

Post Sackett: What Can States Do To Protect Wetlands?



NCEL

National Caucus of
Environmental Legislators



EARTHJUSTICE

We'll start shortly - enjoy the music!

You're listening to: Bad Luck Blues by Lightnin' Slim



NCEL



EARTHJUSTICE



- 550 Staff
- 15 offices
- >1000 clients
- >390 active lawsuits



Earthjustice handles a lot of matters...

1123

Open Matters

390

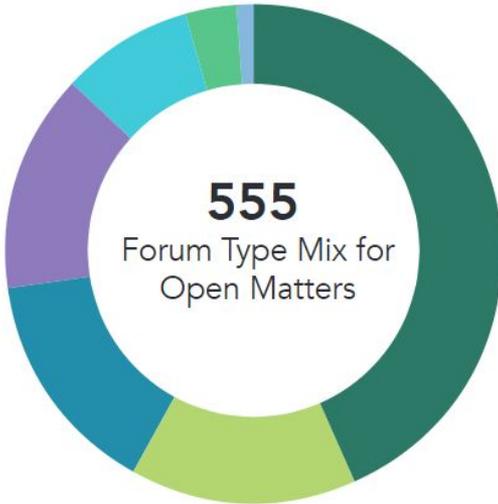
Open Matters in
Active Litigation

95

Open Lobbying
Matters

106

Open Litigation Matters with
Potential for a Trial or
Evidentiary Hearing



241 Federal Judicial
82 State Administrative
81 State Utility Commission
79 Federal Administrative
48 State Judicial
19 International Judicial
5 International Administrative

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

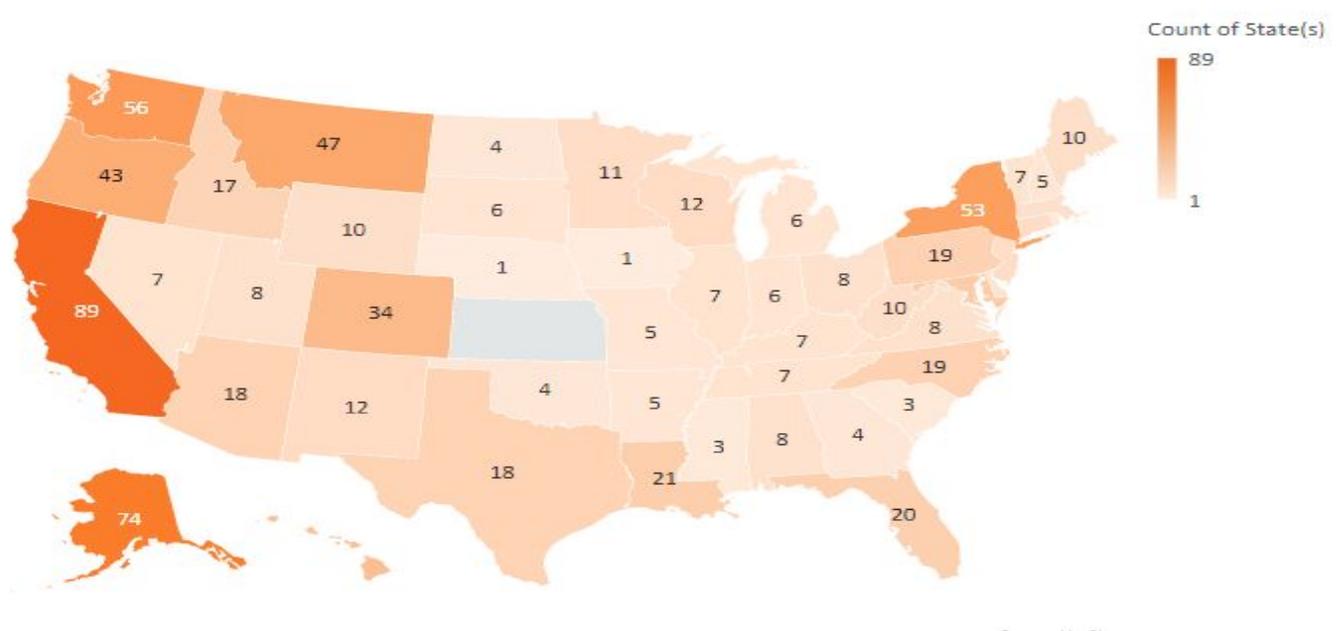


PRIMARY ISSUE FOCUS

- 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...

Client Locations in the United States



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.”



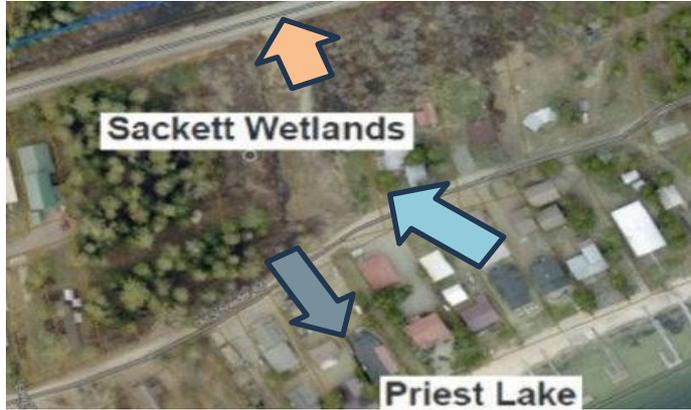
Sackett v. EPA

Kalispell Bay Fen

This aerial map displays three distinct environmental areas. At the top, a blue line traces the boundary of the Kalispell Bay Fen, which is a large, brownish, textured area. Below this, a road runs horizontally across the middle. Further down, a white box labels the Sackett Wetlands, a smaller brownish area. At the bottom, a residential neighborhood with various houses and a marina is shown, with a white box at the very bottom labeling Priest Lake.

Sackett Wetlands

Priest Lake



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.

Sackett v. EPA

Liberal bloc



Sotomayor



Jackson



Kagan



Roberts



Kavanaugh



Barrett



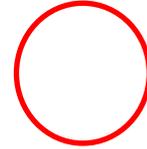
Gorsuch



Alito



Thomas

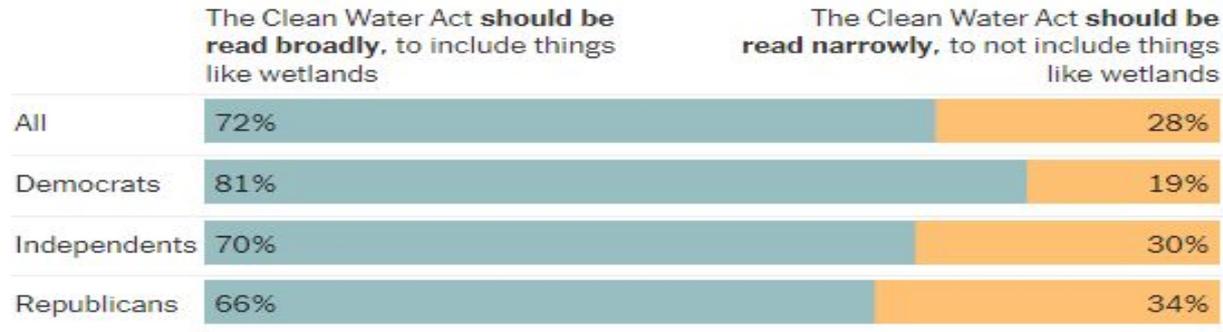


- “[T]he *Rapanos* plurality was correct.”
- The CWA covers only relatively permanent water bodies that would ordinarily be described as “streams, oceans, rivers, and lakes.”
- The only wetlands the CWA covers are those that are “indistinguishably part of” a covered water body.



Where does the public stand?

Where the public stands



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

OF DYING BECAUSE OF EXPLOITATION AND GREED • UNTIL WILDLIFE CAN BE WILD • UNTIL THE EARTH DOESN'T NEED A LAWYER ANYMORE • UNTIL TR
LITY IS ACHIEVED • UNTIL WE HAVE CLEAN ENERGY • UNTIL THE CLIMATE CRISIS IS GLOBALLY ACKNOWLEDGED AS THE BIGGEST THREAT HUMANITY
UNTIL CAPITALISM DIES • UNTIL THE EARTH AND ITS PEOPLE LIVE IN RIGHT RELATIONSHIP AGAIN • UNTIL WE ARE ALL SEEN, HEARD, AND VALUED • UNT
AREN'T FEARING HUMAN EXTINCTION • UNTIL EVERYONE AND EVERYTHING CAN EXIST IN HARMONY AND COLLECTIVELY MANIFEST A CONSCIOUS FUTU
L PEOPLE, ESPECIALLY THOSE WITH LESS POWER, AND OUR PLANET ARE PLACED ABOVE CORPORATE GREED • UNTIL HUMANS STOP PRETENDING WE'
FROM THE EARTH • UNTIL LIBERTY AND JUSTICE FOR ALL • UNTIL ALL PEOPLE HAVE ACCES TO HEALTHY, CLEAN, LIVING ENVIRONMENTS REGARDLESS
GENDER, RACE, SOCIO ECONOMIC STATUS • UNTIL HUMANS STOP ENCROACHING ON ANIMALS AND VALUE THEIR EXISTENCE • UNTIL PEOPLE ARE VALU
PROFITS • UNTIL WE LIVE IN HARMONY WITH OUR ENVIRONMENT • UNTIL THE MOST VULNERABLE DOMESTIC AND GLOBAL POPULATIONS ARE SAFE FRO
CHANGE AND ABLE TO THRIVE IN RELATION WITH THE LAW • UNTIL WE ACT FROM CONNECTION, NOT DISCONNECTION • UNTIL A CLEAN HEALT
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TANCY • UNTIL OUR PLANET IS PRIORITIZED OVER PROFIT • UNTIL THE ENVIRONMENTAL RIGHTS ARE HUMAN RIGHTS • UNTIL CLEAN AIR IS A RIGHT I
AT A PRIVILEGE FOR A FEW • UNTIL OUR FOOD IS FREE OF PESTICIDES • UNTIL EVERY HUMAN IS DEDICATED TO PROTECTING THE EARTH, ITS WILDLAN
AND ALL OF ITS INHABITANTS • UNTIL THE LAWS OF NATURE ARE OUR OWN • UNTIL WILDLIFE AND WILD LANDS ARE PERMANENTLY PROTECTED FROM T
EXTINCTION • UNTIL WE RESPECT, PROTECT, AND ACHIEVE JUSTICE FOR ALL LIFE ON OUR PLANET • UNTIL WE LEAVE THE WORLD IN A BETTER STATE TH
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ENERGY IS CLEAN • UNTIL RED AND BLUE STATES BECOME GREEN • UNTIL THE AMERICAN REVOLUTION BECOMES THE CLEAN ENERGY REVOLUTION • UNT
HANDS FOR ALL • UNTIL WE THE PEOPLE INCLUDES EVERY VOICE • UNTIL PEOPLE START HAVING MORE RIGHTS THAN A CORPORATION • UNTIL FLORID
ARE SAFE TO SWIM IN • UNTIL THE ENVIRONMENT IS DEPOLITICIZED • UNTIL WE ARE ALL SAFE • UNTIL EVERY COMMUNITY IS VALUED • UNTIL OUR SYST
O ON LONG TERM SUSTAINABILITY OVER SHORT TERM RETURNS

We will never rest

UNTIL SUCCESS IS MEASUR
A BETTER WORLD FOR O
ALL ANGELENOS TO BREAT
DETREMENTS OF INDUSTRY
CHILDREN BREATHE CLEAN AIR AND DRINK SAFE WATER • UNTIL WE'VE ACHIEVED A JUST AND EQUITABLE TRANSITION FROM FOSSIL FUELS TO A CLE
ONOMY • UNTIL OUR NATIONAL PARKS AND PUBLIC LANDS ARE PROTECTED SO THAT OUR ICONIC SPECIES CAN THRIVE AND FUTURE GENERATIONS C
COUNTRY'S NATURAL BEAUTY AND HERITAGE • UNTIL I CAN READ THE LATEST NEWS ABOUT THE HEALTH OF OUR PLANET AND ITS DIVERSE AND AV



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

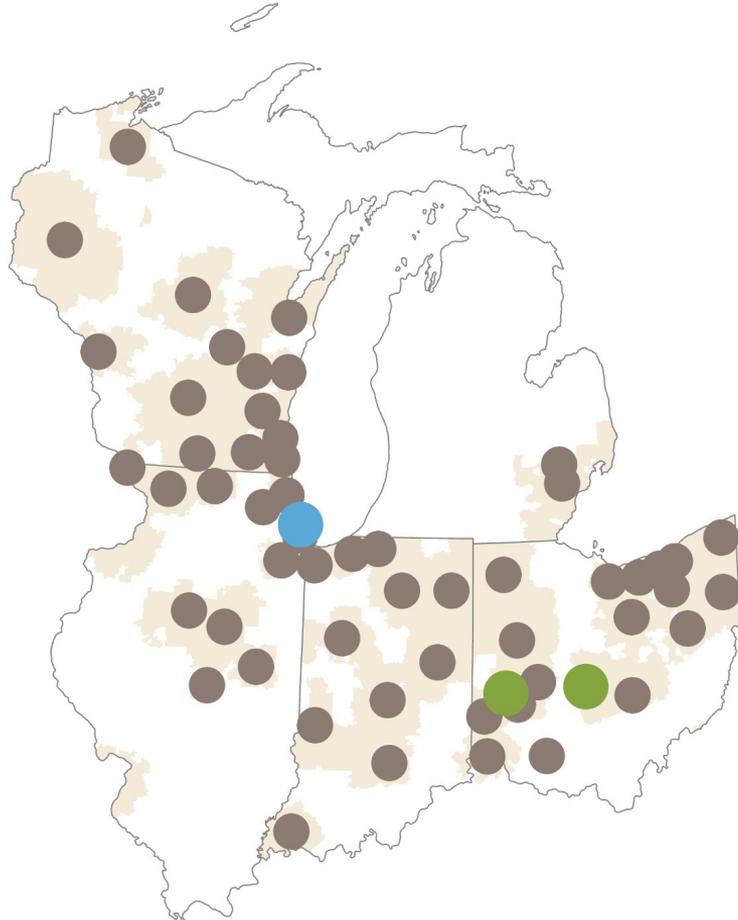
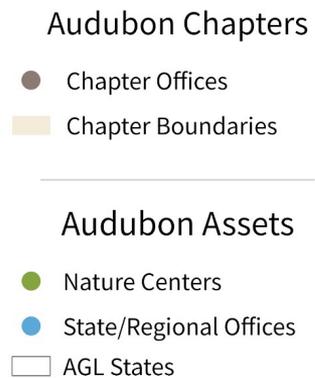
Policy Director of Freshwater, Audubon Great Lakes

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608-843-6355

Great Lakes Region Network

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

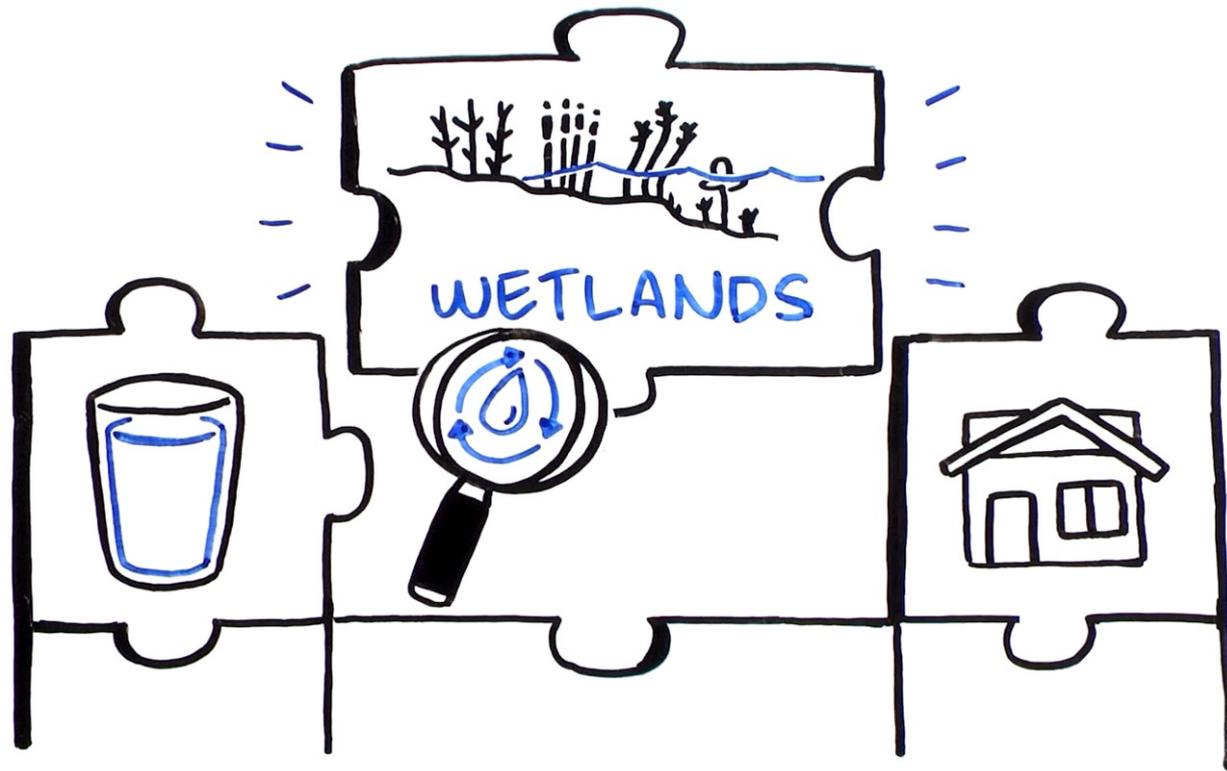




Great Gray Owl

SURVIVAL BY DEGREES:
**389 Bird Species
on the Brink**





Wetlands

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



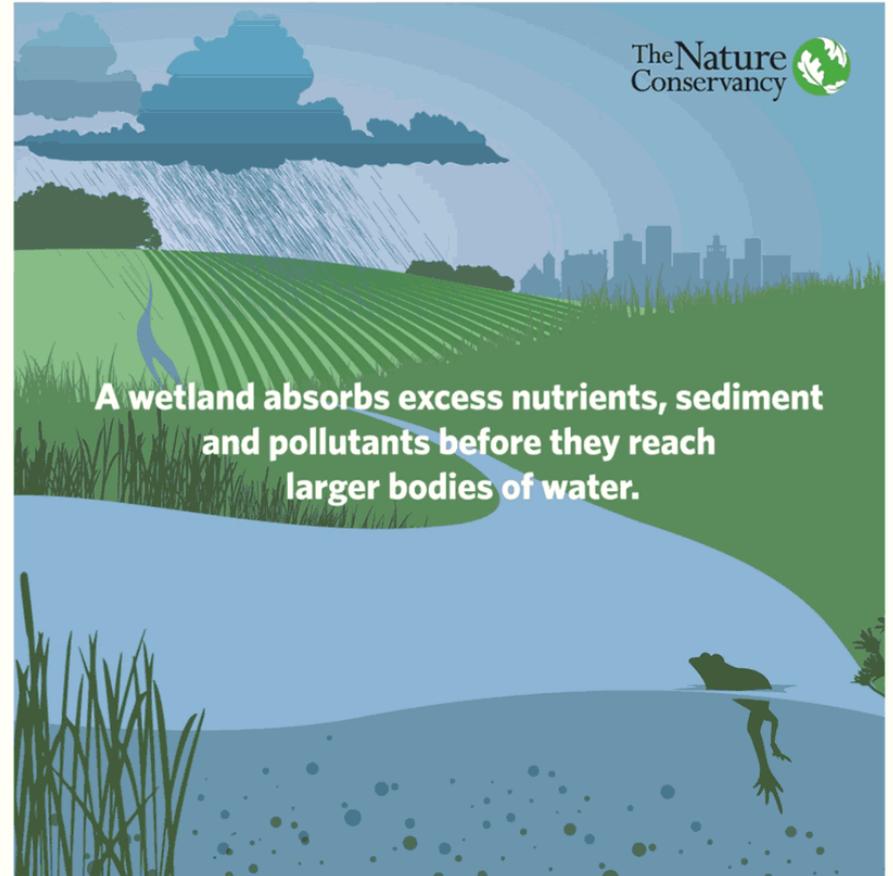
Wetlands

- 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



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.



Trumpeter Swan, adults and fledglings, Tomahawk, Wisconsin.
Photo: Jennifer Miner/Audubon Photography Awards

Coalition Building

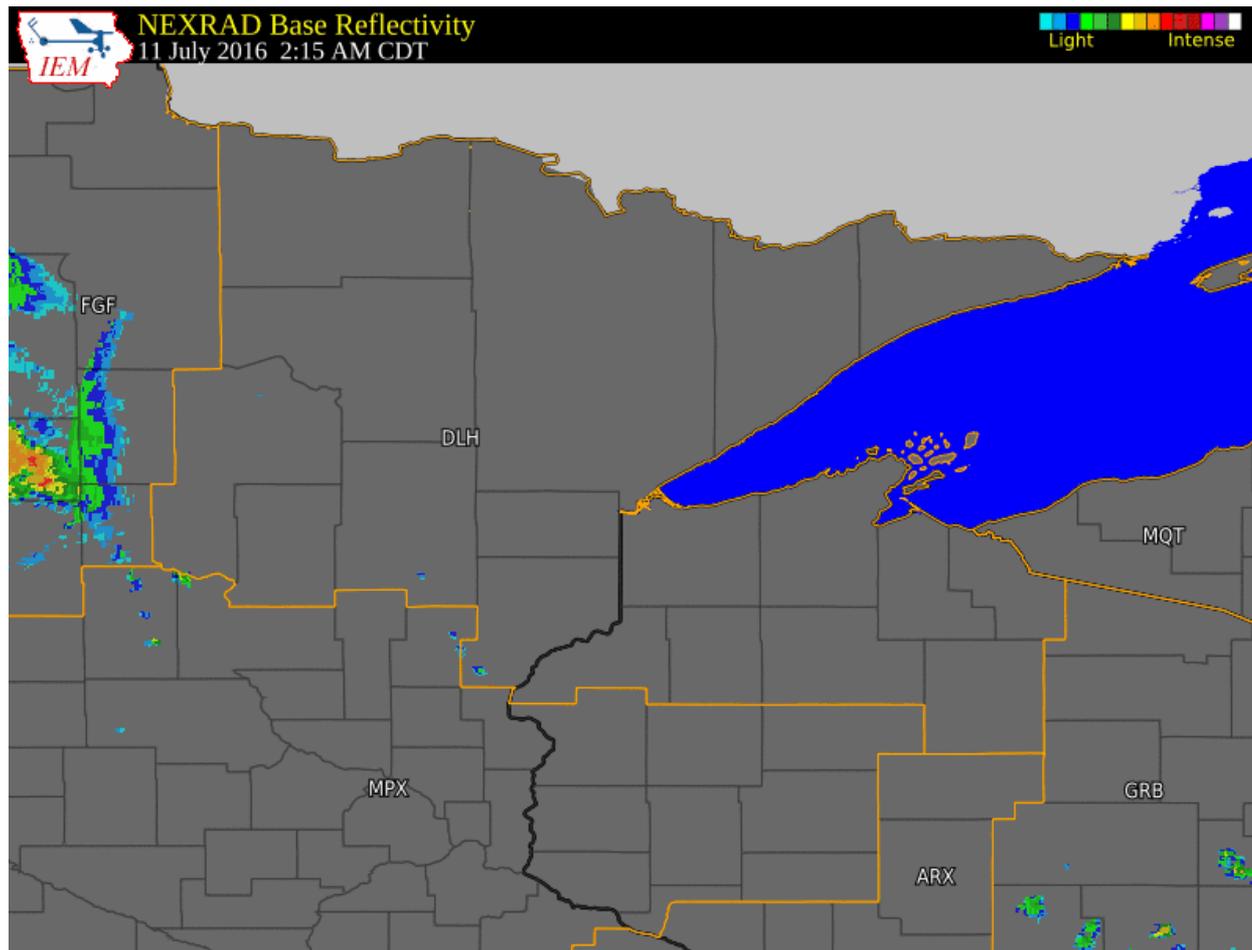
- Working together to protect wetlands
- Traditional "Green" organizations
- "Hook and Bullet" organizations
- New coalition members recruited from outside previous wetland advocacy efforts
 - Trucking
 - Ports
 - Retail
 - Insurance
 - Agriculture/Agri-business
 - Water-intensive industry



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

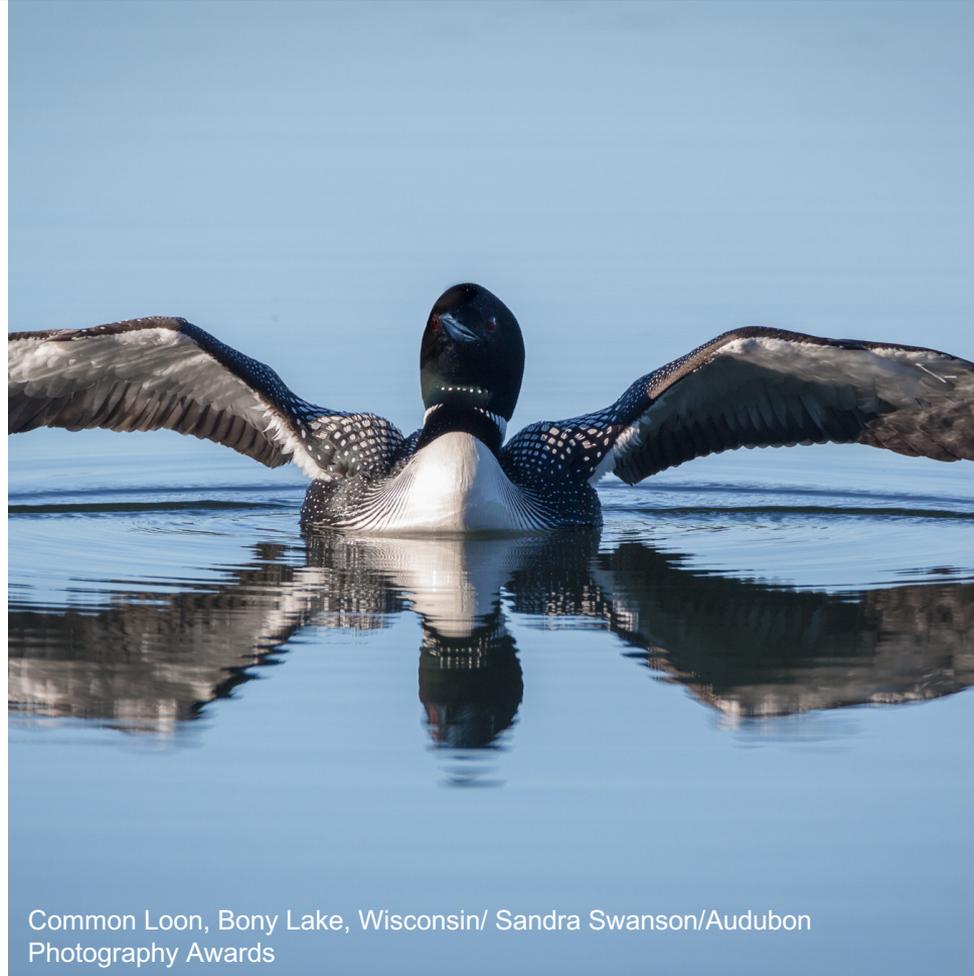
- The Michigan State Legislature approved \$10,000,000 in ARPA funding for wetland conservation and restoration work in the Western Lake Erie Basin and Saginaw Bay.
- The Michigan State Legislature also approved a \$2,000,000 line item in the regular budget for statewide wetland conservation and restoration 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.



Common Loon, Bony Lake, Wisconsin/ Sandra Swanson/Audubon Photography Awards

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



Waterfowl take flight on Oneida Nation's restored wetlands. Photo: Lianne Milton

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/>
- **“Economic Benefits of Wetlands,”** U.S. EPA, May 2006:
https://www.epa.gov/sites/default/files/2021-01/documents/economic_benefits_of_wetlands.pdf
- **Audubon Great Lakes:** <https://gl.audubon.org/>

Questions?



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



Thank you!

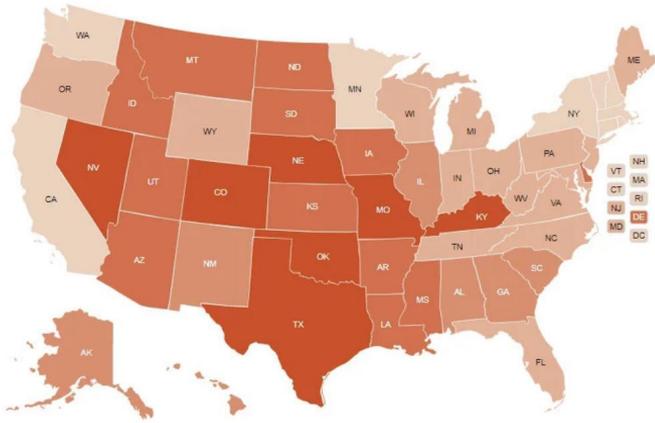
State and Local Policy Solutions In a Post-Sackett World

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



No or Little Protections for Wetlands



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
<https://protectcleanwater.org/>
jmurphy@nwf.org

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

Clean Water for All

Sackett v. EPA: What's next?

Considerations, Obstacles, and Solutions

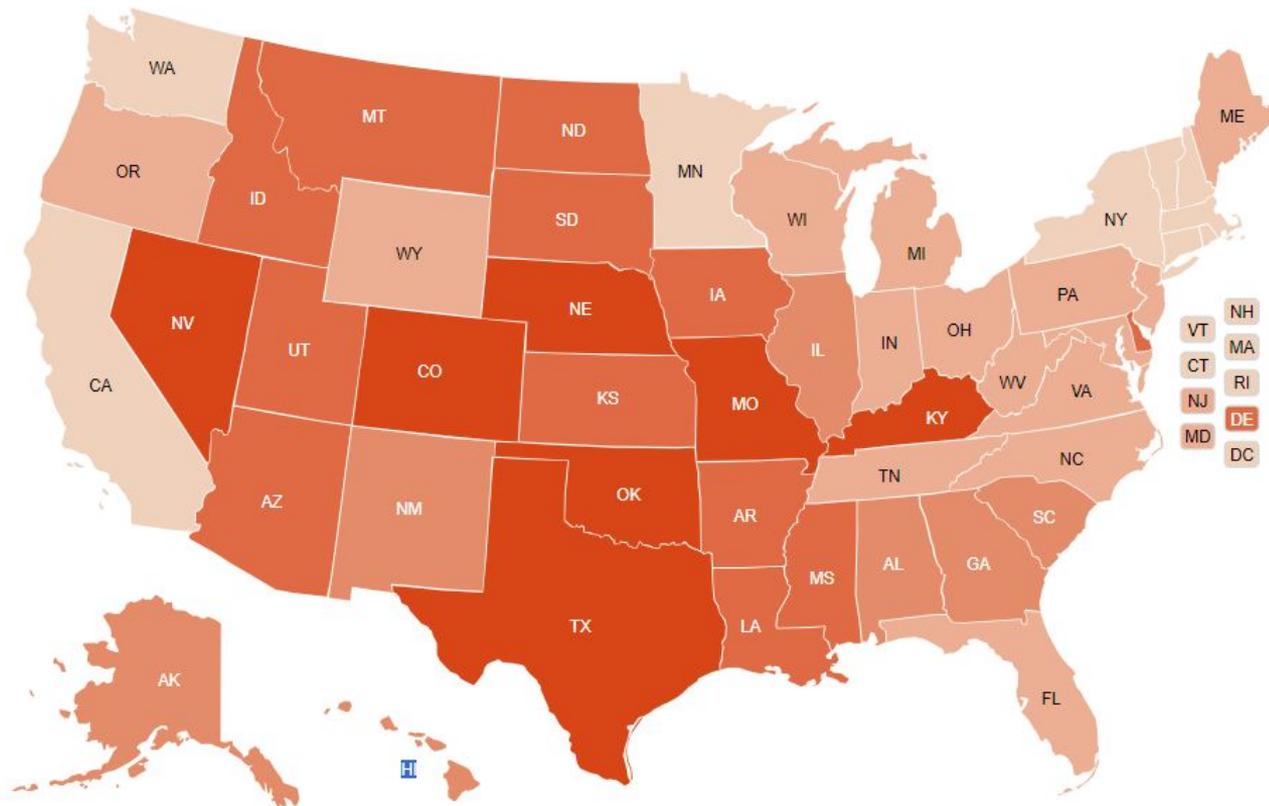
Julian Gonzalez, Senior Legislative Counsel
Earthjustice

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

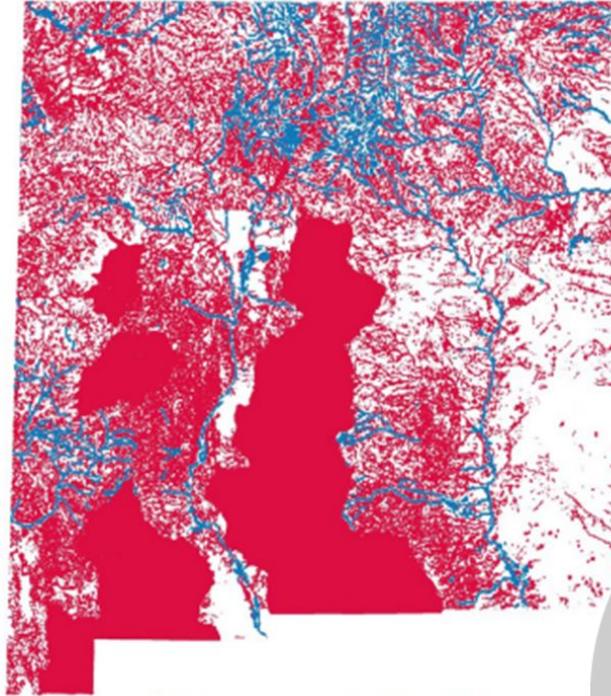
← **No or Little Protections for Wetlands**

Wetlands At Risk, Some Protections →



Map of New Mexico Streams and Closed Basins Left Unprotected or at Risk in the Wake of Sackett and Previous Supreme Court Decisions.

- 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*.



Red = unprotected/at risk
Blue = protected



There are less EPA protections. What does that mean for **states**?

- Regulatory Gaps Exposed:
 - Just because a water was protected by EPA before *Sackett*, doesn't mean it will be protected by states now
 - Some states designed state program *around* EPA
- Many states will seize the opportunity to further weaken laws + regs
 - **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 KOblock@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!