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U.S. Senate

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Committee on Environment  
and Public Works

Washington, D.C.

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EXAMINING THE IMPLICATIONS OF SACKETT V. U.S. ENVIRONMENTAL  
PROTECTION AGENCY FOR CLEAN WATER ACT PROTECTIONS OF WETLANDS  
AND STREAMS

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The committee met, pursuant to notice, at 10:03 a.m. in  
room 406, Dirksen Senate Office Building, the Honorable Thomas  
R. Carper [chairman of the committee] presiding.

Present: Senators Carper, Capito, Cardin, Merkley, Markey,  
Fetterman, Cramer, Lummis, Mullin, Boozman.

STATEMENT OF THE HONORABLE THOMAS R. CARPER, A UNITED STATES  
SENATOR FROM THE STATE OF DELAWARE

Senator Carper. I am pleased to call this hearing to order.

Two of our witnesses are actually here in person. We have another one who is joining us from the other side of the world, somewhere. Ms. Revels, we are anxious to hear from you. Susan, it is nice to see you. Mr. Sulliván, is your family Spanish? Where are you guys from?

Mr. Sulliván. We are a nice mixture. It is a long story, but we speak Spanish and Lithuanian at home.

Senator Carper. Okay. We mostly stick with English.

Mr. Sulliván. I will keep it in English for today.

Senator Carper. All right. I am happy to call this hearing to order. We are here, as you know, to examine the implications of the Supreme Court's decision on Sackett v. Environmental Protection Agency for our Nation's wetlands and streams. Our hearing is timely, as today marks the 51st anniversary of the Clean Water Act.

Susan has been here more than a few times. We know her; she is part of the extended family here. We especially welcome you today, and Mr. Sulliván and Ms. Revels, we are delighted that you could join us and for your contributions.

While the Clean Water Act has been immensely successful at

cleaning up our Country's waters and slowing the loss of wetlands, the Sackett decision, in my view, has jeopardized nearly a half-century of progress under this bedrock environmental law. To understand the significance of this ruling, it is important for us to recall the state of our Nation's waterways in the early 1970s.

Before the Clean Water Act, our Nation's waters were subject to indiscriminate pollution and destruction. Our waters were so polluted that the Cuyahoga River in Cleveland, Ohio, just north of where I went to college in Columbus, Ohio, the Cuyahoga River caught on fire. That was the year after I graduated.

I think I was on my way to Southeast Asia for the Navy, and I remember reading about the Cuyahoga River catching on fire, and I thought, oh my God. That was a wakeup call, not just for me, but for a lot of people in our Country and a lot of people who worked here in the House and the Senate.

As a result, Congress got to work. Thanks to champions like Senator Ed Muskie, a Democrat from Maine, whom many of us knew, and Senator Howard Baker, a Republican from Tennessee, whom many of us knew and respected both of them enormously, Congress enacted the Clean Water Act in 1972. In doing so, they made a bipartisan commitment to protecting and restoring our Nation's waterways. The law very clearly states that its

objective is to restore and maintain the chemical, the physical, and biological integrity of our Nation's waters.

Today, the science is clear: we simply cannot achieve that goal without protecting wetlands and streams. That is because the health of our waterways and the health of our wetlands and streams are inextricably linked.

Unfortunately, the Supreme Court failed to recognize this link in May of this year when the conservative majority upended more than four decades of agency practice and precedent based on the original intent of the law.

While we don't yet know the full extent of the damage from the Sackett decision, scientists estimate that more than half of our Nation's wetlands no longer have Clean Water Act protections. This loss of Federal protections could have disastrous consequences for our environment and our economy.

Why are wetlands so important? In addition to sequestering carbon, wetlands act as a natural sponge that traps, filters, and slowly releases water. They help provide us with clean drinking water and protect our property and infrastructure. In fact, wetlands can store more than a million gallons of floodwater per acre.

Let me just say that again. The first time I heard that, I didn't believe it, so let me say that again: wetlands can store more than a million gallons of floodwater per acre. That is

pretty amazing. They provide an estimated \$1.2 trillion to \$2.9 trillion in prevented National Flood Insurance Program claims each year in our Country.

Why is that important? Because the National Flood Insurance Program is always running out of money, and the ability to actually save and preserve some money there in that fund is important.

Removing protection for wetlands is especially shortsighted as climate change continues to fuel more extreme weather events, which we witness almost daily. In Delaware, we have seen firsthand how wetlands can mitigate flood risk. After Hurricane Sandy a few years ago, we restored degraded wetlands in communities that had long flooded during storms. Since the completion of that restoration project, many of those communities, thank God, no longer flood.

Wetlands also provide irreplaceable habitat for many wildlife species, especially birds and fish. At a time when habitat loss is one of the factors driving a global crisis of biodiversity loss, we should think long and hard before eliminating protections for more than half of our wetlands.

The Sackett decision increased the burden of wetlands management for States. Currently, 25 States do not have laws in lieu of the Clean Water Act to protect their wetlands. Even in States with wetlands protection laws, many regulators have said

that they lack the capacity to issue permits for the wetlands and streams previously protected by Federal agencies.

Furthermore, watersheds span multiple States, which means that the actions in one State can often implicate neighboring States, like Delaware and Maryland, Delaware and Pennsylvania, Delaware and New Jersey, and so forth. Even if States quickly expand their capacity to protect waters and wetlands, a patchwork of State laws would result in confusion and regulatory uncertainty.

I talked with Susan a little bit about one of my goals, certainty and predictability, and hopefully, when all is said and done here, we can have more of that than we have right now. If States are left to conserve wetlands by themselves, the objective of the Clean Water Act would be unfulfilled.

What is more, wetlands are only one part of the impact of the Sackett decision. This ruling also likely means that more than a million miles of streams no longer have protection under the Clean Water Act. These streams provide over \$15 trillion per year in ecosystem services, including protecting and filtering water supplies.

Streams that only flow for part of the year are especially vulnerable because of the Supreme Court's decision in Sackett. These types of streams play a key role in mitigating drought and protecting water supplies for communities in the Western United

States, particularly for tribal nations. Many of those communities are now rightfully concerned about their ability to protect these streams without Federal protections in place.

Let me just close by saying that the Sackett decision, in our view, ignores science and turned back the clock on protections for our wetlands and streams. This decision puts our health, it puts our environment, and our economy, really, at risk.

For more than 45 years, no less than eight consecutive Democrat and Republican administrations interpreted the Clean Water Act protections to be broader than they are following the Sackett decision. The need to make our Nation's waters safe for drinking, swimming, and fishing was obvious to Congress in the 1970s. Today, I believe the Supreme Court got it wrong, with all due respect, in the Sackett decision. I know that many of our colleagues agree with that.

With that said, I also know there is a wide range of stakeholder perspectives on this topic. We look forward to hearing those views from our witnesses today.

Before we do, let me turn to Ranking Member Senator Capito for her opening statement.

Let me just say to our colleagues, we have all kinds of hearings going on, and votes and so forth this morning, so we will have people coming and going, as you know. Please bear

with us.

If you would, Senator Capito.

[The prepared statement of Senator Carper follows:]

STATEMENT OF THE HONORABLE SHELLEY MOORE CAPITO, A UNITED STATES  
SENATOR FROM THE STATE OF WEST VIRGINIA

Senator Capito. Thank you, Mr. Chairman. I thank the witnesses for being here today. It is the 51st anniversary of the Clean Water Act as we speak.

Thanks for holding this important hearing to discuss the scope and implications of the Biden Administration's Waters of the U.S., or WOTUS, rule and its failure to fully implement the Supreme Court's recent Sackett versus EPA decision.

I fear this inability or unwillingness of the Biden EPA and the U.S. Corps of Engineers to follow the directions laid down by the Court sets up only more regulatory uncertainty for stakeholders and the promise of even more litigation.

On day one of this Administration, President Biden signed an Executive Order to once again reopen and expand the reach of Federal jurisdiction over waters of the United States. It was a solution in search of a problem, even after repeated requests that the EPA and the Corps could never identify specific examples of waters that were impaired as a result of the prior rule, and it took two years to finalize the new version. That is two years without clarity, even as Congress moved forward with infrastructure investments that would be held up by WOTUS jurisdictional determinations.

During that time, EPA Assistant Administrator for Water

Radhika Fox repeatedly promised that the Biden Administration's initial WOTUS proposal would balance elements of the prior two revisions, provide regulatory certainty, and perhaps, most importantly, be durable so that it could withstand legal scrutiny. The rule we ultimately got achieved none of those goals.

During those two years of rulemaking, the Sackett case was making its way up to the Supreme Court with every indication that a ruling would significantly affect any rule the EPA or the Corps of Engineers finalized.

The Administration ignored repeated admonitions from, certainly, me and others, as well as impacted property owners and stakeholders that the agency should wait until the Supreme Court acted to proceed so that they could follow the Court's directives. Ultimately, we were right and they were wrong: the Biden Administration wasted valuable time and resources prioritizing the promulgation of a rule that was unanimously rejected by the Supreme Court for its overreach.

The EPA has now done the bare minimum to revise its initial proposal in response to the Supreme Court's decision to that it could rush a direct to final" rulemaking that avoids transparency and public input. The only reason I can see to take this path is to keep WOTUS alive as a political wedge issue and environmental activists engaged. I fear this is setting us

up for a repeat of WOTUS whiplash.

To understand why, let's just go back a few months. The Supreme Court ruling in Sackett versus EPA handed down in May of this year represented a crucial victory for the cause of cooperative federalism enshrined in the Clean Water Act. The Court correctly limited the scope of Federal authority over wetlands consistent with the text of the Clean Water Act, thus reestablishing the delicate equilibrium between Federal and State governments that Congress intended when it comes to safeguarding our precious water resources.

Supporters of expansive Federal regulation of WOTUS argue that the court's decision leaves waters unprotected. The Chairman spoke to this. That is misleading. It is not only misleading, but it does a disservice to State and local governments who know their own local water issues best and have the most at stake in protecting them.

It is an argument we have heard repeatedly over the past decade as the Federal Government embarked on five separate attempts to create a WOTUS Rule, ramping up or scaling back the reach of Federal jurisdiction and the types of projects requiring Federal permits from Washington's broken regulatory apparatus.

The Supreme Court's decisive ruling in the Sackett case should have put an end to this back and forth; at least, that

was our hope. Instead, on September the 8th, the agencies published the updated final WOTUS Rule amending the 2023 rule to allegedly conform to the Sackett decision. The agencies stated that the sole purpose of the rule was to conform to Sackett, and therefore used a procedural tactic that is supposed to apply only when an action allows no agency discretion and imposes no burdens on the regulated community. What that really results in is no public input or transparency into the rulemaking as it is announced in its final form.

The Supreme Court's decision in Sackett did more than just abandon the old significant nexus standard for determining the scope of Federal waters. The majority established a new test pulled from the Clean Water Act that fully accounts for the law's use of the term navigable waters. The agencies entirely ignored this direction, and so on both process and substance have opened themselves up, I believe, to more legal challenges, creating more uncertainty for businesses, landowners, and project sponsors, and prolonged for all of those involved the likelihood that it is going to necessitate yet another WOTUS rule in the future.

This new revision to WOTUS won't even be consistently applied across the Country. The update does nothing to address other issues that prompted the rule to be stayed by District and Circuit Courts. In 27 States, and I have a little picture here,

the purple are the 27 States, and as we sit here, it is your State, my State, and Senator Cramer's State, and those 27 States where the 2023 rule was enjoined, the agencies will interpret WOTUS consistent with the pre-2015 regulatory regime and the Sackett decision. The agencies, in response to questioning from my staff, could not really tell us how this will be implemented or even if or when guidance would come for those States so that people know the rules of the road.

For 23 States, and I believe that is your State, Mr. Chairman, and Washington, D.C., where the 2023 rule has not been enjoined, the agencies will implement their revised rule. A patchwork of States with differing definitions of Federal jurisdiction is a regulatory nightmare for stakeholders, and you brought out a good point in your statement. A lot of these waters cross over from different State to State and now have different regimes.

As it stands, without regulatory guidance from the agencies, no one has clarity on what either side of the bifurcated implementation scheme will mean for a given project in a given State. It is no wonder that everyone who wants to build something in this Country, whether it is a road or a renewable energy project, a semiconductor facility or a pipeline, everybody wants permitting reform. It is essential for policymakers and regulatory agencies to actually address

these issues and ensure a transparent and inclusive decision-making when formulating these environmental regulations.

Only through a fair and transparent approach can we develop effective policies that protect our natural resources, our precious air and water, and have sustainable growth. The Supreme Court correctly applied the Clean Water Act in the Sackett case. Had the Administration faithfully followed the Court's decision, then perhaps we would have avoided this ongoing litigation and the patchwork regulatory standard that we see now exists. Instead, it is likely going to be up to the courts again to constrain administrative overreach or to give us some clarity.

Despite this summer's rulemaking, Sackett was a significant step forward in an effort to make permitting more efficient and in the effort to limit Federal agency authority to the parameters set by this Congress, or our Congress. Cooperative federalism enshrined in statute, when correctly applied, will protect our environment and our economy. The Executive Branch should follow these instructions from both Congress and the judiciary to move in that direction.

I thank you, Mr. Chairman.

[The prepared statement of Senator Capito follows:]

Senator Carper. Thank you very much for that opening statement.

Now, we are going to hear from our three witnesses, two in-person, and one joining us remotely. First, Dr. Sulliván, who is a professor in the Department of Forestry and Environmental Conservation and the Director of the Baruch Institute for Coastal Ecology and Forest Science at Clemson University, the home of the Tigers.

Dr. Sulliván received a bachelor's degree in anthropology and Native American studies from Dartmouth College, and earned his master's degree in biology and Ph.D. in natural resources from the University of Vermont. After earning his Ph.D., Dr. Sulliván was a post-doctoral research fellow at the University of Idaho. He also served as faculty in the School of Environmental and Natural Resources at Ohio State from 2008 to 2022.

I mentioned earlier the Cuyahoga River catching on fire the year after I got into the Navy in 1969. That was long before you showed up on campus there to be a part of the faculty. Dr. Sulliván has authored something like 81 peer-reviewed publications on aquatic ecosystems and water body connectivity. Is that correct?

Mr. Sulliván. That is correct.

Senator Carper. That is a lot. I thought maybe that was a

typo, but all right.

Next, we are going to hear from Kourtney Revels. I just love that name. Isn't that a great name, Revels? She is the Water Justice Organizer for Bayou City Waterkeeper in Texas. Ms. Revels is a community organizer and education justice advocate who works tirelessly for equity in underserved communities. She has advocated for structural improvements to drainage systems, equitable distribution of resources, and disaster preparedness in Northeast Houston.

Last but not least, we are going to hear from Susan Bodine, who is a partner at Earth and Water Law. Somebody came up with a term called Carpertown, people who worked with me in the Navy or Treasurer, Congressman, Governor, Senator, whatever. We consider you part of EPW Town. It is great to have you back, and thank you for joining us. We don't always agree on everything, but we respect you hugely, as you know, and welcome you warmly back to this hearing room.

Prior to enjoying E and W Law, Ms. Bodine served as the Assistant Administrator for the U.S. Environmental Protection Agency's Office of Enforcement and Compliance Assurance from 2017 to 2021. From 2006 to 2009, you served as the Assistant Administrator for the Office of Solid Waste and Emergency Response, which is now called the Office of Land and Emergency Management.

Ms. Bodine also served as chief counselor for this committee from 2015 to 2017. She is a graduate of Princeton University and the University of Pennsylvania's School of Law.

I don't know if Albert Einstein ever taught, I think we has a professor at either Dartmouth or Princeton, but I like to quote him every day: in adversity lies opportunity. There is some adversity here before us today, but I think we have some opportunity, as well. Shoutout to him.

Welcome, and thank you to each of you for your willingness to testify before our committee today. We are now pleased to hear the testimony of all three of you, starting with Dr. Sulliván. Dr. Sulliván, you are now recognized for five minutes. Please proceed.

STATEMENT OF MAŽEIKA PATRICIO SULLIVÁN, PH.D., DIRECTOR,  
PROFESSOR, BARUCH INSTITUTE OF COASTAL ECOLOGY AND FOREST  
science, DEPARTMENT OF FORESTRY AND ENVIRONMENTAL CONSERVATION,  
CLEMSON UNIVERSITY

Mr. Sullivan. Thank you very much. Good morning, Chairman Carper, Ranking Member Capito, and members of the committee. I appreciate the opportunity to stand before you today and discuss the implications of this case for our Nation.

As Senator Carper has said, I have authored 81 peer-reviewed publications on aquatic ecosystems and water body connectivity, so I spent a lot of my career focused on these questions. In my capacity as a member of the American Fisheries Society and the Society for Freshwater Science, I contributed to an amicus brief to the U.S. Supreme Court in the Sackett versus Environmental Protection Agency. I have included the brief, as well as some key publications, in my written testimony.

As described by Justice Alito, Sackett concerns a nagging question about the outer reaches of the Clean Water Act, the principal Federal law regulating water pollution in the United States. These outer reaches, as he terms them, in fact, refer to our Nation's most vulnerable waters.

Sackett disregards the established science around these smaller and often nonperennial streams and wetlands, which shows that they maintain hydrological, chemical, and biological

functions that are essential in sustaining human well-being, ecological health, and the economy. For example, they are critically important for fisheries, flood control, drought mitigation, carbon storage, and biodiversity, including many endangered species, as well as recreational and commercially valuable fishes like salmon and herring.

I have a few slides here. We will be on the second one. Yes, so the decision is catastrophic for water protection across the United States. The U.S. Supreme Court declared that a wetland must have a continuous surface connection with a water of the United States to be afforded Federal Clean Water Act protection. By requiring adjoinment, Sackett sets a far more limited standard for jurisdiction than any prior agency rule. Please refer to the figure in the slide, which shows how the conforming rule strips protections from our Nation's waters.

This ruling removes the majority of U.S. wetlands from Federal protection. For example, nationwide, approximately 16.3 million acres of wetlands, or roughly the size of West Virginia, are non-floodplain wetlands, meaning they are found outside of non-adjacent to streams or rivers, such as prairie potholes, and will not be federally protected. Next slide.

We must recognize that this historic loss of protections is occurring at a time when the United States has already lost vast amounts of wetlands. Twenty-two States have experienced a loss

of wetland area greater than 50 percent. Many midwestern States have lost greater than 80 percent. Likewise, five million acres of wetlands existed at the time of California's statehood in 1850. Today, only 9 percent of those wetlands remain.

While the court's opinion is focused on wetlands, it also jeopardizes headwater streams. Non-permanent, ephemeral, and intermittent streams represent 59 percent of all streams of the conterminous United States, and greater than 81 percent of streams in the arid and semi-arid southwest. Across the Nation, at least 4.8 million miles of streams are ephemeral and are left without protection. Next slide.

Conservative estimates suggest that wetlands outside of floodplains, such as prairie potholes, provide \$673 billion U.S.D. per year, whereas headwater streams, small streams at the upper ends of watersheds, contribute \$15.7 trillion U.S.D. per year to the U.S. economy via the ecosystem services listed on the slide. If you can't see them, they are talking about water purification, recreation, climate regulation, and others.

Loss of protections for these waters creates a direct risk to human life and well-being from flooding and drought, with marginalized communities most at risk. Wetlands are key players in reducing the number and severity of floods. On the flipside, wetlands protect against drought by storing water during times of high flows and releasing it slowly over time, returning it to

the water table during times of scarcity. Next slide.

Sackett's inadequate protection of water resources on tribal lands leaves vast swaths of reservation streams and wetlands unprotected and does not uphold the U.S. trust responsibility to the tribes. Hunting, gathering, and fishing from wetlands and headwater streams, for example, are critical for subsistence-based economies of rural Alaskan Native people. In this slide, you can see that ephemeral streams represent 90, 39, and 73 percent of reservation stream length on the Fort Apache Reservation in New Mexico and Arizona, Coeur d'Alene Reservation in Idaho, and Menominee Reservation in Wisconsin, respectfully.

The Court describes non-navigable wetlands and streams as outer reaches, but this is akin to minimizing the importance of the network of capillaries and small veins to the functioning of our circulatory systems and overall condition. The Court's decision has significantly weakened water protection and gambled with environmental, human, and economic health at a time when protections should be strengthened. Climate change will only exacerbate this situation.

In closing, I remember meeting Wilma Mankiller when she was the principal Chief of the Cherokee Nation. She said that in Iroquois society, leaders are encouraged to remember seven generations in the past and consider seven generations in the

future when making decisions that affect the people. Not only do I stand before you today as a scientist, but also as a father of four and a citizen. Water is a precious and finite resource. The information I have provided you today is based on science. It is not hyperbole. I urge you to value this science, consider the seven generations to come, and remedy this situation.

Thank you.

[The prepared statement of Mr. Sulliván follows:]

Senator Carper. Dr. Sullivan, thank you very much for your testimony.

We are going to ask Ms. Revels to join us remotely. Ms. Revels, you are recognized for five minutes. Once you complete your testimony, we will come back to Susan Bodine. Ms. Revels, please proceed.

STATEMENT OF KOURTNEY REVELS, WATER JUSTICE ORGANIZER, BAYOU  
CITY WATERKEEPER

Ms. Revels. Thank you, Chairman Carper and Ranking Member Capito, for hosting this hearing to examine the implications of Sackett v. EPA for Clean Water Act's protections of wetlands and streams.

My name is Kourtney Revels, Water Justice Organizer for Bayou City Waterkeeper and a lifelong resident of Houston, Texas. Bayou City Waterkeeper is a Houston-based organization that serves the lower Galveston Bay watershed with a focus on improving water quality, wetlands protection, and flood mitigation across our region while emphasizing climate resilience and environmental justice. I am also a member of the Northeast Action Collective, which organizes for drainage equity in northeast Houston.

My role within Bayou City Waterkeeper is to organize community members and shed light on experiences in communities most vulnerable to impacts of water pollution, system failures, underinvestment, and wetland development.

Water justice is a personal issue for me, because in my community in northeast Houston, I have experienced recurring flooding in the ditches near my home and my daughter's school. We are the communities on the frontlines of climate-related changes and flooding. I am determined to fight for my community

and the safety of my daughter. My journey in advocacy has been deeply rooted in the quest for flood mitigation, infrastructure enhancement, increasing community engagement, and bolstering community resilience.

Houston is emblematic of the struggle against climate change-induced storm flooding. I have witnessed firsthand the devastating impact of these issues. The greater Houston region has repeatedly experienced floods and storm surges, including 2017's Hurricane Harvey that cause over 100 deaths and over \$125 billion in damage.

In Houston, our watershed is home to some of the most unique and diverse wetlands in the world. These wetlands and others provide real services to our communities that often go unnoticed, like reduced costs to water treatment plants for purifying and filtering our drinking water, as well as soaking in and storing flood waters during heavy rainstorms. With climate change heightening the pressure on our infrastructure, the functions provided by healthy, natural water systems are even more critical.

Many of the wetlands in our region do not directly border or have continuous surface connections to another jurisdictional water, so they no longer qualify as Waters of the United States for the Clean Water Act's protections, yet they have real connections to the way our ecosystems function, and refusing to

protect them has consequences to our environment and communities.

The impact of less protective Federal regulations will likely hit frontline communities like mine the hardest. When we pave over wetlands, floodwaters that would normally be stored in soils flow quickly to communities downstream. This strains our infrastructure and exacerbates flooding that disproportionately impacts Black and lower-income neighborhoods. The water is often polluted, not only from industrial waste, but also from sewer overflows during rain events, spewing untreated sewage into our neighborhoods, homes, and waterways.

This decision also emphasizes the need for local and regional policy solutions and investments that can preserve large ecosystems as a means for flood and climate protection. As our region grapples with how to address the intense storms and rising sea levels, it becomes more important to protect our remaining wetlands at the highest risk of loss due to development and other reasons.

Aging systems, ill-equipped to cope with the surge in demand and impact of extreme weather events, puts immense strain on our communities, and these burdens disproportionately fall on marginalized communities, who lack the resources and political representation to address these issues.

Today, I lift up the urgency of protecting wetlands, not

just as an issue of water conservation or water protection, but also as flood equity and ultimately as environmental justice. Together, with local organizations and communities, I am committed to working towards addressing these water justice crises, fostering resilience, and championing equity.

Our collective efforts are integral to forging a more sustainable and just future where no one is left behind in the face of water-related challenges. We need everyone locally, in the States, and here in D.C. to understand that when we lose Clean Water Act protections, we are facing a water justice crisis.

Thank you guys for the opportunity to testify today.

[The prepared statement of Ms. Revels follows:]

Senator Carper. All right. We guys are happy.

[Laughter.]

Ms. Revels. I mean Senators. I am so sorry. Thank you.

Senator Carper. We are just regular guys and gals.

Welcome. Thanks for that testimony, especially for your close.

Now, we are going to recognize not a stranger in this room, but one that we have worked with and admired for a long time, though we don't always agree, but we have great respect for her, Susan Bodine. Susan, you are recognized, if you will, for five minutes. Please proceed.

## STATEMENT OF SUSAN BODINE, PARTNER, EARTH AND WATER LAW

Ms. Bodine. Thank you, Chairman Carper, Ranking Member Capito, and members of the committee for inviting me to testify today on the Sackett decision.

I don't disagree that all water is connected. My children learned about the water cycle in the fourth grade, but the committee needs to understand that the connectivity report that Dr. Sulliván talked about and worked on was written to support the notion of significant nexus. These connections create a significant nexus to a navigable water. It is important to recognize that all nine Supreme Court Justices held that significant nexus is not a valid basis for establishing Clean Water Act jurisdiction.

Further, the background of the 1972 amendments to the Clean Water Act make it clear that the relatively permanent waters test that was articulated in Rapanos, picked up on Sackett, is consistent with the text and legislative history of the Act.

As I discussed in my written testimony and in the article attached to that testimony, Senator Muskie's staff, and you recognized, Senator Carper, that he was one of the lead authors, they have talked about what they were trying to do in 1972, He said, at the time of the negotiations, the House and Senate staff believed that the scope of Federal jurisdiction that they authorized in the 1972 amendments were more constrained than the

scope identified by the Supreme Court, in both the SWANCC decision on isolated waters and the Rapanos decision. So the Sackett case hasn't removed any Clean Water Act restrictions. It reaffirmed its original scope.

Despite Sackett, as I discussed in my written testimony, I am actually concerned about how the opinion will be implemented. In particular, I am worried about the position that has been taken in the preamble to the January 2023 rule that a continuous surface connection makes a wetland adjacent, and that it is just a physical connection, not a water connection, just a physical connection.

All features on the landscape are connected, just like all water is connected. Under this interpretation, you could argue that all wetlands are connected, and that therefore, all wetlands are considered adjacent.

I am also worried about the test for relatively permanent waters that is articulated not in the regs, but in the preamble in January 2023, again, that you can say something is relatively permanent just if you see a bed and bank, just if you see wet leaves. That is the same test that had been used in the past to identify a stream, even a stream or a channel that only has water when it rains. Again, the way they have interpreted Sackett is to retain and perhaps go back to the same issues that gave rise to these Supreme Court cases.

I also disagree that Sackett means we have lost a lot of authority. For example, referring to Ms. Revels' testimony, I worked on Corps of Engineers projects for Houston when I was in the committee and in the House. I worked on the combined sewer overflow and sanitary sewer overflow, the sewer overflow consent decree for the City of Houston, when I was at EPA. Neither of those authorities are affected at all by Sackett. Both of those authorities can actually incorporate wetlands into their projects to achieve their goals.

Again, waterways are still protected based on the authority under point source. If you have a ditch, if you have a channel, even if it is an ephemeral channel, that can be a point source. You can't dump pollutants into that channel. The channel itself isn't a Water of the United States, but it is a point source that, if it leads to a Water of the United States, results in a discharge into a Water of the United States, it is still regulated. You still need a permit.

Even if wetlands don't directly abut, although leaving aside the fact that the agencies think it is a physical connection only, but even if you don't directly abut, many wetlands are still going to be protected by other programs. The Fish and Wildlife Service has grants under the North American Wetlands Conservation Act. The Department of Agriculture protects wetlands through its conservation programs.

There are a lot of nonfederal partners. Ducks Unlimited, Nature Conservancy, many, many local watershed organizations, all working cooperatively with the private sector, with landowners, to conserve wetlands. States, too, have adopted their own definitions of Waters of the State, and about 26 of them have their own separate State programs to protect those waters.

The other 24 do rely on their 401 authority, which means that they can attach conditions to any kind of Federal spending or project if there is a discharge to something that is a WOTUS, but the way that has been interpreted in a recent rule by the Biden Administration, you can then attach conditions whether or not. If all you need is one discharge, and then you can attach kind of whatever conditions you want. That authority is still there, too.

I do also want to emphasize that back in 1972, the staff was worried and the Senators were worried about federalism and constitutional limitations on their authority. As you look at this issue, I just ask you to keep that in mind.

Thank you.

[The prepared statement of Ms. Bodine follows:]

Senator Carper. Thank you for that testimony. In fact, thanks to all of you for your testimonies this morning.

I have a couple of prepared questions I am going to ask, but I just want to start off and say, Dr. Sulliván, do you want to respond or comment on anything that Ms. Bodine has said, please?

Mr. Sulliván. Yes, I do, and I appreciate the comments. I think that a few points.

One is, I think we need to ask the right questions. I am here as a scientist. The first, the intent of the Clean Water Act, I think we can all agree, is to provide clean water. It is expansive by definition. It wasn't called the Clean Large Rivers Act or the Clean Large Lakes Act. By the name alone, I think the intent is clear in terms of its understanding of protecting waters broadly.

I think that is an important point as we think about what the science tells us around protecting clean water. The connectivity report that Ms. Bodine referred to, the intent of that was to provide an exhaustive and comprehensive understanding of the literature around how upstream and upslope waters can relate or affect downstream and downslope waters.

It was not within the context explicitly; in fact, we were directed to focus on the science and not the policy. While it has implications for the significant nexus, it has equal

implications for where we are today. That information is incredibly valuable.

What we have seen since that time in the science in the decades since that time is increased evidence that changes, alterations of upstream and upslope waters have significant effects on downstream and downslope waters. I think that report is meant to buttress the science and really show those important connectivity, how physical, chemical, biological connectivity is critical in maintaining clean drinking water, for example, for downstream waters. I think those are really important points.

In terms of the programs, and perhaps we will talk about that later, I think a lot of the programs that Ms. Bodine mentioned, I agree those are excellent programs, but they are not a comprehensive national legislation that sets the bar for protection. Many of those are actually programs that are restoring, not conserving, and we know, from decades of research, that restoration, although very important, does not equal conservation.

I think we all know that from our own bodies. I injured my wrist a few years ago and had to have surgery. It works, right, it is restored, but it is not the same as the original condition. So a lot of those programs are actually meant towards restoring.

They are also patchy in their distribution. For example,

the Clean Water Act is based on individual organisms and life history strategies. So species that have very small ranges, that is where that is limited to. It is not a comprehensive national legislation, and I think that is what we need to protect the science.

Senator Carper. All right, thanks very much for that.

Let me yield to Senator Capito.

Senator Capito. Thank you. Thank you both, all three of you, for being here. So, the Biden Administration has come in and revised the rule as a reaction to the Sackett opinion. The Supreme Court found, unanimously, that, for different reasons, the mere presence of water does not allow for Federal jurisdictions. They have removed the phrase "significant nexus" from the rule and kind of called it a day.

Ms. Bodine, would you describe the jurisprudence here, and am I right that mere deletions cannot satisfy the requirements that were laid out by our Supreme Court?

Ms. Bodine. Thank you, Senator Capito. I am concerned, and I agree with you, and the reason is that when the Biden Administration wrote their rule in January, knowing full well that the Sackett decision was pending, they hedged their bets, and so they wrote both on significant nexus and relatively permanent waters, but they didn't put the definitions of what they meant, going to Senator Carper's clarity point. They did

not put it in rule language. I think they attempted to isolate it from judicial review by putting all of that in preamble language.

When they issued their conforming rule on September 7th, they excised "significant nexus" out of the rule language, but they left in all of their preamble language about what related to the Rapanos test. What is a relatively permanent connection, what does it mean to be relatively permanent, what is a continuous surface connection, all that is still there. They reaffirmed in a memo that they wrote on September 27th that that is controlling. So that January 23 language from the preamble is controlling the jurisdictional determinations in the field.

Senator Capito. I would say, to simplify there, what I am hearing is that we are going to be back at court, and this is going to be back up to the Supreme Court, the way the Administration has rewritten this rule.

Would that be a safe statement?

Ms. Bodine. Yes, I agree with you.

Senator Capito. Okay. Let me ask you this. I talked about the rulemaking process. They kind of skirted a little bit the rules there, in terms of public input, which is kind of ironic, because in this committee, all we hear about is community input and how we need to make sure we are listening to communities, which I believe is extremely valuable, and we

should be doing that. That is a big emphasis, but they didn't go through this. How is that going to hold up as we move forward legally here?

Ms. Bodine. I was very surprised they took that approach. There is an exemption in the Administrative Procedure Act, saying that if comment is unnecessary, then you don't need to go through notice and comment, but the only time comment is unnecessary is if Congress took away all the discretion from the agencies. If there is any discretion, then you have to take notice and comment, and there certainly is.

There are certainly questions that remain open based on the Sackett decision. In fact, there is a whole discussion about interstate waters in the Sackett decision that they didn't address at all, and then, of course, there is this whole issue of how they are going to implement it, which is in the preamble language.

Senator Capito. I think, also, to get to it, we have, as much as we might have, a different approach to what we are trying to get here, one of the conforming themes, I think, that the Chairman and I have, and all of us have, is some kind of consistency. If we look at this map, we have the purple and the green. The purple is conforming to the 2015 rule; the green is to the new rule.

How in the world are farmers, or construction, anything,

going to go forward, trying to figure this maze of regulatory mish mash? To me, that makes it even more difficult than it already is.

Ms. Bodine. I agree with you completely. The reason is that, the way they wrote the rule, again, not by creating definitions that could be challenged in court, but by essentially leaving everything to a case-by-case determination. So, those case-by-case determinations about how they are going to implement stuff on the ground, that is going to lead to inconsistency, and we have seen that before. There is a really interesting 2004 GAO report on how different Corps districts around the Country took completely different interpretations, and we are going to be back to that.

Senator Capito. To simplify it, in regular terms, the whole Sackett case was about a couple trying to build a house near a lake. It is very granular. We are talking kind of big, bold definitions and how it is going to implement and everything, but basically, it is about homeowners, construction folks, farmers. It is the basic parts of our different States that are most equally affected.

I think I am out of time. I will turn it back to you, Mr. Chair.

Senator Carper. Thanks for those questions.

Next, Senator Cramer, please. Thank you.

Senator Cramer. Thank you, Mr. Chairman. Thanks, Senator Capito, and to all of our witnesses.

I do think you are right. We are sort of arguing two things here. You are arguing that the science and the effects; you are arguing the law and the constitution. For those of us that want to go back and forward seven generations, my sixth-great grandfather gave his life at Bunker Hill for the cause of liberty. I believe if we are going to use broad definitions, that would be for the cause of federalism, not in the insignificant issue that we should ignore for the science.

I want to ask you, Ms. Bodine, earlier this year, in this committee, Lieutenant General Spellmon, the head of the Corps of Engineers, testified. I gasped when he said it. He said it rather casually in the context of workforce. He said that the Corps of Engineers considers about 80,000 Federal issues a year, 80,000 thousand Federal decisions per year.

Do you believe that if there are 80 thousand regulatory actions by the Corps of Engineers that the clarification, the simplification of Sackett, should reduce that workload for the Corps of Engineers, and perhaps there is some efficiency that we could actually gain from this?

Ms. Bodine. Unfortunately, I don't think we are ever going to see that, because the way they set it up, it is going to be case-by-case determinations instead of right definitions.

Senator Cramer. Thank you. That is my concern. How much simpler could they make it? How much more prescriptive could they have been? I suppose you could say, we could be more prescriptive if we changed the Clean Water Act to the Navigable Waters Act, but we don't call the Endangered Species Act the Every Species Act. Titles are one thing; definitions are another thing.

I want to ask you about permitting reform. Senator Capito referenced the importance of it. A lot of us on all sides of the issue are concerned about it and want some permitting reform. One of the things that I have emphasized throughout this debate is, it has become just as difficult to permit a wind farm or a solar panel farm or a transmission line as it is a fuel pipeline of some sort. Transmission lines and pipelines and, for that matter, interstate highways are long, linear, often, almost always, multi-State, multi-jurisdictional infrastructure.

Because of the complexity of this type of infrastructure, Congress established the Nationwide Permits Program to allow these projects to obtain one permit, as long as they are determined to have a minimal effect on the environment.

Can you discuss the importance of the nationwide permits, and maybe also considering both the efficiency of it, as well as the effectiveness, I guess, of a nationwide permit?

Ms. Bodine. Yes. The Corps of Engineers' Nationwide Permits is really the reason why we haven't completely stopped building infrastructure in this Country, because it is a more efficient and truncated review based on minimal impacts. There has been a gradual narrowing of the nationwide permits, which means that more and more would be subject to the individual permits, which are what take years and years and years, and are subject to lawsuits.

If there isn't Federal jurisdiction, then you don't need to get the nationwide permit, but that question is going to be decided case by case, and it remains to be seen how that will be applied.

Senator Cramer. It is hard for me as a former regulator to imagine multi-State, multi-jurisdictional, linear infrastructure that doesn't have a Federal nexus somewhere along the line, right, so it seems to me that. Anyway, that said, it is another part of the discussion I think we ought to get back to.

Let me ask, where do you see the legal fight coming? Obviously, two and a half pages of amendments to a 141-page rule in the context of a major Supreme Court decision isn't going to be adequate, it is certainly not adequate for the Prairie Pothole region that I come from. By the way, with all due respect, not federally protected does not mean not protected. In fact, I would submit that the mediocrity of the Federal

Government is far, far worse for the protection of wetlands in North Dakota than what North Dakotans, for that matter, what farmers, how they protect their own wetlands.

Where do you see the legal fight coming in the next several months?

Ms. Bodine. I think, and again, I am not representing anybody in this, but what I have read and heard is that yes, there are groups that are going to challenge the September conforming rule based on both the issue of no notice and comment as well as the substance, and then the litigation over the January rule is ongoing.

That is why it is not in effect. That is why it is stayed in 26 States, and that litigation will go on. Yes, there will still be litigation.

Senator Cramer. Let's face it, as long as there is chaos and uncertainty, there is going to be litigation and stays, and maybe that is a strategy in and of itself.

Thank you, Mr. Chairman. Thank you.

Senator Carper. Thank you, Senator. We have been joined by Senator Merkley. If you would like to jump in, you are next in line. Thanks for joining us.

Senator Merkley. Thank you very much, Mr. Chairman.

Senator Carper. After you, if no one else shows up, Senator Mullin, you would be next, and then Senator Boozman.

Senator Merkley. Dr. Sullivan, it is well-established, the connection between wetlands and the nesting and feeding habits of 50 percent of North American birds, 31 percent of plant species. These play a vital role in so many ways.

I wanted to ask you, though, about a particular angle. That is related to whether the loss of protection for wetlands impacts tribal communities. The wetlands are critical to sustain fish species, like the various protected species in Klamath Basin in Oregon, culturally significant plants and first foods.

Are some of these vital ecological and culture functions in jeopardy, and how will Sackett affect tribes across the Country?

Mr. Sullivan. Thank you, Senator Merkley. Yes, this is a critical issue, one which I work with many tribal partners myself addressing these sorts of questions.

I think we probably need to back up a step to fully understand the situation. One is, the key piece is that for the dispossession of land, when it is entered into the trust responsibility with the tribes, and part of that trust responsibility was to protect natural resources, including water. That is a really critical piece that we have a burden of responsibility to protect water as well as other natural resources.

The other pieces of this is, and it is clear to understand,

that we have a duty to protect tribal rights and resources that we don't shoulder with every other group. Although this was initially meant to serve as a protective role, that trust responsibility has morphed today into Federal authority that is considered plenary.

The reason that is important is the combination of limited tribal authority and plenary Federal authority has cause tribes to rely heavily on Federal environmental legislation rather than their inherent sovereignty for environmental protections within tribal lands. That is one point I want to make.

The other is that, despite the trust responsibility, many tribes have found that Federal protection of waters is insufficient, has been inadequate in providing sufficient protection, leading to impaired water quality, largely because of the TAS provisions, which is the Treatment as a State, and I want to make a point here. As of 2018, only 54 of the roughly 330 federally recognized tribes that meet TAS eligibility requirements had received TAS status, and only 44 of those had their water quality standards approved by the EPA.

This leads us to a situation where tribes are in limbo a little bit in terms of protecting water. To your point, these waters are critical. I showed a map earlier of ephemeral streams across multiple reservations. Those were mapping that we did using the most advanced techniques to map ephemeral

streams. Ephemeral streams and wetlands are critical for many tribal nations for a suite of different purposes, ranging from subsistence purposes, hunting, fishing, and gathering, to spiritual purposes.

A couple specific examples I could give is camas is a critical plant in the western United States in the northwest. Where does it grow? It grows in areas around ephemeral streams and seasonal wetlands. These have been longstanding subsistence plants that are central to many tribal cultural practices and subsistence. So that is an example where those waters then lose protection.

Another point that I really want to make, and this is critical, is that on many reservations, due to the Allotment Act, the Dawes Act, which was essentially that even within reservation land, non-Indians were allowed to come in and purchase land. So that patchwork of jurisdiction on the reservations makes it very hard for the tribes to do this themselves, and they need the Clean Water Act protections to protect those critical systems.

I think it is a critically important piece. I am actually working right now with the Coeur d'Alene Tribe where we are looking at wetlands and restoring wetlands to actually combat drought on the reservation. Critical question, absolute need for a consistent protection at the Federal level for wetlands,

ephemeral streams, and to protect multiple uses, beneficial uses for tribes.

Senator Merkley. Thank you very much.

My time is up, so I will just close with a comment, which is in Oregon, we have experienced intense droughts over the last few years. There is a lot more attention to the role of groundwater. Many ranchers are starting to ask for oversight of the control of groundwater for that reason, because if the level drops too low, you are in trouble. It is also drawing attention to the connection of the groundwater filtering and effect on cooling in terms of algae in the lakes and other factors, whether or not it is connected by surface water.

Thank you, Mr. Chairman.

Senator Carper. You are welcome. Thank you, I know you have a lot on your table this morning. Thanks so much for making time to join us and for your questions.

Senator Mullin, you are next, please.

Senator Mullin. Thank you, Mr. Chairman. Is it Sulliván, is that right? Where do you live?

Mr. Sulliván. South Carolina.

Senator Mullin. City?

Mr. Sulliván. It is a small village called McClellanville.

Senator Mullin. How much time do you spend in Indian country?

Mr. Sulliván. How much time do I spend doing what?

Senator Mullin. How much time do you spend in Indian country?

Mr. Sulliván. Quite a bit. I used to live in Idaho; I have projects. I was just out, actually.

Senator Mullin. Are you tribal yourself?

Mr. Sulliván. I am not tribal, no.

Senator Mullin. You are not? I am Cherokee. I lived in tribal land my whole life, and I can tell you, we start talking about seven generations, my kids are probably close to that. We live in the Cherokee Nation inside the reservation, my whole life. You bring up Wilma Mankiller and talk about seven generations there, and you really bring up a lot of interesting points.

But you forget one thing, that tribes have been fighting forever to get the government out of the way. We don't need more government involvement. In fact, that is what led us to Oklahoma to begin with. We have been fighting for water rights forever, and I can assure you that your definition is saying that all waters belong to the United States of America. Is that what you are saying?

Because that map you showed up said that everything flows, eventually, into what you consider a navigable body of water and it is all connected, and so by your definition, you are saying

that all waters belong to the waters of the U.S. Right?

Mr. Sulliván. I am going to back up a step there.

Firstly, all the --

Senator Mullin. No, I don't need you to back up. I am just asking you, is that what your definition is?

Mr. Sulliván. My definition is that waters of the U.S. --

Senator Mullin. All tied together. That is basically what you are saying?

Mr. Sulliván. My definition, from a scientific perspective, waters are tied together. I am not --

Senator Mullin. Okay, so all waters belong to the U.S., so there is no private water rights. So all this land rights that we have been fighting for, farmers have been fighting for, tribes have been fighting for, actually, it doesn't exist, because underneath your definition, all belongs to the United States, and we should all ask permission to the United States before we can even water our cows in a pond.

Mr. Sulliván. No, not at all, and I think you are misinterpreting what I am saying and the intent of what I am saying.

Senator Mullin. Underneath your broadened definition, you are saying all waters belong to the Waters of the U.S.

Mr. Sulliván. No, I am here as a scientist, saying waters are connected.

Senator Mullin. Well, you are also giving your opinion, too.

Mr. Sulliván. No.

Senator Mullin. Well, when you start talking about Wilma Mankiller, and you are talking about seven generations, and you are doing all this, yes, you are. You are giving your opinion about this in a place that you haven't lived.

I take a little bit offense to it to some degree, because you keep talking about all this tribal like you are trying to protect tribal land, and you forget the simple fact that we have simply been fighting for water rights forever on traditional lands, and we really don't want the Federal Government getting involved in it. That is not what we want. We want to be able to use our water without having to ask permission, and if you connect all the waters of the U.S. and you put it underneath a broad definition of saying that everything is tied into that, then that is exactly what it would lead to. It would exactly -- if you say all of it belongs underneath waters of the U.S., everything we would do on tribal land from then on would be us requiring to have some type of permit from a big, overreaching Federal Government. Would that be fair to say?

Mr. Sulliván. I am waiting for you to finish so I can respond.

Senator Mullin. Go ahead.

Mr. Sulliván. I think of a couple points to make. First of all, I absolutely respect where you are coming from. The work I am presenting today and as part of my written testimony, is with tribal partners who wrote these papers and we are working together. You are talking about opinions, but these are points that we are driving together in collaboration.

The position I have here is as a scientist understanding how these waters are connected and how alterations of that connectivity can impact waters on tribal lands.

Senator Mullin. But you are saying that they are all connected.

Mr. Sulliván. They are connected.

Senator Mullin. Are you not afraid of the overreach of the Federal Government at this point, because I am very skeptical.

Mr. Sulliván. My role here is as a scientist. I am not talking --

Senator Mullin. Underneath the Clean Water Act, we originally said that it was navigable bodies of water. The reason why we said in the original navigable bodies of water and we started talking about the 404 and the 402 permits was because we wanted to limit the scope and the reach of the Federal Government.

We came in and redefined that to the Waters of the U.S., and specifically said they were adjacent, because we were afraid

of the Federal Government overreach of going too far in country.

Now, we are saying that everything is tied into. There are 72,000 farmers in Oklahoma, 72,000. I am one of them. My family has been raising cattle on the same land we have been to since we were forced to walk there in the mid-1830s. It is very difficult to say that now, from now on -- are you gaveling me down, and everybody else has went farther than me?

Senator Carper. No, I did not go like that, okay? Just to remind you -- excuse me -- just to remind you that your time has expired. Continue. Continue, okay?

Senator Mullin. I am good.

Senator Carper. All right. Please, go ahead. Thank you.

Senator Lummis. Welcome, witnesses. Ms. Bodine, are you concerned that the wording of the 2023 rule will create uncertainty for landowners across the west, and particularly in Wyoming?

Ms. Bodine. Yes, Senator Lummis. I am very concerned about that. It has been set up as case-by-case jurisdiction, and as what we have seen before, that has led to regulatory expansion and inconsistencies.

Senator Lummis. During your time at the EPA, have you ever seen the Administration willfully ignore the Court's ruling, as they seem to be doing in Sackett?

Ms. Bodine. I have not.

Senator Lummis. What are they hanging their coat on, in terms of departing from what seemed to be a clear direction in Sackett, to get to where they are today?

Ms. Bodine. In their September 8th conforming rule, they excised significant nexus out of their regulations. That is accurate. That reflects what the Sackett decision said.

But what they left was all of the interpretive language, which was in guidance in the preamble. They didn't put it in regs, and that makes it all case-by-case, but they left it all intact. They have said, this is what we are going to do on a case-by-case basis to follow it.

If you compare what they say, how they are going to interpret these terms with the opinion, they don't match. But we may end up having to litigate. People may end up having to litigate that on a permanent basis and not by challenging the rule. That remains to be seen.

Senator Lummis. It seems so unique to me that this could be dealt with on a case-by-case basis, especially after a decision like Sackett. What makes that possible?

Ms. Bodine. They could have written bright lines in their conforming rule and chose not to. I do think that the agencies are trying to hold onto as much jurisdiction as they wanted. There has to be some case-by-case. I am not going to say that everything is absolutely a bright line, but what we have here is

essentially 100 percent case-by-case.

Senator Lummis. I am deeply concerned about that, because some of the examples pre-Sackett of enforcement actions in Wyoming would, to the naked eye of people with common sense, seem to be beyond the scope of the Federal Government. It also seems to fail to recognize State jurisdiction over water, especially quantity, but also quality.

What would you advise if you were involved in the decision making at the agency as a clarification, so we are not just in this pattern of litigating? It almost seems like an effort is being made to run out the clock on people who are regulated and then have to access the courts to have a more reasonable interpretation of the law.

Ms. Bodine. Most people just want to get their project done, and so they won't litigate. That is how you get ever-increasing claims of jurisdiction.

You talked about some older examples of overreach. My concern is that the way they have set this rule up, they have left the door open to go back to that same overreach because of the way they are defining their terms. I would recommend that the operative terms of how the statute should be implemented should be in rule language and not just left to a guidance document.

Senator Lummis. We are told frequently that guidance is

not necessarily something that has to be adhered to with a bright red line, but then there are examples where it is. Does the Congress need to step in and define guidance in a way that makes it less onerous?

Ms. Bodine. If the agencies take the position that a guidance is binding, it is a rule, and it can be challenged in court.

Senator Lummis. I thank the witness.

Thank you, Mr. Chairman.

Senator Carper. Thank you, ma'am. We have been joined by Senator Markey. Senator Markey, welcome, and you are recognized.

Before you do, though, let me ask for a unanimous consent request, if I could, to submit for the record an amicus brief submitted in the Sackett case by 18 federally recognized tribes outlining their concerns with the narrowing Clean Water Act protections. This brief affirms that narrowing Clean Water Act protections through Sackett would have dire consequences for tribes, including undercutting their ability to protect against cross-border pollution. Is there any objection? Hearing none, Senator Markey.

[The referenced information follows:]

Senator Markey. Thank you, Mr. Chairman, very much.

This year alone, we have seen severe flooding, costly storms across the Country. We know that climate change is only going to make those disasters worse, more water, more often. Wetlands are vital to storing water before it gets into our homes and our communities. Almost two-thirds of our wetlands are now at risk of development and destruction, thanks to this misguided Supreme Court ruling.

Dr. Sulliván, do you agree that the Sackett ruling is likely to intensify damage from flooding at a time when we actually need greater storage capacity from our wetlands, thanks to climate supercharged storms?

Mr. Sulliván. Thank you, Senator Markey. I do. I absolutely agree. I think one of the key pieces that we have to recognize there is we have lost tremendous capacity already, so we are past a 50 percent loss of wetlands in the United States. I mentioned that earlier.

Some of these States are upwards of 90 percent, so we are already at a point where the capacity of wetlands to mitigate flooding, exactly through the way you described, wetlands act as sponges, right, so during times of higher flows, they store water, and they release that slowly. They release it not only back onto the landscape, but into groundwater. Wetlands in their historic distribution, we would have seen them hemming

most rivers and serving that role.

I think as we are at a point now where we are working with a limited set, it is, on a commercial two-engine airliner, we are down to one engine right now. When we think about how we are going to maximize the benefits of wetlands, one of those is understanding maximizing their protection so that we maintain the capacity for wetlands to mitigate against floods, which costs money and costs lives, but also, on the flip side, as we discussed earlier, to maximize their capacity to mitigate drought. Those are flip sides of the same coin.

Senator Markey. Is it true that building over wetlands will also contribute to heat surges, amplifying the urban heat island effect that we had a hearing on recently?

Mr. Sulliván. That is absolutely true. It is not just wetlands, it is streams. In fact, there is a well-known scientific principle called the urban stream syndrome, which discusses the changes streams go through under urbanization. Streams and wetlands in urban environments create micro-climates and reduce heat. They absorb, they provide green spaces, and they do exactly that. They create favorable climatic conditions on a local scale, so very critical functions.

Senator Markey. From the Sackett ruling, we are supposed to think that the upstream headwaters don't have any relation to the downstream bodies of water that we fish in, swim in, and

enjoy, but we know that water rolls downhill, so any problems in that water will roll down with it.

Ms. Revels, from what you have seen as a waterkeeper, is it possible to protect our larger rivers, lakes, and bays without protecting headwater streams and wetlands?

Ms. Revels. Absolutely not. In my experience, with just different things within communities, as a community member, I see, on the grass root level, all of the things that are affecting our waterway, like industries, stormwater runoff, things that we don't talk about that lead into our waterway that has to go somewhere. We know that water goes somewhere, and in these disasters where water is sitting and flowing, everything is moving everywhere, so it is a necessity to keep these protections so that our wetlands can work the way wetlands work, by filtering and purifying and putting less pressure on our infrastructure within our cities.

Senator Markey. Do protected wetlands help keep stormwater from flooding chronically underinvested communities with aging or limited infrastructure, Ms. Revels?

Ms. Revels. Absolutely, particularly communities like mine. Now, we are seeing the removal of over 126 acres of wetlands that were previously in front of my neighborhood, and we are just going to be able to sit back and see what happens, but we already know what is going to happen: more flooding and

more devastation.

Senator Markey. In your experience, do those heavy storms cause an uptick in pollution from industrial waste and untreated sewage overflow into communities like yours?

Ms. Revels. Absolutely, because these things are left, they haven't been addressed yet, so when left unaddressed, it absolutely impacts the bigger, broader picture of how things are happening in the city. Ms. Bodine addressed the consent decree. We are still trying to make that work for the community, right, that we are still trying to see the impacts of those on the grass roots levels.

So yes, we need to protections to remain the way they are so that we can see more protections for our communities. Communities are the last persons that are asked questions. We have sat here and talked about protected wetlands, we talked about birds, we talked about tribes, but the frontline communities that are seeing the cancer clusters and the cancer plumes and how the water moves those things around are the last to be spoken about or spoken to.

Senator Markey. Thank you so much. Thanks, all of you, for your testimony.

Thank you, Mr. Chairman.

Senator Carper. Senator Markey, thanks so much for joining us. Thanks for those questions.

We have been joined by my neighbor from Pennsylvania, Senator Fetterman. It is good to see you. Welcome. You are recognized.

Senator Fetterman. Thank you, Chairman. Welcome, thank you for coming today.

Just to kind of set the stage here, Pennsylvania, Dr. Sulliván, how do wetlands in Pennsylvania impact our drinking water?

Mr. Sulliván. Wetlands in Pennsylvania and everywhere are critical in purifying water, and they do, actually, there are three really important pieces to that. They trap sediment, so they remove sediment out of the water, they remove nutrients, so nitrogen and phosphorus, those types of nutrients, and they detox the water, so they take chemicals out.

In doing that, they reduce a huge expense to the taxpayer of purifying water. They do that in Pennsylvania, absolutely. They do that across the Country, and they do that in a way that is 24-7. They work full-time.

Senator Fetterman. Because of the wetlands, that is an impact on clean water, right?

Mr. Sulliván. Correct.

Senator Fetterman. Gosh, I find clean water useful often. It is remarkable.

[Laughter.]

Senator Fetterman. I support clean water.

So now, we have this situation here. The Supreme Court believes that unlimited money is speech, and they believe that women in this Nation aren't entitled to reproductive freedom, and now they attack the Clean Water Act as well, too. Again, the shocking opinion that clean water might be useful to Americans.

Do you believe that this is now based on the politics, or is it because of a very careful, thorough scientific kind of review?

Mr. Sulliván. Sackett got the science all wrong, and that is what I can say. The science is crystal clear. It is not confusing, right? The chemical, physical, biological integrity, which is the goal of the Clean Water Act, of downstream and downslope waters relies on wetlands and streams. It is virtually impossible to restore and maintain the health of our waters and uphold the primary goal of the Clean Water Act while only protecting adjoining waters.

Senator Fetterman. I am no scientist. Our friends in Fox News don't even think I should be a Senator, but to me, personally, it just seems like it is really kind of an extreme right-wing kind of deregulation obsessed that the Supreme Court, and I believe that it puts Pennsylvania's drinking water at risk.

Could you explain that to me, as a non-scientist?

Mr. Sulliván. Explain how it puts it at risk?

Senator Fetterman. Yes, please.

Mr. Sulliván. Yes. So, removing wetlands, removing streams and landscape, they are not protected, and people are saying that, well, just because they are not protected, there are other mechanisms, potentially, that are there, but history tells us a very different story. We arrived at a place where we had already lost 50 percent more of our wetlands across the Country. It is only through legislation like the Clean Water Act that we actually can --

Senator Fetterman. More than 50 percent? I want to reiterate that: more than 50 percent of our critical wetlands?

Mr. Sulliván. More than 50 percent of wetlands have been lost, historically. That rate continued until the Clean Water Act, until legislation came that then started to slow down wetland loss.

Unfortunately, history tells us there is no evidence to suggest that that is going to change unless we protect wetlands, set the standard for protection nationally and across the floor. I think that is really critical.

I would say, too, that the U.S. public agrees. There was a poll in the New York Times that 72 percent of American adults believe the Clean Water Act should be read broadly to include

wetlands and not only major streams, rivers, and lakes.

Senator Fetterman. I believe clean water is cool. We need it. I think that is kind of our job to make sure we are going to protect that, as well, too. It is truly bizarre to me, personally, that anybody would attack the kind of legislation that has been a demonstrative and dramatic kind of change in our water quality. Is that accurate?

Mr. Sulliván. No, it is absolutely accurate. Can I add one small piece there? I think as we think about these, and I brought this up earlier, are we asking the right questions? In my humble opinion, we should be aligning with the science first, and then once we have that set, then decide how we use water responsibly within that context.

Senator Fetterman. So wait, you are suggesting that we follow the science?

Mr. Sulliván. I am absolutely suggesting that we follow the science.

Senator Fetterman. Lunacy.

[Laughter.]

Mr. Sulliván. Just like we would go to the physician in order to follow the best medicine for our health.

Senator Fetterman. Okay. Thank you for joining, and I apologize for going over, Chairman. Thank you.

Senator Carper. Not at all. We are glad you are here.

Thanks.

Senator Capito?

Senator Capito. I would like to ask one final question before I have to go to another event.

The Federal Government does protect clean water. Our State governments protect clean water, and you mentioned other agencies that are involved in this as well.

Ms. Bodine, could you kind of enumerate for me where the protections are? We are not eliminating or getting rid of any protections of clean water here. We are actually asking an Administration to heed the decision, in part, a unanimous decision by our Supreme Court, and to adhere to the law as it was written 51 years ago and has amended since then.

Can you just talk, just say, if somebody is listening to this, what are our water protections now and how they exist?

Ms. Bodine. Thank you, Senator Capito. I know that the Sackett decision has been depicted as this radical change, and it really isn't. For example, when you talk about isolated waters and wetlands, which the connectivity report tried to establish a basis for regulating those, even though in 2001, the Supreme Court said you couldn't regulate them under the SWANCC decision.

Since that decision in 2001, however many years ago that was, EPA and the Corps have not tried to regulate these isolated

wetlands and isolated waters because of SWANCC. They tried to expand their jurisdiction through interpretations including relying on the connectivity report, but they haven't done that, so that is not even a change from practice because of other Supreme Court decisions. Again, that would be status quo.

But in terms of protections, we have other programs, including cooperative programs, that people engage in that protect wetlands. We do talk about the agriculture, the conservation programs from USDA. The Fish and Wildlife Service talked about how after SWANCC, after 2001, they said 88 percent of the prairie potholes are not regulated.

Okay, but then they went on to say, look, we work with the farmers in a cooperative way, and in the wet years, they are not plowing the prairie potholes. In the dry years, they can plant there. It is cyclical because of how climate works; it is always cyclical.

Again, that is not the same as saying you can never plow there. It is not the same as taking someone's land away. That was the status quo that was described in a 2014 report by Fish and Wildlife Service.

Then, of course, when we talked about waterways, it is true. Water flows downstream, undisputedly. You can't just dump pollutants into a channel, and I don't care whether it is ephemeral or a ditch or any kind of channel, a fissure. All

those meet the definition of a point source in the Clean Water Act. You discharge into a point source, and it is conveyed, another word from the statute, to a navigable water, it is regulated.

So a lot of regulatory remains, a lot of nonregulatory remains. When we talk about other authorities and other projects like the infrastructure projects that this committee spent a lot of time on, I have to disagree. The Corps of Engineers projects that I was talked about for flood control have nothing to do with restoration. The restoration authority is a different authority of the Corps.

The flood control, they do, we call it soft infrastructure or green infrastructure. That is not a restoration. That is setting aside or buying up land instead of building levees. That is done; that is part of projects, where you preserve the wetlands to avoid exactly the flood impacts that I think Ms. Revels was talking about, and we do the same thing with our sewer overflow projects. We call it green infrastructure.

Senator Markey was talking about stormwater. I am personally aware of a number of stormwater projects or in consent decrees where the solution was setting aside land to act as the sponge. That was the solution to deal with the stormwater problem. None of those authorities are affected at all by the Sackett decision.

Senator Capito. Thank you, all three of you. Thank you.

Senator Carper. Senator Capito, thanks. We will see you on the Floor later today. Thank you, ma'am.

I have a couple questions. We may be joined by a few of our other colleagues. We are going to start voting here. In fact, we may have already started voted, but let us keep going until we run out of time. Are you okay on time right now? All right. Ms. Revels, are you okay on time?

Ms. Revels. Yes, I am good. Thank you.

Senator Carper. Good. Ms. Revels, we have just been joined by Senator Whitehouse. While he settles in, tell us, where are you today? Are you in Houston?

Ms. Revels. Yes, I am in Houston.

Senator Carper. Okay. All right.

We have just been joined by a Senator from a State even smaller than Delaware. That would be the State of Rhode Island. We are delighted that Sheldon Whitehouse has joined us. He is a great member of this committee. Sheldon, when you are ready, you are on.

Senator Whitehouse. Higher, but smaller. We share being coastal. We share being small, and we share being faced by having to redraw the maps of our States, thanks to fossil fuel emissions-driven climate change and sea level rise, so we have a lot in common.

One of the things that I want to make a matter of record here is that the Sackett case is one of a series of cases in which the Republican appointees to the Supreme Court, who I would perhaps more accurately refer to as the Federalist Society Justices, have rendered decisions that are very much in the interests of big polluters. There is an unpleasant overlap between the billionaire funders of the Federalist Society while the lists off which Supreme Court nominations were chosen and the billionaires who funded the ad campaigns against Judge Garland first, and then for the three Trump nominees, and a lot of the groups that show up in the Supreme Court to direct those chosen justices how to rule.

In this particular case, we had, first of all, the U.S. Chamber of Commerce, which refuses to disclose how much fossil fuel money it receives, but has become, as measured by the influence map organization, one of the worst climate obstructors in America, notwithstanding that is not the favorite position of a good number of its members. Others included Americans for Prosperity Foundation, which is a 501(c)(3) front group that the Koch operation runs.

The state of the art these days is to have a 501(c)(3) and a 501(c)(4) and have them essentially be the same entity, same location, overlapping staff, board, donors, all of that, and one of them is the 501(c)(3) and one of them is the 501(c)(4).

Those of us in politics know Americans for Prosperity, the 501(c)(4), as one of the most aggressive and powerful political battleships of the Koch Brothers organization. So, Americans for Prosperity Foundation showing up is a pretty big clue as to what the Koch fossil fuel empire wants.

Also, it is supported by Donors Trust, Bradley Foundation, and the Sarah Scaife Foundation. The Cato Institute also turned up, funded by the Kochs, Donors Capital, Donors Trust, Bradley Foundation. The Claremont Institute turned up, funded by Donors Capital, Donors Trust, the Bradley Foundation, and the Sarah Scaife Foundation. Liberty Justice Center turned up, funded by Donors Trust and the Bradley Foundation.

Something called the NFIB Small Business Legal Center showed up, funded by Donors Capital, Donors Trust, and the Bradley Foundation. The Atlantic Legal Foundation showed up, funded by the Bradley Foundation and the Sarah Scaife Foundation. The Mountain States Legal Foundation showed up, funded by the Kochs, Donors Capital, Donors Trust, the Bradley Foundation, and the Sarah Scaife Foundation.

The Southeastern Legal Foundation showed up, funded by Donors Trust, the Bradley Foundation, and the Sarah Scaife Foundation, and something called the Washington Legal Foundation showed up, funded by the Kochs, by Donors Capital, by Donors Trust, by the Bradley Foundation, and by the Sarah Scaife

Foundation.

As you can see, from those common funders, it is very hard to distinguish between all those different amici, and particularly because the Supreme Court didn't require them to disclose those donors, and didn't require them to show that they weren't, in fact, one single interlocking group of scripted and choreographed entities trying to look independent, when in fact, they were all part of the same operation. Sure enough, in this case, they got what the big donors wanted.

Thank you very much.

Senator Carper. Thank you very much.

I am going to go back just a little bit earlier in the hearing. Senator Cramer correctly pointed out that we are talking past each other on science and law. As a legislator here, along with my colleagues, I have a lot of respect for law, as you would hope would be the case, but I know we can't pass laws to tell water how to flow. I think we need to understand that by changing the decades-long understanding of what the Clean Water Act protects and the Supreme Court has changed the realities on the ground.

Dr. Sulliván, could you just please give us maybe a couple real world examples of that?

Mr. Sulliván. Yes. I think talking about place-based examples is important. I guess, let me start on a broad scale

first, though, and just remind folks again that we have lost over 50 percent of wetlands, and so one out of every two wetlands is gone. Even at a large scale, what we see is already a reduced number.

Let me take you to South Carolina for a moment, where nearly 4.6 million acres are categorized as wetlands, of which 90 percent are freshwater wetlands. A large chunk of the land area of South Carolina is characterized as a wetland, ranking South Carolina as the State with the third highest percentage of land area of wetlands, so it is really part of our legacy. It is a quintessential part of the State. They support fish and wildlife, recreation, hunting, tourism, education.

I work at an institute where we have partly a focus on wetlands and streams, and the educational component is critical. It is a huge tourist piece, as well, a huge revenue builder. We have talked about their role in mitigating floods and clean water. They are truly a quintessential part of our landscape, and certainly they are in danger without the safeguards, the full safeguards of the Clean Water Act.

In terms of a specific example, I think there are a lot, but I think let us go to the Okefenokee Swamp for a moment, which is in Georgia. It is one of the largest remaining, intact freshwater ecosystems in North America. In addition to its ecological significance, it is critically important to local

communities, supporting over 750 jobs and nearly \$65 million in annual economic output per year.

It is a national wildlife refuge, which is great, so it is protected, but the concern is that on its doorstep, there are hundreds and hundreds, over 600 acres, of wetlands that are unprotected and subject to mining operations and strip mining. This is a wild place. It is iconic. It is one of the last remaining wild wetlands that we have, and wetlands that are bordering it are directly purifying the water. They are the source waters for the Okefenokee Swamp. We are threatening thousands of species of plants and wildlife, recreational opportunities for birders, fishers, hikers, and kayakers, photographers, more and more.

That is an example. I think there are many across the Country, obviously. I would encourage everybody to think about their own landscapes and wetlands that have meaning to them and understand that not only have a lot of wetlands been lost, but most of those wetlands likely remain unprotected, at this point.

Senator Carper. Thanks very much.

Ms. Revels, I have a question for you. EPA has changed its regulations as quickly as possible to conform to the Sackett decision, as you know. I was surprised how quickly they did that. They did that in order to allow permitting decisions to resume.

Now, we are hearing complaints that EPA may not have gone far enough. I think these concerns miss the point. We just had a radical, I think, a sweeping reduction in water protections. Ms. Revels, what could this mean for your community? The question is, what could this mean for your community? Could you just give us some thoughts one that, please? Go ahead.

Ms. Revels. For my community, it looks like possibly looking like more industry coming in and destroying the few wetlands that we have left, and then those things have a cumulative impact. Ms. Bodine talked about the minimal impacts. We bring industry in, and then they have all these different permits, stormwater runoff, all these different things that impact our water and how many cumulative minimal impacts can one community withstand, right?

So, it just creates a bigger compound. It is like putting sprinkles on the cake. It already had the icing, it was already really good, and then you sprinkle the sprinkles, and you just add more layers to an already complex issue that is really difficult for community members like myself to even address these things at a local level and then at a State level, and here at D.C. It becomes taxing on community members, and oftentimes, outside of our areas of expertise.

We know how to survive storms. We know how to be resilient. We know how to build ourselves back up, but we need

protections to help us with those things as we build ourselves up and make our communities more resilient, we need protections that are going to think about the people to come.

I am already some of your kids' age, and just think about my kid and our grandkids that are going to have to clean this up again. It is a reason that the definitions were amended to protect communities from industry that is just dumping and just not thinking about everybody else. We can't just think about one group. We have to think about the community members, also.

Thank you.

Senator Carper. Okay, thank you.

Dr. Sulliván, another question for you, if I could. We have heard from some of our Republican colleagues that the Sackett decision aligns with the intent of the Clean Water Act. However, as I mentioned, I think I mentioned in my statement, the Clean Water Act clearly states, "the objective of this Act is to restore and maintain the chemical, physical, and biological integrity of our Nation's waters."

Given your scientific understanding of how the health of our Nation's waterways is interconnected with the health of our wetlands and streams, do you believe that the Sackett decision aligns with the objective of the Clean Water Act? Please elaborate on that.

Mr. Sulliván. No, I do not. I believe everything you just

said is very accurate. The science, and I know Ms. Bodine has referenced the connectivity report, which is a fundamental document. I want to remind folks that almost 10 years have passed since then, and there has been a lot of work done in this field and understanding connectivity and the impacts of altered connectivity on downstream and downslope waters, and the evidence increasingly points to the critical nature of maintaining, protecting headwater streams, non-permanent streams, wetlands, adjacent, and geographically isolated. We talked about prairie potholes, as an example.

Alterations to these, the science is unequivocal. It is very clear what it is telling us. I think that is one of the pieces that I am struggling with is that we are talking a lot about regulation and those sorts of things, which I understand, but the Sackett decision got the science all wrong. I can't say that enough. It really is not representing the science. To be perfectly blunt, it shows a fundamental lack of understanding of how natural waters function. That decision is counter to what we understand.

Again, it is not just the connectivity report, but it is a decade of research since then, and thousands of scientists will agree with me on this, that are demonstrably showing that if we do not protect upstream, upslope waters, there are serious consequences.

Again, I will use an analogy with our own bodies. If you going into the hospital and get an IV, it goes into a small vein. Where does that go? It goes through your circulatory system. It is the same idea. I don't think many of us would be willing to sacrifice 10, 20, 30 percent of our circulatory systems and say, well, that is okay. We don't need to protect or maintain the health of a large portion of our circulatory systems. We will be fine.

I can't state enough that the science is clear. I do think that we are locked in a circular pattern here, and that one, we need to be more thoughtful in terms of rulemaking. I will give you a specific example, if I may. It has always been a binary, protected or not protected, yet there are examples at the State level and others, for example, with riparian protections, not water, well, certainly riparian protections, where it is a graded system. Certain waters are most protected. Some are intermediate protection. Some are less protected.

There are more strategic ways to be going about this, and I don't think we are exploring those options. I think we need to value the science, follow the science, and be strategic in how we proceed forward.

Senator Carper. Thank you for that.

I am going to ask one more question of you, Dr. Sulliván, and then I am going to just ask a question of all three of you

to sort of close us out please, so thank you for your patience with us.

The last question I will ask of you, Dr. Sullivan, is we have heard testimony that Sackett does not represent a fundamental shift in wetlands protections and that there are other Federal laws and programs that do protect wetlands. Would you just explain for us, if you would, Dr. Sullivan, why laws such as the Endangered Species Act and North American Wetlands Conservation Act, laws that I happen to support strongly, don't fill the void left by the Sackett decision?

Mr. Sullivan. Yes. I agree those are excellent programs. They should be supplemental to the Clean Water Act. The reason is multifold.

I will give you an example with the Endangered Species Act. The Endangered Species Act is based on individual organisms' current status, trends, life history, information that is derived from that specific organism, so it protects habitat of that organism. Yet, most of those cases are going to be organisms with very limited home ranges, very limited territories.

As a result, that only protects that particular habitat, spatially distinct. It is not something that is far-reaching. It is based on individual species, and those species, of course, are going to have their specific home ranges.

We can think about, there are species of fish, for example, that are endemic only to, endangered species, to parts of Death Valley. Therefore, for that particular fish, the Endangered Species Act will protect habitat in that place. We need something that covers the entire Country. That is an example.

The other thing is species can be delisted. We need long-term plans here. That is supplemental, in terms of wetland protection.

The other program is a grants-based program, and I agree, there has been some great work done. I absolutely agree with that, but any grants-based program is going to be patchy in distribution. It is going to be mediated by who applies, where they have access.

Again, it is not creating a floor of protection, which is needed for wetlands. We cannot afford to lose more wetlands and streams. We need a comprehensive protection, which is exactly what the intent of the Clean Water Act was.

Senator Carper. Just a quick comment, Ms. Bodine, on the same question, if you would. Any thoughts that you have, please share them with us, on the question I just asked. If you don't have any comments, that is fine, we will go to my closing question. All right?

Ms. Bodine. I think I have, the question is, comprehensive versus the existence of the other programs.

The Supreme Court in Sackett interpreted the Clean Water Act. All nine agreed that connectivity is not a basis for the jurisdiction. That significant nexus concept was not valid.

We already, as I put in my written testimony, as I have spoken about today, there are a number of programs out there. Does one collectively cover everything? No, but that doesn't mean that we are going to lose the remaining 50 percent of our wetlands.

I believe this building was built on a wetland. Certainly, the mall was actually an estuary. So yes, there has been a lot of building. Maybe it is first in time, first in right, but I am by no means saying that wetlands aren't valuable, and I agree they should be protected.

But the real fundamental question is how, and should it be through various conservation programs, should it be through cooperative programs, should it be a combination of all that, or should it be a single Federal regulatory program? The Clean Water Act has lofty goals, and then it has some nonregulatory programs, and some regulatory programs. It by no means says that we are going to achieve our lofty goal with just one tool. The Clean Water Act has a lot of tools, and then the Federal Government has a lot of tools.

Senator Carper. All right, thank you.

My closing question will be for each of you. One of the

things that Senator Capito and I try to do is develop consensus on difficult issues. We have been remarkably successful, not entirely successful, remarkably successful on a wide range of issues, not the least of which is the Bipartisan Infrastructure Law, a huge piece of legislation which has its roots right here in this room with this committee. Democrat and Republican, bipartisan, and something that we are both very proud of and seeing it implemented across the Country.

My closing question would be, we have this situation where we have a law we have had for decades that has been litigated. The Supreme Court recently with Sackett handed down a decision that folks on our side aren't at all pleased with. The Administration came right back out of EPA a regulation to try to say well, if this is going to be Sackett, we are going to have to live with Sackett for a while. Here are the regs we think that are consistent and line up with that decision.

My question would be this: we are coming out of this hearing today. I am going to be here for 14 more months. I am standing alongside the Christina River, a beautiful river which flows through Wilmington, Delaware. A couple months ago, I announced I wouldn't run for reelection. I had a great run in the Navy and as Delaware's treasurer, Congressman, governor, Senator, and to serve here and chair this committee, and the Homeland Security Committee, I have just been really blessed.

In the next 14 months that I have here, I am going to be looking for consensus and implementing a lot of stuff that we have authored and enacted, a lot of legislation, but I am also going to be looking for consensus, maybe on some areas where we have not identified the consensus. As we have gone through this hearing today, any thoughts that you might share with us, and where you think there is hope for some consensus, where we might actually work together toward actually making sure that we do have clean water from coast to coast in all kinds of States and situations.

One of the things that Senator Capito and I have been trying to do is provide some certainty and predictability. I used to work, when I got out of the Navy, many years ago, and moved to Delaware, and I went to work in the Division of Economic Development for six months and then got to run for State treasurer when I was 29, and I said, I want to do that. One of the things I learned in the six months at the Division of Economic Development was businesses need certainty and predictability.

Right now, we don't have a lot of that in the situation we are in today. Any thoughts you have about maybe, in the next 14 months, we will restore a little bit of certainty and predictability, and if there are any areas that you think where there might be some bipartisan consensus that we should pursue.

Ms. Bodine, if you would just go first, and then we will just ask our other witnesses, as well, please. It is not an easy question. Any thoughts you have.

Ms. Bodine. This committee has had great successes working on bipartisan issues, and I would point out in particular that the infrastructure programs under the jurisdiction of this committee have always had very great bipartisan support. You had a great bipartisan success with the Infrastructure Bill from about two years ago.

You may want to look at the infrastructure model rather than the regulatory model, because I think that, given how this committee and your past successes, that is going to be your highest opportunity for bipartisan agreement.

Senator Carper. All right, thank you.

Dr. Sulliván?

Mr. Sulliván. Yes, thanks for the opportunity to comment on this. I have appreciated being here. I value all of the comments from my colleagues here and from the Senators. I agree. I grew up on a farm, and I understand.

Senator Carper. Where was the farm?

Mr. Sulliván. It was in Vermont.

Senator Carper. Okay. What did you raise there?

Mr. Sulliván. We had dairy for a while, a long time, and then we had beef cattle, and now it is a sugar operation.

The point I am making is, I am a scientist, but I also understand the practicality around this. I understand that we have to find common ground.

What I am asking for is that we value the science in doing that. As I mentioned before, you go to the physician, you want them to tell you the most current, best treatment for whatever your condition is. We need to do the same thing. Sackett has not done that; it has taken us away from the science.

In terms of next steps, I gave you one before, and I will repeat it because I think it is important. I think we have been locked in a bit of a cycle and not thinking as creatively as we can in the rulemaking process and in how we approach this. To repeat, at the risk of repeating, but I think it is worthwhile, we have been very binary in our approach to water protection. Although the connectivity report and our work since then has shown that there is a gradient of the degree to which upstream and upslope waters affect downslope waters, the rulemaking has still been very binary. It has been protected or not protected. Even if it is a case-by-case, it has still been, at the end, protected or not protected.

We have an opportunity to think a little differently and to understand there are models out there that led us to look at these, and this could be an area, maybe, where we could get some consensus to say, can we come up with an understanding that

certain waters are going to be the highest protection level, some are going to be a little lower. We understand that, so I think that is really important to do.

I also, and I wish Senator Mullin hadn't left quite as quickly as he did, because I had an important point I wanted to make, is that tribal colleagues and I have actually suggested that there be a separate category of WOTUS for our tribal nations that are informed by some of the concerns he was bringing up that are in consultation with the tribes.

I think that is really important that we understand and we dig a little deeper, but I do feel that we need a comprehensive -- I do understand there are a lot of programs out there. I feel very strongly as a scientist in what I see these programs doing and some of the outcomes, they are not the same as a Federal level floor. I feel very strongly that we need to value the science. We need to respect that at the first pass, and then at the second pass, we can figure out effectively together how to use water and working landscapes.

Senator Carper. All right, good, thanks. Thanks very much.

I would ask our minority staff, if you could just convey what our witness has just said to Senator Mullin, I would appreciate that. Thanks very much.

Okay, Ms. Revels, please, if you would like to comment.

Same question: we are looking for a pathway to consensus, if that is a hopeless journey, or if that is man's triumph of hope over experienced, that is fine, but any thoughts you have toward how we might move toward consensus on this really important issue. Ms. Revels?

Ms. Revels. Yes, sir. Absolutely. For me, I think there is plenty of opportunity. This is not a Republican or a Democrat issue. This is a human issue. This is an issue for us all, and it is important that we all have our human hats on and our community hats on and just always are considering the impacts of those that are on the frontlines.

This is my life. I have gotten into this work through necessity, not because I thought it would be a great career path. In the consideration, it is so imperative to have people that have experienced the things that we have experienced, like Harvey, and remembering that when we remove wetlands and pave over wetlands, that is climate change. We are changing the climate; we are changing the planet.

We are all human, and there is opportunity for us to remember our humanity. You guys can always come down to Houston and just see the different demographics from six years ago with Harvey to today and see what the science would say about that.

Senator Carper. Good. Thank you, ma'am, and thanks for joining us all the way from Houston. I am going to give a short

closing statement, and then we will wrap it up.

In closing, again, I want to thank the three of you, each of you, very much for appearing before us today. I want to thank my colleagues who have been able to join us and to participate even though we have a lot going on in other committees now and now with votes on the Floor.

Today, we have heard about the scientific context and actually heard about the history, and we have heard about the impacts of the Supreme Court's decision to dramatically narrow the scope of the Clean Water Act. As a matter of science, we have heard that wetlands and more than a million miles of streams are inextricably linked to downstream water quality.

As a matter of history, we have heard that this decision reverses over four decades of clean water implementation, and as a matter of impacts, we have heard that the loss of protections for over half of our Nation's remaining wetlands and millions of miles of streams will lead to more flooding, more polluted waters, and unfortunately, harm to wildlife. Through Sackett, the Supreme Court has weakened one of our bedrock environmental laws, and harms will be felt nationwide.

I would also like to ask, at this point, unanimous consent to submit for the record a number of letters and statements that I have received from stakeholders. These documents underscore the importance of Clean Water Act protections for our Nation's

health and environment and economy. This is one of my favorite parts of a hearing when I get to ask unanimous consent for something to enter into the record and there is nobody here to object, and I am not going to object to my own unanimous consent request.

Without objection.

[The referenced information follows:]

Senator Carper. Seriously though, before we adjourn, Senators may submit their questions for the record until the close of business on Wednesday, November 1st. We will compile those questions. We will send them to our witnesses, and we ask our witnesses to reply by Wednesday, November 15th.

With that, again, our thanks to each of you. To be continued.

I will close with a nod to my mother. We were born in a coal mining town in West Virginia. We grew up in Danville and Roanoke, Virginia, but my mother was a deeply religious woman. She wanted to make sure we always focused on Matthew 25, the least of these, which starts off, "When I was thirsty, did you give me a drink?"

So with the issues that are before us today, I think it is a moral issue, and it is something that we have a moral imperative to make sure we get it right. We have been trying for a long time, but that doesn't mean we should quit now, and I have no intention. In the next 14 months, I like to say I am going to race once through the tape. Since we are talking about water here, I will have to come up with a new, different kind of way of saying that, like swim through the water.

Anyway, I want to make sure if we can make some progress on this front, that we do find some consensus and ways to provide some certainty and predictability, and I like to do that keeping

in mind the moral imperative that we face with respect to making sure we do have clean water to drink and to live by.

With that, this hearing is adjourned. Thank you all.

[Whereupon, at 12:03 p.m., the hearing was concluded.]