Clean Water Injustice

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Betsy Nicholas is the vice president of programs and litigation for Potomac Riverkeeper Network, managing three riverkeepers and leading advocacy, policy, and litigation for the network.

Evan Isaacson is the director of policy and research for Chesapeake Legal Alliance, where he focuses on protecting communities and waterways throughout the Chesapeake Bay watershed.

THE Supreme Court issued a landmark decision in 2023 that sparked an immediate response from environmental advocates across the nation. In *Sackett v. Environmental Protection Agency,* the Court drastically narrowed the jurisdictional scope of the Clean Water Act. In doing so, the justices in effect sent the message to states that "protecting and restoring water quality is now your job."

Maryland was one of the first to respond to this implied invitation from the Court. The state's Clean Water Justice Act of 2024 was crafted by the General Assembly with help from a dedicated community of local advocates to fill the post-*Sackett* coverage gap. The new law will rectify the injustice caused after *Sackett* stripped the public of its right to seek redress for illegal pollution into waters that are deemed no longer jurisdictional. However, the new law was not just a response to the Supreme Court. This bill was the latest in a series of legislative responses to an alarming decline in the use of the federal CWA to protect waterways from pollution. Thus, Maryland is not alone in countering the rapid falloff in enforcement, capped by the *Sackett* decision reducing the CWA's coverage.

Time will tell if Maryland's new law will culminate years of work to bring back the accountability at the heart of the federal CWA—or if this is just the beginning of a decades-long battle to constantly respond to one crisis after another introduced by this Supreme Court. Unfortunately, the latter is probably more likely, especially in light of the damaging administrative law decisions of the last term. If we are ever to realize the intentions of Congress and keep the federal act from turning into only a paperwork exercise for polluters, we will need the public re-engaged and state and local advocacy organizations well-prepared for the long slog ahead.

Sackett accomplished the long-held objective of many enemies of the CWA by dramatically shrinking its scope and its protections. By narrowing which wetlands and streams are considered jurisdictional "waters of the United States," or WOTUS, under the CWA, the Court instantaneously stripped more than 60 percent from the protections created by Congress and implemented by EPA and the states.

Almost no observer of this case was surprised by the outcome. Though *Sackett* effectively overturned nearly a half century of precedent regarding WOTUS, the writing had long been on the wall. Polluters have been challenging the scope of CWA jurisdiction since shortly after its enactment. But these challenges began to take

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on a particular shape, and a particular target, during the last quarter century.

While earlier cases often involved a defendant arguing that a specific jurisdictional element of the CWA ("an addition" of a "pollutant" by "a person" from a "point source") was missing, in recent decades ideological interest groups increasingly targeted one particular element, WOTUS. Property rights groups, developers, big industries, and other interests have specifically sought to narrow which wetlands and waterways are considered jurisdictional and thus protected by the act. They did so because of the perceived nexus between land use decisions and CWA protections, especially Section 404's ban on unpermitted dredging and filling of wetlands and waterways.

For decades, industry groups have continually challenged environmental protections, gaining more success as the Supreme Court became more conservative. It was inevitable that the high court would eventually rule in favor of narrowing the CWA's scope. But this ruling goes much further, contradicting established legal precedent, congressional intent, and scientific knowledge that shows smaller waterbodies are crucial for the health of larger ones.

So when the *Sackett* decision came down last year, policymakers turned to resources like ELI's 50-state survey of enforceable water quality measures, and to local advocates for deeper dives into the scope of their state's wetland and water pollution laws. For some states, this task is comparatively simple because the jurisdictional definition of "state waters" simply needs to be expanded to extend protections for waters that used to be protected by the CWA. For other states, the situation is much more complicated.

Even in states where there are no obvious post-*Sackett* geographical or hydrological gaps because a state's jurisdictional definition includes all types of waters and any wetland, that does not mean that there are no gaps. Such was the case in Maryland and most of the seven states of the Chesapeake Bay watershed.

To illustrate why, examine what happens to a waterbody when it loses its status as a WOTUS, even if it remains a protected state water. That water loses not only the federal resources and protections of U.S. EPA, but also the rights conferred upon the public to enforce the law when the government fails to do so. In Maryland, a waterbody that lost the protection of the CWA also lost the right of the public to protect it from illegal pollution by bringing a citizen suit in federal court.

Just as Congress recognized that public enforcement via the citizen suit was one of the indispensable features of the 1972 Federal Water Pollution Control Act that would separate the modern CWA from its inadequate predecessors, advocates in Maryland today similarly know that restoring this environmental right should be among the first and most basic goals for this post-*Sackett* world. Thus was born Maryland's Clean Water Justice Act, a law to ensure that the public could bring a citizen suit, now under state law, to protect isolated wetlands and intermittent and ephemeral streams from illegal pollution.

There is not one solution for state lawmakers looking to respond to *Sackett*, as the formula will depend on that state's definition of waters of the state as well as enforcement mechanisms. Only a handful of states have current state-level citizen suit provisions that mirror the pre-*Sackett* protections provided by the CWA. For most states where authority for public enforcement of water pollution laws is lacking, the adoption of a law like the Clean Water Justice Act would be useful. In Maryland, we were heartened to see not only the usual environmentally focused legislators in the General Assembly supportive of this concept, but many other policymakers troubled by the torrent of Supreme Court decisions in recent years that obliterated decades of precedent. We assume the same may be the case in many states.

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IN 1972, the federal Clean Water Act was passed to redress the failure of the states to protect the nation's waters. Congress created a system of shared authority between EPA and the states, where the federal agency sets the goals and standards and then states may implement the permitting and enforcement systems. Congress also provided the federal government and the public with crucial backstops to enforce the law when state governments fail or refuse to do so. The literature is replete with discussion of how state and federal enforcement has waxed and waned over the last half century, how staffing levels have declined, and what EPA has (or has not) done in response to flagging state efforts to ensure that the ambitious goals of the CWA are met.

As with many states and, indeed, the federal EPA, the Maryland Department of the Environment has suffered from a slow whittling away of resources. Agencies are often stuck with budget cuts during lean years that are rarely restored when fiscal challenges abate. Between 2002 and 2022, this pattern resulted in MDE losing one out of every seven staff. Its share of the state's general fund dropped by half.

As significant as this decline in resources was, it happened slowly and across administrations. What was far more drastic—and what makes Maryland's experience atypical—was the abrupt change in approach to CWA compliance and the rapidity in the decline in enforcement. Between 2015 and 2020, the number of enforcement actions of water pollution and wetland violations plummeted by 85 percent. The advocacy community repeatedly warned MDE that it was embarking on a dangerous experiment with our environmental and public health laws. These warnings went unheeded, and predictably, the consequences were dire.

In 2021, two of the three largest sources in the Chesapeake Bay across the 64,000-square-mile watershed caused a deluge of pollution into tidal waters that took years to fix. According to EPA data, between December 2020 and March 2021, nitrogen pollution from Baltimore's Patapsco sewage plant increased fivefold. The illegal nitrogen pollution from both the Patapsco and Back River facilities in Baltimore was roughly as large as the total nitrogen discharged by all other plants in the state combined.

All of this pollution occurred even though the state's primary strategy for meeting Chesapeake restoration goals was to ratchet down pollution from these very plants. Given that Annapolis was just wrapping up a multi-billion-dollar, two-decade-long effort to upgrade the state's 67 major wastewater treatment plants, the CWA violations resulting from the lax enforcement became a public embarrassment for Maryland's leaders.

The General Assembly was not pleased to see its billions in appropriations and dozens of new laws passed in the name of Chesapeake Bay restoration squandered by the state's failure to enforce the CWA. So, urged by community advocates between 2020 and 2024, Maryland legislators passed several new laws to bolster permitting and enforcement, the sorts of mundane nuts-and-bolts topics that previously had been rarely addressed during Maryland's short, 90-day legislative sessions.

In the 2020 session, the General Assembly passed a bill to stiffen enforcement for industrial agricultural operations from Maryland's expansive poultry industry and required MDE to produce quarterly reports on its enforcement activity. In 2021, the legislature compelled the department to create an online portal housing the state's compliance data, including inspection reports detailing the violations at individual facilities (going beyond EPA's impressive Environmental Compliance History Online database). That same session gave Marylanders a new right to intervene in the state environmental department's enforcement actions, a tool that has since paid dividends with recent high-profile actions, such as the Back River and Patapsco enforcement actions discussed previously.

But the real show-stopper was a bill that passed in direct response to the Baltimore sewage debacle and several other high-profile environmental concerns, including a discharge of untreated sewage that resulted in multiple people being hospitalized due to *e. coli* contamination of oysters. This new law required inspections by MDE personnel of all facilities in "significant non-compliance" that continues for more than 60 days and automatic and escalating penalties for facilities that do not return to compliance. Further, the bill required the department to clear the backlog of administratively extended permits and ensure that water pollution permits are timely renewed. In effect, the legislature sought to end significant noncompliance with the CWA in Maryland and to ban these administratively extended or "zombie permits" that circumvented Congress's intention to ratchet down pollution at permitted facilities every five years.

The legislature heard from its bean counters that the fiscal impact would be massive, but passed the bill anyway. Then Governor Larry Hogan failed to expend funds to implement the bill. But, in a sign that times are changing, his successor, Governor Wes Moore, made one of his first orders of business the hiring of nearly 50 new inspectors, permit writers, and attorneys for the department's water division, roughly doubling the size of some units.

Building off of these efforts by the Maryland legislature to drive greater enforcement of the CWA, the

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SIDEBAR

States Can Still Protect Their Own Waters

Year after year, my fellow legislators and I have been briefed on the state of the Chesapeake Bay and restoration efforts. The bay is a national gem and a source of beauty and recreation. It is home to more than 3,600 species of plants and animals. It is also an economic engine on which Marylanders—and many others across the country—heavily rely. Improving its health and ensuring our residents can benefit from its many offerings are extremely important goals. But while we have done good work and seen improvements, we have not made as much progress as hoped.

Sara N. Love
Senator, State District 16
Maryland General Assembly

"The new law empowers communities to act against pollution affecting smaller, isolated wetlands and intermittent streams. It ensures every Marylander has the power to defend their local environment when other avenues fail"

Further complicating this situation, in 2023, in *Sackett v. EPA,* the U.S. Supreme Court stripped away federal Clean Water Act protections for many waterways, threatening past and future restoration efforts. Certainly the residents of my district were impacted, and they let me know. We knew we needed to take legislative action in Maryland to both restore what was lost and enhance accountability. Together with Senator Malcolm Augustine (MD D-47), in the 2024 session of the Maryland General Assembly, I sponsored the Clean Water Justice Act with these goals in mind.

Prior to *Sackett,* all Americans had the right to file a lawsuit to enforce the federal Clean Water Act or to intervene in an agency lawsuit to enforce the act. *Sackett* stripped that right away for certain waterways and wetlands. Reinstating the ability for the public to be a part of the enforcement of our clean water laws, as Maryland's new law allows, will move Chesapeake Bay restoration efforts forward and correct a long-standing problem with the actual implementation of the many bills we pass to improve waterways, public health, and environmental justice.

The inspiration for this legislation came from the work Senator Augustine and I conducted with members of the public and nonprofit community advocacy groups. We found that we all share a strong commitment to environmental justice; an understanding of the deep connection Marylanders have with our waters has been invaluable in that regard. Senator Augustine and I recognize that Maryland's waterways are not just an economic asset of major importance to the state but also critical to providing food, recreation, improved air quality, and clean drinking water to millions of residents.

Why is this remedy important? In enacting the Clean Water Act in 1972, Congress realized that Americans have a stake in clean water. We agree. We also know that state agencies do not have the capacity to undertake every needed enforcement action, nor the familiarity with the waters the way the communities do. Public enforcement is crucial.

Sackett took that right away. We restored this right by allowing public enforcement actions in Maryland under state law. The law empowers communities to act against pollution affecting smaller, isolated wetlands and intermittent streams. It ensures every Marylander has the power to defend their local environment even when other avenues fail.

If the stream running through my community exposes my family to toxic pollutants, we need to have the same right to go to court to stop that pollution as we used to before *Sackett.* We cannot play a guessing game as to which streams or wetlands are able to be protected in court, and which are not. All Marylanders must have access to justice for each of their cherished waters.

The fight for clean water is ongoing. The Clean Water Justice Act is a significant step, but it is just the beginning.

We must continue to strengthen our environmental laws, advocate for increased funding, and build partnerships to protect water resources. Maryland has taken bold steps, but we must remain vigilant, innovative, and persistent. By standing together—citizens, lawmakers, advocates—we can ensure that Maryland's waters, which are so integral to the very character of our beautiful state, and the health, enjoyment, and prosperity of its residents, remain protected for generations to come.

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Clean Water Justice Act was thus not just a response to the *Sackett* decision, but the capstone of years of work of shoring up CWA implementation and enforcement in Maryland. Thanks to these new enactments, both the state's environment department and the public have new authority, new resources, and a new charter to push toward realizing the lofty goals of the federal CWA.

Maryland is certainly not alone in seeking to revamp environmental enforcement. After the passage of the Clean Water Justice Act, advocates in California reached out to let their Maryland colleagues know that they are seeking to do the same (despite already having regulatory programs that make those of us on the East Coast green with envy). This year, Minnesota passed a suite of measures to stiffen penalties and boost agency enforcement of water pollution laws. The days of national uniformity in environmental standards created by the federal statutes of the 1970s are over, thanks to the Supreme Court's ongoing federalism initiative, with major implications for environmental advocacy and for industry's compliance costs.

If permitting programs are weak, not only are they unable to drive progress toward the Clean Water Act's goals, they actually establish legal protections for polluters and legal barriers to justice for the rest of us

The CWA has been called one of the greatest government achievements of the second half of the 20th century. A decade after its enactment, the Supreme Court observed that it was "not merely another law," but represented "a total restructuring" and "complete rewriting" of existing water pollution law. This should not be surprising as the CWA, like the Clean Air Act, reflected the values of its principal architect, Senator Edmund Muskie (D-ME). Muskie's legislative legacy has been defined by these towering environmental achievements, but he was also a staunch supporter of civil rights and the concept that good government should be active in resolving social injustices. To fully understand the context, potency, and ambition of our bedrock environmental laws, one should certainly read Muskie's speech at the first Earth Day in 1970: "Can we afford clean water? Can we afford rivers and lakes and streams and oceans which continue to make life possible on this planet? Can we afford life itself?" Muskie asked. "The answers are the same. We cannot afford otherwise."

What seems astonishing today is that this incredibly "bold and sweeping legislative initiative" passed nearly unanimously—over President Nixon's veto. This was, in part, a reflection of the deplorable condition of the nation's waters and a reaction to many unfortunate environmental catastrophes. But while our political and ecological landscape has shifted dramatically in the last half-century, the idea of striving for clean water really has not. Research has consistently shown that clean water polls higher than just about any public good. Moreover, economists have long proven that the benefit-cost ratio of environmental protections is high, making spending on regulatory compliance with our environmental laws a commonsense investment for our economy, society, and ecosystems.

So when we take stock today of where we are a little more than a half-century from the birth of the CWA, we shake our heads not just in disappointment, but also confusion. Why not continue to invest in such a popular law that does so much to protect the health of Americans and make the country a more attractive place to live, work, and recreate? Why are we seeing attacks from all three branches of government against the CWA?

At stake is not merely missing statutory goals and deadlines but subverting the entire legal framework that Congress created. The CWA aims to "restore and maintain the chemical, physical, and biological integrity of the nation's waters." The law is exceedingly clear in expressing its goals, codified right up front. And the mechanisms to achieve those goals are similarly explicit. Chief among these were the permitting programs, or, as the Supreme Court famously said, "where the rubber meets the road." The problem is, if the permitting programs are weak, not only are they unable to drive progress toward the act's goals, worse yet, they actually establish legal protections for polluters and legal barriers to justice for the rest of us.

THESE are the sorts of considerations that reflect the urgency with which advocates in Maryland have moved to restore the CWA. The fate of the Potomac River and the Chesapeake Bay certainly looms large in the public's consciousness here, but the fight to restore the federal statute is even bigger than the fight to restore the capital city's river and the treasured bay into which it flows.

Consider a recent headline story in the *Environmental Law Reporter* about what has gone wrong for the Chesapeake restoration effort in the last 15 years. The author laid much of the blame with EPA for failing to keep the states in line with their promises made at the outset. The tools to do so were simple: the dozens of provisions of the CWA statute and regulations that constitute EPA's legal authorities and obligations. In other words, the very same actions that the bay restoration was predicated on are simply the nuts and

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bolts of the CWA. As goes the federal statute, so goes bay restoration; what is good for the Chesapeake is, likewise, good for so many other environmental and public health priorities.

Maryland's governor, like President Biden, has prioritized climate change and environmental justice. If you read EPA's exhaustive guidance on how it plans to advance environmental justice and combat climate change, the federal agency relies, at least in part, on that very same compendium of existing legal tools that EPA said it would use to advance bay restoration. Moreover, with each passing day, the threats posed by PFAS, nano-plastics, particulate air pollution, heavy metals in coal ash, and many other highly toxic pollutants become clearer. The answer to these and so many other threats are found in the basic regulatory programs we have, thanks to our foundational environmental statutes.

This is why it has become essential for advocacy organizations to engage impacted communities to enforce the law when the government fails to do so, as well as for taxpayers to fund regulators to implement and enforce our laws at the state level. This is the other story behind the Clean Water Justice Act and Maryland's other CWA permitting and enforcement laws passed in recent years.

> ***Uncertainty grows as the Supreme Court continues to dismantle the regulatory frameworks necessary to reach environmental objectives, and a future of clean water for everyone seems increasingly less likely***

Being a public interest environmental attorney in this new era of the Supreme Court can feel Sisyphean. The post-*Sackett* frenzy of state legislative activity that followed the Court's term begun in 2022 was neither the first nor the last major rewrite of an environmental statute this decade. The 2021 term, of course, saw the landmark decision in *West Virginia v. EPA*, ushering in the era of the "major questions doctrine." The Court's 2023 term brought us the demise of four decades of *Chevron* deference in *Loper Bright*. In three straight terms this Court has issued a decision that upended a chunk of environmental law as we knew it since the beginning of our careers. CWA lawyers like us fully expect this streak to continue.

In June, the Court agreed to take up the city of San Francisco's case against EPA, despite (once again) decades of settled precedent and practice by regulatory agencies supporting the federal agency. Most observers fully expect the justices to hand EPA another loss because, well, this Court has become quite predictable in decisions involving the agency's authority.

While *San Francisco v. EPA* may not make the sort of headlines that followed *West Virginia, Sackett,* or *Loper Bright,* it will certainly have major consequences for CWA permits issued by EPA and 46 states plus numerous tribal authorities. If the high court reverses the decision of the Ninth Circuit and decides that narrative water quality standards are not independently enforceable, this will gut the effectiveness of key provisions of permits across the country, with massive volumes of water pollution at stake. CWA permits that were carefully and intentionally crafted with the assumption that water quality standards were enforceable will, in an instant, be rendered far weaker than intended.

ONCE again, states will be left to respond to a Supreme Court decision that upends the way a regulatory framework has existed for decades. Once again, state regulators and permit-writers will have to scramble to help formulate solutions. State environmental advocates will again be thrust into the position of having to push reluctant regulators in every jurisdiction and educate legislatures on a highly wonky legal subject, all while standing up to countless lobbyists who will surely spring into action to preserve the Court's sweeping gift to polluters. The resulting crazy-quilt of state authorities will probably both increase pollution across the nation and increase industry's compliance costs at the same time.

If advocates are lucky enough to help catalyze a state-based response to yet more unraveling of the federal CWA, such an achievement also comes at a steep cost. Each time small NGOs have to respond to another Court decision, it necessitates a massive commitment of resources. These multi-year campaigns to merely put things back to the way they were, one state at a time, divert extraordinarily scarce resources from advancing proactive initiatives. The NGO community has found itself stuck in a perpetual cycle of pushing the boulder up the hill; a practice that will continue seemingly indefinitely given the time it takes for one generation of the Supreme Court to give way to the next.

In 1972, Congress promised the American people that we would eliminate water pollution from point sources by the 1980s and fully attain our water quality standards. While many advocates are still tirelessly working toward these congressionally mandated goals, it is becoming increasingly unclear whether they will ever be achieved. This uncertainty grows as the Supreme Court continues to dismantle the regulatory frameworks necessary to reach these objectives, and a future of clean water for everyone seems increasingly less likely. ❧

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