senator LUMMIS. It seems so unique to me that this could be dealt with on a case by case basis, especially after a decision like Sackett. What makes that possible?

Ms. BODINE. They could have written bright lines in their conforming rule and chose not to. I do think that the agencies are trying to hold onto as much jurisdiction as they wanted. There has to be some case by case. I am not going to say that everything is absolutely a bright line, but what we have here is essentially 100 percent case by case.

Senator LUMMIS. I am deeply concerned about that, because some of the examples pre-Sackett of enforcement actions in Wyoming would, to the naked eye of people with common sense, seem to be beyond the scope of the Federal Government. It also seems to fail to recognize State jurisdiction over water, especially quantity, but also quality.

What would you advise if you were involved in the decision-making at the agency as a clarification, so we are not just in this pattern of litigating? It almost seems like an effort is being made to run out the clock on people who are regulated and then have to access the courts to have a more reasonable interpretation of the law.

Ms. BODINE. Most people just want to get their project done, and so they won't litigate. That is how you get ever increasing claims of jurisdiction.

You talked about some older examples of overreach. My concern is that the way they have set this rule up, they have left the door open to go back to that same overreach because of the way they are defining their terms. I would recommend that the operative terms of how the statute should be implemented should be in rule language and not just left to a guidance document.

Senator LUMMIS. We are told frequently that guidance is not necessarily something that has to be adhered to with a bright red line, but then there are examples where it is. Does the Congress need to step in and define guidance in a way that makes it less onerous?

Ms. BODINE. If the agencies take the position that a guidance is binding, it is a rule, and it can be challenged in court.

Senator LUMMIS. I thank the witness.

Thank you, Mr. Chairman.

Senator CARPER. Thank you, ma'am.

We have been joined by Senator Markey.

Senator Markey, welcome, and you are recognized.

Before you do, though, let me ask for a unanimous consent request, if I could, to submit for the record an amicus brief submitted in the Sackett case by 18 federally recognized Tribes outlining their concerns with the narrowing Clean Water Act protections. This brief affirms that narrowing Clean Water Act protections through Sackett would have dire consequences for Tribes, including undercutting their ability to protect against cross-border pollution.

Is there any objection?

Hearing none, Senator Markey.

[The referenced information follows:]

No. 21-454

IN THE

Supreme Court of the United States

MICHAEL SACKETT & CHANTELL SACKETT,

Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF MENOMINEE INDIAN TRIBE OF WISCONSIN AND 17 FEDERALLY RECOGNIZED INDIAN TRIBES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTERESTS OF *AMICI CURIAE*

The *Amicus* Parties to this brief are federally recognized Indian Tribes from across the United States (the "Tribes").[1]

In the Midwest, the Menominee Indian Tribe of Wisconsin, the Bay Mills Tribal Community, and the Bad River, Fond du Lac, and Grand Portage Bands of Lake Superior Chippewa count thousands of lakes, wetlands, streams, and the Great Lakes as an integral part of their homes, critical to their cultural and subsistence resources.[2]

In the Southwest, the Tohono O'odham Nation, the Pascua Yaqui Tribe, the Navajo Nation, and the Pueblo of Laguna rely on ephemeral and intermittent streams and rivers with flows that rely on significant storms to water their crops, sustain their homes, and serve as cultural touchstones.

On the West Coast, the Swinomish Indian Tribal Community, the Quinault Indian Nation, the Yurok Tribe, the Confederated Tribes of Coos, Lower Umpqua, and Siuslaw Indians, and the Puyallup Tribe of Indians are people of the salmon, dependent upon healthy rivers and tributary streams flowing from the mountains to estuary wetlands at the coast for their traditional foods, subsistence economies, cultural resources, and lifeways.

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[1] The parties have consented to the filing of this brief. Under Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution to its preparation or submission.

[2] Maps showing the locations of the Tribes' reservations and some rivers referenced in this brief are included in the Appendix.

In the eastern Plains, the Iowa Tribe of Oklahoma has settled in eastern Oklahoma, having a woodland heritage, but adopting plains ways over their history. Their landscape is dotted with wetlands and small streams, many intermittent, within the larger watershed of the Cimarron River.

In Idaho, the Fort Hall Reservation of the Shoshone-Bannock Tribes includes the Fort Hall Bottoms, one of the largest wetland waterfowl habitats and premier waterfowl hunting locations in the western U.S. Surface water in the Bottoms area is used by the Tribes' bison herd, which provides subsistence and has cultural significance to the Shoshone-Bannock people.

In the eastern forests, the Seneca Nation and the Rappahannock Tribe live alongside rivers and creeks, including the river that bears the Rappahannock name, and have depended upon these waters and their tributaries and riparian areas for transportation, sustenance, medicines, and spiritual needs throughout time.

For all of these Tribes, clean water and wetlands and the habitat and resources they support are crucial to their physical and cultural survival. *See* Amendments to the Water Quality Standards Regulation That Pertain to Standards on Indian Reservations, 56 Fed. Reg. 64,876, 64, 878 (Dec. 12, 1991) (Environmental Protection Agency's Clean Water Act tribal eligibility rule).

INTRODUCTION AND SUMMARY OF ARGUMENT

As sovereign nations, the indigenous tribes of North America rely on the Clean Water Act and have a distinct perspective on the need to protect our nation's waters. Each of the amici Tribes has a unique cultural, religious, and physical connection to water that is integral to who that Tribe is and how the Tribe's people have lived their lives since time immemorial. These waters already face threats that would only be exacerbated by a narrowing of Clean Water Act jurisdiction.

Tribes depend on the Clean Water Act and federal implementation of its provisions to protect waters within their reservation boundaries and on lands on which they retain treaty rights. Excluding entire categories of waters from Clean Water Act protections—as petitioners propose—would undercut tribes' ability to protect against cross-border pollution, including destruction of upstream wetlands that protect tribal waters, and harm treaty protections. Moreover, eliminating federal jurisdiction and permitting requirements would strip away other federal protections like those under the National Historic Preservation Act, a law that is integral to the protection of important tribal historic sites.

Tribes have always known what science fully demonstrates: Waters of the United States, including wetlands, are connected, and the Clean Water Act must comprehensively cover waters to protect and restore the chemical, physical, and biological integrity of the nation's waters, consistent with Congress's purpose and direction, 33 U.S.C. § 1251(a). Interpreting the Act in line with Congress's stated purpose also avoids harming tribal rights, resources, and culture.

ARGUMENT

I. Petitioners' Narrow Interpretation Would Harm Tribes' Unique Interests and Rights in the Nation's Waters.

Under petitioners' interpretation of waters of the United States, thousands of miles of streams and wetlands—many critical to the Tribes—would lose longstanding Clean Water Act protections. Petitioners would confine the Act's protections for wetlands to a narrow subset of those waters: (1) wetlands with a visible and continuous surface water connection to a stream, ocean, river, or lake, and (2) only when that stream, ocean, river, or lake is itself navigable in either interstate commerce or as a navigable intrastate link between waters that are navigable and used in interstate commerce. *See* Petrs. Br. on the Merits 23-25, 36, 42-43. Under that interpretation, degradation or destruction of countless wetlands could proceed unchecked. And if extended to upstream headwaters and ephemeral water bodies, the damage would be even greater. Tribes will deeply experience those consequences, given their cultural connections to, and dependence on, now-protected waters, as the following examples demonstrate.

A. The Fond du Lac Band and the St. Louis River.

The Fond du Lac Band of Lake Superior Chippewa resides in what is now the State of Minnesota. The Band has deep ties to the St. Louis River, which arises in northern Minnesota wetland bogs and ultimately flows along the northern and eastern bounds of the Fond du Lac Reservation to Lake Superior. The Band (along with other Lake Superior Chippewa Bands such as Bad River and Grand Portage) retains treaty rights

to fish, hunt, and gather on lands throughout Minnesota and Wisconsin that include countless headwater streams, tributaries, and wetlands.

Wetlands make up over 50% of the Band's reservation, which also contains 24 lakes and numerous streams, some of which cross reservation boundaries. The Band has developed federally approved water quality standards to protect their waters and the fish the Band rely on.

Waters on the Fond du Lac reservation, as well as many other waters in which the Band has treaty rights, support manoomin, or wild rice, an aquatic plant from which the Band and other Midwestern tribes have harvested for centuries. Manoomin is central to many tribes' sustenance, identities, and economies. It is a required component of certain annual ceremonial feasts. Manoomin is unique to the Northern Great Lakes region; it grows nowhere else in the world. This important plant is highly sensitive to damage by flooding or washout if upstream wetlands that help absorb flows are damaged or destroyed. Manoomin is also adversely affected by pollution, particularly sulfates released from mining activities.

Petitioners' interpretation would put many waters, including wetlands and headwater streams in the Upper Midwest, at risk of losing the protection that the Clean Water Act has provided for 50 years. Mines throughout the Upper Midwest exemplify these risks of that lost protection. The proposed location of the NorthMet open-pit sulfide mine is in the headwater bogs and wetlands that feed into the Partridge River, the start of the St. Louis River. NorthMet would excavate headwater bogs and wetlands to construct its mine pit, while also burying additional wetlands under stories-high piles of waste rock and tailings

generated by the mine. Cumulatively, the U.S. Army Corps of Engineers calculated that NorthMet would likely degrade or destroy a total of 7,694 acres of wetlands in the headwaters of the Partridge and ultimately St. Louis Rivers.[3]

The NorthMet mine, the type of mine that produces acid mine drainage, will introduce mercury and sulfates into the watershed. Mercury accumulates and magnifies up the food chain, including in the fish that the Band consumes. Sulfates released from mining can devastate manoomin if present in even low quantities. The disposal of waste rock will destroy wetlands that now replenish and control flows in headwater streams that in turn flow into the Partridge River and that now filter other pollutants that would otherwise reach the St. Louis River.

As required by the Clean Water Act, 33 U.S.C. § 1341(a)(2), the Environmental Protection Agency notified the Band of the draft permits for the NorthMet mine. The Band objected to the draft permits because pollutants from the mine would violate the Band's downstream water quality standards for mercury and specific conductance.[4] As the Act requires, the Corps

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[3] For perspective, Seneca Lake in New York (the largest of the Finger Lakes) is 3,550 acres, less than half the amount of waterbody that will be degraded or destroyed by the NorthMet Mine. Deep Creek Lake in Maryland is 3,900 acres, about half the amount of waterbody that will be degraded or destroyed by the NorthMet Mine. Raystown Lake in the Poconos of Pennsylvania is 8,000 acres, only slightly larger than the amount of waterbody that will be degraded or destroyed by the NorthMet Mine.

[4] Specific conductance is a measure of dissolved salts and other inorganic chemicals, often a problem associated with discharges

held a hearing on the Band's objections after EPA confirmed that the NorthMet mine may affect the Band's downstream water quality standards.[5] The Act's regulatory process allows the Band the ability to ensure that its waters will be protected through modification of permit conditions or the project if conditions cannot protect the Tribe's water quality standards.

A narrow interpretation of the Clean Water Act that forecloses this regulatory process could leave the Band with no way to protect itself and its food sources from violations of its water quality standards from mines like NorthMet.

B. The Swinomish Indian Tribal Community and the Skagit River.

The Swinomish Indian Tribal Community is located on the southeastern side of Fidalgo Island in the Salish Sea, in what is now Washington State. The Swinomish are Coast Salish people who have resided and fished in the region since time immemorial.

The Skagit River arises from small streams, many intermittent, high in the Cascade Mountains in Canada, and empties into the Salish Sea at Skagit Bay just off the southern end of the Swinomish Reservation. The Reservation is within the large coastal estuary of the Skagit River.

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from mining operations. Increased salinity from these pollutants can be detrimental to many aquatic resources, including wild rice.

[5] Letter from EPA to Fond du Lac Band under 33 U.S.C. § 1341(a)(2) dated June 4, 2021, *available at* https://www.epa.gov/sites/default/files/2021-06/documents/fond-du-lac-polymet-section-401a2-letter-20210604-2pp.pdf (last visited June 10, 2022).

Today the Skagit River is the second largest salmon-producing river on the West Coast and the only river in the lower 48 states with all six species of wild Pacific salmon. Salmon spawn in its upper reaches and along its many smaller tributaries. Early in their lifecycle, as fry (months old) and smolts (a few years old), salmon rear in the Skagit River's freshwater tributaries and wetlands. Swinomish has studied and identified sloughs and channels along the river that provide critical habitat for juvenile salmon, even though these waters run dry during low river flows. As they make the transformation to becoming saltwater adults, smolts seek the relative safety of the river's lower side streams and especially the estuary wetlands that provide food and cover from predators.

As with many Pacific Coast tribes, Swinomish relies on salmon for its cultural and physical existence.[6] The Swinomish people call themselves People of the Salmon. In the 1855 Treaty of Point Elliott, a number of tribes in the Pacific Northwest including Swinomish retained the right to take fish in their usual and accustomed fishing places, including the Skagit River.[7]

But degradation of the river and its side channels, sloughs, and tributaries has greatly diminished its salmon population, contributing to Chinook salmon being listed as threatened under the Endangered Species Act. In particular, the draining of estuary wetland habitat lands for intensive agricultural use

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[6] *See* Jim Morrison, *An Ancient People With a Modern Climate Plan*, Wash. Post (Nov. 24, 2020), *available at* https://wapo.st/3PgyhJa.

[7] This treaty right includes preventing a state from creating conditions that eliminate fish. *See, e.g.*, *United States v. Washington*, 853 F.3d 946, 962-66 (9th Cir. 2017), *aff'd by equally divided court* 138 S. Ct. 1832 (2018).

has altered the river delta, eliminating habitat important to juvenile salmon and contributing significantly to the reductions of Chinook salmon. Swinomish is actively engaged in restoring estuary habitat on its reservation, but its ability to address the many threats to salmon outside the reservation and throughout the watershed is limited. The Tribe has sometimes been forced to import salmon from Alaska to feed its members and continue its cultural practices and religious ceremonies.

The Tribe has used the Clean Water Act's regulatory structures, to address, in part, some of these threats to the Skagit River. For example, public notice and comment is required for permits the Corps issues for structures that drain or affect wetlands within the basin, *see* 33 U.S.C. § 1344. Through the permitting process and requirements, the Tribe has previously secured permit requirements that require restoration of wetlands necessary for juvenile salmon development. Shrinking the scope of the Act such that fewer wetland-damaging activities require Section 404 permits would leave more wetlands in the Skagit unprotected and would eliminate one of the few procedures by which Swinomish can engage with its Trustees to protect and restore off reservation habitat that is critical to salmon.

C. The Pueblo of Laguna and Its Reliance on Multiple Ephemeral and Intermittent Waters Upstream of and on Laguna Lands.

The Pueblo of Laguna is located in the K'awaika homeland between the Sandia Mountains, Magdalena Mountains, and Mt. Taylor, near where the Rio San Jose meets the Rio Puerco in arid, west-central New Mexico. Approximately 4,800 tribal members live

within the Pueblo's boundaries, which includes approximately 500,000 acres of tribal trust land in Cibola, Valencia, Bernalillo, and Sandoval Counties.

In this arid region, clean water is essential to the Pueblo and its members' daily lives, spiritual beliefs, and cultural and ceremonial practices. Members of the Pueblo consume water directly from surface waters and apply it topically as part of ceremonial practices. They use surface waters for drinking, domestic supply, recreation, irrigation, livestock, and maintaining riparian habitat.

The Pueblo relies on a vast network of ephemeral and intermittent streams connected to the Rio Puerco, which is one of the largest tributaries to the middle Rio Grande. The Rio Puerco drains 7,000 square miles (only slightly smaller than the State of New Jersey), contributing roughly 30,000 acre-feet of water to the Rio Grande each year. Of the 1,416 stream miles within the Pueblo's boundaries and upon which the Pueblo relies, 79% are ephemeral, 18% are intermittent, and only 3% are perennial.

Many of these waters are threatened by upstream mining and other activities that could pollute or destroy the Pueblo's scarce waters in the absence of the Clean Water Act. Existing and potential upstream uranium mines and an upstream coal mine discharge water into ephemeral streams that carry contamination downstream to Pueblo waters. The Pueblo actively uses the tools and regulatory structure of the Clean Water Act to protect its diminishing rivers and streams from these discharges.

The Pueblo estimates that a narrow interpretation of Waters of the United States could strip Clean Water Act protections from 79 to 97% of its waters. That

would limit the Pueblo's ability to ensure that upstream dischargers comply with the Pueblo's water quality standards, resulting in harms to the Pueblo's waters, including waters used for drinking.

D. The Shoshone-Bannock Tribes and the Waters of the Snake River Plain.

The Shoshone-Bannock Tribes are located in what is now the state of Idaho. The Tribes' traditional homelands include the Snake River plain, which is filled with examples of interconnected surface and groundwater that are a critical part of Shoshone-Bannock culture.

The Snake River plain and its surrounding waters occur in a lava geology that is porous, conducting snowmelt into streams and ultimately rivers, but those streams do not all flow year round or are not always visible on the surface. Along the northern boundary three distinct river systems, the Lost River, Little Lost River, and Birch Creek all wind their way through montane river valleys until they 'disappear' or are 'lost' beneath the lava flows. The rivers and creek waters re-emerge in cold, fresh-water springs along the Snake River, including in the Thousand Springs reach of the Snake, which had been one of the most prolific spawning areas in the Snake River basin for fall Chinook salmon, sturgeon, and steelhead. The area is now one of the richest aquaculture regions in the country because of the abundance of clear, pathogen-free spring water, and hatcheries there grow millions of pounds of fish for use in a variety of applications, including conservation hatcheries for steelhead and sturgeon.

One of these downstream spring-fed water-recharging areas, known as the Fort Hall Bottoms, is located

within the Shoshone-Bannock Tribes' Fort Hall Reservation. Groundwater from the "disappearing" rivers and streams of the Snake River plain and Portneuf River watershed rises up and forms several large springs, creeks, and hundreds of smaller order springheads. The springs and creeks have long been important cultural sites for the Shoshone-Bannock. The area is also one of the nation's largest wetland waterfowl habitats and is a premier waterfowl hunting location. The Shoshone-Bannock also use these waters for the Tribes' bison herd, which provides subsistence and has cultural significance.

Old phosphate mines and processing facilities on and upstream of the Fort Hall Reservation have already contaminated tribal waters with phosphorous, arsenic, sulfate, selenium, and radioactive constituents. The phosphate mines have engaged in what they refer to as cross valley fill, the permanent dumping of mine waste in a valley or drainage that typically contains an intermittent or ephemeral stream. That waste releases pollutants, contaminating downstream waters through the ephemeral and intermittent channels. The phosphate mines demonstrate the long-term harms that come to downstream tribes from poorly regulated, or unregulated, discharges of pollutants and fill.

If upstream rivers and ephemeral and intermittent streams are unprotected, then the Shoshone-Bannock Tribes' downstream resources will be jeopardized, either by pollution that is not regulated or by destruction of recharge of springs due to dredging and filling in resource waters.

E. The Tohono O'odham Nation, Pascua Yaqui Tribe, and Ciénega Creek.

The Tohono O'odham Nation and Pascua Yaqui Tribe inhabited large areas of what is now the southwestern United States and northern Mexico. Their ancestors lived, hunted, and sought refuge in the Santa Rita Mountains, which rise as "sky islands" above the desert south of Tucson, Arizona.

The Santa Rita Mountains support a network of ephemeral and intermittent streams, which are of great importance to the O'odham and Yaqui people. Their ancestors depended on these water sources to survive in the harsh desert environment. To this day, the Tribes continue to offer blessings and prayers to these waters, including the seeps and springs throughout the mountains, for sustaining human, plant, and animal life.

A proposed mine in the Santa Rita Mountains shows the adverse effects of stripping these waters of Clean Water Act protection. The Rosemont Copper Company proposes to construct a mile-wide by half-mile deep open-pit copper mine, accompanied by towering waste dumps, industrial processing facilities, and utility corridors. Construction of the mine would fill 18 miles of waters in Barrel Canyon and degrade hundreds of additional acres of streams and wetlands in Davidson Canyon and Ciénega Creek, both of which contain some of the highest-quality stream and wetland ecosystems in Arizona. Heavy-metal runoff would further contaminate the water that reaches these downstream waters, including Tucson's drinking water supply. The EPA concluded that these adverse

impacts would be substantial, unacceptable, and contrary to goals of the Clean Water Act.[8]

If the Clean Water Act does not reach intermittent and ephemeral streams that feed downstream waters, such as those threatened by the Rosemont Mine, the filling in of these upstream waters will adversely affect downstream waters, including all who depend on them for physical, spiritual, and religious needs.

II. Without Clean Water Act Protection, Tribes Would Not Be Able To Prevent Harms To Their and Neighboring Waters.

There are 574 federally recognized sovereign Indian Tribes within the contiguous United States and Alaska.[9] Tribes are sovereign entities within the United States, as well as within the states. With only a few exceptions, tribes' reservations and lands are downstream of non-tribal lands and often share waterbodies with neighboring states, creating multiple shared waters. This creates significant cross-boundary pollution issues: activities in waterbodies outside reservation boundaries can threaten tribes' waters both on reservation and in other areas in which they have treaty rights, religious interests, or are working to restore important species.

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[8] Letter from Nancy Woo, Assoc. Dir., Water Div., U.S. Envtl. Prot. Agency, to Edwin S. Townsley, Operations & Regul. Div. Chief, S. Pac. Div., U.S. Army Corps of Eng'rs, Environmental Consequences of the Proposed Rosemont Copper Mine: Significant Degradation to Waters of the United States 34 (Nov. 30, 2017).

[9] *See* Indian Entities Recognized by and Eligible To Receive Services From the United States Bureau of Indian Affairs, 87 Fed. Reg. 4636 (Jan. 28, 2022).

The Clean Water Act's protections for all waters, including wetlands, is necessary to protect Tribes and our nation's waters alike. Protection of tribal waters, water-dependent treaty rights, and important tribal cultural resources depends on Clean Water Act jurisdiction and the regulatory protections and processes that come with it. If that jurisdiction is narrowed, neither tribes nor states will be able to prevent the degradation of our nation's waters.

A. Tribes Rely on Implementation of the Clean Water Act to Protect Waters In Which They Have An Interest.

Protection of waters important to tribes occurs almost exclusively through application of the Clean Water Act. Eliminating federal jurisdiction over a wide array of wetlands and, possibly, streams would deprive tribes of important tools for protecting their water quality standards on reservation. It will also impair tribes' ability to enforce treaty rights and protect sacred waters off reservation.

1. The Clean Water Act Provides Tribes With Important Tools To Protect Water Quality Uses and Standards.

Tribes rely on the Clean Water Act's procedures to protect their water quality standards and water quality generally both on their reservations, and waters off their reservations in which they have an interest. Before a permit may issue, the Act requires a permitting authority (the federal government or authorized state government) to provide public notice and opportunity for written comment and a hearing, and specifically requires procedures to ensure that downstream governments, like the Tribes, can enforce their own federally approved water quality standards. *See*

33 U.S.C. §§ 1342(a)(1), (2), and (b)(3), 1344(a), 1369(b). Tribes rely on these procedures to ensure that upstream pollution does not harm downstream reservation water quality standards and uses those standards are meant to protect such as catching and eating fish.

Permits must ensure that activities authorized will not cause or contribute to a violation of downstream water quality standards. *See Arkansas v. Oklahoma*, 503 U.S. 91, 105 (1992); *see also* 40 C.F.R. § 122.4(a), (d). Thus, if the State of Minnesota issues a Section 402 (33 U.S.C. § 1342) permit for the discharge of pollution into a tributary of the St. Louis River, the Fond du Lac Band has both a procedural mechanism to enforce its federally approved water quality standards and a substantive guarantee that those standards will not be exceeded because of the permitted activity.

2. The Clean Water Act Also Provides Tribes With Tools To Protect Treaty Rights And Other Interests In Waters.

Tribes also rely on the Act's application to trigger consultation requirements and procedures to protect waters in which they have a treaty, cultural, or other interest.

Federal jurisdiction provides protections for off-reservation treaty rights to hunt, fish, and gather, which often depend on clean water or waters that flow freely.[10] These treaties with the federal government

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[10] *See, e.g.*, Treaty with the Chippewa, Chippewa-U.S., July 29, 1837, 7 Stat. 536, Treaty with the Chippewa, Chippewa-U.S., Oct. 4, 1842, 7 Stat. 591, Treaty with the Chippewa, Chippewa-U.S., Sept. 30, 1854, 10 Stat. 1109 (hunt, fish, and gather, for example wild rice or cranberries); Treaty with Ojibwe and Ottawa, Mar. 28, 1836 (hunt, fish and gather); Treaty with the Eastern Band Shoshoni and Bannock ("Fort Bridger Treaty of 1868") art. 4, July

establish property rights that require federal protection. *See Washington v. Wash. State Com. Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979). The federal government thus has an obligation to consult with tribes before acting in a way that may affect a tribe's rights, such as by granting a Clean Water Act permit that would impair, degrade, or eliminate waters in which a Tribe has treaty rights.

Additionally, tribes have strong cultural and historic ties to waters outside their reservations. The National Historic Preservation Act (NHPA) recognizes the importance of indigenous historic sites such as the Santa Rita Mountains and waters for the Tohono O'odham Nation and Pascua Yaqui Tribe, or the Sixty Islands and surrounding forest and wetlands of the Menominee River for the Menominee People. The NHPA requires federal permitting agencies to consult with affected tribes before approving actions that may harm or otherwise negatively affect indigenous historic sites. *See* 54 U.S.C. § 306108; *see also id.* §§ 302701, 306102(b)(5)(B). But importantly, these obligations attach only to a federal permitting action; if a water is unprotected by the Clean Water Act, so too are tribes' interests in those waters. *See Menominee Indian Tribe of Wis. v. Env't Prot. Agency*, 947 F.3d 1065, 1073-74 (7th Cir. 2020).

3, 1868, 15 Stat. 673 (Shoshone-Bannock rights to hunt, fish and gather); Treaty with the Six Nations ("Treaty of Canandaigua"), Nov. 11, 1794, 7 Stat. 44; Agreement with the Seneca, Seneca-U.S., ("Treaty of the Big Tree"), Sept. 15, 1797, 7 Stat. 601, Treaty with the Senecas, Seneca-U.S., May 20, 1842, 7 Stat. 586 (Seneca Nation treaties upholding rights to hunt and fish); and Treaty with the Navaho, Navajo-U.S., June 1, 1868, 15 Stat. 667 (Navajo Nation treaty right to hunt).

Tribes also have federally reserved water rights that protect quantities of water for their use, an especially important right in the arid West. *Winters v. United States*, 207 U.S. 564 (1908). These water rights apply to all reservations and federal Indian water law does not distinguish whether the waters to which these rights attach are perennial, ephemeral, intermittent, or connected to navigable waters. *See Cappaert v. United States*, 426 U.S. 128, 138-39 (1976). Reserved rights are not limited to waters within reservation boundaries, especially when a tribe has off-reservation treaty rights, *United States v. Adair*, 723 F.2d 1394, 1417-18 (9th Cir. 1983). Clean Water Act jurisdiction and the regulatory processes that come with it are a vital tool to ensuring harm does not come to the waters in which a tribe has these reserved rights.

A number of examples demonstrate how Tribes have used the Clean Water Act's permit requirements and processes to protect the rights described above. The Swinomish Tribe, for example, has obtained mitigation requirements for estuary wetland habitat negatively affected by drainage for agriculture. The Pascua Yaqui Tribe and Tohono O'odham Nation are engaged in the permitting process to prevent adverse effects from the Rosemont Mine to waters and sacred sites in the Santa Rita Mountains. The Quinault Indian Nation has raised objections to proposed Section 404 permitting of a new salmon-blocking dam in the upper watershed of the Chehalis River where the Nation has treaty-protected fishing rights. The Seneca Nation is meeting with the Corps and neighboring New York State to discuss conditions to an upstream permit to protect the Nation's treaty fishing rights and other tribal resources. These Tribes' actions to protect waters important to them were possible only because the Clean Water Act

applied to the activities that have the potential to harm the Tribes' standards, treaty rights, and other interests.

Under petitioners' narrow interpretation of the Clean Water Act, many wetlands and even streams would no longer be covered by the Act's provisions. As a result, tribes would lose the accompanying protections provided by Clean Water Act permitting requirements connected with those waters.

B. Treatment as a State Status For Tribes Will Not Meaningfully Protect Tribal Waters In the Face of A Narrow Interpretation of Federal Clean Water Act Jurisdiction.

Tribes cannot redress the harms from petitioners' narrow interpretation through the Clean Water Act's treatment-as-a-state (TAS) provision. The Clean Water Act authorizes EPA to treat tribes in the same manner as states for purposes of implementing the Act, provided the tribes meet certain jurisdiction and capability requirements. 33 U.S.C. § 1377(e). For example, a tribe may apply for TAS to develop water quality standards and, if approved, the tribe may develop its own water quality standards and submit them for federal approval. But TAS status, even if obtained, cannot remedy a restrictive interpretation of Clean Water Act jurisdiction that removes federal protection from important waters.

First, EPA generally requires that waters subject to TAS must be within or share a boundary with reservations, meaning TAS status does not protect off-reservation waters in which tribes have treaty

rights.[11] Further, TAS authority extends only as far as the Clean Water Act's jurisdictional reach. EPA will approve water quality standards only for waters of the United States, so even if a tribe's laws extend to a broader scope of waters, it cannot invoke its TAS authority to protect waters not deemed waters of the United States.

Second, many tribes simply do not have the resources to obtain, or fully carry out, TAS status. Only 78 tribes have acquired TAS status for developing their own water quality standards and some of these tribes have not yet obtained federal approval of these standards.[12] And, as explained, even when a tribe has set its own water quality standards for waters on its reservation, if those waters are

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[11] TAS authority extends over "water resources which are held by an Indian tribe, held by the U. S. in trust for Indians, held by a member of an Indian tribe if such property interest is subject to a trust restriction on alienation, or otherwise within the borders of an Indian reservation." 33 U.S.C. § 1377(e)(2). Though the language does not expressly limit TAS to reservations, and there are other types of Indian country where tribes have jurisdiction, *see* 18 U.S.C. § 1151, EPA has interpreted it in that limited way. *E.g.*, Treatment of Indian Tribes in a Similar Manner as States for Purposes of Section 303(d) of the Clean Water Act, 81 Fed. Reg. 65,901, 65,902 (Sept. 26, 2016).

[12] *Tribes Approved for Treatment as a State (TAS)*, Env't Prot. Agency, https://www.epa.gov/tribal/tribes-approved-treatment-state-tas (last visited June 8, 2022). Of the Tribal amici, Bad River, Fond du Lac, Grand Portage, Navajo, Laguna, Quinault, Seneca, Shoshone-Bannock, Swinomish, the Confederated Tribes of Coos, Lower Umpqua and Siuslaw, and Puyallup have TAS for water quality standards. Of these, all but Seneca, Confederated Tribes of Coos, Lower Umpqua and Siuslaw, and Shoshone-Bannock have federally approved standards; these three Tribes are still in the process of obtaining federal approval of standards, which could take several more years.

downstream from waters that have been stripped of Clean Water Act jurisdiction, they will face increased risk of harm from upstream dredging and pollution.

Third, though a tribe may also obtain TAS authority to issue permits under Sections 402 and 404 of the Act, no tribes currently have approval to issue either type of permit.[13] This void stems largely from the significant structural and financial conditions EPA rightly requires for developing and implementing permit programs. Tribes instead rely on the federal government to carry out and enforce these permitting programs and to protect tribal waters even within reservation boundaries as well as on other tribal lands.

Narrowing the scope of the Clean Water Act will leave many such waters unprotected. If, for example, through the narrow interpretation of waters of the U.S. advanced by petitioners a wild rice-supporting wetland on Fond du Lac's reservation or an ephemeral stream within the Navajo Nation (where the vast majority of streams are ephemeral or intermittent, even reaches of the Little Colorado River) is stripped of Clean Water Act jurisdiction and permit requirements, no other entity could step in and regulate discharges of pollutants or dredge and fill activities in those waters, leaving them unprotected.[14]

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[13] *Id.*

[14] Although conceivably, to protect waters on a reservation a tribe could engage in the process to secure TAS permitting status or develop an entire code and regulatory structure of their own, either option is unlikely given the fact that no tribes have to date been able to develop and secure TAS for permitting.

C. States Cannot Fill These Regulatory Gaps.

The risks and harms discussed above that would result from a narrow interpretation of Waters of the United States also cannot be addressed through state regulation.

First, states lack jurisdiction to regulate waters within reservation boundaries.[15] If the Clean Water Act does not extend to those waters, and if tribes lack the resources to enforce tribal permitting requirements, as many do, the waters will be completely unprotected.

Second, states do not have the same obligations to tribes as the federal government. The relationship between tribes and the federal government imposes an obligation on the United States to consult with tribes where an action of the United States, like a Clean Water Act permit, may harm tribal interests and rights. States simply do not have the same consultation obligation. Although some states voluntarily consult with tribes, the meaning of consultation and the willingness of states to do so varies widely. Even states that have statutory directives to consult apply it inconsistently and that duty is a creature of legislation, not a treaty or trust obligation. Similarly, states have no obligation to consult with tribes under the National Historic Preservation Act. *Menominee Indian Tribe of Wis.*, 947 F.3d at 1073-74. The consultation obligation under the National Historic Preservation Act applies only to federal actions. *Id.*

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[15] States lack jurisdiction to regulate within reservation boundaries, absent express Congressional authorization. *See McClanahan v. State Tax Comm'n of Ariz.*, 411 U.S. 164 (1973).

Third, many states will not step in and regulate pollution or degradation from dredging and filling in waters upstream of tribes that are not waters of the U.S. A significant number of states ban or erect substantial barriers to regulating more stringently than federal law provides.[16] Currently, 24 out of the 50 states' regulations are dependent upon the federal definition of waters of the U.S., meaning that the reach of the state is limited.[17] Florida, one of the three states with Section 404 permitting authority, has refused to regulate any waterbody that does not meet the very narrow jurisdictional test of the Navigable Waters Protection Rule, even after the rule was vacated.[18] Many other states (for example Alaska) do not have a state structure or laws for regulating the dredging or filling of waters, relying entirely on the federal laws.

In sum, the states cannot protect waters on which tribes rely, in which they have treaty rights, or that are culturally and historically important.

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Congress directed that the Clean Water Act be applied to restore and maintain the chemical,

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[16] *See Resource and Programmatic Assessment for the Navigable Waters Protection Rule*, U.S. Env't Prot. Agency & Dep't of the Army 45-46 (Jan. 23, 2020), *available at* https://www.epa.gov/sites/default/files/2020-01/documents/rpa_-_nwpr_.pdf; *State Constraints: State-imposed Limitations on the Authority of Agencies to Regulate Waters Beyond the Scope of the Federal Clean Water Act*, Env't Law Inst. (May 2013), *available at* https://www.eli.org/sites/default/files/eli-pubs/d23-04.pdf.

[17] Jim McElfish, *State Protection of Non-Federal Waters: Turbidity Continues*, 52 Env't L. Rep. (forthcoming Sept. 2022).

[18] EPA letter to Florida Dep't of Environmental Protection, Jan. 31, 2022.

physical, and biological integrity of the nation's waters. 33 U.S.C. § 1251(a). Congress further instructed that water quality be protected for public water supplies; propagation of fish, shellfish, and wildlife; use for recreation, agriculture, and industry; and navigation. *Id.* §§ 1251(a)(2), 1313(c)(2)(A). To fulfill the broad purpose and reach of the Act, the proper jurisdictional test cannot exclude most wetlands and potentially also intermittent and ephemeral streams. Instead, it must acknowledge the connections between waters and the consensus science that demonstrates that those connections affect the chemical, physical, and biological integrity of the nation's waters.

Tribes will be especially harmed by a narrow interpretation that leaves waters of this nation unregulated under federal law, thereby allowing significant sources of pollution and degradation of water quality to proceed unchecked both on and upstream of their lands and triggering a diminution in tribal rights and the legal processes available to protect those rights.

CONCLUSION

This Court should affirm.

Respectfully submitted,

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June 17, 2022

APPENDIX

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APPENDIX A

Pacific Northwest Region
Tribal Lands and Watersheds

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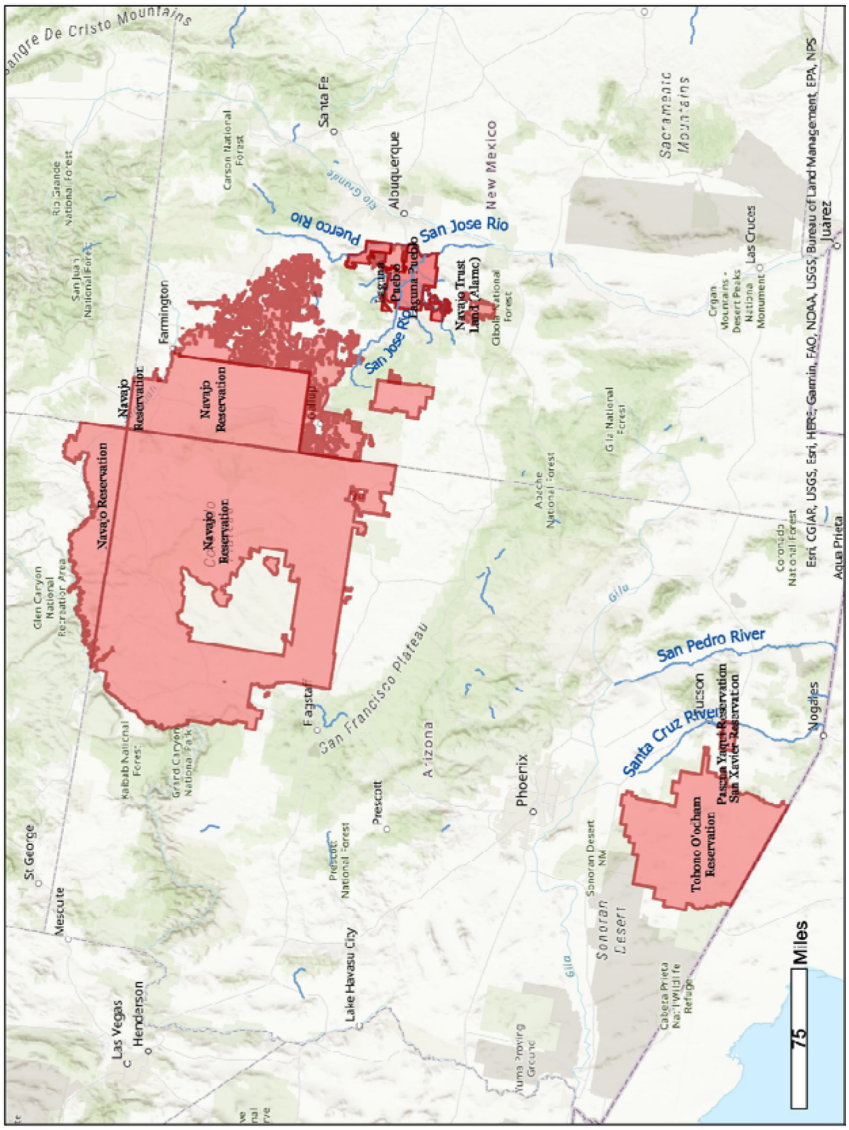
APPENDIX B

Southwest Region
Tribal Lands and Watersheds



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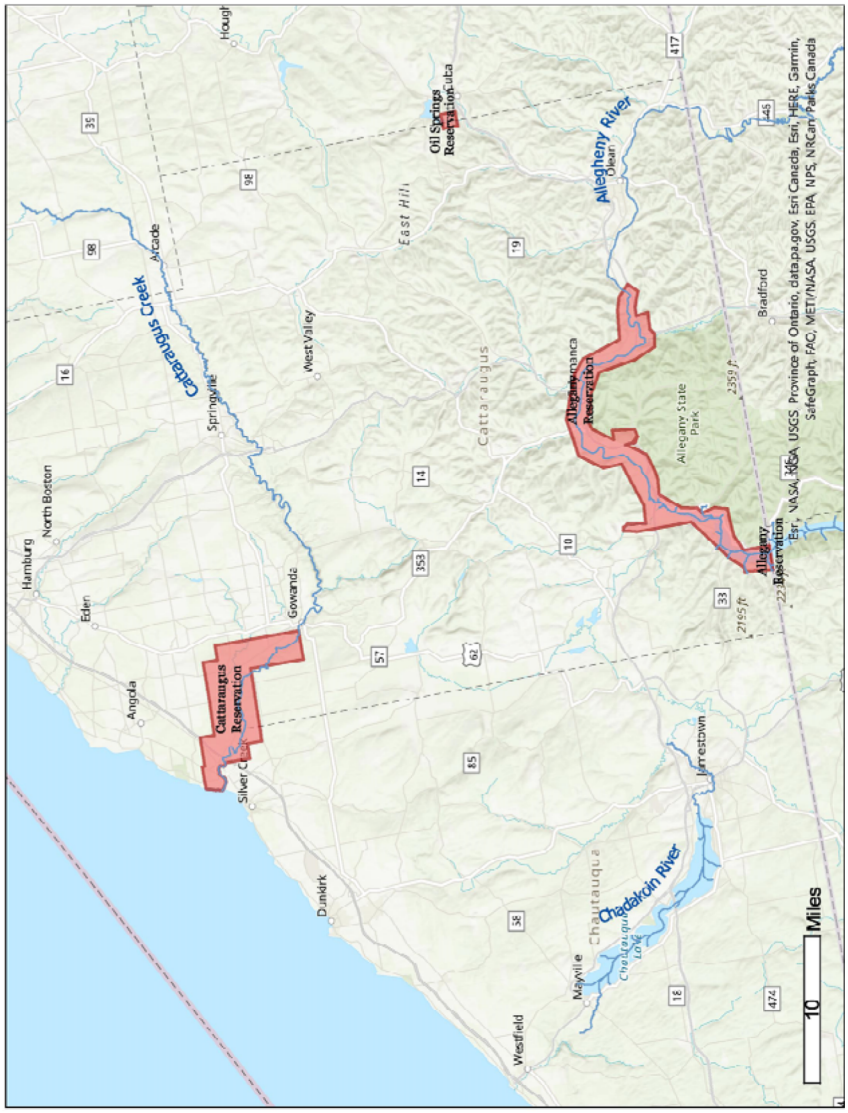
APPENDIX C

Seneca Nation
Tribal Lands and Watersheds



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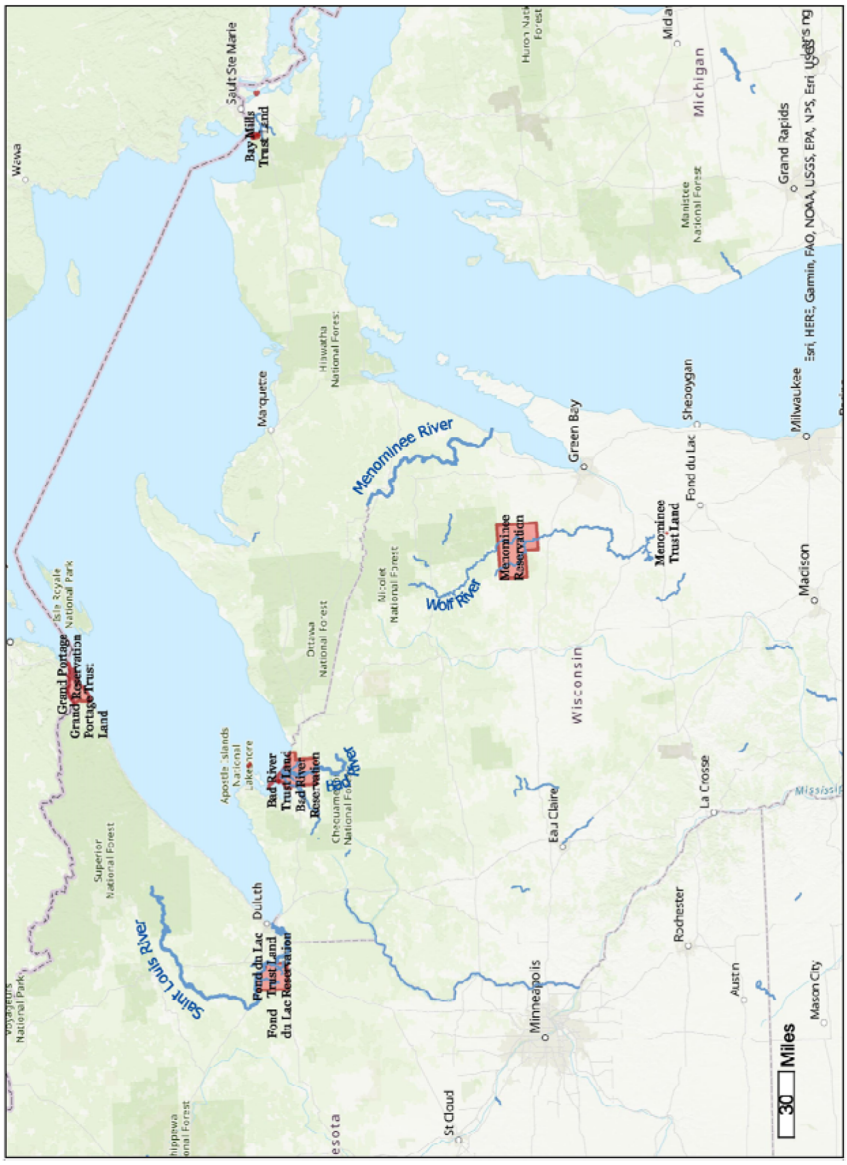
APPENDIX D

Midwest Region
Tribal Lands and Watersheds



Senator MARKEY. Thank you, Mr. Chairman, very much.

This year alone, we have seen severe flooding, costly storms across the country. We know that climate change is only going to make those disasters worse, more water, more often. And wetlands are vital to storing water before it gets into our homes and our communities. Almost two-thirds of our wetlands are now at risk of development and destruction, thanks to this misguided Supreme Court ruling.

Dr. Sulliván, do you agree that the Sackett ruling is likely to intensify damage from flooding at a time when we actually need greater storage capacity from our wetlands, thanks to climate supercharged storms?

Mr. SULLIVÁN. Thank you, Senator Markey. I do. I absolutely agree. I think one of the key pieces that we have to recognize there is we have lost tremendous capacity already, so we are past a 50 percent loss of wetlands in the United States. I mentioned that earlier.

Some of these States are upwards of 90 percent, so we are already at a point where the capacity of wetlands to mitigate flooding, exactly through the way you described, wetlands act as sponges, right, so during times of higher flows, they store water, and they release that slowly. They release it not only back onto the landscape, but into groundwater. Wetlands in their historic distribution, we would have seen them hemming most rivers and serving that role.

I think as we are at a point now where we are working with a limited set, it is, on a commercial two engine airliner, we are down to one engine right now. When we think about how we are going to maximize the benefits of wetlands, one of those is understanding maximizing their protection so that we maintain the capacity for wetlands to mitigate against floods, which costs money and costs lives, but also, on the flip side, as we discussed earlier, to maximize their capacity to mitigate drought. Those are flip sides of the same coin.

Senator MARKEY. Is it true that building over wetlands will also contribute to heat surges, amplifying the urban heat island effect that we had a hearing on recently?

Mr. SULLIVÁN. That is absolutely true. It is not just wetlands, it is streams. In fact, there is a well known scientific principle called the urban stream syndrome, which discusses the changes streams go through under urbanization. Streams and wetlands in urban environments create micro-climates and reduce heat. They absorb, they provide green spaces, and they do exactly that. They create favorable climatic conditions on a local scale, so very critical functions.

Senator MARKEY. From the Sackett ruling, we are supposed to think that the upstream headwaters don't have any relation to the downstream bodies of water that we fish in, swim in, and enjoy, but we know that water rolls downhill, so any problems in that water will roll down with it.

Ms. Revels, from what you have seen as a waterkeeper, is it possible to protect our larger rivers, lakes, and bays without protecting headwater streams and wetlands?

Ms. REVELS. Absolutely not. In my experience, with just different things within communities, as a community member, I see, on the grass root level, all of the things that are affecting our waterway, like industries, stormwater runoff, things that we don't talk about that lead into our waterway that has to go somewhere. We know that water goes somewhere, and in these disasters where water is sitting and flowing, everything is moving everywhere, so it is a necessity to keep these protections so that our wetlands can work the way wetlands work, by filtering and purifying and putting less pressure on our infrastructure within our cities.

Senator MARKEY. Do protected wetlands help keep stormwater from flooding chronically underinvested communities with aging or limited infrastructure, Ms. Revels?

Ms. REVELS. Absolutely, particularly communities like mine. Now, we are seeing the removal of over 126 acres of wetlands that were previously in front of my neighborhood, and we are just going to be able to sit back and see what happens, but we already know what is going to happen: More flooding and more devastation.

Senator MARKEY. In your experience, do those heavy storms cause an uptick in pollution from industrial waste and untreated sewage overflow into communities like yours?

Ms. REVELS. Absolutely, because these things are left, they haven't been addressed yet, so when left unaddressed, it absolutely impacts the bigger, broader picture of how things are happening in the city.

Ms. Bodine addressed the consent decree. We are still trying to make that work for the community, right, that we are still trying to see the impacts of those on the grass roots level.

So yes, we need to protections to remain the way they are so that we can see more protections for our communities. Communities are the last persons that are asked questions. We have sat here and talked about protected wetlands, we talked about birds, we talked about Tribes, but the frontline communities that are seeing the cancer clusters and the cancer plumes and how the water moves those things around are the last to be spoken about or spoken to.

Senator MARKEY. Thank you so much.

Thanks, all of you, for your testimony.

Thank you, Mr. Chairman.

Senator CARPER. Senator Markey, thanks so much for joining us. Thanks for those questions.

We have been joined by my neighbor from Pennsylvania, Senator Fetterman.

It is good to see you. Welcome. You are recognized.

Senator FETTERMAN. Thank you, Chairman.

Welcome, thank you for coming today.

Just to kind of set the stage here, Pennsylvania, Dr. Sulliván, how do wetlands in Pennsylvania impact our drinking water?

Mr. SULLIVÁN. Wetlands in Pennsylvania and everywhere are critical in purifying water, and they do, actually, there are three really important pieces to that. They trap sediment, so they remove sediment out of the water, they remove nutrients, so nitrogen and phosphorus, those types of nutrients, and they detox the water, so they take chemicals out.

In doing that, they reduce a huge expense to the taxpayer of purifying water. They do that in Pennsylvania, absolutely. They do that across the country, and they do that in a way that is 24/7. They work full time.

Senator FETTERMAN. Because of the wetlands, that is an impact on clean water, right?

Mr. SULLIVÁN. Correct.

Senator FETTERMAN. Gosh, I find clean water useful often. It is remarkable.

[Laughter.]

Senator FETTERMAN. I support clean water.

So now, we have this situation here. The Supreme Court believes that unlimited money is speech, and they believe that women in this Nation aren't entitled to reproductive freedom, and now they attack the Clean Water Act as well, too. Again, the shocking opinion that clean water might be useful to Americans.

Do you believe that this is now based on the politics, or is it because of a very careful, thorough scientific kind of review?

Mr. SULLIVÁN. Sackett got the science all wrong, and that is what I can say. The science is crystal clear. It is not confusing, right? The chemical, physical, biological integrity, which is the goal of the Clean Water Act, of downstream and downslope waters relies on wetlands and streams. It is virtually impossible to restore and maintain the health of our waters and uphold the primary goal of the Clean Water Act while only protecting adjoining waters.

Senator FETTERMAN. I am no scientist. Our friends in Fox News don't even think I should be a Senator, but to me, personally, it just seems like it is really kind of an extreme right wing kind of deregulation obsessed that the Supreme Court, and I believe that it puts Pennsylvania's drinking water at risk.

Could you explain that to me, as a non-scientist?

Mr. SULLIVÁN. Explain how it puts it at risk?

Senator FETTERMAN. Yes, please.

Mr. SULLIVÁN. Yes. So, removing wetlands, removing streams and landscape, now I understand they are not protected, and people are saying that, well, just because they are not protected, there are other mechanisms, potentially, that are there, but history tells us a very different story. We arrived at a place where we had already lost 50 percent more of our wetlands across the country. It is only through legislation like the Clean Water Act that we actually can——

Senator FETTERMAN. More than 50 percent? I want to reiterate that: More than 50 percent of our critical wetlands?

Mr. SULLIVÁN. More than 50 percent of wetlands have been lost, historically. That rate continued until the Clean Water Act, until legislation came that then started to slow down wetland loss.

Unfortunately, history tells us there is no evidence to suggest that that is going to change unless we protect wetlands, set the standard for protection nationally and across the floor. So I think that is really critical.

I would say, too, that the U.S. public agrees. There was a poll in the New York Times that 72 percent of American adults believe the Clean Water Act should be read broadly to include wetlands and not only major streams, rivers, and lakes.

Senator FETTERMAN. I believe clean water is cool. We need it. I think that is kind of our job to make sure we are going to protect that, as well, too. And it is truly bizarre to me, personally, that anybody would attack the kind of legislation that has been a demonstrative and dramatic kind of change in our water quality. Is that accurate?

Mr. SULLIVÁN. No, it is absolutely accurate. Can I add one small piece there? I think as we think about these, and I brought this up earlier, are we asking the right questions? In my humble opinion, we should be aligning with the science first, and then once we have that set, then decide how do we use water responsibly within that context.

Senator FETTERMAN. So wait, you are suggesting that we follow the science?

Mr. SULLIVÁN. I am absolutely suggesting that we follow the science.

Senator FETTERMAN. Lunacy.

[Laughter.]

Mr. SULLIVÁN. Just like we would go to the physician in order to follow the best medicine for our health.

Senator FETTERMAN. OK. Thank you for joining, and I apologize for going over, Chairman.

Thank you.

Senator CARPER. Not at all. We are glad you are here. Thanks.

Senator Capito.

Senator CAPITO. I would like to ask one final question before I have to go to another event.

The Federal Government does protect clean water. Our State governments protect clean water, and you mentioned other agencies that are involved in this as well.

Ms. Bodine, could you kind of enumerate for me where the protections are? We are not eliminating or getting rid of any protections of clean water here. We are actually asking an Administration to heed the decision, in part, a unanimous decision by our Supreme Court, and to adhere to the law as it was written 51 years ago and has been amended since then.

Can you just talk, just say, if somebody is listening to this, what are our water protections now and how they exist?

Ms. BODINE. Thank you, Senator Capito. I know that the Sackett decision has been depicted as this radical change, and it really isn't. For example, when you talk about isolated waters and wetlands, which the connectivity report tried to establish a basis for regulating those, even though in 2001, the Supreme Court said you couldn't regulate them under the SWANCC decision.

Since that decision in 2001, however many years ago that was, EPA and the Corps have not tried to regulate these isolated wetlands and isolated waters because of SWANCC. They tried to expand their jurisdiction through interpretations including relying on the connectivity report, but they haven't done that, so that is not even a change from practice because of other Supreme Court decisions. Again, that would be status quo.

But in terms of protections, we have other programs, including cooperative programs, that people engage in that protect wetlands. We do talk about the agriculture, the conservation programs from

USDA. The Fish and Wildlife Service talked about how after SWANCC, after 2001, they said 88 percent of the prairie potholes are not regulated.

OK, but then they went on to say, look, we work with the farmers in a cooperative way, and in the wet years, they are not plowing the prairie potholes. In the dry years, they can plant there. And it is cyclical because of how climate works; it is always cyclical.

Again, that is not the same as saying you can never plow there. It is not the same as taking someone's land away. And that a was the status quo that was described in a 2014 report by Fish and Wildlife Service.

Then, of course, when we talked about waterways, it is true. Water flows downstream, undisputedly. You can't just dump pollutants into a channel, and I don't care whether it is ephemeral or a ditch or any kind of channel, a fissure. All those meet the definition of a point source in the Clean Water Act. You discharge into a point source, and it is conveyed, another word from the statute, to a navigable water, it is regulated.

So a lot of regulatory remains, a lot of nonregulatory remains. When we talk about other authorities and other projects like the infrastructure projects that this Committee spent a lot of time on, I have to disagree. The Corps of Engineers projects that I was talking about for flood control have nothing to do with restoration. The restoration authority is a different authority of the Corps'.

The flood control they do, we call it soft infrastructure or green infrastructure. That is not a restoration. That is setting aside or buying up land instead of building levees. That is done; that is part of projects, where you preserve the wetlands to avoid exactly the flood impacts that, I think Ms. Revels was talking about, and we do the same thing with our sewer overflow projects. We call it green infrastructure.

Senator Markey was talking about stormwater. I am personally aware of a number of stormwater projects and consent decrees where the solution was setting aside land to act as the sponge. That was the solution to deal with the stormwater problem. None of those authorities are affected at all by the Sackett decision.

Senator CAPITO. Thank you, all three of you.

Thank you.

Senator CARPER. Senator Capito, thanks. We will see you on the floor later today. Thank you, ma'am.

I have a couple questions. We may be joined by a few of our other colleagues. We are going to start voting here. In fact, we may have already started voting, but let us keep going until we run out of time.

Are you OK on time right now? All right.

Ms. Revels, are you OK on time?

Ms. REVELS. Yes, I am good. Thank you.

Senator CARPER. Good.

Ms. Revels, we have just been joined by Senator Whitehouse. While he settles in, tell us, where are you today? Are you in Houston?

Ms. REVELS. Yes, I am in Houston.

Senator CARPER. OK. All right.

We have just been joined by a Senator from a State even smaller than Delaware. That would be the State of Rhode Island. We are delighted that Sheldon Whitehouse has joined us. He is a great member of this Committee.

Sheldon, when you are ready, you are on.

Senator WHITEHOUSE. Higher, but smaller. We share being coastal. We share being small, and we share being faced by having to redraw the maps of our States, thanks to fossil fuel emissions driven climate change and sea level rise, so we have a lot in common.

One of the things that I want to make a matter of record here is that the Sackett case is one of a series of cases in which the Republican appointees to the Supreme Court, who I would perhaps more accurately refer to as the Federalist Society Justices, have rendered decisions that are very much in the interests of big polluters. And there is an unpleasant overlap between the billionaire funders of the Federalist Society while the lists off which Supreme Court nominations were chosen and the billionaires who funded the ad campaigns against Judge Garland first, and then for the three Trump nominees, and a lot of the groups that show up in the Supreme Court to direct those chosen justices how to rule.

In this particular case, we had, first of all, the U.S. Chamber of Commerce, which refuses to disclose how much fossil fuel money it receives, but has become, as measured by the influence map organization, one of the worst climate obstructors in America, notwithstanding that is not the favored position of a good number of its members. Others included Americans for Prosperity Foundation, which is a 501(c)(3) front group that the Koch operation runs.

The state of the art these days is to have a 501(c)(3) and a 501(c)(4) and have them essentially be the same entity, same location, overlapping staff, board, donors, all of that, and one of them is the 501(c)(3) and one of them is the 501(c)(4). Those of us in politics know Americans for Prosperity, the 501(c)(4), as one of the most aggressive and powerful political battleships of the Koch Brothers organization. So, Americans for Prosperity Foundation showing up is a pretty big clue as to what the Koch fossil fuel empire wants.

Also, it is supported by Donors Trust, Bradley Foundation, and the Sarah Scaife Foundation. The Cato Institute also turned up, funded by the Kochs, Donors Capital, Donors Trust, Bradley Foundation. The Claremont Institute turned up, funded by Donors Capital, Donors Trust, the Bradley Foundation, and the Sarah Scaife Foundation. Liberty Justice Center turned up, funded by Donors Trust and the Bradley Foundation.

Something called the NFIB Small Business Legal Center showed up, funded by Donors Capital, Donors Trust, and the Bradley Foundation. The Atlantic Legal Foundation showed up, funded by the Bradley Foundation and the Sarah Scaife Foundation. The Mountain States Legal Foundation showed up, funded by the Kochs, Donors Capital, Donors Trust, the Bradley Foundation, and the Sarah Scaife Foundation.

The Southeastern Legal Foundation showed up, funded by Donors Trust, the Bradley Foundation, and the Sarah Scaife Foundation, and something called the Washington Legal Foundation showed up, funded by the Kochs, by Donors Capital, by Donors

Trust, by the Bradley Foundation, and by the Sarah Scaife Foundation.

As you can see, from those common funders, it is very hard to distinguish between all those different amici, and particularly because the Supreme Court didn't require them to disclose those donors, and didn't require them to show that they weren't, in fact, one single interlocking group of scripted and choreographed entities trying to look independent, when in fact, they were all part of the same operation. And sure enough, in this case, they got what the big donors wanted.

Thank you very much.

Senator CARPER. Thank you very much.

I am going to go back just a little bit earlier in the hearing. Senator Cramer correctly pointed out that we are talking past each other on science and law. As a legislator here, along with my colleagues, I have a lot of respect for law, as you would hope would be the case, but I know we can't pass laws to tell water how to flow. I think we need to understand that by changing the decades long understanding of what the Clean Water Act protects and the Supreme Court has changed the realities on the ground.

Dr. Sulliván, could you just please give us maybe a couple real world examples of that?

Mr. SULLIVÁN. Yes. I think talking about place based examples is important. I guess, let me start on a broad scale first, though, and just remind folks again that we have lost over 50 percent of wetlands, and so one out of every two wetlands is gone. Even at a large scale, what we see is already a reduced number.

Let me take you to South Carolina for a moment, where nearly 4.6 million acres are categorized as wetlands, of which 90 percent are freshwater wetlands. A large chunk of the land area of South Carolina is characterized as a wetland, ranking South Caroline as the State with the third highest percentage of land area of wetlands, so it is really part of our legacy. It is a quintessential part of the State. They support fish and wildlife, recreation, hunting, tourism, education.

I work at an institute where we have partly a focus on wetlands and streams, and the educational component is critical. It is a huge tourist piece, as well, a huge revenue builder. We have talked about their role in mitigating floods and clean water. They are truly a quintessential part of our landscape, and certainly they are in danger without the safeguards, the full safeguards of the Clean Water Act.

In terms of a specific example, I think there are a lot, but I think let us go to the Okefenokee Swamp for a moment, which is in Georgia. It is one of the largest remaining, intact freshwater ecosystems in North America. In addition to its ecological significance, it is critically important to local communities, supporting over 750 jobs and nearly $65 million in annual economic output per year.

It is a national wildlife refuge, which is great, so it is protected, but the concern is that on its doorstep, there are hundreds and hundreds, over 600 acres, of wetlands that are unprotected and subject to mining operations and strip mining. This is a wild place. It is iconic. It is one of the last remaining wild wetlands that we have, and wetlands that are bordering it are directly purifying the

water. They are the source waters for the Okefenokee Swamp. We are threatening thousands of species of plants and wildlife, recreational opportunities for birders, fishers, hikers, and kayakers, photographers, more and more.

That is an example. I think there are many across the country, obviously. I would encourage everybody to think about their own landscapes and wetlands that have meaning to them and understand that not only have a lot of wetlands been lost, but most of those wetlands likely remain unprotected, at this point.

Senator CARPER. Thanks very much.

Ms. Revels, I have a question for you. EPA has changed its regulations as quickly as possible to conform to the Sackett decision, as you know. I was surprised how quickly they did that. They did that in order to allow permitting decisions to resume.

Now, we are hearing complaints that EPA may not have gone far enough. I think these concerns miss the point. We just had a radical, I think, a sweeping reduction in water protections. Ms. Revels, what could this mean for your community? The question is, what could this mean for your community? Could you just give us some thoughts one that, please? Go ahead.

Ms. REVELS. For my community, it looks like possibly looking like more industry coming in and destroying the few wetlands that we have left, and then those things have a cumulative impact. Ms. Bodine talked about the minimal impacts. We bring industry in, and then they have all these different permits, stormwater runoff, all these different things that impact our water and how many cumulative minimal impacts can one community withstand, right?

So, it just creates a bigger compound. It is like putting sprinkles on the cake. It already had the icing, it was already really good, and then you sprinkle the sprinkles, and you just add more layers to an already complex issue that is really difficult for community members like myself to even address these things at a local level and then at a State level, and here at DC. It becomes taxing on community members, and oftentimes, outside of our areas of expertise.

We know how to survive storms. We know how to be resilient. We know how to build ourselves back up, but we need protections to help us with those things as we build ourselves up and make our communities more resilient, we need protections that are going to think about the people to come.

I am already some of your kids' age, and just think about my kid and our grandkids that are going to have to clean this up again. It is a reason that the definitions were amended to protect communities from industry that is just dumping and just not thinking about everybody else. We can't just think about one group. We have to think about the community members, also.

Thank you.

Senator CARPER. OK, thank you.

Dr. Sulliván, another question for you, if I could. We have heard from some of our Republican colleagues that the Sackett decision aligns with the intent of the Clean Water Act. However, as I mentioned, I think I mentioned in my statement, the Clean Water Act clearly states, "The objective of this Act is to restore and maintain

the chemical, physical, and biological integrity of our Nation's waters."

Given your scientific understanding of how the health of our Nation's waterways is interconnected with the health of our wetlands and our streams, do you believe that the Sackett decision aligns with the objective of the Clean Water Act? If you would, please elaborate on that.

Mr. SULLIVÁN. No, I do not. I believe everything you just said is very accurate. The science, and I know Ms. Bodine has referenced the connectivity report, which is a fundamental document. I want to remind folks that almost 10 years have passed since then, and there has been a lot of work done in this field and understanding connectivity and the impacts of altered connectivity on downstream and downslope waters, and the evidence increasingly points to the critical nature of maintaining, protecting headwater streams, nonpermanent streams, wetlands, adjacent, and geographically isolated. We talked about prairie potholes, as an example.

Alterations to these, the science is unequivocal. It is very clear what it is telling us. I think that is one of the pieces that I am struggling with is that we are talking a lot about regulation and those sorts of things, which I understand, but the Sackett decision got the science all wrong. I can't say that enough. It really is not representing the science. To be perfectly blunt, it shows a fundamental lack of understanding of how natural waters function. That decision is counter to what we understand.

Again, it is not just the connectivity report, but it is a decade of research since then, and thousands of scientists will agree with me on this, that are demonstrably showing that if we do not protect upstream, upslope waters, there are serious consequences.

Again, I will use an analogy with our own bodies. If you go into the hospital and get an IV, it goes into a small vein. Where does that go? It goes through your circulatory system. It is the same idea. I don't think many of us would be willing to sacrifice 10, 20, 30 percent of our circulatory systems and say, well, that is OK. We don't need to protect or maintain the health of a large portion of our circulatory systems. We will be fine.

I can't state enough that the science is clear. I do think that we are locked in a circular pattern here, and that one, we need to be more thoughtful in terms of rulemaking.

I will give you a specific example, if I may. It has always been a binary, protected or not protected, yet there are examples at the State level and others, for example, with riparian protections, not water, well, certainly riparian protections, where it is a graded system. Certain waters are most protected. Some are intermediate protection. Some are less protected.

There are more strategic ways to be going about this, and I don't think we are exploring those options. And I think we need to value the science, follow the science, and be strategic in how we proceed forward.

Senator CARPER. Thank you for that.

I am going to ask one more question of you, Dr. Sulliván, and then I am going to just ask a question of all three of you to sort of close us out please, so thank you for your patience with us.

The last question I will ask of you, Dr. Sulliván, is we have heard testimony that Sackett does not represent a fundamental shift in wetlands protections and that there are other Federal laws and programs that do protect wetlands. Would you just explain for us, if you would, Dr. Sulliván, why laws such as the Endangered Species Act and North American Wetlands Conservation Act, laws that I happen to support strongly, don't fill the void left by the Sackett decision?

Mr. SULLIVÁN. Yes. I agree those are excellent programs. They should be supplemental to the Clean Water Act. The reason is multifold.

I will give you an example with the Endangered Species Act. The Endangered Species Act is based on individual organisms' current status, trends, life history, information that is derived from that specific organism, so it protects habitat of that organism. Yet, most of those cases are going to be organisms with very limited home ranges, very limited territories.

As a result, that only protects that particular habitat, spatially distinct. It is not something that is far reaching. It is based on individual species, and those species, of course, are going to have their specific home ranges.

We can think about, there are species of fish, for example, that are endemic only to, endangered species, to parts of Death Valley. Therefore, for that particular fish, the Endangered Species Act will protect habitat in that place. We need something that covers the entire country. That is an example.

The other thing is species can be delisted. We need long term plans here. That is supplemental, in terms of wetland protection.

The other program is a grants based program, and I agree, there has been some great work done. I absolutely agree with that, but any grants based program is going to be patchy in distribution. It is going to be mediated by who applies, where they have access.

Again, it is not creating a floor of protection, which is needed for wetlands. We cannot afford to lose more wetlands and streams. We need a comprehensive protection, which is exactly what the intent of the Clean Water Act was.

Senator CARPER. Just a quick comment, Ms. Bodine, on the same question, if you would. Any thoughts that you have, please share them with us, on the question I just asked. If you don't have any comments, that is fine, we will go to my closing question. All right?

Ms. BODINE. I think I have, the question is, comprehensive versus the existence of the other programs.

The Supreme Court in Sackett interpreted the Clean Water Act. All nine agreed that connectivity is not a basis for the jurisdiction. That significant nexus concept was not valid.

We already, as I put in my written testimony, as I have spoken about today, there are a number of programs out there. Does one collectively cover everything? No, but that doesn't mean that we are going to lose the remaining 50 percent of our wetlands.

I believe this building was built on a wetland. Certainly, the Mall was actually an estuary. So yes, there has been a lot of building. Maybe it is first in time, first in right, but I am by no means saying that wetlands aren't valuable, and I agree they should be protected.

But the real fundamental question is how, and should it be through various conservation programs, should it be through cooperative programs, should it be a combination of all that, or should it be a single Federal regulatory program? The Clean Water Act has lofty goals, and then it has some nonregulatory programs, and some regulatory programs. It by no means says that we are going to achieve our lofty goal with just one tool. The Clean Water Act has a lot of tools, and then the Federal Government has a lot of tools.

Senator CARPER. All right, thank you.

My closing question will be for each of you. One of the things that Senator Capito and I try to do is develop consensus on difficult issues. We have been remarkably successful, not entirely successful, remarkably successful on a wide range of issues, not the least of which is the Bipartisan Infrastructure Law, a huge piece of legislation which has its roots right here in this room with this Committee. Democrat and Republican, bipartisan, and something that we are both very proud of and seeing it implemented across the country.

My closing question would be, we have this situation where we have a law we have had for decades that has been litigated. The Supreme Court recently with Sackett handed down a decision that folks on our side aren't at all pleased with. The Administration came right back out of EPA a regulation to try to say well, if this is going to be Sackett, we are going to have to live with Sackett for a while. Here are the regs we think that are consistent and line up with that decision.

My question would be this: We are coming out of this hearing today. I am going to be here for 14 more months. I am standing alongside the Christina River, a beautiful river which flows through Wilmington, Delaware.

A couple months ago, I announced I wouldn't run for reelection. I had a great run in the Navy and as Delaware's treasurer, Congressman, Governor, Senator, and to serve here and chair this Committee, and the Homeland Security Committee, I have just been really blessed.

In the next 14 months that I have here, I am going to be looking for consensus and implementing a lot of stuff that we have authored and enacted, a lot of legislation, but I am also going to be looking for consensus, maybe on some areas where we have not identified the consensus. As we have gone through this hearing today, any thoughts that you might share with us, and where you think there is hope for some consensus, where we might actually work together toward actually making sure that we do have clean water from coast to coast in all kinds of States and situations.

One of the things that Senator Capito and I have been trying to do is provide some certainty and predictability. I used to work, when I got out of the Navy, many years ago, and moved to Delaware, and I went to work in the Division of Economic Development for 6 months and then got to run for State treasurer when I was 29, and I said, I want to do that. One of the things I learned in the 6 months at the Division of Economic Development was businesses need certainty and predictability.

Right now, we don't have a lot of that in the situation we are in today. So any thoughts you have about maybe, in the next 14 months, we will restore a little bit of certainty and predictability, and if there are any areas that you think where there might be some bipartisan consensus that we should pursue.

Ms. Bodine, if you would just go first, and then we will just ask our other witnesses, as well, please. It is not an easy question. Any thoughts you have.

Ms. BODINE. This Committee has had great successes working on bipartisan issues, and I would point out in particular that the infrastructure programs under the jurisdiction of this Committee have always had very great bipartisan support. You had a great bipartisan success with the Infrastructure Bill from about 2 years ago.

You may want to look at the infrastructure model rather than the regulatory model, because I think that, given how this Committee and your past successes, that is going to be your highest opportunity for bipartisan agreement.

Senator CARPER. All right, thank you.

Dr. Sulliván.

Mr. SULLIVÁN. Yes, thanks for the opportunity to comment on this. I have appreciated being here. I value all of the comments from my colleagues here and from the Senators. I agree. I grew up on a farm, and I understand.

Senator CARPER. Where was the farm?

Mr. SULLIVÁN. It was in Vermont.

Senator CARPER. OK. What did you raise there?

Mr. SULLIVÁN. We had dairy for a while, a long time, and then we had beef cattle, and now it is a sugar operation.

The point I am making is, I am a scientist, but I also understand the practicality around this. I understand that we have to find common ground.

What I am asking for is that we value the science in doing that. As I mentioned before, you go to the physician, you want them to tell you the most current, best treatment for whatever your condition is. We need to do the same thing. Sackett has not done that; it has taken us away from the science.

In terms of next steps, I gave you one before, and I will repeat it because I think it is important. I think we have been locked in a bit of a cycle and not thinking as creatively as we can in the rulemaking process and in how we approach this. To repeat, at the risk of repeating, but I think it is worthwhile, we have been very binary in our approach to water protection. And although the connectivity report and our work since then has shown that there is a gradient of the degree to which upstream and upslope waters affect downslope waters, the rulemaking has still been very binary. It has been protected or not protected. Even if it is a case by case, it has still been, at the end, protected or not protected.

We have an opportunity to think a little differently and to understand there are models out there that led us to look at these, and this could be an area, maybe, where we could get some consensus to say, can we come up with an understanding that certain waters are going to be the highest protection level, some are going to be

a little lower. We understand that, so I think that is really important to do.

I also, and I wish Senator Mullin hadn't left quite as quickly as he did, because I had an important point I wanted to make, is that tribal colleagues and I have actually suggested that there be a separate category of WOTUS for our tribal nations that are informed by some of the concerns he was bringing up that are in consultation with the Tribes.

I think that is really important that we understand, and we dig a little deeper, but I do feel that we need a comprehensive—I do understand there are a lot of programs out there. I feel very strongly as a scientist in what I see these programs doing and some of the outcomes, they are not the same as a Federal level floor. So I feel very strongly that we need to value the science. We need to respect that at the first pass, and then at the second pass, we can figure out effectively together how to use water and working landscapes.

Senator CARPER. All right, good, thanks. Thanks very much.

I would ask our minority staff, if you could just convey what our witness has just said to Senator Mullin, I would appreciate that. Thanks very much.

OK, Ms. Revels, please, if you would like to comment. Same question: We are looking for a pathway to consensus, if that is a hopeless journey, or if that is man's triumph of hope over experience, that is fine, but any thoughts you have toward how we might move toward consensus on this really important issue. Ms. Revels.

Ms. REVELS. Yes, sir. Absolutely.

For me, I think there is plenty of opportunity. This is not a Republican or a Democrat issue. This is a human issue. This is an issue of us all, and it is important that we all have our human hats on and our community hats on and just always are considering the impacts of those that are on the frontlines.

This is my life. I have gotten into this work through necessity, not because I thought it would be a great career path. In the consideration, it is so imperative to have people that have experienced the things that we have experienced, like Harvey, and remembering that when we remove wetlands and pave over wetlands, that is climate change. We are changing the climate; we are changing the planet.

We are all human, and there is opportunity for us to remember our humanity. You guys can always come down to Houston and just see the different demographics from 6 years ago with Harvey to today, and see what the science would say about that.

Senator CARPER. Good. Thank you, ma'am, and thanks for joining us all the way from Houston.

I am going to give a short closing statement, and then we will wrap it up.

In closing, again, I want to thank the three of you, each of you, very much for appearing before us today. I want to thank my colleagues who have been able to join us and to participate even though we have a lot going on in other committees now and now with votes on the floor.

Today, we have heard about the scientific context and actually heard about the history, and we have heard about the impacts of

the Supreme Court's decision to dramatically narrow the scope of the Clean Water Act. As a matter of science, we have heard that wetlands and more than a million miles of streams are inextricably linked to downstream water quality.

As a matter of history, we have heard that this decision reverses over four decades of clean water implementation, and as a matter of impacts, we have heard that the loss of protections for over half of our Nation's remaining wetlands and millions of miles of streams will lead to more flooding, more polluted waters, and unfortunately, harm to wildlife. Through Sackett, the Supreme Court has weakened one of our bedrock environmental laws, and harms will be felt nationwide.

I would also like to ask, at this point, unanimous consent to submit for the record a number of letters and statements that I have received from stakeholders. These documents underscore the importance of Clean Water Act protections for our Nation's health and environment and economy.

This is one of my favorite parts of a hearing when I get to ask unanimous consent for something to enter into the record, and there is nobody here to object, and I am not going to object to my own unanimous consent request.

Without objection.

[The referenced information follows:]

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

SACKETT ET UX. *v.* ENVIRONMENTAL PROTECTION AGENCY ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 21–454. Argued October 3, 2022—Decided May 25, 2023

Petitioners Michael and Chantell Sackett purchased property near Priest Lake, Idaho, and began backfilling the lot with dirt to prepare for building a home. The Environmental Protection Agency informed the Sacketts that their property contained wetlands and that their backfilling violated the Clean Water Act, which prohibits discharging pollutants into "the waters of the United States." 33 U. S. C. §1362(7). The EPA ordered the Sacketts to restore the site, threatening penalties of over $40,000 per day. The EPA classified the wetlands on the Sacketts' lot as "waters of the United States" because they were near a ditch that fed into a creek, which fed into Priest Lake, a navigable, intrastate lake. The Sacketts sued, alleging that their property was not "waters of the United States." The District Court entered summary judgment for the EPA. The Ninth Circuit affirmed, holding that the CWA covers wetlands with an ecologically significant nexus to traditional navigable waters and that the Sacketts' wetlands satisfy that standard.

Held: The CWA's use of "waters" in §1362(7) refers only to "geographic[al] features that are described in ordinary parlance as 'streams, oceans, rivers, and lakes' " and to adjacent wetlands that are "indistinguishable" from those bodies of water due to a continuous surface connection. *Rapanos* v. *United States,* 547 U. S. 715, 755, 742, 739 (plurality opinion). To assert jurisdiction over an adjacent wetland under the CWA, a party must establish "first, that the adjacent [body of water constitutes] . . . 'water[s] of the United States' (*i.e.*, a relatively permanent body of water connected to traditional interstate navigable waters); and second, that the wetland has a continuous surface connection with that water, making it difficult to determine where the 'water' ends and the 'wetland' begins." *Ibid.* Pp. 6–28.

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(a) The uncertain meaning of "the waters of the United States" has been a persistent problem, sparking decades of agency action and litigation. Resolving the CWA's applicability to wetlands requires a review of the history surrounding the interpretation of that phrase. Pp. 6–14.

(1) During the period relevant to this case, the two federal agencies charged with enforcement of the CWA—the EPA and the Army Corps of Engineers—similarly defined "the waters of the United States" broadly to encompass "[a]ll . . . waters" that "could affect interstate or foreign commerce." 40 CFR §230.3(s)(3). The agencies likewise gave an expansive interpretation of wetlands adjacent to those waters, defining "adjacent" to mean "bordering, contiguous, or neighboring." §203.3(b). In *United States* v. *Riverside Bayview Homes, Inc.,* 474 U. S. 121, the Court confronted the Corps' assertion of authority under the CWA over wetlands that "actually abut[ted] on a navigable waterway." *Id.*, at 135. Although concerned that the wetlands fell outside "traditional notions of 'waters,'" the Court deferred to the Corps, reasoning that "the transition from water to solid ground is not necessarily or even typically an abrupt one." *Id.,* 132–133. Following *Riverside Bayview*, the agencies issued the "migratory bird rule," extending CWA jurisdiction to any waters or wetlands that "are or would be used as [a] habitat" by migratory birds or endangered species. 53 Fed. Reg. 20765. The Court rejected the rule after the Corps sought to apply it to several isolated ponds located wholly within the State of Illinois, holding that the CWA does not "exten[d] to ponds that are not adjacent to open water." *Solid Waste Agency of Northern Cook Cty.* v. *Army Corps of Engineers,* 531 U. S. 159, 168 (*SWANCC*) (emphasis deleted). The agencies responded by instructing their field agents to determine the scope of the CWA's jurisdiction on a case-by-case basis. Within a few years, the agencies had "interpreted their jurisdiction over 'the waters of the United States' to cover 270-to-300 million acres" of wetlands and "virtually any parcel of land containing a channel or conduit . . . through which rainwater or drainage may occasionally or intermittently flow." *Rapanos*, 547 U. S., at 722 (plurality opinion).

Against that backdrop, the Court in *Rapanos* vacated a lower court decision that had held that the CWA covered wetlands near ditches and drains that emptied into navigable waters several miles away. As to the rationale for vacating, however, no position in *Rapanos* commanded a majority of the Court. Four Justices concluded that the CWA's coverage was limited to certain relatively permanent bodies of water connected to traditional interstate navigable waters and to wetlands that are "as a practical matter indistinguishable" from those waters. *Id.,* at 755 (emphasis deleted). Justice Kennedy, concurring only in the judgment, wrote that CWA jurisdiction over adjacent wetlands

requires a "significant nexus" between the wetland and its adjacent navigable waters, which exists when "the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity" of those waters. *Id.,* at 779–780. Following *Rapanos,* field agents brought nearly all waters and wetlands under the risk of CWA jurisdiction by engaging in fact-intensive "significant-nexus" determinations that turned on a lengthy list of hydrological and ecological factors.

Under the agencies' current rule, traditional navigable waters, interstate waters, and the territorial seas, as well as their tributaries and adjacent wetlands, are waters of the United States. See 88 Fed. Reg. 3143. So too are any "[i]ntrastate lakes and ponds, streams, or wetlands" that either have a continuous surface connection to categorically included waters or have a significant nexus to interstate or traditional navigable waters. *Id.,* at 3006, 3143. Finding a significant nexus continues to require consideration of a list of open-ended factors. *Ibid.* Finally, the current rule returns to the agencies' longstanding definition of "adjacent." *Ibid.* Pp. 6–12.

(2) Landowners who even negligently discharge pollutants into navigable waters without a permit potentially face severe criminal and civil penalties under the Act. As things currently stand, the agencies maintain that the significant-nexus test is sufficient to establish jurisdiction over "adjacent" wetlands. By the EPA's own admission, nearly all waters and wetlands are potentially susceptible to regulation under this test, putting a staggering array of landowners at risk of criminal prosecution for such mundane activities as moving dirt. Pp. 12–14.

(b) Next, the Court considers the extent of the CWA's geographical reach. Pp. 14–22.

(1) To make sense of Congress's choice to define "navigable waters" as "the waters of the United States," the Court concludes that the CWA's use of "waters" encompasses "only those relatively permanent, standing or continuously flowing bodies of water 'forming geographic[al] features' that are described in ordinary parlance as 'streams, oceans, rivers, and lakes.'" *Rapanos*, 547 U. S., at 739 (plurality opinion). This reading follows from the CWA's deliberate use of the plural "waters," which refers to those bodies of water listed above, and also helps to align the meaning of "the waters of the United States" with the defined term "navigable waters." More broadly, this reading accords with how Congress has employed the term "waters" elsewhere in the CWA—see, *e.g.*, 33 U. S. C. §§1267(i)(2)(D), 1268(a)(3)(I)—and in other laws—see, *e.g.*, 16 U. S. C. §§745, 4701(a)(7). This Court has understood CWA's use of "waters" in the same way. See, *e.g.*, *Riverside Bayview*, 474 U. S., at 133; *SWANCC*, 531 U. S., at 168–169, 172.

The EPA's insistence that "water" is "naturally read to encompass

wetlands" because the "presence of water is 'universally regarded as the most basic feature of wetlands'" proves too much. Brief for Respondents 19. It is also tough to square with *SWANCC*'s exclusion of isolated ponds or *Riverside Bayview*'s extensive focus on the adjacency of wetlands to covered waters. Finally, it is difficult to see how the States' "responsibilities and rights" in regulating water resources would remain "primary" if the EPA had such broad jurisdiction. §1251(b). Pp. 14–18.

(2) Statutory context shows that some wetlands nevertheless qualify as "waters of the United States." Specifically, §1344(g)(1), which authorizes States to conduct certain permitting programs, specifies that discharges may be permitted into any waters of the United States, except for traditional navigable waters, "including wetlands adjacent thereto," suggesting that at least some wetlands must qualify as "waters of the United States." But §1344(g)(1) cannot define what wetlands the CWA regulates because it is not the operative provision that defines the Act's reach. Instead, the reference to adjacent wetlands in §1344(g)(1) must be harmonized with "the waters of the United States," which is the operative term that defines the CWA's reach. Because the "adjacent" wetlands in §1344(g)(1) are "includ[ed]" within "waters of the United States," these wetlands must qualify as "waters of the United States" in their own right, *i.e.*, be indistinguishably part of a body of water that itself constitutes "waters" under the CWA. To hold otherwise would require implausibly concluding that Congress tucked an important expansion to the reach of the CWA into convoluted language in a relatively obscure provision concerning state permitting programs. Understanding the CWA to apply to wetlands that are distinguishable from otherwise covered "waters of the United States" would substantially broaden §1362(7) to define "navigable waters" as "waters of the United States *and adjacent wetlands*." But §1344(g)(1)'s use of the term "including" makes clear that it does not purport to do any such thing. It merely reflects Congress's assumption that certain "adjacent" wetlands are part of the "waters of the United States."

To determine when a wetland is part of adjacent "waters of the United States," the Court agrees with the *Rapanos* plurality that the use of "waters" in §1362(7) may be fairly read to include only wetlands that are "indistinguishable from waters of the United States." This occurs only when wetlands have "a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between 'waters' and wetlands." 547 U. S., at 742.

In sum, the CWA extends to only wetlands that are "as a practical

matter indistinguishable from waters of the United States." This requires the party asserting jurisdiction to establish "first, that the adjacent [body of water constitutes] . . . 'water[s] of the United States' (*i.e.*, a relatively permanent body of water connected to traditional interstate navigable waters); and second, that the wetland has a continuous surface connection with that water, making it difficult to determine where the 'water' ends and the 'wetland' begins." *Rapanos,* 547 U. S., at 755, 742. Pp. 18–22.

(c) The EPA asks the Court to defer to its most recent rule providing that "adjacent wetlands are covered by the [CWA] if they 'possess a significant nexus to' traditional navigable waters" and that wetlands are "adjacent" when they are "neighboring" to covered waters. Brief for Respondents 32, 20. For multiple reasons, the EPA's position lacks merit. Pp. 22–27.

(1) The EPA's interpretation is inconsistent with the CWA's text and structure and clashes with "background principles of construction" that apply to the interpretation of the relevant provisions. *Bond* v. *United States*, 572 U. S. 844, 857. First, "exceedingly clear language" is required if Congress wishes to alter the federal/state balance or the Government's power over private property. *United States Forest Service* v. *Cowpasture River Preservation Assn.*, 590 U. S. ___, ___. The Court has thus required a clear statement from Congress when determining the scope of "the waters of the United States." Second, the EPA's interpretation gives rise to serious vagueness concerns in light of the CWA's criminal penalties, thus implicating the due process requirement that penal statutes be defined "'with sufficient definiteness that ordinary people can understand what conduct is prohibited.'" *McDonnell* v. *United States*, 579 U. S. 550, 576. Where penal statutes could sweep broadly enough to render criminal a host of what might otherwise be considered ordinary activities, the Court has been wary about going beyond what "Congress certainly intended the statute to cover." *Skilling* v. *United States*, 561 U. S. 358, 404. Under these two principles, the judicial task when interpreting "the waters of the United States" is to ascertain whether clear congressional authorization exists for the EPA's claimed power. Pp. 22–25.

(2) The EPA claims that Congress ratified the EPA's regulatory definition of "adjacent" when it amended the CWA to include the reference to "adjacent" wetlands in §1344(g)(1). This argument fails for at least three reasons. First, the text of §§1362(7) and 1344(g) shows that "adjacent" cannot include wetlands that are merely nearby covered waters. Second, EPA's argument cannot be reconciled with this Court's repeated recognition that §1344(g)(1) "'does not conclusively determine the construction to be placed on . . . the relevant definition of "navigable waters."'" *SWANCC*, 531 U. S., at 171. Third, the EPA

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falls short of establishing the sort of "overwhelming evidence of acquiescence" necessary to support its argument in the face of Congress's failure to amend §1362(7). Finally, the EPA's various policy arguments about the ecological consequences of a narrower definition of "adjacent" are rejected. Pp. 25–27.

8 F. 4th 1075, reversed and remanded.

ALITO, J., delivered the opinion of the Court, in which ROBERTS, C. J., and THOMAS, GORSUCH, and BARRETT, JJ., joined. THOMAS, J., filed a concurring opinion, in which GORSUCH, J., joined. KAGAN, J., filed an opinion concurring in the judgment, in which SOTOMAYOR and JACKSON, JJ., joined. KAVANAUGH, J., filed an opinion concurring in the judgment, in which SOTOMAYOR, KAGAN, and JACKSON, JJ., joined.

SUPREME COURT OF THE UNITED STATES

No. 21–454

MICHAEL SACKETT, ET UX., PETITIONERS *v.* ENVIRONMENTAL PROTECTION AGENCY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[May 25, 2023]

JUSTICE ALITO delivered the opinion of the Court.

This case concerns a nagging question about the outer reaches of the Clean Water Act (CWA), the principal federal law regulating water pollution in the United States.[1] By all accounts, the Act has been a great success. Before its enactment in 1972, many of the Nation's rivers, lakes, and streams were severely polluted, and existing federal legislation had proved to be inadequate. Today, many formerly fetid bodies of water are safe for the use and enjoyment of the people of this country.

There is, however, an unfortunate footnote to this success story: the outer boundaries of the Act's geographical reach have been uncertain from the start. The Act applies to "the waters of the United States," but what does that phrase mean? Does the term encompass any backyard that is soggy enough for some minimum period of time? Does it reach "mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, [or] playa lakes?"[2] How about ditches, swimming pools, and puddles?

[1] 86 Stat. 816, as amended, 33 U. S. C. §1251 *et seq.*

[2] 40 CFR §230.3(s)(3) (2008).

For more than a half century, the agencies responsible for enforcing the Act have wrestled with the problem and adopted varying interpretations. On three prior occasions, this Court has tried to clarify the meaning of "the waters of the United States." But the problem persists. When we last addressed the question 17 years ago, we were unable to agree on an opinion of the Court.[3] Today, we return to the problem and attempt to identify with greater clarity what the Act means by "the waters of the United States."

I

A

For most of this Nation's history, the regulation of water pollution was left almost entirely to the States and their subdivisions. The common law permitted aggrieved parties to bring nuisance suits against polluters. But as industrial production and population growth increased the quantity and toxicity of pollution, States gradually shifted to enforcement by regulatory agencies.[4] Conversely, federal regulation was largely limited to ensuring that "traditional navigable waters"—that is, interstate waters that were either navigable in fact and used in commerce or readily susceptible of being used in this way—remained free of impediments. See, *e.g.*, Rivers and Harbors Act of 1899, 30 Stat. 1151; see also *United States* v. *Appalachian Elec. Power Co.*, 311 U. S. 377, 406–407 (1940); *The Daniel Ball,* 10 Wall. 557, 563 (1871).

Congress's early efforts at directly regulating water pollution were tepid. Although the Federal Water Pollution Control Act of 1948 allowed federal officials to seek judicial abatement of pollution in interstate waters, it imposed high

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[3] See *Rapanos* v. *United States*, 547 U. S. 715 (2006). Neither party contends that any opinion in *Rapanos* controls. We agree. See *Nichols* v. *United States*, 511 U. S. 738, 745–746 (1994).

[4] See N. Hines, Nor Any Drop To Drink: Public Regulation of Water Quality, 52 Iowa L. Rev. 186, 196–207 (1966).

hurdles, such as requiring the consent of the State where the pollution originated. See 62 Stat. 1156–1157. Despite repeated amendments over the next two decades, few actions were brought under this framework.[5]

Congress eventually replaced this scheme in 1972 with the CWA. See 86 Stat. 816. The Act prohibits "the discharge of any pollutant" into "navigable waters." 33 U. S. C. §§1311(a), 1362(12)(A). It broadly defines the term "'pollutant'" to include not only contaminants like "chemical wastes," but also more mundane materials like "rock, sand," and "cellar dirt." §1362(6).

The CWA is a potent weapon. It imposes what have been described as "crushing" consequences "even for inadvertent violations." *Army Corps of Engineers* v. *Hawkes Co.*, 578 U. S. 590, 602 (2016) (Kennedy, J., concurring). Property owners who negligently discharge "pollutants" into covered waters may face severe criminal penalties including imprisonment. §1319(c). These penalties increase for knowing violations. *Ibid.* On the civil side, the CWA imposes over $60,000 in fines per day for each violation. See Note following 28 U. S. C. §2461; 33 U. S. C. §1319(d); 88 Fed. Reg. 989 (2023) (to be codified in 40 CFR §19.4). And due to the Act's 5-year statute of limitations, 28 U. S. C. §2462, and expansive interpretations of the term "violation," these civil penalties can be nearly as crushing as their criminal counterparts, see, *e.g.*, *Borden Ranch Partnership* v. *United States Army Corps of Engineers*, 261 F. 3d 810, 813, 818 (CA9 2001) (upholding Agency decision to count each of 348 passes of a plow by a farmer through "jurisdictional" soil on his farm as a separate violation), aff'd by an equally divided Court, 537 U. S. 99 (2002) (*per curiam*).

The Environmental Protection Agency (EPA) and the

[5]See Hearings on Activities of the Federal Water Pollution Control Administration before the Subcommittee on Air and Water Pollution of the Senate Committee on Public Works, 90th Cong., 1st Sess., 674 (1967) (reporting only one abatement suit between 1948 and 1967).

Army Corps of Engineers (Corps) jointly enforce the CWA. The EPA is tasked with policing violations after the fact, either by issuing orders demanding compliance or by bringing civil actions. §1319(a). The Act also authorizes private plaintiffs to sue to enforce its requirements. §1365(a). On the front end, both agencies are empowered to issue permits exempting activity that would otherwise be unlawful under the Act. Relevant here, the Corps controls permits for the discharge of dredged or fill material into covered waters. See §1344(a). The costs of obtaining such a permit are "significant," and both agencies have admitted that "the permitting process can be arduous, expensive, and long." *Hawkes Co.*, 578 U. S., at 594–595, 601. Success is also far from guaranteed, as the Corps has asserted discretion to grant or deny permits based on a long, nonexclusive list of factors that ends with a catchall mandate to consider "in general, the needs and welfare of the people." 33 CFR §320.4(a)(1) (2022).

Due to the CWA's capacious definition of "pollutant," its low *mens rea*, and its severe penalties, regulated parties have focused particular attention on the Act's geographic scope. While its predecessor encompassed "interstate or navigable waters," 33 U. S. C. §1160(a) (1970 ed.), the CWA prohibits the discharge of pollutants into only "navigable waters," which it defines as "the waters of the United States, including the territorial seas," 33 U. S. C. §§1311(a), 1362(7), (12)(A) (2018 ed.). The meaning of this definition is the persistent problem that we must address.

B

Michael and Chantell Sackett have spent well over a decade navigating the CWA, and their voyage has been bumpy and costly. In 2004, they purchased a small lot near Priest Lake, in Bonner County, Idaho. In preparation for building a modest home, they began backfilling their property with

dirt and rocks. A few months later, the EPA sent the Sacketts a compliance order informing them that their backfilling violated the CWA because their property contained protected wetlands. The EPA demanded that the Sacketts immediately "'undertake activities to restore the Site'" pursuant to a "'Restoration Work Plan'" that it provided. *Sackett* v. *EPA*, 566 U. S. 120, 125 (2012). The order threatened the Sacketts with penalties of over $40,000 per day if they did not comply.

At the time, the EPA interpreted "the waters of the United States" to include "[a]ll . . . waters" that "could affect interstate or foreign commerce," as well as "[w]etlands adjacent" to those waters. 40 CFR §§230.3(s)(3), (7) (2008). "[A]djacent" was defined to mean not just "bordering" or "contiguous," but also "neighboring." §230.3(b). Agency guidance instructed officials to assert jurisdiction over wetlands "adjacent" to non-navigable tributaries when those wetlands had "a significant nexus to a traditional navigable water."[6] A "significant nexus" was said to exist when "'wetlands, either alone or in combination with *similarly situated lands* in the region, *significantly affect* the chemical, physical, and biological integrity'" of those waters. 2007 Guidance 8 (emphasis added). In looking for evidence of a "significant nexus," field agents were told to consider a wide range of open-ended hydrological and ecological factors. See *id.*, at 7.

According to the EPA, the "wetlands" on the Sacketts' lot are "adjacent to" (in the sense that they are in the same neighborhood as) what it described as an "unnamed tributary" on the other side of a 30-foot road. App. 33. That tributary feeds into a non-navigable creek, which, in turn, feeds into Priest Lake, an intrastate body of water that the

[6] EPA & Corps, Clean Water Act Jurisdiction Following the U. S. Supreme Court's Decision in *Rapanos* v. *United States* & *Carabell* v. *United States* 7–11 (2007) (2007 Guidance).

EPA designated as traditionally navigable. To establish a significant nexus, the EPA lumped the Sacketts' lot together with the Kalispell Bay Fen, a large nearby wetland complex that the Agency regarded as "similarly situated." According to the EPA, these properties, taken together, "significantly affect" the ecology of Priest Lake. Therefore, the EPA concluded, the Sacketts had illegally dumped soil and gravel onto "the waters of the United States."

The Sacketts filed suit under the Administrative Procedure Act, 5 U. S. C. §702 *et seq.*, alleging that the EPA lacked jurisdiction because any wetlands on their property were not "waters of the United States." The District Court initially dismissed the suit, reasoning that the compliance order was not a final agency action, but this Court ultimately held that the Sacketts could bring their suit under the APA. See *Sackett*, 566 U. S., at 131. After seven years of additional proceedings on remand, the District Court entered summary judgment for the EPA. 2019 WL 13026870 (D Idaho, Mar. 31, 2019). The Ninth Circuit affirmed, holding that the CWA covers adjacent wetlands with a significant nexus to traditional navigable waters and that the Sacketts' lot satisfied that standard. 8 F. 4th 1075, 1091–1093 (2021).

We granted certiorari to decide the proper test for determining whether wetlands are "waters of the United States." 595 U. S. ___ (2022).

II

A

In defining the meaning of "the waters of the United States," we revisit what has been "a contentious and difficult task." *National Assn. of Mfrs.* v. *Department of Defense*, 583 U. S. ___, ___ (2018) (slip op., at 1). The phrase has sparked decades of agency action and litigation. In order to resolve the CWA's applicability to wetlands, we begin by reviewing this history.

The EPA and the Corps initially promulgated different interpretations of "the waters of the United States." The EPA defined its jurisdiction broadly to include, for example, intrastate lakes used by interstate travelers. 38 Fed. Reg. 13529 (1973). Conversely, the Corps, consistent with its historical authority to regulate obstructions to navigation, asserted jurisdiction over only traditional navigable waters. 39 Fed. Reg. 12119 (1974). But the Corps' narrow definition did not last. It soon promulgated new, much broader definitions designed to reach the outer limits of Congress's commerce power. See 42 Fed. Reg. 37144, and n. 2 (1977); 40 Fed. Reg. 31324–31325 (1975).

Eventually the EPA and Corps settled on materially identical definitions. See 45 Fed. Reg. 33424 (1980); 47 Fed. Reg. 31810–31811 (1982). These broad definitions encompassed "[a]ll . . . waters" that "could affect interstate or foreign commerce." 40 CFR §230.3(s)(3) (2008). So long as the potential for an interstate effect was present, the regulation extended the CWA to, for example, "intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds." *Ibid.* The agencies likewise took an expansive view of the CWA's coverage of wetlands "adjacent" to covered waters. §230.3(s)(7). As noted, they defined "adjacent" to mean "bordering, contiguous, or neighboring" and clarified that "adjacent" wetlands include those that are separated from covered waters "by manmade dikes or barriers, natural river berms, beach dunes and the like." §230.3(b). They also specified that "wetlands" is a technical term encompassing "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." §230.3(t). The Corps released what would become a 143-page manual to guide officers when they determine whether

property meets this definition.[7]

This Court first construed the meaning of "the waters of the United States" in *United States* v. *Riverside Bayview Homes, Inc.*, 474 U. S. 121 (1985). There, we were confronted with the Corps' assertion of authority under the CWA over wetlands that "actually abut[ted] on a navigable waterway." *Id.*, at 135. Although we expressed concern that wetlands seemed to fall outside "traditional notions of 'waters,'" we nonetheless deferred to the Corps, reasoning that "the transition from water to solid ground is not necessarily or even typically an abrupt one." *Id.*, at 132–133.

The agencies responded to *Riverside Bayview* by expanding their interpretations even further. Most notably, they issued the "migratory bird rule," which extended jurisdiction to any waters or wetlands that "are or would be used as [a] habitat" by migratory birds or endangered species. See 53 Fed. Reg. 20765 (1988); 51 Fed. Reg. 41217 (1986). As the Corps would later admit, "nearly all waters were jurisdictional under the migratory bird rule."[8]

In *Solid Waste Agency of Northern Cook Cty.* v. *Army Corps of Engineers*, 531 U. S. 159 (2001) (*SWANCC*), this Court rejected the migratory bird rule, which the Corps had used to assert jurisdiction over several isolated ponds located wholly within the State of Illinois. Disagreeing with the Corps' argument that ecological interests supported its jurisdiction, we instead held that the CWA does not "exten[d] to ponds that are not adjacent to open water." *Id.*, at 168 (emphasis deleted).

Days after our decision, the agencies issued guidance that

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[7] See Corps, Wetlands Delineation Manual (Tech. Rep. Y–87–1, 1987) (Wetlands Delineation Manual); see also, *e.g.*, Corps, Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Alaska Region (Version 2.0) (ERDC/EL Tr–07–24, 2007).

[8] GAO, Waters and Wetlands: Corps of Engineers Needs To Evaluate Its District Office Practices in Determining Jurisdiction 26 (GAO–04–297, 2004) (GAO Report).

sought to minimize *SWANCC*'s impact. They took the view that this Court's holding was "strictly limited to waters that are 'nonnavigable, isolated, and intrastate'" and that "field staff should continue to exercise CWA jurisdiction to the full extent of their authority" for "any waters that fall outside of that category."[9] The agencies never defined exactly what they regarded as the "full extent of their authority." They instead encouraged local field agents to make decisions on a case-by-case basis.

What emerged was a system of "vague" rules that depended on "locally developed practices." GAO Report 26. Deferring to the agencies' localized decisions, lower courts blessed an array of expansive interpretations of the CWA's reach. See, *e.g.*, *United States* v. *Deaton*, 332 F. 3d 698, 702 (CA4 2003) (holding that a property owner violated the CWA by piling soil near a ditch 32 miles from navigable waters). Within a few years, the agencies had "interpreted their jurisdiction over 'the waters of the United States' to cover 270-to-300 million acres" of wetlands and "virtually any parcel of land containing a channel or conduit . . . through which rainwater or drainage may occasionally or intermittently flow." *Rapanos* v. *United States*, 547 U. S. 715, 722 (2006) (plurality opinion).

It was against this backdrop that we granted review in *Rapanos* v. *United States*. The lower court in the principal case before us had held that the CWA covered wetlands near ditches and drains that eventually emptied into navigable waters at least 11 miles away, a theory that had supported the petitioner's conviction in a related prosecution. *Id.*, at 720, 729. Although we vacated that decision, no position commanded a majority of the Court. Four Justices concluded that the CWA's coverage did not extend beyond two categories: first, certain relatively permanent bodies of

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[9] EPA & Corps, Memorandum, Supreme Court Ruling Concerning CWA Jurisdiction Over Isolated Waters 3 (2001) (alteration omitted).

water connected to traditional interstate navigable waters and, second, wetlands with such a close physical connection to those waters that they were "as a practical matter indistinguishable from waters of the United States." *Id.*, at 742, 755 (emphasis deleted). Four Justices would have deferred to the Government's determination that the wetlands at issue were covered under the CWA. *Id.*, at 788 (Stevens, J., dissenting). Finally, one Justice concluded that jurisdiction under the CWA requires a "significant nexus" between wetlands and navigable waters and that such a nexus exists where "the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity" of those waters. *Id.*, at 779–780 (Kennedy, J., concurring in judgment).

In the decade following *Rapanos*, the EPA and the Corps issued guidance documents that "recognized larger grey areas and called for more fact-intensive individualized determinations in those grey areas."[10] As discussed, they instructed agency officials to assert jurisdiction over wetlands "adjacent" to non-navigable tributaries based on fact-specific determinations regarding the presence of a significant nexus. 2008 Guidance 8. The guidance further advised officials to make this determination by considering a lengthy list of hydrological and ecological factors. *Ibid.* Echoing what they had said about the migratory bird rule, the agencies later admitted that "almost all waters and wetlands across the country theoretically could be subject to a case-specific jurisdictional determination" under this guidance. 80 Fed. Reg. 37056 (2015); see, *e.g.*, *Hawkes Co.*, 578 U. S., at 596 (explaining that the Corps found a significant nexus between wetlands and a river "some 120 miles

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[10] N. Parrillo, Federal Agency Guidance and the Power To Bind: An Empirical Study of Agencies and Industries, 36 Yale J. on Reg. 165, 231 (2019); see 2007 Guidance 7–11; EPA & Corps, Clean Water Act Jurisdiction Following the U. S. Supreme Court's Decision in *Rapanos* v. *United States* & *Carabell* v. *United States* 8–12 (2008) (2008 Guidance).

away").

More recently, the agencies have engaged in a flurry of rulemaking defining "the waters of the United States." In a 2015 rule, they offered a muscular approach that would subject "the vast majority of the nation's water features" to a case-by-case jurisdictional analysis.[11] Although the rule listed a few examples of "waters" that were excluded from regulation like "[p]uddles" and "swimming pools," it categorically covered other waters and wetlands, including any within 1,500 feet of interstate or traditional navigable waters. 80 Fed. Reg. 37116–37117. And it subjected a wider range of other waters, including any within 4,000 feet of indirect tributaries of interstate or traditional navigable waters, to a case-specific determination for significant nexus. *Ibid.*

The agencies repealed this sweeping rule in 2019. 84 Fed. Reg. 56626. Shortly afterwards, they replaced it with a narrower definition that limited jurisdiction to traditional navigable waters and their tributaries, lakes, and "adjacent" wetlands. 85 Fed. Reg. 22340 (2020). They also narrowed the definition of "[a]djacent," limiting it to wetlands that "[a]but" covered waters, are flooded by those waters, or are separated from those waters by features like berms or barriers. *Ibid.* This rule too did not last. After granting the EPA's voluntary motion to remand, a District Court vacated the rule. See *Pascua Yaqui Tribe* v. *EPA*, 557 F. Supp. 3d 949, 957 (D Ariz. 2021).

The agencies recently promulgated yet another rule attempting to define waters of the United States. 88 Fed. Reg. 3004 (2023) (to be codified in 40 CFR §120.2). Under that broader rule, traditional navigable waters, interstate waters, and the territorial seas, as well as their tributaries and adjacent wetlands, are waters of the United States. 88

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[11] EPA & Dept. of the Army, Economic Analysis of the EPA-Army Clean Water Rule 11 (2015).

Fed. Reg. 3143. So are any "[i]ntrastate lakes and ponds, streams, or wetlands" that either have a continuous surface connection to categorically included waters or have a significant nexus to interstate or traditional navigable waters. *Id.*, at 3006, 3143. Like the post-*Rapanos* guidance, the rule states that a significant nexus requires consideration of a list of open-ended factors. 88 Fed. Reg. 3006, 3144. Finally, the rule returns to the broad pre-2020 definition of "adjacent." *Ibid.*; see *supra*, at 7. Acknowledging that "[f]ield work is often necessary to confirm the presence of a wetland" under these definitions, the rule instructs local agents to continue using the Corps' Wetlands Delineation Manual. 88 Fed. Reg. 3117.

B

With the benefit of a half century of practice under the CWA, it is worth taking stock of where things stand. The agencies maintain that the significant-nexus test has been and remains sufficient to establish jurisdiction over "adjacent" wetlands. And by the EPA's own admission, "almost all waters and wetlands" are potentially susceptible to regulation under that test. 80 Fed. Reg. 37056. This puts many property owners in a precarious position because it is "often difficult to determine whether a particular piece of property contains waters of the United States." *Hawkes Co.*, 578 U. S., at 594; see 40 CFR §230.3(t) (2008). Even if a property appears dry, application of the guidance in a complicated manual ultimately decides whether it contains wetlands. See 88 Fed. Reg. 3117; Wetlands Delineation Manual 84–85 (describing "not . . . atypical" examples of wetlands that periodically lack wetlands indicators); see also *Hawkes Co.* v. *United States Army Corps of Engineers*, 782 F. 3d 994, 1003 (CA8 2015) (Kelly, J., concurring) ("This is a unique aspect of the CWA; most laws do not require the hiring of expert consultants to determine if they even apply to you or your property"). And because the CWA can sweep

broadly enough to criminalize mundane activities like moving dirt, this unchecked definition of "the waters of the United States" means that a staggering array of landowners are at risk of criminal prosecution or onerous civil penalties.

What are landowners to do if they want to build on their property? The EPA recommends asking the Corps for a jurisdictional determination, which is a written decision on whether a particular site contains covered waters. Tr. of Oral Arg. 86; see Corps, Regulatory Guidance Letter No. 16–01, at 1 (2016) (RGL 16–01); 33 CFR §§320.1(a)(6), 331.2. But the Corps maintains that it has no obligation to provide jurisdictional determinations, RGL 16–01, at 2, and it has already begun announcing exceptions to the legal effect of some previous determinations, see 88 Fed. Reg. 3136. Even if the Corps is willing to provide a jurisdictional determination, a property owner may find it necessary to retain an expensive expert consultant who is capable of putting together a presentation that stands a chance of persuading the Corps.[12] And even then, a landowner's chances of success are low, as the EPA admits that the Corps finds jurisdiction approximately 75% of the time. Tr. of Oral Arg. 110.

If the landowner is among the vast majority who receive adverse jurisdictional determinations, what then? It would be foolish to go ahead and build since the jurisdictional determination might form evidence of culpability in a prosecution or civil action. The jurisdictional determination could be challenged in court, but only after the delay and expense required to exhaust the administrative appeals

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[12] See 88 Fed. Reg. 3134; Corps, Questions and Answers for *Rapanos* and *Carabell* Decision 16 (2007); J. Finkle, Jurisdictional Determinations: An Important Battlefield in the Clean Water Act Fight, 43 Ecology L. Q. 301, 314–315 (2016); K. Gould, Drowning in Wetlands Jurisdictional Determination Process: Implementation of *Rapanos* v. *United States*, 30 U. Ark. Little Rock L. Rev. 413, 440 (2008).

process. See 33 CFR §331.7(d). And once in court, the landowner would face an uphill battle under the deferential standards of review that the agencies enjoy. See 5 U. S. C. §706. Another alternative would be simply to acquiesce and seek a permit from the Corps. But that process can take years and cost an exorbitant amount of money. Many landowners faced with this unappetizing menu of options would simply choose to build nothing.

III

With this history in mind, we now consider the extent of the CWA's geographical reach.

A

We start, as we always do, with the text of the CWA. *Bartenwerfer* v. *Buckley*, 598 U. S. 69, 74 (2023). As noted, the Act applies to "navigable waters," which had a well-established meaning at the time of the CWA's enactment. But the CWA complicates matters by proceeding to define "navigable waters" as "the waters of the United States," §1362(7), which was decidedly not a well-known term of art. This frustrating drafting choice has led to decades of litigation, but we must try to make sense of the terms Congress chose to adopt. And for the reasons explained below, we conclude that the *Rapanos* plurality was correct: the CWA's use of "waters" encompasses "only those relatively permanent, standing or continuously flowing bodies of water 'forming geographic[al] features' that are described in ordinary parlance as 'streams, oceans, rivers, and lakes.'" 547 U. S., at 739 (quoting Webster's New International Dictionary 2882 (2d ed. 1954) (Webster's Second); original alterations omitted).

This reading follows from the CWA's deliberate use of the plural term "waters." See 547 U. S., at 732–733. That term typically refers to bodies of water like those listed above. See, *e.g.*, Webster's Second 2882; Black's Law Dictionary

1426 (5th ed. 1979) ("especially in the plural, [water] may designate a body of water, such as a river, a lake, or an ocean, or an aggregate of such bodies of water, as in the phrases 'foreign waters,' '*waters of the United States*,' and the like" (emphasis added)); Random House Dictionary of the English Language 2146 (2d ed. 1987) (Random House Dictionary) (defining "waters" as "a. flowing water, or water moving in waves: The river's mighty waters. b. the sea or seas bordering a particular country or continent or located in a particular part of the world" (emphasis deleted)). This meaning is hard to reconcile with classifying "'"lands," wet or otherwise, as "waters."'" *Rapanos*, 547 U. S., at 740 (plurality opinion) (quoting *Riverside Bayview*, 474 U. S., at 132).

This reading also helps to align the meaning of "the waters of the United States" with the term it is defining: "navigable waters." See *Bond* v. *United States*, 572 U. S. 844, 861 (2014) ("In settling on a fair reading of a statute, it is not unusual to consider the ordinary meaning of a defined term, particularly when there is dissonance between that ordinary meaning and the reach of the definition"). Although we have acknowledged that the CWA extends to more than traditional navigable waters, we have refused to read "navigable" out of the statute, holding that it at least shows that Congress was focused on "its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." *SWANCC*, 531 U. S., at 172; see also *Appalachian Electric*, 311 U. S., at 406–407; *The Daniel Ball*, 10 Wall., at 563. At a minimum, then, the use of "navigable" signals that the definition principally refers to bodies of navigable water like rivers, lakes, and oceans. See *Rapanos*, 547 U. S., at 734 (plurality opinion).

More broadly, this reading accords with how Congress has employed the term "waters" elsewhere in the CWA and

in other laws. The CWA repeatedly uses "waters" in contexts that confirm the term refers to bodies of open water. See 33 U. S. C. §1267(i)(2)(D) ("the waters of the Chesapeake Bay"); §1268(a)(3)(I) ("the open waters of each of the Great Lakes"); §1324(d)(4)(B)(ii) ("lakes and other surface waters"); §1330(g)(4)(C)(vii) ("estuarine waters"); §1343(c)(1) ("the waters of the territorial seas, the contiguous zone, and the oceans"); §§1346(a)(1), 1375a(a) ("coastal recreation waters"); §1370 (state "boundary waters"). The use of "waters" elsewhere in the U. S. Code likewise correlates to rivers, lakes, and oceans.[13]

Statutory history points in the same direction. The CWA's predecessor statute covered "interstate or navigable waters" and defined "interstate waters" as "all *rivers, lakes, and other waters* that flow across or form a part of State boundaries." 33 U. S. C. §§1160(a), 1173(e) (1970 ed.) (emphasis added); see also Rivers and Harbors Act of 1899, 30 Stat. 1151 (codified, as amended, at 33 U. S. C. §403) (prohibiting unauthorized obstructions "to the navigable capacity of any of the waters of the United States").

This Court has understood the CWA's use of "waters" in the same way. Even as *Riverside Bayview* grappled with whether adjacent wetlands could fall within the CWA's coverage, it acknowledged that wetlands are not included in "traditional notions of 'waters.'" 474 U. S., at 133. It explained that the term conventionally refers to "hydrographic features" like "rivers" and "streams." *Id.*, at 131. *SWANCC* went even further, repeatedly describing the "waters" covered by the Act as "open water" and suggesting

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[13] See, *e.g.*, 16 U. S. C. §745 ("the waters of the seacoast . . . the waters of the lakes"); §4701(a)(7) ("waters of the Chesapeake Bay"); 33 U. S. C. §4 ("the waters of the Mississippi River and its tributaries"); 43 U. S. C. §390h–8(a) ("the waters of Lake Cheraw, Colorado . . . the waters of the Arkansas River"); 46 U. S. C. §70051 (allowing the Coast Guard to take control of particular vessels during an emergency in order to "prevent damage or injury to any harbor or waters of the United States").

that "the waters of the United States" principally refers to traditional navigable waters. 531 U. S., at 168–169, 172. That our CWA decisions operated under this assumption is unsurprising. Ever since *Gibbons* v. *Ogden*, 9 Wheat. 1 (1824), this Court has used "waters of the United States" to refer to similar bodies of water, almost always in relation to ships. *Id.*, at 218 (discussing a vessel's "conduct in the waters of the United States").[14]

The EPA argues that "waters" is "naturally read to encompass wetlands" because the "presence of water is 'universally regarded as the most basic feature of wetlands.'" Brief for Respondents 19. But that reading proves too much. Consider puddles, which are also defined by the ordinary presence of water even though few would describe them as "waters." This argument is also tough to square with *SWANCC*, which held that the Act does not cover isolated ponds, see 531 U. S., at 171, or *Riverside Bayview*, which would have had no need to focus so extensively on the adjacency of wetlands to covered waters if the EPA's reading were correct, see 474 U. S., at 131–135, and n. 8. Finally, it is also instructive that the CWA expressly "protect[s] the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution" and "to plan the development and use . . . of land and water resources."

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[14]See, *e.g.*, *United States* v. *Alvarez-Machain*, 504 U. S. 655, 661, n. 7 (1992) (discussing a treaty "to allow British passenger ships to carry liquor while in the waters of the United States"); *Kent* v. *Dulles*, 357 U. S. 116, 123 (1958) (discussing a prohibition on boarding "vessels of the enemy on waters of the United States"); *New Jersey* v. *New York City*, 290 U. S. 237, 240 (1933) (enjoining employees of New York City from dumping garbage "into the ocean, or waters of the United States, off the coast of New Jersey"); *Cunard S. S. Co.* v. *Mellon*, 262 U. S. 100, 127 (1923) (holding that the National Prohibition Act did not apply to "merchant ships when outside the waters of the United States"); *Keck* v. *United States*, 172 U. S. 434, 444–445 (1899) (holding that concealing imported goods on vessels "at the time of entering the waters of the United States," without more, did not constitute smuggling).

§1251(b). It is hard to see how the States' role in regulating water resources would remain "primary" if the EPA had jurisdiction over anything defined by the presence of water. See *County of Maui* v. *Hawaii Wildlife Fund*, 590 U. S. ___, ___ (2020) (slip op., at 7); *Rapanos*, 547 U. S., at 737 (plurality opinion).

B

Although the ordinary meaning of "waters" in §1362(7) might seem to exclude all wetlands, we do not view that provision in isolation. The meaning of a word "may only become evident when placed in context," *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U. S. 120, 132 (2000), and statutory context shows that some wetlands qualify as "waters of the United States."

In 1977, Congress amended the CWA and added §1344(g)(1), which authorizes States to apply to the EPA for permission to administer programs to issue permits for the discharge of dredged or fill material into some bodies of water. In simplified terms, the provision specifies that state permitting programs may regulate discharges into (1) any waters of the United States, (2) except for traditional navigable waters, (3) "including wetlands adjacent thereto."[15]

When this convoluted formulation is parsed, it tells us that at least some wetlands must qualify as "waters of the

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[15]This provision states in relevant part: "The Governor of any State desiring to administer its own individual and general permit program for the discharge of dredged or fill material into the navigable waters (other than those waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce shoreward to their ordinary high water mark, including all waters which are subject to the ebb and flow of the tide shoreward to their mean high water mark, or mean higher high water mark on the west coast, including wetlands adjacent thereto) within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact." 33 U. S. C. §1344(g)(1).

United States." The provision begins with a broad category, "the waters of the United States," which we may call category A. The provision provides that States may permit discharges into these waters, but it then qualifies that States cannot permit discharges into a subcategory of A: traditional navigable waters (category B). Finally, it states that a third category (category C), consisting of wetlands "adjacent" to traditional navigable waters, is "includ[ed]" within B. Thus, States may permit discharges into A minus B, which includes C. If C (adjacent wetlands) were not part of A ("the waters of the United States") and therefore subject to regulation under the CWA, there would be no point in excluding them from that category. See *Riverside Bayview*, 474 U. S., at 138, n. 11 (recognizing that §1344(g) "at least suggest[s] strongly that the term 'waters' as used in the Act does not necessarily exclude 'wetlands'"); *Rapanos*, 547 U. S., at 768 (opinion of Kennedy, J.). Thus, §1344(g)(1) presumes that certain wetlands constitute "waters of the United States."

But what wetlands does the CWA regulate? Section 1344(g)(1) cannot answer that question alone because it is not the operative provision that defines the Act's reach. See *Riverside Bayview*, 474 U. S., at 138, n. 11. Instead, we must harmonize the reference to adjacent wetlands in §1344(g)(1) with "the waters of the United States," §1362(7), which is the actual term we are tasked with interpreting. The formulation discussed above tells us how: because the adjacent wetlands in §1344(g)(1) are "includ[ed]" within "the waters of the United States," these wetlands must qualify as "waters of the United States" in their own right. In other words, they must be indistinguishably part of a body of water that itself constitutes "waters" under the CWA. See *supra*, at 14.

This understanding is consistent with §1344(g)(1)'s use of "adjacent." Dictionaries tell us that the term "adjacent" may mean either "contiguous" or "near." Random House

Dictionary 25; see Webster's Third New International Dictionary 26 (1976); see also Oxford American Dictionary & Thesaurus 16 (2d ed. 2009) (listing "adjoining" and "neighboring" as synonyms of "adjacent"). But "construing statutory language is not merely an exercise in ascertaining 'the outer limits of a word's definitional possibilities,'" *FCC* v. *AT&T Inc.*, 562 U. S. 397, 407 (2011) (alterations omitted), and here, "only one . . . meanin[g] produces a substantive effect that is compatible with the rest of the law," *United Sav. Assn. of Tex.* v. *Timbers of Inwood Forest Associates, Ltd.*, 484 U. S. 365, 371 (1988). Wetlands that are separate from traditional navigable waters cannot be considered part of those waters, even if they are located nearby.

In addition, it would be odd indeed if Congress had tucked an important expansion to the reach of the CWA into convoluted language in a relatively obscure provision concerning state permitting programs. We have often remarked that Congress does not "hide elephants in mouseholes" by "alter[ing] the fundamental details of a regulatory scheme in vague terms or ancillary provisions." *Whitman* v. *American Trucking Assns., Inc.*, 531 U. S. 457, 468 (2001). We cannot agree with such an implausible interpretation here.

If §1344(g)(1) were read to mean that the CWA applies to wetlands that are not indistinguishably part of otherwise covered "waters of the United States," see *supra*, at 14, it would effectively amend and substantially broaden §1362(7) to define "navigable waters" as "waters of the United States *and adjacent wetlands*." But §1344(g)(1)'s use of the term "including" makes clear that it does not purport to do—and in fact, does not do—any such thing. See *National Assn. of Home Builders* v. *Defenders of Wildlife*, 551 U. S. 644, 662–664, and n. 8 (2007) (recognizing that implied amendments require "'clear and manifest'" evidence of congressional intent). It merely reflects Congress's assumption that certain "adjacent" wetlands are *part of* "waters of the United States."

This is the thrust of observations in decisions going all the way back to *Riverside Bayview*. In that case, we deferred to the Corps' decision to regulate wetlands actually abutting a navigable waterway, but we recognized "the inherent difficulties of defining precise bounds to regulable waters." 474 U. S., at 134; see also *id.*, at 132 (noting that "the transition from water to solid ground is not necessarily or even typically an abrupt one" due to semi-aquatic features like shallows and swamps). In such a situation, we concluded, the Corps could reasonably determine that wetlands "adjoining bodies of water" were part of those waters. *Id.*, at 135, and n. 9; see also *SWANCC*, 531 U. S., at 167 (recognizing that *Riverside Bayview* "held that the Corps had . . . jurisdiction over wetlands that actually abutted on a navigable waterway").

In *Rapanos*, the plurality spelled out clearly when adjacent wetlands are part of covered waters. It explained that "waters" may fairly be read to include only those wetlands that are "as a practical matter indistinguishable from waters of the United States," such that it is "difficult to determine where the 'water' ends and the 'wetland' begins." 547 U. S., at 742, 755 (emphasis deleted). That occurs when wetlands have "a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between 'waters' and wetlands." *Id.*, at 742; cf. 33 U. S. C. §2802(5) (defining "coastal waters" to include wetlands "having unimpaired connection with the open sea up to the head of tidal influence"). We agree with this formulation of when wetlands are part of "the waters of the United States." We also acknowledge that temporary interruptions in surface connection may sometimes occur because of phenomena like low tides or dry spells.[16]

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[16] Although a barrier separating a wetland from a water of the United States would ordinarily remove that wetland from federal jurisdiction, a

In sum, we hold that the CWA extends to only those wetlands that are "as a practical matter indistinguishable from waters of the United States." *Rapanos*, 547 U. S., at 755 (plurality opinion) (emphasis deleted). This requires the party asserting jurisdiction over adjacent wetlands to establish "first, that the adjacent [body of water constitutes] . . . 'water[s] of the United States,' (*i.e.*, a relatively permanent body of water connected to traditional interstate navigable waters); and second, that the wetland has a continuous surface connection with that water, making it difficult to determine where the 'water' ends and the 'wetland' begins." *Id.*, at 742.

IV

The EPA resists this reading of §1362(7) and instead asks us to defer to its understanding of the CWA's jurisdictional reach, as set out in its most recent rule defining "the waters of the United States." See 88 Fed. Reg. 3004. This rule, as noted, provides that "adjacent wetlands are covered by the Act if they 'possess a "significant nexus" to' traditional navigable waters." Brief for Respondents 32 (quoting *Rapanos*, 547 U. S., at 759 (opinion of Kennedy, J.)); see 88 Fed. Reg. 3143. And according to the EPA, wetlands are "adjacent" when they are "neighboring" to covered waters, even if they are separated from those waters by dry land. Brief for Respondents 20; 88 Fed. Reg. 3144.

A

For reasons already explained, this interpretation is inconsistent with the text and structure of the CWA. Beyond that, it clashes with "background principles of construction"

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landowner cannot carve out wetlands from federal jurisdiction by illegally constructing a barrier on wetlands otherwise covered by the CWA. Whenever the EPA can exercise its statutory authority to order a barrier's removal because it violates the Act, see 33 U. S. C. §§1319(a)–(b), that unlawful barrier poses no bar to its jurisdiction.

that apply to the interpretation of the relevant statutory provisions. *Bond*, 572 U. S., at 857. Under those presumptions, the EPA must provide clear evidence that it is authorized to regulate in the manner it proposes.

1

First, this Court "require[s] Congress to enact exceedingly clear language if it wishes to significantly alter the balance between federal and state power and the power of the Government over private property." *United States Forest Service* v. *Cowpasture River Preservation Assn.*, 590 U. S. ___, ___–___ (2020) (slip op., at 15–16); see also *Bond*, 572 U. S., at 858. Regulation of land and water use lies at the core of traditional state authority. See, *e.g.*, *SWANCC*, 531 U. S., at 174 (citing *Hess* v. *Port Authority Trans-Hudson Corporation*, 513 U. S. 30, 44 (1994)); *Tarrant Regional Water Dist.* v. *Herrmann*, 569 U. S. 614, 631 (2013). An overly broad interpretation of the CWA's reach would impinge on this authority. The area covered by wetlands alone is vast—greater than the combined surface area of California and Texas. And the scope of the EPA's conception of "the waters of the United States" is truly staggering when this vast territory is supplemented by all the additional area, some of which is generally dry, over which the Agency asserts jurisdiction. Particularly given the CWA's express policy to "preserve" the States' "primary" authority over land and water use, §1251(b), this Court has required a clear statement from Congress when determining the scope of "the waters of the United States." *SWANCC*, 531 U. S., at 174; accord, *Rapanos*, 547 U. S., at 738 (plurality opinion).

The EPA, however, offers only a passing attempt to square its interpretation with the text of §1362(7), and its "significant nexus" theory is particularly implausible. It suggests that the meaning of "the waters of the United

States" is so "broad and unqualified" that, if viewed in isolation, it would extend to all water in the United States. Brief for Respondents 32. The EPA thus turns to the "significant nexus" test in order to reduce the clash between its understanding of "the waters of the United States" and the term defined by that phrase, *i.e.*, "navigable waters." As discussed, however, the meaning of "waters" is more limited than the EPA believes. See *supra*, at 14. And, in any event, the CWA never mentions the "significant nexus" test, so the EPA has no statutory basis to impose it. See *Rapanos*, 547 U. S., at 755–756 (plurality opinion).

2

Second, the EPA's interpretation gives rise to serious vagueness concerns in light of the CWA's criminal penalties. Due process requires Congress to define penal statutes "'with sufficient definiteness that ordinary people can understand what conduct is prohibited'" and "'in a manner that does not encourage arbitrary and discriminatory enforcement.'" *McDonnell* v. *United States*, 579 U. S. 550, 576 (2016) (quoting *Skilling* v. *United States*, 561 U. S. 358, 402–403 (2010)). Yet the meaning of "waters of the United States" under the EPA's interpretation remains "hopelessly indeterminate." *Sackett*, 566 U. S., at 133 (ALITO, J., concurring); accord, *Hawkes Co.*, 578 U. S., at 602 (opinion of Kennedy, J.).

The EPA contends that the only thing preventing it from interpreting "waters of the United States" to "conceivably cover literally every body of water in the country" is the significant-nexus test. Tr. of Oral Arg. 70–71; accord, Brief for Respondents 32. But the boundary between a "significant" and an insignificant nexus is far from clear. And to add to the uncertainty, the test introduces another vague concept—"similarly situated" waters—and then assesses the aggregate effect of that group based on a variety of open-ended factors that evolve as scientific understandings

change. This freewheeling inquiry provides little notice to landowners of their obligations under the CWA. Facing severe criminal sanctions for even negligent violations, property owners are "left 'to feel their way on a case-by-case basis.'" *Sackett*, 566 U. S., at 124 (quoting *Rapanos*, 547 U. S., at 758 (ROBERTS, C. J., concurring)). Where a penal statute could sweep so broadly as to render criminal a host of what might otherwise be considered ordinary activities, we have been wary about going beyond what "Congress certainly intended the statute to cover." *Skilling*, 561 U. S., at 404.

Under these two background principles, the judicial task when interpreting "the waters of the United States" is to ascertain whether clear congressional authorization exists for the EPA's claimed power. The EPA's interpretation falls far short of that standard.

B

While mustering only a weak textual argument, the EPA justifies its position on two other grounds. It primarily claims that Congress implicitly ratified its interpretation of "adjacent" wetlands when it adopted §1344(g)(1). Thus, it argues that "waters of the United States" covers any wetlands that are "bordering, contiguous, or neighboring" to covered waters. 88 Fed. Reg. 3143. The principal opinion concurring in the judgment adopts the same position. See *post*, at 10–12 (KAVANAUGH, J., concurring in judgment). The EPA notes that the Corps had promulgated regulations adopting that interpretation before Congress amended the CWA in 1977 to include the reference to "adjacent" wetlands in §1344(g)(1). See 42 Fed. Reg. 37144. This term, the EPA contends, was "'"obviously transplanted from"'" the Corps' regulations and thus incorporates the same definition. Brief for Respondents 22 (quoting *Taggart* v. *Lorenzen*, 587 U. S. ___, ___ (2019) (slip op., at 5)).

This argument fails for at least three reasons. First, as we have explained, the text of §§1362(7) and 1344(g)(1)

shows that "adjacent" cannot include wetlands that are not part of covered "waters." See *supra*, at 22.

Second, this ratification theory cannot be reconciled with our cases. We have repeatedly recognized that §1344(g)(1) "'does not conclusively determine the construction to be placed on . . . the relevant definition of "navigable waters."'" *SWANCC*, 531 U. S., at 171 (quoting *Riverside Bayview*, 474 U. S., at 138, n. 11); accord, *Rapanos*, 547 U. S., at 747–748, n. 12 (plurality opinion). Additionally, *SWANCC* rejected the closely analogous argument that Congress ratified the Corps' definition of "waters of the United States" by including "'other . . . waters'" in §1344(g)(1). 531 U. S., at 168–171. And yet, the EPA's argument would require us to hold that §1344(g)(1) actually did amend the definition of "navigable waters" precisely for the reasons we rejected in *SWANCC*.

Third, the EPA cannot provide the sort of "overwhelming evidence of acquiescence" necessary to support its argument in the face of Congress's failure to amend §1362(7). *Id.*, at 169–170, n. 5. We will infer that a term was "'transplanted from another legal source' . . . only when a term's meaning was 'well-settled' before the transplantation." *Kemp* v. *United States*, 596 U. S. ___, ___–___ (2022) (slip op., at 9–10). Far from being well settled, the Corps' definition was promulgated mere months before the CWA became law, and when the Corps adopted that definition, it candidly acknowledged the "rapidly changing nature of [its] regulatory programs." 42 Fed. Reg. 37122. Tellingly, even the EPA would not adopt that definition for several more years. See 45 Fed. Reg. 85345 (1980). This situation is a far cry from any in which we have found ratification. See, *e.g.*, *George* v. *McDonough*, 596 U. S. ___, ___ (2022) (slip op., at 5) (finding ratification when "Congress used an unusual term that had a long regulatory history in [the] very regulatory context" at issue).

The EPA also advances various policy arguments about

the ecological consequences of a narrower definition of adjacent. But the CWA does not define the EPA's jurisdiction based on ecological importance, and we cannot redraw the Act's allocation of authority. See *Rapanos*, 547 U. S., at 756 (plurality opinion). "The Clean Water Act anticipates a partnership between the States and the Federal Government." *Arkansas* v. *Oklahoma*, 503 U. S. 91, 101 (1992). States can and will continue to exercise their primary authority to combat water pollution by regulating land and water use. See, *e.g.*, Brief for Farm Bureau of Arkansas et al. as *Amici Curiae* 17–27.

V

Nothing in the separate opinions filed by JUSTICE KAVANAUGH and JUSTICE KAGAN undermines our analysis. JUSTICE KAVANAUGH claims that we have "rewrit[ten]" the CWA, *post*, at 12 (opinion concurring in judgment), and JUSTICE KAGAN levels similar charges, *post*, at 3–4 (opinion concurring in judgment). These arguments are more than unfounded. We have analyzed the statutory language in detail, but the separate opinions pay no attention whatsoever to §1362(7), the key statutory provision that limits the CWA's geographic reach to "the *waters* of the United States." Thus, neither separate opinion even attempts to explain how the wetlands included in their interpretation fall within a fair reading of "waters." Textualist arguments that ignore the operative text cannot be taken seriously.

VI

In sum, we hold that the CWA extends to only those "wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right," so that they are "indistinguishable" from those waters. *Rapanos*, 547 U. S., at 742, 755 (plurality opinion) (emphasis deleted); see *supra*, at 22. This holding compels reversal here. The wetlands on the Sacketts' property are distinguishable

from any possibly covered waters.

* * *

We reverse the judgment of the United States Court of Appeals for the Ninth Circuit and remand the case for further proceedings consistent with this opinion.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 21–454

MICHAEL SACKETT, ET UX., PETITIONERS *v.* ENVIRONMENTAL PROTECTION AGENCY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[May 25, 2023]

JUSTICE THOMAS, with whom JUSTICE GORSUCH joins, concurring.

I join the Court's opinion in full. The Clean Water Act (CWA) confines the Federal Government's jurisdiction to "'navigable waters,'" defined as "the waters of the United States." 33 U. S. C. §§1311(a), 1362(7), (12). And the Court correctly holds that the term "waters" reaches "'only those relatively permanent, standing or continuously flowing bodies of water "'forming geographic[al] features'" that are described in ordinary parlance as "streams, oceans, rivers, and lakes."'" *Ante*, at 14 (quoting *Rapanos* v. *United States*, 547 U. S. 715, 739 (2006) (plurality opinion)). It also correctly holds that for a wetland to fall within this definition, it must share a "'continuous surface connection to bodies that are "waters of the United States" in their own right'" such that "'there is no clear demarcation between "waters" and wetlands.'" *Ante*, at 21 (quoting *Rapanos*, 547 U. S., at 742 (plurality opinion)).

However, like the *Rapanos* plurality before it, the Court focuses only on the term "waters"; it does not determine the extent to which the CWA's other jurisdictional terms—"navigable" and "of the United States"—limit the reach of the statute. *Ante*, at 14–18; *Rapanos*, 547 U. S., at 731 (plurality opinion). I write separately to pick up where the

Court leaves off.

I

The CWA's jurisdictional terms have a long pedigree and are bound up with Congress' traditional authority over the channels of interstate commerce. *Solid Waste Agency of Northern Cook Cty.* v. *Army Corps of Engineers*, 531 U. S. 159, 168, and n. 3, 172, 173–174 (2001) (*SWANCC*). That traditional authority was limited in two ways. First, the water had to be capable of being used as a highway for interstate or foreign commerce. Second, Congress could regulate such waters only for purposes of their navigability—by, for example, regulating obstructions hindering navigable capacity. By the time of the CWA's enactment, the New Deal era arguably had relaxed the second limitation; Congress could regulate navigable waters for a wider range of purposes. But, critically, the statutory terms "navigable waters," "navigable waters of the United States," and "waters of the United States" were still understood as invoking only Congress' authority over waters that are, were, or could be used as highways of interstate or foreign commerce. The CWA was enacted, and must be understood, against that key backdrop.

A

As the Court correctly states, "land and water use lies at the core of traditional state authority." *Ante*, at 23; see also *ante*, at 2. Prior to Independence, the Crown possessed sovereignty over navigable waters in the Colonies, sometimes held in trust by colonial authorities. See R. Adler, The *Ancient Mariner* of Constitutional Law: The Historical, Yet Declining Role of Navigability, 90 Wash. U. L. Rev. 1643, 1656–1659 (2013); R. Walston, The Federal Commerce and Navigation Powers: *Solid Waste Agency of Northern Cook County*'s Undecided Constitutional Issue, 42 Santa Clara L. Rev. 699, 721 (2002) (Walston). Upon Independence, this

sovereignty was transferred to each of the 13 fully sovereign States. See *Martin* v. *Lessee of Waddell*, 16 Pet. 367, 410 (1842) ("[W]hen the Revolution took place, the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters and the soils under them for their own common use, subject only to the rights since surrendered by the Constitution to the general government"). Thus, today, States enjoy primary sovereignty over their waters, including navigable waters—stemming either from their status as independent sovereigns following Independence, *ibid.*, or their later admission to the Union on an equal footing with the original States, see *Lessee of Pollard* v. *Hagan*, 3 How. 212, 230 (1845) ("The shores of navigable waters, and the soils under them, were not granted by the Constitution to the United States, but were reserved to the states respectively. . . . The new states have the same rights, sovereignty, and jurisdiction over this subject as the original states"); see also M. Starr, Navigable Waters of the United States—State and National Control, 35 Harv. L. Rev. 154, 169–170 (1921). The Federal Government therefore possesses no authority over navigable waters except that granted by the Constitution.

The Federal Government's authority over certain navigable waters is granted and limited by the Commerce Clause, which grants Congress power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Art. I, §8, cl. 3. From the beginning, it was understood that "[t]he power to regulate commerce, includes the power to regulate navigation," but only "as connected with the commerce with foreign nations, and among the states." *United States* v. *Coombs*, 12 Pet. 72, 78 (1838) (Story, J., for the Court); accord, *Gibbons* v. *Ogden*, 9 Wheat. 1, 190 (1824) ("All America understands . . . the word 'commerce,' to comprehend navigation. It was so un-

derstood, and must have been so understood, when the constitution was framed"); see also R. Barnett, The Original Meaning of the Commerce Clause, 68 U. Chi. L. Rev. 101, 125–126 (2001) (Barnett); R. Natelson, The Legal Meaning of "Commerce" in the Commerce Clause, 80 St. John's L. Rev. 789, 807–810 (2006). In fact, "shipping . . . was at that time the indispensable means for the movement of goods." Barnett 123. The Commerce Clause thus vests Congress with a limited authority over what we now call the "channels of interstate commerce." *United States* v. *Lopez*, 514 U. S. 549, 558–559 (1995); see also *American Trucking Assns., Inc.* v. *Los Angeles*, 569 U. S. 641, 656–657 (2013) (THOMAS, J., concurring).

This federal authority, however, does not displace States' traditional sovereignty over their waters. "The power to regulate commerce comprehends the control *for that purpose*, and to the extent necessary, of all the navigable waters of the United States which are accessible from a State other than those in which they lie." *Gilman* v. *Philadelphia*, 3 Wall. 713, 724–725 (1866) (emphasis added). And, traditionally, this limited authority was confined to regulation of the channels of interstate commerce themselves. *Corfield* v. *Coryell*, 6 F. Cas. 546, 550–551 (No. 3,230) (CC ED Pa. 1823) (Washington, J., for the Court). It encompassed only "the power to keep them open and free from any obstruction to their navigation" and "to remove such obstructions when they exist." *Gilman*, 3 Wall., at 725. Thus, any activity that "interferes with, obstructs, or prevents such commerce and navigation, though done on land, may be punished by congress." *Coombs*, 12 Pet., at 78. But, activities that merely "affect" water-based commerce, such as those regulated by "[i]nspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State," are not within Congress' channels-of-commerce authority. *Gibbons*, 9 Wheat., at 203; see also *Corfield*, 6 F. Cas., at 550.

This understanding of the limits of Congress' channels-of-commerce authority prevailed through the end of the 19th century. The Court's cases consistently recognized that Congress has authority over navigable waters for only the limited "purpose of regulating and improving navigation." *Gibson* v. *United States*, 166 U. S. 269, 271–272 (1897); see also *Port of Seattle* v. *Oregon & Washington R. Co.*, 255 U. S. 56, 63 (1921) ("The right of the United States in the navigable waters within the several States is limited to the control thereof for purposes of navigation"). And, this Court was careful to reaffirm that "technical title to the beds of the navigable rivers of the United States is either in the States in which the rivers are situated, or in the owners of the land bordering upon such rivers" as determined by "local law." *United States* v. *Chandler-Dunbar Water Power Co.*, 229 U. S. 53, 60 (1913).

The River and Harbor Acts of 1890, 1894, and 1899 illustrate the limits of the channels-of-commerce authority. The 1890 Act authorizes the Secretary of War to "prohibi[t]" "the creation of any obstruction, not affirmatively authorized by law, to the navigable capacity of any waters, in respect of which the United States has jurisdiction." §10, 26 Stat. 454. The 1894 Act made it unlawful to deposit matter into "any harbor or river of the United States" that the Federal Government has appropriated money to improve and prohibited injuring improvements built by the United States in "any of its navigable waters." §6, 28 Stat. 363.

Congress consolidated and expanded these authorities in the 1899 Act. Section 10 of the Act prohibits "[t]he creation of any obstruction . . . to the navigable capacity of any of the waters of the United States," requires a permit to build "structures in any . . . water of the United States," and makes it unlawful "to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity" of any water, "within the limits of any breakwater, or of the channel of any navigable water of the United States." 30

Stat. 1151 (codified, as amended, at 33 U. S. C. §403). In addition, §13 of the Act, sometimes referred to as the "Refuse Act," prohibits throwing, discharging, or depositing "any refuse matter . . . into any navigable water of the United States, or into any tributary of any navigable water from which the same shall float or be washed into such navigable water." 30 Stat. 1152 (codified, as amended, at 33 U. S. C. §407). Section 13 also prohibits depositing material "on the bank of any navigable water, or on the bank of any tributary of any navigable water, where the same shall be liable to be washed into such navigable water . . . whereby navigation shall or may be impeded or obstructed." *Ibid.*

Three things stand out about these provisions. First, they use the terms "navigable water," "water of the United States," and "navigable water of the United States" interchangeably. 33 U. S. C. §§403 and 407; see also V. Albrecht & S. Nickelsburg, Could *SWANCC* Be Right? A New Look at the Legislative History of the Clean Water Act, 32 Env. L. Rev. 11042, 11044 (2002) (Albrecht & Nickelsburg). As a result, courts have done the same in decisions interpreting the River and Harbor Acts. See, *e.g.*, *United States* v. *Stoeco Homes, Inc.*, 498 F. 2d 597, 608–609 (CA3 1974); *New England Dredging Co.* v. *United States*, 144 F. 932, 933–934 (CA1 1906); *Blake* v. *United States*, 181 F. Supp. 584, 587–588 (ED Va. 1960).

Second, Congress asserted its authority only to the extent that obstructions or refuse matter could impede navigation or navigable capacity. Thus, in *United States* v. *Rio Grande Dam & Irrigation Co.*, 174 U. S. 690 (1899), this Court recognized that any "act sought to be enjoined" under the 1890 Act must be "one which fairly and directly tends to obstruct (that is, interfere with or diminish) the navigable capacity of a stream." *Id.*, at 709; accord, *Lake Shore & Michigan Southern R. Co.* v. *Ohio*, 165 U. S. 365, 369 (1897) (holding

that federal jurisdiction over "navigable waters" was limited to preventing "interfering with commerce"). Similarly, in *Wisconsin* v. *Illinois*, 278 U. S. 367 (1929), this Court interpreted the 1899 Act in light of the constitutional prohibition on Congress "arbitrarily destroy[ing] or impair[ing] the rights of riparian owners by legislation which has no real or substantial relation to the control of navigation or appropriateness to that end." *Id.*, at 415.[1] The touchstone, thus, remained actual navigation.

Third, §13 of the Act requires some form of surface water connection between a tributary and traditionally navigable waters. See 33 U. S. C. §407 (prohibiting depositing refuse "into any tributary of any navigable water from which the same shall float or be washed into such navigable water"). To be sure, the Refuse Act also prohibits leaving refuse "on the bank of any navigable water, or on the bank of any tributary of any navigable water, where the same shall be liable to be washed into such navigable water." *Ibid.* But, this prohibition reflects nothing more than Congress' traditional authority to regulate acts done on land that directly impair the navigability of traditionally navigable waters. See *Rio Grande Dam & Irrigation Co.*, 174 U. S., at 708 (explaining that the Act reaches "any obstruction to the navigable capacity, and anything, wherever done or however

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[1] Courts had long carefully enforced limits on Congress' navigation authority in prosecutions brought under the Act of July 7, 1838, ch. 191, 5 Stat. 304 (Steamboat Acts of 1838), which prohibited the transportation of goods "upon the bays, lakes, rivers, or other navigable waters of the United States" by certain steamboats. See, *e.g.*, *The Seneca*, 27 F. Cas. 1021 (No. 16,251) (DC Wis. 1861); see also *The James Morrison*, 26 F. Cas. 579, 582 (No. 15,465) (DC Mo. 1846) (holding that the 1838 Act did not reach a ship whose "employment ha[d] no other than a remote connection with 'commerce or navigation among the several states;' no more connection than has the farmer who cultivates hemp, tobacco or cotton for a market in other states—the miner who digs and smelts lead—the manufacturer who manufactures for the same market, or the traveler who intends purchasing any of these articles").

done, . . . which tends to destroy the navigable capacity of one of the navigable waters of the United States"); see also *Northern Pacific R. Co.* v. *United States,* 104 F. 691, 693 (CA8 1900); *Coombs,* 12 Pet., at 78. It does not mean that the land itself is a navigable water.[2]

The history of federal regulation of navigable waters demonstrates that Congress' authority over navigation, as traditionally understood, was narrow but deep. It only applied to a discrete set of navigable waters and could only be used to keep those waters open for interstate commerce. See *Port of Seattle,* 255 U. S., at 63; *Rio Grande Dam & Irrigation Co.,* 174 U. S., at 709. Yet, where Congress had authority, it displaced the States' traditional sovereignty over their navigable waters and allowed Congress to regulate activities even on land that could directly cause obstructions to navigable capacity. *Gilman,* 3 Wall., at 724–725; *Coombs,* 12 Pet., at 78.

In light of the depth of this new federal power, it was carefully limited—mere "effects" on interstate commerce were not sufficient to trigger Congress' navigation authority. As one District Court presciently observed in interpreting the term "navigable waters of the United States" in the Steamboat Act of 1838:

> "To make a particular branch of commerce or trade within a state, a part of the commerce among the several states, it would not be sufficient that it was remotely connected with that commerce among the several states; for almost everything and every occupation and employment in life are remotely connected with

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[2]The early 20th century also saw the Reclamation Act of 1902, ch. 1093, 32 Stat. 388; Federal Power Act, ch. 285, 41 Stat. 1063; Oil Pollution Act, 1924, ch. 316, 43 Stat. 604; and Flood Control Act of 1936, ch. 688, 49 Stat. 1570, all of which relied on navigability. See Walston 724–726. Although the Acts were also designed to achieve incidental benefits such as pollution control, Congress located its authority in preserving navigation. *Ibid.*

> that commerce or navigation. And if congress has the right to regulate every employment or pursuit thus remotely connected with that commerce, of which they have the control, then it has the right to regulate nearly the entire business and employment of the citizens of the several states. . . . Yet, if congress has the power to regulate all these employments, and a thousand others equally connected with that commerce, then it can regulate nearly all the concerns of life, and nearly all the employments of the citizens of the several states; and the state governments might as well be abolished. It is not sufficient, then, that navigation, or trade, or business of any kind, within a state, be remotely connected, or, perhaps, connected at all with 'commerce with foreign nations, or among the several states, or with the Indian tribes,' it should be a part of that commerce, to authorize congress to regulate it." *The James Morrison*, 26 F. Cas. 579, 581 (No. 15,465) (DC Mo. 1846).

The Court's observation that "federal regulation was largely limited to ensuring that 'traditional navigable waters' . . . remained free of impediments," *ante*, at 2, thus does no more than reflect the original understanding of the federal authority over navigable waters.

B

As noted above, the scope of Congress' authority over waters was defined by the traditional concept of navigability, imported with significant modifications from the English common law.[3] Thus, Congress could regulate only "naviga-

[3]The English rule tied navigability to the ebb and flow of the tides, but began to be eroded in America as early as the Northwest Ordinance of 1787 due to the superior commercial capacity of American inland rivers. See *The Daniel Ball*, 10 Wall. 557, 563 (1871); *Propeller Genesee Chief* v. *Fitzhugh*, 12 How. 443, 454–457 (1852); see also *Economy Light & Power*

ble waters." Consistent with that backdrop, the term "navigable waters"—used interchangeably with "waters of the United States" and "navigable waters of the United States"—referred to the waters subject to Congress' traditional authority over navigable waters until the enactment of the CWA.

1

The term "navigable waters" has been in use since the founding to refer to the highways of commerce that were key to the Nation's development. Great cities like Philadelphia and St. Louis emerged at first as commercial ports along these navigable waters. The Framers recognized that "Providence has in a particular manner blessed" our country with "[a] succession of navigable waters" that "bind [the Nation] together; while the most noble rivers in the world, running at convenient distances, present [Americans] with highways for the easy communication of friendly aids and the mutual transportation and exchange of their various commodities." The Federalist No. 2, p. 38 (C. Rossiter ed. 1961) (J. Jay). These "vast rivers, stretching far inland" have been of "transcendent importance" to our Nation's economic expansion by forming "great highways" for commerce. L. Houck, Law of Navigable Rivers xiii (1868).

This Court authoritatively set out the scope of the term "navigable waters of the United States" in the seminal case of *The Daniel Ball*, 10 Wall. 557 (1871). That case arose under the Steamboat Act of 1838, which prohibited the transportation of goods "upon the bays, lakes, rivers, or other navigable waters of the United States." §2, 5 Stat.

Co. v. *United States*, 256 U. S. 113, 120 (1921) ("[I]t is curious and interesting that the importance of these inland waterways, and the inappropriateness of the tidal test in defining our navigable waters, was thus recognized by the Congress of the Confederation [in the Northwest Ordinance] more than 80 years before this court decided *The Daniel Ball* . . . and more than 60 years before *The Propeller Genesee Chief*").

304. This Court held that the term "navigable" refers to waters that are "navigable in fact," meaning that "they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water." *The Daniel Ball*, 10 Wall., at 563. The Court then explained that navigable waters are "of the United States," "in contradistinction from the navigable waters of the States, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water." *Ibid.*; see also *The Montello*, 11 Wall. 411, 415 (1871) ("If . . . the river is not of itself a highway for commerce with other States or foreign countries, or does not form such highway by its connection with other waters, and is only navigable between different places within the State, then it is not a navigable water of the United States, but only a navigable water of the State"). It is this "junction" between waters to "for[m] a continued highway for commerce, both with other States and with foreign countries," that brings the water "under the direct control of Congress in the exercise of its commercial power." *The Daniel Ball*, 10 Wall., at 564. The definition of a "navigable water of the United States" was thus linked directly to the limits on Congress' commerce authority: A navigable water of the United States was one that was ordinarily used for interstate or foreign commerce.

Wetlands were generally excluded from this definition. In *Leovy* v. *United States*, 177 U. S. 621 (1900), for example, the Court employed the *Daniel Ball* test to hold that the term "navigable waters of the United States," as used in the 1890 River and Harbor Act, did not "prevent the exercise by the State of Louisiana of its power to reclaim swamp and overflowed lands by regulating and controlling the current

of small streams not used habitually as arteries of interstate commerce." 177 U. S., at 632. The Court observed that applying the Act to wetlands reclamation "would extend the paramount jurisdiction of the United States over all the flowing waters in the States." *Id.*, at 633. "If such were the necessary construction of the" term "navigable water," the Court explained, the River and Harbor Act's "validity might well be questioned." *Ibid.* But, the Court declined to interpret the Act to reach the wetlands, because it recognized that the phrase "navigable waters of the United States" encompassed only those waters reached by the traditional channels-of-commerce authority:

> "When it is remembered that the source of the power of the general government to act at all in this matter arises out of its power to regulate commerce with foreign countries and among the States, it is obvious that what the Constitution and the acts of Congress have in view is the promotion and protection of commerce in its international and interstate aspect, and a practical construction must be put on these enactments as intended for such large and important purposes." *Ibid.*

The Court thus held that the mere use of a wetland by fishermen was not sufficient to make the wetland a navigable water of the United States; it "was not shown that passengers were ever carried through it, or that freight destined to any other State than Louisiana, or, indeed, destined for any market in Louisiana, was ever, much less habitually, carried through it." *Id.*, at 627.[4]

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[4] *Leovy* v. *United States* also reflected the law's longstanding hostility to wetlands: "If there is any fact which may be supposed to be known by everybody, and, therefore, by courts, it is that swamps and stagnant waters are the cause of malarial and malignant fevers, and that the police power is never more legitimately exercised than in removing such nuisances." 177 U. S., at 636. Traditionally, the only time wetlands were the subject of federal legislation was to aid the States in draining them.

The *Daniel Ball* test, with minor variations, marked the limits of federal jurisdiction over waters up to the enactment of the CWA. For instance, in *Economy Light & Power Co.* v. *United States*, 256 U. S. 113 (1921), the Court applied *The Daniel Ball* but expanded it to hold that the River and Harbor Act of 1899 reaches waters that are not currently capable of supporting interstate commerce, though they once did. 256 U. S., at 123–124. And, in *United States* v. *Appalachian Elec. Power Co.*, 311 U. S. 377 (1940), the Court applied *The Daniel Ball* to reach waters that could be made navigable with reasonable and feasible improvement. 311 U. S., at 408–409. While these cases expanded the outer boundaries of the term, creating an expanded form of the *Daniel Ball* test, they reflect the Court's longstanding view that the statutory term "navigable water" required application of the *Daniel Ball* test.

2

In the New Deal era, as is well known, this Court adopted a greatly expanded conception of Congress' commerce authority by permitting Congress to regulate any private intrastate activity that substantially affects interstate commerce, either by itself or when aggregated with many similar activities. See *Wickard* v. *Filburn*, 317 U. S. 111, 127–129 (1942); see also *United States* v. *Darby*, 312 U. S. 100, 119 (1941). Yet, this expansion did not fundamentally change the Court's understanding that the term "navigable waters" referred to waters used for interstate commerce. Thus, in *Appalachian Elec.*, the Court continued to apply the concept of navigability to determine the scope of Congress' Commerce Clause authority to require licenses under

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See, *e.g.*, Swamp Land Act of 1850, ch. 84, 9 Stat. 519; see also S. Johnson, Wetlands Law: A Course Source 25–26 (2d ed. 2018). Wetlands preservation only gained traction due, in large part, to advances in firearms technology that made waterfowl hunting feasible. G. Baldassarre & E. Bolen, Waterfowl Ecology and Management 10–14 (1994).

the Federal Water Power Act for the construction of hydroelectric dams in "navigable waters." 311 U. S., at 406–410. Only after applying the *Daniel Ball* definition to determine that the river in question was navigable did the Court hold that Congress had plenary authority over the erection of structures in the river, regardless of whether the structure actually impeded navigability. 311 U. S., at 423–426. While this represented an expansive application of the old concept that Congress can prevent obstructions to navigable capacity, see *supra*, at 4, 7–8, *Appalachian Elec.* made clear that the *term* "navigable waters" remained tethered to Congress' traditional channels-of-commerce authority—not to the broader conceptions of the commerce authority adopted by the Court at that time.

The next year, in *Oklahoma ex rel. Phillips* v. *Guy F. Atkinson Co.*, 313 U. S. 508 (1941), the Court reaffirmed that the term "navigable waters," this time as used in the Flood Control Act of 1936, was to be interpreted in light of the expanded *Daniel Ball* test. 313 U. S., at 522–525. Significantly, *Oklahoma* was decided mere months after *Darby*, one of the most significant cases expanding the scope of the commerce authority. 312 U. S., at 119. However, *Oklahoma* did not so much as mention *Darby* in construing the jurisdiction Congress conveyed in the term "navigable waters." Instead, it cited *Darby* only in passing and to support the argument that, once a river is deemed navigable under the channels-of-commerce authority, Congress has authority to protect "the nation's arteries of commerce" by regulating intrastate activities on nonnavigable parts and tributaries of the navigable river lest such activities "impai[r] navigation itself." *Oklahoma*, 313 U. S., at 525. This was nothing more than an application of the principle that Congress can regulate activities that obstruct navigable capacity. Thus, even as the Court expanded the Commerce Clause in other contexts, it continued to understand that the term "navigable waters" refers solely to the aquatic

channels of interstate commerce over which Congress traditionally exercised authority.

3

This understanding of the term "navigable waters"—*i.e.*, as shorthand for waters subject to Congress' authority under the *Daniel Ball* test—persisted up to the enactment of the CWA. See, *e.g.*, *Stoeco Homes, Inc.*, 498 F. 2d, at 608–609; *United States* v. *Joseph G. Moretti, Inc.*, 478 F. 2d 418, 428–429 (CA5 1973); see also D. Guinn, An Analysis of Navigable Waters of the United States, 18 Baylor L. Rev. 559, 579 (1966) ("[T]he test of *The Daniel Ball* and *Appalachian Power Co.* are religiously cited as being the basis for the holding on the issue of navigability"). As a court observed near the time of the CWA's enactment, "[a]lthough the definition of 'navigability' laid down in *The Daniel Ball* has subsequently been modified and clarified, its definition of 'navigable water of the United States,' insofar as it requires a navigable interstate linkage by water, appears to remain unchanged." *Hardy Salt Co.* v. *Southern Pacific Transp. Co.*, 501 F. 2d 1156, 1167 (CA10 1974) (citations omitted). This Court's cases, too, continued to apply traditional navigability concepts in cases under the River and Harbor Acts right up to the CWA's enactment. See *United States* v. *Standard Oil Co.*, 384 U. S. 224, 226 (1966) (holding that spilling oil in a navigable water was prohibited by the Refuse Act (§13 of the 1899 Act) because "its presence in our rivers and harbors is both a menace to navigation and a pollutant"); *United States* v. *Republic Steel Corp.*, 362 U. S. 482, 487–491 (1960) ("diminution of the navigable capacity of a waterway" required for violation of the Refuse Act). Thus, on the eve of the CWA's enactment, the term "navigable waters" meant those waters that are, were, or could be used as highways of interstate or foreign commerce.

II

This history demonstrates that Congress was not writing on a blank slate in the CWA, which defines federal jurisdiction using the same terms used in the River and Harbor Acts: "navigable waters" and "the waters of the United States," 33 U. S. C. §§1311(a), 1362(7), (12). As explained above, courts and Congress had long used the terms "navigable water," "navigable water of the United States," and "the waters of the United States" interchangeably to signify those waters to which the traditional channels-of-commerce authority extended. See *supra*, at 6. The terms "navigable waters" and "waters of the United States" shared a core requirement that the water be a "highway over which commerce is or may be carried," with the term "of the United States" doing the independent work of requiring that such commerce "be carried on with other States or foreign countries." *The Daniel Ball*, 10 Wall., at 563. The text of the CWA thus reflects the traditional balance between federal and state authority over navigable waters, as set out by *The Daniel Ball*. It would be strange indeed if Congress sought to effect a fundamental transformation of federal jurisdiction over water through phrases that had been in use to describe the traditional scope of that jurisdiction for well over a century and that carried a well-understood meaning.[5]

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[5]In fact, when Congress has wished to depart from this traditional meaning, it has done so expressly, as in parts of the Federal Power Act, §23, 41 Stat. 1075 (requiring approval for dam construction "across, along, over, or in any stream or part thereof, other than those defined herein this chapter as navigable waters"); the Federal Water Pollution Control Act, ch. 758, §2(a), 62 Stat. 1155 (as amended, 86 Stat. 816) (authorizing federal-state cooperation to abate water pollution in "interstate waters" and their tributaries); and the Water Quality Act of 1965, 79 Stat. 905–906 (authorizing grants to research abatement of pollution into "any waters"); see *Hardy Salt Co.* v. *Southern Pacific Transp. Co.*, 501 F. 2d 1156, 1168 (CA10 1974) (noting that Congress only departs from the expanded *Daniel Ball* test by using "clear and explicit language," as it did in parts of the Federal Power Act).

The Army Corps of Engineers originally understood the CWA in precisely this way. In its 1974 regulation establishing the first CWA §404 permitting program,[6] the Corps interpreted the term "the waters of the United States" to establish jurisdiction over the traditional navigable waters as determined by the expanded *Daniel Ball* test, noting also that the term is limited by Congress' navigation authority. 39 Fed. Reg. 12115. The Corps anchored its jurisdiction in the expanded *Daniel Ball* test, defining "navigable waters" to include "those waters of the United States which are subject to the ebb and flow of the tide, and/or are presently, or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce." 33 CFR §209.120(d)(1) (1974); see also §§209.260(d)(1)–(3) (requiring "[p]ast, present, or potential presence of interstate or foreign commerce," "[p]hysical capabilities for use by commerce," and "[d]efined geographic limits of the water body"). The regulations also made clear that traditional navigability factors were the baseline for CWA jurisdiction: "It is the water body's capability of use by the public for purposes of transportation or commerce which is the determinative factor." §209.260(e)(1).

Almost immediately, however, a few courts and the recently created Environmental Protection Agency (EPA) rejected this interpretation. Instead, they interpreted the CWA to assert the full extent of Congress' New Deal era authority to regulate anything that substantially affects interstate commerce by itself or in the aggregate. See *United States* v. *Ashland Oil & Transp. Co.*, 504 F. 2d 1317, 1323–1329 (CA6 1974); *P. F. Z. Properties, Inc.* v. *Train*, 393 F. Supp. 1370, 1381 (DC 1975); *National Resource Defense Council, Inc.* v. *Callaway*, 392 F. Supp. 685, 686 (DC 1975);

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[6] Section 404 authorizes the Corps to "issue permits . . . for the discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 U. S. C. §§1344(a), (d).

United States v. *Holland*, 373 F. Supp. 665, 669, 672–674 (MD Fla. 1974); 40 CFR §125.1(o) (1974) (initial EPA CWA definition). The courts that reached this conclusion relied almost exclusively on legislative history and statutory purpose. See, *e.g.*, *Holland*, 373 F. Supp., at 672 ("The foregoing [legislative history] compels the Court to conclude that the former test of navigability was indeed defined away in the [CWA]"). But signals from legislative history cannot rebut clear statutory text, and the text of the CWA employs words that had long been universally understood to reach only those waters subject to Congress' channels-of-commerce authority. See *supra*, at 15.

These courts and the EPA had only one textual hook for their interpretation: In defining the term "navigable waters" as "the waters of the United States," the CWA seemed to drop the term "navigable" from the operative part of the definition. Seizing on this phrasing, the EPA's general counsel asserted in 1973 that "the deletion of the word 'navigable' eliminates the requirement of navigability. The only remaining requirement, then, is that pollution of waters covered by the bill must be capable of affecting interstate commerce." 1 EPA Gen. Counsel Op. 295 (1973). Similarly, the District Court that vacated the Corps' original CWA definition held, without any analysis or citation, that the term "the waters of the United States" in the CWA is "not limited to the traditional tests of navigability." *National Resource Defense Council*, 392 F. Supp., at 671.

That interpretation cannot be right. For one, the terms "navigable waters" and "the waters of the United States" had long been used synonymously by courts and Congress. The CWA simply used the terms in the same manner as the River and Harbor Acts. Moreover, no source prior to the CWA had ever asserted that the term "the waters of the United States," when not modified by "navigable," reached any water that may affect interstate commerce. Instead, *The Daniel Ball* made clear that "[t]he phrase 'waters of the

United States, in contradistinction from the navigable waters of the States,' . . . distinguishes interstate from intrastate waters." Albrecht & Nickelsburg 11049 (quoting *The Daniel Ball*, 10 Wall., at 563); accord, 1 A. Knauth, Benedict on Admiralty §44, p. 96 (6th ed. 1940) ("The inland lakes of various States are navigable but, having no navigable outlet linking them with our system of water-ways, have never been held to be public *waters of the United States*" (emphasis added)). The text of the CWA extends jurisdiction to "navigable waters," and—precisely tracking *The Daniel Ball*—clarifies that it reaches "the waters of the United States," rather than the navigable waters of the States.

Thus, the CWA's use of the phrase "the waters of the United States" reinforces, rather than lessens, the need for a water to be at least part of "a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water." *The Daniel Ball*, 10 Wall., at 563. At most, the omission of the word "navigable" signifies that the CWA adopts the expanded *Daniel Ball* test—that includes waters that are, have been, or can be reasonably made navigable in fact—in its statutory provisions. The Federal Government's interpretation, by contrast, renders the use of the term "navigable" a nullity and involves an unprecedented and extravagant reading of the well-understood term of art "the waters of the United States." See Albrecht & Nickelsburg 11049 ("EPA's conclusion is ahistorical as well as illogical").[7] "*[T]he* waters *of* the

[7]To be sure, the CWA is more aggressive in regulating navigable waters than the River and Harbor Acts. But, the increased stringency is not accomplished by expanding jurisdiction. The Acts use the same jurisdictional terms. Instead, the difference between them lies in the expanded scope of activities that the CWA regulates and its shift from an enforcement and injunctive regime to a previolation licensing regime. See Albrecht & Nickelsburg 11046. I express no view on the constitutionality of this regime as applied to navigable waters or on the Court's holding in *United States* v. *Appalachian Elec. Power Co.*, 311 U. S. 377

United States" does not mean *any* water *in* the United States.

There would be little need to explain any of this if the agencies had not effectively flouted our decision in *SWANCC*, which restored navigability as the touchstone of federal jurisdiction under the CWA, and rejected the key arguments supporting an expansive interpretation of the CWA's text. We expressly held that Congress' "use of the phrase 'waters of the United States'" in the CWA is not "a basis for reading the term 'navigable waters' out of the statute"—directly contradicting the EPA's 1973 interpretation, upon which every subsequent expansion of its authority has been based. 531 U. S., at 172. We also held that the Corps did not "mist[ake] Congress' intent" when it promulgated its 1974 regulations, under which "'the determinative factor'" for navigability was a "'water body's capability of use by the public for purposes of transportation or commerce.'" *Id.*, at 168 (quoting 33 CFR §209.260(e)(1)). In doing so, we rejected reliance on the CWA's "ambiguous" legislative history, which the EPA had used "to expand the definition of 'navigable waters'" to the outer limit of the commerce authority as interpreted in the New Deal. 531 U. S., at 168, n. 3.[8] Instead, we made clear that Congress did not intend

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(1940), that Congress can regulate things in navigable waters for purposes other than removing obstructions to navigable capacity. I note, however, that before the New Deal era, courts consistently construed statutes to authorize only federal actions preserving navigable capacity in order to avoid exceeding Congress' navigation authority. See *supra*, at 8–13.

[8]The historical context demonstrates that it was the Corps' failure to regulate to the full extent of Congress' navigation power, not its commerce power generally, that led to the enactment of the CWA. See Albrecht & Nickelsburg, 11047 (explaining that the CWA's legislative history is better interpreted "as the Supreme Court in *SWANCC* read it, to mean simply that Congress intended to override previous, unduly narrow agency interpretations to assert its broadest constitutional authority over *the traditional navigable waters*"); see also S. Bodine, Examining the Term "Waters of the United States" in Its Historical Context, C.

"to exert anything more than its commerce power over navigation." *Ibid.*; see also *id.*, at 173 (rejecting the Government's argument that the CWA invokes "Congress' power to regulate intrastate activities that 'substantially affect' interstate commerce").

SWANCC thus interpreted the text of the CWA as implementing Congress' "traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made"—*i.e.*, the expanded *Daniel Ball* test. 531 U. S., at 172 (citing *Appalachian Elec.*, 311 U. S., at 407–408).[9] And, consistent with the traditional link between navigability and the limits of Congress' regulatory

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Boyden Gray Center for the Study of the Administrative State Policy Brief No. 4 (2022).

[9]Section 404(g), added by the 1977 CWA Amendments, does not demonstrate that the CWA departs from traditional conceptions of navigability. That provision states that States may administer permit programs for discharges into "navigable waters (other than those waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce . . . , including wetlands adjacent thereto)." 91 Stat. 1601 (codified, as amended, at 33 U. S. C. §1344(g)). This provision thus authorizes States to establish their own permit programs over a discrete class of traditionally navigable waters of the United States: those that once were navigable waters of the United States, but are no longer navigable in fact. See *Economy Light & Power Co.*, 256 U. S., at 123–124. Some have asserted that this nonjurisdictional provision—the function of which in the statute is to *expand* state authority—signals that Congress actually intended an unprecedented expansion of federal authority over the States. *Rapanos* v. *United States*, 547 U. S. 715, 805–806 (2006) (Stevens, J., dissenting); see also *post*, at 3–5 (KAVANAUGH, J., concurring in judgment); *post*, at 1–3 (KAGAN, J., concurring in judgment). But, as the Court explains, not only is §404(g) not the relevant definitional provision, its reference to "wetlands" is perfectly consistent with the commonsense recognition that some wetlands are indistinguishable from navigable waters with which they have continuous surface connections. *Ante*, at 18–22, 27. To infer Congress' intent to upend over a century of settled understanding and effect an unprecedented transfer of authority over land and water to the Federal Government, based on nothing more

authority, *SWANCC* noted that any broader interpretation would raise "significant constitutional and federalism questions" and "result in a significant impingement of the States' traditional and primary authority over land and water use." 531 U. S., at 174. Both in its holdings and in its mode of analysis, *SWANCC* cannot be reconciled with the agencies' sharp departure from the centuries-old understanding of navigability and the traditional limits of Congress' channels-of-commerce authority.

In sum, the plain text of the CWA and our opinion in *SWANCC* demonstrate that the CWA must be interpreted in light of Congress' traditional authority over navigable waters. See Albrecht & Nickelsburg 11055 (noting that *SWANCC* "states more than once that Congress' use of the term 'navigable waters' signifies that Congress intended to exercise its traditional authority over navigable waters, and not its broader power over all things that substantially affect commerce"). Yet, for decades, the EPA (of its own license) and the Corps (under the compulsion of an unreasoned and since discredited District Court order) have issued substantively identical regulatory definitions of "the waters of the United States" that completely ignore navigability and instead expand the CWA's coverage to the outer limits of the Court's New Deal-era Commerce Clause precedents.

III

This case demonstrates the unbounded breadth of the jurisdiction that the EPA and the Corps have asserted under the CWA. The regulatory definition applied to the Sacketts' property declares "intrastate" waters, wetlands, and various other wet things to be "waters of the United States" if their "use, degradation or destruction . . . *could affect* inter-

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than a negative inference from a parenthetical in a subsection that preserves state authority, is counterintuitive to say the least.

state or foreign commerce." 40 CFR §230.3(s)(3) (2008) (emphasis added). To leave no doubt that the agencies have entirely broken from traditional navigable waters, they give several examples of qualifying waters: those that "are or could be used by interstate or foreign travelers for recreational or other purposes," those "[f]rom which fish or shellfish are or could be taken and sold in interstate or foreign commerce," those that "are used or could be used for industrial purposes by industries in interstate commerce," "[t]ributaries of" any such waters, and "[w]etlands adjacent to" any such waters. §§230.3(s)(3)(i)–(iii), (5), (7). This definition and others like it are premised on the fallacy repudiated in *SWANCC*: that the text of the CWA expands federal jurisdiction beyond Congress' traditional "commerce power over navigation." 531 U. S., at 168, n. 3.

Nonetheless, under these boundless standards, the agencies have "asserted jurisdiction over virtually any parcel of land containing a channel or conduit . . . through which rainwater or drainage may occasionally or intermittently flow," including "storm drains, roadside ditches, ripples of sand in the desert that may contain water once a year, and lands that are covered by floodwaters once every 100 years." *Rapanos*, 547 U. S., at 722 (plurality opinion). The agencies' definition "engulf[s] entire cities and immense arid wastelands" alike. *Ibid.* Indeed, because "the entire land area of the United States lies in some drainage basin, and an endless network of visible channels furrows the entire surface," "any plot of land containing such a channel may potentially be regulated." *Ibid.*

If this interpretation were correct, the only prudent move for any landowner in America would be to ask the Federal Government for permission before undertaking any kind of development. See Tr. of Oral Arg. 86, 116–117. This regime turns Congress' traditionally limited navigation authority on its head. The baseline under the Constitution, the CWA, and the Court's precedents is state control of waters. See

SWANCC, 531 U. S., at 174 (reaffirming "the States' traditional and primary power over land and water use"); *Leovy*, 177 U. S., at 633 (repudiating an interpretation of the 1899 Act that would render practically every "creek or stream in the entire country" a "navigable water of the United States" and "subject the officers and agents of a State . . . to fine and imprisonment" for draining a swamp "unless permission [was] first obtained from the Secretary of War"). By contrast, the agencies' interpretation amounts to a federal police power, exercised in the most aggressive possible way.

Thankfully, applying well-established navigability rules makes this a straightforward case. The "wetlands" on the Sacketts' property are not "waters of the United States" for several independently sufficient reasons. First, for the reasons set out by the Court, the Sacketts' wetlands are not "waters" because they lack a continuous surface connection with a traditional navigable water. See *ante*, at 27. Second, the nonnavigable so-called "tributary" (really, a roadside ditch) across the street from the Sacketts' property is not a water of the United States because it is not, has never been, and cannot reasonably be made a highway of interstate or foreign commerce. See *SWANCC*, 531 U. S., at 172. Third, the agencies have not attempted to establish that Priest Lake is a navigable water under the expanded *Daniel Ball* test. The lake is purely intrastate, and the agencies have not shown that it is a highway of interstate or foreign commerce. Instead, the agencies rely primarily upon interstate tourism and the lake's attenuated connection to navigable waters. See U. S. Army Corps of Engineers, G. Rayner, Priest Lake Jurisdictional Determination (Feb. 27, 2007); see also Brief for National Association of Home Builders of the United States as *Amicus Curiae* 21–24. But, this is likely insufficient under the traditional navigability tests to which the CWA pegs jurisdiction. See *supra*, at 10–13; accord, Tr. of Oral Arg. 119 (EPA counsel conceding that Congress "hasn't used its full Commerce Clause authority" in

the CWA). Finally, even assuming that a navigable water is involved, the agencies have not established that the Sacketts' actions would obstruct or otherwise impede navigable capacity or the suitability of the water for interstate commerce. See *Rio Grande Dam & Irrigation Co.*, 174 U. S., at 709.

This is not to say that determining whether a water qualifies under the CWA is *always* easy. But, it is vital that we ask the right question in determining what constitutes "the waters of the United States": whether the water is within Congress' traditional authority over the interstate channels of commerce. Here, no elaborate analysis is required to know that the Sacketts' *land* is not a *water*, much less a water of the United States.

IV

What happened to the CWA is indicative of deeper problems with the Court's Commerce Clause jurisprudence. The eclipse of Congress' well-defined authority over the channels of interstate commerce tracks the Court's expansion of Congress' power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Art. I, §8, cl. 3. As I have explained at length, the Court's Commerce Clause jurisprudence has significantly departed from the original meaning of the Constitution. See *Gonzales* v. *Raich*, 545 U. S. 1, 58–59 (2005) (dissenting opinion); *Lopez*, 514 U. S., at 586–602 (concurring opinion). "The Clause's text, structure, and history all indicate that, at the time of the founding, the term '"commerce" consisted of selling, buying, and bartering, as well as transporting for these purposes.'" *Raich*, 545 U. S., at 58. This meaning "stood in contrast to productive activities like manufacturing and agriculture," and founding era sources demonstrate that "the term 'commerce' [was] consistently used to mean trade or exchange—not all economically gainful activity that has some attenuated connection

to trade or exchange." *Ibid.* (citing *Lopez*, 514 U. S., at 586–587 (THOMAS, J., concurring); Barnett 112–125).[10] By departing from this limited meaning, the Court's cases have licensed federal regulatory schemes that would have been "unthinkable" to the Constitution's Framers and ratifiers. *Raich*, 545 U. S., at 59 (opinion of THOMAS, J.).

Perhaps nowhere is this deviation more evident than in federal environmental law, much of which is uniquely dependent upon an expansive interpretation of the Commerce Clause. See *Hodel* v. *Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U. S. 264, 281–283 (1981); see also Brief for Claremont Institute's Center for Constitutional Jurisprudence as *Amicus Curiae* 17–25. And many environmental regulatory schemes seem to push even the limits of the Court's New Deal era Commerce Clause precedents, see *Hodel*, 452 U. S., at 309–313 (Rehnquist, J., concurring in judgment), to say nothing of the Court's more recent precedents reining in the commerce power. See, *e.g.*, *SWANCC*, 531 U. S., at 173–174; cf. *Rancho Viejo, LLC* v. *Norton*, 334 F. 3d 1158, 1160 (CADC 2003) (Roberts, J., dissenting from denial of rehearing en banc) ("The panel's approach in this case leads to the result that regulating the taking [under the Endangered Species Act] of a hapless toad that, for reasons of its own, lives its entire life in California constitutes regulating 'Commerce among the several States'" (ellipsis omitted)).

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[10] Further scholarship notes that the term "commerce" as originally understood "was bound tightly with the *Lex Mercatoria* and the sort of activities engaged in by merchants: buying and selling products made by others (and sometimes land), associated finance and financial instruments, navigation and other carriage, and intercourse across jurisdictional lines." R. Natelson, The Legal Meaning of "Commerce" in the Commerce Clause, 80 St. John's L. Rev. 789, 845 (2006). This "did not include agriculture, manufacturing, mining, *malum in se* crime, or land use. Nor did it include activities that merely 'substantially affected' commerce; on the contrary, the cases included wording explicitly distinguishing such activities from commerce." *Ibid.*

The Court's opinion today curbs a serious expansion of federal authority that has simultaneously degraded States' authority and diverted the Federal Government from its important role as guarantor of the Nation's great commercial water highways into something resembling "a local zoning board." *Rapanos*, 547 U. S., at 738 (plurality opinion). But, wetlands are just the beginning of the problems raised by the agencies' assertion of jurisdiction in this case. Despite our clear guidance in *SWANCC* that the CWA extends only to the limits of Congress' traditional jurisdiction over navigable waters, the EPA and the Corps have continued to treat the statute as if it were based on New Deal era conceptions of Congress' commerce power. But, while not all environmental statutes are so textually limited, Congress chose to tether federal jurisdiction under the CWA to its traditional authority over navigable waters. The EPA and the Corps must respect that decision.

SUPREME COURT OF THE UNITED STATES

No. 21–454

MICHAEL SACKETT, ET UX., PETITIONERS *v.* ENVIRONMENTAL PROTECTION AGENCY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[May 25, 2023]

JUSTICE KAGAN, with whom JUSTICE SOTOMAYOR and JUSTICE JACKSON join, concurring in the judgment.

Like JUSTICE KAVANAUGH, "I would stick to the text." *Post*, at 14 (opinion concurring in judgment). As he explains in the principal concurrence, our normal method of construing statutes identifies which wetlands the Clean Water Act covers—and the answer provided exceeds what the Court says today. Because the Act covers "the waters of the United States," and those waters "includ[e]" all wetlands "adjacent" to other covered waters, the Act extends to those "adjacent" wetlands. 33 U. S. C. §§1362(7), 1344(g)(1). And in ordinary language, one thing is adjacent to another not only when it is touching, but also when it is nearby. See *post*, at 4–5 (quoting multiple dictionaries). So, for example, one house is adjacent to another even when a stretch of grass and a picket fence separate the two. As applied here, that means—as the EPA and Army Corps have recognized for almost half a century—that a wetland comes within the Act if (i) it is "contiguous to or bordering a covered water, *or* (ii) if [it] is separated from a covered water only by a man-made dike or barrier, natural river berm, beach dune, or the like." *Post*, at 14 (emphasis in original). In excluding all the wetlands in category (ii), the majority's "'continuous surface connection' test disregards the ordinary meaning of

'adjacent.'" *Post,* at 9. The majority thus alters—more precisely, narrows the scope of—the statute Congress drafted.

And make no mistake: Congress wrote the statute it meant to. The Clean Water Act was a landmark piece of environmental legislation, designed to address a problem of "crisis proportions." R. Adler, J. Landman, & D. Cameron, The Clean Water Act: 20 Years Later 5 (1993). How bad was water pollution in 1972, when the Act passed? Just a few years earlier, Ohio's Cuyahoga River had "burst into flames, fueled by oil and other industrial wastes." *Ibid.* And that was merely one of many alarms. Rivers, lakes, and creeks across the country were unfit for swimming. Drinking water was full of hazardous chemicals. Fish were dying in record numbers (over 40 million in 1969); and those caught were often too contaminated to eat (with mercury and DDT far above safe levels). See *id.*, at 5–6. So Congress embarked on what this Court once understood as a "total restructuring and complete rewriting" of existing water pollution law. *Milwaukee* v. *Illinois,* 451 U. S. 304, 317 (1981) (internal quotation marks omitted). The new Act established "a self-consciously comprehensive" and "all-encompassing program of water pollution regulation." *Id.*, at 318–319. Or said a bit differently, the Act created a program broad enough to achieve the codified objective of "restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation's waters." §1251(a). If you've lately swum in a lake, happily drunk a glass of water straight from the tap, or sat down to a good fish dinner, you can appreciate what the law has accomplished.

Vital to the Clean Water Act's project is the protection of wetlands—both those contiguous to covered waters and others nearby. As this Court (again, formerly) recognized, wetlands "serve to filter and purify water draining into adjacent bodies of water, and to slow the flow of surface runoff into lakes, rivers, and streams." *United States* v. *Riverside Bayview Homes, Inc.,* 474 U. S. 121, 134 (1985) (citation

omitted). Wetlands thus "function as integral parts of the aquatic environment"—protecting neighboring water if themselves healthy, imperiling neighboring water if instead degraded. *Id.*, at 135. At the same time, wetlands play a crucial part in flood control (if anything, more needed now than when the statute was enacted). And wetlands perform those functions, as JUSTICE KAVANAUGH explains, not only when they are touching a covered water but also when they are separated from it by a natural or artificial barrier—say, a berm or dune or dike or levee. See *post*, at 12–13 (giving examples). Those barriers, as he says, "do not block all water flow," and in fact are usually evidence of a significant connection between the wetland and the water. *Ibid.* Small wonder, then, that the Act—as written, rather than as read today—covers wetlands with that kind of connection. Congress chose just the word needed to meet the Act's objective. A wetland is protected when it is "adjacent" to a covered water—not merely when it is "adjoining" or "contiguous" or "touching," or (in the majority's favorite made-up locution) has a "continuous surface connection." See, *e.g.*, *ante*, at 27.

Today's majority, though, believes Congress went too far. In the majority's view, the Act imposes unjustifiably "crushing consequences" for violations of its terms. *Ante*, at 3. And many of those violations, it thinks, are of no real concern, arising from "mundane" land-use conduct "like moving dirt." *Ante*, at 13. Congress, the majority scolds, has unleashed the EPA to regulate "swimming pools[] and puddles," wreaking untold havoc on "a staggering array of landowners." *Ante*, at 1, 13. Surely something has to be done; and who else to do it but this Court? It must rescue property owners from Congress's too-ambitious program of pollution control.

So the majority shelves the usual rules of interpretation—reading the text, determining what the words used there mean, and applying that ordinary understanding

even if it conflicts with judges' policy preferences. The majority's first pass through the statute is, as JUSTICE KAVANAUGH says, "unorthodox." *Post*, at 9. "A minus B, which includes C"? *Ante*, at 19. The majority could use every letter of the alphabet, and graduate to quadratic equations, and still not solve its essential problem. As the majority concedes, the statute "tells us that at least some wetlands must qualify as 'waters of the United States.'" *Ante*, at 18–19. More, the statute tells us what those "some wetlands" are: the "adjacent" ones. And again, as JUSTICE KAVANAUGH shows, "adjacent" does not mean adjoining. See *post*, at 4–6; *supra*, at 1–2. So the majority proceeds to its back-up plan. It relies as well on a judicially manufactured clear-statement rule. When Congress (so says the majority) exercises power "over private property"—particularly, over "land and water use"—it must adopt "exceedingly clear language." *Ante*, at 23 (internal quotation marks omitted). There is, in other words, a thumb on the scale for property owners—no matter that the Act (*i.e.*, the one Congress enacted) is all about stopping property owners from polluting. See *supra*, at 2.

Even assuming that thumb's existence, the majority still would be wrong. As JUSTICE KAVANAUGH notes, clear-statement rules operate (when they operate) to resolve problems of ambiguity and vagueness. See *post*, at 11; see also *Bond* v. *United States*, 572 U. S. 844, 859 (2014); *United States* v. *Bass*, 404 U. S. 336, 347 (1971). And no such problems are evident here. One last time: "Adjacent" means neighboring, whether or not touching; so, for example, a wetland is adjacent to water on the other side of a sand dune. That congressional judgment is as clear as clear can be—which is to say, as clear as language gets. And so a clear-statement rule must leave it alone. The majority concludes otherwise because it is using its thumb not to resolve ambiguity or clarify vagueness, but instead to "correct" breadth. Those paying attention have seen this move

before—actually, just last Term. In another case of environmental regulation (involving clean air), the Court invoked another clear-statement rule (the so-called major questions doctrine) to diminish another plainly expansive term ("system of emission reduction"). See *West Virginia* v. *EPA*, 597 U. S. ___, ___, ___ (2022) (slip op., at 2, 19). "[C]ontra the majority," I said then, "a broad term is not the same thing as a 'vague' one." *Id.*, at ___ (dissenting opinion) (slip op., at 8). And a court must treat the two differently. A court may, on occasion, apply a clear-statement rule to deal with statutory vagueness or ambiguity. But a court may not rewrite Congress's plain instructions because they go further than preferred. That is what the majority does today in finding that the Clean Water Act excludes many wetlands (clearly) "adjacent" to covered waters.

And still more fundamentally, why ever have a thumb on the scale against the Clean Water Act's protections? The majority first invokes federalism. See *ante*, at 23–24. But as JUSTICE KAVANAUGH observes, "the Federal Government has long regulated the waters of the United States, including adjacent wetlands." *Post*, at 11. The majority next raises the specter of criminal penalties for "indeterminate" conduct. See *ante*, at 24–25. But there is no peculiar indeterminacy in saying—as regulators have said for nearly a half century—that a wetland is covered *both* when it touches a covered water *and* when it is separated by only a dike, berm, dune, or similar barrier. (That standard is in fact more definite than a host of criminal laws I could name.) Today's pop-up clear-statement rule is explicable only as a reflexive response to Congress's enactment of an ambitious scheme of environmental regulation. It is an effort to cabin the anti-pollution actions Congress thought appropriate. See *ante*, at 23 (complaining about Congress's protection of "vast" and "staggering" "additional area"). And that, too, recalls last Term, when I remarked on special canons "magically appearing as get-out-of-text-free cards"

to stop the EPA from taking the measures Congress told it to. See *West Virginia*, 597 U. S., at ___–___ (dissenting opinion) (slip op., at 28–29). There, the majority's non-textualism barred the EPA from addressing climate change by curbing power plant emissions in the most effective way. Here, that method prevents the EPA from keeping our country's waters clean by regulating adjacent wetlands. The vice in both instances is the same: the Court's appointment of itself as the national decision-maker on environmental policy.

So I'll conclude, sadly, by repeating what I wrote last year, with the replacement of only a single word. "[T]he Court substitutes its own ideas about policymaking for Congress's. The Court will not allow the Clean [Water] Act to work as Congress instructed. The Court, rather than Congress, will decide how much regulation is too much." *Id.*, at ___ (slip op., at 32). Because that is not how I think our Government should work—more, because it is not how the Constitution thinks our Government should work—I respectfully concur in the judgment only.

SUPREME COURT OF THE UNITED STATES

No. 21–454

MICHAEL SACKETT, ET UX., PETITIONERS *v.* ENVIRONMENTAL PROTECTION AGENCY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[May 25, 2023]

JUSTICE KAVANAUGH, with whom JUSTICE SOTOMAYOR, JUSTICE KAGAN, and JUSTICE JACKSON join, concurring in the judgment.

The Clean Water Act generally prohibits dumping dredged or fill material without a permit into the "waters of the United States." 33 U. S. C. §§1311(a), 1344(a), 1362. The "waters of the United States" include wetlands that are "adjacent" to waters covered by the Act—for example, wetlands that are adjacent to covered rivers or lakes. §§1344(g), 1362(7). The question in this case is whether the wetlands on the Sacketts' residential property are adjacent to covered waters and therefore covered under the Act.

The Ninth Circuit held that the wetlands on the Sacketts' property are covered by the Clean Water Act because, as relevant here, the wetlands have a "significant nexus" to covered waters nearby. 8 F. 4th 1075, 1093 (2021). The Court today reverses the Ninth Circuit's judgment.

I agree with the Court's reversal of the Ninth Circuit. In particular, I agree with the Court's decision not to adopt the "significant nexus" test for determining whether a wetland is covered under the Act. And I agree with the Court's bottom-line judgment that the wetlands on the Sacketts'

property are not covered by the Act and are therefore not subject to permitting requirements.

I write separately because I respectfully disagree with the Court's new test for assessing when wetlands are covered by the Clean Water Act. The Court concludes that wetlands are covered by the Act only when the wetlands have a "continuous surface connection" to waters of the United States—that is, when the wetlands are "adjoining" covered waters. *Ante,* at 20, 22 (internal quotation marks omitted). In my view, the Court's "continuous surface connection" test departs from the statutory text, from 45 years of consistent agency practice, and from this Court's precedents. The Court's test narrows the Clean Water Act's coverage of "adjacent" wetlands to mean only "adjoining" wetlands. But "adjacent" and "adjoining" have distinct meanings: Adjoining wetlands are contiguous to or bordering a covered water, whereas adjacent wetlands include both (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. By narrowing the Act's coverage of wetlands to only adjoining wetlands, the Court's new test will leave some long-regulated adjacent wetlands no longer covered by the Clean Water Act, with significant repercussions for water quality and flood control throughout the United States. Therefore, I respectfully concur only in the Court's judgment.

I

The Clean Water Act generally prohibits dumping a "pollutant"—including dredged or fill material—into "navigable waters" without a permit. 33 U. S. C. §§1311(a), 1344(a), 1362. The Act defines "navigable waters" as "the waters of the United States, including the territorial seas." §1362(7).

As the Court today ultimately agrees, see *ante,* at 19, and

the Sacketts acknowledge, see Tr. of Oral Arg. 7–8, 33–34, 56–57, the statutory term "waters of the United States" covers wetlands "adjacent" to waters of the United States—for example, wetlands adjacent to a river or lake that is itself a water of the United States. 33 U. S. C. §1344(g).

As enacted in 1972, the Clean Water Act protected "the waters of the United States." §§1311(a), 1362(7), 1362(12). In 1975, the Army Corps interpreted "waters of the United States" to include wetlands "adjacent to other navigable waters." 40 Fed. Reg. 31324. In 1977, Congress expressly adopted that same understanding of the Act, amending the Act to make clear that only the Federal Government, and not the States, may issue Clean Water Act permits for dumping dredged or fill material into certain "waters of the United States," "including wetlands adjacent" to those covered waters. Clean Water Act, 91 Stat. 1601; 33 U. S. C. §1344(g). In that 1977 Act, Congress thus expressly recognized "adjacent wetlands" as "waters of the United States."

Interpreting the text of the Act as amended in 1977, this Court has long held that the Act covers "adjacent" wetlands. See *United States* v. *Riverside Bayview Homes, Inc.*, 474 U. S. 121, 134–135, 138 (1985) ("Congress expressly stated that the term 'waters' included adjacent wetlands."); see also *Rapanos* v. *United States*, 547 U. S. 715, 742 (2006) (plurality opinion) (wetlands that "are 'adjacent to'" waters of the United States are "covered by the Act"); *Solid Waste Agency of Northern Cook Cty.* v. *Army Corps of Engineers*, 531 U. S. 159, 167, 172 (2001) (recognizing "Congress' unequivocal" "approval of, the Corps' regulations interpreting the [Act] to cover wetlands adjacent to navigable waters"). The Court has also ruled that the Act's coverage of adjacent wetlands does not extend to "isolated" wetlands. *Id.*, at 168–172.

So the question here becomes the meaning of "adjacent" wetlands under the Clean Water Act. As a matter of

ordinary meaning and longstanding agency practice, a wetland is "adjacent" to a covered water (i) if the wetland is adjoining—that is, contiguous to or bordering—a covered water—*or* (ii) if the wetland is separated from a covered water only by a man-made dike or barrier, natural river berm, beach dune, or the like.

The Court and I agree that wetlands in the first category—that is, wetlands adjoining a covered water—are covered as adjacent wetlands. *Ante,* at 19–22. But the Court and I disagree about the second category—that is, wetlands separated from a covered water only by a man-made dike or barrier, natural river berm, beach dune, or the like. The Court concludes that wetlands in that second category are not covered as adjacent wetlands because those wetlands do not have a continuous surface connection to a covered water—in other words, those wetlands are not adjoining the covered water. I disagree because the statutory text ("adjacent") does not require a continuous surface connection between those wetlands and covered waters.

The ordinary meaning of the term "adjacent" has not changed since Congress amended the Clean Water Act in 1977 to expressly cover "wetlands adjacent" to waters of the United States. 91 Stat. 1601; 33 U. S. C. §1344(g). Then as now, "adjacent" means lying near or close to, neighboring, or not widely separated. Indeed, the definitions of "adjacent" are notably explicit that two things need not touch each other in order to be adjacent. "Adjacent" includes "adjoining" but is not limited to "adjoining." See, *e.g.,* Black's Law Dictionary 62 (rev. 4th ed. 1968) (defining "adjacent" as "Lying near or close to; sometimes, contiguous; neighboring; . . . may not actually touch"); Black's Law Dictionary 50 (11th ed. 2019) (defining "adjacent" as "Lying near or close to, but not necessarily touching"); see also, *e.g.,* Webster's Third New International Dictionary 26 (1976) (defining "adjacent" as

"to lie near, border on"; "not distant or far off"; "nearby but not touching").

By contrast to the Clean Water Act's express inclusion of "adjacent" wetlands, other provisions of the Act use the narrower term "adjoining." Compare 33 U. S. C. §1344(g) with §§1321(b)–(c) ("adjoining shorelines" and "adjoining shorelines to the navigable waters"); §1346(c) ("land adjoining the coastal recreation waters"); see also §1254(n)(4) ("estuary" includes certain bodies of water "having unimpaired natural connection with open sea"); §2802(5) ("'coastal waters'" includes wetlands "having unimpaired connection with the open sea up to the head of tidal influence"). The difference in those two terms is critical to this case. Two objects are "adjoining" if they "are so joined or united to each other that no third object intervenes." 1968 Black's 62 (comparing "adjacent" with "adjoining"); see *ibid.* ("Adjoining" means "touching or contiguous, as distinguished from lying near to or adjacent"); see also Black's Law Dictionary 38–39 (5th ed. 1979) (same); Webster's Third 26–27 (similar). As applied to wetlands, a marsh is adjacent to a river even if separated by a levee, just as your neighbor's house is adjacent to your house even if separated by a fence or an alley.

In other contexts, this Court has recognized the important difference in the meaning of the terms "adjacent" and "adjoining" and has held that "adjacent" is broader than "adjoining or actually contiguous." *United States* v. *St. Anthony R. Co.*, 192 U. S. 524, 533 (1904). As an example, the *St. Anthony* case concerned a federal statute granting railroads the right to cut timber from "public lands adjacent" to a railroad right of way. *Id.*, at 526, n. 1, 530. The Court held that timber could be taken from "adjacent" sections of land that were *not* "contiguous to or actually touching" the right of way. *Id.*, at 538. The Court explained that if "the word 'adjoining' had been used instead of 'adjacent,'" a railroad could not have taken the relevant

timber. *Ibid.*

In short, the term "adjacent" is broader than "adjoining" and does not require that two objects actually touch. We must presume that Congress used the term "adjacent" wetlands in 1977 to convey a different meaning than "adjoining" wetlands. See *Russello* v. *United States*, 464 U. S. 16, 23 (1983).

II

Longstanding agency practice reinforces the ordinary meaning of adjacency and demonstrates, contrary to the Court's conclusion today, that the term "adjacent" is broader than "adjoining."

After the Act was passed in 1972, a key question quickly arose: Did "waters of the United States" include wetlands? By 1975, the Army Corps concluded that the term "waters of the United States" included "adjacent" wetlands. 40 Fed. Reg. 31324. In 1977, Congress itself made clear that "adjacent" wetlands were covered by the Act by amending the Act and enacting §1344(g). 91 Stat. 1601.

Since 1977, when Congress explicitly included "adjacent" wetlands within the Act's coverage, the Army Corps has adopted a variety of interpretations of its authority over those wetlands—some more expansive and others less expansive. But throughout those 45 years and across all eight Presidential administrations, the Army Corps has *always* included in the definition of "adjacent wetlands" not only wetlands adjoining covered waters but also those wetlands that are separated from covered waters by a man-made dike or barrier, natural river berm, beach dune, or the like.

- In 1977 and 1980, under President Carter, the Army Corps and EPA defined "adjacent" wetlands as including wetlands "separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like." 42 Fed. Reg.

37144; see 45 Fed. Reg. 85345.

- In 1986, under President Reagan, the Army Corps adopted a new regulatory provision defining "waters of the United States" and reaffirmed that "adjacent" wetlands include wetlands "separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like." 51 Fed. Reg. 41210, 41251.
- From 1986 until 2015, under Presidents Reagan, George H. W. Bush, Clinton, George W. Bush, and Obama, the regulations continued to cover wetlands "separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like." See 33 CFR §328.3(c) (1991); 40 CFR §230.3(b) (1991); 33 CFR §328.3(c) (1998); 40 CFR §230.3(b) (1998); 33 CFR §328.3(c) (2005); 40 CFR §230.3(b) (2005); 33 CFR §328.3(c) (2010); 40 CFR §230.3(b) (2010).
- In 2015, under President Obama, the Army Corps and EPA promulgated a new rule, which again specified that "adjacent" wetlands include wetlands "separated by constructed dikes or barriers, natural river berms, beach dunes, and the like." 80 Fed. Reg. 37105, 37116.
- In 2019 and 2020, under President Trump, the Army Corps and EPA repealed the 2015 rule and issued a new rule. But even following the repeal and new rule, adjacent wetlands included wetlands that are "physically separated" from certain covered waters "only by a natural berm, bank, dune, or similar natural feature" or "only by an artificial dike, barrier, or similar artificial structure so long as that structure allows for a direct hydrologic surface connection . . . in a typical year, such as through a culvert, flood or tide gate, pump, or similar artificial feature." 85 Fed. Reg. 22338, 22340 (2020).

- In 2023, under President Biden, the Army Corps and EPA once again issued a new rule that defined "adjacent" wetlands to include wetlands "separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes, and the like." 88 Fed. Reg. 3143–3144.

That longstanding and consistent agency interpretation reflects and reinforces the ordinary meaning of the statute. The eight administrations since 1977 have maintained dramatically different views of how to regulate the environment, including under the Clean Water Act. Some of those administrations promulgated very broad interpretations of adjacent wetlands. Others adopted far narrower interpretations. Yet *all* of those eight different administrations have recognized as a matter of law that the Clean Water Act's coverage of adjacent wetlands means more than adjoining wetlands and also includes wetlands separated from covered waters by man-made dikes or barriers, natural river berms, beach dunes, or the like. That consistency in interpretation is strong confirmation of the ordinary meaning of adjacent wetlands.

III

The Act covers "adjacent" wetlands. And adjacent wetlands is a broader category than adjoining wetlands. But instead of adhering to the ordinary meaning of "adjacent" wetlands, to the 45 years of consistent agency practice, and to this Court's precedents, the Court today adopts a test under which a wetland is covered only if the wetland has a "continuous surface connection" to a covered water—in other words, if it adjoins a covered water. *Ante,* at 22 (internal quotation marks omitted). The Court says that the wetland and the covered water must be "indistinguishable" from one another—in other words, there must be no "clear demarcation" between wetlands and covered waters. *Ante,* at 21 (internal quotation marks

omitted).

The Court's "continuous surface connection" test disregards the ordinary meaning of "adjacent." The Court's mistake is straightforward: The Court essentially reads "adjacent" to mean "adjoining." As a result, the Court excludes wetlands that the text of the Clean Water Act covers—and that the Act since 1977 has *always* been interpreted to cover.

In support of its narrower "continuous surface connection" interpretation of covered wetlands, the Court emphasizes that the 1972 Act's overarching statutory term is "waters of the United States." *Ante,* at 19. And the Court suggests that the term "waters of the United States" cannot be interpreted to cover "adjacent wetlands" but only "adjoining wetlands." See *ante,* at 19–22. But in 1977, Congress itself expressly made clear that the "waters of the United States" include "adjacent" wetlands. 91 Stat. 1601. And Congress would not have used the word "adjacent" in 1977 if Congress actually meant "adjoining," particularly because Congress used the word "adjoining" in several other places in the Clean Water Act. 33 U. S. C. §§1321(b)–(c), 1346(c); see also §§1254(n)(4), 2802(5).

To bolster its unorthodox statutory interpretation, the Court resorts to a formula: "A minus B, which includes C." *Ante,* at 19. That just seems to be a fancier way of arguing (against all indications of ordinary meaning) that "adjacent" means "adjoining." But again the Court is imposing a restriction nowhere to be found in the text. In the end, the Court has no good answer for why Congress used the term "adjacent" instead of "adjoining" when Congress enacted §1344(g) in 1977.[1]

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[1]Perhaps recognizing the difficulty of reading the Act to mean "adjoining" when it actually says "adjacent," the Court at one point suggests that "adjoining" is equivalent to "adjacent." *Ante,* at 19–20. As a matter of ordinary meaning, as explained at length above, that is incorrect. Adjoining wetlands are a subset of adjacent wetlands, not the

Recall again how the 1977 Act came about. In 1975, the Army Corps concluded that the 1972 Act's coverage of "waters of the United States" included "adjacent" wetlands. 40 Fed. Reg. 31324. Then in 1977, Congress adopted a new permitting program for a category of "waters of the United States." Congress allocated to the Federal Government exclusive authority to issue Clean Water Act permits for dumping dredged or fill material into certain "waters of the United States," "including wetlands adjacent thereto." 91 Stat. 1601. Through that statutory text, Congress made clear its understanding that "waters of the United States" included "adjacent" wetlands—and indeed, Congress designed important federal-state permitting authorities around that precise understanding. Congress's 1977 amendment did not "merely" express "an opinion" about the meaning of the Clean Water Act; rather, it reflected what Congress understood "its own prior acts to mean." *Bell* v. *New Jersey*, 461 U. S. 773, 785, n. 12 (1983) (internal quotation marks omitted).

Moreover, Congress's 1977 decision was no accident. As this Court has previously recognized, "the scope of the Corps' asserted jurisdiction over wetlands"—including the Corps' decision to cover adjacent wetlands—"was specifically brought to Congress' attention" in 1977, "and Congress rejected measures designed to curb the Corps' jurisdiction." *United States* v. *Riverside Bayview Homes, Inc.*, 474 U. S. 121, 137 (1985). Subsequently, this Court has recognized that Congress's 1977 amendment made clear that the Act "cover[s] wetlands adjacent to navigable waters." *Solid Waste Agency of Northern Cook Cty.* v. *Army Corps of Engineers*, 531 U. S. 159, 167 (2001); see *Riverside Bayview*, 474 U. S., at 138 ("Congress expressly stated that the term 'waters' included adjacent wetlands").

Not surprisingly, in the years since 1977, no one has

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whole set of adjacent wetlands.

seriously disputed that the Act covers adjacent wetlands. And in light of the text of the Act, eight consecutive Presidential administrations have recognized that the Act covers adjacent wetlands and that adjacent wetlands include more than simply adjoining wetlands. The Court's analysis today therefore seems stuck in a bit of a time warp—relitigating an issue that Congress settled in 1977 and that this Court has long treated as settled: The Act covers adjacent wetlands. By adopting a test that substitutes "adjoining" for "adjacent," the Court today errs.

The Court also invokes federalism and vagueness concerns. The Court suggests that ambiguities or vagueness in federal statutes regulating private property should be construed in favor of the property owner, particularly given that States have traditionally regulated private property rights. See *ante*, at 23–25; see also *Solid Waste Agency of Northern Cook Cty.*, 531 U. S., at 173–174. To begin with, the Federal Government has long regulated the waters of the United States, including adjacent wetlands.

In any event, the decisive point here is that the term "adjacent" in this statute is unambiguously broader than the term "adjoining." On that critical interpretive question, there is no ambiguity. We should not create ambiguity where none exists. And we may not rewrite "adjacent" to mean the same thing as "adjoining," as the Court does today.

Finally, contrary to the Court's suggestion otherwise, the analysis in this separate opinion centers on the "operative" text, "waters of the United States." *Ante,* at 27. To recap: The 1972 Act covered "waters of the United States." In 1977, when Congress allocated permitting authority, Congress expressly included "adjacent" wetlands within the "waters of the United States." Since then, the Executive Branch and this Court have recognized that "waters of the United States" covers "adjacent" wetlands. Based on the

text of the statute, as well as 45 years of consistent agency practice and this Court's precedents, I respectfully disagree with the Court's decision to interpret "waters of the United States" to include only adjoining wetlands and not adjacent wetlands.

IV

The difference between "adjacent" and "adjoining" in this context is not merely semantic or academic. The Court's rewriting of "adjacent" to mean "adjoining" will matter a great deal in the real world. In particular, the Court's new and overly narrow test may leave long-regulated and long-accepted-to-be-regulable wetlands suddenly beyond the scope of the agencies' regulatory authority, with negative consequences for waters of the United States. For example, the Mississippi River features an extensive levee system to prevent flooding. Under the Court's "continuous surface connection" test, the presence of those levees (the equivalent of a dike) would seemingly preclude Clean Water Act coverage of adjacent wetlands on the other side of the levees, even though the adjacent wetlands are often an important part of the flood-control project. See Brief for Respondents 30. Likewise, federal protection of the Chesapeake Bay might be less effective if fill can be dumped into wetlands that are adjacent to (but not adjoining) the bay and its covered tributaries. See *id.*, at 35. Those are just two of many examples of how the Court's overly narrow view of the Clean Water Act will have concrete impact.

As those examples reveal, there is a good reason why Congress covered not only adjoining wetlands but also adjacent wetlands. Because of the movement of water between adjacent wetlands and other waters, pollutants in wetlands often end up in adjacent rivers, lakes, and other waters. Natural barriers such as berms and dunes do not block all water flow and are in fact evidence of a regular connection between a water and a wetland. 85 Fed. Reg.

22307; 88 Fed. Reg. 3095, 3118. Similarly, artificial barriers such as dikes and levees typically do not block all water flow, 85 Fed. Reg. 22312; 88 Fed. Reg. 3076, and those artificial structures were often built to control the surface water connection between the wetland and the water. 85 Fed. Reg. 22315; 88 Fed. Reg. 3118. The scientific evidence overwhelmingly demonstrates that wetlands separated from covered waters by those kinds of berms or barriers, for example, still play an important role in protecting neighboring and downstream waters, including by filtering pollutants, storing water, and providing flood control. See 88 Fed. Reg. 3118; 33 CFR §320.4(b)(2) (2022); see also *United States* v. *Riverside Bayview Homes, Inc.*, 474 U. S. 121, 134 (1985). In short, those adjacent wetlands may affect downstream water quality and flood control in many of the same ways that adjoining wetlands can.

The Court's erroneous test not only will create real-world consequences for the waters of the United States, but also is sufficiently novel and vague (at least as a single standalone test) that it may create regulatory uncertainty for the Federal Government, the States, and regulated parties. As the Federal Government suggests, the continuous surface connection test raises "a host of thorny questions" and will lead to "potentially arbitrary results." Brief for Respondents 29. For example, how difficult does it have to be to discern the boundary between a water and a wetland for the wetland to be covered by the Clean Water Act? How does that test apply to the many kinds of wetlands that typically do not have a surface water connection to a covered water year-round—for example, wetlands and waters that are connected for much of the year but not in the summer when they dry up to some extent? How "temporary" do "interruptions in surface connection" have to be for wetlands to still be covered? *Ante,* at 21. How does the test operate in areas where

storms, floods, and erosion frequently shift or breach natural river berms? Can a continuous surface connection be established by a ditch, swale, pipe, or culvert? See 88 Fed. Reg. 3095. The Court covers wetlands separated from a water by an artificial barrier constructed *illegally*, see *ante,* at 21–22, n. 16, but why not also include barriers authorized by the Army Corps at a time when it would not have known that the barrier would cut off federal authority? The list goes on.

Put simply, the Court's atextual test—rewriting "adjacent" to mean "adjoining"—will produce real-world consequences for the waters of the United States and will generate regulatory uncertainty. I would stick to the text. There can be no debate, in my respectful view, that the key statutory term is "adjacent" and that adjacent wetlands is a broader category than adjoining wetlands. To be faithful to the statutory text, we cannot interpret "adjacent" wetlands to be the same thing as "adjoining" wetlands.

* * *

In sum, I agree with the Court's decision not to adopt the "significant nexus" test for adjacent wetlands. I respectfully disagree, however, with the Court's new "continuous surface connection" test. In my view, the Court's new test is overly narrow and inconsistent with the Act's coverage of adjacent wetlands. The Act covers adjacent wetlands, and a wetland is "adjacent" to a covered water (i) if the wetland is contiguous to or bordering a covered water, *or* (ii) if the wetland is separated from a covered water only by a man-made dike or barrier, natural river berm, beach dune, or the like. The wetlands on the Sacketts' property do not fall into either of those categories and therefore are not covered under the Act as I would interpret it. Therefore, like the Court, I would reverse the judgment of the U. S. Court of Appeals for the Ninth Circuit and remand for further proceedings. But I respectfully

concur only in the Court's judgment.

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October 24, 2023

The Honorable Thomas R. Carper, Chair
The Honorable Shelley Moore Capito, Ranking Member
United States Senate
Committee on Environment and Public Works

Re: Letter for the Record, EPW Oct. 18, 2023 Hearing: "Examining the Implications of *Sackett v. Environmental Protection Agency* for Clean Water Act Protections of Wetlands and Streams."

Dear Chairman Carper and Ranking Member Capito:

On behalf of the American Fisheries Society (AFS), we write to share with you the staggering impact to fish and aquatic ecosystems resulting from the Supreme Court's ruling, *Sackett v. EPA*, 143 S. Ct. 1322 (2023), and the recent conforming rule issued by the U.S. Environmental Protection Agency (EPA) and Army Corps of Engineers (Corps) (collectively, the Agencies), 88 Fed. Reg. 61964 (Sept. 8, 2023). We appreciate the opportunity to share our concerns with you and the members of the committee.

AFS is the world's oldest and largest professional society of fisheries and aquatic scientists and managers. The Society seeks to improve the conservation and sustainability of fisheries and aquatic ecosystems by advancing science and promoting the development of fisheries professionals. We greatly value the country's clean waters and healthy aquatic ecosystems as they are critical to maintaining fisheries, biodiversity, flood control, and carbon storage.

The *Sackett* decision and the Agencies' conforming rule dealt a crippling blow to the future of our nation's fish and aquatic ecosystems and will have a massive impact on fish, fisheries, wildlife, aquatic ecosystems, and human health (Colvin et al. 2019).

This basis for jurisdiction is at odds with the Clean Water Act's singular objective: restoring and maintaining the water quality of the Nation's waters. The Clean Water Act's mandate can only be met if the science regarding wetlands and streams is used to determine which waters the Clean Water Act protects. The court's decision limiting Clean Water Act protections only to wetlands that have a "continuous surface connection" to a traditionally navigable water and the conforming rule's limitation

of jurisdiction to only "relatively permanent, standing, or continuously flowing" tributary streams is not based on the best available science.

Fifty years of science that demonstrates that the integrity of "traditionally navigable" waters fundamentally depends on tributaries – including headwater ephemeral, intermittent, and perennial streams – as well as many associated lakes, wetlands, and off-channel habitats (USEPA 2015). Aquatic ecosystems depend upon transfers of chemical components, organisms, sediment, and organic materials among waterbodies to support the life in and around their shores. Without the safeguards of the Clean Water Act for these streams and wetlands, the ability of these waters to convey nutrients, provide pathways for migrating organisms such as fish and wildlife, and serve as a drainage and storage system for floodwaters is severely undermined. (e.g., Cohen et al. 2016; Rains, et al. 2016; Fritz et al. 2018; Harvey et al. 2018; Leibowitz et al. 2018; Schofield et al. 2018; Colvin et al. 2019).

Wetland loss in some regions of the U.S. already approaches or exceeds 85 percent. More than 50% percent of wetlands in some watersheds are now without Clean Water Act protections. Wetlands deliver important services such as consistent stream flows, floodwater storage, and water filtration to navigable waters through both surface and subsurface connections. Unchecked dredging and filling of wetlands will cripple wetlands' ability to filter pollutants, absorb flood waters, reduce drought, recharge groundwater aquifers, and stabilize shorelines.

With climate change bringing more numerous extreme weather events such as flooding and droughts, loss of CWA protections will most certainly impair the functioning of wetlands that help ensure that navigable waters are drinkable, fishable, and swimmable. A cascade of consequences from poorer water quality, increased flooding and pollution, lost fish and wildlife habitat, and reduced carbon storage will result from the removal of federal CWA protections.

A recent analysis calculated that 57% of the nation's total stream miles are ephemeral (Fesenmyer et al. 2021). These networks of headwater streams not only function as the vital capillaries of the larger arteries in our watersheds, but they also convey pollutants downstream with their seasonal flows. The loss of federal protections for these headwater features means the potential for more pollution downstream in addition to the loss of aquatic function and habitats on which many of the species rely (Cohen et al. 2016; Creed et. al. 2017; Sullivan Declaration 2020; Fesenmyer et. al. 2021).

Aquatic resources in many states, particularly in the central and western U.S., are already stressed by overuse of water and extreme weather patterns. The reduction in groundwater has greatly impaired flow regimes, causing many streams to shift from perennial to intermittent or even ephemeral (Hughes et al. 2005; Stoddard et al. 2005; Perkin et al. 2017; Colvin et al. 2019). Streams and playas that were historically perennial, but now have impaired flows because of groundwater depletion, may no longer be protected. The negative impacts of unregulated dredge and fill within those streams and playas would amplify the current stresses faced by aquatic ecosystems and further reduce the potential for habitat recovery. Such cumulative impacts increase the likelihood of future listings and extinctions of fish, amphibians, and waterfowl, thereby jeopardizing the ecological integrity and function of our waters.

The American Fisheries Society joined several other aquatic science societies In an *amicus* brief to the Supreme Court that demonstrated how narrowing the reach of the Clean Water Act would have devastating effects on wetlands, rivers and streams, fish and wildlife habitat, and for people. We include it here for the record.

In closing, the U.S. Congress should and must act to ensure the Clean Water Act can meet the mandate of the law, to restore and maintain the chemical, physical, and biological integrity of the Nation's waters and preserve our drinkable, fishable, swimmable waters.

Sincerely,

;

Douglas J. Austen, Ph.D.
Executive Director
American Fisheries Society

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October 18, 2023

The Honorable Thomas R. Carper, Chair
The Honorable Shelley Moore Capito, Ranking Member
United States Senate Committee on Environment and Public Works

Re: Letter for the Record, EPW Oct. 18, 2023 Hearing: "*Examining the Implications of Sackett v. Environmental Protection Agency for Clean Water Act Protections of Wetlands and Streams.***"**

Dear Chairman Carper and Ranking Member Moore Capito:

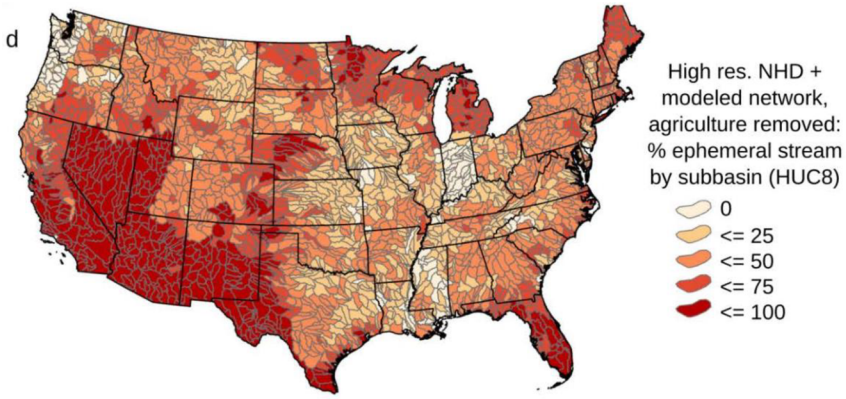
The under-signed hunting and fishing organizations and their members write to highlight the risk to America's hunting and fishing heritage resulting from the Supreme Court's ruling, *Sackett v. EPA,* 143 S. Ct. 1322 (2023), and the recent conforming rule issued by the US Environmental Protection Agency (EPA) and Army Corps of Engineers (Corps) (collectively, the Agencies). 88 Fed. Reg. 61964 (Sept. 8, 2023). We appreciate the opportunity to voice our concern with you and the Members of your Committee at this hearing coinciding with the 51st year of the Clean Water Act.

Wetlands and Tributary Streams Vital to Hunting and Fishing. The health of our nation's watersheds is the barometer of our wildlife and fish populations. Aquatic habitat and connectivity in the vital network of small, tributary streams and in their downstream rivers not only provide fish habitat, but also provide key migration corridors for elk, deer, bears, and many other wildlife species. The vast category of "non-adjacent" wetlands—no longer under the jurisdiction of the Clean Water Act after the Agencies' conforming rule—provides essential migratory bird and duck habitat, such as the deservedly famous prairie pothole region. Wetlands provide breeding grounds for over half of North American Waterfowl. Comment on Rule by Susan Colvin, Asst Prof, Sustainable Fisheries, & Randall Colvin, Instructor, Unity College School of Biodiversity Conservation (2019).

Aquatic Resources at Risk. These aquatic resources, vital to the " . . . physical, chemical, and biological integrity of the Nation's waters," Section 101(a) of the Clean Water Act, 33 U.S.C. 1251(a), are now at risk. No longer is a 404 Permit required prior to their destruction or harm if non-adjacent wetlands are located where a new development, road, bridge, pipeline, or transmission line is proposed. This means that a 404 Permit's requirement to avoid, minimize, or mitigate harm no longer applies to non-adjacent wetlands. EPA estimates that between 51-63% of wetlands are at risk of loss under its conforming rule. (King, Pamela, "Supreme Court sides with Sacketts to narrow Clean Water Act, Greenwise, E&E News (May 25, 2023). In addition to the loss of wetlands, the conforming rule's limitation to "relatively permanent, standing, or continuously flowing" tributary streams as coming under Clean Water Act jurisdiction, 33 C.F.R. 328.3(a)(3), means that ephemeral streams are at risk.

The below map (Fig. d) displays the percent of the nation's total stream network estimated to consist of ephemeral streams, based on the analysis in Fesenmyer, K. A., Wenger, S. J., Leigh, D. S., & Neville, H. M.

(2021), Large portion of USA streams lose protection with new interpretation of Clean Water Act, *Freshwater Science*, *40*(1), 252-258:



This map displays the regional variations in the prevalence of ephemeral streams, with the arid southwest having the greatest proportion of ephemeral streams. This analysis calculated that 57% of the nation's total stream miles are ephemeral.

Outdoor Recreation is a Sustainable Economic Driver. Clean water is a lynchpin of an outdoor recreation economy that creates 4.3 million jobs and generates $689 billion in consumer spending annually. What's more, the entire outdoor recreation industry is built on sustaining and protecting aquatic resources, as opposed to industries that encroach on or pollute these vital, national resources. A national bipartisan poll shows that 92% of hunters and anglers support clean water protections.

Conclusion. Over the past 50 years, the Clean Water Act has been the driving force to protect water quality and enhance the condition of rivers, lakes, wetlands, and other water bodies of the United States. The next 50 years present even greater challenges, from newly-discovered toxins in drinking water to extreme weather events super-charged by climate change. High-functioning watersheds are the best bulwark of protection from these threats.

We call on Congress to take action to protect and restore our nations' waters, specifically the approximately half of our nations' wetlands and stream miles at risk of loss in the wake of *Sackett.* The future of hunting and fishing opportunities for our children, and our children's children, depend on it.

Sincerely,

Dr. Douglas J. Austen, Executive Director, American Fisheries Society
Kathleen Bergeron, Chair, Conservation Committee, Fly Fishers International
Jared Mott, Conservation Director, Izaak Walton League of America

Alex Funk, Director of Water Resources & Senior Counsel, Theodore Roosevelt Conservation Partnership
Kate Miller, Director of Government Affairs, Trout Unlimited
Jessica Helsley, Director of Government Affairs, Wild Salmon Center

October 17, 2023

Senator Tom Carper
Chairman
Committee on Environment and Public Works
United States Senate
410 Dirksen Senate Office Building
Washington, D.C. 20510

Senator Shelley Moore Capito
Ranking Member
Committee on Environment and Public Works
United States Senate
170 Russell Senate Office Building
Washington, DC 20510

RE: Senate Environment and Public Works (EPW) Committee Hearing, "Examining the Implications of Sackett v. Environmental Protection Agency for Clean Water Act Protections of Wetlands and Streams"

Dear Chairman Carper and Ranking Member Capito,

On behalf of American Whitewater, Outdoor Alliance, and Outdoor Industry Association, we write to thank you for holding a hearing to examine the impacts of the Supreme Court's decision in Sackett v. EPA, and to encourage prompt action to restore the Clean Water Act's vital role in protecting the outdoor recreation economy, public safety, and universal access to clean and healthy rivers, lakes, and oceans for all Americans.

About American Whitewater

American Whitewater is a national 501(c)(3) non-profit organization with a mission to protect and restore America's whitewater rivers and to enhance opportunities to enjoy them safely. Our members are primarily conservation-oriented kayakers, canoeists, and rafters that enjoy exploring whitewater rivers. As outdoor enthusiasts that spend time on and in the water, our members have a direct interest in the health and quality of our nation's waterways–with particular interest in headwater streams and wetlands. As whitewater enthusiasts, our members depend on the rivers and streams they enjoy being free from pollution, and we support strong Clean Water Act protections for these waters.

About Outdoor Alliance

Outdoor Alliance is a coalition of ten member-based organizations representing the human powered outdoor recreation community. The coalition includes American Whitewater, Access Fund, American Canoe Association, International Mountain Bicycling Association, Winter

Wildlands Alliance, The Mountaineers, the American Alpine Club, the Mazamas, Colorado Mountain Club, and Surfrider Foundation and represents the interests of the millions of Americans who climb, paddle, mountain bike, backcountry ski and snowshoe, and enjoy coastal recreation on our nation's public lands, waters, and snowscapes.

About Outdoor Industry Association

Based in Boulder, Colorado, with offices in Washington, D.C., Outdoor Industry Association (OIA) is a catalyst for meaningful change. A member-based collective, OIA is a passionate group of business leaders, climate experts, policy makers and outdoor enthusiasts committed to sustainable economic growth and climate positivity while protecting – and growing access to – the benefits of the outdoors for everyone. For more than 30 years, OIA has catalyzed a thriving outdoor industry by supporting the success of every member company across four critically aligned areas: market research, sustainability, government affairs, and inclusive participation. OIA delivers success for its members through education, events, and business services in the form of solutions and strategies, consultation, collaboration, and opportunities for collective action. For more information, visit outdoorindustry.org

Outdoor recreation is a vital aspect of American life that depends on clean water

We collectively write to the Committee representing the outdoor recreation interests of millions of Americans who are drawn to water to relax, exercise, connect with nature, and work in the outdoor recreation industry. We ask the Committee to consider the importance of clean water to a broad spectrum of outdoor recreation interests. A child splashing in a backyard stream is participating in outdoor recreation, as is a family enjoying fishing to supplement their diet, as is a multi-million dollar rafting business, and a community investing in riverside trails to attract and benefit residents. In each case, people connecting to our nation's waters depend on the quality of those waters. American's have built livelihoods, families, and communities around rivers and other waters based on Congress's promise of clean water that is embodied by the Clean Water Act. Now, with a recent Supreme Court decision hamstringing that Act, we posit to the Committee that we've likely reached *peak clean water* in the United States – that without Congressional action future generations will watch our waters get dirtier, more dangerous to public health, and less valuable as assets for the outdoor recreation economy.

Sackett threatens the $454 Billion outdoor recreation economy

The US Bureau of Economic Analysis found that in 2021: "Boating/fishing was the largest conventional [outdoor recreation] activity for the nation at $27.3 billion in current-dollar value added and was the largest conventional activity in 27 states and the District of Columbia."[1] Beneath this impressive figure are the livelihoods of many Americans and the fabric of many communities that span our Country. A significant portion of the $454 Billion outdoor recreation economy requires clean water in our rivers, lakes, estuaries, and oceans. Sackett v. EPA will damage this economy. As wetlands and small streams are drained, filled, and otherwise cut-off

[1] See: https://www.bea.gov/news/2022/outdoor-recreation-satellite-account-us-and-states-2021

from rivers due to the *Sackett* decision, it is widely understood that streams will become flashier, with higher high flows and lower low flows, with fewer of the predictable moderate flows that are ideal for fishing and paddling. In addition, pollution discharges into non jurisdictional ephemeral or intermittent streams and wetlands will flush downstream following rains, just when many paddlers head to the rivers. That pollution will cascade through communities downstream.

It is worth noting that even now, at what is perhaps peak clean water, poor water quality impacts water-based segments of the outdoor recreation economy: there are fish consumption warnings, water quality warnings at beaches, and people avoid recreating on polluted rivers. With *Sackett* now in place, the shaky foundation of the water-based outdoor recreation economy is further weakened. Congress should protect those people and businesses that rely on clean water for their livelihoods from the damage that *Sackett* is almost certain to cause.

Sackett threatens the public health of Americans engaged in water-based outdoor recreation

Anyone who has raised a child will attest that it is impossible to keep kids out of the water, and equally impossible to keep water out of kids. Splashing and playing in a local creek or lake is one of the great summertime joys of childhood, and children invariably end up with water in ears, eyes, mouths, and noses. Children are perhaps the most vulnerable population to the impacts of unsafe surface waters.

Most whitewater rivers and streams can only be descended during higher-than-normal flows caused by rainfall or during snowmelt. Surface runoff and pollution, and specifically non-point source pollution, often spike during these times.[2] Additionally, whitewater boating requires submersion as paddlers get splashed, flip over, and occasionally swim. Likewise surfers spend hours in the water, diving beneath waves and being tossed about in the surf after exciting rides. And of course swimming, in our warming world, is simple and affordable recreation that keeps Americans cool, healthy, and happy.

Immersion in water while in nature is a profound pleasure for many Americans, but not if the water that gets in our mouths, ears, nose, and any cuts is polluted. Strong regulatory protections for surface waters are essential to protect paddlers and other river users from getting sick. Our nation's waters can already make people sick, but *Sackett* will make water bodies in the US less safe, and the safety or our waters less transparent due to reduced permitting.

Sackett raises equity and environmental justice concerns regarding access to clean water for outdoor recreation

The economic, public safety, and property impacts of *Sackett* will not be equitably distributed. Previously a universal right protected by the Clean Water Act, *Sackett* has shifted access to

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[2] An Approach for Using Load Duration Curves in the Development of TMDLs, EPA 841-B-07-006, August 2007, Document posted at: <https://www.epa.gov/sites/default/files/2015-07/documents/2007_08_23_tmdl_duration_curve_guide_aug2007.pdf>.

clean water to state-by-state, stream-by-stream determinations. It is anticipated that some states will choose relatively weak standards that allow degradation of many wetlands and streams, and citizens of those states and downstream states will suffer the consequences, while citizens in other states will continue to enjoy relatively safe and clean water. Within states, some specific wetlands and streams will be deemed non-jurisdictional at the request of land-owning and commercial permit applicants, while the effects of those permits will be felt by many other downstream Americans who simply want access to clean water in our nation's shared rivers, lakes, and oceans.

For many Americans in rural and urban areas alike, their local river is the only affordable and available place for them to swim and engage in subsistence fishing. These existing and beneficial uses of rivers, protected under the Clean Water Act in the decades leading up to *Sackett*, have been available to all Americans, including those that can't readily afford a pool membership or store-bought seafood. They are also among the uses of our nation's rivers that render people most vulnerable from a public health perspective.[3] This is one of many reasons that the jurisdictional scope of the Clean Water Act needs to be science-based and actually result in fishable and swimmable waters.

Because *Sackett* renders many streams and wetlands non-jurisdictional that discharge into larger waterways following rain or snowmelt, the Clean Water Act will no longer protect vulnerable populations downstream without congressional action. Congress should ensure all Americans have equal access to clean water and safe rivers, lakes, and oceans.

The Clean Water Act requires implementation based on science to meet its important goals, and Sackett is not based on science.

Sackett removes many wetlands and streams from decades of federal Clean Water Act protection based on views held by the Court that eschew the science of how wetlands and rivers work. Water's movement is a process best predicted through well-established science,[4] and Congress needs to restore the role of science in protecting the waters that flow to our treasured rivers, lakes, and oceans. Just as buildings constructed without science are prone to topple, so too rivers managed without science will be prone to unravel. In turning away from science, *Sackett* makes meeting the important goals of the Clean Water Act improbable if not impossible.

Examples of likely impacts of Sackett highlight the need for action

It is likely that *Sackett* will have cumulative and chronic impacts on rivers for future generations without congressional action. We offer three representative examples of impacts of *Sackett* that we foresee.

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[3] Nicole, W., 2013, Meeting the Needs of the People: Fish Consumption Rates in the Pacific Northwest, Environmental Health Perspectives, Vol. 121, No. 11-12, <https://doi.org/10.1289/ehp.121-A334>.
[4] Environmental Protection Agency, Office of Research and Development., 2015, *Connectivity of Streams & Wetlands to Downstream Waters: A Review & Synthesis of the Scientific Evidence.* <https://cfpub.epa.gov/ncea/risk/recordisplay.cfm?deid=296414>

Example 1: Florida Everglades

The *Sackett* decision could have serious consequences for the Florida Everglades, a unique and vital ecosystem in southern Florida. This "River of Grass" with its slow-moving waters, vast wetlands, and rich biodiversity is under threat. The potential limitation of the EPA's authority could result in some Everglades wetlands falling outside regulatory oversight, leading to increased pollution and nutrient runoff that could harm water quality, negatively impacting the overall ecosystem, as well as recreational opportunities. Paddling and fishing, popular activities in the Everglades, could face challenges in access and navigation due to potential disruptions in water flow patterns and impacts on fish populations. Additionally, the Everglades support a variety of wildlife, over 2,000 species, including endangered species like the Florida panther and American crocodile. Wetland destruction and adverse water quality could displace and harm these species, making it more difficult for enthusiasts and conservationists to observe and appreciate these creatures in their natural habitat. Protecting the Everglades' wetlands is vital for preserving this iconic ecosystem, Florida's $33B outdoor economy, and its role in providing recreational opportunities and environmental conservation in southern Florida.

Example 2: Franklin, New Hampshire

The *Sackett* decision will adversely affect water quality and the outdoor recreation economy in Franklin, New Hampshire, a low-income Environmental Justice Community with high unemployment. The community recently celebrated the opening of a whitewater park that is a catalyst for economic renewal in a struggling community on the banks of the Winnipesaukee River. Upstream from the whitewater park near the Winnipesaukee River is a large wetland area draining into the river. The wetlands are separated by a roadway and flows are intermittent during the summer months. Adjacent to the wetland area is industrial and commercial development. Water quality on the Winnipesaukee in Franklin and in neighboring communities is affected by flows from the wetland area, and there have been periodic water quality issues on the Winnipesaukee in past years. As a result of the *Sackett* decision, this wetland area may be outside the scope of the EPA's authority to regulate, having an adverse impact on recreation opportunities and the outdoor recreation economy in Franklin.

Example 3: San Rafael River, UT

Like all but the largest rivers in the arid Southwestern United States, the San Rafael River has no surface water flow for significant parts of the year. Following rains though, it swells to a full-fledged river, carrying sediment – and whitewater paddlers – downstream. Under the *Sackett* decision, countless rivers like the San Rafael and their tributaries could be deemed non-jurisdictional and not subject to the Clean Water Act. Materials and pollution from unregulated discharges into these rivers could simply sit in the riverbed until rains come and flush them downstream. These flow pulses are precisely when paddlers flock to the rivers, and also when many ecological and geomorphological processes occur. Flows come to desert rivers as surely as tides come to the beach, even though like the beach they sometimes look like a dry terrestrial environment. Desert rivers are indeed rivers, and must be protected as such under the Clean Water Act.

Conclusion

Congress must act to ensure the Clean Water Act fills the vital role for the next generation that it has since its passage a half-century ago. The *Sackett* decision will end the universal access to clean and healthy rivers the American public has enjoyed, damage the outdoor recreation economy, and put Americans at risk of pollution and flooding. We ask that Congress restore the central role of science in determining which waters need to be subject to the Clean Water Act to protect the lives and livelihoods of all Americans that live downstream of others. Our rivers, lakes, and oceans are shared collective treasures that greatly enrich our lives. We must act to ensure we and future generations will continue to enjoy the many benefits of those treasures.

Sincerely,

Kevin R. Colburn
National Stewardship Director
American Whitewater

Louis Geltman
Vice President for Policy and Government Relations
Outdoor Alliance

Hannah Wintucky
Policy Fellow
Outdoor Industry Association

October 18, 2023

Dear Chairman Carper and Ranking Member Capito:

Thank you for holding a hearing to examine the impacts of the Supreme Court's decision in *Sackett v. EPA*, which removed federal Clean Water Act protection for critical waters nationwide. Because the Court's opinion so fundamentally misconstrued Congress's intent in enacting the Clean Water Act and the importance of science in its implementation, communities across the country are counting on Congress to restore the protections that the Supreme Court majority ripped away. This hearing is an important first step towards fixing the law.

The Environmental Protection Agency estimates that up to 63% of the country's wetlands and as much as 4.9 million miles of streams could be denied Clean Water Act protections because of the Court's opinion. The public health, safety, and welfare threats the decision could unleash are difficult to overstate. Wetlands filter pollution, curb flooding, capture carbon in soils, and provide important habitat for fish and other aquatic life, while non-perennial streams directly affect the condition of downstream waters and feed the drinking water supplies of tens of millions of people. Environmental justice communities and Tribal communities will be especially impacted, with these same communities already disproportionately impacted by water pollution and a lack of water infrastructure investment.

Yet the Court's opinion dismantled numerous federal safeguards for countless important waters. The protections weakened by the *Sackett* decision include requirements to mitigate unavoidable harms when wetlands and other waters are filled, pollution control limits for industrial and municipal dischargers, restrictions on sewage sludge disposal near waters, and spill prevention and cleanup obligations for facilities with significant amounts of oil or hazardous substances.

Collectively, these programs have greatly improved the condition of our waters. However, even before the *Sackett* decision, the work of the Clean Water Act was far from done; according to the Environmental Protection Agency's most recent report to Congress, more than half of the nation's assessed rivers and streams and 70 percent of assessed lake acres fail to meet water quality standards. By forcing the country to retreat from Congress's declared objective -- "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters" -- the Supreme Court has all but guaranteed that water quality nationwide will deteriorate.

Simply put, this reckless judicial revision of our most important federal law protecting surface waters cannot stand. Congress must amend the Clean Water Act to restore longstanding protections and it must do so soon.

Sincerely,

Anacostia Riverkeeper
Atchafalaya Basinkeeper
Black Warrior Riverkeeper
Cahaba Riverkeeper
Chautauqua-Conewango Consortium
Children's Environmental Health Network
Choctawhatchee Riverkeeper

Clean Water Action
Columbia Riverkeeper
Congaree Riverkeeper
Cook Inletkeeper
Earthjustice
Endangered Habitats League
Environmental Protection Network
Environmental Stewardship
Flint Riverkeeper, Georgia
Friends of Casco Bay/Casco Baykeeper
GreenLatinos
Gunpowder RIVERKEEPER
Hackensack Riverkeeper
Kentucky Waterways Alliance
Kissimmee Waterkeeper
Lawyers for Good Government
League of Conservation Voters
League of Women Voters Upper Mississippi River Region
Milwaukee Riverkeeper
Missouri Confluence Waterkeeper
Missouri River Bird Observatory
Mobile Baykeeper
Natural Resources Defense Council
New Mexico Wild
Ohio River Foundation
Orange County Coastkeeper
Park Watershed
Peconic Baykeeper
Potomac Riverkeeper Network
Puget Soundkeeper
Raritan Riverkeeper
Save The Bay, Narragansett Bay
ShoreRivers
Snake River Waterkeeper
Southern Environmental Law Center
Suncoast Waterkeeper
Surfrider Foundation
The Water Collaborative of Greater New Orleans
Three Rivers Waterkeeper
Waterkeeper Alliance
Waterkeepers Chesapeake
Winyah Rivers Alliance

October 17, 2023

Chairman Tom Carper
Ranking Member Shelley Moore Capito
Senate Committee on Environment & Public Works
410 Dirksen Senate Office Building
Washington, D.C. 20510

Via email

RE: Farmers support legislation to restore strong federal clean water protections under the Clean Water Act

Dear Chairman Carper & Ranking Member Capito:

We are farmers and other agricultural professionals who support strong protections under the Clean Water Act. We need strong federal protections to safeguard the streams, wetlands, and other waterways that help sustain our livelihoods and communities. In the wake of the U.S. Supreme Court's decision in *Sackett v. EPA*, which drastically reduced the number of waters protected by the Clean Water Act, we support congressional action now to restore the full scope of the Act as the bipartisan Congress that enacted the statute intended.

To feed America, we farmers need clean water. Our crops and livestock are only as healthy as the water we use on our farms. Headwater, seasonal, and rain-dependent streams supply water to larger streams and rivers from which we draw water for irrigation and for our livestock to drink. If our water is contaminated, our businesses suffer because we cannot sell contaminated crops or rely on tainted livestock. And just like families and communities across America, we need clean, safe water for drinking, cooking, bathing, and numerous other things at our homes.

Farmers also need healthy, intact wetlands. With more frequent storms and a warming climate, wetlands help reduce pollution and protect our homes and farming operations from flooding. If upstream industries are allowed to degrade these critical water bodies, they put farmers and our families and livelihoods at risk.

Federal clean water protections benefit farmers and ranchers; they do not impose unreasonable or unworkable burdens on our industry. We know that most day-to-day agricultural practices do not require Clean Water Act permits because they are exempt.

That means we can farm our land, build or maintain stock ponds or irrigation ditches, maintain drainage ditches, and build farm roads without having to apply for a permit or worry about Clean Water Act enforcement. In fact, EPA and the Army Corps of Engineers have estimated that agricultural discharges account for less than one percent of the wetland area and about two percent of the stream length for which they have issued Clean Water Act permits. And in the rare instances when we do need permits, fast-track permits with modest requirements (nationwide permits or general permits) are available.

We disagree with the rhetoric advanced by the Farm Bureau, some states, and industry, that strong clean water protections harm farmers. The streams, wetlands, and other waters flowing through our farms are no less worthy of protection because of the farming and ranching that occurs there. Rather, we need the waters on our land to be protected to support our farming and ranching. We therefore support congressional action to restore strong federal clean water protections under the Clean Water Act.

Sincerely,

Robert Whitescarver (lead)
Whiskey Creek Angus
Churchville, Virginia

John Ager
Hickory Nut Gap Farm
Fairview, North Carolina

Greg Bowen
American Chestnut Land Trust
Double Oak Farm
Prince Frederick, Maryland

Patrick Crowe
Owner, Crowesgrow
Matthews, North Carolina

Peter Elmore
Star Bright Farm, LLC
White Hall, Maryland

Vera Fabian
Farmer/Owner, Ten Mother's Farm, LLC
Cedar Grove, North Carolina

Queen Quet Marquetta L. Goodwine
Chieftess of the Gullah/Geechee Nation
Gullah/Geechee Sea Island Coalition
St. Helena Island, South Carolina

Ben Grimes
Dawnbreaker Farms
Hurdle Mills, North Carolina

Liz Lamb
Community Farming Program Manager,
The 6th Branch
Baltimore, Maryland

Bernard Nagelvoort
Associate Director, Lord Fairfax Soil and
Water Conservation District
Berryville, Virginia

Hiram Ramirez
Urban Gourmet Farms
Charlotte, North Carolina

Maria Russo
Co-Founder, Sistermoon Farm
Shenandoah Junction, West Virginia

Lindsey Shapiro
Pasa Sustainable Agriculture
Harrisburg, Pennsylvania

Sean Simpson
Farmer/Owner, Terra Flora Market Garden
Norwood, North Carolina

Jamie Swofford, Farmer
Old North Farm
Shelby, North Carolina

Jennifer Stafford
Farmer/Owner, J & J Family Farm, LLC
Clover, South Carolina

Leo Tammi
Shamoka Run Farm
Mount Sidney, Virginia

Kevin Tate
Richard Foltz Farm
Stanley, Virginia

Brent Wills
Farmer, Wills Soil & Stream
Farm Advisor, Bramble Hollow Farm
Montvale, Virginia

October 17, 2023

Chairman Tom Carper
Ranking Member Shelley Moore Capito
Senate Committee on Environment & Public Works
410 Dirksen Senate Office Building
Washington, D.C. 20510

Via email

RE: Mitigation bankers and ecological restoration professionals in support of legislation to restore strong federal clean water protections under the Clean Water Act

Dear Chairman Carper and Ranking Member Capito:

We are professionals in the ecological restoration and mitigation banking business who support strong federal clean water protections. We urge you to pass legislation restoring the Clean Water Act to the broad scope necessary to restore and maintain the nation's streams, wetlands, and other waterways. We rely on broad protections for the success of our businesses and the safety of our communities.

The U.S. Supreme Court's decision in *Sackett v. EPA* has limited the scope of federal Clean Water Act protections more than ever before. This unprecedented retraction of clean water protections threatens the integrity of the nation's waters, undercuts the ability of the government to achieve the objective of the Clean Water Act, and harms our industry and the economy at large. Mitigation banking, stream and wetland restoration, and other ecological restoration activities contribute greatly to a healthy economy: approximately $25 billion and at least 220,000 jobs annually.[1] This growing industry is key to increasing the number of green jobs and to promoting responsible development that furthers the economy and ensures the restoration of streams, wetlands, and other waters so critical to communities. While our ecological restoration industry represents a burgeoning source of economic activity that furthers the goals of the Clean Water Act, the *Sackett* decision represents the largest rollback of Clean Water Act protections in the fifty years since the law was enacted.

The weakening of federal Clean Water Act protections post-*Sackett* will degrade streams, wetlands, and other waterways. And it will prevent us and others in our industry from doing what we do best. According to data from the Environmental Protection Agency, an estimated 1.2 million to 4.9

[1] BenDor *et al.*, "Estimating the Size and Impact of the Ecological Restoration Economy," PLOS ONE (June 17, 2015), https://doi.org/10.1371/journal.pone.0128339.

million miles of streams and up to 63 percent of wetlands acres across the United States have lost protection under *Sackett*.[2] In February 2022, several signatories to this letter wrote EPA and the Army Corps of Engineers to express our concerns about the effects of the now-vacated Navigable Waters Protection Rule (NWPR) on our industry and the nation's waters. Concerningly, the *Sackett* decision goes even further than the NWPR in restricting the scope of federal protections.

With the drastic reduction of protected waterways under the *Sackett* decision, the demand for mitigation credits—a primary source of income for our industry—greatly diminishes, and a net loss of wetlands follows.

For example, prior to the *Sackett* decision, a developer proposing to fill five acres of a ten-acre jurisdictional wetland would be required under a Clean Water Act permit to mitigate for the losses of those wetland acres. But now, post-*Sackett*, the entire ten-acre wetland may be deemed non-jurisdictional, and the developer could change its site plan to fill all ten acres, with no permitting or mitigation required. In this scenario, the mitigation banking industry loses the sale of credits equivalent to five acres of impacts – but the environment sees double that impact, with ten acres of wetlands lost with no mitigating offsets. This is extremely harmful to our critical water resources, and directly undercuts the no-net-loss of wetlands goal established by the George H. W. Bush administration in 1989.

We have seen this scenario play out on the ground already as new development proposals were evaluated under the NWPR; as developers sought new revised jurisdictional determinations under the rule; or, in some cases, given that rule's narrow protections, as projects proceeded without any jurisdictional determination at all. We are very concerned that the *Sackett* decision will have similar, if not even more pronounced, effects.

For example, a June 2021 Army Corps public notice for a permitted mixed-use development in Goose Creek, South Carolina reflected the purchase of 35.6 mitigation credits for permanent impacts to 3.27 acres of jurisdictional wetlands.[3] The notice stated that an additional 10.39 acres of on-site wetlands excluded under the NWPR would be filled. In addition to the loss of over 10 acres of wetlands, with no mitigation required, this exclusion equated to a loss of hundreds of thousands of dollars to the mitigation banking industry, funds which otherwise would have been invested in the purchase of offsetting credits.

The loss of protections for waters and wetlands means the demand for compensatory mitigation also diminishes. This will have an irreversible impact on our businesses and on our ability to

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[2] The Washington Post, "Biden Rule, heeding Supreme Court, could strip over half of U.S. wetlands' protections" (Aug. 29, 2023), https://www.washingtonpost.com/climate-environment/2023/08/29/epa-new-wetland-rule/ (last accessed Sept. 22, 2023) (citing EPA official).

[3] Joint Public Notice, Charleston District, Corps of Engineers and South Carolina Dept. of Health and Envtl. Control, P/N SAC-2020-01477.

mitigate the water quality impacts from development projects across the county. Destruction of at-risk wetlands also places communities at risk by eliminating our greatest natural safeguards against increasingly intense rain events and flooding accompanying climate change. Indeed, one acre of wetland can store as much as 1.5 million gallons of floodwater. In the hurricane-prone Atlantic and Gulf coasts, each square mile of wetlands saves almost $700,000 in storm damage on average each year.

Water and wetland resources are critical to our businesses and communities. We therefore support congressional action to restore broad federal clean water protections consistent with the objective of the Clean Water Act.

Sincerely,

Tommy Cousins, President (lead)
Kayne Van Stell, VP Ecosystem Design
Water and Land Solutions
Raleigh, North Carolina

David Groves
The Earth Partners
Chevy Chase, Maryland

Rich Mogensen
President
Mogensen Mitigation, Inc.
Charlotte, North Carolina

Shawn D. Wilkerson
CEO
Wildlands Engineering, Inc.
Charlotte, North Carolina

John Hutton
Vice President
Wildlands Engineering, Inc.
Raleigh, North Carolina

Michael Beinenson
President
Eco Terra LLC
Atlanta, Georgia

Norton Webster
Ecosystem Planning and Restoration
Professional
Raleigh, North Carolina, and raised in
Delaware

Gregory Smith
Ecological Restoration, Mitigation, and
Conservation Banking Professional
Sugar Hill, Georgia

Jennifer Pahl
Ecologist and Mitigation Markets and Policy
Expert
Lawrenceville, Georgia

Brad Breslow
President
North Carolina Environmental Restoration
Association
Raleigh, North Carolina

Wesley Johnson
Environmental Scientist
Wetland Solutions
Dunn, North Carolina

Leif Embertson
President; Principal River Engineer
Natural Systems Design, Inc.
Seattle, Washington

National Wildlife Federation
National Advocacy Center
1200 G Street NW, Suite 900 • Washington, DC 20005 • 202-797-6800

October 18, 2023

The Honorable Thomas Carper
Chair
Senate Environment and Public Works Committee
410 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Shelley Moore Capito
Ranking Member
Senate Environment and Public Works Committee
456 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Chairman Carper and Ranking Member Capito,

On behalf of the National Wildlife Federation, affiliates from Arizona, California, Delaware, Florida, Idaho, Illinois, Iowa, Kentucky, Maryland, Massachusetts, Missouri, Montana, Nevada, New Mexico, North Carolina, Oklahoma, Oregon, Pennsylvania, Puerto Rico, South Dakota, Texas, Vermont, Virginia, and West Virginia, and our nearly seven million members and supporters, thank you for holding this hearing to examine the devastating impacts of the Supreme Court's decision in *Sackett v. EPA* on our nation's waters and wildlife habitat. The decision is a major setback for public health as well as access to cultural resources, traditions, and outdoor recreation. Small streams and wetlands that are no longer federally protected in light of *Sackett* provide clean water for farmers, supply drinking water to tens of millions of people, keep the economy afloat, protect communities from floods, provide fish and wildlife habitat, and serve as natural features to promote drought resilience.

The National Wildlife Federation is the nation's largest conservation education and advocacy organization with a long history of interest and involvement in the management and protection of the nation's rich array of water resources. We have championed clean and healthy rivers and streams since our founding in 1936. Conserving our nation's wetlands, streams, and rivers for fish, wildlife, and communities is at the core of our mission. We worked to pass the Clean Water Act in 1972 and have worked hard to fulfill its promise of clean water for all Americans ever since.

The bipartisan Clean Water Act was overwhelmingly enacted to address the dire water quality crisis facing our country. Through a federal-state partnership, the Clean Water Act aims to prevent, reduce, and eliminate pollution and destruction of our waters in order to "restore and maintain the chemical, physical and biological integrity of the Nation's waters," with a goal to make all waters in the United States "swimmable and fishable" by 1983.

For the past 50 years, the Clean Water Act helped improve the health of many waters nationwide and prevented deterioration or destruction of many more.[1] However, there is a long way to go to achieve clean water for all.

The Supreme Court's decision in *Sackett v. EPA* threatens five decades of progress made to clean up our rivers and restore our wetlands. To comply with the Court's decision in *Sackett*, the Environmental Protection Agency was forced to amend a 2023 rule defining "waters of the United States" in a manner that, according, EPA, removes federal Clean Water Act protections from up to 63% of wetlands and up to 4.9 million of miles of streams – protections that have been in place for nearly fifty years.[2]

Several states and Tribes have laws in place prohibiting the regulation of waters beyond those covered by the Clean Water Act. Many states that do wish to be protective of wetlands and streams do not currently have the resources or expertise to do so, and there is little to no federal funding available to resource state wetland programs. Additionally, states that do have the resources and expertise to safeguard wetlands can only do so much to protect watersheds shared with other states that may have no or lesser protections in place.

The *Sackett* decision comes at a time when communities need the natural benefits of wetlands and streams more than ever. The wetlands under threat store and slowly release water downstream, naturally protecting communities from flood and storm surge, recharging groundwater, improving water quality, storing carbon, shoring up water supplies in times of drought, serving as fish and wildlife habitat, and providing access to cultural resources.

This year alone has seen severe flooding from California to Vermont, catastrophic wildfires like those in Hawai'i and Louisiana, persistent drought in the Western United States, and record heat across the country. When Hurricane Idalia made landfall in Florida this September and caused widespread flooding, it marked a record-breaking 23rd "billion dollar" weather disaster in the United States in 2023 – and the year is not over yet.[3]

Protecting and restoring wetlands helps mitigate the damage from increasingly severe storms and floods, which continue to disproportionately impact socially vulnerable communities. Wetlands play an enormous and low cost role in absorbing floodwaters. One single acre of wetland can store 1 to 1.5 million gallons of floodwaters.[4] A 2011 study of insured property losses across 144 coastal counties in the five Gulf Coast states between 2001-2005 showed that wetland loss was significantly related to increased reported damage from floods.[5] A 2020 analysis of all 88 tropical storms and hurricanes impacting the U.S. between 1995 and 2016 found that counties with greater wetland coverage experienced significantly less property damage than counties with little or no wetlands.[6]

As such, wetlands protect people, property, and communities. For example, wetlands prevented an estimated $650 million in direct flood damages due to Hurricane Sandy.[7] If Florida had not lost the 500 square kilometers of wetlands that it did between 1996 and 2010, Hurricane Irma would have caused an estimated $430 million less in damage when it made landfall in 2017.[8]

Removing federal protections from vast swaths of waters across the country will also have a disproportionate impact on Tribal communities, Indigenous peoples, communities of color, and low-income communities.

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[1] National Wildlife Federation. Five Decades of Clean Water. https://www.nwf.org/Educational-Resources/Reports/2022/Five-Decades-of-Clean-Water
[2] Environmental Protection Agency. https://www.youtube.com/watch?v=IcCVelsAy2c&ab_channel=U.S.EPA
[3] https://www.ncei.noaa.gov/access/billions/
[4] Environmental Protection Agency, Functions and Values of Wetlands, EPA 843-F-01-002c (2001) (factsheet)
[5] https://journals.sagepub.com/doi/10.1177/0739456X11419515
[6] Sun, F., and R.T. Carson. 2020. Coastal wetlands reduce property damage during tropical cyclones. Proceedings of the National Academy of Sciences 117: 5719–5725
[7] Narayan, S., M.W. Beck, P. Wilson, et al. 2017. The value of coastal wetlands for flood damage reduction in the northeastern USA. Scientific Reports 7: 1–12
[8] Sun, F. & Carson, R. T. Coastal wetlands reduce property damage during tropical cyclones. Proc Natl Acad Sci U S A 117, 5719-5725 (2020)

Communities that depend on fishing for sustenance and for cultural practices are particularly at risk from impaired water quality.

Tribes rely on the Clean Water Act to trigger consultation requirements. The broad exclusion of important waters from federal jurisdiction also undercuts states and Tribes' ability to protect against cross-border pollution, including the destruction of upstream wetlands and ephemeral streams that protect tribal waters. Without federal resources to regulate waters within their borders, states and Tribes may be impacted by pollution from upstream sources.

Additionally, for many states and Tribes, the health of the economy and dependent communities is directly linked to the health of the state's natural resources. Nationwide, the craft brewing industry, notably dependent on clean water supplies, contributed $72.2 billion to the U.S. economy in 2022 and more than 460,000 jobs.[9] Smaller, non-perennial streams threatened by the Sackett decision sustain prized sport fisheries like trout and salmon. As such, much of the nation's $867 billion outdoor recreation economy rely on these small streams and wetlands as well.[10] In some rural, mountain communities, river recreation and related activities generate the largest share of the local economy. Roughly half of North American waterfowl hatch in the Prairie Pothole Region and more than a third of North American bird species rely on wetlands for food, shelter, breeding, nesting, and rearing their young. Waterfowl hunting and bird watching are both substantial economic activities in many communities.

Poll after poll shows that the public overwhelmingly wants the clean, fishable, and swimmable waters promised by the Clean Water Act. A recent survey found that the vast majority of Americans strongly support Clean Water Act protections, with 75% of Americans in favor of protecting more waters and wetlands nationwide.[11] Congress should heed the public and scientists' recommendations and act to fully restore longstanding, bipartisan federal Clean Water Act protections for waters across the country, from the mightiest lakes and rivers to the tributaries, wetlands, and streams that support the health of these larger waters.

Sincerely,

Arizona Wildlife Federation
Association of Northwest Steelheaders
Conservation Coalition of Oklahoma
Conservation Federation of Missouri
Delaware Nature Society
Environmental League of Massachusetts
Florida Wildlife Federation
Idaho Wildlife Federation
Iowa Wildlife Federation
Kentucky Waterways Alliance
Montana Wildlife Federation
National Aquarium
National Wildlife Federation
Nevada Wildlife Federation
New Mexico Wildlife Federation
North Carolina Wildlife Federation
PennFuture
Planning and Conservation League
Prairie Rivers Network
Sociedad Ornitológica Puertorriqueña, Inc.
South Dakota Wildlife Federation
Texas Conservation Alliance
Vermont Natural Resources Council
Virginia Conservation Network
West Virginia Rivers Coalition

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[9] Brewers Association. https://www.brewersassociation.org/statistics-and-data/economic-impact-data/
[10] Outdoor Industry Association. https://outdoorindustry.org/advocacy
[11] Morning Consult survey on behalf of the Walton Family Foundation. https://www.waltonfamilyfoundation.org/learning/access-and-availability-to-clean-water-is-a-concern-nationwide

National Association of Wetland Managers

"Dedicated to the Protection and Restoration of the Nation's Wetlands"

October 30, 2023

Chairman Tom Carper
U.S. Senate Committee on Environment & Public Works
410 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Chairman Carper,

The National Association of Wetland Managers (NAWM, formerly the Association of State Wetland Managers (ASWM)) is a national 501(c)(3) professional organization that supports the use of sound science, law, and policy in development and implementation of state and tribal wetland and aquatic resource protection programs. Since 1983, our organization and our member states and Tribes have had longstanding positive and effective working relationships with federal agencies. As an association representing states and Tribes as co-regulators tasked with implementation of regulations implementing the Clean Water Act (CWA), NAWM understands the complexity of the CWA and the implementation challenges the Act poses. We have worked for over 40 years with federal, state, and tribal agencies on the implementation of regulatory and non-regulatory programs designed to protect waters of the United States (WOTUS). Our collaboration has involved programs such as the CWA section 404 permit program for dredged or fill material, state and tribal water quality standards for wetlands, CWA section 401 water quality certification of federal licenses and permits, as well as determining the jurisdictional status of wetlands and other waters as WOTUS.

During a call with NAWM's state coregulators on June 1, 2023, and in subsequent conversations with individual states, it became clear that the impacts from the changed definition of WOTUS will be distributed unequally among states. Those states that have "no more stringent than" laws on their books, those states that do not have the capacity to fund a comprehensive state wetland program (or to assume the 404 dredge or fill permitting program or develop a State Programmatic General Permit (SPGP) program), and those states that do not have the political will to enact a definition of waters of the State or enact new broader state protections – these are the states that are at risk of losing their valuable freshwater wetland and aquatic resources to dredge or fill activities. The fact that many of the poorest states that lack either the funding or political will to protect these now vulnerable aquatic resources are the ones who will be impacted the most, raises serious equity concerns.

In the past, about 24 states have relied on their authority provided under CWA Section 401 to condition federal permits or licenses, including permits

authorizing discharge of dredge or fill material, ensuring that they comply with state level protections. However, Section 401 only applies to WOTUS, therefore all the wetlands that were previously subject to Section 401 review as WOTUS are left without any state level mechanism to protect them in these states.

Another ripple effect of the Sackett decision is that since fewer wetlands and waters will be WOTUS, there will be fewer Jurisdictional Determinations (JDs) performed by the U.S. Army Corps of Engineers (Corps). This means that fewer 404 project permits that require consideration of the least environmentally damaging ("practicable") alternatives will be triggered. Even when JDs are performed, the "least damaging alternatives" analysis will also be impacted as many of the alternatives that may have been previously excluded may now be included if they do not affect any WOTUS under the new definition (despite their impacts to non-WOTUS wetlands and waterbodies). There is a serious domino effect that will inevitably come into play in ways we have yet to comprehend or imagine. Tribes will be the most significantly impacted as most of them rely almost entirely on federal protections. What we have heard unanimously from states and Tribes is a desperate need for more wetland program funding now.

NAWM performed an analysis of federal funding for CWA programs, including EPA's Wetland Program Development Grants (WPDG)/5 Star Program, National Estuary Program (NEP), Nonpoint Source Program (319), and Pollution Control (106) and found alarming discrepancies in program support. Adding to this extreme lack of sufficient funding overall for state and Tribal wetland programs is the fact that these numbers are not even adjusted for inflation – which if they were would show a -21.8% reduction in adjusted dollars over the ten years from FY14 – FY24.

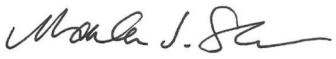
The WPDG/5 Star program at EPA is also the only one that is 100% competitive in nature, pitting states against states and Tribes against Tribes for very limited funding. These funds for states (Tribes are now exempted) also require a 25% cost share, in contrast to the other CWA programs. And historically, these funds have only been historically only allowed for program development, not implementation (again, unlike the other CWA programs). This results in a lack of sustainable program funding and puts wetland programs in the precarious situation of having to always come up with new program ideas, having to win grants every two years, or face having to shutter their doors and lay-off their staff. The Pyramid Lake Paiute Tribe in Nevada had a successful wetland program until this year when they were not awarded a new WPDG. The Tribe's Wetland Specialist had to leave her position in August of 2023 because the future of their wetland program was uncertain after the Tribe did not receive funding in the WPDG competition. The combination of staff turnover (and associated loss of institutional knowledge), lack of funding, and the time-consuming process of applying for competitive grants may jeopardize the ability for Tribes like the Pyramid Lake Paiute Tribe to restart their wetland program in the future.

It is also notable that EPA's wetland program did not receive any of the billions in federal infrastructure funding that has been distributed widely among many other federal programs. For example, the NEP gets $132 million over five years (FY22-FY26), and the Administrator can waive or reduce the non-federal cost share. However, inland freshwater wetlands get nothing. All one has to do is look for the news stories regarding Vermont, Iowa, Missouri, Kentucky (among many other states) in regard to recent catastrophic flooding events to find multiple reports highlighting the importance of inland wetlands to reducing flood damages. The fact that wetlands are still being overlooked as a critical tool in the toolbox for infrastructure solutions to mitigate and adapt to climate change and extreme storm events is mindboggling.

Americans are also now at an increased risk of property damage, economic loss, and loss of life from extreme storms, drought, and wildfire – natural hazards that wetlands can help protect us against. If states and Tribes are expected to "fill the gaps" in protections for wetlands and ephemeral streams (not to mention the interest in having states and Tribes assume the 404 dredge or fill program), then Congress will need to appropriate a significant increase in funding to support state and Tribal programs. The first step, however, is to enable the existing pot of money to be used for either wetland program development or implementation. The next step is to model the WPDG/5 Star program funding after the NEP program, with a mix of competitive funding programs for innovative new ideas, coupled with a sufficient pot of funding for program implementation -- $14.7 million for 50 state and 100+ Tribal programs is absurdly insufficient.

Given the political climate in Congress, asking for additional funding is a huge lift. However, if we want clean water for our families and safe, resilient communities, it is worth every dollar invested. A healthy environment should not be a partisan issue – it should be something that all our elected officials should support. The antiquated idea that somehow a healthy environment and a healthy economy are somehow at odds with each other is inane. We can do better than this – and we have to if we want a sufficient supply of clean water for ourselves and our children's future, if we want healthy food for our families, and if we want to protect our communities and our property from natural hazards.

Sincerely,



Marla J. Stelk
Executive Director

Cc: NAWM Board of Directors

National Association of Wetland Managers
"Dedicated to the Protection and Restoration of the Nation's Wetlands"

WHY WETLANDS ARE IMPORTANT

Wetlands provide multiple societal and economic benefits. While diverse in type and structure, the functions that wetlands provide collectively and individually are critical for supporting healthy and prosperous communities. Key among these functions are water storage, water filtration, and biological productivity.

Some of the goods and services provided by wetland functions include:

1. Fisheries production
2. Habitat for rare and endangered species
3. Water quality buffering and pollution control
4. Wave attenuation and erosion control
5. Production of forestry products and natural crops
6. Flood conveyance and flood storage
7. Carbon storage and sequestering
8. Groundwater recharge and drought risk reduction
9. Traditional foods from plants, fish, and wildlife
10. Plants used for medicinal, healing, and ceremonial purposes
11. Reeds and grasses for traditional uses such as weaving baskets and textiles
12. Cultural and spiritual ceremonies and practices

We estimate that each hectare of wetland loss between 2001 and 2016 increases NFIP claims by $1,840 to $1,900 per year when accounting for spatial spillovers. However, this value masks significant spatial heterogeneity in wetland benefits. For example, we estimate that one hectare of wetland loss in developed areas (those with >10% built-up area) costs society $8,290 in flood mitigation value. Using this range, the societal benefits from reduced flooding outweigh the cost of conserving wetlands (based on land price) within 6 to 22 years, on average. One interpretation of our results is that lifting federal protections for wetlands represents a transfer from taxpayers, who fund the NFIP, to private landowners, who profit from converting wetlands to other uses.

~ Wetlands, Flooding, and the Clean Water Act (2021). Charles Taylor and Hannah Druckenmiller, Resources for the Future Working Paper.

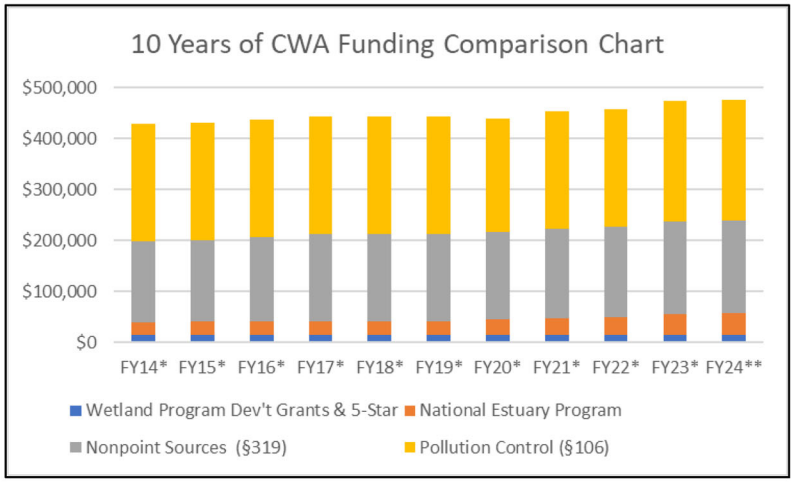
ECONOMIC IMPORTANCE

- The U.S. EPA estimates of commercially harvested fish and shellfish species indicate that up to 75% of these animals depend on wetlands at some point in their lifecycle; this percentage could be as high as 90% for recreational fish species. In 2017, NOAA Fisheries estimated that the US seafood industry supported 1.2 million jobs and added $69.2 billion to the gross domestic product.
- Estimates by the American Sportfishing Association indicate that recreational fishing may have an annual economic impact of $116 billion.
- A University of Vermont study found that wetlands and floodplains protected Middlebury, VT from as much as $1.8 million in flood damage during Tropical Storm Irene, saving the town up to 78% of potential damages.
- A 2018 study by the Delaware Dept. of Natural Resources and Environmental Control found that Delaware wetlands contribute over $1 billion in annual economic value from water quality, flood control, parks/open space, fish/wildlife, recreation, forested wetlands/carbon storage, and nonuse value (willingness to pay) functions and support 25,000 jobs with $568 million in wages.
- In South Carolina is has been estimated that the filtering effects of the Congaree Bottomland Harwood Swamp would cost $5 million dollars in treatment to remove the same pollutants.
- New York City's drinking water supply is the largest unfiltered water supply in the United States serving over 9 million customers approximately 1.2 billion gallons of water every day. Maintaining a healthy watershed which supplies the 19 reservoirs and major tributaries is essential to avoid the estimated $8 to $10 billion dollars to construct a treatment facility and the $1million dollars in daily operational costs.
- Research published in 2016 found that coastal wetlands prevented more than US$625 million in property damages during Hurricane Sandy, reducing property damages throughout the Northeast US by 10% on average.

National Association of Wetland Managers
"Dedicated to the Protection and Restoration of the Nation's Wetlands"

HISTORICAL APPROPRIATIONS: COMPARISON AMONG CWA PROGRAMS

	Wetland Program Dev't Grants & 5-Star	National Estuary Program	Nonpoint Sources (§319)	Pollution Control (§106)
Budget Account	STAG Categorical Grant	Enviro Programs & Mgmt	STAG Categorical Grant	STAG Categorical Grant
Type	Competitive	Mix	Formula	Formula
FY14*	$14,661	$25,098	$159,252	$230,806
FY15*	$14,661	$26,723	$159,252	$230,806
FY16*	$14,661	$26,723	$164,915	$230,806
FY17*	$14,661	$26,773	$170,915	$230,806
FY18*	$14,661	$26,723	$170,915	$230,806
FY19*	$14,661	$26,723	$170,915	$230,806
FY20*	$14,183	$29,823	$172,348	$223,289
FY21*	$14,192	$31,822	$177,000	$230,000
FY22*	$14,192	$35,000	$178,000	$231,000
FY23*	$14,692	$40,000	$182,000	$237,000
FY24**	$14,692	$42,000	$182,000	$237,000



*Enacted in the thousands. Dollars are not adjusted for inflation.
**Senate recommendation in the thousands.
Sources: Congressional Record, EPA Justification of Estimates, EPA program webpages, Catalog of Federal Domestic Assistance
Formulas:

- Pollution Control (§106) "Funds on the basis of the pollution problem in the state;" formula at 40 CFR Part 35.162.
- Nonpoint Sources (§319) "National allocation formula based on the total annual appropriation set by Congress for the §319 Program;" formula at https://www.epa.gov/sites/default/files/2015-09/documents/319-guidelines-fy14.pdf.

National Association of Wetland Managers
"Dedicated to the Protection and Restoration of the Nation's Wetlands"

Brief State Summaries of Impacts from Sackett

October 2023

WA: Although Washington State issues AOs, it does not have its own dredge or fill permitting program. There are no general permits under the AO system, so each application has to be reviewed individually. Current staff (2.5 direct FTEs funded from FY22 through FY24) issued approximately 8.1 administrative orders per FTE per year last biennium. Based on an analysis of permit data from Ecology's Aquatics Database, and about 200 permit actions taken by the Corps between January 2022 and August 2023, they estimated between 50 to 100 projects will now need administrative orders each year. Based on the range of 50-100 new AOs per year, and how many staff were able to complete per year last biennium, Ecology estimated they would need between 6.2 direct FTEs (50 orders / 8.1 per FTE) and 12.3 (100 orders / 8.1 FTEs) direct FTEs to address the workload. Furthermore, based on complaint data from Ecology's Environmental Reports Tracking System (ERTS) from July 2019 through June 2023 (including the brief time that the NWPR was in effect), Ecology also expects an increase in inadvertent violations, where proponents discover they do not need a federal permit, and proceed to implement their project assuming that no other authorization is needed. Based on ERTS data, the number of complaints reported to Ecology for wetlands has increased from 181 in fiscal year 2020 to 258 in fiscal year 2023.

ME: Even though the State of Maine has a strong regulatory program with broad protections, regulatory uncertainty at federal level has caused confusion with permittees and developers. Their regulations used to be in line with the Corps, but that has changed over the years as the federal definition of WOTUS has changed. Overall, they are very understaffed – they have experienced an increase in complaints this year but haven't been able to review all of them because of their staffing shortage. Maine's monitoring and assessment program is in even worse shape – they only have two staff for the entire state and their positions, until recently, were only funded under EPA's competitive 2-year Wetland Program Development Grant program. So, every two years, they were at risk of losing their entire staff. Just this year they were able to get funding from the State general fund to cover both positions, but they still don't have funding for seasonal help, sampling (which includes expensive laboratory work to analyze water samples and perform taxonomic work on biological samples), or to lease seasonal vehicles. Although the State does not expect the *Sackett* decision to change anything in their regulatory program because of their state mandate, they do have concerns that the cooperative arrangements they had with the Corps for permit review will be impacted. With fewer waters being considered WOTUS, the Corps will likely bow out of application meetings that do not include WOTUS. The ability in the future for the State to get assistance from the federal agencies in working with difficult applications is of concern.

MN: Due to Minnesota's comprehensive wetland protections programs, the State does not expect to see any substantive effects from the *Sackett* decision on the condition or extent of the State's wetland resources. Some of the States's streams, however, may be left unprotected as well as some "tweeners" that are not big enough to be classified as a lake but are deeper than a wetland as defined under the Cowardin classification system. Additional staff may be required to cover some of these gaps, especially for the upper watershed headwater stream systems. Additionally, the State's ability to coordinate with the Corps may become more time-consuming if it takes the Corps longer to determine jurisdiction. Minnesota's wetlands are managed under three State agencies which coordinate via common and joint procedures. The Minnesota Board of Water and Soil Resources (BWSR) alone employs approximately 20 staff to run the State's wetland mitigation banking program and provide the technical assistance to local governments. BWSR's staffing costs last year were around $2.3 million, not including overhead or the local government replacement road program (mitigation for local road projects).

OH: In Ohio, wetlands are either regulated under CWA section 401 as a WOTUS, or under Ohio Revised Code, as an "isolated wetland". For Ohio's purposes, "isolated wetlands" means those wetlands that are not subject to regulation under the Federal Water Pollution Control Act. Ohio is unique among states due its successful and long-standing isolated wetlands program which was enacted in response to the 2001 U.S. Supreme Court decision in *SWANCC vs EPA*. the State does not expect to see much of an impact on their wetland resources post-*Sackett* because of their isolated wetlands program and strong statewide protections in place. Impacts are expected to be seen in regard to program expenses, however. Ohio's wetland program employs 8 FTEs to review all wetland applications whether federal or not (CWA section 401, isolated wetland permits). The State charges $500/acre for reviews (up to a cap of $25,000) and they also charge application fees to fund their program. However, these fees are not enough to fund the time spent on reviews, so additional money is utilized from other programs within the division to help fund it. Ohio is expecting an increase in level 1 (poorest condition) isolated wetland permit applications (that would have normally been addressed under a Nationwide Permit (NWP)), requiring an increase in staffing and associated costs. Ohio's Isolated Wetlands Program is very underfunded. Expenses for 2023 for the program was approximately $225,000, however, fees generated only about $57,000 worth of revenue.

OR: Overall, the *Sackett* decision has not had much of an impact on Oregon's DSL program, however, it has created challenges for the DEQ which administers the 401 certifications. Oregon requires a consideration under State law of compliance with water quality standards, which Oregon has viewed as met by the 404 permit process and 401 certification. If those fall by the wayside, where there is no 404 nexus and 401, the State may need to fill that certification gap. Oregon has roughly 30 FTEs on staff to protect wetlands and waterways. In addition to wetlands, staff also manage the State's navigable waterways and manage those as the landowner (equal footing doctrine). Oregon's budget for its wetland program is approximately $6 million per year. The program funding is fee-based with an important backstop from the Common School Fund. However, the program does not pay for itself. The application fees and civil penalties only cover about 25% or so of the cost to run the program. The rest is covered by proprietary leasing (where Oregon is the landowner) and if leasing revenue is not enough, then they dip into the Common School Fund. In this year's legislative session, DSL was directed to look at different fee structures to stop draining school fund; therefore, it is anticipated that fees will increase significantly by tripling or quadrupling the current rates. Oregon has looked closely at state assumption of the 404 program and estimated it would require adding roughly 7 additional FTEs to perform cultural reviews, Endangered Species Act (ESA) reviews, etc. which are time consuming tasks without the federal nexus.

VA: The *Sackett* decision has had some practical substantive effects with day-to-day tasks but did not affect the legal authorities. Virginia still regulates today what it has regulated for 25 years. The real effect of *Sackett* for Virginia is in the day-to-day operations, primarily with jurisdictional determinations. Prior to *Sackett*, the State did few of their own state JDs since there was quite a bit of overlap with federal and state authorities – the Norfolk District picked up most JDs. Virginia accepted Norfolk's PJDs and AJDs but would always do surface water assessments to make sure they did not include any waters of the State that could be potentially impacted and weren't covered by federal jurisdiction. The number of state-only protected waters has now increased in numbers since the *Sackett* decision. Virginia employs approximately 33 FTEs although they have 3-4 vacancies. They have talked about the need for additional staff due to the *Sackett* decision, but instead launched a Virginia State Waters Delineator Program in the early fall of 2023. The new program is intended to help reduce State employee increased workload. Virginia's wetland protection program costs around $3.5 - $4 million annually, including staff salaries, other compensation benefits, indirect costs, and implementation costs for field visits, etc. The DEQ is funded through a combination of resources: about 80% is funded through the State's General Fund, and 20% is funded through fees. Fees are assessed on a sliding scale – more impacts equal higher fees. Thus, the percentage

of the annual budget funded by fees varies from year to year but is generally an 80/20 split. This sliding scale fee structure creates an economic incentive to minimize impacts. Fees are in a separate regulatory action as part of the overall agency fees (not just wetlands), so wetlands fees haven't changed since the program was established in 2001, and there is no clause to allow for adjustments in relation to inflation. Virginia has considered applying for 404 assumption twice – once in 2006 and again in 2012. In 2006, the emphasis was more on the statutory changes and regulatory changes that would be necessary. While the State looked at funding, it didn't look at funding with the same detail as in 2012. In 2012, the State did an economic study and concluded that it would have to double the current 2012 budget of $3 million to $6.25 million (in 2012 dollars). Additionally, the State determined that it would need about $3 million dollars as a lump sum over the course of three years to cover one-time costs like IT upgrades, database upgrades, etc.

Written Statement of American Rivers
Submitted for the Hearing Record
"Examining the Implications of Sackett v. Environmental Protection Agency for Clean Water Act Protections of Wetlands and Streams"

Tuesday, October 17, 2023

Since 1973, American Rivers has protected wild rivers, restored damaged rivers, and conserved clean water for people and nature. With headquarters in Washington, D.C. and 355,000 supporters, members, and volunteers across the country, we are the most trusted and influential national river conservation organization in the United States.

American Rivers is pleased to submit comments for the record in support of restoring vital protections as a result of the Supreme Court's decision in Sackett v. EPA which removed critical federal Clean Water Act protection for waters nationwide. A strong Clean Water Act is needed to meet the nation's emerging water pollution challenges impacting rivers, streams, lakes, and wetlands. This bedrock environmental law lays the foundation for improving water quality by limiting sludge, sewage, and other toxic waste from entering our rivers. Yet with clean water supplies becoming scarcer and more polluted due to climate change, the mounting pressures of rising population, and sprawling development trends, the law has fallen short of its intended purpose and today is being interpreted incorrectly by the Courts. If we fail to preserve its original meaning, purpose, and intent established by Congress, state and federal agencies along with partners will struggle to deliver clean water for rivers, fish, wildlife, and our communities.

The court's ruling in Sackett v. EPA is a serious blow to wetlands, which are essential to clean, affordable drinking water, public health, and flood protection. This ruling puts rivers and people at greater risk from pollution and harm. In our recommendations, we highlight key opportunities to preserve the primary objectives of the Clean Water Act while also improving enforcement measures, monitoring systems, and technological standards. American Rivers looks forward to working with the committee to formulate solutions that restores its basic functions and brings this law into the 21st Century.

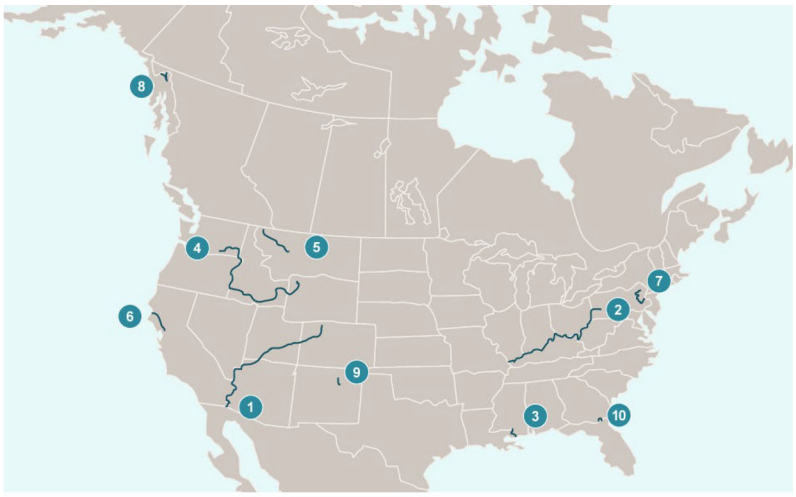
History of the Clean Water Act

In the early 1970s, two-thirds of the nation's lakes, rivers, and coastal waters were unsafe for fishing or swimming, and untreated sewage was dumped into open water. The widespread and uncontrolled contamination of public water supplies resulted in rivers catching on fire. From bacterial levels in the Hudson River, New York to massive fish die-off in Florida, the public had enough and demanded action.

In 1972, Congress amended and passed the Clean Water Act to establish the foundation for water quality protection. The law gave the Environmental Protection Agency the explicit and specific authority to implement pollution controls such as setting wastewater standards for industry as well as direct federal investments to improve our nation's water infrastructure.

Since the law was enacted, we have seen steady improvements of our waterways benefiting public health and the environment. A 2018 study revealed the Clean Water Act has reduced pollution in U.S. waterways. Data shows the number of rivers safe for fishing increased by 12 percent from 1972-2001. We have come far but more needs to be done to clean up rivers.

Our Most Endangered River reports is one of the longest-lived annual reports spotlighting river health issues. The report curates the list based on major proposed actions that the public could help influence to better protect rivers and understand the scale of the threats in their backyards.



America's Most Endangered Rivers® of 2023

1. **Colorado River, Grand Canyon (Arizona):**
   - THREAT: Climate change, outdated water management
   - AT RISK: Ecosystem health, reliable water delivery, regional economy
2. **Ohio River (Pennsylvania, Ohio, West Virginia, Kentucky, Indiana, Illinois):**
   - THREAT: Pollution, climate change
   - AT RISK: Clean water for 5 million people
3. **Pearl River (Mississippi):**
   - THREAT: Dredging and dam construction
   - AT RISK: Clean drinking water, local and downstream communities, fish and wildlife habitat
4. **Snake River (Idaho, Oregon, Washington):**
   - THREAT: Four federal dams
   - AT RISK: Tribal treaty rights and culture, endangered salmon runs, rural and local communities
5. **Clark Fork River (Montana):**
   - THREAT: Pulp mill pollution
   - AT RISK: Public health, fish and wildlife
6. **Eel River (California):**
   - THREAT: Dams
   - AT RISK: Fish and wildlife, tribal culture and sustenance
7. **Lehigh River (Pennsylvania):**
   - THREAT: Poorly planned development
   - AT RISK: Clean water, fish and wildlife habitat, rural and local communities, open space

8. **Chilkat and Klehini rivers (Alaska):**
    - THREAT: Mining
    - AT RISK: Bald eagle, fish, and wildlife habitat, tribal culture and sustenance
9. **Rio Gallinas (New Mexico):**
    - THREAT: Climate change, outdated forest and watershed management
    - AT RISK: Clean drinking water, farming, watershed functionality
10. **Okefenokee Swamp (Georgia, Florida):**
    - THREAT: Mining
    - AT RISK: Fish and wildlife habitat, wetlands, water quality and flow

How the Clean Water Act Protects Rivers

The Clean Water Act protects rivers and streams through the establishment of different permitting programs. The first permit system in the Act is the National Pollutant Discharge Elimination System (NPDES), which requires permits for any point source such as a discharge from a chemical plant, factory, or wastewater treatment facility, entering into "waters of the United States". This permit limits pollutants from contaminating or overloading waterways with dangerous chemicals that can alter or change the natural environment or harm public health.

The second permit system is established under Section 404 of the Clean Water Act and requires permits for the discharge of dredge and fill materials reserved principally for construction activities in, on, or around waterbodies. Additionally, Section 401 of the Clean Water Act requires that any applicant for a Section 404 permit also obtain a Water Quality Certification from the state in which the activity is occurring. The purpose of the certification is to confirm that the discharge of fill materials will be in compliance with the state's applicable Water Quality Standards. The Environmental Protection Agency and U.S. Army Corps of Engineers, respectively, issue these permits, but the Clean Water Act delegates to the States the authority to make permitting decisions for activities that discharge pollutants to streams and wetlands within their borders.

Over the last half century, American Rivers has tackled some of the nation's greatest threats to water quality by working with state and federal agencies, wastewater utilities, community leaders, and scientists. Our network of more than 1.3 million volunteers participates in our National River Cleanup®, a key initiative focused on achieving national litter reduction goals in our waterways.[1] Through this program, we have led cleanups across the country, covering more than 261,000 miles of waterways and removing more than 32.5 million pounds of litter and debris. **We believe a strong Clean Water Act allows us to continue working with state and federal agencies, local partners, and the public to achieve even greater victories for clean water and healthy rivers.**

Post-Sackett Analysis

The original intent of the Clean Water Act was to reduce pollution flowing into rivers and maintain river and stream health where permits allowed it to recover. The goal of the Clean Water Act is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters, with Congress declaring as "the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985."[2] **We still have not been able to eliminate pollutants discharging into our waters, even 38 years after the original goal due to lack of enforcement, yet the Supreme Court is making this original congressional intent even more difficult to achieve.**

The Clean Water Act specifically protects wetlands that are "adjacent" to navigable waters, and understands that there are streams that don't run all year, and yet are critical to community drinking water

[1] American Rivers. National River Cleanups. See: https://www.americanrivers.org/make-an-impact/national-river-cleanup/
[2] Clean Water Act § 101(a), 33 U.S.C. § 1251(a) (1982)

reserves as well as the health of downstream rivers. The original Congressional intent behind the Clean Water Act acknowledged the importance of protecting wetlands that are "adjacent" to navigable waters because of their value to river health and flood management. However, the Court majority decided that adjacent doesn't mean near too, but that it should mean a direct physical connection.

The world that we face after the Sackett ruling is one of more pollution, more flood damages and more wanton destruction of our critical natural infrastructure. The Court redefined the term "adjacent". Justice Kavanaugh sums this problem up succinctly:

> *"Adjoining wetlands are contiguous to or bordering a covered water, whereas adjacent wetlands include both those wetlands contiguous to or bordering a covered water, and wetlands separated from a covered water only by a man-made dike or barrier, natural river berm, beach dune, or the like. By narrowing the Act's coverage of wetlands to only adjoining wetlands, the Court's new test will leave some long-regulated adjacent wetlands no longer covered by the Clean Water Act, with significant repercussions for water quality and flood control throughout the United States."*[3]

As a result of these flawed interpretations, more waterways will be threatened with pollution, wetlands critical to flood control will be filled, and more people's water supplied will be at risk.

Impacts to American Rivers and Waterways Across the Country

Many great American places face a renewed threat as a result of the Sacket ruling.

The great Okefenokee Swamp in Georgia is a unique wetland nearly half a million acres in size and home to alligators, carnivorous plants, an abundance of birds, several threatened and endangered species, and the Florida black bear. There is currently a mine proposed in the swamps watershed that would devastate the clean water and wildlife habitat of this national treasure. Both the U.S. Fish and Wildlife Service and the Environmental Protection Agency predict that the proposed mine, located within three miles of the Okefenokee National Wildlife Refuge and designed to extract titanium bearing minerals, would result in "permanent" and "unacceptable" damage to the Okefenokee Swamp. **The Sackett ruling will make it easier to put this mine in place and with fewer safeguards.**

The San Pedro River in Arizona is sustained by groundwater from a regional aquifer, which keeps the river flowing during the dry season. The Sackett decision, however, will potentially remove protections for seasonal and intermittent streams, which encompass almost 94 percent of the San Pedro River's waterways and provide the lifeblood that sustains the river. The San Pedro is an essential lifeline to agriculture, people and rich biodiversity in this desert region. The San Pedro was listed as one of America's Most Endangered Rivers© due to the earlier attempt at removing Clean Water Act protections. It was during this time that Rep. Raúl M. Grijalva, stated that the San Pedro "is an important life source for Arizona. Its waters give life to a rich diversity of animals, plants and other wildlife, while also being part of the increasingly limited supply of groundwater that is vital to communities and local businesses across the state."

These are just two examples from our most recent report series where the Sackett ruling weakens our ability to protect rivers and waterways across the country.

Recommendations

The Clean Water Act was passed with a goal to "restore and maintain the chemical, physical and biological integrity of the Nation's waters." While the Clean Water Act, and the EPA's efforts to enforce it have made gains in improving our nation's waters since the passage of the act, there is still much work to do. **We strongly urge Congress to restore vital protections for rivers under the Clean Water Act**

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[3] MICHAEL SACKETT, ET UX., PETITIONERS v. ENVIRONMENTAL PROTECTION AGENCY, ET AL.. Supreme Court of the United States, No. 21–454, May 25, 2023

and reaffirm our nation's commitment to clean water. In response to the Sackett ruling, we recommend the following:

1. Support a comprehensive definition of the "Waters of the United States" that includes small streams and wetlands as Congress intended when the law was amended and passed in 1972.
2. Increase federal funding to conservation programs that prioritize acquiring lands through voluntary measures such as easements to protect aquatic areas or programs that compensate landowners not to develop on wetlands.
3. Enhance enforcement of state, tribal, and local water protections currently on the books and increase funding for enforcement agencies.
4. Support a scientifically robust review process under Section 401 to ensure states and tribes have the specific authority to condition or deny water quality certifications for infrastructure projects.
5. Direct EPA to update its technology-based limits for industry water pollution control systems as frequently and consistently as possible to protect public health.
6. Strengthen the Clean Water Act by closing its loophole for agricultural runoff and other "nonpoint" sources of pollution, which are by far the largest sources of impairments in waterways across the U.S.
7. Consider more consistent, universal guidelines for waterway impairment designations for all 50 states, and for gauging unhealthy levels of key pollutants like nitrogen.
8. Make it easier to effectively enforce key provisions and requirements of the Clean Water Act, including the cleanup plans -- called "Total Maximum Daily Loads".
9. Boost funding for the EPA and state environmental agency staff required to measure water quality, and to develop and implement the cleanup plans needed to bring impaired waterways back to life.
10. Require EPA to produce and publish an updated National Water Quality Assessment report, which they are required to send to Congress biennially under section 305(b) of the Clean Water Act. Congress should also require the EPA to update their data requirements to include improved information on stormwater pollution.

Our organization is fully committed to working with you on these timely federal water issues and appreciate your strong leadership. Thank you for your consideration.

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AMERICAN
RIVERS
Life Depends on Rivers.℠
America's Most
Endangered
Rivers® of 2023
10 RIVERS. 10 THREATS. 10 SOLUTIONS.

Life Depends on Rivers℠.

Two-thirds of our water comes from rivers. Rural and urban areas depend on rivers for clean drinking water, food production, economic vitality, and cultural connection. Rivers provide natural habitat indispensable to fish, birds, and other aquatic and land animals. Like the veins and arteries in our own bodies, our health and our future are directly linked to our rivers.

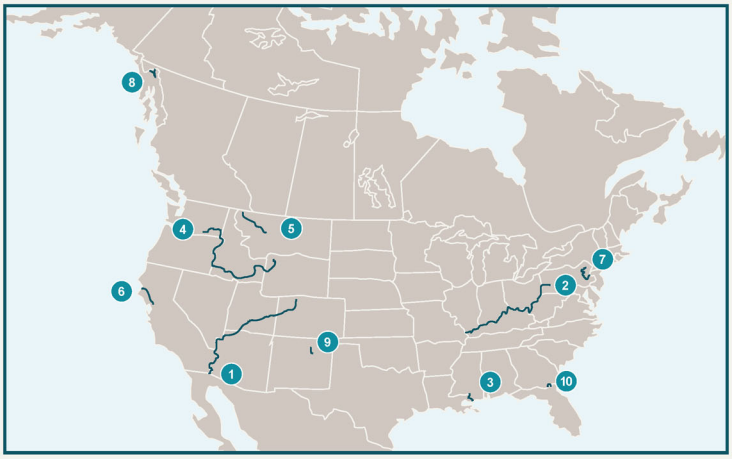
But too many of our rivers are sick. Forty-four percent of waterways in the United States are too polluted for fishing or swimming, according to the US Environmental Protection Agency. Freshwater species are going extinct faster than ocean or land species, and rivers are among the most threatened ecosystems on the planet. Meanwhile, climate change is fueling more severe floods and droughts — and unjust policies put the burden of all these impacts disproportionately on Communities of Color and Tribal Nations.

Healthy rivers are essential to human health and public safety. When rivers are sick, people and nature suffer.

In its 38th year, America's Most Endangered Rivers® amplifies the voices of local leaders speaking up for rivers at risk. The 10 rivers on this year's list underscore how health and safety are threatened by climate change, pollution, dams, and other threats to rivers.

As American Rivers marks 50 years of conservation impact, we know we need to work shoulder to shoulder with strong leaders and partners on rivers all across the country. We are proud to join with partners like those advocating for the future of America's Most Endangered Rivers® of 2023. Together, we must defend these 10 rivers — and demand greater protections for all 3 million miles of rivers across our country.

Healthy rivers are essential to human health and public safety. When rivers are sick, people and nature suffer.



American Rivers reviews nominations for the America's Most Endangered Rivers® report from river groups and concerned citizens across the country. Rivers are selected based upon the following criteria:

- A major decision that the public can help influence in the coming year on the proposed action.
- The significance of the river to people and nature.
- The magnitude of threat to the river and its communities, especially in light of climate change and racial injustice.

ABOUT AMERICAN RIVERS

American Rivers is championing a national effort to protect and restore all rivers, from remote mountain streams to urban waterways. Healthy rivers provide people and nature with clean, abundant water and natural habitat. For 50 years, American Rivers staff, supporters, and partners have shared a common belief: Life Depends on Rivers℠.

FOR MORE INFORMATION: AMERICANRIVERS.ORG

STATE: Arizona

AT RISK: Ecosystem health, reliable water delivery, regional economy

SUMMARY

The Colorado River's Grand Canyon is one of our nation's, and the world's, greatest natural treasures. A sacred place of deep cultural significance, it is also a beloved recreation and travel destination, and home to endangered plants and animals. But rising temperatures and severe drought driven by climate change, combined with outdated river management and overallocation of limited water supplies put this iconic river at serious risk. As it makes critical decisions about water management along the Colorado River, the Bureau of Reclamation must consider the environment a key component of public health and safety and prioritize the ecological health of the Grand Canyon.

THE RIVER

The Colorado River flows nearly 1,500 miles from the Rocky Mountains to the sea in Mexico. Along its way, the river traverses some of the driest and hottest areas of the country, providing drinking water to 40 million people, including some of the nation's largest cities including Los Angeles, Phoenix, Las Vegas, and Denver, as well as 30 federally recognized Tribes including the Navajo, Ute, Havasupai, and many others. The Colorado River provides irrigation water for nearly six million acres of ranch and farmland, including farms that grow 90 percent of this country's winter vegetables. The river is also the engine of a recreational economy dependent on adequate river flows and water supplies to operate. In all, the Basin feeds a $1.4 trillion economy integrally connected to the broader national economy.

The Grand Canyon is the iconic heart of the Colorado River. This 277-mile stretch of river in Northern Arizona is unmatched in nature. Recognized as a World Heritage Site, one of the Seven Natural Wonders of the World, and one of the most famous landscapes on earth, the Grand Canyon is the foundation of the Colorado River Basin's natural and cultural fabric, and the National Park draws millions of visitors each year.

The biodiversity of the Grand Canyon is astounding. From alpine meadows and soaring Douglas fir of the North Rim at over 8,000 feet to the stiff Blackbrush and fuchsia petals of the Pincushion cactus in a desert the same elevation as Tucson, the Grand Canyon is an ecological refuge. It is home to unique wildlife including bighorn sheep, mountain lion, elk, and beaver, as well as fish such as the endangered Humpback Chub and Colorado River Pikeminnow.

The Grand Canyon is the lifeline between the Upper and Lower Colorado River Basins and is bookended from above and below by two massive dams, forming the two largest reservoirs in the country. The Grand Canyon National Park starts 16 miles below the tailwaters of Glen Canyon Dam located in Page, Arizona.

FOR MORE INFORMATION:

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TAKE ACTION:

AMERICANRIVERS.ORG/GRANDCANYON2023

Construction on the dam was completed in 1963, and waters began to back up behind the dam, flooding the back country of Glen Canyon to create Lake Powell. Hoover Dam in Nevada was completed in 1936 and backs up water to form Lake Mead — the largest reservoir in the US — backing up the river 65 miles at its longest reach to Pearce Ferry at the western end of Grand Canyon.

THE THREAT

The Colorado River is on the brink of collapse, and the Grand Canyon is in the crosshairs as river managers make critical decisions about how to allocate dwindling water supplies. While the river originally terminated in Mexico's Sea of Cortez, it has been so over-tapped since the mid 1900s that it dries up 100 miles from its original end point. Over the past 20+ years, river flows have dropped precipitously, and water levels of Lake Powell and Lake Mead have fallen to historic lows, in large part driven by climate change.

To protect critical infrastructure including dam integrity, hydropower generation and the ability to deliver water through the Grand Canyon to Nevada, Arizona, California and Mexico, the federal government and the 7 basin states must continue to modify the amount and timing of water allowed to flow through Glen Canyon Dam. The question before river managers is "will we attempt to solve the basin's water challenges by sacrificing the health of the Grand Canyon, or will we pursue lasting solutions that balance water demands with environmental health and safety?"

In response to more than two decades of dry years throughout the Colorado River basin, in 2022 the Bureau of Reclamation (BOR) took emergency actions to protect infrastructure at Lake Powell. Despite the prospect of an above average water year in 2023, which may buy a little time for the basin, reducing water deliveries and resulting changes in flows through Glen Canyon Dam into the Grand Canyon in the coming years is inevitable.

Altering flows from Glen Canyon Dam has significant impacts on the Grand Canyon. The prolonged drought and accelerating impacts from climate change triggering falling lake levels at Lake Powell has already caused significant harm to the canyon. If future flows are severely altered without consideration for the environment, it could further devastate the Grand Canyon's irreplaceable natural, cultural, and recreational values.

For many, the Grand Canyon and its surroundings are sacred. Reducing releases from the dam to turn the river into a mere trickle would not only impact native fish, plants, and wildlife, but also the health and well-being of those who are inextricably tied to this place. More than a dozen Native American Tribes and Pueblos revere the Canyon, and millions of people a year find awe, healing, and excitement by just being in and around this place. These challenges are serious threats to the health and well-being of both people and the environment, and if not solved, could do serious, lasting harm to arguably the most recognizable National Park in the country, and all people who love it.

Furthermore, with the rapid and consistent decline of water elevations at Lake Powell, Colorado River flows from Glen Canyon dam are warming. That is, the warmer layer of water in the top of the reservoir's water column has dropped to a level where that warm water is flowing through the dam's hydropower tubes. This situation has allowed high-risk, non-native fish such as smallmouth bass to pass

AMY MARTIN

through the dam into the Grand Canyon. Smallmouth bass are new to the Grand Canyon environment and biologists fear they will cause serious harm to both cold-water sport fish (rainbow and brown trout) and juvenile native and endangered fish such as the humpback chub. Without a mechanism to stop these and other types of non-native fish from getting into the Grand Canyon, cold-water and native fish populations that have been supported through long-term investments of millions of dollars and countless operational hours will once again be placed in serious jeopardy.

WHAT MUST BE DONE

We simply cannot allow the beloved Grand Canyon to become an ecological sacrifice zone as we work to solve the Colorado River basin's ongoing water crisis. The BOR is currently considering two federal actions where the public can participate and encourage the development of flow regimes that will incorporate and consider ways to protect the ecological, cultural, and economic values of the Grand Canyon.

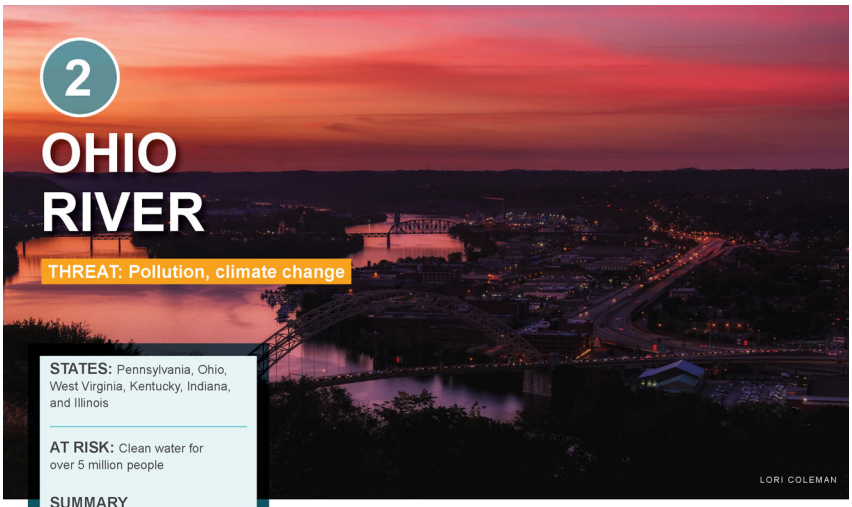
Low flows in the river are creating a perception that we can no longer implement the types of flows needed to support environmental and natural resources in the Grand Canyon because there is not enough water. We can, however, both protect public health and safety and support the ecosystem by ensuring that water delivered through the Grand Canyon is released in a way that not only accounts for critical infrastructure and sustains the river's essential connection to the Lower Basin States and Mexico, but also protects the canyon's cultural heritage and the natural environment from extinction.

BOR is requesting public comments around a Supplemental Environmental Impact Statement (SEIS) to temporarily amend a set of rules known as the 2007 Interim Guidelines that could alter flows through Glen Canyon Dam in the short-term. BOR's purpose for this action is to address the immediate emergency to the Colorado River community's water supply and public health and safety for the Basin. It is critical that BOR recognize the environment as a key component of public health and safety.

The Grand Canyon's ecological stability is at stake and must be part of the calculations for operating the Colorado River system under the SEIS. That is, in determining the suitable range of flows to pass through Glen Canyon Dam in response to the emergency conditions in Colorado River Basin, it will be imperative to identify and assess the critical resource needs within the Canyon and the operational opportunities available to help sustain and improve physical conditions of the Colorado River in Grand Canyon. Specifically, BOR should consider how it can best utilize and time the altered flow volumes from Glen Canyon Dam to replicate natural flow dynamics through Grand Canyon.

Understanding the impacts from the range of possible flow options must be comprehensive to fully evaluate and prioritize the tradeoffs to the array of physical, biological, and cultural values and what adaptation or resilience strategies will be needed to protect and sustain these resources.

This future is not possible without leadership and representation of Colorado River Tribes. As sovereign nations, tribes must have an equal role in the deployment and implementation of federal infrastructure dollars and all future Colorado River management decisions. It is imperative that the seven Colorado River Basin states and the Biden administration establish a way to formally engage with Tribal Nations to address this river emergency. They must act with urgency to invest and implement equitable and proven solutions to reduce water risk in the Basin and build a stronger future centered around a healthy Colorado River.



STATES: Pennsylvania, Ohio, West Virginia, Kentucky, Indiana, and Illinois

AT RISK: Clean water for over 5 million people

SUMMARY

The Ohio River unifies 30 million people across 15 states, from New York to Mississippi. Protecting this precious resource is essential to ensuring the endurance of cultural identity, historical significance, biodiversity, vibrant river communities, and safe drinking water. But the upper river is threatened by industrialization and pollution, recently exemplified by the East Palestine train derailment. This ongoing chemical disaster underscores the vulnerability of the Ohio River and need for increased safeguards and durable funding for additional and continuous monitoring. To protect the Ohio River, Congress must designate the river as a federally protected water system and commit to significantly fund both the Ohio River Restoration Plan and Ohio River Valley Water Sanitation Commission's technical upgrades.

THE RIVER

The Ohio River begins at the confluence of the Allegheny and Monongahela rivers in Pittsburgh, Pennsylvania, flowing southwest and defining boundaries of Ohio, West Virginia, Kentucky, Indiana, and Illinois before flowing into the Mississippi River in Cairo, Illinois. The watershed covers more than 200,000 square miles and provides drinking water for over five million people.

The Ohio River is rich in Indigenous history and culture. The word "Ohio" comes from the Seneca name for the river, Ohiyo, which means "it is beautiful." Many ancestors of Native American descendants still living in Ohio today were forced to relocate. In addition to Native American history, the river also holds deep significance in our nation's struggle for justice from an African American perspective. A sign in Parkersburg, West Virginia reminds us that before emancipation, the Ohio River was the gateway to freedom for those enslaved south of the Ohio River. If you could cross the Ohio River, you had reached freedom. The river remains a significant historic site and a symbol of freedom.

In addition to its cultural and historic importance, the river provides critical habitat for 150 species of fish and the watershed protects endangered species such as the candy and diamond darter, several species of mussels, and crayfish. The rivers, streams and lakes are a source of recreation for communities throughout the watershed.

THE THREAT

The Ohio River Basin drains areas affected by environmental pollution from heavy industrialization, including mining and resource extraction for energy development, chemical production, and durable goods manufacturing. This history has resulted in significant discharges of toxic chemicals, including both legacy chemicals (such as mercury, dieldrin, PCBs, and dioxins) and chemicals of emerging concern (especially PFAS and Gen-X chemicals). These discharges, with associated carbon and methane

emissions, threaten human and ecosystem health.

Pollution from disposal of coal ash and acid mine drainage also impact the watershed. Ongoing discharges from industrial, municipal, and agricultural sources remain a challenge as a decades-long effort to improve and sustain the river system continue. Despite measurable progress, two thirds of the river is listed as impaired for bacteria under the Clean Water Act. High levels of nutrients present in the river results in the formation of toxic algae outbreaks. The cumulative impact of all of this pollution threatens drinking water and public health, while also putting vulnerable communities at risk.

One example of the continued challenges occurred on February 3, 2023 when a Norfolk Southern train carrying hazardous chemicals derailed in East Palestine, Ohio, 16 miles from the Ohio River. This train was carrying at least five toxic chemicals. Of immediate concern was the vinyl chloride, a chemical used in plastic products. Fearing an uncontrolled explosion, Norfolk Southern chose to "vent" this chemical by burning the substance from 5 railcars. Additionally, butyl acrylate leaked into nearby streams that flow into the Ohio River. Soon after came reports of rashes and headaches, fish kills and animal deaths. Officials began tracking a plume of chemicals in the Ohio River in real time. ORSANCO, in conjunction and coordination with local and state emergency response officials and environmental agencies, stepped up to the plate to safeguard drinking water through monitoring and technical expertise. Unfortunately, ORSANCO is operating its staff and systems — including the organic detection system currently being used to navigate the East Palestine tragedy — on the same federal appropriation formula it received in 1972. Sustained increases in financial support for ORSANCO are needed to protect the communities and the environment in the Ohio River basin.

WHAT MUST BE DONE

This recent chemical tragedy underscores the precious value and vulnerability of the Ohio River. To protect the safety of drinking water for the 5 million people who depend on the river, ORSANCO requires robust, sustained funding to prevent disasters and pollution through immediate testing, long term monitoring, and technical expertise. Sustained funding is required for technical upgrades to their monitoring system and increases to staff capacity.

The Ohio River Basin Alliance (ORBA), a multi-state effort in partnership with hundreds of stakeholders across the region, is drafting a basin-wide restoration plan. The Ohio River Restoration Plan is a collaborative effort modeled after successful restoration projects such as the Federal Great Lakes Restoration Initiative. This "blueprint" presents goals, objectives and actions for general improvements to safeguard drinking water, support the ecological well-being of the river, and invest in quality of life for communities along the river. Members of Congress from across the Ohio River watershed must support the plan to designate the Ohio River as a distinct water system worthy of substantial federal funding to support its recovery, protection, and future value.

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3 PEARL RIVER

THREAT: Dredging and dam construction

STATES: Louisiana, Mississippi

AT RISK: Clean drinking water, local and downstream communities, fish and wildlife habitat

SUMMARY

The Pearl River is one of the most biodiverse rivers in the U.S. and the primary drinking water source for Jackson, Mississippi. But this natural treasure is threatened by a devastating private real estate development scheme masquerading as a flood control project. This "One Lake" project would dredge and dam the Pearl River to create new waterfront property, destroying vital fish and wildlife habitat, worsening Jackson's flooding and drinking water crisis, increasing toxic contamination, and reducing freshwater flows critical to the region's important seafood and tourism economies. The Biden administration must stop this project and invest in environmentally-sustainable flood relief for the predominantly Black community of Jackson while protecting the Pearl River and all the communities and economies that rely on it.

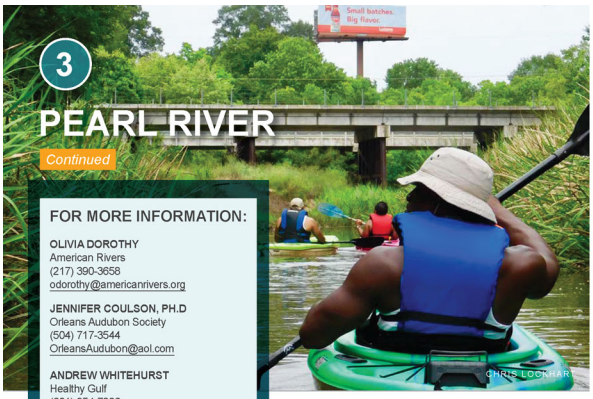
THE RIVER

From its headwaters on native Choctaw lands, the Pearl River flows nearly 500 miles through Mississippi and Louisiana to the Gulf of Mexico. The Pearl River provides habitat for more than 300 species of birds, fish, and wildlife, including the federally threatened Gulf sturgeon and ringed sawback turtle, and 125,000 acres of wetland and bottomland hardwood conservation lands. The Pearl supplies freshwater flows critical to the health of the Gulf of Mexico; the region's oyster, crab, shrimp and tourism industries; and hundreds of industrial and municipal users.

The Pearl is the only public drinking water source for the city of Jackson, which includes 150,000 residents, 83 percent of whom are Black. The city has struggled for decades to maintain basic water and sewer service and is currently under an Environmental Protection Administration (EPA) consent decree to enforce established rules and regulations due to sewage discharge violations in the billions of gallons annually. In 2022 the city's residents were left without clean drinking water for months when one of the city's two drinking water treatment plants failed.

THE THREAT

One Lake is a private real estate development scheme masquerading as a flood control project that threatens public health and safety, river and coastal ecosystems, and regional economies. It will dredge 10-miles of the Pearl River, destroying 2,500 acres of mostly wetland habitat, disturbing eight highly contaminated toxic sites with no plan to protect public health, and causing a harmful rise in the river's water temperature. A new dam will be constructed to contain the dredged 1,900-acre impoundment, and the dredged material will be used to build new waterfront property for real estate development putting more people in harm's way.



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PEARL RIVER

Continued

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In addition to the massive loss of floodplain, wetlands, and in-stream habitats, One Lake will worsen Jackson's significant urban flash flooding and stormwater drainage problems. One Lake will permanently elevate water levels in eight tributary creeks that flow through primarily low-income Black neighborhoods in Jackson. During the four years of project construction, Jackson will be forced to somehow find an alternative water source for the one drinking water plant that was able to operate during the city's most recent drinking water crisis. One Lake will then add to the city's drinking water and water quality problems, including by confining the rampant discharges of raw and poorly treated sewage that has already closed the Pearl to public contact recreation in the Jackson area. The low-head dam will reduce and alter the delivery of freshwater flows and nutrients vital to a healthy river-Gulf ecosystem and the communities and industries that rely on those flows.

Instead of subsidizing private real estate development, the federal government should invest in already identified flood relief solutions, including setting some levees farther back from the river, investing in floodplain and wetland easements, targeted elevations, and voluntary relocations of structures in flood-prone areas.

WHAT MUST BE DONE

One Lake is a federal civil works project that was rejected by the U.S. Army Corps of Engineers multiple times in the past. This project has been revived by local developers under a unique process that allows non-federal project sponsors to study federal civil works projects. While the Army Corps is currently reviewing the environmental documents developed by the private interests and has yet to decide whether the project merits moving, the agency has already committed $221 million from the Infrastructure Investment and Jobs Act to construct the project.

The incredibly destructive One Lake project will not protect communities from flooding. Instead, it will result in more environmental injustice harm in metro Jackson's communities of color by worsening urban flooding, exacerbating the city's long-standing drinking water crisis, and funneling critically needed investments and resources away from marginalized communities–all for the benefit of private real estate developers.

The US Army Corps of Engineers, US Environmental Protection Agency, and US Fish and Wildlife Service must protect the Pearl River for people and wildlife by rejecting the One Lake project. These agencies should prioritize non-structural and natural infrastructure solutions to provide effective, environmentally sustainable flood relief to Jackson while protecting the river's unique ecology and wildlife.

STATES: Idaho, Oregon, Washington

AT RISK: Tribal treaty rights and culture, endangered salmon runs, rural and local communities

SUMMARY

Salmon in the Columbia-Snake River basin are on the brink of extinction in large part due to four dams on the lower Snake in eastern Washington. Restoring salmon runs and honoring treaties and responsibilities with Tribal Nations across the region requires removal of these four dams. Momentum and support for this river restoration effort is growing, but it is critical that the hydropower, transportation, and irrigation services of the dams are replaced before dam removal can begin. The region's congressional delegation and the Biden administration must act with urgency to invest in infrastructure so that the dams can be removed, setting the Northwest on a course to climate resilience, economic strength, abundant salmon, and cultural revitalization.

THE RIVER

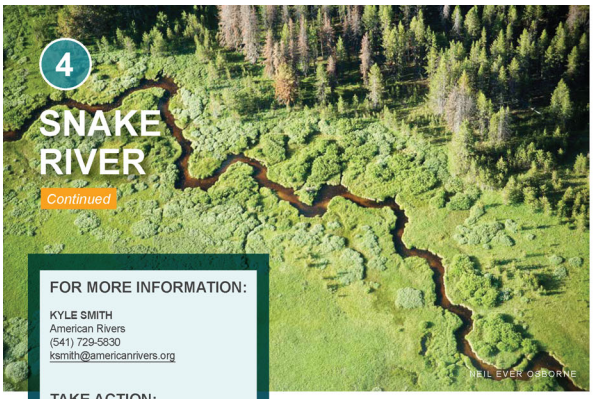
The Snake River begins high in the mountains of Wyoming and flows for more than 1,000 miles before merging with the Columbia River at the Tri-Cities in eastern Washington. As the largest tributary of the Columbia, the Snake once produced 2-6 million fish annually, or 40 percent of the prized Chinook salmon and steelhead in the Columbia River Basin. Each year, fewer Snake River salmon complete the return trip from the ocean in what remains the longest distance, highest elevation salmon migration on earth.

Salmon are at the heart of the cultures of Northwest Tribal Nations — integral to religion, identity and physical sustenance. Historically, the region's tribes were wealthy people thanks in large part to a trade economy based on abundant salmon. Tribes have led regional salmon recovery efforts for decades. In recent years, the lack of salmon has been devastating to communities across the region. Businesses that depend upon the recreation and tourism dollars that salmon bring are suffering, and commitments to Northwest Tribal Nations remain unfulfilled.

THE THREAT

The four dams on the lower Snake River provide irrigation, transportation, and hydropower generation benefits to economies of the inland Northwest. Since construction of the dams concluded in 1975, the four lower Snake River dams have contributed to dramatic decreases in the basin's salmon and steelhead populations. All Snake Basin salmon and steelhead populations are now listed as threatened under the Endangered Species Act.

In January 2023, the American Fisheries Society, the world's oldest and largest organization dedicated to strengthening the fisheries profession, advancing fisheries science, and conserving fisheries resources, issued a position statement calling for



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the removal of the lower four Snake River dams. The statement reads in part; "(w)hen the body of scientific evidence is considered, it is clear that breaching the four lower Snake River dams is necessary to (1) substantially improve the probability of recovering these cultural and ecological keystone species to healthy and harvestable populations and (2) safeguard those fishes from extinction." It's clear that salmon cannot recover with the lower four Snake River dams in place.

The urgency of removing the lower four Snake River dams has been increased by current and future threats from climate change. The dams turned was once a free-flowing river into a series of still-water reservoirs that act as a bathtub left in the sun, contributing to increased water temperatures and exacerbating climate change through emissions of methane. Temperatures in the lower Snake now consistently reach 70 degrees, a temperature which can be lethal for salmon and steelhead, in July and remain high throughout summer months. Upstream from the four dams lies some of the best cold-water fisheries habitat in the continental United States, with the Salmon, Grande Ronde, Clearwater and other Snake tributaries projected to represent over 65% of the nation's coldwater fish habitat by the year 2080.

WHAT MUST BE DONE

Washington Governor Jay Inslee and Senator Patty Murray issued a report in late 2022 that showed that the services the dams provide can be replaced with new infrastructure, and that these investments must be made before the dams can be removed. Even the important, though modest, contributions of power to the Northwest electrical grid can be replaced with a variety of new clean energy resources. Nimiipuu Energy, a project led by the Nez Perce Tribe, is leading the way in developing alternative energy resources, with the ultimate goal of producing 5,311MW of solar power- the amount BPA has stated is required to replace the power generated by the lower four Snake River dams.

We need an action plan that identifies the additional strategies and development needed to replace the services provided by the dams — irrigation, transportation, and energy — with other forms of infrastructure that allow for local economies and salmon to thrive in harmony, rather than in conflict. With Northwest Tribes leading the way on renewable energy, Federal and Northwest State governments and agencies should follow this lead and procure new clean energy resources and prioritize investments in grid modernization and energy storage to set in motion this transition.

STATE: Montana

AT RISK: Public health, fish and wildlife

SUMMARY

The Clark Fork is a regional boating and angling destination and supplies some of the richest habitat in the lower 48. Throughout European settlement and industrial development, the Clark Fork was the backbone of large-scale enterprises that left a legacy of pollution and ecological damage. Community members, advocates, Tribes, and government officials are among many who have been helping to heal the river, however, the shuttered Smurfit-Stone pulp mill threatens to reverse the gains made. Sitting along four miles of the Clark Fork downstream of Missoula, Montana, Smurfit-Stone is poisoning the groundwater and river with dioxins and heavy metals. These pollutants threaten fish and wildlife and put the health of tribal subsistence fishers at risk. Through federal Superfund law, the polluters are responsible for cleaning up the site.

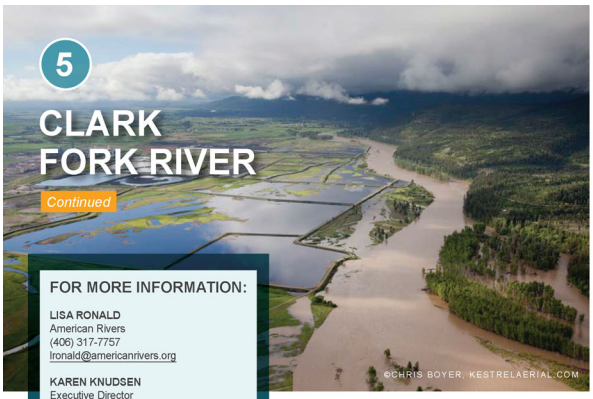
THE RIVER

Rising out of mountains along the Continental Divide, the Clark Fork captures water from 28,000 miles of creeks and streams on its 320-mile journey to Lake Pend Oreille. It supplies irrigation for farms and ranches throughout western Montana, and drinking water and hydropower for local communities. The river also provides food, shelter, and vital pathways for wildlife and is a popular fishery, supporting westslope cutthroat trout, threatened bull trout, and other game fish. The Confederated Salish and Kootenai Tribes, whose ancestral territories span the Clark Fork watershed, have treaty rights to fish the river. The Clark Fork is a recreation destination for kayakers, rafters, and recreational floaters and the river has become the primary driver of local outdoor economies.

The Clark Fork River has faced a long legacy of industrial pollution, resulting in a complex of Superfund sites in the river's hard-working headwaters — several of which have been successfully cleaned up, including the Milltown Reservoir and Dam that was removed in 2009. Cleanup work is making headway at these sites and the river is on the mend. The lack of action at Smurfit-Stone, however, puts these gains in jeopardy.

THE THREAT

In 1957, the Smurfit-Stone mill began producing pulp products on 3,200 acres adjacent to the Clark Fork. Initially, operators discharged wastewater directly into the river causing fish kills and triggering public outcry. Later, the mill stored wastewater in unlined settling ponds. Garbage and ash went into unlined, unpermitted landfills perched on top of the aquifer. After the mill closed in 2010, EPA placed Smurfit-Stone on its inventory of Superfund sites because of the high volumes of toxic industrial chemicals.



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CLARKFORKRIVER2023

While the remaining mill buildings are set back from the river, the unlined sludge ponds and landfills are located within or adjacent to the river's historic floodplain – allowing dioxins, furans, and heavy metals like manganese to leak into the groundwater that flows to the river. Even small amounts of these toxins can cause reproductive and immune system damage in fish and wildlife, and these toxins increase as they move up the food chain. Due to human health concerns, the Montana Department of Fish, Wildlife and Parks issued a warning to anglers against eating any fish caught in the Clark Fork for 100 miles downstream of the mill. This legacy of pollution is in violation of the treaty rights held by the Confederated Salish and Kootenai Tribes under the 1855 Hellgate Treaty.

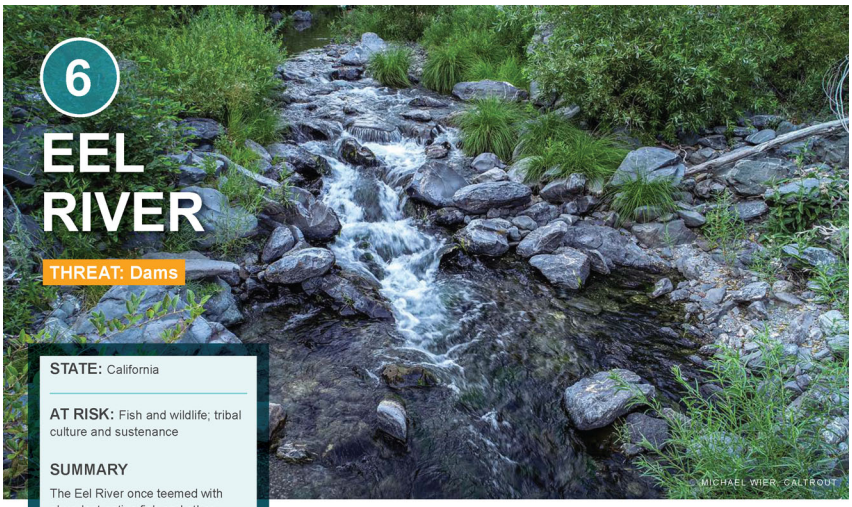
Although an earthen berm separates the river from the mill, annual spring runoff and periodic flooding have eroded parts of the berm – which was never engineered or licensed as a levee. Catastrophic flooding, like the Yellowstone River experienced in summer 2022, threatens to fully erode the berm and wash tons of industrial pollutants downstream. Missoula County's floodplain regulations ban unlined ponds and improperly engineered flood control structures.

For more than a decade, the EPA has failed to adequately address these threats, and the polluters continue to resist taking responsibility for sufficient pollution testing and cleanup.

WHAT MUST BE DONE

The EPA must compel the polluters, whose companies have morphed into International Paper and Westrock, to eliminate the site's immediate risk of catastrophic flooding and its ongoing release of contaminants that pollute the Clark Fork River. The place to start is by cleaning up approximately 140 acres of toxic soil and industrial waste in the unlined sludge ponds and landfills near the Clark Fork River. The EPA has authority through the Superfund process to order cleanup actions on part of a site to reduce immediate risks to human health and the environment while continuing to investigate pollution problems elsewhere at the site.

In addition to cleaning up the portion of the property that most threatens the Clark Fork River and downstream communities, the EPA must compel the polluters to undertake additional groundwater, soil, and wildlife exposure testing to better understand sources and pathways of contamination. The EPA must compel completion of tests the Missoula Water Quality District recommended in 2022.



STATE: California

AT RISK: Fish and wildlife; tribal culture and sustenance

SUMMARY

The Eel River once teemed with abundant native fish and other wildlife, supporting the Wiyot, Sinkyone, Lassik, Nongatl, Yuki and Wailaki peoples who have lived along the river since time immemorial. Today the river's Chinook salmon, steelhead, and Pacific lamprey are all headed toward extinction in large part because of two obsolete dams that make up Pacific Gas & Electric's (PG&E's) Potter Valley Hydroelectric Project. Together the dams completely block salmon migration and harm river habitat. The license for the dams recently expired and PG&E no longer wants to operate the facilities. Moreover, in a March 16, 2023 press release, PG&E indicated that Scott Dam's seismic risks would result in a 20,000 acre foot reduction in the project's reservoir capacity. It's up to federal regulators to require PG&E to remove the dams as part of the decommissioning plan, expected during the Fall of 2023.

THE RIVER

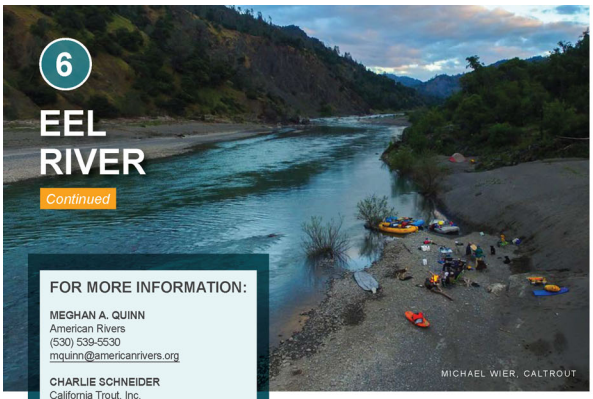
The Eel River is the ancestral home of tribal groups including the Wiyot, Sinkyone, Lassik, Nongatl, Yuki and Wailaki peoples, and also now the home of other Tribes that were forcibly moved to the area in the early 20th Century. Many of these people continue to live along and care for the river today.

The river is the third largest in California, with an area of 3,684 square miles. The mainstem Eel River's headwaters are located in the Snow Mountain Wilderness in Mendocino National Forest, where cold waters provide an ideal refuge for native fish as the climate warms.

The Eel River was historically one of the most productive fisheries in the state, supporting a diverse array of native species, including four anadromous salmonid species (Chinook and coho salmon, steelhead-rainbow trout, and coastal cutthroat trout), two sturgeon species, and three lamprey species. The construction of Cape Horn Dam in 1908 and Scott Dam in 1922 have severely impacted fisheries in the river.

THE THREAT

Two obsolete and unsafe dams on the Eel River, Scott and Cape Horn (part of the Potter Valley Hydroelectric Project), are preventing recovery of critically endangered salmonids, including federally protected Chinook salmon and steelhead trout. The dams completely block access to high-quality habitat in the upper watershed for these fish and also prevent sediment from moving through the system, leading to habitat loss in the Eel River watershed. Once-prolific fish populations are no longer able to access 89 miles of Chinook salmon spawning habitat and 288 miles of steelhead habitat.



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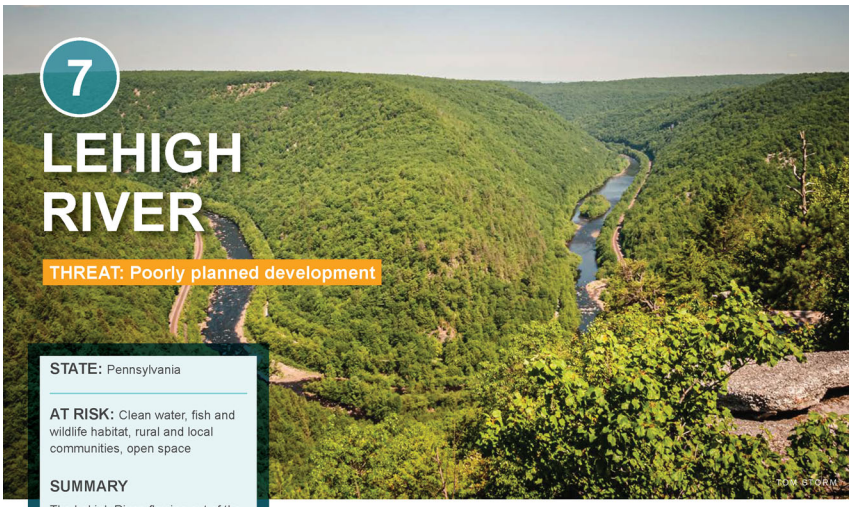
The high elevation and cool headwaters above the dams are critical to the recovery of these native fish in an era of climate change and are especially important to rare summer steelhead, which are listed as endangered under California's Endangered Species Act. Studies have shown that resident trout living above the dams still carry the genes for ocean migration, suggesting that once the dams are removed those fish may once again return to their ancestral spawning grounds. Scott and Cape Horn Dams have caused immense harm to the Eel River ecosystem and the communities that depend on a healthy Eel River watershed. The dams adversely impact Tribal Nations and Indigenous people for whom the Eel River holds cultural significance and who rely on it for sustenance. Loss of culturally and economically important fish runs, habitat loss and deterioration, and reductions in water quantity and quality are some of the negative impacts caused by the dams. Additionally, the way the dams are managed causes fish to struggle at key moments in their life cycle due to low water flows associated with out of basin diversions, inhospitable water temperatures caused by the reservoirs, water quality degradation including toxic algae outbreaks, excessive predation at a poorly designed fishway, and the proliferation of invasive species. In addition, PG&E recently admitted that Scott Dam, which impounds the Lake Pillsbury reservoir, presents unacceptable seismic risk when the reservoir is at full capacity.

WHAT MUST BE DONE

PG&E's decision to surrender their license to operate the dams and decommission the project is an enormous opportunity to remove obsolete unsafe dams that endanger downstream communities, facilitate salmon recovery, restore cultural connections, revitalize an important commercial and recreational fishery, and reconnect what would be California's longest free flowing river.

PG&E must expedite the next step towards restoring this river and its communities by removing both dams, repairing the damage they have caused, and ensuring the safety of downstream communities. They must also take immediate steps to reduce the impacts to already struggling fish populations caused by the current operation of the dams. If PG&E isn't willing to do this on their own, the federal agency that oversees hydropower dams, the Federal Energy & Regulatory Commission (FERC), should hold PG&E to account and require the full removal of Scott and Cape Horn dams as a component of decommissioning. PG&E cannot be allowed to walk away from these obsolete dams leaving a liability in place for current and future generations to contend with.



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LEHIGH RIVER

THREAT: Poorly planned development

STATE: Pennsylvania

AT RISK: Clean water, fish and wildlife habitat, rural and local communities, open space

SUMMARY

The Lehigh River, flowing out of the Appalachian Mountains and through the densely populated Lehigh Valley region, is the "backyard river" for half a million people, and the keystone to Northeastern Pennsylvania's outdoor recreation industry. The areas that surround the river offer outdoor gathering spaces and accessible recreation opportunities for people throughout the watershed, but especially in the cities of Allentown, Easton, and Bethlehem. But as the region becomes the logistics hub of the eastern seaboard, with over four square miles of warehouses and distribution centers built to date, the river's health is at risk. Unless federal, state and local decision makers act to improve protections for local waterways, the area's clean water and wildlife habitat could suffer irreversible harm.

THE RIVER

From its headwaters in the boreal forests of the Pocono Plateau, the Lehigh River flows 109 miles to its confluence with the Delaware River in Easton, Pennsylvania. The river valley is the homeland of the Lenape people and includes present-day cities of Allentown and Bethlehem.

Part of the Lehigh River is designated as one of Pennsylvania's Scenic Rivers, and the headwaters are designated as Exceptional Value. The river's name comes from the Lenape name for the river, Lechewuekink, which means "where there are forks".

The Lehigh is a whitewater river, and both new and experienced boaters enjoy its rapids. The river connects rural and urban communities, is a direct drinking water source for hundreds of thousands of people, and as a tributary to the Delaware River, supports the drinking water supply of 15 million. Located in a region that has grown and contracted alongside the resource extraction industry, tourism to the Lehigh River has helped restore the region's economies after the transition away from coal, timber, and steel.

THE THREAT

The region has become the logistics hub of the eastern seaboard, with warehouses and logistics centers already covering more than four square miles of land within the watershed. According to the Lehigh Valley Planning Commission, there's another square mile (approximately) of development in the pipeline. Currently, only California's Inland Empire can compare to the buildout happening in the Lehigh Valley.

Poorly planned, large-scale warehouse and distribution center development threatens the Lehigh River by converting critical forest and wetlands to hard surfaces—roofs and parking lots. These impervious surfaces prevent rainwater from soaking into the ground. Instead, warm, salty, dirty water runs off the pavement

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LEHIGH RIVER

Continued

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directly into the river and its tributaries. These impacts to water quality, and the paving of the remaining open space in the urban stretches in the Lehigh Valley, disproportionately impact downstream communities that have already borne the brunt of environmental degradation and pollution.

This development also accelerates the impacts of climate change. Based on calculations in a recent economic benefit report from Our Pocono Waters, that acceleration will be costly. Watershed ecosystems provide numerous services, like water purification, air filtration, carbon storage, nutrient cycling, soil formation, erosion control, food, and recreational value. In the Delaware River Basin, riparian buffers provide about $11,000 per acre through these services and $9,000 of carbon storage benefits per acre per year. The continued destruction of these buffers will increase carbon emissions and the severity of flooding, and it will be costly for communities to replace the services provided.

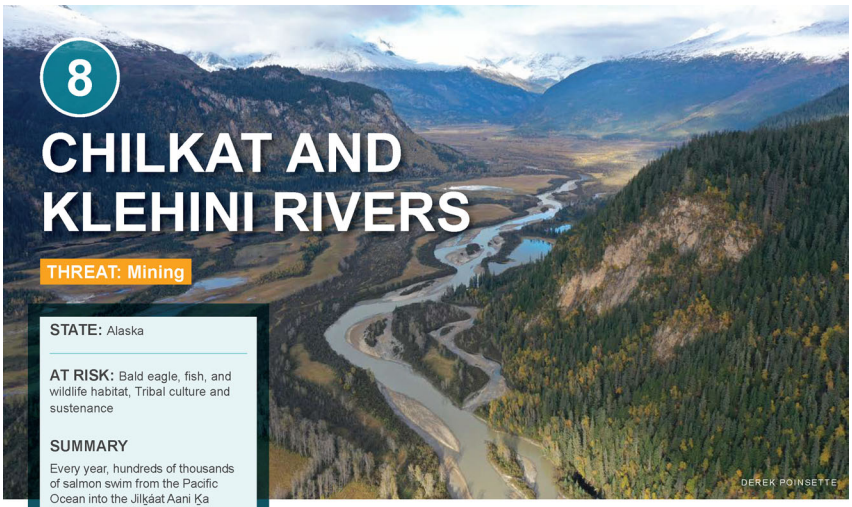
Better planning and development regulations could help reduce the economic and environmental impacts of development, but many local governments feel powerless. Communities throughout the region have voiced concerns, but their capacity is limited in the face of laws that fail to protect communities and the environment.

WHAT MUST BE DONE

The public can demand federal and state government decision-makers make crucial funding and legislative decisions to protect water quality from land development throughout the watershed.

Both the federal and state governments must provide their full, fair share of funding to the Delaware River Basin Commission (DRBC). This regulatory agency oversees a multi-state approach to water resource management that includes the Delaware River and its tributaries, including the Lehigh River. Its programs address water quality protections, flow management, and recreation, which is challenging to do when chronically underfunded since 2014.

The Pennsylvania state legislature must pass what's been known as the Riparian Buffer Protection Act (previously known as HB 714). This bill would ensure that all waterways across the state are guaranteed critical protective riparian buffers of at least 100 feet. High Quality and Exceptional Value waterways would be provided 300-foot buffers, which would be an increase from the current 150 foot requirement. Impaired waters would receive additional protection, as well, of 150 feet.



8 CHILKAT AND KLEHINI RIVERS

THREAT: Mining

STATE: Alaska

AT RISK: Bald eagle, fish, and wildlife habitat, Tribal culture and sustenance

SUMMARY

Every year, hundreds of thousands of salmon swim from the Pacific Ocean into the Jilḵáat Aani Ḵa Héeni (Chilkat River watershed) to spawn. Alaska Natives and other communities depend upon the river and its abundance for their culture and livelihood. But the Palmer Project, a proposed copper and zinc mine, is about to move to the next stage of development that could result in the release of hundreds of thousands of gallons per day of toxic wastewater, contaminating nearby creeks that feed directly into the Chilkat and Klehini rivers and crippling the entire ecosystem of the Chilkat Valley. This is in addition to the already concerning impacts of climate change, such as rapid glacier melting and a historic increase of rainfall. Congress and the Environmental Protection Agency (EPA) must act now to ensure the fundamental protections guaranteed by the federal Clean Water Act are not abandoned and a grave environmental injustice is not allowed. EPA must intercede immediately and direct the mining consortium to apply for a standard surface water discharge permit that will require meeting all applicable State and federal Water Quality Standards.

THE RIVER

The Klehini River is a main tributary to the Chilkat River. Together, the two rivers flow through the Alaska Chilkat Bald Eagle Preserve, critical habitat for the largest congregation of eagles in the world. The watershed also supports five species of wild salmon and a large brown bear population. Additionally, the ancient Tlingit Village of Klukwan, ancestral and current home of the Chilkat Tlingits, and the town of Haines, just downstream from the project, are totally dependent on these healthy and productive waters for their food, economy, and culture. The land being developed by the mining consortium is currently controlled by the State of Alaska and the U.S. government, but it has been Tlingit land for thousands of years and was never ceded to the State or federal government.

THE THREAT

The ongoing development of the Palmer Project is being pursued by a Canadian and Japanese consortium: American Pacific Mining and Dowa Mining and Metals. The next stage of development for the project is slated for the summer of 2023. The developers want to dig a mile-long “exploratory” tunnel under the Saksaia Glacier, directly above the Klehini River. The excavation will create huge waste storage piles and contaminated wastewater discharges in an area with extremely high levels of sulfide deposits, rainfall, snowfall, and seismic activity. The acidic wastewater, contaminated with heavy metals, hydrocarbons from vehicles and drilling muds, and explosive residues, will flow into the nearby creeks and the Chilkat and Klehini rivers. This development is extremely dangerous to the fragile ecosystem of the Chilkat Valley.

Mining industry supporters claim the demand for more electric cars is justification for mining copper wherever it can be found, ignoring the potential for reclaiming copper through recycling, as well as acknowledging the recklessness of mining new deposits

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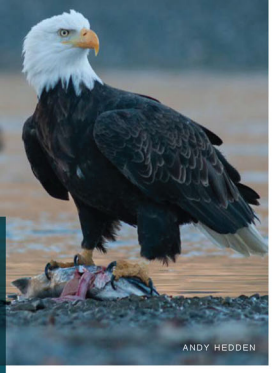
CHILKAT AND KLEHINI RIVERS

Continued



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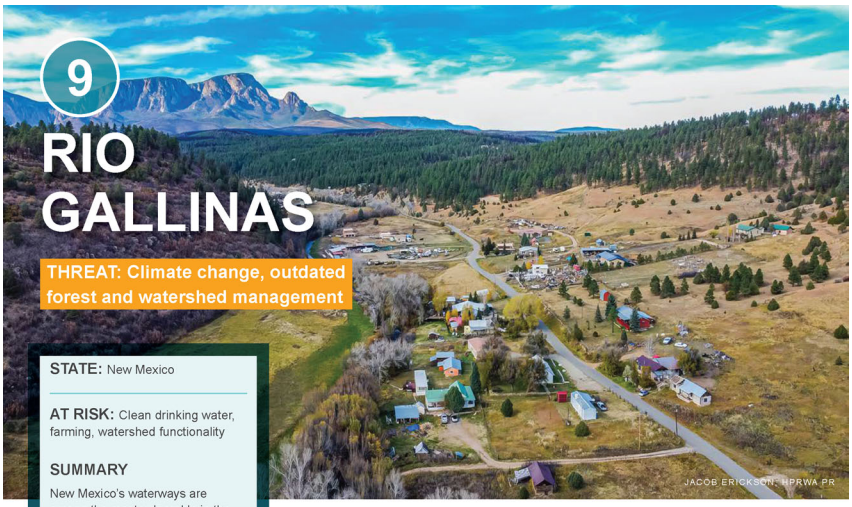
located in critical salmon habitat, especially habitat with the worldwide ecological significance of the nearby Alaska Chilkat Bald Eagle Preserve.

Congress and the EPA have the ability to ensure that the Clean Water Act is enforced. Public support could also play a significant role in convincing the federal government to allow co-management of the area by the Tribal Council of the Village of Klukwan, whose people have been living in, and protecting this ecosystem for thousands of years.

WHAT MUST BE DONE

Congress and the EPA must act now to ensure the fundamental protections guaranteed by the federal Clean Water Act are not abandoned and a grave environmental injustice is not allowed. EPA must intercede immediately and direct the mining consortium to apply for a standard surface water discharge permit that will require meeting all applicable State and federal Water Quality Standards.



STATE: New Mexico

AT RISK: Clean drinking water, farming, watershed functionality

SUMMARY

New Mexico's waterways are among the most vulnerable in the United States. The Rio Gallinas is the poster child for the adverse impacts — both ecological and cultural — of climate change on Southwestern watersheds. The river provides water for Las Vegas, New Mexico, and for the traditional acequia irrigation system. Drinking water, farming, and overall watershed functionality are all threatened by climate change and outdated forest management practices. Furthermore, without a good connection to its floodplain and a loss of wetlands, the Rio Gallinas is less able to naturally store the water needed to maintain flows during periods of drought.

In the aftermath of the largest fire in New Mexico's history, the multiple state and federal agencies charged with managing the Rio Gallinas watershed will determine the river's fate. It's essential that their work includes local communities' input and updated forest management protocols.

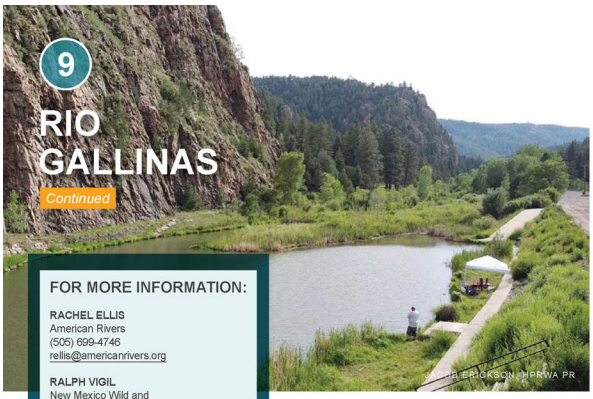
THE RIVER

The Rio Gallinas, flowing from the east side of the Sangre de Cristo Mountains, is a critical tributary to the Pecos River. Approximately 13,000 people depend on the Rio Gallinas for drinking water. Traditional Hispanic acequia systems, with a 500-year history on the landscape, also depend on the river to sustain agricultural and ranching communities. A large amount of the river is diverted to Storrie Lake to meet the needs of the Storrie Project Water Users Association. The Rio Gallinas watershed is home to a rich and diverse array of wildlife, including threatened and endangered species. The watershed and river also support many recreational activities such as hunting, fishing, and hiking.

THE THREAT

Over 20 years of drought, reduced snowpack, declining riparian health, high-intensity wildfire, and increased human demands are threatening the existence of the Rio Gallinas. A long history of land uses that have channelized and degraded the river and its riparian area have made them less resilient to climate change. Infrastructure (e.g., homes, roads) located in the river's floodplain further limits the ability of the Rio Gallinas to mitigate floods and fire. Most pressingly, outdated agency policy and protocols on forest management, prescribed burning, and watershed management pose threats to local drinking water, traditional acequia agriculture, and the forest products economy.

The Hermit's Peak/Calf Canyon fire, a catastrophic wildfire event in Spring 2022, was started by two USFS-prescribed burns that merged and became the largest wildfire in New Mexico history. The fire devastated 341,735 acres and the majority of the upper Rio Gallinas watershed. Over 900 structures were destroyed, including over 300 homes. The fire and ensuing floods contaminated water sources watershed-wide, including the Rio Gallinas. Pollution of wells and the town's reservoir caused drinking



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water emergencies and forced mandatory water cuts. Acequias that aid in aquifer recharge were destroyed by flooding and debris flows. There have been major negative impacts to the outdoor recreation economy and traditional hunting and fishing for sustenance.

The community and environment will experience long-term impacts from continued flooding, water quality degradation, the loss of vegetation, and decreased soil stability resulting from the Hermit's Peak/Calf Canyon fire. The lack of government agency collaboration and minimal opportunities for community engagement in watershed restoration hinder efforts to save the Rio Gallinas. While prescribed burning remains important for forest health, modernizing forest management policies and protocols is essential to improving watershed management and stewardship.

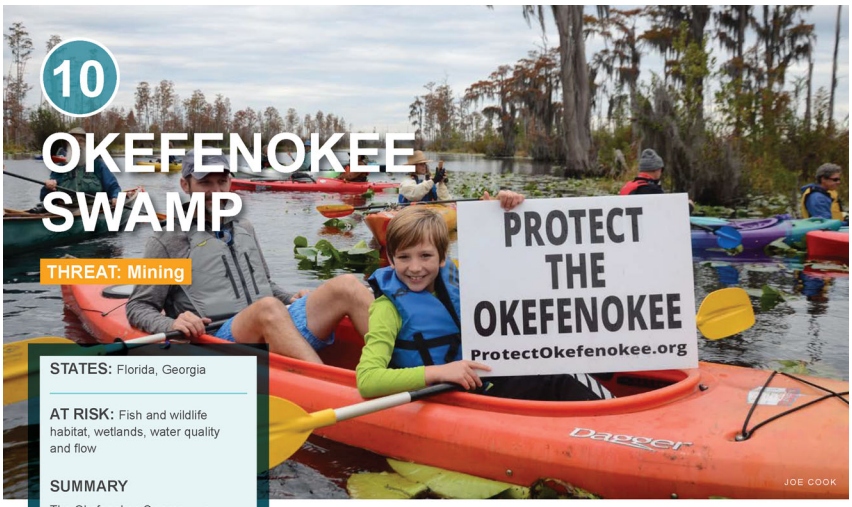
WHAT MUST BE DONE

The federal and state agencies that steward the public lands in the Rio Gallinas watershed must overhaul their stewardship practices in watershed-friendly, transparent, locally appropriate, and community-driven ways. Public involvement is critical to making this happen. Individuals can send comments to the relevant federal and state agencies, including the Santa Fe National Forest, Army Corps of Engineers, Federal Emergency Management Agency (FEMA), New Mexico Energy, Minerals and Natural Resources Department (EMNRD) Forestry Division, and New Mexico Environment Department, asking for:

A commitment to participate in the first annual New Mexico Fire and Water Summit in the summer of 2023, where all affected communities, decision makers, federal agencies, and state agencies come together to create a long-term management and mitigation plan.

A long-term management and mitigation plan for the Rio Gallinas that accounts for:

- Mandatory and improved public engagement protocols for prescribed burns, forest fuels treatment, and post-fire watershed impacts.
- Worsening climate change impacts, including severe storms.
- The long-term health of the river and watershed in all emergency response activities.
- Natural solutions to post-fire watershed and flood management (e.g., floodplain restoration, beaver dam analogs).



10 OKEFENOKEE SWAMP

THREAT: Mining

STATES: Florida, Georgia

AT RISK: Fish and wildlife habitat, wetlands, water quality and flow

SUMMARY

The Okefenokee Swamp — a unique wetland nearly half a million acres in size — is threatened by a proposed titanium mine, which government agencies predict would result in "permanent" and "unacceptable" damage to this special place. In 2022, the U.S. Army Corps of Engineers abdicated its responsibility for oversight of the proposed mine. The Corps' decision leaves permitting to the Georgia Environmental Protection Division, which must deny the permit applications for this ill-advised project. The Corps should make it clear that a federal Clean Water Act permit is required for the proposed mine. Perhaps no clearer case exists for why meaningful wetland protections at the federal level under the Clean Water Act are so important.

THE RIVER

The Okefenokee Swamp is part of the ancestral lands of the Muscogee (Creek) Nation. A unique international treasure, it is a potential UNESCO World Heritage Site. The Okefenokee is an unparalleled wetland system made up of peat beds, island prairies, open lakes, creek channels and cypress forests. It is home to alligators, carnivorous plants, an abundance of birds, several threatened and endangered species, and the Florida black bear.

Uncompromised by agriculture or industrial development, the swamp is one of the world's healthiest large-scale freshwater ecosystems. While other large wetland ecosystems have suffered ditching, draining and channelization, the Okefenokee retains its original hydrologic function, storing immense volumes of water through both flood and drought years and feeding the rivers that drain from it.

Okefenokee National Wildlife Refuge — the largest national wildlife refuge in the eastern United States — receives an average of 600,000 visitors annually. In addition to $64.7 million in local economic output, Okefenokee Swamp tourism supports over 700 local jobs.

THE THREAT

The proposed mine site is situated in a portion of Trail Ridge — the geologic formation that forms the eastern boundary of the swamp — that enables water storage and circulation within the swamp. If mining damages Trail Ridge, the U.S. Fish and Wildlife Service and Environmental Protection Agency anticipate that "permanent" and "unacceptable" damage could befall the Okefenokee Swamp.

Meanwhile, over the past three years the story of the Okefenokee has been a roller-coaster ride subject to the politicization of basic wetland protections under the Clean Water Act.

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The ill-conceived Twin Pines mining proposal benefitted from the Trump Administration's short-lived Navigable Waters Protection Rule, which eliminated many of the most basic clean water protections for wetlands across the country. Under the Trump-era rule, the Corps of Engineers issued wetland determinations in 2020 and 2021 that left all permitting decisions for the proposed mine up to the State of Georgia.

The Corps changed course in June 2022, rescinding the Trump-era wetland determinations. However, in August 2022 the Corps back-tracked as part of an out-of-court settlement with Twin Pines. Offering no explanation, the Corps reinstated the 2020 and 2021 determinations, leaving hundreds of acres of wetlands and putting the Okefenokee at risk of catastrophic changes from the proposed mine's impacts. The Corps' abdicates its important role not only in protecting the area's wetlands, but also in protecting important cultural values important to the Muscogee (Creek) Nation.

In fall 2022, Interior Secretary Deb Haaland visited the Okefenokee and subsequently wrote to Georgia Governor Brian Kemp, stating: "The proposed mining activity in this area poses an unacceptable risk to the long-term hydrology and future of the swamp ecosystem and these cultural values." Yet Georgia regulators could issue permits for the mine as soon as this spring.

WHAT MUST BE DONE

The Georgia Environmental Protection Division (EPD) must deny all permits that would enable the proposed mine to be built. Georgia EPD should heed the warnings of University of Georgia experts and federal agencies, taking all critical information into account in assessing the proposed mine's impacts on the Okefenokee's hydrology and ecology.

Further, the U.S. Army Corps of Engineers should do its duty and re-engage as the proper authority over permitting decisions regarding the proposed mine. Perhaps no clearer case exists for why meaningful wetland protections at the federal level under the Clean Water Act are so important.

Finally, Georgia leaders should pursue permanent protections for the Okefenokee Swamp and Trail Ridge, preserving the area's many natural and cultural values for future generations.

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About American Rivers

American Rivers is championing a national effort to protect and restore all rivers, from remote mountain streams to urban waterways. Healthy rivers provide people and nature with clean, abundant water and natural habitat. For 50 years, American Rivers staff, supporters, and partners have shared a common belief: Life Depends on Rivers. AMERICANRIVERS.ORG

American Rivers acknowledges, works, and seeks to amplify Indigenous leadership in river protection and honors the traditional ecological knowledge and perspectives held by Indigenous People and Tribal Nations.

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STATEMENT OF JAMES M. MCELFISH, JR.,

Senior Advisor, Environmental Law Institute

before the

Senate Environment and Public Works Committee (October 18, 2023)

I am James McElfish, a senior advisor to the Environmental Law Institute (ELI), where I previously served as a senior attorney from 1986 to 2022, managing the Institute's land, water, mining, and biodiversity programs. Since graduating from Yale Law School in 1979, I have worked as an environmental lawyer — first with the U.S. Department of the Interior, and then in private practice, before joining the ELI staff in 1986.

ELI is a nonpartisan research and policy institute founded in 1969 and dedicated to making law work for people, places, and the planet. Its research and publications have guided numerous federal, state, and local agencies, legislatures, international organizations, national governments, private industry, nongovernmental organizations, and lawyers and environmental professionals across all sectors. My statement today is based on ELI's research and publications on federal, state, tribal, and local laws and programs protecting waters, including wetlands. I have led much of this research, including decades of work on compensatory mitigation, permitting, state water quality programs, and alternative approaches to protection of biodiversity and water quality.

My statement discusses some implications of the Supreme Court's decision this year concerning what waters are subject to the 1972 Federal Water Pollution Control Act, as amended (the Clean Water Act).[1]

On May 25, 2023, the Supreme Court, ruling in *Sackett v. EPA*, sharply limited the scope of the federal Clean Water Act's protection for the nation's waters. The Court significantly redefined the Act's coverage of "waters of the United States" (WOTUS).[2] In doing so, the Court took a step advocated by a plurality of justices in *Rapanos v. United States*, a fractured 2006 decision in which no opinion commanded a majority.

In *Sackett,* Justice Samuel Alito's opinion for a 5-member majority (himself, Chief Justice Roberts, Justice Thomas, Justice Gorsuch, and Justice Barrett) endorsed the late Justice Scalia's previous plurality opinion for 4 justices in *Rapanos*. The *Sackett* decision holds that the Clean Water Act applies only to (1) "relatively permanent, standing or continuously flowing bodies of water forming 'geographical features' that are described in ordinary parlance as streams, oceans, rivers, and lakes," and to (2) wetlands *only* when they have a "continuous surface connection" to such waters "making it difficult to determine where the water ends and the wetland begins."

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[1] 33 U.S.C. 1251 *et seq.* The same definitional terminology is used in the Oil Pollution Act, 33 U.S.C. 2701(21).

[2] In 1972 the Act established regulatory programs for protection of the "chemical, physical, and biological integrity" of the nation's "navigable waters." 33 U.S.C. 1251(a). See 33 U.S.C. 1313(c)(2) (water quality standards for navigable waters), *id.* 1342(a) (permits for discharges into navigable waters), *id.* 1344(a) (permits for discharge of dredge or fill material into navigable waters). The Act defined the term "navigable waters" as "the waters of the United States, including the territorial seas." 33 U.S.C. 1362(7). It has always been applied in regulation and enforcement to include waters that are not themselves subject to navigation in commerce. See, e.g., United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1986).

In 1986, in *United States v. Riverside Bayview Homes, Inc.*, a unanimous Supreme Court, interpreting the same Act and recognizing federal agency rules, had confirmed that the Act extended to adjacent wetlands even if not inundated or frequently inundated. *Sackett* effectively inverts this holding to require that in order to be a WOTUS a wetland must not only have a "continuous surface connection" to these other waters but be "indistinguishable" from the covered waters. The majority opinion in *Sackett* explicitly denied any deference to prior federal administrative determinations and regulatory definitions over the past 50 years, and deviated from previous interpretations of the Act by the federal courts consistently upholding such regulations and requirements as applied.

Although all nine justices concurred in rendering judgment for the Sacketts – finding that their specific wetlands were not WOTUS – they did not agree on the scope of the Act's coverage. Justice Brett Kavanaugh (writing for himself, Justice Kagan, Justice Sotomayor, and Justice Jackson) said that the 5-member majority had substituted its judgment for that of Congress. The 1977 Amendments to the Clean Water Act explicitly confirmed that the Act's protections extend to "adjacent wetlands," which have always, as Kavanaugh observed, included numerous wetlands with no continuous surface connection to open waters – including wetlands "separated from covered waters by man-made dikes or barriers, natural river berms, beach dunes, or the like," as implemented thereafter by eight different Presidential administrations of both parties. Kavanaugh wrote:

> The Court's "continuous surface connection" test disregards the ordinary meaning of "adjacent." The Court's mistake is straightforward: The Court essentially reads "adjacent" to mean "adjoining." As a result, the Court excludes wetlands that the text of the Clean Water Act covers—and that the Act since 1977 has always been interpreted to cover.

Notably, none of the nine justices applied the Clean Water Act test articulated by former Justice Kennedy in *Rapanos*. That test, which lower courts had treated as controlling, had recognized Clean Water Act applicability to waters and wetlands that have a "significant nexus" to traditionally navigable waters if they "either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical and biological integrity of" such waters.

The Consequences

1. Numerous wetlands and waters have lost regulatory protections previously in place.

First, the Court's decision means that immediately, numerous freshwater wetlands, bogs, fens, brackish wetlands, interdunal wetlands, floodplain wetlands cut off from rivers by levees and berms, as well as playa lakes and complexes of prairie wetlands, are no longer subject to federal Clean Water Act permitting and protection. Absent federal legislation, these waters will be protected from discharges of pollutants (including dredge and fill material) only if *state laws* or *tribal laws* independently impose regulatory requirements.

While every state has some definition of "waters of the state" that includes more waters than the Clean Water Act's "waters of the United States" — often including groundwater, wetlands, springs, etc. — most of the states have not enacted comprehensive permitting programs for protection of these waters. Thus, the removal of certain waters and wetlands from Clean Water Act coverage means that states without such programs will be faced with decisions about whether to enact new protections. And because *Sackett* interpreted the statutory coverage of the Clean Water Act, its effect was immediate.

There is no grace period or lag time during which states may act to maintain uninterrupted regulatory protections for such waters.

In anticipation of *Sackett*, ELI examined state regulatory programs that might cover the waters that have now lost coverage.[3] We identified nineteen (19) states that have in place comprehensive (or nearly comprehensive) nontidal wetlands permitting programs, enabling them to regulate dredge and fill activities in their non-WOTUS waters (some by incorporating local wetlands permitting regulations): California, Connecticut, Florida, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Hampshire, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, Tennessee, Vermont, Virginia, Washington, and Wisconsin.

Some of these programs are quite comprehensive and continue to cover all, or virtually all, wetlands and waters formerly covered under the Clean Water Act prior to *Sackett* (e.g., Virginia, California, Minnesota). However, not all of these state 19 programs cover all wetlands. For example, New York's state permitting program applies only to freshwater wetlands over 12.4 acres, as well as to smaller wetlands of "unusual importance"; the acreage threshold will be lowered in the future under New York 2022 legislative amendments, and jurisdiction over smaller wetlands not of unusual importance is delegated to local municipalities.

As for the remaining states, a few have partial programs that cover permitting for certain waters, or that have filled some gaps in coverage. Some of these partial state programs (e.g., Ohio, Indiana) were enacted to protect "isolated wetlands" after the Supreme Court's 2001 decision in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC)*, which held that the Clean Water Act does not cover isolated ponds located entirely within one state where the asserted basis for federal jurisdiction was their use by migratory birds. West Virginia asserts authority on a case-by-case basis to review and decide whether to require a permit for filling of isolated waters and wetlands. States with partial regulatory programs will likely have gaps in coverage unless they enact additional requirements to pick up the waters no longer subject to the Clean Water Act.

Most significantly, however, 25 states rely entirely on their authority under federal Clean Water Act Section 401 to review and place conditions on Army Corps of Engineers CWA Section 404 permits to protect their nontidal wetlands and waters from dredge and fill activities.[4] With federal jurisdiction reduced, these states do not have independent regulatory permit programs that can pick up the functions previously served by their Section 401 review. Communities and ecosystems reliant on waters in these states are directly, and most immediately, affected by *Sackett's* narrow definition of WOTUS. The 25 states without independent permitting programs for dredge and fill activities are Alabama, Alaska, Arkansas, Colorado, Delaware, Georgia, Hawaii, Idaho, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, Nevada, New Mexico, North Carolina, North Dakota, Oklahoma, South Carolina, South Dakota, Texas, and Utah.

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[3] James McElfish, "State Protection of Nonfederal Waters: Turbidity Continues," 52 Envtl. L. Rep. 10679 (September 2022).

[4] Our 2022 review identified 24 such states, but following *Sackett* the North Carolina legislature amended that state's law to limit its wetland regulatory programs solely to wetlands that are waters of the United States. N.C. Session Laws 2023-63, section 15.

It is important to recognize that when a water ceases to be a "water of the United States," Section 401 of the Clean Water Act ceases to apply as there is no federal permitting process. Thus, states also lose the authority to review and condition the activities in such waters – unless as a matter of state law they have enacted their own regulations and permit programs independent of the Act. The *Sackett* decision effectively removed existing state protections linked to federal permit requirements for numerous waters that are no longer WOTUS.

2. The status of intermittent streams is in jeopardy.

Although the *Sackett* decision specifically addressed a case involving Clean Water Act coverage of wetlands, the majority specifically incorporated the dictionary-based definition offered by Justice Scalia in 2006, which says that in order to be WOTUS, non-wetland "waters" must themselves be "relatively permanent, standing or continuously flowing…features." Thus, the decision now also throws into question the status of many important non-wetland waters that are seasonal, intermittent, or otherwise subject to hydrologic change, even if those conditions are predictable and periodic. Many tributaries, and particularly headwater streams, flow only at certain seasons of the year, or are based on hydrology sufficient to support flow in a channel during periods following snowmelt or other events.

Certainly, the Scalia plurality in *Rapanos* strongly argued against including intermittent streams as WOTUS, although even that opinion noted that there might be "extraordinary" circumstances – such as drought – that would allow a non-continuously flowing water to be considered WOTUS. And Scalia took pains to explain in footnote 5 of his opinion: "We also do not necessarily exclude seasonal rivers, which contain continuous flow during some months of the year but no flow during dry months—such as the 290-day, continuously flowing stream postulated by Justice Stevens' dissent….. It suffices for present purposes that channels containing permanent flow are plainly within the definition [of WOTUS], and that the dissent's 'intermittent' and 'ephemeral' streams…are not."

While the *Sackett* opinion had no need to address or consider what may distinguish a "seasonal river" from an "intermittent stream" (as neither were involved in the facts of that case), its wholesale adoption of the *Rapanos* plurality definition suggests that intermittent streams are likely to be unprotected in many instances. This poses serious issues for effective regulation of pollutants that enter headwaters streams, as well as for the permitting of numerous stream crossings for linear features such as pipelines and roads. It also will create substantial issues related to whether compensatory mitigation can be required for damage to or destruction of stream segments that may not be continuously flowing.

3. Much of the nation will lose compensatory mitigation for non-WOTUS waters.

The *Sackett* decision will undoubtedly affect the nation's multi-billion-dollar compensatory mitigation industry, and the government agencies and developers that continually rely on its expertise and activities. Substantial investments have been made in constructing and restoring freshwater wetlands and other aquatic resources on a watershed basis to offset permitted impacts to such resources because of detailed requirements under the Clean Water Act. See 33 CFR Parts 325, 328; 40 CFR Part 230, adopted April 10, 2008, by the Corps and EPA (Compensatory Mitigation Rule). These rules provide the basis for advance mitigation by wetland mitigation banks (including those providing mitigation for streams), as well as for in-lieu fee mitigation provided by nonprofit conservation organizations, and permittee-responsible mitigation. Many of the wetland types for which mitigation has been required are no longer waters of the United States after *Sackett*. Where loss of such resources is no longer subject to

permitting by the Corps of Engineers, the requirement for restoration or replacement of wetlands also disappears unless required by an independent state permitting scheme.

This will affect not only many forms of wetlands that do not have a continuous surface connection to relatively permanent surface waters, but as noted above, many intermittent and ephemeral tributaries that are also no longer WOTUS. Among other questions will be how to assess and coordinate remaining state mitigation requirements with a suddenly absent Corps of Engineers permitting component. In addition, many federally funded projects that normally would have to compensate for an entire array of aquatic features may now leave the landscape without restoration or compensation for those portions of a project that affect non-federal waters. This poses potentially significant management challenges, as well as leaving communities and ecosystems without protections they have enjoyed until now.

4. The decision may portend additional federal court-imposed limitations on Congressional and administrative actions.

The *Sackett* decision specifically declined to grant judicial deference to EPA's and the Corps' long-standing interpretations of law, in part based on the Supreme Court's evolving elaboration of something it is calling a "clear statement rule" of statutory construction. The majority put it this way:

> First, this Court "require[s] Congress to enact exceedingly clear language if it wishes to significantly alter the balance between federal and state power and the power of the Government over private property." [citation omitted] Regulation of land and water use lies at the core of traditional state authority. [citations omitted] An overly broad interpretation of the CWA's reach would impinge on this authority. The area covered by wetlands alone is vast—greater than the combined surface area of California and Texas.

The majority concludes that when a regulation affects a large area often or traditionally subject to state authority, Congress has to use exceedingly clear language in order to justify upholding this authority. But Justice Kagan, in her concurring opinion in *Sackett*, notes that this places a thumb on the scales:

> A court may, on occasion, apply a clear-statement rule to deal with statutory vagueness or ambiguity. But a court may not rewrite Congress's plain instructions because they go further than preferred. That is what the majority does today in finding that the Clean Water Act excludes many wetlands (clearly) "adjacent" to covered waters. And still more fundamentally, why ever have a thumb on the scale against the Clean Water Act's protections? Congress wrote the statute it meant to.... [The majority] relies...on a judicially manufactured clear-statement rule...

It is very likely that Congressional legislation will need to take this new feature of jurisprudence into careful account if Congress decides to legislate in response to *Sackett* – or, indeed in addressing any subject of significant public impact.

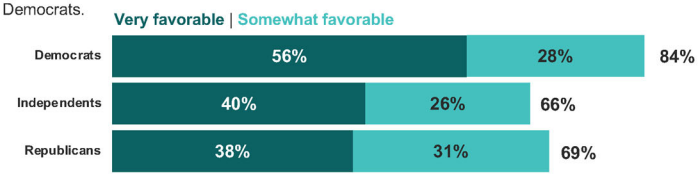
TO: Walton Family Foundation
FR: Morning Consult
DT: September 2022
RE: Results for 2022 Clean Water Act Research

WALTON FAMILY FOUNDATION

Morning Consult ran a survey, on behalf of the Walton Family Foundation, focusing on favorability and support for the protections in the Clean Water Act, as well as general views of water issues and who should set standards for water quality in the United States. The survey was conducted from August 26th – 30th among a sample of 2,210 adults nationally and oversamples in Arizona, Colorado, Pennsylvania, Louisiana, and Wisconsin. The interviews were conducted online. The survey finds that the Clean Water Act is popular among adults, and they support protecting more waters and wetlands under the Clean Water act considering an upcoming Supreme Court case in which the Clean Water Act is a focus.

THE CLEAN WATER ACT IS POPULAR AND REMOVING ITS PROTECTIONS ARE CONCERNING FOR ADULTS NATIONWIDE

- Three-in-four (73% favorable) adults nationally, and in the oversampled states, have a *favorable* opinion of the Clean Water Act: Arizona (73%), Colorado (74%), Pennsylvania (76%), Louisiana (76%), Wisconsin. (79%). Among national adults, the Clean Water Act is also viewed favorably among Republicans, Independents, and Democrats.



- After learning that the Clean Water Act created federal water quality standards that polluters must meet, nine-in-ten (89% concerned) adults nationally, and in the oversampled states, are *concerned* if polluters no longer had to meet water quality requirements before adding waste into streams or wetlands: Arizona (93%), Colorado (92%), Pennsylvania (89%), Louisiana (89%), Wisconsin. (95%).
- After learning that the Clean Water Act requires permits before making a permanent physical change to a water body, such as damming a river, changing the banks of a stream, or filling a wetland, nine-in-ten (88% concerned) adults nationally, and in the states oversampled, are concerned that if this requirement was removed in some cases that it would make it easier to physically harm or pave over streams and wetlands: Arizona (84%), Colorado (86%), Pennsylvania (88%), Louisiana (83%), Wisconsin. (92%).
- After learning the facts of the the upcoming Supreme Court case, Sackett v. the Environmental Protection Agency, three-in-four (75%) adults nationally are supportive of protecting more waters and wetlands under the Clean Water Act, while 13% support removing protections for certain waters and wetlands under the Clean Water Act. This support is consistent across the key states tested as well: Arizona (74%), Colorado (78%), Pennsylvania (81%), Louisiana (65%), Wisconsin (81%).
- When presented with the authority within the Clean Water Act, such as the authority to restrict pollution entering our waters and limiting the destruction and physical damage to lakes, rivers, wetlands, streams, and other waterways, nearly nine-in-ten (88%) adults say it is important that the Environmental Protection Agency have the authority presented in the Clean Water Act: Arizona (83%), Colorado (88%), Pennsylvania (91%), Louisiana (86%), Wisconsin (94%).

THE ENVIRONMENTAL PROTECTION AGENCY (EPA) SHOULD TAKE THE LEAD ON SETTING WATER STANDARDS

- When presented with different organizations and levels of government, three-in-five (61%) adults nationally, and in the oversampled states, say that the EPA should set standards to protect rivers, lakes, and streams that provide drinking water from pollution: Arizona (63%), Colorado (61%), Pennsylvania (65%), Louisiana (61%), Wisconsin (67%).
- Not only do adults want the EPA to protect bodies of water that provide drinking water from pollution, but they also make it clear that they *trust* them to do so more so than other organizations and different levels of government tested.

Trust to Protect Clean Water			
	Total Trust	**Total Not Trust**	**Net Trust**
EPA	**71%**	**20%**	**+51**
U.S. Congress	**40%**	**51%**	**-11**
Your state government	**60%**	**32%**	**+28**
Your local government	**62%**	**30%**	**+32**
Drinking water utilities	**68%**	**24%**	**+44**

ACCESS AND AVAILABILITY TO CLEAN WATER IS A CONCERN NATIONWIDE

- Three-in-four (76%) adults nationwide, and in the oversampled states, are *concerned* about having access to safe drinking water over the next ten years: Arizona (83%), Colorado (76%), Pennsylvania (76%), Louisiana (75%), Wisconsin (70%).
- Four-in-ten (79%) adults nationwide, and in the oversampled states, are *concerned* about having enough water in streams, lakes, and rivers over the next ten years: Arizona (90%), Colorado (86%), Pennsylvania (79%), Louisiana (74%), Wisconsin (72%).

National Methodology: This poll was conducted between August 26th – 27th, 2022 among a sample of 2,210 Adults. The interviews were conducted online and the data were weighted to approximate a target sample of adults based on gender, age, race, educational attainment, and region. Results from the full survey have a margin of error of plus or minus 2 percentage points.

State Methodology: The state level polls were conducted between August 26th – 30th, 2022, among a sample of 303 adults in Arizona, 303 adults in Colorado, 304 adults in Pennsylvania, 254 adults in Louisiana, and 304 adults in Wisconsin. The interviews were conducted online, and the data was weighted to approximate a target sample of adults based on gender by age, educational attainment, race, marital status, population density, home ownership, and race by education attainment. Results from the full surveys have a margin of error of plus or minus 6 percentage points in each state.

MEMORANDUM FOR: **INTERESTED PARTIES**

FROM: **Chad Lord, Senior Director, Government Affairs**
Rachel Kenigsberg, Senior Associate General Counsel

DATE: **Fall 2023**

REASON: **Potential Impacts of *Sackett v. EPA* on waters in and near units of the National Park System**

Introduction

On May 25, 2023, the U.S. Supreme Court released its decision in *Sackett v. EPA*, which reduced the scope of waters regulated by the Clean Water Act (CWA). Justice Alito's opinion held:

> "The CWA's use of 'waters' encompasses 'only those relatively permanent, standing or continuously flowing bodies of water 'forming geographic[al] features' that are described in ordinary parlance as 'streams, oceans, rivers, and lakes.')[1]
>
> "[w]e hold that the CWA extends to only those wetlands that are 'as a practical matter indistinguishable from waters of the United States.' *Rapanos*, 547 U. S., at 755 (plurality opinion) (emphasis deleted). This requires the party asserting jurisdiction over adjacent wetlands to establish 'first, that the adjacent [body of water constitutes] . . . 'water[s] of the United States,' (i.e., a relatively permanent body of water connected to traditional interstate navigable waters); and second, that the wetland has a continuous surface connection with that water, making it difficult to determine where the 'water' ends and the 'wetland' begins.' *Id.*, at 742.)"[2]

On August 29, 2023, the Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers (Corps) announced it would finalize a rule amending the 2023 definition of "waters of the U.S." (WOTUS) to conform federal regulations with the Supreme Court's *Sackett* decision. The decision made clear that certain aspects of the 2023 rule were invalid, so the agencies' amendments conformed the regulatory text to the Court's holding (cited above). The agencies published their final rule on September 8, 2023.[3]

The practical impact of the Court's decision and subsequent revision of federal regulations is still being evaluated. However, insight into the local effects of the Court's decision might follow the impacts identified in an analysis of a similar WOTUS definition proposed by the EPA and Army Corps in 2020. This analysis suggests that many waters upstream from national parks will no longer be protected by federal law.

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[1] Sackett, ET UX. v. Environmental Protection Agency ET AL. No. 21–454. Pg. 14.
[2] Sackett, ET UX. v. Environmental Protection Agency ET AL. No. 21–454. Pg. 22.
[33] 88 FR 3004. Sept. 8, 2023.

Water plays an essential role in national parks: they provide crucial habitat for fish and wildlife, offer recreational opportunities, provide drinking water for visitors and—in many cases—are central to the parks' unique character and value. Such water-dependent parks are found across the country. Although these waters are protected by statute and National Park Service (NPS) policies within park boundaries, many park waters originate outside park boundaries or are otherwise substantially affected by waters outside of parks, including tributaries and wetlands. The protection of water quality and wildlife habitat in national parks depends on the protection of these upstream wetlands and ephemeral streams. Since NPS relies on the federal protections provided under the Clean Water Act, the recent narrowing of the definition of WOTUS leaves more upstream waterways and wetlands unprotected by federal law.

NPCA's analysis[4] of the Navigable Waters Protection Rule[5] (the "2020 Rule"), which proposed a similar definition to the one adopted by the Supreme Court, showed that it would have stripped protections from many waters by revising the definition of "waters of the United States." Specifically, the 2020 rule – like the *Sackett* decision – narrowed the scope of the Clean Water Act by removing federal protection for wetlands that do not have a continuous surface flow into covered waters (now defined as relatively permanent, standing or continuously flowing bodies of water 'forming geographic[al] features' that are described in ordinary parlance as "streams, oceans, rivers, and lakes."). The 2023 Rule also narrowed what tributaries are federally protected to only ones that are relatively permanent, standing or continuously flowing.

The loss of federal protection for non-adjacent wetlands and many tributaries could be devastating to parks because these waterbodies play crucial roles in maintaining the biological, chemical and physical integrity of downstream park waters.[6] Because of the similarity between the 2020 Rule and the recent Supreme Court decision, NPCA believes its analysis of the 2020 Rule is useful to describing the future impact of *Sackett v. EPA* on national park waters.

National Park Waters

The National Park System has over 150,000 miles of rivers and streams flowing through it and over 4 million acres of lakes, oceans and other water bodies are found within park boundaries.[7] These waters are integral aspects of many parks. Visitors rely on clean water for drinking, fishing and swimming and clean water ensures the integrity of wildlife habitat and ecosystems inside national parks.[8] Moreover, many iconic parks rely on the presence of water for stunning visuals that attract millions of visitors. Nonetheless, as discussed below, many parks have impaired waters or waters that were threatened by the 2020 Rule and likely threatened by the *Sackett* decision.

Saint Croix National Scenic Riverway, Wisconsin & Minnesota

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[4] NPCA appreciates the work by the Emmett Environmental Law and Policy Clinic at Harvard Law School, which conducted this analysis on behalf of NPCA.
[5] 85 Fed. Reg. 22,250 (Apr. 21, 2020)
[6] *See* EPA & Dep't of the Army, *Technical Support Document for the Clean Water Rule: Definition of Waters of the United States* 101 (May 27, 2015), https://www.epa.gov/sites/production/files/2015-05/documents/technical_support_document_for_the_clean_water_rule_1.pdf.
[7] *Water Quantity*, NAT'L PARK SERV., https://www.nps.gov/subjects/protectingwater/water-quantity.htm.
[8] *See Water Use in National Parks*, NAT'L PARK SERV., https://www.nps.gov/subjects/protectingwater/water-use.htm#:~:text=Ecosystem%20Use&text=Many%20ecosystems%20in%20national%20parks,of%20maintaining%20healthy%20river%20systems.

Saint Croix National Scenic Riverway could be at risk from this decision. The St. Croix River, which flows through the park, has recently experienced greater pollution because of expanded agriculture and urban development.[9] The 2020 Rule and now likely the *Sackett* decision increased the possibility of further pollution to St. Croix National Scenic Riverway. It is estimated that 26 percent of the wetlands located in the park's watershed would have been unprotected under the 2020 Rule and 64–77 percent of the watershed's streams are ephemeral and at risk for loss of protection.[10] The loss of federal protection for these waters could have had negative downstream consequences for the integrity of St. Croix National Scenic Riverway's waters.

Indiana Dunes National Park, Indiana

The decrease in waters protected also impact waters at Indiana Dunes National Park. Approximately 69 percent of the park's waterbodies are already impaired.[11] The park is home to the Great Marsh—the biggest internal wetland on the Lake Michigan shoreline. NPCA helped secure funding for a restoration project aimed at rehabilitating the Great Marsh because recent agriculture and construction have disturbed its hydrology.[12] However, NPCA's efforts will likely be hindered by the *Sackett* decision because part of Indiana Dunes National Park is located in the Chicago River watershed and experts estimated that 86 percent of that watershed's wetlands may have lost protection and that 39–56 percent of the watershed's streams are ephemeral.[13] Another part of the park is also located in the Little Calumet-Galien watershed and 70 percent of that watershed's wetlands would have been unprotected under the 2020 rule and likely are federally unprotected after *Sackett*.[14] It is likely that the pollution and hydrological disturbances already found in the park's waterbodies and in the Great Marsh will now get worse.

Chaco Culture National Historical Park, New Mexico

Ephemeral streams play an important role in many national parks, particularly in parks in the arid West where there is a high percentage of ephemeral waters. The United States Geological Survey (USGS) and NPS have identified several "parks with significant intermittent or ephemeral drainages" within the Four Corners region, including Chaco Wash in Chaco Culture National Historical Park.[15] As noted by the report, a "vast network of perennial, intermittent and ephemeral springs, pools, washes and streams sustain the larger water bodies and their associated riparian corridor," and these areas "collectively support the diverse flora and fauna throughout the region."[16] Specifically, the ephemeral features support the region's "unique and

[9] Abigail A. Tomasek et al., *Wastewater Indicator Compounds in Wastewater Effluent, Surface Water, and Bed Sediment in the St. Croix National Scenic Riverway and Implications for Water Resources and Aquatic Biota, Minnesota and Wisconsin, 2007–08*, U.S. GEOLOGICAL SURVEY 3 (2012), https://pubs.usgs.gov/sir/2011/5208/pdf/sir2011-5208.pdf.
[10] Woods Decl. ¶ 58; Fesenmyer Decl. ¶ 13.
[11] *See Indiana Dunes National Park Statistics*, NAT'L PARK SERV. (last updated Feb. 7, 2019), https://www.nps.gov/subjects/protectingwater/his-parkreport.htm?unitType=Park&parkNames=INDU.
[12] *Id.*
[13] Woods Decl. ¶ 55; Fesenmeyer Decl. ¶ 8.
[14] Woods Decl. ¶ 56.
[15] Juliane M. Bowen, Review of Available Water-Quality Data for the Southern Colorado Plateau Network and Characterization of Water Quality in Five Selected Park Units in Arizona, Colorado, New Mexico, and Utah, 1925 to 2004, Scientific Investigations Report 2008-5130, U.S. GEOLOGICAL SURVEY 5 (2008).
[16] Id.

significant water-dependent features such as hanging gardens and cottonwood stands."[17] Potentially eliminating protection for certain ephemeral streams may have dire consequences for Chaco, given the integral roles they play.

NPS's Hydrographic and Impairment Statistics website indicates that the park has negligible amounts of currently impaired waters.[18] However, the park's waters are at risk because the Army Corps has determined that ephemeral streams located near Chaco Culture National Historical Park will be impacted by oil and gas projects.[19] The Bureau of Land Management has also noted that there may be negative impacts to surface water quality in the surrounding area and the map accompanying their analysis reveals that potential projects may be developed in Chaco's watershed.[20] Downstream park waters are at risk because developers may no longer need a permit under section 402 or 404 of the CWA when their projects impact certain ephemeral streams. NPCA has sought to protect Chaco Culture National Historical Park in New Mexico from the negative impacts of oil and gas developments,[21] but the *Sackett* decision could hamper those efforts.

Everglades National Park, Florida

Nearly 100 percent of waters in the Everglades are already impaired,[22] in part because "land-use activities that impair water quality have intensified in the upstream watersheds."[23] The Everglades is highly susceptible to the effects of upstream water practices and is increasingly threatened by nearby land development and agricultural practices.[24] Water pollution has caused overpopulation of some coastal and inland plant species in the park, disturbing its ecosystem.[25] Park waters are further threatened because the 2020 Rule would not have protected 81 percent of the wetlands in the Big Cypress Swamp watershed, which provides a significant portion of water flow into the park.[26] Degraded water quality may threaten the substantial economic activity the park attracts. In 2019, the Everglades accumulated $110 million in visitor spending and helped support 1,510 jobs.[27]

The 2020 Rule would have also hampered wetlands restoration efforts in Everglades National Park. The park has undertaken a project seeking to restore 6,300 acres of wetlands within the

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[17] Id.
[18] *See Chaco Culture National Historical Park Statistics*, NAT'L PARK SERV. (last updated Feb. 27, 2018), https://www.nps.gov/subjects/protectingwater/his-parkreport.htm?unitType=Park&parkNames=CHCU
[19] *See* Pls.' Mem. Law Supp. Mot. Summ. J, *Conservation Law Foundation et al., v. Environmental Protection Agency*, No. 1:20-cv-10820-DPW (D. Mass. Oct. 15, 2020) at 39; Decl. Michelle Wu Exs. 21–24, *Conservation Law Foundation et al., v. Environmental Protection Agency*, No. 1:20-cv-10820-DPW (D. Mass. Oct. 15, 2020) [hereinafter "Wu Decl."].
[20] *See* Wu Decl. Ex. 25 (map of potential oil and gas developments around Chaco Culture National Historical Park, with potential projects inherently located in the park's watershed).
[21] *See Advocacy in Action: Fragile Treasures Threatened in Chaco Culture National Historical Park*, NATIONAL PARKS CONSERVATION ASSOCIATION, https://www.npca.org/advocacy/25-fragile-treasures-threatened-in-chaco-culture-national-historical-park.
[22] *See Everglades National Park Statistics*, NAT'L PARK SERV. (last updated July 27, 2020), https://www.nps.gov/subjects/protectingwater/his-parkreport.htm?unitType=Park&parkNames=EVER.
[23] *Water Quality in Big Cypress National Preserve and Everglades National Park—Trends and Spatial Characteristics of Selected Constituents*, U.S. GEOLOGICAL SURVEY 3 (2004), https://pubs.usgs.gov/wri/wri034249/wri03_4249_miller.pdf.
[24] *Id.* at 3–4.
[25] Donatto Surratt et al., *Recent Cattail Expansion and Possible Relationships to Water Management: Changes in Upper Taylor Slough" (Everglades National Park, Florida, USA)*, ENVIRONMENTAL MANAGEMENT, 49(3), 720–733 (2012), https://doi.org/10.1007/s00267-011-9798-x.
[26] Woods Decl. ¶ 53.
[27] *South Florida National Parks and Preserve Create Over $352 Million in Economic Benefit*, NAT'L PARK SERV. (June 16, 2020), https://www.nps.gov/ever/learn/news/south-florida-national-parks-and-preserve-create-over-352-million-in-economic-benefit.htm.

park.[28] Compensatory mitigation funds from permitted development projects that fill wetlands in the adjacent counties finance this unprecedented wetland restoration program. Because the 2020 Rule and probably the *Sackett* decision eliminated the need to obtain federal permits for filling many types of wetlands, such as those separated by a jurisdictional water by a manmade feature that does not have a direct hydrological surface connection with said water, compensatory mitigation could be reduced.

Big Cypress National Preserve, Florida

One hundred percent of Big Cypress National Preserve's waters are already impaired,[29] in part because "land-use activities that impair water quality have intensified in the upstream watersheds."[30] Big Cypress is highly susceptible to the effects of upstream water practices and is increasingly threatened by nearby land development and agricultural practices.[31] Preserve waters are further threatened because the 2020 Rule, and likely the *Sackett* decision, would not have protected 81 percent of the wetlands in the Big Cypress Swamp watershed, which is where the preserve is located.[32] Degraded water quality may threaten the substantial economic activity the preserve attracts. In 2019, Big Cypress National Preserve accumulated $81.5 million in visitor spending and helped support 1,080 jobs.[33]

During 2017 and 2018, oil and gas exploration surveys in Big Cypress National Preserve injured many of the preserve's wetlands. In March of 2020, NPCA supported the Army Corp's position that the CWA would regulate future projects; however, the Corps rescinded that position in April 2020.[34] Apart from oil and gas, the threat of off-road vehicle (ORV) trail development as proposed by the National Park Service in 2022 would potentially require the agency to seek 404 permits and compensatory mitigation. However, wetlands protections have now been significantly decreased.

Florissant Fossil Beds National Monument, Colorado

NPS's Hydrographic and Impairment Statistics website reveals that Florissant has no currently impaired waters.[35] However, the park is at risk of degradation because up to 35 percent of its miles of streams may have lost protection.[36] These streams are at significant risk of becoming polluted, and because they flow directly to the park, threaten the water quality of Florissant Fossil Beds National Monument.

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[28] *Hole-in-the-Donut Restoration Project*, NAT'L PARK SERV. (last updated Oct. 13, 2020), https://www.nps.gov/ever/learn/nature/hidprogram.htm.
[29] *See Big Cypress National Preserve Statistics*, NAT'L PARK SERVICE (last updated Aug. 16, 2020), https://www.nps.gov/subjects/protectingwater/his-parkreport.htm?unitType=Park&parkNames=BICY.
[30] *Water Quality in Big Cypress National Preserve and Everglades National Park—Trends and Spatial Characteristics of Selected Constituents*, U.S. GEOLOGICAL SURVEY 3 (2004), https://pubs.usgs.gov/wri/wri034249/wri03_4249_miller.pdf.
[31] *Id.* at 3–4.
[32] Woods Decl. ¶ 53.
[33] *South Florida National Parks and Preserve Create Over $352 Million in Economic Benefit*, NAT'L PARK SERV. (June 16, 2020), https://www.nps.gov/ever/learn/news/south-florida-national-parks-and-preserve-create-over-352-million-in-economic-benefit.htm.
[34] *Army Corps Finds Significant Damage in Big Cypress National Preserve After NPS Green Lights Oil and Gas Exploration*, NATIONAL PARKS CONSERVATION ASSOCIATION (Mar. 11, 2020), https://www.npca.org/articles/2486-army-corps-finds-significant-damage-in-big-cypress-national-preserve-after.
[35] *See Florissant Fossil Beds National Monument Statistics*, NAT'L PARK SERV. (last updated Feb. 14, 2014), https://www.nps.gov/subjects/protectingwater/his-parkreport.htm?unitType=Park&parkNames=FLFO.
[36] Decl. Andrew Robertson (on file with author) (forthcoming).

Yellowstone National Park, Montana, Idaho and Wyoming

NPS's Hydrographic and Impairment Statistics website reveals that Yellowstone's waterways are currently negligibly impaired.[37] However, the park could be at risk of becoming degraded. The Tongue River basin in Montana lays upstream of Yellowstone River, and in 2015, about 35 percent of its waters that were impacted by section 404 projects were non-relatively permanent ephemeral streams and non-floodplain wetlands.[38] Such waters may no longer be jurisdictional under the CWA. The loss of protection for these basin waters can result in the degradation of Yellowstone River, due to downstream pollutants, and thereby harm Yellowstone National Park.

Great Smoky Mountains National Park, North Carolina and Tennessee

Great Smoky Mountains National Park has waterways that are nearly 54 percent impaired and shoreline miles that are about 93 percent impaired.[39] Headwater streams in the park are threatened by high acidity and NPS notes that "acidic streams are suspected to be the main cause of decline of the native brook trout population in the park."[40] There are karst-depression wetlands outside of the park that will likely now be considered non-adjacent and will therefore be at risk of being dredged or filled, or having pollutants be discharged into them.[41] Karst-depression wetlands are habitats "for plants and animals that are otherwise rare or absent in southern uplands" and are ecologically significant.[42] Moreover, wetlands in general can act as buffers for acidity.[43] The loss of CWA protection for these wetlands may prevent them from being helpful acidity buffers to the Great Smoky Mountains National Park, further endangering the native book trout and the area's recreational fishing industry.

Kings Canyon National Park, California

NPS's Hydrographic and Impairment Statistics website indicates that the park is not impaired.[44] However, park waters could be in danger of becoming impaired because the park is located in the San Joaquin River watershed, which contains a substantial amount of non-relatively permanent ephemeral streams.[45]

Gila Cliff Dwellings National Monument, New Mexico

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[37] *See Yellowstone National Park Statistics*, NAT'L PARK SERV. (last updated Dec. 27, 2017), https://www.nps.gov/subjects/protectingwater/his-parkreport.htm?unitType=Park&parkNames=YELL.
[38] Br. Amici Curiae Trout Unlimited et al., *South Carolina Coastal Conservation League v. Wheeler*, No. 2:20-cv-01687-DCN (D.S.C. July 17, 2020) at 27.
[39] *See Great Smoky Mountains National Park Statistics*, NAT'L PARK SERV. (last updated Mar. 29, 2018), https://www.nps.gov/subjects/protectingwater/his-parkreport.htm?unitType=Park&parkNames=GRSM.
[40] *Great Smoky Mountains: Water Quality*, NAT'L PARK SERV., https://www.nps.gov/grsm/learn/nature/water-quality.htm.
[41] *See* Shaun A. Goho, Harvard Law School's Emmett Environmental Law and Policy Clinic, on Behalf of National Parks Conservation Association, Comment Letter on Proposed 2020 Rule to Revise Definitions of "Waters of the United States" 46 (Apr. 12, 2019), http://clinics.law.harvard.edu/environment/files/2019/04/EELPC-NPCA-WOTUS-comments.pdf.
[42] William J. Wolfe, *Hydrology and Tree-Distribution Patterns of Karst Wetlands at Arnold Engineering Development Center, Tennessee*, U.S. GEOLOGICAL SURVEY 2 (1996), https://pubs.usgs.gov/wri/wri96-4277/pdf/wrir_96-4277_a.pdf.
[43] *See, e.g.*, W.M. Mayes, et al., *Wetland Treatments at extremes of pH: A review*, 407 SCI. TOTAL ENV'T 3944 (2007).
[44] *See Kings Canyon National Park Statistics*, NAT'L PARK SERV. (last updated Mar. 31. 2017), https://www.nps.gov/subjects/protectingwater/his-parkreport.htm?unitType=Park&parkNames=KICA.
[45] Woods Decl. ¶ 38; Woods Decl. Ex. 9.

Approximately 21 percent of park waterways are impaired.[46] However, park waters could be in danger of becoming impaired because the park is located in the Upper Gila watershed, which contains a substantial amount of ephemeral streams.[47]

Obed Wild and Scenic River, Tennessee

About 28 percent of the park's waterways are impaired,[48] and the park contains some "severely polluted waters."[49] Its water quality is threatened by out-of-park operations, such as wastewater discharges associated with upstream suburban and urban growth, and pollutants associated with timbering, mining, oil, and gas operations.[50] Obed Wild and Scenic River most likely has ephemeral streams located within its watershed,[51] which could have lost CWA protection. The park hosts "one of only two existing populations of the federally endangered Alabama lampshell mussel" as well as the spotfin chub, a federally threatened fish species.[52] Further impairment of the park's already degraded waters could jeopardize the survival of these vulnerable species.

Blue Ridge Parkway, Virginia and North Carolina

About 67 percent of the park's waterways are already impaired, as well as about 74 percent of its waterbodies and 68 percent of its shoreline miles.[53] The impairment of many waters within Blue Ridge Parkway is caused by conditions that originate outside of the parks' boundaries, such as urban and residential development that occurs adjacent to the park.[54]

Congaree National Park, South Carolina

Over 24 percent of Congaree's waterways are impaired.[55] Congaree has poor surface water quality and is threatened in part by the effects of municipal and industrial wastewater discharges, urbanization, stormwater runoff and upstream poultry concentrated animal feeding operations.[56]

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[46] *See Gila Cliff Dwellings National Monument Statistics*, NAT'L PARK SERV. (last updated Feb. 27, 2018), https://www.nps.gov/subjects/protectingwater/his-parkreport.htm?unitType=Park&parkNames=GICL.
[47] Woods Decl. ¶ 41; Woods Decl. Ex. 12.
[48] *See Obed Wild and Scenic River Statistics*, NAT'L PARK SERV. (last updated Apr. 28, 2017), https://www.nps.gov/subjects/protectingwater/his-parkreport.htm?unitType=Park&parkNames=OBRI.
[49] James Hughes et al., *Long-Term Discrete Water Quality Monitoring at Big South Fork National River and Recreation Area, Blue Ridge Parkway, and Obed Wild and Scenic River*, NAT'L PARK SERV. 15 (Dec. 2018), [hereinafter "Long-Term Monitoring Report"].
[50] *Id.*
[51] *See* Rodney R. Knight et al., *Hydrologic Data for the Obed River Watershed, Tennessee*, NAT'L PARK SERV. & U.S. GEOLOGICAL SURVEY 4 (2014), https://pubs.usgs.gov/of/2014/1102/pdf/ofr2014-1102.pdf.
[52] James Hughes et al., *Long-Term Discrete Water Quality Monitoring at Big South Fork National River and Recreation Area, Blue Ridge Parkway, and Obed Wild and Scenic River*, NAT'L PARK SERV. 17 (Dec. 2018).
[53] *See Blue Ridge Parkway Statistics*, NAT'L PARK SERV. (last updated Sept. 9, 2021), https://www.nps.gov/subjects/protectingwater/his-parkreport.htm?unitType=Park&parkNames=BLRI.
[54] Long-Term Monitoring Report, *supra* note 80 at 18–19 ("These streams are 303d-listed for causes originating outside park boundaries.").
[55] *See Congaree National Park Statistics*, NAT'L PARK SERV. (last updated April 6, 2021), https://www.nps.gov/subjects/protectingwater/his-parkreport.htm?unitType=Park&parkNames=CONG.
[56] JoAnn M. Burkholder et al., *Natural Resource Condition Assessment: Congaree National Park*, NAT'L PARK SERV. (2018) xxii, 176.

Senator CARPER. Seriously though, before we adjourn, Senators may submit their questions for the record until the close of business on Wednesday, November 1st. We will compile those questions. We will send them to our witnesses, and we ask our witnesses to reply by Wednesday, November 15th.

With that, again, our thanks to each of you. To be continued.

I will close with a nod to my mother. We were born in a coal mining town in West Virginia. We grew up in Danville and Roanoke, Virginia, but my mother was a deeply religious woman. She wanted to make sure we always focused on Matthew 25, the least of these, which starts off, "When I was thirsty, did you give me a drink?"

So with the issues that are before us today, I think it is a moral issue, and it is something that we have a moral imperative to make sure we get it right. We have been trying for a long time, but that doesn't mean we should quit now, and I have no intention. In the next 14 months, I like to say I am going to race once through the tape. Since we are talking about water here, I will have to come up with a new, different kind of way of saying that, like swim through the water.

Anyway, I want to make sure if we can make some progress on this front, that we do find some consensus and ways to provide some certainty and predictability, and I like to do that keeping in mind the moral imperative that we face with respect to making sure we do have clean water to drink and to live by.

With that, this hearing is adjourned. Thank you all.

[Whereupon, at 12:03 p.m., the hearing was concluded.]

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