DIALOGUE

ANALYZING THE CONSEQUENCES OF *SACKETT V. EPA*

SUMMARY

The U.S. Supreme Court's May ruling in *Sackett v. Environmental Protection Agency* sharply limited the scope of the federal Clean Water Act's (CWA's) protection for the nation's waters. The Court redefined the Act's coverage of "waters of the United States" (WOTUS), effectively removing protection from many wetlands that have been covered under the Act for almost a half century. On June 8, 2023, the Environmental Law Institute hosted a panel of experts that analyzed the consequences of *Sackett* and discussed what actions can be taken to protect non-WOTUS waters. Below, we present a transcript of that discussion, which has been edited for style, clarity, and space considerations.

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James McElfish: Welcome to all of you joining us to discuss the *Sackett v. Environmental Protection Agency* decision.[1] The U.S. Supreme Court, acting on a wetlands case on appeal from the U.S. Court of Appeals for the Ninth Circuit,[2] ruled on the scope of the federal Clean Water Act (CWA).[3] The CWA was enacted in 1972 and amended significantly in 1977, and then again in 1987.[4]

The Court's decision defined, or in some respects redefined, what the term "waters of the United States" (WOTUS) subject to the CWA means. The decision essentially finds that the U.S. Environmental Protection Agency (EPA), the U.S. Army Corps of Engineers (the Corps), and indeed almost all of the lower federal courts have for five decades been applying the law to protect waters that were not entitled to protection under the CWA.

In effect, this decision directly and immediately affects the legal status of many thousands of activities across the United States each year that either are covered by Corps permits or general permits, or that might have been covered by such permits up until two weeks ago. Thus, it's important that we understand what this decision means and what comes next.

We're going to focus pretty heavily on what our expert panelists feel may be coming next and what some of the possible responses to the decision might be. This matters a lot as federal regulators, state and local governments, tribal governments, infrastructure developers, water managers, flood control districts, landowners, private businesses, and conservationists determine what to do as they order or reorder their affairs and activities in response to the redefinition that the Supreme Court has presented us with.

We'll begin with two law professors, both leading experts in environmental law, and on water, wetlands, and clean water law in particular. We'll lead off with Jonathan Adler, professor of law and director of the Coleman Burke Center for Environmental Law at Case Western Reserve University School of Law. He'll be followed by Robin Craig, who is the Robert C. Packard Trustee Chair in Law at the University of Southern California's Gould School of Law. Robin has written extensively on this set of topics, including a recent *Case Western Reserve Law Review* article,[5] which I commend to your attention.

1. Sackett v. Environmental Prot. Agency, 143 S. Ct. 1322, 53 ELR 20083 (2023).
2. Sackett v. U.S. Env't Prot. Agency, 8 F.4th 1075, 51 ELR 20159 (9th Cir. 2021).
3. 33 U.S.C. §§1251-1387, ELR Stat. FWPCA §§101-607.
4. Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500; Clean Water Act of 1977, Pub. L. No. 95-217; Water Quality Act of 1987, Pub. L. No. 100-4.
5. *See generally* Robin Kundis Craig, *There's More to the Clean Water Act Than Waters of the United States: A Holistic Jurisdictional Approach to the Section 402 and Section 404 Permit Programs*, 73 Case W. Rsrv. L. Rev. 349 (2023) (discussing the probable outcome of *Sackett v. EPA* and its intersection for jurisdictional purposes with the Court's 2020 *County of Maui* decision).

Our two law professors will then be followed by Rebecca Kihslinger, who leads the Environmental Law Institute's (ELI's) Wetlands Program. Her research has focused to a substantial degree on state and local protection of wetlands and waters, and she has also done work in the area of compensatory mitigation, which is mitigation that's required by permit to offset losses to WOTUS or waters of the state.

Then, we will hear from Edward Ornstein, the environmental counsel for the Miccosukee Tribe of Indians of Florida. Tribal perspectives will be extremely important, because it's not only states and the federal government that have authority over these waters, but also tribal governments with respect to the lands subject to their jurisdiction. The Miccosukee Tribe's experience will be of particular interest given that their lands are to a large degree located within the Everglades, a very complex system of waters and wetlands.

Jonathan H. Adler: It's certainly great to be able to talk about *Sackett*—or what I'm referring to as "*Sackett II*: Justice Scalia's Triumph." This case, in many respects and for reasons I'll discuss, is a confirmation of Prof. Richard Lazarus' hypothesis that the current Court's approach to environmental law is basically the approach that Justice Scalia wanted, but that Justice Scalia was rarely able to put together a majority in support of.[6] To understand this opinion and what it means, and certainly how the justices see it, one has to focus on what Justice Scalia wrote for a plurality of the Court in the *Rapanos v. United States* case.[7]

In terms of *Sackett*, it's worth starting with the Sacketts themselves. As folks will remember, the Sacketts were initially before the Court 11 years ago seeking to challenge EPA's position that they could not challenge a jurisdictional determination.[8] Basically, EPA had told them that their land did constitute WOTUS. The Sacketts disagreed, and they were at the Supreme Court 11 years ago arguing that they should be allowed to seek judicial review of that determination.

When they sought certiorari again in 2021, there were really two very different conversations about whether or not this was a good case to flesh out or help define the meaning of "waters of the United States." Within the environmental community, a lot of the conversation focused on the fact that the Sacketts engaged in development. This isn't a small family that just accidentally got ensnared in federal regulation, but rather folks who knew what they were doing and deliberately sought to develop their land even though they knew the federal government didn't think they could.

Whereas if you talk to folks in the property rights community and folks at the Pacific Legal Foundation, their view was, here's a couple who run a small business, and they've been to the Court before, and they're still dealing with this conflict 11 years later. They still didn't have certainty over whether or not they were covered by regulation.

The other reason why folks were interested in this case as a possible test case for how to define "waters of the United States" was that, as we'll talk about, in the *Rapanos* case from 2006, the Supreme Court had split 4-1-4. In fact, in the initial cert petition that was filed on behalf of the Sacketts, the question they had asked the Court to answer was simply whether *Rapanos* should be revisited to adopt the plurality's test for wetlands jurisdiction under the CWA.

That's not the question the Court accepted though. The question the Court actually accepted was much broader in some respects: whether the Ninth Circuit set forth the proper test for determining whether wetlands are WOTUS under the CWA.

What the Ninth Circuit had done, like most lower courts, was to adopt the "significant nexus" test, which had been embraced by Justice Anthony Kennedy in his opinion concurring in the judgment in *Rapanos* under the *Marks* rule.[9] That was generally understood as the narrowest grounds for sustaining the judgment in *Rapanos*. So, the Ninth Circuit, like most lower courts, like the federal government, has been focusing on the significant nexus test. The question was merely put in terms of whether this was the right test or not.

As noted in the case, we care about this test because the CWA requires a permit to discharge a pollutant. "Discharge a pollutant" means any addition of any pollutant to navigable waters from any point source.[10] And "navigable waters" in turn is defined as "the waters of the United States."[11] So, the question initially put to the Court was, does the Sacketts' property constitute part of WOTUS?

The figure below is an aerial view of the Sacketts' property. It is a picture from the Pacific Legal Foundation, which represented the Sacketts. I added the dotted box where the Sacketts' property is. This is when it was still wooded, I think before they had begun development on the site. It is near Priest Lake, but separated at least somewhat by a road and some houses. There are also some intermittent streams to the north of the property, although non-navigable.

This is the way the Pacific Legal Foundation presented it, highlighting the fact that the water that the Sacketts' property was closest to was not navigable water. Whereas the navigable water that folks would be concerned about, Priest Lake, was to the south. The issue for the Court was whether the property was part of WOTUS.

As noted, the test everyone thought they were applying was *Rapanos*. In that case, five justices had concluded that EPA and the Corps had been adopting a too-expansive interpretation of "waters of the United States." Four did not. But those five justices were split. There were only four in favor of adopting Justice Scalia's fairly narrow test about what constitutes WOTUS. Justice Kennedy called for a "significant nexus" test instead. What to do with the Sacketts' property in light of this prior disposition was the real question.

6. *See* Richard J. Lazarus, *The Scalia Court: Environmental Law's Wrecking Crew Within the Supreme Court*, 47 Harv. Env't L. Rev. (forthcoming 2023).
7. 547 U.S. 715, 36 ELR 20116 (2006).
8. Sackett v. Environmental Prot. Agency, 566 U.S. 120, 42 ELR 20064 (2012).
9. *See* Sackett v. U.S. Env't Prot. Agency, 8 F.4th 1075, 1088-89, 51 ELR 20159 (9th Cir. 2021).
10. 13 U.S.C. §1362(12).
11. *Id.* §1362(7).

Figure 1. Aerial View of Sacketts' Property

Source: Pacific Legal Foundation, *Sackett v. EPA*, https://www.flickr.com/photos/pacificlegalfoundation/sets/72177720301408375/ (last visited Aug. 3, 2023).

In terms of what the *Sackett* opinion now did, the Court unanimously rejected the significant nexus test. That's a pretty big deal, and was pretty surprising. It's important because everyone had been assuming that a significant nexus was sufficient to establish jurisdiction over land as part of WOTUS. If wetlands on a given property had a significant nexus to navigable waters, the assumption was that was sufficient. But the *Sackett* Court unanimously rejected the significant nexus test.

The Court also unanimously concluded that there was no jurisdiction over the Sackett property. That's also significant. I will confess that was a surprise too. I've gone back multiple times to the opinion to make sure I read that correctly because one possible disposition—the disposition we in fact saw in the *Rapanos* case—would have simply been: Ninth Circuit, you applied the wrong test. EPA and the Corps, you applied the wrong test, but maybe, under a better test, you could establish jurisdiction.

Not a single opinion in this case holds that out as the proper disposition of this case. Justice Brett Kavanaugh's concurrence in the judgment explicitly says that those who join his opinion agree that a significant nexus is not sufficient and that the Sacketts' property is on the far side of the line for jurisdiction. So, wherever we draw the line, the Sacketts' property is not included in WOTUS.

I'm going to spend my remaining time unpacking where the Court is 5-4. One way to understand why they are split 5-4 is to focus on the definition of "what is adjacent." All the justices agree that some wetlands adjacent to at least some water, certainly navigable waters, are part of WOTUS. The split between the majority and the opinion concurring in the judgment is on whether or not adjacent is best defined really narrowly, as "adjoining," those wetlands with a continuous surface water connection, versus those wetlands that may merely be neighboring jurisdictional waters.

Relatedly, the opinions split over whether or not there is a need for a continuous surface water connection, whether there needs to be a genuine boundary-drawing problem in terms of when waters end and lands begin. This is clearly a part of Justice Samuel Alito's opinion for the Court, but is too restrictive in the view of the concurrence.

I could have picked out a bunch of quotes from the Justice Alito opinion. One thing that's striking in his opinion is that everywhere he wants to tell us what the holding is or what the Court is deciding, he quotes and cites to the *Rapanos* plurality. That's important because there are some issues that Justice Alito does not really address, that Justice Scalia did address in the *Rapanos* plurality.

I think it's fair to assume that, where the Alito opinion is silent, one should look to the *Rapanos* plurality for guidance. It's fair to say that the justices who join Justice Alito's opinion understand that opinion as an articulation of the same test or holding as the plurality in *Rapanos*: that the CWA's use of "waters" encompasses only those relatively permanent standing or continuously flowing bodies of water forming geographical features that are described in ordinary parlance as streams, oceans, rivers, and lakes.

Justice Alito also makes very clear what this means for the party asserting jurisdiction. For EPA or the Corps, if they want to assert jurisdiction over adjacent wetlands, they first have to show that the adjacent body of water is part of WOTUS (i.e., a relatively permanent body of water connected to traditional interstate navigable waters). And second, that the wetland has a continuous surface connection.

So, a wetland has to be next to something that would indisputably be part of WOTUS *and* there has to be this continuous surface connection that makes it difficult to determine where the water ends and the wetland begins. This is a very narrow test, and the opinion makes it clear that the burden on demonstrating this is on the party that wants to assert jurisdiction, which will usually mean the Corps or EPA. This is a test that does not provide for much room, if any, for deference to the agencies. The burden is upon them to make this demonstration.

After acknowledging agreement on the ultimate judgment, Justice Kavanaugh in his separate opinion concurring in the judgment explains that this continuous surface water connection test, in his view and the view of the three justices that joined him, is too narrow; that interpreting "adjacent" to merely mean "adjoining" is too narrow. The continuous surface water connection test is not only, in his view, inconsistent with the text of the statute, but also—and I think this is an important divide between the majority and the concurrence—departs from 45 years of consistent agency practice and the Court's precedents. In his view, "adjacent" has always been something that should be understood more broadly than the majority is interpreting it here.

In terms of understanding the split between the justices, some commentaries said one side cares about the text and the other side doesn't. Certainly, the opinions in this case make those sorts of suggestions about each other. But I don't think that's fair. I think they're both focused on text. They're just emphasizing different things.

Justice Alito emphasized text with a focus on the operative provision and the word "waters," and not allowing any interpretation of "waters" that is counterintuitive or that pushes against our natural understanding of that word. Justice Kavanaugh focused more on understanding the provisions of the Act together in light of consistent agency practice.

That division is significant in part because one thing that's been the undercurrent in this Court for the past few years, and certainly will be a big deal next year, is the extent to which the Court should care about things like consistent agency practice and the way the agencies consistently or historically understood a statute. There are overtones here of the debate we are likely to see next term about *Chevron* deference as well.[12] That's one way to understand this split.

Another way to understand the split is that the majority is very concerned about there being a constrained understanding of federal jurisdiction that does not push the boundaries of federal power. That's certainly something we saw in Justice Scalia's plurality in *Rapanos*, but also something we saw in Justice Kennedy's controlling opinion, what we used to think of as the controlling opinion, in *Rapanos*, and that we also saw in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (*SWANCC*).[13]

One passage in the Alito opinion that highlights this is where he makes a point that was also made in the *SWANCC* opinion, but not made that forcefully in *Rapanos*: that the Court requires the U.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. Regulation of land and water use lies at the core of traditional state authority.

If you go back to the *SWANCC* opinion, you see this idea very prominently, arguably driving the Supreme Court's opinion in the case. It receded a little bit in the background in *Rapanos*. Here, you see it again. While Justice Alito says this is unnecessary to the Court's conclusion, I think it is significant that it is there. And it's certainly something that connects what the Court is doing here to what we've seen it do in cases like *West Virginia v. Environmental Protection Agency*.[14]

Some questions going forward and some that I know my co-panelists are going to address concern tributaries and headwaters. There is a lot of emphasis on this continuous surface water connection, but how far can we follow that? How far upstream or downstream can we go with surface water? Does there have to be a potential of navigability?

Related to the potential for navigability, while Justice Alito doesn't stress the constitutional aspects of this, Justice Clarence Thomas in a separate concurrence joined by Justice Neil Gorsuch does. While the Court doesn't rely upon constitutional concerns in its opinion, it's certainly worth thinking about the fact that the wetlands program has for a few decades now been understood to be one of the environmental programs arguably most vulnerable to constitutional challenge on enumerated powers grounds. If Congress seeks to revisit this opinion or to revise the CWA and expand jurisdiction, we will have to think about what clues this opinion gives us about the constitutional limitations on federal regulatory power.

I've already suggested that the Court doesn't give a lot of room for the Corps and EPA to give their expert opinion about the nature of connections. The focus on surface water connection is kind of focusing on things that any of us can see as opposed to something that requires scientific or hydrological expertise. There are some questions about how firm a limit that is and whether there is room for the Corps and EPA to explain to courts about hydrological connections that may not be readily apparent.

Lastly, there are some questions about how this interacts with CWA §401, with the national pollutant discharge

12. Chevron U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 14 ELR 20507 (1984); *see* Loper Bright Enterprises, Inc. v. Raimondo, 45 F.4th 359 (D.C. Cir. 2022), cert. granted, 598 U.S. ___ (2023) (No. 22-451).

13. 531 U.S. 159, 31 ELR 20382 (2001).

14. No. 20-1530, 52 ELR 20077 (U.S. June 30, 2022).

elimination system (NPDES) permits under §402, and with the Court's holding in *County of Maui v. Hawaii Wildlife Fund*.[15] Of note, there is a whole section in Justice Scalia's *Rapanos* plurality that goes into why narrowing the scope of WOTUS as applied to wetlands does not necessarily narrow the CWA for traditional pollution control to the same extent.

Justice Kavanaugh made the same point in a separate opinion in *Maui*. Justice Alito doesn't talk about it. So, whether or not we can rely upon the discussion in the Scalia opinion or what Justice Kavanaugh said in *Maui* is a question that is worth considering, and one of the questions that Robin is going to address.

Robin Craig: Moving on, what exactly does *Sackett* mean? I'm going to pick up some of the threads that Jonathan laid out.

What are the statutory jurisdictional waters? If you look at the text of the CWA, it applies to the ocean, the contiguous zone, and the navigable waters.[16] "Navigable waters" is obviously the phrase we care about because it's the one that comes up in these cases. The ellipsis that Jonathan left off in the definition of the CWA's "navigable waters" was the "territorial sea," which are included in the statute's definition.[17]

No one has ever seriously argued that the ocean, the contiguous zone, and the territorial sea are not under federal jurisdiction. I don't think even Justices Thomas and Gorsuch would attempt to do that. So, it's worth remembering in this context that we do have waters that no one is questioning are jurisdictional. The ocean is clearly one of them.

Traditionally, "navigable waters"—whatever you want that phrase to mean—is a legal term of art. Unfortunately, however, it's at least 50 legal terms of art, depending on context.[18] There are waters that are navigable under most definitions from the Court in most contexts. They include waters that are navigable-in-fact in commerce, a result of the Supreme Court's navigation-related Commerce Clause decisions. The Mississippi River is in no danger of being declared *not* a water of the United States, nor the Columbia River. Anything subject to the ebb and flow of the tide is also a navigable water not in danger of losing CWA jurisdiction.

As I said, I'd like to remind everyone that we do have waters that are unquestionably covered by the CWA regardless of what "waters of the United States" actually means. The Commerce Clause constitutional "navigable waters" issue came up in a very interesting way in this case. It was in part a statutory interpretation arguing that what Congress meant by "navigable waters" in 1972 was what it understood to be federal navigable waters for purposes of the Commerce Clause.[19]

That in itself is an interesting and not as-easy-to-decide issue as Justices Thomas and Gorsuch made it sound. But viewing it as a statutory interpretation issue is still a different question than reviewing Congress' Commerce Clause authority over navigable waters as a straight-up constitutional matter. So, I want to emphasize—and Jonathan alluded to this—that if that constitutional aspect ever gets unpacked, it's going to be much more complicated than Justice Thomas' concurrence made it sound.

Looking at the Sacketts' property, over many years of the CWA's existence, a property this close to a navigable water—Priest Lake—that had soggy patches on it, you would assume you had to talk to the Corps. Whatever the Corps said at that point, you would assume you had to do it. Obviously, we are in a different world now, but it is worth seeing how close the Sacketts' property is to Priest Lake and to other wetlands, but also how divided it is from Priest Lake. That's where this case was operating.

What I want to pull out from the amicus briefs that were filed with the Supreme Court are some of the projections of what *Sackett* would mean. Specifically, these briefs and the maps they included illustrated in a concrete way what the choice between those two *Rapanos* tests—significant nexus and continuous surface water connection to a relatively permanent water—would actually mean on the ground. Across the country—West and East—the choice matters, with the continuous surface water connection test subjecting fewer waters to protection from pollution and filling.

These were the litigation attempts to illustrate to the Court what this choice could actually mean. Particularly in the West—where I think the import of *Sackett* will be felt the most at the federal level—we have a lot of waters that are intermittent, that dry up on a regular basis. Even naturally, they dry up on a regular basis, but the water is also being diverted for irrigation and municipal uses. *Sackett* could thus become a really interesting opinion in terms of defining what "relatively permanent" means. Relatively permanent compared to what?

If it means relatively permanent in a year-round sense—and Justice Alito's opinion made clear there doesn't have to be water in it every single day of the year—what exactly is the borderline? Do we get to compare it to its natural flow and natural drying in areas where that is, in fact, the natural pattern of waterways? You can see dramatic potential reductions in jurisdictional waters, for example, in New Mexico and in the South Platte Watershed in Colorado. This will be true in many places in the West. Even in places that are wetter, like Minnesota, the test will make a difference.

That brings up three follow-on issues from *Sackett* that I want to discuss. First, we have new regulations from EPA

15. No. 18-260, 50 ELR 20102 (U.S. Apr. 23, 2020).
16. 33 U.S.C. §1362(7), (9), (10).
17. *Id.* §1362(7).
18. *See* Robin Kundis Craig, *Navigability and Its Consequences: State Title, Mineral Rights, and the Public Trust Doctrine*, 60 Proc. Rocky Mountain Mineral Law Ann. Inst. 7-1, 7-2 (2014) (discussing various of the definitions and uses of "navigable waters").
19. Sackett v. Environmental Prot. Agency, 143 S. Ct. 1322, 1344-48, 53 ELR 20083 (2023) (Thomas, J., concurring).

and the Corps, issued at the beginning of this year.[20] Those regulations are permeated with the significant nexus test, so they are going to have to be revisited. They have severance provisions in them, but it's hard to sever out the core tests that the agencies were relying on.

Another issue is tributaries. Tributaries are arguably on much safer ground. This assertion depends in part on the reflection back to Justice Scalia's opinion from *Rapanos*. So, we're looking at a continuous surface water connection. If you look at any surface water system of tributaries, arguably the entire thing has a continuous surface water connection. As long as you end up with a traditional navigable water at the end, which most of them do, you've got the whole watershed.

That's one potential argument going forward and a potential subject for a new rulemaking, even though we can't expect that the agencies will get deference for anything. Even applying the continuous surface water connection test, we still could have a relatively broad approach to tributaries. That is consistent with Justice Scalia's opinion from *Rapanos*, which Jonathan alluded to. There is a moment in the *Rapanos* decision where Justice Scalia tried very hard to distinguish §404 and §402, on the theory that in §402, when you dump a bunch of fill material into a wetland, it more or less stays put.[21]

I've always said that statement proves Justice Scalia never actually saw a dredging and filling operation. But, nevertheless, his thought was that because the material more or less stays put, there aren't pollutants flowing downstream. But he was also very careful to say that if you're talking about industrial toxics, industrial pollutants, they do flow. That's the whole point. That's why you have to get smaller waters into the §402 permit context to make sure that those industrial pollutants don't get to the larger waters.

I think there's a very solid legal argument, even from the perspective of Justice Scalia's *Rapanos* opinion and Justice Kavanaugh's understanding of it in the *Maui* decision, that tributaries are in—that this aspect of CWA jurisdiction has not changed. It remains to be seen. I hope this is one of the issues that the agencies take up in their new rulemaking, because I think they can be very consistent with *Sackett* and still broad regarding CWA jurisdiction over tributaries.

The next big issue will be what happens when *Sackett* meets *Maui*. *Maui* was a 2020 decision involving the §402 permit program, and the case was before a Court different enough from this Court that it's an open question as to whether this Court would have reached the same conclusion as the *Maui* Court did. Nevertheless, *Maui* remains precedent for the moment. But in the §402 context, the county of Maui's sewage treatment plant was partially treating its sewage, pumping it into injection wells that then connected up with groundwater, flowed out to the Maui coast, and hurt some coral reefs. It took about 87 to 110 days to reach the reefs. There were dye tests to prove it.

The question was whether this facility needed a §402 NPDES permit. The Court said yes. It invented the "functional equivalence" test and made it a factor-based test for lower courts to develop, but also said time and distance are going to be the most important factors. The Court left it basically that if you're discharging pollutants in such a way that they flow relatively quickly to a relatively close traditional navigable water and remain identifiable as your pollutants, then you need an NPDES permit.

The question that *Sackett* raises is, can this test and analysis be carried over to the §404 context? That issue that Justice Scalia didn't want to think about is what happens when your dredged and fill material also flows down to a navigable water. I can make the argument that if you discharge dredged or fill material into a non-jurisdictional water, but it flows relatively quickly to a bigger water and it is recognizably your dredged and fill material, *Maui* would apply and you would still need a §404 permit for that. I also can very easily see courts going exactly the opposite way. Where that line is drawn will be important for the future.

What has changed in getting rid of the significant nexus test, however, is that the significant nexus test allowed EPA and the Corps to think about how what you were doing to a smaller water affected the larger chemical, physical, and biological processes of the aquatic system. That meant when you were filling in a wetland, you got opinions like the Ninth Circuit's that this was affecting ecological integrity, nurseries, reproduction, nesting grounds, and so on.

After *Sackett*, I don't think we can do that anymore. We are in a world now where we are tracking where pollutants go. That may, in fact, be one of the biggest changes that the *Sackett* case brought. It does dovetail very neatly with *Maui* because that's what the Court was worried about in *Maui*, but it is a significant change from the significant nexus test and what exactly litigants will be worried about proving in court.

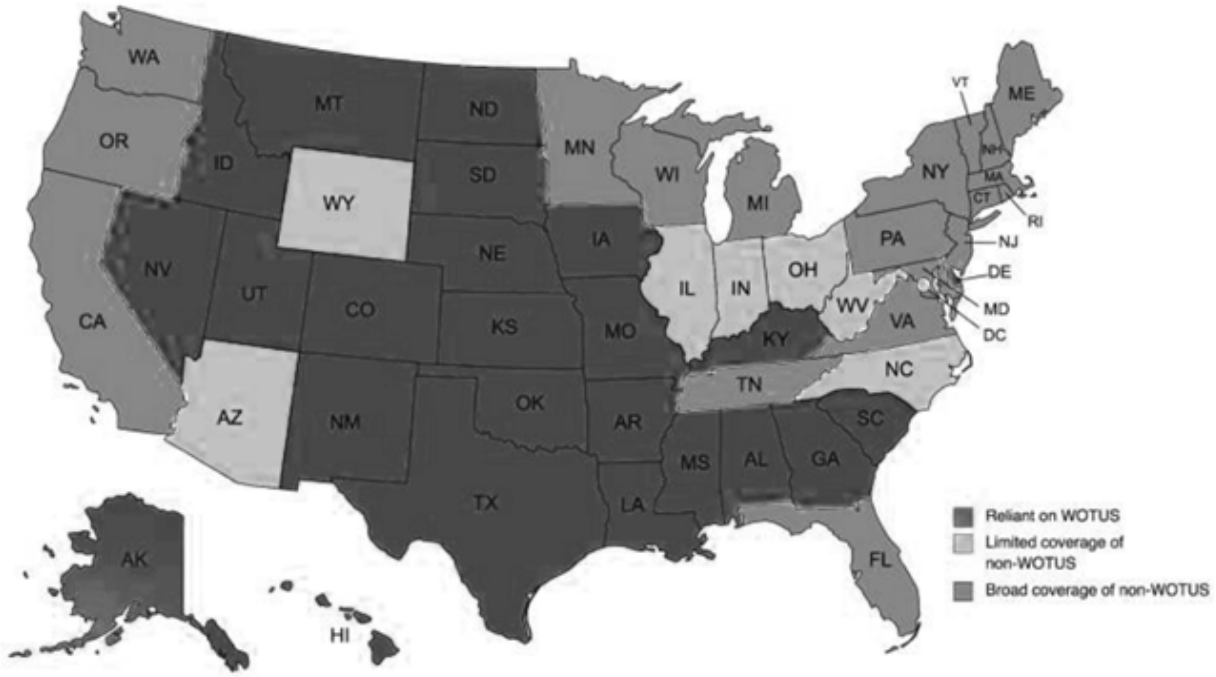
Rebecca Kihslinger: I'm going to switch gears and talk about what the state approaches are to regulating waters given this changing federal regulatory landscape. I'm going to give a snapshot and then talk about some opportunities moving forward.

The change in jurisdiction is really going to put a substantial burden on many states to protect their state waters. One of the ways they can do this is through enacting and implementing regulatory programs or permitting programs for impacts to wetlands and waters. In addition to those regulatory programs, there are also other kinds of nonregulatory approaches that states have already adopted, or may contemplate adopting, to protect priority waters in their state. I'm going to talk about both.

First up on the regulatory side, the figure below is a map that ELI put together, looking at the current status of regulatory coverage. States without independent dredge-and-fill regulatory programs are in dark gray. In medium gray are the states that have some broad permit coverage

20. Revised Definition of "Waters of the United States," 88 Fed. Reg. 3004 (Jan. 18, 2023).
21. Rapanos v. United States, 547 U.S. 715, 743-45, 36 ELR 20116 (2006).

Figure 2. State Regulatory Coverage



Source: Rebecca Kihslinger et al., Environmental Law Institute, Filling the Gaps: Strategies for States/Tribes for Protection of Non-WOTUS Waters 4 (2023), https://www.eli.org/sites/default/files/files-pdf/Strategies%20for%20States-Tribes%20for%20Protection%20of%20non-WOTUS%20waters%201.2.pdf.

of non-WOTUS waters or waters of the state. And in light gray are states where their coverage may be for a specific set of waters or activities.

Nearly half the states, in dark gray, do not operate any independent state permitting scheme regulating dredge and fill activities in non-WOTUS waters. They may apply §401 of the CWA to federal permits or licenses, but they do not have a state regulatory program. These are the states that are most vulnerable to changes in federal jurisdiction, and their waters will be most affected by these changes.

The 19 states in medium gray are the states that have fairly comprehensive permitting programs. The coverage of these programs does vary. These states include Virginia, Maryland, and California.[22] In Washington, there are several programs that do cover most waters of the state, so they are fairly comprehensive.[23] There are other states that have some limitations. For example, New York's current regulatory program covers wetlands of greater than 12.4 acres or of unusual importance.[24] New York amended the program in April 2022 to make it successively more protective, including reducing the size of meaningful regulation to 7.4 acres.[25]

With these medium gray states, it's important to note that their waters are less vulnerable or will be less affected by changes in federal jurisdiction. In some of these states, the regulatory programs may not look too different given this change because they have joint permitting programs with the federal agencies. So, things may move forward looking quite the same.

The light gray states, this last group of states, may have adopted specialized laws or regulations that cover certain activities or types of wetlands. We have categorized these in a few buckets.

The first bucket includes "isolated waters" permitting states. So, those states that enacted permitting programs following the 2001 Supreme Court decision in *SWANCC*. These states include Ohio, which enacted an isolated wetland permitting program that defined "isolated wetlands" as wetlands not subject to the CWA.[26]

Indiana has an isolated wetland permitting program, which was designed to regulate wetlands of three classes—from Class I, which are the more disturbed wetlands, all the way through Class III wetlands, which are more pristine or habitats for threatened or endangered species.[27] North Carolina is another example of these isolated water permitting programs where they enacted such a program

22. Va. Code Ann. §§62.1-44.5, 62.1-44.15 (2022); Md. Code Ann., Envir. §§9-101(1), 5-901 et seq. (2021); Cal. Water Code §§13000 et seq. (2021); Cal. Pub. Res. Code §§30000 et seq. (2022).
23. Wash. Rev. Code chs. 90.48, 77.55 (2022); *see also* Wash Rev. Code ch. 70A (2022) (local government protections of critical areas, use of best available science).
24. N.Y. Envtl. Conserv. Law ch. 43B, §§24-0101 et seq. (2022).
25. *Id.* §24-0107 (2022).
26. Ohio Rev. Code Ann. §§6111.01-6111.28 (2022).
27. Ind. Code §§13-18-22-2 et seq. (2022).

following *SWANCC*.[28] All three of these states have since made some changes.

The second bucket includes permitting programs for most non-WOTUS state waters. One example is the District of Columbia.[29] It adopted emergency and final rules following the 2020 Navigable Waters Protection Rule promulgated by the Donald Trump Administration.[30] These rules identify the District's waters as critical areas in need of protection, and subject them to a wetland and stream protection permitting program that applies to non-WOTUS waters.

Our third bucket is permitting for designated or specific state non-WOTUS waters or permitting programs for a specific kind of wetland or specific activity. One example is Arizona's Surface Water Protection Program, which was enacted in 2021.[31] It protects some important non-WOTUS waters, especially for their value in drinking water, fisheries, fishing, and recreation. It only applies to non-WOTUS waters on the state's list. It's a specific list of wetlands that are covered by this program. It directs the director of the Arizona Department of Environmental Quality to apply the state's water quality standards to these waters, but it is not a comprehensive permitting program.

Another example in this category is Illinois. It has a program that protects some wetlands from impacts resulting from state-funded activities.[32]

The final bucket is case-by-case regulation. One example is West Virginia. West Virginia does not routinely permit dredged discharges into non-WOTUS waters, but it does assert authority to regulate some activities on a case-by-case basis.[33]

I want to talk a bit about some recent changes to these programs. As I mentioned, Ohio, North Carolina, and Indiana all have isolated waters programs. All have made recent changes. Following the 2020 Navigable Waters Protection Rule, Ohio sought to extend its permitting program to ephemeral features with a regulatory action in 2020. However, last year, the Ohio Legislature rejected that regulatory change and reverted the scope of coverage of waters to the federal scope.

North Carolina is also seeking to adopt final regulations that would cover a gap in the state's protection between its isolated waters protection permit program and any changes in federal jurisdiction. It adopted temporary regulations in 2021, and has required permits for those specific waters. These are specifically nonadjacent and non-isolated wetlands—those that are put at risk by the *Sackett* decision. However, permanent regulations in North Carolina are still on hold because they're under review by the state's legislature-controlled Rules Review Commission. So, the fate of that program is uncertain.[34]

As I mentioned, in Indiana, the permitting program is organized by class of wetlands. The state has recently rolled back the types of wetlands that it's protecting under that program, removing protection for Class I wetlands and Class II wetlands that are less than three-fourths of an acre. The other one I mentioned is Arizona's new Surface Water Protection Program. There have been recent changes also in California and in New York.

That's a snapshot of where the states are in their regulatory programs. We have states that are comprehensive, and we have many states with no permitting program at all. So I think, at least in the immediate or short or even medium term, some states are going to have to think about other kinds of protection programs outside of regulatory programs to protect their waters and wetlands. These are going to become really important.

I want to run through some of the other approaches that states and local governments might be able to take or might contemplate adopting in order to protect their waters and wetlands. Local governments can use their land use regulatory powers to protect wetland buffer areas. Wetland buffers provide important protection for wetlands, for water quality and quantity purposes. Local governments can derive authority for protecting wetland buffer areas through state wetland programs or critical area programs, but they can also use their local government land use authority to protect wetland buffers.

In 2008, ELI produced the *Planner's Guide to Wetland Buffers for Local Governments*,[35] which reviews some of the approaches local governments have taken to protect these areas. As with buffer requirements, local governments can also have authority to create permitting programs for impacts to wetlands and waters. There are a number of states where their wetland regulatory programs also provide for local regulations, like Washington, New York, and Virginia.

Critical area laws in Maryland and the State Growth Management Act in Washington[36] also give local governments substantial authority to protect wetlands through permitting programs. In states without these kinds of regulatory programs, local governments can use their land use powers to create local regulatory programs. There are several examples of local governments with wetland protection ordinances.

Another opportunity for states that do not have regulatory protection on specific kinds of waters is to regulate

28. 15A N.C. Admin. Code 02H.1300 (2001).
29. 68 D.C. Reg. 5254 (May 14, 2021) (adopting D.C. Mun. Regs. tit. 21, §§2500-2505, 2599, 2600-2699).
30. *Id.*
31. Ariz. Rev. Stat. §49-221(G) (2022).
32. 20 Ill. Comp. Stat. 830.
33. West Virginia Department of Environmental Protection, Application for West Virginia State Waters Permit for Federally Non-Jurisdictional Waters, https://dep.wv.gov/WWE/Programs/wqs/Documents/401%20Program/Isolated%20Waters%20Application%20090315.pdf.
34. In June 2023, the North Carolina state legislature (overriding a governor veto) amended the state's definition of wetlands (15A N.C. Admin. Code 02B .0202), restricting wetlands classified as waters of the state to those defined as waters of the United States. North Carolina Farm Act of 2023, S. 582, Gen. Assemb., 2023-2024 Sess. (N.C. 2023).
35. James M. McElfish et al., Environmental Law Institute, Planner's Guide to Wetland Buffers for Local Governments (2008), https://www.eli.org/sites/default/files/eli-pubs/d18_01.pdf.
36. Wash. Rev. Code ch. 36.70A (2022), especially §36.70A.170 (designating critical areas) and §36.70A.172 (use of best available science); Wash. Admin. Code §§365-190-080, 365-190-090, 365-195-900 (2022).

particular activities. These could include regulations that prohibit or provide some specific permits for dewatering of aquifers or for groundwater protection programs. In California and Arizona, there are programs that may regulate instream flows or withdrawal of water from watersheds.[37] Lots of states have stream alteration or habitat protection permit requirements that may apply to these waters.

On the nonregulatory side, there are several states that have engaged in spatially explicit planning to identify and prioritize habitat, important wetlands, and floodplains. Examples include Colorado's potential conservation areas[38] and the Maryland GreenPrint Program.[39] These programs identify specific areas that are worthy of or are priorities for protection. They may be tied directly to funding schemes within the state or may be freestanding, and the results may be used for multiple management purposes.

Some states have adopted water quality standards for non-WOTUS waters, even in states that don't have specific regulatory programs or permitting programs for wetlands. Certain states have adopted wetland-specific water quality standards, but more commonly states apply their water quality standards to wetlands. This could provide a basis for some state protection.

Conservation banking may be an opportunity. Conservation banking provides a mechanism to offset impacts to species listed as threatened or endangered under the Endangered Species Act (ESA)[40] or a state equivalent. Conservation banking may provide opportunities to protect some of these important features in the landscape, especially if the target species is dependent on these habitats.

One important category of state approaches is voluntary conservation and restoration. Every state has some kind of voluntary conservation and restoration program. They leverage the efforts of landowners, nonprofits, and the public to protect and restore wetlands and other waters. They take a huge variety of forms, from engaging citizens in wetland monitoring with many participatory science programs, to paying citizens to remove invasive species, to funding landowners to change agricultural processes or purchasing easements from landowners, to providing technical assistance. There is lots of opportunity through voluntary conservation and restoration at the state level. Most states are engaged in these efforts.

ELI hosted a webinar recently on wetlands resilience and new technologies.[41] Several of the panelists said that wetlands are having a moment. And I agree. There's a lot of attention being paid to policy development around restoration and conservation of wetlands, floodplains, and other kinds of ecosystems as natural infrastructure or nature-based strategies for hazard mitigation, water management, and resilience.

There are important opportunities to build partnerships among the wetland agencies at the state level with hazard mitigation and resilience agencies to leverage investment in protection and restoration of these ecosystems for purposes such as hazard mitigation. We're seeing these kinds of efforts growing in the Federal Emergency Management Agency, the Corps, and the water resources side at the state level and with nonprofits. I think there are also many opportunities with tribes but I'll leave that to Edward.

I want to finish with a few words on compensatory mitigation under the CWA. This is an area, as Jim mentioned, where ELI does a lot of its work. Section 404 of the CWA requires that permanent impacts be compensated. This compensation program operates under a set of regulations finalized in 2008.[42] They include requirements for siting, implementation, review and approval, and management of compensatory mitigation projects.

The mitigation market directs billions of dollars annually to the restoration of these wetlands and waters. Many of these projects are accomplished through a third party, restoration experts, the mitigation bankers, and in-lieu fee programs. The Corps' RIBITS site tracks mitigation projects that are done by mitigation banks and in-lieu fee programs.[43] There are more than 4,000 sites in the United States, many of which include mitigation banks and in-lieu fee projects. It's a big program, and there's lots of money going to restoration.

With the *Sackett* decision, this landscape is going to change dramatically. The requirements for compensatory mitigation will largely be thrown back to the states that were highlighted in Figure 2, with regulatory programs and compensatory mitigation requirements. The business of mitigation providers that are engaged in this work will thus also largely be thrown back to these states with regulatory programs.

Edward Ornstein: I'm a member of the Southeastern Mvskoke Nation, a state-recognized tribe in Alabama. I work as the special counsel on environmental affairs for the Miccosukee Tribe of Indians of Florida and as a vice chair for the American Bar Association's Native American Resources Committee. I'm happy to be here and to share a slightly different perspective from Indian Country.

37. Texas A&M University has identified 30 states with instream flow requirements or permit requirements. Freshwater Inflows, *United States State Laws Relating to Protection of Instream Flows for Environmental Purposes*, https://www.freshwaterinflow.org/united-states-state-laws-relating-protection-instream-flows-environmental-purposes/ (last visited Aug. 3, 2023).
38. Colorado Natural Heritage Program, *CNHP Potential Conservation Area Reports*, https://cnhp.colostate.edu/ourdata/pca-reports/ (last visited Sept. 28, 2022).
39. LandScope America, *Maryland GreenPrint Targeted Ecological Areas*, http://www.landscope.org/maryland/map_layers/conservation_priorities/greenprint_targeted_ecological_areas/25000/ (last visited Sept. 28, 2022).
40. 16 U.S.C. §§1531-1544, ELR Stat. ESA §§2-18.
41. ELI, *From Data to Decisions: Remote Sensing and Wetland Resilience* (May 15, 2023), https://www.eli.org/events/data-decisions-remote-sensing-and-wetland-resilience.
42. 33 C.F.R. §§325, 332 (2008); 40 C.F.R. §230 (2008).
43. U.S. Army Corps of Engineers, *RIBITS*, https://ribits.ops.usace.army.mil/ (last visited July 11, 2023).

If you look at the Barack Obama-era wetland delineations and the location of federally recognized tribes within the United States, you'll notice that pretty much everywhere there's wetlands, there's tribes. In other words, wetlands are Indian lands, and especially in areas like the Great Lakes or the Louisiana bayou or the swamps of Florida, there are tribes. Although often overlooked by the broader legal community, these are sovereign nations that can regulate in addition to states.

Some of my colleagues have highlighted the opinion handed down by the Court, but this is not necessarily the last word on this issue. Over the next few months or years, our profession is going to interpret and reinterpret this decision in courts and agencies, in tribal and state governments, and in academia and law review articles. Rather than focusing on direct implications, which at this point in our presentation you probably have a good grasp on, I want to focus on what open questions we have and encourage you to start thinking about innovative answers.

For example, I work in the Everglades, which is not unlike many wetlands around the nation that are divided by artificial infrastructure. If you're working in a space like that, maybe a good question to ask is, what is continuous surface water connection if, say, there's a gate that is controlled by an agency that if left open would create a continuous surface water connection, but if closed might sever that connection?

If there's an artificial impediment to the natural flow of the water, will the law recognize an artificial tool to create continuous flow? If I take a 24-inch culvert (an artificial tool to create flow) and I ram it through a levee (an artificial impediment to flow), and drill a hole in the top, have I created a continuous surface water connection? Do agencies need to account for this in their management of those structures? If closing a gate means a water body would no longer be considered a water of the United States, is that something that agencies need to take account of?

Even if there aren't surface water connections, I think all of us on this panel are thinking about the implications of the *Maui* decision. Because what's the lag time for a pollutant in a wetland to make it to a water of the United States? Can a navigable water that will receive subterranean flows from a polluted water body be used as a proxy to regulate that source surface water body? I think the answer is definitely in a gray area, but it's worth exploring.

And what's the impact for a tribe or state that's assumed regulatory authority from EPA? Many tribes have done this through the CWA's treatment as a state program. Many states have done this as well. Does there need to be an impact if you are working with a sovereign government like a tribe or state? Justice Alito said in his opinion that states can and will continue to exercise their primary authority to control surface water pollution by regulating land and water use. That's clearly how the justices are thinking about it, and we should probably take that cue.

If you will indulge me for a moment, let me give a brief recounting of some of the basics of tribal civil regulatory authority and jurisdiction so that what I say next has some context. Tribes are sovereign nations. They're not just reservations. They are national bodies, and they are recognized as such by a very long line of case law going back to the 1820s and 1830s, with a trilogy of cases—*Cherokee Nation v. Georgia*,[44] *Worcester v. Georgia*,[45] and *Johnson v. McIntosh*[46]—all the way into the present day through cases like *Santa Clara Pueblo v. Martinez*[47] or *McGirt v. Oklahoma*.[48]

It's very clear that tribes are sovereign nations with all of the aspects of sovereignty that have not been explicitly divested by Congress or by the tribe itself. That means tribes are sovereign nations viewed sometimes to the exclusion of states. We can look to cases from a tribal gaming law like *California v. Cabazon Band of Mission Indians*,[49] where we see a tribe seeking to authorize its own bingo hall without the approval of the state.

We can look to *Brendale v. Confederate Yakima Indian Nation*[50] to see the Supreme Court considering the interest balancing that's necessary to determine whether or not a tribe or a state might have regulatory jurisdiction in a certain space. And the *Montana v. United States* case[51] gives a very clear hook for tribal civil regulatory jurisdiction in Indian Country, including over non-Indian polluters, because it provides an avenue for jurisdiction whenever there is a threat to the health, welfare, or political integrity of a tribal nation.

In addition to having those aspects of being a sovereign nation with the authority to regulate Indian land, tribal nations are often also federal regulators to the extent that they have assumed the CWA enforcement program through that treatment as a state through §518. We've actually seen the U.S. Court of Appeals for the Tenth Circuit look at a tribal water quality standard and impose it off the reservation, on an upstream polluter in the city of Albuquerque, and hold them to account to the tribe's water quality standards.[52]

There are 576 federally recognized tribes in almost every, if not all, watershed(s) in the United States. So, if one tribe in that watershed imposes, for example, a limit on total phosphorus, that may be extended to upstream polluters in the watershed. These are things that are worth thinking about when we're talking about tribal nations. That there's in fact two sorts of levers that tribal nations can pull—their own sovereignty and that delegated authority.

Now, with all that jurisdiction and authority in mind, what strategies might be employed? Unfortunately, there is a trend toward the devolution of regulatory power from the federal government. So, if you're an advocacy organization, if you're a tribal nation, if you're a private actor and you're thinking about how to make an impact, maybe one of

44. 30 U.S. (5 Pet.) 1 (1831).
45. 31 U.S. (6 Pet.) 515 (1832).
46. 21 U.S. (7 Wheat.) 543 (1823).
47. 436 U.S. 49 (1978).
48. No. 18-9526 (U.S. July 9, 2020).
49. 480 U.S. 202 (1987).
50. 492 U.S. 408 (1989).
51. 450 U.S. 544 (1981).
52. City of Albuquerque v. Browner, 97 F.3d 415, 27 ELR 20283 (10th Cir. 1996).

those strategies is reallocating national advocacy resources to states.

I live in Florida. While some may expect Florida to not strongly enforce water quality or to be more business-focused, there's been a lot of investment recently from the state government into ensuring that the Everglades is healthy.[53] That comes from the interests of the constituency, which care about Florida's beaches, parks, and springs, even if they aren't as dialed in on more progressive-coded issues, like climate change. Public relation campaigns need to be one of the things that we as attorneys are also thinking about, because maybe a combination of those public relations campaigns, of lobbying in the state, and of legal advocacy can get us to a different place in the state houses even if it doesn't get us to that place in the District of Columbia.

Tribes and states can interpret this decision in varying ways. You can't break the law. But if you have a reasonable interpretation of what's going on that might differ from how another state or tribe or federal agency is doing it within your jurisdiction, you have the right to pursue that interpretation. And of course there is tribal and state regulation. As I noted, there is some of that downstream enforcement power that may be latent as the Tenth Circuit has considered it, that may allow tribes or states to impose their water quality regulations on surrounding entities.

Of course, the federal agency interpretation, the rulemaking, the guidance documents they put out in the next few months or years are incredibly crucial because there's still, I think, a strong sense of deference to agencies. That may have been weakened by some recent decisions by the Supreme Court, but it's nonetheless an established body of law. I think that to the extent agencies come to some sort of consensus about how to interpret this decision, that's going to have an impact on the courts. You don't need to get to the courts if you have an agency that has an innovative idea about how to approach these issues.

Before the CWA, before EPA, most environmental law was done through mass torts. There was a group of folks affected and they had standing. They could sue to enjoin a particular activity, and that absolutely remains the case. If you live in a wetland and somebody is disturbing the water quality and it's affecting your drinking water, it doesn't matter whether or not WOTUS include your specific body of water because if you're impacted, you'll still have standing to bring this in court.

There are a lot of tools that we can begin to look to that are not necessarily based in an understanding of the Supreme Court's jurisprudence, but may be based in our understanding of what kind of injury we might be sustaining. I want to encourage everybody to broaden their tool kits and consider, particularly if you're an actor within a tribal government, how you might be extending your jurisdiction under that *Montana* exception—health, welfare, and political integrity—or operationalizing your CWA treatment as a state authority regulating a body of water that is still a water of the United States on your reservation and noting how those impacts are traveling from adjacent wetlands.

James McElfish: We've covered a lot of ground. One of the early questions I'm going to give to Jonathan is, where do Justice Alito and the majority locate the need for a surface connection between the wetlands as opposed to any other sort of connection?

Jonathan H. Adler: The short answer is, it's in the word "waters," which is within the phrase "the waters of the United States," which is the definition for "navigable waters." There is both emphasis placed on the fact that it's "*the* waters of the United States" and that the meaning of that is not merely water but a set of waters that can be understood as WOTUS as opposed to, say, the waters of the states and the like.

But there's also recognizing that historically the CWA has not been understood to apply to groundwater, so it applies in the first instance to surface water, that WOTUS are surface waters. So, it is understanding the boundaries of that definition. That's how to characterize the logic or the understanding that the majority opinion is adopting. And then, as we discussed, rejecting what had been the view of EPA for most of the past 50 years, that this should also include adjacent wetlands that have hydrological connections that might not be on the surface or at least not continuously on the surface.

James McElfish: This may be a related question. How should agencies, landowners, and others evaluate the duration or permanence of wetlands and their connection? For example, there are many wetlands that are periodically inundated, but don't maintain a continuous surface connection. How should those be addressed, or what's the likely approach that the agencies will take?

Robin Craig: As I flagged, what exactly we mean by permanence or continuous surface water connection are areas that need to be developed. My reading of the Court majority is that they're not going to tolerate big interruptions. They did make some allowance for small interruptions, like perhaps in a severe drought or a small seasonal interruption. But I would hope that at some future date they would also take into consideration what the natural state of certain waters is.

I would speculate on the extremes. I don't think they're going to allow as WOTUS waters that are connected only during flooding. On the other hand, at the other extreme, I think they would let in waters that are normally connected but whose flow gets interrupted only because of a severe drought. Even this Court. Where the line falls in-between

53. Governor Ron DeSantis, Exec. Order No. 23-06 (Jan. 10, 2023) (proposing $3.5 billion in Everglades restoration funds, coordinating wastewater discharge, expediting wildlife corridor acquisitions, expediting Everglades restoration programs, direction to Blue-Green Algae and Harmful Algae Task Forces, etc.); Governor Ron DeSantis, Exec. Order No. 19-12 (Jan. 10, 2019) (proposing $2.5 billion in Everglades restoration, establishing algal task forces, establishing or updating restoration plans for Lake Okeechobee and the Caloosahatchee and St. Lucie Estuaries, expediting key Everglades restoration projects, etc.).

those extremes, I would say it's closer to the flooding and that we're going to see fewer exceptions. But that remains to be developed.

James McElfish: Can we borrow anything from Justice Scalia's notion that rivers with seasonal flow might be in? What about wetlands with seasonal surface connection?

Robin Craig: This goes to Jonathan's point of how much of Justice Scalia's opinion is being adopted by implication. Justice Scalia did make some allowances for that, although more enthusiastically when he was talking about §402 than when he was talking about §404. Again, if they adopt Justice Scalia's opinion, we might have some broader leeway. It's always going to be tied to natural conditions, though—at least that would be my guess as to where the Court would be going forward.

Jonathan H. Adler: I think it's important to go back and read Justice Scalia's *Rapanos* opinion. It implicitly assumes that there is going to be some boundary drawn by the agency. Throughout the plurality in *Rapanos*, there's hedging about how continuous the surface connection has to be, how much intermittency is too much, and so on. There's a lot less of that hedging language in Justice Alito's opinion. His opinion very explicitly says we're not going to defer to the agency at all. That creates a challenge that Justice Scalia's plurality as written might not have created, in that it's not as clear in the Justice Alito opinion where the gaps are that the agency can try and fill with its expertise.

James McElfish: There a number of questions about wetlands connected by culverts. There are a number of wetlands that might be culverts in a continuous flow over several miles. They might go under roads and the like. At what point does a wetland become distinguishable even though there is kind of a continuous surface hydrologic connection via culverts and other structures?

Edward Ornstein: It's definitely a question that's been on my mind a lot lately. Where I work, there's 2,175 miles of canals and 2,135 miles of levees, berms, and dikes. The Everglades is a very infrastructure-rich area. If we think about this from the perspective of what's the natural condition, the natural condition doesn't include those artificial disruptions. Is there a point in time that something that's artificial becomes natural? I don't think so.

But I think the proper answer here is a cautious one. That if you're a polluter, then you should be assuming that, yes, in fact, there is a continuous surface connection when it goes through a gate or is interrupted by a levee. If you're someone who is trying to protect the environment, you want to argue that that is the case, but probably assume that it's not. We can get a sense of where some of the justices are on this question, but certainly not enough of them to be able to give a particularly educated answer. But to me this is a very wide avenue for agency interpretation and one that I think agencies and tribal and state governments can step into.

Robin Craig: I think this is one of the tragedies of the Supreme Court addressing WOTUS, that it will do it in §402 or §404, but it will never think about them simultaneously. I think many decisions would have been tempered if they were thinking about the entirety of the Act at the same time.

James McElfish: Rebecca, a question for you. What is the likely effect of this decision or its fallout on state programmatic general permits, which are the permits the Corps has entered into with various states to coordinate permitting or function, and particularly the effect on mitigation programs that relate to some of these cooperative ventures?

Rebecca Kihslinger: At least in the context of mitigation, there is coordination where states have regulatory programs or compensatory mitigation requirements. There's a lot of coordination with the Corps and the state. The state often sits on the federal-state interagency review team, especially in states that have permitting programs for wetlands, so they play a part of the decisionmaking team for compensatory mitigation projects and programs.

I think the Corps also does the jurisdictional determinations oftentimes for state permitting. There's potential for more of the administrative burden to go to the states with the lack of that federal partner in the Corps in a lot of these decisions. That goes to the state programmatic general permits as well, which are coordinating efforts with the Corps. Those are likely to change substantially for waters that are non-WOTUS, now that the state will have to take over that function.

James McElfish: There are a number of questions that relate to functions of other federal agencies that might have jurisdiction for various purposes, or that are landowners, or the Bureau of Land Management and U.S. Fish and Wildlife Service. To what extent do other federal agencies have an opportunity or option to step in and provide protections even if the WOTUS definition doesn't protect these waters?

Robin Craig: It's important to remember that *Sackett* is interpreting a term specific to one statute, the CWA. To the extent that any other regulatory provision—state, federal, or tribal—does not depend on that definition, it can go its own way. Where it is important is if federal jurisdiction under §404 was then the trigger for, say, an ESA §7 consultation for endangered species or a National Environmental Policy Act (NEPA)[54] environmental impact analysis requirement. Those would be affected.

However, any governmental body that has independent jurisdiction to do something else does not have to follow the Supreme Court's *Sackett* decision. And, by the way, that includes some states that have assumed CWA permitting authority, but have adopted it as state law that oper-

54. 42 U.S.C. §§4321-4370h, ELR Stat. NEPA §§2-209.

ates functionally independently from whatever's going on in federal jurisprudence.

So, the short answer is, if an agency or government had the authority to do it before and it's not dependent on how WOTUS is defined in the CWA, they still have that authority.

James McElfish: Edward, you mentioned federally recognized tribes, of which there are a great many. What about nonfederally recognized tribes? Do they have a particular set of implications that we should be aware of?

Edward Ornstein: We can separate this into three categories: federally recognized tribes, state-recognized tribes, and fully unrecognized tribes. If you're an unrecognized tribe, you've got mass torts. You've got the ability as citizens of the United States to lobby your state and federal government.

As a state-recognized tribe, there's a little bit more to act on. Most state-recognized tribes are recognized by a state commission. My own tribe is recognized by the Alabama Indian Affairs Commission, which is organized under the governor of Alabama. I know in Hawaii they don't consider themselves a state-recognized tribe, but it's a parallel system of recognition where the Office of Hawaiian Affairs is the tie-in between the government of Hawaii and the Hawaiian people, the Kanaka Maoli. Also, for example, in North Carolina, the Lumbee have a very tight relationship with their state government.

So, I guess the answer is, if you're a state-recognized tribe and you have amassed a degree of political influence within your state, then you can act through organs of that state government and push for a degree of regulation. But there is no federally recognized authority to regulate, despite the fact that state-recognized tribes would generally across the board say that they haven't sacrificed their inherent sovereignty to do so. That's worth mentioning. I think federally recognized tribes are definitely best positioned to take advantage of the current situation.

James McElfish: There are a number of questions that ask, in effect, did a whole lot change? Or is the Supreme Court basically reining in regulatory overreach and the agencies should have been aware all along that they had gone further than they were entitled to go?

Jonathan H. Adler: The answer is both. I'm in the camp that EPA and the Corps have been on notice that their regulations were problematic at least since 1995. There's a great Richard Lazarus column from the *Environmental Forum*[55] from the late 1990s, pointing out that in the wake of the *Lopez* decision[56] and the way that it altered how we understand federal jurisdiction under the Commerce Clause, EPA and the Corps stuck their heads in the sand and maintained a definition of "waters" that was just facially incompatible with the Supreme Court's understanding of the scope of Commerce Clause authority. That's part of what led to *SWANCC* and the reason the Court wrote its *SWANCC* opinion the way it did.[57]

The relevant language that was a problem in the regulations was about conditional effects on interstate commerce, not even actual effects let alone significant effects being sufficient for jurisdiction, and wasn't fixed until the Joseph Biden Administration—very recently.[58]

On one hand, EPA and the Corps in some respects have been out over their skis, or regulating without a net, for a long period of time. That said, the majority opinion in this case is certainly more aggressive than what the Court did in *SWANCC*. And clearly more aggressive than what a majority of the Court was willing to do in *Rapanos*. So, it's both.

In some respects, EPA and the Corps have for a long time been interpreting the CWA in ways that were very legally vulnerable. The day of reckoning didn't come until a Court as conservative as the current Court was willing to address it. What's interesting, and we didn't talk about this before, is that there's a footnote in the Alito opinion that no justice contests that says, from the standpoint of statutory stare decisis, there was no controlling opinion in *Rapanos*.[59] So, nothing is being overturned, and there's not a precedential concern.

On the one hand, that makes it much easier for the majority to blow through Justice Kennedy's significant nexus test and throw it aside. On the other hand, it means that this opinion might not be as much of an augur for what we're going to see in other environmental regulatory contexts where there is a clear majority opinion interpreting statutory language that would have precedential effect.

So, while you have a more aggressive and more conservative Court in that respect, it doesn't mean programs across the board are vulnerable. There were things about both the way EPA and the Corps have been operating and the precarious nature of *Rapanos* that created an additional vulnerability here that you might not see in other environmental regulatory programs.

James McElfish: I have some questions related to assumption, the program under which states and presumably tribes could undertake operation of much of the §404 federal permitting program. Three states have assumed §404 authority: Michigan, New Jersey, and most recently Florida. Are states more or less likely to seek assumption,

55. Richard J. Lazarus, *Corps Slips on* Lopez*, FWS Wins*, Env't F., Mar.-Apr. 1998, at 8.

56. United States v. Lopez, 514 U.S. 549 (1995); *see also* Jonathan H. Adler, *Wetlands, Waterfowl, and the Menace of Mr. Wilson: Commerce Clause Jurisprudence and the Limits of Federal Wetlands Regulation*, 29 Env't L. 1 (1999).

57. *See* Jonathan H. Adler, *The Ducks Stop Here? The Environmental Challenge to Federalism*, 9 Sup. Ct. Econ. Rev. 205 (2001).

58. Revised Definition of "Waters of the United States," 88 Fed. Reg. 3004 (Jan. 18, 2023).

59. Sackett v. Environmental Prot. Agency, 143 S. Ct. 1322, 1329 n3, 53 ELR 20083 (2023) ("Neither party contends that any opinion in *Rapanos* controls. We agree.").

given the change in the amount of waters that are covered by WOTUS?

Rebecca Kihslinger: That's a really good question. I don't know. I know that prior to this there were a number of states that were moving in that direction. Minnesota had talked about it, as well as Arizona, Alaska, and several other states. I don't know if this will change their motivation for seeking assumption. If that's something that they'll still pursue, it will be interesting to see.

Robin Craig: One thing this decision does is narrow the number of waters you can assume, because §404 has always had a carve-out for the truly federal "navigable waters"—those that are navigable-in-fact or subject to the ebb and flow of the tide. States cannot assume §404 authority for those waters. The *Sackett* justices referenced the Rivers and Harbors Act as well. So, unlike §402 that doesn't have that carve-out, where states can take jurisdiction over all jurisdictional water, §404 has always been more limited. I think it remains to be seen how much is actually left to assume through §404, depending on where we go with the jurisdiction. Assumption is a hassle for states to do—as we witnessed in Florida's recent assumption attempt—and now there are fewer and fewer waters for states to get control over. There's never been a great rush to do it, so I don't see *Sackett* as encouraging more states to try.

James McElfish: I want our panelists to have an opportunity to respond to what they think the chances are for federal legislative responses, even in part, to this decision or aspects of the decision.

Jonathan H. Adler: The short answer is, there is not currently the stomach for expanding EPA's and the Corps' regulatory authority. But one thing at least to think about is that as we saw with *West Virginia v. Environmental Protection Agency*, there was a willingness of Congress to shift from thinking of regulatory strategies to address greenhouse gas emissions to fiscal strategies that both produce less political opposition.

Procedurally, it is easier to get fiscal measures through the legislative process. There are various programs, and certainly Congress could create additional programs that would use incentives, conservation easements, land purchases, and other sorts of things as ways of inducing greater conservation. If there's a legislative response that can get across the finish line in the current political environment, that's the sort of thing that would be the most viable.

Robin Craig: I agree. And if they tried to codify a narrowed jurisdiction, which I think there would be more political stomach for right now, that actually gets very hard to do. It's *difficult* to specifically define which kinds of waters are included and which aren't; it's *much* easier just to say that CWA jurisdiction extends to the limits of the Commerce Clause or something similar. I don't know that congressional drafters could meet the requisite clear statement requirement necessary to satisfy this Court.