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Filling the Gap in State Wetland Protections After Sackett vs EPA

By Marla J. Stelk, Executive Director, National Association of Wetland Managers

The May 25, 2023, U.S. Supreme Court decision on *Sackett vs EPA* dealt a significant blow to wetland protections nationwide. However, exactly how significant the impacts will be is still relatively unknown, primarily because the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) have not shared details yet on how they will define and interpret key terms such as “continuous surface connection” and “indistinguishable”. The *Sackett* decision may have focused primarily on wetlands, but the decision also has serious implications for the health of and protections afforded to other aquatic features such as streams, lakes, and ponds.

The *Sackett* decision holds that WOTUS includes only those “wetlands with a continuous surface connection to bodies that are ‘waters of the United States’ in their own right,” so that they are “as a practical matter indistinguishable from waters of the United States.” As a result, to assert Clean Water Act (CWA) jurisdiction over an adjacent wetland a party now must establish:

1. The adjacent body of water is relatively permanent and connected to traditional interstate navigable waters, and
2. The wetland has a continuous surface connection with that relatively permanent water, making it “difficult to determine where the ‘water’ ends and the ‘wetland’ begins.”



Photo Credit: Steve Hillebrand, USFWS

During a call with NAWM's state coregulators on June 1, 2023, and in subsequent conversations with individual states, it became clear that the impacts from the changed definition of WOTUS will be distributed unequally among states. Those states that have "no more stringent than" laws on their books, those states that do not have the capacity to fund a comprehensive state wetland program (or to assume the 404 dredge or fill permitting program or develop a State Programmatic General Permit (SPGP) program), and those states that do not have the political will to enact a definition of waters of the State or enact new broader state protections – these are the states that are at risk of losing their valuable freshwater wetland and aquatic resources to dredge or fill activities. The fact that many of the poorest states that lack either the funding or political will to protect these now vulnerable aquatic resources are the ones who will be impacted the most, raises serious equity concerns.



Photo Credit: ncwetlands.org

On August 29, 2023, EPA and the Corps issued a final rule to amend the 2023 WOTUS rule to conform to the key aspects of the regulatory text of the *Sackett* decision (which became effective on September 8, 2023). The final rule deleted all references to the significant nexus test as directed by the *Sackett* decision, revised the adjacency test, removed wetlands and streams from the text of the provision for "additional waters", and removed interstate wetlands from the interstate waters category. Many of the states that NAWM had spoken with previously who felt their programs would be relatively unimpacted, expressed serious concerns about how their wetlands and waters might be impacted now by the removal of

interstate wetlands. The actions and protections or lack thereof by neighboring states can have serious consequences for their downstream neighbors. These kinds of interstate conflicts are challenging at best when there is no federal involvement. Many important questions remain unaddressed by the final rule, such as does a Karst formation, a levee or a berm create a disconnection from a WOTUS, thereby making the wetlands next to those features non-WOTUS? If so, this could create serious risks for flooding along the entire Mississippi River corridor and other locations. What about duck impoundments?

Those states that have assumed the CWA 404 dredge or fill permitting program (Michigan, New Jersey, and Florida) do not anticipate any significant impacts on their programs. Other states that have comprehensive "waters of the State" definitions and/or strong SPGP programs will also be *relatively* unaffected. However, many of these states have still reported that they are challenged by the public perception that *Sackett* eliminated protections altogether and not just for a substantial number of waters formerly protected by the federal CWA. These states are seeing an increase in complaints due to this misunderstanding and have had to issue notices reminding their citizens that state regulations are still in place.

Other states in the arid west, such as Colorado¹ and New Mexico, are disproportionately affected due to the types of wetlands and waters that are prevalent in their states which are primarily ephemeral or intermittent. A modeling study of the South Platte headwaters, one of Colorado's seven major watersheds, determined that between 15 and 54 percent of wetlands lacked the types of continuous surface connections to traditionally navigable waters required by Justice Scalia's plurality opinion in *Rapanos*.² An estimated 93% of New Mexico's streams and rivers are ephemeral or intermittent. Since the new WOTUS definition, revised based on the *Sackett* decision, removes jurisdiction from all ephemeral streams, some

intermittent streams, and all wetlands adjacent to ephemeral (and some intermittent and perennial) streams, New Mexico is at risk of losing federal protections for the vast majority of its wetlands.³ Additionally, in the past, these two states and about 22 others have relied on their authority provided under CWA Section 401 to condition federal permits or licenses, including permits authorizing discharge of dredge or fill material, ensuring that they comply with state level protections. However, Section 401 only applies to WOTUS, therefore all the wetlands that were previously subject to Section 401 review as WOTUS are left without any state level mechanism to protect them in these states.

Another ripple effect of the *Sackett* decision is that since fewer wetlands and waters will be WOTUS, there will be fewer Jurisdictional Determinations (JDs) performed by the Corps. This means that fewer 404 project permits that require consideration of the least environmentally damaging (“practicable”) alternatives will be triggered. Even when JDs are performed, the “least damaging alternatives” analysis will also be impacted as many of the alternatives that may have been previously excluded may now be included if they do not affect any WOTUS under the new definition (despite their impacts to non-WOTUS wetlands and waterbodies). There is a serious domino effect that will inevitably come into play in ways we have yet to comprehend or imagine. Tribes will be the most significantly impacted as most of them rely almost entirely on federal protections. This article, however, focuses primarily on impacts to state programs as a starting point for NAWM’s analysis.



Photo Credit: Elisabeth Cianciola, MA Dept. of Fish & Game

There is the assumption among many of those that support the *Sackett* decision that states and Tribes will somehow magically fill the gap in wetland and water protections. Indeed, the CWA is founded on the concept of “cooperative federalism” which is a model of intergovernmental relations that recognizes the overlapping functions of state and federal governments and promotes a shared government model, requiring meaningful and clearly articulated roles for both states and the federal agencies, working together to achieve CWA goals. But as discussed earlier, states have very different levels of capacity, funding, and political will to develop comprehensive wetland protection programs. Many rely on EPA and the Corps to provide those protections. And the types of wetlands and other aquatic resources vary dramatically from one state to the next as well, so if one type of resource is excluded from federal protections such as ephemeral wetlands and streams, that puts some states (in this example, the arid states) at a significant disadvantage. This is why it is so critical to have federal regulations that can provide a base level of protections for all states (and Tribes -- who are considered within nation-to-nation constructs versus cooperative federalism).

So - if there is this expectation that states and Tribes will fill the gap in wetland protections after the *Sackett* decision, what does that mean exactly? How many full-time employees are needed state by state to fill the gap? How much funding is needed? How long will it take to pass new enabling legislation in their states or to set up fee structures to cover costs? How will downstream states and Tribes protect themselves from upstream neighbors who may not have comprehensive regulations in place? NAWM spoke to a handful of states that have strong wetland protection programs in place to learn more, e.g., – how their programs are set up, what it takes to run them successfully, and what their concerns are/or plans to further strengthen their programs post-*Sackett*.

Washington State

The State of Washington provides wetlands protections under numerous state laws, none of which provide wetlands protection as their primary purpose: State Water Pollution Control Act; Growth Management Act; Shoreline Management Act; State Hydraulic Code; and Forest Practices Act. In general, the State emphasizes a local approach to wetlands protection and regulation. Most State laws authorize local municipalities to plan and regulate their lands, including wetlands, with State agencies often playing an advisory role. Section 401 certification is the primary mechanism of wetlands regulation at the State level. However, the State is able to issue Administrative Orders (AOs) under the Washington State Water Pollution Control Act for all wetlands, regardless of whether or not they are under federal jurisdiction.

Staff at the Washington Department of Ecology (Ecology) expect to see a 100-400% increase in AOs after the *Sackett* decision. Although Washington State issues AOs, it does not have its own dredge or fill permitting program. There are no general permits under the AO system, so each application has to be reviewed individually. Current staff (2.5 direct FTEs funded from FY22 through FY24) issued approximately 8.1 administrative orders per FTE per year. Based on an analysis of permit data from Ecology's Aquatics Database, and about 200 permit actions taken by the Corps between January 2022 and August 2023, they estimated between 50 to 100 projects will now need administrative orders each year. Based on the range of 50-100 new AOs per year, and how many staff were able to complete per year last biennium, Ecology estimated they would need between 6 and 12 FTEs to address the workload.

Furthermore, based on complaint data from Ecology's Environmental Reports Tracking System (ERTS) from July 2019 through June 2023 (including the brief time that the NWPR



Photo Credit: Lauren Driscoll, WA Dept of Ecology

was in effect), Ecology also expects an increase in inadvertent violations, where proponents discover they do not need a federal permit, and proceed to implement their project assuming that no other authorization is needed. Based on ERTS data, the number of complaints reported to Ecology for wetlands has increased from 181 in fiscal year 2020 to 258 in fiscal year 2023.

Given all of this, Ecology is hoping to set up a statewide dredge or fill permitting program. There is, of course, a cost associated with this. They estimate they will need 3-4 FTEs for the state rulemaking effort itself. And they estimate it will increase costs for the development community too, since Ecology will need to set up a fee structure to pay for the permitting program (which will have to be approved by the State legislature). Ecology estimates it will cost them around \$2.2 million to hire new staff, issue AOs (or future permits), for 3 years until they can get a fee structure going. Overall, the rulemaking and permit program effort is estimated to end up costing around \$7 million statewide. The State has not opted to pursue assumption of the 404 permitting program though because the Corps would still retain many waters and there were no resources from the federal agencies to implement an assumed program. Without implementation funding, Washington is not currently interested in assuming the 404 dredge or fill program.

Maine

The State of Maine has a statewide wetland permitting program under Maine's 1988 Natural Resources Protection Act (NRPA), which establishes its regulatory authority over wetlands, provides several definitions of wetlands in Maine's Natural Resources Protection Act (NRPA) and is regulated by the Maine Department of Environmental Protection (DEP). Maine communities regulate wetlands under the home rule provisions of the Maine Constitution and under Maine's Municipal Shoreland Zoning statute which gives authority to local government to regulate non-forested wetlands greater than ten acres in size. The State and federal government have developed cooperative arrangements that streamline the permitting process for activities affecting wetlands. For activities affecting coastal wetlands, the State and federal government retain full permitting over all wetlands of any size. For activities involving freshwater wetlands, the State and federal government have developed a reduced permitting process, based on the size of the alteration in the wetland, rather than the size of the wetland itself. DEP coordinates with the Corps to avoid, minimize, and discuss compensation requirements (so that applicants do not have to provide 2 different compensations to 2 different agencies). This is voluntary and there is nothing in State law or regulation that requires the State to do this. Since there are two permits (DEP and the Corps) a developer needs approval from both agencies in order to move forward with their proposal.



Photo Credit: Marla J. Stelk, NAWM

Although the State does not expect the *Sackett* decision to change anything in their regulatory program because of their state mandate, they do have concerns that the cooperative arrangements they had with the Corps for permit review will be impacted. With fewer waters being considered WOTUS, the Corps will likely bow out of application meetings that do not include WOTUS. The ability in the future for the State to get assistance from the federal agencies in working with difficult applications is of concern. Although Maine has a Waters of the State definition that is very comprehensive and includes groundwater, there is concern that a change in leadership at the state level could put Maine's program at risk.

Even though the State of Maine has a strong regulatory program with broad protections, regulatory uncertainty at the federal level has caused confusion with permittees and developers. Maine's regulations used to be in line with the Corps, but that has changed over the years as the federal definition of WOTUS has changed. Maine's regulatory program is funded through a combination of 3 resources: 1) NOAA's coastal zone management program, 2) the State's general fund, and 3) application fees. They have 22 FTEs that work on the NRPA, but those responsibilities include far more than wetlands – they also work on stormwater, solar and wind energy projects, and more. Overall, they are very understaffed – they have experienced an increase in complaints this year but haven't been able to review all of them because of their staffing shortage. Maine's monitoring and assessment program is in even worse shape – they only have two staff for the



Photo Credit: Jim Pendergast, NAWM Volunteer

entire state and their positions, until recently, were only funded under EPA's competitive 2-year Wetland Program Development Grant program. So, every two years, they were at risk of losing their entire staff. Just this year they were able to get funding from the State general fund to cover both positions, but they still don't have funding for seasonal help, sampling (which includes expensive laboratory work to analyze water samples and perform taxonomic work on biological samples), or to lease seasonal vehicles.

Minnesota

Minnesota has a definition of Waters of the State as well as the State's Wetland Conservation Act (WCA) which is a non-regulatory program. In 1991, the State legislature passed the WCA in recognition that wetlands not protected under other federal or State programs were being lost throughout the State. To curb the loss, the WCA establishes a no net loss policy for all wetlands in the State and calls for an increase in quality, quantity, and biodiversity of wetlands. Essentially, if a wetland meets the Corps' 1987 Manual definition, it is covered under Minnesota law. Minnesota's wetlands are managed under three State agencies which coordinate via common and joint procedures.:

1. The Minnesota Department of Natural Resources implements the Public Waters Permit Program, established in the early 1980s, which regulates activities occurring below the ordinary high water level in designated public waters, including lakes, rivers, and a few very large wetlands.
2. The Minnesota Pollution Control Agency, which implements CWA section 401 and develops state water quality standards.
3. The Minnesota Board of Water and Soil Resources (along with local governments), which is responsible for implementing the State Wetland Conservation Act of 1991 (not regulatory) that applies to all wetlands in the State.

Minnesota wetlands are diverse, ranging from extensive northern peatlands to small prairie potholes, to rare calcareous fens. Minnesota has more acres of freshwater wetlands than



Photo Credit: Jennie Skancke, MN Dept. of Natural Resources

any other state except Alaska, and a quarter of the state is in the Prairie Pothole Region.

Due to Minnesota's comprehensive wetland protections programs, the State does not expect to see any substantive effects from the *Sackett* decision on the condition or extent of the State's wetland resources. Some of the States's streams, however, may be left unprotected as well as some "tweeners" that are not big enough to be classified as a lake but are deeper than a wetland as defined under the Cowardin classification system. The State's WCA protects the fringes of these aquatic features so the risk would only pertain to the center of those systems. Additional staff may be required to cover some of these gaps, especially for the upper watershed headwater stream systems. Additionally, the State's ability to coordinate



Photo Credit: Marla J. Stelk, NAWM

(BWSR) alone employs approximately 20 staff to run the State's wetland mitigation banking program and provide the technical assistance to local governments. BWSR's staffing costs last year were around \$2.3 million, not including overhead or the local government replacement road program (mitigation for local road projects).

Minnesota has been interested in assumption for several years and invested substantial time and funds into researching the practicality of assuming the federal CWA section 404 dredge or fill permitting program. A 2022 report to the State Legislature estimated it would cost the State \$4.8 million to implement the assumed 404 program.⁴ Although the State has not decided to apply for assumption under CWA section 404(g) yet, it still may do so. Minnesota will likely consider how the *Sackett* decision affects wetlands and landowners in their state and may examine if the State should establish protections for statewide headwater streams that lost federal protections.

with the Corps may become more time-consuming if it takes the Corps longer to determine jurisdiction.

Similar to Washington State, although the State of Minnesota develops the regulations, the primary responsibility for implementing them falls on local government. However, the State works with local governments via the State's technical evaluation panel (similar to the federal/state interagency review teams) to provide technical support and runs a training program for local governments, soil conservation staff, and consultants. The Minnesota Board of Water and Soil Resources

Ohio

In Ohio, wetlands are either regulated under CWA section 401 as a WOTUS, or under Ohio Revised Code, as an "isolated wetland". For Ohio's purposes, "isolated wetlands" means those wetlands that are not subject to regulation under the Federal Water Pollution Control Act. Ohio is unique among states due its successful and long-standing isolated wetlands program which was enacted in response to the 2001 U.S. Supreme Court decision in *SWANCC vs EPA*. By April of that year, the State had filed emergency rules to protect their isolated wetlands, and within 3 months, the rules were established into law with a House bill. The State's wetland regulations follow the Corps' 2008 Mitigation Rule very closely.

However, Ohio House Bill 175, passed and signed by the Governor in April of 2022, removed protections for ephemeral streams, thus there



Photo Credit: Ohio Environmental Protection Agency

is no longer a permitting program or application process required to dredge or fill ephemeral streams in the State. And since the *Sackett* decision explicitly removed ephemeral streams and wetlands from federal jurisdiction, these resources are definitely now at risk. Despite this, the State does not expect to see much of an impact on their wetland resources post-*Sackett* because of their isolated wetlands program and



Photo Credit: Ohio Environmental Protection Agency

strong statewide protections in place. Impacts are expected to be seen in regard to program expenses, however.

Ohio's wetland program employs eight FTEs to review all wetland applications whether federal or not (CWA section 401, isolated wetland permits). The State charges \$500/acre for reviews (up to a cap of \$25,000) and they also charge application fees to fund their program. However, these fees are not enough to fund the time spent on reviews. Expenses for 2023 for the Isolated Wetlands Program were approximately \$225,000, however,

fees generated only about \$57,000 worth of revenue so additional money is utilized from other programs within the division to help fund it. A rough breakdown of program costs from 2020-2024 shows how changes in WOTUS with the Navigable Waters Protection Rule (NWPR) impacted time spent on permit reviews and thus program expenses. During 2021-2023, the State witnessed a significant jump in isolated wetland permit applications due to the reduction in federal protections in the NWPR. A similar trend is now being seen post-*Sackett*:

	2020*	2021*	2022*	2023*	2024*	Grand Total
Personnel	\$22,452	\$132,015	\$176,183	\$224,960	\$22,690	\$578,300

*Based on Sept-Oct Fiscal Year

Thus, challenges to Ohio's program post-*Sackett* include:

- Staffing: Ohio is expecting an increase in level 1 (poorest condition) isolated wetland permit applications (that would have normally been addressed under a Nationwide Permit (NWP)), requiring an increase in staffing and associated costs.
 - Relatedly, the State is concerned about how they will account for activities with minimal impacts that were previously authorized under a NWP. For example, if Lake Erie's diked wetlands are no longer federally jurisdictional, every time there is a berm repair or water control structure issue, the State will have to do a level 3 isolated wetlands permit with a public hearing (formerly done under NWP 27 with a director's authorization).
- Unauthorized impacts to isolated wetlands: Ohio is considering how they will conduct isolated wetland boundary verifications without creating a "state jurisdictional determination" and while also providing regulatory predictability.
 - One option under consideration is to create a "non-reporting" General Permit for activities with minimal impacts.
- Mitigation: the State is considering developing a state sponsored mitigation bank and/or in lieu fee program.

Oregon

In Oregon, wetlands are regulated through the authority of a handful of federal and State laws and, in some cases, city or county ordinances. The State's Wetlands Program was established by statute in a 1989 comprehensive wetlands conservation bill using the federal 1986 delineation standard/manual to identify wetlands. The Program is responsible for developing and maintaining the Statewide Wetland Inventory, providing wetland planning assistance, developing standards and tools, and providing public information and training. Wetlands are managed and coordinated via six primary state agencies:

- Department of State Lands (DSL)
- Department of Environmental Quality (DEQ)
- Department of Fish and Wildlife (DFW)
- Department of Land Conservation and Development
- Department of Agriculture
- Watershed Enhancement Board (OWEB)

Oregon defines wetlands similarly to the pre-2015 WOTUS definition. The State regulates isolated wetlands and does not require a connection to navigable waters – wetlands are waters of the State regardless of whether or not they are connected to a tributary system. Wetlands are regulated up to the ordinary high water mark in most places, but they do not regulate ephemeral streams – only intermittent and perennial.



Photo Credit: Dan Cary, Oregon Department of State Lands



Photo Credit: Dan Cary, Oregon Department of State Lands

Overall, the *Sackett* decision has not had much of an impact on Oregon's DSL program, however, it has created challenges for the DEQ which administers the 401 certifications. Oregon requires a consideration under State law of compliance with water quality standards, which Oregon has viewed as met by the 404 permit process and 401 certification. If those fall by the wayside, where there is no 404 nexus and 401, the State may need to fill that certification gap. Oregon also has concerns with recent efforts to reduce protections by the State, to reduce either the scope of protections or by expanding exemptions or reducing regulatory processing. Concerns regarding an increasing homeless population in the State has increased some of this pressure as a way to reduce permitting costs and delays for affordable housing projects. The Governor and an advisory committee tasked with looking into the affordable housing situation have recommended that the State adopt the new post-*Sackett* definition of WOTUS to allow for more housing to be built in wetlands.

Oregon has roughly 30 FTEs on staff to protect wetlands and waterways. In addition to wetlands, staff also manage the State's navigable waterways and manage those as the landowner (equal footing doctrine). For example, if a permittee wants to build a jetty on the Willamette, they will need dredge/fill permits (from Oregon and the Corps) but also need permission from Oregon as the landowner of the bed of the Willamette. Oregon's budget for its wetland program is approximately \$6

million per year. The program funding is fee-based with an important backstop from the Common School Fund. However, the program does not pay for itself. The application fees and civil penalties only cover about 25% or so of the cost to run the program. The rest is covered by proprietary leasing (where Oregon is the landowner) and if leasing revenue is not enough, then they dip into the Common School Fund. This is a common strategy for Western states. When Western states joined the Union, they were required to guarantee public education, so states got lands to manage for schools in each township and those lands are managed to generate revenue for the Common School Fund. It is unusual in the West that the same state agency oversees the Common School Fund and also regulates wetlands. In this year's legislative session, DSL was directed to look at different fee structures to stop draining school fund; therefore, it is anticipated that fees will increase significantly by tripling or quadrupling the current rates.

Oregon has looked closely at state assumption of the 404 program and estimated it would require adding roughly seven additional FTEs to perform cultural reviews, Endangered Species Act (ESA) reviews, etc. which are time consuming tasks without the federal nexus. The State ultimately decided not to pursue assumption, not because of the additional costs, but due to resistance from Tribes. The nine federally recognized Tribes in Oregon are wary of the State and generally don't trust the State to protect their interest absence a federal nexus – the lack of federal trust responsibilities. This is why Oregon was interested in partial assumption. Partial assumption could have allowed them to only assume 404 permitting responsibilities within urban growth areas, and not on Tribal reservations. Unless the Tribes are in support of Oregon assuming the federal dredge or fill permitting program, the State will not pursue it.

Virginia

The State of Virginia implements a state-wide policy for wetlands and streams and has jurisdiction over all surface waters (including wetlands) in the Commonwealth of Virginia. The over-arching regulation for the permit program is the Virginia Water Protection (VWP) permit program regulation. Through the VWP permit program, the State regulates water withdrawal, excavation, filling, or activities that affect the biological, chemical, or physical properties of surface waters (including streams, lakes and wetlands). The VWP can serve as the section 401 certification of a federal permit or as a state permit when no federal permit is required. The Department of Environmental Quality (DEQ) implements the VWP permit program, which is responsible for the Section 401 certification process for both tidal and nontidal impacts permitted under Section 404 of the Clean Water Act. DEQ can provide Section 401 certification by either issuing a VWP individual or general permit



Photo Credit: Donna Downing, NAWM

or by certifying U.S. Army Corps of Engineers nationwide or regional permits.

In 2000, the General Assembly removed the dependence of the State nontidal wetlands program on the issuance of a federal permit, thus enabling DEQ to use the VWP permit program to regulate activities in wetlands. Such activities like certain types of excavation in wetlands and

fill in isolated wetlands (which may not be under federal jurisdiction) were added to the activities already regulated through the Section 401 Certification process. Impacts to tidal wetlands, including vegetated tidal wetlands and non-vegetated shoreline between mean low and mean high water, are regulated by the Virginia Marine Resources Commission under the Virginia Tidal Wetlands Act. The State also has a State Programmatic General Permit program.

The *Sackett* decision has had some substantive effects with day-to-day tasks, but did not affect the legal authorities. Virginia still regulates today what it has regulated for 25 years. The real effect of *Sackett* for Virginia is in the day-to-day operations, primarily with jurisdictional determinations. Prior to *Sackett*, the State did few of their own state JDs since there was quite a bit of overlap with federal and State authorities – the Norfolk District picked up most JDs. Virginia accepted Norfolk's PJDs and AJDs but would always do surface water assessments to make sure they did not include any waters of the State that could be potentially impacted and weren't covered by federal jurisdiction. The number of State-only protected waters has now increased in numbers since the *Sackett* decision.



Virginia employs approximately 33 FTEs although they have 3-4 vacancies. They have talked about the need for additional staff due to the *Sackett* decision, but instead launched a Virginia State Waters Delineator Program in the early fall of 2023. The new program is intended to help reduce State employee increased workloads. A QA/QC procedure has been set up including field sites as needed. The program has already certified 25-28 individuals and expects to expand substantially.

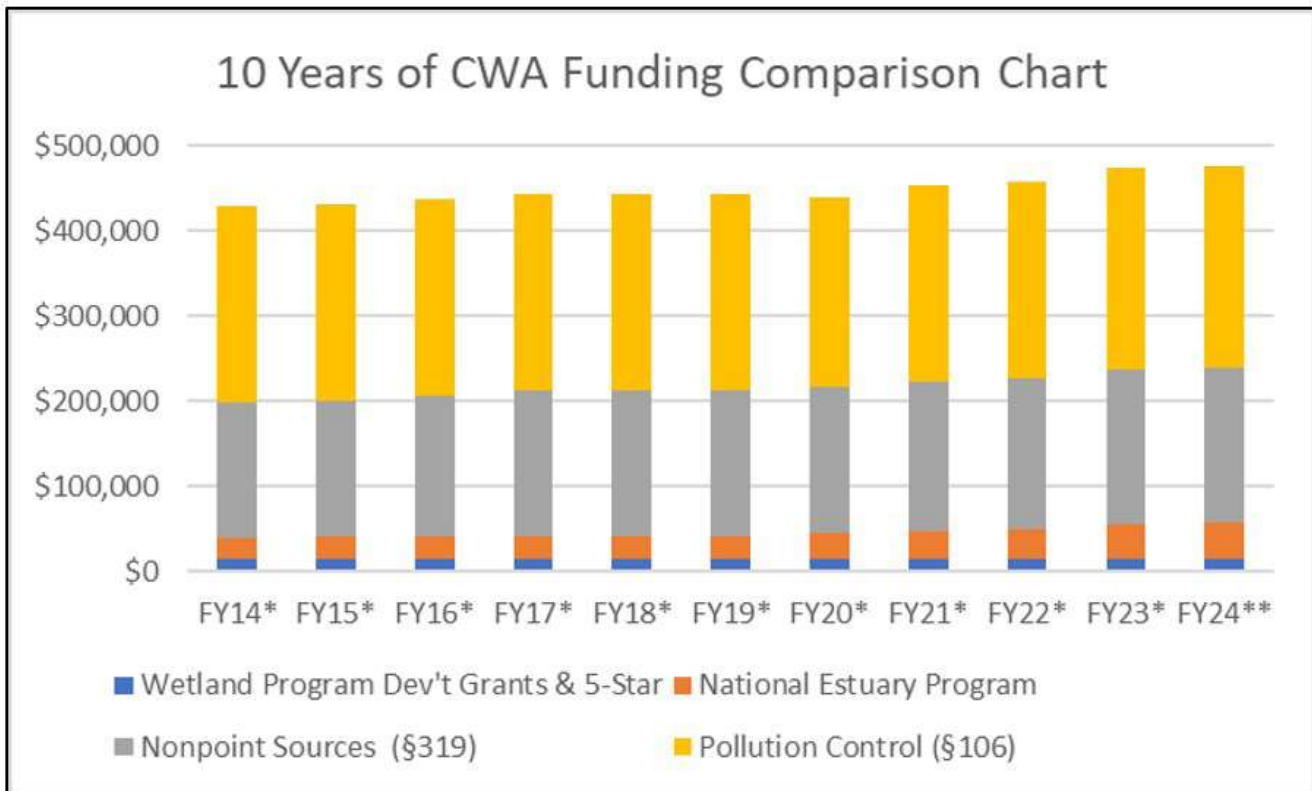
Virginia's wetland protection program costs around \$3.5 - \$4 million annually, including staff salaries, other compensation benefits, indirect costs, and implementation costs for field visits, etc. The DEQ is funded through a combination of resources: about 80% is funded through the State's General Fund, and 20% is funded through fees. Fees are assessed on a sliding scale – more impacts equal higher fees. Thus, the percentage of the annual budget funded by fees varies from year to year but is generally an 80/20 split. This sliding scale fee structure creates an economic incentive to minimize impacts. Fees are in a separate regulatory action as part of the overall agency fees (not just wetlands), so wetlands fees haven't changed since the program was established in 2001, and there is no clause to allow for adjustments in relation to inflation.

Virginia has considered applying for 404 assumption twice – once in 2006 and again in 2012. In 2006, the emphasis was more on the statutory changes and regulatory changes that would be necessary. While the State looked at funding, it didn't look at funding with the same detail as in 2012. In 2012, the State did an economic study and concluded that it would have to double the current 2012 budget of \$3 million to \$6.25 million (in 2012 dollars). Additionally, the State determined that it would need about \$3 million dollars as a lump sum over the course of three years to cover one-time costs like IT upgrades, database upgrades, etc.

Funding for State and Tribal Wetland Programs

NAWM performed an analysis of federal funding for CWA programs,⁵ including EPA’s Wetland Program Development Grants (WPDG)/5 Star Program, National Estuary Program (NEP), Nonpoint Source Program (319), and Pollution Control (106) and found alarming discrepancies as illustrated in the charts below. Adding to this extreme lack of sufficient funding overall for state and Tribal wetland programs is the fact that these numbers are not even adjusted for inflation – which if they were would show a -21.8% reduction in adjusted dollars for wetland programs over the ten years.

	Wetland Program Dev't Grants & 5-Star	National Estuary Program	Nonpoint Sources (\$319)	Pollution Control (\$106)
Budget Account	STAG Categorical Grant	Enviro Programs & Mgmt	STAG Categorical Grant	STAG Categorical Grant
Type	Competitive	Mix	Formula	Formula
FY14*	\$14,661	\$25,098	\$159,252	\$230,806
FY15*	\$14,661	\$26,723	\$159,252	\$230,806
FY16*	\$14,661	\$26,723	\$164,915	\$230,806
FY17*	\$14,661	\$26,773	\$170,915	\$230,806
FY18*	\$14,661	\$26,723	\$170,915	\$230,806
FY19*	\$14,661	\$26,723	\$170,915	\$230,806
FY20*	\$14,183	\$29,823	\$172,348	\$223,289
FY21*	\$14,192	\$31,822	\$177,000	\$230,000
FY22*	\$14,192	\$35,000	\$178,000	\$231,000
FY23*	\$14,692	\$40,000	\$182,000	\$237,000
FY24**	\$14,692	\$42,000	\$182,000	\$237,000



*Enacted in the thousands. Dollars are not adjusted for inflation.

**Senate recommendation in the thousands.

As you can also see from the charts above, the WPDG/5 Star program at EPA is also the only one that is 100% competitive in nature, pitting states against states and Tribes against Tribes for very limited funding. These funds for states (Tribes are now exempted) also require a 25% cost share, in contrast to the other CWA programs. And historically, these funds have only been allowed for program development, not implementation (again, unlike the other CWA programs). As mentioned in the summary of Maine's program, this results in a lack of sustainable program funding, and puts wetland programs in the precarious situation of having to always come up with new program ideas, having to win grants every two years, or face having to shutter their doors and lay-off their staff. The Pyramid Lake Paiute Tribe in Nevada had a successful wetland program until this year when they were not awarded a new WPDG. The Tribe's Wetland Specialist had to leave her position in August of 2023 because the future of their wetland program was uncertain after the Tribe did not receive funding in the WPDG competition. The combination of staff turnover (and associated loss of institutional knowledge), lack of funding, and the time-consuming process of applying for competitive grants may jeopardize the ability for Tribes like the Pyramid Lake Paiute Tribe to restart their wetland program in the future.

It is also notable that EPA's wetland program did not receive any of the billions in federal infrastructure funding that has been distributed widely among many other federal programs. For example, the NEP gets \$132 million over five years (FY22-FY26), and the Administrator can waive or reduce the non-federal cost share. However, inland freshwater wetlands get nothing. All one has to do is look for the news stories regarding Vermont, Iowa, Missouri, Kentucky (among many other states) in regard to recent catastrophic flooding events to find multiple reports highlighting the importance of inland wetlands to reducing flood damages. The fact that wetlands are still being overlooked as a critical tool in the toolbox for infrastructure solutions to mitigate and adapt to climate change and extreme storm events is mindboggling.

Observations and Take Aways

We are witnessing a perfect storm of threats to our nation's clean water. State and Tribal wetland protection programs were already stretched thin financially, if they were able to cover their own programmatic costs at all. With the reduction of federal protections for wetlands and headwater streams after the *Sackett* decision, we are now at risk of losing the progress that the U.S. has made over the last 51 years since the CWA was enacted in providing clean water for all Americans. The impacts will be felt most significantly in the most economically challenged states and those that are downstream from states that either cannot or will not increase their state's ability to protect their critical wetlands and headwater streams.

Americans are also now at an increased risk of property damage, economic loss, and loss of life from extreme storms, drought, and wildfire – natural hazards that wetlands can help protect us against. If states and Tribes are expected to “fill the gaps” in protections for wetlands and ephemeral streams

We estimate that each hectare of wetland loss between 2001 and 2016 increases NFIP claims by \$1,840 to \$1,900 per year when accounting for spatial spillovers. However, this value masks significant spatial heterogeneity in wetland benefits. For example, we estimate that one hectare of wetland loss in developed areas (those with >10% built-up area) costs society \$8,290 in flood mitigation value. Using this range, the societal benefits from reduced flooding outweigh the cost of conserving wetlands (based on land price) within 6 to 22 years, on average. One interpretation of our results is that lifting federal protections for wetlands represents a transfer from taxpayers, who fund the NFIP, to private landowners, who profit from converting wetlands to other uses.”

~ Wetlands, Flooding, and the Clean Water Act (2021). Charles Taylor and Hannah Druckenmiller, Resources for the Future Working Paper.

(not to mention the interest in having states and Tribes assume the 404 dredge or fill program), then Congress will need to appropriate a significant increase in funding to support state and Tribal programs. The first step, however, is to enable the existing pot of money to be used for either wetland program development or implementation. The next step is to model the WPDG/5 Star program funding after the NEP program, with a mix of competitive funding programs for innovative new ideas coupled with a sufficient pot of funding for program implementation – \$14.7 million for 50 state and 100+ Tribal programs is absurdly insufficient.



Photo Credit: AdobeStock - Richard

Given the political climate in Congress, asking for additional funding is a huge lift. However, if we want clean water for our families and safe, resilient communities, it is worth every dollar invested. A healthy environment should not be a partisan issue – it should be something that all our elected officials should support. The antiquated idea that somehow a healthy environment and a healthy economy are somehow at odds with each other is inane. We can do better than this – and we have to if we want a sufficient supply of clean water for ourselves and our children’s future, if we want healthy food for our families, and if we want to protect our communities and our property from natural hazards. 🌱

¹Colorado filed an amicus brief with the U.S. Supreme Court in regard to the Sackett case outlining the negative impacts that a decision in favor of the Sacketts would have on their headwater systems: https://www.supremecourt.gov/DocketPDF/21/21-454/228302/20220617132230773_21-454%20bsac%20Colorado%20Final.pdf

²Meyer, R., and A. Robertson, Saint Mary’s University of Minnesota, Winona, Minnesota, Clean Water Rule Spatial Analysis: A GIS-based scenario model for comparative analysis of the potential spatial extent of jurisdictional and non-jurisdictional wetlands (Jan. 16, 2019).

³Kyla Bennett, Impact of Proposed Waters of the U.S. (WOTUS) Redefinition on Wetlands and Waters in New Mexico, August 1, 2019: <https://peer.org/wotus-redefinition-new-mexico/>.

⁴Minnesota Federal Clean Water Act Section 404 Assumption – Report on Funding Estimates: <https://bwsr.state.mn.us/sites/default/files/2022-01/404%20Assumption%20Report%20on%20Funding%20Estimates%20-%20Executive%20Summary%201-27-22.pdf>.

⁵Sources: Congressional Record, EPA Justification of Estimates, EPA program webpages, Catalog of Federal Domestic Assistance Formulas: Pollution Control (§106) “Funds on the basis of the pollution problem in the state;” formula at 40 CFR Part 35.162; Nonpoint Sources (§319) “National allocation formula based on the total annual appropriation set by Congress for the §319 Program;” formula at <https://www.epa.gov/sites/default/files/2015-09/documents/319-guidelines-fy14.pdf>.



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