Environmental Protection Network

(202) 656-6229
environmentalprotectionnetwork.org
info@environmentalprotectionnetwork.org

THE SUPREME COURT *SACKETT v. EPA* DECISION
Critical Post-*Sackett* Actions for States and Tribes

The Decision

In *Sackett v. EPA*, the Supreme Court held that the Clean Water Act (CWA) extends only to wetlands that have a continuous surface connection with "waters of the U.S." These waters are described as relatively permanent bodies of water connected to traditional interstate navigable waters, making it difficult to determine where the waters end and the wetlands begin. While the Court was clear in its ruling about which wetlands were covered, it did not clarify what constitutes a "relatively permanent" body of water. EPA and the U.S. Army Corps of Engineers (Corps), the federal agencies responsible for protecting waters of the U.S., will have to provide that clarity in the rule they are developing to amend the definition following the *Sackett* decision. It is estimated that based on the decision, over 50% of the country's wetlands and as much as 70% of the total length of its stream and river channels will no longer have federal CWA protection.

What the Decision Means for Clean Water Protections

The estimated 50% of wetlands being excluded from jurisdiction under the CWA is based on analyses of the impact of the 2020 Navigable Waters Protection Rule (NWPR). That estimate, however, is lower than the jurisdictional limitations reflected in the *Sackett* decision because the NWPR covered wetlands with a continuous surface connection that were separated from waters of the U.S. by man-made dikes or barriers, natural river berms, and beach dunes. *Sackett* excludes wetlands separated by any barrier, overturning the past 45 years of practice that included these influential wetlands as "waters of the U.S." The estimate of 70% of stream and river channels being excluded is based on the U.S. Geological Survey (USGS) National Hydrography Dataset, which indicates only 30% of the nation's streams and rivers are permanently flowing; the rest are either intermittent or ephemeral. Stream and river networks in arid regions have an even higher proportion of channels that do not have "relatively permanent" flow. In Arizona, for example, 96% of stream channels by length are classified as ephemeral or intermittent, and similar conditions prevail throughout the arid Southwest.

Wetlands provide numerous socially beneficial functions, including absorbing extreme rainfall events that threaten infrastructure, transport, and pollutant filtration capacity. The loss of wetlands excluded from CWA protection will result in increasing costs for additional infrastructure resiliency measures, preparedness, and protection of water quality.

The Role of States and Tribes in Waters and Wetlands Protection

Congress passed the CWA in 1972 precisely because the reliance on state water quality programs had failed to protect the nation's waters and subjected downstream states to water pollution from upstream states. By restricting and limiting federal jurisdiction, *Sackett* is returning a major portion of wetlands and waters to only state control. It is essential that Congress and the public be aware of the actions that states and tribes will need to take to ensure protection of these valuable resources. If states or tribes are unable or unwilling to take these actions, small streams and wetlands throughout the country will be permanently lost to dredge and fill activities, pollution will increase from unregulated sources, and flooding will worsen in inland and coastal areas.

A Checklist of Actions for States and Tribes

Below are critical actions every state and eligible tribe needs to take to restore protections to waters and wetlands no longer covered by the CWA. While no tribe currently administers permitting programs under Section 402 or Section 404 of the CWA, and a majority of tribes do not have approved water quality standards or issue Section 401 water quality certifications, they could be authorized to do so in the future. It should be noted that even if a state is able to expend substantial resources to protect waters/wetlands no longer covered by the CWA, that state will not be able to prevent pollution flowing in from upstream states that are unwilling or unable to establish such protections.

- Repeal or modify any state law limiting authority to regulate waters not covered by the CWA

  In 2013, the Environmental Law Institute published a study[1] that found 36 states have laws that include absolute or qualified prohibitions requiring state law to be "no more stringent than" federal law, or include property rights limitations, or a combination of the two that constrain the authority of state or local regulators to protect aquatic resources excluded from the CWA. States would have to repeal or modify these laws to ensure they had the authority to protect waters and wetlands no longer covered by the CWA following the *Sackett* decision.

- Identify state/tribal waters and wetlands no longer covered by the CWA

  Each state has its own definition of "waters of the state." About half of the states have definitions covering some surface waters beyond those under federal jurisdiction. All states also define wetlands in their state laws and regulations. Some are more inclusive than the

[1] State Constraints: State-Imposed Limitations on the Authority of Agencies to Regulate Waters Beyond the Scope of the Federal Clean Water Act, https://www.eli.org/research-report/state-constraints-state-imposed-limitations-authority-agencies-regulate-waters

federal regulatory definition, while others incorporate the federal definition. At least 26 states have programs that cover all or some isolated waters, including wetlands, which the *Sackett* decision excluded from the CWA.

States/tribes will need to put significant resources into identifying waters no longer covered by the CWA. They can use USGS topographic maps; elevation models, including those based on light detection and ranging (LIDAR) derived data; aerial and surveillance imagery. Unfortunately, maps and imagery may not be sufficiently detailed or may not cover all the areas and time frames needed to distinguish relatively permanent, intermittent, and ephemeral streams. Historic data may be unusable because of climate change impacts. EPA and the Corps are developing regionalized streamflow duration assessment methods to assist in determining relatively permanent flows, but these methods require on-site visits that many states lack the resources to conduct. States/tribes will also find it very difficult to identify wetlands no longer covered by the CWA. Over the past 45 years, no authority has excluded wetlands with a continuous surface connection through a natural or man-made barrier. States/tribes will need to expend considerable effort to identify such wetlands, now that *Sackett* has excluded those wetlands from jurisdiction under the CWA.

- Adopt designated uses and water quality criteria for state/tribal waters/wetlands

  CWA Section 303 requires states/tribes to develop water quality standards for waters of the U.S.; assess their water quality; and develop Total Maximum Daily Loads (TMDLs), the amount of a pollutant that a water body can accept, for waters not meeting water quality standards. States will already have water quality standards and TMDLs for waters newly excluded by *Sackett*. They should keep these standards and TMDLs in place under state jurisdiction. States/tribes should also adopt designated uses and water quality criteria for any state waters lacking them. States will not have to get EPA approval of the designated uses and water quality criteria for state waters, but they should still keep the criteria up-to-date with best available science and should still develop TMDLs for pollutants exceeding the applicable criteria.

  States may be faced with requests from point source dischargers in newly excluded waters to increase their wasteload allocations and shift pollutant reductions to downstream sources discharging to waters covered by the CWA. There are over 73,000 completed TMDLs for pollutants nationwide for which requests could be generated. Point source dischargers may also argue that they should not have permits if the permits are based on CWA jurisdiction. States should refuse these changes, citing anti-backsliding permitting provisions and water quality standards antidegradation policy.

- Create a pollutant discharge permitting program for point source discharges to state/tribal waters/wetlands

  Forty-seven states and the U.S. Virgin Islands have been authorized to administer the CWA Section 402 National Pollutant Discharge Elimination System (NPDES) program. EPA issues NPDES permits for Massachusetts, New Hampshire, and New Mexico. These permit programs are based on a pre-*Sackett* definition of jurisdiction and will be subject to review and possibly changes to meet the limitation in the new requirements. Only 21 states regulate point source discharges in waters not subject to CWA regulation. These states either explicitly cover waters excluded from the CWA in the text of their regulations, or apply their broad regulatory authority in a way that captures some waters not covered. All states should begin issuing pollutant discharge permits for state waters based solely on state authority to replace the prior CWA based permits.

  The CWA's effluent limitation guidelines are only required for facilities that discharge to waters of the U.S., but states should choose to use these technology-based permit limits for dischargers to state waters. States should also refuse any requests from dischargers in newly excluded waters to increase their water quality-based permit limits based on lack of CWA authority or to account for attenuation or dilution farther downstream to waters that are covered by the CWA.

- Develop a permitting program for dredge and fill activities in state/tribal waters/wetlands

  Unless the activity is statutorily exempt, CWA Section 404 prohibits the discharge of dredged or fill material from a point source into waters of the U.S. without a permit. The 404 permitting program is administered by the Corps with oversight by EPA in 47 states. Only Michigan, New Jersey, and Florida issue 404 permits for waters within their borders. To be permitted, the permittee must demonstrate that steps have been taken to: 1) avoid impacts to wetlands and other aquatic resources, 2) minimize potential impacts through design and risk avoidance measures, and 3) compensate for remaining unavoidable impacts if required. There are three mechanisms for providing compensation: mitigation banks, in-lieu fee programs, and permittee-responsible mitigation.

  Twenty-three states have programs that address dredge and fill activities in waters not covered by the CWA. All states need to develop dredge and fill programs as soon as possible to cover all the waters and wetlands newly excluded from the CWA. Unless states develop and operate these programs, there will be no requirements for avoidance, minimization, or compensatory mitigation measures. Streams and wetlands will be permanently lost as a result of unpermitted dredge and fill activities, and no compensation will be provided by restoring or preserving aquatic resources elsewhere.

- Create a process through which states/tribes can request conditions on federal licenses/permits in state/tribal waters/wetlands

  Under CWA Section 401, states, authorized tribes, and interstate agencies have the authority to grant or deny any federal permits or licenses that may result in a discharge to waters of the U.S. within their borders. They can also place conditions on these permits or licenses in order to enhance environmental benefits. States and tribes should develop a process for the governor or tribal leader to notify federal agencies issuing permits or licenses in state waters/wetlands of any concerns they have or desired conditions to enhance environmental benefits. Federal agencies will have no obligation to address their concerns, but at least states/tribes will be on record with their views.

- Establish oil spill programs and funds for state/tribal waters

  CWA Section 311 and the Oil Spill Pollution Act of 1990 authorize the Oil Spill Liability Trust Fund to pay for or reimburse the costs of assessing and responding to oil spills in waters of the U.S. or adjoining shorelines. The fund cannot reimburse states and tribes for cleanup costs and damages for spills solely affecting waters excluded from the CWA. States/tribes should consider setting aside funds for spills in their waters in order to defray cleanup costs and compensate affected parties for damages not reimbursed by responsible parties. EPA lacks authority to take enforcement actions based on spills solely affecting waters excluded from the CWA, so states/tribes must develop the ability to enforce cleanups and oversee responsible party responses based on state/tribal removal requirements.

  In addition, Section 311 requirements for oil spill and prevention plans do not apply to facilities from which oil discharges will not reach waters of the U.S. Some states have oil spill planning requirements equivalent to Section 311 requirements but often apply them to fewer facilities based on size and type of facility. All states should develop oil spill prevention and preparedness programs for all facilities that could impact waters excluded from the CWA.

Contacts: Questions regarding this information should be addressed to:
Michelle Roos
Executive Director of the Environmental Protection Network
michelle.roos@environmentalprotectionnetwork.org