One Year After Key Supreme Court Decision, Almost Half of States Leave Many Wetlands Unprotected

States that Sought to Curb EPA Authority are Least Likely to Protect Wetlands

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Until last spring, Section 404 of the Clean Water Act required developers to obtain federal Clean Water Act permits before dredging and filling wetlands that could alter the "chemical, physical, or biological integrity" of adjacent navigable waters (or their tributaries). But on May 25, 2023, the U.S. Supreme Court held in *Sackett v. Environmental Protection Agency* that the federal Clean Water Act no longer applied to adjacent wetlands that lacked a "continuous surface connection with that water, making it difficult to determine where the 'water' ends and the wetland begins."[1]

Research by the Environmental Integrity Project (EIP) has revealed that the states that joined West Virginia's *amicus* brief supporting the limits on federal authority ultimately approved by the Supreme Court are in fact the least likely to regulate wetlands that are now exempt from the Clean Water Act. This is despite claiming in their brief that states have not hesitated to "flex their authority" to protect these critical natural resources.

The chart on the next page identifies states that do not require permits for the dredging and filling of adjacent wetlands no longer subject to the Clean Water Act, and which of those states signed West Virginia's *amicus* brief. As the Supreme Court recognized before its decision in *Sackett*, wetlands can protect the quality of nearby rivers, lakes, or streams, even when separated from those waterways by a road, dike, or other manmade barrier. For example, they can absorb and treat pollutants that would otherwise be released to open waters through periodic flooding or through the groundwater that wetlands share with surface waters. Previously, developers were required to obtain permits before dredging and filling these adjacent wetlands to at least minimize (or "mitigate") their environmental impact. Now, such permits are no longer required even for wetlands separated from open water by just a few feet of dry land.

Pictured is an example of an isolated wetland called a "Delmarva pothole" on farmland on the Eastern Shore of Maryland that is not connected on the surface to any rivers, streams, lakes, or bays.

Wetlands Most at Risk Because of Supreme Court Decision in *Sackett v. EPA*

States that do not regulate the dredging/filling of "adjacent" wetlands that are now exempt from the federal Clean Water Act protections under *Sackett v. EPA*

No state permits required to dredge & fill *Sackett* exempt wetlands	Joined *Amicus* Brief Seeking *Sackett* Restrictions	State wetlands affected by *Sackett* restrictions
Alabama	Yes	All
Arizona	Yes	All
Arkansas	Yes	All
Delaware*	No	Non-coastal
Georgia	Yes	Non-coastal
Hawaii	No	Non-coastal
Idaho	Yes	All
Illinois*	No	All unless publicly funded
Kansas	Yes	All
Kentucky	Yes	All
Louisiana	Yes	Non-coastal
Mississippi	No	All
Missouri**	Yes	All
Montana	Yes	All
Nebraska	Yes	All
Nevada	No	All
New Mexico***	No	All
North Carolina	No	Non-coastal
North Dakota	Yes	All
Oklahoma	Yes	All
South Carolina	Yes	Non-coastal
South Dakota	Yes	All
Texas	Yes	All
Utah	Yes	All

(**Note**: DE, GA, HI, LA, NC and SC have limited authority to protect wetlands in coastal areas.)

*As of May 21, 2024, state appears poised to pass legislation that would expand protections to freshwater wetlands.

**Legislation to codify *Sackett* restrictions was introduced but not approved by state legislature.

***As of May 21, 2024, state expected to convene Technical Advisory Committee in summer 2024 to draft wetlands permitting regulations.

Justice Alito, writing for the 5-4 *Sackett* majority, assured us that "states can and will continue to exercise their primary authority to combat water pollution by regulating land and water use."[2] That may have been wishful thinking. Based on a review of current state laws, at least 18 states do not require permits before developers dredge or fill wetlands that are now exempt from federal regulation under *Sackett*, regardless of their "physical, biological or chemical" impact on nearby open water, while six more states lack such requirements outside of tidal or coastal areas. These limitations arise from state laws that prohibit adoption of any regulations stricter than federal law requires, or which limit state jurisdiction to coastal waterways, or because states have never established a wetlands permitting program for other reasons. (Several of these states do provide for limited permitting of dredge and fill projects that involve public financing or are on public land, but those are narrow exceptions).

Speaking for the coalition of 25 states that joined West Virginia's *amicus* brief supporting the narrow interpretation of the federal Clean Water Act adopted in *Sackett*, the state of West Virginia claimed that:

> [T]he States have not hesitated to flex their authority. Indeed, many States have implemented laws and regulations that are more protective of their waters than if the CWA alone applied. Many define the 'state waters' over which they assert jurisdiction more broadly than 'waters of the United States.'[3]

Ironically, 14 of the 25 states joining West Virginia's *amicus* brief do not require permits for any wetlands no longer protected under *Sackett*, while the permitting authority for three additional states joining that *amicus* brief is limited to wetlands in coastal areas.

Also, the authority that other states retain to regulate wetlands no longer protected by federal law often comes with significant limits. For example, Michigan only requires dredge and fill permits for isolated waters that are over five acres, within 400 feet of a stream or lake, within 1,000 feet of certain lakes, or essential to the preservation of natural resources. Similarly, New York does not require permits for dredge and fill projects on private lands that are smaller than 12.5 acres (although the state is considering lowering that exemption after *Sackett*). Oregon provides differentiated protections for wetlands depending on whether they are in the "protection category," conservation category," or "development category." While a number of states are considering legislation to better protect wetlands left behind by *Sackett*, there is no evidence that states who advocated for the federal exemptions approved by the Supreme Court have done so.

According to a U.S. Fish and Wildlife Service (USFWS) report to Congress in March 2024, wetland loss rates between 2009 and 2019, "...have increased by 50 percent over the last decade and continue to disproportionally impact vegetated wetlands such as marshes and swamps. Approximately 670,000 acres of vegetated wetlands, an area greater than the land extent of Rhode Island, disappeared between 2009 and 2019."[4]

While wetland losses during the ten-year period surveyed by the USFWS obviously predate the 2023 *Sackett* decision, the disturbing trend is likely to get worse if the states, including those that hailed the Supreme Court's decision, do not step up to protect wetlands no longer subject to federal law. Will they rise to the challenge?

Methodology

This report is based on an online review of state law and wetland permitting programs as of May 20, 2024. The analysis does not consider state water quality certifications required under Section 401 of the Clean Water Act for any projects that require a federal license or permit. In some cases, states have leveraged these certifications to secure additional protection for wetlands not otherwise regulated under state law. But state certifications will no longer be triggered for dredge and fill projects in wetlands that are now exempt from federal permitting requirements.[5] Nor does it consider state regulation of dredging or filling in open water, such as harbors, rivers, or lake beds, as these are not wetlands. Also excluded are state authorities to manage the construction or placement of docks, jetties, piers, or other infrastructure, as the impact of these projects on wetlands is incidental.

Although important, state authority to protect wetlands through outright purchase or easements were also excluded from this report, as these do not substitute for the authority to require permits for dredge and fill projects. Finally, state flood plain management was not considered, as such regulation is almost always designed to avoid damage from "once in a hundred year" storms and even then, may result in infrastructure projects designed to drain floodwaters quickly rather than protect wetlands. Local zoning rules that may affect wetlands were outside the scope of this study.

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Endnotes

[1] *Sackett v. Envt'l. Protection Agency*, 598 U.S. 551, 678-79 (2023).
[2] *Id.* at 683 (citation omitted).
[3] "Brief of Amici Curiae States of West Virginia and 20 Other States in Support of Petition" (Oct. 25, 2021) at p. 6.
[4] U.S. Fish & Wildlife Service, "Status and Trends of Wetlands in the Conterminous United States 2009 to 2019" (March 2024).
[5] State certifications may continue to apply to a limited number of large federal projects, such as pipelines, which require a license from the Federal Energy Regulatory Commission.