



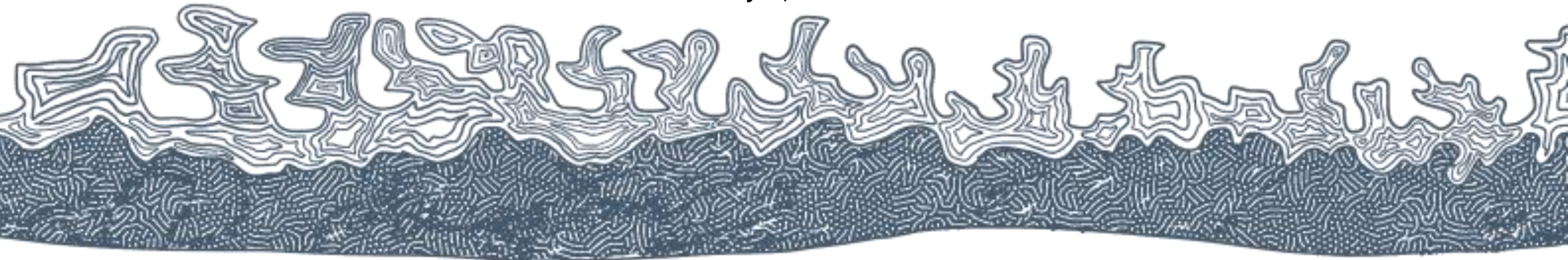
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The Supreme Court's *Sackett* Decision

Matt Shudtz
Law and Policy Fellow

RBC Workshop
May 7, 2024



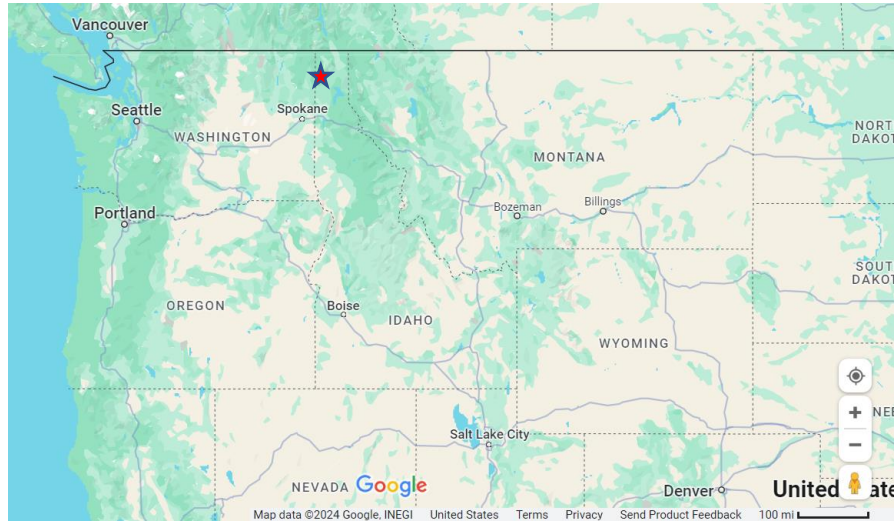
Roadmap



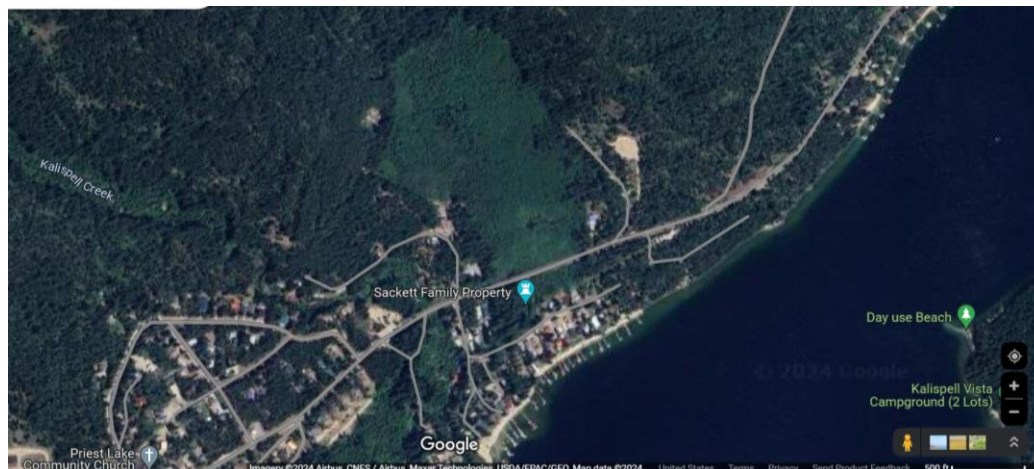
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- CWA jurisdictional wetlands, today
- How we got here
- What's next

How we got here: The Sacketts' dream home



- Priest Lake, Idaho
- Existing subdivision with sewer hookup
- 300' from property to lake
- Large wetlands complex
- Started “site prep,”
Feds showed up



<https://pacificlegal.org/case/sackett-v-environmental-protection-agency/>

How we got here: Timeline



- Historically: property part of Kalispell Bay Fen complex
- 1996: prior owners were informed that property contained jurisdictional wetlands
- 2004: Sacketts purchased property
- 2007: Sacketts dumped 1,700 cu yds of gravel and sand to fill wetlands and prep site for homebuilding (no permit)
- May 2007: complaint →
 - USACE/EPA inspection, observing soils, vegetation, and pooling of water consistent with wetland
 - Sacketts' consultant: "site is part of a wetland"
 - JD based on property being similarly situated to wetlands with significant nexus to Priest Lake

How we got here: PLF's dream case?

“...the government often tramples on individuals’ property rights by taking it without compensation and by unreasonable regulation or intrusion.”



The screenshot shows the Pacific Legal Foundation website. The main headline reads "Suing the government since 1973." Below this, a sub-headline states: "We stand as a powerful champion for Americans like you, fighting back against the government when it abuses your rights." A yellow "LEARN MORE" button is positioned at the bottom of the text. On the left side, there is a navigation menu with the following items: HOME, WHO WE ARE, WHAT WE FIGHT FOR, WHAT WE DO, STORIES, GET INVOLVED, NEWSROOM, and DONATE.

<https://pacificlegal.org/>



Credit: Keith Kinnard/AP

https://www.washingtonpost.com/politics/supreme-court-case-involving-idaho-lake-house-ignites-conservative-cause-against-epa/2011/12/13/gIQAbgfyWP_story.html

How we got here: FedSoc's dream team?



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The Burger Court (1981-1986). Seated, from left to right: Justices Thurgood Marshall and William J. Brennan, Chief Justice Warren E. Burger, and Justices Byron R. White and Harry Blackmun. Standing, from left to right: Justices John Paul Stevens, Lewis F. Powell, Jr., William H. Rehnquist, and Sandra Day O'Connor



The Roberts Court (2006-2009). Seated, from left to right: Justices Anthony M. Kennedy and John Paul Stevens, Chief Justice John G. Roberts, Jr., and Justices Antonin Scalia and David H. Souter. Standing, from left to right: Steven G. Breyer, Clarence Thomas, Ruth Bader Ginsburg, and Samuel A. Alito.



The Roberts Court (2020-Present). Seated from left to right: Justices Samuel A. Alito, Jr. and Clarence Thomas, Chief Justice John G. Roberts, Jr., and Justices Stephen G. Breyer and Sonia Sotomayor. Standing from left to right, Justices Brett M. Kavanaugh, Elena Kagan, Neil M. Gorsuch, and Amy Coney Barrett.

How we got here: FedSoc's dream team?

Wetlands themselves need not
be navigable

“significant nexus” test

“continuous surface connection”

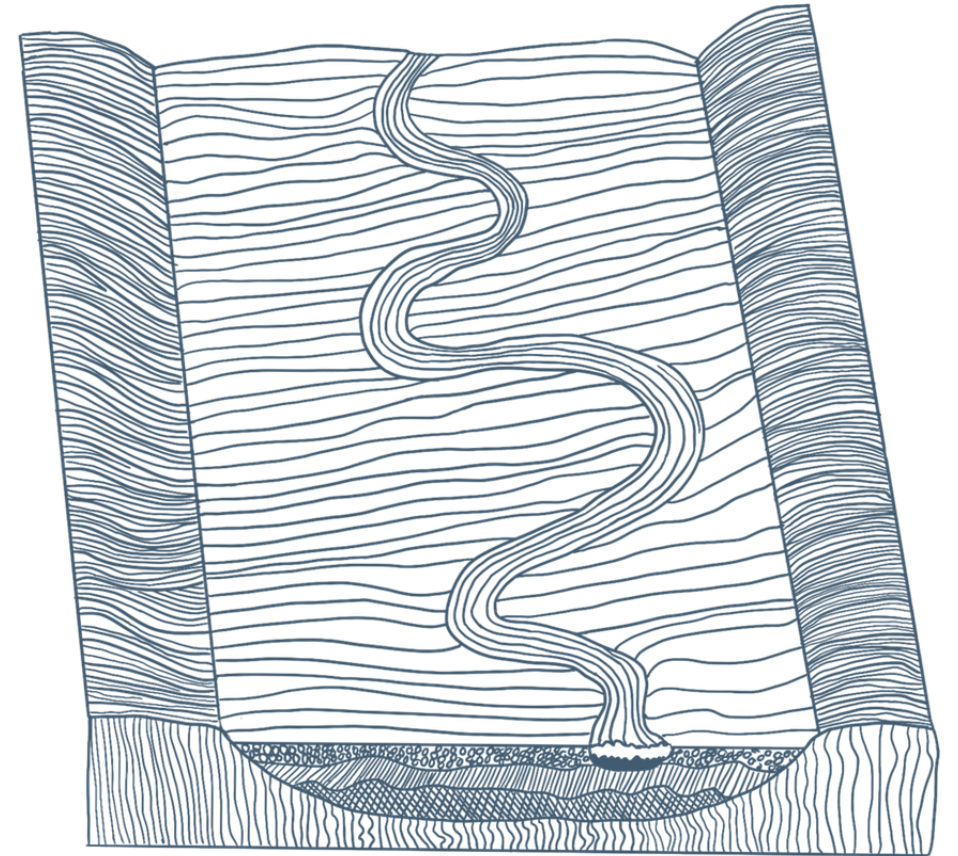
Riverside Bayview (1985) (Oct 1985 term)		Rapanos (2006) (Oct 2005 term)		Sackett (2023) (Oct 2022 term)	
TMarshall	-4.069	JPStevens	-2.856	SSotomayor	-4.085
WJBrennan	-2.547	RBGinsburg	-1.573	EKagan	-2.063
HABlackmun	-0.689	DHSouter	-1.53	KBJackson	-1.712
JPStevens	-0.458	SGBreyer	-1.236	JGRoberts	0.425
LFPowell	0.941	AMKennedy	0.499	BMKavanaugh	0.45
BRWhite	1.298	JGRoberts	1.395	ACBarrett	0.824
SDOConnor	1.373	SAAlito	1.424	NMGorsuch	1.078
WEBurger	2.227	AScalia	2.622	CThomas	2.355
WHRehnquist	3.605	CThomas	3.959	SAAlito	2.588

How we got here: Question presented by SCOTUS



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- “Did the Ninth Circuit set forth the proper test for determining whether wetlands are “waters of the United States” under the Clean Water Act, 33 U.S.C. § 1362(7)? ”
 - “significant nexus” test used

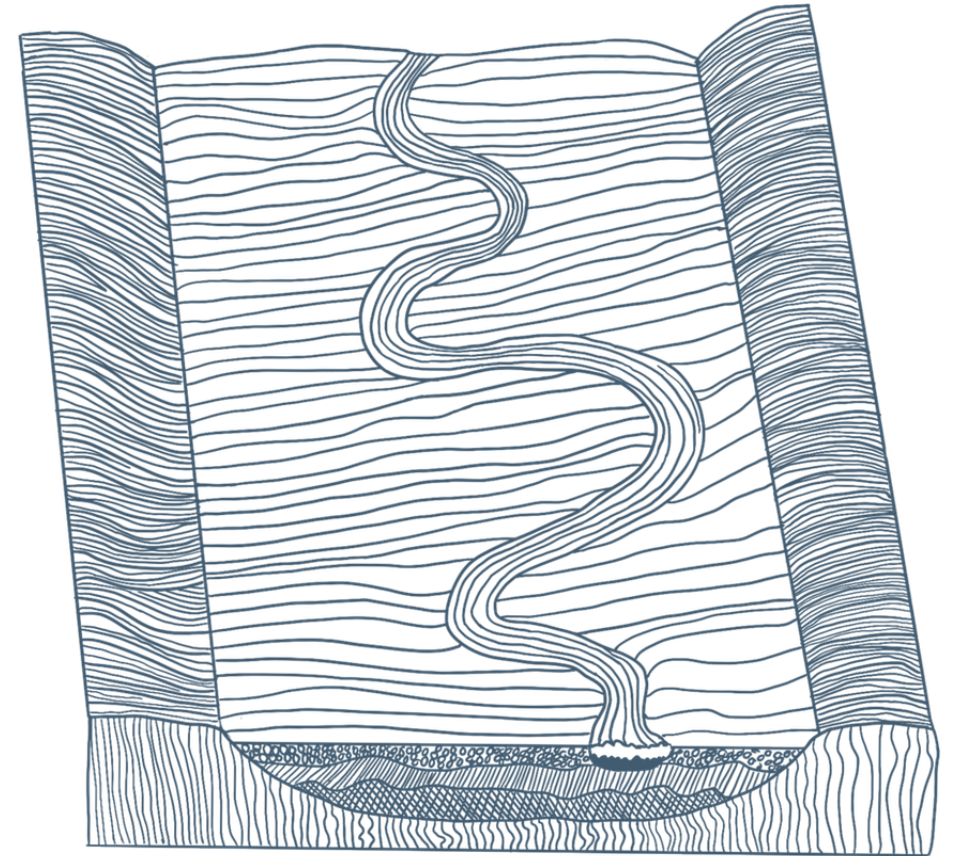


How we got here: Questions answered by SCOTUS



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- What is a “water of the United States?”
 - Traditionally navigable
- What does “adjacent” mean?
 - Answer: “continuous surface connection” and “no clear demarcation”



CWA jurisdictional wetlands, today



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Sept. 8, 2023 EPA & USACE “conforming rule” – 88 Fed. Reg. 61964

33 C.F.R. § 328.3 (USACE regulations) & 40 C.F.R. § 120.2 (EPA regulations)



61964 Federal Register / Vol. 88, No. 173 / Friday, September 8, 2023 / Rules and Regulations

Jacksonville, Florida. The Coast Guard is activating these safety zones in order to protect vessels and waterway users from the potential hazards created by reentry vehicle splashdowns and recovery operations. In accordance with the general regulations in 33 CFR part 165, subject C, no U.S. flagged vessel may enter the safety zone unless authorized by the COTP Savannah or a designated representative except as provided in § 165.T09-0806(f)(1). All foreign flagged vessels are encouraged to remain outside the safety zone.

There are four other safety zones listed in § 165.T09-0806(f)(2) through (f)(5), which are located within the COTP St. Petersburg and Jacksonville ACRS, that are being simultaneously activated through separate notifications of enforcement of the regulation document found under Docket Numbers USCG-2023-0716, and USCG-2023-0737.

Twenty-four hours prior to the Cove-6 recovery operations, the COTP Jacksonville, the COTP Savannah, the COTP St. Petersburg, or designated representative will inform the public that whether any of the five safety zones described in § 165.T09-0806, paragraph (a), will remain activated (subject to enforcement). None of the safety zones described in § 165.T09-0806, paragraph (a), remain activated. It will be notified for four hours prior to the Cove-6 splashdown and remain activated until announced by Broadcast Notice to Mariners on VHF-FM channel 16, and/or Marine Safety Information Bulletin (as appropriate) that the safety zone is no longer subject to enforcement. After the Cove-6 reentry vehicle splashdown, the COTP or a designated representative will grant general permission to come as close as 3 nautical miles of any reentry vehicle or space support vessel engaged in the recovery operations, within the activated safety zone described in § 165.T09-0806, paragraph (a). Once the reentry vehicle, and any personnel involved in reentry service, are removed from the water and secured onboard a space support vessel, the COTP or designated representative will issue a Broadcast Notice to Mariners on VHF-FM channel 16 announcing the activated safety zone is no longer subject to enforcement. The recovery operations are expected to last approximately one hour.

The Coast Guard may be assisted by the Federal, State, or local law enforcement. For information on the regulations, see the final at <https://www.regulations.gov> by searching for docket number USCG-2023-0716, and USCG-2023-0737.

enforcement agencies in enforcing this regulation.

Dated: September 1, 2023.

Nathan L. Bakeman,
Commander, U.S. Coast Guard, Captain of the Port Savannah
(FR doc. 2023-1919 Filed 9-7-23; 43 pp)

BILLING CODE 9100-06-P

DEPARTMENT OF DEFENSE
Department of the Army, Corps of Engineers

33 CFR Part 328

ENVIRONMENTAL PROTECTION AGENCY
40 CFR Part 120
[EPA-HQ-OW-2023-036; FRL-1132-01-OW]
RM 2020-0332
Revised Definition of “Waters of the United States”; Conforming

AGENCY: Department of the Army, Corps of Engineers, Department of Defense, and Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) and the Department of the Army (“the agencies”) are amending the Code of Federal Regulations (CFR) to conform the definition of “waters of the United States” to a 2023 Supreme Court decision. This conforming rule amends the provisions of the agencies’ definition of “waters of the United States” that are invalid under the Supreme Court’s interpretation of the Clean Water Act in the 2023 decision.

DATES: This final rule is effective on September 8, 2023.

ADDRESSES: The agencies have established a docket for this action under Docket ID No. EPA-HQ-OW-2023-0346. All documents in the docket are listed on the <https://www.regulations.gov> website. Although listed in the index, some information is not publicly available, e.g., confidential business information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy form. Publicly available docket materials are available electronically through <https://www.regulations.gov>.

FOR FURTHER INFORMATION CONTACT: Whitney Beck, Ocean, Wetlands and

Communities Division, Office of Water (40401), Environmental Protection Agency, 1200 Pennsylvania Avenue NW, Washington, DC 20460; telephone number: (202) 564-2381; email address: CWwater@epa.gov; and Stacy Jensen, Office of the Assistant Secretary of the Army for Civil Works, Department of the Army, 108 Army Pentagon, Washington, DC 20310-0104; telephone number: (703) 456-6020; email address: stacy.jensen@army.mil; or cw-reporting@army.mil.

SUPPLEMENTARY INFORMATION:

1. Why are the agencies issuing this final rule?

This action amends Code of Federal Regulations (CFR) provisions promulgated in “Revised Definition of Waters of the United States,” 48 FR 2084 (January 18, 2023) (“2023 Rule”), to conform to the 2023 Supreme Court decision in *Sackett v. EPA*, 598 U.S. 243 S.Ct. 1322 (2023) (“*Sackett*”). The Administrative Procedure Act (APA) provides that when an agency’s good cause finds that public notice and comment procedures are impracticable, unnecessary, or contrary to the public interest, the agency may issue a rule without providing notice and an opportunity for public comment. 5 U.S.C. 553(b)(3). The Environmental Protection Agency (EPA) and the Department of the Army (“the agencies”) have determined that there is good cause under APA section 553(b)(3) to issue the final rule without prior proposal and opportunity for comment because such notice and opportunity for comment is unnecessary. Certain provisions of the 2023 Rule are invalid under the Supreme Court’s interpretation of the Clean Water Act in *Sackett*. The effect of the Supreme Court’s decision was to render those provisions immediately inconsistent with the Supreme Court’s interpretation of the Clean Water Act. Consistent with the agencies’ previously stated intent regarding the severability of the 2023 Rule in the event that provisions of that rule were held invalid, see 48 FR 1118, the agencies are conforming the 2023 Rule’s definition of the term “waters of the United States” to the Supreme Court’s decision. Specifically, the agencies are revising 40 CFR 120.2(a)(1)(iii), (a)(1)(iv) through (v), and 33 CFR 328.3(a)(1)(iii), (a)(1)(iv) through (v), and 33 CFR 328.3(a)(1)(v) to amend aspects of the definition as needed to conform to the Supreme Court’s interpretation of the Clean Water Act in *Sackett*. Because the rule purpose of this rule is to amend these specific provisions of the 2023



CODE OF FEDERAL REGULATIONS

CFR

Revised as of January 1, 2023

OFFICE OF THE FEDERAL REGISTER



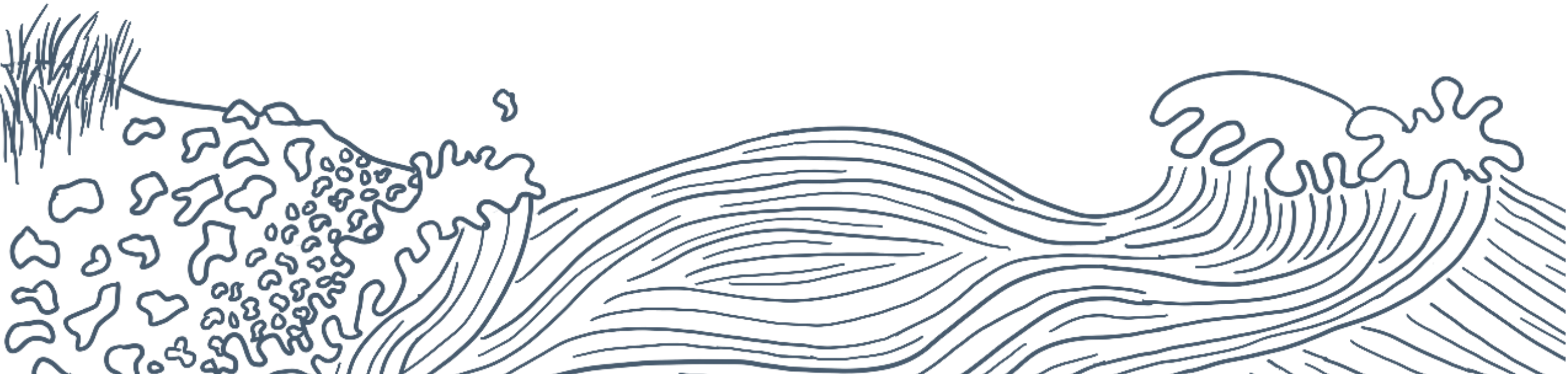
CWA jurisdictional wetlands, today



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A jurisdictional or covered wetland is:

- (1) A wetland
- (2) That is adjacent to
- (3) A body of water that is a “water of the United States” in its own right



CWA jurisdictional wetlands, today



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(1)

“**Wetlands** means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.”

33 C.F.R. § 328.3(c)(1); 40 CFR § 120.2(c)(1)



CWA jurisdictional wetlands, today



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(2)

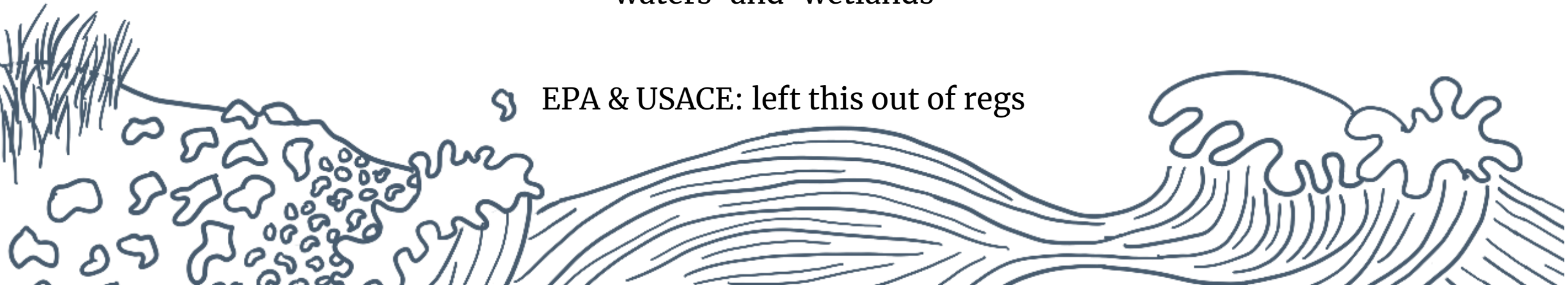
EPA & USACE regs:

“**Adjacent** means having a continuous surface connection.”

SCOTUS:

also, “no clear demarcation between ‘waters’ and ‘wetlands’”

↳ EPA & USACE: left this out of regs



CWA jurisdictional wetlands, today

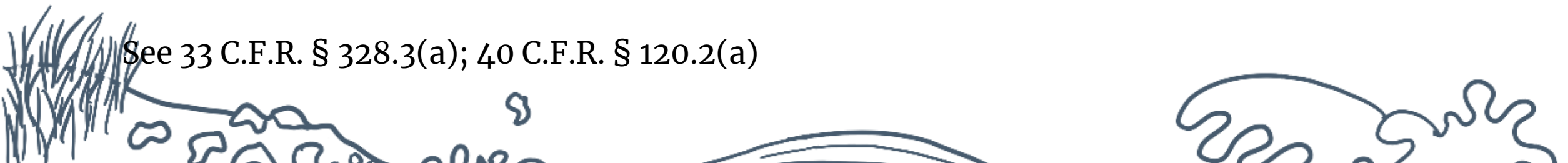


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Waters of the United States

- Traditionally navigable waters
 - “Currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide”
- Tributaries
 - “relatively permanent, standing or continuously flowing bodies of water”
- Impoundments
 - Unless artificially created exclusively for stock watering, irrigation, settling basins, or rice growing

See 33 C.F.R. § 328.3(a); 40 C.F.R. § 120.2(a)



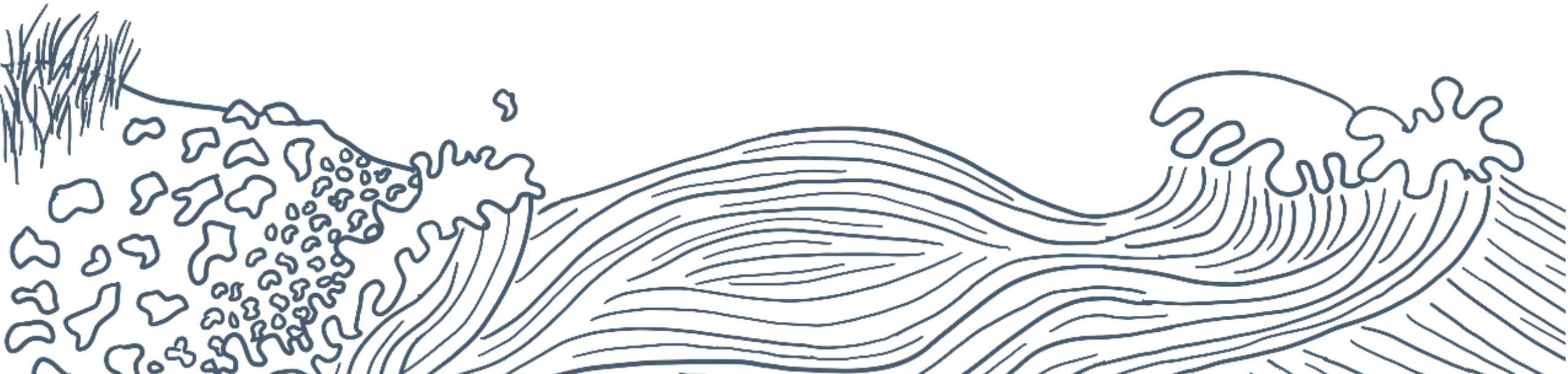
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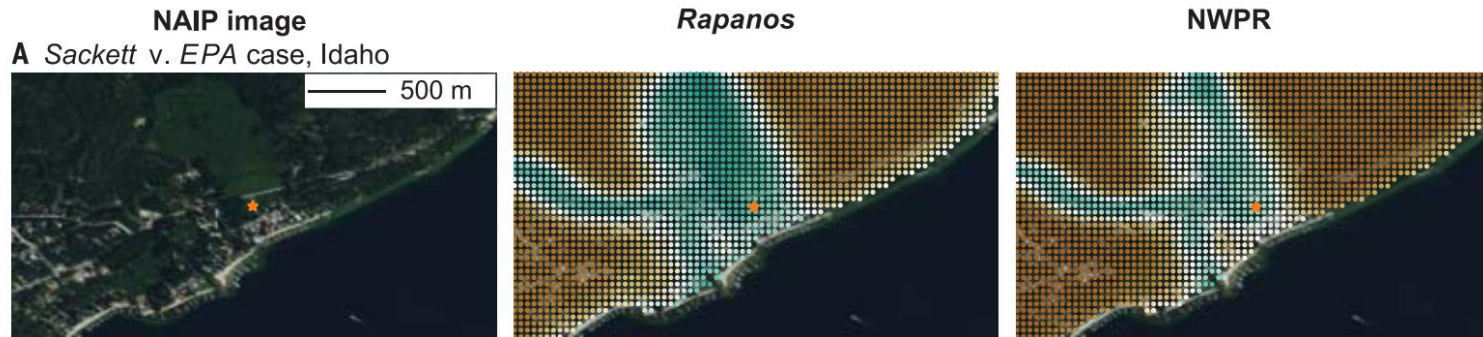
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CWA jurisdictional wetlands, today



Greenhill et al., “Machine learning predicts which rivers, streams, and wetlands the Clean Water Act regulates,” 383 *Science* 406 (2024).

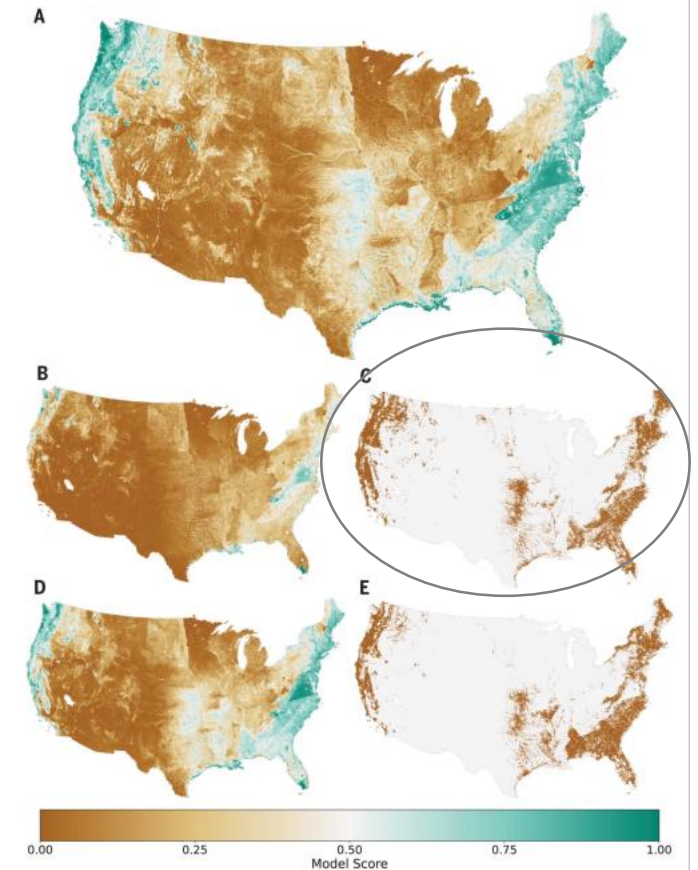
A: Rapanos

B: Trump rule

C: changes: Rapanos > Trump rule

D: Obama rule

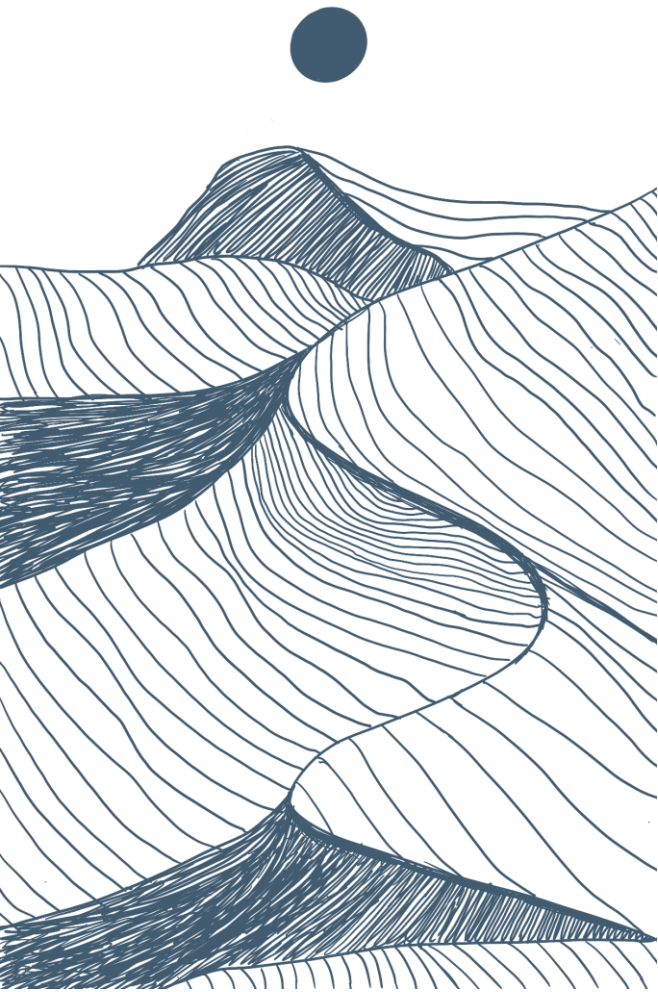
E: Obama rule > Trump rule



What's next: Federal regulation and litigation



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- USACE actions – project planning & development
 - Aquatic Ecosystem Restoration (esp. § 206 CAP) – prioritize restoring hydro. connect. for floodplain wetlands, improve physical + biological integ. of ephemeral streams
 - Technical assistance, esp. for EJ communities
 - Avoid creation of non-jurisdictional wetlands
- USACE actions – regulatory
 - Approved JD transparency – website
 - Confirmed (per 2008 rule): non-jurisdictional waters can provide compensatory mitigation

See O'Connor [March 2024 memo](#)
- PLF Cases
 - Robert White (NC) – multiple uses, permit requirements in coastal counties – wetlands case
 - Skip & Val Valentine (NC) – road improvements on forested land – wetlands case
 - Dan Ward – (IA) – pond creation – not wetlands case

What's next: State regulation



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James McElfish, "State Protection of Nonfederal Waters: Turbidity Continues," 52 ELR 10679 (Sept. 2022)

