

STEEL OR SAND? PROTECTING THE INDIANA DUNES
THROUGH COMMUNITY ACTIVISM, THE NATIONAL
PARK SERVICE, AND THE CLEAN WATER ACT

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I. INTRODUCTION

On May 25, 2023, in *Sackett v. EPA*, the United States Supreme Court redefined the scope of the Clean Water Act in defiance of the Act’s text, forty-five years of agency practice, and the Court’s own precedent.¹ The ramifications of *Sackett* are frightening: at least fifty percent of wetlands in the United States may now be excluded from Clean Water Act jurisdiction.² There is no doubt the Clean Water Act, including section 404, however limited it now is, remains critical for environmental protection.³ Yet *Sackett* is a wake-up call. Post-*Sackett*, we must look to other proven models of environmental conservation that use multiple legal tools, not just the Clean Water Act, to protect unique, vulnerable ecosystems. The Indiana Dunes National Park, from its establishment to the present day, is such a model.⁴ While the Court’s decision in *Sackett* may not directly affect wetlands protection within the confines of the Indiana Dunes National Park,⁵ the Indiana Dunes National Park is an effective model of using multiple legal tools—leasebacks, the Clean Water Act, and National Park Service unit designation—and citizen-activism to protect a vulnerable environment in close proximity to heavy industry.⁶

¹ *Sackett v. EPA*, 598 U.S. 651, 684 (2023); *id.* at 716 (Kavanaugh, J., concurring) (asserting the Court’s test adopted in the case “departs from the statutory text, from [forty-five] years of consistent agency practice, and from this Court’s precedents”).

² See *infra* text accompanying note 227.

³ See *infra* Part III, especially Section III.D.

⁴ See *infra* Parts IV, V.

⁵ The National Park Service has “broad discretion to . . . provid[e] for the conservation and the enjoyment of national parks” bolstered by federal environmental statutes. John Copeland Nagle, *How National Park Law Really Works*, 86 U. COLO. L. REV. 861, 902–03 (2015).

⁶ See *infra* Part V.

The Indiana Dunes⁷ stretch along Indiana's forty-five miles of Lake Michigan shoreline.⁸ Today, white sand beaches lined with smooth basalt pebbles, two-hundred-foot tall sand dunes moored in place by sharp-bladed marram grass, young forests, old forests, oak savannas, and low-lying bogs, swamps, fens, and marshes jostle for space with steel mills, the Port of Indiana-Burns Harbor, and other industrial development.⁹ A scant forty miles from downtown Chicago, the Indiana Dunes have drawn locals, Chicagoans, and tourists for over a century to recreate in Lake Michigan, on the beaches, and amongst the dunes.¹⁰

So, too, have the Indiana Dunes drawn industrial development.¹¹ Various industries sand-mined the dunes—literally removing individual sand dunes—from the 1850s to the early 1950s.¹² Industrial ports along Lake Michigan's southern shore received iron ore mined on Minnesota's Iron Range, and steel mills in Illinois and northwest Indiana alike

⁷ This note capitalizes "Dunes" when referring to the specific region in northwest Indiana, in line with other sources, or when using the word in a formal title (e.g., Indiana Dunes National Park or Indiana Dunes State Park), but not when referring to sand dunes as a type of landform. *See generally* KAY FRANKLIN & NORMA SCHAEFFER, DUEL FOR THE DUNES: LAND USE CONFLICT ON THE SHORES OF LAKE MICHIGAN (1983) (examining the long-standing industrial and environmental tensions at the Indiana Dunes); James B. Lane, *Tales of Lake Michigan and the Northwest Indiana Dunelands* 28 STEEL SHAVINGS 1 (1998) (compiling oral history interviews of Indiana Dunes residents).

⁸ Lake Michigan is part of the Great Lakes, the largest contiguous freshwater lake system in the world, which is sometimes considered an inland sea. *See Great Lakes and Inland Seas*, U.S. GEOLOGICAL SURV., <https://www.usgs.gov/science/science-explorer/ocean/great-lakes-and-inland-seas> [<https://perma.cc/3GUW-CUWF>]; *Lake Michigan Shoreline Recreation Guidelines*, IND. DEP'T OF NAT. RES., <https://www.in.gov/dnr/lake-michigan-coastal-program/lake-michigan-shoreline-recreation-guidelines> [<https://perma.cc/KEL3-27YJ>].

⁹ *Indiana Dunes: Nature & Science*, NAT'L PARK SERV. (July 26, 2023), <https://www.nps.gov/indu/learn/nature/index.htm> [<https://perma.cc/9DT4-KTJ6>]; *United States v. U.S. Steel Corp.*, No. 2:18-CV-127, 2021 WL 3884852, at *1 (N.D. Ind. Aug. 30, 2021); *Indiana Dunes: History & Culture*, NAT'L PARK SERV. (Sept. 8, 2023), <https://www.nps.gov/indu/learn/historyculture/index.htm> [<https://perma.cc/5HJJ-2J9D>]. Marshes, swamps, bogs, and fens all constitute types of wetlands. *Classification and Types of Wetlands*, EPA, <https://www.epa.gov/wetlands/classification-and-types-wetlands#marshes> [<https://perma.cc/8CBM-7Z55>].

¹⁰ *See generally* FRANKLIN & SCHAEFFER, *supra* note 7; Lane, *supra* note 7; KENNETH J. SCHOON, CALUMET BEGINNINGS: ANCIENT SHORELINES AND SETTLEMENTS AT THE SOUTH END OF LAKE MICHIGAN (2003) (documenting the ecological and social history of northwest Indiana).

¹¹ *See infra* Section IV.B.

¹² *See infra* Section IV.B.1.

processed the ore.¹³ This industrial development leveled the sand dunes; polluted Lake Michigan and adjacent waterways; introduced invasive species into the Great Lakes; and fed the greater Chicagoland area's massive population, economic, and cultural growth.¹⁴ Quite simply, the United States would not exist in its current form without this industrial and cultural development, yet this very development nearly destroyed the unique Indiana dunes ecosystem and endangered public health.¹⁵ Local activists and residents saw the region approaching a tipping point and stepped up to protect the remaining Indiana dunes ecosystem, even at the expense of their own property rights.¹⁶

Their advocacy led Congress to create the Indiana Dunes National Lakeshore¹⁷ in 1966 expressly to preserve this unique environment.¹⁸ Because the land designated to become the Lakeshore was a mix of industrial private property and individually owned private property,¹⁹ Congress established a leaseback program²⁰ in line with contemporaneous National Park Service land acquisition policy.²¹ Under the leaseback program, individuals whose property was within the Lakeshore's boundaries, and therefore designated to be acquired by the Department of the Interior, could retain the right of use and occupancy for a twenty-five-year period.²² But the conservation efforts did not

¹³ See FRANKLIN & SCHAEFFER, *supra* note 7, at 14.

¹⁴ See *infra* Section IV.B.

¹⁵ See *infra* Section IV.B.

¹⁶ See *infra* Section IV.A.

¹⁷ Congress recategorized the Indian Dunes National *Lakeshore* as the Indiana Dunes National *Park* in 2019. Consolidated Appropriations Act, 2019, Pub. L. No. 116-6, § 115(a), 133 Stat. 13, 232. This Note uses "National Lakeshore" or "Lakeshore" for the period of 1966 to 2018 and "Park" for 2019 to the present or when otherwise appropriate for clarity.

¹⁸ Act of Nov. 5, 1966, Pub. L. No. 89-761, 80 Stat. 1309 ("to preserve for the educational, inspirational, and recreational use of the public certain portions of the Indiana dunes and other areas of scenic, scientific, and historic interest and recreational value in the State of Indiana").

¹⁹ See RON COCKRELL, A SIGNATURE OF TIME AND ETERNITY: THE ADMINISTRATIVE HISTORY OF INDIANA DUNES NATIONAL LAKESHORE, INDIANA 79-80 (1988) (noting the proposed park included 590 permanent residences, 240 summer homes, and 63 commercial installations).

²⁰ Act of Nov. 5, 1966 § 6(a), 80 Stat. at 1311. Section V.A discusses the leaseback program in more detail.

²¹ See *infra* Section II.A.

²² Act of Nov. 5, 1966 § 6(a), 80 Stat. at 1311.

stop there, and neither did industrial encroachment.²³ Residents of the Edgewater community—not included within the 1966 Lakeshore boundaries—on the far western edge of Porter County went so far as to lobby for their own community to be included in the 1976 expansion, knowing inclusion meant they would only have another twenty-five years in their own homes.²⁴ Such was the dedication to conserving the Dunes and the desperation to stop additional industrial development.²⁵ To be clear: Edgewater residents knowingly and willingly deprived themselves of their own private property rights to protect the Dunes and curtail the area's continued industrial degradation.²⁶

The Indiana Dunes National Park now stretches along fifteen miles, or fully one-third, of Indiana's Lake Michigan shoreline.²⁷ Spanning some 15,000 acres, the Indiana Dunes National Park is the fifth most biodiverse national park in the United States.²⁸ While the Indiana Dunes are, strictly speaking, *land*, the sand dunes themselves only exist because of *water*—they are the remnants of previous Lake Michigan shorelines from thousands of years ago.²⁹ The entire dune ecosystem, from waterline through wetland through oak savanna, developed from and, indeed, relies upon interconnected waterflows within this environment.³⁰ The towering sand dunes shelter extensive interdunal wetlands, and these wetland-sheltering sand dunes ease into sandy beaches along Lake Michigan.³¹ While the Park's designation as a National Park Service unit protects the land and water *within* the Park's boundaries, the Clean Water Act and other federal environmental statutes play a crucial role in protecting

²³ See FRANKLIN & SCHAEFFER, *supra* note 7, at 228–30 (discussing a regional power company's disposal of industrial waste and attempt to build a nuclear power plant next to the Lakeshore and related citizen activism).

²⁴ See John Laue, *An Oral History of Edgewater: A Disappearing Community*, 28 STEEL SHAVINGS 111, 112 (1998).

²⁵ See *id.*

²⁶ See *id.*

²⁷ See *Indiana Dunes*, NAT'L PARK SERV., <https://www.nps.gov/indu/index.htm> [<https://perma.cc/4E6Y-XXF6>]. Congress expanded the Lakeshore in 1976, 1980, and 1992. Act of Oct. 18, 1976, Pub. L. No. 94-549, 90 Stat. 2529; Act of Dec. 28, 1980, Pub. L. No. 96-612, 94 Stat. 3575; Act of Oct. 23, 1992, Pub. L. No. 102-430, 106 Stat. 2208.

²⁸ *Indiana Dunes: Frequently Asked Questions*, NAT'L PARK SERV. (Mar. 24, 2022), <https://www.nps.gov/indu/faqs.htm> [<https://perma.cc/9YBD-XDCU>].

²⁹ See generally SCHOON, *supra* note 10, at 25–42 (explaining how the Lake Michigan shoreline formed).

³⁰ See *Indiana Dunes: Nature & Science*, *supra* note 9.

³¹ See *id.*

the water-based ecosystem within the Park by regulating water pollution in adjacent waterways.³²

Compare the Indiana dunes wetlands to the wetlands at the heart of *Sackett v. EPA*. Nestled at the northern end of the Idaho Panhandle, the Kalispell Bay Fen, a large wetlands complex, “provides significant hydrological, biological, and ecological influences on Priest Lake.”³³ The Kalispell Bay Fen drains into an unnamed tributary, which in turn flows into Kalispell Creek.³⁴ Kalispell Creek, in turn, flows into Priest Lake, one of Idaho’s largest lakes.³⁵ Priest Lake’s western shore lies within the Idaho Panhandle National Forests, and the lake itself is barely thirty miles south of the United States-Canada border.³⁶

Like the interdunal wetlands in the Indiana Dunes National Park, the Kalispell Bay Fen is a unique—and vulnerable—environment in its region.³⁷ Unlike the extensive interdunal wetlands at the Indiana Dunes, the Kalispell Bay Fen and its connection to Priest Lake have been at the heart of litigation that has progressed to the United States Supreme Court—twice—as Chantell and Michael Sackett fought to limit section 404 of the Clean Water Act in order to fill in wetlands on their property.³⁸

In 2004, the Sacketts purchased a “soggy residential lot” across a road from Priest Lake and, planning to build a house, began backfilling the lot with sand and gravel.³⁹ In response to a neighbor’s complaint,⁴⁰ the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) visited the site and concluded the site likely

³² See Nagle, *supra* note 5, at 902.

³³ *Sackett v. EPA*, No. 2:08-CV-00185, 2019 WL 13026870, at *11 (D. Idaho Mar. 31, 2019), *aff’d*, 8 F.4th 1075 (9th Cir. 2021), *rev’d*, 598 U.S. 651 (2023).

³⁴ *Sackett v. EPA*, 8 F.4th at 1081, *rev’d*, 598 U.S. 651.

³⁵ *Id.* at 1080–81.

³⁶ See *Idaho Panhandle National Forests: Priest Lake Area*, U.S. FOREST SERV. <https://www.fs.usda.gov/recarea/ipnf/recreation/recarea/?recid=6763> [<https://perma.cc/Q4QL-TVG2>]; see also *Priest Lake State Park*, IDAHO DEP’T OF PARKS & RECREATION, <https://parksandrecreation.idaho.gov/parks/priest-lake> [<https://perma.cc/J2DJ-VM3U>].

³⁷ See *Indiana Dunes: Nature & Science*, *supra* note 9; *Sackett v. EPA*, No. 2:08-CV-00185, 2019 WL 13026870, at *11 (D. Idaho Mar. 31, 2019) (noting the Kalispell Bay Fen wetland complex’s “rar[ity] in northern Idaho”).

³⁸ See *Sackett v. EPA*, 566 U.S. 120 (2012); *Sackett*, 598 U.S. 651.

³⁹ *Sackett*, 8 F.4th at 1079, 1081.

⁴⁰ Jeff Turrentine, *What the Supreme Court’s Sackett v. EPA Ruling Means for Wetlands and Other Waterways*, NRDC (June 5, 2023), <https://www.nrdc.org/stories/what-you-need-know-about-sackett-v-epa> [<https://perma.cc/KT5T-TS6Q>].

contained a wetland subject to the Clean Water Act.⁴¹ The EPA ordered the Sacketts to remove the sand and gravel and restore the site.⁴² Rather than complying, the Sacketts sued, alleging their property was not subject to the Clean Water Act.⁴³ And so began fifteen years of litigation, involving not one, but two trips to the United States Supreme Court—all over 0.63 acres of wetlands.⁴⁴ The Court granted the Sacketts' petition for certiorari, limited to the question of what constitutes the proper test to determine which wetlands are "waters of the United States" under section 1362(7) of the Clean Water Act.⁴⁵ In May 2023, the Court unanimously held the Sacketts' property did not require a section 404 permit; however, the Court split over the proper test to adopt.⁴⁶ The majority adopted the continuous surface connection test, holding that a wetland only falls under Clean Water Act jurisdiction when it has continuous surface connection to a navigable water; a surface connection is only continuous when the two bodies of water are indistinguishable from each

⁴¹ *Sackett*, 8 F.4th at 1081.

⁴² *Id.*

⁴³ Memorandum of Points and Authorities in Support of Temporary Restraining Order at 1, *Sackett v. EPA*, No. 2:08-CV-00185, 2008 WL 2814724 (D. Idaho Apr. 28, 2008). The Sacketts also alleged that the EPA's compliance-order-related procedures violated the Sacketts' due process rights. *Id.*

⁴⁴ *Sackett v. EPA*, 566 U.S. 120 (2012); *Sackett v. EPA*, 598 U.S. 651 (2023). Pacific Legal Foundation (PLF) represented the Sacketts throughout their cases, from the initial complaint filed on April 28, 2008, through the decision from the United States Supreme Court on May 25, 2023. See Complaint for Declaratory and Injunctive Relief, *Sackett v. EPA*, No. 2:08-CV-00185, 2008 WL 2814724 (D. Idaho Apr. 28, 2008). PLF has been involved in each of the section 404 cases that have reached the Court, representing a petitioner in *Rapanos v. United States*, 547 U.S. 715 (2006) (plurality opinion), and submitting amicus briefs in favor of the non-governmental parties in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers (SWANCC)*, 531 U.S. 159 (2001), and *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985). Founded in 1973, PLF describes itself as "a public interest law firm that defends Americans' liberties when threatened by government overreach and abuse." *About Pacific Legal Foundation: Fight Back and Win*, PAC. LEGAL FOUND., <https://pacificlegal.org/about> [<https://perma.cc/B4W8-CBSY>]. PLF's United States Supreme Court litigation focuses on property rights and administrative law, and the organization has won seventeen of the nineteen cases it has brought to the Supreme Court. *Id.* The Court held in favor of PLF's clients in three cases that it heard in October of the 2022 Term alone: *Sackett v. EPA*, 598 U.S. 651; *Tyler v. Hennepin County*, 598 U.S. 631 (2023); and *Wilkins v. United States*, 598 U.S. 152 (2023).

⁴⁵ *Sackett*, 8 F.4th 1075, cert. granted, 142 S. Ct. 896, 896 (2022).

⁴⁶ See *Sackett*, 598 U.S. at 716 (Kavanaugh, J., concurring) (concurring in the judgment but disagreeing with the Court's new test).

other.⁴⁷ *Sackett* will likely have grievous consequences for wetlands-based ecosystems in the United States.⁴⁸

The Clean Water Act has been wildly successful—no longer are United States rivers open sewers filled with raw sewage and industrial waste,⁴⁹ nor are wetlands lost at the same rate as before the Act.⁵⁰ Just as the Clean Water Act has improved water quality across the United States, it has proved absolutely critical to the Indiana Dunes National Park’s success at protecting sensitive interdunal wetlands while maintaining critical industrial facilities in one of the largest metropolitan areas in the United States.

An Indiana Dunes National Park case study highlights the successes of two different federal environmental protection programs—the National Park Service and the Clean Water Act—at balancing the competing demands of recreation, environmental protection, and industrial development within a fifteen-mile strip of Indiana’s Lake Michigan shoreline. The National Park Service’s leaseback-based land acquisition policy engaged community members and avoided extensive, drawn-out litigation and a hardening of anti-National Park Service attitudes as a gradual land acquisition policy would have.⁵¹ The Clean Water Act’s National Pollution Discharge Elimination System (NPDES) program has proved critical for maintaining a balance between the National Park and neighboring steel processing facilities.⁵²

Discussing the Indiana Dunes National Park in the context of *Sackett* also reveals a significant shift in the balancing of private property rights against environmental protection. To create the Indiana Dunes National Park, individual homeowners voluntarily surrendered their private property rights to protect against ongoing industrial encroachment on a sensitive environmental area.⁵³ In

⁴⁷ Under the continuous surface connection test, the EPA or Corps must prove two prongs: (1) that the body of water to which the wetland is adjacent constitutes a water of the United States; and (2) that the wetland at issue has a continuous surface connection with the adjacent body of water such that it is “difficult to determine where the ‘water’ ends and the ‘wetland’ begins.” *Id.* at 678–79 (quoting *Rapanos*, 547 U.S. at 742).

⁴⁸ See *infra* text accompanying note 227.

⁴⁹ See *infra* text accompanying notes 100–03.

⁵⁰ See *infra* text accompanying notes 163–64.

⁵¹ See *infra* Section V.A.

⁵² See *infra* Section V.B.

⁵³ See *infra* Section IV.A.

contrast, Chantell and Michael Sackett participated in a decade and a half of litigation so they could fill in a wetland to build a home in the midst of a sensitive environmental area.⁵⁴ Juxtaposing these two diametrically opposite approaches illustrates a major shift in attitudes towards environmental protection—and raises concerns about continuing to balance competing environmental use goals in the era of climate change.

Section II.A introduces the National Park Service's land acquisition policies, and Section II.B briefly reviews congressional environmental actions of the 1960s and 1970s.⁵⁵ Part III reviews the Clean Water Act, including the history of water pollution control measures in the United States,⁵⁶ a high-level Clean Water Act overview,⁵⁷ and sections 402 and 404 of the Clean Water Act.⁵⁸ Part IV examines the history of the Indiana Dunes National Park.⁵⁹ Part V assesses the success of the leaseback program at the Indiana Dunes National Park; argues that the Clean Water Act remains critical to the Indiana Dunes National Park; briefly considers the Court's federalism and private property concerns, as expressed in *Sackett*; and suggests the citizen-activism that has proved so critical to the Indiana Dunes National Park remains critical today.⁶⁰ Part VI concludes by recommending return of leasebacks to transition vulnerable wetlands ecosystems to federally managed—and protected—lands for better protection of these sensitive habitats.⁶¹

II. BACKGROUND

The National Parks and environmental laws embody many of the tensions inherent in land ownership and land use in the United States. National Park Service lands, and public lands in general in the United States, have a complex relationship with United States policy towards Tribal Nations, including treaties, dispossession, allotment, and

⁵⁴ See *infra* Section III.D.

⁵⁵ See *infra* Sections II.A, II.B.

⁵⁶ See *infra* Section III.A.

⁵⁷ See *infra* Section III.B.

⁵⁸ See *infra* Sections III.C, III.D.

⁵⁹ See *infra* Part IV.

⁶⁰ See *infra* Part V.

⁶¹ See *infra* Part VI.

assimilationist policies.⁶² Water pollution control measures, and environmental regulation measures more broadly, frequently involve various parties at different levels of government.⁶³ Both the Indiana Dunes National Park and the Clean Water Act represent evolutions of policy within their respective areas.

A. *The National Park Service's Land Acquisition Policies Through the 1970s*

In 1916, Congress created the National Park Service.⁶⁴ Several national parks already existed at that time,⁶⁵ and the National Park Service Organic Act created a federal agency to consistently manage those parks.⁶⁶ The National Park Service focused on expansion and growth in the 1910s and 1920s; diversifying its units in the 1930s and 1940s; improving park infrastructure in the 1950s and 1960s; and creating urban

⁶² See generally Kekek Jason Stark, Autumn L. Bernhardt, Monte Mills & Jason Robison, *Re-Indigenizing Yellowstone*, 22 WYO. L. REV. 397 (2022) (discussing the historical relationship between Yellowstone-associated Tribal Nations and the National Park Service and offering recommendations for the future); Jeanette Wolfley, *Reclaiming a Presence in Ancestral Lands: The Return of Native Peoples to the National Parks*, 56 NAT. RES. J. 55 (2016) (discussing the evolving relationship between the National Park Service and Tribal Nations and proposing policy changes).

⁶³ Namely, these regulations involve municipal governments, state governments, and the federal government. See *infra* Section III.A.

⁶⁴ 54 U.S.C. § 100301 (formerly cited as 16 U.S.C. § 1) (“There is in the Department of the Interior a service called the National Park Service.”).

⁶⁵ These included Yellowstone National Park (Idaho, Montana, and Wyoming), created in 1872 as the United States’ first national park; Yosemite National Park (California); Glacier National Park (Montana); Crater Lake National Park (Oregon); Grand Canyon National Park (Arizona); Olympic National Park (formerly Mount Olympus) (Washington); and Carlsbad Caverns National Park (New Mexico). Sarah J. Morath, *A Park for Everyone: The National Park Service in Urban America*, 56 NAT. RES. J. 1, 3 (2016); *Yellowstone*, NAT’L PARK SERV., <https://www.nps.gov/yell/index.htm> [<https://perma.cc/BP7Y-ZPF7>]; *Yosemite*, NAT’L PARK SERV., <https://www.nps.gov/yose/index.htm> [<https://perma.cc/VF8C-GYB9>]; *Glacier*, NAT’L PARK SERV., <https://www.nps.gov/glac/index.htm> [<https://perma.cc/TH93-M6WK>]; *Crater Lake*, NAT’L PARK SERV., <https://www.nps.gov/crla/index.htm> [<https://perma.cc/K8WN-MHR3>]; *Grand Canyon*, NAT’L PARK SERV., <https://www.nps.gov/grca/index.htm> [<https://perma.cc/T9K5-2Z99>]; *Olympic: History & Culture*, NAT’L PARK SERV., <https://www.nps.gov/olym/learn/historyculture/index.htm> [<https://perma.cc/2TEH-MAMF>]; *Carlsbad Caverns*, NAT’L PARK SERV., <https://www.nps.gov/cave/index.htm> [<https://perma.cc/EW8T-9EE2>]. Importantly, many of these early national parks are inextricably tied to United States policy towards Tribal Nations, including treaty-making, allotment, and displacement of Tribal Nations. See *supra* note 62 and accompanying text.

⁶⁶ Morath, *supra* note 65, at 3.

national parks in the 1960s and 1970s.⁶⁷ The National Park Service Director from 1964 to 1972, George Hartzog, focused on developing urban national parks.⁶⁸

National Park Service land acquisition policy also changed during these decades. While some national parks consisted entirely of federal lands,⁶⁹ other national parks had inholdings,⁷⁰ or tracts of privately owned land, within park boundaries when the parks were created.⁷¹ National Park Service policy as to these private holdings varied; the National Park Service might acquire these tracts through purchase, donation, or condemnation, or it might allow these tracts to remain privately owned.⁷² The National Park Service developed a policy of eventual acquisition for privately held lands within parks established before July 1959.⁷³ In contrast, the National Park Service's policy towards parks established after July 1959 was to immediately acquire all privately owned land within park boundaries.⁷⁴ In such instances, the National Park Service offered landowners leasebacks.⁷⁵ Under a leaseback, a landowner retained a right of use and occupancy for a specified period, usually the owner's lifetime or a specified period of years.⁷⁶ This policy—immediate acquisition paired with leasebacks—fell out of favor around 1980.⁷⁷

⁶⁷ *Id.* at 4–5.

⁶⁸ *Id.* at 5–6.

⁶⁹ See *supra* text accompanying note 62; *supra* note 65.

⁷⁰ An inholding is a “non-federal property surrounded by federally managed public lands.” Kellen Zale, *Inholdings*, 46 HARV. ENV'T L. REV. 439, 442 (2022). For a thorough discussion of inholdings, see Zale, *supra*.

⁷¹ Joseph L. Sax, *Buying Scenery: Land Acquisitions for the National Park Service*, 1980 DUKE L.J. 709, 713 (1980).

⁷² *Id.* at 713–14.

⁷³ Parks established before 1959 were known as “old parks” during this period. *Id.* at 714–15. The National Park Service did, however, at one point, offer a voluntary “opportunity purchase program” to inholders in thirty-eight parks established before 1959. John F. Lambert Jr., *Private Landholdings in the National Parks: Examples from Yosemite National Park and Indiana Dunes National Lakeshore*, 6 HARV. ENV'T L. REV. 35, 36 (1982).

⁷⁴ Sax, *supra* note 71, at 715.

⁷⁵ See *id.* (“[T]he general policy is one of prompt acquisition of all privately owned lands within park boundaries Exceptions permit existing residents . . . to retain their residences and a few acres of surrounding land for their lifetimes or a period of years, as long as they do not significantly change their present use of the land.”).

⁷⁶ See *id.*; see also Bruce R. Huber, *The Durability of Private Claims to Public Property*, 102 GEO. L.J. 991, 1017 (2014) (noting leasebacks typically lasted “ten to twenty-five years or perhaps for the life of the occupant”).

⁷⁷ See Lambert, *supra* note 73, at 36–38.

B. Relevant Federal Environmental Action in the 1960s and 1970s

Environmental degradation and industrial development have often gone hand-in-hand in the United States.⁷⁸ Water quality has particularly suffered.⁷⁹ Yet in some cases, polluted waterways were themselves seen as signs of progress and modernity—even when they endangered human health.⁸⁰ In response to increasing concerns about environmental degradation and the impact on humans, the federal government took several significant environmental actions in the 1960s and 1970s. The President created a new federal agency specifically intended to address environmental issues—the Environmental Protection Agency (EPA)—in 1970.⁸¹ Congress, in turn, addressed air pollution⁸² and endangered species issues⁸³ and enacted the Comprehensive Environmental Response, Compensation, and Liability Act.⁸⁴ Water protection was of particular import: in addition to the Clean Water Act, Congress passed the Coastal Zone Management Act in 1972⁸⁵ and the Safe Drinking Water Act in 1974.⁸⁶

III. CLEAN WATER ACT

⁷⁸ See, e.g., *infra* Section III.A.

⁷⁹ See, e.g., *infra* Section III.A.; see also Robin Kundis Craig, *There is More to the Clean Water Act than Waters of the United States: A Holistic Jurisdictional Approach to the Section 402 and Section 404 Permit Programs*, 73 CASE W. RESV. L. REV. 349, 355–58 (2022).

⁸⁰ Craig, *supra* note 79, at 355 (“Until the late 1950s, however, residents often viewed the Cuyahoga’s and other rivers’ pollution as a sign of progress, even though the growing water pollution problem could also affect their drinking water: The water was nearly always covered in oil slicks, and it bubbled like a deadly stew. . . . Everyone knew [the river] was polluted, but pollution meant industry was thriving, the economy was booming, and everyone had jobs.”).

⁸¹ Jonathan H. Adler, *The Environmental Protection Agency Turns Fifty*, 70 CASE W. RESV. L. REV. 871, 871 (2020) [hereinafter *The EPA Turns Fifty*].

⁸² Congress passed the Clean Air Act in 1963 and amended it significantly in 1970. Clean Air Act, Pub. L. No. 88-206, 77 Stat. 392 (1963); Clean Air Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676 (codified as amended at 42 U.S.C. § 7401).

⁸³ Congress passed the Endangered Species Act in 1973. 16 U.S.C. §§ 1531–1544.

⁸⁴ Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601–9675.

⁸⁵ 16 U.S.C. §§ 1451–1468.

⁸⁶ 42 U.S.C. §§ 300f–300j-27.

The Clean Water Act⁸⁷ did not mark a sea change from sole state regulation of water pollution control; instead, it was a response to the inadequacies of a state-federal collaborative program that was clearly insufficient to respond to mid-twentieth century water pollution.⁸⁸ The Clean Water Act is an example of cooperative federalism.⁸⁹ The Act creates state-federal partnerships⁹⁰ to support state water pollution control efforts by implementing national pollution standards.⁹¹ Effectively, the Clean Water Act sets a federal regulatory floor: States are free to set stricter limits than the federal standard.⁹² While the Act displaces federal common law,⁹³ a party may bring a claim under state common law through the Act's citizen suit provision.⁹⁴

Section III.A reviews the shift from local municipal water pollution control to federal water pollution control

⁸⁷ 33 U.S.C. §§ 1251–1389.

⁸⁸ See *infra* Section III.A.

⁸⁹ Robert L. Fischman, *Cooperative Federalism and Natural Resources Law*, 14 N.Y.U. ENV'T L.J. 179, 189 (2005) (“[C]ooperative federalism involves programs where federal monies are made available to each state contingent on its creation of a regulatory scheme that is at least as stringent as the federal floor. States may tailor federal standards (e.g., water quality criteria under the CWA), . . . implement permit programs (e.g., state pollutant discharge elimination systems under the CWA), and enforce rules (e.g., state administrative and judicial procedures).”); see also *The Evolution of Cooperative Federalism*, TULANE UNIV. L. SCH. (Apr. 15, 2021), <https://online.law.tulane.edu/blog/the-evolution-of-cooperative-federalism> [<https://perma.cc/C6X7-8HHW>] (“Cooperative federalism requires state and national governments to share power and collaborate on overlapping functions. In contrast, dual federalism works on the idea that federal and state governments function separately and distinctly.”).

⁹⁰ Oliver A. Houck, *Cooperative Federalism, Nutrients, and the Clean Water Act: Three Cases Revisited*, 44 ENV'T L. REP. NEWS & ANALYSIS 10426, 10429 (2014).

⁹¹ National standards, rather than state-by-state standards, curtail industry influence on state pollution requirements by preventing an industry from controlling state pollution control measures by threatening to relocate out of that particular state. William L. Andreen, *The Evolution of Water Pollution Control in the United States—State, Local, and Federal Efforts, 1789-1972: Part II*, 22 STAN. ENV'T L.J. 215, 286 (2003) [hereinafter Andreen, *Part II*]. In other words, uniform national water pollution control standards are intended to avert “a destructive environmental ‘race to the bottom’ among the states.” William W. Buzbee, *The Antiregulatory Arsenal, Antidemocratic Can(n)ons, and the Waters Wars*, 73 CASE W. RES. L. REV. 293, 331 (2022).

⁹² Buzbee, *supra* note 91, at 331 (“The [Clean Water Act], like other federal environmental laws, thus sets federal regulatory floors, allowing states to do more.”).

⁹³ In *Milwaukee v. Illinois*, the Court held that the Clean Water Act displaced federal common law nuisance tort in a suit by two states against Milwaukee for polluting Lake Michigan. 451 U.S. 304 (1981).

⁹⁴ 33 U.S.C. § 1365; see, e.g., *City of Chicago v. U.S. Steel Corp.*, No. 2:22-CV-357, 2023 WL 6037395, at *3 (D. Ind. Sept. 15, 2023) (concluding that the city of Chicago’s negligence claim did not constitute an impermissible private right of action under the Clean Water Act).

measures that preceded the Clean Water Act.⁹⁵ Section III.B provides a broad overview of the Clean Water Act, the initial regulatory definition conflict between the Environmental Protection Agency (EPA) and the Corps, and the 1977 Amendment adding “adjacent wetlands thereto” to Clean Water Act jurisdiction.⁹⁶ Sections III.C and III.D review the section 402 NPDES and section 404 dredge and fill permit programs, respectively.⁹⁷

A. *Water Pollution Control Before the Clean Water Act*

Water protection efforts in the United States shifted from municipal, to state, to federal control as population densities increased, industrial pollution worsened, and technology- and science-based methods of water pollution control advanced.⁹⁸ Broadly speaking, municipalities regulated, or sought to regulate, water pollution until the early twentieth century.⁹⁹ States did not become involved in water pollution control until the late nineteenth century, and in many instances, state regulation alone was simply insufficient to have any meaningful impact on water quality.¹⁰⁰ Water pollution control also existed in tension with the view that polluted rivers indicated progress and modernity.¹⁰¹ Even as late as 1960, municipalities in the United States failed to treat raw sewage from roughly seventy-five million people.¹⁰² Between industrial pollution and raw sewage, United States rivers were increasingly dangerous.¹⁰³

Federal water pollution control also began in the late nineteenth century. Sections 13 and 10 of the Rivers and Harbors Act are the antecedents of Clean Water Act sections

⁹⁵ See *infra* Section III.A.

⁹⁶ See *infra* Section III.B.

⁹⁷ See *infra* Section III.C, Section III.D.

⁹⁸ See generally William L. Andreen, *The Evolution of Water Pollution Control in the United States—State, Local, and Federal Efforts, 1789-1972: Part I*, 22 STAN. ENV'T L.J. 145 (2003) [hereinafter Andreen, *Part I*].

⁹⁹ *Id.* at 160–78.

¹⁰⁰ *Id.* at 178–82.

¹⁰¹ Craig, *supra* note 79, at 355.

¹⁰² In 1960, the United States' population was 179.3 million; therefore, raw sewage from nearly forty-two percent of the population went untreated. Andreen, *Part I*, *supra* note 98, at 197; U.S. CENSUS BUREAU, *1960 Census: Population, Supplementary Reports: Birthplace and Country of Origin* (Dec. 10, 1962), <https://www.census.gov/library/publications/1962/dec/population-pc-s1-28.html> [<https://perma.cc/S4U3-2CDW>].

¹⁰³ See Craig, *supra* note 79, at 355–56 (“[R]ivers also functioned as the United States' primary sewer system.”).

402 and 404, respectively. Section 13 of the Rivers and Harbors Act of 1899¹⁰⁴ attempted to consolidate four related federal water pollution control statutes that had been passed in the decade preceding the Rivers and Harbors Act.¹⁰⁵ As consolidated, section 13 “prohibited the discharge of ‘any refuse matter of any kind or description whatever,’ except for municipal storm-water and sewage, into any navigable water of the United States unless a permit [was] first obtained from the U.S. Army Corps of Engineers.”¹⁰⁶ Strictly reading section 13 could have encompassed a wide variety of pollutants as “refuse” and prohibited refuse discharges even when such discharges did not impact navigation; however, the Army Corps of Engineers generally interpreted section 13 to only bar “discharge[s] of materials that could impede navigation.”¹⁰⁷ Section 10 of the Rivers and Harbors Act¹⁰⁸ prohibited excavating or filling navigable waterways without a Corps-issued permit.¹⁰⁹

Congress next attempted to regulate water pollution nationally through the Federal Water Pollution Control Act of 1948.¹¹⁰ The Federal Water Pollution Control Act provided only limited federal jurisdiction and “modest” federal enforcement power,¹¹¹ so much so that between 1948 and

¹⁰⁴ 33 U.S.C. § 407.

¹⁰⁵ Andreen, *Part II*, *supra* note 91, at 220.

¹⁰⁶ *Id.* at 221.

¹⁰⁷ *Id.* at 221–22. Section 13 is sometimes understood to have been “passed to prevent obstructions to navigation” and to have simply “evolved into a pollution prevention statute.” *E.g.*, Jesse J. Richardson Jr., Tiffany Dowell Lashmet & Gatlin Squires, *Turtles All the Way Down: A Clearer Understanding of the Scope of Waters of the United States Based on the U.S. Supreme Court Decisions*, 46 WM. & MARY ENV’T L. & POL’Y REV. 1, 3 (2021).

¹⁰⁸ 33 U.S.C. § 403.

¹⁰⁹ *Id.* (“[I]t shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure [sic] within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same.”); *see also* 33 C.F.R. § 320.2(b) (“[T]he excavating from or depositing of material in such [navigable] waters, or the accomplishment of any other work affecting the course, location, condition, or capacity of such waters is unlawful unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army.”).

¹¹⁰ Federal Water Pollution Control Act of 1948, ch. 758, 62 Stat. 1155 (codified as amended at 33 U.S.C. §§ 1251–1389); *see also* Craig, *supra* note 79, at 354 n.17.

¹¹¹ Effectively, “[p]olluters were immune to federal action as long as they only endangered local residents or refrained from activities that actually threatened public health.” Andreen, *Part II*, *supra* note 91, at 238. Even when federal

1970, the United States brought only one enforcement case under the Federal Water Pollution Control Act.¹¹² Broader social awareness of local water pollution issues and environmental degradation—and the accompanying dangers to public health—increased during the 1950s and 1960s.¹¹³ Congress’s initial attempts to amend the Federal Water Pollution Control Act to provide stronger water pollution control measures had too little impact.¹¹⁴ Two major water pollution disasters in 1969 finally pushed the federal government to act more assertively to address water quality and environmental degradation more broadly.¹¹⁵ By 1971, the EPA¹¹⁶ and the Corps formulated a new permit program under section 13 of the Rivers and Harbors Act to penalize those who polluted navigable waters, thereby creating a direct antecedent to section 402 of the Clean Water Act.¹¹⁷

B. The 1972 Clean Water Act, the First Five Years, and the 1977 Amendment

In 1972, Congress amended the Federal Water Pollution Control Act expressly “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”¹¹⁸ The amended statute became commonly known as the Clean Water Act.¹¹⁹ At its most fundamental level, the Clean Water Act bans the discharge of any pollutant by any

enforcement power was applicable, enforcement action “require[ed] the consent of the State where the pollution originated.” *Sackett v. EPA*, 598 U.S. 651, 660 (2023).

¹¹² Houck, *supra* note 90, at 10427.

¹¹³ See Andreen, *Part II*, *supra* note 91, at 244; Craig, *supra* note 79, at 354.

¹¹⁴ Houck, *supra* note 90, at 10426 (“We have a federal CWA for one reason: programs run by the states with federal assistance had failed utterly for [twenty-five] years.”); see also Andreen, *Part II*, *supra* note 91, at 239–55.

¹¹⁵ Craig, *supra* note 79, at 354 (referring to “the latest in a century-long series of Cuyahoga River fires[] and the Santa Barbara oil spill from an oil drilling platform”).

¹¹⁶ *The EPA Turns Fifty*, *supra* note 81, at 871 (stating that the EPA was established in 1970).

¹¹⁷ Craig, *supra* note 79, at 354 (noting also that “the [Rivers and Harbors Act] was an imprecise fit given its larger focus on preserving navigation”).

¹¹⁸ 33 U.S.C. § 1251(a).

¹¹⁹ Craig, *supra* note 79, at 357 n.35 (explaining that the 1977 amendments coined the name “Clean Water Act”).

person¹²⁰ from a point source¹²¹ into navigable waters.¹²² The Act expansively defines both pollutant¹²³ and person;¹²⁴ specifically defines pollution as human-caused;¹²⁵ and confusingly defines navigable waters as “the waters of the United States, including the territorial seas.”¹²⁶ The Clean Water Act includes a citizen suit provision under which an individual may file a civil suit against any party for an alleged violation of the Clean Water Act.¹²⁷ While the Act bans pollutant discharges, the ban is not absolute. Pollutant discharges are permitted subject to the permitting programs under sections 402¹²⁸ and 404,¹²⁹ which each derive from earlier federal permitting programs.¹³⁰

*1. Initial Agency Conflict over “Navigable Waters”
Led to Significantly Divergent Jurisdictional
Definitions*

Placing the Clean Water Act under the aegis of both the EPA and the Corps created tension. After all, the EPA was created in 1970 expressly to protect the United States—its people and resources—from pollution and environmental

¹²⁰ 33 U.S.C. § 1311(a) (“Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.”).

¹²¹ *Id.* § 1362(14) (“The term ‘point source’ means any discernible, confined[,] and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged.”).

¹²² *Id.* § 1362(7) (“The term ‘navigable waters’ means the waters of the United States, including the territorial seas.”).

¹²³ *Id.* § 1362(6) (“The term ‘pollutant’ means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water.”).

¹²⁴ *Id.* § 1362(5) (“The term ‘person’ means an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body.”).

¹²⁵ *Id.* § 1362(19) (“The term ‘pollution’ means the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water.”).

¹²⁶ *Id.* § 1362(7).

¹²⁷ *Id.* § 1365 (establishing a citizen suit component to the Clean Water Act and defining the parameters of Clean Water Act citizen suits).

¹²⁸ *Id.* § 1342.

¹²⁹ *Id.* § 1344.

¹³⁰ *See supra* Section II.A.

harms,¹³¹ while the Corps's pollution-related and environmental work dates to the late nineteenth century and historically focused on navigation.¹³² The EPA, therefore, defined "navigable waters" fairly expansively in its 1973 regulations;¹³³ the Corps, in contrast, initially adopted a strict definition of navigable waters tailored to navigation.¹³⁴ The Corps revised its definition and published an interim final regulation in July 1975 defining "navigable waters" more expansively.¹³⁵

2. *The Corps Made Significant Changes to Its Jurisdictional Definitions in 1977, Which Congress Codified in the 1977 Amendments*

In 1977, the Corps first adopted a set of regulations defining "waters of the United States."¹³⁶ These regulations defined "waters of the United States" under Clean Water Act jurisdiction broadly and specifically included "adjacent wetlands" and "isolated wetlands . . . the degradation or destruction of which could affect interstate commerce."¹³⁷

¹³¹ *The EPA Turns Fifty*, *supra* note 81, at 871.

¹³² See *Brief History of the Corps: Introduction*, U.S. ARMY CORPS OF ENG'RS, <https://www.usace.army.mil/About/History/Brief-History-of-the-Corps/Introduction> [<https://perma.cc/G94A-9UZ3>].

¹³³ Non-transportation Related Onshore and Offshore Facilities, 38 Fed. Reg. 34164, 34165 (Dec. 11, 1973) ("The term 'navigable waters' of the United States means 'navigable waters' as defined in section 502(7) of the FWPCA, and includes: (1) all navigable waters of the United States, as defined in judicial decisions prior to passage of the 1972 Amendments to the FWPCA (Pub. L. 92-509), and tributaries of such waters; (2) interstate waters; (3) intrastate lakes, rivers, and streams which are utilized by interstate travelers for recreational or other purposes; and (4) intrastate lakes, rivers, and streams from which fish or shellfish are taken and sold in interstate commerce.").

¹³⁴ Permits for Activities in Navigable Waters or Ocean Waters, 39 Fed. Reg. 12115, 12119 (Apr. 3, 1974) ("The term 'navigable waters of the United States' and 'navigable waters,' as used herein mean those waters of the United States which are subject to the ebb and flow of the tide, and/or are presently, or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce . . .").

¹³⁵ Craig, *supra* note 79, at 363–64 (noting that the U.S. District Court for the District of Columbia ordered the Corps to revise its definition to comply with Congress's definition of "navigable waters" under the Clean Water Act).

¹³⁶ Regulatory Programs of the Corps of Engineers, 42 Fed. Reg. 37122, 37144 (July 19, 1977).

¹³⁷ *Id.* (The "waters of the United States" means: "(1) The territorial seas . . . ; (2) Coastal and inland waters, lakes, rivers, and streams that are navigable waters of the United States, including adjacent wetlands; (3) Tributaries to navigable waters of the United States, including adjacent wetlands . . . ; (4) Interstate waters and their tributaries, including adjacent wetlands; and (5) All other waters

When Congress amended the Clean Water Act in 1977, it “expressly adopted”¹³⁸ the Corps’s interpretation of “waters of the United States” as including adjacent wetlands.¹³⁹

C. Section 402 National Pollutant Discharge Elimination System (NPDES) Permit Program

Section 402 of the Clean Water Act establishes the National Pollutant Discharge Elimination System (NPDES), which regulates most pollutant discharges covered under the Clean Water Act.¹⁴⁰ NPDES originates from the Rivers and Harbors Act of 1899,¹⁴¹ although the section 13 Refuse Act permitting program dates only to 1971.¹⁴² NPDES permits effectively serve two purposes: (1) regulation and (2) notice.¹⁴³ Because NPDES permits impose specific numerical limits, determining whether a violation has occurred is relatively

of the United States not identified in paragraphs (1) – (4) above, such as isolated wetlands and lakes, intermittent streams, prairie potholes, and other waters that are not part of a tributary system to interstate waters or to navigable waters of the United States, the degradation or destruction of which could affect interstate commerce.”).

¹³⁸ See *Sackett v. EPA*, 598 U.S. 651, 717 (2023) (Kavanaugh, J., concurring).

¹³⁹ See 33 U.S.C. § 1344(g)(1) (“The Governor of any State desiring to administer its own individual and general permit program for the discharge of dredged or fill material into the navigable waters (other than those waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce shoreward to their ordinary high water mark, including all waters which are subject to the ebb and flow of the tide shoreward to their mean high water mark, or mean higher high water mark on the west coast, including wetlands adjacent thereto) within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact.”).

¹⁴⁰ Clean Water Act, Pub. L. No. 92-500, § 402, 86 Stat. 816, 880 (1972) (codified as amended at 33 U.S.C. § 1342).

¹⁴¹ Robert W. Adler, *A Unified Theory of Clean Water Act Jurisdiction*, 73 CASE W. RES. L. REV. 235, 270 (2022) [hereinafter Adler, *A Unified Theory of CWA Jurisdiction*].

¹⁴² See *supra* text accompanying notes 115–17.

¹⁴³ See Craig, *supra* note 79, at 372 (“NPDES permits address classic industrial water pollution by imposing ‘end of the pipe’ limitations (the effluent limitations) on how much or what concentration of pollutants the polluter can discharge into the waterway”); Robert W. Adler & Brian House, *Atomizing the Clean Water Act: Ignoring the Whole Statute and Asking the Wrong Questions*, 50 ENV’T L. 45, 74 (2020) (“Most fundamentally, [NPDES permits] ensure that no discharges of pollutants into waters covered by the Act occur ‘off the record’ or without public notice and attention. All discharges must be known to the appropriate government agencies so they can determine which controls are necessary or appropriate . . . [and] affected members of the public and downstream states can comment on the proposed permit and the sufficiency of its pollution control provisions.”).

simple and requires only “a comparison of the permit conditions with actual performance.”¹⁴⁴ The federal government has significant enforcement power, including “administrative actions, civil actions, and criminal sanctions.”¹⁴⁵

Section 402 also authorizes the EPA to approve state-operated permitting programs if the state can demonstrate that its permitting system will ensure compliance at least as strictly as EPA-issued permitting would.¹⁴⁶ Once the EPA approves a state’s program, the EPA may delegate its authority to issue NPDES permits to the state.¹⁴⁷ A significant majority of states have opted to create state-operated NPDES permitting programs.¹⁴⁸ States may set standards that more strongly protect public health and the environment than the federal standards.¹⁴⁹ NPDES permits have proven enormously successful.¹⁵⁰

The United States Supreme Court has focused less on the NPDES program than section 404 in the past two and a half decades, but the Court still takes NPDES cases.¹⁵¹ The

¹⁴⁴ William L. Andreen, *Success and Backlash: The Remarkable (Continuing) Story of the Clean Water Act*, 4 GEO. WASH. J. ENERGY & ENV’T L. 25, 26 (2013) [hereinafter Andreen, *Success and Backlash*] (“The permit system greatly eased enforcement of the Act because NPDES permits normally contain precise numerical limits that define compliance with the Act. Determining the existence of a violation is thus a relatively simple process in most cases.”).

¹⁴⁵ *Id.*

¹⁴⁶ Adler & House, *supra* note 143, at 74 (“To obtain such program delegation, however, a state must demonstrate that its permits will ensure compliance with the same list of other statutory provisions as apply to EPA-issued permits.”).

¹⁴⁷ *Id.* (“Section 402 also authorizes EPA to delegate authority to issue NPDES permits to states with approved programs.”).

¹⁴⁸ Andreen, *Success and Backlash*, *supra* note 144, at 26; Adler, *A Unified Theory of CWA Jurisdiction*, *supra* note 141, at 277 (“States have overwhelmingly chosen to exercise CWA authority over National Pollutant Discharge Elimination System (NPDES) permitting governing pollutant discharges from municipal and industrial point sources.”).

¹⁴⁹ Andreen, *Success and Backlash*, *supra* note 144, at 26 (“Moreover, all of these states have the authority to set and enforce standards, if they wish, that are even more protective of public health and the environment.”).

¹⁵⁰ Craig, *supra* note 79, at 392 (“Section 402 works. Rivers no longer burn and, for the most part, cities no longer discharge raw sewage into the nation’s waterways. Water quality nationwide has gotten better.”).

¹⁵¹ *Id.* at 371 (“Ten of the Court’s seventeen decisions that focused on the NPDES permit program (almost 60 percent) occurred in the first half of the Act’s existence, between 1972 and 1996. In contrast, of the Court’s eight decisions focused on section 404, seven (more than 87 percent) have occurred *since* 1997. To cast this information slightly differently, the Court moved from an overwhelming focus on section 402 between 1972 and 1996 (ten NPDES decisions versus one section 404 decision) to giving roughly equal attention to

Court's most recent decision on section 402 was in *County of Maui v. Hawaii Wildlife Fund* in 2020.¹⁵² In *Maui*, the Court held that the section 402 permitting requirement applies to point source discharges of pollutants where those pollutants reach navigable waters after traveling through groundwater when the discharge "is the functional equivalent of a direct discharge from the point source into navigable waters."¹⁵³ In that case, the County of Maui operated a wastewater reclamation facility that dispersed approximately four million gallons of partially treated sewage each day into underground wells and subsequently into groundwater.¹⁵⁴ The treated water traveled approximately half a mile through the groundwater before entering the ocean.¹⁵⁵ Several environmental groups filed suit against the County of Maui under the Clean Water Act's citizen suit provision,¹⁵⁶ and the district court and Ninth Circuit each found for the plaintiffs.¹⁵⁷ After granting certiorari to resolve a three-way circuit court split,¹⁵⁸ the Court reasoned that a party must obtain a section 402 discharge permit if the discharge is similar to a direct discharge into navigable waters.¹⁵⁹

Therefore, under *Maui*, section 402 requires a discharge permit for point-source pollutant discharges if (1) a pollutant is directly discharged into navigable waters; or (2) "the addition of the pollutants through groundwater is the

the two permit programs between 1997 and 2022 (seven decisions focused on each permit program).").

¹⁵² *Cnty. of Maui v. Haw. Wildlife Fund*, 590 U.S. 165 (2020).

¹⁵³ *Id.* at 183.

¹⁵⁴ *Id.* at 171.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 171–72 (explaining that the district court found that there was a "clearly ascertainable" path such that it was "functionally" a direct discharge and triggered section 402's permitting process, whereas the Ninth Circuit found that the pollutant discharge was "fairly traceable . . . such that the discharge [was] the functional equivalent of a discharge into the navigable water.").

¹⁵⁸ *Compare* *Haw. Wildlife Fund v. Cnty. of Maui*, 886 F.3d 737, 749 (9th Cir. 2018) (noting a "fairly traceable" connection is required for liability under the CWA), *with* *Upstate Forever v. Kinder Morgan Energy Partners*, 887 F.3d 637, 651 (4th Cir. 2018) (stating a plaintiff must assert a "direct hydrological connection between ground water and navigable waters" to support a claim under the CWA), *and* *Ky. Waterways All. v. Ky. Utils. Co.*, 905 F.3d 925, 932–38 (6th Cir. 2018) (concluding the Clean Water Act does not require permits for discharges through groundwater).

¹⁵⁹ *Maui*, 590 U.S. at 184–85.

functional equivalent of a direct discharge from the point source into navigable waters.”¹⁶⁰

D. Section 404 Dredge and Fill Permit Program

Like section 402’s NPDES, section 404’s dredge and fill permit program has been remarkably successful at reducing the rate of wetland loss.¹⁶¹ Section 404 regulates the deposit of dredge or fill material into waters within the Act’s jurisdiction.¹⁶² In the twenty years before the Clean Water Act was implemented, the United States lost approximately 580,000 acres of wetlands each year.¹⁶³ In contrast, average annual wetland losses between 2004 and 2009 were estimated at about 14,000 acres.¹⁶⁴

Despite this success, disputes over section 404’s jurisdiction have generated far more hotly contested litigation than NPDES permits have.¹⁶⁵ While section 404 also regulates pollutant discharges, the specific subset of pollutant discharges under section 404’s regulation—the deposit of dredge or fill material into waters of the United States—more frequently interferes with private property development.¹⁶⁶ In contrast to NPDES permits, section 404 permits are issued by the U.S. Army Corps of Engineers in compliance with EPA-promulgated guidelines.¹⁶⁷ The EPA may also review and disapprove permits that the Corps has already issued.¹⁶⁸ Like NPDES permitting, states may create and operate their own

¹⁶⁰ *Id.* at 170. The Court noted that the functional equivalence test is a fact-specific inquiry and listed several potentially relevant factors: “(1) transit time, (2) distance traveled, (3) the nature of the material through which the pollutant travels, (4) the extent to which the pollutant is diluted or chemically changed as it travels, (5) the amount of pollutant entering the navigable waters relative to the amount of the pollutant that leaves the point source, (6) the manner by or area in which the pollutant enters the navigable waters, [and] (7) the degree to which the pollution (at that point) has maintained its specific identity.” *Id.* at 184–85. The Court further noted that the “most important factors in most cases” would be time and distance, although “not necessarily [in] every case.” *Id.* at 185.

¹⁶¹ Andreen, *Success and Backlash*, *supra* note 144, at 30.

¹⁶² 33 U.S.C. § 1344.

¹⁶³ Andreen, *Success and Backlash*, *supra* note 144, at 30.

¹⁶⁴ *Id.*

¹⁶⁵ Adler & House, *supra* note 143, at 52 (“The most persistent and contested CWA jurisdictional battles have involved attempts by the Supreme Court and lower federal courts to define ‘navigable waters’ in the context of the Army Corps of Engineers (Corps) dredge and fill program.”).

¹⁶⁶ Craig, *supra* note 79, at 378 (noting also that larger development projects often require section 404 permits).

¹⁶⁷ Andreen, *Success and Backlash*, *supra* note 144, at 26.

¹⁶⁸ *Id.*

section 404 permitting; however, few states have opted to implement a section 404 permitting program.¹⁶⁹

The United States Supreme Court has assessed whether “waters of the United States”¹⁷⁰ include wetlands “adjacent” to navigable waters¹⁷¹ on four occasions.¹⁷² In *United States v. Riverside Bayview Homes, Inc.*, the Court unanimously held that a wetland fell within section 404 jurisdiction when it was “actually abut[ting]” a navigable waterway.¹⁷³ In that case, the Court explicitly deferred to the agency’s expertise in defining “waters of the United States” to include wetlands adjacent to other bodies of water that fell within the Corps’s jurisdiction.¹⁷⁴ The Court noted that including all adjacent wetlands within Clean Water Act jurisdiction risked protecting some less environmentally valuable wetlands, but dismissed this as a minor concern.¹⁷⁵

In *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers* (SWANCC), the Court, by a 5-4 majority, held that the Corps did not have jurisdiction under the Clean Water Act over water-filled abandoned gravel pits used by migrating birds.¹⁷⁶ In that case, the Corps asserted jurisdiction over “seasonally ponded, abandoned gravel mining depressions” used by migrating

¹⁶⁹ Adler, *A Unified Theory of CWA Jurisdiction*, *supra* note 141, at 277 (noting that section 404 “has generated most of the controversy regarding the scope of [waters of the United States] due to potential infringement on land use and private property rights”).

¹⁷⁰ 33 U.S.C. § 1362(7) (“The term ‘navigable waters’ means the waters of the United States, including the territorial seas.”).

¹⁷¹ *Id.* § 1344(g)(1) (“including wetlands adjacent thereto”).

¹⁷² *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 135 (1985); *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng’rs* (SWANCC), 531 U.S. 159, 162 (2001); *Rapanos v. United States*, 547 U.S. 715 (2006) (plurality opinion); *Sackett v. EPA*, 598 U.S. 651 (2023).

¹⁷³ 474 U.S. at 135.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 135 n.9 (“Of course, it may well be that not every adjacent wetland is of great importance to the environment of adjoining bodies of water. But the existence of such cases does not seriously undermine the Corps’ decision to define all adjacent wetlands as ‘waters.’ If it is reasonable for the Corps to conclude that in the majority of cases, adjacent wetlands have significant effects on water quality and the aquatic ecosystem, its definition can stand. That the definition may include some wetlands that are not significantly intertwined with the ecosystem of adjacent wetlands is of little moment, for where it appears that a wetland covered by the Corps’ definition is in fact lacking in importance to the aquatic environment—or where its importance is outweighed by other values—the Corps may always allow development of the wetland for other uses simply by issuing a permit.”).

¹⁷⁶ SWANCC, 531 U.S. at 162.

birds.¹⁷⁷ Rather than granting deference to the agency as in *Riverside Bayview*, the Court instead read the statutory text narrowly and opined that the Clean Water Act raised constitutional questions related to Congress's Commerce Clause authority.¹⁷⁸ The Court reasoned that Congress had not clearly stated an intent that the Clean Water Act cover seasonal ponds in an abandoned gravel mine.¹⁷⁹ *SWANCC* is also notable as the first time the Court used the term "significant nexus" in connection with the Clean Water Act.¹⁸⁰

The Court again considered the scope of the term "waters of the United States" in relation to wetlands in *Rapanos v. United States*.¹⁸¹ In that case, the Court split 4-1-4.¹⁸² The plurality would have applied a continuous surface connection test, where a wetland adjacent to a navigable water only falls under Clean Water Act jurisdiction when it has a

¹⁷⁷ *Id.* at 164 (citation omitted).

¹⁷⁸ *Id.* at 173 ("These arguments raise significant constitutional questions."); see also Adler, *A Unified Theory of CWA Jurisdiction*, *supra* note 141, at 245.

¹⁷⁹ *SWANCC*, 531 U.S. at 172–73 ("Where an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result. This requirement stems from our prudential desire not to needlessly reach constitutional issues and our assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority.") (citation omitted).

¹⁸⁰ Richardson et al., *supra* note 107, at 17. In *SWANCC*, the Court described its decision in *Riverside Bayview* as having been "informed" by "the significant nexus between the wetlands and 'navigable waters.'" 531 U.S. at 167.

¹⁸¹ *Rapanos v. United States*, 547 U.S. 715 (2006) (plurality opinion). *Rapanos* consolidated two Sixth Circuit cases. *Id.* at 729–30. In one case, the plaintiff was held liable for violating the Clean Water Act for depositing fill material into wetlands without a permit; in the other case, the plaintiffs' application for a permit to deposit fill material into a wetland was denied. *Id.* The split left the Sixth Circuit's rulings against the plaintiffs in place, and plaintiff John Rapanos "agreed to pay a civil penalty and re-create approximately 100 acres of wetlands and buffer areas to settle the case." Patrick Parenteau, *My Own Private Idaho Wetland: What Will the Court Do with the Sackett Case*, 52 ENV'T L. 373, 376 n.12 (2022).

¹⁸² *Rapanos*, 547 U.S. at 718. Justice Scalia wrote the plurality opinion, joined by Chief Justice Roberts, Justice Thomas, and Justice Alito. *Id.* at 719–57. Chief Justice Roberts wrote a separate concurrence. *Id.* at 757–58 (Roberts, C.J., concurring) (noting that the Corps failed to complete a rulemaking to comply with *SWANCC* and expressing disappointment that there was no majority opinion). Justice Kennedy concurred in the judgment but disagreed with the plurality's test. *Id.* at 758–87 (Kennedy, J., concurring in the judgment) (finding the plurality's opinion "inconsistent with the Act's text, structure, and purpose"). Justice Stevens dissented, joined by Justices Souter, Ginsburg, and Breyer. *Id.* at 787–810 (Stevens, J., dissenting) (finding that *Riverside Bayview* controlled, and the Corps applied the proper analysis). Justice Breyer wrote a separate dissent. *Id.* at 810–12 (Breyer, J., dissenting) (finding that the Corps's Clean Water Act authority stretched the limits of Congress's Commerce Clause power and, further, that *SWANCC*'s precedential effect essentially added a significant nexus requirement to the Act).

continuous surface connection such that “there is no clear demarcation between ‘waters’ and wetlands.”¹⁸³ In contrast to *Riverside Bayview*, where the Court deferred to the agency’s expertise in determining its own jurisdiction, here, the Court explicitly rejected the agency’s position¹⁸⁴ and provided its own definitions of what does,¹⁸⁵ and does not, constitute a water of the United States.¹⁸⁶

Justice Kennedy concurred in the judgment, finding the plurality’s opinion inconsistent with the Clean Water Act.¹⁸⁷ At least six circuits accepted his concurrence as a controlling opinion—if not the controlling opinion—before May 2023.¹⁸⁸ Noting the importance of both the Clean Water Act and wetlands, the concurrence also took issue with the plurality’s tone and approach to the Clean Water Act.¹⁸⁹

¹⁸³ *Id.* at 742 (plurality opinion) (“Therefore, *only* those wetlands with a continuous surface connection to bodies that are ‘waters of the United States’ in their own right, so that there is no clear demarcation between ‘waters’ and wetlands, are ‘adjacent to’ such waters and covered by the Act. Wetlands with only an intermittent, physically remote hydrologic connection to ‘waters of the United States’ do not implicate the boundary-drawing problem of *Riverside Bayview*, and thus lack the necessary connection to covered waters that we described as a ‘significant nexus’ in *SWANCC*. Thus, establishing that wetlands such as those at the Rapanos and Carabell sites are covered by the Act requires two findings: first, that the adjacent channel contains a ‘wate[r] of the United States,’ (i.e., a relatively permanent body of water connected to traditional interstate navigable waters); and second, that the wetland has a continuous surface connection with that water, making it difficult to determine where the ‘water’ ends and the ‘wetland’ begins.” (alteration in original) (citation omitted)).

¹⁸⁴ *Id.* at 731–32 (“The only natural definition of the term ‘waters,’ our prior and subsequent judicial constructions of it, clear evidence from other provisions of the statute, and this Court’s canons of construction all confirm that ‘the waters of the United States’ in § 1362(7) cannot bear the expansive meaning that the Corps would give it.”). The Court concluded that *Chevron* deference did not apply to the Corps’s “expansive interpretation” of waters of the United States. *Id.* at 739.

¹⁸⁵ *Id.* (noting “‘waters of the United States’ includes only those relatively permanent, standing or continuously flowing bodies of water ‘forming geographic features’ that are described in ordinary parlance as ‘streams[,] . . . oceans, rivers, [and] lakes’” (alteration in original)).

¹⁸⁶ *Id.* (“[W]aters of the United States” are not “channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall.”).

¹⁸⁷ *Id.* at 776 (Kennedy, J., concurring in the judgment) (“In sum the plurality’s opinion is inconsistent with the Act’s text, structure, and purpose.”).

¹⁸⁸ See Adler, *A Unified Theory of CWA Jurisdiction*, *supra* note 141, at 251 n.81 (noting that, under the *Marks* test, Justice Kennedy’s concurrence was likely the controlling opinion absent a majority opinion, and that the First, Third, Seventh, Eighth, Ninth, and Eleventh Circuits had all accepted Justice Kennedy’s test).

¹⁸⁹ *Rapanos*, 547 U.S. at 776–77 (Kennedy, J., concurring in the judgment) (“It bears mention also that the plurality’s overall tone and approach—from the characterization of acres of wetlands destruction as ‘backfilling . . . wet fields,’ to

Justice Kennedy's concurrence set forth that the Corps had jurisdiction over wetlands when there was a significant nexus between the navigable water and the adjacent wetland.¹⁹⁰ In his concurrence, Justice Kennedy asserted that the Court should remand to the Sixth Circuit to apply the proper test.¹⁹¹

The Court next considered the Clean Water Act's applicability to wetlands in *Sackett II*.¹⁹² In that case, the plaintiffs, Chantell and Michael Sackett, sought to fill in a wetland on their property to build a home.¹⁹³ After a neighbor contacted the EPA about the Sacketts' construction activity,¹⁹⁴ the EPA and Corps visited the Sacketts' property, determined the property likely contained wetlands subject to the Clean Water Act, and recommended the Sacketts halt construction unless they obtained a permit from the Corps.¹⁹⁵ In its formal administrative compliance order issued to the Sacketts six months later, the EPA noted that their property fell under the Clean Water Act.¹⁹⁶ As such, the Sacketts had violated the Clean Water Act by depositing fill material onto the property without a discharge permit.¹⁹⁷ The EPA ordered the Sacketts to restore the site in compliance with an EPA-provided "Restoration Work Plan."¹⁹⁸ The order stated that the restoration must be completed within five months, with

the rejection of Corps authority over 'man-made drainage ditches' and 'dry arroyos' without regard to how much water they periodically carry, to the suggestion, seemingly contrary to Congress' judgment, that discharge of fill material is inconsequential for adjacent waterways, seems unduly dismissive of the interests asserted by the United States in these cases. Important public interests are served by the Clean Water Act in general and by the protection of wetlands in particular." (citations omitted)).

¹⁹⁰ *Id.* at 782 ("When the Corps seeks to regulate wetlands adjacent to navigable-in-fact waters, it may rely on adjacency to establish its jurisdiction. Absent more specific regulations, however, the Corps must establish a significant nexus on a case-by-case basis when it seeks to regulate wetlands based on adjacency to nonnavigable tributaries. Given the potential overbreadth of the Corps' regulations, this showing is necessary to avoid unreasonable applications of the statute. Where an adequate nexus is established for a particular wetland, it may be permissible, as a matter of administrative convenience or necessity, to presume covered status for other comparable wetlands in the region.").

¹⁹¹ *Id.* at 787.

¹⁹² *Sackett v. EPA (Sackett II)*, 598 U.S. 651 (2023).

¹⁹³ *Sackett v. EPA*, 8 F.4th 1075, 1079–81 (9th Cir. 2021), *rev'd*, 598 U.S. 651 (2023).

¹⁹⁴ See Brief for the Respondents in Opposition at 4, *Sackett v. EPA*, 598 U.S. 651 (2023) (No. 21-454).

¹⁹⁵ *Sackett*, 8 F.4th at 1081.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

potential civil and administrative penalties of over \$40,000 per day for failure to comply.¹⁹⁹

Rather than complying, the Sacketts sued the EPA on April 28, 2008—just shy of the compliance deadline—under the Administrative Procedure Act, seeking an injunction and a declaratory judgment.²⁰⁰ The EPA and the Corps inspected the Sacketts' property again on May 15, 2008; the EPA's amended, post-inspection compliance order postponed the compliance date.²⁰¹ The Sacketts sued in federal district court, alleging that their property was not subject to Clean Water Act jurisdiction.²⁰² After a multi-year interlude to address the administrative law components of the case,²⁰³ and attempted settlement negotiations, the case was reopened.²⁰⁴ Both the federal district court²⁰⁵ and the Ninth Circuit held in favor of the EPA.²⁰⁶ The Sacketts appealed the Ninth Circuit's ruling to the Supreme Court.²⁰⁷ The Court granted certiorari on January 24, 2022, limited to the following issue: "Whether 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)."²⁰⁸

The Court unanimously held that the Clean Water Act did not apply to the Sacketts' property, but the Justices split

¹⁹⁹ *Id.*

²⁰⁰ *Id.* The Ninth Circuit and Supreme Court framed the Sacketts' claim under section 702 of the Administrative Procedure Act (APA) somewhat differently. The Ninth Circuit characterized the Sacketts' complaint as "alleg[ing] that the [EPA]'s issuance of the compliance order was arbitrary and capricious under the [APA] . . . because it was premised on an erroneous assertion of jurisdiction under the [Clean Water Act]." *Id.* at 1081. The Supreme Court characterized the Sacketts' initial suit as "alleging that the EPA lacked jurisdiction because any wetlands on their property were not 'waters of the United States.'" *Sackett v. EPA*, 598 U.S. 651, 663 (2023).

²⁰¹ *Sackett*, 8 F.4th at 1081. An EPA wetlands ecologist who participated in the site inspection wrote a July 1, 2008 memorandum about the site inspection. *Id.*

²⁰² Complaint, *Sackett v. EPA*, No. 2:08-CV-00185, 2008 WL 2814724 (D. Idaho Apr. 28, 2008).

²⁰³ The Sacketts appealed up to the Supreme Court to determine whether the EPA compliance order was a final agency action subject to judicial review under the Administrative Procedure Act; the Court held that it was and remanded the case back to the lower courts. *Sackett v. EPA*, 566 U.S. 120, 131 (2012).

²⁰⁴ *Sackett v. EPA*, No. 2:08-CV-00185, 2019 WL 13026870 at *2 (D. Idaho Mar. 31, 2019) (noting that the case had been previously stayed to aid settlement negotiations).

²⁰⁵ *Id.* at *12–13.

²⁰⁶ *Sackett*, 8 F.4th at 1093.

²⁰⁷ Petition for Writ of Certiorari, *Sackett v. EPA*, 598 U.S. 651 (2023) (No. 21-454).

²⁰⁸ *Sackett v. EPA*, 142 S. Ct. 896 (2022).

5-4 over the proper test to apply.²⁰⁹ The majority adopted a “continuous surface connection” test to determine whether a wetland constitutes a water of the United States and, consequently, falls within the Clean Water Act’s jurisdiction.²¹⁰ Under the test, the party asserting jurisdiction—which will almost always be the EPA or Corps—must prove two prongs: (1) that the body of water to which the wetland is adjacent is a water of the United States; and (2) that the wetland at issue “has a continuous surface connection with” the adjacent body of water such that it is “difficult to determine where the ‘water’ ends and the ‘wetland’ begins.”²¹¹ The majority interpreted “adjacent,” for the purposes of the Clean Water Act, to mean “adjoining,”²¹² thereby restricting the CWA’s jurisdiction over wetlands separated by any naturally occurring or human-created barrier from a body of water that constitutes a water of the United States.²¹³

The principal concurrence agreed only in the judgment and found serious fault with the Court’s continuous surface connection test, noting the Court’s “depart[ure] from the statutory text, from [forty-five] years of consistent agency practice, and from [the] Court’s precedents.”²¹⁴ Justice Kavanaugh argued that “adjacent” and “adjoining” do not, in fact, share a dictionary definition—and did not in 1977 when Congress amended the Clean Water Act to cover “wetlands adjacent” to waters of the United States.²¹⁵ Explaining the difference between the two definitions, Justice Kavanaugh noted that

“adjacent” and “adjoining” have distinct meanings: Adjoining wetlands are contiguous to or bordering a covered water, whereas adjacent wetlands include both (i) those wetlands contiguous to or bordering a covered water, *and* (ii) wetlands separated from a covered water

²⁰⁹ Sackett v. EPA, 598 U.S. 651, 657, 684 (2023).

²¹⁰ *Id.* at 678–79 (majority opinion).

²¹¹ *Id.*

²¹² *Id.* at 676–77.

²¹³ *Id.* at 716 (Kavanaugh, J., concurring).

²¹⁴ *Id.*

²¹⁵ *Id.* at 717–18 (“The ordinary meaning of the term ‘adjacent’ has not changed since Congress amended the Clean Water Act in 1977 to expressly cover ‘wetlands adjacent’ to waters of the United States.”).

only by a man-made dike or barrier, natural river berm, beach dune, or the like.²¹⁶

In other words, “adjacent” *includes* “adjoining,” but “adjoining” *does not always* include “adjacent.”²¹⁷ Construing “adjacent” in context of other provisions of the Clean Water Act, Justice Kavanaugh noted that other provisions exclusively use the narrower term “adjoining” rather than using “adjacent” and “adjoining” interchangeably.²¹⁸ He noted that long-standing agency practice was relevant for statutory interpretation purposes in the case because it reinforced the term’s ordinary meaning.²¹⁹ Justice Kavanaugh noted that agency heads under eight presidential administrations—Republican and Democratic alike—consistently included “adjacent wetlands” under the Clean Water Act, despite “dramatically different views” on environmental regulation.²²⁰ Finally, Justice Kavanaugh noted the Court’s opinion departed from its own precedent,²²¹ pointing out the Court previously recognized the Clean Water Act’s jurisdiction over adjacent wetlands and,²²² even earlier, explicitly recognized the validity of the 1977 Amendment.²²³

In September 2023, the EPA and Corps promulgated a new rule in response to *Sackett*.²²⁴ The new rule removed all references to the significant nexus standard and revised the definition of “adjacent.”²²⁵ Under the new rule, the term

²¹⁶ *Id.* at 716.

²¹⁷ *See id.* at 718–19. Consider the relationship between a square and a rectangle. All squares are rectangles, but not all rectangles are squares. The definition of “rectangle” includes a square; therefore, square is the more limited term and rectangle is the more expansive term. Here, the relationship between the terms “adjacent” and “adjoining” is like the relationship between a square and a rectangle: adjacent is a more expansive term, while adjoining is the more limited term.

²¹⁸ *Id.* at 719.

²¹⁹ *Id.* at 720.

²²⁰ *Id.* at 720–22.

²²¹ The principal concurrence went so far as to call the Court’s analysis “stuck in a bit of a time warp.” *Id.* at 724.

²²² *Id.* (citing *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985)).

²²³ *Id.* (citing *Solid Waste Agency of N. Cook Cnty. v. Army Corps of Eng’rs (SWANCC)*, 531 U.S. 159 (2001)).

²²⁴ Revised Definition of “Waters of the United States,” U.S. Army Corps of Eng’rs, 33 C.F.R. § 328.3(a); EPA, 40 C.F.R. § 120.2(a) (Sept. 8, 2023).

²²⁵ Revised Definition of “Waters of the United States,” U.S. Army Corps of Eng’rs, 33 C.F.R. § 328.3(a); EPA, 40 C.F.R. § 120.2(a) (Sept. 8, 2023); EPA & U.S. ARMY CORPS OF ENG’RS, FACT SHEET FOR THE FINAL RULE: AMENDMENTS TO THE REVISED DEFINITION OF “WATERS OF THE UNITED STATES” 2 (Aug. 2023).

“adjacent,” in the context of wetlands subject to Clean Water Act jurisdiction, is defined as “having a continuous surface connection.”²²⁶ While the exact number of wetlands now excluded from Clean Water Act jurisdiction is still unclear, in 2017, the EPA produced an internal analysis estimating that adoption of a continuous surface connection test per *Rapanos*—which is the test the Court adopted in *Sackett*—would remove at least fifty percent of wetlands in the United States from Clean Water Act jurisdiction.²²⁷

IV. HISTORY OF THE INDIANA DUNES NATIONAL PARK BEFORE 1966

The Indiana Dunes region has long existed in a state of tension between industry and recreation, and the Indiana Dunes’ proximity to Chicago has been simultaneously an asset and a detriment.²²⁸ The land was heavily used for industrial purposes before the Lakeshore was established in 1966, yet it also provided a recreational destination for locals and Chicagoans alike.²²⁹ Urban growth, industrial pollution, and inadequate federal water pollution control laws led to significant pollution in Lake Michigan and along Indiana’s Lake Michigan shoreline by the mid-twentieth century.²³⁰ An area resident recounted steel mills discharging waste “straight into the [l]ake”; another resident recounted a past mill foreman’s story that the steel companies “dump[ed] waste into the lake . . . [to] try[] to get more land to build on.”²³¹ Another resident recalled a sign warning people of danger from chlorine gas near a stream by a park pavilion in the

²²⁶ 33 C.F.R. § 328.3(c)(2); 40 C.F.R. § 120.2(c)(2).

²²⁷ Richard J. Lazarus, *Judicial Destruction of the Clean Water Act: Sackett v. EPA*, U. CHI. L. REV. ONLINE, (Aug. 2023), at 5 n.21, <https://lawreview.uchicago.edu/judicial-destruction-clean-water-act-sackett-v-epa> [<https://perma.cc/958Z-V5UW>].

²²⁸ See generally FRANKLIN & SCHAEFFER, *supra* note 7 (examining the land use conflict at the Indiana Dunes from the mid-1800s through the early 1980s).

²²⁹ See, e.g., *id.* at 11–12 (briefly discussing sand-mining at the Indiana Dunes); *id.* at 14–16 (discussing the development of the Chicago steel industry and the industry’s expansion into northwestern Indiana); *id.* at 25–26 (discussing the Saturday Afternoon Walks, the first documented organized group of Chicagoans to regularly recreate in the Indiana Dunes starting around 1909).

²³⁰ See Lane, *supra* note 7, at 74–76.

²³¹ *Id.* at 75.

Indiana Dunes State Park.²³² That resident later realized the chlorine gas was leaking from a storage tank near a parking lot.²³³ Establishing the Lakeshore became not just an act of saving the region's natural features but a public health imperative.

A. Activists Long Sought to Protect the Sensitive Indiana Dunes Ecosystem and Preserve the Area's Natural Features for Scientific and Recreational Purposes.

Chicagoans' conservation and recreational ties to the Indiana Dunes region date to at least the turn of the twentieth century.²³⁴ As Chicago itself underwent great change, various social organizations and conservation groups began engaging with the Indiana dunes area and promoting specific conservation measures.²³⁵ Upon establishment of the National Park Service in 1916, activists rallied in support of creating a national park in the Indiana Dunes region,²³⁶ gaining the support of the National Park Service's first director, Stephen Mather.²³⁷ Despite Mather's proposal for a Sand Dunes National Park along Indiana's Lake Michigan

²³² *Id.* The Indiana Dunes State Park, separate from the Indiana Dunes National Park, was established in 1925 and is now bordered by the Indiana Dunes National Park and Lake Michigan. *Indiana Dunes State Park*, IND. DEP'T OF NAT. RES., <https://www.in.gov/dnr/state-parks/parks-lakes/indiana-dunes-state-park> [<https://perma.cc/SA62-626N>]. It stretches for more than three miles along Lake Michigan and includes 2,182 acres of land. *Id.*

²³³ Lane, *supra* note 7, at 75.

²³⁴ FRANKLIN & SCHAEFFER, *supra* note 7, at 24–25. The author acknowledges the problematic history of the conservation movement; however, that topic is beyond the scope of this Note.

²³⁵ In the last decades of the nineteenth century, Chicago underwent extensive social and physical change through the 1893 World's Columbian Exposition and the preservation of open space and lakefront access within the city. Robert W. Rydell, Chi. Hist. Soc'y, *World's Columbian Exposition*, ENCYCLOPEDIA OF CHI., <http://www.encyclopedia.chicagohistory.org/pages/1386.html> [<https://perma.cc/7A48-7R5V>]; Carl Abbott, Chi. Hist. Soc'y, *Planning Chicago*, ENCYCLOPEDIA OF CHI.,

<http://www.encyclopedia.chicagohistory.org/pages/972.html>

[<https://perma.cc/S8AC-KQ7Q>]. The *Plan of Chicago* of 1909, popularly known as the Burnham Plan "after its principal author, architect and city planner Daniel H. Burnham," was "an ambitious and farsighted attempt at city design emphasizing open space." Carl Smith, Chi. Hist. Soc'y, *The Plan of Chicago*, ENCYCLOPEDIA OF CHI.,

<http://www.encyclopedia.chicagohistory.org/pages/10537.html>

[<https://perma.cc/LF8A-FQ62>]; FRANKLIN & SCHAEFFER, *supra* note 7, at 24–25.

²³⁶ FRANKLIN & SCHAEFFER, *supra* note 7, at 33, 35; *see also* SCHOON, *supra* note 10, at 214–16.

²³⁷ FRANKLIN & SCHAEFFER, *supra* note 7, at 33–34; SCHOON, *supra* note 10, at 214, 216.

shoreline,²³⁸ the proposed national park failed in the face of opposition from local businessowners who preferred industrial development.²³⁹

Even without a national park, locals and Chicagoans alike saw the Indiana Dunes' recreational value. At least as early as the 1920s, Chicago day-trippers generally traveled by train before hiking down to the beaches in Lake and Porter Counties.²⁴⁰ Many Chicagoans traveled to the Dunes regularly.²⁴¹ As more and more Chicagoans traveled to the western Indiana Dunes for days at the beach, a local resident started building summer cottages and renting them to Chicagoans who would otherwise have traveled back to the city at the end of each day.²⁴² By the 1940s, some renters began building their own summer cottages; for some, a cottage at the Dunes was "one of [their] dreams."²⁴³

B. Industrial Activity at the Indiana Dunes Radically Transformed the Landscape and Polluted Lake Michigan and Nearby Waterways.

Recreational use of the Indiana Dunes has consistently existed in tension with the area's industrial use. While various industries used the Indiana Dunes area and its resources as early as the mid-1800s, industrial development in the area really took off around the turn of the twentieth century with the United States' steel industry's massive expansion.²⁴⁴ The United States steel industry used Lake Michigan, and the other Great Lakes, as a major transportation route, and several ports were constructed along Indiana's forty-five miles of Lake Michigan shoreline.²⁴⁵

1. Sand-Mining Thrived at the Indiana Dunes for over a Century.

²³⁸ FRANKLIN & SCHAEFFER, *supra* note 7, at 34; *see also* SCHOON, *supra* note 10, at 216.

²³⁹ *See* FRANKLIN & SCHAEFFER, *supra* note 7, at 240; SCHOON, *supra* note 10, at 214–16.

²⁴⁰ *See, e.g.*, Laue, *supra* note 24, at 117.

²⁴¹ *See id.* at 117–21.

²⁴² *Id.* at 117.

²⁴³ *Id.* at 119.

²⁴⁴ *See* FRANKLIN & SCHAEFFER, *supra* note 7, at 14–20; SCHOON, *supra* note 10, at 155–56.

²⁴⁵ *See infra* Section IV.B.3.

Extensive sand-mining at the Indiana Dunes quite literally removed entire sand dunes.²⁴⁶ Industrialists used this sand to “reclaim” wetlands and create more arable land,²⁴⁷ and, after fire nearly destroyed Chicago in 1871, the Indiana Dunes provided much of the material used to rebuild and expand the city.²⁴⁸

But Chicago was quickly becoming a railroad city, and the railroads drove the sand-mining industry.²⁴⁹ As one of only two harbors at the southern end of Lake Michigan, Chicago became a transit hub for goods and people by lake and rail.²⁵⁰ Indiana Dunes sand was used to create railroad embankments.²⁵¹ With low overhead costs, sand-mining was appealing—and the supply of sand seemed endless.²⁵² Even as late as 1952, sand-mining removed an average of five thousand tons of sand from the Indiana Dunes daily.²⁵³

2. *The Steel Industry Became the Indiana Dunes’ Dominant Industry.*

Proximity to vast amounts of water was critical to twentieth-century steel production, and the steel industry turned to northwest Indiana when it ran out of land in northeast Illinois.²⁵⁴ Steel companies such as U.S. Steel and Bethlehem Steel built facilities along Indiana’s Lake Michigan shoreline.²⁵⁵ U.S. Steel’s Gary Works location remains the

²⁴⁶ FRANKLIN & SCHAEFFER, *supra* note 7, at 11 (describing sand-mining at the Indiana dunes in general); *id.* at 159 (describing Bethlehem Steel’s sale of sand to Northwestern University in Illinois).

²⁴⁷ *Id.* at 11 (noting that in 1850 Congress ceded swamplands to states like Indiana with the proviso that the states use the sale proceeds to drain and fill in swamplands).

²⁴⁸ *Id.* (noting that “Chicago rose, expanded, flourished, and rebuilt itself after its great fire on sand from the Indiana Dunes”).

²⁴⁹ *Id.* at 11, 14–15.

²⁵⁰ *See, e.g., id.* at 11.

²⁵¹ SCHOON, *supra* note 10, at 83.

²⁵² FRANKLIN & SCHAEFFER, *supra* note 7, at 11 (“The overhead could not have gotten lower: sand-mining companies backed a railroad siding into the nearest dune, chuted or shoveled sand into a waiting car, and thereby provided round-the-clock supply and a profit to match.”).

²⁵³ SCHOON, *supra* note 10, at 99.

²⁵⁴ FRANKLIN & SCHAEFFER, *supra* note 7, at 98–99; CHI. HIST. SOC’Y, *Indiana Dunes: Steel Mills on Sand*, *ENCYCLOPEDIA OF CHI.*, <http://www.encyclopedia.chicagohistory.org/pages/300074.html> [<https://perma.cc/EAR7-VPKC>].

²⁵⁵ *See, e.g.,* FRANKLIN & SCHAEFFER, *supra* note 7, at 98. Inland Steel purchased land within the Indiana dunes in 1919 but the land was still undeveloped in the late 1950s. *Id.* at 159.

company's largest steel mill in the United States, and the company has another steel finishing facility—U.S. Steel's Midwest Plant—only ten miles east.²⁵⁶ U.S. Steel constructed its Gary Works mill from 1906 to 1909; by some accounts, the construction required removing eleven million cubic yards of sand.²⁵⁷ The steel works construction involved both leveling existing sand dunes and pumping sand from the lakebed “through huge suction pipes” to provide a level construction surface.²⁵⁸ In 1959, to accompany the St. Lawrence Seaway's opening, National Steel began constructing a finishing plant along Lake Michigan.²⁵⁹ The steel mills thoroughly transformed the landscape and severely polluted the region.²⁶⁰

3. *The Steel Industry Drove Port Construction on Southern Lake Michigan.*

Lake Michigan, like the other Great Lakes, played a critical role in United States industrial development and has served as a valuable navigable waterway since the 1800s.²⁶¹ The port at Michigan City, Indiana, opened in 1870, and construction of the Calumet Harbor at South Chicago began the same year.²⁶² The growing United States steel industry developed private harbors along Indiana's Lake Michigan shoreline, including the following: Indiana Harbor Ship Canal, opening in 1901; U.S. Steel's Gary Works Harbor, constructed between 1906 and 1908; and Buffington Harbor, opening in 1927.²⁶³ The St. Lawrence Seaway's opening, in 1959,²⁶⁴ connected Lake Michigan—and the entire Great

²⁵⁶ *Locations: U.S. Steel's Footprint*, U.S. STEEL, <https://www.ussteel.com/about-us/locations> [<https://perma.cc/MR9C-K3LG>]. In 2023, Gary Works could process up to seven and a half million tons of raw steel each year. *Id.*

²⁵⁷ See SCHOON, *supra* note 10, at 100, 155; see also FRANKLIN & SCHAEFFER, *supra* note 7, at 19–20.

²⁵⁸ SCHOON, *supra* note 10, at 100; see also FRANKLIN & SCHAEFFER, *supra* note 7, at 20.

²⁵⁹ Lane, *supra* note 7, at 44.

²⁶⁰ See SCHOON, *supra* note 10, at 100, 155–56; see also FRANKLIN & SCHAEFFER, *supra* note 7, at 20 (describing U.S. Steel's obliteration of one stretch of the Indiana Dunes to construct Gary Works).

²⁶¹ See, e.g., FRANKLIN & SCHAEFFER, *supra* note 7, at 14–15 (discussing Lake Michigan's importance to the steel industry since the late 1800s).

²⁶² SCHOON, *supra* note 10, at 107–08.

²⁶³ *Id.*

²⁶⁴ Daniel A. Applegate, Note, *The New Cold War: The Battle to Prevent Eurasian Invaders from Destroying the Great Lakes*, 57 CASE W. RES. L. REV. 391, 392 (2007).

Lakes—to the Atlantic Ocean.²⁶⁵ In 1969, the Port of Indiana-Burns Harbor opened as part of a compromise establishing the Indiana Dunes National Lakeshore.²⁶⁶

Industry at the Indiana Dunes thrived for well over a century. Proximity to Chicago brought Chicagoans seeking nature and recreation, but the same proximity brought sand-mining and the steel industry. The twentieth-century Indiana Dunes illustrate tensions common across the United States during the same time period: booming industrial development, environmental degradation, nature recreation, and rapid urban population growth.

V. ANALYSIS

The Indiana Dunes National Park serves as a best practice case study for examining the success of both the National Park Service's leaseback-based land acquisition policy and the Clean Water Act. Examining the Indiana Dunes National Park in this context also highlights that simply designating a unique, vulnerable ecosystem as a National Park Service unit is insufficient protection without the Clean Water Act. While designation of the Indiana Dunes National Park has prevented additional industrial development within Park boundaries, the Clean Water Act shields the unique Indiana dunes ecosystem from the nearby steel mills and Port of Indiana-Burns Harbor.²⁶⁷ Together, national park designation and the Clean Water Act protect and preserve the Indiana Dunes.²⁶⁸ Establishing the Indiana Dunes National Lakeshore and passing the Clean Water Act each relied on citizen activism and congressional willpower to act decisively and intentionally.²⁶⁹ The Court's federalism and private property concerns pale in comparison to the benefits of the Clean Water Act to sensitive ecosystems like those at the Indiana Dunes National Park. Perhaps above all, community

²⁶⁵ With this connection to the Atlantic came serious invasive species problems: lamprey eels destroyed fish stocks; alewives washed up on beaches and rotted; and, most recently, zebra mussels have wreaked havoc on beachgoers and industry alike. Lane, *supra* note 7, at 79–80. For an in-depth discussion of the ecological repercussions of opening the Great Lakes to the Atlantic Ocean, see DAN EGAN, *THE DEATH AND LIFE OF THE GREAT LAKES* (2017).

²⁶⁶ SCHOON, *supra* note 10, at 108.

²⁶⁷ See *infra* Section V.B.

²⁶⁸ See *infra* Section V.B.

²⁶⁹ See *infra* Section V.B.

activism proved critical to establishing and protecting the Dunes and will be critical in the future as well.

Section V.A examines the Indiana Dunes National Lakeshore leaseback program's success.²⁷⁰ Section V.B analyzes the Clean Water Act's critical role in protecting the Indiana Dunes National Park from adjacent steel processing facilities.²⁷¹ Section V.C posits that comparing the story of the Indiana Dunes National Park and *Sackett* reveals significant shifts in the way environmental protection interests and private property interests are weighed against each other.²⁷² Section V.D analyzes the importance of citizen-activism and buy-in for projects such as the Indiana Dunes National Lakeshore.²⁷³

A. The Indiana Dunes National Park Illustrates the National Park Service's Successful Leaseback-Based Land Acquisition Policy.

From any perspective,²⁷⁴ the Indiana Dunes National Park is a clear success. It is a national park successfully created from privately owned lands—individually and corporately owned—with minimal harm to individual homeowners. National Park designation protects the *land* and *waterbodies* within the Park's boundaries from industrial development, but it is the Clean Water Act that has proven essential in protecting the *ecosystems* within the Park from water pollution caused beyond the Park's boundaries.

1. The Indiana Dunes National Lakeshore's 1966 Establishment

By the mid-twentieth century, the steel industry's expansion rate in the region alarmed full-time residents and longtime seasonal residents. Activists formed the Save the Dunes Council in 1952 to protect against further destruction of the Indiana Dunes region.²⁷⁵ The organization had its work cut out for it: in 1959 alone, Portage, Indiana, was incorporated to surround the beach community of Ogden

²⁷⁰ See *infra* Section V.A.

²⁷¹ See *infra* Section V.B.

²⁷² See *infra* Section V.C.

²⁷³ See *infra* Section V.D.

²⁷⁴ Except perhaps from the steel industry's perspective.

²⁷⁵ Lane, *supra* note 7, at 44.

Dunes on three sides;²⁷⁶ National Steel broke ground for a new finishing plant;²⁷⁷ and Northern Indiana Public Service Company (NIPSCO) began clearing land for a coal-fired power plant.²⁷⁸ Bethlehem Steel began clearing land for a new facility in 1962.²⁷⁹ Proponents justified the creation of the Indiana Dunes National Lakeshore as a way to protect the unique Indiana Dunes environment, combat existing industrial environmental degradation, and prevent further industrial development.²⁸⁰ But industry supporters wanted a deepwater port, not a national lakeshore, and the Indiana Dunes National Lakeshore came at a price.²⁸¹ In a compromise initially negotiated by the Kennedy Administration, the Indiana Dunes would be designated a National Lakeshore—but the Port of Indiana would be created at Burns Harbor, more or less in the middle of the shoreline of the proposed park.²⁸²

Congress finally passed legislation establishing the Indiana Dunes National Lakeshore in 1966.²⁸³ The legislation specified the terms under which the Secretary of the Interior could acquire land to create the Lakeshore.²⁸⁴ The legislation specifically suspended the Secretary's condemnation power over single-family dwellings located within the Lakeshore's boundaries.²⁸⁵ Instead, in accordance with contemporaneous

²⁷⁶ *Id.* The fourth side of Ogden Dunes is Lake Michigan. *See id.*

²⁷⁷ *Id.*

²⁷⁸ *Id.*

²⁷⁹ *Id.*

²⁸⁰ *See generally* FRANKLIN & SCHAEFFER, *supra* note 7, at 158–69 (examining the political negotiations that occurred between 1958 and 1966 over the competing park and port proposals).

²⁸¹ *See id.* at 110, 146, 167–69.

²⁸² *See id.* at 167–69 (discussing the Kennedy Administration's initial terms and the final compromise); *see also* Lane, *supra* note 7, at 44.

²⁸³ Act of Nov. 5, 1966, Pub. L. No. 89-761, § 1, 80 Stat. 1309, 1309 (“That in order to preserve for the educational, inspirational, and recreational use of the public certain portions of the Indiana dunes and other areas of scenic, scientific, and historic interest and recreational value in the State of Indiana, the Secretary of the Interior is authorized to establish and administer the Indiana Dunes National Lakeshore . . . in accordance with the provisions of this Act.”).

²⁸⁴ *Id.* § 2(a), 80 Stat. at 1309 (“Within the boundaries of the lakeshore the Secretary of the Interior . . . is authorized to acquire lands, waters, and other property, or any interest therein, by donation, purchase with donated or appropriated funds, exchange, or otherwise.”).

²⁸⁵ *Id.* § 4(a)–(b), 80 Stat. at 1309–10 (“(a) The Secretary's authority to acquire property by condemnation shall be suspended with respect to all improved property located within the boundaries of the lakeshore (b) The term ‘improved property’ . . . shall mean a detached, one-family dwelling, construction

National Park Service land acquisition policy,²⁸⁶ the legislation established a leaseback program.²⁸⁷ The program provided that the owner of an improved property whose property was purchased to create the Lakeshore could retain the right of use and occupancy for up to twenty-five years.²⁸⁸ Owners were paid the fair market value of their properties at the time of purchase, minus the fair market value of the retained right of use and occupancy, if any.²⁸⁹ The retained right of use and occupancy could be conveyed or leased, limited to noncommercial uses.²⁹⁰

Even after the national lakeshore's creation, activists and conservationists found that their vision for the national lakeshore diverged sharply from the National Park Service's plans.²⁹¹ The National Park Service's initial plans for West Beach²⁹² drew a massive outcry from locals and conservationists.²⁹³ The National Park Service proposed a massive recreational complex with Olympic-sized swimming pools and a multi-deck, two thousand car parking garage.²⁹⁴ Conservationists and locals questioned why the National Park Service would spend so much money to build such facilities when the lake was right there.²⁹⁵ After activists mobilized, the National Park Service adjusted its plans significantly, eliminating swimming pools and limiting the parking facility to a simple, ground-level lot.²⁹⁶

of which was begun before January 4, 1965, together with so much of the land on which the dwelling is situated, the said land being in the same ownership as the dwelling, as the Secretary shall designate to be reasonably necessary for the enjoyment of the dwelling for the sole purpose of noncommercial residential use . . . The amount of land so designated shall in every case be not more than three acres in area . . .”).

²⁸⁶ See *supra* Section II.A.

²⁸⁷ Act of Nov. 5, 1966, § 6(a), 80 Stat. at 1311.

²⁸⁸ *Id.* (“Any owner or owners of improved property on the date of its acquisition by the Secretary may, as a condition to such acquisition, retain the right of use and occupancy of the improved property for noncommercial residential purposes for a term of twenty-five years, or for such lesser time as the said owner or owners may elect at the time of acquisition by the Secretary.”).

²⁸⁹ *Id.*

²⁹⁰ *Id.*

²⁹¹ FRANKLIN & SCHAEFFER, *supra* note 7, at 223–28.

²⁹² West Beach is, as one might expect, located near the western end of the Indiana Dunes National Park.

²⁹³ FRANKLIN & SCHAEFFER, *supra* note 7, at 223–28.

²⁹⁴ *Id.* at 225–26.

²⁹⁵ See *id.* at 226.

²⁹⁶ *Id.* at 227–28.

2. *Citizen Activists Advocated to Expand the Lakeshore to Protect Against Further Industrial Degradation.*

Local residents and activists quickly realized that their work to protect the Indiana Dunes had not ended with the lakeshore's establishment in 1966.²⁹⁷ In 1967, NIPSCO proposed building a nuclear power plant immediately adjacent to the Lakeshore.²⁹⁸ By the time NIPSCO ultimately canceled the project, it was clear that designation as a national lakeshore had curtailed but not halted industrial development in the Indiana Dunes.²⁹⁹

The Edgewater community at the far western edge of Porter County had fought additional development in the area for over a decade, and the community realized that mere proximity to the lakeshore only extended a certain degree of protection.³⁰⁰ Less than half a mile from Lake Michigan, the Edgewater community was nestled amongst and atop sand dunes; tiny Oak Place ended with a single cottage perched atop a dune that was accessible only after climbing some five dozen railroad-tie steps. Many Edgewater residents were long-time community activists and had worked to prevent commercial and industrial development in their neighborhood since the 1950s.³⁰¹ By the late 1960s, many Edgewater residents believed including their community within the boundaries of the 1976 expansion was the best way to halt the steel companies' ongoing expansion and incursion

²⁹⁷ See, e.g., *id.* at 220–21 (discussing citizen activists' work to prevent railroad freight yard construction next to the lakeshore in 1968); *id.* at 229–30 (discussing citizen activists' efforts to stop a utility company from dumping industrial waste next to the lakeshore in the early 1970s).

²⁹⁸ *Id.* at 231. While NIPSCO's initial 1967 proposal garnered little immediate attention from citizen activists or the National Park Service, its application for a construction permit and other concrete steps three years later caught activists' attention. *Id.* at 231–32. Interested parties raised alarms about the likely environmental impact from the plant's construction—and the proposed *nuclear* plant's proximity to Chicago and the greater Chicagoland metropolitan region. *Id.* at 231. Interested parties ranged from citizen activist groups and local residents to the Illinois Attorney General. *Id.*

²⁹⁹ *Id.* at 233. Cost increases, construction issues, and increasing public opposition to nuclear facilities prompted NIPSCO to cancel the project in 1981. *Id.*

³⁰⁰ See Laue, *supra* note 24, at 112.

³⁰¹ See *id.* (“During the 1950s, [Edgewater residents] formed the Edgewater Improvement Association to fight proposals ranging from the construction of gas stations to integrated steel mills.”).

into less-industrialized parts of the Dunes.³⁰² Save the Dunes Council's last-minute lobbying led to Edgewater's inclusion in the 1976 expansion bill.³⁰³ Congress passed additional legislation expanding the Indiana Dunes National Lakeshore in 1980 and 1992.³⁰⁴

3. *The Leaseback Program Minimized Harm to Private Landowners.*

The leaseback program, while by no means perfect, eased the transition of the Indiana Dunes from private property to public lands.³⁰⁵ Rather than the National Park Service evicting homeowners from their properties immediately upon acquisition, prior owners had the opportunity to retain the right of use and occupancy for an initial term of twenty-five years.³⁰⁶ Even when lessees conveyed their right of use and occupancy, little conflict occurred.³⁰⁷ Later supplemental legislation permitted some lessees to extend their leasebacks until September 30, 2010, or, for the relatively small number of homeowners whose property was not added to the Lakeshore until 1991, up to

³⁰² *Id.* ("Most [Edgewater residents] believed that being included in the National Lakeshore was the best method of stopping Inland Steel's proposal to build a new steel mill on several hundred acres between Edgewater and Ogden Dunes.").

³⁰³ *Id.* ("When Edgewater was included in the 1976 Indiana Dunes Expansion Bill, [John Laue] was working as a lobbyist for the Save the Dunes Council and was directly involved in some last-minute negotiations that resulted in Edgewater being included within the boundaries of the park."); see Act of Oct. 18, 1976, Pub. L. No. 94-549, 90 Stat. 2529 (expanding the Indiana Dunes National Lakeshore).

³⁰⁴ Act of Dec. 28, 1980, Pub. L. No. 96-612, 94 Stat. 3575 (expanding the Indiana Dunes National Lakeshore); Act of Oct. 23, 1992, Pub. L. No. 102-430, 106 Stat. 2208 (expanding the Indiana Dunes National Lakeshore).

³⁰⁵ See Huber, *supra* note 76, at 1017 ("[L]easebacks are designed as a transitional arrangement—a way of softening the blow to those who will be compelled to leave their homes and move elsewhere while a new national park is created.").

³⁰⁶ Act of Nov. 5, 1966, Pub. L. No. 89-761, § 6(a), 80 Stat. 1309, 1311.

³⁰⁷ *But see* United States v. Arobine, No. 96-1545, 1997 WL 235815 (7th Cir. May 6, 1997). In this case, the leaseback holder quitclaimed her interest to the plaintiff with less than seven years remaining in the leaseback, even after a nine-year extension. *Id.* at *1. When the plaintiff did not vacate by the date her leaseback expired, the United States sued and the plaintiff filed a counterclaim, asserting that she owned the property and should receive a leaseback extension for an additional fifteen years. *Id.* The Seventh Circuit affirmed the district court's grant of summary judgment for the United States, concluding that the plaintiff acquired by quitclaim deed only a reservation of use expiring on January 4, 1995, and was not entitled to an extension. *Id.*

October 1, 2020.³⁰⁸ These extensions allowed many homeowners to age in place; in some cases, the leaseback extensions outlasted the lessees, thus avoiding uprooting older lessees.³⁰⁹ Such an arrangement generally meant that the end of the leasebacks seemed more like a natural transition and less like an eviction.³¹⁰

B. The Indiana Dunes National Park's Vulnerability to Neighboring Industrial Facilities Demonstrates Why the Clean Water Act Remains an Essential Tool to Protect Sensitive Natural Areas, Despite National Park Designation.

Today, a visitor to the Indiana Dunes National Park's West Beach who stands facing the water will see nothing but Lake Michigan—and maybe the occasional powerboat or laker—stretching out to the horizon. On a clear day, the Chicago skyline hovers at the edge of the northwest horizon.

³⁰⁸ 16 U.S.C. § 460u–5(a)(1) (The statute provides that, for those who acquired leasebacks before December 1980, “any owner or owners of record of improved property may retain a right of use and occupancy of said improved property for noncommercial residential purposes for a term (A) ending on his or her death or the death of his or her spouse, whichever occurs last, or (B) for a fixed term not to extend beyond September 30, 2010, or such lesser term as the owner or owners may elect at the time of acquisition by the Secretary [of the Interior]”); *id.* § 460u–5(a)(3)(A) (The statute provides that “[i]n the case of improved property included within the boundaries of the Park after October 1, 1991, that was not included within such boundaries on or before that date, an individual who is an owner of record of such property may retain a right of use and occupancy of such improved property for noncommercial residential purposes for a term ending, subject to subparagraph (B), at either of the following: (i) A fixed term not to extend beyond October 1, 2020, or such lesser fixed term as the owner may elect at the time of acquisition. (ii) A term ending at the death of the owner or the owner’s spouse, whichever occurs later. The owner or owners shall elect the term to be reserved.”); *see also* Lane, *supra* note 7, at inside cover.

³⁰⁹ This information is based on the author’s personal knowledge.

³¹⁰ In one of the few exceptions to this general premise, the lessees had obtained by warranty deed an initial leaseback and special use permit extensions totaling twenty-five years but did not vacate at the end of the final extension. *United States v. Bagnall*, No. 2:10 CV 439, 2011 WL 1641000, at *2 (N.D. Ind. May 2, 2011). The court granted summary judgment for the United States after the former lessees provided neither evidence disputing the United States’ claim of sole ownership and possessory rights nor evidence that the warranty deed was ambiguous. *Id.* at *4. The court concluded the United States had sole ownership and right to possession after the plaintiffs’ right of use and occupancy expired and so ordered the former lessees to vacate. *Id.*; *see also* Mary Owen, *Sands of Time Running Out for Dunes Holdouts*, CHI. TRIB. (Jan. 26, 2011), <https://www.chicagotribune.com/news/ct-xpm-2011-01-26-ct-x-s-indiana-dunes-eviction-0126-20110126-story.html> [<https://perma.cc/7L4H-S37L>] (noting that “[t]here have been only a few instances in which people defy the national park” and refuse to vacate at the end of their leasebacks).

Turning to their right and eastward, the visitor will see the Burns Harbor breakwater at the Port of Indiana stretching into Lake Michigan. Turning back to their left and facing westward, the visitor will see evidence of the United States' ravenous appetite for steel and energy: U.S. Steel's Gary Works, Industrial Steel, LakeShore Coal Company, and the Cokenergy Power Plant. The competing values at play—industry, recreation, and environmentalism—are easily observable from a single spot on the beach.

The balance between industry and the dunes ecosystem is not perfect. Artificial structures at the Port of Indiana-Burns Harbor that extend into the lake have interrupted the natural replenishment of sand at beaches immediately west of Burns Harbor.³¹¹ Without this natural replenishment, the beach immediately west of Burns Harbor—owned by the Town of Ogden Dunes—has completely eroded.³¹² Since the early 1980s, Ogden Dunes, various federal agencies, and the State of Indiana have collaborated to maintain a shore protection system to shield Ogden Dunes' infrastructure from the lake, to little avail.³¹³

Northwestern Indiana's steel industry remains a danger to the Indiana Dunes National Park. Steel industry facilities immediately adjacent to the park have released hazardous chemicals into Lake Michigan several times since the park's creation. When Bethlehem Steel's Burns Harbor facility released an unidentified pollutant into Lake Michigan on January 8, 1988, more than five thousand dead fish washed up on the beach.³¹⁴ The Indiana Department of Natural Resources speculated the pollutant may have been discharged into the lake through the steel plant's warm water discharge.³¹⁵ At the time, the Indiana Department of Natural Resources showed little inclination to penalize Bethlehem

³¹¹ See *Town of Ogden Dunes v. U.S. Dep't of Interior*, No. 2:20-CV-34, 2022 WL 715549, at *3 (N.D. Ind. Mar. 10, 2022).

³¹² See *id.* at *2–3.

³¹³ See *id.* at *3.

³¹⁴ Lane, *supra* note 7, at 76 (“The fish be[ll]ied up and washed onto the shore near the [Bethlehem Steel Burns Harbor P]lant sometime Thursday morning. A survey showed that about 5,000 shad and four carp were killed. The game fish that were killed were two brown trout, nine channel catfish, five small-mouthed bass, and three walleyes.”).

³¹⁵ *Id.*

Steel beyond fining the company the cost to replace the game fish killed.³¹⁶

Both U.S. Steel and Cleveland Cliffs have released hazardous chemicals into the lake in recent years. In April 2017, U.S. Steel's Midwest Plant at Burns Harbor released wastewater containing hexavalent chromium into Lake Michigan.³¹⁷ The spill forced the Indiana Dunes National Park to close park beaches for several days and caused significant alarm.³¹⁸ While initial water testing had not detected hazardous substances in beach waves, the Park Service noted that lake currents and waves could still move the hazardous chemical onto beaches.³¹⁹ In August 2019, the Cleveland-Cliffs Burns Harbor steel manufacturing and finishing facility adjacent to the Indiana Dunes National Park released millions of gallons of high-ammonia and high-cyanide water above and beyond its NPDES permit limits; the discharge eventually reached Lake Michigan.³²⁰ These releases caused massive fish die-offs and forced lengthy beach closures at the Indiana Dunes National Park and other area beaches.³²¹

³¹⁶ *Id.* (“Estimates to replace the game fish will be calculated, and Bethlehem Steel will be expected to pay the cost . . . [I]t is unlikely that charges will be filed against the plant, since there is no evidence of intentional wrongdoing.”).

³¹⁷ See *United States v. U.S. Steel Corp.*, No. 2:18-CV-127, 2021 WL 3884852, at *2 (N.D. Ind. Aug. 30, 2021) (describing the April 2017 release of wastewater containing hexavalent chromium into Lake Michigan from U.S. Steel's steel manufacturing and finishing facility adjacent to the Indiana Dunes National Park and Lake Michigan).

³¹⁸ See *id.* at *2 (noting that Indiana Dunes National Park's beaches were closed for several days after the April 2017 spill); NAT'L PARK SERV., *Chemical Spill Closes Two National Lakeshore Beach Areas* (Apr. 11, 2017), https://www.nps.gov/indu/learn/news/chemical_spill_2017.htm [<https://perma.cc/5C5P-J6MA>] (attributing the beach closures “to the spill of a potentially hazardous chemical” into a nearby waterway that leads directly into Lake Michigan); NAT'L PARK SERV., *Chemical Spill Closes Third National Lakeshore Beach* (Apr. 13, 2017), <https://www.nps.gov/indu/learn/news/third-beach-closed.htm> [<https://perma.cc/4VC9-Z22L>] (noting that the beach closures were “based on a recommendation that all beaches within three miles of the discharge be closed as a precaution”).

³¹⁹ NAT'L PARK SERV., *First Results of Chemical Spill Monitoring at National Lakeshore* (Apr. 17, 2017), <https://www.nps.gov/indu/learn/news/chemspill2.htm> [<https://perma.cc/C5YK-5BW6>].

³²⁰ See *United States v. Cleveland-Cliffs Burns Harbor, LLC*, No. 2:22-CV-26, 2022 WL 1439213, at *1 (N.D. Ind. May 6, 2022).

³²¹ *Id.* (noting that “numerous fish were killed[] and beaches were closed for seven days” after the August 2019 spill).

In September 2021, U.S. Steel's Burns Harbor facility released water with elevated iron levels into Lake Michigan.³²² While the level was later deemed harmless, it tinted the water nearby a rusty red and forced the National Park to close beaches.³²³ Mere days later, in October 2021, the same facility discharged a substance that caused a "sheen" on nearby water.³²⁴

U.S. Steel and Cleveland-Cliffs, who were respectively responsible for the April 2017 and August 2019 releases, have each entered into consent decrees with the United States after investigations revealed systemic problems at their facilities.³²⁵ The post-spill investigations revealed alleged violations of environmental laws at both facilities.³²⁶ U.S. Steel's consent decree implemented extensive public notification requirements for any additional spills, which was a clear response both to the alarm caused by the chemical spill and to the danger the hexavalent chromium poses to humans.³²⁷ The Clean Water Act enabled quick action and investigation for each of these spills and provided the framework by which the United States was able to enter into

³²² Patty Wetli, *Indiana Dunes Beaches Closed Again Due to Unidentified 'Sheen' on Water Leaking from US Steel*, WTTW NEWS (Oct. 8, 2021), <https://news.wttw.com/2021/10/08/indiana-dunes-beaches-closed-again-due-unidentified-sheen-water-leaking-us-steel> [<https://perma.cc/6XB6-HQZD>] (describing the unintentional discharge of an unknown substance by U.S. Steel's Burns Harbor facility in October 2021).

³²³ NAT'L PARK SERV., *Waters of National Park Beaches Temporarily Closed* (Sept. 27, 2021), <https://www.nps.gov/indu/learn/news/waters-of-national-park-beaches-temporarily-closed.htm> [<https://perma.cc/2SWU-2Z4J>] (announcing that the National Park Service "temporarily closed the waters of all beaches at Indiana Dunes National Park due to a discharge of an unknown substance into" nearby waters); Patty Wetli, *'Rusty Colored' Discharge from US Steel Shuts Down Beaches at Indiana Dunes National Park*, WTTW NEWS (Sept. 27, 2021), <https://news.wttw.com/2021/09/27/rusty-colored-discharge-us-steel-shuts-down-beaches-indiana-dunes-national-park> [<https://perma.cc/26KN-LTPP>] (describing the spill of an unknown substance, later identified as elevated levels of iron, from U.S. Steel's Burns Harbor facility in September 2021).

³²⁴ See Wetli, *supra* note 322.

³²⁵ *United States v. U.S. Steel Corp.*, No. 2:18-CV-127, 2021 WL 3884852, at *3 (N.D. Ind. Aug. 30, 2021) (discussing the history of U.S. Steel entering into a consent decree to bringing the company into compliance with the Clean Water Act); *Cleveland-Cliffs Burns Harbor, LLC*, 2022 WL 1439213, at *1 (entering into a consent decree resolving Cleveland-Cliffs Burns Harbor facility's alleged environmental law violations).

³²⁶ *U.S. Steel Corp.*, 2021 WL 3884852, at *2 (noting the facility was out of compliance with environmental laws); *Cleveland-Cliffs Burns Harbor, LLC*, 2022 WL 1439213, at *1 (noting the facility's alleged environmental law violations).

³²⁷ *U.S. Steel Corp.*, 2021 WL 3884852, at *15 (noting that the consent decree implemented "extensive" and "specific" public notification requirements for any additional spills).

consent decrees with both facilities.³²⁸ Despite ongoing hazards from the proximity to industry, the Indiana Dunes National Park clearly protects and conserves a unique aquatic ecosystem on the shores of the largest contiguous freshwater lake system in the world.

C. Juxtaposing the Indiana Dunes National Park and Sackett Reveals Alarming Shifts in Balancing Environmental Protection and Private Property Rights.

The story of the Indiana Dunes National Park stands in stark contrast to *Sackett*. This comparison demonstrates a significant shift in the weighing of private property rights against environmental protection at both the level of individual citizens and the federal government. *Sackett* also highlights the Court's ongoing—or, perhaps, increasing—concerns pertaining to administrative agencies, federalism, and private property rights. While the Court did not go so far as to invoke the major questions doctrine, it expressed serious concerns about Congress's delegation of authority to the Environmental Protection Agency (EPA) through the Clean Water Act.³²⁹ Oddly, the Court seems to have forgotten that it previously found that Congress had clearly delegated authority to the EPA in *Riverside Bayview*.³³⁰

Intriguingly, the *Sackett* Court expressed a concern that the Clean Water Act “significantly alter[ed] the balance between federal and state power.”³³¹ The Court claimed that the Clean Water Act's “express policy” is “to ‘preserve’ the States’ ‘primary’ authority over land and water use” such that Congress is required to make “a clear statement” for the Court to “determin[e] the scope of ‘the waters of the United States.’”³³² As noted above, the Clean Water Act did not significantly alter the balance between state and federal

³²⁸ See *id.* at *2 (noting that U.S. Steel was subject to the Clean Water Act and required to operate within its NPDES permit when the spills occurred); *Cleveland-Cliffs Burns Harbor, LLC*, 2022 WL 1439213, at *1 (noting that the facility violated its NPDES permit under the Clean Water Act).

³²⁹ *Sackett v. EPA*, 598 U.S. 651, 679 (2023) (“[T]he EPA must provide clear evidence that it is authorized to regulate in the manner it proposes.”).

³³⁰ *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 134 (1985) (“We cannot say that the Corps’ conclusion that adjacent wetlands are inseparably bound up with the ‘waters’ of the United States—based as it is on the Corps’ and EPA’s technical expertise—is unreasonable.”).

³³¹ *Sackett*, 598 U.S. at 679 (citation omitted).

³³² *Id.* at 680.

power; instead, it was a logical evolution of water pollution control efforts in line with the development of such efforts throughout the history of the United States.³³³

The *Sackett* Court also openly displayed concern that the Clean Water Act endangers private property rights.³³⁴ As with its nondelegation and federalism concerns, the *Sackett* Court claimed to require a clear statement of congressional intent when an agency action affects individual private property rights.³³⁵ Seemingly, the *Sackett* Court valued the perceived sanctity of private property rights over any public right to environmental protection. Such an approach seems out of step with the growing awareness that climate change demands a more science-based approach to land and water use.

D. The Indiana Dunes National Lakeshore Illustrates Why Citizen Activism, Engagement, and Buy-in Is Critical to Environmental Protection and Environmental Justice.

The Indiana Dunes National Lakeshore, now the Indiana Dunes National Park, exists because citizen activists worked for decades to protect the region—or at least pieces of it—from ongoing industrial degradation at the hands of the sand-mining and steel industries.³³⁶ And when designation as the Indiana Dunes National Lakeshore was insufficient, local activists chose to give up their own private property rights for the sake of protecting the ecosystem.³³⁷ While the park’s creation was not painless and has not perfectly protected the area from environmental harm, what the process reveals, perhaps more than anything, is how critical it is to engage communities in environmental protection work. Citizen activists have sought to protect the Indiana dunes region for decades through the court system.³³⁸ The contrast with the

³³³ See *supra* Section III.A.

³³⁴ *Sackett*, 598 U.S. at 679 (citation omitted) (“[T]his Court ‘require[s] Congress to enact exceedingly clear language if it wishes to significantly alter the balance between federal and state power and the power of the Government over private property.’” (quoting *U.S. Forest Serv. v. Cowpasture River Pres. Ass’n*, 590 U.S. 604, 621–22 (2020))).

³³⁵ *Id.*

³³⁶ See *supra* Part IV.

³³⁷ See *supra* Section V.A.

³³⁸ See *Porter Cnty. Chapter of Izaak Walton League, Inc. v. Atomic Energy Comm’n*, 515 F.2d 513 (7th Cir. 1975); *United States v. 36.96 Acres of Land*, 754

Sackett saga is stark: Chantell and Michael Sackett pursued litigation to privilege their own interests over the needs of the ecosystem in which they chose to live.

The Dunes activists' approach largely aligns with community-based conservation.³³⁹ Community-based conservation is the best path forward to protect sensitive environmental resources and achieve environmental justice.³⁴⁰ The Dunes activists consistently centered the environment in their activism, although it is worth noting that the Indiana Dunes National Lakeshore stopped short of Gary, Indiana, a majority Black city.³⁴¹ The Dunes activists' narrow approach—focusing solely on protecting the environment from industrial harm while overlooking industry's harm to marginalized communities—is insufficient.³⁴² Other environmental activists have sought not merely environmental protection but environmental justice.³⁴³ Any path forward must seek environmental protection *and* environmental justice if it is to be truly community-based environmental work. These lessons can, and must, inform how the United States approaches environmental protection and addresses climate change.

VI. CONCLUSION

F.2d 855 (7th Cir. 1985); *City of Chicago v. U.S. Steel Corp.*, No. 2:22-CV-357, 2023 WL 6037395 (N.D. Ind. Sept. 15, 2023); *United States v. U.S. Steel Corp.*, No. 2:18-CV-127, 2023 WL 4931276 (N.D. Ind. May 16, 2023).

³³⁹ Derek Armitage, Philile Mbatha, Ella-Kari Muhl, Wayne Rice & Merle Sowman, *Governance Principles for Community-Centered Conservation in the Post-2020 Global Biodiversity Framework*, 2 CONSERVATION SCI. & PRAC. 2, 2020, at 3.

³⁴⁰ See, e.g., Martin McCrory, Inara Scott, Angie Raymond & Paul Levy, *Watered Down Voices, Watered Down Justice: A Demand for Polycentrism, Demosprudence, and Praxis in WOTUS Regulatory Reform*, 34 GEO. ENV'T L. REV. 417, 420–21 (2022) (proposing that the EPA adopt a collaborative decision-making process involving affected community members when formulating new regulations defining “waters of the United States”).

³⁴¹ Chris Arnade, *White Flight Followed Factory Jobs Out of Gary, Indiana. Black People Didn't Have a Choice*, GUARDIAN (Mar. 28, 2017), <https://www.theguardian.com/society/2017/mar/28/poverty-racism-gary-indiana-factory-jobs> [<https://perma.cc/SF2C-4SEJ>].

³⁴² For a more thorough discussion of environmental racism in the United States, see CARL A. ZIMRING, *CLEAN AND WHITE: A HISTORY OF ENVIRONMENTAL RACISM IN THE UNITED STATES* (2015) (examining evolving versions of environmental racism throughout United States history and present-day impacts of such racism).

³⁴³ See, e.g., McCrory et al., *supra* note 340, at 422–23 (discussing the birth of the environmental justice movement in Warren County, North Carolina, when Black residents fought to prevent the acceptance of polychlorinated biphenyl-contaminated soil at the landfill in their community).

The Indiana Dunes approach worked. Community activists, the federal government, and the steel industry found a balance between protecting a vulnerable ecosystem, improving water pollution control, maintaining the region's steel industry, and easing the transition from private homeownership to federal public lands through a leaseback program. Establishing the Indiana Dunes National Lakeshore was critical to these efforts—but the Lakeshore alone would have been insufficient without the Clean Water Act's water pollution control measures.³⁴⁴ With its proximity to several steel mills and the Port of Indiana-Burns Harbor, the Park likely has benefitted most from the Clean Water Act's NPDES program. The Park also contains extensive marshes, swamps, bogs, and fens—all types of wetlands—within its 15,000 acres.³⁴⁵ While the Indiana Dunes National Park itself and its wetlands fall under National Park Service protection, the Park serves as a valuable example of precisely what types of environments are at risk now that the Court has limited the section 404 program's jurisdiction over wetlands to only those wetlands that are indistinguishable from a water of the United States.

The successful Indiana Dunes approach highlights an era when private citizens and Congress alike valued environmental protection and creating accessible public lands more highly than private landownership and the right to irrevocably alter sensitive ecosystems. As of 2023, it appears that those priorities have shifted.³⁴⁶ Examining the Indiana Dunes National Park and the Clean Water Act together reveals the success of the National Park Service's leaseback-based land acquisition policy³⁴⁷ and the degree to which the Clean Water Act has proved critical to achieving a sustainable balance between industry and the sensitive Indiana dunes ecosystem.³⁴⁸

Moving forward, the National Park Service, the EPA, and the Corps should continue to collaborate to protect National Parks like the Indiana Dunes National Park through the application of the Clean Water Act's two permitting

³⁴⁴ See *supra* Section V.B.

³⁴⁵ See *supra* Part I.

³⁴⁶ See *Sackett v. EPA*, 598 U.S. 651 (2023).

³⁴⁷ See *supra* Section V.A.

³⁴⁸ See *supra* Section V.B.

programs, NPDES³⁴⁹ and section 404.³⁵⁰ The National Park Service must also work with the Indiana Department of Environmental Management, which administers Indiana's NPDES program, to address the Park's safety in light of its proximity to nearby steel processing facilities. So, too, must the National Park Service work with the EPA to consider how *Sackett* affects the wetlands within the Indiana Dunes National Park. While the wetlands within the Park will remain under National Park Service protection, wetlands ecosystems are commonly interconnected, and the wetlands within the Indiana Dunes National Park may suffer from deposition of fill material in nearby wetlands outside Park boundaries.

To protect other sensitive wetlands ecosystems in the wake of *Sackett*, the National Park Service and other federal land conservation divisions should strongly consider bringing back leasebacks. If the U.S. Forest Service expanded the national forest to encompass Priest Lake rather than simply one side of the lake, that expansion would alleviate the pressures on Priest Lake and the Kalispell Bay Fen caused by new developments like the Sacketts'. Leasebacks are ideal for easing the transition of privately held land into federal ownership for environmental protection purposes and will better protect sensitive ecosystems, like wetlands, than the Clean Water Act alone. Any individual leaseback program does not require the approval of a majority of the United States—just a majority of property owners in a particular area. History shows that leasebacks work to protect vulnerable ecosystems while balancing landowners' interests. Yet the Indiana Dunes National Park's story shows the power of looking not just to the past but also to the future. Edgewater residents—Edgewater *citizen activists*—looked to the future and saw national park protection as the best path forward for the Indiana dunes, even at the expense of their own private property rights. *Sackett's* gutting of Clean Water Act wetlands protection need not be a death knell for vulnerable wetlands. Just as the Court creatively interpreted “adjacent” in *Sackett*, today's citizen activists can respond creatively by turning to proven legal tools like leasebacks.

³⁴⁹ 33 U.S.C. § 1342.

³⁵⁰ *Id.* § 1344.

2024

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Recommended Citation

Hill, Sophie (2024) "Steel or Sand? Protecting the Indiana Dunes Through Community Activism, The National Park Service, and The Clean Water Act," *Mitchell Hamline Law Review*: Vol. 50: Iss. 3, Article 2. Available at: <https://open.mitchellhamline.edu/mhlr/vol50/iss3/2>

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