CRYSTAL COURTS AND MUDDY WATERS: WETLAND REGULATION IN A POST-*SACKETT* WORLD

ABSTRACT

In Sackett v. EPA*, the Supreme Court held that the EPA lacks jurisdiction under the Clean Water Act to regulate wetlands, unless those wetlands share a "continuous surface connection" with an otherwise jurisdictional waterbody. In doing so, the Court struck down the EPA's definition of "waters of the United States," revisited forty-five years of practice, and signaled increasing suspicion of vague jurisdictional mandates in administrative law. In particular, the Court's bright-line definition of which wetlands are "waters of the United States"—the continuous surface connection rule—has garnered significant criticism.*

But the critics have missed something strange: the Court rejected the alternative "significant nexus test" unanimously*. Stranger still, the Court did so without significant discussion. This has created a startling gap. Academic discussion of* Sackett *focuses almost exclusively on critiquing the continuous surface connection test but has not grappled with why the significant nexus test was discarded in the first place. Nor has the academy attempted to divine lessons from* Sackett *to inform how regulators and NGOs should respond going forward. This note seeks to fill that gap. By considering the economic incentives that exist for both the regulators and the regulated, I argue the Court was right to discard the significant nexus rule as a matter of first principles. As a jurisdictional hook, the significant nexus test presented regulators with an unjustifiable economic incentive to coerce unregulated landowners.*

There is a light at the end of the tunnel, however, for those who believe regulation of wetlands will be insufficient under the continuous surface connection rule. Alternative regulatory forms such as conservation easements can enable Congress, environmental regulators, and NGOs to more efficiently and more ethically protect America's wetlands—without creating the perverse incentives rejected in Sackett*.*

All streams flow into the sea,
yet the sea is never full.
To the place the streams come from,
there they return again.

–Ecclesiastes 1:7

INTRODUCTION

Water flows in a cycle.[1] We simplify the cycle into discrete parts—evaporation, condensation, and eventually lakes, rivers, and the Ocean—but in truth, the hydrologic system is itself fluid. Our "discrete parts" are in a constant state of flux, as molecule by molecule old lakes empty, rivers carve new paths, and beaches disappear into the sea. Water simply does not respect arbitrary human categories.

As humans, this disrespect is a problem. Our ability to coordinate depends on crafting useful categories for the natural world, but occasionally, the natural world refuses to cooperate. The resulting tension between a desire for accuracy on the one hand, and the need for practicality on the other, can create insurmountable confusion.

Wetlands present particularly difficult line-drawing problems. These liminal spaces exist wherever land and water meet, including beaches, marshes, swamps, and banks.[2] Once thought of as public nuisances,[3] scientific study has revealed how important these muddy waters are to our political and ecological communities. Geologists highlight the importance of wetlands in erosion prevention and flooding.[4] Public works specialists laud their potential to improve water quality.[5] And biologists emphasize the unique, keystone environments wetlands provide for local flora and fauna.[6]

For scientists, the line-drawing problems are mostly irrelevant. When a geologist uses the term "wetland," they refer to wetlands by their typical

1. Dale M. Robertson, Howard A. Perlman & T.N. Narisimhan, *Hydrological Cycle and Water Budgets*, *in* 1 ENCYCLOPEDIA OF INLAND WATERS 19–27 (Thomas Mehner & Klement Tockner eds., 2d ed. 2022).

2. Per the EPA, when determining the presence of waters of the United States, "[w]etlands means 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." 33 C.F.R. § 328.3(c)(1) (2025).

3. *See* Kenneth S. Gould, *Drowning in Wetlands Jurisdictional Determination Process: Implementation of* Rapanos v. United States, 30 U. ARK. LITTLE ROCK L. REV. 413, 413–414 (2008).

4. DONALD L. HEY, DEANNA L. MONTGOMERY, & LAURA S. URBAN, FLOOD DAMAGE REDUCTION IN THE UPPER MISSISSIPPI RIVER BASIN: AN ECOLOGICAL ALTERNATIVE 3–5 (2004).

5. U.S. EPA, EPA/625/R-99/010, MANUAL: CONSTRUCTED WETLANDS TREATMENT OF MUNICIPAL WASTEWATERS 21–23 (2000).

6. Scott G. Leibowitz et al., *National Hydrologic Connectivity Classification Links Wetlands with Stream Water Quality*, 1 NATURE WATER 370, 370 (2023).

rather than their distinguishing features. But when we try to translate scientific insights into legal rules, our line-drawing questions reemerge. If society is to regulate people's interactions with wetlands, we must first agree on what *is* and *is not* wetland. If we have failed in our quest for a clear definition, it is not for lack of trying.[7] For the last half century, regulators, water users, and NGOs have engaged in a vicious and multifaceted tug-of-war over how to conceptualize and protect these spaces, leaving the law, land users, and the environment caught in the middle.

In the United States, the federal government regulates water pollution via the Clean Water Act.[8] Sweeping in scope and staggering in severity, the act gives broad authority to the Army Corps of Engineers (ACE) and the Environmental Protection Agency (EPA) to protect the "waters of the United States," affectionately known to practitioners as "WOTUS."[9] The act defines pollutants in broad terms, makes people strictly liable for their discharge, and establishes criminal sanctions for the worst offenders.[10]

Landowners hoping to comply with the act face two options. First, they can cooperate with the agencies and seek a permit. Cooperation has its benefits: because permits can authorize otherwise prohibited pollution, getting regulatory approval may allow property owners to rest easy while doing most (if not all) of what they want.[11]

But cooperation comes with risks as well. While permits can authorize pollution for now, there is no guarantee that the same activities will remain permissible after the permit expires. And for landowners who have already engaged in certain ongoing forms of pollution (like reclamation of a wetland), the cost of a permit may include paying for remediation, not to mention the subjective cost of giving up on one's dreams for the parcel.[12] Faced with the short- and long-term costs of compliance, some landowners choose the second option: arguing their land is not covered by the Clean

7. *See, e.g.*, 38 Fed. Reg. 13528, 13529 (May 22, 1973); 39 Fed. Reg. 12115, 12119 (Apr. 3, 1974); 40 Fed. Reg. 31320, 31324–25 (July 25, 1975); 42 Fed. Reg. 37122, 37144 (July 19, 1977); 45 Fed. Reg. 33290, 33424 (May 19, 1980); 47 Fed. Reg. 31794, 31810–11 (July 22, 1982); 51 Fed. Reg. 41206, 41217 (Nov. 13, 1986); 53 Fed. Reg. 20764, 20765 (June 6, 1988); 80 Fed. Reg. 37054, 37056 (June 29, 2015); 85 Fed. Reg. 22250, 22340 (Apr. 21, 2020); 88 Fed. Reg. 3004, 3004 (Jan. 18, 2023).

8. *Summary of the Clean Water Act*, U.S. ENV'T PROT. AGENCY (June 12, 2024), https://www.epa.gov/laws-regulations/summary-clean-water-act [https://perma.cc/SQ2M-9XM5].

9. 33 U.S.C. § 1362(7); KATE R. BOWERS, CONG. RSCH. SERV., LSB10981, SUPREME COURT NARROWS FEDERAL JURISDICTION UNDER CLEAN WATER ACT 1 (2023).

10. *See* 33 U.S.C. § 1311; THE CLEAN WATER ACT HANDBOOK, 233 (Mark A. Ryan ed., 3d ed. 2011) [hereinafter HANDBOOK].

11. *See* 33 U.S.C. §§ 1311(a), 1344 (prohibiting discharge unless otherwise authorized by a permit).

12. *See* 33 C.F.R. § 326.3(d) (2025).

Water Act at all.[13] The Supreme Court has responded to these controversies by crafting several different tests for determining whether a given body is a "water of the United States."[14]

The Supreme Court once again revisited its definition of the "waters of the United States" in *Sackett v. EPA* (*Sackett II*).[15] There, as I discuss in Part I, the Court confronted the confusion created in its prior *Rapanos* decision.[16] In *Rapanos*, the Supreme Court's fractured opinion produced two dueling standards: the continuous surface connection test favored by the Court's conservative wing, and the significant nexus test proposed by Justice Kennedy in his controlling opinion.[17] Under the continuous surface rule, wetlands are waters of the United States if they are themselves—or if they share a continuous surface connection with waters which are—navigable or interstate.[18]

Justice Kennedy took a different approach. He would have expanded WOTUS's definition to include waters sharing a "significant nexus" with otherwise jurisdictional streams.[19] A "significant nexus," in turn, existed when "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.'"[20]

But Kennedy's approach proved no more popular after he left the Court than it did when he wrote his lone concurrence. In *Sackett II*, the Court unanimously rejected the significant nexus test.[21] While the Court gave a passing nod to textualism as a justification for repudiating Justice Kennedy's test, it gave no further explanation.[22] Given the inherent vagueness in the broad term, "waters of the United States," many

13. *See, e.g.*, United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 124–25 (1985); Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs (*SWANCC*), 531 U.S. 159, 165 (2001); Rapanos v. United States, 547 U.S. 715, 719–21 (2006); U.S. Army Corps of Eng'rs v. Hawkes Co., 578 U.S. 590, 596 (2016).

14. *See* Sackett v. EPA (*Sackett II*), 598 U.S. 651, 666–67, 678–79 (2023).

15. *Id.* at 658.

16. *Rapanos*, 547 U.S. 715.

17. *See id.* at 741–42, 779–80. While the term "significant nexus" itself dates to the Court's prior *Cook County* decision, construction of it as, essentially, a totality of the circumstances test began with Justice Kennedy's controlling opinion in *Rapanos*. *See* 547 U.S. at 779–80; HANDBOOK, *supra* note 10, at 30–31.

18. *Rapanos*, 547 U.S. at 741–42.

19. HANDBOOK, *supra* note 10, at 30–31.

20. *Rapanos*, 547 U.S. at 780.

21. *Sackett II*, 598 U.S. 651, 679 (2023).

22. *See id.* The Court's analysis will be discussed in more detail *infra* Section I.C., but in brief, the Court's analysis focused on the ordinary use of the term "water" as indicated by dictionaries.

commentators find the Court's reliance on textualism unconvincing.[23] But even if more was necessary, is it possible that the Court's rejection of the significant nexus test is justifiable on sound policy considerations?

I believe so. In Part II, I seek to justify the Court's rejection of the significant nexus test through the lens of bureaucratic economics. Using *Sackett II* as a touchstone, I argue that the unique characteristics of the Clean Water Act—in particular command-and-control regulation and agency-defined jurisdiction—fatally flaw its ability to regulate America's wetlands.[24] Using a game-theoretic approach, I seek to show that rational regulators intending to maximize their resources will strategically define jurisdiction through fact-intensive—and thus expensive—standards.[25] But tweaking jurisdictional rules to effectively regulate beyond that jurisdiction violates the central purpose of such limitations: namely, distinguishing the regulated from the unregulated.[26] I therefore argue that either the Court rejected the significant nexus because it reflected an impermissible perverse incentive, or in the alternative, that *Sackett II* was justified on that basis.

However, even if *Sackett II* was right on the law, its critics may still have a point on the policy. The continuous surface connection rule is far too narrow to effectively meet the environmental needs of America's wetlands.[27] Put simply, keystone wetlands do not necessarily share surface connections with waterways they impact. Where the significant nexus test is too broad as a matter of law, the continuous surface connection test is too narrow as a matter of policy.

What America's wetlands need—and, according to *Sackett II*, what the law demands—is more narrowly targeted regulation than the Clean Water Act's command-and-control regime. In Part III, I advocate for the use of conservation easements to protect wetlands excluded by the continuous surface connection rule as a more efficient and targeted form of regulation.[28] American environmental policy already depends on conservation easements in other contexts,[29] and the approach has distinct advantages over a traditional regulatory regime.[30] The conservation easement approach involves tradeoffs to be sure, but in the end I argue they will still accomplish

23. *See, e.g.*, Dana Neacşu, *The Ersatz of the Plain-Meaning Rule of Statutory Construction in* Sackett v. EPA (II), 62 DUQ. L. REV. 275 (2024); Richard J. Lazarus, *Judicial Destruction of the Clean Water Act:* Sackett v. EPA, U. CHI. L. REV. ONLINE, https://lawreview.uchicago.edu/judicial-destruction-clean-water-act-sackett-v-epa [https://perma.cc/FW7J-JHR7].

24. *See infra* Part II.

25. *See infra* Section II.A.

26. *See infra* Section II.A.

27. *See infra* Section II.B.

28. *See infra* Part III.

29. *See infra* Part III.

30. *See infra* Part III.

the goals of the Clean Water Act and all federal environmental regulation: a cleaner environment.[31]

I. THE LAY OF THE WETLAND

In this section, I provide a brief overview of wetland regulation under the Clean Water Act from its inception to *Sackett II*. The Clean Water Act drastically expanded the Federal Government's role in regulating the cleanliness of America's waters, including its wetlands. Under the Clean Water Act's section 404 permitting process, landowners are strictly (and potentially criminally) liable for dredging or filling wetlands covered by the jurisdictional umbrella, "waters of the United States." But "waters of the United States" (alias WOTUS) is cripplingly vague. So, for the last 45 years, agencies and landowners have engaged in a political and legal struggle to define WOTUS's outer limits. *Sackett II* is the culmination of that conflict. It represents a victory of landowners over agencies and of a bright-line rule over a totality-of-the-circumstances standard.

A. Background to the Clean Water Act

When Congress drafted the Clean Water Act, it was not acting on a blank slate, but rather revolutionizing a field of regulation the federal government had been involved in for decades. Congress's regulation of water quality began incidental to its authority over navigable waterways.[32] The Constitution presumptively leaves regulation of inland waterways in the hands of the states, where it remained for the nation's first century. The gradual shift to federal water pollution policy began with the Rivers and Harbors Acts,[33] Congress's first attempt at preventing the pollution of America's "navigable waters."[34]

The Rivers and Harbors Acts were first and foremost works of industrial policy aimed at preserving American shipping lanes rather than protecting the environment as such.[35] Nonetheless, the Rivers and Harbors Acts are relevant to understanding the Clean Water Act in at least two respects. First, the Acts assign responsibility for jurisdictional determinations to the ACE,

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31. *See infra* Part III.

32. David Lawrence Hankey, *Sections 9 and 10 of the Rivers and Harbors Act of 1899: The Erosion of Administrative Control by Environmental Suits*, 1980 DUKE L.J. 170, 174–78.

33. *Id.*

34. *See* HANDBOOK, *supra* note 10, at 1; The Daniel Ball, 77 U.S. 557 (1870), *superseded by statute*, Federal Water Pollution Control Act Amendments of 1972 (Clean Water Act), Pub. L. No. 92-500, 86 Stat. 816, *as recognized in* Rapanos v. United States, 547 U.S. 715 (2006); Robert L. Potter, Comment, *Discharging New Wine into Old Wineskins: The Metamorphosis of the Rivers and Harbors Act of 1899*, 33 U. PITT. L. REV. 483, 502–03 (1972).

35. Potter, *supra* note 34, at 502–03.

a responsibility they keep under the Clean Water Act.[36] Second, the acts limit their jurisdiction using a preexisting term of art—"navigable waters"—a well-understood but narrow term which the Clean Water Act's drafters chose to reject.[37]

The subsequent decades saw environmental catastrophes grow even as faith in local regulation shrank. Congress's first self-conscious attempt to regulate America's aquatic environment was the Federal Water Pollution Control Act of 1948 (FWPCA).[38] While laudable as a forthright attempt to clean up America's waterways, in practice the 1948 act was toothless. The FWPCA required federal regulators to conduct numerous rounds of research and make recommendations to local actors—local actors who could refuse to accept homework from the federal government.[39] If (or, more likely, when) the state actors declined to moonlight as unpaid federal bureaucrats, the Surgeon-General could step in with direct enforcement.[40] But by the time the deadlines passed and public hearings were complete, the damage was often already done.

Over the next two decades, the light touch of the 1948 law began to seem out of step with the problems facing American environments. By 1969, the last year the Cuyahoga River erupted into flames,[41] Congress had already begun exploring how to enable federal officials to fight pollution directly.[42] Congress overrode Nixon's veto on October 18, 1972, enshrining the Federal Water Pollution Control Act Amendments of 1972 in law.[43] But the

36. Memorandum of Agreement Between the Environmental Protection Agency and the Department of the Army 1 (Aug. 11, 1992) (on file with the Environmental Protection Agency). While the Army retains ultimate authority for the grant or denial of a Section 404 (wetlands dredge and fill) permit pursuant to the "Civiletti Memorandum," the Attorney General maintains that the Administrator of the EPA retains ultimate authority for determining the geographic reach of the Clean Water Act. Admin. Auth. to Construe § 404 of the Fed. Water Pollution Control Act, 43 Op. Att'ys Gen. 197, 202 (1979).

37. *See* ROBIN KUNDIS CRAIG, THE CLEAN WATER ACT AND THE CONSTITUTION 117–18 (2d ed. 2009).

38. Federal Water Pollution Control Act, ch. 758, 62 Stat. 1155 (1948).

39. *Id.* at 1155–57. In consultation with the states and local water users, the Act directed the Surgeon-General to investigate the public health implications of pollution and craft comprehensive plans to reduce or eliminate pollutants and their effects. *Id.* at 1155–56. Direct enforcement was possible, but only where pollutants in one state caused harm in another, and even then the Surgeon-General had to first ask the local governor—on two separate occasions—to enforce the law. *Id.* at 1156. If the governor rebuffed the Surgeon-General both times, it could initiate a public hearing with notice and an opportunity for the accused to be heard. *Id.* at 1156–57. Only then could the Surgeon-General refer the matter to the local U.S. Attorney for prosecution—subject to their prosecutorial discretion. *Id.* at 1157.

40. *Id.* at 1156–57; *see also* H.R. REP. No. 92-911, at 66 (1972).

41. *See* Jonathan H. Adler, *Fables of the Cuyahoga: Reconstructing a History of Environmental Protection*, 14 FORDHAM ENV'T. L.J. 89, 90–91 (2002).

42. H.R. REP. No. 92-911, at 67–68.

43. *See* Federal Water Pollution Control Act Amendments of 1972 (Clean Water Act), Pub. L. No. 92-500, 86 Stat. 816; Robert J. Rauch, Note, *The Federal Water Pollution Control Act Amendments of 1972: Ambiguity as a Control Device*, 10 HARV. J. ON LEGIS. 565, 570 (1973).

FWPCAA so completely overhauled federal water regulation that it has become popularly known by a new name—the Clean Water Act.[44]

B. The Clean Water Act in Practice

Section 301(a) of the Clean Water Act flatly prohibits discharge of pollutants into jurisdictional waters[45] unless agencies grant a permit.[46] The act's strict liability standard[47] and capacious definition of pollution[48] make obtaining permits virtual necessities for many American landowners hoping to improve their land.[49]

Permits typically fall into one of two categories: § 404 permits and § 402 NPDES permits.[50] Most stereotypical examples of water pollution—a culvert dumping sludge into a lake or river, for instance—are termed "point-source" pollution requiring § 402 NPDES permits.[51] Section 404 permits, by contrast, cover cases where waters—very often wetlands—are polluted through dredging or filling.[52]

In general, the Corps is responsible for the initial decision on whether to grant a permit, with the EPA retaining a theoretical veto.[53] The Corps

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44. *See* HANDBOOK, *supra* note 10, at 1. The name took a while to catch on, however. The FWPCAA has been generally referred to as the Clean Water Act since 1977. *See id.* at n.6.

45. *See* 33 U.S.C. §§ 1311, 1362(6) ("The term 'pollutant' means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water.").

46. 33 U.S.C. §§ 1342, 1344; HANDBOOK, *supra* note 10, at 27.

47. Violators are strictly liable for the Clean Water Act's civil penalties, but negligence or knowledge are required to establish criminal liability. *See* HANDBOOK, *supra* note 10, at 233; *see also* Am. Canoe Ass'n v. Murphy Farms, Inc., 412 F.3d 536, 540 (4th Cir. 2005); Kelly v. U.S. EPA, 203 F.3d 519, 522 (7th Cir. 2000).

48. As defined by current regulation, pollutants include "dredged spoil, solid waste, incinerator residue, filter backwash, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials (except those regulated under the Atomic Energy Act of 1954, as amended (42 U.S.C. 2011 *et seq*.)), heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water." 40 C.F.R. § 122.2 (2025). Interestingly, regulations exclude materials injected into the ground as part of hydraulic fracturing ("fracking") activities so long as the State determines the activity will not degrade surface or subsurface waters. *Id.* § 122.2(b).

49. *See* 33 U.S.C. §§ 1311(a), 1362(6); *see also Sackett II*, 598 U.S. 651, 660–61 (2023).

50. Robin Kundis Craig, *There Is More to the Clean Water Act than Waters of the United States: A Holistic Jurisdictional Approach to the Section 402 and Section 404 Permit Programs*, 73 CASE W. RSRV. L. REV. 349, 362 (2022).

51. HANDBOOK, *supra* note 10, at 27, 29–30. NPDES stands for "National Pollutant Discharge Elimination System."

52. Craig, *supra* note 50, at 399. Whether and to what extent pollution to wetlands themselves could be regulated under the point-source permitting authority of § 402 is an open question.

53. 33 U.S.C. § 1344(a–c). Section 1344(a) gives the Secretary of the Army authority over initial permitting decisions in the § 404 context; section 1344(c) allows the Administrator of the EPA to veto the granting of a permit or the withdrawal of a permit by the ACE, after consultation with the Secretary. By Memorandum of Agreement, the ACE and EPA have a coordinated process for implementing the

employs a three-tiered approach to permitting. At the most general level, the agencies permit certain widespread activities by rule, otherwise known as a nationwide permit (NWP).[54] Such activities are generally common, present minimal impacts on aquatic ecosystems, and what risks they do pose are roughly identical from instance to instance.[55] Thus, the Corps outlines general conditions and best practices.[56] Assuming the landowners follow the terms of the NWP, no further action is generally necessary.[57] Division and District Engineers can issue regional permits which likewise grant standing permission to engage in certain activities, subject to the permits' terms.[58]

Landowners who wish to discharge dredged or fill material, but cannot find an applicable a NWP or regional permit must seek an individual permit from the Corps.[59] In evaluating an individual permit, the landowner must file an application for public notice and comment.[60] The District Engineer must consider a number of factors in deciding whether to grant a permit: a) the Corps' own regulations under the NEPA, b) the provisions of the Coastal Zone Management Act, National Historic Preservation Act, or the Endangered Species Act to the extent they apply, c) a state water quality certification or waiver, d) the various factors jointly termed "public interest review," and finally e) the EPA's § 404(b)(1) guidance as set forth in 40 C.F.R. part 230.[61]

The individual permitting process is arduous and inconvenient. So, what does the landowner risk by eschewing federal regulation? Unsurprisingly, quite a lot. The Clean Water Act establishes a multitude of public and private regulatory options to ensure compliance with its demands. When a Corps District Engineer believes a landowner is violating the Clean Water Act, the Corps' first step is to issue the owner a cease and desist letter.[62] If the violation meets severity criteria the engineer may issue a compliance order instead, directing the landowner to engage in certain remediation

consultation requirement. Memorandum of Agreement Between the Environmental Protection Agency and the Department of the Army, *supra* note 36, at 6–10. In the fifty-plus years of Clean Water Act regulation, the EPA has vetoed a Corps permit only fourteen times through January 2023. *See Clean Water Act Section 404(c) "Veto Authority*," U.S. EPA, https://www.epa.gov/sites/default/files/2016-03/documents/404c.pdf [https://perma.cc/WV76-M4JM].

54. HANDBOOK, *supra* note 10, at 119.

55. *See* 33 C.F.R. pt. 330 (outlining the procedure for designating a NWP), 33 U.S.C. 1344(e) (statutory authority). NWPs have been issued for a wide variety of activities, from minor discharges (of less than 25 cubic yards and impacting less than 0.1 acres of WOTUS, per NWP 18) to discharges incident to cranberry cultivation (for the creation of cranberry beds disturbing less than 10 acres of WOTUS, per NWP 34). 86 Fed. Reg. 73575, 73579–80 (Dec. 27, 2021).

56. *See* 33 C.F.R. pt. 330.

57. HANDBOOK, *supra* note 10, at 119.

58. 33 C.F.R. § 325.2(e)(2) (2025).

59. *See id.* § 323.3(a).

60. HANDBOOK, *supra* note 10, at 121.

61. *Id.* at 122–24; *see* 33 C.F.R. pt. 336.

62. 33 C.F.R. § 326.3(c)(1) (2025).

activities.[63] If the Corps determines further legal action is necessary,[64] it may seek either Class I administrative penalties (of $26,686 per violation up to $66,713) or civil penalties (of up to $66,713 per day per violation).[65] Even escaping the Corps' notice may not help a duplicitous landowner; the act provides for citizen suits as well.[66] And in extreme cases, the EPA may seek criminal sanctions for knowing violations.[67]

To review: the Clean Water Act provides substantial sanctions for a wide variety of activities—*if* the property is jurisdictional. For many landowners seeking to evade regulation, arguing that their property is not jurisdictional therefore seems the most promising strategy.

C. Judicial Development of WOTUS

In the years since 1972, the Supreme Court has interpreted the Clean Water Act's term "waters of the United States," as applied to wetlands, in four landmark cases.

1. United States v. Riverside Bayview Homes, Inc.

The Court first addressed whether wetlands fit within the definition of "waters of the United States" in *United States v. Riverside Bayview Homes*. The Court concluded that they did.[68] While acknowledging that "[o]n a purely linguistic level, it may appear unreasonable to classify 'lands,' wet or otherwise, as 'waters,'" the Court recognized that

> the transition from water to solid ground is not necessarily or even typically an abrupt one. Rather, between open waters and dry land may lie shallows, marshes, mudflats, swamps, bogs—in short, a huge array of areas that are not wholly aquatic but nevertheless fall far short of being dry land.[69]

The Court elected to defer to agency expertise, deciding that wherever the line lay, the federal agencies were the ones to find it.[70]

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63. *Id.* § 326.3(d)(1).
64. *See id.* § 326.5.
65. *See id.* § 326.6. If the Corps choses to pursue administrative penalties, it must observe a high degree of substantive due process, including a notice and comment, a public hearing, available administrative record, hearing, written decision, and judicial review. *See id.* § 326.6(c)(l).
66. 33 U.S.C. § 1365.
67. 33 U.S.C. § 1319.
68. *See* United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 139 (1985).
69. *Id.* at 132.
70. *Id.* Notably, the Court in *Riverside Bayview* relied in part on *Chevron* deference, *id.* at 131, which is no longer valid under *Loper Bright*. Loper Bright Enters. v. Raimondo, 603 U.S. 369, 396 (2024). Note well, however, that the Court in *Loper Bright* explicitly preserved prior decisions relying

2. SWANCC

The Court next addressed the definition of "waters of the United States" in *Solid Waste Agency of Northern Cook County. v. Army Corps of Engineers*, otherwise known as *SWANCC*.[71] There, the Court was asked whether WOTUS extended to cover isolated ponds relevant to the migration patterns of certain birds.[72] Pointing to *Riverside Bayview*, the Court noted Congress had acquiesced in the regulatory definition of *adjacent* wetlands as within the scope of WOTUS.[73] But *isolated* wetlands were another matter. As the Court put it, "[i]t was the significant nexus between the wetlands and 'navigable waters' that informed our reading of the Clean Water Act in *Riverside Bayview Homes*."[74] Finding that the Migratory Bird Rule was not within the outer limits of WOTUS, the Court struck it down.[75]

3. Rapanos v. United States

Rapanos v. United States was the last of the pre-*Sackett II* WOTUS cases, and the source of the confusion that *Sackett II* addressed. There, a farmer backfilled a waterlogged portion of his property which the United States argued was a protected wetland.[76] Vacating the Sixth Circuit's opinion below, the Court held that the farmer's wetlands were jurisdictional only if they were sufficiently connected to jurisdictional waters.[77] But the Court fractured on what kind of connection the United States must show.[78] Justice Scalia, for a four-Justice plurality, concluded that the plain meaning of "waters" refers primarily to distinct surface water bodies, and covers wetlands only to the extent that they share a continuous surface connection with the primary waterbody itself.[79] To wit: "[o]n this definition, 'the waters of the United States' include only relatively permanent, standing or flowing bodies of water."[80]

Justice Kennedy concurred in the judgment alone, finding the majority's reasoning impermissibly narrow and arguing for a far more expansive

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on the *Chevron* framework, finding that a prior case's "mere reliance" on *Chevron* would not constitute sufficient grounds for overcoming statutory stare decisis. *Id.* at 412.

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

72. *Id.* at 165–66.

73. *Id.* at 167.

74. *Id.*

75. *Id.* at 174.

76. Rapanos v. United States, 547 U.S. 715, 719–22 (2006).

77. *Id.* at 757.

78. *Id.* at 757, 782.

79. *Id.* at 732–33, 757 (citing WEBSTER'S NEW INTERNATIONAL DICTIONARY 2882 (2d ed. 1954)).

80. *Id.* at 732.

standard. On his view, the statutory history of the Clean Water Act clearly covered "adjacent" wetlands, and he went further to define hydrologic adjacency as sharing a significant nexus with a traditionally navigable water.[81] Justice Kennedy concluded that "[w]hen the Corps seeks to regulate wetlands adjacent to navigable-in-fact waters, it may rely on adjacency to establish its jurisdiction. Absent more specific regulations, however, the Corps must establish a significant nexus on a case-by-case basis when it seeks to regulate wetlands based on adjacency to nonnavigable tributaries."[82] The determination of which standard governs is the central question animating *Sackett II*.

4. Sackett v. United States

In *Sackett II*, the Supreme Court once again took up the challenge of defining the "waters of the United States." When the Sacketts began to backfill a waterlogged portion of their property, the EPA asserted jurisdiction.[83] The Sacketts filed suit under the Administrative Procedure Act, and after winding up and down the court system for over a decade, the Ninth Circuit ruled the Sacketts' property jurisdictional under the significant nexus test.[84] The Supreme Court granted certiorari on the question of whether the Ninth Circuit applied the proper test to determine EPA jurisdiction.

This time, the *Rapanos* plurality's continuous surface connection test garnered a clear majority.[85] Justice Alito, writing for the Court, focused his analysis in two areas. First, the Court took pains to highlight the theoretical breadth, heavy penalties, and onerous adjudication requirements of assessing jurisdiction under the Clean Water Act.[86] Second, the Court moved to a putatively textual analysis of the term "waters of the United States."[87] Drawing from dictionary definitions[88] and related terms,[89] the Court established a two part test.[90] For wetlands to be jurisdictional, they must 1) be adjacent to a relatively permanent body of water connected to traditional interstate navigable waters, and 2) share a continuous surface connection with that body such that determining where one ends and the other begins

81. *Id.* at 782, 784–85.
82. *Id.* at 782.
83. *Sackett II*, 598 U.S. 651, 661–62 (2023).
84. Sackett v. U.S. EPA, 8 F.4th 1075, 1093 (9th Cir. 2021).
85. *Sackett II*, 598 U.S. at 678.
86. *Id.* at 659–61, 663–71.
87. *Id.* at 671–72.
88. *Id.*
89. *Id.* at 672.
90. *Id.* at 678–79.

is difficult.[91] While the Court disposes of the significant nexus test on the basis of a putatively textual analysis, I argue the text is not as clear as the Court finds it to be, and that the Court's discussion of messy jurisdictional tests suggests an implicit understanding of jurisdiction which informs the Court's decision.

Before launching its textual analysis, the Court explains the Clean Water Act's enforcement provisions with clear sympathy to the regulated. In Section I.A and Part II, the Court goes into detail regarding the penalties the act provides, as well the process for finally determining whether one's waters are jurisdictional under the Clean Water Act.[92] As the Court notes, violating the Clean Water Act can result in severe liability.[93] Criminal sanctions for section 404 violations include up to six years in prison and a fine of $100,000 per day.[94] Civil and administrative sanctions are nearly as harsh, with fines of up to $60,000 per day for each violation.[95] As the Court points out, the definition of "violation" can be mercilessly sharp: one farmer who plowed his land in violation of the act was assessed one violation for each pass of the plow, resulting in 348 separate penalties.[96] And, if the government has not yet filed suit against a violator, private citizens may bring suit to enforce the Clean Water Act's requirements.[97]

The primary safe harbor for landowners who wish to avoid running afoul of the Clean Water Act is to obtain a permit from the Army Corps of Engineers, though the Court seems skeptical that the current jurisdictional determination process is adequate in the face of the act's stiff penalties.[98] Alito writes: "The costs of obtaining such a permit are 'significant,' and both [the EPA and ACE] have admitted that 'the permitting process can be arduous, expensive, and long.'"[99]

The court's sympathy with the regulated is understandable. Ordinarily, in the words of the English common law, "everything that is not forbidden is allowed."[100] The Clean Water Act inverts the maxim. All things not

91. *Id.*
92. *Id.* at 659–61.
93. *Id.* at 660; 33 U.S.C. § 1319.
94. For repeat knowing offenses, see 33 U.S.C. § 1319(c)(2).
95. 33 U.S.C. § 1319(d). Pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990 and its 2015 Amendments, the statutory civil penalty amounts have been adjusted for inflation up from their initial $25,000 per day maximum to their current $60,000-plus levels. 40 C.F.R. § 19.4 (2025); 90 Fed. Reg. 1375, 1377 (Jan. 8, 2025).
96. *Sackett II*, 598 U.S. at 660–61; Borden Ranch P'ship v. U.S. Army Corps of Eng'rs, 261 F.3d 810, 813, 818 (9th Cir. 2001).
97. *See* 33 U.S.C. § 1365.
98. *Sackett II*, 598 U.S. at 661 (quoting Army Corps of Eng'rs v. Hawkes Co., 578 U.S. 590, 594–95, 601 (2016)).
99. *Id.*
100. John Laws, *Beyond Rights*, 23 OXFORD J. LEGAL STUD. 265, 273 (2003).

explicitly allowed are prohibited—and prohibited by stiff sanctions at that.[101]

In Part II, the Court turns to detailing the jurisdictional determination process. After detailing the winding path of the Court's WOTUS case law,[102] the majority evaluates the state of modern practice.[103] In 2008, the agencies jointly implemented Justice Kennedy's significant nexus test, to operate alongside the *Rapanos* plurality's continuous surface connection test.[104] The most recent regulation prior to *Sackett II* came in 2023, which expanded the jurisdictional test from the previous rule enacted in 2019.[105] According to the 2023 rule, several bodies of water were categorically waters of the United States, including traditionally navigable waters, their tributaries, or interstate wetlands.[106] Also included are intrastate lakes, ponds, streams, or wetlands which share either a continuous surface connection or a significant nexus with a categorically covered water.[107]

Having set the scene, the Court launched into its analysis of the proper reading of the Clean Water Act's WOTUS designation. The Court first concluded that the "waters," according to the "ordinary meaning" of the term, applies 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.'"[108] Like Justice Scalia in *Rapanos*, Justice Alito started with the dictionary definition of "waters,"[109] before turning to the other provisions within the act.[110] Noting that "waters of the United States" is technically the statutory definition of the term "navigable waters," Justice Alito argues that the dictionary definition better aligned "WOTUS" with the term it was defining, as that

101. *See supra* Section I.B.; *see also supra* notes 92–97 and accompanying text.

102. *Sackett II*, 598 U.S. at 665–67.

103. *Id.* at 667–69.

104. Memorandum, Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States* & *Carabell v. United States*, EPA & Dep't of the Army 8–12 (Dec. 2, 2008).

105. 88 Fed. Reg. 3004, 3006, 3144 (Jan. 18, 2023).

106. *Id.* at 3143.

107. *Id.*

108. *Sackett II*, 598 U.S. at 671–72 (alteration in original) (quoting Rapanos v. United States, 547 U.S. 715, 739 (2006)).

109. *Id.* at 671–72. The dictionaries cited (Webster's Second, Black's, and Random House) all give as examples open bodies of water such as lakes, rivers, and oceans. *Id.*

110. *Id.* at 672–74; *cf.* Isaiah McKinney, Comment, *"Navigable Waters" Does Not Include Mud Puddles: The Clean Water Act's Legislative History Supports a Narrow, Commercial-Focused Interpretation*, 12 WAKE FOREST J.L. & POL'Y 381, 400 (2022) (surveying legislative history to conclude that the vast disparity between mentions of "navigable waters" (231 instances) and "wetlands" (2 instances) suggests that wetlands were not expected by legislators to be covered by the Clean Water Act). Justices Thomas and Gorsuch noted their reservations as to the Clean Water Act's applicability to streams, creeks, and purely intrastate lakes which would not have historically been considered "navigable." *Sackett II*, 598 U.S. at 707 (Thomas, J., concurring).

term was historically understood.[111] And it seems to better comport with the specific waters—the Chesapeake Bay, for example—called out by name in the Clean Water Act.[112]

Despite its focus on the open bodies of water, the Court does not categorically reject the possibility of jurisdictional wetlands. Nor could it. In 1977, Congress amended the Clean Water Act to allow states to take over § 404 permitting.[113] In that amendment, Congress authorized States to administer programs related to the dredging and filling of, inter alia, "wetlands adjacent thereto."[114] Turning to the question of adjacency, the Court likewise found the common reading of "adjacent" when used to refer to geographic features means something similar to "abutting."[115] Thus, according to Alito, a continuous surface connection is necessary to render a water jurisdictional.[116] Because the Court found that such a reading was the text's plain meaning, no more was required to dispose of the significant nexus test.[117]

Justice Alito's textual analysis has had its share of critics, starting with four of his fellow justices. Justice Kavanaugh, writing for himself and Justices Kagan, Sotomayor, and Jackson, concurred only in the judgment.[118] He appeared to adopt the Court's rejection of the significant nexus test wholesale, but felt the majority's adoption of the continuous surface test confused the word "adjacent" for the word "adjoining."[119] Martialing his

111. *Id.* at 672–73 (majority opinion). Justice Alito notes, however, that the Court has consistently interpreted the Clean Water Act's use of a new term (waters of the United States) to define an old term (navigable waters) as indicating a desire to *expand* the act's jurisdictional scope. Recognizing the tension, Justice Alito argues that "we have refused to read 'navigable' out of the statute . . . . At a minimum, then, the use of 'navigable' signals that the definition principally refers to bodies of navigable water like rivers, lakes, and oceans." *Id.* at 672 (citing *Rapanos*, 547 U.S. at 734).

112. *Id.* Alito's argument here essentially takes the form of *noscitur a sociis*—a word is known by its associates. The vague term "waters" should, according to that canon, be interpreted similarly to the other associated words. *See* WILLIAM N. ESKRIDGE JR., JAMES J. BRUDNEY, JOSH CHAFETZ, PHILLIP P. FRICKEY & ELIZABETH GARRETT, CASES AND MATERIALS ON LEGISLATION AND REGULATION: STATUTES AND THE CREATION OF PUBLIC POLICY 595 (6th ed. 2020). Interestingly, however, one of the examples cited ("estuarine waters," as mentioned in 33 U.S.C. § 1330(g)(4)(C)(ix), cited at 672) would typically be associated with or themselves form wetlands. *See Estuary Habitat*, NOAA FISHERIES (Feb. 18, 2025), https://www.fisheries.noaa.gov/national/habitat-conservation/estuary-habitat [https://perma.cc/LR3A-BW8P].

113. Clean Water Act of 1977, Pub. L. No. 95-217, § 67(b), 91 Stat. 1566, 1600–06.

114. 33 U.S.C. § 1344(g)(1).

115. *Sackett II*, 598 U.S. at 676–77; *id.* at 713–14 (Kagan, J., concurring).

116. *Sackett II*, 598 U.S. at 676–77 (majority opinion).

117. It is plausible that the Court pushed itself to reach its decision as a matter of plain meaning because doing otherwise would have implicated *Chevron* deference at the time. *See* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–45 (1984); *see also* Brief for the Respondents at 38–40, *Sackett II*, 598 U.S. 651 (No. 21-454). As the Court has since rejected *Chevron* deference, *see* Loper Bright Enters. v. Raimondo, 603 U.S. 369 (2024), the court may be willing to consider the issue more deeply in future WOTUS cases.

118. *Sackett II*, 598 U.S. at 715.

119. *Id.* at 716.

own slate of dictionaries, Justice Kavanaugh noted that adjacent typically means lying next to or close to, but not necessarily touching.[120] Justice Kavanaugh would have therefore left intact regulations extending jurisdiction to certain wetlands traditionally considered "adjacent" but lacking a "continuous surface connection," such as those separated by dikes or causeways.[121]

The majority has not fared any better in the court of academic opinion. Professor Neacşu declared *Sackett II* the "Ersatz of the Plain-Meaning Rule" and took particular issue with the Court's unanimous definition of wetlands "aesthetically, rather than scientifically."[122] Professor Kalen argues that Alito's focus on the word "waters" is myopic and ignores the deliberate efforts of Congress to expand Clean Water Act jurisdiction beyond the historical scope of "navigable waters."[123] Professor Jaffe criticizes the majority's textualist credentials, concluding that Alito read the word "adjacent" out of the statute entirely.[124]

It is unnecessary for the purposes of this Note to establish whether Alito or his critics are correct in the final analysis. It is sufficient to point out that many have found the Court's reasoning unpersuasive as a matter of plain or ordinary meaning. The project of this Note is instead to argue that the critics have failed to seriously grapple with the risks of giving the agencies—economically interested parties—control over the definition of "waters of the United States" in the wetlands context.

II. OVERINCLUSIVE/UNDERINCLUSIVE

In this section, I attempt to build a policy justification for the Court's rejection of the significant nexus test. I do so by highlighting the interaction of two characteristics of wetlands regulation under the Clean Water Act. First, changes in the operative standard for determining whether a parcel is jurisdictional can effectively coerce landowners with shallow pockets to accept the ACE's jurisdictional determination without a fight. Second, because wetlands are characteristically liminal spaces, giving wetlands a "scientific" definition would allow the agencies to adopt exorbitantly involved—and exorbitantly costly—tests for jurisdiction. Drawing from the Niskanen model of bureaucratic economics, I argue that prior to *Sackett II* the agencies were perversely incentivized to adopt the significant nexus test

120. *Id.* at 718.

121. *Id.* at 719–20.

122. Neacşu, *supra* note 23, at 283.

123. Sam Kalen, Essay, *The Court's Abject Failure at Statutory Construction: Sackett v. Environmental Protection Agency*, 73 CATH. U. L. REV. 531, 540 (2024).

124. Cale Jaffe, Sackett *and the Unraveling of Federal Environmental Law*, 53 ENV'T L. REP. 10801, 10804 (2023).

as a cost-cutting measure which misallocated America's conservation dollars. Finally, I argue that the *Sackett II* opinion did not solve the problem so much as trade out the devil we knew for the devil we are just now getting to meet.

A. Overinclusiveness of the Significant Nexus Test

To better understand the situation regulated parties and the Government find themselves in, it is helpful to assess what factors lead them to make their respective decisions.[125] As an illustration, let's imagine the situation of John Doe, a property owner who has filled a swampy part of his property in a manner identical to the Sacketts. One day, Doe gets a compliance order in the mail, and like the Sacketts, he is unsure whether the EPA has jurisdiction over him. Throughout this section, we will imagine Doe's—and the Government's—situation under a variety of hypothetical facts as they try to pursue the most economically efficient way to respond to the jurisdictional dispute.[126] As we shall see, by creating complex, fact dependent jurisdictional standards evaluated in a lengthy adjudicative process, the Government may disincentivize litigation to such an extent that parties have no economically efficient choice but to comply. In such a situation, the EPA would effectively evade its own jurisdictional limits. I argue that the Court's rejection of the significant nexus test either represents a condemnation of that evasion, or can be partially justified in light of it.[127]

When Doe gets his compliance order, he has two options. He could comply with the order and swallow the burden. Or he could sue and argue that the Agency lacks jurisdiction over his wetland. (In reality, Doe has more than two options, including incurring some of the transaction costs of obtaining advice before deciding, but the two options will make the incentive easier to illustrate.) Because the ultimate existence of jurisdiction is uncertain, this leads to four possible outcomes.[128] Doe can litigate and

125. For another economic analysis of the incentives created by the Clean Water Act jurisdiction regime, see generally Jeffrey Jakob, Comment, *Agency Games: Why the EPA and Army Corps of Engineers Exceed Their Jurisdiction Under the Clean Water Act, and What Can Be Done About It*, 31 TEMP. J. SCI. TECH. & ENV'T. L. 285 (2012).

126. *See generally* EDI KARNI, DECISION MAKING UNDER UNCERTAINTY: THE CASE OF STATE-DEPENDENT PREFERENCES (1985) (explaining the basics of decision making under uncertainty).

127. *Cf.* Brandon Pang, Comment, *Doesn't Look like Anything to Me: Protecting Wetlands by Narrowing the Definition of "Waters of the United States*," 7 LSU J. ENERGY L. & RES. 223, 236–37, 242 (2019) (arguing that Congress should adopt a continuous surface connection rule by statute, in part based on the fears of property owners that broad standards will result in overregulation).

128. In theory, the Government could further hone the strategy I describe now by opportunistically settling as it becomes more likely that jurisdiction does not exist. In practice however, the Government's settlement policies do not appear to map perfectly to such a strategy. *See* Memorandum, Issuance of Revised CWA Section 404 Settlement Penalty Policy, Sylvia K. Lowrance, Acting Assistant Adm'r, U.S. EPA (Dec. 21, 2001).

lose, litigate and win, or comply regardless of whether jurisdiction exists. Assume that Doe values the cost of compliance (the cost of paying for remediation and the opportunity cost of lost utility) at $5,000. If Doe charted his four possible outcomes without taking into account any other factors, his chart would look something like this[129]:

FIGURE 1: NO TRANSACTION COSTS

	Jurisdiction Exists	Jurisdiction Does Not Exist
Compliance	-5	-5
Litigation	-5	0

Note that if compliance costs are the only factor, Doe would litigate every time. At worst he simply pays compliance costs. At best, he avoids the cost entirely.

Of course, we do not live in that world, and for good reason. First, there will always be some transaction costs involved in determining whether jurisdiction exists. The financial cost of obtaining and paying lawyers, hiring experts, and commissioning studies—along with the time and emotional investment required to sustain litigation—all serve to increase the cost of defiance. Let us refer to these transaction costs as *T*.

Second, because defying the government hampers its ability to impose law and order, society often imposes penalties on those who do so wrongly. In the context of the Clean Water Act, these penalties take the form of civil or criminal sanctions for knowing unauthorized discharges into waters of the United States, as well as penalties required by EPA policy to be exacted in case of settlement.[130] Let these defiance penalties be *D*.[131]

Conversely, people who own land often make plans for the future—in the Sacketts' case, building their dream home. Such plans can be referred to

129. The following analysis uses rudimentary decision making under a state of uncertainty theory. In this model, the existence of jurisdiction is labeled a "state of nature." The parties are aware that one of two possible states (jurisdiction and not jurisdiction) will obtain, they know how both states would affect them should one obtain, and they can estimate the probability that jurisdiction exists, but they cannot know which state obtains until judgment.

130. *See* Memorandum, Issuance of Revised CWA Section 404 Settlement Penalty Policy, *supra* note 128.

131. Prior to *Sackett I*, administrative orders to remediate were not considered final agency action, which meant any party seeking to challenge jurisdiction had to intentionally violate the AO and exhaust administrative enforcement remedies before filing in federal court. *See* Sackett v. EPA (*Sackett I*), 566 U.S. 120, 125–26 (2012). Without pre-enforcement review, defiance penalties could form a serious deterrent to litigating jurisdiction. However, since the Court found pre-enforcement review necessary in *Sackett I*, parties can effectively avoid defiance penalties. *See id.* at 131.

as the "utility" of a person's unregulated exercise of the land. Complying requires giving up that utility. Let us refer to utility as *U*.

Together, these factors determine which of the four possible outcomes a perfectly rational person in Doe's shoes would pick. As we have seen, the cost of compliance (which we can call *C*) remains the same regardless of whether jurisdiction exists or not. But if Doe litigates, his total costs could be significantly greater. Along with paying his compliance costs *C*, Doe also has to pay the transaction costs involved in litigating his case *T*, and potentially a defiance penalty *D*.[132] Even if he wins, Doe's success is bittersweet: he gains the right to fully enjoy his utility *U*, but still pays transaction costs *T.* Thus, for any given value of each of these variables, the outcomes can be charted:

FIGURE 2: ALGEBRAIC PAYOFF MATRIX

	Jurisdiction Exists	Jurisdiction Does Not Exist
Compliance	C	C
Litigation	C+D+T	U+T

Note that all possible values for *C*, *D*, and *T* will be negative, whereas *U* will be positive.

Finally, to understand why any of this might justify rejecting the significant nexus test, we must consider how Doe's choice to comply or litigate impacts the Government. For regulators, there is some benefit to compliance—psychological, fiscal, or otherwise—which can be characterized as the government's utility interest U_G. At the same time, if Doe choses to litigate, the Government must still pay transaction costs *T*.[133] Combining that reality with what we know of Doe's situation creates the following matrix, with Doe's interest to the left of the hash and the Government's to the right:

132. Again, in reality, the average litigant will not incur transaction costs all at once. Transaction costs will accrue over time, and as those costs accumulate, parties might be able to get a better sense of whether the parcel is jurisdictional. Then again, maybe not. If the standard to be applied is vague enough, the information gained through hiring biologists, hydrologists, and surveyors might be important to survive summary judgment but not necessarily determinative of the outcome.

133. In theory the Government was able to recapture the defiance penalty *D* where a regulated party defied a compliance order and incurred civil penalties, but the availability of pre-enforcement injunctive relief for jurisdictional determinations after *Sackett I* precludes that possibility. *See* 566 U.S. 120, 131 (2012).

FIGURE 3: ALGEBRAIC PAYOFF MATRIX W/ GOV.

	Jurisdiction Exists	Jurisdiction Does Not Exist
Compliance	C / UG	C / UG
Litigation	C+D+T / UG+T	UR+T / T

Plugging in some values for each variable allows us to visualize both parties' possible outcomes. Consider a plausible situation: Doe's compliance order includes a remediation plan estimated to cost around $5,000 ($C$=-5), his attorney has estimated a litigation cost of $4,000 ($T$=-4), and he will be taxed $1,000 in attorney's fees if he loses the case (D=-1). If Doe subjectively values his free use of the land as worth $3,000 ($U_R$=3), his payoff matrix would look like this:

FIGURE 4: MEDIUM T, LOW D

	Jurisdiction Exists	Jurisdiction Does Not Exist
Compliance	-5 (-5)	-5 (-5)
Litigation	-10 (-5-1-4)	-1 (3-4)

In Figure 4, the optimal outcome for Doe depends on whether jurisdiction exists. He would rather swallow the $5,000 compliance costs than face the $10,000 cost of litigating and losing—unless, of course, he would win. Thus, Doe will estimate his odds of winning, and adjust each course of action's expected outcome accordingly. On these numbers, for instance, Doe will litigate any time he estimates the odds against jurisdiction to exceed ~55.56%.[134]

The situation illustrated by Figure 4 is one the Government would rather avoid. Regardless of whether jurisdiction exists or not, the Government is worse off if Doe litigates than if he complies. Moreover, there is sufficient incentive for Doe to litigate (and the odds jurisdiction exists are sufficiently indeterminate) that Doe choosing to litigate is a real possibility. From a strictly economic perspective, the Government has an incentive to

134. Algebraically, Doe will litigate anytime $\sum p(j)C + (1 - p(j))C < \sum p(j)(C + D + T) + (1 - p(j))(U_R + T)$, where $p(j)$ is Doe's subjective estimated probability that jurisdiction exists. *See generally* Simone Cerreia-Vioglio, Fabio Maccheroni, Massimo Marinacci & Luigi Montrucchio, *Classical Subjective Expected Utility*, 110 PROC. NAT'L ACAD. SCIS. 6754 (2013). This model assumes that Doe is not especially risk averse or risk seeking. Because the marginal utility of money decreases as wealth increases, if Doe is extremely poor, he may be excessively risk averse. Conversely, if Doe is exceedingly wealthy he will be more comfortable with risk and maybe even risk seeking.

encourage Doe to comply. In the absence of a defiance penalty, the EPA's only available means of doing so, and the central concern of the *Sackett II* majority, is through its ability to set the test for establishing jurisdiction. The more fact intensive the test, the more experts have to be hired, the greater the time commitment involved—i.e., the higher the transaction costs—the fewer private parties will choose to litigate. To illustrate the point, imagine a different, high transaction cost scenario: C=-5, D=0, T = -10, and U_G, U = 3,3.

FIGURE 5: HIGH T, NO D

	Jurisdiction Exists	Jurisdiction Does Not Exist
Compliance	-5 / 3	-5 / 3
Litigation	-15 / -7	-7 / -10

In this scenario, Doe will comply every time. The cost of discovering whether his land is regulated is greater than the cost of simply complying with the Government's order, even accounting for the extra utility he gains from being able to use the property as he wishes. His win would be pyrrhic. Formally, where $C - U \geq T$, (that is, whenever compliance costs minus the opportunity cost of giving up one's free use is less of a burden than the transaction costs) a rational actor will always comply.

It is probable that in most cases, the Government's ability to set a jurisdictional predicate by rule will not change transaction costs enough to make a difference in litigation behaviors.[135] But because the line between land, wetland, and water is both nebulous and expensive to ascertain, the difference in the Clean Water Act context can be significant.[136] According to Justice Scalia in *Rapanos*, the average applicant spends $271,596 seeking an individual permit.[137] Thus, on average, unless the cost of remediation plus the opportunity cost of giving up the land's intended use is greater than $271,596, even landowners outside Clean Water Act jurisdiction are better off complying.[138]

135. *See* Hawkes Co. v. U.S. Army Corps of Engineers, 782 F.3d 994, 1004 (8th Cir. 2015) (Kelly, J., concurring) ("This is a unique aspect of the CWA; most laws do not require the hiring of expert consultants to determine if they even apply to you or your property.").

136. *Id.*

137. Rapanos v. United States, 547 U.S. 715, 721 (2006).

138. Note that while the Government has worsened its own costs considerably if Doe choses to litigate, it does not anticipate realizing that risk in most cases. Prospective litigants below the $271,596 threshold will not litigate unless they are irrational or risk-seeking, allowing the Government to focus its litigation resources. And even those cases it does litigate, the Government can still try to

B. What's Wrong with a Little Coercion?

This dynamic—the Government coercing individual compliance through overregulation—is present in nearly all forms of regulation. It is far more efficient for people to do the right thing (as the Government sees it) the first time rather than for the Government to engage in costly enforcement procedures. But there are three reasons to find that dynamic problematic in this instance.

First, broadening jurisdictional predicates may be a reflexive defense against democratic accountability. Bureaucratic economists have long posited that agency officers act out of a mix of motives, with a primary motive being the preservation of their budget.[139] This is not necessarily because agency officials are craven; quite the opposite: agency officials often believe strongly in the need for the public service their agency provides.[140] Achieving their policy goals requires maximizing their budgets. And when it comes to exacting higher budgets out of legislators, agencies have the upper hand.

Agencies have more information than appropriators, giving them the ability to opportunistically reveal information to justify a larger budget while withholding information that might lead to reasonable budget cuts.[141] According to the Niskanen school, the peculiar economics of the bureau was a partial explanation for the growth of the federal budget in the 20th century.[142] The relative positions of the agencies and appropriators made growth all but inevitable.

Over the past few decades, however, the converse has been true for the EPA. Under increasing pressure from Congress and early 21st century presidencies, the EPA's budget has fallen from $5.4 billion in 1979 to an inflation-adjusted $2.4 billion in 2017.[143] Meanwhile, the average federal agency has seen a 26% increase in inflation-adjusted budgets over the same period.[144] Assuming that the bureaucratic economists are correct (and follow on studies have, in the main, corroborated Niskanen's account[145]), a rational

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opportunistically settle. Admittedly, the Government does not appear to have a *policy* of opportunistically settling. *See supra* note 128 and accompanying text.

139. *See, e.g.*, William A. Niskanen, *The Peculiar Economics of Bureaucracy*, 58 AM. ECON. REV. 293, 293–94 (1968).

140. *Id.*

141. *See id.* at 296.

142. WILLIAM A. NISKANEN, JR., BUREAUCRACY AND REPRESENTATIVE GOVERNMENT 16–18 (1971).

143. Keith Gaby, Opinion, *EPA's Budget Has Been Devastated for Decades: Here's the Math*, THE HILL (Jan. 24, 2018, 10:15 AM), https://thehill.com/opinion/energy-environment/370334-epas-budget-has-been-devastated-for-decades-heres-the-math/ [https://perma.cc/XLA4-G2BG].

144. *Id.*

145. *See* André Blais & Stéphane Dion, *Are Bureaucrats Budget Maximizers? The Niskanen Model and Its Critics*, 22 POLITY 655, 673 (1990).

bureaucrat would then be faced with a choice: ratchet back enforcement and lose the subjective satisfaction of doing the job you signed up for (but in the process acquiesce to democratic accountability), or bend the rules to achieve the good you value on a smaller budget. Which would you pick?

Second, when a jurisdictional term is the only meaningful limitation on regulatory discretion, there is something normatively disconcerting about defining jurisdiction in so broad a fashion.[146] Jurisdiction as a concept carries notions of the proper exercise of power and of due process.[147] Early administrative case law expressed increased concern over matters of jurisdiction in administrative law. In *Crowell v. Benson*, the Supreme Court noted that Congress could not assign the determination of "jurisdictional facts" to agencies without providing for de novo review in federal courts.[148]

The Court walked back the category of "jurisdictional facts" in *City of Arlington v. FCC* several decades later.[149] In *City of Arlington*, the Court unanimously found that the concept of an agency's "jurisdiction" collapsed into the scope of an agency's statutory authority.[150] *City of Arlington*, however, was decided in partial reliance on the now-discarded *Chevron* doctrine.[151] With the Court more skeptical of agency authority, with the *Sackett II* majority's clear skepticism of the Clean Water Act regime as a whole, and in light of the Court's unanimous discarding of the significant nexus standard, it is possible that the Court may be open to revisiting the

146. *See Sackett II*, 598 U.S. 651, 661 (2023) (noting the Clean Water Act's "capacious definition of 'pollutant,' . . . low *mens rea*, and . . . severe penalties" have focused litigation attention on the act's geographic scope (emphasis omitted)).

147. *See* Ins. Co. of Ir. v. Compagnie Des Bauxites De Guinee, 456 U.S. 694, 702–03 (1982) (citing Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945)); *see also* FLOYD R. MECHEM, A TREATISE ON THE LAW OF PUBLIC OFFICES AND OFFICERS § 508, at 332 (Chi., Callaghan & Co. 1890) ("The authority of public officers being derived from the law, it necessarily follows that the authority can not exist in places where that law has no effect. The authority of all public officers is, therefore, limited and confined to that territory over which the law, by virtue of which they claim, has sovereign force."). Admittedly, the Court has characterized the word jurisdiction as "a word of many, too many, meanings." Arbaugh v. Y&H Corp., 546 U.S. 500, 510 (2006) (quoting Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 90 (1998)). But typically, the exasperation at the many meanings of "jurisdiction" arises in the context of challenges to the subject matter jurisdiction of federal courts. *See id.*; *see also* Blackstone Headwaters Coal., Inc. v. Gallo Builders, Inc., No. 16-CV-40053, 2025 WL 563279, at *2 (D. Mass. Feb. 20, 2025). Here, the term is used to describe a geographic predicate—the scope of spaces governed by a given regime. I express no opinion on whether the distinction is meaningful. I wish to point out only that the concept of jurisdiction as applied to the scope of "waters of the United States" is closer to the traditional use of the term than is present in the subject matter jurisdiction cases.

148. 285 U.S. 22, 54–55 (1932) (defined as facts which are a "condition precedent to the operation of the statutory scheme"). *Crowell* concerned deference to mixed facts in the context of an adjudication, rather than the permissibility of an agency's pure interpretation of a statute. *Id.* But it nonetheless highlights the Court's early sense that "conditions precedent to the operation of the statutory scheme," *id.* at 54, might be distinguishable from the scheme itself, and implicate additional protections or considerations, *contra* City of Arlington v. FCC, 569 U.S. 290, 296–97 (2013).

149. 569 U.S. at 296–97.

150. *Id.*

151. *Id.*

jurisdictional facts concept. In particular, courts should seriously consider closely policing highly complex jurisdictional tests asserted by agencies.[152]

Third, and more practically, high-cost litigation over significant nexuses misallocates America's conservation dollars. The $271,000-plus average costs incurred by parties contesting Clean Water Act jurisdiction do not go toward protecting land, rehabilitating injured habitats, establishing new wetlands, or compensating landowners for their non-use. They go to experts and lawyers.

To be sure, both experts and lawyers have important conservation roles. The former improve society's understanding of the ecological importance of the land while the latter help ensure the land is properly regulated. But because there is no necessary connection between the *ecological importance* of a wetland and the *tenuousness of its nexus* to a navigable water, the parcels we fight over might not be the most important. In fact, because the rich care proportionately less about a few hundred thousand dollars than the poor (or in economic parlance, the marginal utility of money decreases), the parcels we are most likely to fight over under a significant nexus test are those of the wealthy, regardless of the wetlands' relative importance.[153]

It is important to recall that not every organic statute presents agencies the same set of incentives and options as those present here. Two factors in particular create the conditions and motivations for improper jurisdictional tailoring: a vague jurisdictional predicate and command-and-control regulation. Agency jurisdiction is a creature of statute, and some jurisdictional predicates are much clearer than the Clean Water Act's talismanic reference to "waters of the United States." In such cases, agencies would not possess the discretion required to create coercive jurisdictional standards.

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152. *Skidmore* deference, which survived the death of *Chevron* in *Loper Bright*, 603 U.S. 369, 402 (2024), provides a sliding-scale of deference to agency decisions based on several factors, including the importance of expertise to the decision, the consistency and priority date of the interpretation, and the validity of its reasoning. Skidmore v. Swift & Co., 323 U.S. 134, 139–40 (1944). Determining whether a given hydrological feature impact navigable waters is a matter of agency expertise that might be accorded deference. *See, e.g.*, United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 132 (1985). But the scope of an agency's legitimate authority under a statute involves assessing several factors not squarely within *environmental* expertise as such. Environmental expertise may be valuable in statutory construction, but ultimately, "Congress expects courts to handle technical statutory questions," *Loper Bright*, 603 U.S. at 402, and agency jurisdiction is a technical statutory question.

153. Defenders of the significant nexus test might argue (citing the above economic analysis, no less) that, even if the dollars spent in litigation might be misallocated, the coercive jurisdictional standard might reduce total system costs. "Yes, rich people will litigate over whether their lands are jurisdictional, and those dollars will be wasted, but by pricing out all the little guys, fewer people are litigating and overall costs will fall." But such an argument misapprehends the reason an agency might adopt a coercive standard. The agency will adopt a coercive standard when such a standard is most efficient for the *agency*, not the system generally. The two are not identical.

Nor does every vague jurisdictional predicate create the same incentive to litigate as the Clean Water Act. If a party faces a vague jurisdictional predicate, but is still capable of achieving most of its utility while complying, the party faces a greatly reduced incentive to risk litigation. But the Clean Water Act's command-and-control regime (either your property is jurisdictional, in which you cannot dredge or fill at all without a permit, or it is not, and you can do anything unless stopped by local law) creates powerful incentives to litigate. The agency has to manage that incentive somehow. Because the Clean Water Act does possess both characteristics, it creates an impermissible incentive to rachet jurisdictional standards toward a totality-of-the-circumstances test.

C. The Paucity of the Continuous Surface Connection Test

Even though the Court was right to reject the significant nexus test as a matter of first principles, those sounding the environmental alarm should not be dismissed out of hand.[154] Water molecules are no respecters of human categories. At an ecological level, there may be little difference between a wetland separated by a natural causeway from a navigable water and another wetland sharing a continuous surface connection with that water. Necessary as the continuous surface connection test (or some similar bright line) might have been, the choice was one of human convenience rather than ecological reality.

And the ecological reality is that many wetlands are deserving of protection. Wetlands are critically important to many American ecosystems.[155] Some kinds of wetlands (particularly marshes and fens) serve a dual purpose in environmental regulation, both as habitats for rare species and as carbon sinks sequestering vast amounts of carbon.[156] And while state and local governments have obvious incentives to protect local habitats, the loss of wetland-sequestered carbon results in disparate harms ill-suited to local regulation. For the purposes of this Note, then, I assume as a matter of policy (if not law) that the nation needs greater wetland protection than the continuous surface connection rule can provide.

III. MOVING FORWARD

The situation following *Sackett II* is thus supremely unsatisfying. Both the significant nexus test and the continuous surface connection test possess

154. *See generally* Neacşu, *supra* note 23; Lazarus, *supra* note 23.

155. *See* Leibowitz et al., *supra* note 6, at 370.

156. *See* Melanie Sturm, *Stewardship of Wetlands and Soils Has Climate Benefits*, NRDC (Sept. 30, 2019) https://www.nrdc.org/bio/melanie-sturm/stewardship-wetlands-and-soils-has-climate-benefits [https://perma.cc/UY9D-TVVF].

substantial drawbacks as wetland regulation tools. Wetlands' inherent liminality presented an impermissible temptation for environmental agencies to use their regulatory power to ease their litigation burdens. At the same time, the continuous surface connection test is useful for surveyors but ecologically vacuous.

The Court was probably right to discard the significant nexus test as a matter of first principles and jurisdictional analysis, but America's wetlands still need to be protected. Looking forward, I propose using the economic analysis in Part II to inform how we regulate wetlands going forward. In particular, I seek to catalogue the priorities that an economic system should seek to accomplish. I then attempt to accommodate the identified priorities, using conservation easements as a possible solution. While I believe in the plausibility of my proposal, it is offered primarily as an initial effort at developing more efficient and effective wetland regulation. The academy, interested parties, and broader constituencies will be ultimately responsible for crafting effective wetland regulation in a post-*Sackett II* world.

A. Characteristics

Whatever rule, standard, or alternate regulatory form replaces *Sackett II* must succeed in a variety of different ways. First and most obviously, it must effectively manage America's keystone wetlands. Second, it must allocate the costs of obtaining information, identifying the parcels for protection, and managing the protected parcels fairly and efficiently. Third, the system must prioritize parcels which roughly track the ecological importance of the wetlands.

At the outset, I do not believe that command-and-control regulation is appropriate in wetland regulation where the wetland is not clearly part of a traditional navigable water. As discussed in Part II, wetland regulation is simply too circumstance-dependent for effective command-and-control regulation.[157] Either the jurisdictional predicate is hydrologically sound but overbroad,[158] or it is narrow enough to be meaningful but too narrow to be useful.[159]

A system of conservation easements may provide the best way for Congress to accomplish its goal of restoring America's wetlands while accommodating both the inherently fact-specific nature of wetlands' impact and the law's concern for providing clear jurisdictional demarcations. The increased flexibility that conservation easements provide in both their creation and regulation make them well-suited for addressing the context

157. *See supra* Part II.
158. *See supra* Section II.A.
159. *See supra* Section II.C.

dependent concerns with regulating wetlands.[160] When every swamp is unique, it makes sense to take a tailored approach.

B. Proposal

I propose consolidating current wetland conservation easement programs and incentives into one coordinated program to proactively survey America's wetlands, rank them according to estimated ecological importance, and align the various incentives accordingly. In particular, I propose the proactive use of conservation easements in two circumstances: first, where ecologically important wetlands lack a continuous surface connection to a traditional body of water; and second, where compensation may incentivize the restoration or enhancement of impaired wetlands. Using conservation easements to provide coverage where Clean Water Act jurisdiction runs out ideally would allow for the Government to prioritize its efforts on the most ecologically important parcels while fully compensating landowners for the loss of their use.

For context: a conservation easement is formed when a landowner sells their right to develop their land to a public[161] or private[162] entity for the benefit of the environment. In exchange for promising to leave portions of their property mostly undisturbed,[163] property owners are compensated with (depending on the context) cash, tax benefits, regulatory approval for a different project, or even the satisfaction of knowing one's rural scenery is protected for future generations.[164] Instead of taking the entire "bundle of

160. The devil is in the details, however. For an exploration of how overly constraining provisions in conservation easements limit their ability to adapt to new conservation needs, see Jesse J. Richardson Jr., *Conservation Easements and Adaptive Management*, 3 SEA GRANT L. & POL'Y J. 31 (2010).

161. Primarily through programs introduced in various Farm Bills and administered through the USDA and its attendant land management wings, the National Resources Conservation Service and the Forest Service. *See, e.g.*, 7 C.F.R. pt. 1468 (providing for the Agricultural Conservation Easement Program (ACEP)).

162. *See* Gerald Korngold, *Solving the Contentious Issues of Private Conservation Easements: Promoting Flexibility for the Future and Engaging the Public Land Use Process*, 2007 UTAH L. REV. 1039, 1042.

163. While the land will always be left *mostly* undisturbed, conservation easements can permit varying levels of development depending on the terms of the grant. *See, e.g.*, 7 C.F.R. § 1468.38(d) (permitting the Wetland Reserve Easement Program easements—a sub-program within ACEP—to allow for compatible uses). For instance, many grants permit recreation, ecotourism, access improvement, and ethical resource harvesting. *See* NAT. RES. CONSERVATION SERV., LANDOWNER GUIDE TO NATURAL RESOURCES CONSERVATION SERVICE WETLAND RESERVE EASEMENTS (2016), https://www.nrcs.usda.gov/sites/default/files/2022-09/NRCS%20Landowner%20Guide%20to%20Wetland%20Reserve%20Easements.pdf [https://perma.cc/L9AG-EQFU]; NAT. RES. CONSERVATION SERV., HOW NRCS WETLAND RESERVE EASEMENTS WORK, (2016), https://www.nrcs.usda.gov/sites/default/files/2022-10/How%20NRCS%20WRE%20easements%20work.pdf [https://perma.cc/MUP4-NRWS].

164. Jessica Owley Lippmann, *The Emergence of Exacted Conservation Easements*, 84 NEB. L. REV. 1043, 1088–89 (2006).

sticks"[165] (as in eminent domain or outright purchase) or restricting how those sticks can be used (as in the current regulatory scheme), a conservation easement takes only some of the sticks, leaving the others in the hands of the owner.[166] Critically, conservation easements go further than what can be achieved by contract: when the grantee conveys the rest of the property, the easement is not destroyed.[167] Indeed, many conservation easements are by their own terms "perpetual."[168]

Conservation easements are nothing new. Since at least 1964, federal and state governments have employed conservation easements as part of a pluralistic environmental policy approach.[169] Nor would they be new to the wetlands context specifically. Through Wetland Reserve Easements, the federal government has been obtaining conservation easements in wetlands since 1985.[170] But current federal wetland conservation easement policy has serious drawbacks.

First, conservation easements under this voluntary framework are of questionable ecological value. As tax scholars have noted, the tax advantages attached to conservation easements are substantial, costing the federal government billions of dollars a year.[171] Such an expense might be justifiable if it resulted in a decent return on investment (that is, if it induced people to protect land that would not otherwise be protected), but there are reasons to believe this is not always the case.[172] Because charitable deductions are tied to the market value of the property rather than the ecological significance of the wetland,[173] they skew protection to urban and high-property value wetlands.[174] And clever taxpayers can figure out how to deduct more than the value of the easement in multiple ways.[175]

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165. *See* Thomas W. Merrill & Henry E. Smith, *Why Restate the Bundle? The Disintegration of the Restatement of Property*, 79 BROOK. L. REV. 681, 683 (2014) (noting the origin of the "bundle of sticks theory in the *Restatement (First) of Property*).

166. Lippmann, *supra* note 164, at 1087.

167. *Id.* at 1076.

168. Richardson, *supra* note 160, at 35.

169. Lippmann, *supra* note 164, at 1091.

170. Brian J. Oakey, *The Wetlands Reserve Program: Charting a Course Through the WRP*, 8 DRAKE J. AGRIC. L. 631, 634 (2003). Note that the Wetlands Reserve Program was folded into the larger Agricultural Conservation Easement Program by the 2014 Farm Bill. NAT. RES. CONSERVATION SERV., U.S. DEP'T OF AGRIC., RESTORING AMERICA'S WETLANDS 2 (2023).

171. *See* MOLLY F. SHERLOCK & ERIKA K. LUNDER, CONG. RSCH. SERV., IN12054, THE TAX DEDUCTION FOR CONSERVATION EASEMENT CONTRIBUTIONS 2 (2022).

172. *See, e.g.*, *id.* at 3 (discussing concerns regarding syndicated conservation easements).

173. David J. Dietrich, *Conservation Easements*, 12 PROB. & PROP. 43, 43 (1998).

174. *See id.*

175. See, for example, syndication, the process by which pass through entities are formed with the intention of obtaining property subject to conservation easements, potentially inflating their value, and passing along the tax benefits thus inflated to the membership. *See* SHERLOCK & LUNDER, *supra* note 171, at 1, 3.

Second, current conservation easement programs are prosecuted halfheartedly and by disparate offices. Even before *Sackett*, scholars bemoaned the weaknesses in Clean Water Act enforcement stemming from the agencies' unwillingness to deny permits.[176] And current wetland preservation practices are divided between the EPA and ACE (which until recently administered vast swaths of wetlands with an eye toward ecology) on the one hand, and the USDA on the other (which administers the Wetland Reserve Easement program).[177] The U.S. Fish and Wildlife Service has a role as well, maintaining the National Wetlands Inventory, a compilation of geospatial data on American wetlands across the country.[178] In theory, these programs interact through mitigation banks, stores of credits created by the enrollment of wetlands in conservation easement programs.[179] But in practice, the § 404 dredge/fill program credits were subject to inflation and did not actually indicate any baseline of environmental quality.[180]

The current conservation easement by conveyance thus serves as a useful starting point, but one in dire need of improvement. First, tax incentives should be tied to the ecological value of the property conserved. Tax incentives are currently more lucrative and yet less ecologically meaningful than either Clean Water Act regulation or conservation easement enrollment.[181] Paying out tax incentives in ecological credits better fits the overall purpose of the incentive and ensures the taxpayers get what they pay for. Second, wetland operations should be consolidated in a single interagency taskforce, empowered to survey and rank all or substantially all American wetlands.[182] Together, these measures should streamline wetland conservation operations and eliminate some of the incoherence between tax policy, command-and-control policy, and conservation easement policy.

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176. *See, e.g.*, Jessica Owley, *Preservation is a Flawed Mitigation Strategy*, 42 ECOLOGY L. CURRENTS 101, 106 (2015); Michael Pappas & Victor B. Flatt, *The Costs of Creating Environmental Markets: A Commodification Primer*, 9 U.C. IRVINE L. REV. 731, 746 (2019).

177. *See* 7 C.F.R. pt. 1468 (establishing rules for the Agricultural Conservation Easement Program); 33 C.F.R. pt. 323 (providing for Clean Water Act dredge/fill permits).

178. *National Wetlands Inventory*, U.S. FISH & WILDLIFE SERV., https://www.fws.gov/program/national-wetlands-inventory [https://perma.cc/V9VM-YU3R].

179. *See* Owley, *supra* note 176, at 107, 109 n.45.

180. *See* Pappas & Flatt, *supra* note 176, at 746.

181. *Compare* Nat. Res. Conservation Serv., *Announcing Fiscal Year (FY) 2025 Signup for Inflation Reduction Act (IRA), Agricultural Conservation Easement Program (ACEP)*, U.S. DEP'T AGRIC. (August 30, 2024), https://www.nrcs.usda.gov/programs-initiatives/acep-agricultural-conservation-easement-program/news/announcing-fiscal-year-fy [https://perma.cc/2MF3-HCUL] (noting $1.4 billion in extra funding for ACEP from the Inflation Reduction Act over a five year period), *with* SHERLOCK & LUNDER, *supra* note 171, at 2 (noting more than $6 billion in conservation easement-related tax incentives in 2018 alone). *See also* Dietrich, *supra* note 173, at 43 (noting that the amount of the benefit is tied to the fair market value of the land encumbered).

182. Admittedly, including a proposal to survey all or substantially all American wetlands is ambitious—perhaps prohibitively so. However, the National Wetlands Inventory provides a plausible starting point.

Once wetland policy is consolidated and made coherent, the taskforce should target wetlands for acquisition based on the ecological characteristics of the wetland. Low priority wetlands may continue to be regulated according to an expanded but voluntary conservation easement program, with tax credits paid out in terms of ecological credits rather than cash. Because the program is voluntary, it may allow those passionate about ecological preservation to better sell their programs and organizations to the more skeptical, improving the funding for more efficiently-run private enterprises.

But there are other methods of easement creation too—methods which may better enable regulators to target specific, high-impact wetlands.[183] First, conservation easements can be created through exaction.[184] An easement is exacted when it is demanded by a local governing body in exchange for the approval of a building permit or other similar license.[185] Exacted easements risk being considered a taking under the 5th Amendment,[186] but so long as the exaction is not prohibitively demanding and shares a nexus to a legitimate interest, they are generally permissible as a mitigation requirement.[187] Exaction should employed as a strategy to secure permanent protection for medium- to high-impact wetlands.

Finally, in extreme cases, the Federal Government may use its inherent eminent domain powers to condemn a taking.[188] Historically, the Government was not even required to pay just compensation when condemning a negative easement like a conservation easement, although the modern trend is toward compensating owners when easements are condemned.[189] Even if the Government is required to pay just compensation, condemnation of an easement remains a useful tool for the restoration of critically important wetlands which possess important hydrological, ecological, and greenhouse-gas-related facets.

Conservation easements show three major benefits over the command-and-control regime exemplified by the Clean Water Act. First, they are properly targeted. Whether the regime is overbroad or underinclusive is a matter of how well the Government accomplishes its goals, *not* the coercive situation the Government puts landowners in. Second, a national system of

183. As I use the term, a "high-impact wetland" is one which is either a local keystone habitat, performs important aquifer purification and flood regulation functions, or serves as a prominent carbon sink.

184. Lippmann, *supra* note 164, at 1045.

185. *Id.* at 1095.

186. Beckett G. Cantley, *Environmental Preservation and the Fifth Amendment: The Use and Limits of Conservation Easements by Regulatory Taking and Eminent Domain*, 20 HASTINGS W.-NW. J. ENV'T. L. & POL'Y 215, 217 (2014).

187. *Id.* at 235.

188. *See id.* at 227–28.

189. *Id.*

conservation easements provides significantly greater clarity and flexibility for landowners. In order to tell whether your property is encumbered, all you have to do is check your local recording office. Third and finally, conservation easements last a minimum of several decades, giving them relatively strong protection from regulatory capture. Conservation easements thus provide an intriguing and useful tool to post-*Sackett II* wetland regulation.

CONCLUSION

Wetlands are all around us, constantly performing a variety of tasks that demand our protection. However, command-and-control regulations are not the tool to do so. A more targeted mechanism is necessary, and as regulators respond to the *Sackett II* decision, they should seriously consider the possibility of widespread deployment of conservation easements as part of a permanent wetland solution.

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