

October 17, 2023

Senator Tom Carper
Chairman
Committee on Environment and Public Works
United States Senate
410 Dirksen Senate Office Building
Washington, D.C. 20510

Senator Shelley Moore Capito
Ranking Member
Committee on Environment and Public Works
United States Senate
170 Russell Senate Office Building
Washington, DC 20510

RE: Senate Environment and Public Works (EPW) Committee Hearing, “Examining the Implications of Sackett v. Environmental Protection Agency for Clean Water Act Protections of Wetlands and Streams”

Dear Chairman Carper and Ranking Member Capito,

On behalf of American Whitewater, Outdoor Alliance, and Outdoor Industry Association, we write to thank you for holding a hearing to examine the impacts of the Supreme Court’s decision in Sackett v. EPA, and to encourage prompt action to restore the Clean Water Act’s vital role in protecting the outdoor recreation economy, public safety, and universal access to clean and healthy rivers, lakes, and oceans for all Americans.

About American Whitewater

American Whitewater is a national 501(c)(3) non-profit organization with a mission to protect and restore America’s whitewater rivers and to enhance opportunities to enjoy them safely. Our members are primarily conservation-oriented kayakers, canoeists, and rafters that enjoy exploring whitewater rivers. As outdoor enthusiasts that spend time on and in the water, our members have a direct interest in the health and quality of our nation’s waterways—with particular interest in headwater streams and wetlands. As whitewater enthusiasts, our members depend on the rivers and streams they enjoy being free from pollution, and we support strong Clean Water Act protections for these waters.

About Outdoor Alliance

Outdoor Alliance is a coalition of ten member-based organizations representing the human powered outdoor recreation community. The coalition includes American Whitewater, Access Fund, American Canoe Association, International Mountain Bicycling Association, Winter

Wildlands Alliance, The Mountaineers, the American Alpine Club, the Mazamas, Colorado Mountain Club, and Surfrider Foundation and represents the interests of the millions of Americans who climb, paddle, mountain bike, backcountry ski and snowshoe, and enjoy coastal recreation on our nation's public lands, waters, and snowscapes.

About Outdoor Industry Association

Based in Boulder, Colorado, with offices in Washington, D.C., Outdoor Industry Association (OIA) is a catalyst for meaningful change. A member-based collective, OIA is a passionate group of business leaders, climate experts, policy makers and outdoor enthusiasts committed to sustainable economic growth and climate positivity while protecting – and growing access to – the benefits of the outdoors for everyone. For more than 30 years, OIA has catalyzed a thriving outdoor industry by supporting the success of every member company across four critically aligned areas: market research, sustainability, government affairs, and inclusive participation. OIA delivers success for its members through education, events, and business services in the form of solutions and strategies, consultation, collaboration, and opportunities for collective action. For more information, visit [outdoorindustry.org](https://www.outdoorindustry.org)

Outdoor recreation is a vital aspect of American life that depends on clean water

We collectively write to the Committee representing the outdoor recreation interests of millions of Americans who are drawn to water to relax, exercise, connect with nature, and work in the outdoor recreation industry. We ask the Committee to consider the importance of clean water to a broad spectrum of outdoor recreation interests. A child splashing in a backyard stream is participating in outdoor recreation, as is a family enjoying fishing to supplement their diet, as is a multi-million dollar rafting business, and a community investing in riverside trails to attract and benefit residents. In each case, people connecting to our nation's waters depend on the quality of those waters. Americans have built livelihoods, families, and communities around rivers and other waters based on Congress's promise of clean water that is embodied by the Clean Water Act. Now, with a recent Supreme Court decision hamstringing that Act, we posit to the Committee that we've likely reached *peak clean water* in the United States – that without Congressional action future generations will watch our waters get dirtier, more dangerous to public health, and less valuable as assets for the outdoor recreation economy.

Sackett threatens the \$454 Billion outdoor recreation economy

The US Bureau of Economic Analysis found that in 2021: "Boating/fishing was the largest conventional [outdoor recreation] activity for the nation at \$27.3 billion in current-dollar value added and was the largest conventional activity in 27 states and the District of Columbia."¹ Beneath this impressive figure are the livelihoods of many Americans and the fabric of many communities that span our Country. A significant portion of the \$454 Billion outdoor recreation economy requires clean water in our rivers, lakes, estuaries, and oceans. Sackett v. EPA will damage this economy. As wetlands and small streams are drained, filled, and otherwise cut-off

¹ See: <https://www.bea.gov/news/2022/outdoor-recreation-satellite-account-us-and-states-2021>

from rivers due to the *Sackett* decision, it is widely understood that streams will become flashier, with higher high flows and lower low flows, with fewer of the predictable moderate flows that are ideal for fishing and paddling. In addition, pollution discharges into non jurisdictional ephemeral or intermittent streams and wetlands will flush downstream following rains, just when many paddlers head to the rivers. That pollution will cascade through communities downstream.

It is worth noting that even now, at what is perhaps peak clean water, poor water quality impacts water-based segments of the outdoor recreation economy: there are fish consumption warnings, water quality warnings at beaches, and people avoid recreating on polluted rivers. With *Sackett* now in place, the shaky foundation of the water-based outdoor recreation economy is further weakened. Congress should protect those people and businesses that rely on clean water for their livelihoods from the damage that *Sackett* is almost certain to cause.

Sackett threatens the public health of Americans engaged in water-based outdoor recreation

Anyone who has raised a child will attest that it is impossible to keep kids out of the water, and equally impossible to keep water out of kids. Splashing and playing in a local creek or lake is one of the great summertime joys of childhood, and children invariably end up with water in ears, eyes, mouths, and noses. Children are perhaps the most vulnerable population to the impacts of unsafe surface waters.

Most whitewater rivers and streams can only be descended during higher-than-normal flows caused by rainfall or during snowmelt. Surface runoff and pollution, and specifically non-point source pollution, often spike during these times.² Additionally, whitewater boating requires submersion as paddlers get splashed, flip over, and occasionally swim. Likewise surfers spend hours in the water, diving beneath waves and being tossed about in the surf after exciting rides. And of course swimming, in our warming world, is simple and affordable recreation that keeps Americans cool, healthy, and happy.

Immersion in water while in nature is a profound pleasure for many Americans, but not if the water that gets in our mouths, ears, nose, and any cuts is polluted. Strong regulatory protections for surface waters are essential to protect paddlers and other river users from getting sick. Our nation's waters can already make people sick, but *Sackett* will make water bodies in the US less safe, and the safety of our waters less transparent due to reduced permitting.

Sackett raises equity and environmental justice concerns regarding access to clean water for outdoor recreation

The economic, public safety, and property impacts of *Sackett* will not be equitably distributed. Previously a universal right protected by the Clean Water Act, *Sackett* has shifted access to

² An Approach for Using Load Duration Curves in the Development of TMDLs, EPA 841-B-07-006, August 2007, Document posted at: <https://www.epa.gov/sites/default/files/2015-07/documents/2007_08_23_tmdl_duration_curve_guide_aug2007.pdf>.

clean water to state-by-state, stream-by-stream determinations. It is anticipated that some states will choose relatively weak standards that allow degradation of many wetlands and streams, and citizens of those states and downstream states will suffer the consequences, while citizens in other states will continue to enjoy relatively safe and clean water. Within states, some specific wetlands and streams will be deemed non-jurisdictional at the request of land-owning and commercial permit applicants, while the effects of those permits will be felt by many other downstream Americans who simply want access to clean water in our nation's shared rivers, lakes, and oceans.

For many Americans in rural and urban areas alike, their local river is the only affordable and available place for them to swim and engage in subsistence fishing. These existing and beneficial uses of rivers, protected under the Clean Water Act in the decades leading up to *Sackett*, have been available to all Americans, including those that can't readily afford a pool membership or store-bought seafood. They are also among the uses of our nation's rivers that render people most vulnerable from a public health perspective.³ This is one of many reasons that the jurisdictional scope of the Clean Water Act needs to be science-based and actually result in fishable and swimmable waters.

Because *Sackett* renders many streams and wetlands non-jurisdictional that discharge into larger waterways following rain or snowmelt, the Clean Water Act will no longer protect vulnerable populations downstream without congressional action. Congress should ensure all Americans have equal access to clean water and safe rivers, lakes, and oceans.

The Clean Water Act requires implementation based on science to meet its important goals, and Sackett is not based on science.

Sackett removes many wetlands and streams from decades of federal Clean Water Act protection based on views held by the Court that eschew the science of how wetlands and rivers work. Water's movement is a process best predicted through well-established science,⁴ and Congress needs to restore the role of science in protecting the waters that flow to our treasured rivers, lakes, and oceans. Just as buildings constructed without science are prone to topple, so too rivers managed without science will be prone to unravel. In turning away from science, *Sackett* makes meeting the important goals of the Clean Water Act improbable if not impossible.

Examples of likely impacts of Sackett highlight the need for action

It is likely that *Sackett* will have cumulative and chronic impacts on rivers for future generations without congressional action. We offer three representative examples of impacts of *Sackett* that we foresee.

³ Nicole, W., 2013, Meeting the Needs of the People: Fish Consumption Rates in the Pacific Northwest, Environmental Health Perspectives, Vol. 121, No. 11-12, <<https://doi.org/10.1289/ehp.121-A334>>.

⁴ Environmental Protection Agency, Office of Research and Development., 2015, *Connectivity of Streams & Wetlands to Downstream Waters: A Review & Synthesis of the Scientific Evidence*. <<https://cfpub.epa.gov/ncea/risk/recordisplay.cfm?deid=296414>>

Example 1: Florida Everglades

The *Sackett* decision could have serious consequences for the Florida Everglades, a unique and vital ecosystem in southern Florida. This "River of Grass" with its slow-moving waters, vast wetlands, and rich biodiversity is under threat. The potential limitation of the EPA's authority could result in some Everglades wetlands falling outside regulatory oversight, leading to increased pollution and nutrient runoff that could harm water quality, negatively impacting the overall ecosystem, as well as recreational opportunities. Paddling and fishing, popular activities in the Everglades, could face challenges in access and navigation due to potential disruptions in water flow patterns and impacts on fish populations. Additionally, the Everglades support a variety of wildlife, over 2,000 species, including endangered species like the Florida panther and American crocodile. Wetland destruction and adverse water quality could displace and harm these species, making it more difficult for enthusiasts and conservationists to observe and appreciate these creatures in their natural habitat. Protecting the Everglades' wetlands is vital for preserving this iconic ecosystem, Florida's \$33B outdoor economy, and its role in providing recreational opportunities and environmental conservation in southern Florida.

Example 2: Franklin, New Hampshire

The *Sackett* decision will adversely affect water quality and the outdoor recreation economy in Franklin, New Hampshire, a low-income Environmental Justice Community with high unemployment. The community recently celebrated the opening of a whitewater park that is a catalyst for economic renewal in a struggling community on the banks of the Winnepesaukee River. Upstream from the whitewater park near the Winnepesaukee River is a large wetland area draining into the river. The wetlands are separated by a roadway and flows are intermittent during the summer months. Adjacent to the wetland area is industrial and commercial development. Water quality on the Winnepesaukee in Franklin and in neighboring communities is affected by flows from the wetland area, and there have been periodic water quality issues on the Winnepesaukee in past years. As a result of the *Sackett* decision, this wetland area may be outside the scope of the EPA's authority to regulate, having an adverse impact on recreation opportunities and the outdoor recreation economy in Franklin.

Example 3: San Rafael River, UT

Like all but the largest rivers in the arid Southwestern United States, the San Rafael River has no surface water flow for significant parts of the year. Following rains though, it swells to a full-fledged river, carrying sediment – and whitewater paddlers – downstream. Under the *Sackett* decision, countless rivers like the San Rafael and their tributaries could be deemed non-jurisdictional and not subject to the Clean Water Act. Materials and pollution from unregulated discharges into these rivers could simply sit in the riverbed until rains come and flush them downstream. These flow pulses are precisely when paddlers flock to the rivers, and also when many ecological and geomorphological processes occur. Flows come to desert rivers as surely as tides come to the beach, even though like the beach they sometimes look like a dry terrestrial environment. Desert rivers are indeed rivers, and must be protected as such under the Clean Water Act.

Conclusion

Congress must act to ensure the Clean Water Act fills the vital role for the next generation that it has since its passage a half-century ago. The *Sackett* decision will end the universal access to clean and healthy rivers the American public has enjoyed, damage the outdoor recreation economy, and put Americans at risk of pollution and flooding. We ask that Congress restore the central role of science in determining which waters need to be subject to the Clean Water Act to protect the lives and livelihoods of all Americans that live downstream of others. Our rivers, lakes, and oceans are shared collective treasures that greatly enrich our lives. We must act to ensure we and future generations will continue to enjoy the many benefits of those treasures.

Sincerely,



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