



Summer May 2024

Navigating Murky Waters: Strengthening Water Protections in a Post-Sackett Landscape

Brittany Herrera

Recommended Citation

Brittany Herrera, *Navigating Murky Waters: Strengthening Water Protections in a Post-Sackett Landscape*, 54 N.M. L. Rev. 599 (2024).

Available at: <https://digitalrepository.unm.edu/nmlr/vol54/iss2/12>

NAVIGATING MURKY WATERS: STRENGTHENING WATER PROTECTIONS IN A POST-SACKETT LANDSCAPE

Brittany Herrera*

ABSTRACT

Nearly ninety percent of New Mexico's rivers and streams potentially have been removed from federal protection under the Clean Water Act following the United States Supreme Court's decision in Sackett v. EPA to substantially reduce what qualify as "waters of the United States." Before this decision, many ephemeral streams, tributaries, and wetlands were protected by the Environmental Protection Agency. Permits are essential to protect not only the environment but landowners as well. The New Mexico Environment Department is in the process of developing its own surface water discharge permitting program, as the EPA's jurisdiction contracted commensurately with the Supreme Court's new definition of "waters of the United States." The New Mexico Environment Department and water conservationists worry that without a permitting process, many bodies of water in New Mexico and the United States would be left unprotected, allowing unregulated discharge of harmful pollutants into waters on which the public relies for drinking water, agriculture, recreation, and ecological stability.

But is requiring a permit enough to protect the waters of New Mexico? How would obtaining a permit through the state protect waters in New Mexico from those who, either intentionally or unintentionally, discharge pollutants into waters outside of New Mexico that flow into the state? Does the interpretation of "waters of the United States" in Sackett only apply to wetlands? This Note addresses the local problems created by the Sackett decision and offers possible solutions to the lack of protection for states like New Mexico with dry and arid climates. It proposes that it is not enough for the New Mexico Environment Department to create its own permitting process—to truly protect our most precious

* J.D. Candidate, University of New Mexico, Class of 2025. I would like to thank Professors Carol Suzuki and Ben Osborn for all their help and guidance and Adrian Oglesby of the Utton Transboundary Resources Center for helping me get started on this topic and providing helpful resources. Thank you to my peers in my working group and my peer editor for their valuable feedback. I extend heartfelt appreciation to my late parents, Gary and Louella Mo, whose unwavering support paved the path to my current achievements. Special thanks to my wife, Olivia, for all of her encouragement, support and patience in listening to me talk about this topic ad nauseum.

resource, Congress needs to correct the Court's mistake and enact an improved definition of "waters of the United States" in the Clean Water Act itself. Congress cannot continue to ignore the reoccurring problem of the Court's intrusion into environmental regulation. Leaving the interpretation of the Clean Water Act to the United States Supreme Court has proven to be a critical error. The time to act was decades ago, and the consequences of Congress's inaction are at New Mexico's doorstep.

INTRODUCTION

"Ranchers need clean water for their stock, farmers need it for their crops, every employer needs it to stay in business, and every living thing needs it for life . . . The law needs to be clear to protect water quality and the rights of landowners."

*Mark Udall, Former United States Senator*¹

Imagine taking a drive through Albuquerque, New Mexico, across the Rio Grande, the state's largest river, and witnessing a sunbaked, nearly barren, and overgrown "big river." This is a sad reality for many New Mexicans who observe the Rio Grande on a regular basis and know of the severe drought conditions that regularly plague New Mexico.² The abhorrent condition of the Rio Grande becomes obvious as it narrows to a mere trickle of mud water throughout many areas on its journey to its final destination in the Gulf of Mexico.³ Despite the Rio Grande's unfortunate state, many local communities as well as surrounding states are reliant on this diminishing body of water.⁴ Ecologically, it nourishes the surrounding land and ecosystem.⁵ While it might be a safe assumption that it would be federally unlawful to discharge pollutants into what is left of the Rio Grande, this assumption may be called into question in the future.

Water, one of the earth's most precious resources, is a necessity to life on this planet.⁶ Human and ecological life depend on the existence of an unsullied water supply.⁷ The United States Supreme Court decision in *Sackett v. EPA* has devastating

1. Flathead Lake Bio Station, *Hot Chili, Cold Beer, Clean Water Seminar*, UNIV. OF MONT. (Feb. 12, 2024) <https://flbs.umt.edu/newflbs/monitoring/mmw/mmw-blog/posts/hot-chili-cold-beer-clean-water-seminar/> [<https://perma.cc/55L3-7UFD>].

2. David Gutzler, *Drought in New Mexico: History, Causes, and Future Prospects*, UNM DIGITAL REPOSITORY, 101–05, 104 (2003), https://digitalrepository.unm.edu/cgi/viewcontent.cgi?article=1002&context=eps_fsp [<https://perma.cc/6Y4X-LN6L>].

3. FRED M. PHILLIPS, ET AL., *REINING IN THE RIO GRANDE: PEOPLE, LAND, AND WATER* 17 (2011) (ebook).

4. *Id.*

5. MIDDLE RIO GRANDE ECOSYSTEM MANAGEMENT RESEARCH UNIT, U.S. FOREST SERVICE ROCKY MOUNTAIN RESEARCH STATION, *MIDDLE RIO GRANDE BASIN RESEARCH REPORT 2008* (2008), <https://search.ebscohost.com/login.aspx?direct=true&db=edsgrpr&AN=edsgrpr.ocn641676767&site=eds-live&scope=site> [<https://perma.cc/LP3Q-CH6D>].

6. MARQ DE VILLIERS, *WATER: THE FATE OF OUR MOST PRECIOUS RESOURCE* 30 (1st ed. 2001).

7. KENNETH M. VIGIL, *CLEAN WATER: AN INTRODUCTION TO WATER QUALITY AND WATER POLLUTION CONTROL* 2 (2d ed. 2003).

consequences for many states with dry, arid climates.⁸ The Court held that “waters of the United States” (“WOTUS”) must be “relatively permanent, standing or continuously flowing bodies of water,” in order for them to receive protection under the Clean Water Act (“CWA”) from the discharging of pollutants.⁹ Once protected bodies of water of the United States are now at risk and vulnerable to future contaminants if they do not fall within the Courts’ latest definition of WOTUS.

The Clean Water Act of 1972 protects WOTUS from the discharge of pollutants unless a permit is obtained, but the definition—or clarity of the definition—of WOTUS has been absent from the Act.¹⁰ The Environmental Protection Agency (“EPA”), along with the Army Corps of Engineers, has evolved its interpretation of WOTUS into significant protections for many bodies of water of the United States, as they as they are responsible for enforcing the regulations contained within the CWA.¹¹ In August 2023, the United States Supreme Court ended the comprehensive level of protections for WOTUS provided by the EPA with its decision in *Sackett v. EPA*, addressing the definition of WOTUS under the CWA.¹²

Following the United States Supreme Court’s recent decision in *Sackett*, if conditions continue to worsen for the Rio Grande, it is possible that the river may no longer fall into the definition of a “continuous” body of water. The distinction that water needs to be continuous was not a requirement prior to the *Sackett* decision. It raises the question of whether the Rio Grande would no longer be protected under the CWA if the river were to dry up seasonally. The new interpretation of WOTUS would potentially leave the Rio Grande vulnerable to those who are either unaware of or have nefarious intentions to discharge pollutants into the water.

In 2023, the Rio Grande was on course to dry up for the second time in forty years in Albuquerque.¹³ The dwindling of this significant river has worrying implications, as the absence of any flow of water could potentially mean the river is no longer “navigable” or “continuous.” Not only is the Rio Grande at risk, but there are many bodies of water in New Mexico that already flow intermittently and will

8. *Seasonal and Rain-Dependent Streams*, EPA, <https://archive.epa.gov/epa/cleanwaterrule/seasonal-and-rain-dependent-streams.html> [https://perma.cc/FC3E-DGFP] (last visited Oct. 1, 2023); Emily Benson, *The Supreme Court just made it easier to destroy wetlands and streams*, HIGH COUNTRY NEWS (July 2, 2023), <https://www.hcn.org/articles/north-water-the-supreme-court-just-made-it-easier-to-destroy-wetlands-and-streams> [https://perma.cc/2HY8-WNF6]; Adrian Hedden, *Gov. Lujan Grisham calls out Supreme Court decision as ‘devastating’ to NM’s waters*, CARLSBAD CURRENT ARGUS (May 31, 2023), <https://www.currentargus.com/story/news/2023/05/31/new-mexico-leaders-criticize-us-supreme-court-ruling-on-federal-water-drought-law/70262195007/> [https://perma.cc/R25H-UDV9].

9. *Sackett v. EPA*, 143 S. Ct. 1322, 1336 (2023).

10. *Id.* at 1329.

11. *Id.* at 1330–1331. Since 1984, the United States Supreme Court has implemented the rule that when Congress has “left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation.” See *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 843–44 (1984).

12. *Sackett* 143 S. Ct. at 1341.

13. Andres Valle, *Rio Grande in Albuquerque to run dry*, KOAT ALBUQUERQUE (Aug. 29, 2023, 6:41 PM), <https://www.koat.com/article/rio-grande-in-albuquerque-to-run-dry/44942161#:~:text=For%20the%20second%20time%20in,it%20will%20improve%20anytime%20so> on [https://perma.cc/26EF-PC6Q].

be federally unprotected under the current ruling in *Sackett*.¹⁴ These include tributaries that flow into the Rio Grande. The Santa Fe River, Rio Galisteo, Rio Puerco, and Rio Salado are examples of intermittent tributaries of the Rio Grande but that nonetheless are crucial to local communities and habitats.¹⁵ This concern is not unique to New Mexico; there are temporary waterways throughout the United States.¹⁶ Nearly sixty percent of streams in the United States are limited to seasonal flow or after-storm events.¹⁷

The *Sackett* decision raises vital questions regarding the protection of Earth's most precious resource. In Part I, this Note will explore the historical context of the CWA, its original purpose, and how the meaning of WOTUS has varied over the years. In Part II, this Note will examine why the interpretation of WOTUS set forth most recently by the United States Supreme Court falls short, and the implications of the *Sackett* interpretation for bodies of water throughout the United States. In Part III, this Note will evaluate the efficacy of the EPA in enforcing the CWA. Finally, Part IV proffers a practical solution to address the vulnerabilities that waters protected prior to the *Sackett* ruling now face, what states can do to continue to protect their water, and why New Mexicans should care and support a state surface water discharge permitting program.

I. THE EVOLUTION OF THE CLEAN WATER ACT

A. The Introduction of the Clean Water Act

The United States first enacted major legislation to combat the problem of rising water pollution in 1948 with the passage of the Federal Water Pollution Control Act.¹⁸ During this time, there was growing concern regarding water pollution in the United States.¹⁹ The goal of the Act was to benefit “public health and welfare by the abatement of stream pollution.”²⁰ The Act specified that it would help federal agencies work with state agencies in developing “comprehensive programs for eliminating or reducing the pollution of interstate waters and tributaries thereof and improving the sanitary condition of surface and underground waters.”²¹

14. Cliff Dahm, *Protecting temporary waterways of the United States*, UNM NEWSROOM (Sept. 04, 2018), <http://news.unm.edu/news/protecting-temporary-waterways-of-the-united-states#:~:text=Examples%20of%20intermittent%20rivers%20in,Puerco%2C%20and%20the%20Rio%20Salado> [https://perma.cc/X6CG-B9DN].

15. *Id.*

16. *Water: Rivers and Streams*, EPA, <https://archive.epa.gov/water/archive/web/html/streams.html> [https://perma.cc/62ET-23VJ].

17. *Id.*

18. *History of the Clean Water Act*, EPA, <https://www.epa.gov/laws-regulations/history-clean-water-act> [https://perma.cc/4D8B-WQX6].

19. The Cuyahoga River in Ohio was so severely polluted that it caught fire in 1868, 1883, 1887, 1912, 1922, 1936, 1941, and 1948. LAURA LA BELLA, NOT ENOUGH TO DRINK: POLLUTION, DROUGHT, AND TAINTED WATER SUPPLIES 26 (1st ed. 2009) (ebook).

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

21. *Id.*

The Act was an appropriate first step, but it was apparent that the Act lacked the level of protection necessary to safeguard the nation's waters.²² The need for expansion of the Federal Water Pollution Control Act was recognized, leading to the passage of amendments aimed at improving the Act. The Federal Water Pollution Control Act has undergone significant changes since 1948 and has been amended in 1956, 1961, 1965, 1966, 1970, and 1972.²³ After the 1972 amendments, the Act became known as the Clean Water Act.²⁴

To enforce the CWA, Congress cited the Commerce Clause as justification for the CWA's validity and Congress' authority to protect "navigable" waters from the discharge of pollutants.²⁵ Because "navigable waters" is a narrow definition, to broaden the scope of the CWA, Congress included that the CWA also protected "waters of the United States."²⁶ This broad definition has led to much debate and litigation over the years about what WOTUS actually means in terms of the CWA.

Today, the EPA, along with the Army Corps of Engineers, is responsible for enforcing the CWA.²⁷ If an area is determined to be covered under the EPA's jurisdiction, a person wanting to discharge pollutants into the covered area must first obtain a permit through the National Pollutant Discharge Elimination System ("NPDES"). Pollutants not only include "traditional contaminants"²⁸ but also "dredged soil . . . rock, sand, [and] cellar dirt."²⁹ Once a permit is obtained, the EPA is charged with ensuring the polluter complies with federal regulations. There are consequences to discharging pollutants without obtaining a permit. Under 33 U.S.C. § 1319(c)(1) and (2), if an individual or entity negligently or knowingly "discharges a pollutant from a point source³⁰ into a water of the United States without a NPDES or 404 Permit or in violation of a permit," they face up to one year in jail and fines

22. See Kenneth M. Murchison, *Learning from more than Five-and-a-Half Decades of Federal Water Pollution Control Legislation: Twenty Lessons for the Future*, 32 B. C. ENV'T AFF. L. REV. 527 (2005).

23. *Id.*

24. *Summary of the Clean Water Act*, EPA, <https://www.epa.gov/laws-regulations/summary-clean-water-act> [<https://perma.cc/A7G6-EP2P>].

25. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1985).

26. *Id.*

27. "The U.S Army Corps of Engineers (Corps) and EPA have enforcement authorities for the Section 404 program, as specified in Sections 301(a), 308, 309, 404(n), and 404(s) of the CWA." *Federal Enforcement for the Section 404 Program of the Clean Water Act*, EPA, (Jan. 1989), [https://www.epa.gov/cwa-404/federal-enforcement-section-404-program-clean-water-act#:~:text=The%20U.S%20Army%20Corps%20of,\(s\)%20of%20the%20CWA.](https://www.epa.gov/cwa-404/federal-enforcement-section-404-program-clean-water-act#:~:text=The%20U.S%20Army%20Corps%20of,(s)%20of%20the%20CWA.) [<https://perma.cc/9LHX-WKV9>]; see also *Riverside Bayview Homes, Inc.*, 474 U.S. at 123.

28. *Rapanos v. United States*, 547 U.S. 715, 723 (2006). The EPA considers conventional pollutants as biochemical oxygen demand (BOD₅), total suspended solids (TSS), fecal coliform, pH, and any additional pollutants EPA defines as conventional. See *Learn About Effluent Guidelines*, EPA, <https://www.epa.gov/eg/learn-about-effluent-guidelines#:~:text=particular%20model%20technology,-,Pollutant%20Types,pollutants%20EPA%20defines%20as%20conventional> [<https://perma.cc/2FUU-P8ZM>].

29. *Rapanos*, 547 U.S. at 723.

30. "The term 'point source' means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture." 33 U.S.C.S. § 1362(14).

of \$2,500–\$25,000 per day for negligent violations.³¹ For knowing violations, they face up to 3 years in jail and fines of \$5,000–50,000 per day.³²

Congress deliberated over whether the waters being regulated by the Corps amounted to government overreach.³³ There was some congressional opposition to the regulatory authority the Corps was asserting in 1977.³⁴ The critics of the permitting program wanted to limit the Corps' jurisdiction to "waters navigable in fact and their adjacent wetlands (defined as wetlands periodically inundated by contiguous navigable waters)."³⁵ An amendment was proposed to limit the scope of "navigable waters," but the Conference Committee at that time agreed with the broader definition.³⁶ Thus, Congress evaluated restricting the Corps' jurisdiction, and rejected the proposition.

B. SCOTUS' Interpretation of WOTUS

In 1985, the United States Supreme Court considered if wetlands were recognized "waters of the United States" in *United States v. Riverside Bayview Homes*. Wetlands are areas "where water covers the soil, or is present either at or near the surface of the soil all year or for varying periods of time during the year, including during the growing season."³⁷ The Court held that wetlands fell within "waters of the United States."³⁸ Relying on the CWA's text and intent, as well as principles of judicial deference to agencies' interpretation of their own governing statutes, the Court held that the Corps' regulatory authority could include wetlands holding that "an agency's construction of a statute it is charged with enforcing is entitled to deference if it is reasonable and not in conflict with the expressed intent of Congress."³⁹ The Court came to that understanding by looking at the legislative intent of the CWA.⁴⁰ The Court determined that to reduce the ambiguity, considering the legislative history along with the "underlying policies of its statutory grants of authority," it was reasonable for the Corps to include wetlands as waters of the United States.⁴¹

In *Riverside*, the Court held that the CWA was a "comprehensive legislative attempt 'to restore and maintain the chemical, physical, and biological integrity of

31. 33 U.S.C.A. § 1319(c)(1)–(2); *Criminal Provisions of Water Pollution*, EPA, <https://www.epa.gov/enforcement/criminal-provisions-water-pollution#:~:text=33%20U.S.C.%201411-Penalty%3A,any%20property%20used%20in%20violation> [https://perma.cc/22G5-Q7V3] (last visited Nov. 2, 2023).

32. *Id.* § 1319(2).

33. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 136 (1985).

34. *Id.*

35. *Id.*

36. *Id.* at 137.

37. *What is a Wetland?*, EPA, <https://www.epa.gov/wetlands/what-wetland> [https://perma.cc/Y2L2-6E52] (last visited Nov. 2, 2023).

38. *Riverside Bayview Homes*, 474 U.S. at 138.

39. *Id.* at 131 (citing *Chemical Mfrs. Assn. v. Nat. Res. Def. Council, Inc.*, 470 U.S. 116, 125 (1985); *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–45 (1984)).

40. *Riverside Bayview Homes*, 474 U.S. at 132.

41. *Id.*

the Nation's waters."⁴² The Court determined that "[p]rotection of aquatic ecosystems, Congress recognized, demanded broad federal authority to control pollution."⁴³ The Court held that the Corps' conclusions that "wetlands adjacent to lakes, rivers, streams, and other bodies of water may function as integral parts of the aquatic environment even when the moisture creating the wetlands does not find its source in the adjacent bodies of water," were reasonable.⁴⁴ The Court concluded that the definition of WOTUS did include wetlands that were adjacent to other bodies of water which the Corps had jurisdiction over and was an allowable interpretation of the CWA.⁴⁵

In 2001, the Supreme Court was divided 5-4 in *Solid Waste Authority of Northern Cook County v. Army Corps of Engineers* ("SWANCC") when it held that the wetlands in *Riverview* were protected in that case because of the "significant nexus."⁴⁶ In *SWANCC*, the Court explained that its holding in *Riverview* "was based in large measure upon Congress' unequivocal acquiescence to, and approval of the Corps' regulations interpreting the CWA to cover wetlands adjacent to navigable waters."⁴⁷ Ultimately, the Court concluded that the Corps did not have "claim of jurisdiction over nonnavigable, isolated, intrastate waters."⁴⁸ This made the Corps' jurisdiction over WOTUS limited to waters that had a "significant nexus" with navigable waters.

In 2006, the Supreme Court clarified in *Rapanos* that "navigable waters" was defined as "waters of the United States."⁴⁹ The court extended protection beyond a body of water being literally navigable to be afforded protection, but also constraining "the expansive meaning that the Corps would give it."⁵⁰ Rather than consider scientific evidence covering what type of waters should be protected under the CWA's jurisdiction, the Court relied on the Webster's Dictionary definition to make its determination.⁵¹ The Court in *Rapanos* held the Corps' broad definition of what types of water it was permitted to regulate was not authorized by the statute.⁵²

The Court pointed out the CWA's distinction between a "point source" and "navigable waters," which the Court used to corroborate its finding that intermittent waters were not "waters of the United States."⁵³ A "point source" as defined by the CWA is "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft,

42. *Id.*

43. *Id.* at 132-33.

44. *Id.* at 135.

45. *Id.* at 139.

46. *Id.* at 131 (citing *Chemical Mfrs. Assn.*, 470 U.S. at 125; *Chevron*, 467 U.S. at 842-45; *Solid Waste Agency v. United States Army Corps of Eng'rs*, 531 U.S. 159, 167 (2001)).

47. *SWANCC*, 531 U.S. at 167.

48. *Id.* at 170-71.

49. *Rapanos v. United States*, 547 U.S. 715, 731-32 (2006).

50. *Id.*

51. *Id.* at 732-33. While the Supreme Court and lower courts often rely on definitions from dictionaries, in this instance, a scientific approach would have been more appropriate.

52. *Id.* at 745-46.

53. *Id.* at 735-36.

from which pollutants are or may be discharged.”⁵⁴ The Court reasoned that its interpretation of the definition of WOTUS was consistent with the goal of the CWA to “recognize, preserve, and protect the primary responsibilities and rights of the States to prevent, reduce, and eliminate pollution, [and] to plan the development and use (including restoration, preservation, and enhancement) of land and water resources.”⁵⁵ The Court noted that the Corps was acting more akin to a local zoning board, and land and water use “is a quintessential state and local power.”⁵⁶

The Court determined that if Congress were to permit an “unprecedented intrusion,” a “clear and manifest” statement would be required rather than broad terminology.⁵⁷ The Court concluded:

In sum, on its only plausible interpretation, the phrase “the waters of the United States” includes 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.” See Webster’s Second 2882. The phrase does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall. The Corps’ expansive interpretation of the “the waters of the United States” is thus not “based on a permissible construction of the statute.”⁵⁸

The Court justified this interpretation by stating it would not have any effect on allowable dredge or fill material because those materials are placed “for the purpose of staying put” and do “not normally wash downstream.”⁵⁹ The Court’s interpretation meant that the Corps would have to be reactive rather than proactive and would have to “prove that the contaminant-laden waters ultimately reach covered waters,” rather than providing protection for those waters prior to those waters being polluted.⁶⁰

The Court also pointed out Congress’s lack of action in addressing the need to clarify the definition of WOTUS in the CWA.⁶¹ However, it was noted by the Court in *Riverview* that Congress had already considered narrowing the definition of WOTUS, and the appropriate course of action for Congress was to leave the definition broad.⁶² In *Rapanos*, that was not enough to influence the Court’s decision because the lack of congressional action was not precise enough to influence the Court’s determination of the intended definition.⁶³ This was enough for the Court to justify its interpretation.

54. *Id.* at 735 (citing 33 U.S.C. § 1362(14)).

55. *Id.* at 737.

56. *Id.* at 738.

57. *Id.* (citing *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 544, (1994)).

58. *Id.* at 739.

59. *Id.* at 744.

60. *Id.* at 745.

61. *Id.* at 750.

62. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1985).

63. *Rapanos*, 547 U.S. at 750.

Following *Rapanos*, but prior to the decision in *Sackett*, the Obama Administration had expanded protection for waters including wetlands.⁶⁴ Those protections were then scaled back and trumped by the Trump Administration, leaving ninety percent of New Mexico’s waters, which are ephemeral, unprotected.⁶⁵ Under the Biden Administration, waters that are “relatively permanent” were covered, which excluded waters in closed basins.⁶⁶ This teetering of WOTUS protections with each presidential administration change and Court interpretation leaves WOTUS vulnerable.

C. The *Sackett* Decision in 2023

The Supreme Court revisited WOTUS again in 2023 in *Sackett v. EPA*. Writing for the Court, Justice Samuel Alito addressed the “nagging question about the outer reaches of the Clean Water Act.”⁶⁷ The Court acknowledged that the CWA has been a “great success” in combating pollution since its enactment in 1972.⁶⁸ The Court intended to resolve decades of confusion on the interpretation of the broad terminology of “waters of the United States” within the CWA.⁶⁹ The appellants in the case, Michael and Chantell Sackett, had spent over a decade fighting the EPA to backfill their property in Priest Lake, Idaho, with dirt and rocks to construct a home.⁷⁰ It is not clear if the Sacketts were aware they needed a permit to do so, but it is noteworthy, as the Court portrays the Sacketts as unsuspecting landowners, that Michael Sackett was no stranger to criminal activity and had worked for a rock sales company in the past.⁷¹

The EPA determined that the wetlands on the Sacketts’ property—which were separated by a thirty-foot road from a tributary that feeds into a creek that then feeds into Priest Lake—were a “traditional navigable” body of water, and that the “Sacketts had illegally dumped soil and gravel on ‘waters of the United States’.”⁷² The Sacketts argued the wetlands on their property did not fall within the definition of WOTUS, and years of litigation ensued.⁷³

The Court in *Sackett* determined that the *Rapanos* plurality had the definition correct, and that “waters of the United States” encompassed “only those

64. Scott Wyland, *New Mexico seeks to regulate polluted water discharges in face of changing federal rules*, NEW MEXICO POL. REP. (Jan. 23, 2023), <https://nmpoliticalreport.com/2023/01/23/new-mexico-seeks-to-regulate-polluted-water-discharges-in-face-of-changing-federal-rules/> [<https://perma.cc/X2QF-R72W>].

65. *Id.*

66. *Id.*

67. *Sackett v. EPA*, 598 U.S. 651, 657 (2023).

68. *Id.*

69. *Id.*

70. *Id.* at 1331.

71. Michael Sackett was convicted of soliciting a minor and worked for Crushed Rock Sales North America. See Kip Hill, *Sackett, who took on EPA, gets prison in sex case*, THE SPOKESMAN-REV. (Aug. 29, 2015), <https://www.spokesman.com/stories/2015/aug/29/sackett-who-took-on-epa-gets-prison-in-sex-case/#:~:text=Sackett%20worked%20for%20a%20Spokane,sex%20trafficking%20of%20a%20minor> [<https://perma.cc/892G-L67F>].

72. *Sackett*, 589 U.S. at 661–63.

73. *Id.* at 1332.

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.’”⁷⁴ The Court also decided that it could not ignore the significance of the term “navigable” in the CWA, thereby giving the term crucial significance as framing the scope of WOTUS.⁷⁵ Further, the Court found support in the CWA using the term “waters” to refer to open bodies of water.⁷⁶ The Court also reached back to 1824 where the Court referred to “waters of the United States” in relation to ships.⁷⁷

The Court acquiesced that some wetlands are covered under the CWA,⁷⁸ but relied on Webster’s Dictionary to determine what adjacent waters would be covered, rather than relying on science or the EPA’s interpretation.⁷⁹ The Court concluded that “[w]etlands that are separate from traditional navigable waters cannot be considered part of those waters, even if they are located nearby.”⁸⁰ The Court determined the EPA’s interpretation that “wetlands are ‘adjacent’ when they are ‘neighboring’ to covered waters, even if they are separated from those waters by dry land” was inconsistent with the interpretation of the CWA.⁸¹ Ultimately the Court concluded: “In sum, we hold that the CWA extends to only those ‘wetlands with a continuous surface connection to bodies that are “waters of the United States” in their own right,’ so that they are ‘indistinguishable’ from those waters.”⁸² The Court found that the Sacketts’ property containing wetlands are “distinguishable from any possibly covered waters.”⁸³ The Sacketts won their legal battle with the EPA after sixteen years of litigation.

D. State Laws Safeguarding Against Water Pollution

There are states that have enacted their own statutes to protect water from being polluted. It is illegal to pollute the water in New Mexico.⁸⁴ Under New Mexico Statute Section 30-8-2, polluting public water is a misdemeanor crime.⁸⁵ Polluting public water under the statute “consists of knowingly and unlawfully introducing any object or substance into any body of public water causing it to be offensive or dangerous for human or animal consumption or use.”⁸⁶ Under the statute, “body of water” is “any public river or its tributary, stream, lake, pond, reservoir, acequia, canal, ditch, spring, well or declared or known ground waters.”⁸⁷

74. *Id.* at 1326 (citing *Rapanos v. United States*, 547 U.S. 715, 739 (2006)).

75. *Id.* at 1327.

76. *Id.*

77. *Id.* at 1338 (citing *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1(1824)).

78. *Id.* at 1339 (holding that “§1344(g)(1) presumes that certain wetlands constitute ‘waters of the United States.’”).

79. *Id.* at 1339–40.

80. *Id.* at 1340.

81. *Id.* at 1341.

82. *Id.* at 1344.

83. *Id.*

84. N.M. STAT. ANN. § 30-8-2 (1993).

85. *Id.*

86. *Id.*

87. *Id.*

Applying the facts in *Sackett* to New Mexico law, a New Mexico resident backfilling their property under similar conditions would still be in violation of New Mexico law. While the EPA may no longer be able to consider certain wetlands protected, New Mexico can, under its own laws, act under the statute and charge anyone polluting wetlands with a misdemeanor crime. Conversely, there are some states that have fewer protections for their citizens' water, such as Idaho⁸⁸, where the *Sackett* litigation originated.⁸⁹ Under the Idaho Code, the only prohibition is "the use of vacuum or suction dredges capable of moving two (2) or less cubic yards of material per hour shall be guilty of a misdemeanor."⁹⁰ Otherwise, the state, under Idaho Code Section 39-175B, "will not require Idaho pollutant discharge elimination system (IPDES) permits for activities and sources not required to have permits by the United States environmental protection agency."⁹¹ The differing approaches states have towards water protection illuminates the lack of consistency and the need for uniformity.

II. IMPLICATIONS OF THE WOTUS DEFINITION POST-SACKETT DECISION

A. SCOTUS Got WOTUS Wrong

The interpretation of WOTUS by the Court in *Sackett* is not only detrimental to states with dry and arid climates, but it is also incorrect. The Court reasoned that only some wetlands are covered under the CWA, as not all wetlands are WOTUS.⁹² The Court relied on a distinction between what-they-called Category A, B, and C wetlands and concluded that if Category C (adjacent wetlands) are part of Category A (waters of the United States), then there would be no need to have a separate category.⁹³ The Court failed to recognize that all three categories deserve protection in order to combat water pollution regardless of any distinctions between them. The Court's reasoning is unsound.

When the CWA was enacted, its purpose was to protect WOTUS. As the Court in *Riverside* pointed out, Congress's intention in enacting the CWA was "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."⁹⁴ In *County of Maui, Hawaii v. Hawaii Wildlife Fund*, where the County of Maui's wastewater reclamation facility was polluting groundwater, Maui and the Solicitor General argued "the statute's permitting requirement does not apply if a

88. Idaho did not have its own permitting program at the time the *Sackett* litigation began. The "EPA approved Idaho's application to administer the Idaho Pollutant Discharge Elimination System program to issue other NPDES permits in Idaho" in 2018. NPDES PERMITS AROUND THE NATION, EPA, <https://www.epa.gov/npdes-permits/idaho-npdes-permits> [<https://perma.cc/97NG-EDBG>].

89. IDAHO CODE § 42-3811 (1980).

90. *Id.*

91. IDAHO CODE § 39-175B (amended 2018).

92. *Sackett v. EPA*, 598 U.S. 651, 676 (2023). ("Wetlands that are separate from traditional navigable waters cannot be considered part of those waters, even if they are located nearby.")

93. *Id.* at 675. ("If C (adjacent wetlands) were not part of A ("the waters of the United States") and therefore subject to regulation under the CWA, there would be no point in excluding them from that category.")

94. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 132 (1985).

pollutant, having emerged from a ‘point source,’ must travel through any amount of groundwater before reaching navigable waters.”⁹⁵ The Court in *Maui* held “that interpretation is too narrow, for it would risk serious interference with EPA’s ability to regulate ordinary point source discharges.”⁹⁶ The Court rejected the argument that the permitting requirement does not apply if there is any amount of groundwater between a point source and navigable waters.⁹⁷ Further the Court held “[w]e do not see how Congress could have intended to create such a large and obvious loophole in one of the key regulatory innovations of the Clean Water Act.”⁹⁸ This exemplifies the outright contradiction in the Court’s interpretation in *Sackett*.

While one could argue that the Court in *SWANCC* got it right when they held that there must be some “significant nexus” to a navigable body of water,⁹⁹ then it would be logical that the EPA with years of regulatory and enforcement experience protecting waters of the country, is equipped to determine when a nexus would be deemed significant. The Court in *Sackett* held that “the CWA does not define the EPA’s jurisdiction based on ecological importance, and we cannot redraw the Act’s allocation of authority.”¹⁰⁰ However, in *Riverside* the Court determined “the Corps’ ecological judgment about the relationship between waters and their adjacent wetlands provides an adequate basis for a legal judgment.”¹⁰¹ It’s been clear the CWA’s purpose is to “restore and maintain the chemical, physical, and biological integrity.”¹⁰² The Court had already addressed deferring to the Corps’ ecological judgment and determined it is appropriate.

The Court in *Sackett* also acknowledged that the EPA considers “wetlands” to be a “technical term,” and the Corps has a “143-page manual to guide officers when they determine whether property meets this definition.”¹⁰³ The Court also pointed out that the EPA and the Corps had guidance documents for “grey areas” when it comes to wetlands which included a “lengthy list of hydrological and ecological factors.”¹⁰⁴ This shows that the EPA is exercising care and applying a compilation of specific standards in its determinations. It is interesting to note the Court failed to provide its own lengthy list of hydrological and ecological factors to support its holding in *Sackett*. It would be reasonable to expect the Court to provide at least some modicum of scientific examination in their reasoning when refuting the standard set forth by the EPA who has been the regulatory body entrusted with protecting the nation’s waters for decades.

95. 140 S. Ct. 1462, 1473 (2020).

96. *Id.*

97. *Id.*

98. *Id.*

99. *Solid Waste Agency v. United States Army Corps of Eng’rs*, 531 U.S. 159, 167 (2001).

100. *Sackett v. EPA*, 598 U.S. 651, 681–82 (2023).

101. *Riverside Bayview Homes*, 474 U.S. at 134.

102. *Id.* at 132.

103. *Sackett*, 598 U.S. at 664 (The Court is referring to the Wetlands Delineation Manual); see Corps, Wetlands Delineation Manual (Tech. Rep. Y-87-1, 1987) (Wetlands Delineation Manual); see also, e.g., Corps, Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Alaska Region (Version 2.0) (ERDC/EL Tr-07-24, 2007).

104. *Sackett*, 598 U.S. at 664.

The courts in *SWANCC*, *Rapanos*, and *Sackett* all argue for more narrow interpretations of WOTUS, relying on Webster’s dictionary rather than scientific research, the EPA’s technical expertise,¹⁰⁵ or prior SCOTUS precedent,¹⁰⁶ which makes the Court’s argument of its interpretation perturbing. This limited interpretation also disregards legislative intent. It is clear Congress intended for the CWA definition of “waters of the United States” to be broad to afford the waters in the United States increased protections, not less. The Court’s reliance on “interpretation” and “structure” of the CWA¹⁰⁷ is incongruent when it disregards the structure of the CWA and how Congress intended the CWA to be interpreted. The reasoning the Court provides for this disregard is nothing more than a lackadaisical argument.

How such esteemed and judicious individuals could falter so egregiously on clearly established precedent is baffling. The wavering and inconsistency with the Court’s rulings over the years leaves a trail of uncertainty. SCOTUS has missed the mark in *Sackett* with moot arguments on a paramount issue: continuing to provide essential water protections in the United States.

B. Continued Ambiguity Regarding the Definition of WOTUS

A problem with the Court’s ruling in *Sackett* is that it is not clear if the clarified definition of WOTUS applies *only* to wetlands. If it is a definition that expands beyond wetlands, this can impact states with dry and arid climates.¹⁰⁸ When the Court held that WOTUS was defined as “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,’” it did not clarify whether this definition applied only to determining when wetlands are covered.¹⁰⁹ While the Court claimed to definitively resolve the confusion about what counts as WOTUS, its decision will create more confusion, uncertainty, and even less protection for waters in states with noncontinuous flowing bodies of water.

If the Court’s definition of WOTUS does not only apply to wetlands, then protection for all waters of the United States that do not fit the definition would be even more significantly diminished, putting waters like the Rio Grande at serious risk of losing federal protection. If it does only apply to wetlands, the Court did not make that clear. In attempting to resolve the confusion, the Court created a situation for continued confusion to flourish. The Court’s lack of clarification will also create uncertainty for businesses and landowners. In the future, courts could rely on the *Sackett* definition to apply to how *all* WOTUS should be defined, thereby limiting the scope of the CWA even further.

105. *Riverside Bayview Homes*, 474 U.S. at 134.

106. *See id.*

107. *Sackett*, 598 U.S. at 678–69.

108. Danielle Prokop, *What’s a river? Supreme Court WOTUS ruling will be costly for New Mexico, experts warn*, SOURCE NM (July 12, 2023), <https://sourcennm.com/2023/07/12/wotus-ruling-costly-for-new-mexico-experts-warn/> [<https://perma.cc/S2EQ-ZHQW>].

109. *Sackett*, 598 U.S. at 671.

New Mexico's largest river sometimes runs the risk of seasonally drying up.¹¹⁰ It would be troubling if the Rio Grande were to dry up and be left federally unprotected under the CWA. Other bodies of water in New Mexico that are intermittent would also be in a perpetual state of uncertainty. The definition of WOTUS in *Sackett* does not clarify if waters will be protected when they are flowing, or unprotected when they are not, because they would not be continuous. If they are not continuous, then it is still uncertain if they are protected when there is water flow present. From the largest river in the state to the ephemeral streams, the federal protections under the CWA are now uncertain for the waters of New Mexico which can be alleviated by New Mexico enacting their own surface water discharge permit program.

C. The Benefits of Discharge Permits

Permits are necessary to protect the environment against polluters whether they are intentional or unknowing. When a party finds themselves in a situation where they have a reason to pollute the waters of the United States, they must obtain a NPDES permit.¹¹¹ After the permit is obtained, the EPA is entrusted with ensuring the permit holder is polluting within the allowable parameters.¹¹² If a person is polluting the water without a permit, the EPA can require them to obtain a permit.¹¹³

Without a federal permitting process, individual states would be responsible for protecting the water within their own state. There are only three states that still rely on the EPA as the sole permitting authority.¹¹⁴ New Mexico is on that list.¹¹⁵ For the three states that do not have their own permitting process to protect against the unauthorized discharge of pollutants, the EPA's enforcement of the permitting practice is imperative to maintaining clean water for those states.¹¹⁶ There are states with their own permitting program that make clear that they only protect the water of the state as much as the federal government requires them to.¹¹⁷ For example, the

110. Andres Valle, *Rio Grande in Albuquerque to run dry*, KOAT (Aug. 29, 2023), [https://www.koat.com/article/rio-grande-in-albuquerque-to-run-dry/44942161#:~:text=For%20the%20second%20time%20in,it%20will%20improve%20anytime%20so on \[https://perma.cc/52TU-V6L2\]](https://www.koat.com/article/rio-grande-in-albuquerque-to-run-dry/44942161#:~:text=For%20the%20second%20time%20in,it%20will%20improve%20anytime%20so on [https://perma.cc/52TU-V6L2]).

111. *NPDES Permit Basics*, EPA, [https://www.epa.gov/npdes/npdes-permit-basics#:~:text=If%20you%20discharge%20from%20a,municipality%20about%20their%20permit%20requirements \[https://perma.cc/293Q-HSFB\]](https://www.epa.gov/npdes/npdes-permit-basics#:~:text=If%20you%20discharge%20from%20a,municipality%20about%20their%20permit%20requirements [https://perma.cc/293Q-HSFB]); see 33 U.S.C.S. § 1311(a) (Pollutant discharge is illegal unless in compliance with law.); 33 U.S.C.S. § 1342(a) (Statute for NPDES permits.).

112. *NPDES Permit Basics*, *supra* note 111; 33 U.S.C.S. § 1319.

113. NPDES Permit Writers' Manual (2010), [https://www3.epa.gov/npdes/pubs/pwm_chapt_04.pdf \[https://perma.cc/39CE-FL62\]](https://www3.epa.gov/npdes/pubs/pwm_chapt_04.pdf [https://perma.cc/39CE-FL62])). See also *EPA History: Water - The Challenge of the Environment: A Primer on EPA's Statutory Authority*, EPA, [https://www.epa.gov/archive/epa/aboutepa/epa-history-water-challenge-environment-primer-epas-statutory-authority.html \[https://perma.cc/8FRF-HKSE\]](https://www.epa.gov/archive/epa/aboutepa/epa-history-water-challenge-environment-primer-epas-statutory-authority.html [https://perma.cc/8FRF-HKSE]) (Dec. 1972); 33 U.S.C.S. § 1342; 33 U.S.C.S. 1344.

114. The list includes Massachusetts, New Hampshire, New Mexico, and the District of Columbia and U.S. territories (except the Virgin Islands). *NPDES Permit Basics*, *supra* note 111.

115. *Id.*

116. *Id.*

117. Idaho Department of Environmental Quality, *Permit Options*, <https://www.deq.idaho.gov/water-quality/wastewater/permit->

Idaho Department of Environmental Quality only requires someone to obtain a permit if required by the EPA and “will not expand required coverage beyond federal regulatory requirements.”¹¹⁸ This leaves water vulnerable to pollution.

While it is illegal to pollute public water in New Mexico, it is only considered a misdemeanor offense and is not a proactive means to prevent water pollution in the state.¹¹⁹ The law, on its own, would be restrictive in that it punishes those who have a need to discharge pollutants into the water but would have no avenue to not commit a crime without a permitting process. Circumstances arise that necessitate a legitimate reason to discharge pollutants into natural waters. Building a home, running a business, or operating a farm would require citizens the need to emit some pollutants into the waters of the United States.

The restrictions following the *Sackett* decision leave many waters at risk in states that do not have their own permitting program, laws, or enforcement measures. The water being left unprotected would have serious consequences. It could affect clean drinking water supplies, plant and animal life, and recreational waters.¹²⁰

Without a permitting program, New Mexico’s waters are susceptible to future United States Supreme Court rulings that reduce federal protections. New Mexico’s waters would also be susceptible to presidential rules and regulations.¹²¹ As this has been the case, the back and forth between what waters are protected and what waters are not, leaves the protection for waters of states on a perpetual seesaw. States that have their own permitting process and strong protections for water in place are not affected by this fluctuating system.

If New Mexico legislators sought to develop a permitting process for the state, it would enhance protections for the state’s waters and wetlands. Currently, the development of a permitting process will likely take years and is dependent on funding for the New Mexico Environment Department to implement these programs.¹²² The cost to implement a permitting program would set New Mexico back between six and seven million dollars.¹²³ Even though New Mexico is now scrambling to catch up, it is still necessary to move this process forward. There is no

options/#:~:text=IPDES%20permits%20are%20written%20to,Idaho%2C%20except%20on%20tribal%20land,Idaho [https://perma.cc/JA95-BNM8].

118. *Id.*

119. N.M. STAT. ANN. § 30-8-2 (1993).

120. “Pollutants in ground water and fresh surface waters that flow into wetlands can be toxic to plants and animals, and they can accumulate in wetland sediments,” “if fewer wetlands are available to filter pollutants from surface waters, those pollutants could become more concentrated in the remaining wetlands. Wetland loss can also decrease habitat, landscape diversity, and connectivity among aquatic resources.” *Wetlands*, EPA, <https://www.epa.gov/report-environment/wetlands#:~:text=Wetland%20loss%20can%20also%20decrease,habitat%20types%20and%20community%20structure> [https://perma.cc/XB2X-MR4E].

121. The last three presidential administrations have implemented different rules and regulations for WOTUS. See Jim Salter and Michael Phillis, *EPA finalizes water rule that repeals Trump-era changes*, THE ASSOCIATED PRESS (Dec. 30, 2022, 10:00 AM), <https://apnews.com/article/biden-politics-arizona-state-government-donald-trump-8d46b14c20cb0effcb52ace48220dcce> [https://perma.cc/7CJA-NV4J].

122. Danielle Prokop, *What’s a river? Supreme Court WOTUS ruling will be costly for New Mexico, experts warn*, SOURCE NM (July 12, 2023), <https://sourcennm.com/2023/07/12/wotus-ruling-costly-for-new-mexico-experts-warn/> [https://perma.cc/YB4T-9SPS].

123. *Id.*

guarantee that Congress will amend the CWA soon or ever, and therefore, New Mexico cannot rely solely on federal legislation to protect its waters.

If Congress does not amend the CWA, waters in the United States are at the mercy of the United States Supreme Court's interpretations of the CWA. It is not out of the realm of possibility that what has happened over the years with the Court's interpretation—resulting in the loss of protection for water in the United States—would continue to happen. Because the *Sackett* decision did not clarify if the United States Supreme Court's interpretation of WOTUS only applied to wetlands, subsequent Supreme Court decisions relying on precedent could narrow CWA protections for water by expanding the ruling in *Sackett* to applying to New Mexico's largest river if it were to dry up and not be a continuously flowing body of water.

States like New Mexico that have criminal penalties in place to protect public water that go beyond the current federal protections still need a permitting process and regulatory enforcement. A permitting process would protect landowners who need to discharge pollutants into protected water on their property. If someone wants to build a home on their property that requires backfilling, like the Sacketts were doing, a permitting process would be necessary to make sure they would still be allowed to get the best use out of their property while still doing it in a responsible way that is within the appropriate parameters to protect the environment.

D. Implications of Minimum State Protections

While some states want the same level of protection, or greater, for the water of the state that was available pre-*Sackett*, some states do not.¹²⁴ This exacerbates the problem we are left with post-*Sackett* because, without any federal protections, it leaves the responsibility of the permitting and regulation process to each state. For example, wetlands that are no longer covered post-*Sackett* could now be polluted in state A. The pollutants could then seep into the ground to a river thirty feet away. That river runs into state B that would have protected those wetlands. Now state B must deal with the ramifications of state A not taking the appropriate measures to protect the water of state A.

In 2006, Oklahoma sued eight companies polluting the water in Arkansas.¹²⁵ The contaminants from chicken waste being applied to crops in Arkansas was flowing into the Illinois River, which spans Arkansas and Oklahoma.¹²⁶ In 2015, the EPA accidentally released contaminants into the Animas River in Colorado.¹²⁷ The Animas River flows into the San Juan National Forest and

124. John Flesher and Michael Phillis, *States at the forefront of fights over wetlands protections after justices slash federal rules*, ASSOCIATED PRESS (Aug. 30, 2023, 10:04 AM), <https://apnews.com/article/wetlands-supreme-court-state-rules-development-4917c6df50c0cd15da2915fc12f9445e> [<https://perma.cc/X5U8-CS3U>].

125. Juliet Eilperin, *Pollution in the Water, Lawsuits in the Air*, WASH. POST (Aug. 28, 2006), <https://www.washingtonpost.com/wp-dyn/content/article/2006/08/27/AR2006082700849.html?referrer=emailarticle> [<https://perma.cc/W58M-4VFU>].

126. *Id.*

127. Bill Chapell, *EPA Says It Released 3 Million Gallons of Contaminated Water Into River*, NPR (Aug. 10, 2015, 8:42 AM), <https://www.npr.org/sections/thetwo-way/2015/08/10/431223703/epa-says-it-released-3-million-gallons-of-contaminated-water-into-river> [<https://perma.cc/V6LC-CSUG>].

contaminants made their way downstream into New Mexico and Utah.¹²⁸ The influx of per- and polyfluoroalkyl substances (“PFAS”) into United States waters is a growing problem in the country.¹²⁹ States that want to abide by minimum federal standards could impact the contaminated water flowing to their neighboring states. This is why federal protection is imperative. If one state’s limited protections for water result in contamination of another state’s waters, it has negative impacts for ecological life and citizens of the harmed state. The affected state must then resort to litigation to protect its water. With proper federal protections in place, states would not be at the mercy of their neighboring states’ limited water protections because an effective minimum federal standard would create uniformity of safeguards in all fifty states.

III. EPA ENFORCEMENT GAPS

The EPA is focused on enforcing permit obtainment for unpermitted discharges, but not so much on enforcing permit compliance.¹³⁰ Some citizens have fallen victim to the lack of enforcement of the CWA by the EPA and suffer from having unclean water being supplied to their domiciles.¹³¹ This is a significant cause for concern in and of itself.

Organizations like the Environmental Integrity Project¹³² (“EIP”) point out the failures of the EPA to enforce the CWA.¹³³ Half a billion gallons of polluted water is discharged into rivers, streams, and estuaries every day.¹³⁴ The EIP claims that the EPA’s “standards for refineries have not been revised in nearly four decades . . . and apply only to a small handful of pollutants.”¹³⁵ The EIP, along with other organizations, filed a lawsuit against the EPA in the Ninth Circuit on April 11,

128. *Id.*

129. CDC, Per- and Polyfluorinated Substances (PFAS) Factsheet, https://www.cdc.gov/biomonitoring/PFAS_FactSheet.html#:~:text=Print,stains%2C%20grease%2C%20and%20water. [<https://perma.cc/2CGP-UUF3>].

130. ENV’T WORKING GRP., *Pollution Pays* (Jan. 31, 2000), <https://www.ewg.org/research/pollution-pays> [<https://perma.cc/R3VR-9VVV>]; U.S. GOVERNMENT ACCOUNTABILITY OFFICE, *Thousands of Discharges Keep Pollution Flowing: How can EPA better protect Our Nation’s Waters?* (Mar. 22, 2022), <https://www.gao.gov/blog/thousands-discharges-keep-pollution-flowing-how-can-epa-better-protect-our-nations-waters> [<https://perma.cc/G3UC-UEU6>].

131. Greg Larose, *Louisiana refineries are among the top U.S. water polluters, report finds*, LOUISIANA ILLUMINATOR (Jan. 30, 2023, 1:48 PM), <https://lailluminator.com/2023/01/30/louisiana-refineries-are-among-the-top-u-s-water-polluters-report-finds/> [<https://perma.cc/6FE4-62EZ>]; Dorany Pineda, *Study of U.S. oil refineries ranks Chevron El Segundo as worst emitter of two water pollutants*, L.A. TIMES (Jan. 26, 2023 12:57 PM), <https://www.latimes.com/california/story/2023-01-26/chevron-el-segundo-among-worst-refinery-water-polluters> [<https://perma.cc/QH2A-WU2S>].

132. “The Environmental Integrity Project is a 501 (c)(3) nonpartisan, nonprofit watchdog organization that advocates for effective enforcement of environmental laws.” ENV’T INTEGRITY PROJECT, *About Us*, <https://environmentalintegrity.org/who-we-are/> [<https://perma.cc/GZV2-7XJL>].

133. Louisa Markow, et al., *Oil’s Unchecked Outfalls*, ENV’T INTEGRITY PROJECT (Jan. 26, 2023), <https://environmentalintegrity.org/wp-content/uploads/2023/01/Refinery-water-pollution-report-EMBARGOED-until-1.26.23.pdf> [<https://perma.cc/SRF8-B4J4>].

134. *Id.*

135. *Id.*

2023, to hold the EPA accountable for the lack of updated water-pollution control technology standards.¹³⁶

In September 2023, Food & Water Watch¹³⁷ filed a lawsuit against the EPA in the Ninth Circuit claiming the EPA is failing to regulate factory farm pollution.¹³⁸ The organization previously petitioned the EPA to make changes to regulations for factory farm pollution, but the EPA denied the petition.¹³⁹ Food & Water Watch claims that “factory farm waste is responsible for a significant share, including at least 14,000 miles of rivers and 90,000 acres of polluted lakes and ponds nationwide.”¹⁴⁰ The organization also claims that the “EPA has acknowledged that it lacks basic information about where the nation’s CAFOs¹⁴¹ are located, let alone which are illegally polluting.”¹⁴² The current lack of enforcement by the EPA combined with reducing the EPA’s jurisdiction of wetlands will lead to more pollution of the country’s waters.

A. Consequences of Inadequate EPA Enforcement

The Missouri River provides drinking water for ten million people.¹⁴³ In 2020, two Iowa companies repeatedly exceeded the amount of pollution they were allowed to discharge into the river. Despite these violations, the EPA has done nothing to hold the companies accountable.¹⁴⁴ Also in 2020, discharges into the nearby Mississippi River, which is utilized by eighteen million people for drinking water, were not being regulated by the EPA.¹⁴⁵ One company was found to be in violation of permit limits for a total of 689 days.¹⁴⁶ Although the lack of enforcement by the EPA can be a result of a lack of funding, these continuous missteps illustrate

136. Petition for Review at 3, *Water Keeper All. et al., v. EPA* (9th Cir. 2023).

137. “Food & Water Watch is a nonprofit consumer organization that works to ensure clean water and safe food in the United States and around the world.” *Food & Water Watch*, LIBR. OF CONGRESS, <https://www.loc.gov/item/lcwaN0004832/> [<https://perma.cc/QCP8-3LPK>].

138. *13 Groups Sue EPA Over Factory Farm Water Pollution*, FOOD & WATER WATCH (Sept. 11, 2023), <https://www.foodandwaterwatch.org/2023/09/11/13-groups-sue-epa-over-factory-farm-water-pollution/> [<https://perma.cc/PM9H-F785>].

139. *Id.*

140. *Id.*

141. CAFO stands for Concentrated Animal Feeding Operations. See Carrie Hribar, *Understanding Concentrated Animal Feeding Operations and Their Impact on Communities*, CDC, https://www.cdc.gov/nceh/ehs/docs/understanding_cafos_nalboh.pdf [<https://perma.cc/YCP5-EGQ9>] (“A CAFO is a specific type of large-scale industrial agricultural facility that raises animals, usually at high-density, for the consumption of meat, eggs, or milk.”).

142. FOOD & WATER WATCH, *supra* note 138.

143. Donnelle Eller, *Environmental group says two companies in Iowa have escaped enforcement action despite dozens of clean water violations*, DES MOINES REG. (Oct. 7, 2020, 8:42 AM), <https://www.desmoinesregister.com/story/money/business/2020/10/07/water-pollution-laws-unenforced-iowa-environmental-group-clinton-sergeant-bluff-clean-water-act/3636534001/> [<https://perma.cc/M7VL-A82E>].

144. *Id.*

145. *Id.*

146. *Id.*

the importance for individual states to manage their own enforcement through things like state run permitting programs.¹⁴⁷

B. Regulatory Missteps Within the EPA

The EPA, with its regulatory power, does not inform landowners when their land is considered to have protected waters on their property until they come knocking on the landowner's door demanding money. In both *Sackett* and *Rapanos*, the EPA did not target the landowners until they had already begun their construction projects.¹⁴⁸ It is unclear how a person buying a piece of land is supposed to be aware of the regulatory authority of the EPA. The EPA itself must consult its complicated manual to determine what falls within its jurisdiction.¹⁴⁹ A buyer could do what they believe to be due diligence prior to buying a property, only to find out later that they must pay for a costly permit issued by the EPA to be able to build on their property.

The EPA suggests asking the Corps for a jurisdictional determination to determine if the site contains covered waters.¹⁵⁰ This is likely not something prospective buyers or even their real estate agents would know to ask for. Further, the permits come with a high price tag, and it is cumbersome to obtain one.¹⁵¹ “The average applicant for an individual permit spends 788 days and \$271,596 in completing the process, and the average applicant for a nationwide permit spends 313 days and \$28,915—not counting costs of mitigation or design changes.”¹⁵² States having their own permitting program would be helpful to combat this if state agencies provide ample notice, an expedited process, and reasonable fees for permits.

C. Instances of Overreach by the EPA and Army Corps of Engineers

The experiences some landowners have had with EPA and Army Corps enforcement are troubling.¹⁵³ The fines imposed even for civil offenses can be exorbitant. Aside from the fines being high, the process of enforcement can be grossly unfair. Farmers have been slapped with million-dollar fines for simply tilling their soil.¹⁵⁴ Moving soil—which is considered a pollutant—from one point to another point is considered discharging pollutants to an area that falls within the EPA's jurisdiction of regulatory authority.¹⁵⁵

147. *Id.*

148. *Sackett v. EPA*, 598 U.S. 651, 661–62 (2023).; *Rapanos v. United States*, 547 U.S. 715, 719–21 (2006).

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

150. *Id.* at 670.

151. *Id.*

152. *Rapanos*, 547 U.S. at 721.

153. See Patrick Cavanaugh, *Another Northern California Wheat Grower is being sued by the U.S. Army Corps of Engineers, California* AG TODAY, <https://californiaagtoday.com/army-corps-another-wheat-grower/> [<https://perma.cc/2GQ3-HGDY>]; *United States v. Lapant*, No. 2:16-CV-01498-KJM-DB, 2019 U.S. Dist. LEXIS 75309 (E.D. Cal. May 2, 2019); PACIFIC LEGAL FOUND., *Bureaucrats can't rewrite the law just because they don't like it*, <https://pacificlegal.org/case/united-states-v-lapant/> [<https://perma.cc/T42S-Z7PB>] (last visited Nov. 28, 2023).

154. Cavanaugh, *supra* note 153.

155. Soil is considered a pollutant and discharging pollutants into protected waters is not allowed. See *Rapanos*, 547 U.S. at 723

The choice for the landowner is then to either comply with obtaining the mandated costly permit if that is being required, pay any fines imposed, or to take their chances on costly litigation fighting the demands. It is easy to see there is no winning option for a farmer innocently tilling their soil or a property owner wanting to build their family home on their newly purchased piece of land.

There is legitimate concern about government overreach because of the cost of the permits through the EPA and the amount of time it takes to submit the paperwork for a permit and the permit being approved. However, as Justice Alito said, the CWA has been very successful at reducing water pollution since its enactment in 1972.¹⁵⁶ Pollution is a significant concern worldwide and to pull back on regulations that seek to reduce pollution simply because they are inconvenient or expensive is a grave error. States that have issue with the high price of permits can reduce the cost in their own permitting programs. While pollution restrictions necessarily impose costs, these costs are necessary to protect one of the most precious resources, necessary to all life.

D. Balancing Government Overreach and Regulatory Necessity

While it may seem like the EPA can be inefficient and draconian, the fact remains that the EPA enforcing the CWA has improved water pollution significantly.¹⁵⁷ The focus should not be on eliminating government regulations. Rather, the focus should be on balancing the necessity for the regulations that promote the health, safety, and wellbeing of citizens with the necessity for fairness, economic growth, and equality. States that require only the bare minimum to comply with federal law may seem like they are helping the citizens of their state by limiting regulations, but they are limiting the safety of their citizens in the process.

It is important for states to tailor regulations to their citizens' needs. This would prevent excessively harsh regulations while still protecting the water supply. A state with minimum protections for its water is not an accommodation from perceived government overreach. Rather, it is a careless misstep that not only harms the health and safety of its citizens but also the environment. Water protection should not come at the expense of justice for landowners or businesses and states must balance the two.

IV. SOLUTIONS TO THE WOTUS DEFINITION PROBLEM

A. Congress Must Amend the Clean Water Act for Enhanced Water Protections

Because there are states that do not want to adequately restrict water pollution in their state following the *Sackett* decision,¹⁵⁸ it is imperative that Congress take action to ensure the United States is protecting its water by combatting pollution. While it may seem daunting making changes to this long-established

156. *Sackett*, 598 U.S. at 657–59.

157. Jouni Paavola, *Interstate Water Pollution Problems and Elusive Federal Water Pollution Policy in the United States, 1900-1948*, 12 ENV'T & HIST. 435, 455–56 (2006); Murchison, *supra* note 22, at 578–79.

158. Flesher and Phillis, *supra* note 124.

doctrine, the CWA has undergone many changes in the past,¹⁵⁹ demonstrating that it should be a reasonable endeavor to commence.

A state allowing pollution is unfair to surrounding states that would be negatively impacted by one state tolerating pollution to wetlands that harms the environment. To ensure that all citizens are protected, Congress must amend the CWA to have enhanced clarity on the types of protected waters that should be included in the CWA. This is action that Congress should have taken decades ago prior to the extensive litigation and costs incurred to citizens fighting the EPA's permitting program and to the government in having to defend these lawsuits. Congress's inaction has now led to at least 118 million acres of wetlands¹⁶⁰ and 1.2 million to 4.9 million miles of ephemeral waters in the United States being unprotected.¹⁶¹ It has also led to possibly ninety percent of waterways in New Mexico being unprotected¹⁶² because the broad wording in the CWA has been left to the United States Supreme Court, who has decided it is more important to protect polluters than to guard the most precious resource on this planet.

Congress's unwillingness to narrow the definition of "waters of the United States" and insistence on keeping the definition broad demonstrates they intended to have more protection for water, not less. The Sacketts even acknowledge Congress's intention to keep the definition of WOTUS broad in their opening brief.¹⁶³ We also know from the Amicus brief filed by Congress in the *Sackett* case that 167 members of Congress wanted the coverage for waters of the United States to include the wetlands on the Sacketts' property, and those members of Congress understood the implications of scaling back protection for WOTUS.¹⁶⁴

However, because Congress has never taken any action to remedy this problem that has been apparent for decades, the United States has taken a giant step backward in the mission towards reducing water pollution. The interpretations reducing water protections should have never happened and could have been prevented if Congress would have handled the issue more efficiently and clarified the definition of WOTUS.

What can Congress do? It can amend the CWA and include protections for wetlands like the ones on the Sacketts' property. This can and should be done before more states decide to reduce their regulations for once-protected waters. If states do not want to protect their citizens' water, it is imperative that Congress take the necessary steps to intervene.

159. See Murchison, *supra* note 22.

160. Kirti Datla, *What Does Sackett v. EPA Mean for Clean Water?*, EARTHJUSTICE (May 26, 2023), <https://earthjustice.org/article/what-does-sackett-v-epa-mean-for-clean-water> [https://perma.cc/CW3K-FQG3].

161. Press Release, WildEarth Guardians, *New EPA rule removes Clean Water Act protections for 90% of New Mexico waterways* (Sept. 7, 2023), <https://wildearthguardians.org/press-releases/new-epa-rule-removes-clean-water-act-protections-for-90-of-new-mexico-waterways/> [https://perma.cc/DP52-BLAL].

162. *Id.*

163. Petitioner's Brief on the Merits at 7, *Sackett v. EPA*, 143 S. Ct. 1322 (2023) (No. 21-454).

164. Brief of Amici Curiae 167 U.S. Members of Congress in Support of Respondents at 6, *Sackett v. EPA*, 143 S. Ct. 1322 (2023) (No. 21-454).

Congress does not have to create an entirely new doctrine; it could just amend the CWA. The Sackett's property was only separated by a thirty-foot road from protected wetlands. Something straightforward such as a distance parameter could solve this confusion. For example, a wetland without a "significant nexus" that is at least within one-hundred to three-hundred feet of a protected water could be protected if the language of the statute states it is.¹⁶⁵

B. States Should Be Allowed to Be Solely Responsible for Enforcement

If Congress amends the CWA and imposes a distance requirement to protect wetlands, neither the EPA nor the Army Corps should be responsible for the enforcement if states choose to enforce the regulations themselves. This would allow for states to tailor regulation and enforcement to their state. This would also prevent the federal government from imposing excessive penalties, and it would help to curtail costly litigation.

The argument that states should have their own permitting process and enforce those permits has merit. States should be allowed to determine the cost of such permits and make it fair for citizens who are farmers and property owners trying to backfill their property to build homes or other structures on their property. This could be implemented by making permits more affordable by basing the costs of a permit on a percentage of the property value, for example. Alternatively, the type of discharge that the permit applicant is requesting can be considered. For discharges that cause a higher level of pollution and would require a more stringent level of oversight, it would follow that the cost of their permit application would be higher.

A tailored permitting process would also prevent the type of over policing that the EPA and Army Corps of Engineers has been responsible for in the past. If states took charge of implementing and regulating their own permitting programs, the cost for permits and penalties for violations would be further tailored to the citizens of that state, making the process more equitable. The water would still be protected, and citizens would not be excessively punished for unknowing violations, or the need to use their land for maximum efficiency.

The EPA is still a necessary and beneficial organization, and states need to work in conjunction with the EPA to ensure clean water for the country. Enforcement can be a costly endeavor and some states would benefit from assistance from the federal government as some states may lack necessary resources for enforcement.

165. Standard setbacks are from 50 to 100 feet from a stream or river. See PLANNING FOR HAZARDS, *Stream Buffers and Setbacks*, <https://planningforhazards.com/stream-buffers-and-setbacks#:~:text=Standard%20setback%20distances%20often%20range,on%20the%20specific%20riparian%20zone> [https://perma.cc/K6WR-VQHM] (last visited Nov. 30, 2023); "Pollutants can move quickly through saturated soil and may move considerable distances with the risk of contaminating ground or surface water. Bacteria can move 100 feet to 300 feet through saturated soil, thus polluting nearby wells and making it into ditches, streams and ponds. Karen Mancini and Brian Slater, *Using Soil to Remove Pollutants From Wastewater*, OHIO LINE OHIO STATE UNIV. EXTENSION (Feb. 25, 2016), <https://ohioline.osu.edu/factsheet/aex-745#:~:text=Pollutants%20can%20move%20quickly%20through,into%20ditches%2C%20streams%20and%20ponds.> [https://perma.cc/XR68-FPAF].

C. New Mexico's Own State-led Program

It is unsettling that New Mexico remains among the minority of states that still relies solely on the EPA for surface discharge permitting and regulation of surface waters within its borders. This concern is amplified by the inconsistency with SCOTUS's rulings and presidential intervention regarding water protections over the years. The EPA is limited by federal rules where New Mexico implementing its own permitting program would ensure consistent protection for waters of the state.¹⁶⁶ Safeguarding the water supply of New Mexico's citizens must be a priority. Currently NMED is in the process of developing a surface water discharge permitting program which is anticipated to roll out in 2027.¹⁶⁷

Given New Mexico's environmental and economic circumstances—a dry and arid climate,¹⁶⁸ intermittent water flows,¹⁶⁹ and a high poverty rate¹⁷⁰—the need for New Mexico to establish its own permitting and regulation process becomes evident. While implementing the new permitting program, the state needs to consider approaches to maintain a balance between regulatory measures and economic development. It is important to ensure fairness while still maintaining an attractive environment for businesses, both existing and prospective. These factors would require a balance of both regulation and fairness in a permitting system. New Mexico should tailor its permitting process towards fairness and equity that does not deter businesses or compromise water protection.

By crafting a state-specific permitting process, New Mexico can avoid any unnecessary burdens on citizens that the Court referenced in *Sackett*. The process should be more tailored to the unique needs of the state and its citizens. NMED cites the benefits of a permitting program led by New Mexico including: “New Mexicans can create and implement a program to protect our surface waters in a way that is best for New Mexico. Permit writers who know New Mexico's surface waters would draft permits and engage with stakeholders. A state-led program for surface water would streamline permitting in New Mexico.”¹⁷¹

Creating and enforcing a permitting and regulatory program is a massive undertaking. It will cost New Mexico a substantial amount of money.¹⁷² However, the benefits of a permitting process far outweigh the costs. In *N.M. Mining Ass'n v.*

166. Wyland, *supra* note 64.

167. *Surface Water Quality State Permitting Program*, NMED, <https://www.env.nm.gov/surface-water-quality/spp/> [<https://perma.cc/CB77-JP9V>].

168. *Climate in New Mexico*, NEW MEXICO STATE UNIV., <https://weather.nmsu.edu/climate/about/> [<https://perma.cc/EU4A-BHTB>].

169. Cliff Dahm, *Protecting temporary waterways of the United States*, UNM NEWSROOM (Sept. 04, 2018), <https://news.unm.edu/news/protecting-temporary-waterways-of-the-united-states#:~:text=Estimates%20are%20that%20almost%2090,Puerco%2C%20and%20the%20Rio%20Sala do> [<https://perma.cc/QZ5F-PWWW>].

170. LEGISLATIVE FINANCE COMMITTEE, PROGRESS REPORT: DESPITE BENEFITS, POVERTY PERSISTS (Dec. 11, 2023), https://www.nmlegis.gov/Entity/LFC/Documents/Program_Evaluation_Reports/Progress%20Report%20-%20Costs%20and%20Stacking%20Income%20Support.pdf [<https://perma.cc/Q5WR-Y5X5>].

171. NEW MEXICO ENVIRONMENT DEPARTMENT, *Overview-Surface Water Discharge Permitting Program* (Sept. 19, 2023).

172. According to NMED, projected resources needed will be approximately \$6-9 million per year. *Id.*

Water Quality Control Comm'n, in addressing changes to the Water Quality Commission Control's jurisdiction, the Court of Appeals acknowledged that "[b]y decoupling the WQCC's jurisdiction from federal law, the 2005 amendment ensures that any future contraction of federal CWA jurisdiction will not affect the WQCC's subject matter jurisdiction."¹⁷³ It is clear that federal CWA jurisdiction affects water protection in New Mexico.

New Mexico needed its own permitting process prior to the ruling in *Sackett*, and the state will continue to need one given the inconsistencies in SCOTUS's rulings. The New Mexico Legislature is taking steps to provide funding to support the implementation of a permitting program in the state.¹⁷⁴ Continuing to invest in a permitting and regulatory program will show a commitment to protecting New Mexico's water resources for the betterment of its citizens and future generations.

CONCLUSION

Due to decades of litigation over what waters are covered by the Clean Water Act, the lack of protection and proper enforcement by the EPA, the need for tailored permitting and regulation programs in each state, states should have their own permitting program for water pollution discharges. Because there are states desiring limited regulations—or the bare minimum required by federal law—for water pollution, it is still necessary for Congress to amend the CWA and provide well-defined protection for water in the United States from the ongoing problem of water pollution in the United States.

173. N.M. Mining Ass'n v. Water Quality Control Comm'n, 2007-NMCA-084, ¶ 20, 142 N.M. 200, 207, 164 P.3d 81.

174. See Scott Wyland, *Deluge of money for state permitting program delights water advocates*, THE SANTA FE NEW MEXICAN, https://www.santafenewmexican.com/news/local_news/deluge-of-money-for-state-permitting-program-delights-water-advocates/article_a1ba1be6-e233-11ee-b20c-736906afce34.html [<https://perma.cc/JS84-W8D7>] (The Legislature approved \$7.6 million towards a permitting program.).