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

WISCONSIN SUPPLEMENT

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I. Overview

Wisconsin has over 5 million acres of wetlands, covering approximately 15 percent of the state's territory.[1] This represents just half of what the state had in the late 1800s.[2] There are different types of wetlands in Wisconsin, including riverine and geographically isolated wetlands, with different distributions of wetlands in different parts of the state. Currently, Wisconsin has approximately 1 million acres of geographically isolated wetlands.[3]

With a long history of strong wetland protections, Wisconsin is one of the few states to create its own wetland water quality standards, established in 1991. Wisconsin has its own wetland definition and a comprehensive framework for regulating state wetlands. It started regulating "nonfederal wetlands" – wetlands that do not fall under the federal jurisdiction – in 2001, in reaction to the U.S. Supreme Court's *Solid Waste Agency of Northern Cook County* decision. In addition to regulating permitting processes, Wisconsin conducts other wetland-related activities, including wetland restoration, mapping, monitoring and assessment, research, education, and outreach.

The total acreage of Wisconsin wetlands affected by the *Sackett* decision remains unclear. Even though Wisconsin has strong wetlands laws, at least some wetlands are likely to lose their state protection after losing federal protection. This is because Wisconsin exempts some activities in its "nonfederal wetlands" from state permit requirements; thus, if there are more "nonfederal wetlands" after *Sackett*, the number of state exemptions will also likely increase.

II. Regulatory Programs

a) Wetland definitions and delineation

Wisconsin defines "waters of the state" as "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."[4]

Wisconsin defines a "wetland" as "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."[5] Notably, this definition relies on wetlands' scientific

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[1] Wisconsin Department of Natural Resources, *Wetland Ecology and Science*, https://dnr.wisconsin.gov/topic/wetlands/ecology#:~:text=Wisconsin%20has%20over%205%20million%20acres%20of%20wetlands%2C,fish%20and%20wildlife%20habitat%20and%20recreation%20for%20Wisconsinites.
[2] Wisconsin Wetlands Association, *Wetlands 101*, https://www.wisconsinwetlands.org/learn/about-wetlands/wetlands-101/.
[3] Wisconsin Wetlands Association, WETLAND COFFEE BREAK: IMPLICATIONS OF THE SACKETT DECISION FOR WISCONSIN: EARLY TAKES FROM THE FRONT LINES (June 20, 2023) (hereinafter Wetland Webinar). Presentation by Erin O'Brien, WWA.
[4] WIS. STAT. § 281.01(18); WIS. ADMIN. CODE § NR 103.02.
[5] WIS. STAT. § 23.32(1).

characteristics and functions, rather than their visual connections to surface waters. Wisconsin also separately defines a "nonfederal wetland" as "a wetland that is not subject to federal jurisdiction" under Section 404 of the Clean Water Act (CWA).[6]

Wisconsin uses the *1987 U.S. Army Corps of Engineers Wetlands Delineation Manual*, as well as the Army Corps' regional supplements to the delineation manual, *Guidelines for Submittal of Delineation Reports to the St. Paul District Army Corps of Engineers and the Wisconsin DNR*, and *Wetland Screening and Delineation Procedures Guidance* to determine boundaries of wetlands.[7] All state wetland determinations and delineations are done by state employees and qualified professionals.

Wisconsin's Department of Natural Resources (DNR) Wetland Identification Service helps Wisconsin landowners determine the presence and absence of wetlands on their lands, and DNR's Wetland Confirmation Service provides concurrence for wetland delineations completed by private-sector practitioners.[8] Wisconsin also maintains a list of qualified delineation professionals, as part of the DNR Wetland Delineation Assurance Initiative.[9] DNR reviews delineation reports prepared by these consultants.[10]

b) Wetland-related statutes and regulations

In Wisconsin, any discharge of dredged or fill material into a state wetland requires a state exemption or a permit (general or individual).[11] All discharges authorized under permits must comply with DNR's water quality standards,[12] and a DNR permit constitutes water quality certification.[13]

Discharges authorized under general permits may only cause minimal adverse impacts on wetlands, and only in cases when they cannot be avoided.[14] DNR may also prohibit general permit discharges into certain types of wetlands.[15]

For individual permits, applicants must similarly avoid discharges into wetlands when practicable and minimize impacts that cannot be avoided.[16] DNR only issues individual permits for projects when: 1) the "project represents the least environmentally damaging practicable alternative;" 2) adverse impacts are minimized; and 3) projects do not "result in significant adverse impact[s] to wetland functional values," "significant adverse impact to water quality," or

[6] WIS. STAT. § 281.36(1)(br).
[7] WIS. STAT. § 281.36(2m); Wisconsin Department of Natural Resources, *Wetland Boundary Delineation*, https://dnr.wisconsin.gov/topic/Wetlands/delineation.html.
[8] Wisconsin Department of Natural Resources, *Wetland Identification Program*, https://dnr.wisconsin.gov/topic/Wetlands/identification.html.
[9] Wisconsin Department of Natural Resources, *Wetland Delineation Professional Assurance Initiative*, https://dnr.wisconsin.gov/topic/Wetlands/assurance.html.
[10] Id.
[11] WIS. STAT. § 281.36(3b)(b).
[12] WIS. STAT. § 281.36(3b)(b).
[13] WIS. STAT. § 281.36(3b)(a).
[14] WIS. STAT. § 281.36(3g)(d), (h).
[15] WIS. STAT. § 281.36(3g)(d).
[16] WIS. STAT. § 281.36(3n)(c).

"other significant adverse environmental consequences."[17] Individual permit applicants must also mitigate impacts from projects.[18]

There are certain exemptions, including an artificial wetland[19] exemption and nonfederal wetland exemptions, that apply to wetland discharge permit requirements in Wisconsin.[20] Nonfederal wetland exemptions apply in cases when projects involve discharges into wetlands not covered by the CWA.[21]

DNR does not determine whether a wetland is nonfederal. Instead, the Army Corps determines whether it has jurisdiction over a specific wetland.[22] A project proposed in a nonfederal wetland can become eligible for Wisconsin's nonfederal wetland exemption.[23] There are two types of nonfederal wetland exemptions: an urban nonfederal wetland exemption, and non-urban (rural) nonfederal wetland exemption.[24]

The urban nonfederal wetland exemption applies to wetlands located in incorporated areas, within half a mile of an incorporated area, and in areas served by sewerage systems.[25] Urban nonfederal wetland exemptions are issued for projects in which discharges impact up to 1 acre of wetland per parcel, as long as: 1) the discharge does not impact a "rare and high quality wetland,"[26] and 2) the project complies with applicable storm water management zoning ordinances.[27] All urban projects impacting more than 1 acre of wetland per parcel require permits. Wisconsin's law also requires mitigation of exempt urban nonfederal wetland discharges impacting over 10,000 square feet.[28]

The rural nonfederal wetland exemption applies only to structures with an agricultural purpose, such as buildings and roads.[29] It allows for discharges to impact up to 3 acres of wetland per parcel, as long as the discharge does not impact a "rare and high quality wetland."[30] All rural

[17] WIS. STAT. § 281.36(3n)(c).
[18] WIS. STAT. § 281.36(3n)(d).
[19] Wisconsin's laws define "artificial wetland" as a "landscape feature where hydrophitic vegetation may be present as a result of human modification to the landscape or hydrology and for which" DNR has no evidence of existence prior to August 1, 1991. WIS. STAT. § 281.36(4n)(a)1. The definition of artificial wetland excludes: 1) wetlands that serve as fish spawning areas or passages to such areas; and 2) wetlands created as part of mitigation requirements. Id.
[20] WIS. STAT. § 281.36(4n).
[21] WIS. STAT. § 281.36(1)(br).
[22] Wisconsin Department of Natural Resources, BUREAU OF WATERSHED MANAGEMENT PROGRAM GUIDANCE: WATERWAY AND WETLAND PROTECTION—NONFEDERAL WETLAND EXEMPTIONS (2018), available at: https://dnr.wisconsin.gov/sites/default/files/topic/Wetlands/3500-2018-02FinalNonfederalWetland.pdf.
[23] *Id*.
[24] WIS. STAT. § 281.36(4n)(b), (c).
[25] WIS. STAT. § 281.36(4n)(a)5.
[26] Wisconsin laws define a "rare and high quality wetland" as a wetland adjacent or contiguous to certain trout streams or a wetland of a certain type. See WIS. STAT. § 281.36(4n)(a)(3).
[27] WIS. STAT. § 281.36(4n)(b).
[28] WIS. STAT. § 281.36(3n)(d).
[29] WIS. STAT. § 281.36(4n)(c).
[30] Id.; see *supra* note 24 for definition of the "rare and high quality wetland."

projects impacting over 3 acres of wetland per parcel require permits. Wisconsin's law also requires mitigation of exempt rural nonfederal wetland discharges impacting over 1.5 acres.[31]

In addition to discharges, Wisconsin regulates wetland conservation projects, including projects involving wetland restoration, enhancement of degraded wetlands, and management of existing wetlands.[32] Wetland conservation projects are typically approved through the issuance of a wetland conservation general permit. Wisconsin's rules set the eligibility criteria, including types of activities and design specifications, for wetland conservation projects. Wisconsin is also developing a general permit for wetland hydrologic restoration[33] and provides funding for wetland restoration through multiple channels, including a pre-disaster flood resilience grant program[34] and funds collected from wetland general permit surcharge fees.[35]

Wisconsin's laws on "Navigable Waters Protection" apply to wetlands below the ordinary high water mark. Regulations apply to construction and alteration of waterways as they pertain to navigable waters, including dredging, filling, dam construction, construction of artificial water bodies, water diversion, grading, and removing of soils.[36]

In addition, Wisconsin has a city and village shoreland-wetland protection program.[37] The state sets minimum standards for city and village shoreland-wetland zoning ordinances to meet shoreland protection objectives, and cities and villages must adopt their own ordinances.[38] DNR provides assistance to cities and villages with shoreland-wetland zoning ordinances, including with regard to the development, administration, and enforcement.[39]

One key component of Wisconsin's wetland regulatory framework is the Wisconsin Wetland Study Council (Council). Created in 2019 by law,[40] the Council provides a place for diverse stakeholders to find common grounds and resolve disagreements.[41] The Council has nine members, representing distinct interests and stakeholders, including business community, waterfowl interests, real estate and development, municipal interests, agriculture, wetlands, and DNR.[42] Wisconsin's governor appoints members of the Council for 6-year terms.[43] Council's meetings take place once every two months and are open to the public, both in person and virtually.[44]

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[31] WIS. STAT. § 281.36(3n)(d).
[32] WIS. ADMIN. CODE § NR 353.
[33] WIS. STAT. § 30.2065(1g).
[34] WIS. STAT. § 323.63.
[35] WIS. STAT. § 281.36(11).
[36] WIS. STAT. CHS. 30, 31.
[37] WIS. ADMIN. CODE § NR 117.
[38] WIS. ADMIN. CODE § NR 117.05.
[39] WIS. ADMIN. CODE § NR 117.06.
[40] 2017 Wis. Act 183; see also Wisconsin Department of Natural Resources, *Wisconsin Wetland Study Council*, https://dnr.wisconsin.gov/topic/Wetlands/studyCouncil.html.
[41] Personal communication with Erin O'Brien, WWA (Jul. 24, 2024).
[42] WIS. STAT. § 15.347(22).
[43] Id.
[44] Wisconsin Department of Natural Resources, *Wisconsin Wetland Study Council*, https://dnr.wisconsin.gov/topic/Wetlands/studyCouncil.html.

The Council provides research and makes recommendations, including statutory and regulatory, on a variety of wetland-related issues, such as wetland mitigation programs, practicable alternatives, stormwater management ponds, incentive programs, wetland trainings, and financing of wetland mitigation requirements.[45] It serves as a resource to state officials, who can reach out to the Council with questions. It also examines existing wetland-related policies and laws, and their interpretation and implementation.

For example, the Council has an Integrated Watershed Management Working Group, which explores watershed-based approaches to storm and flood water control, aligned with wetland management. This Group analyzes how current state wetland, waterway, and stormwater management policies pose barriers to a more watershed-based approach to wetlands, stormwater, and flood control projects, and makes recommendations to alleviate those barriers.[46]

Last year, the Council considered potential impacts of the *Sackett* decision on Wisconsin's wetlands.[47] During the Council's meeting, DNR shared that it was waiting for additional specifics about how federal wetland jurisdiction would change, but that it **expected to see an increase in nonfederal exemption requests**.[48]

c) Organization of state agencies

Wisconsin's DNR regulates all activities related to wetlands in Wisconsin, including: identification and delineation of wetlands; establishment of water quality standards for wetlands and water quality certifications; issuance of permits and exemptions; compensatory mitigation; conservation and restoration of wetlands; funding; and monitoring, assessment, and reporting on wetlands. DNR also leads public-private partnerships and participates on the Wisconsin Wetland Study Council.

d) Water quality certification

Wisconsin was one of the first states to adopt its own wetland water quality standards. All discharges into wetlands authorized under the state's general and individual permits must comply

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[45] Id.; Wetland Study Council, THE WETLAND STUDY COUNCIL: A BRIEF GUIDE FOR LEGISLATORS (Feb. 13, 2023), available at: https://dnr.wisconsin.gov/sites/default/files/topic/Wetlands/studyCouncil/Wetland_Study_Council_Guide_for_Legislators.pdf.

[46] Wisconsin Wetland Study Council, ANNUAL REPORT JULY 2021-JULY 2023, available at: https://dnr.wisconsin.gov/sites/default/files/topic/Wetlands/studyCouncil/2021_2023_Wetland_Study_Council_Annual_Report.pdf; Wisconsin Wetland Study Council, INTEGRATED WATERSHED COMMITTEE RECOMMENDATION TO DEVELOP GUIDANCE FOR STORM AND FLOOD WATER CONTROL PROJECTS (Jan. 2022), available at: https://dnr.wisconsin.gov/sites/default/files/topic/Wetlands/studyCouncil/WSC_Recommendation_Guidance_Integrated_Watershed.pdf.

[47] Wisconsin Wetland Study Council, MEETING MINUTES (Sept. 14, 2023), available at : https://dnr.wisconsin.gov/sites/default/files/topic/Wetlands/studyCouncil/WSC_Meeting_Minutes_9_14_23.pdf.

[48] Wisconsin Department of Natural Resources, WISCONSIN DNR WETLAND REGULATIONS AND THE SACKETT DECISION, Presentation by Tom Pearce (Sept. 14, 2023, available at: https://dnr.wisconsin.gov/sites/default/files/topic/Wetlands/studyCouncil/WSC_Federal_Wetland_Jurisdiction_Update.pdf.

with DNR's water quality standards.[49] All permits for discharges into wetlands issued by DNR constitute water quality certifications required under section 401 of CWA.[50]

Wisconsin rules establish water quality standards for wetlands, as well as procedures and criteria used for water quality certification.[51] Upon review, DNR determines whether the proposed activity results in a discharge and complies with: water quality standards for effluent limitations, water-related effluent limitations, water quality standards, standards of performance, toxic and pretreatment effluent standards, public interest and public rights standards related to water quality, and any other appropriate requirements of state and federal law.[52]

Over the last few years, the number of state's discharge permits – which is also the number of water quality certifications – has slowly decreased in Wisconsin, as follows: 383 in 2020; 358 in 2021; 344 in 2022; 333 in 2023; and 245 so far (for the first 8 months) in 2024.[53]

e) Regional general permits and nationwide permits

The St. Paul District Army Corps offers eight regional general permits for projects located in Wisconsin. These permits regulate activities related to: bank stabilization and habitat improvement, beach creation and nourishment, beach raking, minor discharges, piers and docks, transportation, utility, and wildlife ponds.[54] All regional general permit activities must meet specific regional permit requirements and water quality certification requirements.[55] In 2022, Wisconsin issued conditions to ensure that these general permits comply with the state's water quality standards.[56]

The St. Paul District Army Corps also offers nationwide permits in Wisconsin.[57] Nationwide permit activities must occur in compliance with nationwide permits, St. Paul District's regional conditions, and appropriate water quality certification conditions.[58] In 2021, Wisconsin issued conditions to ensure that nationwide permits comply with the state's water quality standards.[59]

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[49] WIS. STAT. § 281.36 (3b)(b).
[50] WIS. STAT. § 281.36 (3b)(a).
[51] WIS. ADMIN. CODE §§ NR 103 and 299.
[52] WIS. ADMIN. CODE § NR 299.04.
[53] Personal communication with Tom Nedland, Wisconsin Department of Natural Resources (Sept. 3, 2024).
[54] U.S. Army Corps of Engineers St. Paul District, *Regional General Permits available for use in Minnesota and Wisconsin,* https://www.mvp.usace.army.mil/Missions/Regulatory/rgp/.
[55] Id.
[56] Wisconsin Department of Natural Resources, APPLICATION OF THE UNITED STATES DEPARTMENT OF THE ARMY CORPS OF ENGINEERS FOR WATER QUALITY CERTIFICATION FOR THE FINAL REGULATIONS PERTAINING TO THE ISSUANCE, REISSUANCE, AND MODIFICATION OF REGIONAL GENERAL PERMITS, available at: https://www.mvp.usace.army.mil/Portals/57/docs/regulatory/RGP/WI_DNR_401.pdf?ver=5hkqn4yeUSK0gAVItVfh7A%3d%3d.
[57] U.S. Army Corps of Engineers St. Paul District, *2021 Nationwide Permits available for use in Minnesota and Wisconsi*n, https://www.mvp.usace.army.mil/missions/regulatory/nwp/.
[58] Id.
[59] Wisconsin Department of Natural Resources. Application of the United States Department of the Army Corps of Engineers for Water Quality Certification for the Final Regulations Pertaining to the Issuance, Reissuance, and Modification of Nationwide Permits, available at: https://www.mvp.usace.army.mil/Portals/57/docs/regulatory/NWPs/2021/NWPdecisiondoc9-14-2021-signed.pdf?ver=arkSqHQE2jvbn9xpJd0zJA%3d%3d.

f) Mitigation

Wisconsin has had a wetland compensatory mitigation program since 2000.[60] Wisconsin's laws contain mitigation requirements, establish the In-Lieu Fee (ILF) subprogram, and set mitigation hierarchy and bank credit requirements.[61] They also require that mitigation ratios are consistent with the federal regulations and are, with some exceptions, at least 1.2 acres for each acre affected by a discharge.[62] Wetland compensatory mitigation rules further establish standards for developing and monitoring mitigation projects, and set procedures and standards for the establishment and maintenance of mitigation banks.[63] DNR most recently updated these rules in 2022 to reflect current mitigation standards.[64]

Wisconsin generally[65] requires mitigation of wetland impacts authorized under: 1) individual permits; and 2) nonfederal wetland exemptions in which discharges affect over 10,000 square feet of wetland in urban areas and over 1.5 acres of wetland in rural areas.[66] Nonfederal wetland exemptions with discharges affecting smaller areas of wetlands do not require mitigation. Wisconsin's laws also do not require mitigation of wetland impacts authorized under general permits or artificial wetland exemptions.

DNR issues a biennial report about Wisconsin's compensatory mitigation program.[67] According to the last report, in 2021-2022, DNR approved 73 individual permits (impacting 119.86 acres), all of which required mitigation.[68] DNR also approved 200 nonfederal wetland exemptions (impacting 67.54 acres), but 166 of them or 83 percent (impacting 49.51 acres) *did not* require mitigation.[69] The large number of unmitigated nonfederal wetland exemptions occurred due to the acreage threshold for these exemptions that triggers mitigation requirements.[70]

In 2021-2022, DNR also approved 1,080 general permits and 380 artificial wetland exemptions, impacting 297.21 acres, none of which required mitigation at the state level.[71] The Army Corps required mitigation for six of the artificial wetland exemptions (impacting 3.04 acres).[72] It remains to see how *Sackett* may affect federal jurisdiction over artificial wetlands.

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[60] Wisconsin Department of Natural Resources, STATUS OF WISCONSIN'S WETLAND COMPENSATORY MITIGATION PROGRAM (2021-2022): A BIENNIAL REPORT FROM THE WDNR TO THE WISCONSIN STATE LEGISLATURE (hereinafter Mitigation Report), at 6, available at: https://dnr.wisconsin.gov/sites/default/files/topic/Wetlands/2021_22_Biennial_Mitigation_Report.pdf.
[61] WIS. STAT. § 281.36(3r).
[62] WIS. STAT. § 281.36(3r)(d).
[63] WIS. ADMIN. CODE § NR 350.
[64] Mitigation Report, *supra* note 60, figure 3.
[65] There are some exceptions for individual permits issued to public utilities and cooperative associations for the purpose of producing heat, light, water, or power. WIS. STAT. § 281.36(3n)(d)2.
[66] WIS. STAT. § 281.36(3n)(d)1.
[67] Mitigation Report, *supra* note 60.
[68] Mitigation Report, *supra* note 60, at 7 and Table 1.
[69] Mitigation Report, *supra* note 60, Tables 1 and 2.
[70] WIS. STAT. § 281.36(3n)(d)1; Mitigation Report, *supra* note 60, at 8.
[71] Mitigation Report, *supra* note 60, Tables 1 and 2.
[72] Mitigation Report, *supra* note 60, Tables 1 and 2.

Applicants can meet mitigation requirements in one of three ways: wetland mitigation banking, the ILF subprogram associated with the Wisconsin Wetland Conservation Trust, and permittee responsible mitigation.[73] DNR works with the Army Corps and stakeholders to determine which type of mitigation will most adequately replace impacted wetland functions and values as close to the project area as possible.[74] Generally, mitigation banking is the most preferred option, and permittee responsible mitigation is the least preferred option, as it only addresses specific impacts rather than impacts across a watershed.[75] In 2021-2022, private banks fulfilled 67 percent of Wisconsin's mitigation requirements, and ILF credits fulfilled 33 percent.[76]

Sackett will likely negatively impact wetland mitigation in Wisconsin. Wisconsin's last biennial mitigation report notes that "past federal changes to the definition of 'waters of the United States' (WOTUS) ha[ve] increased the number of nonfederal wetlands in Wisconsin and therefore the number of nonfederal wetland exemptions processed" by DNR.[77] The report further shows that while all of the individual permits require mitigation, most of the nonfederal wetland exemptions (83 percent in the last biennial report) do not require mitigation[78] due to the acreage thresholds for such exemptions that trigger mitigation.[79]

Since the area of nonfederal wetlands is likely to increase after *Sackett*, the number of nonfederal wetland exemptions is likely to increase, as well. If at least some of the projects that will now qualify for nonfederal wetland exemptions would have required individual permits in the past, this will result in less wetland mitigation.

g) Tracking systems

Given that Wisconsin has already lost almost half of its wetlands, many residents have concerns and want to know more about the state of wetlands, ways to prevent further destruction, and ways to restore wetlands.[80] Wisconsin's recently created Wetland Dashboard provides such information, including data about impacts on wetlands, mitigation activities, and restoration projects permitted through DNR's wetland program.[81] The Wisconsin Wetland Study Council initiated creation of the Dashboard in 2020 to improve data access, transparency, and public knowledge about wetland regulatory activities.[82]

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[73] Mitigation Report, *supra* note 60, at 4.
[74] Mitigation Report, *supra* note 60, at 4.
[75] Mitigation Report, *supra* note 60, at 5
[76] Mitigation Report, *supra* note 60, at 4.
[77] Mitigation Report, *supra* note 60, at 7.
[78] Mitigation Report, *supra* note 60, Tables 1 and 2.
[79] Over 10,000 square feet of wetland affected in urban areas and over 1.5 acres of wetland affected in rural areas. WIS. STAT. § 281.36(3n)(d)(1).
[80] Wisconsin Department of Natural Resources, *Tracking, Assessment and Monitoring Wetlands*, https://dnr.wisconsin.gov/topic/Wetlands/assessment.html.
[81] *Wisconsin Department of Natural Resources, Wisconsin Wetland Dashboard*, https://dnr.wisconsin.gov/topic/Wetlands/dashboard. The Dashboard currently presents information for years 2020 through 2022. Data for 2023 has not yet been included on the Dashboard.
[82] Wisconsin Wetland Study Council, ANNUAL REPORT JULY 2021-JULY 2023, available at: https://dnr.wisconsin.gov/sites/default/files/topic/Wetlands/studyCouncil/2021_2023_Wetland_Study_Council_Annual_Report.pdf.

For permitted and exempt impacts on wetlands, the Dashboard presents data about general permits, individual permit, nonfederal exemptions, and artificial exemptions.[83] The Dashboard also provides information about efforts to avoid and minimize impacts on wetlands through "practicable alternatives analysis," as well as wetland restoration and compensatory mitigation for each county.[84] It also provides information about wetland mitigation banks and ILF project status.[85]

III. Water Quality Standards

Wisconsin has established water quality standards for wetlands, which seek to "protect public rights and interest, public health and welfare and the present and prospective uses of all waters of the state for public and private water supplies, propagation of fish and other aquatic life and wild and domestic animals, preservation of natural flora and fauna, domestic and recreational uses, and agricultural, commercial, industrial and other uses."[86] The state's rules focus on conditions necessary to protect wetlands' functions and values, including "sediment and pollutant attenuation, storm and flood water retention, hydrologic cycle maintenance, shoreline protection against erosion, biological diversity and production and human uses[,] such as recreation."[87]

Wisconsin's wetland water quality standards are narrative.[88] They "serve as a basis for developing and implementing strategies to achieve legislative policies and goals," and for "decisions in regulatory, permitting, planning or funding activities that impact water quality and which impact wetlands."[89] Wisconsin also set applicability of the standards, including exemptions, and procedures for DNR's determinations.[90]

IV. Monitoring and Assessment

DNR uses a number of monitoring and assessment tools for wetlands based on the required level of survey intensity.[91] This EPA-endorsed approach includes: level 1, landscape level assessment (remote assessments); level 2, rapid wetland assessment (on-the-ground evaluations); and level 3, intensive wetland assessment (research-derived, intensive measurements assessments).[92]

DNR uses several tools to assess wetland condition or quality, evaluating the extent to which a wetland is free from anthropogenic alterations.[93] These tools include: 1) Level 2: DNR Rapid Floristic Quality Assessment; 2) Level 2: Coarse-Level Monitoring Assessment; and 3) Level 3:

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[83] *Id.*
[84] Wisconsin Department of Natural Resources, *Wisconsin Wetland Dashboard*, https://dnr.wisconsin.gov/topic/Wetlands/dashboard.
[85] *Id.*
[86] WIS. ADMIN. CODE § NR 103.01(2).
[87] WIS. ADMIN. CODE § NR 103.01(3).
[88] WIS. ADMIN. CODE § NR 103.03.
[89] WIS. ADMIN. CODE § NR 103.01(4).
[90] WIS. ADMIN. CODE §§ NR 103.06, 103.08; WIS. STAT § 281.36.
[91] Wisconsin Department of Natural Resources, *Wisconsin Wetlands: Assessment Methods and Tools*, https://dnr.wisconsin.gov/topic/wetlands/methods.html.
[92] *Id*.
[93] *Id.*

DNR Floristic Quality Assessment Methodology.[94] In order to assess wetland function (such as flood water storage and retention, filtration, hydrological functions, shoreline protection, etc.), DNR also uses functional assessment tools. These tools include: 1) Level 1: Wetlands by Design Decision Support Tool; and 2) Level 2: DNR WI Wetland Rapid Assessment Methodology.[95]

Wisconsin is participating in the Minnesota-Wisconsin Wetland Functional Assessment Initiative, which includes EPA and the Army Corps.[96] Through this initiative, Wisconsin is developing a new rapid assessment methodology tool, which will assist with wetland regulatory implementation, wetland conservation, and planning.[97] DNR estimates that this tool should be available in 2025.[98]

Wisconsin also issues wetland assessment reports and maps, most recent of which include *Natural Scenic Beauty of Wisconsin Wetlands*, *Creation of Rare and Unique Wetland Community Quality Thresholds*, and *Development of a Rapid Floristic Quality Assessment Methodology for Wisconsin Wetlands*.[99]

V. Restoration

Wetland restoration is common in Wisconsin.[100] It allows Wisconsin residents to enhance various functions of wetlands, including water storage to prevent flooding, water quality, and wildlife habitat. Wisconsin has a *Wetland Restoration Handbook for Wisconsin Landowners*, which encourages responsible restoration of wetlands and explains restoration process.[101] It also has a wetland restoration action plan, called *Reversing the Loss*, which sets forth DNR's strategies to increase wetlands' functional values.[102]

Wisconsin regulates wetland conservation projects, including projects involving wetland restoration, enhancement of degraded wetlands, and management of existing wetlands.[103] Wetland conservation projects are typically approved through the issuance of a wetland conservation general permit. Wisconsin's rules set the eligibility criteria, including types of activities and design specifications, for wetland conservation projects.[104]

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[94] *Id*.
[95] *Id*.
[96] Wisconsin Department of Natural Resources, *Wisconsin Wetlands: Assessment Methods and Tools*, https://dnr.wisconsin.gov/topic/wetlands/methods.html.
[97] *Id*.
[98] *Id.*
[99] Wisconsin Department of Natural Resources, *Wisconsin Wetlands Assessment Reports and Maps,* https://dnr.wisconsin.gov/topic/Wetlands/reports.html.
[100] Wisconsin Department of Natural Resources, *Wetland Restoration*, https://dnr.wisconsin.gov/topic/Wetlands/restoration.html.
[101] Wisconsin Department of Natural Resources, *Wetland Restoration Handbook for Wisconsin Landowners*, https://dnr.wisconsin.gov/topic/Wetlands/handbook.html.
[102] *Id*.
[103] WIS. ADMIN. CODE § NR 353.
[104] WIS. ADMIN. CODE § NR 353.

Wisconsin is also developing a general permit for hydrologic restoration.[105] This permit will authorize "wetland, stream, and floodplain restoration and management activities that [] result in a net improvement in hydrologic connections, conditions, and functions."[106] Activities authorized under this permit are "designed to the extent possible to return wetland, stream, and floodplain hydrology to a natural and self-regulating condition" so as to achieve various benefits, including improving water quality, flood resilience, and restoring surface and groundwater interactions.[107] These permits might be particularly useful to the restoration of surface water connections important after *Sackett.*

DNR provides funding for restoration projects through the Wisconsin Wetland Conservation Trust.[108] It also identifies other sources of funding, including USDA and Fish & Wildlife Service grants.[109] In addition, just last year, Wisconsin authorized funding for wetland restoration as part of the pre-disaster flood resilience grant program.[110] This funding includes assessment grants, aimed to understand flood flows, erosion hazards, and vulnerabilities, including opportunities to restore wetlands, streams, and floodplain hydrology.[111] This funding also includes implementation grants used to implement hydrologic restoration projects, including projects that reconnect streams and floodplains, reestablish vegetation, and remove or reduce wetland drainage.[112]

Wisconsin also provides wetland restoration funding through cost-share grants. In June 2024, the Wisconsin Department of Agriculture, Trade, and Consumer Protection revised its rules to enable the use of state funding for hydrologic restoration.[113] These cost-share grants, allocated through the Soil and Water Resource Management program, help landowners implement conservation projects related to agriculture.[114] This includes, for example, streambank and shoreline protection, stream restoration, water and sediment control basins, and wetland restoration.[115]

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[105] Wisconsin Wetlands Association, *New Hydrologic Restoration General Permit Unveiled,* https://www.wisconsinwetlands.org/updates/new-hydrologic-restoration-general-permit-unveiled/.
[106] WIS. STAT. § 30.2065(1g).
[107] WIS. STAT. § 30.2065(1g)(a).
[108] Wisconsin Department of Natural Resources, *Wetland Restoration*, https://dnr.wisconsin.gov/topic/Wetlands/restoration.html.
[109] *Id*.
[110] 2023 Wis. Act 265.
[111] WIS. STAT. § 323.63(3).
[112] WIS. STAT. § 323.63(4).
[113] WIS. ADMIN. CODE § ATCP 50.
[114] WIS. ADMIN. CODE § ATCP 50; Wisconsin Wetland Association, *Success! Revised rule breaks down barriers to hydrology-focused wetland and stream restoration practices*, https://www.wisconsinwetlands.org/updates/success-revised-rule-breaks-down-barriers-to-hydrology-focused-wetland-and-stream-restoration-practices/ (last visited Sept. 27, 2024).
[115] WIS. ADMIN. CODE § ATCP 50.74.

VI. Public-Private Partnerships

Approximately 75 percent of Wisconsin's current wetlands and as much as 85 percent of potentially restorable wetland acreage are under private ownership.[116] As such, landowners play a critical role in conservation. DNR leads Wisconsin's public-private partnerships in support of wetland protection and restoration, partnering with nonprofits and providing resources for private landowners to engage in wetland protection and restoration activities.[117]

DNR maintains a repository of resources for private landowners seeking to restore and manage wetlands on their property.[118] These resources include maps that allow property owners to identify potential wetlands and other waterway designations, such as Areas of Special Natural Resource Interest.[119] DNR also identifies potential funding sources for private restoration projects and refers landowners to nonprofit organizations engaged in wetland restoration work.[120]

Nonprofit organizations actively restoring wetlands in Wisconsin include the Wisconsin Wetlands Association (WWA), Ducks Unlimited, the Wisconsin Waterfowl Association, and The Nature Conservancy.[121] Many of these organizations provide technical assistance and funding support to landowners. For example, the Wisconsin Waterfowl Association provides technical assistance and funding through cooperatives and other partnerships.[122] Recently, the Wisconsin Waterfowl Association partnered with DNR on a Natural Resources Conservation Service grant that helped bring in nearly $1 million in additional funding.[123] Projects under this grant are expected to result in over 100 acres of restoration.[124]

Additionally, DNR published the *Wetland Restoration Handbook for Wisconsin Landowners* in partnership with the WWA.[125] This Handbook encourages responsible and effective restoration of waterways by providing information about planning and implementation activities, relevant regulations, potential partners, and case studies.[126]

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[116] Wisconsin Wetland Association, *Partnering for Wetlands*, https://www.wisconsinwetlands.org/videos/partnering-for-wetlands/ (last visited Aug. 13, 2024).
[117] *Id*.
[118] Wisconsin Department of Natural Resources, *Wetland Restoration*, https://dnr.wisconsin.gov/topic/Wetlands/restoration.html (last visited Aug. 13, 2024).
[119] *Id*.
[120] *Id.* Funding sources include the USDA EQIP Program, Natural Resources Conservation Service, North American Wetlands Conservation Act Grants Program, and the DNR Wisconsin Wetland Conservation Trust.
[121] *Id.*
[122] Peter Ziegler, Wisconsin Waterfowl Association, *September 2021 Habitat Program Updates & Wetland Restoration Assistance for Private Landowners*, https://www.wisducks.org/project/september-2021-habitat-program-updates-assistance-for-wetland-restoration-for-private-landowners/ (last visited Aug. 13, 2024).
[123] Peter Ziegler, Wisconsin Waterfowl Association, *Helping to Bring More Money to Wisconsin's Wetlands*, https://www.wisducks.org/project/helping-bring-more-money-to-wisconsins-wetlands/ (last visited Aug. 13, 2024).
[124] *Id*.
[125] Wisconsin Department of Natural Resources, WETLAND RESTORATION HANDBOOK FOR WISCONSIN LANDOWNERS (2010), available at: https://dnr.wisconsin.gov/topic/Wetlands/handbook.html.
[126] *Id.*

VI. Education and Outreach

DNR provides educational resources about wetlands on its website, including resources related to the types of wetlands in Wisconsin, wetland functions, wildlife and plants that depend on wetlands, wetland ecology and science, wetland assessment methodology and reports, wetland mitigation and restoration, and funding opportunities.[127] DNR offers the *Wetland Restoration Handbook for Wisconsin Landowners* on its website, as well as DNR's strategy to increasing wetlands' functional values, called *Reversing the Loss.* DNR also issues biennial Mitigation Reports and updates the Dashboard, which provides information about permits, wetland restoration, and wetland mitigation.

DNR organizes trainings for the public, including trainings for wetland delineators.[128] It also participates in trainings offered by others, including non-profits, such as WWA.[129] For example, DNR participates in efforts to encourage the exploration of Wisconsin wetlands to celebrate American Wetlands Month, which takes place every May.[130] The WWA has highlighted 100 wetland spots in Wisconsin, and has created a guide for visitors for each location.[131] DNR has shared information about these places and encouraged the public to visit them.[132]

In addition, DNR participates on the Council, discussing wetland-related issues with other members of the Council, who represent key stakeholders.[133] The Council serves as a resource to the state's legislature and others, and meetings of the Council are open to the public.[134]

VIII. Coordination with State and Federal Agencies

DNR routinely coordinates its efforts with the federal agencies, including the Army Corps.[135] This was the case before *Sackett* and continues to be the case.[136] Coordination of efforts relates to wetlands that are under both federal and state jurisdiction, as well as wetlands over which there is only state or federal jurisdiction.[137] Wisconsin's strategy, *Reversing the Loss*, stresses the importance of inter-agency coordination.[138]

IX. How *Sackett* Will Impact State's Wetlands Programs

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[127] Wisconsin Department of Natural Resources, *Wetlands*, https://dnr.wisconsin.gov/topic/Wetlands.
[128] Personal communication with Tom Nedland, Wisconsin Department of Natural Resources (Sept. 3, 2024).
[129] Wetland Webinar, *supra* note 3; see also Wisconsin Wetlands Association, *50 Years of Wetland Outreach & Education* (Sep. 21, 2019), https://www.wisconsinwetlands.org/updates/50-years-of-wetland-outreach-education/.
[130] Wisconsin Department of Natural Resources, *Explore Wisconsin Wetlands*, https://dnr.wisconsin.gov/topic/Wetlands/explore.html (last visited Aug. 13, 2024).
[131] *Id.*
[132] *Id.*
[133] Wisconsin Department of Natural Resources, *Wisconsin Wetland Study Council,* https://dnr.wisconsin.gov/topic/Wetlands/studyCouncil.html.
[134] *Id*.
[135] Personal communication with Tom Nedland, Wisconsin Department of Natural Resources (Sept. 3, 2024).
[136] *Id*.
[137] *Id*.
[138] Wisconsin Wetland Team, REVERSING THE LOSS: A STRATEGY TO PROTECT, RESTORE AND EXPLORE WISCONSIN WETLANDS (2008), available at: https://dnr.wisconsin.gov/sites/default/files/topic/Wetlands/ReversingLoss08_FINAL.pdf.

The full impact of *Sackett* remains to be seen. The exact number and acreage of wetlands that will become unprotected are unclear right now.[139] However, *Sackett* will likely negatively affect Wisconsin's wetlands. Wisconsin has approximately 1 million acres of isolated wetlands.[140] Some or all of these wetlands will lose protection under CWA after *Sackett*, due to the lack of "continuous surface water connection" with waters of the U.S. Once the Army Corps determines that a wetland is not covered by federal law, that wetland may qualify[141] for one of Wisconsin's nonfederal wetland exemptions from state's permitting requirements.[142]

Wisconsin is expecting an increase in the number of nonfederal wetland exemptions after *Sackett*.[143] There will be more requests for jurisdictional determinations from the Army Corps, with many in progress now.[144] Permit decisions already made may need to be reconsidered because of *Sackett*.[145] Once there is a jurisdictional determination, an applicant will apply for the nonfederal wetland exemption.

So far, DNR has experienced a decrease in the number of applications it received for nonfederal wetland exemptions: from 109 in 2022 to 54 in 2023 and 53 in 2024 to date.[146] However, this number will likely increase. Applications for nonfederal wetland exemptions in Wisconsin can only proceed after the Army Corps makes a jurisdictional determination over each impacted wetland, and federal agencies had to revise their rules to comply with the *Sackett* decision before they could proceed with jurisdictional determinations. This delayed the process. In addition, the number of applications submitted in 2024 is already equal to the number submitted in 2023, and there are still four months left in 2024.

The number of wetland acres impacted by projects authorized through nonfederal wetland exemptions has been growing over the last few years, even before *Sackett*. It increased from 27 acres in 2020 to 40 acres in 2022.[147] The exact number of acres impacted by nonfederal wetland exemptions approved in 2023 is unfortunately not available, due to recent issues DNR has experienced with its database.[148]

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[139] Wetland Webinar, *supra* note 3.
[140] Wetland Webinar, *supra* note 3. Presentation by Erin O'Brien, WWA.
[141] Though some might be "rare and high quality wetlands" or might not meet certain other criteria and will therefore not qualify for an exemption.
[142] Wisconsin Department of Natural Resources, BUREAU OF WATERSHED MANAGEMENT PROGRAM GUIDANCE: WATERWAY AND WETLAND PROTECTION—NONFEDERAL WETLAND EXEMPTIONS (2018), available at https://dnr.wisconsin.gov/sites/default/files/topic/Wetlands/3500-2018-02FinalNonfederalWetland.pdf; *see* WIS. STAT. § 281.36(4n).
[143] Wisconsin Department of Natural Resources, WISCONSIN DNR WETLAND REGULATIONS AND THE SACKETT DECISION, Presentation by Tom Pearce (Sept. 14, 2023), https://dnr.wisconsin.gov/sites/default/files/topic/Wetlands/studyCouncil/WSC_Federal_Wetland_Jurisdiction_Update.pdf; Wetland Webinar, *supra* note 3. Presentation by Erin O'Brien, WWA.
[144] Wetland Webinar, *supra* note 3. Presentation by Erin O'Brien, WWA.
[145] Wetland Webinar, *supra* note 3. Presentation by Erin O'Brien, WWA.
[146] Personal communication with Tom Nedland, Wisconsin Department of Natural Resources (Sept. 3, 2024).
[147] Wisconsin Department of Natural Resources, *Wisconsin Wetland Dashboard,* https://dnr.wisconsin.gov/topic/Wetlands/dashboard.
[148] Personal communication with Tom Nedland, Wisconsin Department of Natural Resources (Sept. 3, 2024).

Sackett may also result in decreased mitigation in Wisconsin. Wisconsin's nonfederal wetland exemptions have acreage thresholds that trigger mitigation requirements.[149] An increase in the nonfederal wetland exemptions will thus likely decrease mitigation efforts.

Time will tell whether Wisconsin will need to take additional actions, including by legislation, to protect its wetlands.[150] This will depend on the federal agency's actions and interpretation of the *Sackett*'s decision.[151] For now, Wisconsin focuses on wetland restoration and conservation efforts, particularly where there is bipartisan support, including with regard to using wetlands for flood resilience.[152] In addition, many in Wisconsin, including DNR and WWA, will continue public education about the importance of wetlands,[153] which will be key after *Sackett*.

[149] *See* WIS. STAT. § 281.36(3n)(d)1.
[150] Wetland Webinar, *supra* note 3. Presentation by Erin O'Brien, WWA.
[151] Wetland Webinar, *supra* note 3. Presentation by Erin O'Brien, WWA.
[152] Wetland Webinar, *supra* note 3. Presentation by Erin O'Brien, WWA.
[153] *See e.g.*, Wetland Webinar, *supra* note 3.