

Wetlands Protection Post-*Sackett*

EPA Alumni Association

October 22, 2026



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Sackett v. EPA (2023)



The *Sackett* test

The Clean Water Act covers wetlands that have a continuous surface connection to bodies that are “waters of the United States” in their own right, so that they are indistinguishable from those waters.



Interpreting *Sackett*

- “Relatively permanent”
- “Continuous surface connection”
- “As a practical matter indistinguishable”





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COMMENT BLOG ^

What Comes Next for Clean Water? Six Consequences of Sackett v. EPA

Friday, May 26, 2023

 **James M. McElfish, Jr.**
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On May 25 the Supreme Court, ruling in *Sackett v. EPA*, shifted the Clean Water Act's protection for the nation's waters. The Court's 2006 decision in *Rapanos v. United States*, which has been hotly debated, prepared authoritative research and analysis on federal, state, and local prepared workshops focused on legal and programmatic issues. In this post, we've compiled our observations of the *Sackett* decision to help support states, tribes, and policymakers in the wake of the decision.

The Decision

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Navigating Newly Non-WOTUS Wetlands: A Study of Six States' Wetlands Programs after Sackett v. EPA

SEPTEMBER 2024

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FILLING THE GAPS

Strategies for States/Tribes for Protection of Non-WOTUS Waters

May 2023



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COMMENTS

STATE PROTECTION OF NONFEDERAL WATERS: TURBIDITY CONTINUES

by James McElfish
James McElfish is a Senior Attorney at the Environmental Law Institute.

Judicial or administrative changes in the regulatory scope of the 1972 Clean Water Act (CWA) are not merely theoretical, but directly affect members of the public who rely on the services that waters provide to ecosystems and the health of communities. Changes also affect entities that discharge pollutants to waters, and state regulators that are responsible for protection of waters. State regulators, in particular, are faced with difficult and complex decisions, often constrained by state administrative laws.

This Comment examines the legal framework for state protection of nonfederal waters and its implications for cooperative federalism. After a brief overview and legal background, it identifies some recent state actions in North Carolina, Arizona, and Ohio that attempt to fill gaps in coverage created by changes in federal interpretations of the CWA. North Carolina's experience illustrates a particularly difficult regulatory impediment. Next, it summarizes the current scope of state regulation of waters in every state, in order to discern the likely impact of changes at the federal level on the status of waters in the states. Finally, updating an analysis done by the Environmental Law Institute (ELI) in 2013, it examines legal constraints on the ability of state agencies to engage in gap-filling regulations; and discusses the implications of impending changes that may result from federal court decisions, including the U.S. Supreme Court's pending consideration of *Sackett v. Environmental Protection Agency* in its October 2022 term.

I. Overview

A body of water such as a river, stream, wetland, lake, pond, tidal water, or other surface water is covered by the CWA only if it is a "water of the United States" (sometimes referred to as WOTUS).¹ The scope of the definition of "WOTUS" defines a host of protections of such waters under federal law and under state laws that implement federal requirements.

The CWA protections include the prescription of water quality standards,² the assessment of waters to determine whether they are impaired and the preparation of plans to restore their health,³ the regulation by permit of discharges of pollutants from point sources into such waters,⁴ the regulation of the placement of dredge and fill material into such waters,⁵ the applicability of requirements to prevent, report, and correct spills of oil and hazardous substances (and liability for such spills),⁶ and state review of federal licensing and permitting activities that may result in discharges.⁷ In contrast, non-WOTUS waters are protected from discharges of pollutants and disposal of dredge and fill material only by the laws of the state within which they are located.

Therefore, changes in the interpretation of WOTUS resulting from judicial decisions or federal rulemaking place a substantial burden upon state regulators and legislators. States must determine whether, and how, to keep up with shifting federal coverage by adopting and implementing state legal protections for waters that were formerly, but are no longer, protected by federal law.

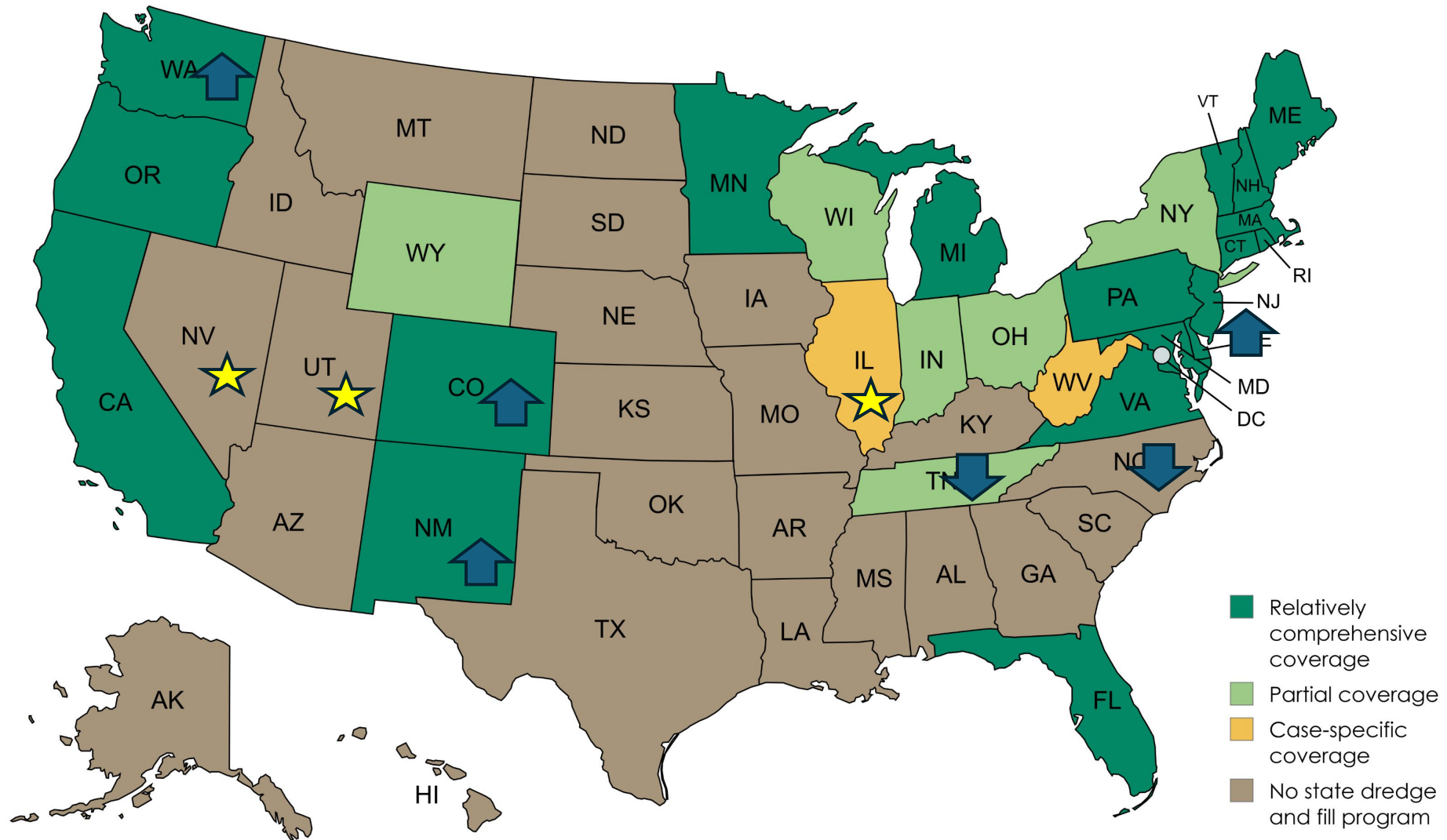
Issues have arisen with many types of waters, including wetlands, that are or have been WOTUS but that may drop from coverage via re-interpretation of the scope of the CWA. Among the waters of concern are intermittent or ephemeral streams that flow into the nation's rivers and lakes, wetlands such as bogs and peatlands that do not have a continuous surface connection with other waters, other wetlands that lack a continuous surface connection to a continuously flowing river or stream, desert arroyos that flow only during several months of the year and not at all in years without rainfall, complexes of prairie potholes and vernal pools, and many other types of waters and wetlands that affect the chemical, physical, and biological integrity of the nation's waters.⁸

3. 42 U.S.C. § 1363a.
4. 42 U.S.C. § 1363b.
5. 42 U.S.C. § 1363c.
6. 42 U.S.C. § 1363d.
7. 42 U.S.C. § 1363e.
8. See generally U.S. Environmental Protection Agency, *Intermittent or Ephemeral Streams to Downstream Waters: A Review of the Science on the Scientific Evidence* (2013) (*scientific review of the science*).

1. 33 U.S.C. §§ 1251-1307; ELR Nov. 2017CA §1101-407.
2. 33 U.S.C. § 1362(5); See also 40 Fed. Reg. 31,513-13,527 (1975); ELR Nov. 2017CA §1101(21).

9-2022 ENVIRONMENTAL LAW REPORTER 52 ELR 10679

State Protection Post-Sackett





NATIONAL ASSOCIATION OF WETLAND MANAGERS

Wetlands Protection After *Sackett*: Policy Developments and Challenges for States and Tribes

Prepared for the EPA Alumni Association

**Donna Downing, NAWM Senior Legal Policy Advisor
October 22, 2026**

Outline of Brief Presentation

- **Trump Administration efforts to redefine WOTUS**
 - November 2025 proposed rule
 - September 2026 supplemental proposal
- **Implementation challenges for states and Tribes**
 - Rate of regulatory change
 - Lack of tools and resources to implement new concepts
 - WOTUS assumptions in the context of other federal water policy changes
- **State and tribal actions to protect their wetlands and waters**



Rulemaking to Define Waters of the US (WOTUS): “Relatively Permanent Waters”

- **Sackett:** WOTUS “encompasses only those relatively permanent, standing or continuously flowing bodies of water...”
- **Nov. 2025 Proposal:** “Relatively permanent” means “standing or continuously flowing bodies are water that are standing or continuously flowing year-round or at least during the wet season.”
 - “Wet season” is intended to include extended periods of predictable, continuous surface hydrology occurring year after year.
- **Sept 2026 Supp:** “Relatively permanent” means perennial, i.e., “having standing or continuously flowing water every day of the year during ordinary conditions.”
 - Sets maximum timeframe for no-flow periods that still reflect ordinary conditions.



Rulemaking to Define Waters of the US (WOTUS): Wetlands and “Continuous Surface Connection”

- **Sackett:** Jurisdictional wetlands must be indistinguishable from other WOTUS, making it difficult to determine where the water ends and the wetland begins. A wetland is indistinguishable when it has a “continuous surface connection” to a relatively permanent water.
- **Nov. 2025 Proposal:** A wetland is jurisdictional when it has a continuous surface connection, i.e., has surface water at least during the wet season and abutting (i.e., touching) a jurisdictional water.
- **Sept 2026 Supp:** A wetland is jurisdictional when it has a continuous surface connection, i.e., has a perennial surface water in a wetland that is continuously connected with the surface water in the jurisdictional water such that it is difficult to determine where the jurisdictional water ends and the wetland begins.”
 - Only the portion of the wetland with perennial surface hydrology would be considered jurisdictional.



Implications for Wetlands and Other Waters

- EPA and the Army Corps anticipate:
 - **All ephemeral streams** would be non-jurisdictional.
 - **Most intermittent streams** would not satisfy the proposed requirements to be WOTUS.
 - The **majority of wetlands** that are jurisdictional currently would not satisfy the proposed definition of “continuous surface connection.”
 - The Nov 2025 proposal estimated 81% loss of non-tidal wetlands.
- Examples of other estimates: 79% of streams non-jurisdictional under the proposal; New Mexico estimates 97% of its rivers and streams and 88% of its wetlands are at risk.



Implementation Challenges for States and Tribes

- The WOTUS definition has changed frequently
- Jurisdictional determinations would require considerably more work under the proposed approach
- Available field tools are ill-suited to determine presence of WOTUS characteristics required by the proposal
- WOTUS definition is made harder to implement by other water policy changes, such as under CWA §401 water quality certification



How are States and Tribes Responding to *Sackett*?

- Taking steps not directly tied to a particular definition of WOTUS, such as wetland mapping and educational outreach
- Increasing cross-program coordination and collaboration
- Developing programs to protect their waters under state or tribal law
- Litigating policy developments they view as inconsistent with *Sackett* and other legal precedent

