The *Rapanos* Nightmare Is Over but WOTUS Worries Remain

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In Sackett v. Env't Prot. Agency, the United State Supreme Court narrowed the Environmental Protection Agency's and the United States Army Corps of Engineer's jurisdiction over wetlands because of the confusion and lengthy and expensive litigation caused by the Rapanos decision in 2006. Although this resolved the long-standing problem of understanding the term "waters of the United States," this ruling risks half of the remaining 100 million acres of wetlands in the lower forty-eight states. Justice Alito, author of the majority, relied upon scant legal authority to reach his conclusion that only adjoining wetlands should enjoy the protections of the Clean Water Act. In Riverside Bayview, the Supreme Court held that all adjacent wetlands including wetlands separated by a dam, dike, natural berm, or other barrier are protected. Now, these wetlands will no longer be protected thus jeopardizing the health of America's waterways and its people. To limit the detrimental effects of this decision, Congress should use its power of the purse to incentivize states to take up their own wetland protection programs and include language in 2023 Farm Bill to conserve wetlands.

I. INTRODUCTION

When Congress passed the Clean Water Act ("CWA") in 1972, one very important yet elusive phrase has caused much confusion and lengthy expensive litigation: waters of the United States ("WOTUS"). In 1969, Americans experienced regular issues with their water: rivers set and remained on fire because of industrial waste;[1] many other bodies of water were unfit for swimming; drinking water contained hazardous chemicals; over 40 million fish died that year, setting records; and caught fish were often unfit to eat because of chemical like mercury and

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1. *The 1969 Cuyahoga River Fire*, NAT'L PARK SERV. (May 3, 2022), https://www.nps.gov/articles/story-of-the-fire.htm [https://perma.cc/WX48-AR45].

dichlorodiphenyltrichloroethane ("DDT") contaminating the meat.[2] As a response, Congress enacted the CWA "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[3]

The CWA only prohibits people from releasing pollution into "navigable waters" which the statute defines as WOTUS.[4] Traditionally, navigable waters meant rivers, lakes, and other bodies of water used in interstate commerce because Congress used the Commerce Clause to justify much of its environmental regulation, including the CWA.[5] However, the agencies who administer CWA expanded to include tributaries and wetlands connected to navigable waters[6] because wetlands are inseparably bound up and significantly affect water quality and the aquatic ecosystem of these waters.[7] Often, these navigable waters rely on wetlands to protect water quality, provide fish and wildlife habitats, and store floodwaters and maintain surface water flow during dry periods.[8]

However, Americans did not always appreciate the value of wetlands as "[p]eople thought of wetlands as places to avoid or, better yet, eliminate" because they acted as "sources of mosquitoes, flies, unpleasant odors, and disease."[9] This thinking resulted in 117 million acres out of the original 220 million acres of wetlands in the lower forty-eight states being filled in to make room for agriculture and industrial development.[10] Today, roughly 100 million acres remain in the lower forty-eight states.[11] Even with a significant change in mindset, many problems plague wetland conservation namely identifying a wetland.

Courts struggle to identify a wetland from a navigable water because often "the transition from water to solid ground is not necessarily or even typically an abrupt one."[12] This challenge started a wave of litigation to understand what WOTUS means and whether wetlands are included.

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2. Sackett v. Env't Prot. Agency, 143 S. Ct. 1322, 1359 (2023) (Kagan, J., concurring) (citing ROBERT W. ADLER, JESSICA C. LANDMAN & DIANE M. CAMERON, THE CLEAN WATER ACT: 20 YEARS LATER 5–6 (1993)).

3. 33 U.S.C. § 1251(a).

4. 33 U.S.C. § 1311(a); § 1362(7); § (12A).

5. *Sackett*, 143 S. Ct. at 1348.

6. 40 C.F.R. § 120.2(a) (2024).

7. *About Waters of the United States*, U.S. ENV'T PROT. AGENCY, https://www.epa.gov/wotus/about-waters-united-states [https://perma.cc/AH33-W2YM] (last updated Oct. 10, 2023).

8. *Why Are Wetlands Important?*, U.S. ENV'T PROT. AGENCY, https://www.epa.gov/wetlands/why-are-wetlands-important [https://perma.cc/Z6WJ-4LAX] (Mar. 22, 2023).

9. U.S. ENV'T PROT. AGENCY: OFF. OF WETLANDS, OCEANS & WATERSHEDS WETLANDS DIV., AMERICA'S WETLANDS: OUR VITAL LINK BETWEEN LAND AND WATER (2021), https://www.epa.gov/sites/default/files/2021-01/documents/wetlands_our_vital_link_between_land_water.pdf [https://perma.cc/EN5P-Q8A2].

10. *Id.* ("Conversion to agricultural use was responsible for 54 percent of the losses, drainage for urban development for 5 percent, and development for 41 percent.").

11. *Id.*

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

Litigation over CWA's Section 404 serves as a good example of the importance of whether a wetland is a WOTUS. Section 404 requires a party to get a permit to dredge or fill in a navigable water;[13] otherwise they face fines up to $25,000 per day of each violation.[14] The Environmental Protection Agency ("EPA") and the United States Army Corps of Engineers ("USACE") jointly oversee the 404-permitting program.[15] To test the limits of their authority, the EPA pulled in Michael and Chantell Sackett to the quagmire that is WOTUS jurisprudence by issuing a compliance order to the couple.[16] Unbeknownst to the Sacketts, they violated Section 404 by preparing their land for the construction of a home leading to nearly twenty years of litigation.[17] After reaching the Supreme Court not only once but twice, the Sacketts received a judgment in their favor. The Supreme Court, through the case *Sackett v. Env't Prot. Agency*,[18] incorrectly narrowed the EPA's and USACE's jurisdiction through a definitional sleight of hand in the majority opinion. The majority's unfounded conclusion will risk the health of most of America's wetlands, jeopardizing the integrity of the nation's waters and undermining the very purpose the CWA serves.[19] This Comment suggests Congress use its power of the purse to incentivize states to conserve wetlands.

II. BACKGROUND

A. Case Description

In 2004, Michael and Chantell Sackett purchased a small parcel of land near Priest Lake, an intrastate lake, in Bonner County, Idaho.[20] To build a home on the parcel, the couple backfilled the property with dirt and rocks.[21] A few months later, the EPA sent the Sacketts a compliance order stating they violated the CWA because they backfilled protected wetlands without a permit.[22] The EPA found the wetlands on the Sacketts' property were adjacent a WOTUS.[23] The wetlands were near an unnamed tributary,

13. 33 U.S.C. § 1344(a).
14. 33 U.S.C. § 1319(d).
15. Sackett v. Env't Prot. Agency, 143 S. Ct. 1322, 1330 (2023).
16. *Id.* at 1331.
17. *Id.*
18. *Id.*
19. *See* Jeff Turrentine, *What the Supreme Court's Sackett v. EPA Ruling Means for Wetlands and Other Waterways*, NDRC (June 5, 2023), https://www.nrdc.org/stories/what-you-need-know-about-sackett-v-epa; *see also* Angela Nicoletti, *What the Recent Supreme Court Ruling Could Mean for U.S. Wetlands*, FLA. INT'L UNIV. NEWS (June 14, 2023, 10:00 AM), https://news.fiu.edu/2023/supreme-court-ruling-sackett-v-epa-what-it-means-for-wetlands.
20. *Sackett*, 143 S. Ct. at 1331.
21. *Id.*
22. *Id.*
23. *Id.* at 1331–32.

separated by a 30-foot road, that fed into a non-navigable creek which finally reaches Priest Lake, a navigable intrastate lake.[24]

The Sacketts wanted a hearing with the EPA to challenge the finding that the parcel is subject to the CWA.[25] However, the EPA refused to grant the Sacketts a hearing because the EPA did not enforce the order yet.[26] In 2008, the Sacketts brought their case before the United States District Court for the District of Idaho.[27] The District Court held it could not hear the case because the government did not waive its sovereign immunity and a court cannot review a pre-enforcement order.[28] In 2010, the Sacketts appealed the case to the Ninth Circuit.[29] The Court of Appeals affirmed the trial court's decision because Congress precluded challenges to a pre-enforcement order.[30] In 2011, the Supreme Court granted the Sacketts' writ of certiorari and held a court may review a pre-enforcement order, as the CWA does not preclude challenges to orders issued under it.[31]

In the second round of litigation, the federal district court and Ninth Circuit granted the EPA's summary judgement on jurisdiction over the wetlands.[32] Both courts reasoned the EPA properly applied the significant nexus test from *Rapanos*, the last significant WOTUS Supreme Court case.[33] In 2023, the Supreme Court ruled in favor of the Sacketts holding the significant nexus test inappropriate[34] and determined only wetlands adjoining a WOTUS fall under the jurisdiction of the CWA.[35]

B. Legal Background

The *Sackett* decision attempts but ultimately fails to balance the interests of regulated parties and providing the USACE and the EPA the jurisdiction necessary to protect America's waters including its wetlands. The Court relied on three significant cases to get to its holding.

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24. *Id.*
25. Sackett v. U.S. Env't Prot. Agency, 622 F.3d 1139, 1141 (9th Cir. 2010).
26. *Id.* at 1143 (reasoning Congress wanted EPA to have the option to allow violators to comply with the statute by following the compliance order before enforcing the order by bringing it before a court).
27. Sackett v. U.S. Env't Prot. Agency, No. 08-cv-185-N-EJL, 2008 U.S. Dist. LEXIS 60060 (D. Idaho Aug. 7, 2008).
28. *Id.* at *5–7.
29. *Sackett*, 622 F.3d at 1139.
30. *Id.* at 1146–47.
31. Chantell v. U.S. Env't Prot. Agency, No. 2:08-cv-00185-EJL, 2019 U.S. Dist. LEXIS 239377, at * 37 (D. Idaho Mar. 31, 2019); Sackett v. U.S. Env't Prot. Agency, 8 F.4th 1075, 1093 (9th Cir. 2021).
32. *Chantell*, 2019 U.S. Dist. LEXIS 239377, at *37; *Sackett*, 8 F.4th at 1093.
33. *Chantell*, 2019 U.S. Dist. LEXIS 239377, at *31–36; *Sackett*, 8 F.4th at 1091–93.
34. Sackett v. Env't Prot. Agency, 143 S. Ct. 1322, 1342 (2023).
35. *Id.* at 1344.

i. Riverside Bayview Homes, Inc.

The Supreme Court upheld the USACE's regulation that defined WOTUS to include non-navigable freshwater wetlands that were adjacent to navigable-in-fact waters.[36] The Corps defined adjacent wetlands as wetlands "that form the border of or are in reasonable proximity to other [WOTUS].[37] Since the wetland abutted a navigable waterway, the developer was required to obtain a §404 permit.[38] In the ninth footnote, the court addressed how sometimes an adjacent wetland is not crucial to adjoining bodies of water, but this did not undermine the "Corps' decision to define all adjacent wetlands as [WOTUS]."[39]

ii. SWANNC

In 1986, the USACE promogulated a rule known as the migratory bird rule which gave them jurisdiction over any intrastate water "[w]hich are or would be used as habitat by other migratory birds which cross state lines."[40] The Supreme Court held the migratory bird rule exceeded the USACE's jurisdiction as the rule included seasonal ponds that were not adjacent to navigable waters.[41] To support its holding, the Court stated "[i]t was the significant nexus between the wetlands and 'navigable waters' that informed our reading of the CWA in *Riverside Bayview Homes*."[42]

iii. Rapanos

The Supreme Court decided *Rapanos* in 2006, but not one of the *five* opinions enjoyed a majority. The *Rapanos* decision resulted in a plurality where two rules were effectively law. Justice Scalia, author of the plurality, and three other Justices agreed the CWA only protects wetlands with a "continuous surface connection" to navigable waters (i.e., a relatively permanent body of water connected to traditional interstate navigable waters).[43] For example, if it is difficult to tell where the wetland begins and the Mississippi river ends, then this is a protected wetland. Justice Scalia relied upon three sources to develop the continuous surface connection test: (1) the statutory language of "the waters" as opposed to "waters"[44]; (2) an

36. United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 123–24 (1985).
37. *Id.* at 134 (citing 42 Fed. Reg. 37128 (1977)).
38. *Id.* at 135.
39. *Id.* at 135 n.9 (emphasis added).
40. Solid Waste Agency v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 164 (2001) (quoting 51 Fed. Reg. 41217 (1986)).
41. *Id.* at 174.
42. *Id.* at 167.
43. Rapanos v. United States, 547 U.S. 715, 742 (2006) (plurality opinion).
44. *Id.* at 732.

inference based on the dictionary definition of waters[45]; (3) and the problem of identifying wetlands discussed in *Riverside*.[46]

The plurality asserted "[t]he use of the definite article ("the") and the plural number ("waters") shows [the CWA] does not refer to water in general" but instead only water bodies forming geographical features such as oceans, rivers, and lakes.[47] Building upon this assertion, Justice Scalia argued the dictionary definition of waters connotes only "continuously present, fixed bodies of water, as opposed to ordinarily dry channels through which water occasionally or intermittently flows."[48] Also, the plurality used the *Riverside* boundary-drawing problem to establish the continuous surface connection.[49] Lastly, Justice Scalia argued the footnote from *Riverside* used adjacent and adjoining interchangeably because the footnote qualified the holding that the wetland in *Riverside* had a physical connection or adjoined a WOTUS.[50]

Justice Kennedy, in his concurrence, argued the CWA should protect wetlands with a "significant nexus" to navigable waters.[51] Justice Kennedy relied on the significant nexus language from *SWANNC*.[52] As a result of this litigation, the EPA and USACE relied upon the "significant nexus" test to expand their jurisdiction over other lands that previously were not considered navigable waters. The competition between the "continuous surface connection" rule and the "significant nexus" rule caused a lot of confusion, headache, and expensive and lengthy litigation.[53] Among its many effects, the *Rapanos* decision caused a circuit split.[54]

The First and Eighth Circuits allowed the EPA and USACE to establish under either test.[55] At the other end of the spectrum, the Eleventh Circuit held the significant nexus test as the only governing rule despite Justice Kennedy's opinion only enjoying one vote.[56] Similar to the

45. *Id.* at 732–33.
46. *Id.* at 757.
47. *Id.* at 732.
48. *Id.* at 732–33.
49. *Id.* at 757.
50. *Id.* at 747.
51. *Id.* at 759 (Kennedy, J., concurring) (quoting Solid Waste Agency v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 167, 172 (2001)).
52. *Id.* ("It was the significant nexus between the wetlands and 'navigable waters' that informed our reading of the [Clean Water Act ("CWA")] in *Riverside Bayview Homes*." (quoting *Solid Waste Agency*, 531 U.S. at 167)).
53. *See generally* Gregory H. Morrison, Comment, *Nexus of Confusion: Why the Agencies Responsible for Clean Water Act Enforcement Should Promulgate a New Set of Rules Governing the Act's Jurisdiction*, 42 MCGEORGE L. REV. 397 (2011); *see also* Joshua C. Thomas, Note, *Clearing the Muddy Waters? Rapanos and the Post-Rapanos Clean Water Act Jurisdictional Guidance*, 44 HOUS. L. REV. 1491 (2008); Kevin Frankel, Comment, *A Flood of Uncertainty: Rapanos and Carabell*, 32 COLUM. J. ENV'T L. 141 (2007).
54. United States v. Freedman Farms, Inc., 786 F. Supp. 2d 1016, 1017–18 (E.D.N.C. 2011).
55. *Id.* at 1019.
56. *Id.* at 1019–20.

Eleventh Circuit, the Fourth, Seventh, and Ninth Circuit also held the significant nexus test as the only appropriate test but refused to exclude future claims under the continuous surface connection test.[57] Given this controversy, it is easy to see how *Rapanos* became a nightmare.

III. COURT'S DECISION

The Supreme Court resolved the issue between the two rules from *Rapanos*. All nine Justices agreed on a definition of WOTUS and the wetlands on the Sacketts' property are not included in this definition.[58] WOTUS now means "only those relatively permanent, standing or continuously flowing bodies of water forming geographical features that are described in ordinary parlance as streams, oceans, rivers, and lakes."[59] As Justice Alito, author of the majority, explained, the EPA went to great lengths to finds these wetlands as WOTUS.[60] However, these unanimous holdings cannot disguise the divide over when a wetlands becomes a WOTUS.[61] The majority held wetlands may only be covered under the CWA if the wetland shares a "continuous surface connection" or adjoins a WOTUS.[62] This means wetlands separated by a dike, berm, dune, or similar barrier are no longer protected under the CWA as the wetland no longer has a continuous surface connection.[63]

To support this contention, Justice Alito advanced the idea USACE and EPA only have jurisdiction over wetlands adjoined to a traditionally navigable water since adjacent and adjoining are synonymous.[64] The majority only mentions adjoining twice in its opinion: (1) in an explanatory parenthetical citing dictionaries[65] and (2) citing to *Riverside* and *SWANCC*.[66] The dictionaries state adjacent could mean either adjoining or

57. *Id.* at 1020.

58. Sackett v. Env't Prot. Agency, 143 S. Ct. 1322, 1336 (2023).

59. *Id.* (quoting Rapanos v. United States, 547 U.S. 715, 739 (2006)).

60. *Id.* at 1331–32 ("According to the EPA, the 'wetlands' on the Sacketts' lot are 'adjacent to' (in the sense that they are in the same neighborhood as) what it described as an 'unnamed tributary' on the other side of a 30-foot road. That tributary feeds into a non-navigable creek, which, in turn, feeds into Priest Lake, an intrastate body of water that the EPA designated as traditionally navigable. To establish a significant nexus, the EPA lumped the Sacketts' lot together with the Kalispell Bay Fen, a large nearby wetland complex that the Agency regarded as 'similarly situated.' According to the EPA, these properties, taken together, 'significantly affect' the ecology of Priest Lake." (internal quotations omitted)).

61. *See id.* at 1359 (Kagan, J., concurring) (explaining the distinction between adjacent and adjoining); *see also id.* at 1362 (Kavanaugh, J., concurring) (same).

62. *Id.* at 1344 (Alito, J., majority).

63. *See id.* at 1361 (Kagan, J., concurring).

64. *Id.* at 1340–41 (Alito, J., majority).

65. *Id.* at 1339–40 ("This understanding is consistent with § 1344(g)(1)'s use of 'adjacent.' Dictionaries tell us that the term 'adjacent' may mean either 'contiguous' or 'near.').

66. *Id.* at 1340 ("In such a situation, we concluded, the Corps could reasonably determine that wetlands 'adjoining bodies of water' were part of those waters."); *see generally* Solid Waste Agency v.

near but Justice Alito believes the outer limits of a word are not always applicable if precedent narrows its definition.[67] Justice Alito offers two citations from *Riverside*.[68] The first citation does not even mention adjoining[69] and the second citation is to the ninth footnote which only mentions adjoining once.[70] Justice Alito also cited to Justice Scalia's discussion of the ninth footnote from *Riverside*.[71] Not a single one of the opinions from *SWANNC* uses adjoining to describe the wetlands.[72]

IV. COMMENTARY

Although the Court all agrees on which rule to follow, there is a 5–4 split on how to understand the rule stemming from the issue of defining adjacent. The majority used a scant amount of legal authority to support its narrowing of adjacent to mean only adjoining. *Sackett* will make America's water less safe to drink, provide less habitat for migratory birds, and make other waters less habitable for fish and other aquatic life.

A. Adjoining versus Adjacent

The majority committed a sleight of hand by narrowing the definition of adjacent to only mean adjoining. Justice Alito's first citation from *Riverside* actually contradicts his holding. The *Riverside* Court concluded "a definition of [WOTUS] encompassing *all* wetlands *adjacent* to other bodies of water . . . is a permissible interpretation of the Act."[73] The ninth footnote, Justice Alito's second citation, further explained "not every adjacent wetland is of great importance to the environment of adjoining bodies of water. But the existence of such cases does not seriously undermine the Corps' decision to define *all adjacent* wetlands as 'waters.'"[74] This footnote may more reasonably be interpreted to mean not every nearby wetlands may be important to the integrity of adjoining interstate waters. Considering the rest of the footnote, the Court does not once modify wetland with the word adjoining. Regardless, the single use of adjoining in a footnote does change *Riverside*'s multiple unequivocal statements that the USACE may include all adjacent wetlands in the definition of WOTUS.

U.S. Army Corps of Eng'rs, 531 U.S. 159 (2001); United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985).

67. *Sackett*, 143 S. Ct. at 1340.
68. *Id.*
69. *Riverside Bayview Homes*, 474 U.S. 121 (1985).
70. *Id.* at 135 n.9.
71. *Sackett*, 143 S. Ct. at 1343.
72. *See generally Solid Waste Agency*, 531 U.S. 159 (2001).
73. *Riverside Bayview*, 474 U.S. at 135 (emphasis added).
74. *Id.* at 135 n.9 (emphasis added).

In *SWANCC*, the Court does not even mention adjoining mostly because there was no reason to.[75] The rule at issue did not use adjacent or adjoining[76] and the wetland at issue was not adjoined or adjacent to any recognizable WOTUS.[77] In *Rapanos*, Justice Scalia relies upon the same *Riverside* citations.[78] Justice Scalia argued the footnote used adjacent and adjoining interchangeably[79] despite *Riverside*'s unambiguous holding that the USACE's definition of adjacent wetlands is permissible, which includes wetlands in a reasonable proximity to a WOTUS.[80] Much like Justice Scalia in *Rapanos*, Justice Alito applied non-existent inferences from the case precedents to inappropriately supply statutory definitions from dictionaries. Therefore, none of the three cases Justice Alito relied upon support the narrowing of adjacent to adjoining.

Although Justice Alito attempts to dissuade worries over people building dams to remove CWA protections from wetlands currently adjoined to a WOTUS, this does nothing to address the wetlands that would adjoin a WOTUS but for such barriers that already exist.[81] Justices Kagan and Kavanaugh, in their concurrences, both admonish the court for leaving formerly protected wetlands outside the jurisdiction of the EPA and USACE.[82] This subtle exclusion risks half of the remaining 100 million acres of wetlands in the lower forty-eight states.[83] When interpreting

75. *See generally Solid Waste Agency*, 531 U.S. 159.

76. *Id.* at 164.

77. *Id.* at 174 (explaining Congress did not provide a clear statement intending Section 404 to reach an inland abandoned sand and gravel pit).

78. Rapanos v. United States, 547 U.S. 715, 740 (2006).

79. *Id.* at 747.

80. United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 134 (1985) (citing 42 Fed. Reg. 37128 (1977)).

81. Sackett v. Env't Prot. Agency, 143 S. Ct. 1322, 1341 n.16 (2023) ("Although a barrier separating a wetland from a water of the United States would ordinarily remove that wetland from federal jurisdiction, a landowner cannot carve out wetlands from federal jurisdiction by illegally constructing a barrier on wetlands otherwise covered by the CWA.").

82. *Id.* at 1359 (Kagan, J., concurring) ("In excluding all the wetlands [separated from a covered water only by a man-made dike or barrier, natural river berm, beach dune, or the like], the majority's continuous surface connection test disregards the ordinary meaning of adjacent. The majority thus alters—more precisely, narrows the scope of—the statute Congress drafted." (internal quotations and citation omitted)); *Id.* at 1362 (Kavanaugh, J., concurring) ("But 'adjacent' and 'adjoining' have distinct meanings: Adjoining wetlands are contiguous to or bordering a covered water, whereas adjacent wetlands include both (i) those wetlands contiguous to or bordering a covered water, *and* (ii) wetlands separated from a covered water only by a man-made dike or barrier, natural river berm, beach dune, or the like. By narrowing the Act's coverage of wetlands to only adjoining wetlands, the Court's new test will leave some long-regulated adjacent wetlands no longer covered by the Clean Water Act, with significant repercussions for water quality and flood control throughout the United States.").

83. *Supreme Court Guts Clean Water Act as Conservative Justices Side with Polluters and Developers*, DEMOCRACY NOW! (May 31, 2023), https://www.democracynow.org/2023/5/31/sam_sankar_scotus_clean_water_act ("So, we are now in a situation where the Supreme Court's new ruling takes away protections from over half of the nation's 100 million acres of remaining wetlands."); *see also Wetlands Most in Danger After the U.S. Supreme Court's Sackett v. EPA Ruling*, EARTH JUST. (June 21, 2023), https://earthjustice.org/feature/sackett-epa-wetlands-supreme-court-map; *see also* Erika Ryan, Patrick Jarenwattananon & Ari Shapiro, *More than Half of Wetlands No Longer Have EPA Protections After Supreme Court Ruling*, NPR (Aug. 3, 2023, 5:33 PM), https://www.npr

statutes, the court applies the ordinary plain meaning of the language in their context.[84] When ordinary people say something is adjacent, they mean those objects do not need to touch but can be nearby. For example, a house is adjacent to another house even when separated by a lawn or a picket fence.[85] Given the absence of sufficient precedent, the majority should not have narrowed adjacent to mean only adjoining.

B. What Now?

The Court should have adopted a but for test to determine whether a wetland would have a continuous surface connection. But for the barrier, if a wetland would have continuous surface connection with a WOTUS, then the party seeking to fill in the wetland must obtain a permit. Now the fate of many wetlands rests in the hands of state officials.

While some states effectively protect wetlands, other states depend largely upon the federal government.[86] Some states with highest proportion of wetlands to land have the least protective laws for wetlands (i.e., Texas).[87] To safeguard these once protected wetlands Congress should incentivize states to implement their own Section 404 permitting program or at least condition agricultural and industrial subsidies on maintaining current wetlands. By implementing their own Section 404 program states can protect wetlands that the federal government would not be able to protect. Sadly, as of October 31, 2023, only three states (Michigan, New Jersey, and Florida) have their own 404 permitting program.[88]

Fortunately, Congress has an opportunity to use their power of the purse to encourage wetland conservation with the 2023 Farm Bill. The 2023 Farm Bill already contains provisions to encourage voluntary forest conservation[89] and significant funding for climate-smart farming practices.[90] It seems common sense to add wetland conservation to the bill given the ecological and economic importance of wetlands.

Congress should provide further funding to Wetland Mitigation Banking Program ("WMBP") administered by the United States

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.org/2023/08/30/1196875240/more-than-half-of-wetlands-no-longer-have-epa-protections-after-supreme-court-ru.

84. *Sackett*, 143 S. Ct. at 1338–39.

85. *Id.* at 1359 (Kagan, J., concurring).

86. *See* 11 POWELL ON REAL PROPERTY § 79A.01[2][d][i].

87. EARTH JUST., *supra* note 82.

88. *State and Tribal Assumption of Section 404 of the Clean Water Act*, U.S. ENV'T PROT. AGENCY, https://www.epa.gov/cwa404g [https://perma.cc/99ZL-UMSP] (last updated Jan. 9, 2024).

89. GT THOMPSON, HOUSE COMM. ON AGRIC., CRAFTING THE 2023 FARM BILL: 2023 AUGUST RECESS PACKET 1, 11 (2023), https://agriculture.house.gov/uploadedfiles/2023_august_recess_packet_combined.pdf [https://perma.cc/VDC7-UCAP].

90. Elizabeth Weise, *Farmers Get Billions in Government Aid. Some of that Money Could Also Fight Climate Change*, USA TODAY (Nov. 9, 2023, 2:36 PM), https://www.usatoday.com/story/news/nation/2023/11/09/farm-bill-2023-could-include-measures-to-fight-climate-change/71421826007/.

Department of Agriculture ("USDA").[91] The USDA encourages farmers not to fill in wetlands by meeting conservation requirements before receiving benefits.[92] If a farmer wants to develop their land despite the presence of wetlands, they can do so by buying credits from a wetland mitigation bank, an individual or entity that is responsible for the cost of restoring, creating, or enhancing wetlands for the long-term.[93] As of December, 2021, the USDA has spent $17.4 million dollars on WMBP.[94] Without some encouragement from Congress, the integrity of America's waters will deteriorate potentially leading to disasters like those experienced before the passage of the CWA.

V. CONCLUSION

By the Supreme Court defining adjacent to mean only adjoining, formerly protected wetlands are now open to pollution[95] which does not serve the purpose of the CWA.[96] Although it resolved the *Rapanos* nightmare, *Sackett v. Env't Prot. Agency* swung the balance in the opposite direction giving regulated parties more avenues to avoid getting permission before dredging and filling America's precious wetlands.

91. *Wetland Mitigation Banking Program*, USDA NAT. RES. CONSERVATION SERV., https://www.nrcs.usda.gov/wetland-mitigation-banking-program [https://perma.cc/JJG3-72Y6] (last visited Mar. 6, 2024).

92. *Id.*

93. *Id.*

94. Press Release, USDA Nat. Res. Conservation Serv., USDA Invests Nearly $5 Million in Wetland Mitigation Banks (Dec 22, 2021) (https://www.nrcs.usda.gov/news/usda-invests-nearly-5-million-in-wetland-mitigation-banks).

95. Sackett v. Env't Prot. Agency, 143 S. Ct. 1322, 1360 (2023) (Kagan, J., concurring); *Id.* at 1362 (Kavanaugh, J., concurring).

96. 33 U.S.C. § 1251(a) ("The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.").