Sackett v. EPA Spells Disaster for Wetlands and Clean Water

By JARED MOTT, Conservation Director

In the largest rollback of clean water protections in 50 years, the Supreme Court ruled in May that the Clean Water Act does not protect a majority of the nation's wetlands and millions of miles of streams. The Court's decision in *Sackett v. Environmental Protection Agency* drastically narrows the scope of the Clean Water Act by eliminating protections for wetlands and tributary streams except in extreme, limited circumstances.

The Court's ruling eliminates safeguards for vital links of our waterways, with no consideration of wetlands' essential role in filtering and improving water quality, dispersing floodwaters and providing critical habitat for fish and wildlife.

Proven science shows how tributary streams influence downstream waters, and one in three Americans get drinking water from public systems that rely, at least in part, on these small streams. Yet, the Court ignored the plain language of the Clean Water Act that clearly articulates congressional intent to protect these waters.

This ruling defies science, the law and common sense by simply pretending that major rivers, lakes and other waters deemed "navigable" cannot be impacted by pollution in their tributaries or adjacent wetlands.

What we must do now

Despite this momentous setback, there is no time to despair. The Izaak Walton League has never backed down from the fight for clean water and will answer the bell once again.

First, we have to conserve wetlands using every tool available. Second, we must protect waters at the source by keeping a watch on neighborhood streams and wetlands. Alarms must be raised as soon as problems begin to surface.

The League is already engaged on both of these fronts, with robust advocacy for wetlands conservation, especially the upcoming Farm Bill. And we have enlisted a growing cadre of volunteer stream monitors across the nation who gather water quality data.

But ultimately, Americans must convince Congress to amend the Clean Water Act to clarify once and for all that this fundamental law protects wetlands and tributary streams. The League is mobilizing now to build a grassroots movement that pressures lawmakers to act.

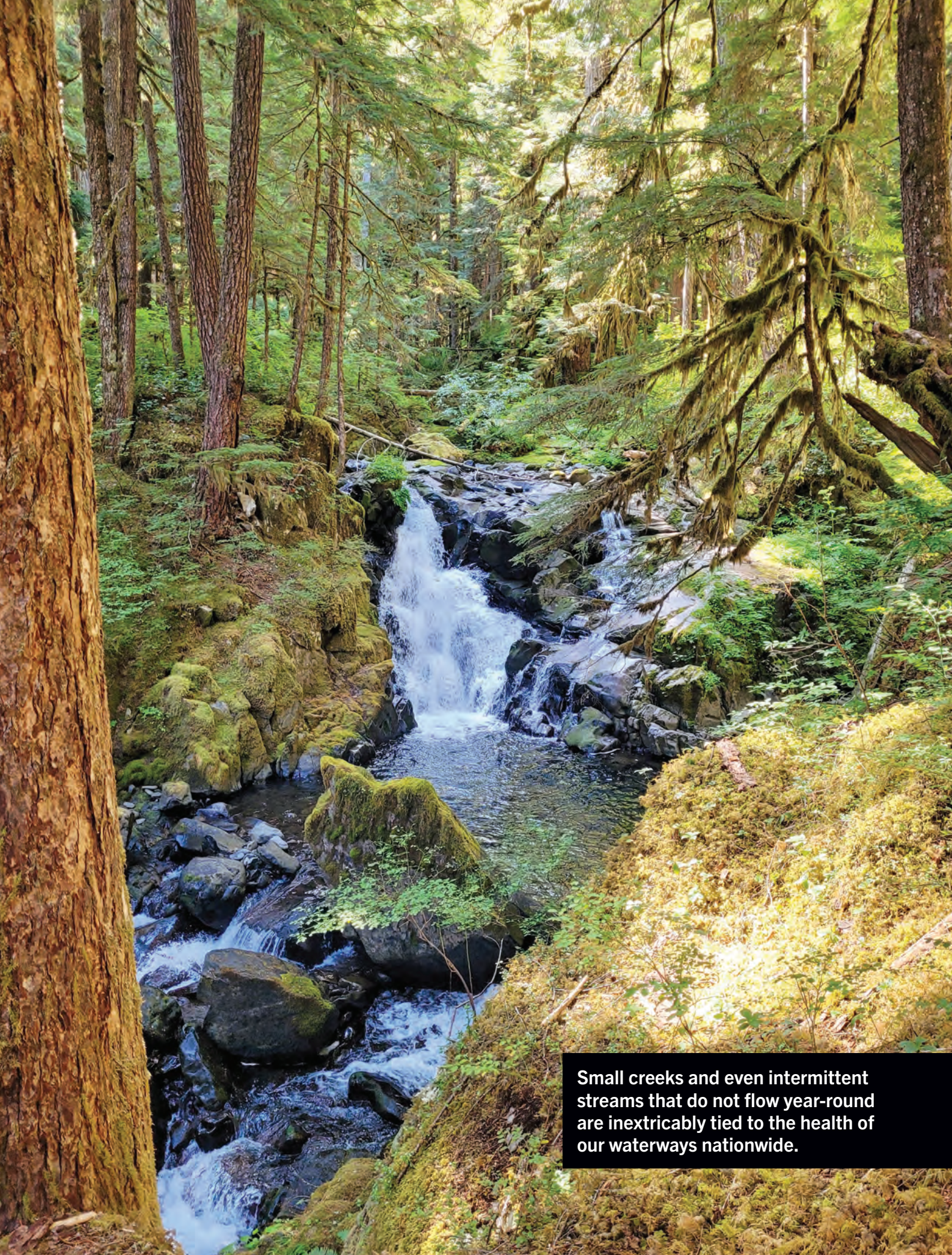
Without protections enumerated in the Clean Water Act, pollution dumped into tributary streams could flow uninhibited into rivers like the Potomac, which provides drinking water for five million people. Here the Shenandoah River joins the Potomac at Harpers Ferry, W.Va.

MICHAEL REINEMER

The *Sackett* case

The Sacketts, who are property owners in Idaho, filled a wetland in order to build a home, but did so without obtaining a Clean Water Act permit. Because of that, they were cited and fined. They appealed and eventually their case made its way all the way to the Supreme Court. The case raised two questions: Does the Clean Water Act protect the wetland the Sacketts filled? How far does the Act go to safeguard wetlands across the country?

The Court has ruled on this issue before in the 2006 case *Rapanos v. United States.* The Court held then that wetlands are protected by the Act if they have a "significant nexus" to navigable waters, defined as "the waters of the United States" (WOTUS) in the text of the Act. *Rapanos* affirmed the stated intent of Congress: that the Act went beyond protections for navigable waters and held that wetlands affecting the chemical, physical and biological integrity of adjacent tributaries of navigable waters were deemed WOTUS and thus covered by the law.



Small creeks and even intermittent streams that do not flow year-round are inextricably tied to the health of our waterways nationwide.

The "significant nexus" standard is based on the intent of Congress when it passed the Clean Water Act. It focuses on the interconnectivity of the hydrologic systems the Act aimed to protect. In order to restore and maintain the chemical, physical and biological integrity of the nation's waters, the reach of the law must extend far enough upstream to protect water quality downstream. In other words, the significant nexus test relies on well-understood science that wetlands and tributary streams directly and indirectly affect downstream water quality within their watershed and that without applying the Act's protections to them, the integrity of the nation's waters cannot be restored or maintained. One need not be a professional scientist to understand that pollution upstream affects water quality downstream.

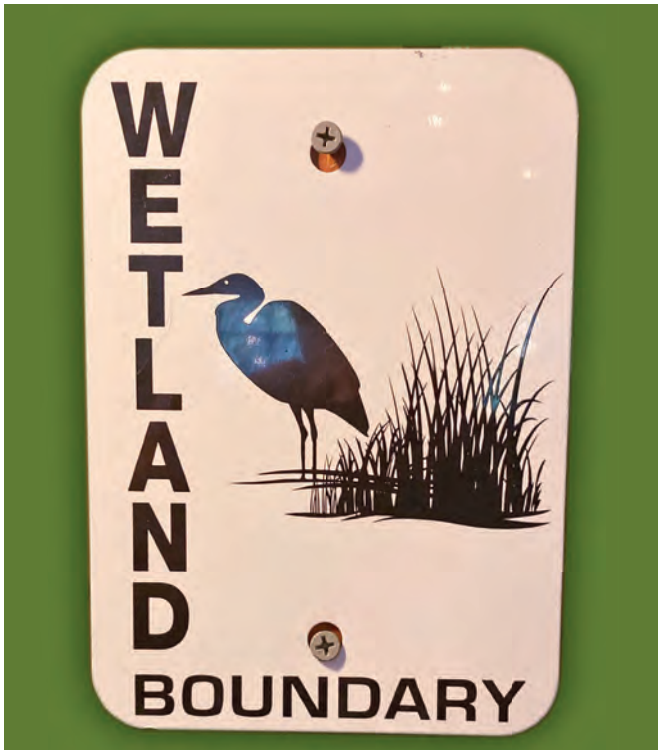
However, the Sacketts argued the Act should not be interpreted with the significant nexus test. They proposed a different yardstick: the physical proximity of surface connections between a wetland and other waters of the U.S. covered by the law. So, the legal question at the heart of *Sackett* is one that the Court has addressed many times, but was being asked to reconsider: which waters, specifically which wetlands, are defined as "waters of the United States" and thus fall under the protections of the Clean Water Act?

What the Supreme Court decided

Courts, elected officials and legal scholars all agree that the Act protects some wetlands. That's because the language in the statute explicitly includes "navigable waters…including wetlands adjacent thereto…" when it details which waters must be protected by states setting up their own permitting systems for wetlands development.

This ruling defies science, the law and common sense.

It is important to remember that Congress defined the term "navigable waters" more broadly than waters used for commercial navigation: "The term 'navigable waters' means the waters of the United States, including the territorial seas." So the Clean Water Act is clear: wetlands that are adjacent to other "waters of the United States" are also waters of the U.S. and protected by the Act. In a baffling repudiation of not just congressional intent, but basic science, the Court disagreed that a significant nexus to navigable waters provides Clean Water Act protections, and the Court overhauled which wetlands should be considered "adjacent."



Under the *Sackett* ruling, Clean Water Act protections only apply to wetlands that have a continuous surface connection to a waterbody like a river, lake or ocean.

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To start, all nine justices ruled that the wetland on the Sacketts' property did not qualify as a WOTUS and that the Sacketts had not violated the Clean Water Act by filling it without first obtaining a permit. In doing so, the Court abandoned the significant nexus test.

But the Court was split 5 to 4 on the meaning of "adjacent" and which wetlands are protected. The majority, comprising Justices Alito, Gorsuch, Thomas and Barrett, as well as Chief Justice Roberts, wrote that because adjacent wetlands are mentioned in the Act as making up the waters of the United States, they may only qualify as a WOTUS if they satisfy a two-part test. First, the adjacent waterbody must be a WOTUS itself, and second, the wetland must be indistinguishably a part of that body of water that itself constitutes a WOTUS. In fact, the

two must be so closely associated that they share a "continuous surface connection such that there is no clear demarcation between the two."

By adopting this new definition of waters of the United States, the Court rejects the language that was passed by Congress and was executed and enforced by the Environmental Protection Agency and Army Corps of Engineers in every administration since President Nixon.

The Court's majority insists that despite the use of the word "adjacent" in the text of the Act, Congress was not sufficiently clear. They write that because the Clean Water Act carries potential criminal and civil liability for violations, Congress has not sufficiently and expressly clarified which wetlands—without an obvious surface connection to another protected waterbody—should be protected. For that reason, the Court's majority concludes that Clean Water Act protections can only be extended as far as the boundaries of wetlands with a continuous surface connection to a covered waterbody—like a river, lake or ocean.

One of the dissenting opinions, written by Justice Kavanaugh and joined by Justices Kagan, Sotomayor

NEW EPA, CORPS REGULATIONS BASED ON *SACKETT*

The Environmental Protection Agency and the Army Corps of Engineers have released a final rule amending the January 2023 "waters of the United States" (WOTUS) rule to conform with the Supreme Court's decision in *Sackett v. EPA.* The Court's ruling in *Sackett* left the agencies with no choice but to strike key elements of the January 2023 WOTUS rule in accordance with the decision. The new rule is drastically less protective of wetlands, tributary streams and overall water quality, reflecting the Supreme Court's unprecedented rollback of the Clean Water Act.

The new rule has three components to conform to the Court's decision:

1. **Removes the "significant nexus" standard for determining what waters are covered by the Clean Water Act. This now means that the Act will only apply to "relatively permanent" streams, wetlands and interstate waters and jurisdiction will not be extended to other waterways that significantly affect the chemical, physical or biological integrity of the Nation's waters without meeting the "relatively permanent" standard.**
2. **Changes the definition of "adjacent" from "bordering, contiguous or neighboring" to "having a continuous surface connection." In 1977, Congress amended the Clean Water Act to protect wetlands that are adjacent to navigable waters. By changing the definition of "adjacent" to only include wetlands with a continuous surface connection to a navigable waterway or another WOTUS, the Supreme Court has drastically lowered the number of wetlands protected by the Act.**
3. **Removes "interstate wetlands" from the list of interstate waters that are considered to be waters of the United States and that are therefore protected by the Clean Water Act. For the first time in the history of the Clean Water Act, iconic wetlands that cross state boundaries, like the Grand Kankakee marsh and the Okefenokee Swamp, are vulnerable to unregulated pollution.**

This new rule for defining waters of the United States is dangerously narrow and fundamentally weakens clean water protections enshrined in the Clean Water Act, one of America's foundational environmental statutes. Some estimates from wetlands experts calculate that up to 63 percent of wetlands in America might lose protection under this new standard, while millions of miles of ephemeral and intermittent streams that directly affect water quality will also be left vulnerable to pollution.

and Jackson, relies on the ordinary meaning of the fairly ordinary word "adjacent," as well as 50 years of legal precedent and federal agency interpretation and implementation. They protest that the majority has substituted its own definition of "adjacent" by requiring wetlands be *adjoining* other waters of the United States in order to fall under the protections of the Act.

The minority writes that this revised definition is not needed, since Congress was sufficiently clear when it declared that wetlands adjacent to navigable waters, or adjacent to tributaries of navigable waters, were to be considered waters of the United States. They also write that the majority is replacing the intent of Congress with their own.

Justice Kavanaugh sums up the Court's misinterpretation: "The Court's 'continuous surface connection' test disregards the ordinary meaning of 'adjacent.' The Court's mistake is straightforward: The Court essentially reads 'adjacent' to mean 'adjoining.' As a result, the Court excludes wetlands that the text of the Clean Water Act covers—and that the Act since 1977 has always been interpreted to cover."

What does the *Sackett* ruling mean on the ground?

The Court's ruling is not complicated. It means that wetlands will no longer be protected by the Clean Water Act unless they have a continuous surface connection to another waterbody that is an established WOTUS, like a river, lake or ocean. It also means that the significant nexus test used to determine jurisdiction, not just for wetlands but for streams as well, will no longer guide which tributaries of navigable waters will be protected.

1. Drastically fewer wetlands will be protected

Using the Court's definition of WOTUS, nearly 60 million acres of wetlands in the U.S. will no longer be protected by the Clean Water Act. For the first time ever, floodplain wetlands cut off from rivers by artificial levees, and coastal wetlands separated from the sea by dunes, will not be protected by the Act. Tens of millions of acres of wetlands that have enjoyed 50 years of protection will now be vulnerable to being drained or having pollution dumped into them.

In the absence of federal protection, most state laws do not fill the gap. Nearly half the states rely on the Clean Water Act and its definition of WOTUS as the guideline for their wetlands protections. As the Act is weakened, so are the regulations in those states. Some states have a basic framework for protecting wetlands, but these regulations often don't go as far as the federal framework in the Clean Water Act.

Finally, some states have fairly extensive wetlands protections, but those mechanisms can't always be counted on either because they may not cover all of the wetlands losing federal jurisdiction. For example, a state may only protect wetlands of a certain size or type.

2. Loss of protections for some tributary streams

Sackett only dealt with the jurisdictional status of wetlands. But the Court's opinion dictates a very narrow view of the Clean Water Act's jurisdiction over other waters as well.

By narrowing the definition of WOTUS to wetlands with a *continuous* surface connection to protected waters and tossing the significant nexus test, the Court leaves the EPA and Army Corps no discretion to enforce their definition of waters of the United States, which included non-perennial streams that significantly affect the health of downstream waters.

Intermittent and ephemeral streams that do not flow year-round are inextricably tied to the quality of downstream waters that supply drinking water for about one third of all Americans. Without the protections enumerated in the Clean Water Act, pollution dumped into these tributary streams could flow uninhibited into America's drinking water intakes.

Where do we go from here?

In order to overcome the loss of protections for wetlands and tributary streams resulting from the ruling in *Sackett,* we cannot despair.

First, we must use every available tool to protect wetlands. Some of the best wetland conservation programs can be found in the Farm Bill, which is being developed and debated right now.

Swampbuster, a program that denies federal subsidies to landowners and farmers who drain wetlands, must be strengthened by dedicating focused resources to enforcement, which is currently left to overextended Department of Agriculture technical service providers. The Wetlands Reserve Easements program is a great tool for incentivizing landowners to conserve wetlands on their property. That program must be robustly funded to fill the gap between resources available and demand from landowners.

Second, we must protect water quality at the source. Ephemeral and intermittent streams are critical to protecting water quality, while wetlands are crucial filters for many of our water systems. But as they are lost, we must do more to make sure that pollution does not overwhelm our waterways.

Through extensive monitoring of water quality, we can detect pollution problems early and approach local, state and federal authorities to correct the problem before it becomes too severe. Volunteers will be critical to these efforts since there are simply too many important sources that must be monitored for the government to handle alone. The League's Save Our Streams program, in addition to our Salt Watch and Nitrate Watch campaigns, are great examples of ways that ordinary people can become clean water champions just by monitoring the streams in their back yards.

Ultimately, Americans must convince Congress to amend the Clean Water Act to clarify once and for all that wetlands and tributary streams are protected.

Finally, the only durable solution to protecting the wetlands and tributary streams Congress intended under the Clean Water Act is for Congress to clarify the Act itself. Congress can amend the Act to specifically define waters of the United States to include wetlands without continuous surface connections to relatively permanent types of waters defined as waters of the United States and streams that might not flow all year long.

This will not be easy. Getting legislation passed through Congress and signed into law takes time. But we cannot afford to wait to begin building pressure on lawmakers to stand up for clean water.

Contact your members of Congress and ask them to strengthen the Clean Water Act right now. The only way to sufficiently build the movement needed to clarify protections for wetlands and tributary streams once and for all is to get started right away. Future generations of Americans that deserve clean water are counting on us.

PUTTING *SACKETT* DECISION IN CONTEXT

In deciding *Sackett,* the Court's majority dramatically altered the definition of "adjacent wetlands," which are protected under the language of the Clean Water Act and the federal government's longstanding interpretations of statutory language defining waters of the United States. The Court declared that the definition of "waters of the United States" only applies to "relatively permanent, standing or free flowing bodies of water."

The League could not disagree more strongly with the decision, in view of the purpose of the Clean Water Act, clear congressional intent when defining the types of waters to be protected, overwhelming science and simple common sense. This case, like others before it, focuses on the one-sentence definition of the waters Congress intended to protect under the Clean Water Act.

In his dissenting opinion in this case, Justice Brett Kavanaugh explained the flawed majority opinion in one sentence: "In my view, the Court's 'continuous surface connection' test departs from the statutory text, from 45 years of consistent agency practice, and from this Court's precedents."

It's hard to overstate how far the Court's decision strays from the purpose and intent of Congress in passing the Act. Congress clearly defined the purpose of the legislation: "to restore and maintain the chemical, physical and biological integrity of the Nation's waters." The clear intent was to reduce water pollution, improve water quality, protect public health and provide for safe uses, like outdoor recreation, of the nation's waters.

During the floor debate on the Clean Water Act, then-Representative John Dingell of Michigan, who played an instrumental role in writing the legislation, explained that waters of the United States "means all the waters of the United States, in a geographical sense. It does not mean navigable waters of the United States in the technical sense, as we see in some laws." Limiting protection to the largest waterbodies and their largest tributaries would make it impossible to achieve the goals Congress established in the Act.

Accordingly, soon after the Act became law and for decades thereafter, the agencies tasked with enforcing it, the Environmental Protection Agency and U.S. Army Corps of Engineers, interpreted the definition of "waters of the United States" to include tributary streams and most wetlands since these waters are so vital to maintaining and restoring healthy water quality.

As a result of this interpretation, some members of Congress attempted to amend the Clean Water Act in 1977 so the statute would explicitly exclude many types of waters, including wetlands, from the definition of "waters of the United States." However, these amendments failed and Congress instead passed amendments *adding* waters to be protected, like wetlands adjacent to rivers and their tributaries. Given the opportunity to clarify that the Act's jurisdiction only extended to larger rivers, lakes and oceans, Congress expressly rejected that notion.

Against this backdrop, the Court's ruling in *Sackett* stands as a stark departure from the purpose of the Clean Water Act and the express intent of its framers.