

Sackett v. EPA, a Once-in-a-Generation Supreme Court Wetlands Decision

Practical Implications for Land Developers in the Upper Midwest

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Overview of *Sackett v. EPA*



Jeremy Greenhouse

Regulatory Framework

- 1972 Clean Water Act prohibits:
 - “the **discharge** of any pollutant by any person” to “**navigable waters**”
- Exceptions for discharges authorized by two types of permits:
 1. National Pollutant Discharge Elimination System (**NPDES**) permits under Section 402 (issued by EPA or state agency)
 2. “Dredge & Fill” permits under **Section 404** (issued the Army Corps of Engineers)
- “**Navigable Waters**” means: “**the Waters of the United States**” (WOTUS)

Chantell & Mike Sackett



Photo credit: Pacific Legal Foundation



The Sacketts' Property

Photo credit: Pacific Legal Foundation

Rapanos v. United States (2006)

- Two tests for when a wetland is subject to the Clean Water Act:
 1. Justice Scalia: The Act only applies to “wetlands with a **continuous surface connection** to bodies that are ‘waters of the United States’ in their own right, so that there is **no clear demarcation** between ‘waters’ and wetlands.”
 2. Justice Kennedy: The Act applies to any wetland that has “a **significant nexus** between the wetlands in question and navigable waters in the traditional sense.”

—*Rapanos v. United States*, 547 U. S. 715, 722 (2006)

Sackett v. EPA Decision (2023)

- Unlike *Rapanos*, a **unanimous** decision with a 5-justice **majority opinion**.
- Justice Alito wrote the court's opinion. Justices Thomas, Kagan, and Kavanaugh wrote concurring opinions.
- Justice Alito looked to **plain meaning** of “navigable waters”:
 - “only those **relatively permanent, standing or continuously flowing** bodies of water forming geographical features that are described in ordinary parlance as **streams, oceans, rivers, and lakes**”
- But conceded the Act must cover some adjacent wetlands.

Sackett v. EPA Decision (cont.)

- The court's basis for Including "Adjacent" Wetlands in WOTUS (CWA Section 404(g):

The Governor of any State desiring to administer its own individual and general permit program for the discharge of dredged or fill material **into the navigable waters (other than those waters which are presently used...as a means to transport interstate or foreign commerce shoreward to their ordinary high water mark...including wetlands adjacent thereto)** within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish... —33 U.S.C. § 1344(g)(1)

- Justice Alito: "Because the adjacent wetlands in §1344(g)(1) are 'includ[ed]' within 'the waters of the United States,' these wetlands **must qualify as 'waters of the United States' in their own right.**"

Sackett v. EPA Decision (cont.)

- The court looked to the dictionary definition of “adjacent”:

“Dictionaries tell us that the term ‘**adjacent**’ may mean either ‘**contiguous**’ or ‘**near**.’”

- But...

“Construing statutory language is **not merely an exercise in ascertaining the outer limits of a word’s definitional possibilities**... and here, only one meaning produces a substantive effect that is compatible with the rest of the law.”

“Wetlands that are **separate** from traditional navigable waters **cannot be considered part of those waters**, even if they are located nearby.”

***Sackett v. EPA* Decision (cont.)**

In sum, we hold that the CWA extends to **only those wetlands that are as a practical matter indistinguishable from waters of the United States**. This requires the party asserting jurisdiction over adjacent wetlands to establish first, that the **adjacent body of water constitutes “waters of the United States,”** (i.e., a relatively permanent body of water connected to traditional interstate navigable waters); and second, that the wetland has a **continuous surface connection** with that water, making it **difficult to determine where the “water” ends and the “wetland” begins.**

Sackett v. EPA Takeaways

1. A new test for determining whether wetlands are WOTUS.

The wetland must be **indistinguishable**, as a practical matter, **from a water of the United States**.

To establish this is the case, you will need to demonstrate **two elements**:

- a. The **water** to which the wetland is adjacent **constitutes “waters of the United States,”** and
- b. The **wetland** has a **“continuous surface connection”** with that water, making it difficult to determine where the water ends and the wetland begins.

***Sackett v. EPA* Takeaways (cont.)**

2. The “Significant Nexus” test for wetlands is no more.
3. Many aspects of the January 2023 EPA/Corps WOTUS definition are no longer enforceable.
4. Millions of acres of previously jurisdictional wetlands likely will no longer be subject to section 404 permitting under the CWA.
5. Sackett’s “bright line” jurisdictional test has created new uncertainties.

What Happens Next with State and Federal Regulators?



Jeff Smith

What Happens Next...

Court Decision Impacts on Regulatory Agencies

- Background
- Shared Goal: Confidently making decisions that are in the best interest of its communities
- Very Challenging!

What Happens Next...

Controlling the Chaos

- External confidence, Internal...scramble
- Understand impacts
- Not easy...or fast

What Happens Next...

Likely Responses:

1. Immediate
2. Maintain the status quo
3. Silent and slow

How Will Sackett Change Wetland Regulation in Midwest States?



Jeremy Duehr: Minnesota

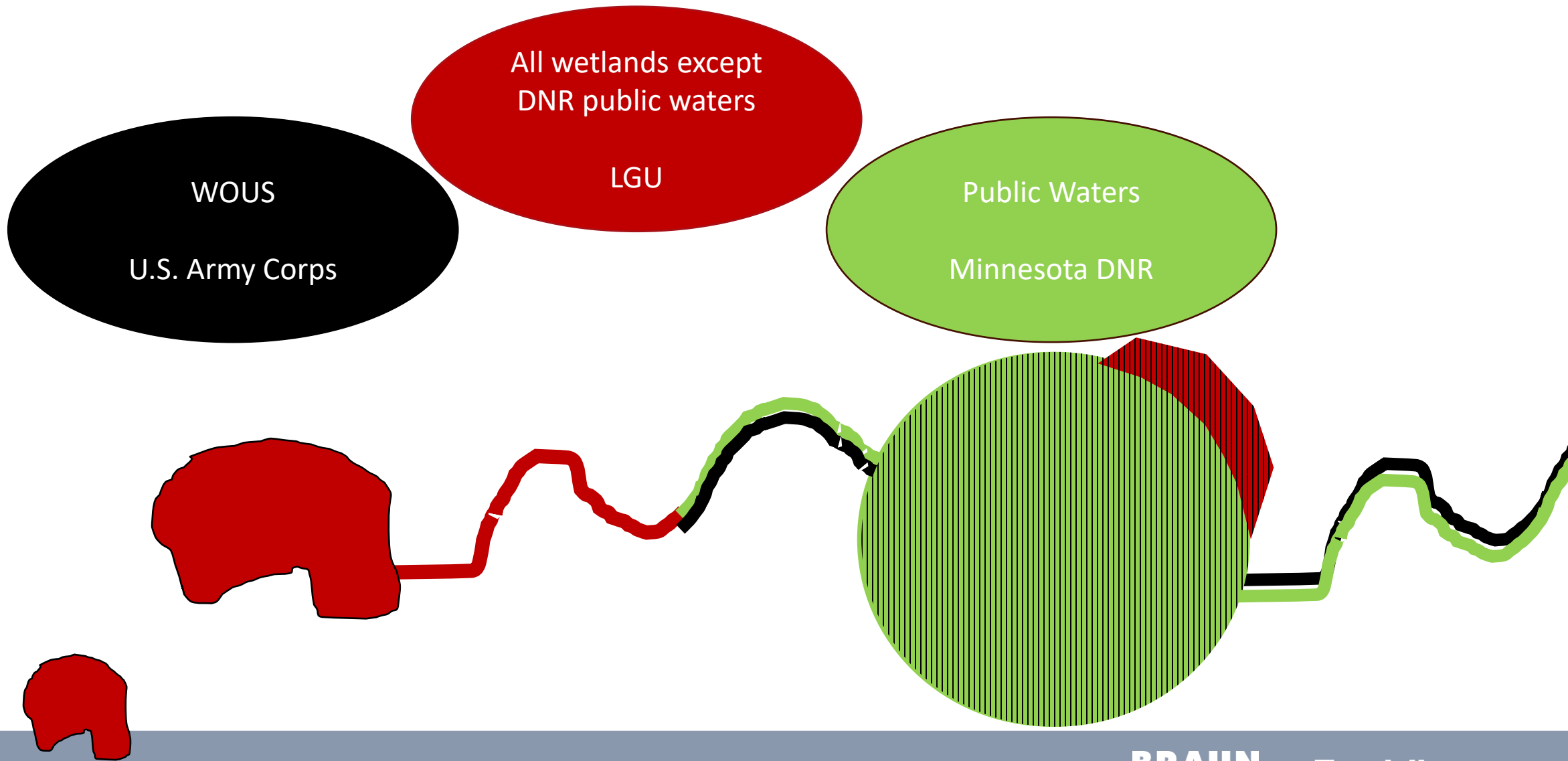
Regulatory Landscape in Minnesota

- Section 404 of Clean Water Act (“CWA”)
 - *U.S. Army Corps of Engineers*
 - Nationwide Permits
 - Regional General Permits
 - Letter of Permission (LOP-5-MN, LOP-10-R & LOP-10-FDL)
 - Individual Permit
- Water Quality Certification under Section 401 of CWA
 - *Minnesota Pollution Control Agency*
 - *Fond du Lac Band of Lake Superior Chippewa*
 - *Grand Portage Band of Lake Superior Chippewa*
 - *Leech Lake Band of Ojibwe*
 - *Red Lake Band of Chippewa Indians*

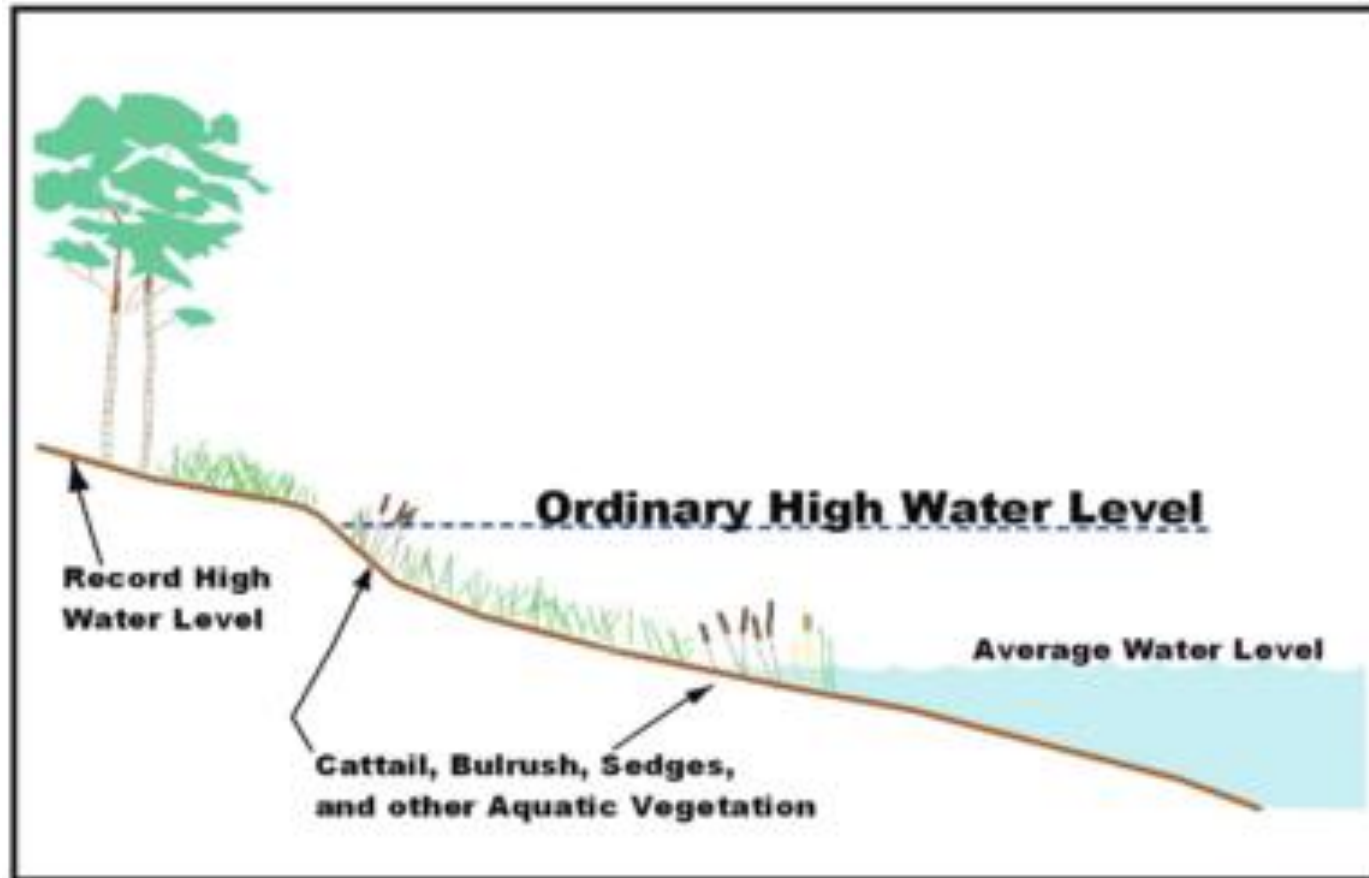
Regulatory Landscape in Minnesota

- Minnesota Public Waters Program
 - *Minnesota Department of Natural Resources*
 - Public Waters Work Permit
 - Public Waters Crossing License
- Minnesota Wetland Conservation Act (“WCA”)
 - *Local Government Unit (“LGU”)*
 - *De Minimis*
 - Exemptions
 - Replacement
 - Technical Evaluation Panel (“TEP”)

Regulatory Landscape in Minnesota



Regulatory Landscape in Minnesota



Source: MN Department of Natural Resources: [Fall 2017 Water Talk \(govdelivery.com\)](http://govdelivery.com)

How Will Sackett Change Wetland Regulation in Midwest States?



Delanie Breuer: Wisconsin

Wisconsin Definitions

“**Wetland**” means an area where water is at, near, or above the land surface long enough to be capable of supporting aquatic or hydrophytic vegetation and which has soils indicative of wet conditions.

“**Waters of the state**” includes those portions of Lake Michigan and Lake Superior within the boundaries of this state, and all lakes, bays, rivers, streams, springs, ponds, wells, impounding reservoirs, marshes, watercourses, drainage systems and other surface water or groundwater, natural or artificial, public or private, within this state or its jurisdiction.

“**Navigable waters**” or “**navigable waterway**” means any body of water which is navigable under the laws of this state.

“**Non-Federal Wetlands**” means a wetland that is not subject to federal jurisdiction under 33 USC 1344.

Wisconsin – History of Wetland Regulation

- 1991: Established Water Quality Standards for Wetlands
- 2001 Wis. Act 6: Authorized WDNR to regulation all wetlands
- 2011 Wis. Act. 118: Revised regulatory program to more closely align with federal regulations
- 2017 Wis. Act. 183: Wetland regulatory reforms intended to lower the permitting burden
- Recent Cases

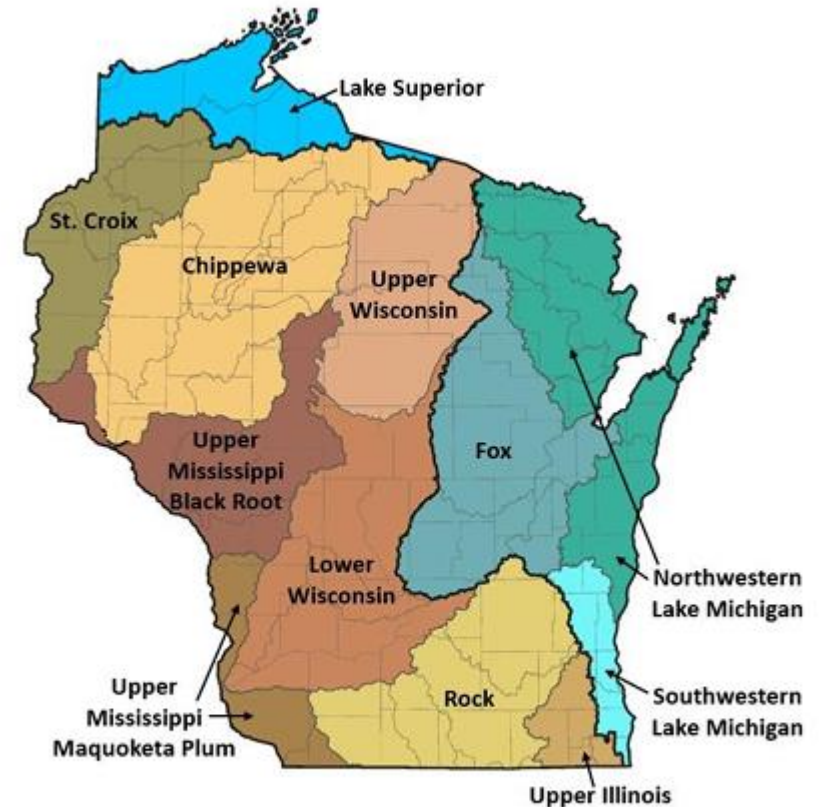
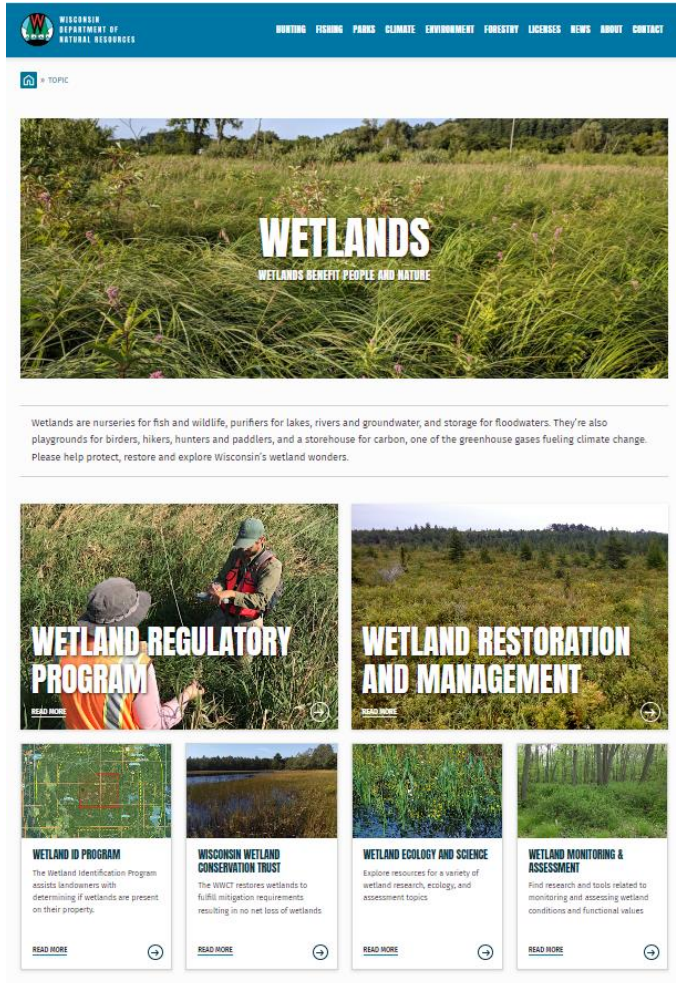


Figure 1. The 12 service areas in Wisconsin

Wisconsin – Current Wetland Regulations



- NR 103 – Water Quality Standards for Wetlands
- NR 299 – Water Quality Certification
- Wis. Stat. Chapters. 30 – Navigable Waters, Harbors and Navigation
- Wis. Stat. Chapter 281 – Water and Sewage
- Wis. Stat. Chapter 283 – Pollution Discharge Elimination
- Wis. Stat. Chapter 23 – Conservation (Wisconsin Mapping and Identification)
- Local Shoreland/Wetland Zoning

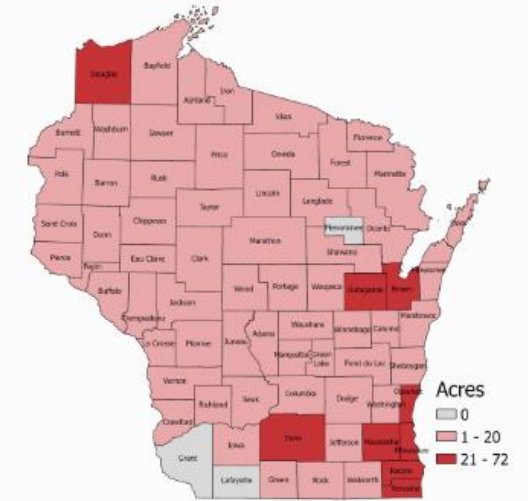
<https://dnr.wisconsin.gov/topic/Wetlands>

Wisconsin Wetland Dashboard

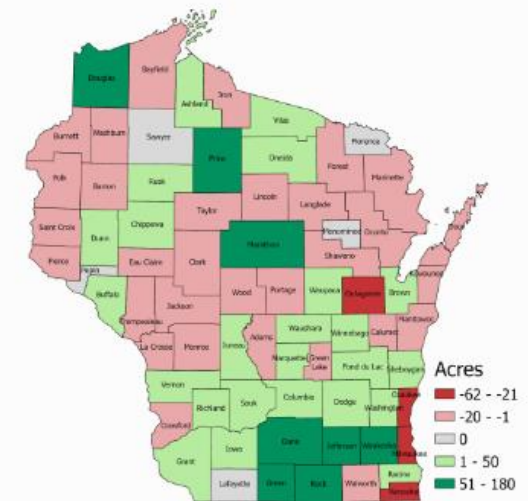
STATEWIDE SUMMARY 2020-22 (ACRES)

- Net Gain/Loss, **+789**
 - Restoration + Mitigation, **+1,517** Acres
 - Permitted Restoration, +818
 - Mitigation Projects, +699
 - Permanent Fill, **-728**
 - Artificial Exemption, -447
 - Nonfederal Exemption, -96
 - General Permit and Individual Permit, -185

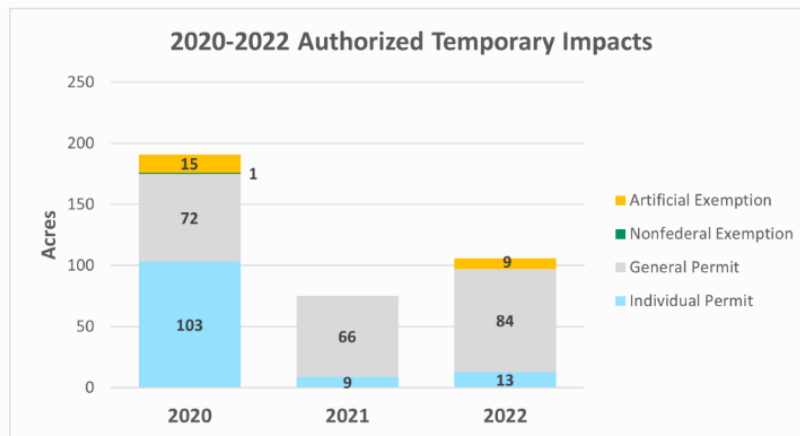
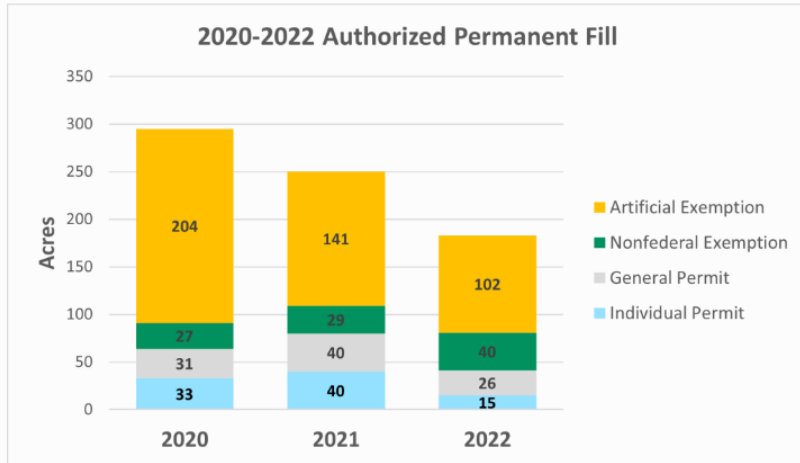
PERMANENT IMPACTS 2020-2022



NET GAIN/LOSS 2020-2022



	2020	2021	2022
Individual Permit	67	15	78%
General Permit	35	26	26%



<https://dnr.wisconsin.gov/topic/Wetlands/dashboard>

How Will Sackett Change Wetland Regulation in Midwest States?



Travis Fristed: Iowa, South Dakota, North Dakota

Iowa, South Dakota, North Dakota

Overview of Wetland and Other Surface Waters Programs

- Isolated prairie potholes and emergent wetlands (agricultural uses)
- No State level wetland programming, other than 401 WQ certification
- Swampbuster (Food Security Act)
- May fall in other protections (Waters of the State or floodplains)
- Few, large stream/wetland mitigation banks (larger service areas)



Hypothetical Application of Wetland Regulations Laws Post-Sackett





Wetland Strategies for Land Developers Post-Sackett



Strategies for Land Developers

- Strategy 1: Even if the wetlands on your site are not abutting a navigable water, **an AJD may still make sense**.
- Strategy 2: Keep track of **EPA/Corps guidance** on how they plan to implement Sackett (TBD)
- Strategy 3: Make sure you are **familiar with state wetland laws** in the state where your project will be located, which have heightened significance post-Sackett.
- Strategy 4: Be sure to consider **other** potentially applicable “connected” **regulatory programs**.
- Strategy 5: As always, **plan ahead** and develop a permitting approach during due diligence/conceptual stage.



Questions?



Thank you!

Fredrikson

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