

*Lessons from the Committee on Transportation
and Infrastructure Democratic Roundtable*

Murky Waters:

Navigating a Post-Sackett World



The House Committee on
Transportation & Infrastructure
Ranking Member Rick Larsen

Note: This report has not been officially adopted by the Committee on Transportation and Infrastructure or the Subcommittee on Water Resources and Environment and may not therefore necessarily reflect the views of its members.

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A NOTE FROM THE RANKING MEMBERS:

Dear Colleague:

For fifty years, the Clean Water Act (CWA) has successfully protected the waters of the U. S.—until now.

In May 2023, the U.S. Supreme Court significantly narrowed the number of rivers, streams, and wetlands once protected by the CWA. The Sackett v. EPA decision will have a significant and lasting impact on the nation’s efforts to protect its water resources and to preserve the health and safety of American families. In light of this decision, several questions have arisen. Which waters and wetlands will maintain protections; which stand to lose them? What consequences will businesses and individuals face who are now subject to different rules in different states?

The Democratic leadership of the Committee on Transportation and Infrastructure held a roundtable titled “Murky Waters: Navigating a Post-Sackett World” to highlight these questions and impacts, and discuss options for continued progress on the unmet goals of the original CWA—to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”

This report summarizes the discussion and further elaborates on the critical impacts of the Sackett decision. As Congress, the administration, legal experts, and landowners sort through the decision and what remains of CWA protections, one conclusion is already emerging: Congress must act to protect our water resources nationwide.

The “Clean Water Act of 2023,” H.R. xxxx, seeks to reverse the dangerous Sackett decision by reinstating the historic and bipartisan, federal-state partnership that has protected our rivers, streams, and wetlands for over 50 years; establish a clear, level playing field for businesses and industries to thrive while protecting our critical natural resources; and ensure clean water for families and communities.

Join us in cosponsoring legislation that would restore protections to the wetlands, streams, and other critical waterbodies that will otherwise be left vulnerable to pollution and potential destruction if the Sackett decision is left in place. Future generations depend on it.



Ranking Member Rick Larsen
Committee on Transportation and Infrastructure



Ranking Member Grace F. Napolitano
Subcommittee on Water Resources and Environment

BACKGROUND: THE CLEAN WATER ACT



The Cuyahoga River in Cleveland, Ohio caught fire as a result of unmitigated pollution. (1952)

Clean water is a universal necessity for life. Families rely on clean water to supply safe drinking water to their homes; farmers and brewers rely on clean water to produce food and drink. Access to clean water is essential to U.S. manufacturers and products. Outdoor recreation by hunters, anglers, birders and others depends on healthy waters and wetlands to sustain wildlife and for recreational opportunities. Communities rely on the network of streams and wetlands to protect against flooding and coastal storms.

Congress recognized the importance of protecting our rivers, streams, and wetlands when it overwhelmingly, and on a bipartisan basis, enacted the Clean Water Act (CWA) over the veto of then-President Richard Nixon in 1972. Congress sought “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters,” and to respond to the water quality disasters of the 1970s when downstream states were at the mercy of pollution flowing from upstream states, when the Great Lakes were pronounced “dead,” and when Ohio’s Cuyahoga River literally caught on fire.

For fifty years, the CWA provided the framework for states to enforce minimum levels of protection for our rivers, streams, and wetlands, allowing state partners to implement the standards necessary to protect local water resources. However, the Supreme Court’s decision has called into question many bipartisan, long-established clean water protections and norms, including who should ultimately be responsible for protecting our nation’s waters. The central principles of the CWA have been thrown into question by the Supreme Court, creating significant legal, scientific, and regulatory uncertainty regarding the continued protection and health of the nation’s water resources.

NOT-SO FUN FACTS ON THE IMPACTS OF THE SACKETT DECISION

Clean Water—A Universal Necessity

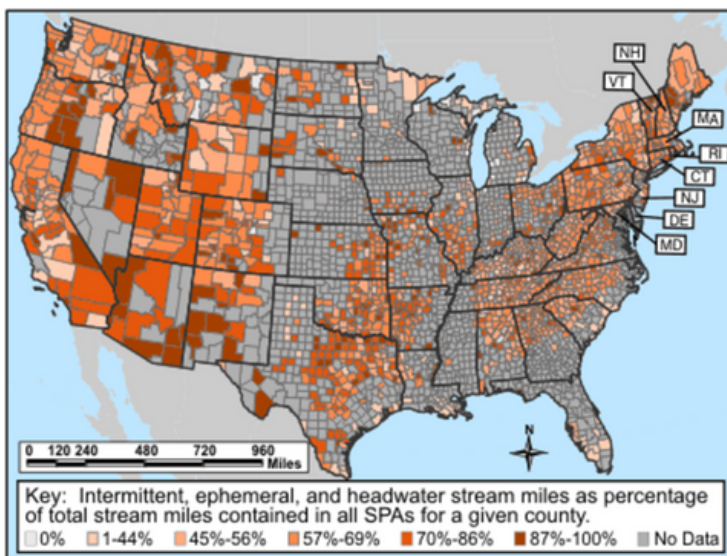
- 95% of Americans say protecting our nation’s lakes, streams, and rivers is important.
- Outdoor recreation, a \$887 billion industry, relies upon clean waters.
- 117 million Americans, or 1/3 of the population, get their drinking water from systems that rely on intermittent, ephemeral, or headwater streams.
- Each acre of protected wetlands saves between \$700-\$3,000 per year in reduced flood damage claims.

The CWA at Work

- The CWA was created specifically to ensure waters are “fishable, swimmable, and drinkable.”
- The CWA exempts by law “normal farming, silvicultural, and ranching activities” from needing a permit under the Act.

Sounding the Alarm—What’s at Stake

- Half of states do not, or cannot by their own laws, protect waters beyond what’s provided at the federal level by the CWA.
- Early estimates point to a loss nationwide of protection for over 50% of wetlands, and over 70% of rivers, lakes, and streams.
 - Man-made barriers that may separate a wetland from jurisdictional waters have been constructed for years—there are currently nearly 25,000 miles of levees, floodwalls, embankments, and dikes across the U.S.
- The loss of CWA protections is likely to be greatest in the arid, drought-prone southwest.
 - There could be a 10-fold increase in non-protected waters for streams in Arizona.
 - There could be a 30-fold increase in non-protected waters for streams in New Mexico.
 - Colorado has 220,000 miles of streams categorized as intermittent or ephemeral.

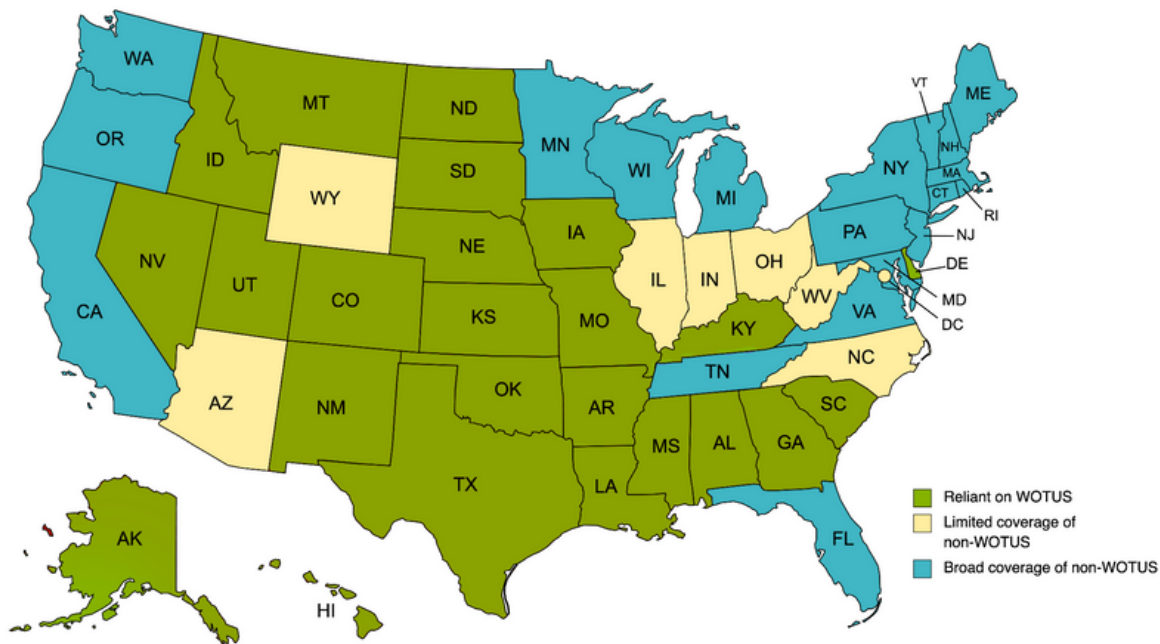


Across the country, 58% of public drinking water supplies stem from intermittent, ephemeral, or headwater streams, now endangered by the Sackett decision. (Source: EPA)

REGIONAL IMPACTS

Waterbodies do not follow political boundaries, with many rivers, lakes, bays, and their associated watersheds covering multiple states or traveling across the northern and southern borders of the U.S. Science shows that waterbodies are heavily influenced by actions undertaken throughout their watersheds—meaning that a waterbody’s health can be affected by the protections and policies of every political jurisdiction through which it flows. A leading reason for the clean water successes of the last fifty years is that every state was guaranteed to have a minimum level of protection; upstream states could not pollute downstream states’ waters with impunity.

Unfortunately, the Sackett decision reinstates the failed state-by-state approach to addressing the water quality of local waterbodies and the preservation of the human health, economic, and environmental benefits these waterbodies provide. It leaves states virtually powerless to protect the quality of their local waters from pollution flowing from upstream states. Supporters of the Sackett decision argue that states will “fill-in-the gap” of protecting waters formerly covered by the CWA, but half of all states rely entirely on the federal CWA for the protection of local waters—a number that is growing as more states have taken action to further limit which waters and wetlands are protected at the state level.



Source: Environmental Law Institute

CASE STUDIES: WATERSHED IMPACTS

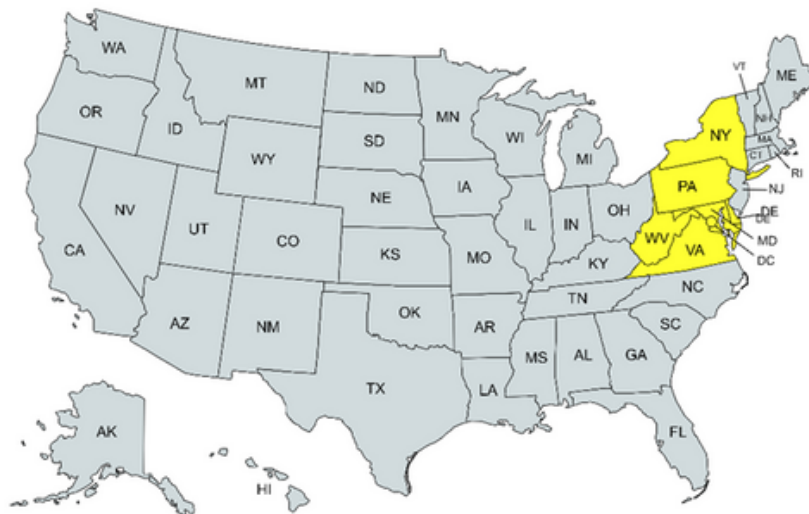
CHESAPEAKE BAY



States have been working in partnership for decades to restore the Bay. (Chesapeake Bay Bridge, Maryland)

The Chesapeake Bay watershed [spans more than 64,000 square miles](#), encompassing parts of six states—Delaware, Maryland, New York, Pennsylvania, Virginia and West Virginia—and the entire District of Columbia. The Susquehanna, Potomac, Rappahannock, York and James rivers are the five largest rivers in the Chesapeake Bay watershed—but more than 100,000 streams, creeks and smaller rivers flow through this watershed and contribute to its water quality.

Through the Chesapeake Bay Watershed Agreement, each of the Chesapeake Bay states have been working in partnership for decades to restore the Bay and the lands that surround it. However, not every state in the Bay watershed has laws that will maintain protections for wetlands that were lost because of the Sackett decision. This means that downstream states will have to contend with additional nitrogen, sediment, and phosphorus loads, placing a greater burden on downstream states and negatively impacting efforts to restore the Bay.



 Chesapeake Bay Watershed

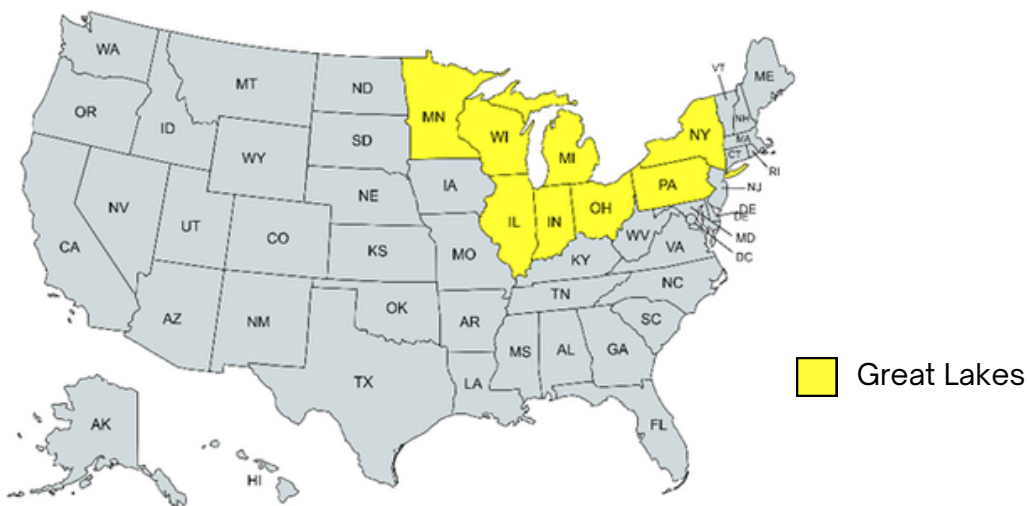
GREAT LAKES



The Great Lakes provide drinking water to approximately 42 million people. (Lake Michigan)

The Great Lakes span more than 750 miles from west to east and represent one of the world's largest surface freshwater systems, providing drinking water to approximately 42 million people. The Great Lakes basin is approximately 201,460 square miles and sits within eight U.S. states, two Canadian provinces, and nearly 40 Tribal nations.

The Great Lakes were declared “dead” in the 1970s, and despite comprehensive efforts to restore them, they are still threatened by agricultural runoff, municipal waste, industrial discharges, pollution from disposal sites, and atmospheric pollutants. Within the last decade, the drinking water supply of the City of Toledo, Ohio, was shut down for 72 hours due to a toxic algal bloom that was fueled by excessive nutrient runoff from the surrounding watershed.



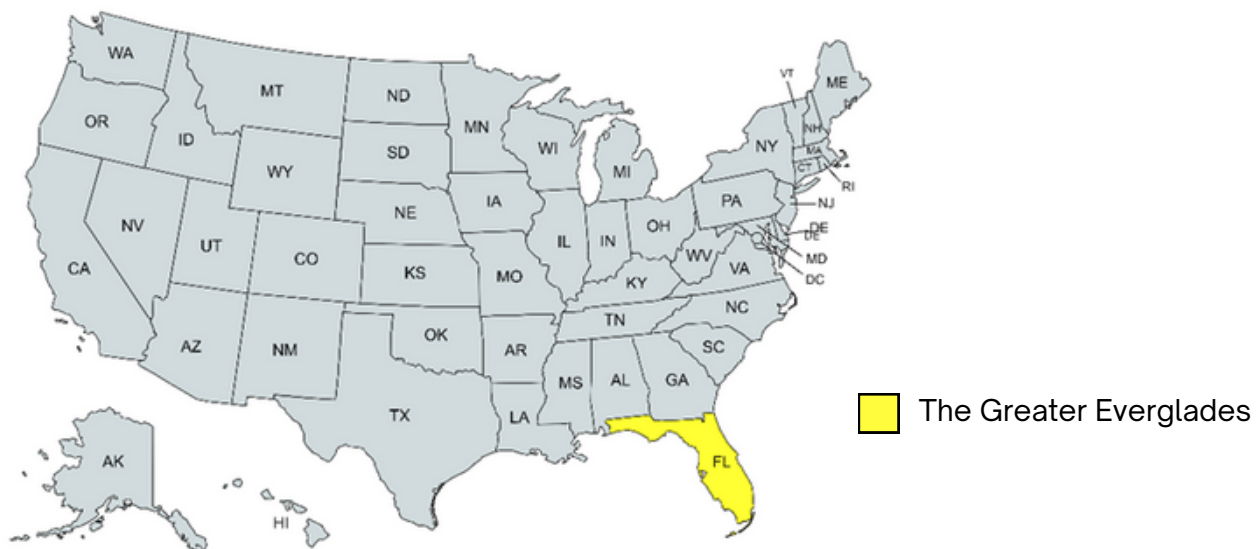
EVERGLADES



The Everglades provides habitat for critical species like manatees, American crocodiles and Florida panthers. (Everglades National Park)

The Greater Everglades is the largest freshwater marsh in the U.S., as well as a World Heritage Site, International Biosphere Reserve and a Wetland of International Importance. The ecosystem spans two million acres across Florida and includes a range of terrestrial, estuarine, and marine habitats that converge to create a one-of-a-kind landscape. The Everglades provide habitat for critical species like manatees, American crocodiles, and Florida panthers.

Water quantity and quality are critical to the health of the ecosystem, which has already experienced serious and continuing degradation from agricultural and urban development. Congress has invested billions in comprehensive restoration efforts, operating on a 35+ year timeline. This fragile ecosystem experiences immediate impacts from upstream pollution, while also depending on continuous upstream flows to provide its wide range of ecosystem services.



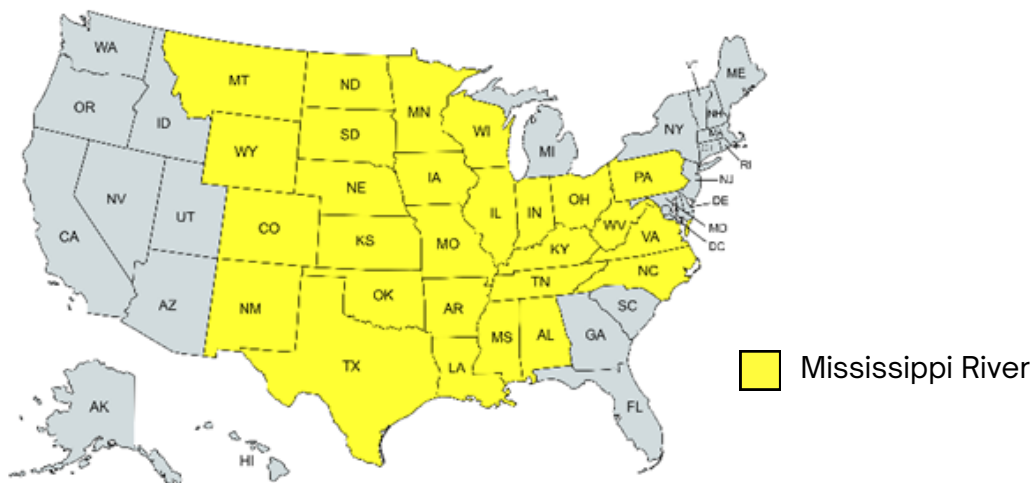
MISSISSIPPI RIVER DELTA

About 40 percent of the coastal wetlands in the continental U.S. are located in the Mississippi River Delta in Louisiana. These wetlands were built over centuries as Mississippi River flows deposited sediment from 32 states and 2 Canadian provinces across the delta. Human alterations of the river system have contributed to the delta's collapse—Louisiana has lost about 1,900 square miles of land since 1930, that has disappeared into open water.

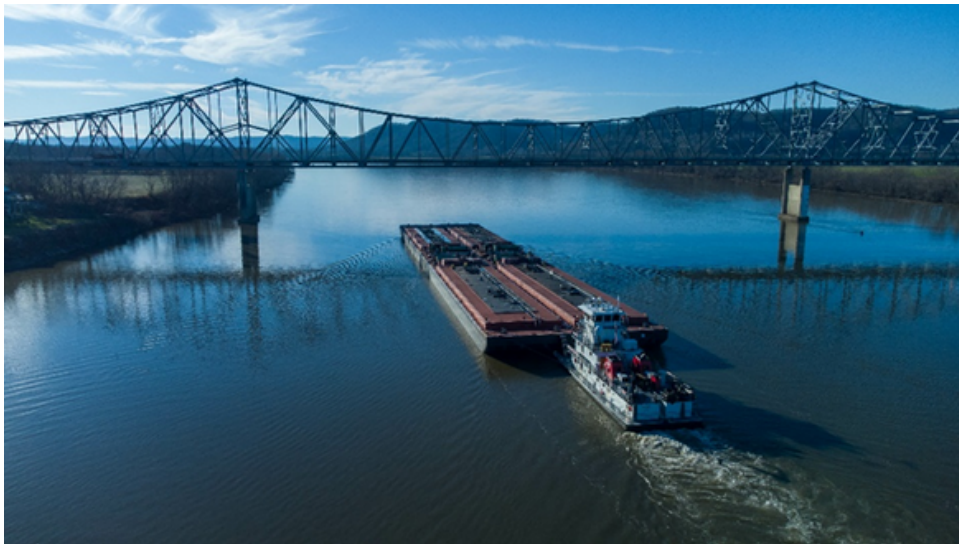


A healthy system of wetlands can slow down hurricanes and dampen storm surge. (Yazoo City, Mississippi)

The Sackett decision has the potential to greatly impact the Mississippi River Delta as unprotected water from 32 states become polluted and degraded before they flow into the delta. To make matters worse, the delta's coastal wetlands may lose protection under the Sackett decision unless they have a visible surface connection to a body of water. Louisiana understands the value of their wetlands—a healthy system of wetlands can slow down hurricanes and reduce storm surge. Without natural storm buffers, the cities within the Mississippi River Delta, including New Orleans, could face renewed threats of flooding similar to the impacts after Hurricane Katrina. Similarly, the businesses and industries that rely on the health of the nearshore waters of the Gulf of Mexico could be adversely affected by increased pollution runoff and damaged coastal ecosystems. Commercial fishermen could be forced to travel farther from land—and spend more time and money—to make their catches, adding stress to an industry already hurt by hurricanes and the Deepwater Horizon oil spill.



MISSISSIPPI RIVER



Some Mississippi River states, such as Ohio, have enacted state laws restricting protection of waterbodies. (Portsmouth, Ohio)

The Mississippi River is the meeting point of 7,000 rivers, creeks, and streams flowing through 32 states, and covers a watershed that represents 40 percent of the continental U.S. Yet, millions of acres of wetlands have been lost throughout the Mississippi River basin, allowing more pollution to enter waterbodies and, when combined with the effects of a changing climate, causing an increase in the frequency and intensity of flooding events. Fewer wetlands to soak up pollutants in the upper basin means more of those pollutants end up rushing downriver, adding to the dead zone in the Gulf of Mexico. The Mississippi River has a history of major flood events with eight major flooding events in the past 30 years, including some of the highest flood levels in the Spring of 2023.

Despite these stakes, since 2020, some Mississippi River states, including Indiana and Ohio, have further limited clean water protections under state law, meaning some waterbodies remain unprotected at either the federal or state level.

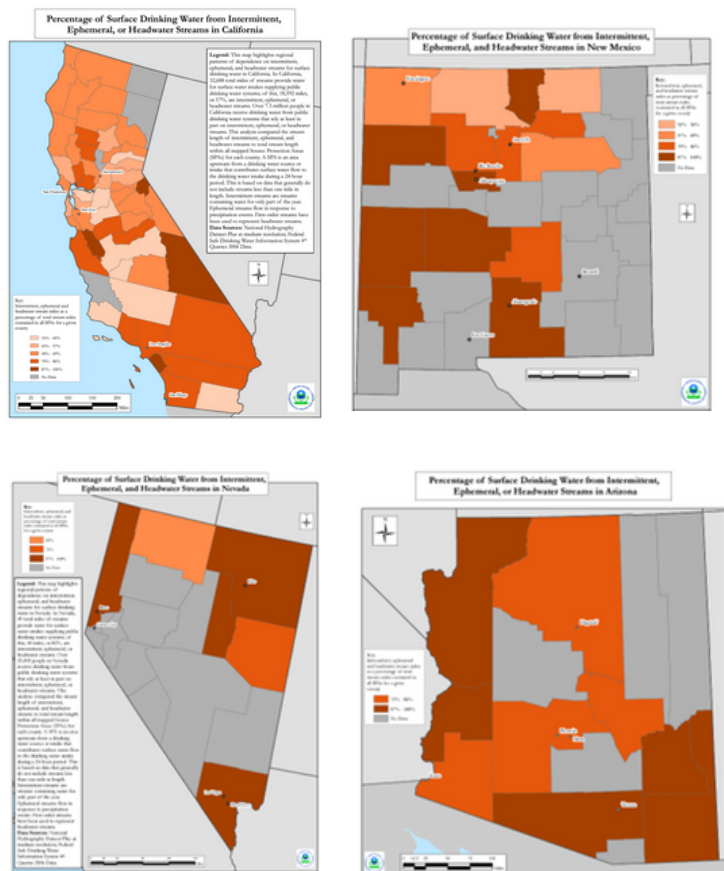
THE ARID WEST: WATER SUPPLY WOES

While each region of the nation will be impacted by the Sackett decision differently, these impacts are more pronounced in the arid West.

The scope of waters and wetlands that lost federal Clean Water protection under the Sackett decision is significantly higher in the arid states that often contain a higher percentage of intermittent and ephemeral streams and associated wetlands.

For example, early federal estimates are that approximately 94 percent, 89 percent, and 88 percent of the streams in Arizona, Nevada, and New Mexico, respectfully, are non-perennial, meaning that they do not flow continuously for the whole year and, because of the Sackett decision, may no longer be protected by the Clean Water Act. None of these states have programs in place to protect waters formerly protected by the Clean Water Act, meaning that impacts to certain non-perennial streams will not be regulated; yet, according to EPA data, 100 percent of the population of the States of Arizona and Nevada, and 99.89 percent of the population of New Mexico depends on non-perennial streams as a source of drinking water for the states' public drinking water systems.

Yet, even arid states that have robust local protections will be impacted by the Sackett decision. For example, California's Porter-Cologne Water Quality Control Act will backfill protections for waters and wetlands within the state that were lost as a result of the Sackett decision at a level similar level to the CWA prior to the Sackett decision. At the same time, the Colorado River basin, which is a critical water supply source for the state, remains largely unprotected by California's law because most of the basin is located outside of California's borders. Despite the arid state's proactive efforts and in-state-led protections, their water supply remains at risk of upstream pollution or significant reductions in flow.



REGIONAL FLOODING IMPACTS

CAPE FEAR RIVER BASIN, NORTH CAROLINA

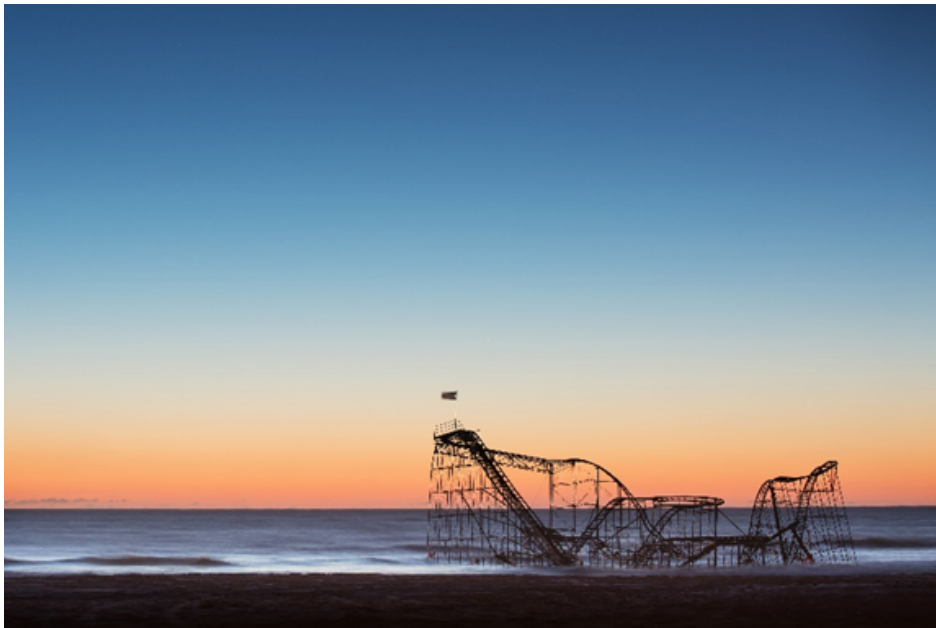


The Cape Fear River Basin is vulnerable to the concentration of hog waste pollution in its watershed. (Cape Fear River)

Several regional water quality and environmental justice issues are likely to get worse because of the Sackett decision. One example is the hog waste pollution in the Cape Fear watershed. North Carolina is the second largest pork producer in the U.S., with an estimated population of 10 million hogs in industrial production facilities statewide. Many of these hog confinement structures are concentrated in lower-income areas such as the communities of color in the Cape Fear River Basin. Hog waste and by-products are typically stored in lagoons or sprayed on local fields as a source of fertilizer; however, hog waste runoff is a leading cause of algal blooms and water quality contamination throughout the river basin. In addition, because of the low-lying and hurricane prone nature of the basin, releases of untreated waste into local streams and rivers regularly occur.

By limiting federal protections of streams and wetlands, the Sackett decision has made it more difficult to ensure untreated hog waste does not contaminate local waterways. Further, following the Sackett decision, the State of North Carolina has narrowed its state-level protection of local waterbodies, leaving many waters and wetlands without federal or state protections.

COASTAL WETLANDS



Natural shorelines and coastal wetlands reduce the impact of coastal storms and hurricanes. Existing wetlands reduced coastal damages from Superstorm Sandy by \$625 million. (Seaside Heights, New Jersey)

Natural shorelines and coastal wetlands significantly reduce the adverse effects of coastal storms and hurricanes. Healthy coastal wetlands and ecosystems absorb wave energy and reduce inland flooding depths, making coastlines and coastal communities more resilient to extreme weather events and reducing potential threats to human health and property damage. One federal study found that existing wetlands reduced coastal damages from Superstorm Sandy by \$625 million.

The Sackett decision overturned 50 years of bipartisan CWA protections for wetlands adjacent to other jurisdictional waterbodies—rejecting protections endorsed by every Presidential administration, Democratic or Republican, since President Carter. By eliminating federal protection of wetlands unless there is a “continuous surface connection,” the Sackett decision eliminates federal protection on millions of acres of wetlands that might be physically separated on the surface by levees, dikes, or beach dunes, but may retain numerous subsurface hydrological or other significant connections with surrounding waters—leaving these critical wetlands subject to pollution, degradation, and destruction.

A WORLD WITH NO CWA

Much of the CWA permitting process is straightforward—permits can be quickly administered and only simple mitigation is required. However, CWA permits are also used for mega projects like a seven-state pipeline or a 1,000 acre mining project. Below are a couple of projects that ultimately were not approved after going through the community engagement, scientific analysis of impacts, and requirements for preventative measures or mitigation that were required by the CWA. If strong clean water protections had not existed when these projects were first proposed, they likely would have proceeded and resulted in significant negative environmental impacts.

REAL-WORLD EXAMPLES

OKEFENOKEE SWAMP



600 acres of Okefenokee were left unprotected for the first time since the creation of the CWA. (Okefenokee Swamp)

Okefenokee Swamp in Georgia includes a National Wildlife Refuge with 353,981 acres of National Wilderness Area within its boundaries. The refuge is a Wetland of International Importance and is also on the tentative list to become a World Heritage Site because of its global significance.

Since the 1990s, multiple entities have proposed building a titanium strip mine along the border of the swamp, but they have been unsuccessful due to the project's inability to comply with the CWA. The 8,000-acre proposed mine would directly threaten the hydrogeology and ecological integrity of the Okefenokee, as well as the nearby St. Marys and Suwanee Rivers. It could also impact the ability of the Okefenokee to store water during storm events and filter waters for the surrounding watersheds.

When a waterbody is determined to be non-jurisdictional (not covered by the CWA), it ends the opportunity for local input, Tribal consultation, or federal oversight through the CWA. There are virtually no actions that can be taken to protect the waters from impending mining, project proposals, or other destructive or polluting activities.

As a result of the Sackett decision, it is unclear how much of the Okefenokee Swamp remains protected or not.

PEBBLE MINE



The CWA successfully protected Bristol Bay, a world-renowned ecosystem of critical importance, from harmful mining. (Bristol Bay, Alaska)

The Bristol Bay Watershed in Alaska is home to world's largest sockeye salmon population, supplying about half of the world's wild sockeye salmon harvest, generating an estimated \$1.2 billion in annual economic output, and supporting more than 12,000 U.S. jobs. The Bristol Bay Watershed is also home to several Alaska Native Villages, who have depended on a subsistence-based lifestyle and fishing for more than 4,000 years.

Beginning in the 1980's, several proposals were put forth to extract minerals from the Pebble Deposit, located at the headwaters of Bristol Bay Watershed. These efforts have included many analyses of mining scale, ore availability, economic viability, and ecological impacts. In December 2017, a Canadian company filed a CWA permit application with the Corps to develop the Pebble Deposit. The permit was required due to the company's intent to place fill in, and work within, CWA jurisdictional waters.

The Corps carried out a full Environmental Impact Statement. This process included input from other agencies, and an evaluation of all the other infrastructure required to make it viable, including waste rock piles and tailing storage facilities, ore processing facilities—and associated wastewater collection, storage, and treatment systems—a groundwater drawdown zone, a new port at Amakdedori, a natural gas pipeline, and a transportation corridor. Once all impacts were evaluated and worst-case scenarios cited, the Corps denied the CWA Section 404 permit in 2020.

Once again, the CWA successfully protected a world-renowned ecosystem of critical importance, particularly to its local communities and salmonid populations down the West coast. As a result of the Sackett decision, entire segments of the Bristol Bay Watershed are likely exempt from CWA jurisdiction and would not require the full analysis completed by the Corps in 2020.

NOTES FROM THE EXPERTS

E. JOAQUIN ESQUIVEL

Chair, California State Water Resources Control Board

“There will be a resource impact and I think importantly when you look nationally at the work that needs to be done, we can’t be erasing and reversing the progress that we’ve made ... these inputs, these protections, and importantly the function of wetlands in our watersheds is only growing more critical. We need to expand them, both protections and the wetlands themselves, not retract. And that retraction is something that we’re very much concerned about, even with state authorities that we’re able to lean upon.”

BETSY SOUTHERLAND

Former Director, Office of Science and Technology, EPA’s Office of Water

“The Sackett decision is the most dramatic constriction of environmental law in history, returning many of the wetlands and streams in this country to protection only by the states. Unless Congress amends the Clean Water Act to spell out a detailed definition of waters of the U.S. based on the proven science of hydrologic connectivity, the goal of restoring and maintaining the chemical, physical, and biological integrity of the nation's waters will be impossible to achieve.”

KEISHA SEDLACEK

Federal Affairs Director, Chesapeake Bay Foundation

“The Chesapeake Bay watershed’s 1.5 million acres of wetlands play a vital role restoring the Bay and its tributaries by filtering out and treating pollutants that degrade water quality. Unfortunately, many of these valuable wetlands are isolated, non-tidal or non-navigable waters that are likely to lose federal protection because of the Sackett decision. While most of the six watershed states and the District of Columbia have their own wetlands safeguards, not all do. The Chesapeake Bay Foundation (CBF) is concerned that this gap will place a greater burden on downstream states and set back efforts to save the Bay.”

DONNA DOWNING

Senior Legal Policy Advisor, National Association of State Wetland Managers

“Sackett creates a large hole in federal Clean Water Act protections, particularly for wetlands, and poses substantial challenges for states and tribes who want to “fill the gap” and protect their wetlands and other waters. NAWM’s state and tribal members are very concerned about the dearth of federal funding assistance for implementation of wetland protection programs, noting that unlike under other Clean Water Act co-regulator programs the Act currently does not provide wetland program implementation funding.”

RHETT LARSON

Senior Fellow, Kyl Center for Water Policy, Arizona State University

“Defining the scope of the Clean Water Act’s jurisdiction is an exercise in drawing a line around a resource that, by its nature, defies lines. Water will erode through, seep into, flow under, or fly above any line the law draws. To borrow from the martial arts philosophy of Bruce Lee, if we want to better manage water, we must become more like water by creating a legal regime as adaptive as the resource we seek to protect.”

KIRA DAVIS

Co-Chair, Healing Our Waters-Great Lakes Coalition

Tribal Member, Grand Traverse Band of Ottawa Chippewa Indians

“Healthy rivers, streams and waterways are integral to the health of America’s national parks, Tribal lands and our Great Lakes. The loss of Clean Water Act protections by the Supreme Court’s shortsighted (Sackett vs. EPA) decision will have devastating impacts to all our national parks and especially in the Great Lakes region where freshwater is our lifeblood here. These waters are directly linked to Tribal communities’ cultural identity and generations-long traditions, which are now in jeopardy. Healthy waters support our local economies, our livelihoods and the plants and wildlife in our parks and Tribal landscapes.”

JAMES M. MCELFISH JR.

Senior Advisor, Research and Policy, Environmental Law Institute

“The current state of affairs is a patchwork of inconsistent protections across the US—in many states resulting in gaps in protection. In the near term, Congress could consider ways to support and encourage state permitting programs focused on non-WOTUS waters that are important for the hydrologic functioning of waters that remain within the protection of the Clean Water Act.”

SHERRI WHITE-WILLIAMSON

Director of Environmental Justice Strategy, North Carolina Conservation Network

"Wetlands are a critical buffer against hurricane and heavy rain flooding of industrial hog operations that contain millions of gallons of bacteria-laden hog waste harmful to communities and wildlife downstream. The narrowing of protections from the Sackett decision and the NC General Assembly threatens wetlands that keep us safe."

COLTON ALLAN FAGUNDES

Policy Director, Clean Water and Regenerative Agriculture, American Sustainable Business Network

"Clean water is the economic lifeblood of many businesses and communities throughout the nation. While a few polluters benefit from weakened clean water protections, most businesses depend on clean water, which is vital for farms, fisheries, and members of the outdoor recreation, hospitality, and tourism sectors.”