White v. EPA: North Carolina Federal Court Declines to Narrow Clean Water Act's Jurisdiction in an Early Challenge to the EPA's Post-*Sackett* Wetlands Rule

I. INTRODUCTION

Only one year after the Supreme Court sought to clarify the outer bounds of the Clean Water Act's (CWA) jurisdiction over wetlands in *Sackett v. EPA*, a North Carolina landowner has become one of the first litigants to challenge the EPA's post-*Sackett* regulation in federal court.[1] Robert White owns properties that border the Pasquotank River, Big Flatty Creek, and other bodies of water feeding into the Albemarle Sound.[2] White intended to use these properties for his commercial seafood business, agriculture, and for their long-term investment value, until he was subjected to a civil enforcement action under the CWA for constructing bulkheads designed to protect his properties from erosion.[3] White moved to stay the enforcement action, but the federal district court denied the motion.[4]

White then went on the offensive and initiated the action in the noted case. In this case, White argued that the EPA's amended rule is inconsistent with *Sackett's* wetland jurisdiction test and should be set aside under the Administrative Procedure Act.[5] The district court, however, held that the amended rule faithfully conformed with *Sackett*

1. White v. United States Environmental Protection Agency, No. 2:24-CV-00013, 2024 WL 3049581, at *1 (E.D.N.C. June 18, 2024).
2. *Id.* at 4.
3. *Id.*
4. *Id.*
5. *Id.*

and rejected White's interpretation of *Sackett's* wetland jurisdiction test. Part II of this Note presents a discussion on the background of the CWA and the Supreme Court's jurisprudence concerning its jurisdiction over wetlands. Part III discusses the court's decision, focusing on its conclusion that the *Sackett* opinion was not meant to require both a continuous surface connection and a separate finding of "indistinguishability." In Part IV, this Note argues that the Federal District Court for the Eastern District of North Carolina's decision was the outcome most consistent with Supreme Court jurisprudence and the codified objective of the CWA as possible in this case. Part V briefly concludes.

II. BACKGROUND

The Clean Water Act (CWA), passed by Congress in 1972, is intended to be an "all-encompassing program of water pollution regulation."[6] The codified objective of the CWA is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[7] The CWA makes the "discharge of any pollutant" into "navigable waters" unlawful.[8] A "pollutant," as defined by the act, includes contaminants such as "chemical wastes," "biological materials," "radioactive materials," as well as more common materials like "rock," "sand," and "cellar dirt."[9] The CWA is jointly enforced by the Environmental Protection Agency (EPA) and the Army Corps of Engineers (Corps).[10] Violations of the CWA can carry civil penalties of up to $60,000 in fines per day for each violation and criminal penalties of up to $25,000 in fines per day and one year of imprisonment for first-time negligent offenders or $50,000 in fines and up to three years' imprisonment for first-time knowing offenders.[11] The EPA and the Corps may issue permits allowing activities that would otherwise be unlawful under the act, though there are often "significant" costs associated with obtaining such permits.[12] Most relevant to the noted case, the Corps is responsible for issuing permits related to dredged or fill material.[13]

6. City of Milwaukee v. Illinois and Michigan, 451 U.S. 304, 318 (1981).
7. 33 U.S.C. § 1251(a).
8. 33 U.S.C. § 1311(a); 33 U.S.C. § 1362(12)(a).
9. 33 U.S.C. § 1362 (6).
10. Sackett v. Environmental Protection Agency, 598 U.S. 651, 661 (2023).
11. *Id.* at 660; 33 U.S.C. § 1319(c).
12. 33 U.S.C. § 1344(a); *Sackett*, 598 U.S. at 661.
13. 33 U.S.C. § 1344(a).

Since the passing of the CWA, the Supreme Court has been tasked with clarifying two key definitions essential to understanding the jurisdictional reach of the act. The first term is "waters of the United States" (WOTUS). As previously mentioned, the Clean Water act applies to "navigable waters," which it defines as "waters of the United States."[14] The definition of WOTUS has long vexed the courts and required extensive consideration of the outer boundaries of Congress's regulatory reach under the commerce clause.[15] Another jurisdictional question, which is at the forefront in the noted case, is what are the outer limits of the CWA's jurisdictional reach with respect to wetlands. The language "wetlands adjacent to" appears in §1344(g)(1) of the CWA, a provision which, rather than establishing wetlands as a primary jurisdictional matter, simply recognizes the authority of the states to "issue permits for the discharge of dredged or fill material into some bodies of water."[16] This provision has sparked extensive debate as to exactly which wetlands are covered by the CWA, and, at one point, the EPA claimed to have jurisdiction over half of Alaska and an area the size of California in the contiguous United States.[17] In its recent jurisprudence, the Court first attempted to answer both of these questions in *Rapanos v. United States*. The Court commanded no majority in *Rapanos*, but two opinions—a plurality opinion authored by Justice Scalia and a concurring opinion by Justice Kennedy—have been especially important in the EPA's practice and, ultimately, in the Court's decision in *Sackett*, which offers the current controlling interpretations of the phrases "WOTUS" and "wetlands adjacent to."

A. Rapanos v. United States

The *Rapanos* case, originating in the Sixth Circuit, concerned four consolidated cases in which the Court considered whether or not wetlands, which ultimately emptied into traditional navigable waters, were WOTUS for purposes of the CWA.[18] In a plurality opinion authored by Justice Scalia, the Court defined WOTUS to mean water "'[a]s found in streams and bodies forming geographical features such as oceans, rivers, [and] lakes,' or 'the flowing or moving masses, as of waves or floods, making up such streams or bodies.'"[19] Scalia further clarified that

14. 33 U.S.C. § 1362(7).
15. *Sackett*, 598 U.S. at 686 (Thomas, J., concurring).
16. 33 U.S.C. § 1344(g)(1); *Sackett*, 598 U.S. at 675.
17. Rapanos v. United States, 547 U.S. 715, 722 (2006).
18. *Id.* at 729.
19. *Id.* at 716 (quoting WEBSTER'S NEW INTERNATIONAL DICTIONARY (2d ed. 1934)).

this definition of WOTUS was intended only to include "relatively permanent, standing or flowing bodies of water."[20] The decision to exclude non-permanent or intermittently flowing bodies of water, Scalia argued, was the only language consistent with the CWA's policy to "recognize, preserve, and protect the primary responsibilities and rights of the States . . ." to manage pollution and water resources.[21] Scalia further argued that interpreting WOTUS to include non-permanent, intermittent, or ephemeral bodies of water would violate the Court's canons of construction because it would upset the balance of federalism without a "clear and manifest statement" from Congress.[22]

Having clarified the meaning of WOTUS, Scalia then turned his attention to the "wetlands adjacent to" question. First, Scalia noted a consideration he calls the "boundary drawing problem" from the Court's decision in *United States v. Riverside Bayview Homes, Inc.*, which he considered critical to the wetlands analysis.[23] The boundary drawing problem is the idea that it is not always obvious to distinguish where water ends and land begins because "the transition from water to solid ground is not necessarily or even typically an abrupt one."[24] Scalia also noted how this boundary drawing problem presented itself in a previous case, *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*.[25] In *SWANCC*, the court considered whether isolated ponds fell within the jurisdiction of the CWA.[26] Scalia argued that *SWANCC* is important in defining wetlands because it illustrates that ecological considerations do not create a basis for determining whether a wetland is within the CWA's jurisdiction, rather they can only be used when resolving the ambiguity created by the boundary drawing problem.[27]

Armed with the *Riverside Bayview* and *SWANCC* decisions, Scalia then offered the following explanation of wetlands within the CWA's jurisdiction: "only those wetlands with a continuous surface connection to bodies that are [WOTUS] in their own right, so that there is no clear demarcation between 'waters' and wetlands, are 'adjacent to' such waters and covered by the Act."[28] Based on this definition, Scalia concluded that waters with physically remote or intermittent connections were not

20. *Id.* at 732.
21. *Id.* at 737.
22. *Id.* at 738.
23. *Id.* at 740.
24. *Id.* (quoting United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985)).
25. Hereinafter "SWANCC."
26. *Rapanos*, 547 U.S. at 741-42.
27. *Id.* at 742.
28. *Id.*

wetlands covered by the CWA because the boundary drawing problem is not implicated.[29] Thus, under Scalia's interpretation wetlands are WOTUS and covered by the CWA "if they bear the 'significant nexus' of physical connection, which makes them as a practical matter indistinguishable from [WOTUS]."[30]

In a separate influential concurring opinion, Justice Kennedy outlined what became known as the "significant-nexus" test that the EPA would adopt in the wake of the *Rapanos* decision.[31] Kennedy's significant nexus test draws from an interpretation of *SWANCC*. Kennedy believed that *SWANCC* required wetlands to bear a significant nexus to navigable waters to fall under jurisdiction of the CWA.[32] Kennedy's first major source of disagreement with the plurality was the decision to only include permanent standing or continuously flowing bodies of water in the scope of waters covered under the act.[33] Kennedy argued that this makes little practical sense because some rivers, such as the Los Angeles River, may usually only contain a trickle of water, yet on occasion they can release powerful, destructive flows of water.[34] Kennedy further argued that Congress could have included language to limit the act to permanent waters, yet it did not do so.

Kennedy's second major source of disagreement was the plurality's decision to only include wetlands with a continuous surface connection to other jurisdictional waters.[35] Kennedy first claimed that the plurality's interpretation was inconsistent with the Court's holding in *Riverside Bayview* that stated that the Corps adjacency requirement is a valid basis for regulation if it reasonably concludes that the adjacent wetlands have significant effects on water quality and the aquatic ecosystem.[36] Similar to the dissenting opinion authored by Justice Stevens, Kennedy also cited ecological concerns such as the role that wetlands play in filtration, purification, flood control, and erosion control as a reason in favor of a more expansive interpretation of the CWA's jurisdiction.[37] Ultimately, Kennedy argued that the basis for jurisdiction over wetlands should depend on "the existence of a significant nexus between the wetlands in

29. *Id.*
30. *Id.* at 755.
31. Revised Definition of "Waters of the United States," 88 Fed. Reg. 3004, 3006 (Jan. 18, 2023).
32. *Rapanos*, 547 U.S. at 759.
33. *Id.* at 769.
34. *Id.*
35. *Id.* at 772.
36. *Id.* at 773.
37. *Id.* at 775.

question and navigable waters . . . ."[38] Such a "significant nexus" exists if, based on the policy of the CWA, "the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'"[39]

B. Sackett v. EPA

The *Sackett* case, originating from the Ninth Circuit, involved Michael and Chantell Sackett who purchased a property near Priest Lake in Idaho. The Sacketts attempted to backfill the property to build a home, but the Environmental Protection Agency believed that the property contained wetlands protected by the CWA.[40] Faced once again with defining WOTUS and "wetlands adjacent to," Justice Alito delivered the majority opinion for the Court. With respect to the definition of WOTUS, the Court held that Scalia's plurality opinion in *Rapanos* was the correct use of the term and that only those waters that are "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'" are [WOTUS].[41] Alito reasoned that this usage of the term is consistent with its usages both throughout the CWA and its predecessor statutes.[42]

Having clarified the proper definition of WOTUS, the majority then considered the question of which wetlands are within the reach of the CWA. Again adopting a definition consistent with the *Rapanos* plurality, the court held that wetlands are covered only when they are "indistinguishably part of a body of water that itself constitutes 'waters' under the CWA."[43] The Court then notes, drawing from *Rapanos*, that this indistinguishability is driven by a continuous surface connection with a water that is itself part of WOTUS.[44] Thus, the Court created a two-part test for determining when a wetland is within the jurisdictional reach of the CWA. First, the body of water adjacent to the wetland must be a "water of the United States" under the new definition; second, the wetland

38. *Id.* at 779.
39. *Id.* at 780.
40. Sackett v. Environmental Protection Agency, 598 U.S. 651, 651 (2023).
41. *Id.* at 671.
42. *Id.* at 672-73.
43. *Id.* at 676.
44. *Id.* at 678.

must have a "continuous surface connection with that water, making it difficult to determine where the 'water' ends and the 'wetland' begins."[45]

It may also be worth noting that, while jurisdiction over the CWA's provisions governing "dredge and fill discharges" now requires a continuous surface connection, a previous case decided between *Rapanos* and *Sackett*—*County of Maui, Hawaii v. Hawaii Wildlife Fund*—reached the conclusion that jurisdiction for purposes of the CWA provisions prohibiting the discharge of "pollutants" from a "point source" does not require such a continuous surface connection.[46] Thus, as the language of the *Sackett* opinion does not seem to overrule *County of Maui*, the Supreme Court seems to have functionally created two different approaches for determining the reach of the CWA's jurisdiction for two different functions of the CWA.

In a lengthy concurring opinion, Justice Thomas joined the majority but argued that the term "navigable waters," appearing in § 1362(7) of CWA, should also inform the court's analysis of jurisdictional reach in accordance with the Supreme Court's jurisprudence defining the term.[47] Justice Thomas argued that the CWA should be interpreted in a manner consistent with Congress's traditional authority over navigable waters based on the "channels of commerce" authority under the Commerce Clause.[48] Thomas further argued that the Supreme Court never extended the outer limits of Commerce Clause authority from its New Deal-era precedents to apply to navigable waters, and the EPA had erred in asserting authority beyond the scope of traditional navigable waters.[49] Thus, Justice Thomas categorically rejected the significant nexus theory used by the EPA's counsel because the intrastate body of water at issue in this case is beyond the bounds of federal regulation under the commerce clause precedent applicable to navigable waters.[50]

Two other opinions authored by Justices Kagan and Kavanaugh, who did not agree with the reasoning of the majority in this case, took issue with the continuous surface connection requirement advanced by the majority opinion, criticizing the continuous surface reading as inconsistent with the text of the CWA.[51] Both opinions pointed out that the continuous surface connection language is contrary to the plain

45. *Id.* 678-79.
46. 590 U.S. 165, 170 (2020).
47. *Sackett*, 598 U.S. at 685 (Thomas, J., concurring).
48. *Id.* at 705.
49. *Id.* at 709-10.
50. *Id.* at 707.
51. *Id.* at 710 (Kagan, J., concurring); *id.* at 716 (Kavanaugh, J., concurring).

meaning of the word "adjacent," which by definition includes things that are not touching.[52] Kavanaugh further noted that while "adjacent" is used in the provision of the statute at issue, the word "adjoining," which is more narrow and consistent with the continuous surface reading, appears in other places in the statute.[53] Based on the inclusion of both terms, Kavanaugh believed that had Congress only intended to regulate wetlands with a surface connection, the word "adjoining" could simply have been used as it was in other portions of the statute.[54] Kagan argued that the narrow construction of protected wetlands frustrates the CWA's ecological interests because of the role wetlands play in water purification, water filtration, and flood control.[55] Both opinions also cited the problem the continuous surface test creates with regards to severing protections on once protected wetlands separated from waters by natural or man-made barriers.[56]

III. COURT'S DECISION

In the noted case, the Federal District Court for the Eastern District of North Carolina was tasked with evaluating the EPA's post-*Sackett* regulation for its conformity with the *Sackett* majority opinion. The new amended regulations define the CWA's jurisdiction over wetlands to include: (1) wetlands adjacent to WOTUS; (2) wetlands with a continuous surface connection to "impoundments of waters" that are considered WOTUS, and (3) wetlands with a continuous surface connection to relatively permanent, standing or continuously flowing tributaries of other WOTUS.[57] White and his counsel, who also represented the plaintiff in *Sackett*, argued that the new regulation was not consistent with the Supreme Court's decision because they interpreted *Sackett* to require (1) that a wetland have a continuous surface connection to a water of the United States and (2) be "practically indistinguishable from the water of the United States, such that it is difficult to determine where the water ends and the wetland begins."[58] The court rejects the

52. *Id.* at 710 (Kagan, J., concurring); *id.* at 717-18 (Kavanaugh, J., concurring).
53. *Id.* at 719 (Kavanaugh, J., concurring).
54. *Id.*
55. *Id.* at 712 (Kagan, J., concurring).
56. *Id.* at 712; *Id.* at 726-27 (Kavanaugh, J., concurring).
57. 33 CFR § 328.3; 40 CFR § 120.2.
58. White v. United States Environmental Protection Agency, No. 2:24-CV-00013, 2024 WL 3049581, at *9 (E.D.N.C. June 18, 2024).

contention that *Sackett* requires both a surface connection and a separate, additional indistinguishability showing.[59]

Before considering the merits of White's claim, the court first recounted the background of the CWA and the judicial history discussed above. The court also considered whether or not White's claim was barred by the ripeness doctrine, ultimately concluding that the claim was justiciable because both elements of the ripeness analysis were satisfied.[60] The court evaluated the merits of White's claim under the context of a preliminary injunction, which requires the plaintiff to make a clear showing that they are likely to succeed at trial."[61] The court determined that White failed to make such a showing.[62] The court finds that the EPA regulation conforms with *Sackett* first, because the *Sackett* opinion makes it clear that a wetland is practically indistinguishable from a water of the United States because of its continuous surface connection.[63] The court's interpretation of *Sackett* is that a wetland only becomes practically indistinguishable when it contains a continuous surface connection.[64]

The court then buttresses this interpretation by citing the decisions of other federal courts, noting that none of them interpreted *Sackett* to require continuous surface connection and practical indistinguishability. The court first examines the Fifth Circuit's interpretation in *Lewis v. United States*. In *Lewis*, the Fifth Circuit concluded that a judicial determination entered by the Corps, an administrative mechanism in which the Corps issues an opinion on the presence of CWA protected waters, was not supported because the Lewis property lacked a "'continuous surface connection' between any plausible wetlands."[65] Similarly, the court cites *Glynn Environmental Coalition, Inc. v. Sea Island Acquisition, LLC*, a case in which the United States District Court for the Southern District of Georgia ruled that a subject property was outside of the CWA's scope because the property did not have a surface connection with a water of the United States.[66]

Finally, the court also considers two arguments from *White* regarding interpretative principles and canons of construction. First, White argues that because the regulation significantly alters the balance

59. *Id.* at *12.
60. *Id.* at *5-6.
61. *Id.* at *8.
62. *Id.* at *12.
63. *Id.* at *10.
64. *Id.*
65. Lewis v. United States, 88 F.4th 1073, 1078 (5th Cir. 2023).
66. Glynn Env't Coalition, Inc. v. Sea Island Acquisition, LLC, CV 219-050, 2024 WL 1088585, at *5 (S.D. Ga. Mar. 1, 2024).

between state and federal power, Congress must use "exceedingly clear language."[67] The court rejects this argument, reasoning that in *Sackett* the Supreme Court only considered the federalism canon after offering its own interpretation of what wetlands are covered by the CWA, and that it would be "a strange turn of events if the Court's interpretation was susceptible to the same faults" which it cited to invalidate the regulation at issue in *Sackett*.[68] Second, White also advances a nondelegation argument.[69] The court also rejects this argument, stating that the CWA is based on an intelligible principle, has the boundaries of its authority outlined, and has never been scrutinized as an impermissible delegation of power in any of the Supreme Court's jurisprudence interpreting it.[70]

IV. ANALYSIS

By determining that the *Sackett* test for adjacent wetlands does not include both a continuous surface connection and a separate "indistinguishability" requirement, the court in the noted case reaches the conclusion as logically consistent with the Supreme Court's decision in *Sackett* as possible. To understand the operation of the "indistinguishable" language that appears in *Sackett*, one should first look to *Rapanos* and the "boundary drawing problem" discussed in Justice Scalia's plurality. As previously discussed, Scalia's "boundary drawing problem" finds its roots in the Supreme Court's *Riverside Bayview* opinion.[71] Scalia's "boundary drawing problem" is the idea that there is an inherent textual difficulty in determining what qualifies as a "wetland" under the CWA and that the Corps must choose some point at which a water ends and land begins.[72] Scalia's definition of covered wetlands are those with a "continuous surface connection to bodies that are '[WOTUS]' in their own right, so that there is no clear demarcation between 'waters' and wetlands . . . ."[73] In other words, a wetland is covered because there is ambiguity in drawing a boundary between a wetland and WOTUS otherwise covered by the act.

Looking next to *Sackett*, Alito's majority opinion uses the "indistinguishable" language alongside the "boundary drawing problem" language from *Rapanos*. The *Sackett* decision made clear that a finding

67. *White*, 2024 WL 3049581, at *10.
68. *Id.* at *11.
69. *Id.*
70. *Id.* at *12.
71. *See infra* text accompanying note 24.
72. Rapanos v. United States, 547 U.S. 715, 740 (2006).
73. *Id.* at 742.

that a water is indistinguishable from a WOTUS requires that the adjacent body of water is itself a WOTUS 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."[74] This is precisely the interpretation that the *White* court takes. According to the court in *White* a wetland is practically indistinguishable "because that continuous surface connection renders the wetland practically indistinguishable from the jurisdictional water to which it is connected."[75] The *White* court further notes that the continuous surface connection is the factor that powers the test.[76] Applying the two-part *Sackett* test, the *White* court reasons that adjacency to a jurisdictional WOTUS does nothing in determining that a water is indistinguishable and that a wetland only becomes indistinguishable when it possesses a surface connection that makes it hard to tell where a covered water ends.[77] Or, as intended by the *Rapanos* opinion, a water is indistinguishable because of the ambiguity presented by the "boundary drawing problem."

Given the clear precedent regarding the relationship between the continuous surface connection requirement and the "indistinguishable" language, White's argument that *Sackett* requires an indistinguishability finding separate from a continuous surface connection is extremely difficult to square with controlling law. White's property is a textbook example of a wetland satisfying the test outlined in *Sackett*. There are three different properties at issue in *White*, and all three of the properties border either the Pasquotank River or Big Flatty Creek, bodies of water that feed into the Albemarle Sound. All of these bodies of water would meet *Sackett's* definition of WOTUS as "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.'"[78] Moving next to the continuous surface connection requirement, it seems clear, based on photos of White's properties, that the properties have a continuous surface connection with WOTUS.[79] White's properties

74. Sackett v. Environmental Protection Agency, 598 U.S. 651, 678-79 (2023).

75. *White*, 2024 WL 3049581, at *10.

76. *Id.*

77. *Id.*

78. *Sackett*, 598 U.S. at 671-72.

79. Bobby Magill, *North Carolina Landowner Aims Wetlands Lawsuit at Supreme Court*, BLOOMBERG LAW (May 8, 2024, 4:05 AM), https://www.bloomberglaw.com/product/blaw/bloomberglawnews/bloomberg-law-news/BNA%200000018f3a07d1aba5ff3effe8c50000?bna_news_filter=bloomberg-law-news&bc=W1siU2VhcmNoICYgQnJvd3NlIiwiaHR0cHM6Ly93d3cuYmxvb21iZXJnbGF3LmNvbS9wcm9kdWN0L2JsYXcvc2VhcmNoL3Jlc3VsdHMvOWViOGZhZjE3NzRlNWY4NzMzMTIwNTM4MDI0NGIxYjQiXV0—5660822c8774030445

also seem to implicate the boundary drawing issue because it is not clear where these WOTUS end and the wetlands begin. There is no barrier separating White's properties from the bodies of water considered WOTUS, so any discharge of dredge or fill materials from White's properties would directly enter these navigable waters. This is exactly the type of wetland the *Sackett* court intended to be covered by their test and the CWA. White's argument that his properties are not within the CWA's jurisdiction because they are distinguishable from WOTUS seems to be, based on the circumstances, a last resort to avoid liability by introducing an additional, vague, and undefined element into the *Sackett* test.

The *White* court's decision not to further narrow the jurisdiction of the CWA over wetlands also reaches the outcome most consistent with the statutory objectives of the CWA. The objective of the CWA is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[80] White's argument that the CWA's wetland coverage should be further restricted would fundamentally frustrate this objective. Concerns have already been expressed that White's interpretation of the *Sackett* ruling would "eliminate nearly all wetlands from the protections of the Clean Water Act."[81] The wetlands at issue in the *White* case are precisely the type of wetlands that were meant to be regulated by the CWA. For example, the Pasquotank River and the Albemarle Sound were historically home to herring fisheries that served as global suppliers of herring.[82] The fish inhabited waters that were especially volatile due to the sound's low levels of dissolved oxygen.[83] The unique ability of the fish to survive was attributed to the lack of polluted waters and the natural flows of creeks that were not diverted by ditches and channels.[84] The fish are mostly gone today, but the Albemarle Sound estuary system is still home to the critically endangered hawksbill sea turtle and the endangered shortnose sturgeon.[85] The survivability of

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80. 3 U.S.C. § 1251(a).

81. Magill, *supra* note 79.

82. *The Pasquotank River*, A HERON'S GARDEN, https://aheronsgarden.com/albemarle-rivers-of-north-carolina-intro/the-pasquotank-river/.

83. *Id.*

84. *Id.*; NORTH CAROLINA DEPARTMENT OF ENVIRONMENT & NATURAL RESOURCES DIVISION OF WATER QUALITY, PASQUOTANK RIVER BASINWIDE WATER QUALITY PLAN 164 (2007), https://files.nc.gov/ncdeq/Water%20Quality/Planning/BPU/BPU/Pasquotank/Pasquotank%20Plans/2007%20Plan/Chapter%2014.pdf.

85. NORTH CAROLINA DEPARTMENT OF ENVIRONMENT & NATURAL RESOURCES DIVISION OF WATER QUALITY, PASQUOTANK RIVER BASINWIDE WATER QUALITY PLAN 174 (2007)

wildlife species such as these are an illustrative example of the federal government's interest in preserving the biological, chemical, and physical integrity of the nation's waters.

Even if the real-world ecological effects on the waters at issue in this case existed in a vacuum, there is very little legal support found throughout the Supreme Court's jurisprudence for further narrowing the CWA's jurisdiction over wetlands. Even if we were to disregard the controlling *Sackett* opinion, White's argument would find even less support among the separate opinions of Justices Kagan and Kavanaugh in *Sackett*. Central to these opinions is the assertion that the CWA should be read to include not only wetlands with a continuous surface connection but also to include wetlands near WOTUS because of their effect on water filtration and purification.[86] The separate opinions expressed serious concerns about the majority's narrowing of wetland coverage under the CWA, explicitly citing the potential that the act's codified objective could be frustrated. When considering the viewpoints articulated throughout the jurisprudence on this issue, White's argument is unique in the sense that it calls for even further narrowing of wetland coverage than that advocated by the *Rapanos* plurality and *Sackett* majority. If the separate opinions in *Sackett* controlled the law on this issue, White's properties would unequivocally be considered regulable under the CWA act because prohibited actions on these properties have the potential to affect the chemical, physical, and biological integrity of jurisdictional waters.

The only other interpretation of the adjacent wetlands issue in modern jurisprudence that calls for a construction narrower than the *Sackett* majority and the *Rapanos* plurality is Justice Thomas's concurring opinion in *Sackett*. Justice Thomas argues that the CWA's authority to regulate wetlands extends only as far as Congress's traditional jurisdictional authority to regulate navigable waters prior to New Deal-era Commerce Clause precedent, governed by the Court's test in *The Daniel Ball*.[87] White's argument for further narrowing the CWA's wetland jurisdiction is in no way supported by references to traditional commerce clause authority and instead seems to be rooted solely in a misinterpretation of *Sackett*. Although White does not argue according to

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https://files.nc.gov/ncdeq/Water%20Quality/Planning/BPU/BPU/Pasquotank/Pasquotank%20Plans/2007%20Plan/Chapter%2014.pdf; National Oceanic and Atmospheric Administration, *Shortnose Sturgeon*, https://www.fisheries.noaa.gov/species/shortnose-sturgeon (last updated Nov. 19, 2024).

86. Sackett v. Environmental Protection Agency, 598 U.S. 651, 712 (2023) (Kagan, J., concurring); *id,* at 726-27 (Kavanaugh, J., concurring).

87. *Id.* at 707 (Thomas, J., concurring).

this reasoning, a case is pending in the United States District Court for the Southern District of Texas that advances an argument very similar to Justice Thomas's regarding Congress's Commerce Clause authority over navigable waters.[88]

V. CONCLUSION

In the noted case, the United States District Court for the Eastern District of North Carolina properly determined that the EPA's post-*Sackett* rule, establishing CWA jurisdiction over wetlands with a continuous surface connection to WOTUS, faithfully conforms with the Supreme Court's opinion in *Sackett*. Throughout the controlling jurisprudence on the issue, the Supreme Court has never required both a continuous surface connection and a separate finding of "indistinguishability." A continuous surface connection is the proper driving factor in determining whether a wetland is indistinguishable from WOTUS. Further, had the court decided to further narrow the CWA's jurisdiction over wetlands, it would have placed serious frustrations on the act's codified objective. While the court in the noted case ultimately determined the EPA rule faithfully conformed with *Sackett*, the arguments by White in this case suggest there is still ambiguity as to the outer bounds of the CWA's jurisdiction. With numerous new cases and appeals pending on this exact issue,[89] the nation's appeals courts will almost certainly be faced with the nagging question of wetland jurisdiction once again.

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88. States' combined reply in support of their motion for summary judgment and response to the agencies' and intervenor's cross-motions for summary judgment at 20-21, Texas v. EPA, No. 3:23-cv-00017 (filed in S.D. Tex. Jan. 18, 2023).

89. *Id.* at 14; Plaintiff States' Memorandum in Support of Motion for Summary Judgment at 8, West Virginia v. EPA, No. 3:23-cv-00032 (filed in D.N.D. Feb. 16, 2023).

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