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Sackett v. U.S. Environmental Protection Agency: "Waters of the United States" Defined by 0.63 Acres

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NOTE

SACKETT V. U.S. ENVIRONMENTAL PROTECTION AGENCY: "WATERS OF THE UNITED STATES" DEFINED BY 0.63 ACRES.

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> Real relief requires Congress to do what it should have done in the first place: provide a reasonably clear rule regarding the reach of the Clean Water Act. When Congress passed the Clean Water Act in 1972, it provided that the Act covers "the waters of the United States." But Congress did not define what it meant by "the waters of the United States"; the phrase was not a term of art with a known meaning; and the words themselves are hopelessly indeterminate.[1]

INTRODUCTION

In 2004, Mike and Chantell Sackett bought a 0.63 acre lot near Priest Lake in Idaho.[2] With building permits from their county, the Sacketts began constructing a house in 2007, leveled the property, and in the process deposited sand and gravel in areas of standing water.[3] Six months after the Sacketts leveled the land, the Environmental Protection Agency ("EPA") found that the property included wetlands that fell under the regulatory jurisdiction of the Clean Water Act.[4] The EPA issued a formal compliance order instructing the Sacketts to restore the

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[1] Sackett v. U.S. Env't Prot. Agency, 566 U.S. 120, 133 (2012) (Alito, J., concurring).

[2] Sackett v. U.S. Env't Prot. Agency, 8 F.4th 1075, 1080 (9th Cir. 2021).

[3] *Id*. at 1081.

[4] *Id*.

wetlands on the property.[5] If the Sacketts failed to comply with the order, they would face fines up to $40,000 per day.[6] Eighteen years later, the Sacketts went to the United States Supreme Court ("Supreme Court") for the second time after appealing an August 2021 decision from the United States Court of Appeals for the Ninth Circuit.[7] In January 2022, the Supreme Court granted the Sacketts certiorari on the question of "whether the Ninth Circuit set forth the proper test for determining whether wetlands are 'waters of the United States' under the Clean Water Act."[8] The Sacketts want to find out whether the water on their property in 2007 fell under the EPA's jurisdiction via the Clean Water Act.[9]

I. RELEVANCY

At the center of *Sackett v. EPA* is the argument over federal control and the scope of the administrative state.[10] The Sacketts and other interested groups have devoted substantial legal energy to protecting this small piece of land in northern Idaho from the reach of the EPA.[11] This effort represents a larger conservative effort to limit the reach of executive agencies.[12] While the Sacketts' saga continues to the Supreme Court, the Ninth Circuit's 2021 decision about determining the EPA's jurisdiction sets up a relevant conversation about the constitutional and ecological implications of the unfolding struggle over the administrative state.[13]

The Sacketts aim to clarify the regulatory process by limiting the jurisdictional reach of the federal government when they argue that for water to be regulable under the Clean Water Act, a surface connection to

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[5] *Id*.

[6] *Id*.

[7] Sackett v. U.S. Env't Prot. Agency, 8 F.4th 1075 (9th Cir. 2021), *cert. granted*, 142 S. Ct. 896 (Mem.) (U.S. Jan. 24, 2022) (No. 19-35469, 2021 Term; renumbered No. 21-454, 2022 Term).

[8] *Id*.

[9] United States Supreme Court decision coming spring of 2023. *Id*.

[10] *Id*.

[11] At least twenty-three amicus briefs were filed in support of the Supreme Court granting certiorari to the Sackett's appeal. *See* Filings, Sackett v. Environmental Protection Agency, Sackett v. U.S. Env't Prot. Agency, 8 F.4th 1075, 1081 (9th Cir. 2021), *cert. granted*, 142 S. Ct. 896 (Mem.) (U.S. Jan. 24, 2022) (No. 19-35469, 2021 Term; renumbered No. 21-454, 2022 Term), *available at* https://www.supremecourt.gov/docket/docketfiles/html/public/21-454.html (last visited Nov. 22, 2021).

[12] Conservative opposition to *Chevron* deference has grown in recent years, and the 2016 Republican platform contained unprecedented objections to administrative government as a category. A major conservative think tank (The Heritage Foundation) claimed that the administrative state was as odds with the Constitution. Craig Green, *Deconstructing the Administrative State:* Chevron *Debates and the Transformation of Constitutional Politics*, 101 B.U. L. REV. 619, 660-61 (2021).

[13] *See Sackett,* 8 F.4th 1075.

traditionally navigable waters must exist.[14] On the other side are interest groups that want to maintain the ecological protective power of agencies like the EPA.[15] These parties believe expanding the scope of environmental protections by federal agencies—through laws like the Clean Water Act—produces significant economic benefits for the nation.[16] These benefits come in the form of recreation, tourism, commercial fishing, and agriculture.[17]

While this case concerns a tiny plot of wetlands, the outcome will have wide-reaching consequences on the health of wetlands across the country.[18] Wetlands play an integral role in the ecology of watersheds, and they are among the most productive ecosystems in the world.[19] The wetland on the Sacketts' property is an example of a non-tidal marsh, which is a fresh-water wetland that typically borders lakes, ponds, or rivers and contains a diversity of life disproportionate to its size.[20] When these types of wetlands are destroyed or filled in, severe flooding and harmful nutrient deposition to downstream waters can follow.[21] Wetlands adjacent to tributaries trap and hold pollutants that would otherwise reach downstream navigable waters, and they also provide habitats and food sources for aquatic species that live in "traditional navigable waters."[22]

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[14] Petition for Writ of Certiorari at 29-31, Sackett v. U.S. Env't Prot. Agency, 8 F.4th 1075 (9th Cir. 2021), *cert. granted*, 142 S. Ct. 896 (Mem.) (U.S. Jan. 24, 2022) (No. 19-35469, 2021 Term; renumbered No. 21-454, 2022 Term).

[15] *E.g.,* Earthjustice, et al., Comment Letter on Proposed Revised Definitions of "Waters of the United States" Rule (Feb. 7, 2022), https://www.regulations.gov/comment/EPA-HQ-OW-2021-0602-0328.

[16] The federal Office of Management and Budget has found significant economic benefits resulting directly from various federal laws protecting the environment. ROBIN K. CRAIG, THE CLEAN WATER ACT AND THE CONSTITUTION, LEGAL STRUCTURE AND THE PUBLIC'S RIGHT TO A CLEAN AND HEALTHY ENVIRONMENT, at 2 (2d ed. 2009).

[17] ROBIN K. CRAIG, THE CLEAN WATER ACT AND THE CONSTITUTION, LEGAL STRUCTURE AND THE PUBLIC'S RIGHT TO A CLEAN AND HEALTHY ENVIRONMENT, at 2 (2d ed. 2009).

[18] *See Sackett,* 8 F.4th 1075 (The "significant nexus" rule used by the Ninth Circuit may be replaced with narrower rule).

[19] *How do Wetlands Function and Why are they Valuable?*, U.S. ENV'T PROT. AGENCY, https://www.epa.gov/wetlands/how-do-wetlands-function-and-why-are-they-valuable (last visited Mar. 28, 2022).

[20] *Classification and Types of Wetlands*, U.S. ENV'T PROT. AGENCY, https://www.epa.gov/wetlands/classification-and-types-wetlands (last visited Mar. 28, 2022).

[21] *Id*.

[22] BENJAMIN H. GRUMBLES & JOHN PAUL WOOLEY, JR., U.S. EPA & ARMY CORPS OF ENG'RS, CLEAN WATER ACT JURISDICTION FOLLOWING THE U.S. SUPREME COURT'S DECISION IN *Rapanos v. United States* & *Carabell v. United States*, at 8 (June 5, 2007), https://www.epa.gov/sites/production/files/2016-04/documents/rapanosguidance6507.pdf ("Traditional navigable waters" are defined as "[a]ll waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide.").

II. BRIEF OVERVIEW

In *Sackett v. EPA,* the Ninth Circuit reinforced an expansive interpretation of the EPA's jurisdiction under the Clean Water Act by applying what prior courts called the "significant nexus" test.[23] The decision highlights the complexity of the Clean Water Act's jurisdiction question and demonstrates the need for regulatory clarity on a decades-old law.[24] The Supreme Court's pending decision is unlikely to deliver this clarity because the Court is ill-equipped to either (1) replace the "significant nexus" with a workable alternative or (2) clarify the meaning of "significant nexus" for regulators.[25] Regardless, either outcome will support the conclusion that Congress needs to end the boat-rocking and water-sloshing that the executive branch and the courts have created over the past fifteen years.[26]

First, this Note will provide a brief history of the Clean Water Act, its origins, and the role that the EPA plays in its implementation. Next, this Note will walk through the three relatively recent Supreme Court cases and one Ninth Circuit case that shaped the definition of "waters of the United States" and, in turn, the jurisdiction of the Clean Water Act. These cases are the murky origins of the term "significant nexus." This Note will also briefly survey the executive branch's role in defining "waters of the United States" and how this definition has reversed course with every administration turnover.[27] Finally, this Note will explore the Ninth Circuit's recent decision in *Sackett v. EPA* and evaluate the opinion's reliance on the 2006 Supreme Court decision in *Rapanos v. United States*.[28] The Note then will conclude by exploring how *Sackett v. EPA* is critical of the current state of regulatory power under the Clean Water Act, and how Congress must address these criticisms through legislative action to create regulatory clarity and meet the needs of the environment.[29]

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[23] Sackett v. U.S. Env't Prot. Agency, 8 F.4th 1075 (9th Cir. 2021).

[24] *Id*.

[25] The leading contender to replace "significant nexus" is likely Justice Scalia's arguably circular "continuous surface connection" test, which holds that waters only fall under the Clean Water Act's jurisdiction (in other words, waters are "waters of the United States"), if they share a surface connection with "bodies that are 'waters of the United States' in their own right." *See* Rapanos v. United States, 547 U.S. 715, 742 (2006).

[26] *See* discussion of case law and the history of executive rulemaking on this subject *infra* Section III, subsections B and C.

[27] 33 U.S.C. § 1362(7); *see also*, discussion of the history of executive rulemaking on this subject *infra* Section III, subsection C.

[28] *Sackett,* 8 F.4th 1075; Rapanos v. United States, 547 U.S. 715 (2006).

[29] *See Sackett,* 8 F.4th 1075.

III. THE CLEAN WATER ACT BEFORE *SACKETT*

A. INTRODUCTION TO THE CLEAN WATER ACT

Congress enacted the Clean Water Act in 1972 to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters," and the text has remained largely unchanged over the past fifty years.[30] Known initially as the Federal Water Pollution Control Act Amendments of 1972 ("FWPCA"), the Clean Water Act was Congress's response to acute environmental catastrophes like the sensational fire on the Cuyahoga River in Cleveland, Ohio.[31] Today, some see the Clean Water Act as one of the most successful federal environmental laws.[32] Even Supreme Court justices have referred to it as "watershed" legislation[33] and have pointed to the Clean Water Act as representing a "shift in the focus of federal water regulation from protecting navigability toward environmental protection."[34]

To achieve its goal of protecting the "Nation's waters," the Clean Water Act prohibits the discharge of pollutants into "navigable waters" without a permit.[35] The definition of "navigable" has evolved since the nineteenth century, when waters were considered navigable if they were used "as highways for commerce, over which trade and travel" were conducted.[36] Notably, when Congress passed the Clean Water Act in 1972, the act included a distinct focus on pollutants, and as Justice Stevens pointed out, the act did not include reference to "avoiding or removing obstructions to navigation."[37] Additionally, rather than relying on the nineteenth century definition, the Clean Water Act defines "navigable waters" as "waters of the United States, including the territorial seas."[38]

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[30] Sean G. Herman, *A Clean Water Act, If You Can Keep It*, 13 GOLDEN GATE U. ENVT'L. L.J. 63, 63-64 (2021); *see* 33 U.S.C. § 1251(a).

[31] In 1969, the Cuyahoga River, coated in flammable industrial waste, literally caught on fire. The event garnered national attention and contributed to a larger movement that culminated in the creation of the EPA. *See* Solid Waste Agency v. United States Army Corps of Eng'rs, 531 U.S. 159, 175 (2001) (Stevens, J., dissenting); *see also* Erin Blakemore, *The Shocking River Fire That Fueled the Creation of the EPA*, HISTORY (Dec. 1, 2020), https://www.history.com/news/epa-earth-day-cleveland-cuyahoga-river-fire-clean-water-act.

[32] Herman, *supra* note 21, at 63.

[33] The inclusion of quotation marks in the opinion suggests that the pun was indeed intended. *SWANCC*, 531 U.S. at 175 (Stevens, J., dissenting).

[34] *Id*. at 179 (Stevens, J., dissenting).

[35] 33 U.S.C. § 1251.

[36] The Daniel Ball, 77 U.S. 557, 563 (1870).

[37] *SWANCC*, 531 U.S. at 180 (Stevens, J., dissenting).

[38] 33 U.S.C. § 1362(7).

From the beginning, it was clear that the scope of the act included more than just bodies of water that can be navigated by boats and barges.[39]

1. Constitutionality of the Clean Water Act

Like many federal environmental laws, the Clean Water Act relies on the Commerce Clause as the foundation for its authority.[40] Article 1, Section 8 of the Constitution gives Congress the power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[41] Notably, a clean environment and clean water are not constitutionally guaranteed rights,[42] which can put on shaky footing the federal environmental protections that rely solely on the Commerce Clause.[43] At its core, the Clean Water Act is considered one of the strongest federal environmental statutes because its foundation is the "almost unquestionable" federal authority to regulate "waters that support navigation."[44] However, this authority becomes murkier the further one gets from traditionally navigable waters.

2. Remedies Under the Clean Water Act

There are two enforcement options for violations of the Clean Water Act.[45] First, the EPA can issue an administrative compliance order, which describes the violation, requires the recipient to cease the illegal discharge activity, and, in some cases, requires the recipient to restore the site via a "restoration work plan."[46] To enforce a compliance order, the EPA can bring a civil action in federal court.[47] Second, the Clean Water Act contains possible criminal penalties—including jail time—for viola-

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[39] "Congress by defining the term 'navigable waters' . . . to mean 'the waters of the United States, including the territorial seas,' asserted federal jurisdiction over the nation's waters to the maximum extent permissible under the Commerce Clause of the Constitution. Accordingly, as used in the Water Act, the term is not limited to the traditional tests of navigability." Nat. Res. Def. Council, Inc. v. Callaway, 392 F. Supp. 685, 686 (D.C. Cir. 1975).

[40] JAY AUSTIN & BRUCE MYERS, ANCHORING THE CLEAN WATER ACT CONGRESS'S CONSTITUTIONAL SOURCES OF POWER TO PROTECT THE NATION'S WATERS, ENV'T L. INST., at 2 (July 2007), https://www.eli.org/sites/default/files/eli-pubs/d17__07.pdf.

[41] U.S. CONST. art. I, § 8. Cl. 3.

[42] Robin K. Craig, *Constitutional Environmental Law, or, the Constitutional Consequences of Insisting That the Environment Is Everybody's Business*, 49 ENV'T. L. 703, 733 (2019).

[43] *Id*. at 712.

[44] ROBIN K. CRAIG, THE CLEAN WATER ACT AND THE CONSTITUTION, LEGAL STRUCTURE AND THE PUBLIC'S RIGHT TO A CLEAN AND HEALTHY ENVIRONMENT, at 4 (2d ed. 2009).

[45] 33 U.S.C. § 1319

[46] 33 U.S.C. § 1319, *see also,* Sackett v. U.S. Env't Prot. Agency, 8 F.4th 1075, 1079-81 (9th Cir. 2021) (appellants sued for injunctive relief after being required to adhere to a "Restoration Work Plan").

[47] 33 U.S.C. § 1319(b).

tions of the Clean Water Act.[48] While criminal penalties are not at issue in the case against the Sackett family, the available criminal penalties create serious constitutionality issues when viewed in conjunction with the unclear nature of the law's jurisdiction.[49] By enforcing criminal penalties for violations of the Clean Water Act, courts require a person of ordinary intelligence to know what the law regulates, which is hard to do without "an army of perfumed lawyers and lobbyists[.]"[50]

B. THE CLEAN WATER ACT CASE LAW FROM 1986-2007

Since 1972, the bounds of the Clean Water Act's jurisdictional reach have been litigated many times.[51] In 1985 with *U.S. v. Riverside Bayview Homes*, the Supreme Court stated the obvious: it was in fact "far from obvious" where the line between open waters and dry land should be drawn.[52] But the Court emphasized that the original legislative intent was to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[53] To this end, the Court recognized the importance of hydrological and biological connections between non-navigable waters like wetlands that abut traditional navigable waterways and included such wetlands within the regulatory scope of the Clean Water Act.[54]

In 2001 with *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers* ("*SWANCC"*), the Court ruled that an isolated gravel pond fell outside of the Clean Water Act's jurisdiction.[55] In doing so, the Court drew a bright line between navigable waters and clearly isolated waters that serve as habitat for migratory birds.[56] Where Congress intended to regulate non-navigable waters like wetlands, that intent extended only to wetlands "inseparably bound up with the 'waters' of the United States."[57] While this ruling may not have seemed significant at the time, during the opinion's discussion of *Riverside Bayview*, Chief

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[48] 33 U.S.C. § 1319(c).

[49] For an analysis of the constitutional implications of a vague Clean Water Act, see Sean G. Herman, *A Clean Water Act, If You Can Keep It*, 13 GOLDEN GATE U. ENV'T L.J. 63, 81 (2021).

[50] *Id*. at 82 (quoting Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1152 (10th Cir. 2016) (Gorsuch, J., concurring)).

[51] *See, e.g.*, United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985); Solid Waste Agency v. United States Army Corps of Eng'rs, 531 U.S. 159 (2001); United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985); N. Cal. River Watch v. City of Healdsburg, 496 F.3d 993 (9th Cir. 2007).

[52] United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 132 (1985).

[53] *Id*. (quoting 33 U.S.C. § 1251).

[54] *Id*. at 131-34.

[55] Solid Waste Agency v. United States Army Corps of Eng'rs, 531 U.S. 159, 167 (2001).

[56] *Id*.

[57] *Id*. (quoting *Riverside Bayview*, 474 U.S. at 134).

Justice Rehnquist (writing for the majority) used the term "significant nexus" to describe the relationship between wetlands and regulable navigable waters.[58]

Then in 2006 with *Rapanos*, the Court attempted to answer the question of whether wetlands that do *not* share a continuous surface connection to navigable waters can be regulated by the Army Corps of Engineers ("Army Corps") under the Clean Water Act.[59] The Court failed to publish a majority opinion.[60] Writing for three other justices in the plurality opinion, Justice Scalia wrote that "adjacent" wetlands are only covered by the act when they share a "continuous surface connection to bodies that are 'waters of the United States' in their own right."[61] In other words, there can be no clear demarcation between waters that are covered by the act and any wetlands in question.[62]

Justice Roberts wrote a brief concurrence that seemingly rebuked the EPA and the Army Corps for not utilizing the "generous leeway" that courts provide agencies to interpret statutes like the Clean Water Act according to their expertise.[63] He also expressed frustration over the Court's indecisive ruling, noting "how readily the situation could have been avoided."[64] However, Justice Roberts's chastisement is a contradictory oversimplification that calls the terms empowering the Army Corps and the EPA "broad, somewhat ambiguous, but nonetheless clearly limiting."[65]

Meanwhile, Justice Kennedy opted to go it alone with a lengthy concurrence because neither the plurality nor the dissent addressed the nexus requirement.[66] Despite the fact that the term "significant nexus" was used only once in the *SWANCC* opinion,[67] Justice Kennedy uncovered a jurisdictional framework hidden within the term.[68] On the one hand, some wetlands without a surface connection to navigable waters will be incorrectly excluded from the Clean Water Act jurisdiction; meanwhile, wetlands with only a small and remote surface connection would be included when they otherwise should not.[69] In this way, Kennedy's "significant nexus" test is more exacting than the approaches taken by both the

[58] *Id*.
[59] Rapanos v. United States, 547 U.S. 715 (2006).
[60] *Id*.
[61] *Id*. at 742.
[62] *Id*.
[63] *Id*. at 757-58 (Roberts, J., concurring).
[64] *Id*.
[65] *Id*. at 758 (Roberts, J., concurring).
[66] *Id*. at 767 (Kennedy, J., concurring).
[67] Solid Waste Agency v. United States Army Corps of Eng'rs, 531 U.S. 159, 167 (2001)
[68] *Rapanos*, 547 U.S. at 759 (Kennedy, J., concurring).
[69] *Id*. at 768-77 (Kennedy, J., concurring).

plurality and the dissent.[70] In his concurrence, Justice Kennedy spotted that the Clean Water Act's word choice creates difficulties when it "contemplates regulation of certain 'navigable waters' that are not in fact navigable."[71] The "nexus" must be assessed using the act's goals of restoring and maintaining the "chemical, physical, and biological integrity of the Nation's waters[.]"[72] The rationale for regulating wetlands is that wetlands perform critical functions related to the integrity of other waters, including "pollutant trapping, flood control, and runoff storage."[73] Wetlands that perform these functions should be included in the statutory phrase "navigable waters" when they "significantly affect" waters more readily understood as navigable.[74]

Northern California River Watch v. City of Healdsburg was the first post-*Rapanos* decision from the Ninth Circuit.[75] Without significant discussion, the court determined that Kennedy's "significant nexus" approach represented the narrowest grounds where a majority of Justices would meet; therefore, it should be considered the controlling holding.[76] In *Healdsburg*, the water in question was a pond that "seep[ed]" into the Russian River (a traditionally navigable water) through both adjacent surface wetlands and through a subsurface connection.[77] The court found both hydrological and significant ecological connections, which had a "significant effect on 'the chemical, physical, and biological integrity' of the Russian River."[78] Like Kennedy in his *Rapanos* concurrence, the court framed its decision by referring to the stated purpose of the Clean Water Act: to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[79]

C. Executive Actions Related to the Clean Water Act

For the purposes of this Note and the Sacketts' case, the question of the Clean Water Act's scope should be evaluated under the pre-2015 regulations that were in place at the time of the EPA's action against the

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[70] *Id*. at 759 (Kennedy, J., concurring).

[71] *Id*.

[72] *Id*. at 779-80 (Kennedy, J., concurring)

[73] *Id*. (citations omitted).

[74] *Id*. (citations omitted).

[75] N. Cal. River Watch v. City of Healdsburg, 496 F.3d 993 (9th Cir. 2007).

[76] *Id*. at 1000 ("Justice Kennedy, constituting the fifth vote for reversal, concurred only in the judgment. His concurrence is the narrowest ground to which a majority of the Justices would assent if forced to choose in almost all cases."); *see Rapanos*, 547 U.S. at 779-80 (Kennedy, J., concurring).

[77] *Id*. at 996.

[78] *Id*. at 1000 (citing *Rapanos*, 547 U.S. at 779-80 (Kennedy, J., concurring), quoting Clean Water Act 33 U.S.C. § 1251).

[79] *Id*. (quoting 33 U.S.C. § 1251).

Sacketts.[80] However, an overview of the ongoing administrative actions since provides essential context for the significance of the Ninth Circuit's decision in *Sackett*.[81]

1. The Obama Administration's Rule

Nearly ten years after *Rapanos*, the Obama Administration promulgated the "Clean Water Rule" in 2015, which expanded the jurisdiction of the Clean Water Act by codifying Justice Kennedy's "significant nexus" test.[82] Under this rule, the EPA could regulate waters that significantly affect the "chemical, physical, or biological integrity" of traditional navigable waters, and in doing so, the agencies were "informed by the goals of the statute and available science."[83]

2. The Trump Administration's Rule

In 2020, the EPA announced the "Navigable Waters Protection Rule," which repealed the Obama Administration's "Clean Water Rule" and limited the scope of the Clean Water Act's jurisdiction to waters with direct surface water flow to traditionally navigable waters.[84] The rule included a long list of waters specifically excluded from the scope, including wetlands that did not share a direct hydrological surface connection with traditionally navigable waters. Particularly relevant to the topic of this Note, wetlands separated by natural berms or dunes were considered "adjacent wetlands" and regulable under the Clean Water Act, but wetlands separated by roads or other man-made barriers without surface connection were not considered "adjacent wetlands."[85]

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[80] The regulation that was in place at the time of the conduct is the regulation that applies. *See* Sackett v. U.S. Env't Prot. Agency, 8 F.4th 1075, 1091 (9th Cir. 2021); *see also* United States v. Lucero, 989 F.3d 1088, 1104-05 (9th Cir. 2021).

[81] *See e.g.*, Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. § 37,054, 37,067 (June 29, 2015); *Overview of the Navigable Waters Protection Rule*, U.S. ENV'T PROT. AGENCY, https://www.epa.gov/sites/default/files/2020-01/documents/nwpr_fact_sheet_-_overview.pdf (last visited Nov. 23, 2021); Revised Definition of "Waters of the United States," 86 Fed. Reg. 69,372, 69,372 (proposed Dec. 07, 2021).

[82] Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. § 37,054, 37,067 (June 29, 2015).

[83] *Id*.

[84] *Overview of the Navigable Waters Protection Rule*, U.S. ENV'T PROT. AGENCY, https://www.epa.gov/sites/default/files/2020-01/documents/nwpr_fact_sheet_-_overview.pdf (last visited Nov. 23, 2021).

[85] *Id*.

3. The Biden Administration's Rule

Little more than a year later under the Biden Administration, the EPA and the Army Corps announced[86] that, because Trump's 2020 Navigable Waters Rule led to significant environmental degradation, the agencies would reevaluate the rule in keeping with a presidential executive order entitled, "Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis."[87] In the meantime, the agencies have halted the implementation of the Navigable Waters Rule and have reverted for the time being to interpreting "waters of the United States" according to the pre-2015 regulatory definition.[88]

4. Status of the Rulemaking

As of October 2022, the EPA and the Army Corps have been in the process of reviewing comments on their proposed rule.[89] The proposed rule includes the "significant nexus standard" (among other clarifications) and defines "waters of the United States" as "waters that either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, or the territorial seas (the 'foundational waters')."[90] In defining "waters of the United States," the agencies' proposed rule specifically considers scientific evidence of how pollution can affect downstream resources, how climate change is negatively impacting water quality, and issues related to environmental justice and the burdens faced by populations vulnerable to environmental risk.[91]

Following the Supreme Court's decision to grant certiorari to the Sacketts, a group of Republican senators urged the EPA to suspend the rulemaking process and wait for the "potentially influential ruling" from the Court.[92] The group noted that it would be "irresponsible" for the EPA

[86] Press Release, U.S. Env't Prot. Agency, EPA, Army Announce Intent to Revise Definition of WOTUS (Jun. 9, 2021) (on file with author), *available at* https://www.epa.gov/newsreleases/epa-army-announce-intent-revise-definition-wotus.

[87] Exec. Order No. 13990, 86 Fed. Reg. 7037 (Jan. 20, 2021).

[88] *Definition of "Waters of the United States": Rule Status and Litigation Update*, U.S. ENV'T PROT. AGENCY, https://www.epa.gov/wotus/definition-waters-united-states-rule-status-and-litigation-update (Jan. 3, 2022).

[89] Revised Definition of "Waters of the United States," 86 Fed. Reg. 69,372, 69,372 (proposed Dec. 07, 2021).

[90] *Id*. at 69,373.

[91] *Id*. at 69,446-47.

[92] Letter from John Thune, Sen., U.S. Cong. et al., to Michael S. Regan, Adm'r, U.S. Env't Prot. Agency & Michael L. Connor, Assistant Sec'y of the Army for Civ. Works, U.S. Dep't of the

to create regulations that could be invalidated or altered.[93] In a perfect world, executive agencies tasked with implementing federal laws would craft actionable, lasting rules.[94] After all, agencies like the EPA and the Army Corps are subject-matter experts and are theoretically well equipped to navigate and clarify nuance.[95] The courts would be called upon to help interpret these rules and resolve disputes only as needed.[96]

The last decade proves that the political stability needed for agencies to craft lasting rules is almost impossible to achieve.[97] By the time President Biden's executive order comes to fruition with a new rule defining "waters of the United States,"[98] political eyes will be focused on the 2024 election and the prospect of yet another policy shift.[99]

D. LEGISLATIVE ATTEMPTS TO REVISE THE CLEAN WATER ACT

While the language of the Clean Water Act has remained largely untouched since 1972, Congress has made multiple fruitless attempts to update the legislation.[100] For example, the 111th Congress (2009-2011) introduced two bills aimed at clarifying the jurisdictional questions: (1) the "Clean Water Restoration Act," introduced by Democratic Senator Russell Feingold; and (2) the "America's Commitment to Clean Water Act," introduced by Democratic Representative Jim Oberstar.[101] Supporters of the legislation intended to reestablish the Clean Water Act's regulatory jurisdiction as it was recognized before the *SWANCC* and *Rapanos* decisions, two cases that were viewed as having ignored Congressional intent by narrowing the jurisdictional scope of the act.[102] Crit-

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Army, at 1 (Feb. 3, 2022) (on file as public comment for proposed rule), *available at* https://www.regulations.gov/comment/EPA-HQ-OW-2021-0602-0435.

[93] *Id*.

[94] *See* 5 USC §551 et seq. (The Administrative Procedure Act (APA) governs federal rulemaking process and addresses other agency actions.)

[95] While Supreme Court Justices are esteemed in their fields, a typical legal education does not include courses covering the ecological relationships between wetlands, tributaries, rivers, ponds, and other bodies of water. *See* Chevron, U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837 (1984).

[96] *See Id*.

[97] Section III, subsection C of this note outlines the back-and-forth of recent agency rulemaking on this topic.

[98] Exec. Order No. 13990, 86 Fed. Reg. 7037 (Jan. 20, 2021); see

[99] See, e.g., *Presidential Election, 2024*, BALLOTPEDIA, https://ballotpedia.org/Presidential_election,_2024, (last visited Fed. 27, 2023) (Presidential candidates are already announcing their campaigns).

[100] 33 U.S.C. § 1251; *see, e.g.*, CLAUDIA COPELAND, CONG. RSCH. SERV., LEGISLATIVE APPROACHES TO DEFINING "WATERS OF THE UNITED STATES," 2 (2010), https://sgp.fas.org/crs/misc/R41225.pdf.

[101] CLAUDIA COPELAND, CONG. RSCH. SERV., LEGISLATIVE APPROACHES TO DEFINING "WATERS OF THE UNITED STATES," 2 (2010), https://sgp.fas.org/crs/misc/R41225.pdf.

[102] *Id*.

ics of the legislation objected to the expanded scope of the Clean Water Act's jurisdiction and claimed that the bills did nothing to clarify the definition of "waters of the United States."[103] The debate pitted environmental advocacy groups and outdoor hunting and fishing organizations against manufacturing, agricultural, and development industry groups.[104] Senator Feingold's legislation would have, among other things, defined the term "waters of the United States" as:

> *[A]ll waters subject to the ebb and flow of the tide, the territorial seas, and all interstate and intrastate waters, including lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, and natural ponds, all tributaries of any of the above waters, and all impoundments of the foregoing.*[105]

Critics called this definition too expansive, but it was comprehensive and clear. Ultimately, Congress's failure to pass any legislation could be what Justice Alito was referencing when he wrote in the first *Sackett v. EPA* that "[r]eal relief requires Congress to do what it should have done in the first place: provide a reasonably clear rule regarding the reach of the Clean Water Act."[106]

IV. *SACKETT V. EPA*

With that context, this Note now turns to the Sacketts' "soggy" residential lot that was part of what once was a large wetland complex called the Kalispell Bay Fern.[107] Long before the Sacketts purchased the property, a road was built that separated the property from a small tributary leading into Priest Lake.[108] Without the road, the record shows that water from the property would flow directly into Priest Lake.[109] A crucial detail in this controversy is that the wetlands on the Sackett's property were

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[103] *Id*.

[104] *Id*.

[105] *Id*. at 3 (emphasis added).

[106] "When Congress passed the Clean Water Act in 1972, it provided that the act covers 'the waters of the United States.' But Congress did not define what it meant by 'the waters of the United States'; the phrase was not a term of art with a known meaning; and the words themselves are hopelessly indeterminate." Sackett v. U.S. Env't Prot. Agency, 566 U.S. 120, 133 (2012) (Alito, S., concurring) (citation omitted).

[107] Sackett v. U.S. Env't Prot. Agency, No. 2:08-CV-00185-EJL, 2019 WL 13026870, at *10 (D. Idaho 2021), *cert. granted*, 142 S. Ct. 896 (Mem.) (U.S. Jan. 24, 2022) (No. 19-35469, 2021 Term; renumbered No. 21-454, 2022 Term).

[108] *Id*.

[109] *Id*.

separated by a man-made barrier that eliminated all surface connections with traditionally navigable waters.

The Sacketts are not fighting this legal battle alone.[110] Throughout the lengthy litigation, they have been represented by the Pacific Legal Foundation, a self-described "nonprofit legal organization that defends Americans' liberties when threatened by government overreach and abuse."[111] The Sacketts certainly have a sympathetic story—a couple who wanted to build their dream home near the shores of a beautiful lake were thwarted at the last minute by a federal agency, costing them their investment in the property and the possibility of hundreds of thousands of dollars in fines.[112] However, their story may be more nuanced—because Mike Sackett[113] owned an excavating business, he was likely aware of the possibility that the property they purchased contained protected wetlands.[114]

Meanwhile, to situate this case in the local political landscape, Idaho's Republican Senator Jim Risch did not appreciate the EPA regulating Idaho's air and water.[115] He noted that, while everyone in America wants clean air and water, "we can do it without sending out the Gestapo to enforce the thing."[116] While the political landscape is not legally significant, the context is important when comparing the ecological goals of the EPA and the Clean Water Act with the constitutional implications for property owners.[117]

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[110] *Property owners challenge EPA's navigable waters overreach*, PACIFIC LEGAL FOUNDATION, https://pacificlegal.org/case/sackett-v-environmental-protection-agency/ (last visited Jan. 14, 2023).

[111] *About Pacific Legal Foundation*, PACIFIC LEGAL FOUNDATION, https://pacificlegal.org/about/ (last visited Nov. 22, 2021).

[112] *What you should know before Sackett v. EPA heads to SCOTUS on Monday*, PACIFIC LEGAL FOUNDATION, https://pacificlegal.org/what-you-should-know-sackett-v-epa-scotus/ (last visited Jan. 14, 2023).

[113] Unrelated to the case at hand, in 2015, Mike Sackett was charged with attempted sex trafficking, pled guilty to coercion and enticement, and served a year in prison. *See* Keith Kinnaird, *Priest Lake Businessman Sentenced in Sex Sting Case*, COEUR D'ALENE / POST FALLS PRESS (Sept. 7, 2015, 9:00 PM), https://cdapress.com/news/2015/sep/07/priest-lake-businessman-sentenced-in-sex-5/.

[114] Judith L. Mernit, *Pity the Sacketts? Not Much*, HIGH COUNTRY NEWS (Jan. 27, 2012), https://www.hcn.org/wotr/pity-the-sacketts-not-much.

[115] Marty Trillhaase, *Did Risch Flip?*, THE LEWISTON TRIBUNE (Sept. 9, 2011), https://lmtribune.com/opinion/did-risch-flip/article_1fd17520-5162-574b-8e97-3f5ba9a59ca1.html.

[116] *Id*.

[117] *See* 33 U.S.C. § 1251(a) (stating that the Clean Water Act's purpose is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters"); *see* Sean G. Herman, *A Clean Water Act, If You Can Keep It*, 13 GOLDEN GATE U. ENV'T L.J. 63, 81 (2021) (analyzing the constitutional implications of a vague Clean Water Act).

A. *SACKETT* 2012: "FINAL AGENCY ACTION"

In 2012, the Sacketts went before the Supreme Court, but unfortunately for them, the Court did not address the question of whether the EPA had jurisdiction over their land to issue a compliance order.[118] Rather, the Court ruled on the narrow question of whether the Sacketts could even challenge the EPA's compliance order as a "final agency action" under the Administrative Procedure Act ("APA").[119] A party is granted judicial review under the APA only for "final agency action[s] for which there is no other adequate remedy in a court."[120] The Court concluded that, even for questions of jurisdiction, the Clean Water Act was not created to strong-arm parties into compliance without giving them the opportunity for judicial review.[121]

The Court nodded to the question on the horizon when Justice Scalia wrote, "[t]he reader will be curious, however, to know what all the fuss is about," and then described the legal landscape shaped by *Riverside Bayview, SWANCC,* and of course, *Rapanos.*[122] Justice Alito did not hold back in his concurrence when he criticized the EPA's position as an overreaching threat to Americans' property rights and challenged Congress to "do what it should have done in the first place" to create a clear jurisdictional definition.[123] Ultimately, the Supreme Court remanded the case back to the district court to be heard on the merits.[124]

B. *SACKETT* 2021: APPLYING THE "SIGNIFICANT NEXUS" TEST

The case was about a compliance order issued by the EPA that directed the Sackett family to remove fill material and restore their property to its "natural state" because the property contained "wetlands" that are federally protected under the Clean Water Act.[125] When the Sacketts returned to the Ninth Circuit in August 2021, the court addressed three main issues.[126] First, despite the EPA's withdrawal of the compliance order at issue, the case was not moot because it was not "absolutely clear" that the EPA would not reinstate its claim.[127] Second, the court addressed an administrative record question and ruled that the district

[118] Sackett v. U.S. Env't Prot. Agency, 566 U.S. 120 (2012).
[119] *Id*. at 125.
[120] *Id*.; *see* 5 U.S.C. § 704.
[121] *Sackett*, 566 U.S. at 130-31.
[122] *Id*. at 123-24.
[123] *Id*. at 132-33 (Alito, J., concurring).
[124] *Id*. at 131.
[125] Sackett v. U.S. Env't Prot. Agency, 8 F.4th 1075, 1079 (9th Cir. 2021).
[126] *Id*.
[127] *Id*. at 1083.

court did not abuse its discretion by allowing a memorandum from an EPA ecologist to remain in the administrative record.[128] Finally, the court addressed the question at the core of the case, ruled that the "significant nexus test" should be applied, and found that the Sacketts' property contained wetlands that were regulable under the Clean Water Act.[129] This section will briefly cover the first two issues, then focus on the third question.

The court first established the definitions of the terms in the regulations. First, "[w]aters of the United States" include "'wetlands' that are 'adjacent' to traditional navigable waters and their tributaries.[130] Second, "wetlands" are "areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions."[131] Third, "adjacent" means "bordering, contiguous, or neighboring," and "adjacent wetlands" *can* include wetlands that are separated from other "waters of the United States" by artificial dikes or barriers.[132] Unfortunately for all involved, these definitions leave room for interpretation. The most hotly debated phrase of all, "waters of the United States," is central both in the Ninth Circuit's decision[133] and in the four cases briefly discussed above: *Riverside Bayview Homes, Inc.*, *SWANCC*, *Rapanos*, and *Healdsburg*.[134]

1. The Procedure

Following the 2012 decision by the Supreme Court, the case was remanded to the district court for seven years until March 2019, when the district court entered a summary judgment in favor of the EPA.[135] The Sacketts appealed, filing their opening briefs in December 2019. Three months later, the EPA sent a two-page letter that withdrew the compliance order, stated that the EPA decided to no longer enforce the order, and promised not to issue a similar order in the future.[136] After sending

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[128] *Id*. at 1086.

[129] *Id*. at 1089-93.

[130] *Id*. at 1080; *see* 33 C.F.R. § 328.3(a)(1), (a)(5), (a)(7) (2008).

[131] *Sackett*, 8 F.4th at 1080; *see* 33 C.F.R. § 328.3(b) (2008).

[132] *Sackett*, 8 F.4th at 1080; *see* 33 C.F.R. § 328.3(c) (2008).

[133] *Sackett*, 8 F.4th at 1080.

[134] United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985); Solid Waste Agency v. United States Army Corps of Eng'rs, 531 U.S. 159 (2001); United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985); N. Cal. River Watch v. City of Healdsburg, 496 F.3d 993 (9th Cir. 2007).

[135] *Id*. at 1082.

[136] *Id*.

the withdrawal, the EPA moved to dismiss the Sacketts' appeal as moot because the family had received complete relief.[137]

The Sacketts now faced an agency that no longer stood by the issue at the center of the fight. When the EPA withdrew the Sackett compliance order, the Trump administration was three years into its efforts to systematically dismantle what ended up being nearly 100 environmental rules that fell mostly under the EPA's purview.[138] While the Sacketts may have hailed the new limited jurisdiction of the EPA that effectively removed the agency's power to regulate their land, the Sacketts had also gained first-hand knowledge of the fickle nature of regulatory rules as a result of having litigated this issue over three presidential administrations.[139] Sure enough, under a year after the EPA withdrew the compliance order, the Biden Administration became the fourth presidential administration to take the EPA's rudder while the Sacketts' litigation was pending, and it soon announced its intent to re-expand the "waters of the United States" definition.[140] Under new leadership, it is probable that the EPA could issue a new compliance order under the re-established definition of "waters of the United States." The Sacketts wanted a final decision.[141]

2. Mootness and the Administrative Record

The court's discussion on the mootness question identifies the lack of regulatory clarity as the core of the problem.[142] The court accurately concluded that this agency's change-of-heart was neither "entrenched" nor "permanent."[143] The court noted that the agency declined to disavow the original jurisdictional determination, and this led the court to decide that it was not absolutely clear that the EPA would not reinstate a compliance order or issue a new one.[144] In the period between when the agency withdrew the Sackett compliance order and when supplemental

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[137] *Id*.

[138] Nadja Popovich, Livia Albeck-Ripka & Kendra Pierre-Louis, *The Trump Administration Rolled Back More Than 100 Environmental Rules*, N.Y. TIMES (Jan. 20, 2021), https://www.nytimes.com/interactive/2020/climate/trump-environment-rollbacks-list.html.

[139] *Sackett*, 8 F.4th at 1080.

[140] Press Release, Michael S. Regan, Admr., EPA & Jaime A. Pinkham, Acting Assistant Sec'y, Army for Civ. Works, EPA, Army Announce Intent to Revise Definition of WOTUS (June 9, 2021), https://www.epa.gov/newsreleases/epa-army-announce-intent-revise-definition-wotus.

[141] In March 2021, the Sacketts' restated their request for relief, *see* Appellants' Supplemental Brief, Sackett v. U.S. Env't Prot. Agency, 8 F.4th 1075 (9th Cir. 2021) (No. 19-35469).

[142] *Sackett*, 8 F.4th.

[143] *Id*. at 1084.

[144] *Id*.

briefings were filed, the administration had changed hands.[145] During oral arguments in November 2020, Judge Michelle Friedland was frustrated with the EPA's position and its non-answer to her question of whether the Sacketts were currently allowed to build on their land.[146] Unsurprisingly, the court found that the case was not moot because the EPA voluntarily withdrew the compliance order and could reinstate it at a later date.[147]

The Sacketts' legal team sought to strike from the record an EPA wetland ecologist's site-visit memorandum, dated May 15, 2008, which was the same day that the EPA filed the Amended Compliance Order in question.[148] The district court concluded that, even though the memo was added to the record *after* the issuance of the Amended Compliance Order, the memo should be included in the record because it was a "clearly formalized summation of [the ecologist's] field notes," and the findings were verbally relayed and considered *prior* to the issuance of the Amended Compliance Order.[149] The Ninth Circuit found that the district court did not abuse its discretion by allowing the memorandum to be included in the administrative record, stating that the memorandum was not a "*post hoc*" rationalization that did not belong in an administrative record.[150]

3. Applying the "Significant Nexus" Test

Finally, the court addressed the question of whether summary judgement should be granted on the merits, and the conversation immediately returned to the Supreme Court's decision in *Rapanos*. As discussed above, there was no controlling decision in *Rapanos*. However, Justice Scalia's plurality opinion created a limited definition of "waters of the

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[145] The withdrawal letter was sent in December 2019, oral arguments were heard in November 2020, President Biden took office in January 2021, and supplemental briefs were filed in the Ninth Circuit in April 2021. *See* Supplemental Brief for Defendants/Appellees, Sackett v. U.S. Env't Prot. Agency, 8 F.4th 1075 (9th Cir. 2021) (No. 19-35469).

[146] Ellen M. Gilmer, *Wetlands Legal Saga Reaches Ninth Circuit Again, a Decade Later*, BLOOMBERG LAW (Nov. 19, 2020, 3:45 PM), https://news.bloomberglaw.com/environment-and-energy/wetlands-legal-saga-reaches-ninth-circuit-again-a-decade-later.

[147] *Sackett*, 8 F.4th at 1085-86.

[148] The memorandum was a seven-page "jurisdictional determination" that included observations and photographs from an EPA ecologist named John Olson, and it concluded that the Sackett's property did in fact contain wetlands subject to regulation under the Clean Water Act. Sackett v. U.S. Env't Prot. Agency, No. 2:08-CV-00185-EJL, 2019 WL 13026870, at *3 (D. Idaho Mar. 31, 2019).

[149] Sackett v. U.S. Env't Prot. Agency, No. 2:08-CV-00185-EJL, 2019 WL 13026870, at *4 (D. Idaho Mar. 31, 2019).

[150] *Sackett*, 8 F.4th at 1086 (quoting Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 419 (1971)) (emphasis added).

United States" that included only wetlands with a "continuous surface connection" to "relatively permanent, standing or flowing bodies of water."[151] The Sacketts argued for this definition because they believed it would exclude their property from the EPA's jurisdiction.[152] Meanwhile, Justice Kennedy's solo concurrence opinion added a requirement that there must be a "significant nexus between wetlands in question and navigable waters in a traditional sense."[153] In *Rapanos*, Kennedy found no significant nexus; therefore, his stricter standard was not met. Justice Kennedy also concurred with Justice Scalia's conclusion.

a. Interpreting Precedent from a Split Court

As *Rapanos* was a four-to-one-to-four decision, the Court addressed the constitutional question of how to interpret a decision like *Rapanos* (with no majority opinion) in *Marks v. United States*.[154] The *Marks* Rule states: "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds. . . .'"[155] While the *Marks* Rule is supposed to help clarify split opinions, lower courts have disagreed on the method to determine the "narrowest groups" and have employed both "reasoning-based" or "results-based" methods.[156] A reasoning-based approach looks for opinions that concur in judgment and determines whether one of the opinions is the "logical subset" of the other broader opinions, and a results-based approach looks for the opinion that produces a rule with which a majority of Justices would agree.[157] The case at hand is not the first time that the Ninth Circuit has found a controlling opinion within a split Supreme Court decision, and the court previously used (and may be bound to use) the reasoning-based approach.[158]

Soon after *Rapanos*, the Ninth Circuit sided with the dissent in its ruling in *Northern California River Watch v. City of Healdsburg* when it

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[151] *Sackett*, 8 F.4th at 1088, (quoting Rapanos v. United States, 547 U.S. 715, 739, 742 (2006)).

[152] *Sackett*, 8 F.4th at 1088, *see Rapanos* 547 U.S. at 739.

[153] *Sackett*, 8 F.4th at 1088, (quoting *Rapanos* 547 U.S. at 739-40).

[154] *See generally* Marks v. United States, 430 U.S. 188 (1977).

[155] *Id*. at 192.

[156] *See* KEVIN M. LEWIS, U.S. CONG. RSCH. SERV., WHAT HAPPENS WHEN FIVE SUPREME COURT JUSTICES CAN'T AGREE? (2018), https://fas.org/sgp/crs/misc/LSB10113.pdf.

[157] *Sackett*, 8 F.4th at 1089, *see* United States v. Davis, 825 F.3d 1014 (9th Cir. 2016).

[158] Here, the court looks to its decision in *U.S. v. Davis*, which binds them to a "reasoning-based" approach. *Davis* introduces the "common denominator" concept as the mechanism for this approach. *Sackett*, 8 F.4th at 1089, *see also Davis*, 825 F.3d.

applied Justice Kennedy's "significant nexus" test.[159] In *Healdsburg*, the court admitted to having relied on a case from the United States Court of Appeals for the Seventh Circuit, *United States v. Gerke Excavating, Inc.*, which also concluded that the "significant nexus" test controlled after conducting a *Marks* analysis.[160] Nearly ten years later, in *United States. v. Davis*, a case unrelated to the Clean Water Act or wetlands, the Ninth Circuit bound itself to the reasoning-based analysis.[161] Consequently, the Sacketts argued that the *Healdsburg* decision did not use the reasoning-based framework; as such, *Healdsburg* was contradictory to *Davis* and was therefore no longer good law.[162]

i. The Gerke Problem

The Ninth Circuit admitted that the analysis in *Gerke* did not fit neatly into either the reasoning-based or results-based *Marks* framework, and it agreed with the Sacketts' assertion that the court's analysis did rely in part on the results-based approach it had rejected in *Davis*.[163] However, as the court pointed out, *Gerke* also recognized that (1) the *Rapanos* plurality and concurrence shared common ground in that they both agreed that Congress intended to regulate *at least some* non-navigable waters; and (2) wetlands needed to share *at least some* connection to traditional navigable waters to be considered within Clean Water Act jurisdiction.[164] Although unexpressed, the court seemed to rely on these commonalities to assert that *Gerke* does not actually rely solely on results-based reasoning; therefore, *Healdsburg*'s reliance on *Gerke* does not necessarily put it in conflict with *Davis*, which bound the court to the reasoning-based framework.

ii. Following the Dissents

The second *Marks* rule-related issue is the Sacketts' assertion that *Healdsburg* relied on Kennedy's concurrence and a dissenting opinion to create a controlling opinion from *Rapanos*.[165] In other words, to achieve a five-justice majority for Kennedy's "significant nexus," *Healdsburg* pulled votes from the dissent rather than the plurality. The Sacketts argued this was inconsistent with Ninth Circuit precedent. In a different

[159] N. Cal. River Watch v. City of Healdsburg, 496 F.3d 993 (9th Cir. 2007).
[160] *Sackett*, 8 F.4th at 1088-89.
[161] *Davis*, 825 F.3d.
[162] *Sackett*, 8 F.4th at 1089, *see Davis*, 825 F.3d.
[163] *Sackett*, 8 F.4th at 1090.
[164] *Id*.
[165] *Id*.

opinion from 2016, the court stated, in choosing an opinion that represents the "common denominator," it must also stick to decisions that "embody a position implicitly approved by at least five Justices who support the judgment."[166] In its opinion at hand, the court acknowledged the statement, but pointed to the court's earlier decision in *Davis* where the court (1) noted that United States Courts of Appeals and the Supreme Court have "considered dissenting opinions when interpreting fragmented Supreme Court decisions"; and (2) stated that it explicitly did not rule out the use of dissents.[167]

It took a convoluted analysis to refute the Sacketts' *Marks* rule arguments, but the court ultimately justified its application of Kennedy's "significant nexus" test as controlling in the same way that it applied the test in *Healdsburg*.[168] During this cherry-picking expedition, the court applied the "significant nexus" test by reaching for elements of the *Marks* Rule used in *Gerke* (which was relied on by *Healdsburg*) that avoided any contradictions with *Davis.*[169]

b. The Wetlands at the Core of the Case

Sixteen pages into the eighteen-page opinion, the court reached the main issue—the application of the "significant nexus" test, created by Justice Kennedy's concurrence in *Rapanos.*[170] After justifying the district court's use of this test, the court had the relatively simple job of reviewing the district court's ruling on the facts. Despite the regulatory back and forth that has occurred since the case began, the regulation that was in place at the time of the conduct is the regulation that applies.[171] That is, the agency's action should be judged according to the regulations in place when the Amended Compliance Order was initially issued in 2008.

Following *Rapanos* in 2006, the EPA and the Army Corps issued a joint memorandum to help clarify the jurisdictional implications of the case.[172] The memo divided waters into two categories: (1) waters that *do*

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[166] *Id*., (quoting Cardenas v. United States, 826 F.3d 1164 (9th Cir. 2016)).

[167] *Davis*, 825 F.3d. at 1024-25.

[168] *Sackett*, 8 F.4th.

[169] Id.

[170] Sackett v. U.S. Env't Prot. Agency, 8 F.4th 1075, 1091 (9th Cir. 2021), *cert. granted in part sub nom.* Sackett v. Env't Prot. Agency, 142 S. Ct. 896 (2022).

[171] *Sackett*, 8 F.4th at 1091; *see also* United States v. Lucero, 989 F.3d 1088, 1104-05 (9th Cir. 2021).

[172] U.S. ENV'T PROT. AGENCY & U.S. DEP'T OF THE ARMY, CLEAN WATER ACT JURISDICTION FOLLOWING THE U.S. SUPREME COURT'S DECISION IN *Rapanos v. United States & Carabell v. United States* (2007), https://www.epa.gov/sites/default/files/2016-04/documents/rapanosguidance6507.pdf.

not require a "significant nexus" determination and (2) waters that *do*.[173] The first list included "traditional navigable waters" along with wetlands adjacent to traditional navigable waters, non-navigable tributaries that are relatively permanent, and wetlands with a continuous surface connection with such tributaries.[174] The second list included "non-navigable tributaries" and other wetlands "adjacent to non-navigable tributaries" if a fact-specific analysis determines that they have a "significant nexus with traditional navigable waters."[175] "'Similarly situated' wetlands include all wetlands adjacent to the same tributary."[176]

The EPA and Army Corps memorandum provided a usable definition of "significant nexus" for the purposes of jurisdictional determinations that focused on the "integral relationship between the ecological characteristics of tributaries and those of their adjacent wetlands."[177] The scientific importance of both physical proximity and shared hydrological and biological characteristics is well documented.[178] The EPA is equipped to do this work.[179]

The Ninth Circuit affirmed the EPA's use of the "significant nexus" test to make its jurisdictional determination, and it did not find the decision to be "arbitrary and capricious," which is the standard required for a court to set aside an agency action.[180] While the Ninth Circuit briefly addressed the technical nature of the "significant nexus" determination, the district court's opinion provided a more comprehensive explanation of the ecological reasons why the property satisfies (1) the definition of a "wetlands," (2) the "adjacent" to jurisdictional tributary requirement, and (3) the "significant nexus" to a traditionally navigable water.[181] The district court found that the record supported the conclusion that the land is

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[173] *Id*.

[174] *Id*.

[175] *Id*.

[176] *Id*.

[177] *Id*.

[178] *Id*.

[179] *Id*. at 10. ("The agencies will also evaluate ecological functions performed by the tributary and any adjacent wetlands which affect downstream traditional navigable waters, such as the capacity to transfer nutrients and organic carbon vital to support downstream foodwebs (e.g., macroinvertebrates present in headwater streams convert carbon in leaf litter making it available to species downstream), habitat services such as providing spawning areas for recreationally or commercially important species in downstream waters, and the extent to which the tributary and adjacent wetlands perform functions related to maintenance of downstream water quality such as sediment trapping. . . . Maps, aerial photography, soil surveys, watershed studies, local development plans, literature citations, and references from studies pertinent to the parameters being reviewed are examples of information that will assist staff in completing accurate jurisdictional determinations.")

[180] Sackett v. U.S. Env't Prot. Agency, 8 F.4th 1075, 1092-93 (9th Cir. 2021).

[181] *Sackett*, 8 F.4th at 1092; *see also* Sackett v. U.S. Env't Prot. Agency, No. 2:08-CV-00185-EJL, 2019 WL 13026870, at *8-12 (D. Idaho Mar. 31, 2019) (providing a more detailed review of the ecological facts in play).

a wetland because of the presence of wetland indicators.[182] Significantly, the court found evidence of a shallow subsurface flow under the road to the undisturbed wetlands.[183] The district court concluded that the "hydrologic connection significantly impacts Priest Lake by contributing base flow and improving water quality through sediment retention and nutrient uptake to runoff before it moves through the shallow subsurface flow into the lake."[184]

V. ANALYSIS

In affirming the EPA's jurisdictional authority over the wetlands on the Sacketts' property, the Ninth Circuit recognized the wetlands' connection to and impact on the biological integrity of the navigable waters of Priest Lake. Critics of this application claim "significant nexus" creates regulatory uncertainty.[185] The Chamber of Commerce of the United States of America joined the Sacketts in asking for "regulatory certainty," pointing to the high costs associated with the case-by-case applications of the "significant nexus" test.[186] The brief claims that only the Court can break the cycle of uncertainty; otherwise, "agencies, lower courts, and stakeholders remain trapped in what might fairly be described as the water regulatory version of *Groundhog Day*."[187] While the degree of uncertainty *may* have been overstated in the brief, the comparison to *Groundhog Day* and the need for regulatory clarity is valid.

By finding a way to use the "significant nexus" test, the Ninth Circuit reinforced the interpretation of the Clean Water Act's purpose: "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[188] This Note illustrates that it was not a straightforward application, but in doing so, the court maintained the EPA's broader jurisdiction under the Clean Water Act. Whether the Supreme Court rejects or affirms[189] the "significant nexus" test, a decision will

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[182] Sackett v. U.S. Env't Prot. Agency, No. 2:08-CV-00185-EJL, 2019 WL 13026870, at *8-12 (D. Idaho Mar. 31, 2019).

[183] *Id*. at 8

[184] *Id*. at 12

[185] Brief of Chamber of Commerce of the United States of America as Amicus Curiae Supporting Petitioners at 16, 18, Sackett v. U.S. Env't Prot. Agency, 8 F.4th 1075 (9th Cir. 2021) (No. 21-454).

[186] *Id*.

[187] *Id*.

[188] 33 U.S.C. § 1251(a).

[189] When deciding *Sackett*, the Justices may not fall on traditional party lines. In April 2020, Chief Justice Roberts and Justice Kavanaugh both joined an opinion expanding the scope of the Clean Water Act by finding that indirect pollutant discharges that are the "functional equivalent" of direct discharges into navigable waters are regulable under the Clean Water Act. *See* Cnty. of Maui, Hawaii v. Hawaii Wildlife Fund, 140 S. Ct. 1462 (2020).

ultimately do little to stop the regulatory rocking or satisfy the need for "regulatory certainty" for stakeholders. If the Court affirms the Ninth Circuit's decision, then a legal term, "significant nexus," with humble origins from a concurring opinion written by one justice, will become the controlling law. Unfortunately, when it comes to wetland ecology, the term "significant nexus" is not founded in the prevailing science-based understanding of the ecological-connectedness of our nation's water systems. This leaves open the potential for degradation. If the Court rejects the Ninth Circuit's decision and replaces the term "significant nexus" with another legal term of art that restricts the EPA's jurisdiction, then our nation's waters will be left even more unprotected.

CONCLUSION

While lawmakers in 1972 relied on interstate "navigation" as a constitutional basis for the Clean Water Act, it was never about the actual navigation of boats and barges as evidenced by the stated purpose of the act.[190] The Seventh Circuit calls "navigability" a "red herring from the standpoint of constitutionality[,]" making the obvious point that Congress can regulate pollution that has no effect on navigability.[191] It is time for Congress to envision a new Clean Water Act whose constitutional justification matches its ecological goals. To achieve these goals, Congress must empower agencies with language that, even more clearly, reaffirms the Clean Water Act's purpose—clean water.

[190] "The objective of this [Act] is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a).

[191] United States v. Gerke Excavating, Inc., 412 F.3d 804, 807 (7th Cir. 2005).