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Critical Legal Issues: **WORKING PAPER SERIES**

The United States Government's Ongoing Defiance of *EPA v. Sackett-II*

By

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Washington Legal Foundation
Critical Legal Issues WORKING PAPER Series

Number 230
May 2024

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The United States Government's Ongoing Defiance of *EPA v. Sackett-II*

INTRODUCTION

The U.S. Clean Water Act's ("CWA") explicit objective is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters" by *inter alia* "eliminat[ing]…the discharge of pollutants into the navigable waters." And the CWA's explicit policy in achieving that goal is to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, and to plan the development and use […] of land and water resources." *See* 33 U.S.C. §§ 1251(a)(1) and 1251(b).

In *Sackett v. Environmental Protection Agency (Sackett-II)*[1], 598 U.S. ___, 143 S. Ct. 1322 (2023), the U.S. Supreme Court opinion authored by Justice Alito determined that the CWA's "geographical reach" has "outer boundaries" subject to Congress's Commerce Clause navigation power limitation. Consequently, the federal government lacks CWA § 404 jurisdiction over intrastate waters and adjacent wetlands having a continuous surface connection with them merely because activities engaged in within such waters may affect interstate commerce. *Sackett-II*, 143 S. Ct. at 1329-30; 1333, n.8; 1334, n.10 (majority op). In *Sackett-II*, the Court rejected as invalid, on both statutory and constitutional grounds, the Seattle, Washington-based Region 10 Office of the Environmental Protection Agency's application of the 'significant nexus' test to determine that Mr. and Mrs. Sackett's Priest, Idaho property contained wetlands constituting federal jurisdictional wetlands subject to the permitting requirements of CWA § 404 (33 U.S.C. § 1344).

This *Working Paper* extensively documents how, despite the Court's May 2023 *Sackett-II* decision, the U.S. Department of Justice (through its Environment and Natural Resources Division ("ENRD")), the U.S. Army Corps of Engineers ("USACE"), the EPA, and other agencies with environmental functions continue to quietly rely on a notion of "plenary" power under the Commerce Clause to justify ongoing jurisdiction over intrastate lakes, rivers, and streams as "waters of the United States" ("WOTUS").

Section 1 describes the *Sackett-II* majority and concurring opinions. It argues that Justice Thomas' concurrence, which accepted the majority opinion in full while also supplying critical historical color as well as key limiting principles, should be read as a binding part of the majority opinion. Section 2 describes instances of federal government non-compliance with *Sackett-II*. It opens with a case study of USACE

[1] In *Sackett v. EPA (Sackett-I)*, 566 U.S. 120 (2012), the Sacketts challenged via the Administrative Procedure Act (APA) an EPA compliance order issued under CWA § 309. The Supreme Court held that the EPA compliance order qualified as a "final agency action" under the Administrative Procedure Act.

actions pre- and post-*Sackett-II* related to wetlands dispute with a landowner in Utah. Section 2 next evaluates several federal rules and related documents, in addition to specific agency assertions of WOTUS jurisdiction over entirely intrastate water bodies, that are no longer valid and yet remain in force and publicly available. Finally, Section 2 explains how some in the federal bureaucracy continue to advance "plenary" power over certain water under a sweeping interpretation of the Commerce Clause's language related to commerce with "the Indian tribes." The *Working Paper* concludes with three suggested ways to address federal agencies' ongoing defiance of the Supreme Court.

I. DISCUSSION OF DECISION

A. The *Sackett-II* Majority Opinion Limited the CWA's Geographical Reach to Congress's Commerce Clause Navigation Power

The Court held that "the *Rapanos* plurality was correct: the CWA's use of 'waters' [in § 1362(7) – i.e., in the term 'waters of the United States' ("WOTUS")] encompasses 'only those relatively permanent, standing, or continuously flowing bodies of water 'forming geographic[al] features' that are described in ordinary parlance as 'streams, oceans, rivers, and lakes.'" 143 S. Ct. at 1336 (quoting *Rapanos*, 547 U.S. at 739).

According to the Court, "[t]his reading []helps to align the meaning of [WOTUS] with the term it is defining: 'navigable waters,'" 143 S. Ct. at 1337, and "the use of 'navigable' signals that the definition principally refers to bodies of navigable water like rivers, lakes and oceans." *Id.* (citing *Rapanos*, 547 U.S. at 734). This means that the *Rapanos* plurality was also correct in concluding that, "[t]he phrase does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall." *Id.* (citing *Rapanos*, 547 U.S. at 739).

The *Sackett-II* majority, in addition, held that "because the adjacent wetlands in §1344(g)(1) are 'includ[ed] within [WOTUS], these wetlands must qualify as [WOTUS] in their own right. In other words, they must be indistinguishably part of a body of water that itself constitutes 'waters' under the CWA." 143 S. Ct. at 1339 (citing *Id.* at 1336). "Wetlands that are separate from traditional navigable waters **cannot** be considered part of those waters, even if they are located nearby." 143 S. Ct. at 1340 (emphasis added). "§1344(g)(1)…reflects Congress's assumption that certain 'adjacent' wetlands are *part of* [WOTUS].'" *Id.* (emphasis in original). The Court's majority, furthermore, held that "the CWA extends only to those wetlands that are 'as a practical matter indistinguishable from [WOTUS]' such that it is 'difficult to determine where the 'water' ends and the 'wetland' begins.''" *Id.*

Furthermore, the *Sackett-II* majority held that "the party asserting jurisdiction over adjacent wetlands" must "establish 'first, that the adjacent [body of water constitutes]…[WOTUS] (i.e., a relatively permanent body of water connected to

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traditional interstate navigable waters); and second, that the wetland has a continuous surface connection with that water." 143 S. Ct. at 1341 (emphasis added) (citations omitted). Significantly, the majority opinion's reference to "traditional interstate navigable waters," *id*., emphasized the need for the physical connection of wetlands to "**interstate** waters that were either **navigable in fact** and used in commerce or readily susceptible of being used in this way," as the sole basis for asserting CWA jurisdiction. (emphasis added). 143 S. Ct. at 1330. The *Sackett-II* majority then distinguished such waters from those of Idaho's "Priest Lake, an **intrastate** body of water that the EPA designated as traditionally navigable" which had no physical surface connection to the wetlands on the Sackett's property. 143 S. Ct. at 1332 (emphasis added).

The *Sackett-II* majority, moreover, emphasized how, in *Solid Waste Agcy. of No. Cook Cty. v. United States ("SWANCC")*, 531 U.S. 159, 168-72 (2001), the Court had rejected the USACE's "assert[ion of] jurisdiction over several isolated ponds located wholly within the State of Illinois" based on "ecological interests," and "instead held that the CWA does not 'exten[d] to ponds that are not adjacent to [i.e., do not have 'a continuous surface connection with'] open water.'" *Sackett-II*, 143 S. Ct. at 1333 (quoting *SWANCC*, 531 U.S. at 168); *see accord Rapanos*, 547 U.S. at 754 (plurality opinion noting same); *see also* 143 S. Ct. at 1338 (noting "*SWANCC* [] held that the Act does not cover isolated ponds"); and 143 S. Ct. at 1340 (citing *SWANCC* as "recognizing that [*United States v.*] *Riverside Bayview* [*Homes, Inc.*, 474 U.S. 121 (1985)] 'held that the Corps had…jurisdiction over wetlands that actually abutted on a navigable waterway'").

Significantly, the Court's majority held that because "the CWA never mentions the 'significant nexus' test, [] the EPA [and the USACE] ha[ve] no statutory basis to impose it." 143 S. Ct. at 1342 (citing *Rapanos*, 547 U.S. at 755-56). The majority reasoned that the Court had "repeatedly recognized that §1344(g)(1) "does not conclusively determine the construction to be placed on…the relevant definition of 'navigable waters.''" 143 S. Ct. at 1343 (quoting *SWANCC*, 531 U.S. at 171), (quoting *Riverside Bayview Homes*, 474 U.S. at 138, n.11), and (citing *Rapanos*, 547 U.S. at 747-48, n.12).

The Court effectively viewed the "significant nexus" test as illegitimately requiring an ecological-evaluation approach that the CWA neither addresses nor prescribes because of its objective of preserving the Constitution's structural protection of federalism. According to the majority, "the CWA does not define the EPA's jurisdiction based on ecological importance," but rather "anticipates a partnership between the States and the Federal Government'" pursuant to which "States can and will continue to exercise their primary authority to combat water pollution by regulating land and water use." 143 S. Ct. at 1344. The majority reasoned that the Court has "require[d] Congress to enact exceedingly clear language if it wishes to significantly alter the balance between federal and state power and the power of Government over private property." 143 S. Ct. at 1341 (quoting *United States Forest Svc. v. Cowpasture River Preserv. Assoc.*, 590 U.S. __ (2020), 140 S. Ct. 1837, 1849-50 (2020)). And the majority pointed to the "[r]egulation of land and

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water use [which] lies at the core of traditional state authority." *Id.* (citing *SWANCC*, 531 U.S. at 174). "Particularly, given the CWA's express policy to 'preserve the States' 'primary' authority over land and water use, §1251(b), this Court has required a clear statement from Congress when determining the scope of 'the waters of the United States'" *Id.*

Finally, and most importantly, the *Sackett-II* Court majority determined that "[t]he historical context demonstrates that it was the Corps' [USACE's] failure to regulate to the full extent of Congress' navigation power, **not** its commerce power generally, that led to the enactment of the CWA." 143 S. Ct. at 1333, n.8 (majority op.) (emphasis added). Despite this context, the majority noted that the EPA had "defined its jurisdiction broadly to include, for example, intrastate lakes used by interstate travelers," and that the USACE had eventually "promulgated…broader definitions [of WOTUS] designed to reach the outer limits of Congress's commerce power…These broad definitions encompassed '[a]ll waters' that 'could affect interstate or foreign commerce.'" 143 S. Ct. at 1332 (majority op.). To emphasize this critical finding, the majority pointed to "[f]urther scholarship not[ing] that the term 'commerce' as originally understood 'was bound tightly with the *Lex Mercatoria* and the sort of activities engaged in by merchants: buying and selling products made by others (and sometimes land), associated finance and financial instruments, navigation and other carriage, and intercourse across jurisdictional lines.'" *Id.* at 1334, n.10. "This 'did not include agriculture, manufacturing, mining…**Nor did it include activities that merely affected' commerce**…" *Id.* (emphasis added).

B. Justice Thomas' Concurrence Reaffirms the *Sackett-II* Majority's Limiting of the CWA's Geographical Reach to Congress's Commerce Clause Navigation Power

This *Working Paper* construes Justice Thomas' concurrence in *Sackett-II* as being part of the precedential majority opinion authored by Justice Alito, a perspective that is admittedly adopts the minority view in the "legal academy's" debate over the binding nature and usefulness of Supreme Court concurring opinions.[2]

[2] *See e.g.*, Meg Penrose, *Legal Clutter: How Concurring Opinions Create Unnecessary Confusion and Encourage Litigation*, 31 GEO. MASON L. REV. F. 65 (2023); Meg Penrose, *Overwriting and Under-Deciding: Addressing the Roberts Court's Shrinking Docket*, 72 SMU L. REV. F.8 (2019); Suzanna Sherry, *Our Kardashian Court (and How to Fix It)*, 106 IOWA L. REV. 181 (2020); Joan Steinman, *Signed Opinions, Concurrences, Dissents, and Vote Counts in the U.S. Supreme Court: Boon or Bane? (A Response to Professors Penrose and Sherry)*, 53 AKRON L. REV. 525 (2019); Thomas B. Bennett, Barry Friedman, Andrew D. Martin, Susan Navarro Smelcer, *Divide & Concur: Separate Opinions & Legal Change*, 103 CORNELL L. REV. 817 (2018); Ryan M. Moore, *I Concur! Do I Matter?: Developing a Framework for Determining the Precedential Influence of Concurring Opinions*, Note, 84 TEMPLE L. REV. 743 (Spr. 2012); Arlen Specter, *Introductory Remarks*, U.S. Supreme Court Confirmation Hearings of Judge Samuel Alito (Jan. 31, 2006); Orin S. Kerr, *How to Read a Judicial Opinion: A Guide for New Law Students*, George Wash. Univ. Law School (Aug. 2005); Richard B. Stephen, *The Function of Concurring and Dissenting Opinions in Courts of Last Resort*, 5 FLA. L. REV. 394 (1952); Legal Information Institute, *Concurring Opinion*.

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Justice Thomas, a member of the *Sackett-II* majority, authored a concurrence joined by Justice Gorsuch. 143 S. Ct. at 1344-59 (Thomas, J. concur.). Justice Thomas emphasized that he "**join[ed] the Court's opinion in full**." *Id.* at 1344 (emphasis added). Since Justices Thomas and Gorsuch were "linchpin justices" who provided the fourth and fifth votes "needed for the majority," the "opinion is *not* a majority except to the extent that it accords with his[/their] views. What he[/they] writes[] is not a 'gloss,' but the least common denominator." *See McKoy v. North Carolina*, 494 U.S. 433, 463, n.3 (1990) (Scalia, J. dissent.).

"Justice [Thomas'] concurring opinion was not the opinion of a justice who refused to join the majority. He joined the majority by its terms, rejecting none of Justice [Alito's] reasoning on behalf of the majority."[3] *In re Grand Jury Subpoena, Judith Miller*, 438 F.3d 1141, 1148 (D.C. Cir. 2005). "Of course, that linchpin justice's opinion 'cannot add to what the majority opinion holds' by 'binding the other four [j]ustices to what they have not said' because his views would not be the narrowest grounds." *B.H. v. Easton Area Sch. Dist.*, 725 F.3d 292, 310 (3d Cir. 2013) (quoting *McKoy*, 494 U.S. at 463, n.3 (Scalia, J. dissent.). "But that justice's separate opinion 'can assuredly narrow what the majority opinion holds, by explaining the more limited interpretation adopted by that necessary member of the majority." *Id.*, 725 F.3d at 310-311 (quoting *McKoy*, 494 U.S. at 463, n.3 (Scalia, J. dissent.).

Justice Thomas, in *Sackett-II*, "wrote separately 'to emphasize' what seemed to him 'to be the limited nature of the Court's holding.'" *In re Grand Jury Subpoena*, 438 F.3d at 1149. And "[i]t is also significant that the [Alito majority] opinion does not indicate any disagreement with Justice [Thomas'] understanding." *Gautreaux v. Chicago Housing Authority*, 503 F.2d 903, 935 (7th Cir. 1974). His concurrence pointedly emphasized how the majority opinion had interpreted the CWA's grant of jurisdiction to the federal agencies based narrowly on "Congress' [Commerce Clause] **navigation power**, not its commerce power generally…'[T]he CWA's legislative history is better interpreted 'as the Supreme Court in *SWANCC* read it, to mean simply that Congress intended to override previous, unduly narrow agency interpretations to assert its broadest constitutional authority over the *traditional navigable waters*.''" (italics emphasis in original; boldfaced emphasis added). *Sackett*, 143 S. Ct. at 1333, n. 8. (majority op., citations omitted).

In other words, Justice Thomas "join[ed] the Court's opinion in full" conditioned on the majority's limited interpretation of the CWA as "confin[ing] the Federal Government's jurisdiction to "navigable waters," defined as 'the waters of the United States.'" *Sackett-II*, 143 S. Ct. at 1344 (Thomas, J. concur.). *See Easton Area Sch. Dist.*, 725 F.3d at 312. Consequently, his concurrence emphasized "the extent to

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[3] Specifically, Justice Thomas' concurrence reaffirmed two of the majority opinion's holdings. "[T]he Court correctly holds that the term 'waters' reaches "only those relatively permanent, standing or continuously flowing bodies of water "forming geographic[al] features" that are described in ordinary parlance as 'streams, oceans, rivers, and lakes.''" *Sackett-II*, 143 S. Ct. at 1344 (citing *Ante* at 1336). "[I]t also correctly holds that for a wetland to fall within this definition, it must share a "a continuous surface connection to bodies that are 'waters of the United States' in their own right" such that "there is no clear demarcation between 'waters' and wetlands.''" *Id.* (citing *Ante* at 1340).

which the CWA's other jurisdictional terms – 'navigable' and 'of the United States'" "limit the reach of the statute" consistent with the Commerce Clause **navigation power**, *Sackett-II*, 143 S. Ct. at 1344 (Thomas, J. concur.), and **traditional state authority over land and water use**. *Id*. at 1345.

The Thomas concurrence focused on the portions of the Alito opinion finding that federal CWA jurisdiction over waters and wetlands had historically[4] been limited "to ensuring that" "traditional interstate navigable waters" "that were either navigable in fact and used in commerce or readily susceptible of being used in this way" (and indistinguishable wetlands "adjacent" thereto) "remained free of impediments." 143 S. Ct. at 1330 (majority op.) (citing Rivers and Harbors Act of 1899, 30 Stat. 1151), (citing *United States v. Appalachian Elec. Power Co*., 311 U.S. 377, 406-07 (1940)), and (citing *The Daniel Ball*, 77 U.S. 557 (1871)). *See also id.* at 1333 n.9, 1334; 1337 (citing *SWANCC*, 531 U.S. at 172), (citing *Appalachian Electric*, 311 U.S. at 406-07) and (citing *The Daniel Ball,* 77 U.S. at 563). In fact, his concurrence reaffirmed that "[t]he Court's observation that 'traditional navigable waters'…remained free of impediments,' *ante* at 1330, thus does no more than reflect the original understanding of the federal authority over navigable waters." 143 S. Ct. at 1349 (Thomas, J. concur.) (quoting 143 S. Ct. at 1330 (majority op.)).

The concurrence also stressed, "[t]hat traditional authority was limited in two ways. *First*, the water had to be capable of being used as a highway for interstate or foreign commerce. *Second*, Congress could regulate such waters only for purposes of their navigability – by, for example, regulating obstructions hindering navigable capacity." 143 S. Ct. at 1345 (Thomas, J. concur.). "From the beginning, it was understood that '[t]he power to regulate commerce, includes the power to regulate navigation,' but only 'as connected with the commerce with foreign nations, and among the states.'" *Id*. at 1345 (Thomas, J. concur.) (quoting *United States v. Coombs*, 37 U.S. 72, 78 (1838)). Thus, by emphasizing that "[t]he Commerce Clause [] vests Congress with a limited authority over what we now call the 'channels of interstate commerce," the Thomas concurrence reaffirmed that federal agency authority to assert CWA § 404 jurisdiction over WOTUS was limited by the authority that Congress, itself, possessed under the Commerce Clause over "channels of interstate commerce" (i.e., only by the first of three broad categories of activity the Supreme Court had previously identified as being subject to regulation under Congress's "commerce power"). *See United States v. Lopez*, 514 U.S. 549, 558-559 (1995);[5] *see also* 514 U.S. at 556 (holding "[t]he Constitution…withholds from

[4] *See* 143 S. Ct. at 1330 ("For most of this Nation's history, the regulation of water pollution was left almost entirely to the States and their subdivisions"); *id.* at 1332 ("In order to resolve the CWA's applicability to wetlands, we begin by reviewing this history […] of the meaning of 'the waters of the United States'"); *id.* at 1336 ("With this history in mind, we now consider the extent of the CWA's geographical reach."); *id.* at 1337 ("Statutory history points in the same direction. The CWA's predecessor statute covered 'interstate or navigable waters' and defined 'interstate waters'…").

[5] In addition to being authorized to regulate "channels of interstate commerce," the Court, in *Lopez*, held that "Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce," and "to regulate those activities that substantially affect interstate commerce." *Id.*

Congress **a plenary police power**") (emphasis added).

The Thomas concurrence, consistent with the majority opinion, also specifically identified land-based pollution as "an[] activity that 'interferes with, obstructs, or prevents such commerce and navigation, though done on land'" which is "punish[able] by Congress.'" 143 S. Ct. at 1346 (Thomas, J. concur.)) (quoting *Coombs*, 37 U.S. at 78). *See* 143 S. Ct. at 1338, n.14 (majority op.) (citing *New Jersey v. New York*, 290 U.S. 237, 240 (1933), "enjoining employees of New York City from dumping garbage 'into the ocean, or [WOTUS] off the coast of New Jersey'"). *See also id.* at 1346 (Thomas, J. concur.) (reaffirming the majority's observation on p. 1330, *supra*, that "[t]he Rivers and Harbor Acts…illustrate the limits of the channels-of-commerce authority" by prohibiting the unauthorized "'creation of any obstruction'" or "deposit[ing of any] matter into 'any harbor or river of the United States."); *id.* at 1346 (quoting *Gibbons, v. Ogden*, 22 U.S. 1, 230 (1824)) (reaffirming, consistent with this observation, that "activities that merely 'affect' water-based commerce, such as those regulated by '[i]nspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State,' are **not** within Congress' channels-of-commerce authority.") (emphasis added).

The Thomas concurrence reaffirmed the portions of the majority opinion in which "the Court correctly states,[]'land and water use lies at the core of traditional state authority,'" *id.* at 1345 (quoting 143 S. Ct. at 1329-30, 1341) (majority op.), and that because "[r]egulation of land and water use lies at the core of traditional state authority," "given the CWA's express policy to 'preserve' the States' 'primary' authority over land and water use [under] §1251(b), [the] Court has required a clear statement from Congress when determining the scope of [WOTUS]." 143 S. Ct. at 1341-42 (majority op.) (citing and quoting *SWANCC*, 531 U.S. at 174). The Thomas concurrence supported its reaffirmation of these specific majority opinion findings by referring to how "States enjoy primary sovereignty over their waters, including navigable waters […'and the shores of…and the soils under them'] – stemming from their status as independent sovereigns following Independence, [] or their later admission to the Union on an equal footing with the original States." 143 S. Ct. at 1345 (Thomas, J. concur.) (quoting *Martin v. Lessee of Waddell*, 41 U.S. 367, 410 (1842) and (quoting *Lessee of Pollard v. Hagan*, 44 U.S. 212, 230 (1845)). It also emphasized that, although "[t]he Commerce Clause [] vests Congress with a limited authority over what we now call the 'channels of interstate commerce,'…[t]his federal authority, however, does **not** displace States' traditional sovereignty over their waters." (emphasis added). 143 S. Ct. at 1346 (Thomas, J. concur.). To this end, it also emphasized that "'technical title to the beds of the navigable rivers of the United States is either in the States in which the rivers are situated, or in the owners of the land bordering upon such rivers' as determined by 'local law.'" *Id.* (quoting *United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53, 60 (1913)).

In sum, the *Sackett-II* Court held that the federal government's "channels-of-commerce authority" is not triggered unless the activities in which a State or private landowner engages create an unauthorized obstruction in or release of "refuse matter" into "traditional interstate navigable waters" qualifying as WOTUS under

CWA § 404 that "could impede [the] navigation or navigable capacity" of said waters. 143 S. Ct. at 1346-47 (Thomas, J. concur.). It also held that the *SWANCC* Court had not only "made clear that "Congress did not intend 'to exert anything more than its commerce power over navigation,'" but it also "reject[ed] the Government's argument that the CWA invokes 'Congress' power to regulate intrastate activities that 'substantially affect' interstate commerce.'" 143 S. Ct. at 1355 (Thomas J. concur.) (quoting *SWANCC*, 531 U.S. at 173). *See also id.* at 1356 noting same). *Accord* 143 S. Ct. at 1332; 1333, n.8; 1334, n.10 (majority op.).

II. FEDERAL GOVERNMENT'S NON-COMPLIANCE WITH *SACKETT-II* DECISION

A. Case Study: Post-*Sackett-II* WOTUS Determination Process in *Phillips v. United States Army Corps of Engineers et al.*

At around the same time EPA was subjecting the Sacketts' property to the significant nexus" test, Scott Phillips, faced the USACE's Sacramento, California District Office's application of the same test to his 9.3-acre development property located in Payson, Utah. In February 2021, the Sacramento District issued an 'affirmative' approved jurisdictional determination ("2021 AJD") that his property contained 2.3 acres of alleged jurisdictional wetlands having a "significant nexus" with Utah Lake, and that his disturbance of those wetlands without a permit violated CWA § 404.[6] The 2021 AJD reached this conclusion in the face of the following facts: 1) the wetlands in question are 'adjacent' to an agricultural diversion ditch carrying non-relatively permanent waters sometimes flowing through the manually operated discrete and confined ditches comprising part of the Salem Irrigation Canal of the federal Strawberry Irrigation Project; 2) the wetlands do not abut (have no continuous surface connection with) the relatively permanent waters of Beer Creek located approximately 1-2 river miles therefrom; and 3) the wetlands do not abut Utah Lake located approximately 10-15 river miles away.

The 2021 AJD had designated the intrastate Utah Lake as a "Traditional Navigable Water" ("TNW")) and as "Navigable-in-Fact",[7] based on the Sacramento District's August 24, 2007 "Traditional Navigable Water Determination for Utah Lake (SPK 2007–01601)"[8] and the District's supporting November 9, 2007 "Memorandum for Record, Subject: Traditional Navigable Waterways, Federally Navigable

[6] *See* Ex. A – Doc. 8-3 (*Ed. Note:* This exhibit and the other four referenced in this paper are available either by clicking on the hyperlinked document citation or navigating to https://www.wlf.org/wp-content/uploads/2024/04/Exhibits-Referenced-in-May-2024-Kogan-Working-Paper.pdf.)

[7] *See* Ex. A – Doc. 8-3, PageID.327, .331, .346, .350.

[8] *See* Ex. B – 2007 Utah Lake TNW.

Determination for Utah Lake (SPK-2007—01601)."[9] The District then used this 2007 TNW designation in tandem with the "significant nexus test" to divine CWA § 404 jurisdiction over the Phillips wetlands located many miles from the lake.[10]

Following the Supreme Court's May 2023 *Sackett-II* decision, the USACE Sacramento District on August 8, 2023 issued Mr. Phillips a new ('negative' no CWA § 404 jurisdiction) AJD ("2023 AJD"),[11] supported by a District "Memorandum for Record" ("MFR 2023").[12] The USACE referenced the 2007 Utah Lake navigable-water determination and the *Phillips* case MFR 2007 in the 2023 AJD even though those documents were of questionable legality in light of *Sackett-II*. The *Sackett-II* decision forced the Sacramento District's hand however, because it could not prove, as the decision requires, a continuous physical surface connection between the Phillips wetlands and Utah Lake or a tributary to Utah Lake.

The 2023 AJD and MFR 2023 correctly "conclude[d] that the 2.3-acre wetland previously documented in our February 2021 AJD is not a [WOTUS]."[13] "The 2.3-acre wetland on the Phillips Site is not a [WOTUS] under applicable law, regulation, and guidance. After the *Sackett* decision, the significant nexus test can no longer be used for identifying [WOTUS] under the CWA."[14] "[I]n light of the *Sackett* decision, the significant nexus test central to category 3 ['waters'…u]nder the 2008 Rapanos-Carabell guidance…is no longer a basis for identifying [WOTUS] under the CWA. Therefore, category 3 no longer represents a valid basis for asserting jurisdiction after *Sackett*."[15] These 2023 AJD and MFR 2023 findings are consistent with the *Sackett-II* decision's 'significant nexus' test holding.

The 2023 AJD and MFR 2023 are also consistent with the *Sackett-II* decision to the extent they conclude that "Bear Creek is a relatively permanent tributary," that "the 2.3-acre wetland would have to abut Bear Creek to be subject to CWA jurisdiction as an adjacent wetland," that "the 2.3-acre wetland was not found to abut Bear Creek," and "[t]hus, it is not jurisdictional under category 2 of the 2008 Rapanos-Carabell guidance."[16] Apparently, this conclusion relied on the 2021 AJD's

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[9] Ex. C – MFR 2007. *See* U.S. Army Corps of Engineers Sacramento District, *Memorandum for Record (SPK-2007-01601), Traditional Navigable Waterways, Federally Navigable Determination for Utah Lake* (Nov. 9, 2007).

[10] Ex. A - Doc. 8-3, PageID.332, .351.

[11] Ex. D – 2023 AJD.

[12] Ex. E – MFR 2023.

[13] Ex. D – 2023 AJD at 1; Ex. E – MFR 2023, Sec.1 at 1.

[14] Ex. E – MFR 2023, Sec. 10 at 5.

[15] Ex. E – MFR 2023, Sec.9.d. at 5.

[16] Ex. E – MFR 2023, Sec.9.c. at 5. *See* U.S. Environmental Protection Agency and U.S. Army Corps of Engineers, *Memorandum, Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in* Rapanos v. United States & Carabell v. United States (Dec. 2, 2008). The 2008 Rapanos-Carabell Guidance described three categories of "waters of the United States" over which federal

factual data (comprising part of the administrative and Court records) describing: (1) the 2.3-acre wetland as "[not] directly abutting the relevant reach" of Bear Creek[17] and as being separated from the start of the Relevant Reach [of Bear Creek]" by "approximately 1.70 miles of discrete and confined ditches and swales" "located in an area of heavy agricultural use" "crisscrossed by a network of agricultural and irrigation ditches;" and (2) the "General Flow Relationship of project waters "with Non-TNW" agricultural and irrigation ditches as an "Intermittent Flow."[18]

Even though the 2023 AJD, supported by the MFR 2023, reached the correct conclusion, the Sacramento District's troubling reliance on rationales and documents that utilize pre-*Sackett-II* WOTUS analysis render's the new AJD at best only technically compliant with *Sackett-II* and reflects that USACE will not easily let go of its authority. The 2023 AJD was based, in part, on the 2007 Utah Lake TNW and MFR 2007.[19] Under those documents, the intrastate Utah Lake is a traditionally navigable water, and thus USACE can declare CWA § 404 jurisdiction over any property containing wetlands located proximate to that lake.

The MFR 2023 also inexplicably relies on legal reasoning contained in portions of four other federal agency documents that is inconsistent with *Sackett-II*, especially with respect to "category 1" waters. The MFR 2023 identifies four primary-source documents the Sacramento District reviewed for its drafting of the Phillips 2023 AJD: (1) 1986 USACE regulations;[20] (2) 1993 USACE regulations;[21] (3) the 2008 Rapanos Memorandum/Guidance;[22] and (4) the USACE Memorandum for Record (Nov. 9, 2007) (SPK-2007-01601), entitled "Traditional Navigable Waterways, Federally Navigable Determination for Utah Lake,"[23] which supported the data set forth in the USACE Sacramento District's AJD Determination Form for Utah Lake's TNW designation.[24] However, none of these documents are consistent with the *Sackett-II* Court's holding.

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agencies could assert CWA § 404 jurisdiction. "[C]ategory 1" jurisdictional waters or "'(a)(1)' waters" were traditional navigable waters and their adjacent wetlands. *Id.* at 4-5. "For purposes of CWA jurisdiction and this guidance, waters will be considered [TNW]s if: [a] They are subject to Section 9 or 10 of the Rivers and Harbors Act, or [b] A federal court has determined that the water body is navigable-in-fact under federal law, or [c] They are waters currently being used for commercial navigation, including commercial water-borne recreation (e.g., boat rentals, guided fishing trips, water ski tournaments, etc.), or [d] They are susceptible to being used in the future for commercial navigation, including commercial water-borne recreation." *Id.* at 5, n.20.

[17] Ex. A - Doc. 8-3.PageID.336, .355.

[18] Ex. A - Doc. 8.3,PageID.335, .354.

[19] Ex. E – MFR 2023, Sec. 2.c at 1.

[20] *See* 51 Fed. Reg. 41206 (Nov. 13, 1986).

[21] *See* 58 Fed. Reg. 45008 (Aug. 15, 1993).

[22] *See* U.S. Environmental Protection Agency and U.S. Army Corps of Engineers Memorandum, *supra*, note 9.

[23] Ex. C – MFR 2007.

[24] Ex. B – 2007 Utah-Lake-TNW.

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MFR 2023 refers to Utah Lake as "[t]he nearest traditional navigable water to the review area."[25] It also states that "[t]he District determined Utah Lake to be a water of the U.S. pursuant to 33 C.F.R. § 328.3(a)(1) (i.e., a 'traditional navigable water') on 9 November 2007 (reference c.)." *Id.* MFR 2023 "reference c" is the MFR-2007-Utah-Lake-TNW.[26] MFR 2023 further states that, "Utah Lake was used in the past for commercial fishing and continues to be susceptible to that use."[27] "In *Utah Division of State Lands v. United States*, 482 U.S. 193, [198] (1987), the Court determined that 'Utah Lake is a navigable body of freshwater covering 150 square miles' for the purposes of determining ownership [of the lakebed] under the equal footing doctrine." *Id.*[28]

The web-accessible MFR-2007, authored by USACE Sacramento District's Regulatory Chief, Michael Jewell, found that "[t]he conclusion Utah Lake is jurisdictional is further supported by [the Tenth Circuit's decision in] *Utah Division of Parks and Recreation v. Marsh*, 740 F.2d 799 [, 803] (10th Cir. 1984)…[where] the court concluded 'that the discharge of dredged or fill material into Utah Lake…could well have a substantial economic effect on interstate commerce.'" MFR-2007-Utah-Lake-TNW further cited the Tenth Circuit's *Marsh* decision as having stated that the "'authority to regulate waters used in interstate commerce [is] consequently best understood when viewed in terms of more traditional Commerce Clause analysis than by reference to whether the stream in fact is capable of supporting navigation or may be characterized as 'navigable' water of the United States.'"[29]

This quoted language, however, was not part of the *Marsh* holding, but was instead an observation the Supreme Court had previously made in *Kaiser Aetna v. United States*, 444 U.S. 164 (1979) regarding the "wide spectrum of economic activities [that] 'affect' interstate commerce and [] are susceptible of congressional regulation under the Commerce Clause irrespective of whether navigation, or indeed, water, is involved." *Kaiser Aetna*, 444 U.S. at 174 (emphasis added). The Court, in *Kaiser Aetna*, in fact, distinguished between "Congress['s]…extensive Commerce Clause authority over this Nation's waters" and its Commerce Clause navigation power or navigation servitude (the latter of which was there in question), before holding that "the Government's attempt to create a public right of access to [an] improved [isolated intrastate] pond goes so far beyond ordinary regulation or improvement for navigation involved in typical riparian condemnation cases as to amount to a taking" "requiring just compensation" under the Constitution's Fifth Amendment. *Kaiser Aetna*, 444 U.S. at 165, 177-78.

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[25] Ex. E – MFR 2023, Sec. 6 at 3.

[26] Ex. E – MFR 2023, Sec. 2 at 1.

[27] Ex. E – MFR 2023, Sec. 6 at 3.

[28] *See accord*, (Ex. C - MFR-2007, at para. 10.a, p.2); (Ex. B – 2007 Utah-Lake-TNW), Sec.III.B.2.A.1(a), at 2) (citing Utah State Division of Lands).

[29] *See accord* Ex. B – Utah-Lake-TNW, Sec.III.B.2.A.1(b), at 2 (citing *Marsh*, 740 F.2d at 804).

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Furthermore, 2007–Utah-Lake–TNW found that "[t]he lake meets the definition of a 33 C.F.R. 328.3(c) water of the U.S.," which "include[s]: All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters: (i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or (ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or (iii) Which are used or could be used for industrial purpose by industries in interstate commerce."[30]

After *Sackett-II*, the main problem with the Sacramento District's MFR 2023 relying on the 2007-Utah-Lake-TNW and the MFR 2007 supporting it[31] is that they reflect the agencies' "pre-2015 regulatory regime" which is no longer good law. Such reliance reflects USACE's unwillingness to fully comply with the Court's *Sackett-II* decision. Furthermore, it indicates that the USACE is more likely to transcend the Commerce Clause navigation power limitation to exert CWA § 404 jurisdiction over activities engaged in on or proximate to lakes such as Utah Lake that merely affect interstate commerce.

Another important web-accessible USACE document that incorporates the now outdated legal reasoning set forth in the MFR 2007 is the 2007 USACE Jurisdictional Determination Form Guidebook Appendix D.[32] It specifically states that "(a)(1) waters" "which are the 'traditional navigable waters,' 'include all of the 'navigable waters of the United States' defined in 33 C.F.R. Part 329 and by numerous decisions of the federal courts, plus all other waters that are navigable-in-fact (e.g., the Great Salt Lake, UT and Lake Minnetonka, MN)." (JD Guidebook App. D at 1) (emphasis added). It also states that, "[i]f the federal courts have determined that a water body is navigable-in-fact under federal law for any purpose, that water body qualifies as a 'traditional navigable water' subject to CWA jurisdiction under 33 C.F.R. 328.3(a)(1) and 40 C.F.R. 230.3(s)(1)." *Id.* (emphasis added). And it further states that, "when determining whether a water body qualifies as a 'traditional navigable water' (i.e., an (a)(1) water), relevant considerations include whether a Corps District has determined that the water body is a navigable water of the United States pursuant to 33 C.F.R. 329.14, or the water body qualifies as a navigable water of the United States under any of the tests set forth in 33 C.F.R. 329, or a federal court has determined that the water body is navigable-in-fact under federal law for any purpose, or the water body is 'navigable-in-fact under the standards that have been used by the federal courts." (JD Guidebook App. D at 5).

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[30] *See* (Ex. B – Utah Lake TNW, Sec. IV.B at 8) (also citing *Utah Division of State Lands* and *Marsh*) (emphasis added).

[31] Ex. E – MFR 2023 at n.3.

[32] *See* U.S. Army Corps of Engineers, *Jurisdictional Determination Form Instructional Guidebook* (May 30, 2007); U.S. Army Corps of Engineers, *Jurisdictional Determination Form Instructional Guidebook, Appendix D, Legal Definition of "Traditional Navigable Waters"* at 3-4.

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At least one USACE administrative tribunal has adopted the 2007 JD Guidebook Appendix D's discussion of intrastate waters.[33] According to this 2008 administrative appeals decision, the 2007 JD Guidebook Appendix D interpreted the 2008 Rapanos Memorandum/Guidance, *supra*, as not requiring the agencies to follow *The Daniel Ball* navigable-in-fact waters standard for asserting CWA jurisdiction over "category 1" waters, as *Sackett-II* requires. "33 C.F.R. Part 329 did not adopt the referenced standard from *The Daniel Ball* [(i.e., "continued highway for commerce," *The Daniel Ball*, 77 U.S. at 564)] as a limitation on the scope of jurisdiction for Sections 9 and 10 of the Rivers and Harbors Act of 1899. Consequently, the position taken by Appendix D regarding Clean Water Act jurisdiction is that TNW's include some isolated lakes that do not constitute part of a continuous highway for the transportation by water of interstate water borne commerce." (emphasis added).[34]

Because the 2007-Utah-Lake-TNW and the web-accessible MFR 2007, 2007 JD Guidebook Appendix D, and 2008 Rapanos Memorandum/Guidance are no longer good law after *Sackett-II*, the Sacramento District should not have relied upon them (directly or indirectly) in the 2023 AJD and MFR 2023 it issued in the *Phillips* case. Indeed, such clear reliance indicates that USACE and EPA will likely continue to assert agency jurisdiction over intrastate lakes and streams as "category 1" 33 C.F.R. 328.3(a)(1) waters in defiance of the Court's *Sackett-II* decision. USACE and EPA, should instead expressly disavow these 2007 and 2008 agency documents and immediately remove them altogether from their websites.

B. Additional Federal Non-Compliance with *Sackett-II*'s Commerce-Clause Rationale

Other general and specific examples demonstrate USACE and EPA's post-*Sackett-II* assertion of broad CWA § 404 jurisdiction over purely intrastate lakes, rivers, and streams merely because their use **could substantially affect interstate commerce**. At oral argument in *Sackett-II*, the federal government argued that Congress could regulate dry land based on a significant effect on interstate commerce, as it has done under the Rivers and Harbors Act ("RHA") to prevent "place[ment of] refuse on the banks of tributaries to navigable waters because it could wash downstream into the navigable waters."[35]

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[33] *See* 2008 USACE Administrative Appeals Decision (Mar. 28, 2008) (Ex. F – 2008-USACE-AAD).

[34] Ex. F – 2008-USACE-AAD at 3.

[35] *Sackett v. EPA*, (Dkt. 21-454) (Ex. G – *Sackett-II* Oct. 3, 2022 Oral Arg. Tr: at 109:10-20; 118:8-24). *See also id.* (Ex. G – *Sackett-II* Oct. 3, 2022 Oral Arg. Tr: at 108:11-110:25) (Conceding Justice Alito's point that "the agencies have take[n] a very broad provision that can [] be read to give them almost **plenary** authority and make some pragmatic judgments about how far they want to go based on [...] pragmatism, administrability, [and] considerations of policy"). (emphasis added).

Federal agencies' assertion of "plenary" powers under the Commerce Clause was addressed by the Water Resources and Power Task Force of the Second Hoover Commission. The Commission

WOTUS regulations that EPA recently issued under 33 C.F.R. § 328.3 carry on the outdated positions advanced in the four documents discussed in the previous section as well as the MFR 2023 supporting the Phillips property 2023 AJD and the 2015 Obama Administration WOTUS regulations.[36] The same can be said for federal-agency interpretation of 33 C.F.R. § 329.

For example, EPA's final WOTUS regulations, "amend[ing] aspects of" the final WOTUS regulations it had previously issued on January 18, 2023 noted that the rule "needed to conform to the Supreme Court's interpretation of the Clean Water Act in" *Sackett-II*. *See* 88 Fed. Reg. 61964-65 (Sept. 8, 2023); 88 Fed. Reg. 3004 (Jan. 18, 2023). Not only did the revised WOTUS regulation fail to comply with Administrative Procedure Act notice-and-comment procedures, but it continues to include as "(a)(5) other waters" intrastate lakes, such as Utah Lake, within the CWA WOTUS jurisdictional definition if they qualify, themselves, as "traditional navigable waters" "for which the Federal interest is indisputable" (*see* 88 Fed. Reg. at 3005 and 3043), and those that are "[c]urrently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce…" *See* 88 Fed. Reg. at 61966, n.2; *Id.* At 61968-69 (including as WOTUS "intrastate lakes and ponds, streams or wetlands not identified in paragraphs (a)(1) through (4) [of 33 C.F.R. § 328.3]…that are relatively

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observed that the federal agencies, including the USACE, following World War II, had assumed "responsibilities and authority **beyond the intent of the law, and perhaps beyond its proper scope**. […] **It is the consensus of this task force that Federal water resource development policies promulgated and programs undertaken in the recent past** to 'provide for the common defense,' 'regulate commerce with foreign nations, and among the several States,' '**dispose of…property belonging to the United States**…' and 'promote the general welfare,' **have gone beyond the proper scope of Federal Government activities**…The fields and activities of conservation and development of water resources are not necessarily Federal responsibilities. To the extent they are essential provide for the national defense, to preserve the national domain or to regulate interstate and foreign commerce, the Federal responsibility is basic. Otherwise, **the interest of the Federal Government does not justify the preemption of the activities involved in the development of water resources and power**." *See* Commission on Organization of the Executive Branch of the Government, *Task Force Report on Water Resources and Power*, Vol. 1 (June 1955) at 36-51 (emphasis added).

[36] For example, the Technical Support Document for the 2015 Obama Administration WOTUS regulations ("Obama-WOTUS-TSD") cited *United States v. Holland*, 373 F. Supp. 665 (M.D. Fl. 1974) as primary support for finding the term WOTUS "recogniz[ed] the full regulatory mandate of the [CWA]" as including **indirect effects on interstate commerce**. *Holland* held that Congress, in the CWA, "intended to define away the old 'navigability' restriction"; "the former test of navigability was indeed defined away in the FWPCA." 373 F. Supp. at 671-72. *See also id.* at 673 ("Clearly, Congress has the power to eliminate the 'navigability' limitation from the reach of federal control under the Commerce Clause. The 'geographic' and 'transportation' conception of the Commerce Clause which may have placed the navigation restriction in the Rivers and Harbors Act of 1899 has long since been abandoned in defining federal power."). In addition, the Obama-WOTUS-TSD also relied on *Natural Resource Defense Council, Inc. v. Callaway*, 392 F. Supp. 685 (D.D.C. 1975), which held that "Congress, by defining the term 'navigable waters' in [CWA] § 502(7)…to mean 'waters of the United States,' asserted federal jurisdiction over the nation's waters **to the maximum extent permissible under the Commerce Clause of the Constitution**. Accordingly, […] the term is not limited to the traditional tests of navigability." 392 F. Supp. at 686. *See* U.S. Environmental Protection Agency and U.S. Army Corps of Engineers, *Technical Support Document for the Clean Water Rule: Definition of Waters of the United States* (May 27, 2015) at 20-26, 219 (emphasis added).

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permanent, standing or continuously flowing bodies of water with a continuous surface connection to the waters identified in paragraph (a)(1) or (a)(3) of this section" – i.e., with interstate waters or tributaries of interstate waters). *See also* 33 C.F.R. § 328.3(a)(5) and (a)(1).

The Technical Support Document ("Biden-WOTUS-TSD") accompanying the January 2023 final regulation deems as CWA § 404 jurisdictional waters "an intrastate lake with relatively permanent standing water that is not a traditional navigable water, is not a tributary, is not a jurisdictional impoundment, and is not an adjacent wetland," if it "ha[s] a continuous surface connection to a traditional navigable water." TSD at 202.[37] The clear implication of this statement is that an **intrastate** lake that **qualifies, itself,** as a "traditional navigable water" will be considered jurisdictional WOTUS under CWA § 404 even if it is **not** a tributary to a traditional **interstate** navigable water. Other extant USACE regulations support this conclusion.

Consistent with the Biden-WOTUS-TSD, current USACE regulations define the term "intrastate" waterway to include "[a] waterbody [that] may be entirely within a state, yet still [is] capable of carrying interstate commerce." 33 C.F.R. § 329.7. "This is especially clear when it physically connects with a generally acknowledged avenue of interstate commerce, **such as the ocean or one of the Great Lakes**, and is yet wholly within one state." *Id.* (emphasis added). According to this regulation, "[**n]or is it necessary that there be a physically navigable connection across a state boundary**. Where a waterbody extends through one or more states, but substantial portions, which are capable of bearing interstate commerce, are located in only one of the states, the entirety of the waterway up to the head (upper limit) of navigation is subject Federal jurisdiction." *Id.*

Current USACE regulations also appear to rely on the rationale that federal courts will defer to agency navigability determinations. For example, 33 C.F.R. § 329.14(a),(b), and § 329.14 (c)(6)-(7) provide that "determinations of navigability…of specific portions of waterbodies…made by federal agencies," specifically "by the division engineer," which reports findings including *inter alia* the waterbody's "[p]ast or present interstate commerce" and "[p]otential use for interstate commerce" are "accorded substantial weight by the courts."

Employing the procedure set forth in § 329.14, the USACE Sacramento District Engineer during the George W. Bush Administration determined that the intrastate Utah Lake did **not** qualify as "traditional navigable waters" under the RHA. Yet, the District Engineer determined that the intrastate Utah Lake, from which the intrastate Jordan River exits as "the lake's only outlet" flowing northward from Utah Lake to

[37] *See* U.S. Environmental Protection Agency and U.S. Department of the Army, Army Corps of Engineers, *Technical Support Document for the Final 'Revised Definition of 'Waters of the United States'* (Dec. 2022).

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the "intrastate" Great Salt Lake,[38] qualified as "traditional navigable waters" under the CWA. As noted above, the District reached this determination because of the Supreme Court's prior decision in *Utah Division of State Lands*, holding that Utah Lake was a navigable water only for purposes of the Equal Footing Doctrine—i.e., even though there was **no** determination that it was part of a navigable **interstate** or international **commercial highway**.[39] The Sacramento District arguably applied the broadest possible reading of the Commerce Clause, citing the Tenth Circuit's decision in *Marsh*, *supra*,—i.e., the discharge of dredged or fill material into Utah Lake could substantially affect interstate commerce (e.g., tourism). *Sackett-II* effectively overruled the 2007 Sacramento District Utah Lake navigability determination.

The USACE Sacramento District reached a similar determination for the navigability of the Great Salt Lake during the Biden and Obama Administrations. First, it found that the lower portion of the Bear River located in Utah continuously flowing southward into the Great Salt Lake[40] qualified as a "traditional **interstate** navigable water" (emphasis added) under the RHA, but **not** under the CWA.[41] Second, the District's Regulatory Chief, Michael Jewell, concluded that the Great Salt Lake is a traditional navigable water based on the Supreme Court's prior decision in *Utah v. United States*, 403 U.S. 9 (1971). In *Utah*, the Court held that although the Great Salt Lake "is **not** part of a navigable **interstate** or international **commercial highway**," it is a traditional navigable water for purposes of establishing that the State of Utah owned the beds and banks of the lake under the Equal Footing Doctrine.[42] The Court limited its navigability holding to the Equal Footing Doctrine because Congress had not then regulated the Great Salt Lake under either the RHA or the CWA, 403 U.S. at 10, 14. *See also Utah v. United States*, 420 U.S. 304 (1975); *Utah v. United States*, 427 U.S. 461 (1975) (affirming same). *See also Hardy Salt Co. v. So. Pacific Trans. Co.*, 501 F.2d 1156, (10th Cir. 1974) (holding that the Great Salt Lake was **not** a traditional navigable water for RHA purposes).[43]

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[38] *See* Benjamin W. Abbott et al., *Getting to Know the Utah Lake Ecosystem*, Brigham Young University (July 29, 2021) at 10.

[39] *See* U.S. Army Corps of Engineers Sacramento District, *Memorandum for Record (SPK-2007-01601), Traditional Navigable Waterways, Federally Navigable Determination for Utah Lake* (Nov. 9, 2007), *supra*.

[40] *See* Utah Department of Natural Resources, *Utah Division of Water Resources – Bear River* (discussing how the Bear River flows from Utah through Wyoming and Idaho back into Utah and then into the Great Salt Lake).

[41] *See* U.S. Army Corps of Engineers Sacramento District, *Navigable Waterways in the Sacramento District*; U.S. Army Corps of Engineers, Memorandum for the Record, Subject: Determination of Navigability, Lower Bear River in Utah (Oct. 1, 2021).

[42] *See* U.S. Department of the Army, U.S. Army Corps of Engineers Sacramento District, Regulatory Division Memorandum 2015-02: *Method for Identifying the Ordinary High Water Mark for the Great Salt Lake* (Sept. 28, 2015), at 2 (emphasis added).

[43] *Id.* at 3.

Third, although the Great Salt Lake was **not** jurisdictional for RHA purposes because it is **not** part of a navigable interstate commercial highway, the Jewell Memorandum nevertheless found it qualified as a jurisdictional traditional navigable water for CWA purposes. *Id.* at 2. "Although [Great Salt Lake] is not a navigable water under the RHA, it is a 'navigable water' for purposes of the Clean Water Act of 1972 (CWA) (33 U.S.C. § 1251, et seq.). The CWA defines 'navigable water' as 'the waters of the United States, including the territorial seas.' The CWA implementing regulations further define 'waters of the United States [...as] encompass[ing] those waters that are commonly referred to as 'traditional navigable waters.'" *Id.* The 2015 Jewell Memorandum further stated that, "[f]or purposes of the CWA, waters are considered 'traditional navigable waters' and therefore jurisdictional under 33 C.F.R. § 328.3(a)(1) and 40 C.F.R. § 230.3(s)(1), if they "hav[e] been determined by a Federal court to be navigable-in-fact under Federal law." *Id.* "T]he GSL meets the second criteria above, having been found navigable-in-fact under Federal law in *Utah v. United States*, 403 U.S. 9 (1971)...Thus, the GSL is a 'traditional navigable water' and is regulated by the Corps under Section 404 of the CWA." *Id.* at 2-3. The Jewell Memorandum seemingly stretched the Court's finding in *Utah* of the periodic "haul[ing of] cattle and sheep from the mainland to one of the islands or from one of the islands to the mainland," *Utah*, 403 at 11, as having had an indirect effect on interstate commerce, in order to conclude that the Great Salt Lake is jurisdictional for CWA 404 purposes. *Id.* at 3. That determination remains in force despite it being contrary to *Sackett-II*.

And, during 2016, the last year of the Obama Administration, the USACE Walla Walla District reached a similar positive navigability determination regarding the **intrastate** waters of Idaho's Salmon River, for purposes of RHA Section 10. Specifically, it determined that 259 miles of the 425-mile Salmon River[44] were "navigable-in-fact," "from its confluence with the Snake River upstream to Salmon, Idaho....The Salmon River and its tributaries are already subject to Section 404 of the Clean Water Act, requiring a U.S. Army Corps permit to conduct work or discharge material in the river."[45] This determination, made by former Northwest Division Commander Scott Spellmon (who is currently USACE's Commanding General), entirely ignored the U.S. Department of Interior Bureau of Land Management's recognition that the Salmon River "lies entirely within Idaho's borders."[46]

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[44] *See* U.S. Department of the Interior Bureau of Land Management, *Lower Salmon River*.

[45] *See* U.S. Army Corps of Engineers Walla Walla District, *Special Public Notice: Navigability Determination for Salmon River* (June 3, 2016); U.S. Army Corps of Engineers, News Release Archive, *16-036 Corps of Engineers Determines 259 Miles of Salmon River Navigable* (June 3, 2016); U.S. Army Corps of Engineers Walla Walla District, *Memorandum for Record, Subject: Navigability Determination on the Salmon River, Idaho* (June 2, 2016).

[46] *See* U.S. Department of the Interior Bureau of Land Management, *Lower Salmon River*, *supra*; U.S. Bureau of Land Management, *Lower Salmon River – 9 Points of Interest*; U.S. Department of the Interior Bureau of Land Management Cottonwood Field Office Idaho, *The Lower Salmon River Boating Guide: Vinegar Creek to Heller Bar*, at Summary.

This Walla Walla District determination was supported by a District Engineer-authored "Salmon River Report of Findings – 33 CFR Section 329.14," which stated that "[n]one of the tributaries to the main stem Salmon are being examined as traditional navigable waters."[47] The Report Findings, in turn, were supported by an inaccessible State of Idaho Historical Report finding that at least one person had hauled for a period of approximately 30 years freight and supplies "from Salmon, Idaho to mining camps along the Salmon River, and even down to Lewiston, Idaho on the Snake River." The Report Findings also speak generally, without providing support, about how "the introduction of jet boats has made travel up the Salmon River, even over the rapids, much more accessible."[48]

Additional sources of support for the Report Findings included "[a] simple internet search" showing "multiple white water rafting businesses that market worldwide to travelers and recreationalists for contracted boating and rafting services on the main stem of the Salmon River along this 259 mile reach…More robust commercial traffic has not developed in recent times due to the Wild and Scenic designation of the Middle Fork Salmon in 1968 and on the main stem Salmon in 1980."[49] Further sources included additional website searches showing "[c]ontinued development of commercial water-oriented recreational activities and transport of small amounts of supplies and products up and downstream," and that "[r]ecreational boating services are used by multiple interstate customers."[50] The Report Findings actually concluded, based on such web searches, that "from 2012-2014 an average of 165 clients per year took trips on the Salmon River, 97% of which traveled from outside of Idaho," and that, "of 79 total viewers that participated in Idaho whitewater rafting trips (2012-2014),…approximately 77% were from outside of Idaho".[51]

Furthermore, the Report Findings set forth other bases for asserting federal jurisdiction over the Salmon River. These include the Wild & Scenic Rivers Act and the Central Idaho Wilderness Act (*infra*), the U.S. Coast Guard's 1974 determination "that the main stem of the Salmon River was navigable water of the United States from the confluence with the Snake River up to Salmon City, Idaho,"[52] the ongoing consideration by the EPA and USACE that "[t]he Salmon River and its tributaries

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[47] U.S. Army Corps of Engineers Walla Walla District, *Memorandum for Record, Subject: Navigability Determination on the Salmon River, Idaho* (June 2, 2016), *supra*, Report of Findings at 1.

[48] *Id.*, Report Findings at 3-4.

[49] *Id.*, Report Findings at 4.

[50] *Id.*

[51] *Id.*, Report Findings at 4-5.

[52] *Id.*, Report Findings at 5. *See also* U.S. Coast Guard Pacific Area, Thirteenth District Seattle, WA, *Navigability Determinations for the Thirteenth District*, at 13 (emphasizing specifically that "**Navigability determinations made by the Coast Guard are for the purposes of exercise Coast Guard authority and jurisdiction only**. <u>They should not be construed as determinative…for jurisdiction by other federal agencies (such as the Army Corps of Engineers)</u>." (boldfaced emphasis in original; underlined emphasis added).

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are…subject to Sections 401, 402 and 404 of the Clean Water Act under the definition of 'waters of the US,' 33 CFR 328.3(a),"[53] and the 1980 Idaho State Attorney General Opinion "deem[ing] the Salmon River to be navigable for purposes of state title to the riverbed."[54] The Report Findings, moreover, referenced that the USACE had performed a navigability determination of the Salmon River in 1933 which found "that the main stem Salmon River was **non-navigable** for the purposes of the Rivers and Harbor Act."[55]

Finally, the Report Findings concluded that, "[a]lthough it is **not** clear from any particular document examined during this investigation, it stands to reason that if [people] could travel from Salmon, Idaho on the Salmon River downstream to Lewiston, Idaho on the Snake River, supplies and products could move further downstream on the Lower Snake River to the Columbia River and travel all the way to the Pacific Ocean."[56] "It is clear that the Salmon River was used to transport commercial traffic historically, and that **it is susceptible to use for interstate or foreign commerce** with or without improvements for navigation. Therefore, our recommendation is that the main stem of the Salmon River from the mouth (RM 0) to Salmon, Idaho (RM 259)…be considered navigable pursuant to the Corps' Regulations at 33 C.F.R. 329.14."[57]

The conclusion that the Salmon River is jurisdictionally navigable and thus WOTUS, however, was not accurate because regulators incorrectly assumed that the Salmon River's potential navigable-in-fact use as a "highway of interstate or foreign commerce" can be inferred from the Salmon River's actual navigable-in-fact use to support only historical **intrastate** commerce consisting of freight service to Salmon River mining communities and only more recent extremely limited **intrastate** commercial recreational whitewater rafting services purchased by fewer than 200 non-Idaho resident clients per year. It also misconstrues the limits of the Supreme Court's expansion, in *Appalachian Electric*, of *The Daniel Ball* navigability test "to reach waters that **could be made navigable** with reasonable and feasible improvement" so that they could be used as "highways of **interstate** commerce." *See Sackett-II* (Thomas, J. concur., 143 S. Ct. at 1351) (emphasis added). The Walla Walla District determination, in other words, should have focused on whether the Salmon River could reasonably be made "navigable-in-fact" **to physically carry interstate commerce across state borders**, and **not** on whether solely intrastate activities taking place in Idaho could affect interstate commerce. *See Sackett-II* (Thomas, J.

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[53] U.S. Army Corps of Engineers Walla Walla District, *Memorandum for Record, Subject: Navigability Determination on the Salmon River, Idaho* (June 2, 2016), *supra*, Report of Findings at 5.

[54] *Id.*, Report Findings at 5-6. *See also id.*, Report Findings at 6 ("The State of Idaho also determined in 1980 that the Salmon River was navigable at the time of Idaho's admission into the Union and as such, the State owns the rights to the riverbed").

[55] *Id.*, Report Findings at 6 (emphasis added).

[56] *Id.*, Report Findings at 6 (emphasis added).

[57] *Id.*, Report Findings at 6-7 (emphasis added).

concur., 143 S. Ct. at 1356 (noting how "the agencies have entirely broken from traditional navigable waters: those that 'are or could be used by interstate or foreign travelers for recreational or other purposes…").

33 C.F.R. § 329.6(a), which supports the definition of "intrastate waters" contained in 33 C.F.R. § 329.7, *supra*, speaks to the issue of commercial waterborne recreation. The regulation provides that "[t]he types of commercial use of a waterway are extremely varied and will depend on the character of the region, its products, and the difficulties or dangers of navigation. It is the waterbody's capability of use by the public for purposes of transportation of commerce which is the determinative factor, and not the time, extent, or manner of that use." For example, "sufficient commerce may be shown by historical use of canoes, bateaux, or other frontier craft, as long as that type of boat was **common or well-suited to the place and period**." *Id.* (emphasis added). Additionally, "the presence of recreational craft may indicate that a waterbody is capable of bearing **some forms of commerce**, either presently, in the future, or at a past point in time." (emphasis added). *Id.* And 33 C.F.R. § 329.6(b) provides that "**interstate commerce may of course be existent on an intrastate voyage which occurs only between places within the same state. It is only necessary that goods may be brought from, or eventually be destined to go to, another state**." (emphasis added).

Sackett-II held that the EPA and USACE must establish that a wetland is "adjacent to" (physically indistinguishable from) either a traditional navigable water or a tributary to a traditional navigable water before they may assert CWA § 404 jurisdiction over it. The practical effect of rendering the Salmon River a "traditional navigable water" is that the EPA and USACE will have CWA § 404 jurisdiction over any wetland that is "adjacent to" (physically indistinguishable from) the Salmon River or is adjacent to any tributary to the Salmon River, including, but not limited to, Panther Creek.

USACE has not repudiated the 2007 and 2015 Jewell Memoranda, nor the 2016 Walla Walla District Report Finding, nor each document's legal rationale, as each remains available online. EPA's public website still contains a 2022 document expressly stating that EPA and USACE "will continue to assert jurisdiction over '[a]ll waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce" under 33 C.F.R. § 328.3(a)(1) and 40 C.F.R. § 120.2(a)(1)."[58] The 2022 EPA document clearly states, "For purposes of the Clean Water Act (CWA), these '(a)(1) waters' are the 'traditional navigable waters.' These (a)(1) waters include all the 'navigable waters of the United States,' defined in 33 C.F.R. Part 329 and by numerous decisions of the federal courts, plus all other waters that are navigable-in-fact **(e.g., the Great Salt Lake, UT and Lake Minnetonka, MN**)…If the federal courts have determined that a water body is **navigable-in-fact** under federal law for any purpose, that water body qualifies as a **'traditional navigable water'** subject to CWA jurisdiction under 33 C.F.R. §

[58] *See* U.S. Environmental Protection Agency, *Waters that Qualify as 'Traditional Navigable Waters' Under Section (a)(1) of the Agencies' Regulations* (Dec. 2022).

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328.3(a)(1) and 40 C.F.R. § 120.2(a)(1).”[59]

The EPA and USACE have not come into full compliance with *Sackett-II*’s holding that Congress’s Commerce Clause authority under the CWA is limited to its navigation power covering only traditional **interstate** navigable-in-fact waters. Landowners nationwide, and especially in those areas around the intrastate bodies of water discussed above, will continue to face the prospect of costly litigation to extricate themselves from possible federal enforcement action.

C. EPA and USACE’s Under-the-Radar Broad Reading of the Indian Commerce Clause

As discussed above, the Court, in *Sackett-II*, held that the CWA’s geographical reach is limited to Congress’s Commerce Clause navigation power, which does **not** displace States’ traditional sovereignty over land and water use in or adjacent to **intrastate** waters. 143 S. Ct. at 1341-42 (majority op.) (quoting *SWANCC*, 531 U.S. at 174). *See also* 143 S. Ct. at 1346 (Thomas, J. concur.) (citing majority op. at 1341, 1329-30). “Thus, today, States enjoy primary sovereignty over their waters, including navigable waters – stemming from their status as independent sovereigns following Independence, or their later admission to the Union on equal footing with the original states.” 143 S. Ct. 1345 (Thomas, J. concur.) (citing *Martin v. Lessee of Waddell*, 41 U.S. 367, 410 (1842)) and (citing *Lessee of Pollard v. Hagan*, 44 U.S. 212, 230 (1845)).

The Thomas concurrence, furthermore, emphasized how the *SWANCC* Court had rejected the federal Government’s broad Commerce Clause argument “that the CWA invokes ‘Congress’ power to regulate **intrastate** activities that substantially affect **interstate** commerce.” It reasoned that such broad assertions of authority “would raise ‘significant constitutional and federalism questions’ and ‘result in a significant impingement of the States’ traditional and primary authority over land and water use.’” *Sackett-II*, 143 S. Ct. at 1355-1356 (Thomas, J. concur. op.) (citing *SWANCC*, 531 U.S. at 174) (emphasis added).

Moreover, Justice Thomas emphasized in his concurrence that, in rejecting the federal government’s broad Commerce Clause argument, the *SWANCC* Court and the *Sackett-II* majority applied the very same definition of the term ‘commerce’ as did the Framers, which covered commerce between the States, with the Indians, **and** with foreign countries. “‘The Clause’s text, structure, and history all indicate that, at the time of the founding, the term “commerce” consisted of selling, buying, and bartering, as well as transporting for these purposes.’” 143 S. Ct. at 1358 (Thomas, J. concur.) (quoting *Gonzales v. Raich*, 545 U.S. 1, 58 (2005) and (citing *Lopez*, 514 U.S. at 585). *See accord Haaland v. Brackeen*, 599 U.S. ___, 143 S. Ct. 1609, 1671 (June 15, 2023) (Thomas, J. dissent.) (“At the time the original Constitution was ratified, ‘commerce’ consisted of selling, buying, and bartering, as well as transporting for

[59] *Id*. at 1 (emphasis added).

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these purposes"). "This meaning 'stood in contrast to productive activities like manufacturing and agriculture, and founding era sources demonstrate that 'the term 'commerce' [was] consistently used to mean trade or exchange – not all economically gainful activity that has some attenuated connection to trade or exchange.'" *Sackett-II*, 143 S. Ct. at 1358 (Thomas, J. concur.) (quoting *Raich*, 545 U.S. at 58-59 (Thomas, J. dissent.) and (citing *Lopez*, 514 U.S. at 586-87) (Thomas, J. concur.)). *See accord Brackeen*, 143 S. Ct. at 1671 (citing *Lopez*, 514 U.S. at 560) and (citing *Raich*, 545 U.S. at 22) ("And even under our most expansive Commerce Clause precedents, the Clause permits Congress to regulate only 'economic activity' like producing materials that will be sold or exchanged as a matter of commerce"). "The Commerce Clause confers the power to regulate a single object – 'Commerce' – that is then cabined by three prepositional phrases: 'with foreign Nations, and among the Several States, and with the Indian Tribes.'" *Brackeen*, 143 S. Ct. at 1672 (Thomas, J. dissent.) (quoting Art. II, § 2, cl. 2). "Accordingly, one would naturally read the term 'Commerce' as having the same meaning with respect to each type of 'Commerce' the Clause proceeds to identify…There is no textual reason why the Commerce Clause would be different. Nor have the parties or the numerous *amici* presented any evidence that the Founders thought that the term 'Commerce' in the Commerce Clause meant different things for Indian tribes than it did for commerce between the States." *Brackeen*, 143 S. Ct. at 1672 (Thomas, J. dissent.). Thus, as noted above, the Framers' notion of 'commerce' would not include activities such as recreational rafting or kayaking in **intrastate** waters by out-of-state travelers merely because it affects interstate commerce, since it does not qualify as *Lex Mercatoria*.

The significance of the *Sackett-II* Court's rejection of the federal government's claimed **'plenary'** Commerce Clause authority and jurisdiction over WOTUS for CWA purposes cannot be understated. *See* 143 S. Ct. at 1358-59 (Thomas, J. concur.) (quoting *Rapanos*, 547 U.S. at 738, plurality op.) ("The Court's opinion today curbs a serious expansion of federal authority that has simultaneously degraded States' authority and diverted the Federal Government from its important role as guarantor of the Nation's great commercial water highways into something resembling 'a local zoning board.'"). As a Citizens Equal Rights Foundation *amicus* brief recently filed with the U.S. Supreme Court argues, the *Sackett-II* Court rejects any United States "assertion of federal jurisdiction over waterways…beyond what is required to keep a channel open under Commerce powers,"[60] (e.g., any U.S. assertion of federal reserved water rights in both navigable and non-navigable waters[61] including that which the Court rejected several years ago in *Sturgeon v. Frost*, 587 U.S. ___, 139 S. Ct. 1066

[60] *See* Citizens Equal Rights Foundation Amicus Curiae Brief Supporting Neither Party, in *Trump v. United States*, No. 23-939 (Mar. 19, 2024), at 25.

[61] *See* Citizens Equal Rights Foundation and New York Fair Business Association Amicus Curiae Brief Supporting Petitioner in *State of Washington v. United States* (Dkt. No. 17-269) (Mar. 5, 2018) at 18-22, 24 (discussing how USDOJ has long relied on a legal memorandum drafted by a former special assistant to the Attorney General as the basis for federal agencies asserting reserved water rights well beyond the boundaries of federal irrigation projects subject to Reclamation Act of 1902 (P.L. 57-161, 32 Stat. 388 (Jun. 17, 1902)) limitations). *See also id.* (quoting Ethelbert Ward, Memorandum: *Federal Irrigation Water Rights* (Jan. 22, 1930) at 1aa-3aa, 6aa.

(2019)),[62] and thereby, also "rejects the waterways definition…argued for in the Nixon Indian policy and restores the jurisdictional analysis made in *Pollard's Lessee*, [] that created the equal footing doctrine."[63] The brief also explains that this rejected waterways definition flowed from the Nixon Administration's creation of the Environmental Protection Agency ("EPA") via Reorganization Plan No. 3 of 1970,[64] which continued the Johnson Administration's Reorganization Plan No. 2 of 1965[65] and from the U.S. Department of Justice's original "at the seat of Government" authority[66] used to supervise and control (i.e., to direct) *inter alia* the U.S. assistant attorneys general/solicitors for the U.S. Department of the Interior.[67]

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[62] *See* 139 S. Ct. at 1078-1079 (rejecting U.S. claim of **plenary** authority over all navigable and non-navigable waters passing through Alaska's Yukon-Charley National Park lands ostensibly based on the navigational servitude having discovered the U.S. Interior Department's National Park Service had actually asserted jurisdiction under Alaska National Interest Lands Conservation Act based on "ownership" of federal reserved water rights in those waters, and holding that "[r]eserved water rights…do[] **not** give the Government **plenary** authority over the waterway to which it attaches") (emphasis added). ***Cf***. USACE and EPA assertion of CWA jurisdiction over the Salmon River likely based on U.S. Department of Agriculture Forest Service ("USFS")-claimed federal reserved water rights. *See In re SRBA*, Case No. 39576, *Partial Decree for Federal Reserved Water Rights 75-13316 and 77-11941, Salmon Wild and Scenic River* (Idaho 5th Dist. Ct., Cnty. Twin Falls, Nov. 16, 2004); *In re SRBA*, Case No. 39576, *Partial Decree for Federal Reserved Water Right 77-13844 Middle Fork Salmon Wild and Scenic River* (Nov. 16, 2004); *In re SRBA*, Case No. 39576, Consolidated Subcase No. 75-13316 Wild & Scenic Rivers Act Claims (Encompassing Subcases 75-13316, 77-11941, 77-13844, 78-11961, 81-10472, 81-10513 and 81-10625), *Amended Order Approving Stipulation and Entry of Partial Decrees* (Idaho 5th Dist. Ct., Cnty. Twin Falls, Nov. 17, 2004) (collectively recognizing USFS's asserted federal reserved water rights in the Middle Fork and main stem of the Salmon River based on Congress's express reservation of water rights in the Wild and Scenic Rivers Act of 1968, (P.L. 90-542, 82 Stat. 906, 908 at Sec. 3(7) (Oct. 2, 1968)).

[63] *See* Citizens Equal Rights Foundation Amicus Curiae Brief Supporting Neither Party, in *Trump v. United States*, No. 23-939 (Mar. 19, 2024), at 25.

[64] *See* Reorganization No. 3 of 1970 (July 9, 1970), 84 Stat. 2086 (transferring to the EPA Administrator *inter alia* all the functions vested in the U.S. Secretary and Department of the Interior administered through the Federal Water Quality Administration, all the functions transferred to the Secretary of the Interior by Reorganization Plan No. 2 of 1966, and all the functions vested in the U.S. Secretary and Department of the Interior by the Federal Water Pollution Control Act). *See also* U.S. Environmental Protection Agency, *Legal Compilation: Statutes and Legislative History, Executive Orders, Regulations, Guidelines, and Reports*, Water Vol. 7 (Jan. 1973) at x.

[65] *See* Reorganization Plan No. 2 of 1965 (Feb. 28, 1966), 31 Fed. Reg. 6857, 80 Stat. 1608 (transferring certain water pollution control functions of the U.S. Department of Health, Education, and Welfare under the Federal Water Pollution Control Act (predecessor to the Clean Water Act) to the U.S. Secretary and Department of the Interior).

[66] *See* Citizens Equal Rights Foundation Amicus Curiae Brief Supporting Neither Party, in *Trump v. United States*, No. 23-939 (Mar. 19, 2024), at 14 (noting how USDOJ's enabling legislation includes the powers of the War Department solicitors of the Army and Navy in two general sections, citing 16 Stat. 162, Ch. 150 at Secs. 3, 6).

[67] *Id.* at 14 (citing *Congressional Directory for the Third Session of the Forty-First Congress of the United States of America*, First Edition (Jan. 1870, Gov't. Print. Off.) at 84. *See also id.* at 13-14 (identifying President Lincoln's Secretary of War, Edwin Stanton, as the likely primary author of USDOJ's enabling legislation) and (citing 1 Rev. Stat. 441, Act of March 3, 1849, 30th Cong. Sess. II, Ch. 108, Sec. 5). Other relevant Congressional Record entries can be found here: https://www.wlf.org/wp-content/uploads/2024/04/Addendum-to-Kogan-Working-Paper-Footnote-67.pdf.

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The Justice Department also, had, until very recently, long asserted federal reserved water (and off-reservation fishing) rights, in its own name or on behalf of federally recognized Indian tribes, pursuant to Congress's claimed '**plenary**' Commerce Clause authority over Indian affairs, thereby invoking the "Indian" portion of that constitutional provision. In addition, DOJ asserted such federal reserved water-use rights in furtherance of both an ostensible special fiduciary federal-Indian trust relationship that the United States has since disavowed in one recent Indian case before the Supreme Court, and a post-Civil War Reconstruction-era federal 1871 Indian policy (premised on such relationship) which, as the Supreme Court determined in other recent Indian cases, entailed a second set of **extra-constitutional** laws.[68] Congress and the federal agencies previously exercised **plenary** sovereign authority over Indians as politically and culturally separate ward-like communities not eligible for U.S. citizenship, which facilitated the United States' assertion of effective sovereign title over reservation and other lands and waters located in many of the western states, including Utah and Idaho, as if they had remained pre-statehood domestic territories comprised of "Indian country."[69]

For example, until recently, DOJ had cited the Supreme Court's decision in *Winters v. United States*, 207 U.S. 564 (1908) to assert federal reserved water rights beyond what is sufficient to support the purpose (i.e., irrigation, fishing needs) of a federal Indian, military, or other reservation, including a national monument.[70] For this reason, as a Citizens Equal Rights Foundation amicus brief argued, "[a]ny additional water source [developed by a Western State] could be attacked and federalized using the *Winters* doctrine."[71] "And in *Winters [ ]*, the Court [...] referred to the inverted treaty interpretation rule-of-thumb it upheld in [*United States v.] Winans*[, 198 U.S. 371, 372-374 (1905)]:...'the treaty was not a grant of rights to the Indians, but a grant of rights from them – a reservation of those not granted' 198 U.S. at 381, which allowed the USDOJ to pervert the 'Indian country' definition into claiming a reserved federal interest in perpetually 'territorial' lands and aboriginal waters to render the Constitution inapplicable in 'Indian Country.'"[72] Pursuant to the *Winans* "'rule of interpretation of agreements and treaties with Indians, ambiguities occurring will be resolved from the standpoint of the Indians.'"[73] "In *Winans*, the Court cited *Worcester [v. Georgia*, 31 U.S. 520 (1832)] as providing the basis for this construction."[74] "It was not until the United States enforced the Indian reservation system that this water issue arose. The previously nomadic Indian tribes were not

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[68] *See* Citizens Equal Rights Foundation Amicus Curiae Brief (Mar. 19, 2024), *supra*, at 3-16.

[69] *Id.*

[70] *See also Arizona v. California*, 373 U.S. 546, 564 (1963); *Cappaert v. United States*, 426 U.S. 128, 141-142, 147 (1976).

[71] *See* Citizens Equal Rights Foundation Amicus Curiae Brief Supporting Neither Party in *Arizona v. Navajo Nation* (Dkt. Nos. 21-1484 and 22-51) (Dec. 27, 2022) at 14.

[72] *Id.* at 7-8.

[73] *Id.* at 8 (quoting Winters, 207 U.S. at 576-77.

[74] *Id.* at 7 (citing *Winans*, 198 U.S. at 372).

farmers, but the Department of the Interior decided they were going to farm. This was the situation that that created *Winters v. United States*. Apparently, the United States did not want to purchase state allocated water rights and instead used the reserved rights doctrine first created in *United States v. Winans* to literally take the pre-existing state allocated private property rights away from farmers without any compensation."[75] In sum, the Supreme Court's *Winters*, *Winans* and *Worcester* decisions protecting federal and Indian reserved land and water rights had clearly gone beyond the bounds of the Commerce Clause navigation limitation and principles of federalism the Court recently rearticulated in *Sackett-II*, and, also beyond the bounds of the Commerce Clause, generally, as the Court held in several recent Indian cases discussed below.

Justice Jackson expressed grave concerns about how these "**plenary**" powers could be politically exploited in his famous concurrence in *Youngstown Sheet & Tube Co. Co. v. Sawyer*, 343 U.S. 579, 646 (1952).[76] Yet, the Nixon Administration later mainstreamed across the federal government, including at the EPA, the powers comprising the 1871 Indian policy and the nebulous Federal-Indian fiduciary trust upon which many United States federal reserved water rights claims are based, and thereby weaponized them against the American people.[77]

During its last two terms, the Supreme Court has effectively rejected most Indian-law bases for the United States' assertion of 'plenary' Commerce Clause authority. In *Oklahoma v. Castro-Huerta*, 597 U.S. ___, 142 S. Ct. 2486, 2502-03 (2022), the Supreme Court rejected the long-held view set forth in *Worcester v. Georgia*, 31 U.S. 1, 17 (1832) (previously creating the special fiduciary Federal-Indian trust relationship from the international law of nations), that Indian tribes and their reservations are racially distinct nations or political communities, and held that an Indian reservation was in many cases a part of the surrounding State or Territory and subject to its jurisdiction, and that "Indian country is part of a State, not separate

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[75] *Id.* at 18.

[76] In *Youngstown*, Justice Jackson warned that USDOJ had "grounded support of the seizure [of steel mills] upon nebulous, inherent powers never expressly granted but said to have accrued to the office from the customs and claims of preceding administrations. The plea is for a resulting power to deal with a crisis or emergency according to the necessities of the case the unarticulated assumption being that necessity knows no law." 343 U.S. at 646. In other words, he admonished that, "[l]oose and irresponsible use of adjectives colors all nonlegal and much legal discussion of presidential powers. **'Inherent' powers, 'implied' powers, 'incidental' powers, 'plenary'** powers, **'war' powers and 'emergency' powers** are used, often interchangeably and without fixed or ascertainable meanings." 343 U.S. at 646-47 (emphasis added). Justice Jackson also emphasized that "the forefathers omitted" "inherent powers *ex necessitate* to meet an emergency," because they "knew [] how they afford a ready pretext for usurpation," "would tend to kindle emergencies," and had instead provided an "evolved technique within the framework of the Constitution" for expanding powers "to meet an emergency." 343 U.S. at 649-50, 652.

[77] *See* Citizens Equal Rights Foundation Amicus Curiae Brief Supporting Neither Party, in *Trump v. United States* (Dkt. 23-939) (Mar. 19, 2024), *supra* at 16-23 (discussing how P.L. 89-554 (1966) mainstreamed the codified 1871 Indian policy across the federal government, and how the Obama Administration's CWA WOTUS regulations embodied/embody the Nixon Indian policy which the *Sackett-II* Court recently reinterpreted).

from it."[78]

In the consolidated cases of *United States v. Navajo Nation* and *Arizona v. Navajo Nation*, 599 U.S. __, 143 S. Ct. 1804, 1814 (2023), the Supreme Court rejected the existence writ-large of a special fiduciary trust relationship between the federal government and all federally recognized Indian tribes requiring the United States to physically procure and/or ensure procurement of water to which the Tribes were allegedly entitled pursuant to their asserted reserved water rights, which fiduciary relationship even the federal government brief conceded did **not** exist.[79]

Then, in *Haaland v. Brackeen*, 599 U.S. __, 143 S. Ct. 1609 (2023), the Supreme Court rejected the federal government's position that Congress's Indian affairs power based on the Indian Commerce Clause is **plenary**. It held, instead, that such power "is not absolute," that "**plenary does not mean free-floating**," and that "Article I gives Congress a series of enumerated powers, not a series of blank checks." 143 S. Ct. at 1629 (emphasis added). "**A power unmoored from the Constitution would lack both justification and limits**." *Id.* at 1629-30 (emphasis added). Instead, the Supreme Court agreed with the observation Justice Alito made in his concurring opinion, that was equally applicable in *Sackett-II*, that federal government "**plenary powers cannot override foundational constitutional constraints**."[80] *Id.* at 1629, n.3 (emphasis added).[81] The Court's holding in *Brackeen* was as likely attributable to the U.S. government's oral argument

[78] *Id.* at 25.

[79] *Id.* at 27. *See also* Federal Parties Brief, in *Arizona v. Navajo Nation* (Dkt. Nos. 21-1484, 22-51) (Dec. 19, 2022) at 20. *See also id.* at 9-11 (arguing that since the Court, in *Castro Huerta*, had rejected the *Worcester* Court's equitable basis for the existence of a special fiduciary trust relationship upon which the Court's later *Winters* and *Winans* decisions were grounded, it also should overrule the *Winters* and *Winans* reserved rights doctrines asserting that Indian interests supplant constitutional structural federalism interests).

[80] *See* Citizens Equal Rights Foundation Amicus Curiae Brief Supporting Neither Party, in *Trump v. United States* (Dkt. 23-939) (Mar. 19, 2024), *supra* at 25-26.

[81] *See* also *Id.* at 26-27 (noting how *Brackeen* held that the 14th Amendment may be invoked against the federal government in state court in Indian Child Welfare Act disputes). *See accord Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.,* 143 S. Ct. 2141, 2161 (2023) (majority op.) ("[T]he Constitution…forbids…discrimination by the General Government, or by the States, against any citizen because of his race."); *Students for Fair Admissions, Inc.* (Thomas, J. concur.) slip op. at 12-13 ("[T]he Amendment also clarified that American citizenship conferred rights not just against the Federal Government but also the government of the citizen's State of residence"). DOJ's assertion of federal reserved water rights on behalf of tribes based on the federal government's "plenary" Indian Commerce Clause powers is arguably a form of race-based discrimination subject to the 14th Amendment.

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responses[82] as it was to its written briefing.[83]

Yet, despite the Supreme Court's consistent rejection of the federal government's claims of '**plenary**' Commerce Clause authority, evidence of regulatory application of an overly broad Indian Commerce Clause still abounds in EPA, USACE, and Interior Department regulations, memoranda, and guidance documents. For example, the aforementioned MFR-2007 states that, "[h]istorically, the lake [Utah Lake] has been used by three Indian tribes: the Paiutes who mainly used the west side; the Utes who used the lake and its streams throughout the year; and the Shoshone who periodically entered Utah Valley from the north. Utah Lake has been of central importance to all of the people who have occupied the lake plains."[84] As noted above, neither the EPA, USACE, nor Interior Department have, since *Sackett-II*, disavowed these documents or removed them from their websites.

Federal officials' reliance on plenary Commerce Clause authority is also evident in the U.S. Forest Service ("USFS")'s 2008 analysis of the Middle Panther Creek Watershed of the Salmon River, which may likely have had an impact on the USACE determination of Salmon River navigability discussed above. "Currently[,] members of the Shoshone-Bannock Tribes and the Nez Perce Tribe exercise their off-reservation reserved rights to hunt and fish and claim the right to gather on unoccupied lands within and near the Middle Panther Creek Watershed."[85] "Despite the decrease in tribal use of the area, the Tribes' interest in the protection of Treaty resources remains paramount. The Shoshone-Bannock and Nez Perce Tribes expect federal agencies to honor the trust responsibility regarding protection of Treaty resources."[86] Another instance is the 2020 National Marine Fisheries Service

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[82] Justice Kagan noted that, "when the Court' uses the phrase '**plenary** power' tens and tens of times over decades and decades, I mean, **plenary** means unqualified. It means all-encompassing." (emphasis added). (Ex. I – *Brackeen* (Nov. 9, 2022), Oral Arg. Tr: at 74:3-6). And Justice Alito observed, that, "if **'plenary'** means **plenary**, Congress can do whatever it wants" and that "if **'plenary'** means everything, then – it means everything." *Id.* (emphasis added) (Ex. I – *Brackeen* (Nov. 9, 2022) Oral Arg. Tr: at 107:19-108:1; 111:6-8). The USDOJ conceded during such oral argument that while "**plenary** at its core means there are no [...] subject matters, geographic areas categorically beyond its power, [...] **external limits from the Constitution would apply**..." (emphasis added). *See id.* (Ex. I – *Brackeen* (Nov. 9, 2022) Oral Arg. Tr: at 112:21-113-2; 157:19-159:4). Indeed, the Solicitor General conceded during the *Brackeen* oral argument that **Congress's plenary power** "doesn't just come from the Indian Commerce Clause. **There is the inherent power that comes from Congress's [...] the federal government, which in turn comes from constitutional powers, like the war power**..." *Id.* (emphasis added) (Ex. I – *Brackeen* (Nov. 9, 2022) Oral Arg. Tr: at 147:3-13; 159:5-15).

[83] But the Solicitor General's response brief in *Brackeen* went even further, by asserting that "**Congress's plenary power over Indian affairs** [...] are **"'necessary concomitants of nationality,"' part of the Constitution's adoption of pre-constitutional powers necessarily inherent in any Federal Government**.'" (emphasis added). (Ex. J - Doc. 118-16, PageID.3734-3736).

[84] Ex. E – 2023 MFR, para. 8 at pp. 2-3.

[85] *See* U.S. Department of Agriculture, U.S. Forest Service Salmon/Cobalt Ranger District Salmon-Challis National Forest, *Middle Panther Creek Watershed Analysis* (Nov. 2008), *supra* at 45.

[86] *Id.*

(“NMFS”) draft Environmental Assessment for the Salmon River Panther Creek Subbasin’s Idaho Chinook Salmon hatchery program under the Endangered Species Act (16 U.S.C. § 1531 et seq.), expressly recognizing “the United States government[’s…] trust or special relationship with tribes.[87] However, neither the USFS nor the NFMS have disavowed these documents or removed them from their websites following the Court’s *Sackett-II* decision.

Also, the January 2023 Biden WOTUS regulation provides that “[e]ligible Tribes or States…may request approval by EPA to administer a Clean Water Act section 402 or 404 program.” 88 Fed. Reg. at 3009. The regulation further states that, “As noted in section III.A.1.a of this preamble, when a Tribe or State assumes a section 404 program, the Corps retains permitting authority over certain waters. The scope of Clean Water Act jurisdiction as defined by ‘waters of the United States’ is distinct from the scope of waters over which the Corps retains authority following Tribal or State assumption of the section 404 program. *Id.* at n.18. **Corps-retained waters** are identified during approval of a Tribal or State section 404 program, and any modifications are approved through a formal EPA process. This rule does not address the scope of **Corps-retained waters**, and nothing in this rule should affect the process for determining the scope of **Corps-retained waters**.” *Id.* (emphasis added). The Biden WOTUS regulation also provides that “[t]he Clean Water Act defines ‘state’ as ‘a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and the Trust Territory of the Pacific Islands.’[88] Clean Water Act section 518(e), which is part of the 1987 amendments to the Act, authorizes EPA to treat eligible federally recognized tribes in a similar manner as a State for implementing and managing environmental programs.” *Id.* at n.16 (quoting 33 U.S.C. § 1362(3) and (citing 33 U.S.C. § 1377(e)).

That WOTUS regulation, moreover, states that “Congress has provided for eligible Tribes to administer Clean Water Act programs over their reservations and expressed a preference for Tribal regulation of surface water quality on reservations to ensure compliance with the goals of the statute…In addition, Tribes may establish more protective standards or limits under Tribal law that may be more stringent than the Federal Clean Water Act.” *Id.* at n. 19. “Tribes and States play a vital role in the implementation and enforcement of the Clean Water Act, and this rule…reinforces that framework by establishing limitations that reflect careful consideration of how best to identify those waters for which Federal regulation is necessary to ensure the protection of the waters **at the core of Congress’s authority and interest** and those for which it is not.” 88 Fed. Reg. 3004, 3046 (emphasis added). “[T]his rule recognizes, preserves, and protects the rights and responsibilities of Tribes and States by leaving within their purview all waters that do not significantly affect paragraph

[87] *See* U.S. National Marine Fisheries Service, West Coast Region, National Oceanic and Atmospheric Administration, *Yankee Fork and Panther Creek Chinook Salmon Hatchery Programs – Upper Salmon River Basin Draft Environmental Assessment* (Aug. 27, 2020) at Secs. 1.2, Fig. 1; 1.31.

[88] *See* Citizens Equal Rights Foundation Amicus Curiae Brief Supporting Neither Party, *supra*, at n.10.

(a)(1) waters of paramount Federal interest. The specific jurisdictional standards in this rule therefore bear a relationship to the nature and extent of the Federal and Tribal and State interests at play." *Id.* (emphasis added).[89]

Consider further EPA's May 2023 proposed rule that would establish baseline federal water quality standards ("WQS") "for all waters of the United States in Indian country." *See* 88 Fed. Reg. 29496, 29500 (May 5, 2023).[90] "Indian reservations "are a subset of the broader geographic area that comprises **Indian country** as a whole." 88 Fed. Reg. 29496, 29498 (emphasis added). "Pursuant to how 'Indian country' is defined by…18 U.S.C. 1151…**Indian country includes all territory within an Indian reservation** (**including land owned in fee simple by non-Indians**). It also includes 'dependent Indian communities' (DICs) and Indian allotments, the titles to which have not been extinguished, regardless of whether those lands are located within a reservation." *Id.* (emphasis added).

Another recent instance of federal reliance on broad Indian Commerce Clause power is the EPA's August 14, 2023, proposed rule on CWA § 404 Tribal and State Program Regulation.[91] "**Retained Waters**…The Agency [EPA] is proposing a procedure to facilitate determining the extent of waters over which **the Corps would retain administrative authority** following Tribal or State assumption of the section 404 program. Under the proposed procedure, before the Tribe or State submits its assumption request to EPA, the Tribe or State must submit a request to EPA that the Corps identify the subset of waters of the United States that would remain subject to Corps section 404 administrative authority following assumption." 88 Fed. Reg. at 55284 (emphasis added). "Specifically, section 404(g)(1) states that the Corps retains administrative authority over the subset of waters of the United States consisting of '…waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce…including wetlands adjacent thereto." *Id.* at 55286 (quoting 33 U.S.C. 1344(g)(1)). "A Tribe or State assumes section 404 administrative authority over all waters of the United States within their jurisdiction that are not retained by the Corps." *Id.* at 55286.

Under this regulation, "EPA proposed to revise [40 C.F.R.] 233.51 to codify Tribes' opportunity to request EPA review of [nontribal CWA § 404] **permits that Tribes view as potentially affecting tribal rights or interests. This may include rights or interests both in and outside of a Tribe's reservation and would facilitate EPA's review of permits that have the potential to impact waters of significance to Tribes**." *Id.* at 55305 (emphasis added). Apparently, this proposal reaffirms EPA's December 2022 proposed regulation on

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[89] *Id.* at 23.

[90] *See* U.S. Environmental Protection Agency, *Federal Baseline Water Quality Standards for Indian Reservations*, Proposed Rule, 88 Fed. Reg. 29496 (May 5, 2023).

[91] *See* United States Environmental Protection Agency, *Clean Water Act Section 404 Tribal and State Program Regulation, Proposed Rule*, 88 Fed. Reg. 55276 (Aug. 14, 2023).

"Water Quality Standards Regulatory Revisions to Protect Tribal Reserved Rights," *infra,* which aims, in part, to "define 'tribal reserved rights' for aquatic and/or aquatic-dependent resources reserved or held by tribes, either expressly or implicitly, through treaties, statutes, executive orders, or other sources of federal law.'" *Id.* at n. 45. This proposed regulation also seeks "to add a definition of 'Indian lands' for Tribal and State CWA section 404 programs. Consistent with the Agency's long-standing interpretation of 'Indian lands' as synonymous with 'Indian country,' EPA is proposing to add a definition clarifying that **'Indian lands' means 'Indian country' as defined at 18 U.S.C. 1151**."[92]

A final example is a rule EPA proposed in December 2022 that would revise the CWA water quality standards to protect Indian tribes' **reserved rights** in aquatic and aquatic-dependent resources as determined by applicable "treaties, statutes, executive orders or other sources of Federal law."[93] For the purpose of this proposed rulemaking, "'**tribal reserved rights'** means any rights to aquatic and/or aquatic-dependent resources reserved or held by tribes, either expressly or implicitly, through treaties, statutes, executive orders, or other sources of Federal law." 87 Fed. Reg. at 74363 (emphasis added). "Rights are 'reserved' by tribes, because, as the U.S. Supreme Court has explained, treaties are 'not a grant of rights to the Indians, but a grant of rights from them, a reservation of those not granted.'" *Id.* at n.5 (quoting *United States v. Winans*, 198 U.S. 371, 381 (1905)). "**Tribal reserved rights as defined in in this proposed rulemaking generally do not address the quantification of *Winters* rights…Under *Winters v. United States*, and its progeny, the establishment of a Federal reservation (Indian or otherwise) implicitly reserves sufficient water to accomplish the purposes of the reservation**." *Id.* and n. 6 (citations omitted) (emphasis added). "The U.S. Constitution defines treaties as part of the supreme law of the land, with the same legal force as Federal statutes. From 1778 to 1871, the U.S.'s relations with tribes were defined and conducted largely through treaty-making. **In 1871, Congress stopped making treaties with tribes**, and subsequent agreements between tribes and the Federal government were instead generally memorialized through Executive orders, statutes, and other agreements, such as congressionally enacted Indian land claim settlements." *Id.* (citing Act of Mar. 3, 1871, § 1, 16 Stat. 544 (codified as carried forward at 25 U.S.C. § 71)) (emphasis added).[94]

Each of the above-referenced instances of reliance on so-called federal reserved rights and interests—water-use rights the agencies ostensibly hold directly or indirectly on the behalf of Indian tribes in furtherance of the 'special' Federal-Indian fiduciary trust relationship—are inconsistent with the dictates of *Sackett-II*. These federal reserved water rights function to illicitly broaden United States

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[92] 88 Fed. Reg. at 55316 (citing 40 C.F.R. 144.3, defining 'Indian lands' as 'Indian country') (emphasis added).

[93] *See* U.S. Environmental Protection Agency, *Water Quality Standards Regulatory Revisions to Protect Tribal Reserved Rights, Proposed Rule* (Dec. 5, 2022).

[94] *See* Citizens Equal Rights Foundation Amicus Curiae Brief Supporting Neither Party, *supra*, at 13-17.

regulatory control over **intrastate** waters properly subject to traditional state ownership and land use control, and thereby, to effectively displace state sovereignty and individual-based federalism in contravention of the Constitution's structural protections—namely, federalism and the Tenth and Fourteenth Amendments.

CONCLUSION

One cannot ignore the *Sackett v. EPA-II* majority's indignation over the federal agencies' overbroad assertions of plenary authority to implement the Clean Water Act and regulators' historical defiance of the Court's CWA rulings paring back that authority, which together have resulted in the lower federal courts deferring to agency statutory and constitutional interpretation at the expense of private landowners.[95] In particular, the Court expressed frustration with how the EPA and USACE issued guidance shortly after the *SWANCC* opinion which sought to minimize the decision's impact, 143 S. Ct. at 1333. Those guidelines led the agencies to assert CWA § 404 jurisdiction over 270-300 million acres of wetlands throughout the nation. 143 S. Ct. at 1334 (quoting *Rapanos*, 547 U.S. at 722, plurality op.). The *Sackett-II* Court also found troubling the agencies' exploitation of the Court's split decision in *Rapanos* by issuing guidance documents recognizing ambiguous areas that demanded more fact-intensive individualized determinations and instructing agency officials to assert jurisdiction over wetlands 'adjacent' to non-navigable tributaries where there was supposedly a significant nexus" based on various hydrological and ecological factors. 143 S. Ct. at 1334.

Justice Thomas' concurring opinion reaffirmed the Court's sense of indignation, stressing that the Commerce Clause restricts federal government jurisdiction over "waters of the U.S." to traditional channels or highways of interstate 'commerce.' 143 S. Ct. 1351, 1355-56 (Thomas, J. concur.). He wrote, "[W]hile not all environmental statutes are so textually limited, Congress chose to tether federal jurisdiction under the CWA to its traditional authority over navigable waters. **The EPA and the Corps must respect that decision**." 143 S. Ct. at 1358-59 (Thomas, J. concur.) (emphasis added).

As this *Working Paper* details, the Justice Department, and in particular its Environment and Natural Resources Division, as well as federal agencies ranging from EPA to the Army Corps, to the Interior Department and its subagencies, to the NMFS, have not accepted Justice Thomas' or the broader Court majority's stern message, and cling to an invalidated view of the Commerce Clause as it relates to water regulation. Those agencies should repudiate the documents discussed above and others based on outdated precedents and remove them from public circulation.

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[95] *See* 143 S. Ct. at 1330 (noting how the agencies employ the CWA as "a potent weapon" to impose civil penalties of "over $60,000...per day for each violation" and how, because of their "expansive interpretations of the term 'violation,' these civil penalties can be nearly as crushing as their criminal counterparts"); 143 S. Ct. at 1335 ("And because the CWA can sweep broadly enough to criminalize mundane activities like moving dirt, this unchecked definition of [WOTUS] means that a staggering array of landowners are at risk of criminal prosecution or onerous civil penalties").

Inconsistent regulations should be amended. If a defendant can show that federal officials continue to rely upon such documents in environmental enforcement actions that predate or ignore *Sackett-II*, and federal judges should properly strike such documents from the judicial record and reject the government's contrary arguments.

The Supreme Court could soon provide landowners and other environmental-enforcement defendants with another tool to compel agencies to follow *Sackett-II*. Courts have paid undue deference to federal-agency interpretations of laws like the CWA and the RHA, and to federal agency legal and technical/scientific expertise[96] under either the *Chevron* doctrine[97] or the *Auer* doctrine.[98] By the end of June, the Court will rule on *Loper Bright Enterprises v. Raimondo* (Dkt. No. 21-5166 (2024) and *Relentless, Inc. v. U.S. Dept. of Commerce* (Dkt. No. 21-1186) (2024).[99] The Court's likely combined decision could empower lower courts to take a far more critical approach to reviewing agency rulemaking and sub-regulatory actions that expand their own authority.

A third way to address federal agencies' disrespect for *Sackett-II* is for Congress to finally clip the wings of the Justice Department's Environment and Natural Resources Division. The division has the authority to bring administrative, civil, and criminal enforcement actions against landowners and land users—formidable powers that it has wielded to advance the broadest possible interpretation of WOTUS jurisdiction and subtly direct environmental agencies' regulatory actions. Congress has looked the other way as the Biden Administration has expansively broadened the division's operational mandate to weaponize the CWA and other federal environmental and wildlife statutes against ordinary citizen landowners.[100]

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[96] *See* Lawrence A. Kogan, *Revitalizing the Information Quality Act as a Procedural Cure for Unsound Regulatory Science: A Greenhouse Gas Rulemaking Case Study*, Washington Legal Foundation Critical Legal Issues Working Paper Series, No. 191 (Feb. 2015). *See also* Washington Legal Foundation Media Briefing Series, *Science and Federal Regulation: Is the Office of Management and Budget an Effective Gatekeeper?*, (May 19, 2015).

[97] *See Chevron USA, Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

[98] *See Auer v. Robbins*, 519 U.S. 452 (1997); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945). The *Auer* doctrine was most recently reviewed by the Court in *PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.*, 139 S. Ct. 2051, 2053 (2019), and *Kisor v. Wilkie*, 139 S. Ct. 2400, 2408 (2019). *See* Lawrence A. Kogan, *The Europeanization of the Great Lakes States' Wetland Laws and Regulations (At the Expense of Americans' Constitutionally Protected Private Property Rights)*, 2019 MICH. ST. L. REV. 687, 692-97.

[99] The Court granted certiorari in *Loper* and *Relentless* on whether it "should overrule *Chevron* or at least clarify that statutory silence concerning controversial powers expressly but narrowly granted elsewhere in the statute does not constitute an ambiguity requiring deference to the agency."

[100] *See* U.S. Department of Justice Office of Public Affairs, Justice Department Releases First-Ever Comprehensive Environmental Justice Enforcement Strategy Report, Press Release (Oct. 13, 2023); White House Briefing Room, FACT SHEET: President Biden Signs Executive Order to Revitalize Our Nation's Commitment to Environmental Justice for All (Apr. 21, 2023); U.S. Department of Justice Office of Public Affairs, Justice Department Launches Comprehensive Environmental Justice Strategy, Press Release (May 5, 2022); U.S. Department of Justice

Narrowing ENRD's operational mandate, conducting greater congressional oversight, and enacting limitations on its budgetary resources could go a long way towards reining in the division's activism.

Memorandum for Heads of Department Components United States Attorneys: Comprehensive Environmental Justice Enforcement Strategy (May 5, 2022).

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