NOTES

SACKETT V. EPA AND THE FUTURE OF WETLAND PROTECTIONS

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INTRODUCTION

In what has now been coined the most important environmental ruling of this generation, the Supreme Court stripped Clean Water Act (CWA) protection from tens of millions of acres of wetlands, simply by altering its understanding of the term "adjacent."[1] After fifteen years of litigation in *Sackett v. EPA* and decades of confusion surrounding the jurisdictional reach of the CWA, the Court narrowed the scope of the Act and its accompanying protections for wetlands "adjacent" to "the waters of the United States."[2]

Before *Sackett*, the two tests in Supreme Court jurisprudence to determine wetland adjacency were the "significant nexus" test[3] and the "continuous surface connection" test.[4] Dialogue surrounding the tests suggests that one is too broad, while the other is too narrow.[5] On the one hand, practically any wetland in the United States could be regulated by the CWA under the "significant nexus" test.[6] On the other hand, the "continuous surface connection" test greatly reduces

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1. *See* Sackett v. EPA, 598 U.S. 651, 676 (2023) ("[B]ecause the adjacent wetlands in § 1344(g)(1) are 'includ[ed]' within 'the waters of the United States,' these wetlands must qualify as 'waters of the United States' in their own right."); Jeff Turrentine, *What the Supreme Court's* Sackett v. EPA *Ruling Means for Wetlands and Other Waterways*, NAT. RES. DEF. COUNCIL (June 5, 2023), https://www.nrdc.org/stories/what-you-need-know-about-sackett-v-epa [https://perma.cc/PZ5T-XBYH]; Albert C. Lin, *The Supreme Court Just Shriveled Federal Protection for Wetlands, Leaving Many of These Valuable Ecosystems at Risk*, THE CONVERSATION (May 26, 2023, 8:27 AM), https://theconversation.com/the-supreme-court-just-shriveled-federal-protection-for-wetlands-leaving-many-of-these-valuable-ecosystems-at-risk-205896/ [https://perma.cc/FN8B-J9ZR].

2. *See* 598 U.S. at 684 ("In sum, we hold that the CWA extends to only those 'wetlands with a continuous surface connection to bodies that are "waters of the United States" in their own right,' so that they are 'indistinguishable' from those waters." (quoting Rapanos v. United States, 547 U.S. 715, 742, 755 (2006) (plurality opinion) (emphasis deleted))).

3. *See infra* notes 34-35 and accompanying text.

4. *See infra* notes 36-39 and accompanying text.

5. This conversation largely arises from Justice Kavanaugh's concurrence in *Sackett v. EPA*. Kavanaugh "agree[d] with the Court's decision not to adopt the 'significant nexus' test," which could indicate that he believed that test was too broad in its prior decisions. *Sackett*, 598 U.S. at 715-16 (Kavanaugh, J., concurring). However, Kavanaugh simultaneously disapproved of the majority's "continuous surface connection" test because it "narrow[ed] the Clean Water Act's coverage of 'adjacent' wetlands to mean only 'adjoining' wetlands." *Id.* at 716. The explicit use of the term "narrow" makes apparent his opinion of the "continuous surface connection" test. *See id.*

6. *See infra* note 45 and accompanying text.

the CWA's coverage of wetlands, which leaves the state of wetland regulation in disarray,[7] ignores both Congress's intention in extending CWA jurisdiction to wetlands in the first place and the agencies' interpretation of the CWA for decades,[8] and disregards the actual impacts that wetland systems reap on navigable waters.[9]

This Note will analyze prior CWA jurisprudence to formulate a test that remains steadfast to Congress's purpose in originally including "adjacent" wetlands and acknowledges the scientific understanding of wetlands' relation to and impact on waters. Part I will provide an overview of the CWA legislation and its application in courts. Part II will specifically analyze the *Sackett v. EPA* decision in order to find a balance between the "significant nexus" and "continuous surface connection" tests. Part III will address criticisms surrounding the overreach of the CWA. Part IV will conversely address criticism concerning the Court's decision to constrain the outer reaches of the CWA. Finally, Part V will set forth a new test, developed from Justice Kavanaugh's concurrence in *Sackett*, that the Supreme Court should apply when analyzing whether any given wetland will be covered by the CWA.

I. OVERVIEW OF CLEAN WATER ACT LEGISLATION AND JURISPRUDENCE

Congress enacted the CWA to address and eliminate widespread pollution of America's waters.[10] Prior to the CWA's passage, a number of federal laws attempted to improve overall water quality, but these efforts were unsuccessful.[11] Rivers, lakes, and creeks

7. *See* Richard J. Lazarus, *Judicial Destruction of the Clean Water Act:* Sackett v. EPA, 2023 U. CHI. L. REV. ONLINE *1, *1 (2023), https://lawreview.uchicago.edu/judicial-destruction-clean-water-act-sackett-v-epa [https://perma.cc/9WKZ-7HN9] (noting that the *Sackett* decision decreased the CWA's jurisdiction over wetlands by at least fifty percent).

8. *See Sackett*, 598 U.S. at 716 (Kavanaugh, J., concurring) ("In my view, the Court's 'continuous surface connection' test departs from the statutory text, from 45 years of consistent agency practice, and from this Court's precedents.").

9. *See infra* notes 97-101 and accompanying text.

10. *See generally* Clean Water Act, Pub. L. No. 95-217, 91 Stat. 1566 (1977) (current version at 33 U.S.C. § 1251).

11. *See History of the Clean Water Act*, EPA, https://www.epa.gov/laws-regulations/history-clean-water-act [https://perma.cc/PE87-MVF4]; *see also Sackett*, 598 U.S. at 660 (explaining the regulatory framework of the Federal Water Pollution Control Act of 1948, which was ultimately replaced by the CWA).

remained unfit for recreational activities.[12] High contamination levels persisted and damaged fish populations, which in turn negatively impacted economic opportunities.[13] Hazardous chemicals continued to infiltrate the drinking water supply, severely impacting human health and safety.[14] Finally, public concern reached an all-time high in 1969 when the Cuyahoga River caught on fire due to industrial pollution.[15]

A. The Clean Water Act of 1972

To remedy this water crisis, Congress fundamentally changed existing water pollution legislation and created the Clean Water Act of 1972.[16] Up to this point, the regulation of water pollution was almost exclusively a matter of state law.[17] Federal regulation was largely limited to addressing any potential impacts that navigable waters could have on commerce; it did not address water quality or non-commercial uses of water.[18] Congress completely upended that existing regulatory scheme with the CWA, perhaps acknowledging the failure of the states to protect the nation's waters, by giving the federal government an added power: the ability to regulate water pollution.[19] Congress's explicit goal for this federal regulation was to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[20]

Since this expansion, the provisions of the CWA have been interpreted and applied by the Environmental Protection Agency (EPA) and the Army Corps of Engineers (Corps).[21] The legislation

12. *See* ROBERT W. ADLER, JESSICA C. LANDMAN & DIANE M. CAMERON, THE CLEAN WATER ACT 20 YEARS LATER 5 (1993).

13. *See id.* at 5-6.

14. *See id.* at 5.

15. *Id.*; EPA, *supra* note 11.

16. *See Sackett*, 598 U.S. at 711 (Kagan, J., concurring) (discussing how Congress enacting the CWA was a "total restructuring and complete rewriting" of the existing law (quoting Milwaukee v. Illinois, 451 U.S. 304, 317 (1981))).

17. *Id.* at 659 (majority opinion).

18. The Federal Water Pollution Control Act of 1948 allowed for some federal intervention in water pollution law, but federal action could not be taken without the consent of the involved state. *See id.* at 659-60.

19. *See* 33 U.S.C. § 1319(a)(1).

20. 33 U.S.C. § 1251(a).

21. *See id.* § 1251(d); *see also Sackett*, 598 U.S. at 661.

was created and defined to be broad in order to allow the EPA and the Corps to extend their jurisdiction as far as possible under the Commerce Clause.[22] The CWA specifically prohibits "the discharge of any pollutant" into "navigable waters."[23] To that end, the EPA and Corps offered a broad definition of "navigable waters" that encompassed "the waters of the United States."[24] The 1977 Amendments to the CWA explicitly required that its protections extend to "adjacent wetlands," and the agencies' expansive view of "navigable waters" also carried over into their interpretation of adjacent wetlands: a wetland was "adjacent" and therefore covered under the CWA if it was "bordering, contiguous, or neighboring" a covered water.[25]

B. Application of the Clean Water Act in the Court

Because of the CWA's broad scope, it has always been up to the courts to determine, in a case-by-case analysis, whether adjacency was established and therefore whether a wetland could be offered protection. The Court first construed the meaning of "the waters of the United States" and their connection to wetlands in *United States v. Riverside Bayview Homes, Inc.*[26] The Court reasoned that, because there is no clear demarcation between water and land, the murky in-between of wetlands could be protected under the CWA even though the features defy "traditional notions of 'waters.'"[27] The Court deferred to the Corps's definition of adjacency, since "the

22. *See* Lazarus, *supra* note 7, at *12 ("[C]ongressional reports explicitly stat[e] that the purpose ... was to expand the Clean Water Act's geographic reach through the exercise of the full scope of congressional Commerce Clause authority."); *see also Sackett*, 598 U.S. at 711 (Kagan, J., concurring) (explaining that Congress "wrote the statute it meant to" when determining the scope of the CWA by making the Act broad enough to achieve their goals).

23. 33 U.S.C. § 1311(a), (f).

24. 33 U.S.C. § 1362(7).

25. 33 C.F.R. § 328.3(a)(4), (c)(2); James M. McElfish, Jr., *What Comes Next for Clean Water? Six Consequences of* Sackett v. EPA, ENV'T L. INST. (May 26, 2023), https://www.eli.org/vibrant-environment-blog/what-comes-next-clean-water-six-consequences-sackett-v-epa [https://perma.cc/78FP-4UTM] (explaining that the "adjacency" requirement for wetland protections could result in regulation of wetlands that had "no continuous surface connection to open waters"); *see also Sackett*, 598 U.S. at 711 (Kagan, J., concurring) ("Vital to the Clean Water Act's project is the protection of wetlands.").

26. *See generally* 474 U.S. 121 (1985).

27. *See id.* at 132-33.

transition from water to solid ground is not necessarily or even typically an abrupt one."[28]

However, the Court found that the agencies' interpretations went too far when they issued the "Migratory Bird Rule," which extended protections under the CWA to any waters or wetlands that provided habitats for migratory birds or endangered species.[29] Because nearly any water could fall within the classification, the Court rejected the Migratory Bird Rule in *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers*.[30] An isolated pond nowhere near traditionally navigable water could not be covered under the CWA.[31] The case did not specifically address wetlands, but the Corps and EPA continued to provide protection for any wetland or water that was not "nonnavigable, isolated [or] intrastate."[32]

Again, the agencies' broad analysis of adjacency proved to be too far-reaching in *Rapanos v. United States*. While no Justice authored a majority opinion, two significant tests came from the decision.[33] First, the "significant nexus" test was formulated by Justice Kennedy in *Rapanos*:

> [The] jurisdiction over wetlands depends upon the existence of a significant nexus between the wetlands in question and navigable waters in the traditional sense.... Accordingly, wetlands possess the requisite nexus, and thus come within the statutory phrase "navigable waters," if the wetlands, either

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28. *See id.* at 131-32 (highlighting that an agency's interpretation and application of a statute—here, the EPA's construction of the CWA—is ordinarily entitled to deference).

29. *See* Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs (*SWANCC*), 531 U.S. 159, 164 (2001). Here, the Court walked back the deference that was afforded to the EPA in *Riverside Bayview*: "Although we have recognized congressional acquiescence to administrative interpretations of a statute in some situations, we have done so with extreme care." *Id.* at 169-70.

30. *See id.* at 171-72, 174.

31. *See id.* at 171-72. When analyzing the case under precedent, the Court stressed that "[i]t was the significant nexus between the wetlands and 'navigable waters' that informed our reading of the CWA in *Riverside Bayview*." *Id.* at 167.

32. *See id.* at 170-71 ("Beyond Congress's desire to regulate wetlands adjacent to 'navigable waters,' respondents point us to no persuasive evidence that the House bill was proposed in response to the Corps' claim of jurisdiction over nonnavigable, isolated, intrastate waters or that its failure indicated congressional acquiescence to such jurisdiction."); Sackett v. EPA, 598 U.S. 651, 666 (2023) (highlighting how the agencies minimized the *SWANCC* decision, which resulted in a system of vague rules based on case-by-case analysis).

33. *See generally* Rapanos v. United States, 547 U.S. 715 (2006).

> 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."[34]

This test seems to acknowledge both the Court's previous deference to Congress's interpretation of the term "adjacent" and the scientific understanding of the impact of wetlands on water systems.[35]

Second, the "continuous surface connection" test, which was developed by Justice Scalia in the plurality opinion, was mentioned for the first time in *Rapanos*: "*only* those wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right" are covered by the CWA.[36] Wetlands separated by some feature "do not implicate the boundary-drawing problem of *Riverside Bayview*, and thus lack the necessary connection to covered waters" required under the CWA.[37] There can be no clear demarcation, and therefore any separation between a wetland and water would strip the wetland of its protected status.[38] This test seems to address an overreach by the EPA and the Corps in their CWA jurisdiction, specifically that the loose term "adjacency" could support even a tenuous connection between wetlands and water.[39]

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34. *Id.* at 779-80 (Kennedy, J., concurring).

35. *See id.* Justice Kennedy, in formulating the "significant nexus" test, addressed Congress' goal in enacting the CWA and additionally in extending its protections to wetlands:

> The required nexus must be assessed in terms of the statute's goals and purposes. Congress enacted the law to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. § 1251(a), and it pursued that objective by restricting dumping and filling in "navigable waters," §§ 1311(a), 1362(12). With respect to wetlands, the rationale for Clean Water Act regulation is, as the Corps has recognized, that wetlands can perform critical functions related to the integrity of other waters—functions such as pollutant trapping, flood control, and runoff storage.

Id. at 779.

36. *See id.* at 742 (plurality opinion). The "continuous surface connection" test is broken down into two steps: those arguing that wetlands are protected under the CWA must establish (1) "that the adjacent channel [body of water] contains a 'wate[r] of the United States,'" and (2) "that the wetland has a continuous surface connection with that water, making it difficult to determine where the 'water' ends and the 'wetland' begins." *See id.* (alteration in original).

37. *Id.*; *see supra* notes 27-28 and accompanying text.

38. *See Rapanos*, 547 U.S. at 742 (plurality opinion).

39. The Court explains that the agencies' interpretation and application of the CWA "stretches the outer limits" of Commerce Clause power and therefore "raises difficult

C. The Broad Expanses of the "Significant Nexus" Test

Initially, because there was no majority in *Rapanos*, there was uncertainty in lower courts surrounding the CWA's protection of wetlands.[40] However, later cases determined that the "significant nexus" test provided the controlling rule of law.[41] The EPA and Corps continued to assert jurisdiction over wetlands "adjacent" to non-navigable waterways so long as they were connected to the body of water through some significant nexus.[42] To determine the existence of a significant nexus, agency officials were instructed to consider a "lengthy list of hydrological and ecological factors."[43]

The CWA succeeded in its original goal of eliminating widespread pollution and simultaneously protecting waters from future pollution.[44] However, jurisdiction under the CWA encompassed 270-to-300 million acres of wetlands and most bodies of water across the country with the application of the "significant nexus" test.[45] In order to develop land that is covered under the CWA, a landowner must obtain a permit to discharge dredged or fill material.[46] This

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questions about the ultimate scope of that power." *See id.* at 738. The Court draws attention to an impingement of states' rights due to the expansive reach of the CWA. *See id.* at 737 ("But the expansive theory advanced by the Corps, rather than 'preserv[ing] the primary rights and responsibilities of the States,' would have brought virtually all 'plan[ning of] the development and use ... of land and water resources' by the States under federal control.") (alteration in original).

40. *See* Sackett v. EPA, 598 U.S. 651, 667-68 (2023) (discussing the agencies' guidance and their "flurry of rulemaking" leading up to Sackett).

41. United States v. Gerke Excavating, Inc., 464 F.3d 723, 724 (7th Cir. 2006) ("When a majority of the Supreme Court agrees only on the outcome of a case and not on the ground for that outcome, lower court judges are to follow the narrowest ground to which a majority of the Justices would have assented if forced to choose." (citing Marks v. United States, 430 U.S. 188, 193 (1977))). In *Gerke*, the Court applied that rule to conclude that Justice Kennedy's "significant nexus" test governs on wetland adjacency questions under the CWA. *See id.* at 724-25. For further application of the test as the controlling rule of law, see N. Cal. River Watch v. City of Healdsburg, 496 F.3d 993, 999 (9th Cir. 2007).

42. *See Sackett*, 598 U.S. at 667.

43. *Id.*

44. A Proclamation on the 50th Anniversary of the Clean Water Act, THE WHITE HOUSE (Oct. 17, 2022), https://www.whitehouse.gov/briefing-room/presidential-actions/2022/10/17/a-proclamation-on-the-50th-anniversary-of-the-clean-water-act/ [https://perma.cc/UWE4-XU38] (explaining that waters are "dramatically cleaner" because of the CWA).

45. *See Sackett*, 598 U.S. at 666 (citing Rapanos v. United States, 547 U.S. 715, 722 (2006) (plurality opinion)).

46. *See* 33 U.S.C. § 1344(a).

means that, on the front end, the EPA or Corps could approve activity that would otherwise be unlawful, such as allowing construction on adjacent wetlands.[47] The Corps specifically controls permits for the discharge of dredged or fill material into covered waters, while the EPA polices any violations that occur after the fact.[48] The practical effect of the agencies' expansive definition of "adjacency" was that permits would be required for wetlands that were actually separated from bodies of water by physical barriers.[49] Because of this physical separation from waters—a separation that could extend a considerable distance—a landowner could face difficulty in determining whether a wetland was protected.

II. *SACKETT V. EPA* REJECTS THE "SIGNIFICANT NEXUS" TEST

This difficulty—determining whether a parcel of land could be subject to CWA regulation—came to a head in *Sackett v. EPA*. In 2004, Michael and Chantell Sackett purchased property in Idaho with the intention of later building a home on that land.[50] The Sacketts then began backfilling their property with dirt and rocks to prepare for construction.[51]

A. Legal Fight Between the Sacketts and the Agencies

Much to the Sacketts' surprise, backfilling their property violated the broad reaches of the CWA: the EPA sent the Sacketts a compliance order informing them that their property contained protected wetlands and that backfilling the land was therefore in violation of the CWA.[52] The agency further demanded that the two

47. *See Sackett*, 598 U.S. at 661 (noting that, while an individual has the right to apply for a permit, the process of obtaining one is lengthy and costly, and the possibility of actually acquiring a permit is never guaranteed).

48. 33 U.S.C. § 1344(a); 33 U.S.C. § 1319(a).

49. *See Sackett*, 598 U.S. at 669 (highlighting that property owners often do not know whether their property contains a protected water or wetland).

50. *Id.* at 662.

51. *Id.* Had the Sacketts known that their property contained protected wetlands, they could have applied for a permit from the Corps before starting to backfill the property. *See supra* notes 47-49 and accompanying text.

52. *See Sackett*, 598 U.S. at 662. The EPA was doling out punishment for the violation in this case because the Sacketts did not apply for a permit prior to construction—the Sacketts

"undertake activities to restore the Site" immediately if they wanted to avoid penalties of over forty thousand dollars a day.[53]

The wetlands on the Sacketts' property were covered by the CWA, according to the EPA, due to their adjacency to a tributary.[54] That tributary was separated from the property by a thirty-foot road and "[fed] into a non-navigable creek, which, in turn, [fed] into Priest Lake, an intrastate body of water that the EPA designated as traditionally navigable."[55] The only water covered by the CWA was Priest Lake, so it was the wetlands' proximity to Priest Lake that ultimately resulted in their protected status.[56] The Sacketts took issue with this designation and filed suit under the Administrative Procedure Act, arguing that the EPA lacked jurisdiction because these wetlands were not "waters of the United States."[57] The Sacketts, in so doing, questioned the reasoning behind the "continuous surface connection" test—that protected wetlands must be connected to a protected "water[ ] of the United States."[58]

This prompted years of litigation between the Sacketts and the EPA. The District Court initially dismissed the Sacketts' suit because of formalities involving the Administrative Procedure Act.[59] That decision made its way up to the Supreme Court—the first time the Court heard the case—and was subsequently reversed and remanded to the district court.[60] This time around, the merits of the case were finally addressed after seven years of proceedings. Both the District Court and the Ninth Circuit, in considering the

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were answering for their violation after the fact. *See supra* note 49.

53. *Sackett*, 598 U.S. at 662 (quoting Sackett v. EPA, 566 U.S. 120, 125 (2012)); *see also infra* notes 90-91 and accompanying text.

54. *Sackett*, 598 U.S. at 662.

55. *Id.* at 662-63.

56. *See id.* Since the test still requires the existence of a significant nexus to "navigable waters in the traditional sense," it is only the proximity to Priest Lake that could justify protection of the wetlands on the Sacketts' property. Rapanos v. United States, 547 U.S. 715, 779 (2006) (Kennedy, J., concurring).

57. *Sackett*, 598 U.S. at 663.

58. *See id.*; *see also Rapanos*, 547 U.S. at 742 (plurality opinion).

59. Sackett v. EPA, No. 08-cv-185-N-EJL, 2008 WL 3286801, at *2-3 (D. Idaho Aug. 7, 2008) (finding that a compliance order was not final agency action and therefore holding that the Court did not have jurisdiction to hear the case).

60. Sackett v. EPA, 566 U.S. 120, 131 (2012) (explaining that the compliance order was final agency action for which there was no adequate remedy other than review under the Administrative Procedure Act).

Sacketts' claim about wetland protections, found in favor of the EPA.[61] In so holding, the courts used the "significant nexus" test to determine that the wetlands on the Sackett's lot did have a significant nexus to "waters of the United States" and therefore could be protected as "adjacent" wetlands under the CWA.[62] After these back-to-back losses, the Sacketts again found themselves in front of the Supreme Court.

B. The Sacketts Succeed in the Supreme Court

Finally, the Supreme Court addressed the merits of the Sacketts' case: whether the wetlands on their property could be subject to the CWA. Instead of deferring to the lower courts' applications of the "significant nexus" test and the EPA's interpretation of their wetland protections, the Court sided with the Sacketts and applied the "continuous surface connection" test.[63] The majority opinion, written by Justice Alito, constrained the previous definition of "waters" under the CWA, excluding those which exist intermittently or experience seasonal change, and instead offered coverage to "only those relatively permanent, standing, or continuously flowing bodies of water."[64] Additionally, the Court limited the coverage of wetlands under the CWA, deciding that, in order to be protected, "adjacent wetlands" must "qualify as 'waters of the United States' in their own right."[65] In order to meet this standard, a wetland must be indistinguishable from—physically touching—the water, so any barrier between wetlands and covered water such as a beach dune or man-made river dike will effectively preclude that wetland from receiving

61. *See* Sackett v. EPA, 8 F.4th 1075, 1093 (9th Cir. 2021); Sackett v. EPA, No. 2:08-cv-00185-EJL, 2019 WL 13026870, at *12 (D. Idaho Mar. 31, 2019).

62. *See Sackett*, 8 F.4th at 1091-92 (9th Cir. 2021) ("It is clear that the requirements of the Kennedy concurrence and the applicable regulations are satisfied here."); *Sackett*, 2019 WL 13026870, at *11 (D. Idaho Mar. 31, 2019) ("Substantial evidence in the record shows that Plaintiffs' property, the adjacent tributary, and the similarly situated wetlands have significant physical and biological impacts on Priest Lake."). These decisions follow *Gerke* and *Healdsburg* in a time when the "significant nexus" test controlled in lower courts. *See* cases cited *supra* note 41.

63. *See Sackett*, 598 U.S. at 684.

64. *Id.* at 671 (explaining that the bodies of water that remain protected under the CWA "are described in ordinary parlance as 'streams, oceans, rivers, and lakes'" (quoting Rapanos v. United States, 547 U.S. 715, 739 (2006) (plurality opinion))).

65. *Sackett*, 598 U.S. at 675-76.

protection under the CWA.[66] It is this test that dominates CWA jurisprudence in the wake of the Sackett decision.

In opting for the "continuous surface connection" test, the majority explicitly rejected the previously controlling "significant nexus" test.[67] In so doing, the majority criticized how attenuated the connection could become between a covered wetland and a navigable water under the "significant nexus" test: "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.'"[68] The underlying tone of the statement seems to denounce this test, suggesting that the lack of clarity in defining a "significant nexus" could allow the EPA and Corps to extend protection to wetlands that are not directly affected, but rather are "lumped" together with impacted wetlands.[69]

C. Is the Story Over?

While the Sacketts triumphed over the agencies in court, some Justices disagreed over whether the "continuous surface connection" test should now control CWA jurisprudence. In his concurrence, Justice Kavanaugh agreed with the majority's decision to depart from the "significant nexus" test for determining wetland protections but disparaged their narrow definition of "adjacency" for disregarding the statutory text and straying from the Court's own precedent.[70] Specifically, he argued that the majority misinterpreted the term "adjacent," which could ordinarily include things not physically touching, and instead only allows adjoining wetlands to continue to be protected under the CWA.[71] While he did not propose

66. *See id. But see id.* at 720 (Kavanaugh, J., concurring) (highlighting how the definition of wetlands "has *always* included ... not only wetlands adjoining covered waters but also those wetlands that are separated from covered waters by a man-made dike or barrier, natural river berm, beach dune, or the like"). Justice Kavanaugh specifically argues that this "consistency in interpretation" across administrations confirms that the term "adjacency" does not require physical connection. *Id.* at 722.

67. *Id.* at 679 (majority opinion).

68. *Id.* at 663 (emphasis added).

69. *See id.*

70. *Id.* at 715-16 (Kavanaugh, J., concurring).

71. *Id.* at 716; *see also id.* at 710 (Kagan, J., concurring) ("And in ordinary language, one thing is adjacent to another not only when it is touching, but also when it is nearby.").

a third test for determining wetland protections, it is clear that, in his eyes, the "significant nexus" test is too broad and the "continuous surface connection" test too narrow.[72]

This highlights the inherent tension within CWA jurisprudence. On the one hand, wetland protections are increasingly important due to climate change, environmental injustice, and pollution.[73] Thus, limiting the protection of wetlands not only departs from the legislative intent of Congress, but also significantly impacts the nation's water quality. On the other hand, federal regulation of wetlands is notoriously unclear, leaves property owners unable to develop their land, and gives rise to federalism concerns.[74]

III. ELIMINATING THE OVERREACH SOLVES SOME PROBLEMS

To that end, following years of fighting against the broad expanses of the CWA,[75] the *Sackett* decision is being praised as a major win for property rights and federalism.[76] Federalism and state-centered arguments focus on Congress's intent in writing the CWA: that Congress explicitly created the CWA to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution."[77] The agencies' policy of reading the CWA as broadly as possible—applying the "significant nexus" test—contradicted Congress's intention when creating the CWA.[78] Thus, the Court in *Sackett* merely adhered to Congress's

72. *See id.* at 715-16 (Kavanaugh, J., concurring).

73. THE WHITE HOUSE, *supra* note 44 (explaining that the United States continues to face water issues, despite the overall success of the CWA, because of "climate change-driven droughts[,] ... rising sea levels[, and] long-standing environmental injustices").

74. *See Sackett*, 598 U.S. at 725 (Kavanaugh, J., concurring) (discussing how the majority argues that the CWA should be construed in favor of the property owner, since the power to regulate property lies with the states).

75. *See id.* at 680 (majority opinion) (explaining how the "significant nexus" test "is so 'broad' that, if viewed in isolation, it would extend to all water in the United States"). Even while disparaging the majority's "continuous surface connection" test as too narrow, Justice Kavanaugh still believed that the "significant nexus" test was too broad. *See id.* at 715-16 (Kavanaugh, J., concurring).

76. Adam Carrington, *Supreme Court's Opinion in* Sackett v. EPA *Is a Victory for the Rule of Law and Federalism*, WASH. EXAM'R (May 26, 2023, 9:34 AM), https://www.washingtonexaminer.com/restoring-america/fairness-justice/supreme-courts-opinion-in-sackett-v-epa-is-a-victory-for-the-rule-of-law-and-federalism [https://perma.cc/8UWR-ZU3H].

77. *See* 33 U.S.C. § 1251(b).

78. *See id. But see* Lazarus, *supra* note 7, at *12.

will and reinstated prior restraints on the government's power to regulate water and wetlands.[79] The Court's decision was not so much about the facts specific to the Sacketts, but rather about rectifying a long history of the agencies' overreach.

Under the "significant nexus" framework, the EPA and Corps had been able to extend jurisdiction to wetlands miles away from navigable waters.[80] Ordinary activities on property like farming, digging ponds, or even just moving dirt could be punished—when the closest "water of the United States" was not remotely close—because of the agencies' broad interpretation of the CWA.[81] Like *Sackett*, property that appeared to be dry and therefore outside of the jurisdiction of the CWA could still be subject to regulation.[82] And a property owner, of their own accord, really had no way of knowing without agency guidance.[83] This is a "unique aspect" of the CWA: most laws do not require expert analysis to ascertain whether or not a particular regulation even applies to your property.[84] If a property owner wanted to develop their property, however, this type of guidance was critical for the CWA, since there was no crystal-clear way of knowing whether a parcel would be subject to regulation.[85]

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79. *See* 33 U.S.C. § 1251(b).

80. *See* United States v. Deaton, 332 F.3d 698, 702-03 (4th Cir. 2003) (explaining that the Corps exacted penalties on a property owner for digging a 1,100-foot ditch on land containing nontidal wetlands because there was a significant nexus between said wetlands and navigable waters miles away); U.S. Army Corps of Eng'rs v. Hawkes Co., 578 U.S. 590, 596 (2016) (explaining that the Corps could regulate wetlands because of the existence of a significant nexus with a river "some 120 miles away"); Mollie Riddle, *Why a Major Clean Water Act Regulation Is Unconstitutionally Broad*, PAC. LEGAL FOUND. (Apr. 22, 2019), https://pacificlegal.org/clean-water-act-regulations-shouldnt-be-clear-as-mud/ [https://perma.cc/XU39-YCHT] (discussing how a man served eighteen months in prison for building on his land, even though his property was located forty miles away from navigable waters).

81. *See* Riddle, *supra* note 80 (highlighting why the agencies' definition of "navigable waters," prior to the *Sackett* decision, was unconstitutionally broad).

82. *See id.*

83. The EPA even recommended asking the Corps for a jurisdictional determination, since a property owner could not have complete assurance that their land was not subject to regulation without a decision straight from the source. *See* Sackett v. EPA, 598 U.S. 651, 670 (2023).

84. Hawkes Co. v. U.S. Army Corps of Eng'rs, 782 F.3d 994, 1003 (8th Cir. 2015).

85. It is important to note that the Corps are not required to provide jurisdictional determinations, even when asked. *See Sackett*, 598 U.S. at 670. In addition, "a property owner may find it necessary to retain an expensive expert consultant who is capable of putting together a presentation that stands a chance of persuading the Corps." *Id.*; *see also* Jacob Finkle, *Jurisdictional Determinations: An Important Battlefield in the Clean Water Act Fight*,

Blindly developing a property left landowners vulnerable to CWA violations.

If a landowner learns that their property is subject to regulation, the owner would then need to apply for a permit—a process that might take years and cost even more money.[86] Many landowners would choose to forgo this endeavor and simply build nothing instead, which diminishes a person's agency in choosing to do whatever they deem fit for their own property.[87] If a landowner instead chooses to stay the course and apply for a permit, they will not necessarily receive a permit: "[T]he Corps has asserted discretion to grant or deny permits based on a long, nonexclusive list of factors that ends with a catchall mandate to consider 'in general, the needs and welfare of the people.'"[88]

The other option would be to start construction on a property without knowing whether or not the land was subject to regulation under the CWA. If the land is not subject to regulation, the property owner would avoid the costs of guidance. If the land is subject to regulation, however, they would then be punished by the EPA for a violation of the CWA.[89] The consequences for a violation could be staggering.[90] Property owners who improperly filled or dredged protected wetlands could face hundreds of thousands of dollars in criminal or civil fines and could even wind up serving prison time.[91]

According to the *Sackett* majority, the "continuous surface connection" test provides the requisite solution to these problems: it eliminates agency overreach and reduces uncertainty for property

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43 ECOLOGY L.Q. 301, 314-15 (2016); Kenneth S. Gould, *Drowning in Wetlands Jurisdictional Determination Process: Implementation of* Rapanos v. United States, 30 U. ARK. LITTLE ROCK L. REV. 413, 440 (2008). Not to mention, it might be frustrating to spend money on expert guidance, only to find out that the property is entirely free from regulation. *See Sackett*, 598 U.S. at 670.

86. *See Sackett*, 598 U.S. at 661 ("The costs of obtaining such a permit are 'significant,' and both agencies have admitted that 'the permitting process can be arduous, expensive, and long.'" (citing *Hawkes Co.*, 578 U.S. at 594-95, 601)).

87. *See id.* at 671 (describing the process as an "unappetizing menu of options").

88. *See id.* at 661 (quoting 33 C.F.R. § 320.4(a)(1) (2022)).

89. *See id.*

90. *Id.* at 660 (describing penalties for violations as "crushing").

91. *See id.* ("Property owners who negligently discharge 'pollutants' into covered waters may face severe criminal penalties including imprisonment. These penalties increase for knowing violations. On the civil side, the CWA imposes over $60,000 in fines per day for each violation." (citations omitted)).

owners.[92] However, prioritizing these concerns comes with a significant tradeoff: the Court overlooks, or even ignores altogether, the scientific reality of wetlands.

IV. BUT ELIMINATING OVERREACH ALSO CREATES MORE PROBLEMS

With agency overreach and the murky boundaries of the CWA in mind, the cries for clarity and protests about the CWA's broad reach do not seem unfounded. The *Sackett* decision provides a clear, narrow answer, and perhaps that was necessary to combat the agencies' sweeping application of the CWA. Returning to the inherent tension within the CWA, however, this decision does not come without its downsides: (1) limiting the protection of wetlands could result in devastating consequences for the nation's water supply,[93] (2) the straightforward "continuous surface connection" test still leaves questions unanswered,[94] and (3) the states must regroup to ensure continued protection of waters and wetlands.[95]

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92. *See id.* at 669, 680.

93. *See id.* at 716 (Kavanaugh, J., concurring) ("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."); United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 134 (1985) (recognizing the important functions of wetlands—that they "filter and purify water[,]" slow runoff, and "prevent flooding and erosion").

94. In recognizing that the "continuous surface connection" test raises questions, Justice Kavanaugh specifically provides examples:

> [H]ow difficult does it have to be to discern the boundary between a water and a wetland for the wetland to be covered by the Clean Water Act? How does that test apply to the many kinds of wetlands that typically do not have a surface water connection to a covered water year-round—for example, wetlands and waters that are connected for much of the year but not in the summer when they dry up to some extent? How "temporary" do "interruptions in surface connection" have to be for wetlands to still be covered? How does the test operate in areas where storms, floods, and erosion frequently shift or breach natural river berms? Can a continuous surface connection be established by a ditch, swale, pipe, or culvert?

Sackett, 598 U.S. at 727 (Kavanaugh, J., concurring) (citations omitted).

95. *See infra* Part IV.C.

A. The "Continuous Surface Connection" Test Ignores the Scientific Significance of Wetlands

Congress explicitly included the requirement that wetlands "adjacent" to bodies of water, not just the waters themselves, be subject to CWA jurisdiction,[96] implicitly recognizing that the protection of wetlands is "[v]ital to the [Act's] project."[97] Prior wetland protections under the CWA found their footing in wetlands' unique abilities to prevent pollutants from entering sources of water[98]: if wetlands are healthy, they can protect adjacent bodies of water; if wetlands are polluted or otherwise damaged, they can in turn contaminate nearby waters.[99] The Supreme Court itself acknowledged that "wetlands ... serve to filter and purify water draining into adjacent bodies of water ... to slow the flow of surface runoff into lakes, rivers, and streams," and to "prevent flooding and erosion."[100]

By narrowing the CWA's coverage with the "continuous surface connection" test and only extending CWA protections to wetlands that physically touch navigable bodies of water, the Court ignores this very real, ongoing relationship between wetlands' nearby sources of water and removes a substantial portion of the nation's wetlands from the CWA's jurisdiction.[101] This in turn exposes these wetland systems and any neighboring bodies of water to destruction and depletion.[102]

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96. 33 C.F.R. § 328.3(a)(4) (2023).

97. *See Sackett*, 598 U.S. at 711 (Kagan, J., concurring).

98. *See Riverside Bayview*, 474 U.S. at 134. Extending more expansive protections over wetlands, then, seems reasonable, especially because "the primary concern of the [CWA] is with water pollution." *See* Gould, *supra* note 85, at 423.

99. *See Sackett*, 598 U.S. at 711-12 (Kagan, J., concurring).

100. *Riverside Bayview*, 474 U.S. at 134.

101. *See* Lazarus, *supra* note 7, at *5 (highlighting how the Court's test on wetlands "bears no relation to any existing scientific understanding of how wetlands relate to traditional navigable waters within close physical proximity"); Colby Galliher, Sackett v. EPA*'s Aftermath and the Risk of Inflamed Western Water Conflict*, JUST SEC. (Oct. 2, 2023), https://www.justsecurity.org/88982/sackett-v-epas-aftermath-and-the-risk-of-inflamed-western-water-conflict/ [https://perma.cc/AR2Y-ZEK7] (emphasizing that the "continuous surface connection" test "ignore[s] hydrological reality").

102. To demonstrate this notion, Justice Kavanaugh highlights how extending CWA protection over the Chesapeake Bay is all well and good, but those protections become "less effective if fill can be dumped into wetlands that are adjacent to (but not adjoining) the Bay and its covered tributaries." *See Sackett*, 598 U.S. at 726 (Kavanaugh, J., concurring).

B. The "Continuous Surface Connection" Test Generates New Uncertainties

The fact that the "continuous surface connection" test disregards the scientific significance of wetlands is not its only issue. The Supreme Court rejected the "significant nexus" test because, among other reasons, it exposed landowners to so much uncertainty; however, the "continuous surface connection" test comes with its own set of uncertainties. The majority opinion mentioned that wetlands separated from a navigable body of water due to "temporary" interruptions could still be protected under the CWA.[103] What exactly is "temporary"? How many hours of the day could the word "temporary" extend to, and how big of an area could this "temporary interruption" cover? And, if wetlands that could be dry throughout various hours of the day would still be covered under the CWA, why then should wetlands interrupted only by natural or man-made features be excluded? Footnote 16 from the decision specifically stresses that deliberate obstructions cannot impact regulation, so a landowner could not themselves separate wetlands from a navigable body of water.[104] If a man-made barrier created after *Sackett* cannot bar the CWA's continued regulation, then why would a man-made barrier created before the decision carve out these "separated" wetlands from federal jurisdiction? Weather events could alter

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103. *Id.* at 678 (majority opinion) (explaining that these "temporary interruptions" could be attributed to "low tides or dry spells"). In acknowledging these "temporary interruptions," however, the majority does not expand on how to distinguish between a temporary interruption and permanent separation or whether CWA protections change in relation to a temporary interruption. *See id.* at 727 (Kavanaugh, J., concurring); *see also* Michael George Romey, Lucas Quass & Peter Rosenau Viola, *What's Next Following the Supreme Court's Decision in* Sackett v. EPA*?*, AM. BAR ASS'N (July 11, 2023), https://www.americanbar.org/groups/environment_energy_resources/publications/wqw/whats-next-following-sackett-v-epa-decision/ [https://perma.cc/QN22-P3AH] (discussing how the EPA will have to clarify "the boundaries of CWA jurisdiction occupying the space between the Court's phrases 'continuous surface connection' and 'temporary interruptions'").

104. Footnote 16 explicitly states:

> 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. Whenever the EPA can exercise its statutory authority to order a barrier's removal because it violates the Act, that unlawful barrier poses no bar to its jurisdiction.

Sackett, 598 U.S. at 678 n.16 (citation omitted).

existing connections or separation between wetlands and navigable waters[105]: what happens if wetlands that previously shared a continuous surface connection are no longer physically connected to the body of water, or conversely if wetlands that used to be separated are now connected?

The *Sackett* majority provides no guidance on any of these questions. The EPA will need to rework the existing CWA to adhere to the Court's "continuous surface connection" test, while simultaneously preparing new regulatory definitions to clarify the actual boundaries of the CWA when considering issues such as "temporary interruptions in surface connection."[106] Because of these significant changes to the previous framework of the CWA, any projects that were anticipating permits or jurisdictional determinations could face lengthy delays or uncertainty while the EPA regains its bearings.[107] This uncertainty could be ameliorated if a specific property contains wetlands located well away from what would now be considered "adjacent" wetlands,[108] but any project "approaching a conceivable 'continuous surface connection' in some form" could not be certain about the status of its wetlands.[109] These uncertainties encompass all of the questions that were left unanswered by the *Sackett* majority and that were highlighted by Justice Kavanaugh's concurrence.[110]

105. *See* Romey et al., *supra* note 103 (highlighting that "storms, floods, or erosion events" could alter the existing boundaries between wetlands and navigable bodies of water).

106. *See id.* (emphasizing that the EPA will need to adhere to the *Sackett* decision, the CWA statute itself, and other considerations such as "geography, hydrology, and administrability").

107. *Id.*; *see supra* note 91 and accompanying text (discussing the possible consequences of improper action that arise when deciding to obtain a jurisdictional determination or a permit).

108. *See* Romey et al., *supra* note 103 (providing an example of what would be an easy call under the "continuous surface connection" test: "a 'neighboring' wetland located thousands of feet away from and that never exhibits a continuous surface flow into a stream, river, or lake").

109. *See id.* (providing an example of what would be a more difficult call under the Sackett controlling test: "projects that impact a wetland that 'continuously' flows into a stream in the rainy season but exhibits a 'temporary interruption' in a 'dry spell'").

110. *See supra* note 94 and accompanying text.

C. The "Continuous Surface Connection" Test Forces States to Regroup

On top of all of these questions, the decision to depart from the "significant nexus" test impacts existing regulation in the states. Because the decision restores the power of the states to regulate wetlands, there will be major differences in protections across state lines; this presents a problem when recognizing that bodies of water are not purely intrastate and, further, that each body of water is connected and impacts other waters by nature of the hydrologic cycle.[111] Essentially, states with stricter wetland protections will have the benefits of safer drinking water and flood pollution and control, while some other states with weaker protections will not experience these same advantages.[112] Or, states with stricter protections will suffer the consequences of neighboring states having weaker protections because, even if the bodies of water do not cross state lines, these waters are still interactive.[113] Some states fully rely on the regulatory framework of the CWA to protect their water resources, leaving them without a framework of their own to provide protection.[114] Protections might be restored, but there is no way of knowing *if* or *when*.[115] Certainly, there will need to be state legislative action if protections are to be restored in those states left without protection in the wake of the *Sackett* decision.[116] The possibility of action depends both on when state legislatures are in session and the legislatures' ability to fully understand how to

111. *See Water Cycle*, NOAA (Feb. 1, 2019), https://www.noaa.gov/education/ resource-collections/freshwater/water-cycle [https://perma.cc/LJ64-F42W].

112. *See* Peggy Otum, Daniel S. Volchok, H. David Gold, Shannon Morrissey & Kate Thoreson, *Wetlands and WOTUS: Implications of* Sackett v. EPA, WILMERHALE (June 7, 2023), https://www.wilmerhale.com/insights/client-alerts/20230607-wetlands-and-wotus-implications-of-sackett-v-epa [https://perma.cc/YFZ3-KZGC] (discussing how states with stricter regulations than the CWA—as it previously was applied—are not likely to change their laws).

113. *See* NOAA, *supra* note 111.

114. Galliher, *supra* note 101 (explaining that Utah, Colorado, Nevada, New Mexico, and Texas do not have their own state-specific water and wetlands regulations but instead rely on the CWA for protection); *see* McElfish, *supra* note 25 (explaining that twenty-four states completely depend on the CWA for protections of navigable waters and their related wetlands).

115. *See* Galliher, *supra* note 101 (maintaining that polarization on the issue could prolong the ability to restore protections).

116. *See* McElfish, *supra* note 25.

amend their existing legislation to provide the protection desired by a particular state.[117] It will take time, and landowners could begin removing wetlands on their property in the meantime—construction that does not violate the CWA but still significantly damages the water quality in protected navigable waters.[118] Not to mention, Congress enacted the CWA, giving federal agencies jurisdiction over certain bodies of water, because of poor state stewardship.[119] There is no way of knowing whether or not history may repeat itself, and the costs of that outcome are extraordinarily high.[120]

V. THE "SUPERFICIAL SEPARATION" TEST

The Supreme Court's "continuous surface connection" test leaves state and federal regulations in flux, constrains landowners with more uncertainty, and disregards the environmental significance of wetlands. Instead of stepping away and allowing the controlling test—with all of its drawbacks—to persist, the Supreme Court could provide clarity about the CWA's coverage of wetlands with a test that simultaneously curbs agency overreach and reinserts the environmental importance of wetlands into the regulatory framework.

To accomplish these intersecting and contradicting goals, the Court could adopt a test that extends CWA jurisdiction over wetlands adjoining covered waters *and* those wetlands that are separated from covered waters by a man-made or natural barrier.[121] If a man-made or natural barrier stands in between wetlands and a navigable body of water, these wetlands can be protected under the CWA if one side of said barrier physically abuts a navigable body of water, and the other side of the barrier physically touches the wetlands. The wetlands, therefore, are physically indistinguishable

117. *See id.*

118. *See id.*; Rapanos v. United States, 547 U.S. 715, 779-80 (2006) (Kennedy, J., concurring) ("[W]etlands can perform critical functions related to the integrity of other waters—functions such as pollutant trapping, flood control, and runoff storage.").

119. *See supra* notes 10-15 and accompanying text.

120. *See 50 Years After the Clean Water Act—Gauging Progress*, U.S. GOV'T ACCOUNTING OFF. (Oct. 17, 2022), https://www.gao.gov/blog/50-years-after-clean-water-act-gauging-progress [https://perma.cc/7LYK-629G] (highlighting the vital role of the CWA in combatting climate change).

121. *See infra* notes 160-64 and accompanying text.

from the water *but for* the presence of a barrier. Rather than solely protecting wetlands with a physical connection to navigable water, it actually acknowledges the scientific reality of wetlands: that wetlands near—but not physically touching—navigable bodies of water still impact that water.[122] A superficial separation between wetlands and navigable bodies of water does not bar their protection under the CWA. For the remainder of this Note, this new test will be referred to as the "superficial separation" test.

A. Support for the "Superficial Separation" Test

No majority on the Supreme Court has ever interpreted "adjacency" as involving a physical connection plus this type of separation. The Supreme Court's analysis on "adjacency" has only ever revolved around the application of the "significant nexus" test or the "continuous surface connection" test: whether to allow attenuated adjacency or adjoined adjacency.[123] In his *Sackett* concurrence, however, Justice Kavanaugh pushed back on the idea that either test provided the correct analysis for CWA coverage of wetlands.[124] He argued that the majority incorrectly constrained the definition of "adjacency," which could ordinarily include things not physically touching, to only allow "adjoining" wetlands to continue to be protected under the CWA.[125] Further, he critiqued the majority's approach for disregarding the statutory text and the agencies' interpretation of the CWA: "[T]he Army Corps has *always* included in the definition of 'adjacent' wetlands not only wetlands adjoining covered waters but also those wetlands that are separated from

122. *See* Sackett v. EPA, 598 U.S. 651, 712 (2023) (Kagan, J., concurring) ("And wetlands perform those functions ... not only when they are touching a covered water but also when they are separated from it by a natural or artificial barrier—say, a berm or dune or dike or levee.").

123. For discussion of the "significant nexus" test, see *supra* notes 34-35 and accompanying text. For the "continuous surface connection" test, see *supra* notes 36-39 and accompanying text.

124. *See Sackett*, 598 U.S. at 715-16 (Kavanaugh, J., concurring) ("In particular, I agree with the Court's decision not to adopt the 'significant nexus' test for determining whether a wetland is covered under the Act.... I write separately because I respectfully disagree with the Court's ["continuous surface connection"] test for assessing when wetlands are covered by the Clean Water Act.").

125. *Id.* at 716.

covered waters by a man-made dike or barrier, natural river berm, beach dune, or the like."[126] Although Justice Kavanaugh does not pose this interpretation as a formal test, the "superficial separation" test is still directly drawn from his concurrence and therefore finds support in Supreme Court jurisprudence.

The Corps and the EPA have consistently held that wetlands only separated from a navigable water by some barrier fall within the CWA's jurisdiction.[127] Thus, the additional coverage would bring the "continuous surface connection" test closer to the agencies' interpretation of the CWA. Even more, the "superficial separation" test finds its roots in a previous CWA rule, which provides: "The final rule defines 'adjacent wetlands' as wetlands that ... are physically separated from a territorial sea or traditional navigable water, a tributary, or a lake, pond, or impoundment of a jurisdictional water only by an artificial dike, barrier, or similar artificial structure."[128]

The agencies ultimately moved to voluntarily remand this rule after President Biden issued Executive Order 13,990.[129] The Order advised the agencies, among other things, "to listen to the science," "to ensure access to clean air and water," and "to immediately review and, as appropriate and consistent with applicable law, take action to" now conform "with these important national objectives."[130] In keeping with the Order, the agencies wished to remand this specific rule in order to "revise or replace" it, so they could address and integrate President Biden's objectives.[131] It is important to keep in mind that the Supreme Court never took offense to this rule. Actually, the Supreme Court specifically mentioned this version of the rule in *Sackett*, describing it as a "narrower definition."[132]

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126. *Id.* at 720.

127. *See id.* at 720-21 (highlighting a series of examples where the agencies interpreted CWA coverage to extend to wetlands separated from covered waters by a man-made or artificial barrier).

128. The Navigable Waters Protection Rule: Definition of "Waters of the United States," 85 Fed. Reg. 22250, 22251 (Apr. 21, 2020) (to be codified at 33 C.F.R. pt. 328; 40 C.F.R. pts. 110, 112, 116, 117, 120, 122, 230, 232, 300, 302, 401).

129. *See* Pascua Yaqui Tribe v. EPA, 557 F. Supp. 3d 949, 953 (D. Ariz. 2021).

130. *Id.* (quoting Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis, 86 Fed. Reg. 7037, 7037 (Jan. 20, 2021)).

131. *Id.*

132. *Sackett*, 598 U.S. at 668.

This explanation of the rule as *narrow* is practically a compliment after the Court's admonishment of the broad expanses of the CWA throughout other parts of *Sackett*. In contrast to this discussion of the 2020 rule, the *Sackett* majority discussed the "*sweeping*" CWA rule in 2015 that "covered ... waters and wetlands ... within 1,500 feet of interstate or traditional navigable waters."[133] The Court's characterization of the rule as "sweeping" makes clear that extending protections to wetlands within 1,500 feet of navigable waters would be too far-reaching.[134] In light of this, extending protections to those wetlands that are merely separated from navigable waters by a physical barrier—what the Court itself described as a "narrower definition"—falls well below the CWA's "sweeping" application and therefore seems reasonable.[135]

In applying the "superficial separation" test, then, the Court not only finds support in existing case law, but also finds support in previous iterations of the CWA. The Court can therefore adhere to a previous version of the statutory text and exercise appropriate deference to the agencies' interpretation of the Act. However, this adherence does not coincide with the previous expansive attenuation of the CWA because the test places clear outer limits on the CWA's reach.

B. The "Superficial Separation" Test Solves Both Sets of Problems

The "superficial separation" test is broader than the "continuous surface connection" test but narrower than the "significant nexus" test,[136] so it offers a sort of meeting-in-the-middle. Both tests have their benefits and drawbacks, and there is a significant amount of space in between the application of one or the other.[137] Either wetlands will be over-protected or under-protected. There will likely never be a scenario in which the solution is just right, but it is possible to lessen the gap between the two tests and incorporate the benefits of both.

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133. *Id.* (emphasis added) (discussing the 2015 rule defining "the waters of the United States" before the agencies repealed and replaced it with a narrower definition in 2019).

134. *See id.*

135. *See id.*

136. *See supra* notes 63-69 and accompanying text.

137. *See id.*

1. The "Superficial Separation" Test Quells the Concerns Raised by the Sackett *Majority*

The drawbacks of the "significant nexus" test—including agency overreach, removal of states' rights, and uncertainty—are alleviated by the "superficial separation" test. Under the test, the majority's concerns about overreach are largely mitigated. Attenuation specifically seemed to encompass most of the majority's concern in *Sackett*.[138] The Court's language in *Sackett* supports this idea.[139] When discussing *Rapanos*, the majority pointed out that the "wetlands near ditches and drains ... *eventually* emptied into [traditional] navigable waters."[140] The wetlands in these cases were not even nearby navigable bodies of water, and the Court clearly took issue with that.[141] The Court's obvious discomfort with how far-reaching CWA jurisdiction could extend under the "significant nexus" test thus prompted the narrow *Sackett* decision.[142]

This attenuation was attributed to agency overreach—that the EPA and Corps could extend CWA protection to wetlands regardless of their proximity to and impacts on navigable bodies of water.[143] When highlighting the agency overreach, the *Sackett* majority mentioned numerous cases where the EPA and Corps extended CWA jurisdiction to wetlands miles away from a navigable body of water.[144] This further supports the notion that the Court was specifically concerned with how attenuated the connection could become between a covered wetland and a navigable body of water under the "significant nexus" test. If the wetlands on the Sackett's property

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138. *See supra* note 68 and accompanying text.

139. For example, the Court claimed that "the EPA *lumped* the Sacketts' lot together with ... a large nearby wetland complex." *Sackett*, 598 U.S. at 663 (emphasis added).

140. *Id.* at 666 (emphasis added).

141. The wetlands in *Sackett* were thirty feet away from a non-navigable body of water and much farther from any navigable waters, *see id.* at 662-63, and the wetlands in *Rapanos* were located eleven to twenty miles away from any navigable body of water, Rapanos v. United States, 547 U.S. 715, 720 (2006) (plurality opinion).

142. *See Sackett*, 598 U.S. at 662-63.

143. *See id.* at 664-65 (discussing how the agencies continued to adopt broader and broader interpretations of the CWA).

144. *See supra* note 80 and accompanying text; *see also Sackett*, 598 U.S. at 666 (discussing how the agencies and lower courts found that CWA jurisdiction covered "wetlands near ditches and drains that eventually emptied into navigable waters at least 11 miles away" (citing *Rapanos*, 547 U.S. at 720-29 (plurality opinion))).

were alternatively only separated from a navigable body of water by a river berm or some other barrier,[145] it is not clear that the Supreme Court would have even granted certiorari for the case; substantially decreasing the attenuation eliminates obvious agency overreach and quells most of the Court's concern.

This theory finds support in the portion of the *Sackett* opinion that addresses *Riverside Bayview*, which highlighted the Court's deference to the Corps' interpretation and thereby rationalized the Court's finding of "adjacency" for those specific facts.[146] Justice Scalia, who first created the "continuous surface connection" test, even acknowledged in *Rapanos* that the wetlands in *Riverside Bayview* were in fact "adjacent" by incorporating the boundary-drawing problem evident in that case as the touchstone of the "continuous surface connection" test.[147] Scalia additionally noted: "When we characterized the holding of *Riverside Bayview* in *SWANCC*, we referred to the close connection between waters and the wetlands that they gradually blend into."[148] There, Scalia did not emphasize the helpful fact that the wetlands in *Riverside Bayview* actually abutted on a navigable waterway but rather focused on their "close connection" to a navigable waterway.[149] While he later formulated the "continuous surface connection" test in that very opinion,[150] this characterization of the "close connection" does not go unnoticed. Only allowing CWA protection of wetlands to extend—at a maximum—to those wetlands separated from a navigable water by a barrier eliminates the possibility of attenuation by establishing the requisite close connection. Those wetlands would be physically touching a navigable water but for the presence of some man-made

145. This alteration on the facts stands in opposition to the original facts of the case: that the wetlands were thirty feet from a tributary that fed into a creek that eventually seeped into a navigable body of water. *Sackett*, 598 U.S. at 662-63.

146. *See id.* at 665 ("Although ... concern[ed] that wetlands ... [fell] outside 'traditional notions of "waters,"' [the Court] nonetheless deferred to the Corps." (quoting United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 132-33 (1985))).

147. *See Rapanos*, 547 U.S. at 742 (plurality opinion) ("Wetlands with only an intermittent, physically remote hydrologic connection to 'waters of the United States' do not implicate the boundary-drawing problem of *Riverside Bayview*, and thus lack the necessary connection to covered waters.").

148. *Id.* at 741.

149. *See id.*

150. *See id.* at 742 (explaining that "*only* those wetlands with a continuous surface connection to" navigable waters should be protected under the CWA).

or natural barrier. This superficial separation does not alter the relationship between the wetlands and the water: the wetlands are still in "close connection" to a navigable waterway.[151]

Clearly, the expansion of CWA coverage to those wetlands that are only physically separated from navigable bodies of water by a physical barrier combats the original concerns with attenuation: the EPA and Corps can *only* regulate those wetlands that physically connect to a navigable body of water and those wetlands that are only separated from a navigable body of water by a natural or man-made barrier. One of the Supreme Court's primary concerns in *Sackett*, then, is ameliorated.[152] The majority's insistence on only allowing regulation for wetlands adjacent to navigable bodies of water, as opposed to other tributaries, remains within the framework of the "superficial separation" test.[153] Agency overreach, then, becomes virtually impossible with these stringent standards.

In like manner, the *Sackett* majority criticized the uncertainty brought on by the "significant nexus" test. Unassuming property owners could be subject to civil or criminal consequences for any CWA violation, without ever even knowing that their property was subject to regulation, because the existence of a significant nexus was oftentimes not immediately apparent.[154] However, any federal CWA jurisdiction is clear with the "superficial separation" test. If a property contains wetlands that physically touch a navigable body of water, those wetlands are subject to the CWA's regulations.[155] If a property contains a navigable body of water that physically touches a man-made or natural barrier and the other side of said barrier physically touches wetlands, those wetlands are subject to the CWA's regulations.[156] The CWA does not extend coverage to wetlands separated from the navigable water or from the barrier by any space at all. The Court's concerns—that the ambiguity of the

151. *See id.* at 741.

152. *See supra* note 68 and accompanying text.

153. *See supra* note 66 and accompanying text. The extremely narrow CWA jurisdiction afforded in the "continuous surface connection" test suggests that the Court finds some connection or proximity to navigable bodies of water persuasive in their decision whether or not to uphold the CWA's protections. *See supra* notes 78-79 and accompanying text.

154. *See supra* notes 80-91 and accompanying text.

155. *See infra* notes 161-64 and accompanying text.

156. *See id.*

CWA's coverage of wetlands left landowners vulnerable to the CWA's consequences—therefore are ameliorated under the "superficial separation" test.

Of course, the *Sackett* majority additionally emphasized that the regulation of wetlands should ultimately be left to the states and their localities.[157] The "superficial separation" test largely leaves the regulation of wetlands adjacent to bodies of water in the hands of each individual state. The sole action prohibited by the new test is for states to detract from the existing coverage. The only federal regulation of wetlands under the CWA applies to those wetlands physically touching a navigable body of water and those wetlands separated from a navigable body of water by a barrier. States could choose to extend wetland protections even farther away from a navigable body of water, perhaps acknowledging that wetlands do substantially impact neighboring bodies of water from even farther distances. States could choose to add wetland protections around non-navigable bodies of water, since those waters do eventually connect to and impact navigable bodies of water. There are numerous possibilities as to what states could enact in relation to this new CWA test, but what is important to recognize here is that those decisions are left to the states. The EPA and Corps cannot reach too far into land use regulation in any particular state, so the CWA wetland regulations merely provide a starting point for possible state wetland regulations. The "superficial separation" test, then, seems to address federalism concerns highlighted by the *Sackett* majority and Justice Thomas's concurrence.[158]

Thus, the aspects of prior CWA legislation and jurisprudence that were "too broad" are relatively resolved under the "superficial separation" test. Further, this test actually provides a similar solution—separate from the "continuous surface connection" test—to those considerations, without removing quite as many existing

157. *See* McElfish, *supra* note 25; Sackett v. EPA, 598 U.S. 651, 674 (2023) ("It is hard to see how the States' role in regulating water resources would remain 'primary' if the EPA had jurisdiction over anything defined by the presence of water.").

158. *See Sackett*, 598 U.S. at 674; *id.* at 704 (Thomas, J., concurring) (explaining that broader interpretations of the CWA, visible under the "significant nexus" test, "would raise 'significant constitutional and federalism questions'" (quoting Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs (SWANCC), 531 U.S. 159, 174 (2001))).

wetland protections and leaving certain states with no protection until new legislation can be enacted.

2. The "Superficial Separation" Test Alleviates the Problems Pointed Out in the Sackett *Concurrences*

Moreover, problems arising from the narrower "continuous surface connection" test—primarily that it limits the protection of wetlands—are also improved by the implementation of the "superficial separation" test. As discussed in Part I.C. and Part IV.A, wetlands provide various hydrological functions that specifically support the health of the nation's waters.[159] A separation[160] between a nearby body of water and a system of wetlands does not altogether stop wetlands from performing those functions.[161] The existence of space between the wetlands and the water does not mean that any water flowing through those wetlands will not impact the water.[162] Further, the existence of an artificial or natural barrier between wetlands and water does not "block all water flow."[163] The *Sackett* majority additionally overlooks the fact that the existence of these barriers oftentimes indicates a "regular connection between a water and a wetland."[164] In his concurrence, Justice Kavanaugh supported this point by using the Mississippi River as an example:

> [T]he Mississippi River features an extensive levee system to prevent flooding. Under the Court's "continuous surface connection" test, the presence of those levees (the equivalent of a dike) would seemingly preclude Clean Water Act coverage of adjacent wetlands on the other side of the levees, even though the

159. *See supra* notes 43, 97-102 and accompanying text.

160. Any reference to a separation between wetlands and waters refers to physical distance or natural or artificial barriers disconnecting the features.

161. *See* Galliher, *supra* note 101 ("The Court focused on a 'continuous surface connection' as the deciding factor in evaluating any given waterway's or wetland's relationship to [waters of the United States]. But the wetlands and waterways targeted by the Court's decision are very much connected to those waters covered by the CWA, despite the lack of a superficial link.").

162. *See id.*

163. *See Sackett*, 598 U.S. at 726 (Kavanaugh, J., concurring).

164. *Id.* (citing 85 Fed. Reg. 22307, 88 Fed. Reg. 3095, 3188) (explaining how artificial barriers are often constructed to control the connection between wetlands and nearby waterways).

> adjacent wetlands are often an important part of the flood-control project.[165]

Although physically separated from the River because of the infrastructure, the wetlands actually work alongside the levee system to control flooding.[166] When water flows over into nearby areas, it ultimately ebbs and returns to its natural system. Accumulated sediment and other materials return with the water, which in turn exposes that body of water to potential pollution.[167] So, the existence of those wetlands alongside the Mississippi River is not only important for flood control, but also serves to purify any accumulated materials around the bank of the river to prevent contamination when the river ultimately floods.[168] That levees are located between the water and the wetlands does not change the fact that the wetlands can significantly impact the water.

That is true solely on the surface of the land, but waterways likewise interconnect underground through subterranean channels.[169] Therefore, any wetland physically separated from a body of water on the surface is still connected to that water underground.[170] On or below the surface, the effects of pollution are not isolated, so damages to wetlands will coincide with damages to waters. The "continuous surface connection" test, then, disregards the fact that wetlands significantly impact nearby bodies of water, regardless of whether they are physically connecting that water.

In light of all of this, the "superficial separation" test presumably cannot extend protection to every single wetland that impacts a navigable body of water because there is no hard-and-fast limit on the distance at which a wetland significantly affects waters. This is especially apparent when considering the "significant nexus" test, which was designed to allow the agencies to consider the "chemical, physical, and biological" impacts that a wetland could have on a

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165. *Id.*

166. *See id.*

167. *See* United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 134 (1985) (discussing how wetlands "filter and purify water," which in turn prevents pollution of bodies of water).

168. *See id.*

169. *E.g.*, Galliher, *supra* note 101 ("[W]aterways interconnect via a network of underground channels and other subterranean mechanisms.").

170. *See id.*

body of water on a case-by-case basis.[171] There was no clear, concise rule because the science behind the connection between wetlands and waters is neither clear nor concise; it depends on the circumstances.[172] However, allowing some separation between wetlands and a navigable body of water reinserts the environmental significance of wetlands back into the equation.[173] The "superficial separation" test allows wetlands that are "separated from covered waters by man-made dikes or barriers, natural river berms, beach dune, or the like" to remain within CWA jurisdiction.[174] The test allows those wetlands closest to navigable bodies of water to continue receiving protection, which in turn could allow the continued protection of those wetlands that presumably have the greatest impacts on bodies of water.[175]

Importantly, states stripped of wetland protections in the wake of the *Sackett* decision have a buffer under this new test.[176] Contrary to *Sackett*, wetlands that are only separated from navigable bodies of water by a physical or man-made barrier remain protected. States that rely on the CWA framework can regroup to determine the desired extent of their wetland protections. This could eliminate a lot of the pollution and destruction anticipated in the wake of the *Sackett* opinion.[177] Thus, the negative impacts of the "too narrow" *Sackett* decision are lessened under the "superficial separation" test.

C. The "Superficial Separation" Test in Practice

The Supreme Court's prior decisions would largely remain the same under the "superficial separation" test. The change will produce the same results but alter the Court's analysis for questions of

171. *See supra* notes 34-35 and accompanying text.

172. *See* Sackett v. EPA, 598 U.S. 651, 666 (2023) (explaining how questions of adjacency were resolved on a case-by-case basis under the "significant nexus" test).

173. *See supra* note 167 and accompanying text.

174. *Sackett*, 598 U.S. at 722 (Kavanaugh, J., concurring). Under Kavanaugh's argument, being able to include this category of wetlands adheres to the Court's precedent and the agencies' longstanding interpretations of the CWA. *See id.* at 716, 722.

175. The agencies have always sought to extend protections to "adjacent" wetlands, most likely because the proximity of these wetland systems to waterways deliver the greatest impacts to these bodies of water. *See id.* at 722.

176. *See supra* notes 112-17 and accompanying text.

177. *See supra* notes 118-20 and accompanying text.

CWA coverage in the future. This only reinforces the fact that the test adheres to the major concerns proffered by the *Sackett* majority and, moreover, that the test would not be too far-reaching or too difficult to implement. Under this new test, CWA protections cannot extend to the Sacketts' property because the impacted navigable waterway—Priest Lake—does not physically touch the property's wetlands.[178] This analysis is exactly the same as the Court's analysis in *Sackett*. The added component—evaluating the existence of a superficial separation—results in the same conclusion because much more than a barrier stands between the wetlands and Priest Lake.[179] *SWANCC* did not directly involve wetlands, but the decision to reject CWA jurisdiction over isolated ponds still stands: those bodies of water are not traditionally navigable and therefore are not protected under the "superficial separation" test.[180] Because the wetlands in *Riverside Bayview* could withstand the application of the "continuous surface connection" test, it can certainly survive this new test; the "continuous surface connection" test explicitly remains within the framework of the "superficial separation" test.[181] Wetlands located eleven miles from navigable waters in *Rapanos* are not covered under this new test.[182] CWA jurisdiction does not extend to wetlands in those cases where the connection between wetlands and waterways becomes too attenuated, which further demonstrates that the Court can curb agency overreach without eliminating as many wetland protections.

Northern California River Watch v. City of Healdsburg, although not a Supreme Court case, perfectly highlights the difference between wetland protections under the "superficial separation" test and the "continuous surface connection" test. There, a pond situated next to a navigable river served as a buffer between the river and a wastewater treatment plant;[183] however, wetlands around the pond also helped purify and filter the wastewater to mitigate its impacts

178. *See supra* notes 54-55 and accompanying text.

179. *See id.*

180. *See* Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs (*SWANCC*), 531 U.S. 159, 171-72 (2001).

181. *See* United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 135 (1985).

182. *See* Rapanos v. United States, 547 U.S. 715, 720 (2006) (plurality opinion).

183. N. Cal. River Watch v. City of Healdsburg, 496 F.3d 993, 996 (9th Cir. 2007).

on the river.[184] No surface connection existed between the river and the wetlands because a levee stood in-between the features.[185] In ruling on the case, the Ninth Circuit applied the "significant nexus" test to uphold CWA protections over the pond.[186]

Under the now-controlling "continuous surface connection" test,[187] the wetlands could not receive CWA protections because the levee almost always blocks a physical connection between the wetlands and the river.[188] This is exactly what Justice Kavanaugh voiced concern about in his *Sackett* concurrence: the presence of a barrier excludes the wetlands from receiving CWA protection, even though there is evidence that these features directly impact the navigable river.[189] So long as the levee physically touches the river and the wetlands physically touch the levee, the "superficial separation" test extends CWA coverage to the wetlands. The environmental significance of the wetlands in *Northern California River Watch*—that they in fact provide a variety of benefits to the river—could actually be considered. The existence of a superficial separation between the wetlands and the river should not bar CWA protections, and it does not with the "superficial separation" test.

CONCLUSION

In an attempt to curb agency overreach and eliminate uncertainty, *Sackett v. EPA* significantly narrowed the expanses of the CWA. The Court almost certainly has accomplished its goals through the decision, but that accomplishment comes at the expense of wetland protections across the country. The existing jurisprudence dictating

184. *Id.* (explaining that the wetlands similarly performed filtration functions for the navigable river).

185. *Id.* (highlighting how "[u]sually" no surface connection existed).

186. *Id.* at 1001.

187. For an in-depth analysis of the requirements of the "continuous surface connection" test, see *supra* notes 63-66 and accompanying text.

188. In order to fulfill the requirements of the "continuous surface connection" test, a wetland must be indistinguishable from the water. *See* Sackett v. EPA, 598 U.S. 651, 676 (2023).

189. *See id.* at 726-27 (Kavanaugh, J., concurring) ("The scientific evidence overwhelmingly demonstrates that wetlands separated from covered waters by those kinds of 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.").

the application of the CWA to wetlands offers a pick-your-poison approach: either wetlands will be over-protected or under-protected; the Court can either consider environmental significance or ignore it completely.

Of course, a third option exists, whereby the Court can allow federal regulation of wetlands adjoining covered waters *and* those wetlands that are separated from covered waters by a man-made or natural barrier. This approach would eliminate the agencies' ability to extend CWA jurisdiction over attenuated connections between wetlands and waterways. It would supply the States with a lot of freedom to tailor wetland protections to their unique needs. It would provide a clear answer to the numerous unanswered questions surrounding the outer reaches of the CWA. And the test could succeed in addressing the *Sackett* majority's concerns, while simultaneously reinserting at least some of the scientific reality of wetland systems into the analysis and adhering to the agencies' narrower interpretation of "adjacency." While the new test would diverge from the status quo of only considering the "significant nexus" test and the "continuous surface connection" test, it would allow the Court to incorporate the dominant views on both sides of the controversy and find balance on a vital issue. Most importantly, the test would allow the Court to consider the scientific reality of wetlands, a reality that was altogether overlooked in *Sackett*: that a superficial separation between a wetland and a navigable body of water does not alter the relationship between the wetlands and the water.

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