SACKETT V. EPA: THE NARROWING OF "WATERS OF THE UNITED STATES" UNDER THE CLEAN WATER ACT AND ITS DOWNSTREAM EFFECTS ON SOUTH CAROLINA WETLAND REGULATION

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I. INTRODUCTION

In 1972, Congress passed what is now known as the Clean Water Act (CWA)[1] in an attempt to address mounting concerns over the degrading conditions of American waterways.[2] Decades of unchecked industrial pollution rendered nearly two-thirds of American water bodies unsafe for

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1. 33 U.S.C. §§ 1251–1389.
2. *See* 33 U.S.C. § 1251(a).

fishing, swimming, and recreation.[3] Furthermore, the rapid urbanization of American towns and cities resulted in the destruction of nearly half a million acres of wetlands annually.[4] Today, the Clean Water Act keeps an estimated 700 billion pounds of pollutants per annum from entering American waters, doubles the number of waters that are safe for fishing and swimming, and slows the rate of wetland destruction.[5] However, in light of the May 2023 *Sackett v. EPA* Supreme Court decision, decades of CWA protections could become a thing of the past. The *Sackett* decision altered the CWA's definition of Waters of the United States (WOTUS) to exclude from its jurisdiction wetlands that do not have a "continuous surface connection" to traditionally navigable waters, such as streams, lakes, rivers, and oceans.[6] This decision, which many argue flies in the face of decades of past precedent backed by credible science, could remove up to half of the nation's wetlands from CWA protection.[7]

This Note proceeds in three parts. Part II provides background information on the Clean Water Act and how decades of case law and executive action have altered the scope of its authority. Part III analyzes the recent May 2023 *Sackett v. EPA* ruling and its narrowing effect on the definition of WOTUS. Lastly, Part IV will discuss the impacts and challenges that this new definition will bring to wetland regulation in South Carolina while exploring potential ways to overcome these challenges.

II. BACKGROUND

A. The History of the Clean Water Act

The Clean Water Act was passed with the goal of "restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation's waters"[8] by eliminating the discharge of pollutants into navigable waters; a term which is more broadly defined as "waters of the United States."[9] The

3. *See* Andrew S. Lewis, *The Clean Water Act at 50: Big Successes, More to Be Done*, YALE ENV'T 360 (Oct. 13, 2022), https://e360.yale.edu/features/delaware-river-clean-water-act [https://perma.cc/TRR8-4DXG].

4. *See Clean Water Act*, NAT'L WILDLIFE FED'N, https://www.nwf.org/Our-Work/Waters/Clean-Water-Act#:~:text=Before%20the%20Clean%20Water%20Act,nation's%20total%20wetlands%20were%20lost [https://perma.cc/XUQ7-J4GX].

5. *Id.*

6. *See* Sackett v. Env't Prot. Agency, 598 U.S. 651, 684 (2023).

7. Jim Murphy, *Supreme Court Delivers Blow to Clean Water Nationwide*, NWF BLOG (Aug. 8, 2023), https://blog.nwf.org/2023/08/supreme-court-delivers-blow-to-clean-water-nationwide/ [https://perma.cc/UZ2X-YLRG].

8. 33 U.S.C. §1251(a).

9. 33 U.S.C. 1362(7).

CWA replaced the Federal Water Pollution Control Act of 1948, which failed to effectively enforce pollution control in the United States.[10] Reflective of national opinion, this Act failed to recognize the importance of localized waters, including wetlands, as a natural resource and lacked the statutory framework to regulate and prevent their destruction.[11] Although wetlands were not explicitly included in the CWA's definition of "waters of the United States," administrative agencies charged with enforcing the act (the Environmental Protection Agency and the Army Corps of Engineers) initially construed this term to include freshwater wetlands that were adjacent to these waters.[12] Since the CWA's passing, the jurisdiction over wetlands under the Act has been subject to litigation in several key Supreme Court cases.[13] Departing from previous Supreme Court precedent, the recent May 2023 *Sackett v. EPA* ruling narrowed the scope of "waters of the United States" and extended CWA jurisdiction only to those wetlands that have a "continuous surface connection" to navigable waters.[14] As a result, it is estimated that nearly half of the United States' wetlands will no longer receive protection under the CWA.[15]

B. Federal Regulation of Wetlands Under the Clean Water Act

Wetlands are an important environmental and economic resource that provide "a multitude of public goods in the form of ecosystem services, including flood mitigation, water quality improvement, and wildlife habitat."[16] A key provision of the CWA is Section 404, which regulates the discharge of pollutants in the form of dredged or fill material into WOTUS.[17] The Act traditionally included in its regulatory scope wetlands

10. *See* Frank J. Barry, *The Evolution of the Enforcement Provisions of the Federal Water Pollution Control Act: A Study of the Difficulty in Developing Effective Legislation*, 68 MICH. L. REV. 1103, 1104 (1970).

11. *See id.* at 1104–07 (The Federal Water Pollution Control Act of 1948 could regulate only those pollutants which "caused or contributed to a danger to the 'health or welfare of persons' in a state other than the state in which the discharges originated. [This] limitation rendered untouchable by the Act pollution in many interstate waters.").

12. Ted Griswold, *Wetland Protection Under Section 404 of the Clean Water Act: An Enforcement Paradox*, 27 SAN DIEGO L. REV. 139, 142 n.22 (1990).

13. *See*, *e.g.*, United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985); Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs, 531 U.S. 159 (2001); Rapanos v. United States, 547 U.S. 715 (2006).

14. *See* Sackett v. Env't Prot. Agency, 598 U.S. 651, 684 (2023).

15. *See* Murphy, *supra* note 7.

16. Charles A. Taylor & Hannah Druckenmiller, *Wetlands, Flooding, and the Clean Water Act*, 112 AM. ECON. REV. 1334, 1334 (2022).

17. 33 U.S.C. § 1344(a).

that were adjacent to these navigable waters.[18] Section 404 delegates regulatory authority to two federal agencies: The Environmental Protection Agency (EPA), and the United States Army Corps of Engineers (Corps).[19] "The principal regulatory program of the CWA is the National Pollution Discharge Elimination System (NPDES), which is managed and administered by the EPA."[20] Under this program, the discharge of any pollutant into "navigable waters" requires an NPDES permit.[21] Section 404 specifically delegates the issuance of NPDES permits to the Corps when pollutants in the form of dredged or fill materials are discharged in WOTUS.[22] The Corps' jurisdiction over these types of pollutants is particularly applicable to wetlands, which are often filled in order to make property suitable for development.[23]

In determining whether a specific property contains wetlands, the Corps performs a "jurisdictional determination," which is a process of identifying and locating aquatic resources on said property.[24] The Corps determines whether these aquatic resources, if any, meet the definition of a wetland according to the "Corps of Engineers Wetland Delineation Manual" in conjunction with one of the ten regional specific supplements issued by the Corps.[25] If a property is found to contain a wetland, an NPDES permit can be obtained through a comprehensive permitting process in order to proceed with prohibited polluting activities under the CWA.[26] The judiciary has played a crucial role in shaping the scope of the CWA and, over the past five decades, has established whether and to what extent wetlands fall under the

18. *See* Griswold, *supra* note 12, at 143.

19. *See id.* at 142.

20. JENNIFER RUFFOLO, CAL. RSCH. BUREAU, CRB 02-003, THE U.S. SUPREME COURT LIMITS FEDERAL REGULATION OF WETLANDS: IMPLICATIONS OF THE SWANCC DECISION 33 (2002).

21. *See id.*

22. *Id. See* 33 U.S.C. § 1344(a) ("The Secretary [of the Army] may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites").

23. *Id. See Overview of CWA Section 404: Regulatory Authority Factsheet,* U.S. ENV'T PROT. AGENCY, https://www.epa.gov/cwa-404/overview-cwa-section-404-regulatory-authority-factsheet [https://perma.cc/3AZR-WPCH].

24. RUTHANN BRIEN, JURISDICTIONAL DETERMINATION PROCESS 19 (2010).

25. *Id. See What is a Jurisdictional Delineation under CWA Section 404*, U.S. ENV'T PROT. AGENCY, https://www.epa.gov/cwa-404/what-jurisdictional-delineation-under-cwa-section-404 [https://perma.cc/VYK3-L6U9].

26. *See generally Permit Program Under CWA Section 404*, U.S. ENV'T PROT. AGENCY, https://www.epa.gov/cwa-404/permit-program-under-cwa-section-404 [https://perma.cc/K8TF-GV3D] (summarizing the CWA Section 404 permit review process, which requires either an "individual permit" for potentially significant wetland impacts or a "general permit" for discharges that have only minimal impacts).

definition of waters of United States. As the following sections illustrate, judicial interpretations have influenced the way that administrative agencies, namely, the EPA and Corps, have implemented wetland protection policies over the years.

C. The Evolution of the Clean Water Act

1. United States v. Riverside Bayview Homes

After the enactment of the CWA in 1972, the scope of "waters of the United States" remained largely unchanged until the Corps issued interim final regulations redefining WOTUS in 1975.[27] After initially construing the Act to cover only waters that were navigable in-fact, the Corps changed its interpretation of WOTUS in 1975 to include "not only actually navigable waters but also tributaries of such waters, interstate waters and their tributaries, and non-navigable intrastate waters whose use or misuse could affect interstate commerce."[28] Notably, the Corps construed the Act to extend its Section 404 jurisdiction over all "freshwater wetlands" that were adjacent to other WOTUS.[29] The Corps defined freshwater wetlands as "an area that is 'periodically inundated' and is 'normally characterized by the prevalence of vegetation that requires saturated soil conditions for growth and reproduction.'"[30] In 1977, the Corps further refined its definition of wetlands to eliminate the "periodically inundated" requirement, and defined the term as:

> those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas.[31]

After the enactment of the 1977 Corps regulations, the first judicial attempt at defining the scope of "waters of the United States" came in the 1985 Supreme Court case of *United States v. Riverside Bayview Homes*. In this landmark case, Riverside Bayview Homes (Riverside) sought to develop "80 acres of low-lying, marshy land near the shores of Lake St. Clair in Macomb

27. United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 123 (1985).
28. *Id.*
29. *Id.* at 124.
30. *Id.* (quoting 33 C.F.R. § 209.120(d)(2)(*h*) (1976)).
31. *Id.* (quoting 33 C.F.R. § 323.2(c) (1978)).

County, Michigan."[32] This land was bordered to the north, south, and east by "navigable waters over which the Corps had undisputed jurisdiction."[33] In 1976, Riverside "began to place fill materials on its property as part of its preparations for construction of a housing development."[34] Believing that the Riverside's land was an "adjacent wetland" under the Corps' 1975 regulations,[35] the Corps filed suit in the United States District Court for the Eastern District of Michigan, seeking to enjoin Riverside from filling the property without their permission.[36] Upon review, the District Court held that a portion of Riverside's property was a "covered wetland," which could not be filled without a Section 404 permit from the Corps.[37] On appeal, the Sixth Circuit reversed the District Court's decision and interpreted the Corps' 1977 regulations to "exclude from the category of adjacent wetlands" those areas "that were not subject to flooding by *adjacent navigable waters* at a frequency sufficient to support the growth of aquatic vegetation."[38] In coming to its conclusion, the Sixth Circuit focused on the scope of authority the CWA had given the Corps to create its own definition of waters that were subject to its jurisdiction and were concerned that its definition had exceeded the statutory authority given to it by Section 404 of the Clean Waters Act.[39] Under the Sixth Circuit's reading of the Corps' 1977 regulation, the Riverside property "was not within the Corps' jurisdiction, because its semiaquatic characteristics were not the result of frequent flooding by the nearby navigable waters."[40] Accordingly, the Sixth Circuit held that Riverside was free to fill its property without obtaining a Section 404 permit.[41]

Upon granting certiorari, the Supreme Court considered two questions: "[1] the proper interpretation of the Corps' regulation defining [WOTUS]; and [2] the scope of the Corps' jurisdiction under the [CWA]."[42] When answering the first question, the Supreme Court held that the Sixth Circuit, in attempting to limit the Corps' jurisdiction, erred in construing the Corps'

32. *Id.* at 124.

33. Curt Devoe, *Army Corps of Engineers Jurisdiction over Wetlands Under Section 404 of the Clean Water Act:* United States v. Riverside Bayview Homes, Inc., 13 ECOLOGY L.Q. 579, 580 (1986).

34. *Riverside Bayview Homes*, 474 U.S. at 124.

35. Permits for Activities in Navigable Waters or Ocean Waters, 40 Fed. Reg. 31320 (July 25, 1975).

36. *Riverside Bayview Homes*, 474 U.S. at 124.

37. *Id.* at 125.

38. *Id*. (emphasis added).

39. Devoe, *supra* note 33, at 584–85.

40. *Riverside Bayview Homes*, 474 U.S. at 125.

41. *Id.*

42. *Id.* at 126.

1977 regulation to require an adjacent wetland to experience "*frequent* flooding" from "nearby navigable waters."[43] The Court highlighted the fact that the Corps' 1975 interim final regulation, which was replaced with the then current 1977 final regulation, "explicitly included a requirement of 'periodi[c] inundation.'"[44] Furthermore, the Supreme Court noted that in deleting the "periodic inundation" requirement from its subsequent 1977 regulation, the Corps was "repudiating the interpretation of that language 'as requiring inundation over a record period of years,'" and that the Sixth Circuit, in "fashioning its own requirement of 'frequent flooding' . . . improperly reintroduced into the regulation precisely what the Corps had excised."[45] Without this requirement of frequent flooding, the Court held that Riverside's property qualified as a wetland within the meaning of the Corps' wetland definition because it was characterized by the presence of vegetation which required saturated soil conditions supplied by ground water on the property. [46]

The Supreme Court then turned to the more important question of whether the Corps' definition of a wetland was within the jurisdiction granted to it under Section 404 of the CWA.[47] The Court first looked to the legislative history of the Act, citing both House and Senate Reports on The Federal Water Pollution Control Act Amendments of 1972, which stated that "[p]rotection of aquatic ecosystems . . . demanded *broad* federal authority to control pollution, for '[w]ater moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source.'"[48] The Court then turned to evidence presented in the Congressional debate over the 1977 amendments to the CWA to establish that Congress had intended for wetlands to be included in the scope of the Act.[49] The Court noted that, during the debate, "Congress rejected measures designed to curb the Corps' jurisdiction in large part because of its concern that protection of wetlands would be unduly hampered by a narrowed definition of 'navigable waters.'"[50] Second, the Court found that even those who would have been in favor of limiting the Corps' jurisdiction under the Act would not have done so by removing wetlands from the definition of WOTUS, but by limiting the

43. *See id.* at 125, 129 (emphasis added).

44. *Id.* at 130 (quoting 33 C.F.R. § 209.120(d)(2)(*h*) (1976)).

45. *Id.* at 130.

46. *Id.* at 130–31.

47. *Id*. at 131; *see also* Devoe, *supra* note 33, at 587.

48. *Riverside Bayview Homes*, 474 U.S. at 132–33 (quoting S. REP. NO. 92-414, at 77 (1972), *as reprinted in* 1972 U.S.C.C.A.N. 3668, 3742) (emphasis added).

49. *See id.* at 135–37 (discussing Congress' treatment of the Corps' § 404 jurisdiction in its consideration of the Clean Water Act of 1977).

50. *Id.* at 137.

definition to waters that were "navigable in fact *and their adjacent wetlands."*[51] Accordingly, the Court found that deferring jurisdiction to the Corps in defining WOTUS was appropriate and that "the language, policies, and history of the [CWA] compel a finding that the Corps has acted reasonably in interpreting the Act to require permits for the discharge of fill material into wetlands adjacent to the 'waters of the United States.'"[52] In reversing the circuit court's decision, the Supreme Court established that wetlands adjacent to navigable waters covered under the CWA were within the Corps' jurisdiction under Section 404, creating precedent that would not be challenged for nearly two decades until *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*.[53]

2. Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers

Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (*SWANCC*) involved a dispute over whether the Corps had authority to regulate intrastate, non-navigable waters on the grounds that such waters provided habitats for migratory birds.[54] In this case, petitioner, SWANCC was a consortium of twenty-three Chicago area cities and towns that sought to develop a disposal site for nonhazardous solid waste.[55] The disposal site was a 533-acre parcel that formerly served as a gravel mining pit that had been abandoned since the 1960s.[56] Over the course of approximately fifty years, the property had transformed from a strip mine into an "attractive woodland" that was home to a number of different plants and animal species.[57] Additionally, due to the presence of large surface depressions from the previous mining operations, portions of SWANNC's land held rainwater and other precipitation which formed over "200 permanent and seasonal ponds."[58] Notably, these ponds were often used as nesting, feeding, and breeding grounds for over 100 species of migratory birds.[59] Prior to converting "approximately 180 acres of the property into a

51. *Id.*
52. *Id.* at 139.
53. *See id.;* Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs, 531 U.S. 159 (2001).
54. *See* RUFFOLO, CAL. RSCH. BUREAU, *supra* note 20, at 55.
55. *Solid Waste Agency*, 531 U.S. at 162–63.
56. *Id.* at 163.
57. Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs, 191 F.3d 845, 848 (7th Cir. 1999), *rev'd* 531 U.S. 159 (2001).
58. *Id.*
59. *See id.* (discussing the presence of migratory birds on the property).

balefill, a repository for non-hazardous solid waste that cannot be recycled or otherwise removed from the waste stream," SWANCC contacted the Corps to determine if a permit, pursuant to Section 404 of the CWA, was required to develop the land.[60] Initially, the Corps determined that "it had no jurisdiction over the site because it contained no 'wetlands,' or areas which support 'vegetation typically adapted for life in saturated soil conditions.'"[61] However, upon reinvestigation, the Corps determined that portions of the project site did contain "waters of the United States," not because of the presence of wetlands adjacent to these waters, but under its Migratory Bird Rule.[62] The Migratory Bird Rule "reflects the fact that the definition of 'waters of the United States'" encompasses "all waters, including those otherwise unrelated to interstate commerce, 'which are or would be used as habitat by birds protected by Migratory Bird Treaties' or 'which are or would be used as habitat by other migratory birds which cross state lines.'"[63] Due to the presence of migratory birds on the SWANCC project site, the Corps denied granting SWANCC a Section 404(a) permit.[64]

In response to its permit denial, SWNACC filed suit in the Northern District of Illinois "challenging both the Corps' jurisdiction over the site and the merits of its denial of the § 404(a) permit."[65] The district court granted the Corps summary judgment on the jurisdictional issue, and SWANCC decided to drop all claims related to the Corps' permit denial in order to appeal the jurisdictional issue to the Seventh Circuit Court of Appeals.[66] On appeal, SWANCC argued that the Corps had exceeded its statutory authority in asserting CWA jurisdiction over "nonnavigable, isolated, intrastate waters based upon the presence of migratory

birds and, in the alternative, that Congress lacked the power under the Commerce Clause to grant such regulatory jurisdiction."[67] In addressing the Commerce Clause issue, the circuit court held that, under the "cumulative impact doctrine," Congress did in fact have the authority to regulate waters

60 . Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs, 998F. Supp. 946, 948 (N.D. Ill. 1998), aff'd, 191 F.3d 845 (7th Cir. 1999), rev'd, 531 U.S. 159 (2001).

61. *Solid Waste Agency*, 531 U.S. at 164 (citing 33 C.F.R. § 328.2(b) (1999)).

62. *See id.*

63. *Solid Waste Agency*, 191 F.3d at 848 (citing Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. 41206, 41217 (Nov. 13, 1986)).

64. *Id.* at 164–65.

65. *Id.* at 165.

66. *Id.*

67. *Id.* at 166.

that were subject to the Migratory Bird Rule.[68] Under the cumulative impact doctrine, "a single activity that itself has no discernible effect on interstate commerce may still be regulated if the aggregate effect of that class of activity has a substantial impact on interstate commerce."[69] In this case, the circuit court determined that the destruction of migratory bird habitats had a substantial impact on interstate commerce, because each year, "millions of Americans cross state lines and spend over a billion dollars to hunt and observe migratory birds."[70] In addressing the regulatory scope of the Corps under the Migratory Bird Rule, the circuit court held that the "CWA reaches as many waters as the Commerce Clause allows and, given its earlier Commerce Clause ruling, it therefore followed that respondents' 'Migratory Bird Rule' was a reasonable interpretation of the Act."[71]

Upon granting certiorari, the Supreme Court reversed the Court of Appeals ruling, holding that the use of "nonnavigable, isolated, intrastate waters" by migratory birds was not a basis for the exercise of Federal authority under the CWA.[72] In reaching this decision, the Court turned to evaluating the Congressional intent behind the CWA and held that "[w]here an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result."[73] The Court noted that in *Riverside*, "Congress' concern for the protection of water quality and aquatic ecosystems indicated its intent to regulate wetlands 'inseparably bound up with the "waters" of the United States'" and that "[i]t was the significant nexus between the wetlands and 'navigable waters' that informed our reading of the CWA" in that case.[74] Unlike in *Riverside*, however, the Court in *SWANCC* found "nothing approaching a clear statement from Congress that it intended § 404(a) to reach an abandoned sand and gravel pit," and that permitting the Corps to claim jurisdiction under the "Migratory Bird Rule" would infringe on the State's traditional authority over land and water use.[75]

In effect, the decision in *SWANCC* constricted the wetland areas that were subject to the Corp's regulation under the CWA, thereby limiting the areas and activities that individual states could regulate under their Section

68. *See id.*
69. *Id.* (internal quotation mark omitted).
70. *Id*.
71. *Id.*
72. *Id.* at 171–72.
73. *Id.* at 172.
74. *Id.* at 167.
75. *Id.* at 174.

401 authority of the CWA.[76] Although the *SWANCC* decision may have indicated the Supreme Court's intent to shift regulatory responsibility over land and waters to the states, the decision limited existing state wetland programs that were built upon the Section 404 program and "shifted more of the economic burden for regulating wetlands to states and local governments."[77] Additionally, although *SWANCC* did not disturb the holding in *Riverside,* which established the Corps' jurisdiction over wetlands adjacent to navigable waters, the Court failed to explain "which connections to interstate commerce would be acceptable means of determining CWA jurisdiction over *isolated* waters."[78] In adhering to the narrowest possible interpretation of the *SWANCC* decision, the EPA and Corps issued a joint memorandum which concluded that the Supreme Court's decision would only apply to isolated, intrastate, non-navigable waters, and that the Corps retained jurisdiction over the traditional navigable waters and adjacent wetlands as established in *Riverside.*[79] In the years following *SWANCC*, agencies and courts struggled to understand what was still protected by the CWA.[80] Over the course of the next five years, various court decisions established a still somewhat broad interpretation of "waters of the United States," and determined that the CWA extended jurisdiction over the "entire tributary system" of a waterway.[81] This precedent, however, would be changed by the 2006 *Rapanos* ruling.[82]

3. Rapanos v. United States

Rapanos v. United States involved a dispute over whether the CWA extended jurisdiction over wetlands that were more indirectly connected to traditional "waters of the United States."[83] Instead of ending the decades long dispute as to the true meaning of "waters of the United States," the *Rapanos* Court, in a 4-1-4 decision, issued a confusing plurality opinion that left many courts and regulatory agencies without direction in tackling this jurisdictional issue.[84]

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76. *See* JON KUSLER, THE SWANCC DECISION; STATE REGULATION OF WETLANDS TO FILL THE GAP 1 (2004) (discussing the impact of the SWANCC decision).

77. *Id.*

78. *See* RUFFOLO, CAL. RSCH. BUREAU, *supra* note 20, at 58 (emphasis added).

79. *See id.* at 63.

80. James Murphy, *Muddying the Waters of the Clean Water Act:* Rapanos v. United States *and the Future of America's Water Resources*, 31 VT. L. REV. 355, 359 (2007).

81. *Id.*

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

83. *See id.* at 719–21.

84. Bren Mollerup, *Rapanos v. United States: "Waters of the United States" Under the Clean Water Act*, 12 DRAKE J. AGRIC. L. 521, 521-22 (2007).

The disputed wetlands in *Rapanos* stem from two separate cases (*Rapanos v. United States* and *Carabell v. U.S. Army Corps of Engineers*) that were consolidated once certiorari was granted by the Supreme Court in 2005,[85] Rapanos' claims involved the filling of three separate wetland sites, the first being waters that "connected to a man-made drain, which drains into Hoppler Creek, which flows into the Kawkawlin River, which empties into Saginaw Bay and Lake Huron."[86] The second *Rapanos* site at issue was a wetland that was connected to a drain, which then flowed, and had a surface connection to, the Titabawasee River.[87] Lasty, the third site contained wetlands that had a surface connection to the Pine River, which then flowed into Lake Huron.[88] Similarly, the Carabell's dispute involved a wetland located on a parcel of land located approximately one mile from Lake St. Clair.[89] The Carabells were denied a permit from the Corps that would have allowed them to fill a ditch in order to retain water over their lands.[90]

Upon granting certiorari, Justice Scalia, along with Chief Justice Roberts, and Justices Alito and Thomas, issued a plurality opinion that established a two-part test in determining whether a wetland would be covered under the definition of "waters of the United States."[91] The first part of this test established a new definition of "waters of the United States," which included "only those relatively permanent, standing or continuously flowing bodies of water forming geographic features that are described in ordinary parlance as streams, oceans, rivers, and lakes."[92] Under the belief that federal jurisdiction granted under the CWA had gone too far, Justice Scalia declined to extend his definition of "waters of the United States" to "channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall."[93] The second portion of Scalia's test limited CWA jurisdiction to "*only* those wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between 'waters' and wetlands."[94]

85. *See Rapanos*, 574 U.S. at 715–17 (detailing the procedural history of the case).
86. *Id.* at 729.
87. *Id.*
88. *Id.*
89. *Id.* at 729–30.
90. *Id.*
91. *See id.* at 739–42.
92. *Id.* at 739 (internal quotations omitted).
93. *Id.*
94. *Id.* at 742.

Alternatively, Justice Kennedy's concurrence "argued that the majority opinion was inconsistent with past precedent."[95] Although Justice Kennedy agreed with the majority that allowing the EPA and the Corps to establish an overly broad definition of "WOTUS" imposed both federalism and constitutional issues, the proper test for determining whether the wetlands in question fell under the definition of WOTUS was the "significant nexus" test as established in *Riverside* and *SWANCC*.[96] Under this interpretation, wetlands would possess the requisite "significant nexus" if the wetlands "either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'"[97] In support of this argument, Justice Kennedy held that the limitations imposed in Scalia's two-part test were "without support in the CWA because limiting the statute to only standing water, or continuous flow, would limit the Corps' and the EPA's jurisdiction in a way that would make 'little practical sense in a statute concerned with downstream water quality.'"[98]

The plurality opinion of *Rapanos* left many courts and federal agencies unsure as to how to proceed in future wetland disputes and scope of WOTUS determinations. In the *Rapanos* opinion, Chief Justice Roberts noted that "'no opinion commands a majority of the Court as to the jurisdiction of the CWA, and that regulatory entities and courts would now have to feel their way around on a case-by-case basis."[99] On the one hand, Justice Kennedy's "significant nexus" test provided a greater degree of administrative and judicial flexibility, while Justice Scalia's test omitted many waterways that were traditionally covered under the CWA.[100] The issue in applying these contrasting opinions would not be resolved until the hallmark 2023 *Sackett v. Environmental Protection Agency* (*Sackett*) opinion.

III. SACKETT V. ENVIRONMENTAL PROTECTION AGENCY

On May 25, 2023, the Supreme Court delivered an opinion in *Sackett* that effectively reduced the CWA's coverage of American streams by as

95. Mollerup, *supra* note 84, at 529.
96. *Id.*
97. *Rapanos*, 547 U.S. at 780 (Kennedy, J., concurring).
98. Mollerup, *supra* note 84, at 529 (quoting *Rapanos*, 547 U.S. at 769 (Kennedy, J., concurring)).
99. *Id.* at 531 (quoting *Rapanos*, 547 U.S. at 758).
100. *Id.* at 531–32.

much as 80%, and its wetlands by at least 50%.[101] In 2004, Michael and Shantell Sackett purchased a small parcel of land near Priest Lake in Bonner County, Idaho.[102] While preparing to build a home, the Sacketts began filling a portion of their land with rocks and soil.[103] Several months later, the EPA sent the Sacketts a violation notice for their filling operations, stating that their land contained wetlands that were subject to the CWA's jurisdiction.[104] To support this determination, the EPA stated that the wetlands on the Sacketts' property were adjacent to an unnamed tributary which eventually fed into Priest Lake, a body of water which plainly fell under the definition of "waters of the United States."[105] Applying the "significant nexus test" as prescribed in *Rapanos,* the EPA determined that the Sacketts' property was "similarly situated" to a nearby wetland complex, and that their property "significantly affect[ed]" the ecology of Priest Lake.[106] Accordingly, the EPA found that dumping fill material into these waters was a violation of the provisions of Section 404 of the CWA.[107] The Sacketts eventually filed suit under provisions of the Administrative Procedure Act[108] and argued that the EPA lacked jurisdiction over their property, because their wetlands were not considered "waters of the United States."[109] Over nearly ten years of litigation in district and appeals courts, the Supreme Court granted certiorari to ascertain "the proper test for determining whether wetlands are 'waters of the United States.'"[110]

Rejecting the "significant nexus test" derived primarily from Justice Kennedy's concurrence in *Rapanos*, the Justice Alito led majority opinion cut back on the CWA's reach in three major aspects. First, the majority found that the "significant nexus" test was unsupported by the statutory language of the CWA, and that its vague application posed serious due process concerns given the severe criminal sanctions that could be issued for violations of the act.[111] Second, the majority relied on the ordinary definition of "waters" in construing the definition of WOTUS, and limited its scope to "only those relatively permanent, standing or continuously flowing bodies of

101. Richard J. Lazarus, *Judicial Destruction of the Clean Water Act:* Sackett v. EPA, UNIV. CHI. L. REV. ONLINE *1, *1 (Aug. 11, 2023), https://lawreview.uchicago.edu/judicial-destruction-clean-water-act-sackett-v-epa [https://perma.cc/N4FV-735F].

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

103. *Id.*

104. *Id.*

105. *Id.* at 662–63.

106. *See id.* at 663.

107. *See id.*

108. 5 U.S.C. §§ 701–06.

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

110. *Id.*

111. *Id.* at 680–81.

water 'forming geographic[al] features' that are described in ordinary parlance as 'streams, oceans, rivers or lakes.'"[112] Lastly, the majority opinion established that the only wetlands that would be covered under the CWA were those that "part of a body of water that itself constitutes 'waters' under the CWA."[113]

In addressing the first aspect of the *Sackett* opinion, the Court relied almost exclusively on Webster's New International Dictionary to develop a definition for waters under the CWA.[114] However, as Justice Stevens explained in his *Rapanos* dissent, that definition had nothing to say "about whether streams must contain water year round to qualify as 'streams'" and "common sense and common usage demonstrate that intermittent streams, like perineal streams, are still streams."[115] In addition to the majority's unreasonable reliance on the ordinary definition of "waters," the *Sackett* opinion fails to consider the legislative history concerning the interpretation of WOTUS.[116] The purpose of defining "navigable waters" as "waters of the United States" was to give the CWA broad jurisdiction through its Commerce Clause power.[117] In fact, this legislative history was a primary motivation for the *Riverside* Court in concluding that adjacent wetlands were within the scope of WOTUS.[118] The *Riverside* Court reasoned that protection of aquatic ecosystems, as Congress recognized, "demanded broad federal authority to control pollution, for '[w]ater moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source.'"[119]

The *Sackett* majority also utilized two judicial canons in coming to its narrow construction of CWA authority under the definition of WOTUS.[120] Firstly, the Court noted that if Congress had intended for the CWA to reach wetlands that were protected pre-*Sackett,* they must use "exceedingly clear language" to "alter . . . the power of Government over private property."[121] The *Sackett* majority recognized that "[r]egulation

112. *Id.* at 671 (quoting Rapanos v. United States, 547 U.S. 715, 739 (2006)).

113. *Id.* at 676.

114. *See id.* at 671.

115. *Rapanos*, 547 U.S. at 801 (Stevens, J., dissenting).

116. *See* Sam Kalen, *The Court's Abject Failure at Statutory Construction:* Sackett v. Environmental Protection Agency, CATH. U. L. REV. (forthcoming 2024) (discussing Justice Alito's brief analysis into the legislative history of the Clean Water Act as well as his dismissal of EPA's argument that ". . . Congress in 1977 solidified the Corps' broader understanding of 'waters of the United States' and concomitantly adjacent wetlands").

117. *Id.*

118. *Id.*

119. United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 132–33 (1985).

120. *See* Lazarus, *supra* note 101, at *13.

121. Sackett v. Env't Prot. Agency, 598 U.S. 651, 679 (2023).

of land and water use lies at the core of traditional state authority," and that an overly broad interpretation of the CWA's reach, without clear Congressional intent, would "impinge on this authority."[122] However, critics argue that the application of this principle is overwhelmingly unfounded, and has only appeared in a single case involving the grants of right of way under the Federal Mineral Leasing Act.[123] This case, however, did not directly address whether "the federal government possesses regulatory authority over activities occurring on private land."[124]

The second judicial cannon relied upon by the *Sackett* majority requires a narrow reading of a federal statute's reach when violation of the statute results in penal sanctions.[125] Civil penalties for violations of Section 404 of the CWA can result in fines of up to "$16,000 per day of violation, with a maximum cap of $187,500 in any single enforcement action by the EPA."[126] Although sparingly used, the EPA and Corps also have authority to impose criminal penalties for Section 404 violations; these penalties are most severe when violations are committed knowingly.[127] In light of this authority, the *Sackett* majority posited that constitutional due process requires Congress to define penal statutes "with sufficient definiteness that ordinary people can understand what conduct is prohibited" and "in a manner that does not encourage arbitrary and discriminatory enforcement."[128] Because the *Sackett* Court felt that the EPA's interpretation of WOTUS as applied in the previously controlling 'significant nexus' test was "hopelessly indeterminate," landowners were provided little notice as to their obligations under the CWA.[129]

In sum, the *Sackett* majority held that in order for a wetland to be within the scope of the CWA, there must exist a "'continuous surface connection to the bodies that are "waters of the United States" in their

122. *Id.* at 679–80.

123. *See* Lazarus, *supra* note 101, at *13–14 (discussing U.S. Forest Serv. v. Cowpasture River Pres. Ass'n, 140 S. Ct. 1837 (2020)).

124. *See id.* (highlighting the limited holding of the *Cowpasture* case).

125. *See id.* at *13; *Sackett,* 598 U.S. at 680.

126. *Enforcement under CWA Section 404*, U.S. ENV'T PROT. AGENCY (Apr. 4, 2023), https://www.epa.gov/cwa-404/enforcement-under-cwa-section-404 [https://perma.cc/CL54-HNQD].

127. *See id.*

128. *Sackett*, 598 U.S. at 680–81 (quoting McDonnell v. United States, 579 U.S. 550, 576 (2016)).

129. *Id.* at 681 (quoting Sackett v. Env't Prot. Agency, 566 U.S. 120, 133 (2012) (Alito, J., concurring)).

own right,' so that they are 'indistinguishable' from those waters."[130] Leaning on the dictionary definition of waters first invoked by Justice Scalia in his *Rapanos* plurality, *Sackett* limited WOTUS to "only those relatively permanent, standing, or continuously flowing bodies of water 'forming geographic[al] features' that are described in ordinary parlance as 'streams, oceans, rivers, and lakes.'"[131]

The *Sackett* ruling represents a dramatic departure from the standard practices established over nearly five decades of legislation and judicial interpretation of WOTUS. As Justice Kavanaugh explained in his concurring opinion in judgement only, "instead of adhering to the ordinary meaning of 'adjacent' wetlands, to the 45 years of consistent agency practice, and to this Court's precedents, the Court today adopts a test under which a wetland is covered only if the wetland has a 'continuous surface connection' to a covered water."[132] Many critics believe that the Court's blatant disregard for this precedent, under the "guise of judicial interpretation," was a step too far in limiting CWA jurisdiction despite clear Congressional intent for the Act to have a broad reach.[133] The primary conclusion requiring wetlands to have a continuous surface connection "demonstrates a fundamental lack of understanding of how natural waters function and connect across space and time."[134] In fact, *Sackett's* ruling decreases wetland protection more than any of the agency rules proposed by the Obama, Trump, or Biden administrations.[135] "[N]o prior agency rule, scientific report, opinion from a scientific agency, or Science Advisory Board recommendation" supports the notion that wetlands must have a continuous surface connection to traditionally navigable waters to be deserving of CWA protection.[136] Under the Obama administration, the 2015 Clean Water Rule[137] incorporated the 'significant nexus test' as proposed by Justice Kennedy in *Rapanos,* which recognized the "importance of the many physical, chemical, and biological

130. *Id.* at 684 (quoting Rapanos v. United States, 547 U.S. 715, 742, 755 (2006) (plurality opinion)).

131. *Id.* at 671 (quoting *Rapanos*, 547 U.S. at 739 (plurality opinion)).

132. *Id.* at 722 (Kavanaugh, J., concurring).

133. *See* Lazarus, *supra* note 101, at *1.

134. S. MAŽEIKA PATRICIO SULLIVÁN, TESTIMONY FOR THE U.S. SENATE COMMITTEE ON ENVIRONMENTAL AND PUBLIC WORKS: EXAMINING THE IMPLICATIONS OF SACKETT V. U.S. ENVIRONMENTAL PROTECTION AGENCY FOR CLEAN WATER ACT PROTECTIONS OF WETLANDS AND STREAMS 5 (2023), https://www.epw.senate.gov/public/_cache/files/c/2/c2e250dc-f65e-49ed-9a12-0440ca52209a/ABA6964E97FE85F628FEB4A43B46657B.10-18-2023-sulliv-n-testimony.pdf [https://perma.cc/2KYB-89A5].

135. *Id.*

136. *Id.*

137. Clean Water Rule: Definition of "Waters of the United States", 80 Fed. Reg. 37054 (June 29, 2015) (to be codified at 33 C.F.R. pt. 328).

connections of headwaters" to downstream navigable waters without overly emphasizing a hydrologic surface connection requirement.[138] This 2015 rule was supported by a "comprehensive scientific report" that "synthesized over 1,200 peer-reviewed publications and provided the technical basis for the rule."[139] Alternatively, the 2020 Navigable Waters Protection Rule (2020 NWPR) proposed under the Trump administration reversed decades of wetland protections established through case law and agency rules, and limited CWA jurisdiction to those wetlands that were directly adjacent to traditional navigable waters.[140] Under *Sackett,* however, even the 2020 NWPR, which "misinterpreted science and ignored the CWA's goals," was too broad in its jurisdictional reach.[141]

In response to the *Sackett* majority ruling, the EPA and Department of the Army issued a final rule[142] (Amended Rule) on August 29, 2023, to amend the final "Revised Definition of 'Waters of The United States' Rule"[143] (Revised Rule) which was published in the Federal Register on January 18, 2023, under the Biden administration. Prior to *Sackett* and the issuance of the Amended Rule, the Revised Rule revived decades old protections of wetlands under the CWA by incorporating both the "significant nexus test" and "relatively permanent" standard from the *Rapanos* plurality for wetlands that were not considered adjacent to traditional navigable waters.[144] The Amended Rule, however, struck much of the language from the Revised Rule that the EPA deemed to be at odds with the *Sackett* majority opinion.[145] Essentially, this Amended Rule imparts the "continuous surface connection" standard and excludes from protection nearly 51% of the nation's wetlands that received CWA coverage under the "significant nexus test."[146] A joint coordination memo issued on September

138. *See* SULLIVÁN, *supra* note 134, at 7.

139. *Id.* (discussing U.S. ENVIRONMENTAL PROTECTION AGENCY, EPA/600/R-14/475F, CONNECTIVITY OF STREAMS AND WETLANDS TO DOWNSTREAM WATERS: A REVIEW AND SYNTHESIS OF THE SCIENTIFIC EVIDENCE (FINAL REPORT) (2015)).

140. *See* Anthony L. Francois, *The New Navigable Waters Protection Rule, Explained*, PERC (Jan. 28, 2020), https://www.perc.org/2020/01/28/the-new-navigable-waters-protection-rule-explained/ [https://perma.cc/4YEN-V4K8].

141. SULLIVÁN, *supra* note 134, at 7.

142. Definition of Waters of the United States, 40 C.F.R. § 120 (2023).

143. Definition of Waters of the United States, 33 C.F.R. § 328 (2023).

144. *See* Ariel Wittenberg & Hannah Northey, *Biden WOTUS Rule Revives Decades-Old Protections*, E&E NEWS (Dec. 30, 2022) https://www.eenews.net/articles/biden-wotus-rule-revives-decades-old-protections/ [https://perma.cc/5VR6-VSF3] (discussing the Biden Administration's definitions of wetlands and waterways pertaining to the Clean Water Act).

145. *See* Definition of Waters of the United States, 40 C.F.R. § 120.

146. *See* Wittenberg & Northey, *supra* note 144.

7, 2023, further established the scope of the CWA under the Amended Rule.[147] According to this memo, the Corps and EPA :

> will not assert jurisdiction based on the significant nexus standard, will not assert jurisdiction over interstate wetlands solely because they are interstate, will interpret "adjacent" to mean "having a continuous surface connection," and will limit the scope of the (a)(3) provision to only relatively permanent lakes and ponds that do not meet one of the other jurisdictional categories.[148]

Operationally, the permitting process under Section 404 of the CWA, which governs the filling of wetlands, will remain relatively unchanged except for the scope of jurisdictional determinations made by the Corps.[149] Post-*Sackett,* jurisdiction under the CWA will only be asserted over wetlands that meet the "continuous surface connection" standard.[150]

IV. IMPACT OF SACKETT ON SOUTH CAROLINA WETLAND PERMITTING

A. Sackett*'s Effect on South Carolina Wetland Regulation*

As a result of *Sackett's* narrowing of wetland protection under the CWA, a substantial portion of South Carolina's 4.6 million acres of wetlands (nearly one-fourth of the state's total land acreage)[151] may be in jeopardy.[152] Increasing developmental pressures in the wake of a changing climate and rising sea levels place the coastal state of South Carolina in a fragile position, and *Sackett* stands to make the problem worse if action is not taken to protect wetlands that have been removed from the jurisdictional scope of the CWA.

South Carolina is one of twenty-four states that rely on the federal definition of WOTUS to define its extent of wetland protection and has

147. U.S. DEP'T OF THE ARMY, U.S. ARMY CORPS OF ENG'RS & U.S. ENV'T PROT. AGENCY, JOINT COORDINATION MEMORANDUM TO THE FIELD BETWEEN THE U.S. DEPARTMENT OF THE ARMY, U.S. ARMY CORPS OF ENGINEERS (CORPS) AND THE U.S. ENVIRONMENTAL PROTECTION AGENCY (EPA) (2023).

148. *Id.* at 2.

149. *See id.*

150. *Id.*

151. South Carolina has the third highest percentage of wetlands per land area of any state in the United States. Karen Jackson & Amy E. Scaroni, *An Introduction to Wetlands of South Carolina*, CLEMSON LAND-GRANT PRESS, 1, 1 (2022), https://lgpress.clemson.edu/publication/an-introduction-to-wetlands-of-south-carolina/ [https://perma.cc/3L77-SHG4].

152. *A Note on* Sackett v. EPA*,* S.C. ENV'T L. PROJECT (June 7, 2023), https://www.scelp.org/news/a-note-on-sackett-v-epa [https://perma.cc/GW88-BEXW].

enacted legislation that prohibits state agencies from adopting regulations more stringent than the corresponding federal law.[153] Currently, South Carolina grants the Department of Health and Environmental Control (SCDHEC) regulatory authority over any discharge activity that may affect the water quality of state waters.[154] Additionally, SCDHEC is required by Sections 401 and 404 of the CWA to provide certification for any activity that requires a federal Section 404 permit (a U.S. Army Corps of Engineers permit for the discharge of dredged or fill material).[155] Because of this tiered regime, SCDHEC relies on the Corps to make a jurisdictional determination as to the presence of wetlands, under the definition of WOTUS, in order to exert regulatory authority.[156] If a property is deemed to be wetland-free through the jurisdictional determination process, neither the Corps nor SCDHEC has regulatory authority to dictate what a landowner can do with their property, which includes the filling of wetlands with dredge or fill material.

South Carolina's isolated wetlands, which are wetlands that have no "chemical, physical, or biological connection to [WOTUS] and have no connection to interstate or foreign commerce," [157] are especially vulnerable under a post-*Sackett* regulatory regime. A 2012 report prepared by South Carolina's Isolated Wetlands and Carolina Bays Task Force identified an estimated 400,000 acres of isolated wetlands within the state, [158] which will likely not meet *Sackett's* continuous surface connection requirement. Of the 400,000 acres, 300,000 are located in the sensitive coastal regions of the state, where low-lying towns and cities are prone to flooding from storm surges and rising sea levels.[159] Many non-isolated coastal wetlands are tidally influenced, and, depending on the time of year and amount of

153. James McElfish, *State Protection of Nonfederal Waters: Turbidity Continues*, 52 ENV'T L. REP. 10679, 10684–85 (2022).

154. *See Water Quality Certification Program (Section 401) – Overview*, S.C. DHEC, https://scdhec.gov/bow/water-quality-certification-program-section-401-overview [https://perma.cc/67DQ-9Z63]. Effective July 1, 2024, South Carolina's Department of Health and Environmental Control will be restructured into two separate entities: the Department of Public Health and the Department of Environmental Services, the latter of which will assume responsibility for, among other things, the regulation of wetlands within the state. *See* S.C. CODE ANN. § 44-1-20 (Supp. 2023) (creating the Department of Public Health); § 48-6-10 (creating the Department of Environmental Services).

155. *Id.* For a discussion of Section 404 permitting, see Section II(B) *supra*.

156. *See id.*

157. ISOLATED WETLANDS & CAROLINA BAYS TASK FORCE, FINAL TASK FORCE REPORT 3 (2013), https://www.scstatehouse.gov/CommitteeInfo/IsolatedWetlandsandCarolinaBaysTaskForce/August272013Meeting/Final%20Task%20Force%20Report.pdf [https://perma.cc/L9ZR-7726].

158. *Id.*

159. *See id.*; Jackson & Scaroni, *supra* note 151, at 6.

precipitation received, may not always have a continuous surface connection to traditionally navigable waters such as streams, rivers, and lakes.[160] Although coastal wetlands only account for 10% of the state's total wetland area, they serve as a first line of defense against storm surges, flooding, and rising sea levels in areas of low elevation.[161] It is estimated that coastal wetlands alone provide up to $447 million dollars of coastal protection per year in South Carolina through flood storage, storm surge, and wave energy management.[162] As South Carolina continues to experience high population growth rates in its coastal regions,[163] wetlands will become increasingly critical in combatting the effects of climate change and rising sea levels.[164] Aside from coastal protection, coastal wetlands contribute to a substantial portion of the $2.74 billion and nearly 32,000 jobs generated from hunting, fishing, and wildlife viewing in South Carolina annually.[165] Coastal wetlands are also important in that they provide a habitat for "diverse and unusual flora and fauna."[166] In fact, coastal wetlands provide far greater habitat diversity than other wetlands because of their fluctuating and often unpredictable hydrologic conditions, which provides a home for species that are specially adapted to these conditions.[167] In addition to coastal wetlands, *Sackett* poses a real risk to a portion of the remaining 90% of upstream wetlands that serve many of the same key functions that coastal wetlands do. In addition to flood storage, wetlands in South Carolina serve as pollutant filters and carbon sequesters, which help clean the major waterbodies that feed the state's drinking and recreational water supplies.[168]

160. *See* Jackson & Scaroni, *supra* note 151, at 1.

161. *Id.* at 5.

162. MATT GORSTEIN, S.C. SEA GRANT CONSORTIUM, SCSGC-T-21-02, THE ECONOMIC BENEFITS OF SOUTH CAROLINA'S BEACHES AND BARRIER ISLANDS 10 (2021), https://www.scseagrant.org/wp-content/uploads/Economic-Benefits-of-Beaches-Barrier-Islands.pdf [https://perma.cc/286H-3P89].

163. South Carolina experienced a 2023 population growth rate of 1.7%, the highest in the nation. Mike Schneider, *South Carolina and Florida Were the Fastest-Growing States in 2023*, L.A. TIMES (Dec. 19, 2023), https://www.latimes.com/world-nation/story/2023-12-19/south-dominates-us-population-gains-as-deaths-drop [https://perma.cc/U2UQ-HR59].

164. *See* ISOLATED WETLANDS & CAROLINA BAYS TASK FORCE, *supra* note 157, at 8.

165. S.C. DEP'T OF NAT. RES., THE ECONOMIC CONTRIBUTION OF NATURAL RESOURCES TO SOUTH CAROLINA'S ECONOMY 13–14 (2017), https://www.dnr.sc.gov/economic/EconomicContributionsSC.pdf [https://perma.cc/6YET-SE8N].

166. ISOLATED WETLANDS & CAROLINA BAYS TASK FORCE, *supra* note 157, at 8.

167. *Id.*

168. Jackson & Scaroni, *supra* note 151, at 5.

B. Future South Carolina Wetland Regulation Recommendations

Because *Sackett* affects the Corps' ability to assert jurisdiction over wetlands in the first stage of the wetland permitting process, South Carolina should enact new legislation that allows state agencies to apply a more stringent standard to regulate wetlands than what is outlined in the CWA. According to South Carolina's Strategic Statewide Resilience and Risk Reduction Plan, released in July of 2023, new legislation should be enacted that "regulate[s] the alteration of isolated wetland systems to reduce the potential loss of flood mitigation and ecosystem services."[169] This risk reduction plan was issued by the South Carolina Office of Resilience (SCOR), which "exists to increase resilience to disasters and reduce or eliminate the long-term risk of loss of life, damage to and loss of property, and suffering and hardship, by lessening the impact of future [environmental] disasters."[170] In recognition of the numerous economic and ecologic benefits that wetlands provide to South Carolina, the SCOR, regardless of the *Sackett* decision, finds it wise to protect wetlands resources through the implementation of more stringent state legislation. In light of *Sackett's* recognition of state's rights to mandate uses of private property, "[s]tate *legislatures* can, without question, enact or amend laws to protect state water resources that have lost federal protection, or whose coverage by federal law is now clouded by legal uncertainty."[171] Currently, nineteen states have enacted laws that go above and beyond the scope of the CWA and regulate waters that fall outside of the WOTUS definition.[172] Michigan, for example, was granted full authority by the EPA in 1984 to enact its own wetland laws.[173] Under this authority, Michigan has imposed several standards (that are more stringent than those prescribed by *Sackett*) that must

169. S.C. OFF. OF RESILIENCE, STRATEGIC STATEWIDE RESILIENCE AND RISK REDUCTION PLAN: EXECUTIVE SUMMARY, at xiii (2023).

170. *Id.* at ii.

171. ENV'T L. INST., STATE CONSTRAINTS: STATE-IMPOSED LIMITATIONS ON THE AUTHORITY OF AGENCIES TO REGULATE WATERS BEYOND THE SCOPE OF THE FEDERAL CLEAN WATER ACT 1 (2013).

172. *See* McElfish, *supra* note 153, at 10689.

173. *See* Kyle P. Konwinski & Seth B. Arthur, *Michigan's Wetlands: What Land Developers and Landowners Need to Know*, VARNUM (Feb. 16, 2023), https://www.varnumlaw.com/insights/michigans-wetlands-what-land-developers-and-landowners-need-to-know/ [https://perma.cc/K4VL-YN94]; Lester Graham, *A Patchwork of Differing State Laws to Protect Wetlands*, CIRCLE OF BLUE (2023), https://www.circleofblue.org/2023/world/a-patchwork-of-differing-state-laws-to-protect-wetlands/#:~:text=Michigan%20in%20particular%20will%20continue,in%20the%20Great%20Lakes%20region [https://perma.cc/6T5N-5WQD].

be met in order to impact wetlands in the state.[174] Similar to South Carolina's proximity to the Atlantic Ocean, part of the reason for Michigan's authority to impose its own wetland protection laws is its proximity to the Great Lakes. Moving forward, South Carolina should enact similar legislation that goes above *Sackett's* "continuous surface connection" standard to protect sensitive wetland environments from being destroyed. However, because enacting new legislation takes a significant amount of time, South Carolina lawmakers may consider imposing a moratorium on development activities occurring in wetland areas that no longer fall within CWA jurisdiction. This moratorium would prevent developers from accelerating their wetland fill processes in an attempt to get ahead of any proposed changes in state wetland regulation, because once a wetland is filled, it is essentially destroyed forever. However, imposing a development moratorium may invoke constitutional taking challenges. In *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, an association of landowners brought an action against the Tahoe Regional Planning Agency (TRPA), claiming that the agencies moratoria on development "constituted a taking of their property without just compensation."[175] The planning agency, in an attempt to maintain the status quo while studying the impact of development on Lake Tahoe, implemented two moratoria that lasted approximately thirty-two months.[176] Specifically, the planning agency was worried that unchecked development would lead to increased pollution of Lake Tahoe and would cause uncontrolled algae blooms, threatening the characteristic water clarity that Lake Tahoe is well known for.[177] Landowners who had purchased their property prior to the enactment of the moratoria were effectively prohibited from continuing with development plans and brought suit against the TRPA, alleging that the moratoria amounted to a taking of their property without just compensation.[178] The Supreme Court found that the moratoria ordered by the TRPA did not constitute *per se* takings of property requiring compensation under the takings clause.[179] In coming to its conclusion, the *Tahoe-Sierra* Court noted that although the thirty-two month moratoria were sufficiently long to warrant skepticism, they were nonetheless necessary to allow the TRPA to ensure the safety of the community.[180] Furthermore, it

174. Konwinski & Arthur, *supra* note 173.

175. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency, 535 U.S. 302, 302 (2002).

176. *Id.* at 306.

177. *Id*. at 307–08.

178. *Id.* at 302.

179. *Id.*

180. *Id.* at 304.

would have been unrealistic and counterproductive to require the TRPA to compensate each and every homeowner for a temporary taking because it would have forced officials to "rush through the planning process or abandon the practice altogether."[181] In comparing *Tahoe-Sierra* to a potential moratorium on wetland development in South Carolina, it seems that lawmakers could avoid any takings claims if they can establish that the moratorium's primary purpose is to promote the welfare of the general public. Certainly, the preservation of wetlands to continue to promote many of their important natural and economic functions would serve to protect the welfare of the state's citizens. Furthermore, officials must be sure that the moratorium does not operate for an unreasonable amount of time such that landowners are restricted from the free use of property containing wetlands.

The primary source of wetland destruction in South Carolina is through development activities.[182] Influencing developers with economic benefits in the form of tax credits and offsite mitigation may be another effective way to curb wetland destruction without the need of State legislation. Between the 1780s and the 1980s, an estimated 27% of South Carolina's wetlands were lost to land conversion.[183] Increasing growth of the state means that, without intervention, this problem will only get worse. However, some organizations such as the Southern Environmental Law Center (SELC) have already employed similar strategies in working with developers to curb wetland destruction.[184] In 2021, "SELC brokered an agreement with a South Carolina Developer to save 50 acres of wetlands slated for destruction to make way for a housing development in Charleston."[185] This agreement involved restoring natural flows on the property to lessen flooding potential in a nearby creek basin, "along with funding a $250,000 trust to help with further flooding fixes."[186] On a state level, South Carolina could also offer development credits which favor sustainable development that emphasizes the protection of wetland resources on a given property. Although there may be more of an upfront cost, the protection of on-site wetlands promotes better flood management, and often provides occupants with an enhanced "green space" that pays off in the long run.

181. *Id.*

182. *See* Jackson & Scaroni, *supra* note 151, at 6.

183. *Id.* at 4.

184. *See SELC Saves South Carolina Wetlands and Helps Create a Better Development*, S. ENV'T L. CTR. (Nov. 16, 2021), https://www.southernenvironment.org/news/selc-saves-south-carolina-wetlands-and-helps-create-a-better-development/ [https://perma.cc/6386-AXUZ].

185. *Id.*

186. *Id.*

V. CONCLUSION

The CWA has evolved over the past five decades to provide comprehensive protection over our nation's waters. Wetlands, which are a key component of these waters, provide numerous ecologic and economic benefits to our nation and the state of South Carolina annually. Before *Sackett,* wetlands were afforded CWA protection if they formed a "significant nexus" with traditional navigable waters such as lakes, streams, rivers, and oceans. This broad view, shaped by decades of agency rules and case precedence, supported the CWA's objective of "restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation's waters."[187] In 2023, the votes of five Supreme Court Justices narrowed this protection and reversed decades of progress by requiring wetlands to have a "continuous surface connection" to "only those relatively permanent, standing or continuously flowing bodies of water 'forming geographic[al] features' that are described in ordinary parlance as 'streams, oceans, rivers or lakes.'"[188] South Carolina, which has the third most wetlands by percentage land mass in the nation, is particularly affected by the *Sackett* decision.[189] Remedial measures, however, in the form of state legislation and public involvement, may be able to prevent the unnecessary destruction of wetlands. Enacting legislation that regulates wetlands beyond the newly revised CWA has already been proven as a reliable means of protection in a number of states.[190] Additionally, educating the public as to the benefits of wetlands and providing developers with economic incentives to protect them may help stop wetland destruction before legislation can be enacted. These methods, despite *Sackett's* narrowing of the CWA's federal jurisdiction, may help protect South Carolina's wetlands and promote the integrity of the state's water resources for future generations.

187. 33 U.S.C. §1251(a).

188. *See* Sackett v. Env't Prot. Agency, 598 U.S. 651, 671, 678–89 (2023) (quoting Rapanos v. United States, 547 U.S. 715, 739, 755 (2006)).

189. Jackson & Scaroni, *supra* note 151, at 1.

190. *See* McElfish, *supra* note 153, at 10690.