Post Sackett: What Can States Do To Protect Wetlands?

We’ll start shortly - enjoy the music!

You’re listening to: Bad Luck Blues by Lightnin’ Slim
• 550 Staff
• 15 offices
• >1000 clients
• >390 active lawsuits
Earthjustice handles a lot of matters...

1123 Open Matters
390 Open Matters in Active Litigation
95 Open Lobbying Matters
106 Open Litigation Matters with Potential for a Trial or Evidentiary Hearing

555 Forum Type Mix for Open Matters

241 Federal Judicial
82 State Administrative
81 State Utility Commission
79 Federal Administrative
48 State Judicial
19 International Judicial
5 International Administrative
With lots of different partners...

**TYPE OF ORGANIZATION**
- 95 National Environmental Group
- 68 National Non-Environmental Group
- 387 State or Regional Environmental Group
- 75 State or Regional Non-Environmental Group
- 206 Community-Based Group
- 107 Tribal or Indigenous Group
- 52 International
- 21 Philanthropic
- 16 Commercial
- 8 Trade Group
- 3 Academic Institution
- 1 Other

**PRIMARY ISSUE FOCUS**
- 56 Civil Rights & Social Justice
- 83 Climate & Energy
- 16 Commercial
- 401 Conservation & Wildlife
- 19 Consumer Rights
- 59 Environmental Justice
- 121 General Environmental
- 23 Labor Issues
- 8 Other
- 126 Public Health
- 13 Trade Group
- 114 Tribal & Indigenous Rights Issues
...in lots of different places...
The Clean Water Act

- Bipartisan! Passed over Nixon veto!
- Intended “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”
- Set as a goal “that the discharge of pollutants into the navigable waters be eliminated by 1985.”
- Instructs EPA to “develop comprehensive programs for preventing, reducing, or eliminating the pollution of the navigable waters and ground waters.”

Section 502(7): “The term ‘navigable waters’ means the waters of the United States, including the territorial seas.”
“WOTUS” matters. A lot.
Does “navigable waters” include wetlands?

- **1975**: Army Corps says wetlands are covered.
- **1977**: Congress amends the Act in a way that shows it agrees
- **1985**: In *Riverside Bayview*, SCOTUS unanimously agree
- **2006**: We get a fractured decision in…

**Rapanos v. United States (2006)**

- **Liberals**: We’ve already said that the Act covers wetlands.

- “Conservatives”: The Act only relatively permanent waters + wetlands with a continuous surface connection so that there’s no clear boundary.
“[T]he *Rapanos* plurality was correct.”

The CWA covers only relatively permanent water bodies that would ordinarily be described as “streams, oceans, rivers, and lakes.”

The only wetlands the CWA covers are those that are “indistinguishably part of” a covered water body.
Where does the public stand?

<table>
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<tr>
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<th>The Clean Water Act should be read broadly, to include things like wetlands</th>
<th>The Clean Water Act should be read narrowly, to not include things like wetlands</th>
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<tbody>
<tr>
<td>All</td>
<td>72%</td>
<td>28%</td>
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<tr>
<td>Democrats</td>
<td>81%</td>
<td>19%</td>
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<td>Independents</td>
<td>70%</td>
<td>30%</td>
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<td>Republicans</td>
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<td>34%</td>
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**Question wording:** The Clean Water Act is a federal law that prohibits the “discharge of pollutants” into “navigable waters.” Some people think that this should be read broadly, to include things like wetlands. Other people think that this should be read narrowly, to include only things like streams, rivers and lakes. What do you think? | Source: SCOTUSPoll
We will never rest
THE RELENTLESS PURSUIT OF JUSTICE
Conserving Wetlands Post Sackett v. EPA

Common Merganser, female, adult and juvenile, East Arm Grand Traverse Bay, Michigan. Photo: Greg Hazen/Audubon Photography Awards
Brian Vigue
Policy Director of Freshwater, Audubon Great Lakes
brian.vigue@audubon.org
608-843-6355
Great Lakes Region Network

- 50+ chapters
- Over 200,000 active members
- 2 nature centers
- 1 regional office
Wetlands

- Can hold approximately one million gallons of water per acre, reducing flooding.

Wetlands help absorb, store and slow floodwaters, decreasing the effect of streambank erosion.
Wetlands

- Provide habitat for the birds, fish and wildlife that depend on wetlands for their survival.
Wetlands

- Clean our water and store carbon from being released into the atmosphere

A wetland absorbs excess nutrients, sediment and pollutants before they reach larger bodies of water.
State of Great Lakes Wetlands

- WI and MI have lost 50 percent of their natural wetlands since European settlement to development.
- In the last 10 years, Wisconsin has suffered roughly $365 million in property damage from flooding.
- Michigan has 3000 miles of coastline, where the wetlands serve as filters for 20,000 acres of watersheds.
- Michigan faces a huge challenge with Harmful Algal Blooms caused by nutrient-rich runoff from agricultural activity.
Coalition Building

- Working together to protect wetlands
- Traditional "Green" organizations
- "Hook and Bullet" organizations
- New coalition members recruited from outside previous wetland advocacy efforts
  - Trucking
  - Ports
  - Retail
  - Insurance
  - Agriculture/Agri-business
  - Water-intensive industry
Opportunities to Protect Wetlands
2016 Flooding in Northern WI

- Storms stall over the region
- 8-14 inches of rain fell in an eight-hour period
- Considered a 1,000 year storm in some areas
- Communities inaccessible for days
Public Infrastructure

- Numerous state and local roads damaged or destroyed.
- Few or no alternatives for residents to travel
- Increased transportation costs for personal and commercial travel
Private Infrastructure

- Saxon Harbor & Marina destroyed.
- Region heavily reliant on tourism
- Flooding damage significantly impacts commercial activity
Vulnerable communities often most impacted

- Communities that have suffered from disinvestment can be the least resilient.
- Communities of color and economically depressed areas often bear the burden of hosting public and commercial infrastructure.
Policy Win

• The Michigan State Legislature approved $10,000,000 in ARPA funding for wetland conservation and restoration work in the Western Lake Erie Basin and Saginaw Bay.

• The Michigan State Legislature also approved a $2,000,000 line item in the regular budget for statewide wetland conservation and restoration work.

• This funding is the largest investment in proactive wetland conservation and restoration in state history.
Policy Win

Pre-Disaster Flood Resilience Grant Program created by AB 222/SB 222.

• First part of bill provides funding so local governments can study how water flows in their communities and where damaging flooding is likely to occur.

• Second part of bill provides funding for local governments to implement wetland restoration projects that will hold onto and redirect water to stop damaging flooding before it occurs.
Policy Win

$175,000/yr for the Oneida Nation and Audubon habitat restoration project.

- The Oneida Nation has restored wetlands on 3,000 acres of their land in Northeast WI, improving water quality and habitat and resulting in the return of birds, fish and wildlife.
- Audubon is leading a volunteer bird monitoring effort on these lands to evaluate the success of this restoration.
- Volunteers have documented the return of more than 75,000 individual birds and 120 different bird species
Results So Far

- The Governor’s budget request for the Oneida Nation/Audubon Great Lakes project was approved by the full Legislature, signed into law by the Governor and will soon be allocated to the Oneida Nation for project work.

- SB 222 has been passed by the Senate unanimously.

- AB 222 awaits a committee vote.

- The Legislature approved and the Governor signed a budget that includes $1,000,000 per year for the next two years for the program.

- We anticipate the bills and the funding to be passed into law unanimously by the end of the year.
Steps to prepare for/defend against bad wetland policy

- Legislators can educate their colleagues about the benefits of wetlands
- Create a wetland policy council made up of major stakeholders
- “Kitchen Cabinet” of wetland engineering consultants supportive of good wetland policy
- Engage with the developers/realtors/farmers in the district, not just their lobbyists in the Capitol

- Establish your own relationship with state agency staff responsible for wetlands, without going through the agency leadership.
There are other tools government can use to protect wetlands.

- State or local governments’ land use regulations can protect buffer areas near wetlands.
- Local governments can use ordinances to regulate activities near or in wetlands without regulating the wetlands themselves.
- Conservation planning allows state or local government to protect entire important natural areas, which just happen to include wetlands.
- Some states have applied water quality standards to wetlands, even though they don’t have an actual wetland regulatory program.
- Voluntary conservation and restoration programs.
Resources for further information.

- National Audubon Society: https://www.audubon.org/
- “Filling the Gaps: Strategies for States/Tribes for Protection of Non-WOTUS Waters,” Environmental Law Institute, May 2023
- National Association of Wetland Managers: https://www.nawm.org/
- Website for Save NYS Wetlands: https://save-nys-wetlands-audubon.hub.arcgis.com/
- Audubon Great Lakes: https://gl.audubon.org/
Questions?

Sandhill Cranes, Pulaski County, Indiana. Photo: Jack Eichner/Audubon Photography Awards
Thank you!

Bald Eagle. Photo: Venu Challa/Audubon Photography Awards
State and Local Policy Solutions
In a Post-Sackett World

Jim Murphy
National Wildlife Federation
Sackett – Impact on States

- Removal of Federal Protections for up to 63% of previously protected wetlands and up to 5 million miles of streams
- The impacts are greatest in dry areas like the Southwest and areas with many depressional, isolated waters like the Great Plains
- Impacts states’ implementation of Clean Water Act Programs like the NPDES permitting program and water quality certification under Section 401
State Backstop Protections

- Most states have little or no state protections
- This leaves countless wetlands and streams at risk after *Sackett*

Graphic Courtesy of Earthjustice
Zoning

- Localities have broad power to protect resources through local zoning
- Community greenprints can help identify wetlands and stream resources for protection
- Incentivize avoidance
- Require mitigation measures for impacts, including preservation
Leveraging SRF Funds

- Clean Water and Drinking Water Act SRFs provide affordable grants and loans for water quality projects
- Federal/state/private partnerships
- Benefits to EJ communities
- Can be directed to green infrastructure practices, wetlands restoration, land acquisition
- States determine how funds are used
Leveraging Ag Conservation Programs

- Swampbuster – hinges eligibility to federal farm programs to wetland protection. Has protected 5 million acres of wetlands
- ACEP – federal funding to conserve wetlands and other resources
- WREP – States/localities must submit proposals to leverage funds
- CRP – subsidizes farmers for taking marginal land out of production, 2.3 million acres of wetlands. States can promote these programs, help farmers with costs
- RCPP – USDA assistance to set up targeted conservation programs, such as watershed conservation
Tax Credits and Conservation Easement Reform

- State credit for conservation easement
- Credits can be transferable
- Creation of state credit for high priority wetlands conservation
Ballot/Bond Initiatives

- Statewide conservation funding ballot – establish statewide preservation trust fund
- Not available in all states, but can be done on local level
- Can be funded by bonds or taxes (property/sales, etc.)
Questions or Further Resources?

Jim Murphy
jmurphy@nwf.org

National Wildlife Federation
https://www.nwf.org/Our-Work/Waters

Clean Water for All

https://protectcleanwater.org/
Sackett v. EPA: What's next?
Considerations, Obstacles, and Solutions

Julian Gonzalez, Senior Legislative Counsel
Earthjustice
There are less EPA protections. What does that mean for **states**?

- Downstream states will experience changes in **both quality and quantity** of water
- A **bulldoze and fill first, ask questions later** mentality
- **Less community input** into development, **less checkpoints for safeguards** on harmful projects
- Depending on where you are, the battle may be "**defensive**" or "**offensive**"
Wetlands Most in Danger After the U.S. Supreme Court’s Sackett v. EPA Ruling
Scale based on state wetland protections and state legislative limits to clean water safeguards

<table>
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<th>No or Little Protections for Wetlands</th>
<th>Wetlands At Risk, Some Protections</th>
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• This isn't even updated with considerations of worsening climate and drier weather

• Wetlands are one problem. **Streams are another, especially in the Southwest.**

• The prior slides were mostly about wetland protections. **Stream protections** are the second gigantic deregulatory consequence of *Sackett.*
There are less EPA protections. What does that mean for states?

• Regulatory Gaps Exposed:
  o Just because a water was protected by EPA before *Sackett*,
    doesn't mean it will be protected by states now
  o Some states designed state program *around* EPA

• Many states will seize the opportunity to further weaken
  laws + regs
  o Examples:
    ▪ North Carolina, Indiana
    ▪ Missouri
Finding state solutions: how to take action

● In most states there are coalitions of advocates already researching the extent of the damage, and strategizing on how to fight back legislatively

● National coalitions like Clean Water for All and larger groups like Earthjustice are providing additional resources and expertise to state-based partners
  ○ Great resources to find out more information on both the state of play in certain states, or technical/legal obstacles.
  ○ Feel free to reach out to me at jgonzalez@earthjustice.org, or Kristine Oblock from Clean Water for All at OBlockK@nwf.org
The long term fight: A Federal Solution

- Ultimately, even if states improve their own laws and regulations and programs, we need a federal fix.

- There is a reason the Clean Water Act was passed: to avoid a state by state patchwork of regulation.

- Politically, we are very far from this in DC. The greater water advocacy movement needs to grow massively in strength, number, and diversity.
A new frame of reference: how the state and federal fights are connected

● The good news: while developing programs and laws are inherently technical exercises, the fight in public now is not about jurisdiction or Sackett or Rapanos or adjacent wetlands or prairie potholes. SCOTUS made sure of that.

● It's about clean water. We're in a place where elected representatives can affirmatively push for and run on protecting waters. While "WOTUS" is a third rail buzzword, protecting water quality and quantity, protecting public health, etc., are absolute winners.

● The action cycle: State fights feed into national movement building. National movement building is what we need for momentum on a federal fix. Momentum national will help resource state fights. And so on.
What we need from legislators:

- **Get in the game** in your state: plug in with local advocates.
- **Get a bit nerdy with them**: this may require finding data, mapping impacts, understanding regulatory gaps, learn about agency roles, state budgetary needs, needed federal funding, etc. These details matter.
- **Work together**: join the water advocates in strategizing, get other folks involved too – these are long term battles.
- **Make Noise**: This is about stopping drought, pollution, development, and protecting waters. You know what framing works best in your state, as do local advocates. You will have support.
Still have questions or interested in introducing legislation in 2024?

Contact Kate Burgess - Conservation Manager at NCEL
kate@ncelenviro.org

We’ll direct your questions to panelists accordingly!