WHAT COMES NEXT FOR WETLANDS? BUILDING A FRESHWATER WETLAND PROTECTION STATUTE FOR A POST-*SACKETT* WORLD

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ABSTRACT

In Sackett v. EPA*, the United States Supreme Court departed from precedent and adopted a relatively narrow interpretation of the geographical scope of the Clean Water Act. As a result, the Court effectively eliminated the federal government's ability to regulate and protect a vast number of the country's freshwater wetlands. To fill this regulatory gap, individual states must now seek to enact their own statutes to protect freshwater wetland ecosystems from unmitigated degradation and destruction. To that end, states should consider adopting a model freshwater wetland protection law that draws upon the strengths of existing state-level programs and seeks to balance environmental interests with the interests of private property owners. Existing state-level programs, such as that created under New Jersey's Freshwater Wetland Protection Act, should serve as a framework upon which this model freshwater wetland statute is based.*

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I. INTRODUCTION

Wetland environments such as swamps, bogs, and marshes were historically regarded as unproductive wastelands.[1] Based on this belief, it was once common practice to drain and fill wetlands in preparation for commercial development or to simply treat them as dumping grounds.[2] As a result, a study published by the U.S. Fish and Wildlife Service found that more than half of the 221 million acres of wetlands that existed in the contiguous forty-eight states during the eighteenth century were virtually destroyed by 1990.[3]

Today, however, authorities uniformly recognize the countless benefits that these fragile ecosystems provide to both the environment and the public.[4] In terms of environmental value, wetlands are often considered to be one of the most productive ecosystems in the world,

1. *See Why Are Wetlands Important?*, NAT'L PARK SERV., https://www.nps.gov/subjects/wetlands/why.htm (May 16, 2025).

2. *See id.*

3. *Id.*

4. *See id.*; *Why Are Wetlands Important?*, U.S. ENV'T PROT. AGENCY [hereinafter EPA, *Why Are Wetlands Important?*], https://www.epa.gov/wetlands/why-are-wetlands-important (July 23, 2025); *Why Are Wetlands Important?*, U.S. GEOLOGICAL SURV., https://www.usgs.gov/faqs/why-are-wetlands-important (Feb. 20, 2025); Sarah Gibbens, *What Are Wetlands, and Why Are They So Critical for Life on Earth?*, NAT'L GEOGRAPHIC (Feb. 24, 2023), https://www.nationalgeographic.com/environment/article/what-are-wetland-ecosystems; Julia A. Cherry, *Ecology of Wetland Ecosystems: Water, Substrate, and Life*, NATURE EDUC., https://www.nature.com/scitable/knowledge/library/ecology-of-wetland-ecosystems-water-substrate-and-17059765/ (last visited Nov. 29, 2025).

comparable only to rainforests and coral reefs.[5] These "biological supermarkets"[6] provide essential nutrients for countless plants, animals, and birds, many of which are uniquely adapted to survive in wetland environments.[7] Wetlands are also essential for freshwater and marine life, including trout, striped bass, and multiple shellfish species.[8] In fact, the U.S. National Park Service estimates that between sixty and ninety percent of all commercial fisheries in the country depend on wetland environments to maintain healthy marine life populations.[9] According to some estimates, wetland ecosystems provide habitats for approximately one-third of all plants and animals listed as threatened or endangered in the United States.[10]

The freshwater wetlands that dot the United States also have significant social and economic value. These ecosystems can help to reduce the damage caused during storms and other natural disasters by absorbing floodwaters and lessening the risk of flash floods.[11] Wetlands also act as "natural water purifiers" by filtering sediment and absorbing pollutants present in surface waters, thereby enhancing the quality of groundwater supplies.[12]

In light of their numerous benefits, it is no wonder that both the federal government and several state governments have since sought to protect wetland ecosystems from the degradation that was once commonplace. At the federal level, the chief weapon against wetland destruction has historically been the Clean Water Act of 1972 ("CWA").[13] Building upon the protection offered by the CWA, some states have followed suit by implementing their own wetland protection laws.[14]

5. *See* EPA, *Why Are Wetlands Important?*, *supra* note 4. Scientists also suspect that wetlands play a significant role in atmospheric maintenance, because carbon is stored in the resident plant species and soil, rather than being released into the atmosphere as carbon dioxide. *See id.*

6. *Id.*

7. *See Why Are Wetlands Important?*, *supra* note 1. It is estimated that almost 7,000 plant species live in U.S. wetlands, and many of these species can only survive in the conditions created by wetland environments. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *See id.*

12. *See id.* Wetlands also provide significant social value by supporting a range of recreational and educational activities. *See id.*

13. *See* United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 123 (1985).

14. *See, e.g.*, N.J. STAT. ANN. §§ 13:9B-1 to -30 (West 2024); N.Y. ENV'T CONSERV. LAW §§ 24-0101 to -1305 (McKinney 2022). Among such states, some have further distinguished between freshwater, or nontidal, wetlands and coastal, or "estuarine," wetlands. *Compare* N.J. STAT. ANN. § 13:9B-1 (West 2024), *with* N.J. STAT. ANN. § 13:9A-1 (West 2024) (stating

However, many more have not yet adopted laws or regulations that specifically protect these vital ecosystems, and those states rely almost entirely on federal action under the Clean Water Act in order to manage wetland degradation.[15]

Despite the clear importance of the CWA to wetland preservation efforts, as well as efforts to protect water resources in general,[16] the CWA has been the source of significant legal controversy.[17] In cases concerning the CWA and its application to wetlands, the key issue has historically been the geographical scope of that law and whether the CWA even extends protection to a particular "wetland" at all.[18] Ultimately, in *Sackett v. EPA*, the United States Supreme Court seems to have definitively resolved this issue by declaring that the CWA only applies to wetlands that have a continuous surface water connection to traditionally navigable bodies of water.[19] The negative effects of this shift become even more clear when viewed in light of the fact that wetlands cover over five and a half percent of the land area in the contiguous states, and an estimated ninety-five percent of those are freshwater wetlands that may not meet the *Sackett* decision's new standard for CWA coverage.[20]

So, in the wake of *Sackett v. EPA*, what comes next for freshwater wetlands? Many commentators, and even the Supreme Court itself,[21]

that the purpose of New Jersey's "Wetlands Act of 1970" is to protect the "estuarine zone," or coastal wetlands, from "deterioration and destruction").

15. *See infra* Part III.

16. *See Clean Water Act*, NAT'L WILDLIFE FED'N, https://www.nwf.org/Our-Work/Waters/Clean-Water-Act (last visited Nov. 29, 2025). Beyond preventing wetland loss, the CWA has been remarkably successful in preserving water resources generally, with one organization estimating that the law has kept over 700 billion pounds of pollutants out of the country's waters. *See id.*

17. *See, e.g.*, *Riverside Bayview Homes*, 474 U.S. at 123; Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 162 (2001) (referred to as "SWANCC" in this Note); Rapanos v. United States, 547 U.S. 715, 722 (2006); Sackett v. EPA, 598 U.S. 651, 657–59 (2023).

18. *See Riverside Bayview Homes*, 474 U.S. at 123–24.

19. *See infra* Section II.C.1. Beyond simply adopting a narrow interpretation of the statute's operative definition, the Supreme Court in *Sackett* also suggests some degree of discomfort with the immense penalties that may be imposed for seemingly mundane activities. *See Sackett*, 598 U.S. at 669–70 ("And because the CWA can sweep broadly enough to criminalize mundane activities like moving dirt . . . a staggering array of landowners are at risk of criminal prosecution or onerous civil penalties.").

20. *Wetlands*, U.S. ENV'T PROT. AGENCY, https://www.epa.gov/report-environment/wetlands (Feb. 5, 2025).

21. *See Sackett*, 598 U.S. at 679 (suggesting that regulation of land use in the context of wetlands is a traditional power belonging to the states).

have suggested that the answer lies at the state level.[22] To that end, this Note will draw upon existing statutes and regulatory programs in order to develop a model framework for state-level freshwater wetland protection laws. First, this Note will examine how federal jurisdiction over freshwater wetlands has been developed and gradually curtailed, leaving this vital area of policy to the states. This Note will then survey key provisions in existing state wetland laws and argue that a model freshwater wetland protection statute, inspired primarily by New Jersey's Freshwater Wetland Protection Act, is an ideal response to the regulatory gap created by *Sackett v. EPA*.

II. FEDERAL WETLAND PROTECTION & THE *SACKETT* SHIFT

A. The Clean Water Act

In 1972, Congress enacted the CWA in order to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[23] To achieve this goal, Section 404 of the CWA prohibits "the discharge of any pollutant by any person"[24] into "navigable waters"[25] without first acquiring a permit to do so.[26] A "pollutant" under the CWA is broadly defined to include many substances that the average person would likely associate with pollution, such as "solid waste, incinerator residue, sewage, [and] garbage," but it also includes more mundane materials often used in construction and residential development, such as "rock, sand, [and] cellar dirt."[27] Broader still, CWA then defines "navigable waters" to simply mean "waters of the United States, including the territorial seas."[28]

Faced with such vague terminology, the federal agencies responsible for enforcement of the CWA have often asserted authority over a wide range of aquatic and semi-aquatic environments.[29] For instance, the Environmental Protection Agency ("EPA") and the U.S. Army Corps of

22. *See* James M. McElfish, *What Comes Next for Clean Water? Six Consequences of* Sackett v. EPA, ENV'T L. INST. (May 26, 2023), https://www.eli.org/vibrant-environment-blog/what-comes-next-clean-water-six-consequences-sackett-v-epa; *Clean Water Act – "Waters of the United States"* – Sackett v. EPA, 137 HARV. L. REV. 390, 398–99 (2023) [hereinafter *Waters of the United States*].

23. 33 U.S.C. § 1251(a).

24. *See* 33 U.S.C. § 1311(a).

25. *See generally* 33 U.S.C. § 1362(7).

26. *See* 33 U.S.C. § 1344.

27. § 1362(6).

28. § 1362(7).

29. *See, e.g.*, United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 123–24 (1985).

Engineers ("Corps") have historically, and often controversially, claimed that the CWA grants these agencies authority over dredge and fill activities in bodies of water such as rivers, lakes, and streams, but also geographical features such as wetlands or "swamps, marshes, bogs, and similar areas."[30] In response to such expansive agency interpretations, the United States Supreme Court has issued no less than four opinions over the last five decades addressing a remarkably similar question: What are the "waters of the United States" subject to federal authority under the CWA, and which wetlands, if any, fit within this definition?[31]

*B. Pre-*Sackett *Cases*

1. *United States v. Riverside Bayview Homes*

The first case to consider the geographical scope of the CWA as applied to wetlands was *United States v. Riverside Bayview Homes*.[32] In *Riverside Bayview*, the defendant company owned approximately eighty acres of low-lying, marshy land near the shores of a navigable lake in Michigan.[33] After the defendant began to place fill materials on this property while preparing to construct a housing development, the U.S. Army Corps of Engineers filed suit, seeking to enjoin the company from filling the property without acquiring a permit.[34] While the property did not contain "navigable waters" in the traditional sense, the Corps asserted that the low-lying, marshy portions of the defendant's property nonetheless qualified as "adjacent wetlands" that were covered by the CWA.[35] The district court agreed with the Corps' assertion and held that the property in question did in fact qualify as a wetland subject to the Corps' permit authority under the CWA, but the Sixth Circuit Court of Appeals subsequently reversed.[36]

30. *See id.*

31. *See id.* at 123; Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 162 (2001); Rapanos v. United States, 547 U.S. 715, 722 (2006); Sackett v. EPA, 598 U.S. 651, 657–59 (2023).

32. *Riverside Bayview Homes*, 474 U.S. at 123–26.

33. *Id.* at 124.

34. *Id.*

35. *Id.* In support of this assertion, the U.S. Army Corps of Engineers cited to its own regulation, promulgated in 1975, which construed the CWA as covering all "freshwater wetlands" that were "adjacent" to other covered waters. *Id.* Under this same regulation, a "freshwater wetland" was defined as an area that is "periodically inundated" and is "normally characterized by the prevalence of vegetation that requires saturated soil conditions for growth and reproduction." *Id.* (quoting 33 C.F.R. § 209.120(d)(2)(h) (1976)).

36. *Id.* at 125. On appeal, the Sixth Circuit based its decision in part on a concern that a broad definition of which wetlands are subject to federal permit authority may result in the taking of private property without just compensation. *Id.*

On appeal, the United States Supreme Court reversed the Sixth Circuit decision and held that the U.S. Army Corps of Engineers did have permit authority over the property in question because the property was a "wetland adjacent to a navigable waterway," and hence constituted "waters of the United States."[37] In reaching this conclusion, the Court was largely deferential to the expertise of the federal agency and accepted the relatively broad interpretation of the CWA's operative definitions set forth in the Corps' regulations.[38] Moreover, the Court pointed out that the legislative history of the Clean Water Act supports a broader interpretation of the Act's geographical scope.[39] "Protection of aquatic ecosystems, Congress recognized, demanded broad federal authority to control pollution, for '[water] moves in hydrologic cycles and it is essential that the discharge of pollutants be controlled at the source.'"[40]

As a result, the Supreme Court in *Riverside Bayview* initially endorsed the efforts of federal agencies to broadly wield the CWA as a means to protect not only "navigable waters" in the traditional sense, but also the wetlands that are "adjacent" to otherwise covered waters.[41]

2. *SWANCC*

The Supreme Court was faced with a similar question regarding the geographical scope of the CWA as applied to wetlands in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, often referred to as "*SWANCC*."[42] In that case, a consortium of municipal governments sought to develop a property for the disposal of nonhazardous solid waste.[43] The property in question was previously the site of a sand and gravel mining operation, but had since been abandoned and given way to a scattering of permanent and seasonal ponds.[44] While the consortium sought permits for the project and received approval from the Illinois Environmental Protection Agency, the U.S. Army Corps of Engineers refused to grant a permit.[45] In response, the

37. *Id.* at 131.
38. *See id.* at 131–32.
39. *Id.* at 132–33.
40. *Id.* (alteration in original) (quoting S. REP. NO. 92-414, at 77 (1972)).
41. *Id.* at 134–35 ("[T]he Corps' ecological judgment about the relationship between waters and their adjacent wetlands provides adequate basis for a legal judgment that adjacent wetlands may be defined as waters under the [Clean Water Act].").
42. 531 U.S. 159, 162 (2001).
43. *Id.* at 162–63.
44. *Id.* at 163.
45. *See id.* at 163–65. The U.S. Army Corps of Engineers asserted permit jurisdiction over this particular property based on the so-called "Migratory Bird Rule." *See id.*

consortium filed suit challenging the Corps' jurisdiction over the property in question.[46]

On appeal, the United States Supreme Court held in favor of the plaintiffs and rejected the Corps' attempt to regulate wetlands that were not "adjacent" to a waterway that is otherwise subject to federal permit authority under the CWA.[47] The majority opinion in *SWANCC* clarified that "[i]t was the *significant nexus* between the wetlands and 'navigable waters'" that informed the Court's decision in *Riverside Bayview*,[48] and, as a result, the isolated, wholly intrastate ponds in question could not be subject to federal permit authority under the CWA.[49]

Further, while explicitly seeking to avoid a more detailed discussion of the constitutional and federalism questions, the majority opinion expressed some discomfort with the "impingement of the States' traditional and primary power over land and water use" that would occur if the Court were to accept an over-expansive interpretation of federal jurisdiction under the CWA.[50] Thus, while recognizing that the CWA grants federal jurisdiction over some wetlands that may not qualify as "navigable waters," the Supreme Court in *SWANCC* refused to expand this principle to cover wholly intrastate, "isolated ponds" that did not have some "significant nexus" to an otherwise covered waterway.[51]

3. *Rapanos v. United States*

Not long after *SWANCC*, the Supreme Court was once again asked to determine the geographical scope of federal jurisdiction under the CWA in the context of wetlands.[52] In *Rapanos v. United States*, a property owner sought to fill approximately fifty-four "acres of land with sometimes-saturated soil conditions" in preparation for development.[53] Notably, the nearest bodies of navigable water to the property in question were eleven to twenty miles away.[54] Nonetheless, federal agencies

46. *Id.* at 165. Prior to reaching the United States Supreme Court, both the district court and Seventh Circuit Court of Appeals ruled in favor of the U.S. Army Corps of Engineers. *See id.* at 165–67.

47. *See id.* at 167–68 ("In order to rule for respondents here, we would have to hold that the jurisdiction of the Corps extends to ponds that are *not* adjacent to open water. But we conclude that the text of the statute will not allow this.").

48. *Id.* at 167 (emphasis added).

49. *See id.* at 170–71.

50. *See id.* at 174 (noting that Congress explicitly sought to "recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources").

51. *Id.* at 167–68, 171–72.

52. *See generally* Rapanos v. United States, 547 U.S. 715 (2006).

53. *Id.* at 719–20.

54. *Id.* at 720 (citing United States v. Rapanos, 339 F.3d 447, 449 (6th Cir. 2003)).

asserted permit authority over the property on the grounds that the wetlands contained within were "waters of the United States" subject to the CWA, and twelve years of costly "criminal and civil litigation ensued."[55]

While the Supreme Court's previous wetland cases each offered a relatively clear interpretation of the scope of the CWA, the Court in *Rapanos* was split on whether the property in question could be subject to federal authority. The plurality opinion, authored by Justice Scalia, was highly critical of the Corps' expansive construction of the CWA[56] and argued that the "only plausible interpretation" of "waters of the United States," as contemplated by the CWA, is that the term includes only "relatively permanent, standing or continuously flowing bodies of water" such as "streams, oceans, rivers, and lakes."[57] Yet, conceding that the holding of *Riverside Bayview* must allow at least some wetlands to be included, the plurality imposed the condition that wetlands must have a "continuous surface connection" to otherwise covered bodies of water in order to be protected by the CWA.[58]

In contrast, the concurrence delivered by Justice Kennedy provided an interpretation of the CWA's operative language that was more deferential to agency expertise and much more amicable to federal wetland protection efforts.[59] Justice Kennedy dismissed the plurality's construction of the CWA as "unpersuasive" and as reading "non-existent requirements into the Act."[60] Justice Kennedy instead chose to build upon the Court's holdings in *Riverside Bayview* and *SWANCC* in suggesting a "significant nexus" test for whether a particular wetland may be subject to the CWA.[61] Under this standard, the federal agencies tasked with implementing the CWA may rely on adjacency to establish their jurisdiction over wetlands that are adjacent to "navigable-in-fact

55. *Id.* at 720–21. Aside from the potential criminal prosecution and civil penalties that may accompany a violation of the CWA, applicants for an individual permit spend an average of 788 days navigating the process and incur average expenses of approximately $271,596. *See id.* As if to add insult to such an inconvenient injury, the plurality opinion in *Rapanos* contends that the U.S. Army Corps of Engineers "exercises the discretion of an enlightened despot" in deciding whether to issue a permit, relying on vague factors such as "economics, aesthetics, recreation, and in general, the needs and welfare of the people." *Id.* (quoting 33 C.F.R. § 320.4(a) (2004)).

56. *Id.* at 722. Justice Scalia's plurality opinion remarks that the Corps' expansive construction of the scope of the CWA would logically allow the agency to regulate not only wetlands and traditional bodies of water, but also "ripples of sand in the desert that may contain water once a year, and lands covered by floodwaters once every 100 years." *Id.*

57. *Id.* at 739.

58. *See id.* at 757.

59. *See id.* at 778 (Kennedy, J., concurring).

60. *Id.* at 772, 778.

61. *See id.* at 779–82.

waters."[62] Where wetlands are not necessarily "adjacent" to navigable waters as commonly understood, then federal agencies must "establish a significant nexus on a case-by-case basis" in order to claim jurisdiction over a given wetland.[63] While the precise definition of what constitutes a "significant nexus" was largely overlooked,[64] Justice Kennedy's standard would prove much more conducive to federal wetland protection efforts than the plurality's "continuous surface connection" test.[65]

C. Sackett v. EPA

1. Majority Opinion

In *Sackett v. EPA*, the U.S. Supreme Court appears to have definitively resolved what it characterized as a "nagging question" about the geographical scope of the CWA.[66] In doing so, the Court explicitly rejected the "significant nexus" standard and held that the CWA covers only wetlands with a continuous surface connection to those relatively permanent bodies of water that are themselves connected to traditionally navigable, interstate waters.[67]

In *Sackett*, the property owners purchased a small parcel of land in rural Idaho and began to discharge fill materials in preparation to build a house on the property.[68] This property was not "adjacent to" a larger body of water in the ordinary meaning of the word; however, the property did abut an "unnamed tributary," which flowed into a non-navigable creek, which in turn flowed into a navigable lake that itself was subject to federal regulation under the CWA.[69] In line with previous Supreme Court decisions on the scope of the CWA as applied to wetlands, the EPA characterized the property as an "adjacent wetland" subject to federal permitting requirements under the CWA because the agency found a

62. *Id.*

63. *Id.*

64. *See id.* at 779–86. Justice Kennedy states that the lower court had erred in placing outsized importance on the "hydrologic connection" between the wetlands in question and the nearest navigable waterway but provides little guidance beyond the assertion that "[a] more specific inquiry, based on the significant nexus standard, is therefore necessary." *Id.* at 786.

65. *Id.* at 742 (plurality opinion).

66. *See* Sackett v. EPA, 598 U.S. 651, 657 (2023) ("This case concerns a nagging question about the outer reaches of the Clean Water Act (CWA), the principal federal law regulating water pollution in the United States.").

67. *Id.* at 678–79.

68. *Id.* at 661–62.

69. *Id.* at 662.

"significant nexus" between the wetlands on the property and the ecological makeup of the nearby lake.[70]

On appeal, however, the U.S. Supreme Court unanimously rejected this finding and determined that the property at issue did not fall within the scope of the CWA, and thus was beyond the jurisdiction of the EPA.[71] Much like previous decisions addressing which wetlands may be subject to federal jurisdiction under the CWA, the Court's decision in *Sackett* was at least ostensibly based on statutory interpretation and a textualist reading of which geographical features could reasonably be included in the phrase "the waters of the United States."[72] To that end, the Court endorsed the position of the *Rapanos* plurality in stating that the phrase "the waters of the United States" is correctly understood to encompass "only those relatively permanent, standing or continuously flowing bodies of water . . . described in ordinary parlance as 'streams, oceans, rivers, and lakes.'"[73]

The Court supported this interpretation by citing the holdings of both *Riverside Bayview* and *SWANCC*.[74] The EPA had argued that the term "waters of the United States" is naturally read to broadly encompass most wetlands because the presence of water is "the most basic feature of wetlands."[75] However, the Court stated that such an expansive interpretation is inconsistent with both *Riverside Bayview*'s focus on whether a wetland is "adjacent" to a larger body of water and *SWANCC*'s clear rejection of the premise that "waters of the United States" could be read to include isolated and intrastate ponds or wetlands.[76]

Moreover, while the Court's decision was primarily based on an interpretative analysis of the phrase "waters of the United States," the majority opinion also expressed some concern for how a broader application of the CWA might infringe upon traditional state authority.[77] According to the majority, "[r]egulation of land and water use lies at the core of traditional state authority," and Congress must "enact exceedingly clear language if it wishes to significantly alter the balance between federal and state power and the power of the Government over

70. *Id.*

71. *See id.* at 684. It should be noted, however, that this decision was unanimous in judgment only, and at least four Justices criticized the majority's underlying rationale in separate concurrences. *See, e.g.*, *id.* at 710 (Kagan, J., concurring); *id.* at 715 (Kavanaugh, J., concurring).

72. *See id.* at 657–59 (majority opinion).

73. *Id.* at 671 (quoting Rapanos v. United States, 547 U.S. 715, 739 (2006)).

74. *Id.* at 673–74.

75. *Id.* at 674.

76. *Id.* at 673.

77. *See id.* at 679–80.

private property."[78] Applying this requirement, the majority asserted that the CWA never explicitly mentions the "significant nexus" test, and therefore there is no "exceedingly clear" statutory basis for utilizing a test that would "extend to all water in the United States."[79]

Despite a narrow interpretation of the statute's operative terms, the Court did recognize that certain provisions of the CWA suggest that the scope must apply to at least *some* wetlands.[80] In an effort to "harmonize" this concession with its adopted interpretation of "waters of the United States," the Court declared that the "adjacent wetlands" referenced in §1344(g)(1) of the Act must qualify as "waters of the United States" in their own right and "must be indistinguishably part of a body of water that itself constitutes 'waters' under the CWA."[81] Thus, the Court held that the CWA, and the federal authority granted therein, only applies to "those wetlands that are 'as a practical matter indistinguishable from waters of the United States,'" and a wetland can only satisfy this requirement if it has a "continuous surface connection with that water, making it difficult to determine where the 'water' ends and the 'wetland' begins."[82]

2. Analysis

To better understand the strengths and weaknesses of the majority's rationale in *Sackett*, a useful starting point can be found in the concurring opinions. As mentioned in the previous section, the majority ostensibly based its decision on a textualist interpretation of the CWA.[83] However, as Justice Kavanaugh and Justice Kagan point out in separate concurring opinions, the majority appears to overlook the clear meaning of the text.[84]

In the "principal concurrence,"[85] Justice Kavanaugh criticizes the majority's new "continuous surface connection" test because it "departs from the statutory text, from 45 years of consistent agency practice, and

78. *Id.* at 679.

79. *Id.* at 680.

80. *See id.* at 675. *See generally* 33 U.S.C. § 1344(g)(1) (authorizing states to apply to the EPA for permission to issue permits for the discharge of dredge and fill material into "waters of the United States," except for "traditional navigable waters, including wetlands adjacent thereto").

81. *Sackett*, 598 U.S. at 676.

82. *See id.* at 678–79.

83. *See supra* Section II.C.1.

84. *See Sackett*, 598 U.S. at 710 (Kagan, J., concurring); *id.* at 716 (Kavanaugh, J., concurring).

85. *See id.* at 710 (Kagan, J., concurring) (referring to Justice Kavanaugh's opinion as the "principal concurrence").

from this Court's precedents."[86] In particular, as Justice Kavanaugh notes, the majority's test effectively narrows the CWA's coverage from "adjacent" wetlands to only "adjoining" wetlands, even though the language of the statute clearly refers to "adjacent" wetlands.[87] Although this may seem to be a simple error, the collapse of these two concepts is a critical flaw in the majority's reasoning because there is a meaningful difference between an "adjoining" wetland and an "adjacent" wetland.[88] Ultimately, Justice Kavanaugh is correct in observing that "[b]y narrowing the Act's coverage of wetlands to only *adjoining* wetlands, the Court's new test will leave some long-regulated adjacent wetlands no longer covered by the CWA, with significant repercussions for water quality and flood control throughout the United States."[89]

Joined by Justices Sotomayor and Jackson in concurrence, Justice Kagan admonishes the majority opinion for using an "unorthodox" approach to statutory interpretation that essentially "shelves the usual rules of interpretation."[90] Moreover, Justice Kagan points out that the majority's new "surface connection" test for when a wetland is covered under the CWA largely ignores the clear legislative intent that underpins the law.[91] Echoing Justice Kavanaugh's argument, Justice Kagan writes that "the Clean Water Act's project is the protection of wetlands—both those contiguous to covered waters and others nearby."[92]

Together, Justices Kavanaugh and Kagan present a compelling critique of the majority's decision. The simple reality is that the majority does not adhere to a textualist interpretation of the CWA.[93] Rather, it largely ignores the plain meaning of the statute's operative definitions and disregards the underlying purpose of the law.[94] However, despite the validity of the arguments laid out by Justices Kavanaugh and Kagan, the majority opinion carries the day and the "continuous surface connection" test is now the defining measure of the CWA as applied to wetland

86. *Id.* at 716 (Kavanaugh, J., concurring). Despite his criticism of the majority's "continuous surface connection" test, however, Justice Kavanaugh does agree that the "significant nexus" test is not the proper standard for assessing Clean Water Act coverage. *See id.* at 715–16.

87. *See id.* at 716.

88. *See id.* "Adjoining wetlands are contiguous to or bordering a covered water, whereas adjacent wetlands include both (i) those wetlands contiguous to or bordering a covered water, *and* (ii) wetlands separated from a covered water only by a man-made dike or barrier, natural river berm, beach dune, or the like." *Id.*

89. *Id.* (emphasis added).

90. *Id.* at 712–13 (Kagan, J., concurring).

91. *See id.* at 713.

92. *Id.* at 711.

93. *See id.* at 712–13.

94. *See id.* at 712–14.

environments.[95] Necessarily, as Justice Kavanaugh notes, this also has the effect of removing many wetlands from the reach of the CWA.[96] In other words, the majority opinion in *Sackett* essentially returns the regulation of many intrastate wetland areas to the realm of "traditional state authority."[97]

III. THE NEED FOR COORDINATED STATE ACTION

After the Supreme Court's decision in *Sackett* effectively narrowed the geographical scope of the CWA, and in turn limited the federal government's ability to regulate harmful activities in an immense swath of the country's freshwater wetlands, state governments must step in to fill the gap and implement laws designed to preserve these vital ecosystems.[98]

Despite the *Sackett* majority's insistence that land use regulation, and by extension wetland regulation, is within the traditional sphere of state powers,[99] notably few States have actually endeavored to protect freshwater wetlands at all.[100] Only twenty-four states currently have laws or regulations providing some degree of protection for freshwater wetlands, and the means by which this is accomplished varies greatly between jurisdictions.[101] For example, Pennsylvania manages harmful activities in freshwater wetlands under a statute that is primarily designed to regulate the construction of dams and reservoirs.[102] Some other states, such as North Carolina, regulate the degradation of

95. *See id.* at 678–79 (majority opinion).

96. *Id.* at 716 (Kavanaugh, J., concurring).

97. *See id.* at 679 (majority opinion).

98. A discussion of the political realities facing state-level wetland protection efforts are beyond the scope of this paper, but see Alex Brown, *States Will Need Millions to Protect Affected Wetlands*, GOVERNING (Dec. 29, 2023), https://www.governing.com/climate/states-will-need-millions-to-protect-affected-wetlands, for an analysis of the issues facing coordinated state action in the wake of the Supreme Court's decision in *Sackett v. EPA*.

99. *Sackett*, 598 U.S. at 679–80.

100. *See* JON KUSLER & JEANNE CHRISTIE, NAT'L ASS'N OF WETLAND MANAGERS, COMMON QUESTIONS: STATE WETLAND REGULATORY PROGRAMS 2–3 (2006), https://www.nawm.org/pdf_lib/CQ_state_wetland_regulatory_6_26_06.pdf.

101. *Id.*

102. *See id.* Some observers have noted the strength of Pennsylvania's wetland regulatory program. *See generally* NAT'L ASS'N OF WETLAND MANAGERS, PENNSYLVANIA STATE WETLAND PROGRAM SUMMARY (2015), https://www.nawm.org/pdf_lib/state_summaries/pennsylvannia_state_wetland_program_summary_090915.pdf. However, rather than relying on a single statute specifically designed to combat freshwater wetland degradation, Pennsylvania's wetland regulatory program is derived from that state's Dam Safety and Encroachments Act and the Clean Streams Law. *See* 32 PA. CONS. STAT. §§ 693.1–.27 (2024); 35 PA. CONS. STAT. §§ 691.1–.1001 (2024).

freshwater wetlands under point-source pollution control laws.[103] Alternatively, states such as California largely regulate freshwater wetlands only under more general water quality statutes.[104]

Within the minority of states that do offer some form of protection for freshwater wetlands, only sixteen have adopted statutes that specifically seek to regulate harmful activities in freshwater wetlands ecosystems.[105] Yet, even within these freshwater wetland statutes, the scope and various provisions can vary significantly.[106] For instance, some states utilize a comprehensive wetland classification system to determine the extent of regulations, while other states determine coverage based on the geographical size of a freshwater wetland.[107] Where some states have implemented a consolidated permitting process at the state level,[108] others actively encourage wetland regulation by local municipalities.[109]

In other words, the status quo of state-level freshwater wetland protection laws looks less like an effective environmental protection regime and more like an unwieldy patchwork of policies, and this lack of coordination between states can undercut wetland preservation efforts.[110] If one state has enacted a strong wetland protection law, but shares a watershed or water resources with a state that offers weaker regulations, then the state with stronger wetland protection laws could still experience the negative effects of pollution and wetland degradation in the watershed as a whole.[111] Even if state law is not a perfect substitute for uniform action at the federal level, a model wetland

103. *See* KUSLER & CHRISTIE, *supra* note 100, at 5.

104. *See id.* at 1.

105. *Id.* at 2. The states which explicitly regulate freshwater or "nontidal" wetlands include Maine, Rhode Island, New Hampshire, New York, Vermont, Connecticut, New Jersey, Virginia, Florida, Maryland, Minnesota, Michigan, Wisconsin, Indiana, Ohio, and Oregon. *Id.*

106. *Compare* N.J. STAT. ANN. § 13:9B-30 (West 2024) (prohibiting local government from enacting any law or ordinance regulating freshwater wetlands), *with* N.Y. ENV'T CONSERV. LAW § 24-0501 (McKinney 2022) (allowing local government to adopt, amend, and implement law or ordinance regulating freshwater wetlands).

107. *See infra* Section IV.B.

108. *See* N.J. STAT. ANN. § 13:9B-27 (West 2024) (assuming federal permit jurisdiction for all freshwater wetlands in the state); § 13:9B-30 (Westlaw) (preempting local regulation of freshwater wetlands).

109. *See* § 24-0501 (authorizing local governments to adopt, amend, and implement local freshwater wetlands protection laws).

110. *See* Lester Graham, *A Patchwork of Differing State Laws to Protect Wetlands*, CIRCLE OF BLUE (June 28, 2023), https://www.circleofblue.org/2023/world/a-patchwork-of-differing-state-laws-to-protect-wetlands/.

111. *See id.* Some commentators have also noted that uncoordinated state action might also encourage a "race to the bottom" in decreasing wetland protections in order to attract economic development. *See id.*

protection statute could be a potent tool in bridging the regulatory gap.[112] But a key question remains: what exactly should a model freshwater wetland protection statute look like?[113]

IV. DEVELOPING A MODEL FRESHWATER WETLAND PROTECTION STATUTE

To develop a model freshwater wetland protection statute, one should look at the strengths and weaknesses of existing wetland protection laws. In particular, New Jersey's Freshwater Wetlands Protection Act ("FWPA")[114] serves as an example of a robust and well-balanced regulatory program. And, although some of the key provisions contained in the FWPA are not necessarily unique,[115] the statute does contain several noteworthy provisions that render it an innovative and effective wetland protection framework.[116]

First, the FWPA contains a strong declaration of the underlying policy goals, namely the preservation of freshwater wetlands and respect for the interests of affected property owners.[117] Second, the FWPA utilizes widely accepted definitions and regulates a broad list of harmful activities in freshwater wetlands to achieve an optimal level of protection.[118] Third, the FWPA establishes a reasonable and consolidated permitting process that encourages property owners to consider alternatives to potentially harmful activities and requires mitigation

112. The use of model statutes to better coordinate the legal systems of different jurisdictions is not a novel concept. For instance, in the context of criminal law, states have long drawn upon the Model Penal Code as a basic framework for constructing their various individual criminal laws. *See* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 319–20 (2007). Similarly, the Uniform Commercial Code is a model state law governing commercial transactions that has been universally adopted throughout the United States. *See Uniform Commercial Code*, UNIF. L. COMM'N, https://www.uniformlaws.org/acts/ucc (last visited Nov. 29, 2025). In particular, the Uniform Commercial Code has been almost invariably deemed a success, with some commentators even calling it the "backbone of American commerce." *Id.* Of course, the areas of criminal law, commercial transactions, and wetland protection are vastly different in practice. However, that is little reason to foreclose the possibility that a model wetland protection law could achieve similar success.

113. While a discussion of the political realities of enacting a model wetland statute in various jurisdictions is beyond the scope of this paper, there is some evidence to suggest that wetland preservation has bipartisan support at the state and local levels. *See Waters of the United States*, *supra* note 22.

114. N.J. STAT. ANN. §§ 13:9B-1 to -30 (West 2024); *see also* N.J. Dep't of Env't Prot. v. Huber, 63 A.3d 197, 199–202 (N.J. 2013) (summarizing the key provisions of the FWPA).

115. *See supra* Part III.

116. *See supra* Part III.

117. *See infra* Section IV.A.

118. *See infra* Section IV.B.

efforts where alternative activities are not feasible.[119] Finally, the FWPA employs a set of civil, administrative, and criminal penalties which serve as strong, yet reasonable, incentives to comply with the law.[120]

A. Declaration of Policy

The overarching goal of any state-level freshwater wetland protection statute is necessarily the regulation and protection of freshwater wetland ecosystems. However, many states have not formally codified a statement of these intentions or explicitly recognized the importance of successfully preserving wetland resources.[121] While this may seem to be a relatively minor omission when compared to more tangible provisions, such as permitting processes or strong enforcement mechanisms, a formal declaration of the policies and principles that underpin the law is fundamental to the consistent application of any statute.[122]

To provide a strong declaration of policy, a model wetland law should draw upon the FWPA as a prime example. In the first section of the statute, the FWPA explicitly recognizes the multitude of benefits that are associated with freshwater wetlands and the value of protecting such valuable resources.[123] Of course, this aspect of the FWPA in itself is certainly not unique amongst comparable state laws.[124] However, the FWPA goes further than simply recognizing the importance of freshwater wetland protection and declares that this goal must be achieved while also maintaining a balance between competing stakeholder interests.[125] In particular, the FWPA provides that the law's "vigorous action to protect the State's inland waterways and freshwater wetlands" must be balanced against "the rights of persons who own or possess real property affected by this act."[126] Nonetheless, the FWPA recognizes that "the public benefits arising from . . . freshwater wetlands, and the public harm from freshwater wetland losses, are distinct from and may exceed the private value of wetland areas."[127]

Such a robust declaration of policy would lend itself well to a model freshwater wetland statute for at least two reasons. First, it establishes

119. *See infra* Section IV.C.
120. *See infra* Section IV.D.
121. *See, e.g.*, OHIO REV. CODE ANN. §§ 6111.02–.028 (West 2024).
122. *See* N.J. Dept. of Env't Prot. v. Huber, 63 A.3d 197, 199–202 (N.J. 2013) (citing the FWPA's declarations and findings to ascertain legislative intent).
123. *See* N.J. STAT. ANN. § 13:9B-2 (West 2024).
124. *See* N.Y. ENV'T CONSERV. LAW § 24-0105 (McKinney 2022) (recognizing the benefits associated with freshwater wetlands and the negative effects of wetland loss).
125. *See* § 13:9B-2.
126. *Id.*
127. *Id.*

a clear expression of legislative intent that can assist courts and legal practitioners in applying the law accurately and consistently.[128] Second, the FWPA's stated goal of balancing public and private interests is responsive to the concerns over property rights that the United States Supreme Court expressed in *Sackett v. EPA*.[129] Importantly, this focus on balancing stakeholder interests does not necessarily diminish the state's "vigorous action" to protect freshwater wetlands. Rather, the law simply acknowledges that although the private value of wetland areas is a legitimate interest to be considered and balanced, the public benefits from preserving freshwater wetlands may not necessarily be reflected in their private value and may even exceed that private value.[130]

B. Scope

1. Wetland Definition

An integral part of any effective freshwater wetland protection statute is a clear statement of precisely what constitutes a protected "freshwater wetland" in the first place. Yet, while there are several widely accepted ecological characteristics of a freshwater wetland ecosystem,[131] not every state utilizes the same operative definitions when seeking to regulate these vital environments.[132]

For example, the definition of covered "freshwater wetlands" utilized in New York's Freshwater Wetlands Act is currently based on a highly detailed list of the physical and ecological traits that often characterize freshwater wetlands, including references to specific species of semi-aquatic plants.[133] However, effective January 1, 2025, this operative definition has been amended so that the statute will only apply to freshwater wetlands that are "at least twelve and four-tenths acres in size, or, if less than twelve and four-tenths acres in size, are of unusual importance."[134] Then, effective January 1, 2028, the size requirement for a protected freshwater wetland in New York will decrease to "seven and four-tenths acres."[135] As a result, the scope of protection afforded under

128. *See* N.J. Dept. of Env't Prot. v. Huber, 63 A.2d 197, 199–202 (N.J. 2013).

129. *See* Sackett v. EPA, 598 U.S. 651, 670 (2023) ("What are landowners to do if they want to build on their property?").

130. *See* § 13:9B-2.

131. *See Huber*, 63 A.2d at 199–202.

132. *See, e.g.*, N.Y. ENV'T CONSERV. LAW § 24-0107 (McKinney 2022).

133. *See* § 24-0107(a)–(d).

134. § 24-0107. It should be noted that New York is not the only state to include a size requirement in order for a freshwater wetland to qualify for protection. *See* ME. REV. STAT. ANN. tit. 38, § 480-X (2024).

135. § 24-0107.

the New York Freshwater Wetlands Act will be effectively diminished, as the law's strong ecological definition is offset by an arbitrary size requirement that will leave smaller, but equally valuable, wetlands without legal protection.

In contrast, the FWPA utilizes a definition of covered freshwater wetlands that approximates the definition set forth by federal regulations.[136] Under the FWPA, a "freshwater wetland" refers to "an area that is inundated or saturated by surface water or groundwater at a frequency and duration sufficient to support . . . a prevalence of vegetation typically adapted for life in saturated soil conditions."[137] Building upon this, the FWPA then instructs that the state agency responsible for implementing the law will employ the U.S. Environmental Protection Agency's "3-parameter approach" in order to make determinations on a case-by-case basis.[138]

While there may be some benefit to the definitions utilized in other states, the FWPA's definition of covered freshwater wetlands is the strongest candidate for use in a model wetland protection statute. For example, despite claims that New York's wetland protection law is relatively strong,[139] the arbitrary size requirement leaves a noticeable gap in coverage that jeopardizes smaller, yet equally valuable, freshwater wetlands. By contrast, the definition utilized at the federal level, and approximated in the FWPA, ensures that any wetland that exhibits certain ecological characteristics, regardless of size, will receive some degree of protection.[140]

2. Classification System

The FWPA, and the laws of a few other states, go beyond simply defining which wetlands are protected and further categorize protected wetlands based on certain criteria.[141] Under the FWPA, protected freshwater wetlands are classified into three categories: exceptional resource value, intermediate resource value, and ordinary resource value.[142]

136. *See* N.J. STAT. ANN. § 13:9B-3 (West 2024).

137. *Id.*

138. *Id. See generally* 11 U.S. ENV'T PROT. AGENCY, WETLAND IDENTIFICATION AND DELINEATION MANUAL (1987).

139. *See* Graham, *supra* note 110.

140. *See* § 13:9B-3.

141. *See* N.J. STAT. ANN. § 13:9B-7 (West 2024); OHIO REV. CODE ANN. § 6111.02 (West 2024) (providing for the classification of protected wetland into "Category 1," "[C]ategory 2," or "[C]ategory 3" wetlands).

142. § 13:9B-7.

Under this system, a wetland of "exceptional resource value" is understood to include wetlands that "discharge into . . . trout production waters and their tributaries" or wetlands that serve as habitats for threatened or endangered species.[143] In contrast, wetlands of "ordinary value" include wetlands that do not discharge into trout production waters or support endangered species and which are "isolated wetlands, man-made drainage ditches, swales, or detention facilities."[144] The remaining category, wetlands of "intermediate resource value," essentially serves as a catch-all for any wetlands that may not exhibit the qualities of either exceptional or ordinary value wetlands.[145]

Of course, in a model wetland statute, the "trout production" aspect of the exceptional resource value classification could be amended to reflect the concerns of a broader population of stakeholders. The precise characteristics that give wetlands exceptionally high resource value may vary from state to state. However, the overarching point is that the general framework of a tiered classification system is conducive to balancing vigorous wetland protection efforts and the interests of private property owners. For example, when viewed in conjunction with the FWPA's protection of "transition areas,"[146] the three-tiered classification system ensures that the freshwater wetlands with the greatest resource value receive protection proportional to that increased value. Conversely, wetlands with lower resource value are afforded a lower, but still effective, degree of protection.[147]

This dynamic inherently balances public and private interests. Where a freshwater wetland has exceptional resource value, then a private property owner's interest in potentially harmful activities within that wetland must yield to the public's heightened interest in preservation.[148] Alternatively, if a wetland is deemed to have only

143. *In re* Freshwater Wetlands Prot. Act Rules, 852 A.2d 1083, 1087 (N.J. 2004).

144. *Id.* (quoting § 13:9B-7(b)).

145. *See id.* (quoting § 13:9B-7(c)).

146. *See* N.J. STAT. ANN. § 13:9B-16 (West 2024). In addition to prohibiting certain unpermitted activities in the wetlands themselves, FWPA prohibits "transition areas," or buffer zones around freshwater wetlands of exceptional resource value and intermediate resource value, in order to further mitigate the harmful impacts of nearby development. *See id.* The transition area requirement for wetlands of exceptional resource value includes any property between seventy-five and 150 feet adjacent to that wetland. *See id.* Similarly, the transition area requirement for wetlands of exceptional resource value includes any property between fifty and twenty-five feet adjacent to that wetland. *See id.* However, these increased protections are balanced by the fact that the agency responsible for implementing the FWPA may adjust or waive these transition area requirements under certain circumstances. *See* N.J. STAT. ANN. § 13:9B-18 (West 2024).

147. *See* § 13:9B-7.

148. *See id.*

ordinary resource value, then the public's interest in preservation carries less weight and may yield to a private property owner's interest in the productive use of their land.[149]

3. Prohibited Activities

Under the CWA, it is unlawful to discharge any pollutant into a wetland subject to the Act's protection,[150] and "pollutant" is broadly defined so as to include materials including dredged spoil, rock, and sand.[151] In other words, after *Sackett v. EPA*, the CWA prohibits the discharge of pollutants like dredged spoil, rock, and dirt into wetlands that have a continuous surface water connection to traditionally navigable waters.[152] Looking forward, however, a model freshwater wetland statute could regulate an even broader range of potentially damaging activities and offer an even greater degree of protection.

The FWPA offers a more comprehensive list of prohibited activities in protected wetlands and transition areas.[153] Unless done in the course of "[n]ormal farming, silviculture, and ranching activities,"[154] the FWPA requires that property owners receive approval from the New Jersey Department of Environmental Protection prior to the "dumping, discharging, or filling" of a protected wetland or transition area "with any materials."[155] Beyond the discharge of pollutants or fill materials, the FWPA also prohibits the mere disturbance of soil, the erection of structures, and the destruction of plant life that would alter the existing pattern of vegetation within a protected freshwater wetland.[156]

In other words, the FWPA offers stronger protections than even the CWA could by prohibiting a more complete list of activities that may impair or destroy the normal functionality of protected wetlands. For instance, consider a property owner whose land falls within the transition area of a nearby wetland. If the property owner were to remove trees or destroy any of the plant life in this transition area, then that

149. *See id.*
150. 33 U.S.C. § 1311(a).
151. 33 U.S.C. § 1362(6).
152. *See* Sackett v. EPA, 598 U.S. 651, 678–79 (2023).
153. *See* N.J. STAT. ANN. § 13:9B-17 (West 2024).
154. N.J. STAT. ANN. § 13:9B-4(a) (West 2024).
155. *See* N.J. STAT. ANN. § 13:9B-3 (West 2024); § 13:9B-17.
156. *See* § 13:9B-3; *In re* Freshwater Wetlands Prot. Act Rules, 852 A.2d 1083, 1087–88 (N.J. 2004). Other states have also adopted comprehensive lists of regulated activities. *See, e.g.*, N.Y. ENV'T CONSERV. LAW § 24-0701(2) (McKinney 2022). For example, New York prohibits a wide range of unpermitted activities in covered wetlands, including "any other activity which substantially impairs any of the several functions served by freshwater wetlands or the benefits derived therefrom." *See id.*

conduct would not necessarily violate the CWA even though it could have an immense impact on the ecology of the nearby wetland. In contrast, under the FWPA's list of prohibited activities, the property owner's conduct would constitute a violation and that property owner would be subject to penalties unless they had first acquired a permit from the appropriate state agency. Naturally, this expanded list of prohibited activities offers a degree of protection that is more attuned to the fragility of wetland ecosystems and would strengthen any model wetland protection statute.

C. Permitting

1. Consolidated Process

It is important to understand that, whether under the CWA or any state law, wetland protection statutes do not generally impose a strict prohibition on the enumerated activities. Instead, such activities are only prohibited *unless* a property owner applies for—and receives—the appropriate permit.[157] However, the complexity of this permitting process varies amongst jurisdictions, and approval must sometimes be sought from multiple regulators at both the state and local levels, which all contribute to the immense costs associated with seeking a permit.[158]

One factor adding to the notoriously complex and expensive wetland permitting process in many jurisdictions is that applicants must navigate regulations and permit requirements at both the state and local levels.[159]

157. *See, e.g.*, 33 U.S.C. § 1344(a); N.J. STAT. ANN. § 13:9B-9 (West 2024); N.Y. ENV'T CONSERV. LAW § 24-703 (McKinney 2022).

158. *See* Sackett v. EPA, 598 U.S. 651, 661 (2023). While discussing the permitting process for wetland alterations under the CWA, the *Sackett* majority mentions that even the EPA and the U.S. Army Corps of Engineers have admitted that the permitting process can be "arduous, expensive, and long." *See id.* Further, in *Rapanos v. United States*, the plurality opinion notes that the process for obtaining an individual permit under the CWA can last for an average of 788 days and cost an average of $271,596. 547 U.S. 715, 720–21 (2006). In total, "over $1.7 billion is spent each year by the private and public sectors obtaining wetlands permits." *See id.* (citing David Sunding & David Zilberman, *The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process*, 42 NAT. RES. J. 59, 81 (2002)). These figures are calculated on a national basis for permitting under the CWA; however, it is reasonable to assume that further permitting at the state and local levels contribute to the immense costs associated with simply applying for permits, let alone developing on or near wetlands after a permit has been duly granted.

159. *See* N.Y. ENV'T CONSERV. LAW § 24-0501 (McKinney 2022) (stating that each local government in New York state may adopt, amend, and implement a freshwater wetlands protection law or ordinance that is applicable within the boundaries of that municipality). Naturally, however, the extent of federal permit authority has been largely curtailed after

Further, some states actively encourage local governments to implement their own freshwater wetland protection ordinances to supplement a state-level program.[160] In sharp contrast, New Jersey's FWPA actually discourages local action and explicitly preempts any local freshwater wetland regulations.[161]

While it may initially seem contradictory to the goal of vigorously protecting freshwater wetlands, the FWPA's approach of preempting local regulation could actually contribute to the success of a model wetland protection statute's regulatory program. As explained previously, one of the underlying policies of the FWPA is the need to balance the public's interest in vigorous protection of freshwater wetlands and the rights or interests of affected property owners.[162] The preemption of local regulation achieves this balance by reducing the complexity of the permit process, and thus, reducing the immense costs or administrative obstacles that might face a property owner. Moreover, the reduced costs associated with less regulation and a more consolidated permitting process at the state level would contribute to the success of freshwater wetland protections by encouraging property owners to proactively seek the appropriate permits and comply with the law's provisions.[163]

2. Rebuttable Presumption

Regardless of the nature of the permitting process that is ultimately included in a model freshwater wetland statute, it is important to clearly articulate the conditions under which a permit will be issued and the persuasive burden facing applicants. Under New Jersey's FWPA, an applicant must provide the reviewing agency with several documents,

Sackett v. EPA, so obtaining a federal permit for activity in freshwater wetlands is not as great a burden as it once was. *See supra* Section II.C.

160. *See* § 24-0501.

161. *See* N.J. STAT. ANN. § 13:9B-30 (West 2024). Even before *Sackett* significantly limited the extent of federal permit authority over intrastate freshwater wetlands, New Jersey was one of only two states to have formally "assumed" responsibility for administering the federal program under the CWA. *See* N.J. STAT. ANN. § 13:9B-27 (West 2024). Together with the FWPA's preemption of local regulation, this assumption of responsibility made New Jersey's program one of the most "consolidated" wetland permitting processes in the country.

162. *See* N.J. STAT. ANN. § 13:9B-2 (West 2024).

163. It is worth acknowledging that, despite the potential benefits of a consolidated permitting process for freshwater wetland permits, the success of a consolidated process at the state level might depend in part on the political landscape of a given state and whether that state is equipped to administer such a program. In other words, state preemption would be a model provision only if a state elects to adopt the entirety of the model statute and adequately fund enforcement of the law.

including "a preliminary site plan[,] . . . a written description of the proposed regulated activity," proof "that notice of the proposed activity has been published in a [local] newspaper[,]" and a written description of environmental impacts and mitigation efforts.[164] Subsequently, a permit will only be issued if the reviewing agency determines that several enumerated conditions are satisfied.[165]

However, beyond simply stating the conditions under which a permit may be issued and the factors to be considered by reviewing state agencies, the FWPA also establishes a rebuttable presumption that contributes to the law's balancing of public and private interests.[166] Under the FWPA, the administering agency will presume "that there is a practicable alternative to any . . . regulated activity" in a protected freshwater wetland, and that such alternatives "would have less of an impact on the aquatic ecosystem."[167] In turn, an applicant can rebut this presumption by demonstrating "that the basic project purpose cannot reasonably be accomplished by utilizing one or more other sites in the general region[;] . . . [t]hat a reduction in the size, scope, configuration, or density of the project" and all alternatives will not accomplish the basic purpose of the project; and that "the applicant has made reasonable attempts to remove or accommodate . . . constraints," "such as zoning, infrastructure, or parcel size," that would render an alternative impracticable.[168] Furthermore, if an applicant's proposed activity would

164. N.J. STAT. ANN. § 13:9B-9(a)(1)–(4) (West 2024).

165. *See* § 13:9B-9(b)(1)–(9). Once an applicant has submitted the required documents, a wetlands permit may be issued under the FWPA if the proposed activity is "water-dependent" or requires access to the freshwater wetland as a central element of its basic function and has no practicable alternative that would result in less adverse impact on the freshwater wetland. *See* § 13:9B-9(b)(1). Alternatively, a permit might be issued if the activity is "nonwater-dependent," will result in minimum alteration or impairment of the aquatic ecosystem, will not jeopardize the continued existence of endangered species, will not cause a violation of state water quality standards, will not cause a violation of other pollution control laws, will not cause or contribute to a significant degradation of ground or surface waters, and is in the "public interest." *See* §13:9B-9(b)(2)–(9). Regarding the last condition, the agency tasked with reviewing wetland permit applications will consider several factors, such as the public's interest in preservation and the property owner's interest in reasonable economic development, the permanence of beneficial or detrimental effects associated with the regulated activity, the quality and number of freshwater wetlands that will be disturbed, and the economic and ecological values of the areas to be affected. *See* N.J. STAT. ANN. § 13:9B-11 (West 2024).

166. *See* N.J. STAT. ANN. § 13:9B-10 (West 2024).

167. § 13:9B-10(a). Under this presumption, an alternative to a proposed activity is considered "practicable" if it is "available and capable of being carried out after taking into consideration cost, existing technology, and logistics." *Id.* Further, an alternative will be deemed practicable even if it would require the use of other areas not owned by the applicant that "could reasonably have been or be obtained." *See id.*

168. § 13:9B-10(b).

impact a wetland of exceptional resource value,[169] then the applicant "must also demonstrate that there is a compelling public need for the proposed activity greater than the need to protect the freshwater wetland."[170]

As some critics would suggest, some aspects of the conditions for issuance and the rebuttable presumption under the FWPA are relatively ambiguous and provide a great deal of discretion to the administering agency.[171] However, this is largely by design, as the state legislature intended to create a significant obstacle for permit applicants to overcome and to ensure that applicants consider all other reasonable alternatives before a permit could be granted.[172]

Together, the FWPA's conditions for issuance and the rebuttable presumption create a potent yet fair framework for assessing the merits of a permit application. First, the extensive list of conditions for issuance ensures that the administering agency weighs both the nature of a proposed activity and the adverse environmental consequences that may result.[173] By explicitly delineating these conditions for issuance, the FWPA's approach also ensures that applicants receive fair notice of the factors that will be considered in approving or rejecting a permit application.[174] Further, by requiring applicants to show that they have carefully considered any practicable alternatives, the FWPA's rebuttable presumption ensures that a freshwater wetland will only be impaired by a regulated activity if there is truly no other alternative.[175]

3. Mitigation Requirements

Assuming that a property owner is successful in receiving a permit for the regulated activity in a protected freshwater wetland, what happens next? Would such a permit constitute an unlimited license to engage in regulated activities while ignoring the adverse impacts on the wetland ecosystem and the public's interest in preservation? Not quite. Even when a permit is issued, New Jersey's FWPA imposes the additional condition that the applicant take "all appropriate measures to

169. *See supra* Section IV.B.2.

170. §13:9B-10(c).

171. *See* Tanurb v. N.J. Dept. of Env. Prot., 833 A.2d 670, 676–77 (N.J. Super. Ct. App. Div. 1997) (rejecting a plaintiff property owner's assertion that the language of §13:9B-10 is unconstitutionally vague).

172. *See id.* at 676 ("[T]he Legislature apparently intended to create a difficult hurdle for permit applicants to meet, essentially requiring them to rule out all other reasonable alternatives before a freshwater wetlands permit would be granted.").

173. *See* N.J. STAT. ANN. § 13:9B-9(b) (West 2024).

174. *See id.*

175. *See* § 13:9B-10(b); *Tanurb*, 833 A.2d at 676.

mitigate adverse environmental impacts, restore vegetation, habitats," or water features, and generally "minimize the area of freshwater" wetlands that will be disturbed.[176]

This mitigation requirement can take one of two forms under the FWPA. First, similar to the mitigation requirements previously mandated under the CWA, the administering agency may require the property owner to create, enhance, or restore "an area of freshwater wetlands of equal" resource value to those that will be lost.[177] This can be done either onsite or at a different location, as deemed appropriate by the agency.[178] Alternatively, if the creation or restoration of an equally valuable freshwater wetland is not feasible, then the administering agency requires other mitigation efforts, including a financial contribution to a "Wetlands Mitigation Bank."[179] Such a financial contribution would be equivalent to either the cost of purchasing and restoring a degraded freshwater wetland, or the cost of purchasing property and creating a freshwater wetland of equal resource value to those that are being lost.[180]

Whether through the creation or restoration of equally valuable freshwater wetlands or through financial contributions to a wetland

176. N.J. STAT. ANN. § 13:9B-13(a) (West 2024). New Jersey is not alone in the imposition of mitigation requirements, with several other states also requiring that property owners mitigate adverse environmental impacts and minimize the disturbance of freshwater wetlands. *See, e.g.*, OHIO REV. CODE ANN. § 6111.027 (West 2024).

177. *See* § 13:9B-13(b).

178. *See id.*

179. *See* § 13:9B-13(c). Naturally, the possibility of requiring contributions to a wetland mitigation bank would require states to provide for the creation of such funds in the first place. To that end, a model wetlands statute could also build upon New Jersey's approach in creating a wetlands mitigation bank and a volunteer council to oversee disbursement of mitigation credits. *See* N.J. STAT. ANN. §§ 13:9B-14, -15 (West 2024).

180. *See* § 13:9B-13(c). The financial contribution to a wetland mitigation bank, sometimes referred to as "mitigation banking," is similar in concept to the "carbon credits" that are popularly used by private companies to offset carbon emissions. Similarly, wetland mitigation banking can be understood as a method through which property owners may purchase "credits" from a wetlands mitigation bank to compensate for impacts to lost or disturbed wetlands. *See Wetland Mitigation Banking Program*, U.S. DEP'T OF AGRIC., https://www.nrcs.usda.gov/programs-initiatives/wmpb-wetland-mitigation-banking-program (last visited Nov. 29, 2025). "Carbon credits" are effectively financial instruments through which the buyer effectively pays another company to reduce its own greenhouse gas emissions. Varsha Ramesh Walsh & Michael W. Toffel, *What Every Leader Needs to Know About Carbon Credits*, HARV. BUS. REV. (Dec. 15, 2023), https://hbr.org/2023/12/what-every-leader-needs-to-know-about-carbon-credits. Further, wetland mitigation banking is viewed by proponents in the ecological restoration industry as a proven strategy for reducing adverse environmental impacts, with one stakeholder arguing that mitigation banks "deliver the highest quality, most reliable offset to environmental impacts." ECOLOGICAL RESTORATION BUS. ASS'N, https://img1.wsimg.com/blobby/go/41e32553-5f04-46fc-9fa2-2486b37b0f46/downloads/1cm5tkduv_369027.pdf (last visited Nov. 29, 2025).

mitigation bank, a mitigation requirement would be a critical component of a model freshwater wetlands protection statute. While a property owner who successfully receives a permit can engage in their proposed activity and enjoy the beneficial use of their property, a mitigation requirement ensures that the adverse environmental impacts of this activity are minimized and offset. This dynamic also contributes to the law's overarching goal of balancing the public's interest in preserving freshwater wetlands and the private property owner's interest in the beneficial use of their land.[181]

D. Enforcement Mechanisms

In order to truly achieve the goal of protecting freshwater wetlands, a model statute must include enforcement mechanisms through which the state can police violations and incentivize compliance. To that end, both the federal and state governments have historically utilized a combination of civil, administrative, and criminal penalties to enforce environmental protection laws, including wetland protection statutes.[182] Under the CWA, the EPA is authorized to issue compliance orders and commence civil actions for "appropriate relief," including permanent or temporary injunctions.[183]

State-level statutes provide for similar enforcement mechanisms. For example, under New Jersey's FWPA, the state's environmental protection agency is authorized to engage in a range of civil enforcement efforts, including issuing compliance orders, initiating civil litigation, or levying civil administrative penalties.[184] In particular, where the agency elects to initiate a civil action in a court of law, the agency may seek remedies in the form of injunctive relief, recovery of reasonable costs incurred by the state, compensatory damages for any loss or destruction of natural resources, and an order requiring the violator to restore the site of the violation to the maximum extent practicable.[185] The agency may also choose to assess a maximum civil administrative penalty of $25,000 for each violation.[186]

181. *See supra* Section IV.B.2.

182. *See* 33 U.S.C. § 1319; N.J. STAT. ANN. § 13:9B-21 (West 2024).

183. *See* 33 U.S.C. § 1319(a)–(b).

184. *See* § 13:9B-21(a).

185. *See id.* § 13:9B-21(c).

186. *See id.* § 13:9B-21(d). For the purposes of a civil administrative policy, "each day during which [a] violation continues shall constitute an additional, separate, and distinct offense." *Id.* In other words, for every day that a property owner continues to engage in unpermitted activity in a freshwater wetland or that the effects of an unpermitted activity continue, that property owner can be subject to an addition administrative penalty of up to $25,000. *See id.*

Similar to the prosecutorial discretion granted to federal agencies under the Clean Water Act, the FWPA also authorizes the state government to seek criminal penalties under certain circumstances.[187] Under the FWPA, an individual who "purposefully, knowingly or recklessly" violates any provision of the law may be subject to criminal prosecution for a crime of the third degree and may be subject to a fine of between $5,000 and $50,000 per violation, imprisonment, or both.[188] However, while the threat of such hefty fines and a term of imprisonment may seem like a potent method for incentivizing compliance, the reality is that enforcement is primarily brought through administrative action, and criminal prosecution under the FWPA is generally reserved for the most "extreme" cases.[189]

Taken together, the combination of civil, administrative, and criminal enforcement would contribute greatly to the success of a model freshwater wetland protection statute. On one hand, the wide range of remedies available under the FWPA allows the state to tailor its enforcement actions as needed depending on the circumstances.[190] Alternatively, in the most "extreme" cases, the state may pursue criminal prosecution and seek to apply much more potent penalties, subject to a higher burden of proof.[191]

This mixture of civil, administrative, and criminal enforcement mechanisms also responds well to the concerns expressed by the U.S. Supreme Court in cases like *Sackett v. EPA*. Seeming to criticize the strict enforcement of dredge and fill restrictions under the CWA, the majority opinion in *Sackett* remarks that the law "can sweep broadly enough to criminalize mundane activities like moving dirt."[192] However, the reality under wetland protection laws like the FWPA is that enforcement is primarily accomplished through civil or administrative actions,[193] and "mundane activities like moving dirt" will only be criminalized in the

187. *See id.* § 13:9B-21(f).

188. *See id.*

189. *See* State v. Rowland, 933 A.2d 21, 25 (N.J. Super. Ct. App. Div. 2007) (citing State v. Robertson, 670 A.2d 1096, 1099 (N.J. Super. Ct. App. Div. 1996)).

190. In cases where the state has elected to pursue civil action or civil administrative penalties, alternative dispute resolution has also proven to be a successful method for resolving FWPA violations. *See* A. Vincent Agovino, *Wetlands*, *in* NEW JERSEY ENVIRONMENTAL LAW HANDBOOK 156, 161 (Albert I. Telsey ed., 8th ed. 2014).

191. *See* § 13:9B-21(f).

192. *See* Sackett v. EPA, 598 U.S. 651, 669 (2023). The majority in *Sackett* further characterizes the penalties for Clean Water Act violations as "'crushing' consequences 'even for inadvertent violations.'" *See id.* at 660 (quoting U.S. Army Corps of Eng'rs v. Hawkes Co., 578 U.S. 590, 602 (2016) (Kennedy, J., concurring)).

193. *See* Agovino, *supra* note 190, at 161.

most extreme circumstances.[194] Further, the remedies for violations largely reflect the actual costs of correcting adverse environmental effects and the loss or destruction of natural resources.[195] As a result, the tiered enforcement mechanisms of the FWPA, much like those employed under the Clean Water Act, should serve as a guide for enforcement provisions of a model wetland protection statute.

V. CONCLUSION

In the wake of *Sackett v. EPA*, the geographical scope of the Clean Water Act has been significantly curtailed, leaving many of the country's freshwater wetlands beyond the reach of federal agencies like the Environmental Protection Agency and the Army Corps of Engineers.[196] As a result, in order to fill the regulatory gap and ensure that these vital ecosystems are not destroyed or degraded, individual states must endeavor to protect freshwater wetlands that are no longer covered by the Clean Water Act.

To that end, states should consider adopting a model wetland protection statute in order to ensure consistent application across jurisdictions and coordinate regulatory efforts to the extent practicable. There is also no need to reinvent the wheel because existing state-level wetland laws can serve as a framework upon which a model statute is based. In particular, New Jersey's FWPA is a comprehensive law that is well-suited to serve as the basis for a model statute that vigorously protects freshwater wetlands while simultaneously respecting the rights and interests of affected property owners.[197]

New Jersey's FWPA is characterized by a broad scope, a reasonable permitting process, and fair enforcement mechanisms that are cumulatively designed to balance the public's interest in preservation and private interests in property.[198] Beyond these key elements, the law offers even more valuable provisions that contribute to this balance and would fit well in a model wetland protection statute.[199] Taken together,

194. *See Rowland*, 933 A.2d at 25; *Sackett*, 598 U.S. at 669.

195. *See* § 13:9B-21(c)(3)–(4).

196. *See Sackett*, 598 U.S. at 682.

197. *See* sources cited *supra* note 114.

198. *See* sources cited *supra* note 114.

199. In addition to the provisions discussed in this paper, the FWPA also addresses some of the most controversial aspects of wetland regulation. For instance, the FWPA explicitly addresses the issue of regulatory takings and directs property owners who suspect that a taking has occurred to petition a court of law for further review. N.J. STAT. ANN. § 13:9B-22 (West 2024). While a full discussion of regulatory takings is beyond the scope of this paper, it must be recognized that regulatory takings issues often arise in cases concerning wetland protection regulations. *See, e.g.*, E. Cape May Assocs. v. N.J. Dep't of Env't Prot.,

these provisions render the FWPA an effective and balanced freshwater wetland protection statute that can serve as the basis for a model statute to fill the environmental gap created by *Sackett v. EPA*.

693 A.2d 114, 120 (N.J. Super. Ct. App. Div. 1997). For a more detailed analysis of regulatory takings in the context of wetland protection, see generally Richard C. Ausness, *Regulatory Takings and Wetland Protection in the Post-*Lucas *Era*, 30 LAND & WATER L. REV. 349 (1995). Professor Ausness analyzes *Lucas v. South Carolina Coastal Council*, in which the United States Supreme Court held that a land use regulation that deprives a property owner of all economically beneficial use of their land is akin to a physical appropriation of that private property and requires just compensation under the Takings Clause of the Fifth Amendment. *Id.* at 387–90.