



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

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About the Environmental Law Institute

The Environmental Law Institute (ELI) makes law work for people, places, and the planet. Since 1969, ELI has played a pivotal role in shaping the fields of environmental law, policy, and management, domestically and abroad. Today, in our sixth decade, we are an internationally recognized, nonpartisan research and education center working to strengthen environmental protection by improving law and governance worldwide.

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Differences in the level of—and disparate approaches to—wetlands protection may be inherent in the collaborative and federalist nature of U.S. environmental regulation. States, tribes, and local governments are all empowered to impose requirements within their jurisdiction. Since the early 1970s, however, the system has depended on the federal Clean Water Act (CWA) to provide a baseline level of protection in the form of permitting requirements for the filling or development of streams and wetlands, many of which fell under the Act's jurisdiction as “waters of the United States” (WOTUS). In the wake of changes wrought by the Supreme Court in *Sackett v. U.S. Environmental Protection Agency* (2023), the previous floor of federal protection is no longer in place, leaving jurisdiction for many areas in question, and for many others only the protection proffered by states or other entities.

The key issue at the heart of *Sackett* was whether certain wetlands qualify as WOTUS under the CWA. Through *Sackett*, the Court eliminated the ecologically based “significant nexus” test for waters and wetlands across the country. States' responses to *Sackett* have varied, with some seeking to weaken their own protections below what was previously required by the CWA and others pursuing additional protections to fill new gaps.

This report seeks to examine state wetland approaches as one section of the national “fabric” of wetlands protection in the aftermath of *Sackett*. We explore whether and how the changes mandated by the *Sackett* Court are impacting state programmatic operations. Equally, the report seeks to provide an up-to-date account of whether and how effectively states are protecting their wetlands after having lost federal protections that had been in place for approximately half a century.

Our 2024 study of state wetland programs builds on the Environmental Law Institute's (ELI's) extensive body of research of state-level approaches to waters and wetlands protection; beginning with a 50-state study of the status of state wetland programs in 2003–2008.¹ We have since completed periodic and more targeted reviews of state regulatory programs as judicial decisions and administrative rulemakings have altered the federal jurisdictional landscape.² For this new study, we have chosen to focus on the Mississippi River Basin, a marvel of different hydrological features and functions that encompasses a wide array of sectors, including prominent agricultural, shipping, and development interests.

The reality of the basin—connected by the mighty Mississippi River and its myriad tributaries, each of which is ecologically linked to the wetlands, streams, and floodplains surrounding it—is that what happens in a state like Minnesota or Iowa affects not only Minnesota or Iowa, but rather percolates throughout the entire basin, impacting the environmental and social well-being of those who inhabit it. Thus, an understanding of the different states' approaches to water management and wetland protection is important for policymaking at the federal, state, local, and watershed levels.

¹ ROXANNE THOMAS ET AL., STATE WETLAND PROTECTION: STATUS, TRENDS & MODEL APPROACHES, A 50-STATE STUDY BY THE ENVIRONMENTAL LAW INSTITUTE (2008); *ELI Study of State Wetlands Programs*, ENVTL. L. INST., <https://www.eli.org/freshwater-ocean/eli-study-state-wetland-programs> (last visited Sept. 30, 2024).

² See *Clean Water Act Jurisdiction*, ENVTL. L. INST., <https://www.eli.org/freshwater-ocean/clean-water-act-jurisdiction> (last visited Sept. 30, 2024).

The objective of this report is to offer insights to policy- and decision-makers as they navigate the evolving landscape of wetland conservation, management, and protection at the federal and state levels. We first provide a concise account of how the federal jurisdictional hook for many CWA programs, “waters of the United States,” has been defined and interpreted over time, highlighting key regulatory changes and pivotal court decisions that have shaped its scope. Next, the report examines the post-*Sackett* landscape at both the federal and state levels. After providing the contextual foundation, the report goes on to describe our research methodology, which involved an in-depth analysis of wetland programs in six Mississippi River basin states. Finally, the report identifies some key findings of ELI’s research and approaches states have implemented to enhance their wetland protection.

I. A Brief History of the Clean Water Act and Wetlands Protection

Assessing *Sackett*’s impacts requires a brief review of how the U.S. Environmental Protection Agency (EPA), U.S. Army Corps of Engineers (Army Corps), and the Supreme Court have historically defined and interpreted the federal jurisdictional hook for several CWA programs. In 1972, Congress significantly amended and recodified the 1948 Federal Water Pollution Control Act through the CWA, aiming to “restore and maintain the chemical, physical, and biological integrity of the nation’s waters.”³

Through the CWA, Congress established a suite of regulatory tools and permitting regimes to improve and protect water quality across the nation, authorizing the EPA and Army Corps (the Agencies) to administer the statute on behalf of the federal government. The statute provides that “navigable waters” receive protection under several CWA programs,⁴ with Congress defining navigable waters under the CWA as WOTUS. However, the term WOTUS is not further defined in the statute itself.⁵

1980s-2015 WOTUS Regulatory Regime and Key Judicial Interpretations

As part of implementing the statute, the Agencies began defining WOTUS via regulation in 1973.⁶ After a brief period of asynchrony between the Agencies’ definitions and some resulting litigation, the EPA ultimately promulgated a 1980 WOTUS rule that the Army Corps adopted shortly thereafter.⁷ The 1980’s era of regulations—currently referred to as the “pre-2015 regulatory regime” by EPA—defined jurisdictional “wetlands” as interstate wetlands and wetlands “adjacent to” traditionally navigable waters. In 1985, the Supreme Court weighed in on the Army Corps’ interpretation of the jurisdictional scope of

³ 33 U.S.C. § 1251(a) (2024).

⁴ *Id.* at §§ 1342, 1344, 1312, 2702, 1341 (2024).

⁵ *Id.* at § 1362(7) (2024).

⁶ 33 Fed. Reg. 13,528, 13,529 (May 22, 1973) (codified at 40 C.F.R. § 125.1(p) (1974)) (EPA’s first definition of WOTUS—as applicable to the National Pollution Discharge Elimination System only—including six categories of waterbodies); 39 Fed. Reg. 12,119 (Apr. 3, 1974) (codified at 33 C.F.R. § 209.12(d)(1) (1974)) (the Army Corps’ definition of WOTUS—as applicable to CWA § 404—limited only to “those waters of the United States which are subject to the ebb and flow of the tide, and/or are presently, or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce”).

⁷ *See Nat. Res. Def. Council v. Callaway*, 392 F. Supp. 685 (D.D.C. 1975) (holding that the Corps impermissibly limited the 1974 WOTUS definition in a manner narrower than what Congress intended); 33 C.F.R. § 323.2(a) (1978) (Corps-issued WOTUS regulations following the *Callaway* decision, identifying five categories of waters that would be considered WOTUS); U.S. ENVTL. PROT. AGENCY & U.S. DEP’T OF ARMY, MEMORANDUM OF AGREEMENT: EXEMPTIONS UNDER SECTION 404(F) OF THE CLEAN WATER ACT (1989); 45 Fed. Reg. 33,290, 33,424 (May 19, 1980) (EPA’s 1980 WOTUS definition); 47 Fed. Reg. 31,794, 31,810 (July 22, 1982) (the Corps’ adoption of EPA’s 1980 WOTUS definition).

WOTUS in *United States v. Riverside Bayview Homes*, unanimously determining that wetlands adjacent to traditionally navigable waters are within the scope of CWA coverage regardless of whether those wetlands are navigable in fact.

The Agencies then further defined the scope of WOTUS via a 1986 rulemaking that included a provision known as the Migratory Bird Rule,⁸ which extended WOTUS coverage to certain waters serving as migratory bird habitat. A 5-4 Supreme Court struck down that provision in 2001 in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC)*.⁹ In *SWANCC*, the Court determined that the Army Corps' asserted jurisdiction over isolated waters (not wetlands)—specifically, an “abandoned sand and gravel pit with seasonal ponds” located wholly within one state—exceeded the agency's delegated authority under the CWA.¹⁰ Differentiating between the isolated waters at issue in *SWANCC* and *Riverside Bayview's* wetlands, Chief Justice Rehnquist's majority opinion explained, “it was the significant nexus between the wetlands and ‘navigable waters’ that informed [the *Riverside Bayview* Court's] reading of the CWA.”¹¹

In 2006, the Court again opined on the scope of federally jurisdictional waters in *Rapanos v. United States*. Writing for a plurality of four justices, Justice Scalia argued WOTUS includes only “relatively permanent, standing, or continuously flowing bodies of water.”¹² He went on to clarify that wetlands are WOTUS only when there is a “continuous surface connection” to such “relatively permanent, standing, and flowing bodies of water.”¹³

Justice Kennedy penned a concurring opinion in which he instead concluded that wetlands and other waters could be jurisdictional under the CWA if they “either alone or in combination with other similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as navigable.”¹⁴ In short, in Justice Kennedy's view, a wetland could be WOTUS if it had a “significant nexus” with navigable waters. Four liberal justices agreed with Justice Kennedy on this substantive point.

Following *Rapanos*, lower federal courts primarily treated Justice Kennedy's “significant nexus” test as controlling—applying it either alone or together with Justice Scalia's test.¹⁵ Until 2015, the WOTUS regulatory regime remained largely the same. In 2015, the Obama Administration's EPA promulgated a final regulation, the Clean Water Rule, which categorized certain waters as WOTUS and non-WOTUS, and established categories of waters and wetlands that would require case-specific application of Justice Kennedy's significant nexus test to determine jurisdictional status.¹⁶

⁸ 51 Fed. Reg. 41,206, 42,217 (Nov. 13, 1986).

⁹ 51 Fed. Reg. 41,206, 42,217 (Nov. 13, 1986); *Solid Waste Agency of Northern Cook Cty. v. United States Army Corps of Eng'rs*, 531 U.S. 159 (2001) [hereinafter *SWANCC*].

¹⁰ *SWANCC*, 531 U.S. at 162, 174.

¹¹ *Id.* at 167.

¹² *Rapanos v. United States*, 547 U.S. 715, 732 (2006).

¹³ *Id.* at 742.

¹⁴ *Id.* at 780 (Kennedy, J., concurring).

¹⁵ KATIE R. BOWERS, CONG. RESEARCH SERV., LSB10707, SUPREME COURT REVISITS SCOPE OF “WATERS OF THE UNITED STATES” (WOTUS) UNDER THE CLEAN WATER ACT 2 (2022).

¹⁶ 2015 Clean Water Rule, 80 Fed. Reg. 37,054 (June 29, 2015).

In 2020, the Trump Administration’s EPA rescinded and replaced the Clean Water Rule with the Navigable Waters Protection Rule (NWPR), which embraced solely Justice Scalia’s *Rapanos* test.¹⁷ Over the next three years, the Biden Administration’s EPA rescinded and replaced the NWPR with the Revised Definition of Waters of the United States Rule (Revised WOTUS Rule), largely reviving the 1980s regulatory definitions (*i.e.*, the pre-2015 regulatory regime), with some new clarifications based on both *Rapanos* tests.¹⁸

Before the Revised WOTUS Rule took effect on March 20, 2023, two key events occurred: 1) the Supreme Court granted a certiorari petition appealing a Ninth Circuit decision in *Sackett v. EPA*; and 2) the United States District Court for the Southern District of Texas preemptively enjoined the Revised WOTUS Rule in Texas and Idaho.¹⁹ After the Revised WOTUS Rule took effect but before the Court issued its *Sackett* decision, another district court issued an order enjoining the Revised WOTUS Rule in various parts of the country, bringing the total number of states in which the pre-2015 regime applied to 26 as of May 24, 2023.²⁰ As of this report, the Agencies are “interpreting [WOTUS] consistent with the pre-2015 regime *and* the Supreme Court’s decision in *Sackett*” in these same 26 states.²¹

Thus, immediately prior to May 25, 2023—the date the Court issued its *Sackett* opinion—the federal regulatory definition of WOTUS applied unevenly across the country. The Revised WOTUS Rule applied in the 23 states where it was not enjoined (now, 24 states because a previous stay of the Revised WOTUS Rule in Kentucky has been lifted as of this Report).²² That Rule, based largely on the 1980s regulations, also included both Justice Kennedy’s and Justice Scalia’s tests. Under it, wetlands were WOTUS if they were interstate wetlands or

adjacent to any of the following: traditional navigable waters; a relatively permanent, standing or continuously flowing impoundment or tributary; an impoundment or tributary if the wetlands alone or in combination with similarly situated waters in the region significantly affect the chemical, physical, or biological integrity of traditional navigable waters.²³

¹⁷ See Exec. Order No. 13,778, 82 Fed. Reg. 12,497 (Feb. 28, 2017) (directing EPA to rescind or replace the 2015 Clean Water Rule); The Navigable Waters Protection Rule: Definition of “Waters of the United States,” 85 Fed. Reg. 22,250 (Apr. 21, 2020).

¹⁸ See Exec. Order No. 13,990, 86 Fed. Reg. 7,037 (Jan. 25, 2021) (directing EPA to review regulations promulgated under the Trump Administration); Revised Definition of “Waters of the United States,” 88 Fed. Reg. 3,004 (Jan. 18, 2023).

¹⁹ *Sackett v. U.S. Evtl. Prot. Agency*, 8 F.4th 1075 (9th Cir. 2021), *cert. granted* (U.S. Jan 24, 2022); *State of Texas v. U.S. Evtl. Prot. Agency*, No. 3:23-cv-17 (S.D. Tex. March 19, 2023).

²⁰ *State of West Virginia v. Am. Farm Bureau*, No. 3:23-cv-00032 (D. N.D. April 12, 2023) (enjoining the Revised WOTUS Rule in Alabama, Alaska, Arkansas, Florida, Georgia, Indiana, Iowa, Kansas, Louisiana, Mississippi, Missouri, Montana, Nebraska, New Hampshire, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Utah, Virginia, West Virginia, and Wyoming); The Sixth Circuit also enjoined the revised WOTUS Rule in Kentucky shortly after *Sackett* was issued, but as of September 23, 2024, the stay has been lifted. Thus, the Conforming Rule applies in Kentucky as of this report. (*Kentucky v. U.S. Evtl. Prot. Agency*, No. 23-5343 (6th Cir. Jul. 29, 2023); *Definition of “Waters of the United States”: Rule Status and Litigation Update*, *infra* note 34.

²¹ *Definition of “Waters of the United States”: Rule Status and Litigation Update*, *infra* note 34 (emphasis added).

²² *Id.*

²³ 88 Fed. Reg. 3,004, 3005–06 (Jan. 18, 2023).

In the 26 states where the Revised WOTUS Rule was enjoined prior to *Sackett*, wetlands were categorized as WOTUS according only to the 1980s regulations,²⁴ which categorize a wetland as WOTUS if it is an interstate wetland or is “adjacent to [certain] waters (other than waters that are themselves wetlands)” enumerated in the rule.²⁵

Post-Sackett Landscape at the Federal Level

Through its majority opinion in *Sackett*, the Supreme Court removed from CWA coverage a large swath of wetlands that were previously covered as WOTUS.²⁶ The *Sackett* plaintiffs challenged EPA’s determination that certain wetlands on their property were jurisdictional because they were adjacent to a traditionally navigable water.²⁷ The question proposed to the Court was simply whether “*Rapanos* [should] be revisited to adopt the plurality’s test for wetland jurisdiction under the [CWA].”²⁸ The Court limited its review to only “[w]hether the Ninth Circuit set forth the proper test for determining whether wetlands are [WOTUS] under the [CWA].”²⁹

Writing for the majority, Justice Alito followed Justice Scalia in determining that the CWA’s use of the word “waters” means only those relatively permanent bodies of water that are connected to traditional, interstate navigable waters.³⁰ Further, to be “adjacent” a jurisdictional *wetland* must have a “continuous surface connection” to a water that is jurisdictional in its own right, “making it difficult to determine where the water ends, and the wetland begins.”³¹ In sum, the *Sackett* Court removed Justice Kennedy’s significant nexus test, drastically redefined adjacency, and excluded certain wetlands from WOTUS coverage.³²

Following the *Sackett* opinion, the Biden EPA promulgated a final direct Conforming Rule, amending its Revised WOTUS Rule to conform to the Court’s *Sackett* mandates.³³ As of this report, the status of the

²⁴ *Pre-2015 Regulatory Regime*, U.S. ENVTL. PROT. AGENCY, <https://www.epa.gov/wotus/pre-2015-regulatory-regime> (last visited Sept. 23, 2024).

²⁵ *Id.* (quoting 40 C.F.R. 230.3(s) (1980) “(1) [a]ll waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide; (2) [a]ll interstate waters including interstate wetlands; (3) [a]ll other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters: a. [w]hich are or could be used by interstate or foreign travelers for recreational or other purposes; or b. [f]rom which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or c. [w]hich are used or could be used for industrial purposes by industries in interstate commerce; 4) [a]ll impoundments of waters otherwise defined as waters of the United States under this definition; 5) [t]ributaries of waters identified in paragraphs (s)(1) through (4) of this section; and 6) [t]he territorial sea”).

²⁶ *Sackett v. U.S. Env’tl. Prot. Agency*, 598 U.S. 651 (2023).

²⁷ *Id.* at 661–63.

²⁸ *Sackett v. U.S. Env’tl. Prot. Agency*, Petition for Writ of Certiorari, Docket No. 21-454 (U.S. Sept. 22, 2021) (available at https://www.supremecourt.gov/DocketPDF/21/21-454/193450/20210922172208802_2021.09.22%20-%20Sackett%20Cert%20Petition.pdf).

²⁹ *Sackett*, *supra* note 19.

³⁰ *Sackett*, *supra* note 26, at 671.

³¹ *Id.* at 678–79.

³² James McElfish, *What Comes Next for Clean Water? Six Consequences of Sackett v. EPA*, ENVTL. L. INST. VIBRANT ENV’T. BLOG (May 26, 2023), <https://www.eli.org/vibrant-environment-blog/what-comes-next-clean-water-six-consequences-sackett-v-epa>.

³³ *Id.*

Conforming Rule is unclear given pending litigation in the 27 states where the Revised WOTUS Rule had already been enjoined. The EPA reports that the Agencies are “interpreting [WOTUS] consistent with the 2015-regulatory regime and [Sackett] until further notice” for those states.³⁴ The Agencies will directly apply the Conforming Rule in the other 23 states, the District of Columbia, and U.S. territories.

Relationship to State Waters and Wetlands Programs

As described above, the CWA contemplates a statutory division of labor between the federal and state governments. States generally retain the authority to protect any of their state waters through regulatory programs, provided they are consistent with the CWA and other applicable federal law.³⁵ Some states, like California, Massachusetts, and Oregon, have fairly extensive regulatory programs and permitting regimes for activities occurring state waters.³⁶ These regulatory programs may encompass and extend beyond waters that are WOTUS. However, as of the date of this report, many states rely only on the federal WOTUS regulations to protect their waters.³⁷ Thus, shifting WOTUS definitions affect state water and wetlands programs differently across the country, depending on the degree of “reliance on federal WOTUS definitions and whether the state has supplemental authority to fill in potential gaps in coverage.”³⁸

While the full reach of *Sackett*’s consequences will unfold in the years to come, some state-level developments have already occurred.³⁹ For example, a few states enacted or proposed legislation either in anticipation, or as a direct result, of *Sackett*. These include:

- **Colorado**, for example, was the first state to pass legislation that will fill a gap in the state’s coverage of former WOTUS. As of the date of this report, Colorado is working to develop a state-level dredge-and-fill permitting program, which will provide additional protection to state waters, which are defined more broadly than federal WOTUS.⁴⁰
- **Illinois** has introduced legislation that proposes to establish, among other programmatic components, a state dredge-and-fill permitting program and a mitigation policy for wetlands permits.⁴¹

³⁴ *Definition of “Waters of the United States”: Rule Status and Litigation Update*, U.S. ENVTL. PROT. AGENCY, <https://www.epa.gov/wotus/definition-waters-united-states-rule-status-and-litigation-update> (last visited Sept. 23, 2024).

³⁵ James McElfish, *State Protection of Nonfederal Waters: Turbidity Continues*, 52 ENVTL. L. REPORTER 10,679, 10,681 (2022).

³⁶ *Id.* at 10,686.

³⁷ *Id.* at 10,684–85.

³⁸ Therese Wilkerson, *Sackett and Stitching Together Nonfederal Environmental Law*, ENVTL. FORUM 48 (July/August 2024); see also REBECCA KIHSLINGER ET AL., FILLING THE GAPS: STRATEGIES FOR STATES/TRIBES FOR PROTECTION OF NON-WOTUS WATERS (May 2023).

³⁹ Wilkerson, *supra* note 38; *Wetlands and Streams Most in Danger After the U.S. Supreme Court’s Sackett v. EPA Ruling*, EARTHJUSTICE (May 14, 2024), <https://earthjustice.org/feature/sackett-epa-wetlands-supreme-court-map>.

⁴⁰ H.B. 24-1379, 74th Gen. Assemb. (Colo. 2024) (stating, in part, that “[t]he new definition of [WOTUS] under *Sackett*, which narrows federal jurisdiction in [the CWA § 404 dredged and fill permitting program], has created a need for a state dredge and fill program”); Colo. Rev. Stat. § 25-8-103(19) (defining “state waters” to mean “any and all surface and subsurface waters that are contained in or flow through this state, including wetlands [exemptions omitted]”).

⁴¹ S.B. 0771, 103rd Gen. Assemb. (Ill. 2024) (finding that “[i]t is important for Illinois to adopt protections under State law to reinstate protections lost by rolling back the scope of the federal Clean Water Act.”)

- **Delaware** has also introduced legislation that would establish a state nontidal wetlands program that “will cover gaps in federal jurisdiction under the CWA and mitigate the uncertainty surrounding the limits to federal jurisdiction.”⁴²

States are also taking steps to protect their waters that go beyond the establishment, or proposed establishment, of dredge-and-fill programs. For example:

- **New Mexico**—one of only three states without CWA § 402 delegation—is seeking to develop a state-led surface water quality permitting program.⁴³
- **California** has passed legislation codifying a policy of “no net loss” of wetlands, first established by former Governor Wilson via a 1993 Executive Order.⁴⁴

In contrast, other states recently have enacted or proposed legislation reducing state-level protection over some wetlands. These states are:

- In **North Carolina**, the General Assembly enacted legislation (2023 NC Farm Bill) that restricts wetlands classified as “waters of the state” to the federal WOTUS definitions.⁴⁵
- **Indiana** has rolled back protection of its isolated wetlands permitting program following *Sackett*, reducing the scope of wetlands for which the most stringent permitting requirements apply.⁴⁶
- **Tennessee**—a state with a fairly comprehensive pre-*Sackett* wetlands program—is currently directing its state waters and wetlands agency to evaluate a legislative proposal to define “wetlands” in a manner functionally identical to the definition mandated by the *Sackett* Court.⁴⁷

States may also consider alternative approaches toward protecting their waters and wetlands. For example:

- **Wisconsin** has authorized funding for wetland restoration as part of its pre-disaster flood resilience grant program.⁴⁸ This funding includes grants for assessment and implementation of hydrological restoration projects, including projects that reconnect streams and floodplains, reestablish vegetation, and remove or reduce wetland drainage.⁴⁹ Notably, the state bill establishing this funding was enacted prior to the *Sackett* opinion; however, the purpose of the funding can provide some degree of protection for wetlands that are no longer considered WOTUS.
- Shortly after the legislation reducing protections for wetlands, the **North Carolina** Governor issued Executive Order 302, which offers limited protection to wetlands no longer protected under state law. As of this report, the executive order is still in effect and directs cabinet-level

⁴² S.B. 290, 152nd Gen. Assemb., Reg. Sess. (Del. 2024).

⁴³ *Surface Water Quality State Permitting Program*, NEW MEXICO ENV'T DEP'T, <https://www.env.nm.gov/surface-water-quality/spp/> (last visited Sept. 23, 2024) (explaining that *Sackett* leaves many of New Mexico’s surface waters at risk of contamination and degradation because the state relies on the CWA for NPDES permitting).

⁴⁴ Assemb. Bill 2875, 2023–2024 Reg. Sess. (Cal. 2024).

⁴⁵ S.B. 582, 2023–2024 Reg. Sess. (N.C. 2023) (this Bill passed through the General Assembly before *Sackett* was decided but after the Supreme Court granted certiorari).

⁴⁶ H.B. 1383, 123rd Gen. Assemb., 2nd Reg. Sess. (Ind. 2024).

⁴⁷ S.B. 0631, 113th Gen. Assemb., Reg. Sess. (Tenn. 2023); H.B. 1054, 113th Gen Assemb., Reg. Sess. (Tenn. 2023).

⁴⁸ WIS. STAT. § 323.63 (2024).

⁴⁹ *Id.* at § 323.63(3)–(4).

agencies to permanently conserve one million new acres of the state’s natural lands, with a particular focus on wetlands.⁵⁰

When WOTUS coverage shrinks, as it has following *Sackett*, state regulators must determine whether and how to accommodate such newly non-jurisdictional waters through state-level initiatives.⁵¹ In most instances, states will need to consider a whole-of-state approach to restore, or, in the first instance, establish regulatory and non-regulatory mechanisms for surface water quality protection. Through our research, described below, we examined whether and how six Mississippi River Basin states are taking holistic approaches toward wetland protection, monitoring, assessment, restoration, and conservation.

II. *Methodology*

For this study, ELI selected six states in the Mississippi River Basin that represent a diversity of geographies, locations along the river, and land uses: **Arkansas, Illinois, Iowa, Louisiana, Tennessee, and Wisconsin**. ELI also selected these states because they represented a variety of approaches to state-level wetland protection prior to the Supreme Court’s *Sackett* opinion.

For each state, we conducted desktop research on regulatory and nonregulatory mechanisms for wetland protection and management, including, but not limited to:

- Definitions of state waters and “wetlands” in state law and policy;
- State CWA § 401 certifications and wetland-specific conditions attached thereto;
- State review of Army Corps-issued Nationwide Permits or statewide programmatic general permits;
- Mitigation requirements or policies;
- Wetland-specific water quality standards;
- Wetland monitoring and assessment methodologies;
- Wetland restoration programs; and
- Coordination with state and federal agencies on wetlands management.

To supplement our research and verify our findings, we interviewed state agency officials selected for their expertise on and personal knowledge of their respective states’ waters and wetlands programs. While the state-specific reports detailing the full results of our findings are available separately and/or as a combined appendix, the following provides a high-level summary of our findings for the six states.

i. **Arkansas**

Arkansas does not have a statewide wetland regulatory scheme; rather, its regulatory oversight of wetlands is generally limited to the CWA § 401 certification process and associated water quality standards, which are developed by the Arkansas Pollution Control and Ecology Commission and

⁵⁰ Gov. Roy Cooper, Exec. Order No. 302 (Jan. 19, 2024), <https://governor.nc.gov/executive-order-no-302/open> (expressly defining wetlands more broadly than state or federal law and directing cabinet agencies to permanently conserve one million new acres of the state’s natural lands, with a focus on wetlands).

⁵¹ McElfish, *supra* note 32.

administered by the Arkansas Department of Energy and Environment’s Division of Environmental Quality.⁵²

Beyond direct regulation, other state agency activities directly and indirectly influence wetlands. For example, the Arkansas Natural Heritage Commission manages a Natural Areas program, which manages ecosystems throughout the state,⁵³ and the Arkansas Game and Fish Commission manages Wildlife Management Areas, which are places for the public to hunt and fish.⁵⁴ The Commission also provides comments on federal water development projects under the federal Fish and Wildlife Coordination Act.⁵⁵

In Arkansas, where 90% of the land is privately owned, some of the state’s most effective wetland protection initiatives involve public-private partnerships.⁵⁶ Wetland restoration efforts are driven by the Wetlands and Riparian Zone Creation, Restoration, and Conservation Tax Credits Act, which created a state income tax credit for any taxpayer who engages in the development, restoration, or conservation of wetland and riparian zones.⁵⁷ A new pilot program supported by the Arkansas Game and Fish Commission and funded by the Arkansas General Assembly, the Conservation Incentive Program, aims to address Arkansas-specific wildlife and fisheries needs on private lands by reimbursing expenses related to conservation practices.⁵⁸ Eligible practices that benefit wetland habitat management include activities that manage for native wetland plants, like seasonal flooding of agricultural fields during the waterfowl wintering period.⁵⁹

⁵² ARK. CODE ANN. § 8-4-207 (2024); Arkansas Pollution Control and Ecology Commission Rule 2: Rule Establishing Water Quality Standards for Surface Waters of the State of Arkansas, 014.00 ARK. CODE R. 2.101 *et seq.* (2022); ARK. CODE ANN. § 8-1-202 (2024) (DEQ is responsible for “the administration of permitting, licensing, certification and grants programs deemed necessary to protect the environmental integrity of the state,” as well as “providing technical and legal expertise and assistance in the field of environmental protection to other agencies and subdivisions of the state.”)

⁵³ *About Natural Areas*, ARK. HERITAGE, <https://www.arkansasheritage.com/arkansas-natural-heritage/naturalareas/about-natural-areas> (last visited Aug. 14, 2024).

⁵⁴ *Wildlife Management Areas*, ARK. GAME AND FISH COMM’N, <https://intranet.agfc.com/en/hunting/where-hunt/wildlife-management-areas/> (last visited Aug. 14, 2024).

⁵⁵ Fish and Wildlife Coordination Act, 16 U.S.C. §§ 661(a)–(b), 662 (2024) (the Fish and Wildlife Coordination Act provides that for federal water development projects, the federal agency must coordinate with US Fish and Wildlife and the state wildlife agency where the project is occurring. Under FWCA, AGFC can provide comments and recommendations to the federal project proponent or lead permitting agency in a Coordination Act Report that is given equal weight as to other project benefits).

⁵⁶ Randy Zellers, *Earn up to \$10,000 to Enhance Wildlife Habitat on Your Land*, ARK. GAME AND FISH COMM’N (Jan. 18, 2024), <https://www.agfc.com/news/earn-up-to-10000-to-enhance-wildlife-habitat-on-your-land/>.

⁵⁷ ARK. CODE ANN. §§ 26-51-1501–26.51.1510 (2024).

⁵⁸ *Id.*; Zellers, *supra* note 56 (according to AGFG, “The initiative was developed similar to many cost-share conservation incentives provided through Farm Bill programs, but is targeted specifically at wildlife and fisheries needs in Arkansas on a state level”).

⁵⁹ Randy Zellers, *New program adds 12,000 acres of Arkansas wetlands for waterfowl*, ARK. GAME AND FISH COMM’N (Sept. 25, 2024), <https://www.agfc.com/news/new-program-adds-12000-acres-of-arkansas-wetlands-for-waterfowl/>.

ii. Illinois

Illinois's regulatory scheme for wetland protection includes statutory safeguards for certain wetlands, including non-WOTUS wetlands, from adverse impacts caused by state-funded activities.⁶⁰ In the November 2024 Veto Session, Illinois will be considering legislation that would establish a state dredge-and-fill program and apply to all wetlands in the state using a state-specific and broad definition of wetlands.⁶¹ Additionally, wetlands within Illinois floodplains may receive protection through the state's permitting regime for construction in floodplains.⁶²

To monitor the health of and identify emerging threats to state wetlands, the state Department of Natural Resources collaborates with a non-governmental organization and a state university in a dedicated wetland assessment program.⁶³ Illinois also supports wetland restoration through a dedicated grant program, financed by funds generated through the sale of stamps.⁶⁴ The grants are used to support projects that acquire, enhance, or manage wildlife habitat, and often include supporting wetland restoration.

Interagency coordination is also a component of Illinois's wetland strategy. For example, the Interagency Wetlands Committee is intended to advise the state Department of Natural Resources on: developing wetlands rules and regulations; coordinating Agency Action Plans for wetlands; and preparing periodic reports on the status of the state's wetlands.⁶⁵ (However, it is unclear how active the Committee is as of the publication of this report.) The state also has a wetlands-specific campaign in its Wildlife Action Plan that seeks to coordinate wetland conservation and restoration efforts across the state with the overarching goals of increasing wetland acreage, interconnectedness, and quality.⁶⁶

iii. Iowa

Iowa's current regulatory scheme for wetland protection depends primarily on CWA Section 401 certification. As of this report, the state Department of Natural Resources has an unfulfilled statutory mandate to: 1) create a "protected wetlands" inventory and permitting program, which could theoretically offer protection to certain state wetlands that are not WOTUS under the CWA; and 2)

⁶⁰ 20 ILL. COMP. STAT. § 830/1-3 (2024).

⁶¹ S.B. 771, 103rd Gen. Assemb., Reg. Sess. (Ill. 2024); Jennifer Bamberg, *Illinois lawmaker's attempt to reinstate wetland protections fails as legislative session ends*, ILLINOIS ANSWERS PROJECT (Jul. 1, 2024) <https://illinoisanswers.org/2024/07/01/wetlands/>.

⁶² 615 ILL. COMP. STAT. § 5/18f (2024).

⁶³ See, e.g., Edward Price, *Wetland Science and Policy*, ILLINOIS NATURAL HISTORY SURVEY (March 2019), <https://www.ideals.illinois.edu/items/110210> (a 2019 analysis of emerging threats to wetlands, including the increasing spread of invasive species in Illinois wetlands, encroachment of woody species into emergent herbaceous wetlands, and changes to wetlands hydrology induced by climate change).

⁶⁴ *Special Wildlife Funds Grant Programs*, ILLINOIS DEP'T OF NAT. RES., <https://dnr.illinois.gov/grants/special-wildlife-funds-grant-program.html> (Aug. 27, 2024).

⁶⁵ 20 ILL. COMP. STAT. § 830/2-1 (2024).

⁶⁶ ILL. DEP'T OF NAT. RES., WILDLIFE ACTION PLAN – WETLANDS CAMPAIGN 223–227 (2015) <https://dnr.illinois.gov/content/dam/soi/en/web/naturalheritage/speciesconservation/illinois-wildlife-action-plan/campaign-sections-2022/WetlandsCampaign2022.pdf>.

establish a wetlands acquisition program, which would help reduce pollution from the closure or change in use of agricultural drainage wells.⁶⁷

Other aspects of Iowa’s wetland protection strategy include monitoring and restoration efforts. In 2005, the state Department of Natural Resources initiated a wetland monitoring program, focusing on prairie pothole wetlands in north-central Iowa with funding from the U.S. Environmental Protection Agency (EPA).⁶⁸ This program has since expanded statewide, aiming to assess the ecological condition of Iowa’s remaining wetlands and guide future conservation efforts.⁶⁹

Another key component of Iowa’s approach to wetland protection is restoration, made up of various efforts, such as IDNR’s Lake Restoration Program, which helps finance projects that improve water quality and watershed protection, and the state’s “Open Spaces Protection” fund, which permits IDNR to acquire and develop state lands and waters.⁷⁰

State law also authorizes the creation of Watershed Management Authorities (WMAs): a “mechanism for cities, counties, Soil and Water Conservation Districts, and stakeholders to cooperatively engage in watershed management and planning.”⁷¹ Some of the duties WMAs can perform include assessing flood risks, water quality, and allocating money to improve water quality and flood mitigation.⁷² This form of oversight contributes to the whole of the state’s wetland management approach.

iv. Louisiana

Given the extent of land loss in Louisiana’s coastal region, the state’s approach to wetland management emphasizes coastal wetland protection and restoration. The primary regulatory tool arises from the State and Local Coastal Resources Management Act (SCLCMA), which established the Coastal Use Permitting program to regulate development activities in the Louisiana coastal zone.⁷³ Under the program, no “activities of state or local concern”—e.g., dredging, filling, levee building, wastewater discharges, energy activities, urban development— can be conducted in the LCZ without a valid permit issued by the state’s Department of Energy and Natural Resources (DENR) or, in some circumstances, a local parish.⁷⁴

While DENR implements the Coastal Use Permit program, the Coastal Restoration and Protection Agency (CPRA) leads the planning and implementation of restoration and protection efforts aimed at

⁶⁷ IOWA CODE §§ 456B.12(1), 456B.1(4), 456B.13(2)(a)–(b), 456B.11 (2024); Office of Auditor of State, Report of Recommendations to the Iowa Department of Natural Resources 4–5 (June 30, 2021) [hereinafter IDNR 2021 Audit] (available at <https://www.legis.iowa.gov/docs/publications/ADRPT/1373828.pdf>).

⁶⁸ IOWA DEP’T OF NAT. RES., THE IOWA WILDLIFE ACTION PLAN 20 (2015).

⁶⁹ *Id.*

⁷⁰ *Open Spaces Protection*, IOWA DEP’T OF NAT. RES., <https://www.iowadnr.gov/idnr/Conservation/REAP/REAP-Funding-at-Work/Open-Spaces-Protection> (last visited Sept. 10, 2024).

⁷¹ IOWA CODE §§ 466B.21–446B.30 (2024); *Watershed Management Authorities in Iowa*, IOWA DEP’T OF NAT. RES., <https://www.iowadnr.gov/Environmental-Protection/Water-Quality/Watershed-Management-Authorities> (last visited Sept. 10, 2024).

⁷² IOWA CODE at §§ 466B.23(1)–(2), (6) (2024).

⁷³ LA. STAT. ANN. §§ 49:214.21–49:214.42 (2024). This act implements the CZMA at the state level.

⁷⁴ *Id.* at § 49:214.30. Such activities include dredging or filling, levee works, hurricane and flood protection, urban developments, energy activities, wastewater discharge, and any activities that would require a permit from the Army Corps, the Environmental Protection Agency (EPA), or LDEQ. LA. ADMIN. CODE tit 43, pt. I, § 723.

rebuilding wetlands and slowing coastal land loss.⁷⁵ CPRA develops both Master Plans and Annual Plans that identify restoration projects and is responsible for their implementation.⁷⁶

In addition, many wetlands within the coastal zone will remain jurisdictional after *Sackett* because the area is so regularly saturated that they will continue to meet the definition of WOTUS.⁷⁷ Due to the state's extensive levee and drainage systems, one of the key outstanding questions in determining how many wetlands remain jurisdictional is whether and where wetlands that are "leveed off" and/or under a pump will qualify as WOTUS under the new definition.

The *Sackett* decision will have the largest impact on wetlands outside of Louisiana's coastal zone, which are subject to little regulation aside from the CWA.⁷⁸ The state has some non-regulatory mechanisms in place to help guide management of inland wetlands. For example, the state has established the Louisiana Watershed Initiative (LWI), which coordinates state funding resources among the CPRA, the Louisiana Department of Wildlife and Fisheries, the Louisiana Department of Transportation and Development, the Governor's Office of Homeland Security and Emergency Preparedness, and the Louisiana Office of Community Development for the purpose of reducing flood risk and improving floodplain management through a watershed-based approach.¹²⁵ The LWI coordinates a \$1.2 billion line of credit in Community Development Block Grant mitigation funds for flood risk reduction priorities, and many of those funds are directed toward projects across the state designed to support healthy wetland ecosystems.¹²⁶

v. Tennessee

The framework of Tennessee's wetland management and protection approach includes CWA Section 401 certifications, general water quality standards, and state-level permitting requirements for the alteration of wetlands in the state.⁷⁹ Tennessee's current wetlands program is fairly comprehensive; however, legislation proposed following the Supreme Court's *Sackett* majority opinion signals that efforts to reduce the protection of state wetlands are occurring.⁸⁰

The state Department of Environment and Conservation (TDEC) has developed a state-specific Rapid Assessment Methodology (TRAM) protocol for state wetland resource value assessment. TRAM is a tool that, according to TDEC, provides "a method to quickly assess existing wetland resource value, which has aided in assessing the ecological consequences of CWA Section 401 and [state-level] permitting decisions."⁸¹ As of this report, TDEC is developing a revised TRAM for scoring wetland functional quality.⁸²

Tennessee's wetland protection strategy also includes a few restoration initiatives, across multiple state agencies. The initiatives include a Stream and Wetlands Restoration Grant Program (funded through

⁷⁵ LA. STAT. ANN. §§ 49:214.5.1–49:214.5.2 (2024).

⁷⁶ *Id.* at § 49:214.5.3.

⁷⁷ Interview with Matt Rota, Senior Policy Director, Healthy Gulf (July 19, 2024).

⁷⁸ *Id.*

⁷⁹ Personal Communication with Jonathon Burr, Tenn. Dep't of Env't & Conservation (Aug. 16, 2024); TENN. COMP. R. & REGS. 0400-40-07.04 (2019); TENN. CODE ANN. §§ 69-3-102–148 (2024).

⁸⁰ S.B. 0631, 113th Gen. Assemb., Reg. Sess. (Tenn. 2023); H.B. 1054, 113th Gen Assemb., Reg. Sess. (Tenn. 2023).

⁸¹ Personal Communication with Jonathon Burr, Tenn. Dep't of Env't & Conservation (Aug. 16, 2024).

⁸² *Id.*

damages recovered by the TDEC Commissioner for violations of the enabling state Water Quality Control Act), voluntary restoration projects funded by the state’s Department of Agriculture, and a wetlands acquisition fund administered by the state Wildlife Resources Agency.⁸³

vi. Wisconsin

Wisconsin has a comprehensive regulatory framework for regulating state wetlands, including wetland-specific water quality standards and a permitting regime for the discharge of dredge and fill material into nonfederal wetlands.⁸⁴ However, even though Wisconsin has strong wetlands laws, at least some wetlands are likely to lose their state protection after they lose federal protection; this is because Wisconsin exempts some activities in “nonfederal wetlands” from its state permitting requirements.

Wisconsin supplements its regulatory regime through wetland restoration, mapping, monitoring and assessment, research, education, and outreach. Wisconsin’s wetland conservation program includes projects involving wetland restoration, enhancement of degraded wetlands, and management of existing wetlands. In addition to the existing wetland conservation general permit, Wisconsin is now developing a general permit for wetland hydrologic restoration. This will help restore Wisconsin’s wetlands, streams, and floodplains, returning their hydrology to a natural condition, and might be particularly useful to the restoration of surface water connections important after *Sackett*.

Wisconsin also provides funding for wetland restoration through multiple channels, including a pre-disaster flood resilience grant program.⁸⁵ Another important component of Wisconsin’s wetland regulatory framework is the Wisconsin Wetland Study Council. Created in 2017 by law, the Council provides a place for diverse stakeholders to find common ground and resolve disagreements regarding, among other topics, the state’s wetland management.⁸⁶

III. Navigating the Post-Sackett Landscape: A Patchwork of State Regulatory Approaches

In a post-*Sackett* landscape, existing regulatory frameworks, political considerations, public buy-in, and potential economic constraints prohibit a one size-fits-all approach toward wetland protection across the six selected basin states. The following findings are intended to help shed light on the current post-*Sackett* landscape and what it might mean for states seeking to protect their surface water quality in light of diminished federal jurisdiction.

States generally did not report experiencing immediate, on-the-ground impacts resulting from *Sackett*. This is likely attributable to a variety of factors, including that states are largely in a holding pattern while the federal Agencies develop their practice and additional implementation guidance on the Conforming Rule, which is not uniformly in effect across the country due to pending litigation. Additional factors that may help explain the states’ reporting on this issue may include: 1) backlogs of permit applications for pre-*Sackett* projects, which could temporarily prevent state permitting agencies from developing up-to-date observations on post-*Sackett* impacts; and 2) premature, or non-existent,

⁸³ *Stream & Wetland Restoration Grant*, TENN. DIV. OF WATER RES., <https://www.tn.gov/environment/about-tdec/grants/water/stream-wetland-restoration.html> (last visited Aug. 5, 2024); *Land and Water Stewardship Section*, TENN. DEP’T OF AGRIC., <https://www.tn.gov/agriculture/farms/conservation.html> (last visited Aug. 5, 2024); TENN. CODE ANN. § 11-14-401 (2024).

⁸⁴ WIS. ADMIN. CODE NR §§ 103, 299, 299.04 (2024); WIS. STAT. § 281.36(3b)(b) (2024).

⁸⁵ WIS. STAT. § 323.63 (2024).

⁸⁶ *Id.* at § 15.347.

data sets on pre- versus post-*Sackett* wetlands projects. Moreover, the full scope of unregulated impacts may only be visible to states with comprehensive, state-wide monitoring and mapping programs. Another factor, identified through our research on Wisconsin's wetland program, may be that states are not experiencing immediate, on-the-ground impacts from *Sackett* due to a lack of awareness among landowners and developers about the ruling and its implications for wetlands located on their properties.

States with narrower regulatory definitions and/or a limited application of state-level wetlands protections are more vulnerable to the recent shift in WOTUS coverage.

- Louisiana's only statewide wetland program is state implementation of the CWA. Coastal wetland protection and restoration are the centerpiece of the state's wetland management activities. While Louisiana has a relatively comprehensive coastal permitting regime, protections for freshwater and inland wetlands are absent from the state's wetland management approach. Because some of these wetlands may be newly non-jurisdictional under the federal CWA regime, freshwater and inland wetlands may receive no regulatory protection at either the state or federal level.
- Arkansas does not have a statewide wetland regulatory scheme that goes beyond the state's role in implementing the federal Clean Water Act. However, in Arkansas, where 90% of the land is privately owned, some of the state's most effective wetland protection initiatives involve public-private partnerships to conserve or create wetlands, which may help maintain protections for some wetlands that have lost regulatory coverage.
- Wisconsin has a generally comprehensive state regulatory program for its state wetlands, including certain permitting requirements for the discharge of dredged or fill material into state wetlands. However, the state has carved out exemptions from its state regulatory program, including for non-WOTUS wetlands.⁸⁷ (For this program, the Army Corps, not the state, determines whether a wetland is WOTUS.⁸⁸) Thus, non-WOTUS wetlands receive no regulatory protection at either the state or federal level. Because the scope of non-WOTUS wetlands has expanded in the wake of *Sackett*, the amount of activities covered by the state's permit requirement is expected to decrease.

Legislation proposed following the *Sackett* opinion in some of the surveyed states may substantially rearrange the structure of their waters and wetlands program.

- In Illinois, wetlands, including non-WOTUS wetlands, are generally protected from adverse impacts resulting from *state-funded* activities only.⁸⁹ While Illinois has a permitting regime for activities occurring in floodways, the state does not currently have a comprehensive wetland permitting regime for all non-WOTUS waters.⁹⁰

⁸⁷ *Id.* at § 281.36.

⁸⁸ WIS. DEP'T OF NAT. RES., BUREAU OF WATERSHED MANAGEMENT PROGRAM GUIDANCE: WATERWAY AND WETLAND PROTECTION, NONFEDERAL WETLAND EXEMPTIONS (Nov. 9, 2018), <https://dnr.wisconsin.gov/sites/default/files/topic/Wetlands/3500-2018-02FinalNonfederalWetland.pdf>.

⁸⁹ 20 ILL. COMP. STAT. § 830/1-3 (2024).

⁹⁰ 615 ILL. COMP. STAT. § 5/18f (2024).

As of this report, however, the Illinois General Assembly has proposed legislation (Senate Bill 771) that would reinstate most pre-*Sackett* CWA protections for wetlands.⁹¹ Senate Bill 771, which will be considered in the November 2024 Veto Session, proposes to authorize the Illinois Department of Natural Resources to develop a state dredge-and-fill permitting program for activities impacting certain non-WOTUS waters and waters not already protected under state law.⁹²

- Tennessee, where the state wetlands permitting regime is considered to be fairly comprehensive, has introduced legislation that would define state “wetlands” in the same manner as the federal WOTUS definition.⁹³ This would impact the state’s statutory backstop for impacts to state wetlands. As of the date of this report, this proposal is being studied by the state water resources agency; however, if a measure of this type passes in the next legislative session, Tennessee’s regulatory regime for wetlands protection will reduce in scope.

Some of the surveyed states have opportunities to strengthen components of their wetlands management strategies under existing statutory mandates.

- Iowa’s Department of Natural Resources (IDNR) is directed to develop a protected wetlands permitting regime. This mandate requires IDNR to: 1) designate and inventory protected wetlands and marshes throughout the state; and 2) develop a permitting program for the draining of such protected wetlands.⁹⁴ State law establishes certain mitigation requirements under this program.⁹⁵ IDNR is additionally required to develop and administer a wetlands and conservation easement acquisition program in coordination with the Iowa Department of Agriculture and Land Stewardship.⁹⁶

However, according to a 2021 state audit, IDNR has not fulfilled these statutory directives.⁹⁷ At the time of the audit—when the 2020 Navigable Waters Protection Rule was in effect in Iowa—IDNR submitted that it did not develop the program because then-current CWA programs offered the same or more protection than state law.⁹⁸ In theory, by standing up a program to fulfill the statutory mandate, IDNR could use it to offer some protection to non-WOTUS wetlands.

- Arkansas state law requires the state Department of Agriculture to implement a mitigation banking program for the purpose of promoting wetland protection, improving cooperative efforts in the restoration and management of wetlands, and encouraging a predictable and

⁹¹ S.B. 0771, 103rd Gen. Assemb. (Ill. 2024).

⁹² *Id.*

⁹³ S.B. 0631, 113th Gen. Assemb., Reg. Sess. (Tenn. 2023); H.B. 1054, 113th Gen Assemb., Reg. Sess. (Tenn. 2023).

⁹⁴ IOWA CODE §§ 456B.1(4), 456.12(1), 456.13(2)(a)–(b) (2024).

⁹⁵ *Id.* at § 456B.13(2).

⁹⁶ *Id.* at § 456B.11.

⁹⁷ IDNR 2021 Audit, *supra* note 67.

⁹⁸ *Id.*

efficient regulatory framework for mitigation.⁹⁹ Through the program, the state acquires degraded wetlands, restores wetland function, and sells the credits to CWA § 404 permittees¹⁰⁰.

However, the implementing regulations—promulgated by the Arkansas Natural Resources Commission—were repealed in accordance with a 2017 state law that sunsets regulations after they have been in effect for 24 years.¹⁰¹ As of this report, no new regulations have been issued; however, the enabling law remains in effect. Reactivating this mitigation banking program may help strengthen a holistic wetland management approach in Arkansas—a state with an otherwise WOTUS-dependent wetlands regulatory program.

IV. Other Ways States are Protecting Their Waters and Wetlands

As demonstrated by the state summaries above, most states manage their waters and wetlands using a variety of strategies that include both regulatory and nonregulatory measures. Planning, coordination, and educational efforts may take on additional importance in states without state-level regulatory programs, and some states have adopted approaches to coordination and messaging that are helping to bolster their programs—and may serve as models for other states.

States may consider establishing interagency coordination groups to advise on decisions impacting water and wetland management.

Our research identified two states that have authorized creation of a unified advisory body to inform wetland management decisions at the state level. Though the following two examples differ in meaningful ways, both may be helpful to other states considering whether and how to establish a central coordinating body that can help resolve the complex issues that arise during implementation of statewide wetland programs.

- In 2017, Wisconsin authorized the creation of a Wetlands Study Council (Council), which consists of nine Governor-appointed members that represent a diverse array of interests, including, but not limited to, the business community, wetland experts, waterfowl organizations, municipalities, and rural and agricultural communities.¹⁰² The Council researches and develops statutory and regulatory recommendations for state officials on a variety of wetland-related subject matter, such as wetland mitigation programs, practicable alternatives, stormwater management ponds, incentive programs, wetland trainings, and financing of wetland mitigation requirements.¹⁰³ The Council's Integrated Watershed Management Working Group, for example, assesses how current state wetland, waterway, and stormwater management policies pose barriers to a more watershed-based approach to wetlands, stormwater, and flood control

⁹⁹ ARK. CODE ANN. § 15-22-1002 (2024).

¹⁰⁰ *Id.* at § 15-22-1104–1106.

¹⁰¹ To Establish a Sunset Date for State Agency Rules; and to Establish a Process for a State Agency Rule to Exist Beyond the Sunset Date, ARK. ACT 781 (2017).

¹⁰² WIS. STAT. § 15.347 (2024).

¹⁰³ *Id.* at § 15.347(b).

projects, and makes recommendations to alleviate those barriers.¹⁰⁴ Recently, the Council considered the potential impacts of the *Sackett* decision on Wisconsin’s wetlands.¹⁰⁵

- The Louisiana legislature has established the Governor’s Advisory Commission on Coastal Restoration, Protection, and Conservation, which was established to: advise the governor on integrated coastal activities; provide a forum for coordinating activities and information across federal, state, and local government agencies, conservation organizations, and the private sectors; identify and resolve conflicts among stakeholders; review programs, conditions, trends, and scientific and engineering findings; and assist in identifying funding sources.¹⁰⁶ While this advisory commission does not opine on regulatory matters, it nevertheless serves as a central and coordinated point of contact for the governor on state wetland management decisions.

States may find success scaling up wetland conservation or restoration through programs that address community needs, like flood mitigation.

Wetlands are critical ecosystems that provide many important benefits for people and wildlife, and are integral to local communities’ culture and economy. Wetlands benefits include flood protection, carbon storage, and water quality improvement and protection. They also provide hunting, fishing, and recreational opportunities that can be an important part of the local economy. Programmatic approaches that scale up wetland conservation or restoration through programs that address community needs may be popular and attract broad support among decision-makers and the public.

For example, both Wisconsin and Iowa have implemented programs that identify and fund wetland restoration projects tied to flood resilience. These programs are increasingly important for communities seeking to address the growing impacts of extreme weather worsened by climate change.

- Wisconsin’s pre-disaster flood resilience grant program funds assessment grants that help the state better understand flood flows, erosion hazards, and vulnerabilities, and identify opportunities to restore wetlands, streams, and floodplain hydrology that can address flood hazards. The program also funds implementation grants for hydrologic restoration projects like those that restore streams, floodplains, and wetlands.
- In Iowa, among other state initiatives created to address flooding, the Iowa Watershed Approach is a multi-stakeholder approach designed to reduce flood risk, improve water quality, and increase resilience in the state. The program created Watershed Management Authorities that were tasked with: assessing hydrologic conditions; creating watershed plans to minimize

¹⁰⁴ See, e.g., WIS. WETLAND STUDY COUNCIL’S INTEGRATED WATERSHED COMM., RECOMMENDATION TO DEVELOP GUIDANCE FOR STORM AND FLOOD WATER CONTROL PROJECTS (Jan. 20, 2022), https://dnr.wisconsin.gov/sites/default/files/topic/Wetlands/studyCouncil/WSC_Recommendation_Guidance_Integrated_Watershed.pdf.

¹⁰⁵ WIS. WETLAND STUDY COUNCIL, Meeting Agenda (Sept. 24, 2023), https://dnr.wisconsin.gov/sites/default/files/topic/Wetlands/studyCouncil/WSC_Agenda_Sept_2023.pdf.

¹⁰⁶ LA. STAT. ANN. § 49:214.4.1 (2024).

flood risk and improve water quality; and implementing flood resilience projects including non-structural strategies, constructed wetlands, floodplain restoration, and buffer strips.¹⁰⁷

V. *Sharing successes and failures could help inform program evolution over time and across states.*

ELI last conducted a comprehensive review of all 50 state wetland programs from 2003 to 2008. In the intervening years, much has changed—new science has emerged informing new monitoring and restoration methodologies, new technologies have been developed that create new possibilities in wetland management, and new WOTUS rules have had vastly different interpretations of the reach of the CWA.

State programs have likewise evolved. New programs have emerged, and some of the 2008-era programs have been either expanded or abandoned. Some states have enhanced existing or created new monitoring programs, as is the case in Iowa. Some states developed new wetland-specific water quality criteria (*e.g.*, Iowa and Tennessee). New restoration programs have emerged (*e.g.*, the Louisiana CPRA released its first Master Plan in 2008). Wisconsin’s Wetlands Study Council, described above, was created in 2017 and is a transformative, cross-cutting assembly of stakeholders that develops statutory and regulatory recommendations for the state, assesses policy barriers, and researches wetland restoration and training programs. Since 2008, the Wisconsin legislature has also enacted a number of statutory revisions related to wetlands management, such as revised permitting standards and processes, the establishment of mitigation requirements for individual permits, and creation of the In-Lieu Fee subprogram.¹⁰⁸

We also identified programs that have been cut or curtailed. For example, Iowa’s IOWATER volunteer community monitoring program was discontinued for financial reasons, and Arkansas’s Multi-Agency Wetland Planning Team was shelved. Similarly, while never formally disbanded, Illinois’ Interagency Wetlands Committee has gradually become less active since its establishment in 1989.

Except for some regulatory changes in Wisconsin, none of the states we reviewed have substantially updated their state-level wetland regulatory programs since 2008.¹⁰⁹ This is perhaps not surprising, as most states, even those with existing state permitting programs, have relied on a strong partnership with federal government to protect wetland resources.

A better understanding of: 1) how states are evaluating the success of their programs and; 2) whether that information is used to justify or support the programmatic changes would be helpful for states across the basin and the country as they grapple with how to move forward, post-*Sackett*. Such an exchange of information could allow state programs to study and, ideally, improve upon the programmatic successes and failures of their state counterparts.

¹⁰⁷ *Iowa Watershed Approach*, IOWA WATERSHED APPROACH, <https://iowawatershedapproach.org/> (last visited Sept. 30, 2024) (the Iowa Watershed Approach was created in 2016 under a five-year National Disaster Resilience grant from the U.S. Department of Housing and Urban Development. This grant has now expired).

¹⁰⁸ S.B. 368, 2011 Leg., Reg. Sess. (Wis. 2011).

¹⁰⁹ There is proposed legislation related to new wetland protection regimes in Illinois and Tennessee, but the laws authorizing the changes have not been enacted as of this report’s publication.

State wetland program plans—initiated by EPA in 2009—could provide a mechanism through which states could routinely evaluate program success and challenges and chart a path forward. For example, Tennessee’s Wetland Program Plan describes a process to evaluate goals and objectives and reflect on progress.¹¹⁰ The plan also includes an explicit regulatory objective to “Evaluate Regulatory Activities to Ensure Environmental Results.”¹¹¹ Other kinds of state planning efforts also provide opportunities.

VI. Conclusion

Through its majority opinion in *Sackett*, the Supreme Court unraveled the nearly 50-year-old federal jurisdictional hook for several CWA programs. With the decline in federal regulatory coverage for wetlands, state-level initiatives to maintain and enhance wetlands protections have taken center stage. States without existing authorities to fill in gaps in regulatory coverage—specifically for wetlands that are no longer WOTUS—must decide whether and how to weave a fabric of protection for surface water quality comparable to the pre-*Sackett* landscape.

For the Mississippi River Basin, like watersheds across the country, the fabric of protection is stitched together by the collective efforts of the individual basin states. As demonstrated in our 2024 study of selected state approaches, each state weaves together a unique array of regulatory and nonregulatory measures, such as permitting regimes, monitoring and assessment programs, and restoration initiatives, to form a tapestry of basin-wide stewardship over shared water resources and water quality.

All six states we reviewed have designed and implemented multi-faceted approaches to wetlands protection, albeit to widely varying degrees. Some methods of surface water quality protection include strict command-and-control type levers, like regulatory and permitting regimes for activities occurring in specified state waters. Other, less prescriptive methods include but are not limited to voluntary wetland restoration funding, training opportunities, and educational initiatives.

The fabric of water quality preservation throughout the Mississippi River basin—decentralized yet interrelated—will depend on the sum of its parts. While some states, like Wisconsin, have fairly comprehensive coverage, other states face ongoing challenges in securing state-level protections for non-WOTUS wetlands. Ultimately, the Basin states’ current and future approaches to state-level wetland protection—in addition to their local, regional, and interstate strategies—will determine the full extent of *Sackett’s* impact on the region in years to come.

¹¹⁰ TENN. DEP’T OF ENV’T & CONSERVATION, TENN. WETLAND PROGRAM PLAN 2019-2025 7 (May 2019).

¹¹¹ *Id.* at 28–29.