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Relatively (Im)permanent: the ever changing scope of the Clean Water Act

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1. INTRODUCTION

In *Sackett v. EPA*, 143 S.Ct. 1322 (2023), the United States Supreme Court addressed the most basic question about the Federal Water Pollution Control Act (33 U.S.C. § 1251 *et seq*.), commonly known as the Clean Water Act (Act)—where does it apply? More specifically, the Court assessed the meaning of the phrase "waters of the United States" (WOTUS), the words Congress used to define the jurisdictional scope of the Act, in connection with wetlands.

Seeking to definitively answer a "nagging question" that has lingered for more than fifty years, the Court found that WOTUS are "only those relatively permanent, standing or continuously flowing bodies of water 'forming geographic[al] features' that are described in ordinary parlance as 'stream, oceans, rivers and lakes'." *Id.* at p. 1336 (quoting *Rapanos v. U.S.*, 547 U.S. 715, 739 (2006). As defined in *Sackett*, the Act therefore only extends to: (1) traditional interstate navigable waters; (2) relatively permanent bodies of water connected to traditional interstate navigable waters; and (3) wetlands that have a continuous surface connection with waters (1) or (2) above, thus making it difficult to determine where the "water" ends and the "wetlands" begins.

Sackett is a seminal case, but it will have different implications depending on geographical location. For certain States, such as California, which already have a broad definition of "waters of the State," *Sackett* will result in less regulation under the Act and continued or more regulation under State law. This change in legal authority is meaningful, and has important implications, particularly regarding third-party lawsuits. However, in the end, the practical implications in terms of whether a water is subject to regulation may be somewhat limited.

For other States, such as Indiana or Texas, which mirror or rely on the federal definition of WOTUS and do not extend their State laws beyond it, the implications of *Sackett* are potentially enormous. In these States, the narrow definition of WOTUS articulated by the Court will result in a large number of water bodies—most prominently wetlands—being unregulated by either federal or State law.

While the Court in *Sackett* attempted to draw bright lines around what waters are WOTUS and what waters are not WOTUS, ambiguities remain that will require litigation or new legislation or regulation to resolve. These ambiguities are particularly acute in portions of the United States where surface water bodies regularly go dry for major periods of time, raising questions about when a water is "relatively permanent" or when waters only "temporarily" lose an otherwise "continuous" surface connection. Similarly, uncertainty remains about what happens when natural conditions—such a storms—sever a wetlands' otherwise continuous surface connection to jurisdictional waters. The decision will also need to be squared with other recent Supreme Court precedent involving discharges to non-jurisdictional waters that are interconnected with WOTUS (i.e, the "functional equivalent" test). Thus, while *Sackett* may have ended over fifty years of one debate, it opens new debates over WOTUS.

Sackett also raises very interesting underlying questions about the relationship between law and science, the relationship among Congress, administrative agencies and the courts, and the relationship between a law's objectives and the words selected by Congress to achieve those

objectives. All of these underlying issues will continue to play a critical role in future interpretations of the Act.

To explore these themes, this paper first presents a short introduction to the Act, limiting its scope to the basics needed to understand the Supreme Court's decision. Similarly, it discusses the key regulatory and Supreme Court history that sets the stage for the decision, again limiting its focus to the basics needed to understand *Sackett*. Next, the paper summarizes the decision, including both the majority opinion and the three concurrences. Finally, it explores the case's implications and discusses its underlying themes.

2. THE ACT—THE BASICS NEEDED TO UNDERSTAND *SACKETT*

The Act is the principal federal law regulating water pollution in the United States. At the federal level, the Act is administered by the Environmental Protection Agency (EPA) and the Army Corps of Engineers (Corps). The express objective of the Act is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C § 1251(a). To help achieve this objective, the Act prohibits "the discharge of any pollutant by any person" into "navigable waters" except as authorized by a permit. 33 U.S.C. §§ 1311(a), 1344(a), 1362. The Act defines "navigable waters" to mean "the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7). This definition of "navigable waters" as WOTUS is what *Sackett* addresses.

Importantly, the Act is built on the concept of cooperative federalism. It establishes federal baselines but preserves significant discretion to the States to do more. It also allows States to assume under State law the primary role in issuing certain permits consistent with the Act's requirements, the most prominent being permits issued under the Act's National Pollutant Discharge Elimination System (NPDES) program. In addition to allowing States to issue permits, the Act expressly "protect[s] the primary responsibilities and right of States to prevent, reduce, and eliminate pollution" and "plan the development and use . . . of land and water resources." 33 U.S.C § 1251(b). Thus, State regulation of waters can extend well-beyond the federal regulation of WOTUS, but there is a limit to how much the Act may intrude on the States' role in regulating land and water resources. Based on an assessment that is specific to wetlands regulation from the Environmental Law Institute, twenty-four States limit their regulation to the scope under the Act, while twenty-six States go beyond federal law at least to some extent. See McElfish, James M. Jr., "What Comes Next for Clean Water? Six Consequences of *Sackett v. EPA*" Environmental Law Institute, May 26, 2023.

The Act has been amended several times, and one such amendment is critical to understanding *Sackett*. In 1977, Congress added Section 1344(g)(1) to the Act. This provision authorizes States to apply to EPA for permission to issue permits for the discharge of dredged or fill material to certain defined WOTUS. Almost all States have been granted authority to issue NPDES permits, but not many States have pursued permission to issue permits to discharge dredged or fill material, so this provision is not particularly well-used. In any case, Section 1344(g)(1) allows States to apply to the EPA to issue such permits for discharges of dredged or fill material to any waters of the United States, except for traditional navigable waters, *including*

wetlands adjacent thereto. Because Section 1344(g)(1) uses the phrase "wetlands adjacent thereto" as an exemption to (and thus a subset of) the broader term WOTUS, the Supreme Court in *Sackett* focused very intensely on this provision as it wrested with the definition of WOTUS.

One other fundamental aspect of the Act is important to understanding *Sackett*. The Act includes very significant enforcement provisions, including enforcement by third-parties. Persons violating the Act, even unwittingly, may be exposed to administrative fines and civil litigation. The Act also contains criminal sanctions, including felonies. In other words, the Act carries a big stick. The significant enforcement options available under the Act helped to inform the Court's analytical approach to the interpretation of WOTUS.

3. PRIOR AGENCY REGULATIONS AND SUPREME COURT DECISIONS—THE BASICS NEEDED TO UNDERSTAND *SACKETT*

Not surprisingly, the Act's definition of "navigable water" as "waters of the United States, including the territorial seas" has led to uncertainty and several attempts by the agencies and the Court to provide clarity regarding where WOTUS begins and ends. This history can be mind-numbing for all but the most ardent of water quality aficionados. The key points are that: (1) EPA and the Corps have defined WOTUS in various way through regulations, sometimes expanding and sometimes contracting the definition; (2) on three occasions prior to *Sackett*, the Supreme Court has assessed those regulations or agency actions in an attempt to fix the Act's jurisdiction; and (3) the current majority of the Supreme Court appears to believe that the EPA and the Corps have ignored previous Supreme Court guidance. The following brief summary outlines the basics of this history that comes together in *Sackett*.

A. **Prior EPA and CORPS Regulations (and Congressional Action)**

Almost immediately after Congress enacted the Act in 1972, EPA and the Corps promulgated regulations defining WOTUS. Oddly, EPA and the Corps initially adopted different definitions. 38 Fed.Reg. 13529 (1973); 39 Fed.Reg. 12119 (1974). Soon, however, EPA and the Corps settled on similar definitions of WOTUS that ultimately encompassed all waters that "could affect interstate or foreign commerce." 40 CFR § 230.3(s)(3) (2008).

Notably, for purposes of understanding the issue in *Sackett*, by 1975, the regulatory definition of WOTUS included "adjacent wetlands." 40 Fed. Reg. 31324. Since that time, the Corps has interpreted "adjacent" to mean more than "adjoining" (keep your eye on this distinction), and has determined that "adjacent" includes waters that are separated by man-made dikes or barriers, natural river berms, beach dunes and the like. 42 Fed.Reg. 37144. As noted above, in 1977, Congress included the phrase "adjacent wetlands" as a subset of WOTUS through its addition of Section 1344(g) to the Act.

Other major regulatory attempts to clarify WOTUS occurred under several different administrations in 1977, 1980, 1986, 2015, 2019, 2020 and 2023. 42 Fed.Reg. 37144; 45 Fed. Reg. 85345; 51 Fed. Reg. 41210; 80 Fed. Reg. 37105; 85 Fed. Reg. 22338; 88 Fed. Reg. 3143-3144. The broadest regulatory definition of WOTUS may have been established in the 1980s,

when the agencies used the "migratory bird rule" to extend jurisdiction to any waters or wetlands that "are or would be used as [a] habitat" for migratory birds or endangered species. 53 Fed.Reg 20765; 51 Fed.Reg. 41217. The "migratory bird rule" was subsequently called into question by the Supreme Court, as discussed below. In general, however, although these various regulatory action involved different definitions of WOTUS, under different administrations, they all included "adjacent wetlands" as a subset of WOTUS, including wetlands separated from jurisdictional waters by man-made dikes or barriers, natural river berms, beach dunes and the like.

The last decade has seen very significant regulatory action on WOTUS. From 2015 to the present, the agencies have engaged in multiple attempts to bring clarity to the definition of WOTUS. These attempts have occurred under three different administrations and, rather than bringing clarity, they have only resulted in litigation. The outcome of this litigation is a bizarre and ever-changing patchwork across the United States, with at times different versions of the regulations applying in different States. In fact, during this period, EPA regularly published and updated a map showing which rule applied where. As discussed later in this paper, *Sackett* has now required EPA and the Corps to start again, and it is anticipated that a proposed new rule defining WOTUS in light of *Sackett* will be issued later this year (possibly in time for discussions at the IMLA conference).

B. **Prior Supreme Court Precedent**

The Supreme Court had weighed in on these regulatory definitions of WOTUS three times before *Sackett*. As with the regulatory history, discussions of these cases can be mind-numbing. Here are the key things you need to know about each case to understand *Sackett*.

The Supreme Court first assessed the meaning of WOTUS in *United States v. Riverside Bayview Homes, Inc.* 474 U.S. 121 (1985). In *Riverside Bayview*, the Supreme Court deferred to the Corps' decision to assert jurisdiction over wetlands that were adjacent to a traditional navigable waterway. *Id.* at 135. The Court reasoned that "the transition from water to solid ground is not necessarily or even typically an abrupt one." *Id.* at 132-133. The Court also recognized the integrated nature of aquatic ecosystems. It quoted with approval from the Corps' 1977 regulations, which stated that the "regulation of activities that cause water pollution cannot rely on . . . artificial lines . . . but must focus on all waters that together form the entire aquatic system." *Id.* at 133-134. The Supreme Court decision in *Riverside Bayview* reflected a deferential approach to the agencies' interpretation of the scope of the CWA, a recognition that the science of water quality made legal line drawing difficult and a willingness to interpret the Act in light of its broad objectives.

Six years later, after the agencies had adopted the "migratory bird rule" mentioned above, the Supreme Court took a much less deferential approach to the agencies' interpretation in *Solid Waste Agency of Northern Cook Cty. V. Army Corps of Engineers* 531 U.S. 159 (2001), commonly known as *SWANCC*. In *SWANCC*, the Court assessed whether the Corps properly took jurisdiction over several isolated ponds located wholly within the State of Illinois. The Court held that the Act does not "exten[d] to ponds that are not adjacent to open water." *Id.* at 168. In contrast to *Riverside Bayview*, the Supreme Court in *SWANCC* did not defer to the agencies' interpretation or expertise, and the Court was unpersuaded by arguments that stressed the need to protect these

waters due to ecological interests.

Four years after *SWANCC*, the Court tried, but ultimately failed, to provide a clear definition of WOTUS in *Rapanos v. United States* 547 U.S. 715 (2006). *Rapanos* involved the filling of wetlands on three sites in Michigan. The wetlands were located near ditches and drains that eventually discharged to navigable water miles downstream. The Supreme Court vacated a lower court's decision that the Act extended to these wetlands, but there was no majority opinion. Four justices would have found that the Act only applied to: (1) certain relatively permanent bodies of water connected to traditional interstate navigable waters; and (2) wetlands with such a close physical connection to those waters that they were "as a practical matter indistinguishable from waters of the United States." *Id.* at 742. Four justices would have deferred to the agencies. *Id.* at 788. One justice concluded that jurisdiction under the Act required a "significant nexus" between wetlands and navigable waters and that such a nexus exists where "the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of those waters." *Id.* at 779-780. This became known as the "significant nexus test".

Because the *Rapanos* Court failed to provide one clear test for lower courts to apply when assessing the Act's jurisdictional reach, different Circuit Courts applies different tests to determine jurisdiction. Some—such as the Fourth, Seventh, Ninth and Eleventh—used the "significant nexus" test. Others—such as the First, Third, Fifth, Sixth and Eighth—applied a combination of tests discussed in the different opinions in *Rapanos*. At the same time, the EPA and the Corps sought to use the "significant nexus" test and other tests, in various forms, in the regulations issued from 2015 to the present. In *Sackett* the Supreme Court revisited the validity of the "significant nexus" test and tried again to end the debate over the reach of the Act.

4. <u>*SACKETT V. EPA*</u>

A. **Factual Background**

The Sacketts own an undeveloped 0.63 acre lot north of Priest Lake in Bonner County, Idaho. In May of 2007, the Sacketts obtained building permits from Bonner County and began preparations for building by removing material from the lot and placing sand and gravel on the building site to create a stable grade. In November 2007, the EPA issued an Administrative Compliance Order concluding the Sacketts' property contained jurisdictional wetlands, and that the Sacketts had illegally placed fill material on the property. As noted above, the agencies definition of WOTUS included "adjacent wetlands," which EPA interpreted at the time to mean bordering, contiguous and neighboring. 40 CFR § 230.3(b). The Compliance Order directed the Sacketts to remove the fill material by April 15, 2008 and conduct other restoration measures by April 30, 2008. The Compliance Order stated that failure to comply may subject the Sacketts to administrative and civil penalties of up to $11,000 and $32,500 per day respectively.

In 2008, the Sacketts sued the EPA after receiving the Compliance Order, arguing that the wetlands were not jurisdictional because the property was separated by dry land containing a road and a developed residential neighborhood. After a successful trip to the Supreme Court on

procedural issues (*see Sackett v. EPA*, 566 U.S.120 (2012)), the Sacketts were unsuccessful in the District Court, losing on summary judgment. The Ninth Circuit affirmed, holding that the Act covers adjacent wetlands with a significant nexus to traditional navigable waters and that the Sackett's lot satisfied that standard. *Sackett v. E.P.A.*, 8 F.4th 1075, 1091-1093 (2021). The Supreme Court granted certiorari to decide the proper test for determining whether wetlands are "waters of the United States."

B. **Supreme Court Decision**

All nine of the members of the Supreme Court agreed that the judgment against the Sacketts must be reversed, and rejected the "significant nexus" test. In that sense, the decision was unanimous. However, four justices (Kavanaugh, Sotomayor, Kagan and Jackson) disagreed with the reasoning in the majority opinion, and two justices (Thomas and Gorsuch) would have actually limited the definition of WOTUS more than the majority. In this sense, the decision can be viewed as a close call or a five-four decision.

1. **Majority Opinion**

The majority opinion is authored by Justice Alito, and reflects a deep skepticism of and lack of deference to how the EPA and the Corps have implemented the Act. Conversely, the opinion demonstrates significant deference to both individual property rights and the role of the States in the federal system. The opinion characterizes the Act as a "potent weapon" that imposes "crushing consequences." It implies that the way the EPA and the Corps have used this "potent weapon" has created such a burden on landowners that many "simply choose to build nothing." Therefore, according to the majority, defining the limits of the Act's geographic scope is critical.

The majority opinion's analysis is focused heavily on the Act's use of the plural term "waters," which the majority interprets to mean "only those relatively permanent, standing or continuously flowing bodies of water 'forming geographic[al] features' that are described in ordinary parlance as 'streams, oceans, rivers and lakes.'" *Sackett, supra,* 143 S.Ct. at p. 1336. According to the majority, interpreting the word "waters" in this sense is consistent with other parts of the Act, prior Supreme Court precedent and Congressional intent.

The challenge for the majority is to explain why Congress amended the Act in 1977 to include "adjacent wetlands". 33 U.S.C. § 1344(g)(1). The Court acknowledges that its interpretation of "waters" seems to exclude all wetlands. However, the Court concedes that Section 1344(g)(1) expressly includes "adjacent wetlands" as a subset of WOTUS. The majority must therefore address what the word "adjacent" means and "harmonize" the meaning of that word with the limited scope of "waters". Because of the way the majority has defined "waters", it reasons that "adjacent wetlands" must qualify as WOTUS in their own right, which means that adjacent wetland must be indistinguishably part of a body of water that itself constitutes "waters" under the Act. According to the majority, this only occurs when the wetlands have "a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between 'waters' and wetlands." *Id.* at p. 1340. Stated in the negative, the majority concludes that wetlands "that are separate from traditional navigable waters cannot be

considered part of those waters, even if they are located nearby." *Id.* at p. 1341.

The majority also expressly rejects the EPA's arguments that ecological consequences should inform its interpretation of WOTUS. In direct contradiction to *Riverside Bayview*, Justice Alito states that the Act "does not define the EPA's jurisdiction based on ecological importance . . . ." *Id.* at p. 1343. Finally, the majority reasons that given the significant penalties for violations of the Act, and because of primacy of the States' power over private property, Congress must provide a "clear statement" if it intends to expand the scope of the Act. *Id.* at p. 1342.

Justice Alito does leave a few cracks in the clarity he tries to bring to the definition of WOTUS. He acknowledges "that temporary interruptions in surface connection may sometimes occur because of phenomena like low tides or dry spells." *Id.* at p. 1341. The majority opinion, however, provides no explanation of what qualifies as a "temporary" interruption in surface connection. In addition, the majority states that "a landowner cannot carve out wetlands from federal jurisdiction by illegally constructing a barrier on wetlands otherwise covered by the CWA." *Id.* at fn. 16. But it does not address other events—such as storms, floods or erosion—that may temporarily or even permanently interrupt surface water connection.

Although it raises many questions, the majority opinion means that only the following will qualify as WOTUS:

- A water that in ordinary terms constitutes a stream, river, ocean or lake that is used for navigation and interstate commerce, or flows across or forms a part of State boundaries (defined as "traditional navigable waters")

- A relatively permanent, standing or continuously flowing stream, river, or lake that maintains a continuous surface connection to traditional navigable waters

- A wetland with a continuous surface connection with the first two.

2. **Concurring Opinions**

Justices Thomas, Kagan and Kavanaugh wrote concurring opinions that are important to an overall understanding of the implications of *Sackett*. Each of these are briefly discussed below.

Justice Thomas, with whom Justice Gorsuch joins, would have gone even farther than the majority opinion in limiting the reach of the Act. According to Justice Thomas, the key jurisdictional question is "whether the water is within Congress' traditional authority over the interstate channels of commerce." Based on what Justice Thomas refers to as the *Daniel Ball* test, *The Daniel Ball*, 10 Wall. 557 (1871), he believes that Congress limited the scope of the Act to navigable-in-fact waters. For Justice Thomas, the significant word in the Act is "navigable" and WOTUS merely signifies those waters to which Congress' Commerce Clause powers over navigation, based on the *Daniel Ball* test, extends. Other than this narrow set of navigable waters, the bulk of the waters in the United States fall solely under State jurisdiction. According to Justice Thomas, "Congress chose to tether federal jurisdiction under the CWA to its traditional authority

over navigable waters. The EPA and the Corps must respect that decision." *Id.* at p. 1359.

Justice Kagan, with whom Justices Sotomayor and Jackson join, accuses the majority of rewriting the Act as drafted by Congress with the intent of narrowing its scope. *Id.* at pp. 1359-1362. Justice Kagan rejects the majority's interpretation of "adjacent wetlands" to mean "adjoining". More broadly, Justice Kagan disagrees with the majority's demand for a "clear statement" from Congress because in her view the Act unambiguously applies to "adjacent wetlands". She also expresses concern with the majority's invocation of federalism and individual property rights, and its creation of interpretive doctrines designed to favor those rights. In the end, Justice Kagan believes that the majority is substituting its own views for that of Congress and the majority has appointed itself as the national decision-maker on environmental policy.

Justice Kavanaugh, with whom Justices Kagan, Sotomayor and Jackson join, focuses his concurring opinion on the difference between "adjacent" and "adjoining". *Id.* at pp. 1362 – 1369. According to Justice Kavanaugh, there is no ambiguity regarding the meaning of "adjacent." Adjacent wetlands include wetlands that are separated from a covered water only by a man-made dike or barrier, a natural river berm, beach dune, or the like. He reasons that EPA and the Corps had defined "adjacent" to have this meaning before Congress used the term "adjacent wetlands" in Section 1344(g), and thus Congress agreed with that definition when it acted in 1977. Justice Kavanaugh thus rejects the majority's interpretation of "adjacent" to mean "adjoining". Justice Kavanaugh notes that the majority's "new and overly narrow test may leave long-regulated and long-accepted-to-be-regulable wetlands suddenly beyond the scope of the agencies' regulatory authority, with negative consequences for waters of the United States." Specifically, Justice Kavanaugh points to many of the flood control projects on the Mississippi River, where levees or other man-made structures have separated wetlands from the River. He also identifies a "host of thorny questions" raised by the majority opinion. Finally, Justice Kavanaugh notes that the majority's opinion, is at odds with scientific evidence, which "overwhelmingly demonstrates that wetlands separated from covered waters by . . . berms or barriers, still play an important role in protecting neighboring and downstream waters, including by filtering pollutants, storing water, and providing flood control."

5. GENERAL IMPLICATIONS AND TAKE AWAYS

Sackett will have significant short and long-term implications on implementation of the Act. It also raises a "host of thorny question" (in Justice Kavanaugh's words) and several underlying issues that will be important for future interpretations of the Act. Some of these are summarized below.

A. Immediate Implications—What *Sackett* Means for Different States and What the Agencies Plan to Do in Response

Immediately after the Court issued its decision, the Corps announced a pause in its process of issuing most final, approved jurisdictional determinations under the Act while it and EPA responded to the decision. This pause may result in significant delay and uncertainty for projects waiting for such determinations. The Corps and EPA are jointly targeting September 1, 2023 as

the date to issue a new WOTUS rule in light of the decision. The White House Office of Management and Budget has completed its review of the proposed ruled, which should permit its release soon. The Corps has stated that it will resume issuing AJDs by the effective date of the new rule, but that rule is likely to result in additional litigation.

Regardless of the new rule, because of the cooperative federalism on which the Act is based, and because different States have different approaches to regulating waters under State law, *Sackett* will have different immediate implications depending on which State you are in.

For the about twenty-four States that limit their programs to federal minimums, *Sackett* will have significant immediate implications for the regulation of wetlands. According to the analysis performed by the Environmental Law Institute, Alabama, Alaska, Arkansas, Colorado, Delaware, Georgia, Hawaii, Idaho, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, South Carolina, South Dakota, Texas and Utah rely on the Act to protect wetlands, and do not extend their State laws beyond the scope of the Act. For these States, a large amount of wetlands previously thought to be protected by the Act are now not subject to regulation. Some have estimated that up to 50% of the Nation's wetlands are now not subject to the Act. See, Timothy Puko and Robert Barnes, "How Supreme Court's EPA Ruling Will Affect U.S. Wetlands, Clean Water," Washington Post, May 25, 2023. While a new WOTUS rule may attempt to return federal regulation to some of these wetlands, these States will ultimately have to amend their State regulations if all of these waters are to be regulated.

For the other States—such as California, New York and Ohio—that already go beyond federal minimums, *Sackett* will have important, but less significant implications. Most importantly, *Sackett* will mean that the enforcement provisions of the Act, including citizen suit provisions, will not apply to waters that fall outside of the Court's narrow definition of WOTUS. Enforcement will depend on the detailed laws of each State. It is unclear whether States will be capable of allocating sufficient resources to enforce their regulations of wetlands.

In short, the immediate result of *Sackett* is less regulation of wetlands under the Act, but at the same time significant delays and questions for projects that might impact wetlands. How a landowner is to proceed depends on where the property is located, and will require risk analysis pending greater clarity from the EPA and the Corps, as well as from the States.

B. **Long Term Implication—Questions *Sackett* Leaves Unanswered**

As Justice Thomas points out, wetlands are just the beginning of the implications of this decision. The decision leaves open "a host of thorny questions". Among others, these questions include:

1. What does "relatively permanent" mean? How does that definition apply in arid regions?

2. What is a "temporary interruption" in an otherwise "continuous surface water connection"? How long of an interruption is allowed and how much is too much?

3. What happens when storms, floods and erosion shift or breach natural river berms? Do such natural changes end a continuous surface water connection or establish (or reestablish) one?

4. What about connections that are established by a ditch, swale, pipe or culvert? Are these sufficient to establish a continuous surface water connection?

5. What about artificial barriers that were authorized by the Corps? May the Corps now rescind those authorizations and thus reestablish a surface water connection?

6. What role will *Maui County v. Hawai'i Wildlife Fund*'s "functional equivalent" standard play when assessing jurisdiction? The "functional equivalent" test extends the Act to discharges to non-jurisdictional waters, such a groundwater, when those discharges are the "functional equivalent" of direct discharges to WOTUS. Is the "functional equivalent" test a backdoor around the Court's continuous surface water connection requirement for jurisdictional wetlands? If a discharge to a non-jurisdictional wetland is the "functional equivalent" to a direct discharge to WOTUS, does the Act apply to that discharge, even if the wetland is not WOTUS? Does this bring hydrology back into the decision-making process?

It will take years to litigate these and other related questions left open by *Sackett*

C. **Important Underlying Themes**

In addition to these and other unanswered questions, *Sackett* contains several underlying themes that will be important to future jurisprudence under the Act. These include:

1. What is the relationship between the Act's text, the science of water quality and the broad objectives of the Act? *Sackett* rejects the "significant nexus" test, which relied on a site-specific analysis about the actual interaction between different waters. The majority is critical of this "complicated approach" and quotes with approval a lower court critique that "most laws do not require the hiring of expert consultants to determine if they even apply to you or your property." The majority also refused to consider various policy arguments about the ecological consequences of a narrow definition of the term "adjacent". According to the majority, the Act "does not define the EPA's jurisdiction based on ecological importance, ..." *Id.* at p. 1343. As noted above, the approach in *Sackett* appears to be at odds with the "functional equivalent" test, which applies a nuanced view of how hydrologic systems work. And as Justice Kavanaugh states, the "scientific evidence overwhelmingly demonstrates that wetlands separated from covered waters by . . . berms or barriers, for example, still play an important role in protecting neighboring and downstream waters, including by filtering pollutants, storing water, and providing flood control." How will the Court address these questions in the future? Should scientific consensus help inform the Court's interpretation? Should the Court be guidance by the Act's broad objectives, and interpret the words of the Act to achieve them, even if a different reading is possible? Or should Congress have to act to answer these questions?

2. Will the Court completely abandon deference to EPA and the Corps? In *Riverside Bayview*, the Court applied traditional concepts of deference. *Sackett* illustrates no such deference, and the Supreme Court in the next session will hear a case which may be a vehicle to overturn the *Chevron* doctrine and its deference to federal agencies. What type of deference, if any, will the Court give the EPA and the Corps in the future?

3. How much of a "clear statement" must Congress make if it wishes to broaden the narrow interpretation of WOTUS established in *Sackett*? In what way was Congress's amendment to the Act in 1977 to include "adjacent wetlands" as part of WOTUS not such a clear statement? What exactly is the relative role of Congress, the Court, the Executive Branch and the States regarding the Act. Who make the "final" decision?

These and other important jurisdictional themes will inform future decisions under the Act.

6. CONCLUSION

Sackett is a seminal case, that narrowly interprets the reach of the Act. The decision will have immediate and longer-term implications regarding the regulation of waters, particularly wetlands, in all States. Implications will be more drastic in about twenty-four States where wetland regulation is limited by the scope of the Act. However, for all States, the relative relationship between federal and state authority over the regulation of waters will change under *Sackett*.

The majority in *Sackett* sought to define the outer reaches of the Act in a simple and concrete way. While the decision answers this "nagging question" specifically, and thus ends fifty years of debate about it, the decision also opens a new chapter in the ongoing implementation of the Act. One thing is clear—the only relatively permanent result of the decision is ongoing questions and more litigation.