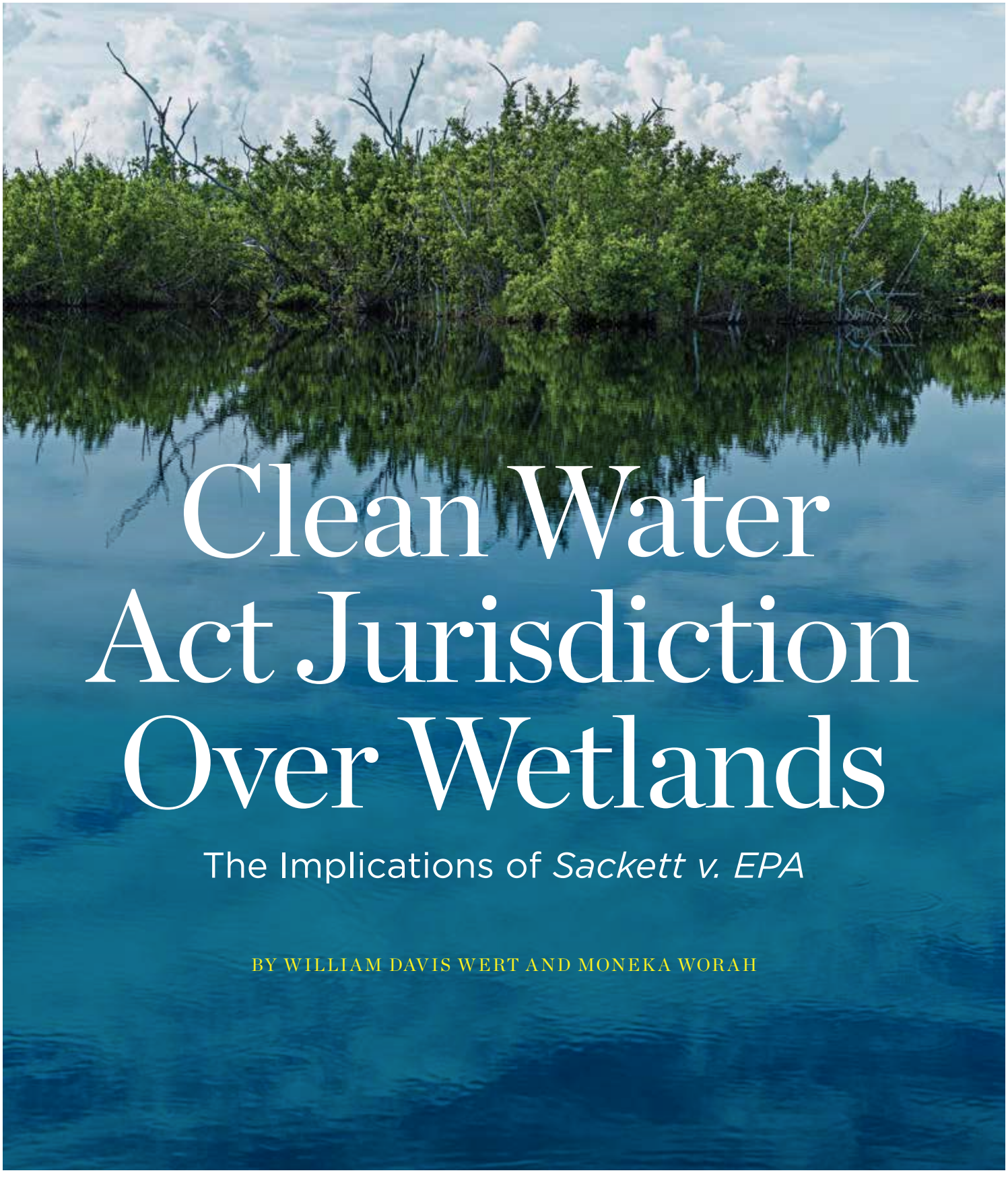

Clean Water Act Jurisdiction Over Wetlands

The Implications of *Sackett v. EPA*

BY WILLIAM DAVIS WERT AND MONEKA WORAH

This article examines the US Supreme Court's ruling in Sackett v. Environmental Protection Agency, *which reduces the geographic scope of Clean Water Act jurisdiction over many wetlands and other waters in Colorado and nationwide, and discusses how the ruling is likely to affect the regulated community.*

Congress enacted the Clean Water Act (CWA or Act) in 1972 to protect the physical, biological, and chemical quality of waters of the United States.[1] The CWA is the primary law protecting our nation's waters and wetlands. Yet the regulatory definition of "waters of the United States," which establishes the scope of the CWA's geographic jurisdiction, has been modified and litigated many times since the CWA's inception, with four Supreme Court rulings and numerous regulatory rulemakings and guidance by successive presidential administrations in that span. In May 2023, the US Supreme Court issued an opinion in *Sackett v. Environmental Protection Agency* that interpreted "waters of the United States" as it applies to wetlands.[2] The new ruling reduces the geographic scope of CWA jurisdiction and removes federal permitting requirements for activities occurring in many aquatic features in Colorado and nationwide, particularly in the western United States where many wetlands do not directly abut a relatively permanent body of water. By rejecting the "significant nexus" test established in *Rapanos v. United States*, the *Sackett* decision likely also eliminates jurisdiction over intermittent and ephemeral streams, which make up the majority of streams in the western United States. The agencies that implement the CWA—the Environmental Protection Agency (EPA) and the US Army Corps of Engineers (Corps)—have already revised their regulatory definition of "waters of the United States" with the intent to conform to the *Sackett* ruling.[3] This article reviews the CWA's legal framework, discusses case law interpreting the scope of CWA jurisdiction and resulting regulatory responses, and explores the implications of *Sackett*.

Legal Background—Regulation of "Navigable Waters"

The scope of CWA jurisdiction refers to whether and where permits or other approvals are required under the Act. Under CWA § 402, National Pollutant Discharge Elimination System (NPDES) permits are required for discharging pollutants from point sources into "navigable waters."[4] The EPA administers the NPDES program, although states can obtain EPA approval to administer the program within their borders.[5] In Colorado, the Colorado Department of Public Health and Environment's Water Quality Control Commission (WQCC) administers CWA § 402 permitting.[6]

CWA § 404 requires permits for discharging "dredged or fill material" into "navigable waters."[7] Like § 402, states can assume administration of CWA § 404 permitting.[8] Colorado has not assumed administration of this program, so the Corps regulates CWA § 404 permitting in Colorado.

Finally, CWA § 401 states that "[a]ny applicant for a Federal license or permit to conduct any activity . . . which may result in any discharge into the navigable waters" must obtain "certification" from the state that the discharge will comply with the applicable effluent limitations, water quality standards, national standards of performance, and toxic and pretreatment standards of the CWA.[9] The WQCC is the agency responsible for issuing such certifications.[10] Often, a project that requires a federal permit (and CWA § 401 certification) also must comply with other federal laws, such as the National Environmental Policy Act.[11]

CWA §§ 401, 402, and 404 all apply when a pollutant[12] or dredge or fill material is discharged into "navigable waters." The CWA defines "navigable waters" as "the waters of the United States, including the territorial seas."[13] But the CWA does not define "waters of the United States," and the term was "decidedly not a well-known term of art" when Congress enacted the CWA in 1972.[14] Without clarity in the statute, the EPA, the Corps, and the courts were left to interpret Congress's use of that term themselves.[15] As a result, the geographic scope of CWA jurisdiction can expand or contract depending on how agencies and courts interpret the term.

Pre-*Sackett* Case Law Shaping CWA Jurisdiction

Before *Sackett*, three US Supreme Court opinions had interpreted the scope of the CWA's jurisdictional reach under the term "waters of the United States."

First, in 1985 the Court held in *United States v. Riverside Bayview Homes, Inc.*, that the Corps reasonably interpreted the CWA to include within the term "waters of the United States" wetlands that are "adjacent" to other jurisdictional waters.[16] As the Court observed, "the transition from water to solid ground is not necessarily or even typically an abrupt one," and so the Corps must necessarily determine a point where "water ends and land begins."[17] The Court stated that "it may well be that not every adjacent wetland is of great importance to the environment of adjoining bodies of water."[18] However, it was reasonable for the Corps to conclude that "in the majority of cases, adjacent wetlands have significant effects on water quality and the aquatic ecosystem," thus warranting broad jurisdiction over wetlands.[19] If a particular wetland does not have a significant effect on a jurisdictional water, the Court reasoned, then the Corps could acknowledge that by simply issuing a requested permit.[20]

In sum, the Court deferred to the Corps' judgment that the CWA extends to adjacent wetlands.[21] Important to that deference was the Court's observation that after promulgation of the Corps' regulations asserting authority over adjacent wetlands, "Congress acquiesced in the administrative construction."[22] As the Court observed, in 1977 Congress rejected a proposal to explicitly exclude wetlands from jurisdiction.[23] Furthermore, the 1977 amendments to the CWA that *were* enacted included a new subsection 404(g) that allows states to assume regulation of dredge and fill activities in certain "navigable waters . . . including wetlands adjacent thereto."[24] This enactment, the Court held, showed that Congress meant to include adjacent wetlands within the CWA's coverage.[25]

Next, in 2001 the Court decided *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers* (*SWANCC*), which addressed the "migratory bird rule"—language in the preamble to the Corps' 1986 regulations that asserted jurisdiction over waters used by protected migratory birds that fly across state lines.[26] The migratory bird rule extended to waters that were isolated and distant from other jurisdictional waters if those waters were used by migratory birds.[27]

The waters at issue in *SWANCC* were ponds created by gravel mining—that were not adjacent to any bodies of open water—at which migratory birds had been observed.[28] Reflecting on *Riverside Bayview*, the Court noted that wetlands adjacent to other "waters of the United States" have a "significant nexus" with those other jurisdictional waters.[29] The Court in *SWANCC* concluded that the CWA's text does not extend to isolated waterbodies that lack this level of connection.[30] Thus, the Court held that the CWA does not extend "to ponds that are *not* adjacent to open water."[31] Allowing the EPA and the Corps to assert jurisdiction over isolated waters would "result in a significant impingement of the States' traditional and primary power over land and water use."[32] While *Riverside Bayview* said that the word "navigable" in the CWA has "limited import," the Court in *SWANCC* clarified that the word still has "at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made."[33]

> "The fractured *Rapanos* decision led the agencies to respond with their interpretation of the proper standard to apply moving forward. In 2008, the EPA and the Corps issued a regulatory guidance that directed how the agencies would implement the CWA in light of *Rapanos*."

In 2006, the US Supreme Court issued its opinion in *Rapanos v. United States*, the last US Supreme Court case before *Sackett* that addressed the CWA's jurisdictional reach.[34] *Rapanos* considered whether wetlands adjacent to man-made ditches and drains that "eventually" emptied into traditional navigable waters fell within the scope of CWA jurisdiction.[35] The Court in *Rapanos* remanded the case for application of the proper standard, but there was no majority opinion setting out a test for determining CWA jurisdiction over wetlands.[36]

A four-justice plurality opinion authored by Justice Scalia (joined by Chief Justice Roberts and Justices Thomas and Alito) concluded that wetlands are covered by the CWA if (1) the channel to which the wetland is adjacent is a "relatively permanent body of water connected to traditional navigable waters" and (2) the wetland has a "continuous surface connection with that water, making it difficult to determine where the 'water' ends and the 'wetland' begins."[37] The plurality concluded that "waters of the United States" extends neither to "channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage or rainfall," nor to wetlands adjacent to such channels.[38]

In his solo concurrence, Justice Kennedy harkened back to *SWANCC* and concluded that the proper test for determining CWA jurisdiction over wetlands should be whether the wetland has a "significant nexus" to waters that are or could reasonably be made navigable in fact.[39] In Justice Kennedy's view, this "significant nexus" must be assessed "in terms of the [CWA's] goals and purposes" to determine whether the wetlands in question, "either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'"[40]

Rapanos Guidance

The fractured *Rapanos* decision led the agencies to respond with their interpretation of the proper standard to apply moving forward.[41] In 2008, the EPA and the Corps issued a regulatory guidance that directed how the agencies would implement the CWA in light of *Rapanos*.[42] With regard to tributaries, the guidance asserted CWA jurisdiction over tributaries to traditional navigable waters that "are relatively permanent" and "typically flow year-round or have continuous flow at least seasonally."[43] In addition, the agencies asserted jurisdiction over tributaries that, based on a fact-specific analysis, have a "significant nexus" with a traditional navigable water.[44] The "significant nexus" test would include assessing adjacent wetlands to determine whether the wetlands' hydrologic and ecologic functions significantly affect the

chemical, physical, and biological integrity of downstream traditional navigable waters.[45] If so, then the wetlands could be brought into jurisdiction with the adjacent tributary.

For wetlands, the *Rapanos* guidance asserted jurisdiction over wetlands that are adjacent to traditional navigable waters and wetlands that directly abut "relatively permanent" tributaries.[46] Similar to tributaries, the agencies also would apply a fact-specific "significant nexus" analysis to determine whether jurisdiction exists.[47] At that time, the regulations defined "adjacent" to mean "bordering, contiguous, or neighboring."[48] This definition did not require direct abutment to the other water in question; a wetland could be adjacent to a jurisdictional water even if separated by man-made dikes or barriers, natural berms, beach dunes, and the like.[49] Under the guidance, the agencies stated that they would consider a wetland "adjacent" if there is a surface or shallow subsurface connection to the jurisdictional water, or if the proximity to the jurisdictional water is "reasonably close, supporting the science-based inference that such wetlands have an ecological interconnection with jurisdictional waters."[50] The agencies would then assess whether the adjacent wetland has a "significant nexus" to the traditional navigable water, taking into consideration "similarly situated" wetlands that also are adjacent to the jurisdictional water.[51]

Pre-*Sackett* Regulatory Changes

Since 2015, the EPA and the Corps have promulgated several revisions to their regulations defining "waters of the United States."[52] Specifically, the agencies revised their regulations under the Obama administration in 2015, repealed that rule in 2019 and replaced it with a new rule in 2020 under the Trump administration, and revised the regulations yet again in January 2023 under the Biden administration (2023 Rule).[53]

The variations between these different iterations of the definition of "waters of the United States" and related litigation fall outside the scope of this article. As relevant here, in the 2023 Rule, the agencies interpreted "waters of the United States" to mean the waters considered jurisdictional under the regulations that had been in place since 1986, "with amendments to reflect the agencies' determination of the statutory limits on the scope of the 'waters of the United States'" as informed by the text of the CWA, the scientific record, Supreme Court precedent, and the agencies' technical experience and expertise.[54] Like the *Rapanos* guidance, the 2023 Rule employed both the "relatively permanent" standard embodied by the *Rapanos* plurality opinion and the "significant nexus" standard from Justice Kennedy's concurrence.[55] In other words, under the 2023 Rule, a tributary would be jurisdictional if it either has relatively permanent flow or has a significant nexus to a traditional navigable water.[56] Wetlands would be jurisdictional under the 2023 Rule if they (1) are adjacent to traditional navigable waters, (2) are adjacent to and with a continuous surface connection to a relatively permanent water, (3) are adjacent to tributaries that meet the significant nexus standard, or (4) meet the relatively permanent or significant nexus standards themselves.[57] Like past versions of the regulations, the 2023 Rule includes several long-standing exclusions from jurisdiction, including exclusions for waste treatment systems, prior converted cropland, and ditches excavated wholly in and draining only dry land and that do not carry a relatively permanent flow or water.[58] These exclusions—along with the CWA's permitting exemptions for certain dredge and fill activities[59] and the Corps' nationwide and general permit program for activities that have only minimal individual and cumulative adverse environmental effects[60]—have provided some level of predictability and streamlining for the regulated community even while the geographic scope of CWA jurisdiction has ebbed and flowed with each new regulatory definition of "waters of the United States."

The *Sackett* Opinion

The property at issue in *Sackett* was a small lot near Priest Lake in Idaho.[61] The EPA sent the Sacketts a compliance order asserting CWA jurisdiction over wetlands on their property and stating that the Sacketts' backfilling of the property to build a home violated the CWA.[62] The EPA found that the wetlands on the Sacketts' lot were adjacent to an unnamed tributary on the other side of a road, which fed into a creek that then fed into Priest Lake, a traditionally navigable intrastate lake.[63] The EPA found that the wetlands on the Sacketts' property had a significant nexus to Priest Lake when considered together with the Kalispell Bay Fen, a nearby wetland complex that the EPA considered "similarly situated."[64]

The district court affirmed the EPA's assertion of jurisdiction over the waters on the Sacketts' property.[65] The Ninth Circuit affirmed the district court's decision, holding that the wetlands were adjacent to a jurisdictional tributary (even though a road separated them on the surface) and met the significant nexus standard because they significantly affected the integrity of Priest Lake when considered in combination with other similarly situated wetlands (the Kalispell Bay Fen).[66]

The issue in the *Sackett* case was whether the Ninth Circuit used the proper test for determining whether wetlands are "waters of the United States" that are subject to CWA jurisdiction.[67] The Supreme Court's unanimous judgment was that the wetlands on the Sacketts' property did not constitute "waters of the United States" under the CWA (although a minority of the justices did not subscribe to the majority opinion's test for assessing when wetlands are covered by the CWA).[68] In the majority opinion authored by Justice Alito, the Court adopted the plurality opinion in *Rapanos* and held that the CWA covers "only those wetlands that are 'as a practical matter indistinguishable from waters of the United States.'"[69]

Thus, under *Sackett*, to have jurisdiction over wetlands, the agencies must establish two things: first, that the body of water adjacent to the wetland constitutes "'waters of the United States,' (i.e., a relatively permanent body of water connected to traditional interstate navigable waters); and second, that the wetland has a continuous surface connection with that water, making it difficult to determine where the 'water' ends and the 'wetland' begins.'"[70] The Court reasoned that the CWA's use of the plural term "waters" and reference to "navigable" waters showed that Congress was focused on bodies of open water "like rivers, lakes, and oceans."[71] The statutory context, particularly CWA § 404(g)(1), shows that some wetlands

qualify as "waters of the United States" as well, but only if they qualify as "waters of the United States" themselves or are indistinguishable from a jurisdictional water such that they can properly be considered "adjacent" to or "*part of*" the jurisdictional water.[72]

The EPA argued that the Court should defer to the agencies' interpretation in the 2023 Rule that also extended jurisdiction over wetlands that met the "significant nexus" test or were separated from jurisdictional waters by dry land, but the Court declined to do so.[73] As the Court explained, the agency's interpretation was "inconsistent with the text and structure of the CWA."[74] Regulation of land and water traditionally was a power wielded by the states, and so Congress must "enact exceedingly clear language if it wishes to significantly alter the balance between federal and state power."[75] In this instance, the Court held, the CWA does not include a "clear statement" that it impinges state authority to the extent that the EPA asserted it does.[76] The Court also was concerned that the EPA's expansive interpretation that relies on a "significant" nexus and assesses "similarly situated" waters would raise "serious vagueness concerns in light of the CWA's criminal penalties."[77]

Finally, the EPA also noted the ecological consequences of a narrow definition of "adjacent wetlands," but the Court dismissed these considerations and stated that it "cannot redraw the Act's allocation of authority" between the states and the federal government, and that the CWA anticipated a "partnership" between the two levels of government.[78] The Court noted that states "can and will continue to exercise their primary authority to combat water pollution by regulating land and water use."[79]

A four-justice minority opinion authored by Justice Kavanaugh and joined by Justices Kagan, Sotomayor, and Jackson agreed with the Court's decision not to adopt the "significant nexus" test, as well as its judgment that the wetlands on the Sacketts' property were not jurisdictional. However, Justice Kavanaugh argued that "adjacent" should be read to include wetlands separated from a jurisdictional water by a "manmade dike or barrier, natural river berm, beach dune or the like," not just wetlands actually touching or adjoining the covered water, as the Court held.[80]

Implications of *Sackett*

The *Sackett* case will reduce the scope of CWA jurisdiction over wetlands and potentially other waters that are subject to federal permitting requirements under the CWA. The EPA and the Corps published a new final rule revising their regulations[81] to conform to *Sackett* on September 8, 2023 (post-*Sackett* revisions).[82] The post-*Sackett* revisions took immediate effect without a public comment period.[83] These revisions removed the significant nexus test for both wetlands and tributaries.[84] They also redefined "adjacent" to remove from jurisdiction waters that are separated from other jurisdictional waters by manmade dikes or barriers, natural river berms, beach dunes, and the like.[85] A water is "adjacent," and therefore jurisdictional, only if it has a continuous surface connection to another jurisdictional water.[86] Finally, the post-*Sackett* revisions also removed "interstate wetlands" from the regulations because the agencies concluded that *Sackett* only considered interstate rivers, lakes, and other "open waters" to be jurisdictional.[87]

Thus, only wetlands directly "abutting" "waters of the United States" are considered jurisdictional. This means that wetlands within floodplains, wetland swales that connect to "waters of the United States" but do not directly abut the stream or body of water, and other wetlands that were previously considered jurisdictional based on a significant nexus to covered "waters of the United States" are no longer subject to the CWA. Ephemeral and potentially some intermittent drainages might also now be outside the CWA's jurisdiction because without the significant nexus test they likely do not satisfy the "relatively permanent" requirement—that is, they may not be considered "permanent, standing, or continuously flowing bodies of water."[88] Jurisdiction with respect to streams is uncertain because the regulations do not define "relatively permanent" or set out criteria for determining whether or how seasonal streams qualify as "relatively permanent." This lack of clarity could create ambiguity for regulated entities about whether their project requires a federal permit (because it is in "relatively permanent" waters) or not. These changes to CWA jurisdiction likely will have significant implications for the western United States, where a large majority of streams are intermittent or ephemeral. In a 2013 assessment, the EPA, US Geological Survey, and US Forest Service concluded that 81% (215,509 miles) of Colorado's streams are intermittent or ephemeral.[89]

It also is unclear how the *Sackett* opinion could affect jurisdiction over ditches. Many ditches in the western United States have been considered jurisdictional under *Rapanos* due to their hydrologic connection to a "water of the United States." However, if ditches are not considered "relatively permanent waters" then they may no longer be considered jurisdictional under *Sackett*.

The *Sackett* ruling could vastly reduce the permitting and mitigation requirements for many existing and future projects, depending on the type and location of the aquatic resources present. Projects that only involve the discharge of dredged or fill material in nonadjacent wetlands or intermittent or ephemeral streams likely will no longer require a federal CWA permit. A project that impacts nonadjacent wetlands or intermittent or ephemeral streams and *also* jurisdictional waters will still require a CWA permit but probably will not be required to implement wetland or stream mitigation to address the impacts to the non-jurisdictional wetlands and streams. Therefore, entities previously subject to permitting and mitigation requirements may find project development less costly and time-consuming.

Jurisdictional Determinations

After *Sackett* was released, all applications for approved jurisdictional determinations (except those for dryland or excluded waters) were put on hold while the EPA and the Corps developed the post-*Sackett* revisions. The Corps now has a significant backlog of existing jurisdictional determination requests and has received many new requests for projects seeking to eliminate jurisdiction based on *Sackett*. There is no statute or regulation that mandates a time frame to review jurisdictional determination requests, so decisions from the Corps are likely

to take several months. Project entities should consider this when evaluating schedules and permitting strategies.

State-Level Response

As the Court noted in *Sackett*, the CWA allocates some authority over water pollution to the federal government, but it does not supplant the states' traditional authority over land and water use.[90] The *Sackett* case may push some states to consider creating their own wetland programs to protect wetlands and streams no longer under CWA jurisdiction. In Colorado, for example, the WQCC has enacted an implementation policy to address the protection of "Sackett Gap Waters"—state waters that are no longer federally jurisdictional after *Sackett*.[91] Under the policy, the Water Quality Control Division (Division) will exercise enforcement discretion for discharges of dredged or fill material into state waters that are no longer subject to CWA § 404 permitting but that the Division considers unlawful under the Colorado Water Quality Control Act.[92] The implementation policy requires notification to the Division if a project would have required a CWA § 404 permit but no longer does as a result of *Sackett*.[93] The extent and timing of notification to the Division depends on the level of CWA § 404 permitting that would have been previously required.[94] The policy also requires projects to stay under the mitigation thresholds required by nationwide permits (0.03 acre for streambed impacts and 0.10 acre for wetland impacts) in order to qualify for the enforcement discretion, which could cause significant impacts to projects if they were previously applying for a Corps permit over those thresholds and no longer are under CWA jurisdiction.

The WQCC intends for the implementation policy to be in effect "until a state regulatory program can be developed."[95] The Division currently is considering whether to create a statewide wetland program to protect those aquatic resources no longer subject to CWA jurisdiction. The state held stakeholder meetings to discuss the *Sackett* ruling, its implications, and potential state programming in July 2023. The Division will be using the discussion and comments from the stakeholder meetings to inform legislation to enact and fund a state dredge and fill permit program.

Conclusion

The saga over the definition of "waters of the United States" continues, with the latest *Sackett* ruling and the agencies' post-*Sackett* revisions likely to significantly reduce the scope of CWA jurisdiction over wetlands and intermittent and ephemeral drainages nationwide. These reductions in federal jurisdiction will likely cause many states, including Colorado, to evaluate creating their own dredge and fill permitting programs to protect aquatic resources that are no longer subject to CWA jurisdiction. As a result, any federal permitting burden lessened after *Sackett* may be replaced by the need to comply with new and untested state permitting programs. CL


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NOTES

1. Federal Water Pollution Control Act Amendments of 1972 (Clean Water Act), Pub. L. No. 92-500, 86 Stat. 816 (codified at 33 USC §§ 1251 et seq.).
2. *Sackett v. EPA*, 143 S.Ct. 1322 (2023).
3. *Revised Definition of "Waters of the United States"; Conforming*, 88 Fed. Reg. 61964 (Sept. 8, 2023).
4. 33 USC §§ 1342(a)(1), 1362(12)(A).
5. *See* 33 USC § 1342(b).
6. *See* 5 CCR 1002-61.3(1)(a).
7. 33 USC § 1344.
8. 33 USC § 1344(g).
9. 33 USC § 1341(a)(1).
10. *See* 5 CCR 1002-82.
11. 42 USC § 4332(2)(C).
12. "Pollutant" means "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt, and industrial, municipal, and agricultural waste discharged into water." 33 USC § 1362(6).
13. 33 USC § 1362(7).
14. *Sackett*, 143 S.Ct. at 1336.
15. *See id.* at 1332.
16. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 139 (1985).
17. *Id.* at 132.
18. *Id.* at 135 n.9.
19. *Id.*
20. *Id.*
21. *See id.* at 131.
22. *Id.* at 136.
23. *Id.* at 136–37.
24. *Id.* at 138 (quoting 33 USC § 1344(g)(1)).
25. *Id.* at 139.
26. *SWANCC*, 531 U.S. 159, 164 (2001); *id.* at 184 n.12 (Stevens, J. dissenting); *Final Rule for*

Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. 41206, 41217 (Nov. 13, 1986).

27. *See SWANCC*, 531 U.S. at 171.

28. *Id.* at 164.

29. *Id.* at 167 (quoting *Riverside Bayview*, 474 U.S. at 134).

30. *See id.* at 168.

31. *Id.* at 168.

32. *Id.* at 174.

33. *Id.* at 172.

34. *Rapanos v. United States*, 547 U.S. 715 (2006) (plurality opinion). The case was consolidated with *Carabell v. US Army Corps of Engineers*, and the Court's decision addressed both cases.

35. *Id.* at 729–30.

36. *See id.* at 758 (Roberts, C.J., concurring).

37. *Id.* at 742 (plurality opinion).

38. *Id.*

39. *Id.* at 759 (Kennedy, J., concurring in the judgment).

40. *Id.* at 779–80 (citing 33 USC § 1251(a)).

41. *See id.* at 758 (Roberts, C.J., concurring) ("Lower courts and regulated entities will now have to feel their way on a case-by-case basis.").

42. *Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in* Rapanos v. United States & Carabell v. United States (Rapanos Guidance) (Dec. 2, 2008), https://www.epa.gov/sites/default/files/2016-02/documents/cwa_jurisdiction_following_rapanos120208.pdf.

43. *Id.* at 1.

44. *Id.*

45. *Id.* at 1, 8–12.

46. *Id.* at 1.

47. *Id.*

48. *Id.* at 5 (citing 33 CFR § 328.3(c)).

49. *Id.*

50. *Id.* at 5–6.

51. *Id.* at 10.

52. *See Sackett*, 143 S.Ct. at 1335.

53. *See id.*

54. *Revised Definition of "Waters of the United States*," 88 Fed. Reg. 3004, 3019 (Jan. 18, 2023).

55. *See id.*

56. *Id.*

57. *Id.* at 3019–20.

58. *Id.* at 3066–67.

59. 33 USC § 1344(f).

60. 33 USC § 1344(e).

61. *Sackett*, 143 S.Ct. at 1331.

62. *Id.*

63. *Id.* at 1331–32.

64. *Id.* at 1332.

65. *Id.*

66. *Sackett v. EPA*, 8 F.4th 1075, 1092–93 (9th Cir. 2021), *rev'd*, 143 S.Ct. 1322.

67. *Sackett*, 143 S.Ct. at 1332.

68. *Id.* at 1344 (five-justice majority opinion); *id.* at 1362 (Kavanaugh, J., joined by Sotomayor, Kagan, and Jackson, JJ., concurring in the judgment).

69. *Id.* at 1341 (majority opinion) (quoting *Rapanos*, 547 U.S. at 755 (plurality opinion)).

70. *Id.* (quoting *Rapanos*, 547 U.S. at 742 (plurality opinion)).

71. *Id.* at 1336–37.

72. *Id.* at 1338–40.

73. *Id.* at 1341.

74. *Id.*

75. *Id.* (quoting *US Forest Serv. v. Cowpasture River Pres. Ass'n*, 590 U.S. ___, 140 S. Ct. 1837, 1849–50 (2020)).

76. *Id.* at 1342.

77. *Id.*

78. *Id.* at 1343–44.

79. *Id.* at 1344.

80. *Id.* at 1362 (Kavanaugh, J., concurring in the judgment).

81. Notably, the 2023 Rule was finalized after oral argument occurred in *Sackett* (on October 3, 2022) but before the Supreme Court delivered its opinion (May 25, 2023). *See* Docket, Case No. 21-454, https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/21-454.html.

82. *Revised Definition of "Waters of the United States"; Conforming, supra* note 3 at 61964.

83. *Id.* at 61964, 61965.

84. *Id.* at 61966.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Sackett*, 143 S.Ct. at 1336–37.

89. INDUS Corp., *Streams and Waterbodies in Colorado* (Oct. 2013), https://19january2021snapshot.epa.gov/sites/static/files/2014-09/documents/colorado.pdf.

90. *See Sackett*, 143 S.Ct. at 1343–44.

91. WQCC, *Implementation Policy No. CW-17* at 5 (July 6, 2023), https://drive.google.com/file/d/1EyAEk-ABtIIC4mV66CR5KwUrkDybQOrH/view.

92. *Id.* at 3.

93. *Id.* at 8 § 2.

94. *Id.*

95. *Id.* at 3.