Brigham Young University Prelaw Review

Volume 38 Article 4

4-2024

Safeguarding Wetlands Post-Sackett v. EPA: Protecting Indigenous Territories and Environmental Health

Anna J. Mahler
Brigham Young University, annajeanmahler@gmail.com

Emily Richardson
emirichardson3@gmail.com

Safeguarding Wetlands Post-Sackett v. EPA: Protecting Indigenous Territories and Environmental Health

Anna J. Mahler[1]

I. Introduction

The Ojibwe Tribe embarked on a historic migration 1,500 years ago.[2] They left their homes along the Atlantic coast to go on a journey

---

1 Anna J. Mahler is a senior at Brigham Young University, pursuing a Bachelor of Science in Wildlife and Wildlands Conservation. She plans to attend law school in Fall 2024. Anna would like to thank her editor, Emily Richardson, who is studying business management at Brigham Young University and plans to attend law school in Fall 2026.

2 *The Ojibwe People*, Minn. Historical Society, https://www.mnhs.org/fortsnelling/learn/native-americans/ojibwe-people (last visited Jan. 11, 2024)

driven by the Seven Fires Prophecy.[3,4] This prophecy urged the Tribe to find the place where "food grows on water."[5] They found a fulfillment of their prophecy in the Manoomin, or wild rice, of the Great Lakes Region, where Manoomin grows in the region's wetlands, streams, and lakeshores.

The Ojibwe have relied on the waters of the Great Lakes region since they first settled in the area to fish, hunt, trap, farm,[6] and travel throughout the vast territory.[7] Before the 20th century, the Tribe was semi-nomadic.[8,9] During the 20th century, treaties between the Tribe

3 *The Prophecy of the Seven Fires of the Anishinaabe*, Seven Fires Foundation, *https://caid.ca/SevFir013108.pdf* (last visited Mar. 3, 2024) Note: *The Seven Fires Prophecy was given by seven prophets who appeared to the Ojibwe. They each spoke about a fire, or period that the Ojibwe would experience, specifically regarding their spiritual path. The first fire warns of the arrival of light-skinned races and instructs the tribe to move west, towards the chosen place where food will grow on water. The second fire describes the hardships of adapting to new challenges and developing new skills in the area. The third fire speaks of the light-skinned race influencing the Ojibwe. Part of this influence enters into the fourth fire, where the people will be introduced to weapons, alcohol, and disease, which will lead to the people suffering. The fifth fire refers to two paths that the Ojibwe can take; one in line with spiritual growth, harmony and earthly connection, the second of materialism, self-destruction, and earthly disconnect. The sixth fire directs the people to reconnect with their spiritual knowledge and traditions. Lastly, the seventh fire speaks of another crossroad, this time between peace and harmony, and one of self-destruction.*

4 *The Teachings of the Seven Fires Prophecy*, Ya-Native, *https://www.ya-native.com/nativeamerica/theteachingsofthesevenfiresprophecy.html* (last visited Mar. 2, 2024)

5 Native Hope, *The History and Culture of the Ojibwe (Chippewa) Tribe,* Native Hope Blog (Jan. 11, 2024, 2:52 PM) https://blog.nativehope.org/history-and-culture-of-the-ojibwe-chippewa-tribe

6 The Ojibwe People, *supra* note 2

7 Native Hope, *supra* note 5

8 The Ojibwe People, *supra* note 2

9 *Migration Tradition*, Fond du Lac Band of Lake Superior Chippewa, http://www.duluthstories.net/index.html (last visited Jan. 22, 2023).

and the United States of America designated specific, permanent residences for the Ojibwe people to settle in.[10]

Along with forming specific residence areas for the Ojibwe, the treaties gave the Tribe a protected right to "fish, hunt, and gather" on lands throughout Minnesota and Wisconsin,[11] including countless headwater streams, tributaries, and wetlands. The rights ensured that the Tribe would always maintain their ability to practice the traditional aspects of their culture that are central to its "sustenance, identities, and economies."[12] Harvesting Manoomin and fishing around the Great Lakes region are two traditional customs of the Ojibwe people. Such practices tie the Ojibwe to the regional water system. These customs cannot continue without lakes, rivers, streams, headwaters, and wetlands maintaining their current state of health. The Ojibwe consider themselves protectors of the Great Lakes hydraulic system and use various methods to perform that duty.

In 2022, the NorthMet Open Pit Sulfide Mine[13] was proposed to reside within headwaters and wetlands that feed into the St. Louis River.[14] A band of the Ojibwe live on the river and would face the consequences of 1,578.6 acres of degraded or destroyed wetlands.[15] One of the most significant problems posed by the NorthMet project

10 *Treaties*, Fond du Lac Band of Lake Superior Chippewa, http://www.duluthstories.net/treaties.html (last visited Jan. 22, 2023).

11 1854 Treaty Authority, Chippewa-U.S., art. 1 Sept. 8, 1854

12 Menominee Tribe v. United States, 391, U.S. 404, 407-408 (1968).

13 *PolyMet NorthMet Mine*, EPA, https://www.epa.gov/mn/polymet-northmet-mine (last modified Oct. 11, 2023).

14 *Babbitt PolyMet NorthMet Project*, Minnesota Pollution Control Agency, https://www.pca.state.mn.us/local-sites-and-projects/babbitt-polymet-northmet-project (last visited Jan. 21, 2024).

15 *NorthMet Mining Project and Land Exchange Final Environmental Impact Statement*, State Of Minnesota Dep't Of Nat. Res., https://files.dnr.state.mn.us/input/environmentalreview/polymet/feis/fact_sheets/wetlands.pdf (last visited Jan. 22, 2023).

was the increased levels of mercury[16] and sulfates within the water system.[17] Increased levels are concerning due to the severe environmental and public health implications of mercury[18] and sulfates.[19]

The Ojibwe successfully used the Clean Water Act (CWA) to prevent the NorthMet Mine from being built, as the CWA had jurisdiction over the proposed construction site in 2022. The CWA is administered by the Environmental Protection Agency (EPA) specifically in fulfillment of the EPA's mission to "...protect human health and the environment."[20] The EPA, in collaboration with the Army Corps of Engineers (COE), has regulated wetlands, streams, rivers, lakes, and headwaters since the passing of the CWA 50 years

16 *NorthMet Mining Project and Land Exchange EIS – Record of Decision*, STATE OF MINNESOTA DEP'T OF NAT. RES., 21 (2016) https://files.dnr.state.mn.us/input/environmentalreview/polymet/polymet-eis-rod-030316-final.pdf

17 *Id.*

18 Mercury - ToxFAQs™, AGENCY FOR TOXIC SUBSTANCES AND DISEASE REGISTRY, (April, 2016), https://www.atsdr.cdc.gov/toxfaqs/tfacts46.pdf. Note: *Mercury is a known neurotoxin that can also affect the kidneys. Its effects depend on the form of mercury, the exposure amount, the age of the person exposed, the length of exposure, and the current health of those exposed. It accumulates through the food chain, increasing as each organism ingests its food, and it is not readily eliminated from most species. The Ojibwe who would consume fish exposed to mercury could be at a higher risk of developing tremors, incoordination, impaired vision, impaired learning and memory, increased mood swings, movement problems, birth defects, high blood pressure, alterations to their immune system, nervous system effects and kidney damage*

19 WebMD Editorial Contributors, *What to Know About Sulfate*, WEBMD, https://www.webmd.com/beauty/what-to-know-sulfate (May 12, 2023). Note: *Sulfates are a group of naturally or man-made produced salts. Increased exposure to sulfates can increase risk of developing diarrhea, intestinal pain, lung irritation, dry skin, dermatitis and edema.* They are additionally a concern for sensitive plants, like manoomin, that will die, even with a slight increase of sulfate presence.

20 *Our Mission and What We Do*, EPA, https://19january2017snapshot.epa.gov/aboutepa/our-mission-and-what-we-do_.html (last visited Feb. 27, 2024)

ago. This regulation ended with the 2023 Supreme Court decision in *Sackett v. EPA*.

During the time of the conflict between the Ojibwe and NorthMet, the EPA, acting within their jurisdiction, suspended the NorthMet mine's construction permit.[21] The EPA's suspension of NorthMet's permit stemmed from concerns that the mine had no viable method to ensure discharges from the proposed construction "would comply with the Ojibwe water quality requirements"[22] deemed vital for the "health and welfare" of individuals in the Ojibwe borders.[23]

Ultimately, the conflict between the Ojibwe and the NorthMet mine was resolved when the NorthMet mine's permit was permanently revoked. The revocation of this permit stopped the construction of the mine and allowed the Ojibwe to maintain its water quality requirements. The ending of the NorthMet conflict would have been very different if these events had unfolded just a few months later, during 2023 instead of 2022. The May 2023 Supreme Court Decision in *Sackett ET UX. v. Environmental Protection Agency ET AL*. (Sackett v. EPA) restricted the EPA's jurisdiction over various bodies of water. Ultimately, the decision allows the EPA to preside only over waters that maintain a "continuous surface connection" to other waters that are considered "navigable." This definition of navigable includes waters that have been traveled by ships, boats, or other watercraft.[24] Under this new decision, the EPA could not revoke the NorthMet 404 permit because NorthMet would have been building on land over which the EPA has no jurisdiction. Therefore, if NorthMet was proposed after May of 2023, it is likely that the mine would have been built, exposing the Tribe to unknown levels of mercury and sulfates with "no way to protect itself and its food sources."[25]

21 *PolyMet NorthMet Mine*, EPA, https://www.epa.gov/mn/polymet-northmet-mine (last modified Oct. 11, 2023)

22 *Id.*

23 Lake Superior, Mich., Water Quality Standards of The Fond Du Lac Reservation Ordinance (Dec. 1998).

24 Sackett v. Environmental Protection Agency, 598 U. S. 21, 24 (2023).

25 Menominee Tribe v. United States, 391, U.S. 404, 411 (1968).

The Ojibwe are just one example of the many tribes across the United States that rely on wetlands and depend on the waters' health for their physical and cultural survival. Wetlands must be protected not only to preserve tribal cultures but also to maintain the components that most contribute to the health of the wetlands and the nation's water. These components include the aquatic system's chemical, physical, and biological properties.

The 2023 *Sackett v. EPA* decision restricted the EPA's authority to safeguard wetlands under the Clean Water Act, posing a significant threat to the environment and indigenous waters. The decision prompts the need for new wetland-specific regulations to preserve the wetlands and waters of the United States. Implementing nationwide wetland-specific regulations is vital for successfully protecting these critical aquatic systems, contributing to biodiversity, carbon sequestration, and flood control. Tribes and states have attempted to solve the problem through localized regulation but have been unsuccessful in managing the waterways that transcend their borders. Therefore, this paper proposes implementing nationwide wetland regulation for the comprehensive protection of the nation's wetlands.

II. Background

Two major types of law regulate the federally recognized tribes in the U.S. The first is Federal Indian Law, which defines the interactions between the federal government, states, and tribes or nations.[26] Federal Indian Law includes laws, judicial decisions, treaties, and presidential orders. They give tribes the right to tribal sovereignty,[27] tribal resource rights,[28] and agricultural water rights.[29] However, Federal Indian Laws do not manage internal tribal affairs.

Tribal law is made by tribes exercising sovereignty. These laws differ for every tribe and are only enforceable within tribal borders.

26 Elizabeth A. Reese, *The Other American Law*, 73 Stan. L. Rev. 555 (2021)

27 Worcester v. the State of Georgia, 31 U.S. (6 Pet.) 515 (1832)

28 Winters v. United States, 207 U. S. 564 (1908)

29 Arizona v. California, 547 U. S. 150 (2006)

The enactment of these laws can include codes of justice, health standards, and environmental regulations. This paper focuses on Federal Indian Laws rather than tribal laws since the latter are tribe specific and affect a smaller population.[30]

A. Federal Indian Law

Federal Indian Legislation History Chart

There are many Supreme Court Decisions that have affected the laws governing tribes. The decisions listed below are a few that significantly impact how tribes in the U.S. interact with the environment within and surrounding their borders.

Case	**Background**	**Holding**	**Implications**
Johnson v. M'Intosh (1823) (Marshall Trilogy)	Thomas Johnson purchased land from the Painkenshaw Indian Tribe and passed it onto his children. Later, William M'Intosh bought the same land from the U.S. Johnson's children then filed suit to determine which man had the right to the land.	The Supreme Court decided in favor of M'Intosh and determined that tribes had the right to occupy land. The right to sell land was reserved for the federal government.	Established Federal supremacy in Indian affairs. The case imposed limits on Tribal Sovereignty.

30 Felicity Barringer, *How the U.S. Legal System Ignores Tribal Law,* High Country News (Oct. 7, 2021), https://www.hcn.org/articles/law-how-the-us-legal-system-ignores-tribal-law

Cherokee Nation v. Georgia (1831) (Marshal Trilogy)	In response to Georgia Laws, Cherokee Chief John Ross sought an injunction at the U.S. Supreme Court. The Cherokee argued that they were a foreign nation.	The Supreme Court determined that tribal nations were "domestic dependent nations," not foreign nations.	The decision reaffirmed Federal Supremacy over Indian affairs.
Worcester v. Georgia (1832) (Marshall Trilogy)	Samuel Worcester was preaching on Cherokee lands. After being arrested, he filed suit, claiming that Georgia did not have the authority to control activity within Cherokee borders.	The Court sided with Worcester, finding the Cherokee Nation as sovereign and giving authority to the U.S.	The decision reaffirmed Federal Supremacy over Indian affairs.

United States v. Winans (1905)[31]	Lineas and Audubon Winans operated a fishing operation along the Columbia River Gorge, an area culturally significant to the Yakima Tribe. The Winans actively prohibited the tribal members from accessing the fishery land. The Yakima members believed the Winans' actions violated their treaty-reserved right to fish at traditional fisheries.	The Supreme Court sided with the Yakima Tribe, deciding that the Yakima Treaty protected tribal rights to hunt and fish. The Supreme Court reasoned that if tribal access to a fishery were limited, the tribal right to fish would be worthless.	The case established tribal rights outside of the borders of the tribal reservation.
Winters v. United States (1906)[32]	When Montana became a state, the U.S. government filed suit on behalf of the Assiniboine and Gros Ventre Tribes to restrain Montana settlers from preventing the Milk River's water from flowing to the Fort Belknap Indian Reservation.	The Supreme Court held that the Tribes reserved a "sufficient amount of water from the Milk River for irrigation purposes." The Court determined that reservations created by the U.S. implied a water right.	Created implied priority water rights for tribes. These implied rights allow tribes to access the water they need regardless of other water rights.

31 United States v. Winans, 198 U.S. 371 (1905)

32 Winters v. United States, 207 U. S. 564 (1908)

Arizona v. California (1963)[33]	The case began when Arizona filed a dispute with California regarding the extent of each state's right to use water from the Colorado River. The United States intervened to set Water Rights for tribes. The case had ten iterations, most ending in degree since the Supreme Court had original jurisdiction.	The Supreme Court issued a decree determining water rights between Arizona, California, tribes, and other states. The decree provided a method for quantifying tribal rights, titled the Practicably Irrigable Acreage (PIA).	Tribes were given an exact amount of water, and the decision also allowed water to be used for nonagricultural purposes.

B. Water Legislation

Water Legislation Chart

The Rivers and Harbors Act, Federal Water Pollution Control Act, and Water Quality Act preceded the Clean Water Act (CWA). Ultimately, these acts failed to create an effective method of regulating the nation's waters. The Rivers and Harbors Act and the Federal Water Pollution Control Act failed because their scopes were too narrow. The Water Quality Act failed because states were unwilling to set designations and water quality standards.

33 Arizona v. California, 373 U. S. 546 (1963)

Case	Details
Rivers and Harbors[34] (1899)	Enacted to protect the navigation of large bodies of water throughout the United States. It prevented discharge, dredges, filling, and altering these "navigable" waters without first obtaining a permit.[35] Focused only on maintaining the ability to navigate the nation's waters. It succeeded in this focus but was not sufficient in protecting the overall health of the nation's waterways.
Federal Water Pollution Control Act[36] (1948)	Created to "provide a comprehensive program for preventing, abating, and controlling water pollution,"[37] it applied only to interstate waters.
Water Quality Act[38] (1965)	It was created as an amended version of the 1948 bill. It relied on state regulation of state-set water quality standards and state designations of waterways.[39]

The CWA was created to remedy the failures of its predecessors and "provide for the protection and propagation of fish, shellfish and wildlife" and for "recreation in and on the water."[40] These specific provisions and regulatory requirements worked at creating municipal

34 Rivers and Harbors Act, 33 U.S.C § 419 (1899)

35 James E. Salzman, Barton H. Thompson Jr., Environmental P*olicy and Law* 178 (5th ed. 2019).

36 Federal Water Pollution Control Act, 33 U.S.C § 1251-1387 (1948)

37 Ann Powers, *Federal Water Pollution Control Ac*t (1948), Encyclopedia.org, https://www.encyclopedia.com/history/encyclopedias-almanacs-transcripts-and-maps/federal-water-pollution-control-act-1948 (last visited Jan. 24th, 2024)

38 Water Quality Act, 33 U.S.C § 1251 (1948)

39 Claudia Copeland, *Clean Water Act: A Summary of the Law*, (Oct. 8, 2016) https://sgp.fas.org/crs/misc/RL30030.pdf

40 Clean Water Act 33 U.S.C. § 1330

sewage treatment plans, constructing treatment plants, and regulating discharges into navigable bodies of water. The expectation was that the impacted aquatic systems' chemical, physical, and biological integrity would improve by decreasing sewage discharges and other pollutants into the waters.

C. Supreme Court Cases

Case	Background	Holding	Implications
Riverside v. Bayview[41] (1985)	Bayview Homes Inc. began placing fill materials on its property in Michigan. The Army Corps of Engineers (Corps) filed suit to enjoin Bayview from filling its property without a permit.	The Corps did not overstep in regulating the wetlands, and the CWA's "language, policies, and history" compelled a holding that the Corps acted reasonably in its interpretation of authorities over discharge material in wetlands.	Created a defined scope of federal regulatory powers regarding WOTUS. That scope included intrastate wetlands

41 United States v. Riverside Bayview, 474 U.S. 121, (1985)

Solid Waste Agency of Northern Cook County (SWANCC) v. U.S Army Corps of Engineers[42] (2001)	SWANCC selected an abandoned sand and gravel pit as a solid waste disposal site. Trenches within the property had been used as ponds for migrating birds. If SWANCC used this area, some trenches would need to be filled. The Corps was contacted to determine if the trenches were considered WOTUS and were under the CWA regulation. The Corps decided the trenches were WOTUS and then denied SWANCC a permit.	The Corps overstepped its jurisdiction as the trenches were not WOTUS. Furthermore, isolated waters, abandoned seasonal ponds providing habitat for migratory birds, and navigable bodies of water were explicitly those that "have been navigable or could reasonably be so made."	Isolated wetlands are not considered under the CWA.

42 Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, 531 U.S. 159, (2001)

U.S. Army Corps of Engineers v. Hawkes Co. Inc.[43]	The Corps attempted to prevent Hawkes Co., Inc. from purchasing land and mining peat by arguing that the land was a wetland connected to WOTUS through a "significant nexus." Hawkes challenged this jurisdiction, and the Corps asserted that they made no final determination regarding the property and could not be challenged.	The Corps determination of WOTUS was a final agency action subject to judicial action. It made no decision on the reach of WOTUS or "significant nexus."	Left confusion over what constituted a "significant nexus" and clarified that jurisdictional designations can be constructed as the final agency decision.

43 U.S. Army Corps of Engineers v. Hawkes Co. Inc., 578 U.S. 15, (2016)

County of Maui, Hawaii v. Wildlife Fund[44]	The Lahaina Wastewater Reclamation Facility in Maui County, Hawaii, injected its reclaimed water into various wells on the island. Due to Hawaii's geologic nature, it was assumed that the reclaimed water seeped into the ocean. The University of Hawaii at Manoa conducted experiments that found evidence of seepage within the oceans.	The CWA forbids "any addition" of pollution from point sources to navigable waters without a permit. It also requires that a permit be granted when there is a "functional equivalent of a direct discharge. SCOTUS determined that the Wildlife Fund had proved there was a functional equivalent of discharge and rejected Maui's assertion that they didn't need a permit. Furthermore, the Court specified that determining a functional discharge should consider the time and distance a pollutant travels.	The decision broadened regulatory authority, emphasized environmental protection and water quality preservation, and expressed the importance of considering hydrologic connections while deciding on tests to determine Corps or EPA jurisdiction.

44 County of Maui, Hawaii v. Hawaii Wildlife Fund, 590 U.S. 18, (2020)

1. Rapanos ET UX., ET AL. v. United States:

Rapanos v. United States[45], decided in 2006, centered on defining and determining the scope of waters protected under the Clean Water Act. It examined whether wetlands, even those not directly adjacent to navigable waters, could be considered "Waters of the United States"[46] due to a "hydrologic connection."[47] John A. Rapanos was charged with violating the CWA for discharging fill material into a wetland adjacent to navigable waters. The Court's decision regarding whether the adjacent wetlands were part of the navigable body of water was split. Justice Scalia proposed a narrow interpretation of the CWA jurisdiction in the plurality, only encompassing relatively permanent, standing, or continuously flowing bodies of water. Justice Kennedy wrote the opposing opinion, which proposed a broader test: CWA jurisdiction should encompass any waters with a "significant nexus" to the traditional navigable waters.

The split nature of the decision led to confusion over which test should be applied to determine the CWA's jurisdiction. The presidential office has attempted to mitigate this confusion by defining what test they believe should be used. Presidents Obama, Trump, and Biden have each proposed their own tests. President Obama chose to apply a test similar to Justice Kennedy's, giving the CWA jurisdiction of waters with a significant nexus to navigable bodies of water. President Trump favored a test similar to Justice Scalia's, limiting CWA jurisdiction to "traditional navigable waters." President Biden revealed his test before the Supreme Court's ruling in *Sackett v. EPA*. His test restored the CWA jurisdiction to what it had been when President Obama was in office, to the significant nexus interpretation. President Biden's interpretation also added protection to relatively permanent water surfaces.

45 Rapanos v. United States, 547 U.S. 715, (2006)

46 33 U.S.C § 1362 (7)

47 Rapanos v. United States, 547 U.S. 715, 718 (2006)

2. Sackett ET UX. v. Environmental Protection Agency ET AL.

The unclear decision from *Rapanos v. United States* eventually led to the *Sackett v. EPA* case filings. The *Sackett cases* arose when the Sacketts, property owners in Idaho, purchased a property near Priest Lake and filled in part of their land.[48] They later received a letter from the EPA notifying them that the land was regulated under the CWA[49] and that the Sacketts would face fines if actions were not taken to reverse the filling of the land. The Sacketts began their lengthy court battle with the EPA and first appeared before the Supreme Court in 2012. This trial addressed the Sacketts' right to challenge the EPA's compliance order before any enforcement actions occurred. The Court granted the Sacketts the right to challenge the order.

With the 2012 right to challenge, the Sacketts began another legal battle—this time, they aimed to contest the EPA's jurisdiction over their land. This case, which appeared before the Supreme Court in October 2022, saw its decision released in May of 2023. The 2023 decision unanimously ruled that the Sacketts' land was not a wetland, and the EPA had no jurisdiction over it. The Majority opinion, delivered by Justice Alito, further determined that subsurface flow and a significant nexus were insufficient for the CWA to have jurisdiction.[50]

The Court, unanimous in its decision regarding the Sackett land, was split on its proposed definition of Wetlands. The majority test adopted a narrower interpretation of the CWA's jurisdiction to include only wetlands with a "continuous surface connection to bodies that are waters of the United States in their own right, with no clear demarcation between the waters and wetlands."[51] This decision has led to more than half of U.S. wetlands no longer being protected through federal law.

48 Sackett v. Environmental Protection Agency, 598 U. S. 21, 41-42 (2023)

49 *Id.* at 65-71

50 *For clarity, the 2023 decision of Sackett v. EPA is the case referred to within the remainder of this paper.*

51 Sackett v. Environmental Protection Agency, 598 U. S. 21, 25 (2023)

III. Proof of Claim

Before the *Sackett v. EPA* decision, wetlands were governed by the EPA under the CWA. This was enabled by past Supreme Court Decisions such as *Rapanos v. U.S., County of Maui v. Wildlife Fund, U.S. Army Corps v. Hawkes*, and *Riverside v. Bayview. Sackett v. EPA* reverses these previous decisions, aligning with the *SWANCC v. U.S.* decision by limiting the scope of the CWA and the EPA's jurisdiction over wetlands. In Sackett, the Court held that "the CWA's use of 'waters' refers only to geographic[all] features that are described in ordinary parlance as streams, oceans, rivers, and lakes."[52] The 2023 *Sackett* decision further states that "adjacent wetlands that are 'indistinguishable' from those bodies of water due to a continuous surface connection" are the only wetlands governed under the CWA.[53] This position reverses the previously held decision of *SWANCC v. U.S. Army Corps of Engineers* and *Riverside* v. *Bayview*, which characterize wetlands as part of the 'waters' the CWA can govern. This restriction of CWA jurisdiction surpasses the precedent set by the *Rapanos v. U.S.* decision, resulting in the most extensive loss in wetland protection in the past 50 years. Without any additional regulation, the loss of protection will be detrimental to wetlands and the environment.[54]

A. Importance of Wetlands

The EPA defines wetlands as "areas where water covers the soil, or is present at or near the surface of the soil all year or for varying periods of times during the year, including the growing season."[55]

52 Sackett v. Environmental Protection Agency, 598 U.S. 21, 1 (2023)

53 *Id.*

54 The Federalist Society, *Courthouse Steps Decision: Sackett v. Environmental Protection Agency*, YouTube (June 8, 2023), https://www.youtube.com/live/D-vsXmeZ9Ew?si=S4FCpDJMAf_p6Va (Minute 1:06:42-1:08:49)

55 *What is a Wetland?*, EPA, https://www.epa.gov/wetlands/what-wetland (last updated May 4, 2023)

The EPA splits wetlands into Coastal/Tidal and Inland/Non-tidal segments,[56] which encompass a variety of other types.[57] Wetlands contribute to their ecosystems' biodiversity, water quality, climate regulation, aesthetics, and flood and erosion control.

1. Biodiversity

Biodiversity, the variety of all life forms, is essential to the existence and proper functioning of all ecosystems.[58] The species counted in a biodiverse ecosystem include plants, vertebrates, and invertebrates. Each species exists in a specialized niche that serves a purpose for the maintenance of the system. Conserving biodiversity is not only a matter of ecological significance but also a source of multifaceted benefits. These benefits include contributions to modern medicine,[59] supporting endangered species and migrating birds, and are essential areas for maintaining aesthetics, recreation, steady food supply, and spiritual purposes of the Native American Tribal Nations.[60]

Tribal nations have relied on biodiversity for as long as they have existed. There are species that exist only in the specialized wetland environment that are important for religious ceremonies, cultural continuance, and tribal economies. For example, the Skokomish of Washington gather and protect Olympia Oysters in saltwater ponds and estuaries.[61] These oysters are essential for the Tribe's economic

56 *Id.*

57 *Classification and Types of Wetlands*, EPA, https://www.epa.gov/wetlands/classification-and-types-wetlands#marshes (Last updated April 13, 2023)

58 *EnviroAtlas Benefit Category: Biodiversity Conservation*, EPA, https://www.epa.gov/enviroatlas/enviroatlas-benefit-category-biodiversity-conservation (Last updated Aug. 9, 2023)

59 Robert T. Watson & A.H Zakri, *Ecosystems And Human Well-Being*, 34 (2005), https://www.millenniumassessment.org/documents/document.354.aspx.pdf

60 *Id.* at 36

61 Bryan Bougher, *Tribes Work To Restore Native Olympia Oysters*, Northwest Indian Fisheries Commission Blog (June 19, 2003), https://nwifc.org/tribes-work-to-restore-native-olympia-oysters/

diversity and maintenance of cultural roots.[62] The Tribe also relies on salmon runs, shellfish populations and beds, macroalgae, economic growth, and cultural education. All of these depend on maintaining a healthy water system. Any degradation could cause catastrophic effects throughout the ecosystem chain, decreasing a tribe's ability to gain access to these invaluable species.

For the Ojibwe mentioned at the start of this paper, Manoomin is central to cultural activities and religious ceremonies. The health of wetlands is crucial for sustaining the growth of plants like Manoomin, which cannot thrive in non-hydric soils.[63] Manoomin relies on wetlands' continuous water supply, specific chemical composition, and water flow to flourish. Healthy wetlands upstream of the plant are able to filter the water to the chemical composition needed and soak up water from floods. If the upstream wetlands are degraded or destroyed, Manoomin will not be able to survive. Therefore, it would not be enough to protect Manoomin alone; the surrounding wetlands also need protection.

2. Carbon

Wetlands contribute to climate regulation through carbon sequestration. During photosynthesis, plants absorb carbon and store it in living biomass and the soil. This process is increased in wetlands with greater plant biomass production. The amount of carbon a system can take depends on the vegetation, soil composition, water flow, restoration activity, and human activity.

When carbon stores are disrupted, carbon is released into the atmosphere, trapping heat from the sun and preventing its escape. This release causes the planet to warm and influences climate change. The consequences of such warming include biodiversity

62 *Aquaculture Holds Connection and Resilience Opportunities for Skokomish Tribal Communities,* NOAA Fisheries (Dec. 3, 2021), https://www.fisheries.noaa.gov/feature-story/aquaculture-holds-connection-and-resilience-opportunities-skokomish-tribal-communities

63 *Hydric soils are soils that are saturated, flooded, or ponded for enough time that they develop low oxygen levels. They are a defining characteristic of wetlands.*

loss, human health risks, loss of glaciers and ice sheets, and rising sea levels. Deliberately protecting wetland ecosystems can prevent the disruption of carbon stores and stop carbon release in the first place.[64] Preventing carbon release creates a better chance that climate change can be slowed and its consequences mitigated.

The Clean Water Act (CWA) has protected wetlands for the majority of its existence. This protection ensures that carbon sinks aren't disrupted and prevents the release of previously trapped gasses. The new *Sackett v EPA* decision has narrowed the CWA's ability to regulate such areas, leaving these sensitive sinks to be degraded and potentially increasing the amount of greenhouse gasses in the atmosphere. The United States has five acts protecting air quality and gas emissions, none addressing gas reduction methods. Currently, the nation has no regulations protecting land that takes CO2 from the air. This paper proposes regulations to be set to preserve CO2-reducing land.

3. Flood and Erosion Mitigation

In addition to controlling what is released into the air, wetlands control what is released in waterways by managing water quality, floods, and erosion, trapping sediment, and retaining excess nutrients or pollutants. This occurs because the high plant density creates a low water flow within wetlands, allowing sediments to settle. Such creates a natural filtration system that is effective enough to provide potable water with no other filtration systems in place.[65]

The density of plants that create a low flow within wetlands also allows them to stop floods and erosion. The plants and soils within wetlands are capable of handling large amounts of water and acting as a sponge during floods, trapping water and then slowly releasing

64 Project Drawdown Team, *The Drawdown Review*, 6 (Christian Leahy et. al eds., 2020)

65 Arturo S. Leon et al., *S.C. Dynamic Management of Water Storage for Flood Control in a Wetland System: A Case Study in Texas*, MDPI Water Journal, Mar. 15, 2018, at 1. https://www.mdpi.com/2073-4441/10/3/325

it.[66] In areas where wetlands have decreased, over three feet of land are lost each year,[67] placing schools, homes, industries, and ecosystems in jeopardy. In 2016, the coastal village of Shishmaref, Alaska, relocated due to the loss of shoreline. Six hundred community members, mostly Inupiat Inuit, voted to move from their land, the ocean, and their traditions.[68] The actions of the community in Shishmaref call for regulations aimed at preventing erosion. Wetland regulation is one possible avenue for mitigating these effects and preventing further displacement of communities from their homes.

Preserving wetlands presents a potential solution to curbing the effects of erosion. Wetlands are able to bind land together through their extensive root network by decreasing soil disruption from rainfall. Currently, no federal regulation directly protects wetlands used for flood and erosion prevention. The lack of protection for flood mitigation could exacerbate erosion and flooding concerns within an area. As wetlands deteriorate, they progressively lose their ability to fulfill ecological requirements, resulting in diminished capacity to filter pollutants, provide habitat, and reduce erosion. This leaves U.S. citizens in danger of losing their homes and creating additional costs to local, state, and federal governments. Wetland-specific regulations would prevent this degradation and protect American life and property.

B. Federal Law

1. Endangered Species Act (ESA)

The Endangered Species Act (ESA) protects species threatened with extinction and their respective habitats. The Act "provides a

66 *Why are Wetlands Important*, EPA, https://www.epa.gov/wetlands/why-are-wetlands-important (Last updated Mar. 22, 2023)

67 Sama Sidik, *How Alaska's Coastal Communities are Racing Against Erosion*, Salon (Mar. 4, 2023) https://www.salon.com/2023/03/04/how-alaskas-coastal-communities-are-racing-against-erosion_partner/

68 Aura Bogado, *Alaska Native Village Votes to Relocate in the Face of Rising Sea Levels*, Grist (Aug. 17, 2016), https://grist.org/equity/alaska-native-village-votes-to-relocate-in-the-face-of-rising-sea-levels/

program for the conservation of threatened and endangered plants and animals."[69] The ESA explicitly bans hunting, killing, and transporting endangered species. It protects against 'significant' habitat loss through the section 9 "takings" provision. Under the ESA, "takings" are actions that "harass[70], harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such contact"[71] with species listed as endangered or threatened.

In the case of *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon,*[72] the plaintiffs consisted of landowners, logging companies, and timber workers. This Chapter of Communities brought action against the Secretary of the Interior and the Director of Fish and Wildlife Service to challenge the departments' definition of the ESA "takings" and "harm." Specifically, this case was about whether habitat modification, when it may injure or kill wildlife, is considered "harm" to the species and, therefore, a "taking." The Supreme Court held that the definition of a "taking" should include anything that "naturally encompasses habitat modification that results in actual injury or death."[73]

The "taking" provision of the ESA is vital for protecting sensitive wetlands and the biodiversity within. Approximately half of all federally listed threatened and endangered species are wetland

69 Summary of the Endangered Species Act, EPA, https://www.epa.gov/laws-regulations/summary-endangered-species-act (Last Updated Sept. 26, 2023)

70 Robin K. Craig, Robert W. Adler, Noah D. Hall, *Water Law (Concepts and Insights)*, 271- 272, 1st ed. 2017 Note: An intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal patterns which include, but are not limited to, breeding, feeding, or sheltering. This definition was upheld by the Supreme court in the Babbitt v. Sweet home case.

71 *Id.* at 271

72 Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 515 U.S. 687 (1995)

73 *Id.* at 687

dependent,[74] meaning that these species could not survive without the wetlands in which they live. If their habitat (the wetland) is degraded or destroyed, these species will cease to exist. The loss of these species would be detrimental to the ecosystem due to the loss of specific niche fulfillments. Many of the species are subjects of medical and natural resource research, as well as recreational benefits. The loss of these species would result in a loss of the associated research, including medicinal discoveries and the recreation associated with these species. The loss of these species will affect the tribal nations that have coexisted with them for hundreds of years. For many tribes, these species are part of their mythology, playing parts of gods and spirits.[75] For the species in these legends and the tribes that share their mythology, a loss of these species is a loss of much more than just the loss of an animal. For that reason, many of the tribes across the U.S. fight for wetland protection.

The Endangered Species Act can stop habitat degradation if an endangered or threatened species resides within the area under the "takings" provision but does nothing if there is no such species. The ESA cannot protect any wetland that does not contain a listed species. The lack of protection is problematic, as it leaves many species in need of habitat protection. Such species could be extinct before they are listed and given protection under the ESA, creating a decrease in biodiversity that is important for ecosystem management. If a species happens to be listed before it becomes extinct, it often faces a near-impossible recovery because its habitat has already deteriorated. Once a species is listed, land managers must invest in

74 *Why Healthy Wetlands are Vital to Protecting Endangered Species*, U.S. Fish And Wildlife Service, https://www.fws.gov/story/2023-04/why-healthy-wetlands-are-vital-protecting-endangered-species (last visited Mar. 12, 2024)

75 *Native American Indian Animals of Myth and Legend*, https://www.native-languages.org/legends-animals.htm (last visited Feb. 20, 2024)

restoring the habitat, an intensive project[76] that can cost over $51 million and take more than five years to complete.[77]

The disruption to the species and the cost of wetland restoration could be avoided if these habitats were already protected under a separate law focused on wetland preservation. However, protecting wetlands only because they house an endangered species is not a sustainable practice. Wetlands must also be protected for more than just the endangered species within their borders.[78]

2. Migratory Bird Treaty Act (MBTA)

The Migratory Bird Treaty Act (MBTA) was passed in 1918 to protect the North American waterfowl. The MBTA implements four international conservation treaties, including the United States, Canada, Mexico, Japan, and Russia as contributing parties. Its purpose is to "ensure the sustainability of populations of all protected migratory bird species."[79] It also prohibits the "killing, capturing, selling, trading and transport of protected migratory bird species."[80] The earlier edition of the act, The North American Waterfowl Management Plan, spurred the creation of the North American Wetlands Conservation Act. The Wetlands Conservation Act authorized grants to public-private partners who would "protect, enhance, restore and manage waterfowl or other migratory birds and other fish and wildlife in wetlands."[81]

76 *Wetland Restoration*, EPA, https://www.epa.gov/sites/default/files/2021-01/documents/wetland_restoration.pdf (2002)

77 *Frequently Asked Questions*, Provo River Delta, https://www.provoriverdelta.us/faqs (last visited Feb. 20, 2023)

78 *Why Are Wetlands Important*, National Park Service, https://www.nps.gov/subjects/wetlands/why.htm (last visited Feb. 20, 2023)

79 *Migratory Bird Treaty Act of 1918*, U.S Fish And Wildlife Service, https://www.fws.gov/law/migratory-bird-treaty-act-1918 (last visited Feb. 27, 2024)

80 Migratory Bird Treaty Act, 16 U.S.C. §§703-711 (1918)

81 *North American Wetlands Conservation Act*, U.S. Fish And Wildlife Service, https://www.fws.gov/law/north-american-wetlands-conservation-act (last visited Feb. 27, 2024)

The combination of the MBTA and the North American Wetlands Conservation Act provides a framework for protecting wetlands that waterfowl rely on. However, its limitations require additional regulation to protect the watershed further. The North American Wetlands Conservation Act relies on public-private partnerships to manage the protection of wetlands. The Standard and Small Grants programs are competitive and require partner contributions at a minimum 1-1 ratio,[82] making it challenging to find motivated partners for wetland protection efforts. Due to this, many wetlands remain unprotected under the Conservation Act.

The Migratory Bird Treaty Act is limited by the Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers Supreme Court decision, which held that the Corps could not regulate isolated, non-navigable intrastate waters solely based on their use as a habitat for migratory birds. This ruling prevented the Corps from regulating wetlands that migratory birds use. The Corps's responsibility is to ensure activities that might impact migratory birds or their habitats are conducted in a manner consistent with the provisions of the MBTA.[83]

Wetlands are vital to their dependent species and migratory birds. They are also heavily relied upon by fish, amphibians, mammals, and insects who do not fit those categories for breeding, birthing, and nursing grounds. Foraging animals, such as deer, elk, cattle, and sheep, who use the wetlands as shelter rely on the proteins and minerals available in wetland plants during the winter. For many of these foraging animals, the food they rely on over the summer becomes dormant in the winter, which means less protein and minerals are available for these species to consume. Wetlands provide green forage throughout the year because the plants within their boundaries have consistent access to surface and subsurface water flows. In subsurface flows, the water in the system isn't seen but can be measured just below the surface. This insulation prevents the waters from freezing because the ground insulates the water, which

82 North American Wetlands Conservation Act, 16 U.S.C. 4401 (1989)

83 Migratory Bird Treaty Act, 16 U.S.C. §§703-711 (1918)

reduces energy loss through evaporation and convection.[84] In above-ground flows, the water is present above the surface. The top layer of this water may freeze, but the remainder will remain a liquid for the plants.

If these water flows are altered, degraded, or polluted, it will lead to the plant biomass[85] decreasing. This change, in turn, would decrease the amount of winter forage available for dependent species. If the gap between what biomass was and is now available cannot be sourced in other areas of a species' range, various species could permanently decrease. Specific wetland areas are protected from this fate because of the presence of endangered species. As clarified by Babbitt v. Sweet Home, these areas are subject to section 4 of the ESA and the "takings" it describes. A majority of wetlands are not protected because they lack the presence of listed endangered species. Before Sackett v. EPA, the Clean Water Act (CWA) played a pivotal role in wetland protection, with the Endangered Species Act (ESA) and Migratory Bird Treaty Act (MBTA) serving as supplementary safeguards. However, in the absence of the CWA, the ESA and MBTA prove inadequate, leaving a significant gap in ensuring the continued well-being of wetlands. A law specifically constructed to protect additional wetlands would create a safeguard for all species, listed or not, maintain their habitat, and ensure the continued health of wetlands.

3. Federal Indian Law

Tribal law governs the legal framework that applies to its members and territories. Within the United States, tribes can practice tribal law because they are classified as "domestic dependent nations."[86] The principle of tribal sovereignty, or the ability of tribes to govern themselves, enables self-determination and self-governance, giving them

84 Scott Wallace, Gene F. Parkin, *Cold Climate Wetlands: Design and Performance,* PubMed (Feb. 2001) https://www.researchgate.net/publication/11555217_Cold_climate_wetlands_Design_and_performance

85 *Biomass refers to the total weight of living plants.*

86 *Native American Policies*, U.S. Dep't Of Justice, https://www.justice.gov/otj/native-american-policies (last visited Feb. 27, 2024)

the authority to administer programs and services independent of the federal government.[87] Tribes have had their right to sovereignty expanded and restricted through Federal Indian Law, specifically through federal courts. Three Supreme Court cases have been especially influential in determining tribal rights. These decisions constitute the "Marshall Trilogy": a series of monumental definitions in the judicial foundation they create. The foundation provides means for tribes to operate within the U.S. without oversight from states and reduced federal regulation—Cherokee *Nation v. Georgia, Johnson v. M'lntosh,* and *Worcester v. Georgia* compose the Trilogy. Chief Justice John Marshall, the primary author of the "Marshall Trilogy," established federal primacy in Indian affairs, barred state law from Indian Country, recognized tribal governance, and established tribes as "domestic dependent" nations. The Trilogy has been reaffirmed countless times, solidifying the principles within as fixtures in Federal Indian Law.[88]

One contribution of Federal Indian Law is its judicial confirmation of tribal water rights, affirmed by Supreme Cases such as *Winters v. U.S.* and *Arizona v. California.* In *Winters v. U.S.,* the Court held that five tribes, the Colorado River Indian Tribes, the Fort Mojave Indian Tribe, the Chemehuevi Indian Tribe, the Cocopah Indian Tribe, and the Fort Yuma (Quenchan) Indian Tribe, retained an implied water right within the treaty, placing the tribal water right at a higher level than settlers in the area.[89] Fearful that lower water rights wouldn't have predictable standards, *Arizona v. California* set forth a test to determine the water rights owned by a tribe. The test examined the acreage that could potentially be used in an economically feasible manner for agricultural purposes. The test was

87 *Indian Affairs*, U.S. Dep't Of The Interior, https://www.bia.gov/frequently-asked-questions (last visited Feb. 27, 2024)

88 Matthew L.M. Fletcher, *A Short History of Indian Law in the Supreme Court,* Human Rights Magazine, May 1, 2015 at 1, 9-11, Note: Williams v. Lee, Montana v. US, Santa Clara Pueblo v. Martinez and Warren Trading Post Co. v. Arizona State Tax Commission are three examples that affirm and retain the principles within the Marshall Trilogy.

89 Winters v. United States, 207 U. S. 564 (1908)

titled the Practicably Irrigation Acreage (PIA) test. It gave a specific amount of water to tribes and allowed that water to be used for any purpose, no longer limited to agriculture.[90] The test was used in the 9th District's decision in *Colville Confederated Tribes*[91] *v. Walton*. The District held that the Confederated Tribes could use their allocated water rights to maintain stream flow and general fish habitat or for agricultural purposes.[92]

Prior to *Colville v. Walton*, the Supreme Court, in its decision on *United States v. Winans,* acknowledged that the Yakama Nation Members deserved the right to access culturally important fish species.[93] The *United States v. Winans* decision created a precedent for tribes maintaining access to culturally significant species. The case debated the rights of the Yamika Nation, specifically regarding whether they could enter private or obstructed land to practice their fishing rights and privileges. The Tribe's 1859 Treaty with the U.S. specifically granted the tribe the right to "taking of fish in all streams running through or bordering said reservation… also the right of taking fish at all usual and accustomed places…"[94] The court held that the members of the Yamika Nation had the same fishing privileges inside and outside of their borders, even if, in accessing fisheries they crossed private lands. The Court majority believed that the right to fishing, offered by the treaty, would be meaningless without fishing sites. Similarly, one must wonder if a tribe's treaty would

90 Arizona v. California, 373 U.S. 546 (1963)

91 Colville Confederated Tribes v. Walton, 460 F. Supp. 1320 (E.D. Wash. 1978) Note: The Colville Confederated Tribes comprise the Methow, Okanogan, Aampoil Nespelem, Lake, and Colville Tribes. No Name Creek, located entirely within the Colville Indian Reservation, serves as the home of the Confederated Tribes. The Waltons held allotments within the Reservation. The Tribes sought to prevent the Waltons from using No Name Creek waters to ensure that the waters could reach Omak Lake and remain available for the Lahontan cutthroat trout.

92 Colville Confederated Tribes v. Walton, 647 F.2d 42, 44 (9th Cir. 1981)

93 United States v. Winans, 198 U.S. 371 (1905)

94 *Yakama Nation Treaty of 1855*, Confederated Tribes And Bands Of The Yakama Nation, https://www.yakama.com/about/treaty/ (last visited Mar. 6, 2024)

be meaningless if the fishing sites were degraded due to a lack of protection.

Aidar v. United States[95] answers whether tribal treaties protect water quality. In this case, the Klamath Tribe claimed the stream flow and lake levels needed to be maintained to protect treaty rights pertaining to fishing, wildlife, and plants. Applying the Winans rationale, the Supreme Court affirmed this stance that treaty rights are void without access to the means to exercise those rights. *Aidar v. United States* was later affirmed when the Washington Supreme Court decided on the *State Department of Ecology v. Yakima Reservation Irrigation District.* The Washington Court recognized that the Yakima Tribe maintained rights to instream flows within and outside of the borders of the district as protection of fishery habitat and treaty rights.[96]

The judicial decisions regarding tribal water rights have set a precedent; tribes are entitled to maintain waterways and wetlands to practice all reserved rights. The United States fails in its responsibility as the protector of the "domestic dependent nations" if waters within the country are refused regulation and are permitted to degrade. When wetlands disappear, the United States cannot fulfill the reserved tribal rights promised within its treaties. To ensure that reserved tribal rights may always be practiced, the United States must pass wetland-specific regulation that protects any significant nexus to wetlands and tribal lands.

C. Tribal Law

As domestic-dependent nations, tribes have the ability to set reservation-specific regulations that apply within their borders. The regulations set under the authority of tribal sovereignty often include

95 *US v. Aidar originated when the US filed suit to determine water rights within the Klamath area. The government named individual land owners as defendants. The US argued that the Klamath Indians retained reserved water rights for fishing and hunting. The land owners disagreed, believing that tribal water rights were only for agricultural purposes.*

96 State Department of Ecology v. Yakima Reservation Irrigation District, 121 Wash. .2d 257, 288 (1993)

environmental regulations, such as water quality standards. Federal entities monitor the regulations and tribal laws set by the nations. Many agencies, such as the EPA, have determined to "look directly to Tribal Governments to play this lead role for matters affecting reservation[s]."[97] The EPA has determined that tribes will have a lead role in environmental matters within their borders. This occurs as tribes are expected to make policies and manage their environmental programs, which the EPA then reviews to ensure they comply with federal requirements. The practice of setting environmental regulations is beneficial, but the benefits are relatively limited as they stop at the borders of the tribal land.

The Fond du Lac Band of Minnesota has created the Fond du Lac Wetlands Protection and Management Ordinance (WPMO) to "ensure maximum protection for wetlands by discouraging development activities in wetlands and those activities in adjacent upland sites that may adversely affect wetlands."[98] The Band has also created a Wetland Protection and Management Plan with Carlton County, St. Louis County, and the City of Cloquet.[99] These, in combination with water quality standards set by the Band, help to ensure that the wetlands and waters within their borders are protected and conserved. Other tribes, such as the Makah of Washington, the Navajo Nation, and the Fort Hall Reservation of the Shoshone Bannock Tribes, maintain similar laws, ordinances, and organizations dedicated to preserving their wetlands and waterways.

After 2023, the CWA's use to protect a wetland similar to that of the Fond du Loc case would be ineffective. The decision in Sackett v. EPA restricted the CWA and EPA's wetland jurisdiction to wetlands

97 Policy for the Administration of Environmental Programs on Indian Reservations, EPA, 2 (Nov. 8, 1984) https://www.epa.gov/sites/default/files/2015-04/documents/indian-policy-84.pdf

98 *Wetland Protection and Management Ordinance*, Fond Du Loc Band Of Lake Superior Chippewa, https://www.fdlrez.com/rm/wetlandordinance.htm (last visited Feb. 27, 2024)

99 *Joint Comprehensive Wetland Protection and Management Plan*, Fond Du Loc Band Of Lake Superior Chippewa, https://www.fdlrez.com/rm/downloads/WetlandPlan16JAN06.pdf (Jan. 16, 2006)

that maintain a "continuous surface connection," severely limiting the act's ability to protect tribal wetlands.

D. State regulations

Many states within the U.S. have wetland-specific laws[100]. Virginia, for instance, has the Tidal Wetlands Act of 1972, Chapters 12 and 13 of Title 28.2, for the code of Virginia, Virginia Code Sections 62.1-44.2 et seq. and 62.1-44.15:5, and the Chesapeake Bay Preservation Act. and more.[101] These acts authorize regulations, recognize the environmental value of wetlands, establish permit systems, and ultimately preserve wetlands.[102] The protections states offer are beneficial; however, wetland protection between states can differ greatly. For instance, Alaska wetlands are regulated mainly by the U.S. Army Corps of Engineers - Alaska District (COE) and the EPA, with limited wetlands protected under the Alaska Coastal Management Program.[103] In contrast, California wetlands are regulated by five agencies and one act: the California Environmental Protection Agency, the State Water Resource Control Board, the Department of Parks and Recreation, The Department of Fish and Game, the California Coastal Conservancy, and the Porter-Cologne Water Quality Control Act.[104] Other states, like Michigan, have received authorization to administer Section 404 of the Clean Water Act within the

100 *Laws and Regulations*, Wetlands Watch, https://wetlandswatch.org/laws-and-regulations (last visited Feb. 27, 2024) Note: *Virginia has the Tidal Wetlands Act of 1972, Chapters 12 and 13 of Title 28.2, for the code of Virginia, Virginia Code Sections 62.1-44.2 et seq. and 62.1-44.15:5, and the Chesapeake Bay Preservation Act and more.*

101 *Laws and Regulations*, Wetlands Watch, https://wetlandswatch.org/laws-and-regulations (last visited Feb. 27, 2024)

102 *Id.*

103 *Wetlands State Resource Locator: Alaska*, https://www.envcap.org/srl/srl.php?srl=21&state=AK (last visited Feb. 27, 2024)

104 *Wetlands State Resource Locator: California*, https://www.envcap.org/srl/srl.php?srl=21&state=CA (last visited Feb. 27, 2024)

state[105] and use that ability in combination with state laws like the Geomare-Anderson Wetland Protection Act.[106]

These regulations are a starting point for wetland protection, but they are not fit to remain as they are. The Water Quality Act,[107] which relied on state action, was revised just seven years after its passing due to the unwillingness of states to pass regulations and the desire to have a unified regulation. The CWA provided this unified front to address the country's water quality issues. Wetlands are in a biological crisis that calls for a similar, unified front that was pushed for in the past because state-by-state regulations will not provide the necessary framework to protect wetlands. It is essential to have national wetland regulations so that the issue can be addressed uniformly and as a united country. Fostering a cohesive national strategy is critical to ensure the comprehensive preservation and sustainable management of wetlands across the entire United States.

E. Proposed Regulation

Wetlands require federal regulations tailored to them, with the purpose of preserving the ecological functions of wetlands by protecting their "chemical, physical and biological"[108] properties that connect to navigable bodies of water. The wetlands included in the law must be clearly defined–leaving no room for the ambiguity that has left so many wetlands and, therefore, people unprotected from harm. This paper proposes new regulations, separate from the CWA, be created. This regulation will include all waters defined by the

105 *Wetlands State Resource Locator: Michigan*, https://www.envcap.org/srl/srl.php?srl=21&state=MI (last visited Feb. 27, 2024)

106 *State and Federal Wetland Regulations*, Dep't Of Environment, Great Lakes, And Energy, https://www.michigan.gov/egle/about/organization/water-resources/wetlands/state-and-federal-wetland-regulations (last visited Feb. 27, 2024)

107 Copeland, *supra* note 39

108 Clean Water Act 33 U.S.C. § 1330

EPA,[109] as well as other bodies of water that contain a significant nexus to navigable bodies of water to ensure the preservation of the ecological functions of these lands. The historical jurisdiction of wetlands is under the EPA and the COE, and this paper proposes the agency retain jurisdiction. The regulation will be modeled after the CWA, creating a robust monitoring and permitting program designed to assess and maintain the health of wetlands. It will purposefully remove wetlands from the jurisdiction of the CWA. Separating the acts creates individualized protection for wetlands, decreases confusion over wetland jurisdiction, and increases wetland protection overall.

The EPA defines wetlands as "areas where water covers the soil, or is present at or near the surface of the soil all year or for varying periods of times during the year, including the growing season."[110] Wetlands of varying sizes will be held under the new regulation. Some wetlands, dependent on spring runoff for sustenance, are barely existent, while others, such as the expansive 41,000-acre Cheyenne Bottoms in Kansas,[111] persist year-round. The diverse characteristics of wetlands prompt a debate over which should be included under the ambit of new regulatory measures. In order to safeguard traditional navigable bodies of water and uphold tribes' capacity to maintain water quality standards, it is crucial to incorporate wetlands that exhibit a "significant nexus"[112] to the traditional bodies of water. Additionally, wetlands with a significant nexus to tribal lands fall within the purview of this proposed regulation.

Under this interpretation, wetlands could be interpreted as bogs directly off a water body's shore or marshes connected only through

109 What is a Wetland?, *supra* note 55 Note: *Areas where water covers the soil, or is present at or near the surface of the soil all year or for varying periods of times during the year, including the growing season.*

110 EPA, *supra* note 55

111 *Places We Protect Cheyenne Bottoms Kansas,* The Nature Conservancy, https://www.nature.org/en-us/get-involved/how-to-help/places-we-protect/cheyenne-bottoms-preserve/ (last visited Feb. 28, 2024)

112 A significant nexus is a body of water that could affect the biological, chemical and physical properties of traditional navigable bodies of water.

subsurface flows and headwaters of a stream that passes through tribal lands. If it can be proven that a change in the wetland can be seen in the navigable body of water, all should be regulated under the new wetland-specific regulation. If there is no detectable connection to a navigable body of water, the regulation will not protect that wetland.

The EPA and Army Corps of Engineers, as they have authority over the CWA, will oversee the program and grant permits for actions affecting wetlands within the regulation. Additionally, in the first stages of the law, it is important that both agencies set quality standards in collaboration with states, tribal authorities, and scientific experts. Each should consider the specific needs and vulnerabilities of wetland ecosystems and provide a guide to management, pollution control, and restoration.

The precedent has determined that wetland regulation is a federal matter. Since 1985, wetlands have been subject to federal government regulation due to their connection with navigable bodies of water. This follows the decision of *Riverside v. Bayview*, which clarified that the Army Corps acted reasonably in interpreting the Act to require permits for the discharge of material into wetlands adjacent to other 'waters of the United States.'

IV. Conclusion

Protecting wetlands is paramount to the protection of American land, whether in the use of Indians, natural life, or the average American citizen. The Clean Water Act (CWA) has served as a crucial regulatory tool for wetland protection aimed at protecting the chemical, physical, and biological properties of water. However, the Supreme Court decision in *Sackett v. EPA* 2023 has imposed limitations on the CWA, rendering it ineffective in achieving its goals. This narrowing of regulatory scope poses a significant challenge to the comprehensive protection of wetlands and their ecological services. Wetlands create unique habitats, carbon reduction, and flood and erosion mitigation. In communities like Shishmaref in Alaska, these services would have prevented the loss of shoreline, protecting the town and its citizens. Federally recognized tribes, such as the

Ojibwe of Minnesota, rely on wetlands outside of their borders to continue cultural practices. In light of the diminishing CWA jurisdiction, there is a pressing need for renewed efforts to reinforce and enhance wetland conservation measures to ensure the sustained well-being of communities and ecosystems across the United States.

State and tribal regulatory initiatives have sought to address the gaps left by inadequate federal regulations. The effectiveness of these measures is limited due to their localized nature. The absence of clear, national guidance regarding wetland protection continues to be a hindrance in state and tribal regulation. Unless this ambiguity is clarified, state and tribal regulations will remain unsuccessful in their attempts to regulate the protection of wetlands. To truly address the complexities of wetland protection, the United States must enact comprehensive federal legislation establishing criteria for safeguarding these critical ecosystems. Such federal legislation would not only bridge the gaps in existing regulation but also provide a constant and standardized approach to wetland preservation, ensuring equitable protection across the nation.