

**ESSAYS FROM *SACKETT V. EPA*—ONE YEAR OUT:
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Sackett and the Five Stages of Grief

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In 1969, Dr. Elisabeth Kübler-Ross published her seminal work on the five stages of death and dying.¹ She examined the psychological reactions of terminally ill patients: denial, anger, bargaining, depression, and acceptance. Kübler-Ross's model, which has been adapted to other settings² and is ensconced in our cultural milieu,³ provides a useful framework with which to consider *Sackett v. Environmental Protection Agency*⁴ and the contributions to this special issue of the *Tulane Environmental Law Journal*.

Kübler-Ross did not intend for the five stages to be viewed as iterative, so let me start with anger, which was the environmental community's immediate response to the decision.⁵ At the heart of the Clean Water Act is the statutory term "waters of the United States,"⁶ often referred to as "WOTUS." If a wetland or other water is a WOTUS, then it is protected by the Clean Water Act (or at least a federal permit is

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1. ELISABETH KÜBLER-ROSS, ON DEATH AND DYING (1969).
2. Patrick Tyrrell et al., *Kubler-Ross Stages of Dying and Subsequent Models of Grief* (last updated Feb. 26, 2023), <https://www.ncbi.nlm.nih.gov/books/NBK507885/>.
3. *All That Jazz* (Twentieth Century Fox 1979) (dir. by Bob Fosse).
4. 598 U.S. 651 (2023).
5. *Supreme Court Catastrophically Undermines Clean Water Protections*, EARTHJUSTICE (May 25, 2023), <https://earthjustice.org/brief/2023/supreme-court-sackett-clean-water-act>.
6. 33 U.S.C. § 1362(7).

required before pollutants may be discharged to it).⁷ If a body of water is not a WOTUS, then the Clean Water Act does not apply. In *Sackett*, the Court definitively declared that WOTUS are “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.’”⁸ Wetlands qualify as WOTUS only if they have a continuous surface connection to a body of water that qualifies as a WOTUS in its own right, and the wetland must be “indistinguishable” from that water.⁹ Brenda Mallory, the then-Chair of the White House Council on Environmental Quality, characterized *Sackett* as “one of the largest judicial rollbacks of environmental protections in U.S. history.”¹⁰

Adam Gold’s article discusses how *Sackett* likely affects Clean Water Act jurisdiction,¹¹ confirming why environmentalists (and the general public) should be angered. He discusses his recent analysis published in *Science* that examines what percentage of wetlands are covered by the Clean Water Act post-*Sackett*.¹² He observes that under the most extreme interpretation of “indistinguishable,” which would require permanent surface water inundation between the wetland and the WOTUS, “nearly all non-tidal wetlands would be non-jurisdictional.”¹³ Taking the Supreme Court at its word, *Sackett* is a near-extinction event for Clean Water Act protection of freshwater wetlands.¹⁴

Damien Schiff (who successfully represented the Sacketts not once, but twice, before the Supreme Court¹⁵) and Charles Yates recount in their article the history of WOTUS litigation, which involved section 404

7. If the discharge is from a point source. Nonpoint source pollution is left to regulation by the states, which have not done an effective job with that responsibility. ROYAL C. GARDNER, WATERS OF THE UNITED STATES: POTUS, SCOTUS, WOTUS, AND THE POLITICS OF A NATURAL RESOURCE, (2024), 155-57 (hereinafter “WATERS OF THE UNITED STATES”).

8. *Sackett*, 598 U.S. at 671 (cleaned up).

9. *Id.* at 678 (holding “that the CWA extends to only those wetlands that are ‘as a practical matter indistinguishable from waters of the United States’”).

10. Press Release, CEQ Chair Brenda Mallory Outlines Biden-Harris Administration’s Vision for Clean Water Post-*Sackett v. EPA* (Nov. 15, 2023). I tend to agree. See Royal C. Gardner, *The US Supreme Court Has Gutted Federal Protection for Wetlands—Now What?*, 681 NATURE 215 (2023).

11. Adam C. Gold, *Putting WOTUS on the Map: Estimating the Implications of Sackett v. EPA on Wetland Protections*, 38 TUL. ENV’T L.J. 269-278 (2025).

12. *Id.*

13. *Id.*

14. GARDNER, WATERS OF THE UNITED STATES, *supra* note 7, at 212-16.

15. See *Sackett v. EPA*, 566 U.S. 120 (2012). For a discussion of *Sackett I*, see GARDNER, *supra* note 7, 194-95.

cases.¹⁶ The section 404 program, with permits granted by the U.S. Army Corps of Engineers for the discharge of dredged and fill material, has long been a flashpoint in debates over federalism and private property rights.¹⁷ But WOTUS is the jurisdictional hook for all of the Clean Water Act. Thus, if a wetland or other body of water is not a WOTUS, not only is section 404 inapplicable, but requirements for section 402 permits, state water quality certifications, and total maximum daily loads no longer apply either.¹⁸

Schiff and Yates suggest that the EPA and the Corps seem to be stuck in the denial stage of processing the decision. In examining post-*Sackett* cases, in both the pre-enforcement and enforcement context, they state that the agencies' litigation tactics remain unchanged, "vigorously" asserting "a very broad view of their authority."¹⁹ The agencies' rulemaking response to *Sackett*, known as the Conforming Rule, omitted any discussion of the word "indistinguishable" in the preamble and the rule itself.²⁰ Perhaps the agencies were hoping that the reference was a mere rhetorical flourish, rather than part of the holding.²¹

The agencies appear unwilling to acquiesce to the full implications of *Sackett*. For example, a recent EPA memorandum (under the Biden administration) asserted that a pipe could establish a continuous surface connection.²² Such a position is difficult to square with *Sackett* and is tantamount to what Kübler-Ross called "magical thinking" during the

16. Damien Schiff and Charles Yates, *Life After Sackett v. EPA—Assessing the Decision's Implementation in the Lower Courts, and Predicting Agencies' Next Steps*, 38 TUL. ENV'T L.J. 297-308 (2025).

17. See ROYAL C. GARDNER, *LAWYERS, SWAMPS, AND MONEY: U.S. WETLAND LAW, POLICY, AND POLITICS* (2011), 35-56 & 177-90.

18. The decision also renders state assumption of the section 404 program largely nugatory, at least for wetlands—what is left to assume? Mitigation bankers may be collateral damage as well, depending on the state. Cf. GARDNER, *WATERS OF THE UNITED STATES*, *supra* note 7, at 165-67 (discussing the impact of the Trump administration's Navigable Waters Protection Rule on the mitigation banking industry).

19. Schiff and Yates, *supra* note 16, at 297. See also Gold, *supra* note 11, at 269 (discussing approved jurisdictional determination decisions post-*Sackett*).

20. Department of the Army & Environmental Protection Agency, Final Rule, Revised Definition of "Waters of the United States"; conforming, 88 Fed. Reg. 61,964 (Sept. 8, 2023).

21. It is part of the holding, however. Indeed, the Court summed up its holding twice, and both times included the word "indistinguishable." *Sackett*, 598 U.S. at 678, 684. The opinion's penultimate sentence even states: "The wetlands on the Sacketts' property are distinguishable from any possibly covered waters." *Id.* at 684.

22. Environmental Protection Agency and Department of the Army, Memorandum on NAP-2023-01223 (June 25, 2024), https://www.epa.gov/system/files/documents/2024-07/joint_memo_for_nap-2023-01223_508c_0.pdf.

bargaining stage.²³ No doubt the Trump administration will reverse the agencies' position on this point.

Regina Buono and Shannon Roesler place *Sackett* within trends of the broader legal ecosystem that include *Loper Bright Enterprises v. Raimondo*,²⁴ which aim “to limit the regulatory authority of expert federal agencies and science-based policy while expanding the governance authority of unelected judges.”²⁵ They argue that the trend threatens the structural flexibility and attention on ecological resilience that enabled some degree of adaptive governance in the United States over the last eighty years and that has facilitated adaptation measures by society in the face of a shifting environment. But should Justice Thomas's view of the Commerce Clause in his concurring opinion in *Sackett* ever garner a majority,²⁶ it's lights out for federal environmental laws and any protection they ever afforded the country's natural resources. Now that's depressing.

Which brings us, finally, to acceptance. The *Sackett* definition of WOTUS may ignore precedent and run counter to science, but it is what the Supreme Court has decreed. Although Congress could override this judicial ukase, the likelihood of that in the current political climate is 0 Kelvin.²⁷ The bottom line is that the responsibility for protecting freshwater wetlands and (at least) ephemeral streams has now shifted to the states and local governments. In her article, Therese Wilkerson provides critical information on the status of state wetland programs.²⁸ Pre-*Sackett*, about half the states lacked a wetland protection program independent from the Clean Water Act.²⁹ Post-*Sackett*, some states, such as Colorado, have sought to fill the gap.³⁰ Others, such as Indiana and North Carolina, have retreated.³¹ The federal floor of protection thus becomes a ceiling. Yet, as Steph Tai points out in their piece, corporations and nongovernmental organizations can play a role to encourage wetland

23. Tyrrell, *supra* note 2.

24. 603 U.S. 369 (2024).

25. Regina M. Buono and Shannon Roesler, *Sackett and Beyond: Reading Recent Supreme Court Decisions Through the Lens of Adaptive Governance*, 38 TUL. ENV'T L.J. PAGE 279-296 (2025).

26. *Sackett*, 598 U.S. at 708-10 (Thomas, J., concurring).

27. I.e., absolute zero.

28. Terese Wilkerson, *As the Silt Settles: State Wetlands Programs After Sackett*, 38 TUL. ENV'T L.J. 315-326 (2025).

29. Jim McElfish, *State Protection of Nonfederal Waters: Turbidity Continues*, 52 ENV'T. L. REP. 10,679, 10,688-90 (2022).

30. Wilkerson, *supra* note 28.

31. *Id.*

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protection.³² And, as Gold emphasizes, applied science must play a role in fostering greater “public awareness of the substantial benefits of wetlands—and the risks they now face post-*Sackett*.”³³ Although skirmishes over WOTUS will continue on the margins, the real battles over which waters—including wetlands—should be afforded protection have shifted elsewhere, to individual states, local governments, and nongovernmental actors. That is where focus and efforts should be concentrated.

When decrying *Sackett* as one of the most damaging environmental judicial decisions in history, Brenda Mallory stated that we must “be honest, clear, vocal, and visual about the impact of the Supreme Court’s ruling.”³⁴ This special issue provides just such an assessment.

32. Steph Tai, *Filling the Sackett Gap with Private Governance*, 38 TUL. ENV’T L.J. 309-314 (2025).

33. Gold, *supra* note 11, at 269.

34. Press Release, *supra* note 10.