

POLICY ESSAY

THE RETREAT OF COOPERATIVE FEDERALISM:
WATER RIGHTS IN A FRAGMENTED REGULATORY ERA

U.S. REPRESENTATIVE HILLARY J. SCHOLTEN*

ABSTRACT

Before Congress stepped in to protect America’s waters, pollution in our rivers and wetlands poisoned humans and wildlife alike. After the Supreme Court’s decision in Sackett v. Environmental Protection Agency, Congress is at another turning point. This article draws on the principles of cooperative federalism embedded in the Clean Water Act (“CWA”) to argue that a strong federal regulatory floor is essential to address the inherently interstate and interconnected nature of water resources. It points out the areas in which the CWA has strayed from federal-state collaboration and made enforcement challenging, arguably contributing to the growing trend we see now—a retreat of the courts and Congress from maintaining baseline environmental protections. In response, this article argues that Congress must draft clear laws to reassert that federal floor while also involving states more directly in regulation to overcome the difficulties posed by the post-Sackett environment.

I. INTRODUCTION..... 32

II. THE STRUCTURE AND PURPOSE OF THE CLEAN WATER ACT..... 35

 A. *Legislative Intention* 35

 B. *The Cooperative Federalist Structure of the CWA*..... 37

III. *SACKETT* AND THE WEAKENING OF FEDERAL WETLANDS JURISDICTION 40

 A. *Weakening of Federal Wetlands Jurisdiction* 40

 B. *Culmination of the Sackett Decision*..... 42

 C. *Shortcomings of the CWA and Sackett* 43

IV. LEGISLATIVE ACTION AND INACTION: THE POST-*SACKETT* RESPONSE ... 44

 A. *The IJJA and the Democratic Response*..... 45

 B. *The Republican Response: The PERMIT Act* 46

V. EXACERBATED UNCERTAINTY IN PERMIT REFORM 49

VI. CONCLUSION: THE NEED TO REASSERT THE FEDERAL FLOOR THROUGH LEGISLATION..... 51

* Member, United States House of Representatives (MI-03). B.A., Gordon College, 2004; J.D., University of Maryland Thurgood Marshall School of Law, 2011. Congresswoman Scholten serves on the House Transportation and Infrastructure Committee and the House Small Business Committee. She began her legal career clerking for the U.S. Court of Appeals for the Second Circuit before working in the Department of Justice and later at the Michigan Immigrant Rights Center. The author would like to thank the House Transportation and Infrastructure Water Resources and Environment Subcommittee staff, Ryan Seiger, Alexa Williams, and Logan Ferree; as well as the staff members of my office, Leila Fleming, Rachel Kline, Cecilia Belzer, Ishya Verma, Max Ernst, and Logan Van de Water, for their valuable assistance.

I. INTRODUCTION

Before Congress stepped in to protect our waters, America's rivers burned, our lakes died, and our drinking water ran brown. The Cuyahoga River in Ohio caught fire at least a dozen times because it was so saturated with industrial waste that flames leapt from the surface.¹ For locals, the burning river was nothing new. Ohioans knew that the river was coated in oil, so much so that the Smithsonian has described how the river "bubbled like a deadly stew," adding that "sometimes rats floated by, their corpses so bloated they were practically the size of dogs."² Images of the fires became symbols of ecological destruction.³ Cleveland was not alone in facing environmental degradation, and so the images resonated and prompted a national push to protect the country's waterways.

Does that sound like fearmongering, or tales from a bygone era? Let's consider how this happened. At the heart of the problem, allowing the Cuyahoga to catch fire and Lake Erie to be declared dead was a perfect storm—a nonexistent regulatory system and industry ramping up toxic discharge in major cities. Prior to the enactment of the Clean Water Act ("CWA") of 1972,⁴ regulating water pollution resulting from industrial processes was largely seen as a state and local issue.⁵ The Federal Water Pollution Control Act of 1948 was the first statement of national interest in protecting water quality.⁶ The statute provided state and local governments with funding to address the issues, but the federal government did not oversee any overarching objectives or limits. Rather, the federal government remained strictly focused on interstate waters and only with the consent of the states where the pollution originated. Over the course of the next two decades, Congress amended the 1948 statute, slowly expanding federal jurisdiction over navigable intrastate waters.⁷ However, the added enforcement mechanisms were disjointed and ineffective,⁸ with burdensome procedures to hold violators accountable. Specifically, programs were merely directed at point source pollution, or wastes discharged by industrial or

¹ See Lorraine Boissoneault, *The Cuyahoga River Caught Fire at Least a Dozen Times, but No One Cared Until 1969*, SMITHSONIAN MAG. (June 19, 2019), <https://www.smithsonianmag.com/history/cuyahoga-river-caught-fire-least-dozen-times-no-one-cared-until-1969-180972444/> [https://perma.cc/NM29-Y3BU].

² *Id.*

³ See Michael Rotman, *Cuyahoga River Fire*, CLEV. HIST. (Sep 22, 2010) <https://clevelandhistorical.org/items/show/63> [https://perma.cc/6W82-3S6D].

⁴ The Act did not officially use the name "Clean Water Act" until amended as the Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566 (Dec. 27, 1977). This article will use the term "Clean Water Act" ("CWA") to differentiate the post-1972 Act from the pre-1972 Federal Water Pollution Control Act.

⁵ See LAURA GATZ, CONG. RSCH. SERV., RL30030, CLEAN WATER ACT: A SUMMARY OF THE LAW 2 (2016).

⁶ *See id.*

⁷ *See id.*

⁸ See William L. Andreen, *The Evolution of Water Pollution Control in the United States - State, Local, and Federal Efforts, 1789-1972: Part II*, 22 STAN. ENVTL. L. J. 145, 200 (2003).

municipal operations.^{9[10]} Under the initial framework, states were encouraged to address pollution, and the federal government could only preempt state law if the polluter was a federal installation.

In September 1962, Rachel Carson published *Silent Spring*, igniting a public-led environmental movement.¹⁰ The book “inspired the environmental movement; spurred the development of the multidisciplinary field of environmental sciences; and led to the development of the Environmental Protection Agency, sweeping in changes in the laws affecting air, land, and water.”¹¹ Americans did not want to be poisoned and looked to their government to act accordingly for public and environmental health.

At the same time, American cities were growing, and industrial waste discharge was ramping up. In 1968, industrial waste accounted for 80 percent of all pollutants in U.S. waters compared to 40 percent in 1900.¹² Within a couple of years, industries were producing 22 billion gallons of wastewater, and less than 30 percent received treatment.¹³ By the early 1970s, coast to coast, Americans lived with the daily consequences of untreated waste, corporate dumping, and the total absence of an enforceable national standard.¹⁴

In response to growing public outcry, Congress passed the CWA in 1972.¹⁵ The law established a strong federal floor for water protection backed by science, supported by bipartisan consensus, and driven by the simple truth that water is not severable by state lines. Rather than being simply an isolated federal law, the CWA implemented the strategy of cooperative federalism to achieve its ends, bringing in state and local governments to help keep our national waters clean. The law was a monumental achievement, and it worked; since enactment, the law has funded 35,000 wastewater projects to the tune of \$650 billion, supporting water quality efforts across the nation.¹⁶ Each year, this law prevents 700 billion pounds of pollutants from entering our waters.¹⁷

The CWA was effective in large part because it replaced a fractured, state-based regulatory environment with one that relied on cooperative federalism, defined by collaborative yet distinct responsibilities of state governments and the federal government to achieve a shared purpose. The federal government sets the floor for minimum protections and works with state and local governments to meet those minimum standards through science-backed standards, monitoring requirements, providing money for infrastructure improvements, and, importantly, enforcement. Our Founding Fathers clearly saw the value in legislative and regulatory powers being held at both the state

⁹ See GATZ, *supra* note 5, at 3–4.

¹⁰ Russ Bahorsky, *The Long Echo of “Silent Spring,”* UNIV. OF VA. (Sep. 15, 2022), <https://as.virginia.edu/long-echo-silent-spring> [<https://perma.cc/2VJU-ZURY>].

¹¹ *Id.*

¹² See Andreen, *supra* note 8, at 197.

¹³ *See id.*

¹⁴ *See id.* at 198.

¹⁵ See GATZ, *supra* note 5, at 2.

¹⁶ See *Clean Water Act*, NAT’L WILDLIFE FED’N, <https://www.nwf.org/Our-Work/Waters/Clean-Water-Act> [<https://perma.cc/S7BN-9ZD2>] (last visited Oct. 24, 2025).

¹⁷ *See id.*

and federal levels,¹⁸ and the CWA leveraged this structure to protect America's waters and wetlands.

The CWA aims to protect “navigable waters,” defined in statute as “waters of the United States” (WOTUS).¹⁹ Even as effective as the CWA has been at cleaning up our waterways and reducing the loss of our wetlands, it is facing incredible challenges to maintain its effectiveness. First, the regulatory framework for the CWA has become layered and overly complex in the 50 years since the CWA's passage.^{20[21]} After the CWA's passage, the Executive Branch was left to develop regulations to implement the law. As the CWA has not received a wholesale update from Congress for modern circumstances, the Executive has filled in the blanks, resulting in a maze of regulations. This has made compliance nearly impossible—both due to difficulty in understanding the law and enforcing the law. The result is a weakened and ineffective law that has become vulnerable to attacks. In the past decade, the attacks have been fast and furious. In May 2023, the Supreme Court severely limited the definition of WOTUS in *Sackett v. Environmental Protection Agency*.²¹

As the Representative of Michigan's Third Congressional District, I carry the responsibility of protecting miles of Lake Michigan shoreline. Further, as the Vice Ranking Member of the Committee on Transportation and Infrastructure's Water Resources and Environment Subcommittee, I have had the opportunity to solicit testimony from experts, debate with my colleagues, and develop legislation with the input of constituents and stakeholders.²² The focus of this work is on water resource development and conservation, water pollution control, hazardous waste cleanup, and providing for the economic vitality of our essential waterways. Back home, our waters are essential to our way of life, as well as our economy. My role as Vice Ranking Member is critical to maintaining the Great Lakes, which provide drinking water for over 40 million people, generate upwards of 1.5 million jobs, and produce approximately \$60 billion in wages annually.²³

The weakening of cooperative federalism that has underpinned the CWA for more than fifty years is a devastating blow to our nation's waterways, but it is not the end of the story. While *Sackett* undercut the regulatory framework

¹⁸ See, e.g., Mary Hallock Morris, *Cooperative Federalism*, CTR. FOR THE STUDY OF FEDERALISM (2006), <https://federalism.org/encyclopedia/no-topic/cooperative-federalism/> [<https://perma.cc/JRK8-J4KD>]; Louis W. Koenig, *Federal and State Cooperation Under the Constitution*, 36 MICH. L. REV. 752, 755–56 (1938).

¹⁹ Clean Water Act of 1972, 33 U.S.C. §§ 1251, 1271–72, 1321–22, 1341.

²⁰ See *The Next Fifty Years of the Clean Water Act: Examining the Law and Infrastructure Project Completion: Hearing Before the Subcomm. on Water Resources and Environment of the House Comm. on Transportation & Infrastructure*, 118th Cong. 4 (2023) (statement of the Nat'l Mining Ass'n, submitted for the record by Hon. David Rouzer).

²¹ 598 U.S. 651 (2023).

²² See *America Builds: Clean Water Act Permitting and Projecting Delivery: Hearing Before the Subcomm. on Water Resources and Environment of the House Comm. on Transportation and Infrastructure*, 119th Cong. 3–4, 28 (2025) (statement of Rep. Hillary Scholten).

²³ *About the Lakes*, GREAT LAKES COMM'N, <https://www.glc.org/lakes/> [<https://perma.cc/5ML7-RKZF>] (last visited Oct. 25, 2025).

developed around the CWA, it left more questions than answers in its place.²⁴ A new framework must be formed that is consistent, clear, and reliable in its protection of the waters of the United States. It must also be nimble in its delivery or denial of permits to our farmers, ranchers, business and property owners, and developers alike. This article will draw on the principles of cooperative federalism embedded in the CWA to argue that a strong federal regulatory floor is essential to address the inherently interstate and interconnected nature of water resources. The article will also point out the areas in which the CWA has strayed from its collaborative federal approach and made enforcement impossible, leading to the growing trend we see now—a retreat of the Courts and Congress from maintaining baseline environmental protections. Finally, this article will argue that Congress must draft clear laws that are not overly reliant on the whims of the Executive or the regulatory process. We need a comprehensible and easy-to-enforce law that allows development to proceed on time and protects our water. We can do both, and Congress must actualize this goal now.

II. THE STRUCTURE AND PURPOSE OF THE CLEAN WATER ACT

A. *Legislative Intention*

It is essential to revisit the structure and purpose of the CWA to understand the threat that *Sackett*, additional Supreme Court decisions, and counterproductive legislative efforts pose to water quality across the country. Before its enactment, the regulation of water pollution in our nation’s waterways was largely left to the states.²⁵ We do not need to imagine the consequences of a lack of federal protections—we have already seen how the decentralized approach failed our country. For example, prior to the CWA, the City of Cleveland lacked the resources and intergovernmental support to conduct effective or meaningful pollution abatement for the Cuyahoga River, so much so that the river was characterized as “a completely unregulated sewer.”²⁶ Beyond the Cuyahoga River, a number of historic disasters that plagued the country were thought to be avoidable had the CWA approach been enacted at the time. Lake Erie was pronounced “dead” by Time Magazine in the 1960s due to pollution,²⁷ and in 1965, President Lyndon B. Johnson called the Potomac River a “national disgrace.”²⁸ President Johnson’s declaration was a reflection

²⁴ See *Sackett v. EPA*, 598 U.S. 651, 727 (2023) (Kavanaugh, J., concurring).

²⁵ See GATZ, *supra* note 5, at 2.

²⁶ Scott Neuman, *The Cuyahoga River Was So Polluted, It Used to Catch Fire. Now It’s Making a Comeback*, NAT’L PUB. RADIO (Oct. 12, 2024), <https://www.npr.org/2024/10/12/nx-s1-5123532/cuyahoga-river-cleanup-sturgeon-cleveland-ohio> [<https://perma.cc/794E-FPUV>].

²⁷ *Environment: Comeback for the Great Lakes*, TIME (Dec. 3, 1979), <https://content.time.com/time/subscriber/article/0,33009,948661,00.html> [<https://perma.cc/QL3A-WDB3>].

²⁸ Naomi Greenberg, *A Dive into Dolphin Data: The History of Bottlenose Dolphins in the*

of the large amounts of pollution (from sewage, algae, and trash) in the Potomac River,²⁹ which made it “unsafe for swimming” in 1957.³⁰ Each of these incidents underscored the urgent need to develop an expansive structure to prevent pollution.

In the 1972 Act, Congress explicitly rejected the idea that only navigable or commerce-linked waters should be protected with the passage of the CWA. Instead, Congress defined “navigable waters” broadly as “the waters of the United States,” a phrase intentionally meant to encompass all waters within Congress’s full authority under the Commerce Clause.³¹ An amicus brief filed by 167 Members of Congress in *Sackett* confirms that this language was chosen to provide “the broadest possible constitutional interpretation” of federal jurisdiction.³² Congress was fully aware that limiting protection to traditionally navigable waters would leave critical aquatic ecosystems—particularly wetlands and tributaries—vulnerable to pollution and degradation. Beyond the legitimate environmental concerns, Congress additionally understood that water is everywhere and can travel anywhere, rendering the regulations within the federal government’s purview as an interstate activity.

The CWA left the definition of WOTUS ambiguous, and Congress’s intent regarding the definition of WOTUS has been subject to litigation for over four decades.³³ In response to this litigation, several presidential administrations have sought to define WOTUS through agency regulation. Recent examples include President Barack Obama’s 2015 Clean Water Rule and President Donald Trump’s 2020 Navigable Waters Protection Rule.³⁴ Further, in January 2023, President Joe Biden’s United States Army Corps of Engineers and EPA issued a rule redefining WOTUS.³⁵ Through this rulemaking, USACE and EPA defined WOTUS more narrowly than the 2015 rule, but more broadly than the 2020 rule. This rule took effect in March 2023 and was immediately challenged.³⁶

Rather than merely preserving water for economic functions, this law is rooted in the holistic understanding that water quality impacts our environment and public health. The CWA’s preamble clearly outlines the law’s objective: “to restore and maintain the chemical, physical, and biological integrity of the

Potomac River, SMITHSONIAN NAT’L MUSEUM NAT. HIST. (Oct. 2023), <https://ocean.si.edu/ocean-life/marine-mammals/dive-dolphin-data-history-bottlenose-dolphins-potomac-river> [<https://perma.cc/EK5T-UGGD>].

²⁹ *See id.*

³⁰ *A Watershed Moment for Swimming in the District’s Waters*, INTERSTATE COMM’N ON THE POTOMAC RIVER BASIN (Jul. 26, 2022), <https://www.potomacriver.org/news/a-watershed-moment-for-swimming-in-the-districts-waters/> [<https://perma.cc/NJ24-5VC4>].

³¹ 33 U.S.C. § 1362.

³² Brief for 167 U.S. Members of Congress as Amici Curiae Supporting Respondents, *Sackett v. EPA*, 598 U.S. 651 (2023) (No. 21-454).

³³ *See infra* Part III.

³⁴ Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. 37054 (Jun. 29, 2015); The Navigable Waters Protection Rule: Definition of “Waters of the United States,” 85 Fed. Reg. 22250 (Apr. 21, 2020).

³⁵ Revised Definition of “Waters of the United States,” 88 Fed. Reg. 3004 (Jan. 18, 2023).

³⁶ *See* Complaint and Petition for Review, *Texas v. EPA*, No. 3:23-cv-00017 (S.D. Tex. Jan. 18, 2023).

Nation's waters."³⁷ This provision reveals the CWA's broad environmental protection ambitions, extending beyond navigability or commercial use to encompass the ecological health and sustainability of all water bodies in the United States.

Floor debate in 1972 underscored Congress's intent. Democratic Senator Edmund Muskie—the bill's sponsor—warned that “[t]oday, the rivers of this country serve as little more than sewers to the seas. Wastes from cities and towns, from farms and forests, from mining and manufacturing, foul the streams, poison the estuaries, and threaten the life of the ocean depths. The danger to health, the environmental damage, the economic loss can be anywhere.”³⁸ On the other side of the aisle, Republican Senator Howard Baker focused on the cultural impact water has on our society: “As I have talked with thousands of Tennesseans, I have found that the kind of natural environment we bequeath to our children and grandchildren is of paramount importance [. . .] If we cannot swim in our lakes and rivers, if we cannot breathe the air God has given us, what other comforts can life offer us?”³⁹ Congress agreed on a bipartisan basis that it was incumbent on the body to safeguard our waters to preserve our nation's public health, environment, economy, and way of life.

The CWA reflects congressional intent for a shared authority within a federal framework.⁴⁰ It established a vision of environmental governance that integrates federal leadership with state partnership—an approach that underpinned the CWA for over fifty years and should remain integral to today's regulatory landscape.

B. The Cooperative Federalist Structure of the CWA

When the regulation was left solely to the states, with some federal guidance under the Federal Water Pollution Control Act of 1948 but no enforceable federal minimum standard, many states stalled or did not submit the Congressionally required standards. States need oversight and the threat of consequences. The Senate Committee on Public Works described the lack of progress states had made in setting the water quality standards that Congress established in 1965.⁴¹ In 1971, four years after the deadline to submit standards, the Committee wrote, “Of the 54 jurisdictions covered by the water pollution control program—the figure includes the 50 States, the District of Columbia, Guam, Puerto Rico, and the Virgin Islands—only 27 have fully approved standards.”⁴² Thus, by 1972, Congress looked for ways to ensure enforcement

³⁷ Clean Water Act, 33 U.S.C. § 1251(a).

³⁸ 117 CONG. REC. 38797 (Nov. 2, 1971) (statement of Sen. Edmund Muskie on the Federal Water Pollution Control Act Amendments of 1971).

³⁹ 118 CONG. REC. 36872 (Oct. 17, 1972) (statement of Sen. Howard Baker on the Federal Water Pollution Control Act Amendments of 1972).

⁴⁰ See Brief for 167 U.S. Members of Congress as Amici Curiae Supporting Respondents, *Sackett v. EPA*, 598 U.S. 651 (2023) (No. 21-454).

⁴¹ See ROBIN KUNDIS CRAIG, *THE CLEAN WATER ACT AND THE CONSTITUTION* 23 (2d ed. 2009).

⁴² S. REP. NO. 92-414, at 4 (1971), reprinted in 1972 U.S.C.C.A.N. 3668, 3671.

and cooperation, leading to the CWA.⁴³

Section 1251 of the CWA serves as a guiding principle for interpreting all subsequent provisions of the Act.⁴⁴ The provision reinforces the federal government's responsibility to establish baseline protections while allowing states to enforce stricter standards. The CWA, in the sections highlighting the purpose and goal of the Act, emphasizes Congress's recognition of the need to protect the rights of states:

It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter. It is the policy of Congress that the States manage the construction grant program under this chapter and implement the permit programs under sections 1342 and 1344 of this title. It is further the policy of the Congress to support and aid research relating to the prevention, reduction, and elimination of pollution and to provide Federal technical services and financial aid to State and interstate agencies and municipalities in connection with the prevention, reduction, and elimination of pollution.⁴⁵

Rather than choosing to have the federal government take full control of the water pollution regulation, Congress ensured that, alongside federal requirements, states would have primary authority over waters exclusively located within their borders.⁴⁶ The Section codifies the cooperative federalist system in the balance between state and federal authorities. In doing so, it affirms that cooperative federalism is the framework for the CWA to prioritize environmental integrity across jurisdictions.

Additionally, Congress intended the CWA to operate as a federal "floor," not a ceiling. Section 1370 of the CWA honed in on the cooperative federalist structure by expressly allowing states to impose "any standard or limitation respecting discharges of pollutants" more stringent than the federal baseline.⁴⁷ This Section preserved federal uniformity while enabling states to establish systems to enforce stricter standards, but not less stringent regulations.⁴⁸ This statutory language underscores the Act's balance: federal leadership to ensure

⁴³ See CRAIG, *supra* note 41, at 23.

⁴⁴ 33 U.S.C. § 1251(a).

⁴⁵ 33 U.S.C. § 1251(b).

⁴⁶ See CRAIG, *supra* note 41, at 10.

⁴⁷ 33 U.S.C. § 1370.

⁴⁸ See *id.*

national standards, coupled with state flexibility to innovate. Whereas Section 1251 recognizes the need for states to have flexibility, this Section acknowledges that, because of the interstate nature of water, there must be baseline protections across the federal government.

The cooperative federalist structure stemmed from the establishment of the federal floor as seen in Sections 1251 and 1370, as well as the creation of two permitting programs.⁴⁹ Under this framework, the CWA prohibited the discharge of pollutants from a point source into navigable waters without a permit. This was made possible through two essential regulatory mechanisms: the National Pollutant Discharge Elimination System (NPDES) and the Section 404 permitting program. NPDES was authorized through the EPA to control the discharge of pollutants into navigable waters, setting limits on pollutants and requiring monitoring and reporting.⁵⁰ Section 404 provided the issuance of permits for dredge-and-fill activities, regulating the discharge of materials into wetlands, rivers, and streams.⁵¹ Coupled together, these sections form the core of the CWA's federal permitting structure, ensuring that pollutant discharges and environmental disruptions are controlled to protect water quality and aquatic ecosystems across the United States.

Throughout the text of the CWA, the importance of the cooperative federalist model is clear. Outside of the text, legislative intent reveals the same. Even decades later, members of Congress still emphasize the CWA's role in balancing state and federal authorities. A 2023 amicus brief filed by 167 House Representatives and Senators explained the legislative intent of ensuring the Clean Water Act is based on the cooperative federalist structure: "The [CWA] is also a strongly federalizing law, setting ambitious antipollution and antidegradation goals. Congress set protective minimum federal floors, while allowing states to do more to protect their waters and citizens, to govern water allocations, and to operate permit programs under cooperative federalism structures."⁵²

For decades, judicial precedent also supported the need for federal and state authorities. In *United States v. Riverside Bayview Homes*,⁵³ the Supreme Court unanimously upheld federal jurisdiction over wetlands adjacent to navigable waters, citing their ecological importance.⁵⁴ This balance began to shift, however, in the 2000s, as federal jurisdiction over certain waters came under further judicial scrutiny.

⁴⁹ See CRAIG, *supra* note 41, at 22.

⁵⁰ See *NPDES Permit Basics*, ENVTL. PROT. AGENCY (June 3, 2025), <https://www.epa.gov/npdes/npdes-permit-basics> [<https://perma.cc/F45N-9WKB>].

⁵¹ See *Permit Program Under CWA Section 404*, ENVTL. PROT. AGENCY (Feb. 26, 2025), <https://www.epa.gov/cwa-404/permit-program-under-cwa-section-404> [<https://perma.cc/V6DC-BP3E>].

⁵² Brief for 167 U.S. Members of Congress as Amici Curiae Supporting Respondents at 4, *Sackett v. EPA*, 598 U.S. 651 (2023) (No. 21-454).

⁵³ 474 U.S. 121 (1985).

⁵⁴ See *id.* at 134.

III. SACKETT AND THE WEAKENING OF FEDERAL WETLANDS JURISDICTION

A. Weakening of Federal Wetlands Jurisdiction

The judicial shift began in 2001 with the Supreme Court's decision in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (*SWANCC*).⁵⁵ Before this decision, the scope of the CWA over wetlands was based on scientific criteria, including whether an area had the hydrology, soils, and vegetation in compliance with federal delineation standards. In essence, if the wetland functioned ecologically as part of a water system, it was subject to protection. The Court held that the CWA does not extend federal jurisdiction to isolated, non-navigable, intrastate ponds solely because they serve as habitat for migratory birds.⁵⁶ The Court's ruling reframed the issue: The key question became whether the Corps and EPA had the constitutional authority under the Commerce Clause to regulate certain waters at all.⁵⁷ This case marked the first consideration of the question of whether the CWA applies to certain non-navigable waters based on this Clause. This opened the door to a broader reconsideration of the legal foundations of the CWA and sparked an era of judicial skepticism toward federal water protections.

Congress intended the CWA's jurisdiction to reach the outer limits of its constitutional authority.⁵⁸ However, *SWANCC* narrowed that reach, introducing legal uncertainty and beginning a series of rulings that significantly constrained the cooperative federalist structure of the CWA by limiting the federal government's ability to regulate certain types of waters. Despite the CWA's text—which Congress, in 1972, deliberately designed to regulate waters “to the fullest extent possible under the [C]ommerce [C]ause”⁵⁹—the Court has read that authority increasingly narrowly.

Within a few years of the *SWANCC* decision, *Rapanos v. United States*⁶⁰ further narrowed the reach of the CWA and the role of the federal government when the Supreme Court addressed the scope of federal regulatory authority under the CWA, specifically over wetlands.⁶¹ While the case did not yield a clear majority, it significantly weakened the Act by creating confusion over which waters are federally protected.⁶²

The facts involved two Michigan property owners who had filled wetlands

⁵⁵ 531 U.S. 159 (2001).

⁵⁶ See *id.* at 174.

⁵⁷ See *id.* at 166.

⁵⁸ See Brief for 167 U.S. Members of Congress as Amici Curiae Supporting Respondents at 7, *Sackett v. EPA*, 598 U.S. 651 (2023) (No. 21-454) (citing William W. Sapp, et al., *From the Fields of Runnymede to the Waters of the United States: A Historical Review of the Clean Water Act and the Term “Navigable Waters,”* 36 ENVTL. L. REP. 10190, 10195-96, 10200-03 (2006)).

⁵⁹ *Quivira Mining Co. v. EPA*, 765 F.2d 126, 130 (10th Cir. 1985).

⁶⁰ 547 U.S. 715 (2006) (plurality op.).

⁶¹ See *id.* at 739, 757.

⁶² See Kristen Clark, *Navigating Through the Confusion Left in the Wake of Rapanos: Why a Rule Clarifying and Broadening Jurisdiction Under the Clean Water Act is Necessary*, 39 WM. & MARY ENVTL. L. & POL'Y REV. 295, 297 (2014).

without permits, arguing that the wetlands were not subject to federal jurisdiction because they lacked a continuous surface connection to traditionally navigable waters.⁶³ Justice Scalia's plurality opinion endorsed this view, proposing a restrictive test under which wetlands must have a continuous surface water connection to "waters of the United States" to be regulated under the CWA.⁶⁴ This approach emphasized a narrow, textual reading of the statute and largely ignored the scientific and ecological connectivity of wetlands to broader water systems.

Justice Kennedy's concurring opinion introduced a more expansive "significant nexus" test.⁶⁵ Under this standard, wetlands could be regulated if they significantly affected the chemical, physical, or biological integrity of navigable waters—an approach grounded in ecological science.⁶⁶ For years, courts and agencies used Kennedy's test as a controlling standard.⁶⁷

Nonetheless, the fragmented nature of *Rapanos* left lower courts and regulators without clear guidance. It opened the door for regulated parties to challenge EPA authority more aggressively and constrained the EPA's ability to protect isolated or ephemeral waters, further eroding the collaboration of federal and state authorities necessary for cooperative federalism to function. Following the decision, agencies and courts struggled in choosing whether to apply Justice Kennedy's "significant nexus" test or Justice Scalia's narrower plurality standard, often reaching conflicting results. For example, in *Northern California River Watch v. City of Healdsburg*, the Ninth Circuit applied the "significant nexus" test to uphold jurisdiction and concluded that this test is applicable most of the time.⁶⁸ However, the Eleventh Circuit held that only the "significant nexus" test may establish the Act's coverage at all times.⁶⁹ Meanwhile, the Sixth Circuit suggested it was unclear which test applied and refused to decide the question.⁷⁰

In an attempt to resolve regulatory uncertainty, the EPA released an "Interpretive Statement" in 2019 to explain the scope of the CWA's point source pollution permitting program.⁷¹ Yet, despite the published guidance, the Supreme Court declined to defer to the agency just one year later in *County of Maui v. Hawaii Wildlife Fund*.⁷² There, the Court held that the CWA requires a

⁶³ See *Rapanos*, 547 U.S. at 719–21.

⁶⁴ *Id.* at 757.

⁶⁵ *Id.* at 779 (Kennedy, J., concurring).

⁶⁶ See *id.*

⁶⁷ See, e.g., *United States v. Gerke Excavating, Inc.*, 464 F.3d 723, 725 (7th Cir. 2006) (per curiam); *N. Cal. River Watch v. City of Healdsburg*, 496 F.3d 993, 999–1000 (9th Cir. 2007); *United States v. Robison*, 505 F.3d 1208, 1221–22 (11th Cir. 2008); see also *United States v. Johnson*, 467 F.3d 56, 60 (1st Cir. 2006) (either Kennedy or plurality test); *United States v. Bailey*, 571 F.3d 791, 799 (8th Cir. 2009) (same). But see *United States v. Chevron Pipe Line Co.*, 437 F. Supp. 2d 605, 613 (N.D. Tex. 2006) (plurality test).

⁶⁸ See *N. Cal. River Watch*, 496 F.3d at 999.

⁶⁹ See *Robison*, 505 F.3d at 1219–22.

⁷⁰ *United States v. Cundiff*, 555 F.3d 200, 210 (6th Cir. 2009).

⁷¹ *Interpretive Statement on the Releases of Pollutants from a Point Source to Groundwater*, 84 Fed. Reg. 16,810. (Apr. 23, 2019) (codified at 40 C.F.R. Part 122).

⁷² 590 U.S. 165 (2020).

permit when “there is a direct discharge from a point source into navigable waters or when there is the *functional equivalent of a direct discharge*.”⁷³ This line of cases illustrates how courts, agencies, and regulated parties navigated the fractured terrain created by *Rapanos*. Each ruling further limited, or at least complicated, the reach of the CWA, setting the stage for future rollbacks and culminating in the *Sackett* litigation.

B. *Culmination of the Sackett Decision*

In *Sackett v. Environmental Protection Agency*, in a 5–4 decision, the Court formally rejected the standard that had guided courts and regulators for nearly two decades—Justice Kennedy’s “significant nexus” test—and adopted the far narrower test articulated by Justice Scalia’s *Rapanos* plurality.⁷⁴ Under this standard, only wetlands with a “continuous surface connection” to traditionally navigable waters fall under the jurisdiction of the CWA.⁷⁵

This shift radically contracted the definition of WOTUS by excluding vast swaths of wetlands, ephemeral streams, and intermittent waterways from federal protection. The environmental, economic, and public health consequences are far-reaching. The decision also undermined interstate efforts to maintain water quality. Water pollution does not respect state boundaries, and with fewer tools available at the federal level, states are forced to shoulder more of the burden of pollution control—yet many are ill-equipped to do so.

While some states have responded by asserting their own authority to regulate formerly protected waters, others have moved in the opposite direction. In states with “no-more-stringent” laws, legislatures have actively restricted state environmental agencies from going beyond weakened federal standards.⁷⁶ This contradicts the claim often made by industry groups that state law will simply fill the regulatory gap left by the Court, an assertion that fails to reflect political and practical realities on the ground.

As a Michigander, the Great Lakes and water are essential to our way of life. Thankfully, since 1979, Michigan is one of two states to have been granted authority by the federal government to administer its own wetland program.⁷⁷ However, Michigan is not the only state that borders our Great Lakes. Indiana,

⁷³ *Id.* at 183 (emphasis in original).

⁷⁴ See *Sackett v. EPA*, 598 U.S. 651, 671 (2023).

⁷⁵ *Id.* at 678.

⁷⁶ See John Flesher and Michael Phillis, *States at the Forefront of Fights over Wetlands Protections after Justices Slash Federal Rules*, ASSOCIATED PRESS (Aug. 30, 2024), <https://apnews.com/article/wetlands-supreme-court-state-rules-development-4917c6df50c0cd15da2915fc12f9445e> [<https://perma.cc/DF7U-4ZNU>] (discussing how North Carolina legislature disallowed adopting state protection standards following federal rollbacks).

⁷⁷ See, e.g., Press Release, Mich. Dep’t of Env’t, Great Lakes, and Energy, Wetlands Regulation Stable in Michigan Despite Supreme Court Ruling Changing Federal Definition (June 22, 2023), <https://www.michigan.gov/egle/newsroom/mi-environment/2023/06/22/wetlands-regulation-stable-in-michigan-despite-supreme-court-ruling-changing-federal-definition> [<https://perma.cc/BSB2-WDUW>].

which shares part of the shoreline of Lake Michigan, was ranked fourth among states with the largest loss of wetlands due to the *Sackett* ruling.⁷⁸ The state legislature recently passed a bill^[91] to further reduce wetland protections by changing what is included in the definition of Class III wetlands.⁷⁹

Meanwhile, some states are racing to codify laws to protect wetlands that were once included in the CWA. A bipartisan effort in Colorado, the first state to take action after *Sackett*, led to the passage of a bill that protects thousands of acres of wetlands and miles of streams by requiring state permits for dredging or filling wetlands, streams, and rivers—mirroring the CWA’s previous protections.⁸⁰

Ultimately, *Sackett* shifted the cost of pollution from polluters to the public by increasing water treatment expenses, risking public health, heightening vulnerability to environmental disasters, and overall weakening one of the nation’s foundational environmental laws.

C. *Shortcomings of the CWA and Sackett*

In the *Sackett* case itself, the EPA prevented Michael and Chantell Sackett from building a home on their property in Idaho due to the proximity of wetlands it deemed protected under the CWA. In 2008, the Sacketts filed a lawsuit challenging the EPA’s jurisdiction, leading to a broader legal debate over the limitations of federal power. Fourteen years later, in a 5-4 decision, the Court decided in the Sacketts’ favor, rejecting the longstanding Kennedy “significant nexus” test and depriving the federal government of the ability to regulate wetlands and streams based on their ecological connection to navigable waters.⁸¹ Instead, the Court embraced a far narrower interpretation of WOTUS that excludes wetlands or any land other than that which is adjacent to navigable waters. Only wetlands with a “continuous surface connection” to navigable waters qualify as WOTUS, significantly narrowing federal jurisdiction under the CWA.⁸²

The Sacketts’ case reveals a legitimate shortcoming of the CWA: namely, the time-consuming nature of the regulatory state. After initially notifying the Sacketts that they needed a permit to fill the wetlands on their property, it took the EPA seven months to send the couple an administrative order, which then instructed the couple to remove the fill and restore the wetlands or risk federal

⁷⁸ See Brian Vigue, *HB 1383 Signed into Law, Further Eroding Wetlands Protections in Indiana*, NAT’L AUDUBON SOC’Y, <https://gl.audubon.org/news/hb-1383-signed-law-further-eroding-wetlands-protections-indiana> [<https://perma.cc/L7KU-92HD>] (last visited Sep. 9, 2025).

⁷⁹ See *id.*; *Actions for House Bill 1383*, IND. GEN. ASSEMBLY, <https://iga.in.gov/legislative/2024/bills/house/1383/actions> [<https://perma.cc/ZK4R-JEN3>] (last visited Sept. 11, 2025).

⁸⁰ See COLO. REV. STAT. § 25-8-205 (2025); Jerd Smith, *Colorado to Shield Thousands of Acres of Wetlands, Miles of Streams After U.S. Supreme Court Left Them Vulnerable*, COLO. SUN (May 9, 2024), <https://coloradosun.com/2024/05/09/colorado-law-protecting-wetlands-supreme-court/> [<https://perma.cc/8DTR-W5VS>].

⁸¹ See *Sackett v. EPA*, 598 U.S. 651, 678 (2023).

⁸² See *id.*

finer.⁸³

The attacks did not stop with the *Sackett* decision. The Supreme Court's decision to significantly narrow the definition of the WOTUS under the CWA runs counter to congressional intent and left a dangerous regulatory vacuum that threatens water quality, public health, and environmental sustainability across the country. As costs and political tensions rise across America, many states lack the financial capability, political will, or incentive to protect downstream or interstate interests.⁸⁴

In a continued erosion of the CWA and the administrative state generally, the Court overruled the longstanding *Chevron* doctrine just a year after the *Sackett* decision in *Loper Bright Enterprises v. Raimondo*.⁸⁵ The *Chevron* doctrine required courts to defer to federal agency interpretations where the statute was ambiguous if the interpretations were reasonable.⁸⁶ However, the *Loper Bright* decision eliminated *Chevron*'s agency deference and now requires courts to determine the meaning of the statutory text for themselves.⁸⁷ As with other agencies, *Loper Bright* opened the floodgates for more litigation against the EPA.

Perhaps if the Sacketts had received an answer sooner regarding whether they needed an EPA permit to build their house, the couple would not have sued, and the courts may have been less sympathetic. Perhaps if Congress had drafted a more explicit CWA, *Loper Bright* would not have hamstrung the administrative state. I believe bringing states closer to the administration, monitoring, and tracking of water permits could expedite these processes and avoid extraneous litigation. Meanwhile, the federal government needs the tools to enforce these regulations.

IV. LEGISLATIVE ACTION AND INACTION: THE POST-SACKETT RESPONSE

Following the *Sackett* decision, Congress had a choice to address the underlying regulatory challenges at the center of the case. Rather than resolving the legitimate issues with our federal water regulations, such as an overly complicated permitting process, Congress allowed its authority to protect our waterways to erode further. We must do more than throw money at the problem—we need to restructure how we regulate our waters in addition to equipping local, state, and federal enforcers with the resources necessary to safeguard public health and the environment.

In parallel with the Supreme Court's disastrous rulings, my Republican colleagues advanced measures that weakened the CWA's scope. This is not something the GOP has done with a clear mandate—House Republicans

⁸³ See Nina Totenberg, *When Property Rights, Environmental Laws Collide*, NAT'L PUB. RADIO (Jan. 7, 2012), <https://www.npr.org/2012/01/07/144797552/when-property-rights-environmental-laws-collide> [<https://perma.cc/CYP3-BCLB>].

⁸⁴ See Vigue, *supra* note 78 (Indiana example).

⁸⁵ See *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 412 (2024).

⁸⁶ See *Chevron U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 865 (1984).

⁸⁷ See *Loper Bright*, 603 U.S. at 395.

currently hold the majority by only four seats. Regardless of their slim majority, the GOP maintains that the tragedies of 50 years ago that compelled Congress to act are somehow now implausible. During testimony before the House Rules Committee, the Chair of the House Transportation and Infrastructure Subcommittee on Water Resources and Environment noted that his colleagues “often talk about rivers catching on fire as a reason for needing a heavy-handed federal government,” characterizing this example as a “50-year-old scare [story].”⁸⁸ It is not a coincidence that the Cuyahoga River has not been engulfed in flames in over five decades. The CWA was enacted 50 years ago, and its protections have served the river well.

A. *The IJA and the Democratic Response*

At every turn, congressional Democrats have fought back against the GOP’s efforts, including amassing over 160 cosigners to an amicus brief submitted to the Supreme Court in *Sackett*.⁸⁹ While in the majority during the 117th Congress, House Democrats sought to improve upon the CWA and reassert congressional authority on federal water regulations—which proved to be politically challenging. Rather than modernizing the CWA’s underlying framework, Democrats championed our nation’s most significant investment in infrastructure through the bipartisan Infrastructure Investment and Jobs Act (“IIJA”).⁹⁰ This bill redirected the federal government’s focus toward critical clean water infrastructure and provided unprecedented support, allocating \$23.4 billion for the Clean Water State Revolving Fund and the Safe Drinking Water State Revolving Fund, \$15 billion for lead service line replacement, and \$10 billion for the removal of per- and polyfluoroalkyl substances (PFAS).⁹¹ Through the IIJA, Michigan alone has received over \$213 million for water treatment projects. In my home district, the City of Muskegon was awarded \$5.6 million through the IIJA’s investments in the Drinking Water State Revolving Fund.⁹² These dollars—only made possible by bipartisan, federal investment—aim to replace water mains and lead service lines to provide more reliable drinking water infrastructure. This example in West Michigan is just one of countless investments made by the federal government through the IIJA.

All the while, the Democratic Caucus remained steadfast in fighting against attempts to gut the CWA in the 118th Congress. Transportation and Infrastructure Committee Republicans sought to clear a Congressional Review

⁸⁸ *Hearing on H.R. 3486, 3898, H.J. Res. 104, 105, and 106 Before the H. Rules Comm.*, 119th Cong. (2025) (statement of Rep. Mike Collins).

⁸⁹ Brief of Amici Curiae 167 U.S. Members of Congress in Support of Respondents, *Sackett v. EPA*, 598 U.S. 651 (2023) (No. 21-454).

⁹⁰ Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, 135 Stat. 429 (2021).

⁹¹ *See id.* §§ 50210, 50102, 50105, 135 Stat. at 1169, 1137–40, 1140–42.

⁹² *See Infrastructure Investment Tracker*, STATE OF MICH.: OFF. OF GOVERNOR, <https://www.michigan.gov/whitmer/issues/michigan-infrastructure-office/michigan-infrastructure-technical-assistance-center/outcomes-dashboard-power-bi> [<https://perma.cc/FS5V-DKYG>].

Act (CRA) measure to nullify a Corps and EPA rule titled Revised Definition of “Waters of the United States,” and the measure cleared the House Floor by a vote of 227–196.⁹³ Fortunately, then-President Joe Biden vetoed this CRA, and Democrats worked together to block the GOP’s attempt to override the veto.⁹⁴ Meanwhile, in the 119th Congress, under a Republican majority, my counterparts across the aisle led legislation to cut corners around Section 401 CWA permitting, roll back protections around the use of pesticides in or near navigable waters, and ease water quality criteria with the Promoting Efficient Review for Modern Infrastructure Today (“PERMIT”) Act.⁹⁵ While my Democratic colleagues have made significant investments in water infrastructure, both parties have failed to improve, follow, or enforce a regulatory framework to protect our waters.

B. *The Republican Response: The PERMIT Act*

With Republicans holding power in the House of Representatives, Senate, and White House during the 119th Congress, the GOP has doubled down on attacking what remains of the CWA. Republicans pushed the PERMIT Act through the House Transportation and Infrastructure Committee, a bill which my colleagues touted would cut red tape for permitting processes.⁹⁶ However, the PERMIT Act—a package of fifteen standalone bills rolled into one—is not about efficiency, but rather is designed to further weaken protections over U.S. rivers, lakes, streams, and wetlands.⁹⁷

Section 2 of the legislation, the Water Quality Standards Attainability Act, undermines the purpose of the CWA by creating a new exemption with a new “cost effectiveness” test for sewage discharges, preventing the implementation of such requirements if they are deemed too expensive.⁹⁸ The CWA established a framework for setting minimum pollution control standards for municipal wastewater infrastructure. Presently, these sewage treatment requirements must be followed, but the use of long-term control plans grants flexibility on how the

⁹³ H.R.J. Res. 27, 118th Cong. (2023); House Roll Call Vote 187, 118th Cong. (2023).

⁹⁴ *Message to the House of Representatives — President’s Veto of H.J. Res 27*, THE WHITE HOUSE (Apr. 6, 2023), <https://bidenwhitehouse.archives.gov/briefing-room/presidential-actions/2023/04/06/message-to-the-house-of-representatives-presidents-veto-of-h-j-res-27/> [<https://perma.cc/3DRS-8HZZ>]; See Chuck Abbott, *House Will Try to Override Biden on Protecting Wetlands*, SUCCESSFUL FARMING (Apr. 17, 2023), <https://www.agriculture.com/news/business/house-will-try-to-override-biden-on-protecting-wetlands> [<https://perma.cc/2UEK-GK2N>].

⁹⁵ See PERMIT Act, H.R. 3898, 119th Cong. (2025).

⁹⁶ See Miranda Willson, *GOP Water Permitting Bill Sails Through Committee*, POLITICO PRO: E&E DAILY (June 26, 2025 06:28 AM), <https://subscriber.politicopro.com/article/eenews/2025/06/26/republican-water-permitting-bill-sails-through-committee-00424170> [<https://perma.cc/F6XX-RKDH>].

⁹⁷ See Caitlin Looby & Madeline Heim, *New Bill Would Gut Protections of Clean Water Act in Name of Growth*, MILWAUKEE J. SENTINEL (Dec. 18, 2025, 11:20 AM), <https://www.jsonline.com/story/news/environment/2025/12/18/new-bill-may-speed-permitting-weaken-clean-water-act-protections/87799020007/> [<https://perma.cc/WD4V-CTD4>].

⁹⁸ PERMIT Act, H.R. 3898, 119th Cong. § 2 (2025).

requirements must be adopted to address human and environmental health impacts from overflows of raw or partially treated sewage. However, Section 2 would effectively prevent states from carrying out sewage treatment requirements should the EPA Administrator deem them to be too expensive. Coupled with the current administration's proposed cuts to clean water infrastructure, as evidenced in the Fiscal Year 2026 Presidential Budget Request, this provision may leave economically disadvantaged communities with limited resources to address untreated sewage.⁹⁹

Section 3 of the PERMIT Act, which is the Water Quality Criteria Development and Transparency Act, takes aim at water quality criteria. Under current law, the EPA is tasked with developing water quality criteria through an informal regulatory process. These criteria serve as baselines to which the EPA and states can refer in determining if the quality of a given waterbody could harm aquatic life, wildlife, or human health.¹⁰⁰ Section 3, however, would require the EPA to utilize a formal rulemaking process to develop quality criteria and, therefore, determine the health of a water body.¹⁰¹ Rather than streamlining federal processes, this shift would complicate and delay the issuance of new criteria, as well as hinder the EPA and states from swiftly responding to new or evolving pollutant challenges.

The Improving Water Quality Certifications and American Energy Infrastructure Act, included as Section 5 of the PERMIT Act, directly undermines states' authorities under Section 401 of the CWA. Section 401 enables states to enforce water quality standards and "other appropriate requirements of state law" on any project or activity carried out in the state that requires a federal license or permit.¹⁰² Section 5 significantly narrows the scope of projects that states are required to approve, restricts states from imposing requirements or conditions on a project, and restricts the time allotted to states to certify or condition a project. This provision represents perhaps the most glaring attack on cooperative federalism by significantly curtailing the role that state governments play in the federal permitting process.¹⁰³

Sections 9, 10, and 11 of the PERMIT Act work in tandem to exempt the

⁹⁹ See Letter from Russell T. Vought, Dir., Off. of Mgmt. & Budget, to Sen. Susan Collins, Chair, S. Comm. on Appropriations (May 2, 2025), <https://www.whitehouse.gov/wp-content/uploads/2025/05/Fiscal-Year-2026-Discretionary-Budget-Request.pdf> [<https://perma.cc/U6S3-3B8Z>] (describing a nearly \$2.5 billion decrease in funding to the Clean and Drinking Water State Revolving Loan Funds program).

¹⁰⁰ See *Basic Information on Water Quality Criteria*, U.S. ENVTL. PROT. AGENCY (Sep. 25, 2025), <https://www.epa.gov/wqc/basic-information-water-quality-criteria> [<https://perma.cc/T4HG-A3B6>].

¹⁰¹ See PERMIT Act, H.R. 3898, 119th Cong. § 3 (2025).

¹⁰² *Id.* § 5.

¹⁰³ See South Yuba River Citizens League, *The PERMIT Act: A Direct Threat to Clean Water and State Authority*, HYDROPOWER REFORM COAL. (Sep. 2, 2025), <https://hydroreform.org/2025/09/the-permit-act-a-direct-threat-to-clean-water-and-state-authority/> [<https://perma.cc/72ET-95F5>] (criticizing Section 5 of the PERMIT Act and noting that it would "drastically limit the ability of states and tribes to review and condition federally licensed projects that affect water quality").

discharge of toxic pesticides, contaminated stormwater, and fire suppressants from the CWA permitting requirement. Specifically, Section 9, or the Forest Protection and Wildland Fire Safety Act, exempts the discharge of fire retardants from the permitting requirements of the CWA.¹⁰⁴ Presently, the CWA prohibits the discharge of any pollutant into protected waterbodies and tasks the EPA or approved states to issue permits from point sources.¹⁰⁵ Section 10 of the PERMIT Act entirely exempts agricultural stormwater runoff, as defined by Section 402 of the CWA point-source permitting regulators.¹⁰⁶ While the CWA presently exempts agricultural stormwater from the CWA's statutory definition of a point source, this provision expands that definition by including discharge or pollution from agricultural lands, as well as adjacent lands necessary for agricultural activities.¹⁰⁷ Section 11, or the Reducing Regulatory Burdens Act, exempts the discharge of pesticides into U.S. waters from the CWA's permitting requirements.¹⁰⁸ The CWA prohibited the discharge of pollutants into protected waters without a permit. The aforementioned permits may be issued by the EPA or an approved state under Section 403 of the CWA.¹⁰⁹ In tandem, these provisions weaken the CWA's permitting requirements and roll back the federal government's—and in some cases state governments'—ability to regulate in the water space.

The Reducing Permitting Uncertainty Act, included as Section 12 of the PERMIT Act, significantly reduces the EPA's oversight authority over the U.S.

¹⁰⁴ See PERMIT Act, H.R. 3898, 119th Cong. § 9 (2025).

¹⁰⁵ See, e.g., *Forest Serv. Emps. For Env't Ethics v. U.S. Forest Serv.*, No. 9:22-cv-00168-DLC, 2023 WL 3647424, at *14 (D. Mont. May 26, 2023) (holding that the aerial discharge of fire suppressants into protected waters without a CWA permit was a de facto violation of the law). The judge stayed this ruling to enable federal agencies to develop a general permit for aerial spraying of fire retardants under the CWA. See *id.*

¹⁰⁶ See PERMIT Act, H.R. 3898, 119th Cong. § 10 (2025).

¹⁰⁷ This legislation differs from the existing “normal farming” practice statutory exemption in Section 404 of the CWA, which exempts all normal farming activities—including plowing, seeding, cultivating, and harvesting—from a wetlands-related permit. See 33 U.S.C. § 1344(f).

¹⁰⁸ See PERMIT Act, H.R. 3898, 119th Cong. § 11 (2025).

¹⁰⁹ The EPA first issued a Pesticide General Permit (“PGP”) on October 31, 2011, in response to *National Cotton Council of America v. EPA*, which vacated a prior EPA rule that generally exempted pesticide application from the CWA's permitting requirement. See *Pesticide General Permit (PGP) for Discharges from the Application of Pesticides*, U.S. ENV'T PROT. AGENCY (Oct. 31, 2011), https://www.epa.gov/sites/default/files/2015-09/documents/final_pgp.pdf [<https://perma.cc/KB83-S6PB>]; *Nat'l Cotton Council of Am. v. EPA*, 553 F.3d 927 (6th Cir. 2009). The U.S. Geological Survey's (“USGS”) 2009 findings on reductions in pesticide contamination from 2003 to 2007 provide important context for the EPA's 2011 PGP. The report documented that declines in pesticide use were associated with corresponding declines in contamination, suggesting that reducing pesticide applications can effectively improve water quality. See CONNIE A. LOPER, KEVIN J. BREEN, TAMMY M. ZIMMERMAN & JOHN W. CLUNE, U.S. GEOLOGICAL SURV., PESTICIDES IN GROUND WATER IN SELECTED AGRICULTURAL LAND-USE AREAS AND HYDROGEOLOGIC SETTINGS IN PENNSYLVANIA, 2003–2007 (2009), <https://pubs.usgs.gov/sir/2009/5139/sir2009-5139.pdf> [<https://perma.cc/4S7Q-ZRHC>]. Since the EPA issued the PGP in 2011—and renewed in 2016 and 2021—there has been little to no adverse impact on pesticide applicators or agricultural interests, as well as no adverse effect on human health through the outbreak of pest-borne illnesses.

Army Corps of Engineers (USACE) permitting program. Specifically, this provision restricts the timeframe during which the EPA may take action to block projects with an “unacceptable adverse effect” on drinking water, recreational areas, or fish and wildlife.¹¹⁰ The new timeline proposed in the language—which would require the EPA to take action between when an applicant “submits all the information required to complete the application” and when the USACE issues a permit—creates legal uncertainty as to when the EPA may act in the permit review process.¹¹¹ Additionally, this provision does not obligate the USACE to share application information with the EPA. This section additionally limits the EPA’s review of dredge and fill activities of the USACE that are not undertaken pursuant to a CWA permit.¹¹² If enacted, this provision would hinder the EPA’s authority to regulate water permitting: a necessary function for the Agency to participate in cooperative federalism.

Similarly, Section 13 of the PERMIT Act, the Nationwide Permitting Improvement Act, hamstring the USACE’s ability to develop, approve, or renew nationwide permits.¹¹³ Section 404 of the CWA grants the USACE or approved states the ability to issue permits for activities that result in the discharge of dredged or fill materials into protected waters.¹¹⁴ Section 13 would significantly amend the process by which the USACE grants nationwide permits. Section 13 also codifies the availability of a nationwide permit for linear infrastructure projects, or projects that cross a waterbody more than once in separate and distant locations.¹¹⁵ That would preclude legal challenges to existing regulatory linear nationwide permits, violating the CWA requirement that authorized activities only have minimal impact on the environment. Further, this language would enable an increased use of the nationwide permits’ expedited review and approval process for potentially contentious projects. Finally, Section 13 prohibits the USACE from modifying nationwide permit requirements for linear projects to assess the cumulative environmental impacts of individual waterbody crossings for an individual project.¹¹⁶ Yet again, this language undermines federal review on the scope, scale, and overall impact of potentially harmful projects.

V. EXACERBATED UNCERTAINTY IN PERMIT REFORM

On June 25, 2025, the House Committee on Transportation and

¹¹⁰ See PERMIT Act, H.R. 3898, 119th Cong. § 12 (2025).

¹¹¹ See *id.*

¹¹² See *id.*

¹¹³ See PERMIT Act, H.R. 3898, 119th Cong. § 13 (2025).

¹¹⁴ See 33 U.S.C. § 1344.

¹¹⁵ See Rebecca Higgins, *House Passes Broad Clean Water Act Changes*, ENO CTR. FOR TRANSP. (Dec. 12, 2025), <https://enotrans.org/article/house-passes-broad-clean-water-act-changes/> [<https://perma.cc/T7MP-X4L2>].

¹¹⁶ See Drew Sifton, Erika Spanton & Andrew Womack, *House Approves Sweeping Clean Water Act Reforms*, BEVERIDGE & DIAMOND (Dec. 17, 2025), <https://www.bdlaw.com/publications/house-approves-sweeping-clean-water-act-reforms/> [<https://perma.cc/V9BP-4FJQ>] (noting that the “secretary of the Army’s ability to modify certain permit terms and conditions in the future would be more limited”).

Infrastructure convened to markup the PERMIT Act. My Democratic colleagues and I offered several amendments in an attempt to restore the integrity of the CWA and, specifically, the federal government's role in protecting our waters. My amendment sought to require a Section 402 permit under the CWA to be issued to discharge pollutants that may adversely impact the health and well-being of pregnant women and children.¹¹⁷ In my remarks, I argued that this amendment was a commonsense approach to ensuring that our most vulnerable—expecting mothers and children—were safe from harmful pollutants. However, upon a requested recorded vote, my colleagues rejected the amendment by a vote of 34 Nays to 30 Yeas along party lines.¹¹⁸

As the PERMIT Act progressed through the legislative process, I was honored to testify against the measure before the House Rules Committee on behalf of Transportation and Infrastructure Democrats.¹¹⁹ In an effort to level set, I argued that “the Supreme Court has time and time again chipped away at this bedrock law [the CWA],” and noted that “we have seen federal protections slashed for over half of our wetlands and up to 70% of our streams.”¹²⁰ Turning to the PERMIT Act, I testified that “on top of these disastrous rulings, H.R. 3898 will gut federal investments and take a final blow at [the CWA] protections” by “[trampling] on states’ rights to regulate the waters that make our communities unique, [saddling] everyday taxpayers with the cost of dirty water, rather than holding polluters . . . accountable[,] . . . [risking] the health of American families, and [failing] to meaningfully reform our permitting processes.”¹²¹

To be clear: the CWA is not perfect. Congress can and should build upon the law to provide greater legal clarity, faster project deployment, and increase public health and environmental benefits. Throughout my testimony, I challenged my colleagues—regardless of political affiliation—to “envision a world in which we can both expedite permitting and protect access to clean water.”¹²² I share the desire of my Republican colleagues to streamline and clarify permitting processes under the CWA. However, the legal uncertainty created within the PERMIT Act, as outlined above, could make way for increased litigation and project delays, ultimately undermining the bill's proclaimed goal. While failing to clarify permitting processes and thus expediting decision-making and project timelines, the PERMIT Act exacerbates the Supreme Court's erosion of cooperative federalism at the crux of the CWA.

¹¹⁷ See Amendment to the Amendment in the Nature of a Substitute to H.R. 3898, 118th Cong. (as proposed in markup before the H. Comm. on Transp. & Infrastructure, June 25, 2025, and not adopted), https://transportation.house.gov/uploadedfiles/scholt_027_xml_anonymous.pdf [<https://perma.cc/CL6V-WAND>].

¹¹⁸ See *Markup of Markup of an Amendment in the Nature of a Substitute to H.R. 3898, the Promoting Efficient Review for Modern Infrastructure Today Act (PERMIT Act); and Other Matters Cleared for Consideration: Hearing Before the H. Comm. on Transp. & Infrastructure*, 119th Cong. (2025), <https://docs.house.gov/Committee/Calendar/ByEvent.aspx?EventID=118391> [<https://perma.cc/7HDD-597T>] (voting tally on Amend. 027).

¹¹⁹ See *Hearing on H.R. 3486, 3898, H.J. Res. 104, 105, and 106 Before the H. Rules Comm.*, 119th Cong. (2025) (statement of Rep. Hillary Scholten).

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

As such, it became clear to me that I could not support a bill that would threaten Michigan's most precious resource, as well as the need to develop a new solution to a decades-long problem. That is why I proudly voted against the measure when it came to the House Floor, as well as managed debate in opposition to the bill.

VI. CONCLUSION: THE NEED TO REASSERT THE FEDERAL FLOOR THROUGH LEGISLATION

The CWA, even in its pre-*Sackett* state, was far from a perfect piece of legislation. If we care about protecting our waters—and I have yet to find a colleague who does not enjoy clean water to drink and use—then we need to defend this vulnerable law, before it is too late. Families and industry alike deserve clear and timely water permit determinations. If a permit is denied due to environmental or community concerns, developers ought to be able to adjust projects accordingly in a timely fashion to minimize impact and maximize innovation. But these problems are not rooted in the CWA's federalism structure. The federal government's floor is, in fact, critical to the most successful elements. I suggest that Congress maximize collaboration between federal and local governments via pointed grant programs; ensure the business community can effectively and efficiently navigate permitting processes; and leverage a whole-of-government approach to ensure maximum capacity.

With an acknowledgement of the current political landscape, I am proud to champion the Federal-State Partnership for Clean Water Act.¹²³ While this bill will not wholly address the damage done to the CWA's cooperative federalism structure, the legislation aims to support states, tribes, and municipalities that wish to oversee their day-to-day wetland operations. Under the CWA, states may assume responsibility over Section 404 permitting. Presently, only Michigan and New Jersey maintain programs to protect, manage, or restore wetlands. This measure would authorize federal dollars to the tune of \$300 million over Fiscal Years 2026 through 2030 to support the establishment of these state- or local-level wetland programs. This bill doubles down on the CWA's cooperative federalism structure and gives it new life. If Congress does not yet have the political will to restore the role of the federal government in cooperative federalism, we should at least empower states that wish to uphold strong wetlands protections to do so themselves. Should this bill become law, we would see yet again how the federal government and local entities can work together to actualize shared goals.

In addition to investing in state and federal programs to protect waters, Congress must ensure the business community's concerns with the CWA are addressed. To provide project developers with quick and clear answers without limiting the filing of legitimate lawsuits against a given project, Congress should consider establishing specialized courts or review boards to process permits. Such a court or board may focus on permits under the CWA, as well as other

¹²³ Federal-State Partnership for Clean Water Act of 2025, H.R. 5445, 119th Cong. (2025).

bedrock laws, like NEPA. Increased capacity will protect the ability for public scrutiny while preventing courts from being bogged down and, therefore, delaying water permit decisions. In the absence of specialized courts, putting time limits on current courts, but increasing capacity and clarity of the law to enhance judicial review, is the answer.

Given the cooperative federalism roots of the CWA, Congress should additionally foster greater interagency coordination and capacity building. With several federal and state agencies involved in water permitting, Congress should incentivize information and data sharing regarding water permits on a single, online resource similar to the Federal Permitting Improvement Steering Council's Permitting Dashboard.¹²⁴ Moreover, increased staffing and resources at the federal and state levels are critical to boosting transparency, communication, and expediency. Unfortunately, the current Administration has cut the staff that administers permits necessary for water projects. For example, the USACE's three senior-most experts have left the agency in the past year, and regulatory staff has been gutted by an estimated fifteen to thirty percent.¹²⁵ Rather than requiring agencies to do more with less, Congress must invest in skilled personnel to oversee these critical permits.

To restore this critical federal-state partnership, Congress must, on a bipartisan basis, expedite our permitting processes while restoring the federal floor to protect our waters. We can do both: expand federal protections and simultaneously ensure that businesses have clear, fair rules in place to invest in communities. By reinforcing this balance, we uphold the principle of cooperative federalism at the heart of the CWA, providing strong national standards while preserving state flexibility to meet local needs. In this way, restoring the federal floor and streamlining permitting strengthens the federal-state partnership that has long guided our water protections and ensures it remains central to our regulatory framework. Ultimately, a cooperative effort can only be successful if all parties are appropriately equipped with the authority, staff, and regulatory framework. Congress must bring parity to state and federal responsibilities and capabilities to make the best decisions as quickly and safely as possible. To that end, I am committed to working with stakeholders from the transportation, agricultural, environmental, manufacturing, and health care sectors, as well as my colleagues in Congress and in the administration, to revitalize our nation's water regulatory framework.

The urgency of acting to protect our wetlands cannot be overstated. The United States has lost over half of its wetlands since European settlers came to America.¹²⁶ We cannot make more water. We can pollute it, we can poison it,

¹²⁴ See Federal Permitting Improvement Steering Council, *Permitting Dashboard: Federal Infrastructure Projects*, PERMITTING DASHBOARD, <https://www.permits.performance.gov/> [<https://perma.cc/GWM9-A9PV>].

¹²⁵ 171 CONG. REC. H5785 (daily ed. Dec. 11, 2025) (statement of Rep. Hillary Scholten).

¹²⁶ See Press Release, U.S. Fish & Wildlife Serv., Continued Decline of Wetlands Documented in New U.S. Fish and Wildlife Service Report (Mar. 22, 2024), <https://www.fws.gov/press-release/2024-03/continued-decline-wetlands-documented-new-us-fish-and-wildlife-service-report> [<https://perma.cc/8RM5-PBNM>].

we can drain it, but we cannot replace it. That is the simple, terrifying truth. It is time for Congress to act with the urgency that this situation demands. Without a clear and easy-to-follow federal floor for protecting our waterways, unscrupulous and unintentional polluters alike will reduce our waterways to the toxic landfills of pre-CWA blight. We can have a system that is easy to understand and administer, and cooperative federalism—with our state and local partners at the table—can once again realize our shared goals of clean and healthy water for all, from sea to shining sea.