Sackett v. EPA

Rethinking 50 years of federal wetland jurisdiction

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Sackett isn't about wetlands . . .

. . . it's about federal jurisdiction under the Clean Water Act

- The Clean Water Act requires permits for "discharge of dredged or fill material into the navigable waters"
- But the Act defines "navigable waters" as "waters of the United States"
- So if there's no discharge into waters of the United States, there's no need for a permit under the Act.
- This is (mainly) a **legal** question, **not** a **scientific** one.

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What was at stake in *Sackett*?

- Everyone agrees:
  - Priest Lake is a navigable water
  - The Sackett's property has wetlands
  - The Sackett's wetlands are hydrologically connected (underground) to Priest Lake
- The parties dispute:
  - Whether the significant nexus test is consistent with the Clean Water Act
  - Whether the Sackett's wetlands are "adjacent" to Priest Lake
  - The proper test for identifying "waters of the United States"

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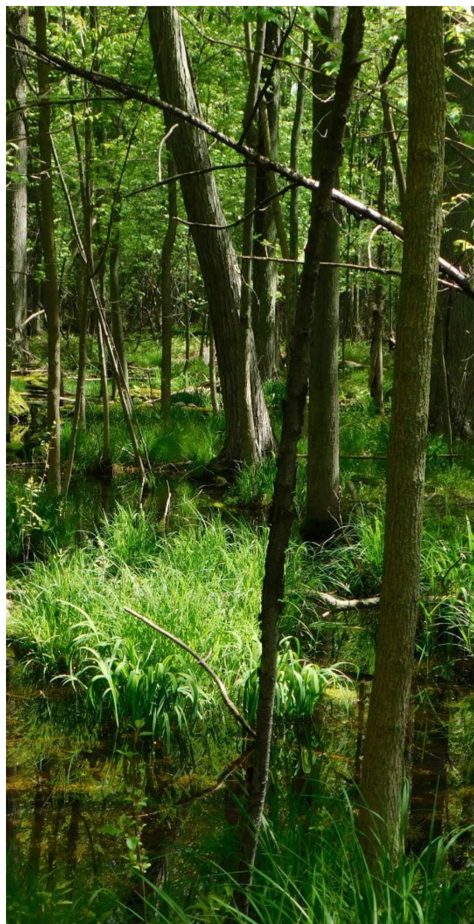
What did the Supreme Court say?

The “significant nexus” test is dead

“At least some wetlands must qualify”



- The Clean Water Act’s focus is on **waters**:
  - “Waters” means “only those relatively permanent, standing, or flowing bodies of water forming geographical features that are described in ordinary parlance as **streams, oceans, rivers, and lakes**.”
  - “This meaning is hard to reconcile with classifying ‘lands,’ wet or otherwise, as ‘waters.’”
  - “The ordinary meaning of ‘waters’ . . . might seem to exclude all wetlands”
- **But** the Clean Water Act also refers to “waters of the United States . . . including wetlands adjacent thereto”
- So “some” wetlands are included in the scope of “waters of the United States”—but they still must be “waters”

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"But what wetlands does the CWA regulate?"

- Jurisdictional wetlands must be waters "in their own right"
- They are "**indistinguishably part** of a body of water that itself constitutes 'waters'"
- As a "practical matter," it must be "'difficult to determine where the 'water' ends and the 'wetland' begins."
- For example, "semi-aquatic features like shallows and swamps" make it harder to define "the transition from water to solid ground"
- "**temporary interruptions** in surface connection may sometimes occur because of phenomena like low tides or dry spells"

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What wetlands are now outside federal jurisdiction?

- “Wetlands that are separate from traditional navigable waters cannot be considered part of those waters, even if they are located nearby”
- “[A] **barrier** separating a wetland from a water of the United States would ordinarily remove that wetland from federal jurisdiction”
- **Not** “waters of the United States *and adjacent wetlands*,” but only wetlands that “are *part of* ‘waters of the United States’” (italics are from *Sackett*)

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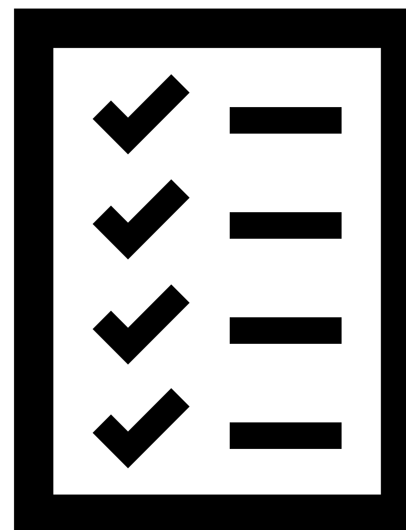
The new test

- "[T]he CWA extends to only those wetlands that are 'as a practical matter indistinguishable from waters of the United States."
- The party asserting jurisdiction (EPA or the Corps) must establish:
  - "that the adjacent body of water constitutes waters of the United States (i.e., a relatively permanent body of water connected to traditional interstate navigable waters)"; and
  - "that the wetland has a continuous surface connection with that water, making it difficult to determine where the 'water' ends and the 'wetland' begins"



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Applying the new test

Sackett doesn't solve everything . . .

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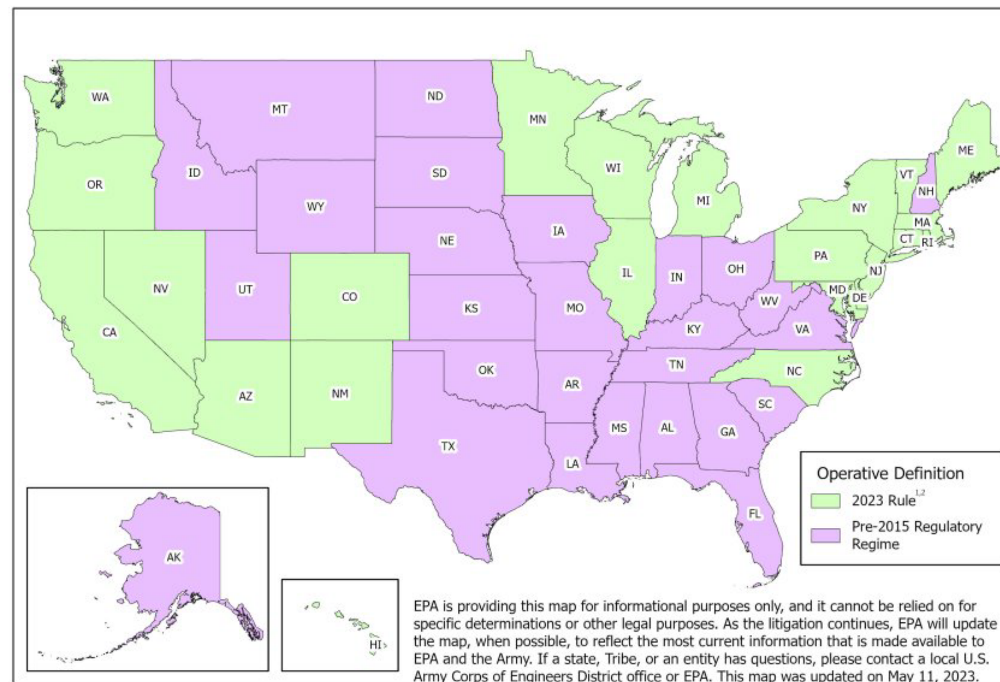
What about the 2023 rule?

- EPA's 2023 rule was already a mess, thanks to lower court decisions
- The Court in *Sackett* observes that the 2023 WOTUS rule relies on the significant nexus test and covers "neighboring" wetlands "even if they are separated from those waters by dry land."
- The Court then rejects the premise of the 2023 rule: "[T]his interpretation is inconsistent with the text and structure of the CWA."
- Crafting a new rule could take a long time

Operative Definition of "Waters of the United States"



[1] Also operative in the U.S. territories and the District of Columbia

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

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New test: relatively permanent water body

Relatively permanent:

- streams
- oceans
- rivers
- lakes

Not permanent enough:

- ephemeral streams
- drainage ditches (“geographical features”)

To be determined:

- intermittent tributaries
- seasonally dry streams
- others?

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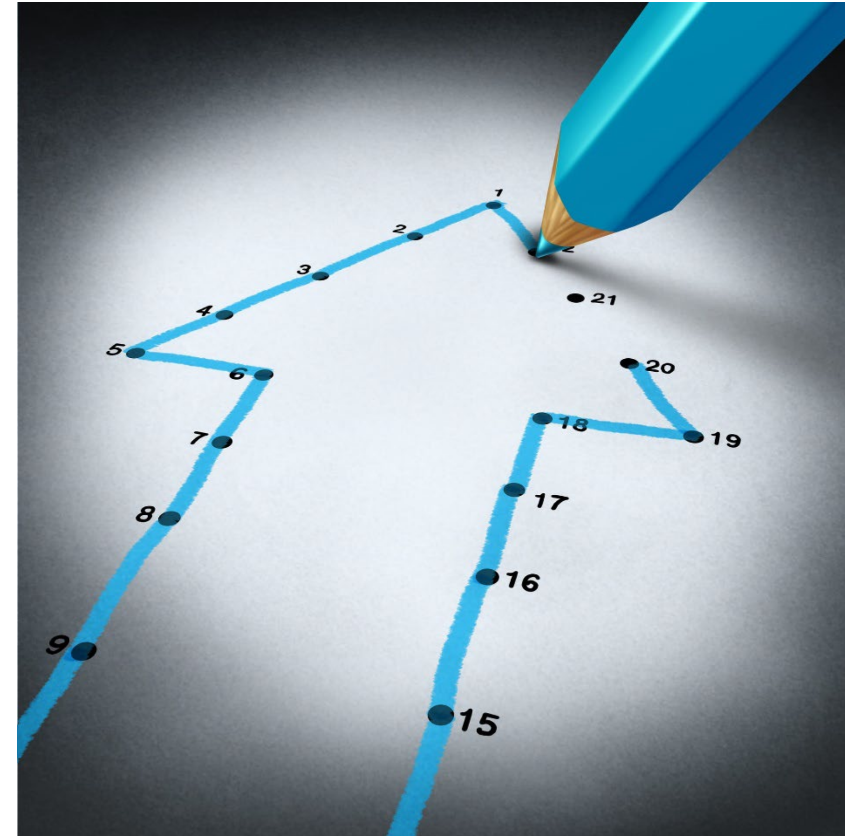
New test: continuous surface connection

“Indistinguishably part of” vs. “connect the dots”

- Scientifically, wetlands often have a “continuous surface connection” to other wetlands and—eventually—to a relatively permanent water body
- At the same time, it may be hard to describe such a “connected” wetland as “indistinguishable” from the relatively permanent water body
- Permit applicants, agencies, and wetlands experts will be the first to address these issues
- At some point, lawyers and courts will be involved again



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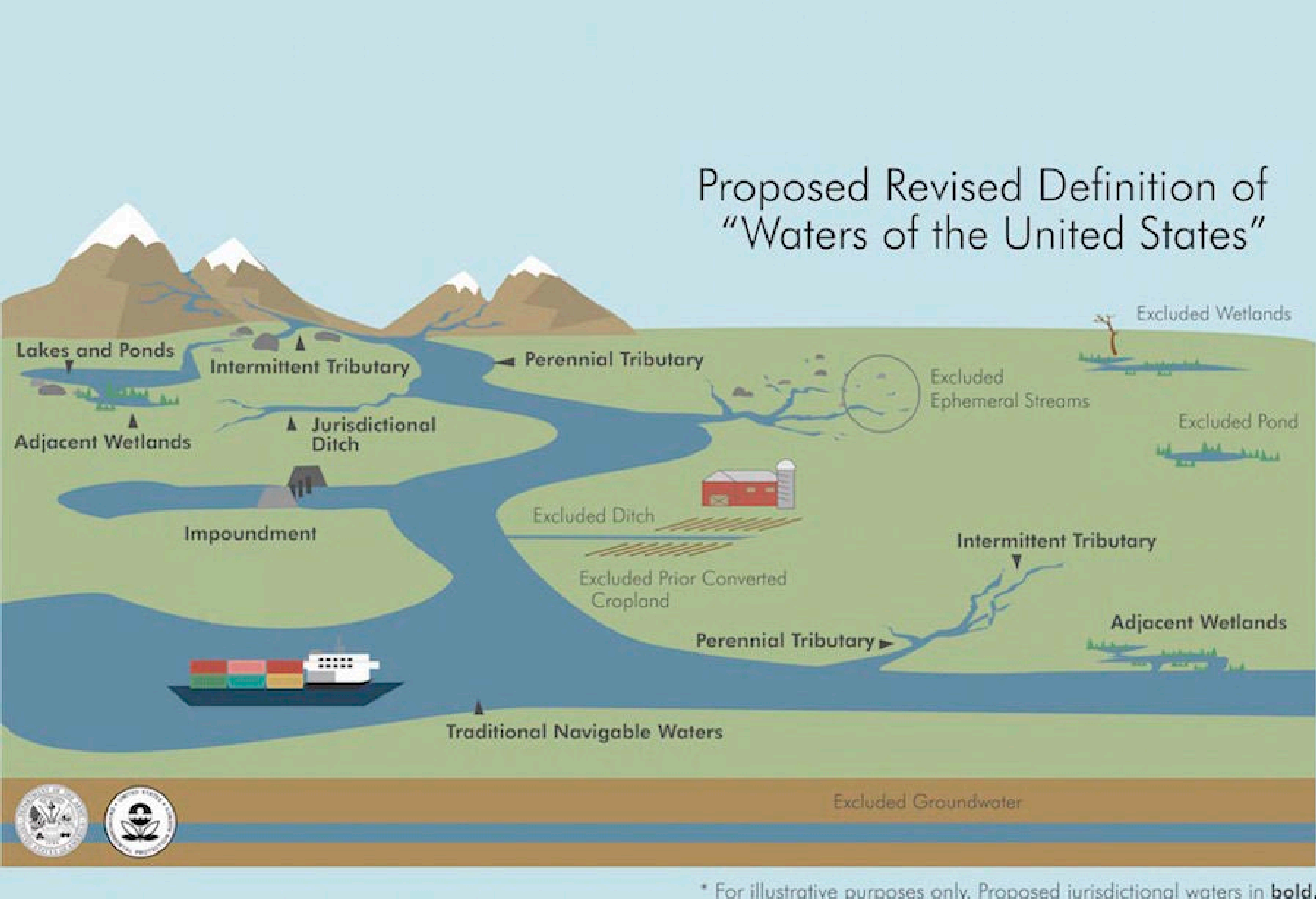
Where are we now?

Is *Sackett* narrower than the 2018 rule?



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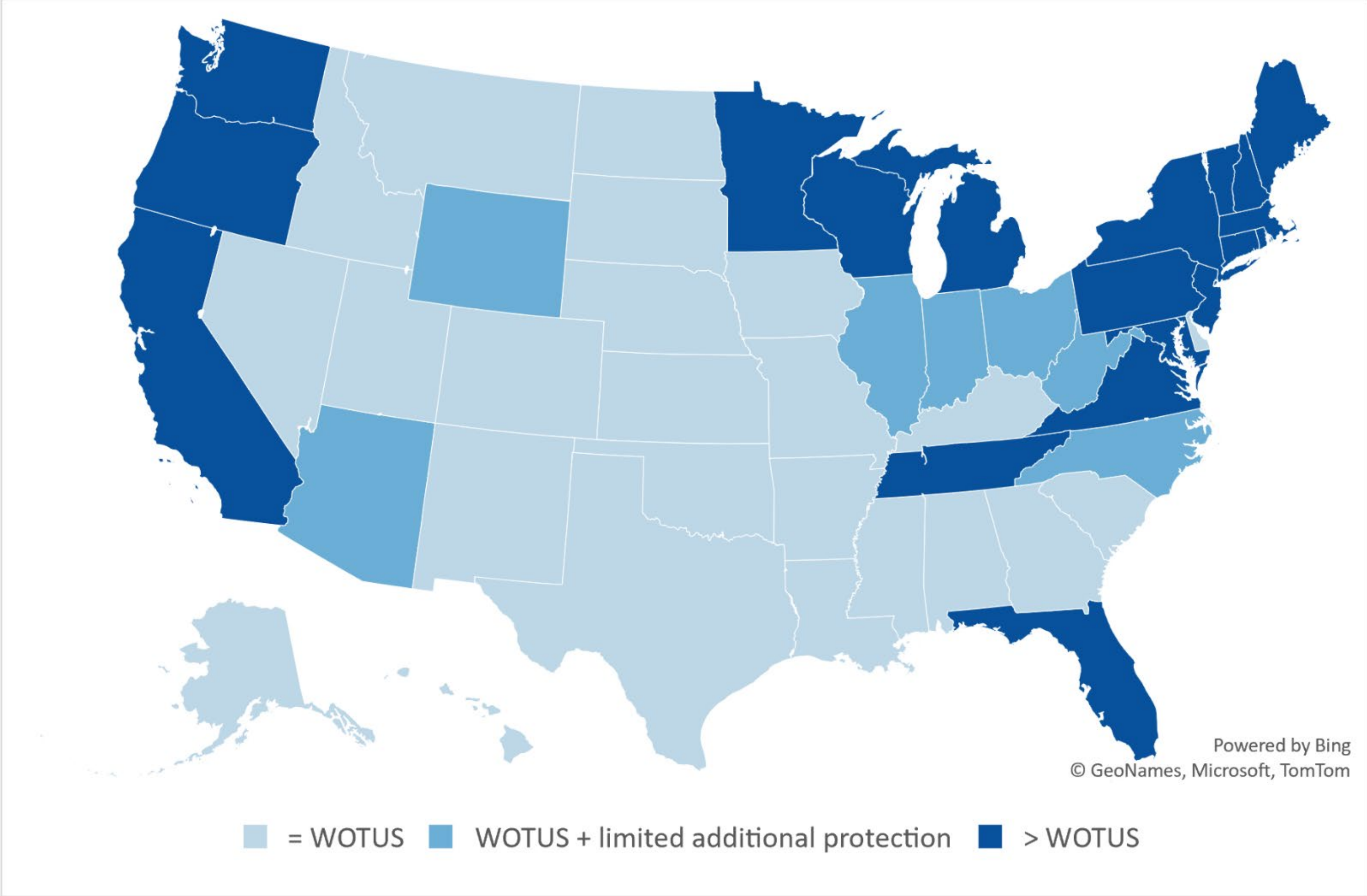
State protection?

The CWA's "policy" is "to 'preserve' the States' 'primary' authority over land and water use"



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Where else will *Sackett* matter?

Where else does the Clean Water Act jurisdiction depend on “navigable waters”?

- The Clean Water Act prohibits “any discharge of any pollutant” without a permit **BUT** the act also defines “discharge of pollutant” to mean “any addition of any pollutant to navigable waters”
- The Supreme Court’s decision in *County of Maui* extends federal jurisdiction to groundwater discharges that are the “functional equivalent” of a discharge to “navigable water”
- What else . . . ?

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Questions?

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