DIALOGUE

UNPACKING THE REVISED WOTUS RULE

SUMMARY

On August 29, 2023, the U.S. Environmental Protection Agency and the U.S. Army Corps of Engineers issued a direct final rule that revised the "waters of the United States" (WOTUS) definition rule. This rule amended the final WOTUS rule, previously published in January 2023, to be consistent with the Supreme Court's May decision in *Sackett v. Environmental Protection Agency*. On September 14, the Environmental Law Institute hosted a panel of experts to analyze the new rule and discuss its regulatory and policy consequences. Below, we present a transcript of that discussion, which has been edited for style, clarity, and space considerations.

Rebecca L. Kihslinger (moderator) is a Senior Science and Policy Analyst and Director of the Wetlands Programs at the Environmental Law Institute.

Brian Frazer is Director of the Office of Wetlands, Oceans, and Watersheds at the U.S. Environmental Protection Agency.

Royal C. Gardner is Co-Director of the Institute for Biodiversity Law and Policy and Professor of Law at Stetson University College of Law.

Greg DeYoung is President and Board Member of the Ecological Restoration Business Association, and Vice President Emeritus for Westervelt Ecological Services.

Edward Ornstein is Special Counsel on Environmental Affairs for the Miccosukee Tribe of Indians of Florida.

Rebecca Kihslinger: Over the past 50 years and throughout recent changes in the definition of "waters of the United States" (WOTUS), ELI has prepared authoritative research and analysis on federal, state, and tribal wetlands and water laws, and has hosted numerous workshops and webinars focused on legal and programmatic means for wetlands protection. This webinar is part of a series of resources we have provided leading up to and following the U.S. Supreme Court's May 2023 decision in *Sackett v. Environmental Protection Agency*,[1] which significantly redefined Clean Water Act (CWA)[2] coverage of WOTUS. Some of these include an ELI Vibrant Environment blog post on six consequences of *Sackett*,[3] which we posted shortly after the decision came down.

Other resources are focused on states and draw on our extensive body of research in that area. The first is an *ELR—Environmental Law Reporter* article examining states' abilities under their existing laws to regulate dredge and fill activities in nonfederal waters.[4] The second is a companion piece called "Filling the Gaps,"[5] which summarizes that regulatory information. We also detail some additional approaches that states, local governments, and others are taking to protect waters in their state or jurisdiction.

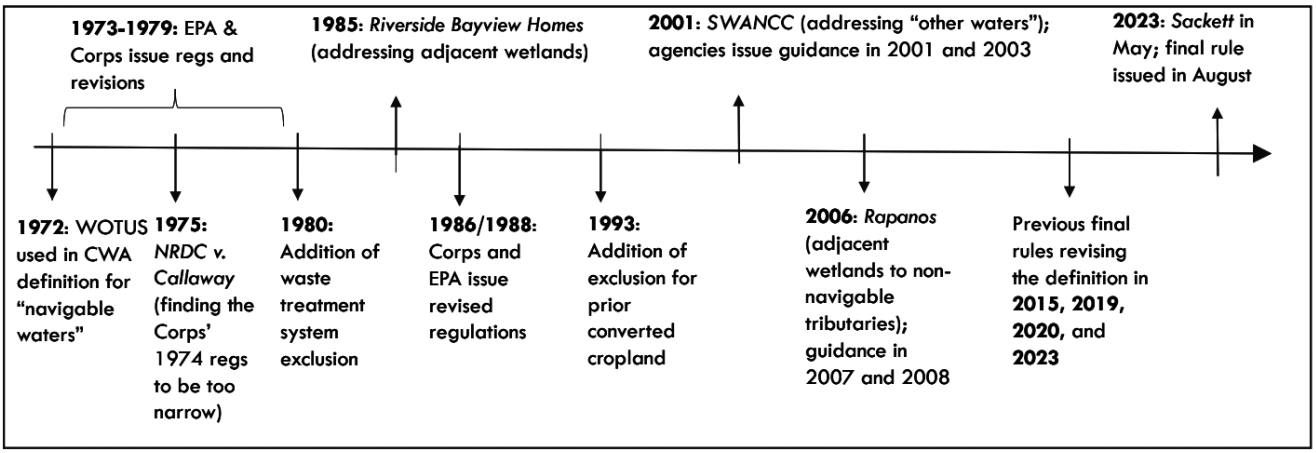
Finally, we had an ELI Breaking News Webinar shortly following the *Sackett* decision.[6] We took a deep dive into the decision, and had a number of experts analyze what we can look for and the consequences in looking ahead for the future of wetland protection.

Why are we here today? Last week, the U.S. Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers' (the Corps') conforming rule, which amended the agencies' January 2023 revised definition of "WOTUS" rule, was published in the *Federal Register*,[7] making it immediately effective. Among other things, the conforming rule made a number of amendments to the January 2023 rule, taking cues from the *Sackett* decision.

These amendments included things like removing the significant nexus standard that was first articulated by Justice Anthony Kennedy's 2006 *Rapanos v. United States*

1. 143 S. Ct. 1322, 53 ELR 20083 (2023).
2. 33 U.S.C. §§1251-1387, ELR Stat. FWPCA §§101-607.
3. James M. McElfish Jr., *What Comes Next for Clean Water? Six Consequences of* Sackett v. EPA, ELI: Vibrant Env't (May 26, 2023), https://www.eli.org/vibrant-environment-blog/what-comes-next-clean-water-six-consequences-sackett-v-epa.
4. James McElfish, *State Protections of Nonfederal Waters: Turbidity Continues*, 52 ELR 10679 (Sept. 2022), https://www.elr.info/articles/elr-articles/state-protections-nonfederal-waters-turbidity-continues.
5. Rebecca Kihslinger et al., ELI, Filling the Gaps: Strategies for States/Tribes for Protection of Non-WOTUS Waters (2023), https://www.eli.org/sites/default/files/files-pdf/Strategies%20for%20States-Tribes%20for%20Protection%20of%20non-WOTUS%20waters%201.2.pdf.
6. ELI, *Analyzing the Consequences of* Sackett v. EPA *and Looking Ahead to the Future*, ELI (June 8, 2023), https://www.eli.org/events/analyzing-consequences-sackett-v-epa-and-looking-ahead-future.
7. U.S. EPA and U.S. Army Corps of Engineers, Revised Definition of "Waters of the United States"; Conforming, 88 Fed. Reg. 61964 (Sept. 8, 2023).

Figure 1. Key Regulatory Changes and Supreme Court Cases Over Time That Have Affected the Definition of "Waters of the United States"



Source: U.S. EPA, *2023 Rule "Revised Definition of 'Waters of the United States'" Training Presentations*, https://www.epa.gov/wotus/2023-rule-revised-definition-waters-united-states-training-presentations (last updated Sept. 22, 2023).

concurrence,[8] revising the definition of "adjacent" to mean having a continuous surface connection from the long-standing definition of "bordering, contiguous, or neighboring," and removing interstate wetlands from the category of interstate waters.

Today, we're going to dive a little deeper into this conforming rule and talk about some of these issues and the changes that were made. We've convened a stellar panel of four experts who are going to provide their unique perspectives on the rule's on-the-ground implications.

With that, I'm going to turn to our first speaker, Brian Frazer. He's the director of the EPA Office of Wetlands, Oceans, and Watersheds. Brian is going to provide a high-level discussion of the conforming rule, discuss how it was developed in response to the *Sackett* decision, and offer some insight into what EPA and the Corps have planned for next steps.

Brian Frazer: I would like to start by providing some background on the definition of "waters of the United States," including covering recent events. Then, I'll review the conforming rule that amends the January 2023 definition of "waters of the United States." Finally, I will discuss next steps and available resources.

"Waters of the United States" is a threshold term in the CWA that establishes the geographic scope of federal jurisdiction under the Act. The CWA does not define the "waters of the United States." EPA and the Corps have defined "waters of the United States" through regulations since the 1970s.

Figure 1 highlights key regulatory changes and Supreme Court cases over time that have affected the definition of "waters of the United States." To set the stage, note that the long-standing regulations defining WOTUS were established in 1986 and 1988 by the Corps and EPA, respectively. New Supreme Court opinions came out in 1985, 2001, 2006, and 2023.

I would like to focus on *Rapanos* specifically. In 2006, in a 4-1-4 decision, the Supreme Court established two different standards for determining jurisdiction in the consolidated case known as *Rapanos*, and did not invalidate the underlying regulations. Under Justice Antonin Scalia's plurality opinion, the test was whether a water was relatively permanent and connected to traditional navigable waters or whether a wetland had a continuous surface connection to such water bodies.

Under the Kennedy concurring opinion, the test was whether a water had a significant nexus to waters that are navigable in fact. Under the *Rapanos* guidance issued in 2007 and revised in 2008, the agencies could use either test to establish jurisdiction. Then, on May 25, 2023, the Supreme Court issued a decision in *Sackett v. Environmental Protection Agency*, which brings us to where we are today.

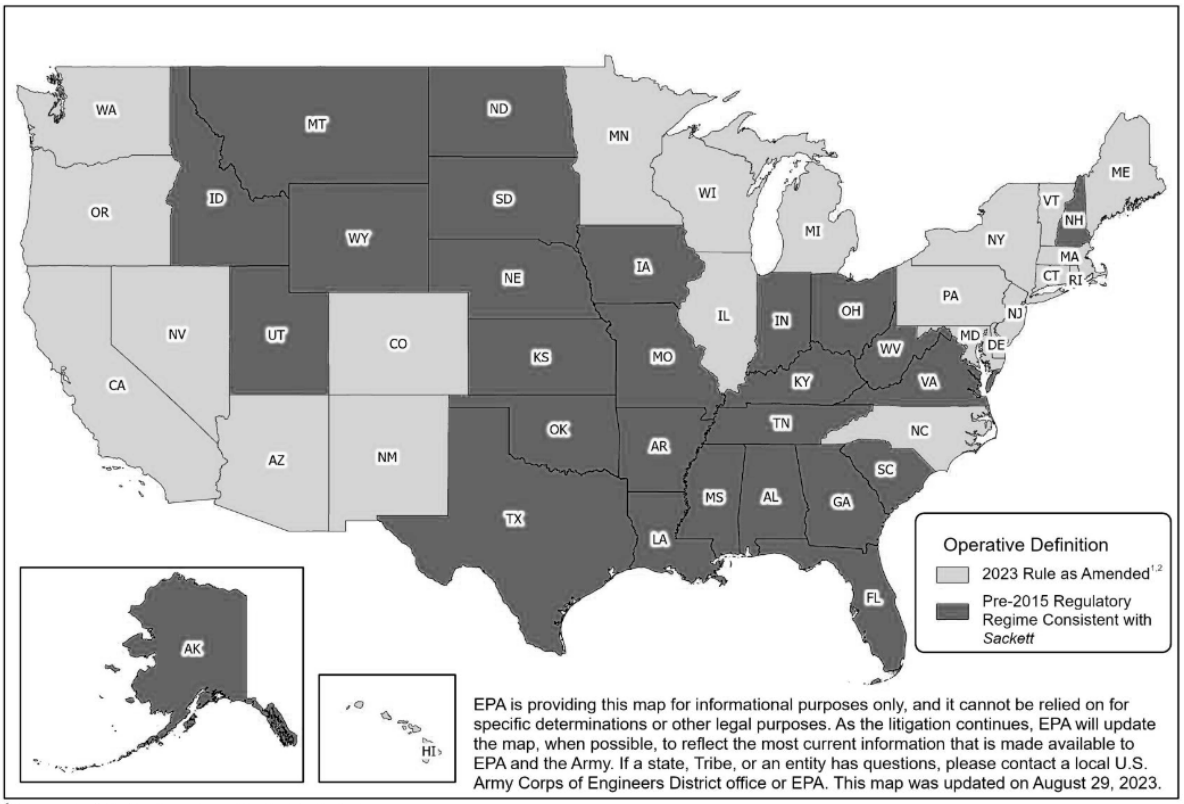
I want to briefly cover some of the more recent events. The January 2023 rule, which is called the Revised Definition of "Waters of the United States," was published in the *Federal Register* in January of this year. The rule took effect 60 days later, on March 20. In June, EPA and the Corps announced plans to issue a final rule to amend the January 2023 rule consistent with the *Sackett* decision that was issued in May. They issued that rule at the end of August, and the rule was published in the *Federal Register* on September 8.[9] The rule was effective immediately upon publication in the *Federal Register*.

Figure 2 illustrates which definitions of "waters of the United States" are generally operative in each state across the country as a result of litigation challenging the 2023 rule. As a result of ongoing litigation on that rule, the agencies will implement the January 2023 rule as amended by the conforming rule in 23 states, the District of Columbia,

8. 547 U.S. 715, 36 ELR 20116 (2006) (Kennedy, J., concurring).

9. 88 Fed. Reg. 61964.

Figure 2. Operative Definition of "Waters of the United States"



[1]Also operative in the U.S. territories and the District of Columbia
[2]The pre-2015 regulatory regime implemented consistent with *Sackett* is operative for the Commonwealth of Kentucky and Plaintiff-Appellants in Kentucky Chamber of Commerce, et al. v. EPA (No. 23-5345) and their members (Kentucky Chamber of Commerce, U.S. Chamber of Commerce, Associated General Contractors of Kentucky, Home Builders Association of Kentucky, Portland Cement Association, and Georgia Chamber of Commerce).

Source: U.S. EPA, *Definition of "Waters of the United States": Rule Status and Litigation Update,* https://www.epa.gov/wotus/definition-waters-united-states-rule-status-and-litigation-update (last updated Sept. 8, 2023).

and the U.S. territories. In the other 27 states and for certain parties, the agencies are interpreting WOTUS consistent with the pre-2015 regulatory regime and the Supreme Court decision in *Sackett* until further notice.

Let's discuss the *Sackett* decision itself. It's important to note that the January 2023 rule was not directly before the Court in *Sackett*. However, the Court did consider the jurisdictional standards that were set forth in the January 2023 rule, including the relatively permanent standard or the significant nexus standard. The Supreme Court concluded that the significant nexus standard was inconsistent with the Court's interpretation of the Act.

The Court also concluded that the *Rapanos* plurality was correct—that the term "waters" used in the CWA encompasses only relatively permanent standing or continuous flowing bodies of water, including streams, oceans, rivers, and lakes. For wetlands, the Court also agreed with the plurality that, to be jurisdictional, wetlands must have a continuous surface connection to water bodies that are WOTUS in their own right so that there is no clear demarcation between waters and wetlands.

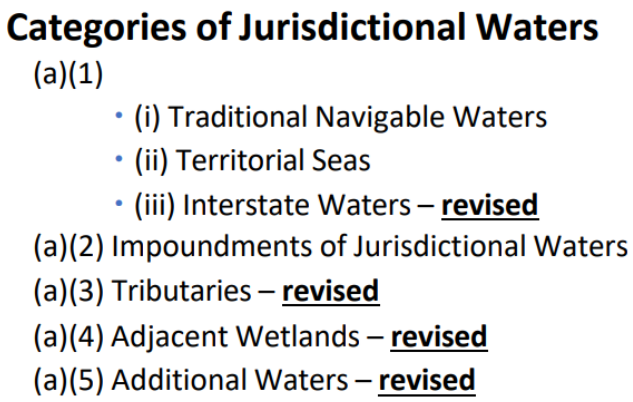
Based on the Court's decision, EPA and the Corps determined that the regulatory text of the January 2023 rule needed to be amended. The agencies have been clear since the *Sackett* decision that they are interpreting the definition of "waters of the United States" consistent with *Sackett*.

Now that we have covered the background, I'll provide an overview of the conforming rule that amends the January 2023 definition of "waters of the United States." The Administrative Procedure Act allows agencies to issue rules without prior proposal and opportunity for comment if there's good cause for doing so. In this case, the agencies have determined that such notice and opportunity for comment is unnecessary. In this instance, certain provisions in the January 2023 rule are invalid under the Supreme Court interpretation of the CWA in the *Sackett* decision.

The agencies have responded by amending the definition of "waters of the United States" to reflect the decision. Providing public notice and seeking comment is unnecessary because the sole purpose of the conforming rule is to amend these specific provisions of the January 2023 rule to conform with *Sackett*. Such conforming amendments do not involve exercise of the agencies' discretion.

I'd like to provide some information about the preamble to the conforming rule. The preamble covers four topics: (1) why the agencies are issuing the rule; (2) the provisions that are amended; (3) a section on separability where the agencies clarify that, in the event of a stay or invalidation of any part of this rule, the agencies' intent is that the remaining portions of the rule can continue to operate independently; and (4) the standard statutory and executive orders review section. I would like to highlight a couple specific parts of the preamble that are relevant to implementation

Figure 3. The Conforming Rule Made Targeted Changes to the January 2023 Rule Categories of Jurisdictional Waters



Source: See U.S. EPA and U.S. Army Corps of Engineers, Revised Definition of "Waters of the United States"; Conforming, 88 Fed. Reg. 61964 (Sept. 8, 2023), and U.S. EPA, *Amendments to the 2023 Rule*, https://www.epa.gov/wotus/amendments-2023-rule (last updated Sept. 22, 2023).

and the agencies' future plans regarding potential additional actions and stakeholder engagement.

First, the preamble notes that the agencies will continue to interpret the definition of "waters of the United States" consistent with the *Sackett* decision. Second, it notes that the agencies have a wide range of approaches to address any issues that may arise outside of this limited rule, including approved jurisdictional determinations (AJDs) and CWA permits, guidance, notice and comment, rulemaking, and agency forms and training. The preamble is also clear that the agencies intend to hold stakeholder meetings to get public input on other issues to be addressed.

As a reminder, with this rule, the agencies are making targeted changes to the January 2023 rule. Figure 3 lists the categories of jurisdictional waters included in the January 2023 rule.

Three categories of water in the January 2023 rule explicitly state that they are jurisdictional if the waters meet either the relatively permanent standard or significant nexus standard. These include tributaries, adjacent wetlands, and additional waters.

In the conforming rule amending the January 2023 rule, the agencies are deleting the significant nexus standard from these categories as the basis of jurisdiction. The agencies are also revising the interstate waters provision to remove interstate wetlands. Under *Sackett*, the provision authorizing wetlands to be jurisdictional simply because they are interstate is invalid.

Finally, the agencies are revising the paragraph (a)(5) additional waters provision to remove streams and wetlands. As a result of the decision in *Sackett* invalidating the significant nexus standard, the provision for assessment of streams and wetlands under the additional waters provision of paragraph (a)(5) is no longer valid, as any jurisdictional streams and wetlands are covered by paragraph (a)(1) through (a)(4) of the January 2023 rule. Therefore, the agencies are deleting streams and wetlands from this provision.

For exclusions, the agencies are not changing any of the paragraph (b) exclusions included in the January 2023 rule. The exclusions are listed in Figure 4 (next page).

For the paragraph (c) definitions included in the January 2023 rule, the agencies are amending the definitions of "adjacent" and deleting the definition of "significantly affect" based on the Supreme Court decision in *Sackett*. The other definitions remain the same. The agencies are revising the definition of "adjacent" to read "[*a*]*djacent* means having a continuous surface connection,"[10] which is narrower than the agencies' long-standing definition of "adjacent." The agencies are deleting the definition of "significantly affect" altogether since the definition is only relevant to the significant nexus standard.

I want to briefly discuss the AJDs issued by the Corps. After the *Sackett* decision was issued, the Corps paused the issuance of all AJDs while the agency determined next steps. However, after a short time, the Corps did begin issuing some types of AJDs. These included dry land AJDs where there are no water resources involved at all. These also included AJD features that meet the terms of the exclusions under the 2023 rule or the pre-2015 regulatory regime where applicable. On September 8, 2023, the effective date of the conforming rule, the Corps resumed issuing all types of AJDs.

I want to cover a key question that the agencies have received from many stakeholders since the *Sackett* decision was issued: how many waters are no longer jurisdictional under the *Sackett* decision and the agencies' amended 2023 WOTUS rule? The agencies' conforming rule simply updated specific aspects of the 2023 WOTUS rule to align with the Supreme Court's decision in *Sackett*.

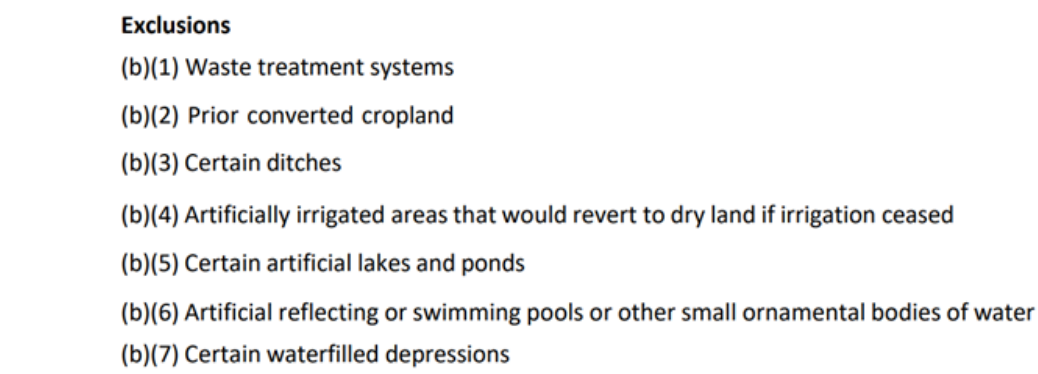
That being said, the *Sackett* decision had a real, practical impact on the ground. Jurisdictional decisions regarding WOTUS that receive federal protection are made at the request of individual landowners or on a case-by-case basis using site-specific information. There are no maps or data sets that depict all waters that are or are not jurisdictional under any definition of "waters of the United States."

EPA and the Corps are still evaluating the impacts of the *Sackett* decision in terms of scope of jurisdiction. It is clear that the Supreme Court decision erodes long-standing clean water protections. As a result of the *Sackett* decision, several types of waters may no longer be under federal protection. Estimates of ephemeral streams that could be affected range from 1.2 million miles to 4.9 million miles. Up to 63% of wetlands by acre are potentially impacted, as mapped in the United States by the U.S. Fish and Wildlife Service (FWS).[11]

In terms of next steps, the agencies plan on hosting listening sessions this fall, with co-regulators and stakehold-

10. 88 Fed. Reg. at 61969.
11. Estimates from EPA.

Figure 4. The Conforming Rule Made No Changes to the January 2023 Rule Categories of Exclusions



See U.S. EPA and U.S. Army Corps of Engineers, Revised Definition of "Waters of the United States"; Conforming, 88 Fed. Reg. 61964 (Sept. 8, 2023), and U.S. EPA, *Amendments to the 2023 Rule,* https://www.epa.gov/wotus/amendments-2023-rule (last updated Sept. 22, 2023).

ers focusing on identifying issues that may arise outside the limit of the rule conforming the definition of "waters of the United States" to the decision in *Sackett*. Please continue to check EPA's website for forthcoming details on listening sessions.[12] You can also find the conforming rule, a fact sheet,[13] and a red line of the amended regulatory text on EPA's website.[14]

To conclude, I'd like to emphasize that EPA is committed to strengthening our partnerships with states and tribes to support their efforts to protect waters for the people and communities that depend on them.

Rebecca Kihslinger: We're going to turn to our next panelist, Roy Gardner. Roy is the co-director of the Institute for Biodiversity Law and Policy, and professor of law at Stetson University College of Law. He's going to discuss his perspectives on the impacts of *Sackett* and the conforming rule, and provide some examples of categories of waters that may not be protected any longer.

Royal Gardner: I should preface this by saying that these are my own personal, pessimistic views. At this particular moment, they don't necessarily reflect or represent the views of any organization with which I'm affiliated or may have represented in the past. It's a pleasure to be here, although I wish it were under different circumstances.

I should note at the start that the agencies are playing the hand they were dealt. They don't really have much flexibility here. They're just following the Supreme Court's lead in adopting the test that it did for whether a wetland is considered to be a WOTUS and, therefore, deserving of CWA protection. The Court rejected the precedent of *United States v. Riverside Bayview Homes*,[15] disregarded the overall objective of the CWA in §101(a), and ignored science. So, I sympathize with the agencies for having to respond to this.

Let's compare the holding with part of the rule change. In the summary by Justice Samuel Alito, there are actually two parts. You have the continuous surface connection requirement, but then you also have this "indistinguishable" requirement that the wetland not only has to have a continuous surface connection, but it has to have such a connection that they're indistinguishable from the other waters.

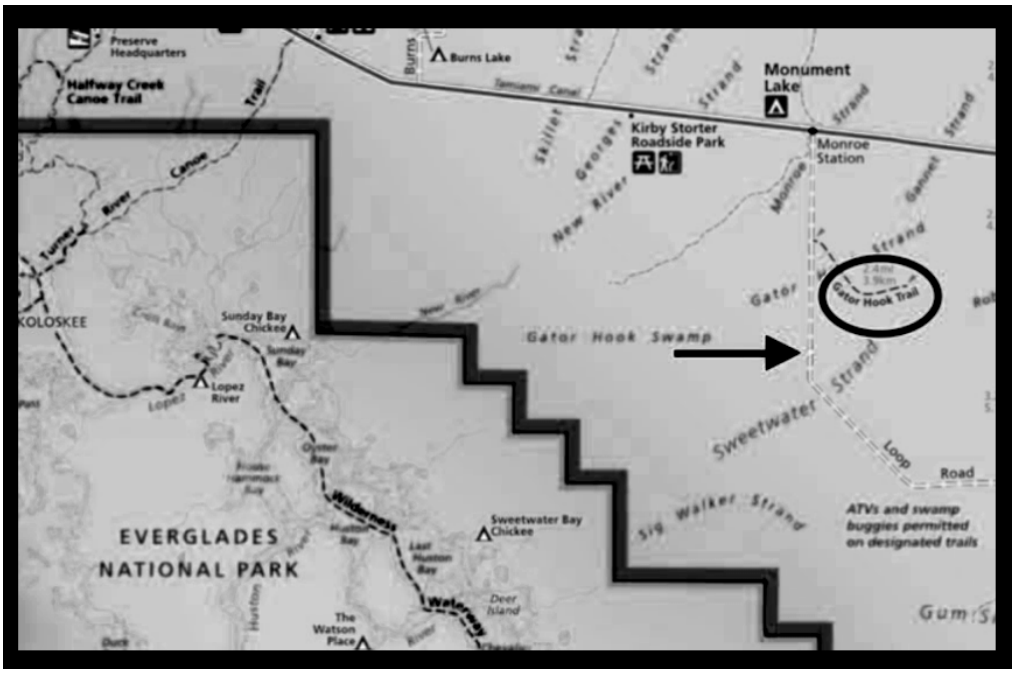
The rule addresses the first part, the continuous surface connection, but there is no mention in the rule or in the preamble with respect to what "indistinguishable" means. Again, I'm sympathetic to the agencies because this is a made-up standard. There's no basis in law, policy, practice, or science to come up with a standard about being indistinguishable. But that is what the Supreme Court has decreed.

There are lots of different ways to categorize wetlands. The 2015 connectivity report that supported the Barack Obama Administration's Clean Water Rule[16] as well as the Joseph Biden Administration's first revised WOTUS rule[17] divides wetlands into non-floodplain wetlands and riparian floodplain wetlands. So, what's eliminated by the continuous surface connection requirement? First of all, the non-floodplain wetlands are gone. That includes prairie potholes, pocosins, vernal pools, and Carolina and Delmarva bays, just to name a few.

In addition, riparian and floodplain wetlands that have a surface connection to an ephemeral stream are no longer jurisdictional. That's because ephemeral streams themselves are not jurisdictional. Any riparian or floodplain wetlands that only have a groundwater connection to a traditional navigable water or larger water body are also out. As Brian

12. *See* U.S. EPA, *Waters of the United States*, https://www.epa.gov/wotus (last updated Sept. 21, 2023).
13. U.S. EPA & U.S. Department of the Army, Fact Sheet for the Final Rule: Amendments to the Revised Definition of "Waters of the United States" (2023), https://www.epa.gov/system/files/documents/2023-08/FINAL_WOTUSPublicFactSheet08292023.pdf.
14. Amendments to 40 C.F.R. 120.2 and 33 C.F.R. 328.3, *available at* https://www.epa.gov/system/files/documents/2023-08/Regulatory%20Text%20Changes%20to%20the%20Definition%20of%20Waters%20of%20the%20United%20States%20at%2033%20CFR%20328.3%20and%2040%20CFR%20120.2.pdf.
15. 474 U.S. 121, 16 ELR 20086 (1985).
16. U.S. EPA and U.S. Army Corps of Engineers, Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37054 (June 29, 2015).
17. U.S. EPA and U.S. Army Corps of Engineers, Revised Definition of "Waters of the United States," 88 Fed. Reg. 3004 (Jan. 18, 2023).

Figure 5. Map of Cypress Dome in Big Cypress National Preserve



Source: National Park Service, Exploring Big Cypress, https://www.nps.gov/bicy/planyourvisit/upload/BICY-S2_final.pdf

stated, EPA is estimating at this point that up to 63% of wetlands are no longer covered—or at least 63% of what FWS has mapped.

It gets worse if we take into account the second part of the test—and there hasn't been a lot of attention on this point, the requirement that the wetland must be "indistinguishable" from the other water body, where it's difficult to determine where the water ends and the wetland begins. This is not a mere rhetorical flourish. This is part of the holding. It's repeated a number of times in the opinion. The Court makes it clear that, to be jurisdictional under the CWA, the wetland has to have a continuous surface connection, making it difficult to determine where the water ends and the wetland begins.

What's the impact of that? Well, we explained it in our amici brief in *Sackett* that we filed on behalf of 12 scientific organizations.[18] It's not that difficult to determine the boundary between a wetland and another water. Generally, it's the limit of wetland vegetation that is a function of water depth. And in practice, it's not difficult. The permit applicants on Corps forms have to separately identify the project's impacts to wetland acreage and the project's impacts to streams in terms of linear feet.

So, there's a distinction made there between wetlands and other waters. Corps public notices for permit applications also make a distinction between wetland and stream impacts. The §404 mitigation program distinguishes between wetland and stream impacts and credits too. Property owners will likely say, hey, if I can delineate the wetland, it's not "indistinguishable" and therefore it's not jurisdictional. If that's the interpretation, that would eliminate the vast majority of wetlands from any CWA protection. I would be pleased to hear about another interpretation of what "indistinguishable" means.

As an example, back in happier days, I was with my students in the Western Everglades in Big Cypress National Preserve, where we were hip-deep in a cypress dome (see Figure 5). Is it still a WOTUS? No—because it dries up, there is no continuous surface connection, and there's actually a road that separates it from other waters. The cypress dome can be distinguished from nearby waters and thus does not meet the Supreme Court's standard to be a WOTUS.

If you're an old-timer like myself, you might recall that back in 1991 the George H.W. Bush Administration had started rulemaking with respect to wetland delineation and didn't complete it in part because it was very controversial. Under that approach, 100,000 acres of the Everglades would not be considered to be wetlands.

This is an order of magnitude worse. Essentially, we've got Everglades National Park, which the United States has designated as a wetland of international importance under the Ramsar Convention on Wetlands,[19] but we're also saying that most of it is not WOTUS anymore. Well, what does this mean?

A number of environmental groups have said that more than 50% of wetlands are no longer protected. As I noted, however, I think it's worse than that, but those groups

18. Brief of Scientific Societies as Amici Curiae in Support of Respondents, Sackett v. United States Env't Prot. Agency, 143 S. Ct. 1322, 53 ELR 20083 (2023), https://www.supremecourt.gov/DocketPDF/21/21-454/228171/20220616144200253_21-454_Amici%20Brief.pdf.

19. Ramsar Sites Information Service, *Everglades National Park*, https://rsis.ramsar.org/ris/374 (last visited Nov. 3, 2023).

don't want to undercut their litigation positions. They also wanted to wait until EPA and the Corps issued the new rule. The agencies are estimating up to 63%. Again, I'd like to know whether that figure takes into account the second part of the test—the requirement that it must be difficult to determine where the water ends and the wetland begins.

In terms of CWA coverage, *Sackett* and the conforming rule are worse than the Donald Trump Administration's Navigable Waters Protection Rule.[20] Under the Navigable Waters Protection Rule, the tributaries, lakes, or ponds of wetlands that were inundated in a typical year by traditional navigable waters were protected by the CWA. There didn't necessarily need to be a continuous surface connection between the wetland and the other water. In some circumstances, they could even be physically separated by natural features or a road, and the wetland could still be jurisdictional. That does not appear to be the case anymore.

So, what does it mean if there is no CWA jurisdiction? It means there is no need for a federal permit, under §402 or §404, even if these waters were the subject of a previous denial or an EPA veto. Consider EPA's recent veto of the Pebble Deposit area to protect the Bristol Bay watershed in Alaska.[21] That action involved, in part, more than 2,100 acres of wetlands that support anadromous fish streams. How much of those wetlands remain jurisdictional under the CWA?

It also means that there is no jurisdictional hook for the states to weigh in on. If there is no federal permit that's being required, then the states will not have the opportunity to participate through §401 in deciding to issue, deny, or otherwise condition a water quality certification.

It also has implications with respect to water quality standards. For example, in Florida, in the Everglades, we have a state water quality standard of 10 parts per billion for phosphorus. The driver for that was the CWA, and the fact that the receiving waters were WOTUS. They're not anymore. *Sackett* and the rule remove that driver for those water quality standards. We'll have to see how that plays out.

Also, if there is no need for a CWA permit, that means there is no need for those projects to provide CWA offsets. Thus, there is no need to obtain federal mitigation credits. If you're in the mitigation banking business, I think it depends on which state you're in in terms of whether the state has its own independent wetland or stream protection program and how that might affect the credit market.

The bottom line is that the responsibility for wetland protection has shifted to state and local governments. From my perspective, *Sackett* is an extinction-level event for the federal regulation and protection of wetlands, at least for nontidal wetlands. The responsibility has shifted to the state and local governments, and the early returns are not positive. North Carolina, for example, has weakened its state wetland programs. In Florida, individual counties, such as Manatee County, are backing off of their wetland protection rules.

That's where we are at. I look forward to someone talking me off the ledge and providing more positive news.

Rebecca Kihslinger: Our next panelist is Greg DeYoung. Greg is the president and a board member of the Ecological Restoration Business Association (ERBA). He's going to provide us with a practitioner's perspective on the conforming rule, the implications of *Sackett*, and in particular the potential impacts to the compensatory mitigation industry.

Greg DeYoung: I'm with a wetland mitigation practitioner and a species mitigation practitioner, Westervelt Ecological Services. I'm also on the board and president of ERBA. I have three things that I want to discuss today: (1) the impact of *Sackett* on our industry, (2) ERBA's initiatives on the WOTUS front, and (3) some thoughts on a potential silver lining.

ERBA's mission is to support private investment and durable environmental results that enable responsible economic growth. Our 80 member companies provide compensatory mitigation for impacts to our wetlands and WOTUS as well as other offsets. We have a depth of experience. Many of our members have two to three decades of dealing with different chapters of the whole WOTUS saga.

To date, our members have helped to restore hundreds of thousands of acres of wetlands and tens of thousands of stream miles, and interestingly enough, our industry sector generates approximately $25 billion in annual economic input and supports more than 126,000 jobs. So, that puts us, in terms of employment, as a sector right up with American traditional employment sectors.

The question of course is, what about our effectiveness after *Sackett*? There's a lot of uncertainty right now as the amended WOTUS rule is implemented and litigation continues. Going forward, how many acres will there be of restored wetlands, how many miles will there be of restored streams, how many dollars of annual economic output will be generated in our fairly major industry sector, and how many jobs will we be able to support?

Before I talk more about the impacts on our industry, I want to talk about my point of view on what happened with *Sackett*. In these remarks, I am not representing my association or my company. What we've seen is that *Sackett* strips away the ecological tests for waters. By cutting away these ecological tests, it leaves a void. I echo Roy's point that this is not the initiative of the agencies, but this is what needs to be done by them to conform to *Sackett*. I am specifically talking about the excision that happened with the conforming WOTUS rule, in which the following words were eliminated from the previous rule: "That either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of waters."

20. U.S. EPA and U.S. Army Corps of Engineers, The Navigable Waters Protection Rule: Definition of "Waters of the United States," 85 Fed. Reg. 22250 (Apr. 21, 2020).

21. U.S. EPA, Final Determination of the U.S. Environmental Protection Agency Pursuant to Section 404(c) of the Clean Water Act Pebble Deposit Area, Southwest Alaska (2023), https://www.epa.gov/system/files/documents/2023-01/Pebble-Deposit-Area-404c-FD-Executive-Summary-Jan2023.pdf.

What's being removed is this idea of significantly affecting the chemical, physical, or biological integrity of waters. What's left as wetland criteria is a collection of features or the physical indicators that focus on navigability. Practitioners who have been out in the field know that this whole question, this whole endeavor that we all participate in, is about much more than just navigability.

We do have a void with the changes to WOTUS, and practitioners have seen situations where watershed integrity can unravel because of the loss of the physical, chemical, and biological integrity. That unraveling can have significant effects on water quality, flood management, and species status. In terms of this void, there will be different responses, as Roy mentioned, from different states. This has a potential for inconsistency and confusion.

In terms of impacts on our industry, the issue is that with a narrowing wetland footprint, there will be less wetland protection, less permitting, and less demand for compensatory mitigation. In the interim, we are going to have uncertainty and inconsistency. We may also have what we refer to as stranded credits. Those are credits that have already been approved under the prior version of WOTUS, but may no longer be as applicable, or even applicable at all, to impacts to the newly defined jurisdictional wetlands. All of this uncertainty, of course, can lead to unfavorable conditions for investment.

But in spite of this uncertainty, our industry remains cautiously optimistic. This quote from Mark Twain has occurred to me before—"The reports of my death are greatly exaggerated."[22] I think that this sentiment can apply to our industry in that the reports of our demise have been greatly exaggerated. Part of the reason why I say that is because we've had threats before. I know this one is significant, but we've always been able to figure out a way to deal with these challenges. But also, we are bolstered by consistent public support for ecological restoration. That's shown in polls. It's revealed in the Bipartisan Infrastructure Bill,[23] and other Biden Administration initiatives.

So, here we are facing challenges all over again. Most recently, prior to this challenge, we faced the Navigable Waters Protection Rule, under which vast areas were removed from jurisdiction. That was a crazy time, yet our industry not only survived, but actually continued to grow.

Looking back to 2008, we saw the Final Compensatory Mitigation Rule, which did create clarity, including timelines for the review and approval of mitigation banks. But the timelines have proven to be very elusive. Even to this day, we have a very difficult time predicting how long it will take to get approvals of mitigation banks, and thus a difficult time understanding and managing what returns on our investments are going to be. It's been a crazy time in that regard too.

Going way back to 2001, some of you may remember the National Academy of Sciences report.[24] That report found that a significant percentage of compensatory mitigation performed in prior years had failed for a variety of reasons. An interesting fact for me was that a lot of the failure, about one-third of it, happened because the projects were never implemented in the first place. And for a mitigation provider, it's really hard to compete with the very low cost of doing nothing. We've had crazy times, and we're back here again. Yet, we feel optimistic, guardedly optimistic, that we're going to be able to continue.

Member input reveals this guarded optimism. Some of the comments are that we have been here before, this is the nature of our business, there is always a new problem to be fixed, and, most importantly, how do we move forward. Here's what some of our members in different parts of the country have been saying. In California, we hear that major infrastructure clients are actually forecasting an increased need for mitigation and not a reduction in need. There are various reasons for that. One of the reasons is that California has robust policy and law that will fill in the gap for federal protection of wetlands. But also, California has a version of the Endangered Species Act (ESA)[25] that has compelled, and will continue to compel, mitigation.

Colorado has already implemented an enforcement policy. It's an interim policy that is intended to protect wetlands while the state develops a broader program. I also want to mention that the person I contacted in Colorado is quite concerned about ephemeral features in the arid West falling through the cracks.

Texas is where the issue of stranded credits, that I referred to earlier, may be surfacing. We don't really know, but we've heard some rumbling that the Corps in that area may reevaluate approved credits that were based on the restoration of wetland areas that had been considered jurisdictional previous to *Sackett*, but that would no longer be considered jurisdictional under the new WOTUS rule. There's quite a concern about this idea of stranded credits.

In the Southeast, interestingly enough, we are not hearing the same thing about stranded credits. In other words, we don't believe that there will be an effect on the use of credits that now are considered non-jurisdictional. Also, there was a comment that, in terms of new investment, the policies of states regarding wetlands really will make a difference. One of the states that was brought up as being potentially favorable was Florida.

This is just a snapshot right now, but something that we're hearing in multiple locations is that permittees want to continue moving forward with their projects as previously planned and permitted. They're concerned about the uncertainty and potential delays associated with reopening their permits.

On the part of mitigation practitioners, there is some concern that even if we're successful in switching our focus

22. Goodreads, *Mark Twain Quotable Quote*, https://www.goodreads.com/quotes/13977-the-reports-of-my-death-are-greatly-exaggerated (last visited Oct. 3, 2023).
23. Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, 135 Stat. 429 (2021).
24. National Research Council, Compensating for Wetland Losses Under the Clean Water Act (National Academies Press 2001).
25. 16 U.S.C. §§1531-1544, ELR Stat. ESA §§2-18.

to state-level protection of wetlands, we need to be mindful that doing rigorous wetland compensation could be politically unpalatable in many states. That's something we need to be thinking about.

Going forward, our industry is going to need working definitions of revised WOTUS terms, including relatively permanent flow and continuous surface connection. We will also need to understand how far up a tributary to a navigable feature jurisdiction will extend.

The 2008 Final Compensatory Mitigation Rule has a concept called the watershed approach. We are seeking guidance on how compensatory mitigation going forward can fit into this idea of the watershed approach. We understand and we've heard before that there will be region-specific guidance. We look forward to participating in and having input to that regional guidance.

Getting more to the meat of what ERBA is actually doing, we look forward to working with the agencies. We have already started by requesting guidance on three items. The first is the use of non-jurisdictional mitigation bank credits to offset impacts for post-*Sackett* waters. Again, this speaks to this idea of stranded credits. The point I want to make here is that the use of restored non-jurisdictional features as compensatory is already permissible. In other words, even before *Sackett* and even before the revised WOTUS rule, the 2008 mitigation rule explicitly allowed the use of restored non-jurisdictional features to be used as credits to offset impacts to jurisdictional waters and wetlands. This is even more important going forward because of the narrowing footprint of wetlands; so, we are requesting guidance on that. We have issued a document called "The Need for Guidance on Application of Non-Jurisdictional Credits."[26]

The second thing we need guidance on is the use of mitigation bank credits for purposes outside of the narrowing realm of the CWA. What I mean by that is a practice that is already happening in some parts of the country, especially with the ESA. In other words, a single mitigation bank can be approved for offsets to wetlands and waters, *and* it can be simultaneously and comprehensively approved for impacts to species.

We're asking for specific guidance on that because we need the flexibility of being able to use these credits for multiple purposes. Again, this is happening in many places. There are some districts, though, that specifically will not allow that. The attitude in these districts seems to be that the mitigation bank credits must only be used for CWA impacts because they are the Corps' credits. So, this is something that we hope to interact with the agencies on going forward. We also hope to provide input to any region-specific guidance developed by the agencies. We feel that our practical experience could contribute to region-specific guidance. We're also tracking wetland protection in states and other federal authorities beyond just the CWA.

Lastly is the potential for diversification of markets. There is an opportunity to apply all of these skills that we have been developing under the CWA to a whole host of different ecological restoration needs. These needs include species recovery, water quality improvements, and biodiversity protection and enhancement. We are already making a lot of progress in this arena. For example, some of our members are doing water quality projects that measure in the thousands of acres. We are looking forward to diversifying our markets.

I'm going to leave on a positive note, which again is getting to the idea of a watershed approach. What has happened, as we've talked about, is that this idea of significant nexus has been excised from the footprint of WOTUS. But the watershed approach, which is in the 2008 Final Compensatory Mitigation Rule, has an emphasis on interconnected aquatic features. So that still exists as a standard for compensatory mitigation.

Compensatory mitigation should be able to play a critical role in the watershed approach. This is a way to get back to the idea of chemical, physical, and biological integrity of waters. We're suggesting that not just practitioners but also agencies and others lean into this idea of the watershed approach. This may involve restoring features that are no longer considered jurisdictional, but that are important connections to jurisdictional waters. I'll leave with the vision that this application of the watershed approach is an opportunity to constructively navigate the post-*Sackett* waters for permittees, practitioners, stakeholders, and watersheds.

Rebecca Kihslinger: Thank you, Greg. I appreciated hearing the perspectives of your contacts and colleagues from across the country on what's immediately happening. I really like the ideas on the watershed approach.

We're going to turn to our next panelist, Edward Ornstein. Edward is the special counsel on environmental affairs for the Miccosukee Tribe of Indians of Florida. He's going to be providing another kind of stakeholder perspective on the conforming rule as a tribal member and special counsel for the tribe, with a focus on the rule's impacts to the Everglades and his practice.

Edward Ornstein: I'm a citizen of the Southeastern Mvskoke Nation, a state-recognized tribe in Alabama. I also serve as special counsel on environmental affairs for the Miccosukee Tribe of Indians of Florida, and as co-chair for the American Bar Association's Indigenous Law Committee (organized within the Section of Environment, Energy, and Resources). I'm happy to be here and to share a slightly different perspective from Indian Country, noting of course that the views I express are my own.

To begin with, it's worth making sure that everybody has a clear picture of what we're talking about when we refer to tribal nations. If you compare the Obama-era wetland delineations and the locations of federally rec-

26. ERBA, Need for Guidance on Application of Non-Jurisdictional Credits, *available at* https://img1.wsimg.com/blobby/go/41e32553-5f04-46fc-9fa2-2486b37b0f46/downloads/ERBA%20Case%20for%20Guidance%20on%20Non-Jurisdictional%20M.pdf?ver=1697207995115.

ognized tribes within the United States, you'll notice that pretty much everywhere there are wetlands, there are tribes. For example, I'm sitting in the center of the Everglades, within the Miccosukee Tribe of Indians of Florida's jurisdiction, in the very southern tip of Florida. With the understanding that wetlands are Indian lands, let's discuss what that means.

For those unfamiliar with federal Indian law, and those who have not worked with tribes in their practice, it's worth clarifying that tribes are not just reservations. They are national bodies. They are recognized as such by a very long line of cases going back to the 1820s and 1830s, with the trilogy of cases sometimes known as the *Marshall Trilogy*, after Chief Justice John Marshall—*Cherokee Nation v. Georgia*,[27] *Worcester v. Georgia*,[28] and *Johnson v. McIntosh*[29]—all the way through to the present day, with cases like *Santa Clara Pueblo v. Martinez*,[30] *California v. Cabazon Band of Mission Indians*,[31] and *McGirt v. Oklahoma*.[32]

These cases, which I would be doing a disservice to attempt to summarize here, make it clear that tribes are sovereign nations invested with all of the aspects of sovereignty that have not yet been explicitly divested by the U.S. Congress or by the tribe itself. Therefore, and this is explicit in the case law, tribes are sovereign nations. The precise term is a "domestic dependent nation," whose regulatory authority is more often than not exclusive of state authority. I would highly encourage anyone in environmental law practice to dig into these cases and other related cases knowing their relevance to the management of, and particularly the conflict of laws within, almost every watershed in the United States.

With that basic foundation established, let's dive into how the conforming WOTUS rule may impact tribal nations. The conforming rule provides further certainty about the outcome of *Sackett*, but it's still not the final word on the matter, as several of my colleagues have noted today. There are still many open questions that require resolution. That's what I'd like to focus on, having already heard such excellent commentary on what the rule does tell us.

First of all, how will individual watersheds be regulated? How will the conforming WOTUS rule trickle down to each locality? The Corps and the various districts have an opportunity to make these decisions on a case-by-case basis, noting of course that FWS and EPA suggest that about 63% of wetlands will be federally deregulated.

Another good question is, how will wetlands divided by artificial structures be regulated? The preamble of the conforming rule does touch on levees, dikes, and berms. But what about a flow gate? We've got a lot of those here in the Everglades. If a flow gate is kept open year-round, then there would be a continuous surface water connection. If there is a rulemaking that causes that flow gate to close, then that continuous surface water connection would be severed.

I hesitate to make any prediction about the implication of the conforming rule on any specific wetland, but it is safe to say that these places are in jeopardy of federal deregulation. But there's policy yet to be developed. It is quite possible that physical alterations to a watershed may change their potential for regulation.

For example, Professor Gardner mentioned his time in a cypress dome off of Gator Hook Trail. Gator Hook Trail is separated from the rest of the Everglades by the Tamiami Trail, which is a highway, U.S. 41, that bisects Florida from east to west. Right now, the western Tamiami Trail is primarily continuing the flow of the Everglades through culverts that are inserted below the road bed.

But what if, as some advocates are pushing for, that trail had bridges instead of culverts? Would that water then become jurisdictional? Are there physical changes to the landscape that might shift the jurisdiction of waters? Do these agencies, under the Administrative Procedure Act, need to take into account the impacts of their rulemaking on the physical map of WOTUS? I think that's worth looking into. Even if there are not surface connections, what's the lag time for impacted waters to cross from one body to another?

While the Supreme Court doesn't necessarily acknowledge this, most of the folks in this webinar are aware that surface waters are connected to groundwater and that groundwater does allow the transfer of nutrients and pollutants from one surface body of water to another. This is something that the Court has thought about in a prior session, in *County of Maui v. Hawaii Wildlife Fund*,[33] where this logic was applied to National Pollutant Discharge Elimination System permitting. Is that a logic that we can extend here? How do we as advocates create the connectivity in order to make that case? What is the impact specifically for a tribe or state that has assumed regulatory authority from EPA? Does there need to be any impact if the tribe or state fills gaps in their regulatory scheme to the conforming rule?

The preamble to the rule specifically does consider the impact on states and tribes administering CWA programs. It's worth reading that language together with the statement of Justice Alito in the *Sackett* decision, where he says states can and will continue to exercise their primary authority to combat water pollution by regulating land and water use.

Clearly, this has become a federalism discussion. It's fair to say that folks at the intersection of policy analysis and geographic information system mapping will be making a lot of money over the next couple of months as stakeholders try to map out what is or is not a jurisdictional water and what does or does not need further regulation by a different sovereign authority. I'm sure the various Corps districts will be equally busy.

27. 30 U.S. (5 Pet.) 1 (1831).
28. 31 U.S. (6 Pet.) 515 (1832).
29. 21 U.S. (7 Wheat.) 543 (1823).
30. 436 U.S. 49 (1978).
31. 480 U.S. 202 (1987).
32. No. 18-9526 (U.S. July 9, 2020).
33. No. 18-260, 50 ELR 20102 (U.S. Apr. 23, 2020).

It's worth going beyond this paradigm of delegated authority and looking especially from a tribal government perspective at the inherent sovereignty of tribes and states to regulate these watersheds. It is true that states or tribes with delegated EPA authority may face challenges in implementing its CWA authority totally dependent upon decisions made by the Corps, which have not yet been made. But there is no reason to think that either sovereign body could not regulate, according to their own sovereign authority, waters that are within their jurisdiction if a determination is made by a Corps district that those waters are no longer jurisdictional WOTUS.

I think it's also worth noting that there's been a bit of press about this decision and its implications. The secretary of New Mexico's Environment Department has spoken very specifically to what the financial implications would be for his state.[34] Notably, he's projecting $6 million to $7 million of additional annual costs covering the hiring of about 40 to 45 new staff members. These numbers are, of course, locally specific. A small tribe executing regulations over a smaller land area will need less staff than a large western state, the waters of which have likely been largely deregulated by the conforming rule.

But the case of New Mexico gives us a window into the financial implications of the new conforming rule. It's not a matter of whether or not these waters will be entirely deregulated. It's more a matter of who will be assuming the cost of regulation. In that context, this is a jurisgenerative moment in the history of environmental federalism for states, but for tribes too.

While we wait for the courts and the agencies to provide more clarity on relative permanency and all of the other new keywords that we're focusing on after the *Sackett* decision and the release of the conforming rule, we can anticipate that states and tribes will need to begin filling gaps in the regulation. We can start thinking about how we might approach that—and to that end, we need to broaden our toolkit. For example, I think there's an opportunity to get more fluent in the functional equivalence test from *County of Maui*.

There is also an opportunity, in acknowledgment of the fact that states will be assuming a lot more of this authority within their jurisdiction, to shift some lobbying resources from national governments to state governments. And if you're a tribal government, this is a great opportunity to establish inherent tribal jurisdiction to regulate.

This tribal civil jurisdiction to regulate non-tribal members is governed by the tests established by the Supreme Court in 1981 in *Montana v. United States*.[35] In that case, the Court said that tribes are presumed not to have civil regulatory authority over non-members unless (1) there was consent to that jurisdiction; (2) there's an existing agreement between the party that is attempting to regulate and the party that is to be regulated; or (3) if the party to be regulated poses a threat to the health, welfare, or political integrity of the tribal nation. I think when we're talking about impacts to water quality, there's a very easy case to make that water pollution causes an impact to the health, welfare, or political integrity of a tribe.

When all else fails, we have to look back to where our field of environmental law began—in mass torts. If someone's releasing something into a water, if someone's damaging a wetland, and there is an injured party, that party still has standing to bring a claim and attempt to enjoin the action. So, I don't think we are in the middle of an apocalypse, but we are in the middle of a major reevaluation of the tools that we can use to effect the same change, the same protection, and the same oversight over the wetlands and waters that are potentially being deregulated by the conforming rule.

Rebecca Kihslinger: We do have a number of questions for our panelists. I have a couple first for Brian.

Given that the rule went into immediate effect, and there are folks on the ground and the districts making decisions on jurisdictional determinations (JDs) and permits and, as we can see reflected in our audience members' questions, there are lots of questions on things like what's relatively permanent, how to assess continuous surface connection, and so on, maybe you can tell us a bit more about the agencies' plans for future rulemaking or guidance that you're going to get out to stakeholders, the Corps districts, and the states on all these remaining implementation questions and the nuances of what came down through *Sackett*?

Brian Frazer: In terms of future plans, the agencies are committed to addressing other issues that may arise outside the scope of the limited rule. We're also hosting public webinars. We had two already, and we have another one coming up to provide updates on the definition of the "waters of the United States." The webinar that we did on September 12, I believe, was recorded, if people want to see that.[36] We have no current plans on doing another rule. I'd like to make folks aware of that.

Rebecca Kihslinger: Do you have input on future guidance or specific issues that will be covered as you do stakeholder input meetings over time?

Brian Frazer: We will be doing internal guidance with the field staff. Then eventually, in the near future, we will go out for training with states and tribes as well. As I mentioned, we have a listening session coming up pretty soon in which we will be taking feedback from folks in terms of moving forward in implementing the regulation.

Rebecca Kihslinger: I want to ask you one more question because I know you covered some of what's going to

34. Danielle Prokop, *WOTUS Rule Offers Certainty, but Little Clarity for New Mexico Waters*, Source NM (Sept. 6, 2023), https://sourcenm.com/2023/09/06/wotus-impacts-new-mexico-waters/ (quoting Sec. James Kenney).

35. 450 U.S. 544 (1981).

36. U.S. EPA, *Amendments to the 2023 Rule*, https://www.epa.gov/wotus/amendments-2023-rule (last updated Sept. 22, 2023).

be happening moving forward in terms of JDs. The Corps districts are now moving forward and making those. But how does this new rule affect current AJDs that were approved under the January 2023 rule or the pre-2015 regulatory regime?

Brian Frazer: Permit decisions that relied on an AJD completed under the January 2023 rule or the pre-2015 regulatory regime will not be reconsidered. The Corps may rely on an AJD issue under the January 2023 rule or the pre-2015 regulatory regime and completed prior to the date of the *Sackett* decision to support pending or new permit decisions where requesters wish to do so.

However, in these circumstances, I want to make clear that the Corps will discuss with the applicant, as detailed in Regulatory Guidance Letter No. 16-01,[37] whether the applicant would like to receive a new AJD under the current regulatory regime to continue their permit processing or whether the applicant would like to proceed in reliance on the existing AJD, a preliminary JD, or no JD.

Rebecca Kihslinger: Roy, I know there were some questions in the chat about culverts and if culverts are enough to indicate continuous surface connection.

Royal Gardner: If you have a culvert, is that a continuous surface connection? I'm not sure. It may depend on the circumstance whether there's a continuous hydrological connection. Whether it's surface or not, I don't know. But in those circumstances, I would ask whether you can distinguish the wetland from the other water body. If you can, the Supreme Court quite clearly said the wetland is not a WOTUS.

Rebecca Kihslinger: Edward, did you want to comment on that? You mentioned that as well.

Edward Ornstein: I think it's a fascinating question, and it's one that I hope is resolved in a positive way. I could certainly make a case for water flowing through a culvert being *a* surface, maybe not *the* surface that the Supreme Court was envisioning. But I think there's an opportunity for further guidance from EPA and Corps headquarters to weigh in on this issue.

Rebecca Kihslinger: Roy, I have a subject we haven't touched on too much: the removal of interstate wetlands from the category of interstate waters. What does that mean practically on the ground and especially, as we've talked about, in places where you might have a wetland crossing states with different kinds of protection programs?

Royal Gardner: If these interstate wetlands do not otherwise qualify as an adjacent wetland, then they're not protected by the CWA. Take, for example, the boundary between Minnesota and Iowa. Minnesota actually protects its wetlands. Iowa, not so much. So, if one state took action to degrade its wetlands, the other state may have rather limited remedies. Certainly, there'd be no remedy that I see under the CWA if those waters are not WOTUS.

Rebecca Kihslinger: Greg, I want to ask about how practically on the ground, from your practitioner's perspective, you see things moving forward. And given that this rule is likely going to be subject to more litigation and may make this patchwork even more confusing, how does your industry address this nationwide patchwork of regulatory regimes at the state and federal levels?

Greg DeYoung: That's a great question because I think there's a presumption that what has happened in *Sackett* is automatically good for our normal clients or permittees, and clearly it was good for the Sacketts. But what you're pointing to is problematic. I think it's going to be a big issue. Part of it is that a lot of infrastructure providers and even a lot of large corporations rely on consistency. They actually thrive on consistency and clarity.

I don't see a future where we will have consistency and clarity, because I think we may have states that are side by side with dramatically different rules. Again, there's a void because I think that the ecological piece of this was cut out of the footprint of WOTUS. I don't have an answer to that other than that we need to start thinking about the future. Not just because this is my industry, but I think we need to figure out how to compensate for impacts to this narrowing footprint of wetlands. There still is a need for physical, chemical, and biological integrity.

There's a narrowing footprint and probably fewer specific instances where there's going to be a trigger for compensatory mitigation. But when there is, we need to figure out how to get back to this idea of ecological integrity. It's possible. It's just going to take a lot of thought on how we get there.

Rebecca Kihslinger: Edward, I want to follow up on thinking outside of the box, especially where you work in the Everglades. There is a real federal investment in that area, in protection and restoration. There are other examples of that across the country, such as the Chesapeake Bay or the Great Lakes. Are there opportunities for using those kinds of programs to make sure these areas continue to be protected? Or more broadly, what are these other kinds of opportunities that may help provide protection or help restore these wetland areas?

Edward Ornstein: The Everglades was historically the widest river in the world, and probably a very clear case of a WOTUS. It would flow from north of Lake Okeechobee in the Chain of Lakes regions, down through Lake Okeechobee along the Kissimmee River. Then, from Lake Okeechobee out west through the Caloosahatchee Estuary, out east through the St. Lucie Estuary, and south all the way to the Florida Bay where the Florida Keys hang out as barrier islands.

37. U.S. Army Corps of Engineers, Regulatory Guidance Letter No. 16-01 (Oct. 2016), https://www.spn.usace.army.mil/Portals/68/docs/regulatory/resources/RGL/RGL16-01.pdf.

Over the course of the past century, beginning with Gov. Napoleon Bonaparte Broward—and we know there's something crazy coming when a Napoleon is involved—the Everglades has been massively compartmentalized. There are now some 2,100 miles of levees, berms, and dikes, more than 2,100 miles of canals, built either by the state's now-defunct Everglades Drainage District or the Corps. The only reason in my mind that we're facing a situation where there is a potential for the deregulation of parts of the Everglades by the federal government is those very same artificial features, largely built by the federal government.

You're right in pointing out that there's a lot more modern investment in Everglades restoration now. Congress, through the Water Resources Development Act, approves a variety of appropriations for the Comprehensive Everglades Restoration Plan, which is more than 50 or 60 projects that intend to address the issues created in Governor Broward's day. Many of those projects are actually seeking to remove those artificial impediments by filling canals and by adding flow gates on levees, by degrading levees and also restoring sheet flow.

Those projects, as I was hinting at when talking about the Tamiami Trail, are an opportunity to reshape the legal landscape as it exists as a superstructure over the physical landscape, for example, if a culvert is replaced by a bridge. That being said, these projects are also intimately tied into the CWA. The Corps relies on the requirements that are set under the Act, the water quality standards, when doing engineering and targeting outcomes. There may need to be some degree of reevaluation in how those projects are executed post-*Sackett*, but those projects still pose an excellent opportunity for the continued restoration and improvement of the Everglades ecosystem.

The other main impact to the Everglades is probably on the periphery, where there are not a bunch of federal lands or tribal lands and where there is some appetite for private real estate development. The intersection with what Greg was discussing, the compensatory mitigation industry, is very significant there. The state may or may not step in to protect those wetlands that are not otherwise public lands, which is the case for most of the interior Everglades.

However, I think we've yet to see how Congress and how the local Corps will respond to the conforming rule. That response is ultimately going to be determinative of how future Everglades restoration projects interact with this complex legal matrix.

Brian Frazer: One thing I was thinking about is bolstering the state and tribal programs. Tools that we have here at EPA include the Wetland Program Development Grants, where we offer states and tribes grants to protect and restore their waters.

The other thing is our nonpoint source program, where we have §319 funding, too. Those are things that I think, outside the box of the regulatory construct, can also support protecting state and tribal waters.

Royal Gardner: Actually, with respect to the nonpoint source program, states have always had the primary responsibility for dealing with nonpoint source pollution. They don't do a very good job. I'm not confident that, with their new responsibilities, they're going to be stepping up to the plate.

But in terms of trying to think outside the box and perhaps beyond the CWA, the ESA might be used as a proxy for protecting wetlands and other waters. Of course, that may be subject to some litigation as well in the future. There are also efforts in Florida, for example, in terms of actually purchasing environmentally sensitive lands or purchasing conservation easements with respect to environmentally sensitive lands that contain wetlands and other waters. That may be something where there's more political support across both aisles.

Then finally, taking a look at the private sector, a case needs to be made about having wetlands in your neighborhood to help attenuate some of the flooding that we see here in Florida on a regular basis. The insurance industry may have a big role to play here.

Brian Frazer: I don't want you to put a broad brush over the United States, Royal. I think there are some states that do a really good job on the nonpoint source protection. Maybe, as you caveated your presentation, it's your opinion, but I do think there are some states that do a really good job.

Royal Gardner: I agree with that. But nonpoint source pollution in Florida is a huge issue. The state has not stepped up to deal with that, especially with respect to the harmful algae blooms that we have here.

Rebecca Kihslinger: An area for opportunity for future growth. There were a number of questions I still wanted to ask. We didn't get to streams, but maybe that's the focus of the next webinar.