THE ANDREW SABIN FAMILY
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CLEAN WATER AFTER SACKETT

A SYMPOSIUM ON THE LEGAL, POLICY, AND CONSERVATION IMPLICATIONS OF *SACKETT V. EPA*

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Panel 3: The *Sackett* Decision From a Legal Perspective

Susan Bodine, Earth and Water Law

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Phillip Mancusi-Ungaro, Senior Counsel, US EPA Region 4 (retired)

Kelly Moser, Senior Attorney and Leader of the Clean Water Program, SELC

Moderator:
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Stan Meiburg: Well, now for the moment you've all been waiting for: you get to hear from a really, really distinguished panel of attorneys with a wide variety of perspectives and experiences about the *Sackett* decision and its impact on water. And with that, I'm going to turn it over to the moderator, Scott Shang, for his introductions, and my job up here will just be to work the computer.

Scott Schang: Thank you, Stan. Hi, everybody. My name is Scott Schang. I'm over at the law school where I run our environmental law and policy clinic and teach some classes. It's a delight to be here today with you. I want to thank Gillian and Stan for making today happen. This really is Stan's baby. He sent me an email over the summer saying, "We have to do something on *Sackett*," and then boom, he just pulled it together. So, that's the power of Stan, particularly when working with Gillian, who makes everything happen. It's terrific.

I really want to thank our panelists. We're very lucky to have a truly all-star panel from across the country here to talk about the legal side of *Sackett*, which is, I think in some ways interesting, hopefully it's not depressing. I didn't think of the earlier panels as depressing at all; I thought they were really fascinating insights into how the law works on the ground. Now we'll

hear about some of the machinations that led to where we are today and perhaps some solutions and some of the different ways of thinking about how things might work.

I'm going to go ahead and introduce the speakers right before they speak, instead of doing a litany of bios all at once. And we're going to start today with Susan Bodine. Susan is a partner of Earth and Water Law in their Washington DC Office. She's recognized as a bipartisan problem solver and has over 30 years of experience in the executive and legislative branches of government and in private practice. Prior to joining E&W Law, Susan served as the Assistant Administrator for US EPA's Office of Enforcement and Compliance Assurance. Prior to that position, she served as Chief Counsel to the Senate Committee for Environment and Public Works, and before that, worked for the House Committee on Transportation and Infrastructure. She was also the Assistant Administrator for what was then known as the Office of Solid Waste and Emergency Response, OSWER. And also practiced at the law firms of Covington & Burling and Barnes & Thornburg. So, Susan has a very in-depth knowledge of all things environmental in Washington, DC, and beyond.

So, Susan, it'd be great to hear from you if you wouldn't mind setting us up. How did we get here? What led to this *Sackett* decision? This is a very minor question.

Susan Bodine: No doubt.

First, let me just say you're going to hear different viewpoints here, and that's appropriate for civil discourse; it's appropriate for liberal arts education. But not everyone is going to have the exact same view about what did the *Sackett* opinion say, what did it do, and how do we get there. I did think Stan teed it up really well when he was talking about framework; there's the legalistic framework and then there's the ecosystem framework. Now, just from my bio, I think you can probably tell I'm going to take the legalistic framework. I spent over 14 years of my career working for Congress. Congress writes laws. Congress doesn't write a law that says, “Go forth and do good things.” All of these statutes are written, perhaps not with the greatest of clarity, but they are written as compromises. They are written as a result of a back-and-forth discussion among members who have specific fact patterns and problems in mind that they're trying to solve. So, it isn't simply a blank slate. There are no authorizations that are blank slates.

Then, second, the background I have, having worked for both Congress and the Executive Branch, shapes my view that the Executive branch’s responsibility is to implement what Congress says. They can fill gaps in authorities, but they can't make up new authority. The authority is limited to the authority that Congress actually gave to them. That obviously puts me right into the legalistic framework. But I also think when you're talking about a statute, that's the framework you have to take. That frustrates people, because it's absolutely true that ecosystems are tremendously important, wetlands are tremendously important, water is tremendously important, and that means groundwater as well as surface water. But not all of that is covered by the Clean Water Act.

I'm not going to go back to 1899, although maybe I should, with the Rivers and Harbors Act, but to the 1972 amendments to the Clean Water Act. A major purpose of those amendments was to actually set up a permitting program that allowed industrial discharges. The background there is that case law and lawsuits under Section 13 of the 1899 Rivers and Harbors Act said, “No, you can’t dump into navigable waters without a permit.” So, either industry had to stop operating or there had to be a permitting program. Yes, the Clean Water Act is an environmental statute. Yes, it's about controlling water pollution. But it also is true that it provides a way to allow discharges to navigable waters.

The Senate bill said that navigable waters are “Navigable waters of the United States, portions thereof, and tributaries, including territorial seas and the Great Lakes.” So, navigable waters plus tributaries were covered under the Senate bill. In contrast, the House bill covered “navigable waters of the United States.” So, both bills were very focused on the navigable waters, but they obviously took different approaches and with different specificity. The House was very Corps-focused. They wanted a permitting program entirely run by the Corps. The Senate was more EPA-focused, and this was the brand-new EPA, stood up in December of 1970 through a reorganization plan. So, there were different opinions held by the Senate and the House, and there was, of course, a compromise. The compromise was to have both the 402 program and 404 program. One of the last issues they decided was the definition of navigable waters, and they punted.

There's this really wonderful series of lectures that were given by Leon Billings, who was Senator Muskie’s chief staffer with responsibility for the Clean Water Act amendments, and Tom Jorling, who represented the Republicans on the committee. They gave a series of lectures called the Origins of Environmental Law at Columbia University, and they're all available online. [Ed. note: See https://news.climate.columbia.edu/2015/05/19/preserving-the-origins-of-environmental-law-for-a-new-generation-of-leaders/] They told amazing stories, including stories about the Clean Water Act and the fact that the members never intended to cover isolated wetlands. They even had a discussion about isolated waters, and this is back in the day when Senators actually sat down and discussed legislation, which doesn't happen anymore, but that's a different story. But they actually had discussions about how, “No, no, we can't go into isolated waters; that’s beyond our authority.”

And so, to tee that up, and how much time do I have? To tee that up, let me just say, the history of the Act is that there has not been one definition of water of the United States that has been implemented. There have been a series of regulations that have not been changed since 1986 for the Corps, or I think since 1993 for EPA. But in between, and before, and after, there have been different interpretations that have expanded jurisdiction because people see problems and they want to solve them.

As a result, there have been a series of examples where the agencies have expanded jurisdiction and then received blowback. Originally, there was a case in the DC Court of Appeals for the District of Columbia that said that the Corps had to regulate beyond navigable waters.

Then there was a huge blowback as the Corps started regulating wetlands. During consideration of the 1977 amendments, long hearings were held on the 404 program in the Senate, long hearings, lots of concern. But the compromise was to create the, 404(f) exemptions for certain activities and no change to the scope of jurisdiction.

But then over time, there's continued to be expansion. EPA and the Corps were always looking for shortcuts because they didn't want to get on the ground and actually see if it's wet. They don't have the resources to do it One of the shortcuts that they devised was called the Migratory Bird Rule. If a water may be used by a migratory bird, an endangered species, or irrigation of food or irrigation to grow food, or to transport interstate commerce, then it is regulated. This huge shortcut was not based on the regulations, led to the Supreme Court's *SWANCC* decision, which was in 2001, which said, no, you can't regulate based on this Migratory Bird Rule. Whatever the Clean Water Act means, it has to have something to do with navigable waters.

Since 2001, the agencies have not tried to regulate isolated wetlands. But the agencies then turned to the issue of what is a tributary and what is adjacency and began to expand jurisdiction based on those issues. And again, fast forward a couple years, you have the Supreme Court's *Rapanos* decision. The agency had tried to regulate a ditch, well, a wetland next to a ditch that flowed to a tributary, that eventually flowed to a river about 11 miles downstream. And that was the question was, is that regulated or is it not? This teed up the question of what is a tributary and teed up the question of what is adjacent. But *Rapanos* was a splintered decision; four Justices agreed in a plurality decision that to be regulated a water must be directly abut a relatively permanent water. Kennedy concurred in the decision because he felt that the Corps hadn't adequately proved that they had jurisdiction over the *Rapanos* ditch, but his test was significant nexus. The dissenting opinion said that test should be based on an ecosystem approach.

Immediately after *Rapanos*, EPA and the Corps took to the position that their jurisdiction had shrunk dramatically. At the beginning of the Obama administration the EPA Administrator, the head of the CEQ, and the acting Assistant Secretary for the Army, wrote a letter to Barbara Boxer saying, "Please, Senator, change the act because we've lost so much jurisdiction." Well, the legislation never moved. So, in 2011, they decided to reinterpret the significant nexus test and turned it into an expansion of jurisdiction. They used significant nexus to mean that a physical, chemical, or biological connection was the basis of jurisdiction. This construct had not been used before but that was the agencies new preferred basis for establishing jurisdiction. In fact, as it was written, it went beyond *SWANCC.* You know, now we're talking about regulating isolated waters not just based just on interstate commerce effects, , but if you look at the studies that they used to justify their policy, what they called the Connectivity Study, jurisdiction could be established by any migration between what is a navigable water and anything that's isolated . This biological connection would then allow for jurisdiction. They adopted this position first in a guidance, codified it in the 2015 rule which was stayed. With a change of administration., the 2015 rule was withdrawn.

Interpretations of what exactly *Sackett* says, I'm not going to go into that. I think we may have different views on the panel about what exactly does it say, and hopefully, we'll get into that in the Q&A so I'll turn it over.

Scott Schang: Thank you, Susan, that was really helpful. And Stan will get us up the slides for Robin, as we get started. As a reminder to folks as to what was said in the first panel this morning: the reason we're talking about navigable waters is it is the only way that Congress has authority under our Constitution over things related to the environment is through the Interstate Commerce Clause. That itself is an obscenity that we take as a fact. One hundred fifty countries around the globe have a right to a healthy environment and/or power over the environment in their constitutions. But we've not been good enough stewards of our Constitution to give our citizens those protections that most other citizens have. But just a reminder, that's why we have to tie anything that Congress does to the Interstate Commerce Clause, or the Treaty Clause; there are other ways to do it, property sometimes. But right now, our environmental laws hang on the Interstate Commerce Clause, which we'll come back and talk about more later as well.

Next, we're going to hear from Robin Craig. Robin is the Robert C. Packard Trustee Chair in Law at the University of Southern California Gould School of Law. She specializes in all things water. She is the author, co-author, or editor of twelve books, including “The Clean Water Act and the Constitution.” Robin was elected a member of the American Law Institute in 2015 and has served on various National Academy of Science committees. She's an active leader in the bar association and academic associations and is widely regarded as one of the deans of environmental academics. Robin clerked for Judge Robert Jones after law school and has held tenure-track positions at Western New England, Indiana University, Florida State University, and University of Utah Schools of Law. Robin, over to you.

Robin Craig: All right, thank you. Thank you, Stan and Scott, for inviting me to be here, and for all of you for being here. What Scott didn't mention about the book, “The Clean Water Act and the Constitution,” is he's the editor who shepherded it through and suggested that it get written, so I will be eternally grateful for that.

All right, so what does *Sackett* mean for wetlands? I’m just going to back up a little bit. The water is subject to the Clean Water Act. So, what triggers the Clean Water Act is that the discharge of a pollutant by a person from a point source is illegal unless you have a permit. What does it mean to discharge a pollutant? It's to add a pollutant, both of which are pretty broad definitions, to jurisdictional waters from a point source. And so, that's where “navigable waters” comes in. There are actually more jurisdictional waters than navigable waters, which, since I do ocean and coastal law, I like to remind people of. But the navigable waters, as Susan mentioned, are defined as “the waters of the United States, including the territorial seas,” where the territorial seas are the first 3 miles of ocean. Nobody's ever contested that the ocean is not federal; nobody ever has fought about that. But if you're visualizing what's problematic and what's not, which, like I said, I think it's important to remember that some things aren't. Anything that's salty has never been a problem under the Clean Water Act; that is clearly federal, and

those include some of the navigable waters. It is really the “waters of the United States” definition that has caused the legal issues.

As Susan mentioned, there are two permit programs. The Supreme Court has visited “waters of the United States” exclusively in the context of section 404, which involves dredging or filling private property. Meaning, if you have to get a permit, it's interfering with private property rights, development, profit-making, all sorts of things, unlike Section 402, which is actually more directly relevant to keeping waters unpolluted. So, there are those 1986 and 1988 Consensus Regulations, just so you see where they are. They default to the Interstate Commerce interpretation of the Clean Water Act, that the Act should extend to the limits of the Commerce Clause, which it no longer does, but that's what the default regulations are based on. And I flag these regulations because in the absence of getting new regulations that hold up in court, this is what we fall back to, as modified by SWANCC, *Rapanos*, and now *Sackett*. So, it's these that we come back to. And down there, number seven, the definition of what wetlands are included: wetlands adjacent to waters, other than waters themselves; wetlands identified everywhere else; waste treatment systems, etc. So, long definition, but wetlands are clearly in the regulations.

So, this is the *Sackett* property. The Supreme Court took *Sackett* specifically to answer the question of which of those three approaches from *Rapanos* actually applied: Justice Scalia's plurality, Justice Kennedy's sole-authored opinion, which became the majority rule in the courts of appeal in a very bizarre way, or the dissent which took kind of an “Either, sort of, we would make it broader, but we lost, so it's going to be either or, either Justice Kennedy, or Justice Scalia's test will work.” Like I said, bizarrely, we ended up with a circuit split in the federal courts of appeal, but the circuit split was not plurality versus something else; it was Justice Kennedy alone or Justice Kennedy plus the dissent. It was a very weird aftermath, but the point of that discussion is the Clean Water Act has not been applied the same way across the country since the *Rapanos* decision.

So, this is the property that was actually involved in *Sackett*, the Sacketts’ property there. This shows it filled in; it did use to be a lot wetter than displayed in this picture. And you can see it's kind of close to Priest Lake. There are small streams; there are roads. Priest Lake is navigable itself, so we are close to an actually navigable water and didn't have the convolutions of going through multiple tributaries to get to Priest Lake. But the District Court focused on the underground water connections, so when the District Court said, “Yes, there's jurisdiction over this property,” it was because what the Sacketts were doing affected groundwater, which in turn affected the chemical, physical, and biological integrity of Priest Lake. The Ninth Circuit had a much more convoluted decision on the significant nexus. The property was adjacent to a channel that went past the road to a tributary that flowed across a farm into the lake, so it was a long, convoluted how we got there, but it did rely solely on surface water. Nevertheless, both courts said, “Yeah, this is jurisdictional or there are jurisdictional wetlands on this property because of the Justice Kennedy's significant nexus test.” So, the question keyed up to the Supreme Court was, was that the correct test? And the Court said no. It is another multiple opinion decision. But it is 9-0 on a couple of things. It is 9-0 that the wetlands on the Sacketts’

property are not jurisdictional. It is 9-0 that Justice Scalia's test from *Rapanos* is the correct test. It splits on what “adjacent” means, with four of the justices thinking that the majority opinion, and it is finally a majority opinion, were wrong about what you should count as adjacent. The majority opinion was Justice Alito for the Court, like I said, it was 9-0 on a couple of the key points including Justice Alito, Roberts, Thomas, Gorsuch, and Barrett. Justice Thomas has a somewhat bizarre concurrence getting into the very--sorry.

[Laughter]

Phillip Mancusi-Ungaro: Please don't kill your fellow panelists.

Robin Craig: All right, getting into the Commerce Clause and the history of navigable waters. If you know anything about the history of navigable waters, it's wrong on multiple counts. But raising the issue that I suspect we will see again at some point in the future--we've seen it in the past; it died down for a while; I suspect we're going to see it again--of whether the Clean Water Act in general violates the Commerce Clause, or parts of the Clean Water Act violate the Commerce Clause. But nevertheless, like I said, if you know the history of navigable waters, it's got some inaccuracies in it. Justice Kagan concurred with Justices Sotomayor and Jackson. Justice Kavanaugh concurred, really being the only justice that brought up the fact that we have been dealing with this issue for over 50 years now, and we have some settled points that maybe we shouldn't be disturbing. But again, the focus of those two concurrences, and they are concurrences, was not on what rule applied, but rather on the majority being too narrow in its definition of adjacent.

So, what did the majority hold? **“**We conclude that the *Rapanos* plurality was correct: the [Clean Water Act]’s use of ‘waters’ encompasses ‘only those relatively permanent, standing, or continuously flowing bodies of water, forming geographical features that are described in ordinary parlance as “streams, oceans, rivers, and lakes”’”, quoting *Rapanos*, which was quoting *Webster's New International Dictionary*. If you know the late Justice Scalia, he liked *Webster's*. Even as *Riverside Bayview* grappled with whether adjacent wetlands could fall within the Clean Water Act coverages, it acknowledged that wetlands are not included in traditional notions of water. So, *Riverside Bayview* was the first of these cases, and it held 9-0 that wetlands adjacent to traditionally navigable waters could be jurisdictional, on the basis that it's hard to tell where the water ends and the land begins. Again, according to the majority, *Riverside Bayview* acknowledged that wetlands are not traditional navigable waters. As Susan mentioned, we've had some amendments to Section 404; 404(g)(1) clearly gives jurisdiction over some wetlands, and the court picked up on that, it tells that, whatever else it means, “it tells us that at least some wetlands must qualify as waters of the United States”. . . [B]ecause adjacent wetlands in section 404(g)(1) are ‘include[ed]’” . . . “these wetlands must qualify as ‘waters of the United States’ in their own right. In other words, they must be indistinguishably part of a body of water that itself constitutes ‘waters’ under the Clean Water Act.” So, in sum, the Court held that the Clean Water Act extends only to those wetlands with a continuous surface connection to bodies that are waters of the United States in their own right, so they are indistinguishable from those waters.

This is going to be fun going forward because no biologist I'm aware of will ever tell you a wetland is indistinguishable from the larger body of water it's attached to; that's why you call it a wetland and not a lake. But that's what the Court said, so that's going to be some fun issues going forward, just parsing out what an indistinguishable wetland actually is. But I just want to take some projections from the amicus briefs**.** There were several amicus briefs filed in the court, some of which were filed by Tribes trying to appeal to Justice Kavanaugh, trying to make him swing vote on the grounds of what *Sackett* could do to tribal jurisdiction. These are just projections of what the loss in jurisdiction was, from what is now being referred to as "the pre-2015 regulatory regime," to take account of SWANCC and *Rapanos*, plus those 1980s regulations. As you might expect, major changes are expected in the West, where we don't have a lot of continuously flowing water; they all tend to dry up on a semi-regular basis, so the extent to which drying up on a regular basis will stop them from being jurisdictional under the Clean Water Act is yet to be developed. The Supreme Court had a few caveats that if it's only during drought or maybe only for a few days, we don't know, they might be jurisdictional, but these are the projections of how many waters in some parts of the West may have just lost jurisdiction. So, this is the South Platte in Colorado; if you're not familiar with the Platte, it disappears on a regular basis, it's got very sandy soil, and it just kind of fades out of existence. This is Minnesota, so it's not just the West that could be affected.

But the other interesting legal issue that's out there, and this is what I'll end with, is in 2020, the Supreme Court decided the *County of Maui* case, which involved Section 402; it was not a 404 decision, and it involved Lahaina's wastewater treatment plant, which treated the sewage and then injected it into underground wells. And there were dye trace studies that showed that this sewage was reaching the ocean, reaching coral reefs, and contributing to some damage to the coral reefs. The question was, did that sewage treatment plant need a permit? Was this a discharge "from" a point source? And literally that's what the court was interpreting, was the word "from". Yeah, this is what we get into in the Clean Water Act. The Court said "yes." Again, this is Section 402; we have traditional water pollution going on. They were actually some of my favorite reefs in Maui that we're getting hurt. The Court said, "Yeah, we're going to come up with a functional equivalence test." If what you're doing is the functional equivalent of dumping treated sewage into the ocean, good enough; you need a permit. That test is still being worked out; it's a factor-based test. The Court very unusually said, "Yeah, we're fine with leaving this to the lower courts to figure out." But in the wake of *Sackett*, I think the *County of Maui* test will actually pick up a lot of the slack in the Section 402 contexts, as long as there is some sort of hydrological connection that gets pollutants to larger water bodies. The interesting lawyering question, and this is going to take some creativity, is whether discharges of dredged or fill material subject to 404, can release enough pollutants to also qualify under *County of Maui* as the functional equivalent of a discharge? So, stay tuned; reconciling those two cases is going to be a lot of fun.

Scott Schang: Thank you, Robin; that was really helpful, as well.

Next, we get to hear from Phillip Mancusi-Ungaro. Phillip is currently retired from EPA and does part-time consulting and volunteers with the Environmental Protection Network, helping

communities address environmental issues. At the EPA, Phillip was Senior Attorney Advisor in the Office of Water Legal Support in Region 4 in Atlanta. Phillip was a region's senior wetlands attorney, lead attorney on Everglades restoration, and related issues in South Florida. He also worked on RCRA, Superfund issues and multimedia enforcement cases. He served in the US Department of Justice and was an Associate at Ogletree, Deacons, Nash, Smoak & Stewart in Greenville, South Carolina. Prior to that, before going to law school, he worked at the South Carolina Department of Health and Environmental Control as an environmental quality manager. Phillip, you had to live through this; you lived through all this we've heard through. Going back and forth, how did you not go bonkers? And what was your experience trying to enforce this? And what do you foresee happening in the future after *Sackett*?

Phillip Mancusi-Ungaro: That's interesting. And I do apologize for my little outburst there; maybe it was intentional, maybe it wasn't. We've seen a lot of interesting decisions from Justice Thomas over the years. Some folks believe Justice Thomas's opinion in *Sackett* actually would say Priest Lake is not jurisdictional at all, so that's kind of how far he went.

What I want to talk to you today about is enforcement, because that was one of my primary duties at EPA. I was talking to Susan about it because she ultimately was one of my bosses; Stan was my boss; I have a lot of bosses around. But we did a lot of enforcement in Region 4, which includes the eight Southeastern States. We mostly did administrative enforcement, and I'll get into details of that in a second, but we did that because we could manage our cases very closely, and pick our cases, and have them move forward, which is really what this all comes down to.

With the new definition of waters of the United States under *Sackett*, it really has changed the scope of jurisdiction of what is the jurisdictional wetlands that could be subject to enforcement if you discharge dredged or filled material into it, and that's what we've been playing with over the years.

Why is that so important? You've already heard about *Riverside Bayview, SWANCC, Rapanos, Sackett*. You know, the *Rapanos* case was a 4-1-4 split with, I think, five opinions. It created this whole cottage industry of people trying to figure out what did that actually mean in terms of the *Marks* decision, which, when you have this non-plurality decision out there, that results in all kinds of different versions of what the jurisdiction was. And I was actively involved in the Obama administration when we first tried to define "waters of the United States." I had the illustrious task of responding to all questions and comments on a general category. We had over 100,000 comments just in that group alone. And we spent tons of times on that. Whether folks agree with how we define significant nexus there, which we took pretty far out, is questionable.

But the old issue is, how do you define "waters of the United States," particularly wetlands? And if you're trying to decide whether to take an enforcement case forward, how do you decide whether that's the right case to take forward?

So, it is interesting. Robin already paraphrased it; I'll do it again. Clean Water Act enforcement: there must be a discharge from a point source into a WOTUS by a person without a permit. By the way, it is interesting we call it WOTUS now. At first, we called it WUS; everybody thought that was kind of a bad acronym, so they went to WOTUS instead.

It's already been mentioned, but the “waters of the United States” is important for not just wetlands and discharges under 404, the 402 program, the Water Quality Standards Program, the OPA (Oil Pollution Act) Program. They're all defined by what is “waters of the United States.” And with the Oil Pollution Act cases, we had the hardest time because most of those were into roadside ditches; those roadside ditches go downstream. Where do they attach to a water to the United States, or are they jurisdictional in themselves? So, those are all the questions we always wrestled with.

Nationally, what we would do in the wetlands program is we would have these calls every couple of months to talk about what we're doing, what's going on in the wetlands world. And the *Sackett* case came up in the very, very beginning. And a lot of us in the region thought it was kind of a, at least Region Four, thought it was not the best case to take forward factually. You saw the pictures that Robin had; you have to really stretch it to make sure you're connecting to the waters. Now, you could do it, and they did successfully at different levels. But was that the best case to move forward, or at some point, was it better to cut fish and run? In our Region, we always looked at all of our cases the same way: we did the majority opinion in *Rapanos*, the Scalia opinion; we did the Kennedy approach; then we also did a general approach of how we would normally jurisdictionally look at waters under the 2015 regime, which is--

Speaker: Pre-2015 regime.

Phillip Mancusi-Ungaro: --pre-2015 regime, which is an incredible acronym in itself. But we always felt that that case was kind of risky; that's just our personal opinion. But so: bad case, bad facts, bad law. That's just generally the way it works.

Susan and I were talking earlier about, before the meeting, before we started, about how we approach cases. We did most of the administrative cases because we felt, number one, we could control them; number two, it gave us a lot better ability to control the penalties we were looking at. Because when you do a case administratively, the penalty numbers are high, but they're not as high as you would see under a civil case, and they're definitely not as onerous as you would see in a criminal case. By the way, I also did criminal prosecutions too, so, I had the full gamut there.

But given the facts of Kennedy--I mean of *Sackett*--and that the Kennedy test was really ultimately the test they were using, it's not hard to see how this Court went full bore and all the Justices said, “No, it's not jurisdictional.” I think it's been hinted at, and let's get into the real nitty-gritty here: what is left over after all this? You have *Sackett*; you have a new definition; we’re all trying to wrestle with that. But unfortunately, in my opinion, the Court left a significant issue open for further interpretation. They found that wetlands are jurisdiction if the wetlands are

indistinguishable from the traditionally navigable waters. Robin discussed that: is it next to it--or Susan discussed it--I don't know indistinguishable either. I mean, a wetland is usually a wetland, and then there's some water body nearby that's maybe a flowing stream or something. But citing to *Rapanos*, as long as there's a continuous surface connection to a traditionally navigable water, or a TNW, the wetlands are jurisdictional. That sounds clear, but is it really clear? Does that really answer your questions? What is a continuous surface connection? This issue, to me, is going to be the most important issue going forward when it comes to enforcement in particular, because you're not going to want to take a case forward unless you really, really know you have a continuous surface connection and that you have a jurisdictional wetland you're involved with.

So, based on the language in *Sackett*, the *Rapanos* opinions, the preamble to the 2023 rule regarding *Rapanos* and the Scalia standard, and the EPA and the Corps' guidance implementing the Scalia standard, a surface connection to a relatively permanent water may exist if the connection is a discrete formation, and importantly, does not require water to be present at all times. That's based on all the things we've been saying, all the things the courts have said, trying to pull it all together in one place. And Susan helped me do that, and I appreciate that. It's interesting to think that a feature, a drainage way itself without water in it at all times, could be a connection to navigable water that would allow you to have jurisdiction over the wetlands. Those are the facts that you're going to have to wrestle with when you take enforcement cases.

In the 2023 preamble to the rule which implemented the Scalia standard, they also noted that features such as ditches, culverts, swales, or pipes could be a continuous surface connection. So, now you have another layer of facts that you have to wrestle with to try to decide, "Is this a good enforcement case?" But what is unanswered is how long will water need to be present in that feature to be a connection. It's not described anywhere. What characteristics do you look at? Is there evidence of flow? Is there a bed and bank, meaning that there's a bed in the bottom of the feature and a bank on the side that was eroded away? What tests are we going to use to make that decision, to make that call? Those are not clearly articulated anywhere yet. And that's what people are asking about: "When are we going to get guidance on this?" I'm not sure we're going to get guidance or not. I don't really know.

But before we move forward with an enforcement case, before EPA or the Corp moves forward with an enforcement case, it will have to really look closely at this issue and decide: Is it connected? The easy cases are easy: saltwater cases, water subject to the eb and flowing tides, the ones that are adjacent to major water bodies on the Mississippi River or something, that's not a problem. But there's other ones out there that you do have to ask about. You have to wonder; how far upstream will you have to go? Kavanaugh wasn't sure; he asked that question. So, where's the court ultimately going to go on that?

Also, just to make things a little more confusing, so in 2023, when the new rule came out, 27 states in the country sued and they managed to get an injunction against the applicability of the 2023 rule to their states. Fine, they didn't want it. Well, now the decision has come out. The

other 23 states are now subject to the *Sackett* decision and any decisions moving forward in terms of how to implement it. Those 27 states are not subject to the *Sackett* decision at this time. And see, Susan would agree with me, but that's what a lot of people look at. They say, "Wait, 27 cases are enjoined from implementing the 2023 rule, which is what the *Sackett* decision was all about." We can have this conversation. Kind of throw small, easy pitches out there. You know, over the years, we've tried so hard to define waters of the United States. I personally have been involved in several of them and, thankfully, I'm not involved in any more of them and don't want to be. It is interesting when they did the 2023 rule, it was intentionally written, is my understanding, so that they could carve out the Kennedy part of it very easily. And so, the rule was written almost in two parts, so they could immediately issue the new rule in 2023, basically getting rid of the part that was associated with Kennedy, and that allowed them to move forward with the normal rule-making, without the normal rule making, we go through a notice and comment.

Another issue outstanding is *Chevron*. There's the *Chevron* deference issue. And there's a case on *Chevron* deference that I think is working its way up through the courts [Ed. note: reference is to the *Loper* and *Relentless* cases]. Should they give the agency deference on how they make these definitions? And so, all of this is the umbrella that you operate under when you're trying to take an enforcement case. What are the facts? What are the facts that you're looking at? Is it really jurisdictional wetlands or not? And how important are those wetlands that you move forward with the case? These are all the things you have to think about.

Thank you.

Scott Schang: Thank you, Philip. We really appreciate that. Next, we're going to hear from Kelly Moser.

Kelly is the Senior Attorney at Southern Environmental Law Center and leader of SELC's Clean Water Program. The center's clean water program works across the southeast and nationally, focusing on point sources and industrial pollution, stormwater, CAFOs, the scope of the waters of the United States, and wetlands protections, and other water issues. Kelly began her career as a trial attorney in the U.S. Department of Justice's Environmental and Natural Resources Division as part of its honors program and served as a law clerk in the United States District Court for the late Honorable William Benson Bryant. Prior to joining SELC in 2018, Kelly was a partner in the Environment, Energy and Natural Resources Group at Perkins Coie in the firm's Seattle office.

Kelly, you've had a more local and regional view of what's been going on with all this, what's your perspective on where we're at, where we're headed?

Kelly Moser: Yes. One of the things that is worth emphasizing, as you've heard from a number of the panelists here, is that we don't know exactly how much is going to be lost under *Sackett* because there are key terms that the court used that have to be fleshed out. For example, what does "relatively permanent" mean? And relatively permanent to what? As compared to what?

What does a “continuous surface connection” mean? It's not a continuous surface *water* connection, so, what exactly does that look like on the ground? And then, what does the *Sackett* decision mean for tributaries? There are a lot of questions that are going to need to be answered by the agency's implementation of the *Sackett* test and also by federal courts across the country. At least for those of us who want to see our waters across the country and wetlands protected, we are obviously concerned, but I don't think the story is over.

I've been asked to switch gears a little bit and talk about whether or not states can fill the gap left by *Sackett*, to the extent there is a wide gap, and some of the issues states might have to wrangle with. And just so you know a little bit more about where I'm coming from, the Southern Environmental Law Center is a public interest nonprofit law firm, and we represent nonprofit organizations, community organizations, and environmental justice organizations. The Clean Water Act is a tool that our clients rely on to protect their families, communities, and drinking water sources. Because we're rooted in the South, we use the Clean Water Act to try to prevent harm on the ground all the time, and we're seeing how communities are affected when wetlands are destroyed. And laws like the Clean Water Act give our clients a seat at the table. A lot of our clients have been bearing the unfair burden of pollution and flooding for decades. Communities of color and lower-wealth communities have historically been able to use the Clean Water Act, along with our other clients, to protect the waters and wetlands that are so important to their livelihoods and to their drinking water sources.

In *Sackett*, the Supreme Court assumed that the states will fill the gap. The reason, though, that we have a Federal Clean Water Act is to have a national baseline. We need federal clean water protections that are not dependent on state funding, or local politics, or industrial influence—the types of consistent federal protections that apply in every state equally are essential. And that reality really applies here in the Southeast, and we are at risk given state funding, politics, and industrial influence in our region.

I am going to talk a little bit about what's at stake on the ground to our streams, rivers, lakes, and estuaries, which are key to our regional southeastern culture, to our tourism businesses, to our recreation, and to our drinking water sources. Compared to other regions, we have more miles of streams and more acres of wetlands. Those resources, combined with the chronically underfunded state water quality programs, make the region and its water resources and its drinking water especially vulnerable. Just to give it a little bit more context, nearly half, or over 60 million acres, of the wetlands in the coterminous United States are located in ten southeastern states. And North Carolina, South Carolina, and Georgia alone have 18 million acres of wetlands, many of which are pocosins, Carolina bays, and other unique wetland types that are only found in the Southeast. And based on projections, over half of those wetlands are at risk following the *Sackett* decision.

Zooming out a little bit and looking across the country, the narrowing of federal clean water protections under *Sackett* is going to put burden on states that want to protect the waters within their borders. This map was prepared by the Environmental Law Institute, and it summarizes the landscape of state-water-protection and wetland-protection laws at the time of the *Sackett*

decision. Nearly half the nation's states don't operate any sort of independent state permitting program for the dredge and fill of wetlands; these states. shaded in green, rely on the 404 program implemented by the Army Corps of Engineers, and only the wetlands within those states that meet the definition of "waters of the United States" as now defined by the *Sackett* decision are protected. The states in blue, including Virginia, Maryland, New York, and California, have fairly comprehensive state permitting programs to protect wetlands and other waters not protected by the Clean Water Act. Wetlands and other waters in those states may be less vulnerable given the change in federal jurisdiction. The yellow states have adopted state laws or regulations that cover certain activities or certain types of wetlands, such as in Carolina bays or bogs, or wetlands in the coastal plain.

One thing that has been a big concern for us is: how are things going to shift after *Sackett* and can (and will) states fill the gap in wetland protections left by the *Sackett* decision? You heard that over 20 states supported the Sacketts' arguments in the Supreme Court and wanted to see the narrowing of the Clean Water Act. It's doubtful that those states are going to expend their resources to protect wetlands or other waters given they sided with the Sacketts?

North Carolina is an example of where a state has not only not filled the gap left by *Sackett* but also where a state legislature has limited the state's ability to protect wetlands within its borders. After the *Sackett* decision, our General Assembly acted very quickly by slipping a provision in the must-pass Farm Bill to prevent North Carolina from protecting wetlands beyond those protected by the federal government. The threat of that limitation on North Carolina was so great that Governor Cooper took the unprecedented step to veto the Farm Act. Unfortunately, that veto didn't hold. And now the North Carolina Department of Environmental Quality estimates that over 2 million acres of our state's wetlands are at high risk of destruction, including 800,000 acres within the Cape Fear River Basin and the Neuse River Basin alone. Those two river basins provide drinking water for half of North Carolina's population. We are concerned that other states may be heading in the wrong direction too.

To prevent this from happening, there is a lot of effort to emphasize the importance of state wetland protections before state agencies and legislatures. On a more positive note, we're also seeing some states go the other way, mobilizing to improve their wetland protections within the state. But even where states want to fill the gap, they often lack the staff, knowledge, and resources to do so. Here in the South, our states have some of the most underfunded and largest budget shortfalls in the country. In North Carolina, our environmental agency has been so chronically underfunded and understaffed in recent years that more than a fourth of the state's Clean Water Act section 402 permits have expired without being replaced by new permits, or with any new controls to address the chemicals that we're seeing being discharged into our waterways.

And then, even when states do act, they can't protect water quality on their own. States can't protect themselves against pollution that's coming in from upstream states. As an example, many of our clients have dedicated careers to protecting the Chesapeake Bay, and that watershed is home to 18 million people and spans across six states, including West Virginia and

Virginia. But without having a strong, consistent level of protection across all of those states, the efforts to protect the Bay could be undone. And a patchwork of state laws across six states won't maintain water quality in the various tributaries that are flowing from those states into the Chesapeake Bay. So, no matter how comprehensively one state protects their waters and wetlands, if a neighboring state doesn't, then everyone loses.

Sackett, unfortunately, also means that families, communities, and businesses will suffer across the country and in our region from flooding, loss of fisheries, and loss of tourism. In the last six years, North Carolina and other Southern states have been hit with 500-year storms that have devastated our communities, including Hurricane Matthew, Florence, and Idalia. It's been estimated that the damage from Florence alone was upwards of $18 billion, most of which was caused by flooding. This is a photo of where I live in Chapel Hill, North Carolina, following Hurricane Florence. It's the East Gate Shopping Center in Chapel Hill. This looks pretty bad, but most of the damage from Hurricane Florence was on the coast. East Gate was built on the floodplain in Chapel Hill, and during the hurricane, the floodwaters just didn't have anywhere to go given all the wetland destruction in the area. The types of back-to-back hurricanes that we're experiencing are occurring more frequently and they're getting stronger, meaning we need our wetlands more than ever because they are our best natural guards to flooding; they act like sponges. You heard Secretary Biser mention that the General Assembly appropriated a large amount of funds to the state for resiliency work address our state's flooding problem. It's very curious that our General Assembly would appropriate those funds and then turn around and allow the destruction of our very best natural guards to flooding.

Now, I don't want to leave you with like doom and gloom. Obviously, the *Sackett* decision is going to be interpreted over time. The agencies have not provided guidance, and we don't know what they're going to say. We and our clients are looking for other levers, other ways to protect the wetlands and water resources within our states. We're working with our partners throughout the region and across the country. The Clean Water Act has been the best tool for us; it has the sole objective to restore and maintain the chemical, physical, and biological integrity of the nation's waters. If it is weakened, we're going to have to find other ways to do it. Looking at other federal statutes, the Resource Conservation and Recovery Act perhaps, or the Endangered Species Act, looking at floodplain regulations that require buffer zones that must be protected near rivers. Folks on the ground are being really creative and getting ready to make sure that we are prepared to protect our wetlands and waterways.

We'll continue to fight. Thank you.

Scott Schang: Thank you, Kelly. We really appreciate it. If you have questions, please do fill out your card and hold them up so we know you have some questions, and we'll grab them from you. Before we get started, though, I heard a couple of things, at least, where we need to go back and make sure the panelists have a chance to talk to each other before we get to questions. So, I'm going to actually go back to you, Susan. You've heard a lot. I want to give you a chance to respond, including whether you think the panel does have a common understanding of what *Sackett* means, because maybe there is? Maybe?

Susan Bodine: Well, I'll agree with Phillip in some sense in that nobody has a clue; no one understands exactly what it means, that's absolutely true. Particularly with respect to tributaries. I think it's very clear what it means with respect to wetlands, and that you have to be adjacent, as in abutted. You have to directly abut a water, something that is otherwise a water in the United States. Okay, I got that.

But interestingly, even though *Sackett* was a wetlands case, it got into the question of what is a tributary? What is the scope of a federal regulation? And that's where it really wasn't a focus. And so, all they did was cut and paste from the *Rapanos* decision, which talks about relatively permanent waters. And I heard some of the earlier panelists to opine that that meant water had to be present 365 days a year, always present. Clearly, it doesn't mean that, but there is no standard for, you know, what does it mean?

The *Rapanos* guidance, which came out from the Bush administration after *Rapanos*, said, “Oh well” --it's only a guide, it wasn't a rule--but it said, “Okay, roughly three months.” The 2020 WOTUS rule under the Trump administration said that there had to be a hydrological connection in a typical year, which is based on 30 years’ worth of data, yes, looking backwards, but nonetheless, 30 years’ worth of data, excluding droughts and floods. And the connection could last one day. We don't have any kind of a test like that right now. We don't have a three-month test; we don't have a one-day-a-year-in-a-typical-year test. We don't have any test. That's really going to be unusual.

Phillip Mancusi-Ungaro: And that's what's interesting when they say, “a typical year,” a typical year in the Southeast is different than a typical year in the West.

Susan Bodine: And that's exactly how it was intended to be implemented.

Phillip Mancusi-Ungaro: Well, I asked the question during one of the webinars they did recently: “Are they going to do something for localities, geographic regions?” We did it once before. And they indicated they really didn't have any intention they were going to do that.

Susan Bodine: Yeah.

Phillip Mancusi-Ungaro: I do think this gets to be an issue. We look at certain critters that are in the water that will show you that there's relatively permanent waters there, but they're not always there. We look at features. It’s not clearly defined. And as an enforcement attorney, I'm scared to death when I'm relying on something like that.

Susan Bodine: Yeah, those kinds of indicators are all in the preamble to the 2023 rule. The part that purports to implement the plurality opinion in *Rapanos*--what is relatively permanent. But they talk about leaf litter, bed and bank, the presence of aquatic insects, as all being indicators of relative permanence, which, of course, could have been the same things that you would have used to identify ephemeral waters. The preamble would suggest that the agency is going to, at least as a matter of theory, try and keep its jurisdiction as broad as possible and use the same

tools that once would have been used to identify ephemeral water now to identify relatively permanent. However, to Phil's point, what the agency says is the scope of their authority and what's actually, unfortunately, on the ground, it's going to be completely different because they don't want to lose.

And that goes back to how the agency responded to the SWANCC decision in 2001, when the Supreme Court said, “No, no, no, no, you can't regulate based on migratory birds.” And so the agency used other tools. Or how the agency responded after *Rapanos*, saying. “Okay, you can't use…” --you know, who knows what you could use after *Rapanos*--it became broader and broader and broader.

But to one point, since the *SWANCC* decision in 2001, the EPA and the Corps have not tried to enforce against isolated waters. All the guidance says, “Oh, we can do it if we want to,” but they haven't done it, and they've made that statement repeatedly, most recently it was in the preamble to the proposal in 2021 of the Biden Administration rule, like, “Yeah, significant nexus--we can regulate based on all these biological connections, but we haven't actually done it.”

Phillip Mancusi-Ungaro: Right. By the way, we used to call that the “reasonable bird test.”

Kelly Moser: I just wanted to follow up; we've heard a couple times that the agencies haven't regulated isolated waters, and I want to distinguish between geographically isolated. So, I guess one point I'd like to make is that *Sackett* does not necessarily just exclude geographically isolated wetlands that are out on their own because the way it's described is that the wetlands have to abut the relatively permanent water, such that they're indistinguishable. There are wetlands--for decades, the agencies protected adjacent wetlands that were nearby, that flowed into the river, or vice versa. And there's a big difference between not protecting geographically isolated wetlands and what we're seeing now.

Phillip Mancusi-Ungaro: Well, an example of that: Many, many rivers overflow their banks, and you end up getting natural berms that get developed, that isolate the wetlands that, in theory, are adjacent to it. That's different than *SWANCC, SWANCC* really was a solid waste—

Robin Craig: Sand and gravel pit.

Susan Bodine: Yeah, a sand and gravel pit in Cook County.

Scott Schang: Robin did you--I'm sorry.

Susan Bodine: Just one point on that--I agree with you Kelly, entirely, that the Supreme Court said “indistinguishable.” The preamble, which is the only guidance that the agency put out yet, says this is not a hydrologic test; it's a physical test. So, all it has to do is have a continuous surface connection, and that connection can be anything at all.

Kelly Moser: Right, and what that looks like on the ground.

Robin Craig: We'll see. I'll just throw into this: it'll be interesting in many realms. But the other player that has really entered the Clean Water Act scene with the last couple of regulations has been Tribes. It was actually a tribal coalition that took on the Navigable Waters Protection Rule, which was the 2020 Trump rule. Tribes have some additional authorities and some limitations in weird ways, but it's important to remember, they're taking on water quality standards authority, they are taking on regulatory authority, and some of them are starting to take on permitting authority. That's going to be an interesting dynamic as all of these ambiguities play out as well.

Scott Schang: To get to one question that came up as well, Phil mentioned that there had been an injunction based on several states, and there seem to be some disagreement on the panel about the meaning of that. Did you want to, or anybody want to comment on that?

Susan Bodine: My reaction was "Whoa, whoa, whoa." *Sackett* applies nationwide, of course; it's the Supreme Court saying what is the scope of the Clean Water Act. The two coordination memos that EPA and the Corps put out on September 27th--one memo applies to the 23 states where the where the January rule, the Biden administration rule, is in effect. And the other one applies to the 27 states where it's not in effect. Both say we're going to apply *Sackett*. One says we're going to apply the January rule plus *Sackett*, and the other one says, we're going to go back to whatever this mythical pre-2015 regime and *Sackett*. But I would argue that it's going to be identical, that there's no distinction. And the reason is that in the 2023 rule, they left everything to a case-by-case determination, so it matters not whether there's a rule; it's still going to be case-by-case. All of the detail is in the preamble. So, whether it's case-by-case, January 2023 rule, or case-by-case, whatever the pre-2015 regime was--the good old days, the mythical days--I think that the decisions will be the same.

Robin Craig: Yeah, I agree, mostly, except that there's now the conforming rule from August that took effect in the 23 states in September, which is the narrowest definition of waters of the United States since probably the late 1970's. Ironically, in the 23 states that didn't challenge the January rule, they've got that narrower definition to start with.

Susan Bodine: As informed, the other jurisdictional determinations are, as informed by *Sackett*.

Robin Craig: Yeah, the other ones are informed by *Sackett*, so we'll see if that makes a difference. Also worth noting, it's three cases; the big one is another *West Virginia v. EPA*, this time in the water realm, that involves 24 states. They are already making noises that they're going to challenge the conforming regulations on procedural grounds because it didn't go through notice and comment, and perhaps on substantive grounds as well. So, even the litigation is not over.

Phillip Mancusi-Ungaro: No, and--a couple of things. First of all, I do agree with Susan that at the end of the day, they're all going to be following the same thing, and I suspect at the end of the day we're all going to be following the pre-2015 regime again, as something--the rule gets

thrown out or whatever. But they're very similar; it's just how it applies and how it works. I'm going to add one other thing, Robin mentioned Maui, which I've always found was a fascinating, important case. Here in North Carolina, it was important to us because we used that to look at all the coal slurry ponds at the power plants that were leaching into the ground water and then leaching into the rivers, and so those are direct connections. I would look at it from also a hydrologic connection to make connectivity. You can show that those wetlands, through a dye test or whatever, have a direct connection to the adjacent water body, even though it's underground. I don't know why you can't argue that that's not connected.

Susan Bodine: Because the Alito opinion says surface connection.

Phillip Mancusi-Ungaro: I know it says surface connection, but it comes up to the surface at some point.

Kelly Moser: And interestingly at least, unless I missed it, the majority opinion in *Sackett* did not mention Maui. I think it was just mentioned in Kavanaugh's concurrence, perhaps. But none of the justices wrestled with the objective of the act, and no one wrestled with *Maui*.

Robin Craig: And they're conceptually different because in *County of Maui*, you don't really care what you're discharging into, which is what you care about with waters of the United States; you care about where those pollutants end up. As long as they end up in a big water body, something that is traditionally navigable waters, we don't care how they got there. That's a different way of thinking about hydrological connectivity from *Sackett*, which what you're asking is, is this thing that you're actually discharging into, is it itself a water of the United States?

Scott Schang: Because doesn't *Maui* prove too much in the 404 concept? Because eventually pollutants do go somewhere; they eventually will get someplace. So, if you use *Maui*, isn't it too broad in the 404 context?

Robin Craig: Well, this is the fundamental misconception Justice Scalia had in the *Rapanos* decision. In his view of discharge of dredge and fill materials, it all stays in place; it all sticks in place, so you don't have the 402 problem. He went to great lengths to try and separate the two permit programs in his mind because he really didn't, even Justice Scalia didn't really want to damage 402 all that much. But in his mind, you put in fill material, and it sits there. Well, if you've ever seen a dredge and filling operation, you know that's not the case. So, that's the great ambiguity that was left through his misunderstanding of how dredging and filling works on the ground. But we have gotten rid of functionality, so we're no longer worried about what this wetland was doing for the larger ecosystem. It's now more about where the pollutants are going.

Susan Bodine: A Clean Water Act question.

Robin Craig: As a Clean Water Act question.

Scott Schang: I do want to emphasize for folks that we're talking about justices, and just how important a justice can be to the outcome of the case. Justice Scalia was definitely a personality who was fun to listen to. He wrote entertaining opinions, even if you didn't agree with them. But note how Justice Alito started this opinion. He wrote, “This case concerns a nagging question about the outer reaches of the Clean Water Act” -- which I think we've already heard, in fact, that's not what it's about, although in his mind it was --“[b]y all accounts, the act has been a great success. Before its enactment in 1972, many of the nation's rivers, lakes, and streams were severely polluted, and existing federal legislation had proved to be inadequate. Today, many formerly fetid bodies of water are safe for the use and enjoyment of the people in the country.” We didn't hear that this morning. In fact, we heard statistics. I think last I looked, only half of the waters have even been tested to see where they're at. And of those that have been tested, the majority are still not there. As a result of this, at least 60% of the waters that are intermittent streams are probably certainly gone from jurisdiction. So just note that Justice Alito's view--it's true that the Cuyahoga is not catching on fire, and the Clean Water Act has been, in many ways—

Phillip Mancusi-Ungaro: It did in 2022.

Scott Schang: --There you go, it did again. But in many ways, it has been a success, but just note that Justice Alito, which is leading to this next question, may be trying to get at something different.

Justice Alito, we have a question from the audience saying that Justice Alito's opinion talks about the need for Congress to be very explicit when it tries to infringe on private property rights, which may be what he was actually most upset about. When I teach about the Clean Water Act, I ask people, “Why is federal jurisdiction talked about so much in water and not at all in air? It's because it touches private property.” That's what we're really talking about. Is it that crucial for the legal argument, or mostly rhetorical framing? And if the former, what are the broader implications for our bedrock environmental laws? Any thoughts on that?

Robin Craig: Yeah, sure. I've written a lot on this, particularly, I think it's absolutely critical. That's why I think you get schizophrenic Supreme Court opinions depending on whether it’s 402 in front of them or 404. I would actually take on anybody who wants to make the argument that in *SWANCC*, the justices had no idea they were affecting 402. They figured it out by *Rapanos* decision, but you know, in the *SWANCC* decision it's like, “Oh no, we're just deciding the scope of 404, and we don't want to, you know, we can't go close to the limits of the Commerce Clause without a clear statement from Congress.” Which is one inkling of the Major Questions Doctrine yet to come. I honestly don't think they thought they were affecting the other permit program in the slightest, and they were.

And that’s also why I think Justice Scalia goes to the lengths he does. If you have not read the full *Rapanos* opinion, it’s a really long opinion. He goes to great lengths to say, this isn't going to affect 402, and they're trying to separate the two permit programs, but the hook is because 404

affects private property, and 402 looks a whole lot more like public nuisance and protecting public waterways, they've always had fewer problems with it.

Phillip Mancusi-Ungaro: That's an extremely interesting point because we've always looked at 402 as protecting water quality; I mean, that was the whole idea. 404 is not a wetlands protection program; it's a wetlands permitting program to fill it. And unfortunately, we really have missed the ball by not having an actual wetlands permitting protection program, and that's where Congress should go. Not in my lifetime, I think it will happen.

Susan Bodine: Not in many of our lifetimes. But I agree with you that absolutely it never made sense; it was a compromise between the House and the Senate in 1972. It never made sense to have the merging of those two programs. The Civiletti Attorney General opinion from 1979 said there's one definition of "water of the United States," that applies both to Corps of Engineers' dredge and fill program and EPA's delegated state 402 programs. And by the way, EPA gets to decide what it means. So yeah, it's all interconnected, but obviously people didn't seem to understand that.

But I'd like to actually make two 402 points. One is, 402 is still there to protect downstream navigable waters. If you're dumping something, and this is a 402 problem, not a 404 problem, but if you're dumping your waste, your industrial waste, whatever, into an ephemeral stream, if you're dumping it into a ditch, if you're dumping it into just a channel, any kind of channel that has no water in it whatsoever and it gets to a downstream water, you're regulated. And the reason you're regulated is because that's a point source, and you can't have a discharge from a point source to a navigable water without a permit. So, it does get into gray areas of, okay, who is the permittee and where does it start. But these features that maybe once somebody said was a water of the United States, a lot of them, again if they're conduits for pollution to get to something that is a water of the United States, then they meet the definition of a point source.

Kelly Moser: I was just going to follow up on that. The problem with that, if the ephemeral stream is just a conduit, right, for the protection of the navigable water, is that any permitting is based on protecting the navigable water and not the ephemeral or intermittent stream for itself.

All scientists know that it's not just the pollution that is running into the navigable waters. There are fish that go up into ephemeral and headwater streams to spawn. So, it's a real problem if we aren't protecting some of those smaller streams and headwater streams.

And I guess the other thing is, with ephemeral streams and intermittent streams that potentially are at risk and even if they're seen as conduits and requiring a permit to go into navigable water, what happens to the arid west where even the largest rivers only run after huge rains? It can't be that that Congress intended to carve out an entire part of the country from the protections of the Clean Water Act.

Scott Schang: We have another question from the audience. Given the continued uncertainty in post-*Sackett* federal jurisdiction, what advice would you give to state legislators wanting a

reasonable, fair level of protection within the state? And as an addendum to that, Robin, would you mind mentioning what's happening in California in terms of what you would feel like if you were a permittee?

Robin Craig: Yeah. We saw the map that ELI put together of what the different states do. I have lived in four of the blue states. And so, in Oregon, in Florida, in California, it kind of doesn't matter because all that changed in the regulatory process really was the name of the permit, whether it was a state permit or a federal permit.

But in California, in particular, what the change means is not that you're not regulated; it's you just lost all of the Army Corps' general permits. And instead of being subject to NEPA, you're now subject to the California Environmental Quality Act, so your life just got a whole lot worse for that switch, if you're a permittee.

It is going to play out differently in different states. Oregon was the same way; there was the label "state permit," the state PDES permit, but the process for doing the permitting was pretty much the same, the same people sitting in the same office, it was just a labeling. So, in some states, it's probably not going to matter all that much.

And like I said, what people have forgotten is if you're in the state, state permitting, you're probably not getting the advantage of the--how many nationwide general permits does the Army Corp have? Ninety-something? Yeah, yeah. You've lost all the nationwide and regional general permits that 404 had, which actually covered a huge percentage of the number of 404 permits out there, so for the blue states, it's going to be procedurally a little tougher.

Phillip Mancusi-Ungaro: And that's an interesting point because Region 1, which is the New England states, they use regional programmatic state permits to actually let the states implement the 404 program. So, I got a call from a former colleague up there who was saying, "Well, what do you think we're going to do with these things?" And they don't know. And there are some states in the country, and I think it was in that ELI article perhaps, or another one I saw, that said, "You cannot do anything more stringent or more inclusive than the Feds." The Feds is it; other states can be broader than that. So, we're going to end up with sort of a mosaic, mishmash of jurisdictional calls.

Kelly Moser: And it's going to be a patchwork—sorry--even beyond states. We hear of local governments also taking the same steps, either to build up their wetland protections or to weaken them, and it's just going to increase the patchwork that the regulated community has to work within.

Scott Schang: And call out to Jim McElfish at ELI, who's the person who has been writing about this for decades and has kept a watch on it even when this went underground, and people weren't paying attention. Also, he reminds us that many states have enacted "no more stringent than" laws, meaning their state laws cannot be more stringent than federal law, even before any

of this happened. So, whenever somebody tells you, “Don't worry about federal law because the states will always be there,” that's not true any longer, and it hasn't been true for decades.

Phillip Mancusi-Ungaro: And I saw that map, and it was interesting that Florida was listed as one of the more stringent states

Robin Craig: It is.

Phillip Mancusi-Ungaro: Having been involved in Florida for 30 years in my career, I think that was true 30 years ago, but I clearly don't think that's true these days. Especially because they took over the 404 program for the non-Corps waters. [*ed. note: On February 15, 2024. a federal D.C. District Court judge invalidated Florida’s assumption of the Section 404 permitting program.*] And they are just--it's just everything goes, just give me a permit assignment. There used to be--they had an incredibly protective program. In the past five to ten years, it's just gone downhill.

Kelly Moser: And just a reminder, that map was describing laws that are on the books, not how they're enforced or applied. So, it still goes back to whether the state has the resources or the interest to actually enforce the laws that are on the book.

Susan Bodine: I think the ask that ECOS has made to Congress is, “Give us money so we can stand up our own wetlands permitting program.”

Scott Schang: So, Justice Alito wrote that the Clean Water Act is a potent weapon that imposes crushing consequences on even inadvertent violations. And I think he thought he was getting rid of the lack of clarity, and I think as you've heard, not so much.

This is a really, really hard area, I don't want people to think this is all a political argument, because today, in our polarized society, we tend to see everything through that political lens. This is a very hard question, and it has been for 50 years, but it continues to be plaguing us, which is concerning. And in the face of a court that seems to be taking different interpretations and demanding increased levels of clarity from Congress, in an area which is very hard to legislate, we’re between the crosshairs. One solution: Congress can be more clear. Another solution: if you don't like the result, vote, and then vote again, and then vote again.

Susan Bodine: Yeah, it's hard to get clarity when you're writing and drafting legislation--

Scott Schang: Yeah, the way they write legislation.

Susan Bodine: --In a bipartisan way and trying to get congressional clearance.

Scott Schang: As Susan mentioned, I would recommend, we also did a series of oral histories at ELI, one of which you cited in your congressional testimony, with Leon [Billings] and Tom [Jorling], who were congressional staffers. And they talked about writing the Clean Air Act and

the Clean Water Act, along with others. And they did say, when *Rapanos* came down, they called each other and said, “I'm surprised there's still so much jurisdiction left.” So, also one perspective, we may have had 50 years of far broader jurisdiction.

Susan Bodine: They said it was broader than they thought at the time. In 1972, at the time, they thought in both SWANCC and *Rapanos*, the Supreme Court affirmed broader jurisdiction than they thought they had enacted in 1972. So, the idea is that this has been an evolution, there's never been a single definition of water of the United States, it's been an evolution of different varying interpretations, expansions, the Court saying no, and then expansions again, and Court saying no.

Phillip Mancusi-Ungaro: I'm sure we'll be back again. Yeah, it's actually a very hard term to define. Take a stab at it; the actual easiest way to define it is, it extends to the limits of the Commerce Clause. Fine, but now we have to decide what that means. But that actually works the easiest in terms of legislative language.

Once you try to get specific about what you're trying to cover and what you're not trying to cover, it's actually very hard. So, asking Congress for a specific statement is not necessarily going to be an easier answer either.

Phillip Mancusi-Ungaro: Be careful what you ask for.

Robin Craig: Right, be careful what you ask for.

Scott Schang: There's a reason there are 50 years of jurisdictional determinations and lots of learning around this, which I think we might want to listen to some of the agency experts before the end of the day. I want to thank this amazing panel of experts who helped bring some clarity to a very murky area, I think. Thank you so much.

Stan Meiburg: I want to thank all of you who spent the day with us; it was very interesting, especially this last panel. Scott, thank you for the tremendous job you did moderating this. When I first had the idea of producing this symposium, I thought it was complicated, and what I've learned is it's even worse than I thought.

Several other things: one is that this is the continuation of a long conversation; it's also not the last word. I'm reminded of Mike Leavitt's metaphor about the environmental protection business being a relay race—well, this race is still going on. Also, Susan, thank you for your thoughts about perspective. I heard those again and again during the course of the day, the perspective of the legal language focus versus a more ecological focus. though I was also reminded of the comment my son makes about climate change, when he says, “Dad, nature doesn't care what you think.” That might be true here, at least that nature is not as responsive to our legal categories as we might wish that it were.

It's pretty clear that jurisdiction in some ways has shrunk from the outer reaches of what it may have been at one time. But exactly how far it has shrunk is not clear. Going back to Keith's advice to farmers at the beginning, "Don't just go out there and start digging without checking with somebody is probably a good idea." I also heard today that there are many other tools available to protect ecosystem water quality, which can include states, but these tools are going to take both money and leadership, especially when we talk about conserving land, which is one of the other ways to go.

Finally, the significance of this decision is probably ultimately going to depend on context. In some ways, nature and facts will come back and reassert themselves as you figure what the ultimate consequences of *Sackett* are going to be. Thanks to everyone who has been here with us today and this really fascinating set of presentations. Thanks especially to the panelists on other panels who are still with us, listening to all of the panels and to those, especially in this last panel, providing as much clarity as can be gotten on this subject.

Thank you very much, everyone, and have a good weekend.