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Preserving History Through the Lens of Recently Amended Environmental Laws and Policy

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PRESERVING HISTORY THROUGH THE LENS OF RECENTLY AMENDED ENVIRONMENTAL LAWS AND POLICY

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I. PROJECT DESCRIPTION AND ABSTRACT

On May 23, 2023, the United States Supreme Court published the final opinion on *Sackett v. EPA*, a case about the federal jurisdictional disputes over wetland use and the Clean Water Act's statutory definition of the "Water of the United States." On June 3, 2023, the Biden Administration signed the Fiscal Responsibility Act and amended the National Environmental Policy Act. These most recent changes in environmental laws are far removed from being impactful in carrying out archeological digs, historical building renovations, and other cultural resource protection.

Yet, the natural and human environments are intrinsically linked to land development. Land development projects that concern historic preservation require federal permits, an environmental review and assessment by a federal, state, or tribal agency, and "more than 30 federal regulations, directives, and legal mandates—in addition to several state laws and codes—in place to protect these resources."[1]

Therefore, this project includes two articles that closely examine historical preservation through the lens of environmental laws. Significantly, the need for more scholarship in

[1] *See* FEMA, *Environmental Planning and Historic Preservation*, https://www.fema.gov/emergency-managers/practitioners/environmental-historic (last visited Aug. 2, 2023).

addressing the intersectionality between the impact of law and policy changes in historical preservation calls for an overview of the most recent updates in law and policy of the Clean Water Act, National Environmental Policy Act, and National Historic Preservation Act.

Broadly, the project walks readers through the background and history of these respective statutes, highlighting and emphasizing terms and concepts that overlap with historical preservation laws. Narrowly, this project focuses on teasing out potential (foreseeable and unforeseen) effects the revised statutory language or provisions might have on cultural resources management, local land use projects, and tribal archeological excavations. While it is still too early to find concrete examples to illustrate the impacts from a historical preservation point of view, this project proposes potential effects and flags the need for caution to concerned audiences in the relevant industry.

II. INTRODUCTION TO HISTORIC PRESERVATION

The National Trust is a congressionally charted non-profit organization dedicated to preserving historic places in the United States. It is the leading player in the field of historical preservation law. To implement and actualize the skills and knowledge I gained by working with the general counsel offices in policy and statutory analysis, this project anchor and purposefully intends to forward the policy and legal concern for historical preservation.

Generally, historical preservation is a political movement and a professional endeavor to identify resources that withhold historic, cultural, or architectural significance. Historical preservation law is the legal framework that supports preservation efforts.

Historical preservation as a movement in the United States has developed threefold.[2] First, historical preservation was once a movement to identify and collect significant archeological resources. Then, the movement morphed further to include the protection of natural landscapes, especially ones in national parks. Eventually, the movement provides for preserving the human-altered/built environment.

More specifically, in response to these three-tiered movements and their underlying goals, the National Trust crowdsourced seven goals that embody the hopes and dreams the contemporary historical preservation movement should achieve.[3] The seven goals are growing, collaborative networks, representative action, climate resilience, modernized, expanded tools, equitable communities, an engaged public, and a more accurate history.

These goals start by localizing regional planning with an emphasis on localizing more inclusive, de-colonized narratives in historic places that are/were written out of account. Thus, the National Trust's programs now extend to charting landmark artists' homes and studios (including Indigenous artists), route 66 projects that re-evaluate the historical landmarks along the route, which extends to parts of Trial of Tears, Chinatowns, and other historical resources that once were marginalized and neglected from proper preservation cares.

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[2] Sara C. Bronin & Ryan Rowberry, *Historic Preservation Law in a Nutshell* 2-3 (2d ed. 2018).
[3] *See* Di Gao et al.,"Leading the Change Together: A National Impact Agenda for the Preservation Movement (Oct. 26, 2021), https://savingplaces.org/stories/leading-the-change-together-national-impact-agenda.

The boots-on-the-ground type of historic preservation advocacy that the National Trust has been campaigning for decades is significant to the field. However, monitoring and responding to the preservation law and the relevant laws and policy changes are also critical to advancing the historic preservation field. After all, policy dictates funding, compliance, and other critical decision-making that organizations such as the National Trust must consider when researching and conducting preservation projects.

NEPA AND NHPA INTERSECTION AND AMENDMENT IMPACT ON HISTORICAL PRESERVATION

I. INTRODUCTION & BACKGROUND

On June 3, 2023, the Fiscal Responsibility Act of 2023 ("FRA") was signed into law under the Biden Administration. The FRA subsequently amended the National Environmental Policy Act ("NEPA"), the chief doctrinal architect of environmental law in the United States. Effective in June, this amendment, on paper, made the following changes to NEPA.

First, through amendment, the but-for causation and reasonably foreseeable effect of proposed federal action should be included in the statute.[4] Second, the amendment clarified requirements for federal agencies to prepare environmental impact or assessment-related documents and conduct NEPA reviews.[5] Third, the amendment clarified the structure and roles of agencies' actions and delegations of duties under NEPA.[6]

[4] 42 U.S.C. §4332(2)(c).
[5] *Id*. §4336.
[6] *Id*.(a).

The amendment further provided flexibility and possible "development of a single environmental document"[7] and codified the environmental document page limits and deadlines.[8] It clarified circumstances when federal agencies could rely on available, programmatic environmental documents without further review.[9] The amendment also allows agencies to exclude categorically,[10] adds online and digital technologies to help conduct the environmental impact review and public consultation process,[11] and clarifies specific terms in NEPA.[12]

At first glance, these changes in NEPA seem technical and procedural. However, they can considerably impact the field and relevant industries in historical preservation and land use, given that historical preservation activities and environmental impact analysis/documents are intimately intertwined. Moreover, the close mirroring of the National Historic Preservation Act ("NHPA") to NEPA led to the "stop, look, and listen" integrated approach for federal agencies' decision-making process before any potential adversarial impact made to historical properties and the human environment.[13]

Therefore, this paper comprehensively engages with both NHPA and NEPA to tease out the impact of the NEPA amendment on historic preservation. The analysis also addresses potential changes impacting the NHPA Section 106 review process and historic preservation. At the same time, the difference in the law and policy left the industry in an amorphous shadow, where further changes and revisions from Congress should be reasonably expected. In anticipation of the uncertain fate of amending statutory regulations, especially for

[7] *Id*. (b).
[8] *Id*. (e)&(g).
[9] *Id*. (b).
[10] *Id*. (c).
[11] *Id*. (d).
[12] *Id*. (e).
[13] *See generally*, CEQ & ACHP, *NEPA and NHPA A Handbook for Integrating NEPA and Section 106* (Mar. 2013).

the NEPA agency reviewing process, this paper offers summaries and observations from the integrated perspective of environmental law and historic preservation laws.

II. STATUTORY OVERVIEW NHPA AND NEPA

i. National Historic Preservation Act ("NHPA")

NHPA was first enacted by Congress in 1966. It is a multi-layered framework encompassing federal, state, and tribal preservation criteria, agencies, and processes. The NHPA has three significant roles in nationwide directing and regulating historical preservation efforts. [14]

First, it oversees the authorization, maintenance, and expansion of the National Register of Historic Places through a list of "districts, sites, buildings, structures, and objects significant in American history, architecture, archeology, engineering, and culture." Second, the Act established a reviewing process under Section 106 ("Section 106 review process")[15] that enables independent federal agencies such as the Advisory Council on Historic Preservation ("ACHP") to process federal undertakings and their impacts on historic properties enlisted on the National Register.

The two critical components of the NHPA Section 106 review are the role of agencies and the effect of undertaking. First, more than merely federal involvement is required to undertake a federal action. Here, ACHP defines an "undertaking" as "a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a federal agency, including [a] those carried out by or on behalf of a federal agency; [b] those carried out with Federal financial assistance; and [c] those requiring a federal permit, license or approval."[16] Therefore, activities

[14] *See* ACHP, *National Historic Preservation Act*, https://www.achp.gov/digital-library-section-106-landing/national-historic-preservation-act (last visited Aug. 2, 2023).
[15] 54 U.S.C. §306108.
[16] 36 C.F.R. §800.16(y).

that require an agency to carry out licenses, permits, or funds with federal financial assistance that impact historic places and properties are foundational to undertaking.

Second, under the Administrative Procedure Act, "agency" is defined as "each authority of the government of the United States, whether or not it is within or subject to review by another agency."[17] An agency's scope includes federal entities state, tribal, and local governments. Administrative procedure governs that the head of any Federal agency has direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State. Before the approval of the expenditure of any Federal funds on the undertaking or before the issuance of any licenses, the head of any Federal department of the independent agency must factor in the project's effect on any historic property. Moreover, the head of the Federal agency shall afford the Council a reasonable opportunity to comment regarding the undertaking.

To illustrate, the Secretary of the Interior is the head of the agency for the National Park Service's undertakings. Under the scope of section 106, the Secretary's tasks include but are not limited to administrative duties and financial obligations specified under 36 CFR Part 800, which entails a four-step process. Respectively, they are 1) initiation of the section 106 process, 2) identification of historic properties, 3) assessment of adverse effects, and 4) resolution of adverse effects.[18] Upon "twelve levels of review (usually state and federal),"[19] a historic property can be enlisted on the National Register and eligible for statutory protection under Section 106.

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[17] 5 U.S.C. §551(1).
[18] 36 C.F.R. Part 800.
[19] Sara C. Bronin & Ryan Rowberry, *Historic Preservation Law in a Nutshell* 90 (2d ed. 2018).

ii. National Environmental Policy Act ("NEPA")

President Nixon first signed NEPA into law as an act "to establish a national policy for the environment, to provide for the establishment of a Council on Environmental Quality, and (for) other purposes."[20] It was the chief instrument of federal environmental law. Procedurally, NEPA functions as an agency behavior guideline. Without any mandatory requirement, it directs federal agencies to "stop, look, and listen"[21] before making environmentally concerned decisions.

To maximize decision-making efficiency by stopping, looking, and listening to various other stakeholders involved—such as scientists, lobbyists, concerned citizens, and other impacted parties—NEPA requires federal agencies to always issue an Environmental Impact Statement ("EIS") before acting. Here, EIS is a detailed statement that discusses the federally proposed action and its impact, its alternatives, and any related resources used for operating.[22] Additionally, for each EIS submitted to the federal register and open for public commenting, federal agencies may include an Environmental Assessment ("EA") in conjunction with their EIS statement. According to the EPA, the non-mandatory submission of the EA is to help decide "whether or not a federal action has the potential to cause significant environmental effects."[23] Additionally, NEPA established the Council on Environmental Quality ("CEQ"). Like the ACHP to the Historic Preservation Act, the CEQ oversees environmental policies behind federal project implementations and planning processes. It also regulates (or promulgates regulations)[24]

[20] 42 U.S.C. 4321-4347.
[21] *See* ACHP, *A Brief Explanation of NEPA and Section 106 Reviews*, https://www.achp.gov/integrating_nepa_106 (last visited Aug. 2, 2023).
[22] 42 U.S.C. 4332(C).
[23] *See* EPA, *National Environmental Policy Act Review Process*, https://www.epa.gov/nepa/national-environmental-policy-act-review-process (last visited Aug. 2, 2023).
[24] *See* Bronin & Rowberry, at 118.

the national environmental review process. In the next section, this article will discuss the similarities between the CEQ and ACHP more in-depth.

Procedurally, NEPA also narrates two critical roles in the statute—the role of federal agencies and the effect of federal agencies' actions. First, under NEPA, the statutory definition for "federal agency" is "all agencies of the Federal Government. It does not mean the Congress, the Judiciary, or the President, including the performance of staff functions for the President in his Executive Office…It also includes…States and units of general local government and Indian tribes assuming NEPA responsibilities under section 104(h) of the Housing and Community Development Act of 1974."[25]

Compared to NHPA, NEPA's agency scope is similarly structured but considerably more complex in its delegation of authority. For example, the concepts of "lead agencies" and "cooperating agencies" are introduced to NEPA to delineate the duties and responsibilities of local, state, and federal government's participation in the environmental review procedure. While the delegatory roles for reviewing might seem redundant to some areas of the environmental law issues, for historic preservation, this structure of delegated authorities allows state or tribal preservation offices to be more effective in engaging and contributing to the federal agency action that impacts the regional historical resources.[26]

Second, like the federal agency's undertaking to NHPA, the "major federal actions" to NEPA outline the "federal control and responsibility"[27] that the federal agencies owe to the national environmental projects under their stewardship. Here, the term "major" (now the

[25] 40 C.F.R. §1508.12.
[26] *See* Bronin & Rowberry, 121.
[27] 40 C.F.R. §1508.18.

definition has been amended) is coined to include a broader scope of federal control of responsibility, where a project can be major under NEPA if it was "potentially subject to federal control and responsibility."[28]

After the recent NEPA amendment, this definition narrowed to only referring to federal actions that an agency "determines is subject to substantial Federal control and responsibility."[29] Federal inaction or failure to act could also be a part of the "major federal actions." For example, when courts review the instances where the federal agency fails to act per statutory requirements, despite the agency's discretion not to work, a NEPA review process may be triggered circumstantially.

Depending on jurisdictions, the federal projects may qualify as significant federal action. Nonetheless, courts have uniformly agreed that the federal inaction in some historic preservation areas, such as approving contract agreements between Native American tribes and local municipalities, falls out of the scope of major federal action.[30] Likewise, reviewing urban plans for sewer realignment,[31] approving land exchange between private parties,[32] and allowing financial aid to support local environmental studies[33] are not federal actions under NEPA.

iii. Comparing and Contrasting NEPA and NHAP

Some of the discussions above have reflected similarities between the NEPA and NHAP. It is evident that these two statutes, introduced three years apart in the 1960s, mirrored each other.

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[28] *Id.*
[29] *See* Jay C. Johnson et al., *NEPA Amendments: Highlights and Practical Implications* (Jun. 8, 2023), https://www.venable.com/insights/publications/2023/06/nepa-amendments-highlights-and-practical#:~:text=Congress%20has%20redefined%20this%20term%20to%20mean%20an,%E2%80%9C%20potentially%20subject%20to%20Federal%20control%20and%20responsibility.%E2%80%9D.
[30] *See Ringsred v. City of Duluth*, 828 F.2d 1305 (8th Cir. 1987).
[31] *See People for Responsible Omaha Urban Dev. V. Interstate Com. Comm'n* CV88-0-247 (D. Neb. Feb. 14, 1989).
[32] *See Gettysburg Battlefield Pres. Ass'n v. Gettysburg C.* 799 F. Supp. 1571 (N.D. Pa. 1992).
[33] *See Vill. Of Los Ranchos de Albuquerque v. Banhart*, 906 F.2d 1477 (10th Cir. 1990).

procedurally and structurally. The intersection of the two acts in the field of historic preservation further illustrates how historical and cultural activities can profoundly shape the "human environment"[34] as part of the shared "natural heritage."[35] NEPA, therefore, shares the same fundamental objective with NHAP in conducting federal actions or undertakings. In a way, they are meant to protect the historic resources in the United States and safeguard the "aesthetic, historic, and cultural"[36] effects and values.

In sum, the similarities between NEPA and NHAP are fourfold.[37] First, both statutes implement procedural regulations and review processes over human activities' environmental or historical/cultural impacts. Second, both laws established federal agencies, NHPA and CEQ, overseeing the programs for federal historical preservation and environmental projects through Section 106 and NEPA reviewing procedures. Third, both statutes require federal agencies to publish findings of respective federal actions on environmental and historical resources and invite and provide notice for public comments. Fourth, despite both statutes not actively seeking outcome-determinative results to protect the national historical and natural resources, the "stop, look, and listen" procedure is required before federal agencies move forward with their federal actions.

However, the two statutes differ fundamentally in setting up "separate requirements with different parameters for what is afforded consideration in each review."[38] First, before this year's amendment, NEPA has a broader scope of review than NHPA. It used to cover environmental

[34] 40 C.F.R. §1508.14.
[35] 42 U.S.C. §4331(b).
[36] 42 U.S.C. §1508.8.
[37] *See* Bronin & Rowberry, 142.
[38] *See supra* note 18.

resources impacted by the "major federal actions significantly affecting the quality of the human environment."[39]

After the amendment, the required EIS and EA review scope is considerably narrowed. For example, the revision indicated that EIS and EA review is only required to pinpoint "reasonably foreseeable environmental effects" of the proposed federal actions. Instead of being required to identify all the "irreversible and irretrievable commitments of resources," the federal agencies need only to identify all "irreversible and irretrievable commitments of *federal* resources involved."[40]

In contrast, NHPA's scope of review under Section 106 is still relatively narrow. Section 106 only requires NHPA to review federal undertaking impacted historical properties that are "included on, or eligible for inclusion on, the National Register."[41] As discussed, the National Register is a list "of districts, sites, buildings, structures, and objects significant in American history, architecture, archeology, engineering, and culture."[42] Selecting historical places that fit these statutorily defined categories invites an extensive review process (twelve levels). It excludes many structures that are enlisted in tribal or local historical registers.

Another critical aspect that distinguishes NEPA and NHAP is their consultation requirements. NEPA consultation process, or "public involvement," under 40 C.F.R. Pt. 1503, 1506.6 requires federal agencies to "provide public notice of NEPA-related hearings, public meetings, and the availability of environmental documents to inform those persons and agencies who may be interested or affected."[43] Compared to NHAP, where the consultation process is

[39] See 42 U.S.C. §4332 (C) (before amendment).
[40] *See supra* note 26.
[41] 54 U.S.C. §4332(C); *see also* Bronin & Rowberry, 144.
[42] 54 U.S.C. §32101.
[43] 54 U.S.C. §1506.6 (b).

much more comprehensive and codified in the Section 106 review process, NEPA's public involvement criteria are less organized and thorough.

For example, when consulting with Native American tribes, NHPA Section 106 mandates various participation from concerning State Historic Preservation Office ("SHPO"), Tribal Historic Preservation Office ("THPO"), tribal organizations, and local governments who might have jurisdictional interest in the undertaking, and other parties who have legal or economic concerns related to the federal action.[44] Unlike the extensive opportunity for various players and the public to engage in the NHPA consultation, NEPA's consultation process limits and excludes categorically tribal and public participation and subjects to public involvement. The amendment leaves the federal agency's environmental assessment of federal actions at the whims of federal agencies.[45]

III. AMENDMENT'S IMPACT ON HISTORIC PRESERVATION

After laying some foundations for the NEPA and NHAP, this section further investigates the integrated relationship between the two statutes in the context of historical preservation post-NEPA amendment. Since NEPA was enacted for the first time in almost fifty years, the amendment adjusted and altered its guidelines for the scope and definition of environmental review, CEQ's authorities, and further engagements in EIS and EA reviews.

The first section of this paper touches on definitional changes of "major federal action" and the scope of review for EIS and EA. This section further addresses the additional amendment

[44] 36 C.F.R. §§800.2 (c).
[45] *See* Bronin & Rowberry, 146.

impact of the NEPA amendment on NHAP and the Section 106 process for historical preservation.

i. Policy and Historical Background of NEPA Amendment

Several policy and law-making changes predominately concerned with climate change and energy consumption slowly paved the substantive changes to NEPA under the Fascial Responsibility Act of 2023.[46] First, on August 15, 2017, Trump issued E.O. 13807, "Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects."[47] This led the CEQ to a new rulemaking proposal that proposed revisions to 1978 NEPA regulations with the invitation of 12,500 public comments approximately.[48]

Since 1978, there haven't been updates on CEQ regulations for over 40 years. The amended changes in NEPA "signal Congress's intent to streamline the environmental review of projects and improve the federal permitting process for energy projects."[49] After the amendment officially took effect on September 14, 2020, five consequential lawsuits followed and challenged the newly amended NEPA on different counts of claims and various grounds.[50]

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[46] H.R. 3746.
[47] Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects, Executive Order No. 13,807 (Aug. 15, 2017).
[48] *Id.*
[49] Michelle-Ann C. Williams et al., *Amendments to NEPA Following Debt-Ceiling Deal Would Improve Permitting for Major Infrastructure Projects* (Jun. 7, 2023), https://www.lexology.com/library/detail.aspx?g=17ff8e7b-889e-455e-a291-ed853d51314a#:~:text=The%20amendments%20to%20NEPA%20are%20the%20first%20major,improve%20the%20federal%20permitting%20process%20for%20energy%20projects.
[50] *Wild Va.* v. *Council on Env't Quality,* No. 3:20cv45 (W.D. Va. 2020); *Env't Justice Health All.* v. *Council on Env't Quality,* No. 1:20cv06143 (S.D.N.Y. 2020); *Alaska Cmty. Action on Toxics* v. *Council on Env't Quality,* No. 3:20cv5199 (N.D. Cal. 2020); *California* v. *Council on Env't Quality,* No. 3:20cv06057 (N.D. Cal. 2020); *Iowa Citizens for Cmty. Improvement* v. *Council on Env't Quality,* No. 1:20cv02715 (D.D.C. 2020). Additionally, in *The Clinch Coalition* v. *U.S. Forest Service,* No. 2:21cv00003 (W.D. Va. 2020), plaintiffs challenged the U.S. Forest Service's NEPA implementing procedures, which established new categorical exclusions, and, relatedly, the 2020 rule's provisions on categorical exclusions.

On January 20, 2021, the Biden administration issued E.O. 13990, "Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis."[51] Section 3 of the executive order, "Restoring National Monuments," applies explicitly to historical preservation issues.

The modification in the consultation process mentioned above in the policy-making history allows and directs agencies such as DOI and the Secretary to act in reviewing, implementing, and advising Presidential steps necessary to preserve cultural resources in the public land. The CEQ, too, under the executive order, is granted the power to review, revise, and update guidance such as the "Draft National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emission" and "Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in National Environmental Policy Act Review." [52]

On January 27, 2021, the Biden administration issued E.O. 14008, "Tackling the Climate Crisis at Home and Aboard."[53] While appointing and enlisting a national climate task force to address climate-resisting, science-focused, and clean-energy approaches to enforce climate justice and envision a sustainable future, the executive order directed CEQ and the Office of Management and Budget (OMB) to oversee the greenhouse gas emission-related impact on climate change.

The CEQ also planned a phased approach to review this executive order in response to the delegated duties to battle climate change. Effective September 14, 2020, the CEQ finalized

[51] *See* Protecting Public Health and the Environmental and Restoring Science to Tackle the Climate Crisis, Executive Order, No.13,990 (Jan. 20, 2021).
[52] *Id.*
[53] *See* Tackling the Climate Crisis at Home and Abroad, Executive Order, No. 14,008 (Jan. 27, 2021).

the "Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act."[54] This document "comprehensively updates, modernizes, and clarifies the regulations to facilitate more efficient, effective, and timely NEPA reviews by Federal agencies in connection with proposals for agency action."[55]

Following the CEQ's series of climate-responsive reviews, on June 3, 2023, Congress passed the Fiscal Responsibility Act of 2023. As discussed at the beginning of this article, the FRA amendment to NEPA raised the U.S. debt ceiling and significantly amended NEPA for the first time since Nixon signed the act into law in the 1970s.

ii. Potential Impact on Historic Preservation and NHPA

Besides apparent definitional changes for "major federal action" and narrowing the scope of review for EIS and EA, another considerable change by amending NEPA is restructuring the "effect or impact"[56] that the federal proposed actions might cause to the human environment, such as archeological sites.

NHPA loosely defines any federal undertaking's "alternation to the characteristics of a historic property" will qualify such property "for inclusion in or eligibility for the National Register of Historic Places."[57] Unlike NHPA, before the Amendment, NEPA's protective scope of cultural resources—"ecological, aesthetic, historic, cultural, economic, social, or health"[58] related—was subject to the "reasonably foreseeable" standard. Unlike the amended version, NEPA once distinguished and clarified the standard with the following three categories.

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[54] *See* Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 43,304 (Sep. 14, 2020).
[55] *Id.*
[56] 40 C.F.R. 1508.1(g).
[57] 36 C.F.R. 800.16(i), 800,5(a)(1).
[58] 40 C.F.R. 1508 (g) (1).

First, a proposed federal action's effects on cultural resources may be direct— "caused by the action and occur at the same time and place." Second, any indirect effects—"effects or other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems"—are caused by a proposed federal action but happened "later in time or farther removed in distance."[59]

Third, cultural resources can also experience calmative effects brought forth by federal actions that are positively or negatively impacting "on the environment that result from the incremental effects of the action when added to the effects of other past, present, and reasonably foreseeable actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions."[60]

Here, the amended language takes out the three-tiered categorization (while preserving some languages), replacing them with a tort-based "but for" causal analysis. The amended 40 C.F.R. 1508(g) emphasizes the "reasonably close causal relationship" between proposed federal actions or their alternatives to the cultural and historical resources as the foundation in determining the national analysis of effects and impacts.

The amended statute also reasons that "but for" causal relationship here "is sufficient to make an agency responsible for a particular effect under NEPA. [Because] [e]ffects should generally not be considered if they are remote in time, geographically remote, or the product of a lengthy causal chain."[61] Further, the amendment clarifies that effects exclude "those effects that

[59] *Id.*
[60] *Id.*
[61] See 40 C.F.R. 1508 (g) (2) (amended).

the agency cannot prevent due to its limited statutory authority or would occur regardless of the proposed action."[62]

IV. CONCLUSION

Overall, besides the nine amendment changes discussed up front, the NEPA amendment further narrowed the scope of "major federal actions," and some historic preservation projects may well fall out of the area of "substantial Federal control and responsibility."[63] The scope of EIS and EA review under the environmental document is, too, considerably narrowed after amendment.

Depending on the case, archeological projects that may alter the land and the surrounding ecosystem could no longer have "reasonably foreseeable environmental effects"[64] and therefore require EIS and EA review. Lastly, the limitation of agency statutory authority may further restrain the amended "but for" analysis for the agency's action and cause the complete stop of some preservation efforts for ancient cultural resources that are time-consuming and may be considered too far remote in time and place.

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[62] *Id.*
[63] *See supra* note 26, 37.
[64] *Id.*

SACKETT V. EPA AND IMPACT ON HISTORIC PRESERVATION

I. INTRODUCTION & BACKGROUND

Decided on May 25, 2023, the Supreme Court of the United States (SCOTUS/ "the Court") unanimously held that the waters of the United States (WOTUS) comprised only of "wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right," and they are "indistinguishable from those waters."[65] Before Justice Alito revisits the "nagging questions"[66] on what constitutes WOTUS, in 2012, *Sackett v. EPA* first presented the difficulty and complexity of pinning down a clear definition of WOTUS in front of the Court.

The *Sackett* saga began when the U.S. Environmental Protection Agency ("EPA") sent a compliance order, with a civil penalty attached for non-compliance, to Michael and Chantell Sacketts, who have been discharging filled materials from their property (lot/site wetlands adjacent to Priest Lake) into Priest Lake, which EPA treated as "navigable water" therefore categorically fell within the federal protection under the "waters of United States." The Sacketts claimed that "EPA's issuance of the compliance order was 'arbitrary [and] capricious' under the Administrative Procedure Act (APA)."[67]

Before this year's decision, the scope for the EPA to exercise regulatory authority under the Clean Water Act ("CWA") remained unclear and "still leaves most property owners with little practical alternative but to dance to the EPA's tune."[68] However, the current majority's opinion

[65] *See Sackett v. EPA*, 143 S. Ct. 1322, 1344 (2023).
[66] *Id*. at 1329.
[67] *See* 566 US. 120, 125 (2012).
[68] *Id*. at 132.

can and potentially shake the foundation of the federal regulatory authority and wetlands under its protection.

When Congress passed the CWA in 1972, it did not provide pristine definitions for what it meant by "the waters of the United States."[69] Despite lacking definitional clarity, the Court previously gave the EPA a unilateral administrative power to enforce judicial review under APA (single statute).

Before *Sackett*, the Supreme Court held in *U.S. V. Riverside Bayview Homes* that the scope of the navigable water of the United States definition encompasses freshwater wetlands, which were not navigable but located nearby to a navigable water body.[70] The Supreme Court also held in *Solid Water Agency of Northern Cook Cty. V. Army Corps of Engineers* that the "navigable waters" do not include abandoned sand and gravel pit, which are "seasonably ponded" but were not adjacent to open water.[71] The Court also noted that wetlands adjacent to navigable bodies of water are not, by definition, navigable water themselves.[72]

Specifically, in *Rapanos v. U.S.*, the Court established a bifurcated approach, which began to shape the post-*Sackett* treatment on the complexity of this topic. On the one hand, Justice Scalia's narrower test defines the navigable waters of the United States as water with surface water connection.[73] On the other hand, Justice Kenney's broader interpretation of this definition reads that "if an area (wetlands) had a 'significant nexus' to navigable waters or those that 'could reasonably be made so,' it could be regulated—as could adjacent wetlands if they could 'significantly affect the chemical, physical, and biological integrity' of those waters."[74]

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[69] *See* 33 CFR §309(a).
[70] 474 U.S. 121 (1985).
[71] 531 U.S. 159 (2006).
[72] *Rapanos v. U.S.*, 547 U.S. 715 (2006).
[73] E.A. Crunden, *Post-Sackett, chaos erupts for wetlands oversight* (Jun. 2, 2023, 01:34 PM), https://www.eenews.net/articles/post-sackett-chaos-erupts-for-wetlands-oversight/.
[74] *Id.*

In other words, if a parcel of land exhibits a significant nexus to the WOTUS, it will be subject to federal regulation and EPA control.

Following the "significant nexus" reasoning, the Sacketts and other private property owners in the "*Rapanos* era" will not be able to contest EPA's compliance order unless and until EPA enforces the order and implements the penalties for Sackett's inaction or failure to comply.

i. Post-*Sackett*, APA's presumptive judicial review effect extends to other EPA regulatory programs and provides these programs the pre-enforcement review.

In 2012, the majority had yet to articulate and produce a clear-cut answer. However, to the least, the Court provided private landowners a presumptive judicial review basis to sue/litigate their dispute in federal court under the APA (i.e., The Clean Water Act should not be read as precluding judicial review under the APA). The EPA added the following language in response to the 2012 SCOUTS *Sackett* holding: "Respondent may seek federal judicial review of the Order pursuant to [insert applicable statutory provision providing for judicial review of final agency action.]"[75]

This added interpretation, following Justice Alito's majority opinion, disregarded Kennedy's "significant nexus" (or "reasonable proximity") test and instead embraced Scalia's reasoning that the federal protection only extends to the wetlands that have a surface water connection, where it appears to be "difficult to determine where the water ends, and wetland begins."[76]

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[75] Memorandum from the U.S. EPA on Language Regarding Judicial Review of Certain Administrative Enforcement Orders Following the Supreme Court Decision in *Sackett v. EPA*. 2 (Mar. 21, 2013) https://www.epa.gov/sites/default/files/documents/languageregarding-sackett032113.pdf.

[76] *See* 547 U.S. 715, at 741 (footnote 10, stating "a rationale that would have no application to physically separated 'neighboring' wetlands…given that our opinion recognized that unconnected wetlands could not naturally be characterized as "waters" at all…and given the repeated reference to the difficulty of determining where waters end and wetlands begin; the most natural reading of the opinion is that a wetlands' mere "reasonable proximity" to waters of the United States is not enough to confer Corps jurisdiction.").

Conforming to the congressional objective to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters,"[77] the amended CWA focuses on holistically safeguarding water quality for WOTUS. The EPA expanded the CWA §309(a) related administrative enforcement order from a single statute to other statutes (i.e., any applicable statutory provisions bracketed and shown above) that address and regulate issues concerning water quality related to public health, welfare, and environmental threats.

Specifically, the EPA has directed the enforcement of the post-2012 *Sackett* judicial review under the Federal Insecticide, Fungicide, and Rodenticide Act, the Clean Air Act, the Safe Drinking Water Act, and the Emergency Planning and Community Right-To-Know Act.

ii. Revised Definition of "Waters of the United States" (or WOTUS)

Under the 1986 CWA Regulation[78] of WOTUS, the EPA and the Army Corps have separate definitions. Revised in March 2023, the official report of WOTUS under the Biden Administration is being finalized as below:[79]

1. Traditional navigable waters, the territorial seas, and interstate waters (or "paragraph (a)(1) waters")[80]
2. Impoundments of "waters of the United States" (or "paragraph (a)(2) impoundments")[81]
3. Tributaries to traditional navigable waters or impoundments when the tributaries meet either the relatively permanent standard or the significant nexus standard (or "jurisdictional tributaries")

[77] 33 U.S.C. 1251(a).
[78] *See* Memorandum from the U.S. EPA, at 3012 (stating "…the (Army) Corps consolidate and recodified its regulatory provisions defining (WOTUS) for the purpose of implementing the section 404 program...").
[79] *Id*., at 3005-06; *see also id*., at 3019-20 (Federal Register Revised Definition of "Waters of the United States").
[80] 33 CFR §328.3 (a)(1) ("[W]aters which are i) currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide; ii) the territorial seas; or iii) interstate waters, including interstate wetlands").
[81] 33 CFR §328.8 (a)(2) ("Impoundments of waters otherwise defined as waters of the United States under this definition, other than impoundments of waters identified under paragraph (a)(5) of this section").

4. Wetlands adjacent to paragraph (a)(1) water, wetlands adjacent to and with a continuous surface connection to relatively permanent paragraph (a)(2) impoundments, wetlands adjacent to tributaries that meet the relatively permanent standard, and wetlands adjacent to paragraph (a)(2) impoundments or jurisdictional tributaries when the wetlands meet the significant nexus standard (or "jurisdictional adjacent wetlands")
5. Interstate lakes and ponds, streams, or wetlands not identified in paragraphs (a)(1) through (4) that meet either the relatively permanent standard or the significant nexus standard[82]

While the revised definition retains Justice Kenney's "significant nexus" language, the rule introduces perspectives such as "relatively permanent" standards. It provides further clarifications on terms such as "adjacent wetlands." Here, the "significant nexus" standard specifically applies to "waters that either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of traditional navigable waters, the territorial seas, or interstate waters—i.e., the paragraph (a)(1) waters."[83]

The "relatively permanent" language, on the other hand, refers to a test that "identify relatively permanent, standing or continuously flowing waters connected to paragraph (a)(1) waters, and waters with a continuous surface connection to such relatively permanent waters or traditional navigable waters, the territorial seas, or interstate waters."[84]

II. 2023 SACKETT DECISION

In the 2023 *Sackett* holding, Justice Alito threw out Kennedy's "significant nexus" (or "reasonable proximity") test. Scalia's narrower interpretation and the new premise of the revised CWA definition of WOTUS render this test unclear and ambiguous regarding whether federal

[82] *Id*. at (a)(1)-(4).
[83] Memorandum from the U.S. EPA, at 3006.
[84] *Id*.

regulation covers the intermediate, not continuously adjoining wetlands to the water bodies—the areas where the "'water' ends and the 'wetlands' begin."[85]

Here, the jurisdictional wetlands post-*Sackett* include only ones that "with a continuous surface connection to bodies that are 'waters of the United States' in their own right"[86] and are "indistinguishable" from those waters."[87] Conversely, the wetlands separated and isolated from the traditional navigable water under CWA do not constitute jurisdictional wetlands. Therefore, by affirming the plurality opinion from *Rapanos*, the Court discounted the complexity of the natural changes for many non-jurisdictional wetlands that now fall outside of the federal jurisdiction under the revised WOTUS definition. For example, natural changes such as during low tides or droughts will temporarily disconnect wetlands from the bodies of water.[88]

However, the leading industry experts and scientists have observed that until the final rule is announced by September 2023, the rulings in the long term will reduce the protection of over 51 percent of the wetlands in the United States.[89] In a short time, according to environmental scientists, ecologists, and lawyers, there could be four layered impacts on land developers and wetland regulators:

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[85] *See* 547 U.S. 715, at 742 (stating "…that the wetland has a continuous surface connection with that water, making it difficult to determine where the 'water' ends, and the 'wetland' begins").
[86] 143 S.Ct. 1322, 1340 (discussing "[t]hat occurs when wetlands have 'a continuous surface connection to bodies that are 'waters of the United States' in their own rights so that there is no clear demarcation between 'waters' and wetlands.").
[87] *Id*. (holding "'waters' may fairly be read to include only those wetlands that are 'as a practical matter indistinguishable from waters of the United States…").
[88] 143 S.Ct. 1322, 1340-41.
[89] E.A. Crunden, *Post-Sackett, chaos erupts for wetlands oversight* (Jun. 2, 2023, 01:34 PM), https://www.eenews.net/articles/post-sackett-chaos-erupts-for-wetlands-oversight/.

1. "Developers should expect delays from the USACE in processing wetland determinations and permit applications. Some USACE districts have suspended processing Approved Jurisdictional Determinations altogether for the time being."
2. "Developers will face uncertainty if a specific wetland will be subject to federal jurisdiction under the CWA. Similarly, states' regulations of a wetland vary and may shift post-*Sackett*."
3. "Due to the anticipated reduction of Section 404 permitting, other federal laws that often depend on the Section 404 process for review, such as the Endangered Species Act and National Historic Preservation Act, may see a reduction in regulatory review."
4. "Despite the potential for substantial deregulation, wetland and stream delineations will still be necessary to determine what aquatic resources are present within a property."

Besides reporting some difficult predictions from industry insiders, this paper also identifies two general issues that the *Sackett* decisions brought forth for wetlands and wetland-related development from the historic preservation perspective: 1) for wetlands that are not conforming to the new definition of WOTUS, the burden of protecting them shifts to the states or even tribal level; 2) for wetland-related or wetland-based development or preservation activities, the enforcement of the CWA Section 404 permits are further restricted.

i. Jurisdictional Determinations Shift the Burden to States and Tribal Level

First, the *Sackett* decision shifts the burden of regulation and protection for wetlands that do not conform to the new WOTUS definition to the state or even tribal level. To help visualize and organize data points for WOTUS, the Army Corps and EPA published a map to pinpoint the "Water of the U.S." locations of bodies of water that are "Not a water of the U.S." The map demonstrates that 57,050 bodies of water count as WOTUS, and 107,908 are not. These

Jurisdictional Determinations ("JDs")[90] of waters draw jurisdictional boundaries under "Section 10 of the Rivers and Harbors Act of 1899, (factoring in) the discharge of dredged or fill materials into [WOTUS] under Section 404 of the CWA."[91] The data published online also visualized congressional attempts in line pulling while avoiding jurisdictional conflicts and raising federalism concerns.

Post *Sackett*, for upstream waters where the water flow "significantly affects the integrity of the traditional navigable waters, the territorial seas, and interstate waters," the federal laws and policies will steward the protection of the downstream activities.[92] States and federally recognized tribes in the United States will share concurrent jurisdiction if the upstream water use and downstream impact appear none or significantly less.[93]

Besides facing potential jurisdiction disputes in managing and allocating water flows (especially for prior appropriation states West of the Mississippi River), *Sackett* brings more pressing problems. It raises concerns for Native American tribes, which the holding may condemn to an unknown fate of historic preservation for the archeological excavation sites on the wetland.

For example, the valuable data that has been identified for archeological excavations and geospatial files that were/are stored in the SHIPO (State Historic Preservation Offices) or THPO (Tribal Historic Preservation Office) might have been protected by federal protections and Army Corps' stewardship in the past. Post *Sackett*, it is unclear whether all or some of these files and data related to wetland archeology will still be protected federally.

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[90] *See* U.S. EPA, Clean Water Act Approved Jurisdictional Determination, https://watersgeo.epa.gov/cwa/CWA-JDs/ (last visited Jul. 28, 2023).
[91] *See* U.S. Army Corps of Engineers, USACE Jurisdictional Determinations and Permit Decisions Welcome, https://permits.ops.usace.army.mil/orm-public (last visited Jul. 28, 2023).
[92] Memorandum from the U.S. EPA, at 3020.
[93] *Id.*

Moreover, for many jurisdictional wetlands that formerly belonged to federal regulations, *Sackett* decision can shift the regulatory burden to state or tribal levels. Recall that the previous discussion has addressed that federal protection under *Sackett* only extends to wetlands under the definition of WOTUS "in their rights so that there is no clear demarcation between waters and wetlands."[94]

Therefore, in addition to jurisdictional ambiguity, the geographic challenge of determining WOTUS-categorized wetlands adds difficulty to regulation and further restricts the federal regulatory power over wetlands that are not confirmative of the *Sackett* definition. On the state level, "at least two-thirds of states have laws that could restrict authority or local agencies to do more to protect waters unprotected under CWA."[95] The shift in jurisdictional regime alarms a bleak future where there is going to be a shift of legal duty to protect the non-confirmative wetlands within the WOTUS definition to the states and tribes—who often do not have as comprehensive laws and resourceful programs as the federal agencies.

ii. Permits Enforcement Narrow the Scope of Wetland-Based or Related Activities

The second issue that the *Sackett* decision flagged out might further restrict the CWA Section 404 permits for wetland-related or wetland-based development or preservation activities. The CWA Section 404 authorizes the Army Corps to regulate through various permit programs. The Crops began its first permit program under Section 404 in 1974.[96] In 1978, the Army Corps published the "Corps of Engineers Wetlands Delineation Manual" to identify and regulate wetlands in the United States under Section 404. Besides specific forestry or farming-related

[94] 143 S.Ct. 1322, 1340-41.
[95] Sara Dewey, *Sackett v. EPA: Departure from Textualism Significantly Limiting Clean Water Protection*, at 5 (Jun. 16, 2023), https://eelp.law.harvard.edu/2023/06/sackett-v-epa-departure-from-textualism-significantly-limiting-clean-water-protection/.
[96] 143 S.Ct. 1322, 1353.

activities, Section 404 specifies permit-required activities such as fill for development, water resources projects (dams and levees), infrastructure development (highways and airports), and mining activities.[97]

Section 404 of CWA aims to maximize wetland use without harming aquatic environments. For anything that might destroy the water quality in the WOTUS, an applicant must submit individual or general permits to the Army Corps and process the permits through the State/Tribal 404(g) program for public interest review. More specifically, for wetland-based activities regulated through Section 404, the EPA requires individual permits for any actions that might cause significant impacts and general permits for discharges that might bring forth minimal adverse effects.[98]

To protect waters from harm, CWA prohibits discharging dredged[99] or fill material[100] into any jurisdictional wetlands of the WOTUS without a permit under Section 404.[101] However, the statutes do not specifically define "dredged" or "fill material" to the extent that it eliminates all the foreseeable harm imposed by land development activities on the wetlands. For example, one can still lawfully remove vegetation from the wetland, drain the wetland, or excavate the wetland if there is "no discharge of dredged or fill material may be permitted, only if "practicable

[97] *See* U.S. EPA, Permit Program under CWA Section 404, https://www.epa.gov/cwa-404/permit-program-under-cwa-section-404 (last visited Jul. 28, 2023).
[98] *See* U.S. EPA, Wetland Regulatory Authority, https://www.epa.gov/sites/default/files/2015-03/documents/404_reg_authority_fact_sheet.pdf (last visited Jul. 28, 2023).
[99] Further Revisions to the Clean Water Act Regulatory Definition of "Discharge of Dredged Material, 66 Fed. Reg. 4,550 (Jan. 17, 2001) (to be codified at 33 C.F.R. pt. 323, 40 C.F.R. pt. 232).
[100] Final Revisions to the Clean Water Act Regulatory Definitions of "Fill Material" and "Discharge of Fill Material", 67 Fed. Reg. 31,129 (May 9, 2002) (to be codified at 33 C.F.R. pt. 323, 40 C.F.R. pt. 232).
[101] *See* 33 U.S.C.A. §1344 (f)(2) (stating "[a]ny discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of the navigable waters may be impaired or the reach of such waters be reduced, shall be required to have a permit under this section.")

alternative exists that is less damaging to the aquatic environment or the nation's waters would be significantly degraded."[102]

III. APPLICATION (WETLAND CULTURAL/HISTORICAL RESOURCES)

Under the new statutory regulations for WOTUS and the 2023 *Sackett* holding, more than half of the wetlands in the United States that were once shielded by federal protections now face precarious and unforeseeable fates. Concerned audiences and experts in the related field predicted that the *Sackett* might negatively impact historic preservation and biological diversity conservation on wetlands no longer defined as part of the WOTUS.

Specifically, the short-term impact of *Sackett* will likely shift the Section 404 process for permit programs under the Endangered Species Act and National Historic Preservation Act, which may likely experience a reduction in regulatory review.[103] Historic Preservation works on wetlands that fell outside the scope of WOTUS will inevitably face a short, or long-term impact because of the *Sackett* holding.

This section provides the reader with a closer look at wetland archeological sites by surveying and sampling relevant archaeological and historical resources that could be subject to *Sackett* holding's negative impact. The areas discussed here were loosely grouped by location and separated into coastal and inland areas.

Scientifically, the EPA categorizes wetlands into coastal/tidal and inland/non-tidal. Generally, coastal wetlands exist on the Atlantic, Pacific, Alaskan, and Gulf coasts. The inland or non-tidal wetlands are spread across rivers, lakes, streams, and ponds. [104]

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[102] *See* U.S. EPA, Permit Program under CWA Section 404, https://www.epa.gov/cwa-404/permit-program-under-cwa-section-404 (last visited Jul. 28, 2023).
[103] *See generally*, Tara Alden et.al., What's Next for U.S. Wetlands After *Sackett v. EPA*? (Jul. 11, 2023), https://www.kimley-horn.com/news-insights/perspectives/us-wetlands-sackett-v-epa/.
[104] *See generally*, U.S. EPA, What is a Wetland?, https://www.epa.gov/wetlands/what-wetland (last visited Jul. 28, 2023).

First, under CWA, archeological or historical preservation activities on wetlands are typically case-by-case, site-based. Depending on the specific activities that might discharge fill materials into the water, they could fall within or out of the permitting scope under CWA Section 404 in a post-*Sackett* world. Technically, the CWA defines the "discharge" of a pollutant as adding the said pollutant from a point source and the premise that the point source discharges as a prerequisite to trigger permit requirements.[105]

For an archeological activity that involves dredging (digging up soil from the bottom of a water body) or creating fills (using any material that primarily functions to replace an aquatic area with dry land or "changing the bottom elevation of a water body"),[106] it is unclear whether the activity will accumulate enough adversarial impacts that can impair the wetlands. Even if the level of discharging rises to the trigger point that requires a permit, under the new *Sackett* holding, excavating on the disjointed, isolated wetlands located inland or cut off from their tidal sites falls out of federal jurisdiction because these lands are not "distinguishable" from WOTUS.

This impact under *Sackett* diminishes the importance of the historic preservation of non-jurisdictional wetlands. To illustrate the importance of wetland archeology and wetland-based historical preservation, this article features the following wetland archeological sites or historical sites that bear significant colonial legacies and Indigenous memories of the land.

i. Coastal/Tidal Sites

Evidence of the human-altered environments on wetlands historically were built for transportation or trade. For example, the archeological remains of the trackways or "corduroy

[105] *See* Royal C. Gardner, *Dredge and Fill: The Importance of Precise Definitions*, *In Lawyers, Swamps, and Money* 57, 57 (2011).
[106] *Id.*

roads"[107] by the York River in York River State Park (20 miles from the Chesapeake Bay) are still visible in the tidal marshes. They have existed since the colonial era and were once a means to "bring goods into the marshes and loaded on small boats to load ships without sinking into the mud."[108] In the United States, wetland archeological preservation efforts have extended beyond preserving the shoreline and colonial legacy.

Now, some of the most demanding preservation efforts give priority and spotlights to protect ancient Native American historical and cultural resources. Here, the York River also contained memories of tribes in Virginia, the Chickahominy, Eastern Chickahominy, Mattaponi, Nansemond, Pamunkey, Rappahannock, and Upper Mattaponi. In 2016, an archeological site, the "Werowocomoco," dated as early as circa A.D. 1200.

Four indigenous archeological sites were unearthed in 2013, along the shore of Otter Creek in Pittsford, Vermont.[109] Through the State Natural Resources Conservation Service's Wetland Reserve Program, a conservation easement sheltered the excavation. Archeologists could unearth artifacts such as spear points, arrowheads, scraping tools, and unsurfaced segments of access roads built by the indigenous ancestors.

ii. Inland/Non-Tidal Sites

In the Great Valley of Maryland (Ridge and Valley Province of Maryland and Pennsylvania), there were ponds-based Native American archeological settlements that dated back to at least 65,000 B.C. or 7500 to 7000 B.C.[110] Conducting archeological digs in these

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[107] John Gresham, *A Day in the Life of York River State Park: Our Slice of the River*, Virginia State Park (Dec. 15, 2014), https://www.dcr.virginia.gov/state-parks/blog/5329.
[108] *Id.*
[109] U.S. Dept. of Agric., *Archeological Site Protection Within WRP Easements*, Natural Resources Conservation Service (May 17, 2013), https://www.nrcs.usda.gov/conservation-basics/conservation-by-state/vermont/news/archeological-site-protection-within-wrp.
[110] *See* Steward R. Michael, Ancient Ponds*, Marl Deposits, and Native American Archology in the Ridge and Valley Province of Maryland and Pennsylvania*, at 7 (2003).

wetland environments provide valuable insights into pre-historical human activities. By studying the mineral (marl) deposit, the researchers concluded that there is a "clustering of Native American bifaces diagnostic of the Early and Middle Archaic period of regional prehistory around the edge of marl deposits."[111]

Similarly, the inland/non-tidal archeological site at Yellowstone Lake suggests that based on the mineral deposits and unearthed artifacts such as "lithic raw material (stone tool)," "nearly all the Native American people who utilized the lake (with the possible exception to tribes on the southeastern shore) also traveled to Obsidian Cliff, some 25 miles (40 km) to the northwest of Fishing Bridge, to procure stone for tool manufacture."[112] The archeological data further reflects the importance of the relationship between the ancestral tribal people and the wetlands they dwelled upon.

In the Southwest, the non-tidal, indigenous archeological sites along the Colorado River are not only facing the threat of climate change, rapid erosion, and water table decline (reduction of water flow and sediments) from the Colorado River Basin, the *Sackett* decision also untimely situates these excavation sites in an even more precarious position.

After years of dedication and hard work, the National Park Service has identified over four hundred[113] archeological sites along the Colorado River that belong to the ancestors of Hopi, the Hualapai, the Kaibab Paiute, the Navajo, the Paiute, the Shivwits Paiute, and the Zuni Pueblos. Among them, the Park Service has identified nine sites in Grand Canyon that are the

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[111] *Id*., at 7.
[112] Douglas H. MacDonald, Archeological Significance of Yellowstone Lake, National Park Service, https://www.nps.gov/articles/archeology-archeological-significance-yellowstone-lake.htm (last visited Jul. 28, 2023).
[113] National Park Service, *Archeology Along the Colorado River*, https://home.nps.gov/grca/learn/historyculture/archeology-along-the-colorado-river-video.htm (last visited Jul. 28, 2023).

most endangered by the combined threat of these factors.[114] To protect these sites, which hold the ancient Native history and cultural memories of the Grand Canyon, advocating for more funding resources, labor, and functional legal and policy frameworks should be the priority of the caring audiences.

IV. CONCLUSION

In an age where ethical and socially responsible land use is increasingly proven valuable in protecting lived history and collective narratives, it is fundamental to continue preserving endangered sites by having unambiguous, comprehensive, and thoughtful legal rules and policies in place.

Narrowly, the *Sackett* holding only covers wetlands with "continuous surface connection" to the WOTUS and writes out wetlands that are not adjoining, but only adjacent to, water bodies out of federal protection. However, given the statutory differences between "adjacent" and "adjoining," the new WOTUS definition does not concern wetlands that are not "contiguous to or bordering a covered water (body)…(or) wetlands separated from a covered water only by a man-made dike or barrier, natural river berm, beach dune, or the like."[115]

Broadly, the current *Sackett* test for jurisdictional wetlands did nothing to meet these initiatives. Not only does it further burden state and tribal counterparts with taking on what CWA cannot reach but is supposed to protect, but it also restricts Section 404 permitting programs for wetland-based activities, especially for wetland archaeological activities.

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[114] National Park Service, Archeological Excavations at Nine Sites along the Colorado River Corridor, https://home.nps.gov/grca/learn/historyculture/archeology-excavation.htm (last visited Jul. 28, 2023).
[115] 143 S.Ct. 1322, 1362 (J. Kavanaugh, Sotomayor, Kagan, Jackson concurring).