



National Association of Wetland Managers

Hot Topics Webinar Series

June 14, 2023

Implications of the Supreme Court's Sackett Decision for Protection of Wetlands and Waters

JON DEVINE, NATURAL RESOURCES DEFENSE COUNCIL

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PAT PARENTEAU, VERMONT LAW SCHOOL

Please Note

The views expressed here today are those of the panelists in their personal capacity, and do not necessarily represent the organizations for which they work.



Agenda

- 3:00pm – 3:10pm Welcome & Introductions
- 3:10pm – 3:20pm Overview of the Sackett Decision
- 3:20pm – 3:50pm Panel Discussion
- 3:50pm – 4:20pm Audience Q&A
- 4:20pm – 4:30pm Wrap Up & Final Thoughts



Technical Difficulties

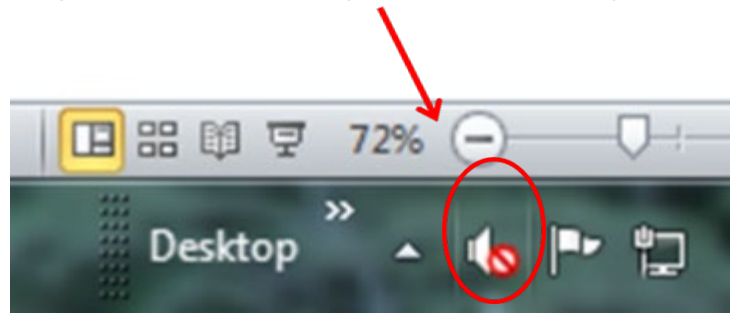
If you have any technical difficulties during the webinar you can send us a question in the webinar question box or call Laura at (207) 892-3399.



Webinar Tech Tips

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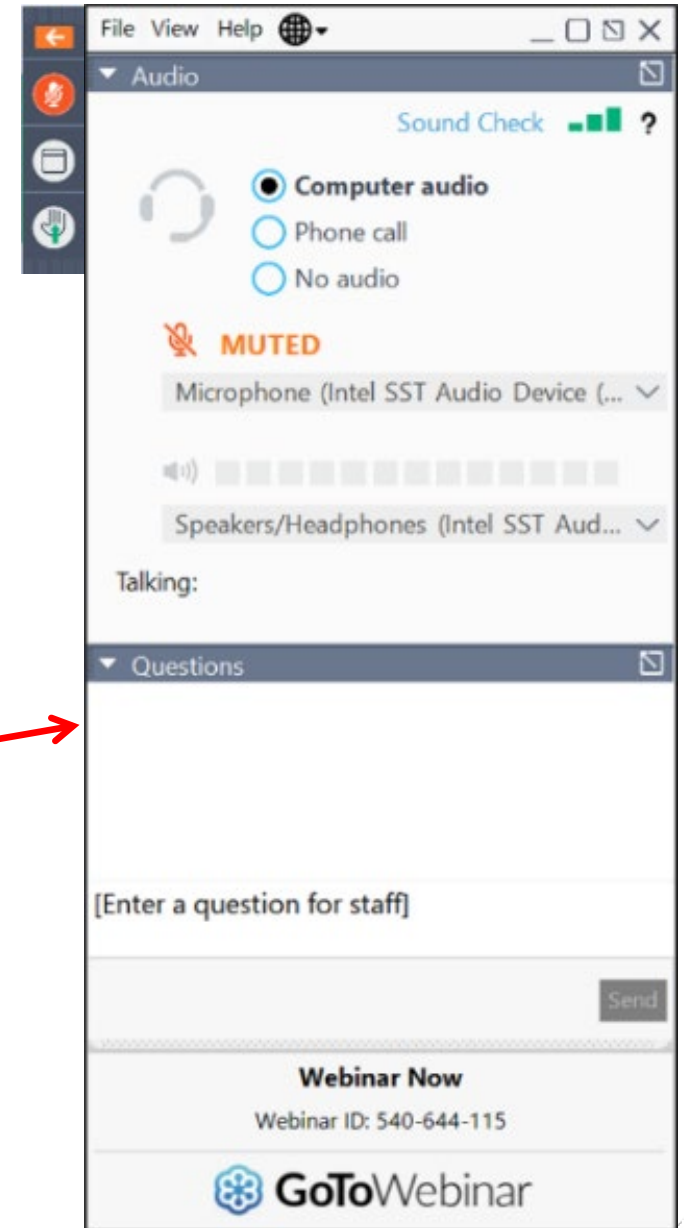


Questions?

Please submit your questions for the presenters via the question box.

TIP:

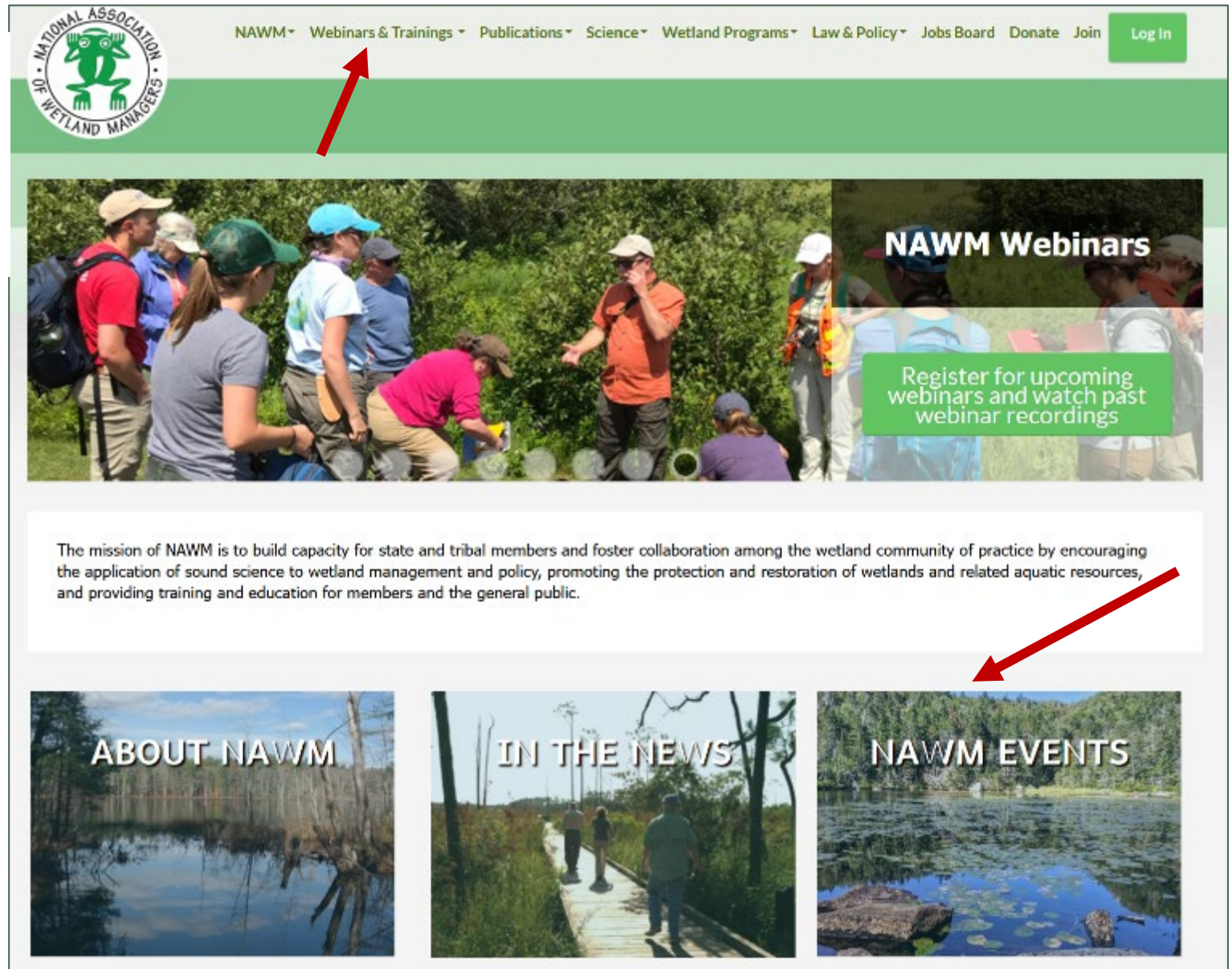
Close out other non-essential programs on your desktop.



NAWM WEBINARS

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The screenshot shows the NAWM website homepage. At the top left is the NAWM logo, a green frog in a circle with the text "NATIONAL ASSOCIATION OF WETLAND MANAGERS". To the right of the logo is a navigation menu with the following items: "NAWM", "Webinars & Trainings", "Publications", "Science", "Wetland Programs", "Law & Policy", "Jobs Board", "Donate", "Join", and a "Log In" button. A red arrow points from the "Webinars & Trainings" menu item down to a large banner image. The banner image shows a group of people in a field, with a green box overlaid on the right side containing the text "NAWM Webinars" and "Register for upcoming webinars and watch past webinar recordings". Below the banner is a white box containing the mission statement: "The mission of NAWM is to build capacity for state and tribal members and foster collaboration among the wetland community of practice by encouraging the application of sound science to wetland management and policy, promoting the protection and restoration of wetlands and related aquatic resources, and providing training and education for members and the general public." Below the mission statement are three image-based navigation buttons: "ABOUT NAWM" (with a wetland landscape image), "IN THE NEWS" (with a wooden boardwalk image), and "NAWM EVENTS" (with a pond image). A red arrow points from the "NAWM EVENTS" button up to the "Webinars & Trainings" menu item.



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NEW - All Certificates must be claimed **no later than 60 days** from the live presentation.

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Today's Speakers



Marla Stelk (moderator)
NAWM



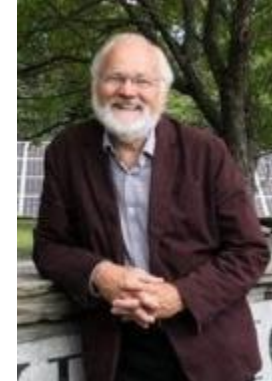
Donna Downing
NAWM



Jon Devine
NRDC



Timothy Hoffman
NY State AG's Office



Pat Parenteau
Vermont Law School



In Memory of Steven Samuels



Association of State Wetland Managers
Hot Topics Webinar Series

What's Next for Waters of the U.S. (WOTUS)

February 9, 2018
10:30 am - 12:00 pm Eastern

Webinar Presenters:

- Roy Gardner, Stetson University, College of Law
- Stephen Samuels, Retired from the U.S. Department of Justice

Part 1: Introduction: Jeanne Christie, Association of State Wetland Managers
Presenter: Stephen Samuels, Retired from the U.S. Department of Justice

The screenshot shows a navigation menu on the right with four items: 'What's Next for Waters of the U.S. (WOTUS)', 'Urban Watersheds Initiative', 'Current and Potential Litigation', and 'Questions/Discussion'. Each item has a play button icon.





National Association of Wetland Managers

Overview of the *Sackett* Decision

DONNA DOWNING, NAWM SENIOR LEGAL POLICY ADVISOR

WEDNESDAY, JUNE 14, 2023

Background on Waters of the United States

- 1) Clean Water Act (CWA) programs apply to “navigable waters,” defined as “waters of the United States including the territorial seas.”
- 2) The CWA does not define “waters of the United States,” (WOTUS) leaving the details of this key threshold term to EPA and the Army Corps to define via regulation.
- 3) EPA and the Army Corps have defined WOTUS several times, resulting in many legal challenges.
- 4) The latest challenge was before the U.S. Supreme Court in *Sackett vs EPA*.



What Did *Sackett* Hold?

- 1) *Sackett* focused on wetlands, but the decision affects jurisdictional status of all types of waters.
- 2) A relatively permanent stream or other body of water connected to interstate traditional navigable waters is considered a WOTUS.
- 3) Wetlands are WOTUS if they are “indistinguishable” from a WOTUS to which they are adjacent and have a “continuous surface connection” to that water.
- 4) The significant nexus standard is no longer valid for identifying WOTUS.



What Did *Sackett* Not Change?

- 1) *Sackett* did not change the federal procedure for identifying wetlands. The Corps' 1987 Wetland Delineation Manual and regional supplements remain applicable.
- 2) *Sackett* focused on the geographic scope of the CWA, and did not address regulated activities under the CWA such as what is a “discharge.”
- 3) *Sackett* did not change states' and tribes' authority under the CWA to be more environmentally protective than the federal program.



What are EPA and the Army Corps Doing Initially in Response to *Sackett*?

- 1) Agencies' website says they will interpret WOTUS consistent with *Sackett* but offers no details yet.
- 2) Typically, after a Supreme Court decision like *Sackett*, agencies:
 - Consult with their counsels' offices and DOJ about next steps.
 - Determine if a new regulation is required or desirable.
 - Clarify status of existing permits and jurisdictional determinations.
 - Look to past implementation practices under a legal standard (i.e., the relatively permanent standard) and see if those interpretations remain valid.
- 3) Agencies understand CWA programs are being implemented on a day-to-day basis, and likely are working to clarify key issues as quickly as possible.



Where Do We Go From Here?

- 1) EPA and the Army Corps may do rulemaking defining WOTUS consistent with *Sackett*, although they have not announced their plans.
- 2) The U.S. Congress may consider legislation to “fill the gap.”
- 3) Some states and tribes may choose to “fill the gap” in jurisdiction under state and tribal law.
- 4) NGOs such as NAWM may develop model legislation or model regulations to help state and tribal gap-filling actions.
- 5) Many will attempt to quantify the loss in resource protection from *Sackett*, and potential environmental and health effects including for drinking water.
- 6) Anticipate continued litigation over how *Sackett* is interpreted and implemented, with associated uncertainties.



Panel Discussion Questions

- 1) After *Sackett*, must EPA and the Army Corps do a new rulemaking defining WOTUS?
- 2) Does the decision in effect reinstate the 2020 NWPR definition?
- 3) Are there differences between the relatively permanent standard in *Sackett* and in the 2006 *Rapanos* plurality opinion?
- 4) What are the aquatic resource implications of *Sackett*?



Panel Discussion Questions

- 5) Why was the court in *Sackett* unanimous in its judgment?
- 6) How does the *Sackett* decision affect ongoing and future WOTUS litigation?
- 7) What challenges and opportunities do you see for states and tribes “filling the gap” in jurisdiction after *Sackett*?





Audience Questions?

Wrap-Up and Final Thoughts



Thank you!

National Association of Wetland Managers

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