Filling the *Sackett* Gap with Private Governance

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I. INTRODUCTION

Wetlands perform a wide range of valuable services, from soaking up floodwaters to filtering out pollutants and providing habitats for thousands of species of mammals, fish, reptiles, insects, and birds. But in a high-profile 2023 ruling, *Sackett v. Environmental Protection Agency*,[1] the U.S. Supreme Court greatly limited federal power to protect wetlands. No comprehensive scientific study has fully explored the extent of regulatory coverage lost after the *Sackett* decision, but there are several indications that it will be substantial. The headwater streams and associated wetlands at the center of the *Sackett* controversy represent seventy-nine percent of the United States' overall river network, drain seventy percent of the nation's land, and have an economic value of over $15.7 trillion.[2] The results of modeling by twelve professional water science societies submitted to the Supreme Court before *Sackett* suggested that moving away from the significant nexus approach

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1. Sackett v. Environmental Protection Agency, 598 S.Ct. 651 (2023) (hereinafter "*Sackett*").

2. Patrick Parenteau, *My Own Private Idaho Wetland: What Will the Court Do With the Sackett Case,* 52 ENV'T L. 373, 389 (2022) (citing *Headwater Stream Studies,* U.S. ENV'T PROT. AGENCY (Mar. 8, 2022); Susan A. R. Colvin et al., *Headwater Streams and Wetlands Are Critical for Sustaining Fish, Fisheries, and Ecosystem Services,* 44 FISHERIES 73, 74 (2019)).

presented by Justice Kennedy in *Rapanos v. United States*,[3] as Justice Alito ultimately did in *Sackett*, would lead to a thirty to seventy-five percent loss of wetlands coverage depending on the watershed at issue.[4] One recent scientific study of the more modest regulatory loss under the Trump administration's Navigable Waters Protection Rule, which excluded from federal wetlands coverage isolated wetlands and ephemeral streams and required a surface water connection to navigable waters,[5] found that the Trump rule would have led to a twenty-seven percent coverage loss compared to the significant nexus approach.[6]

Today, the U.S. is still rapidly losing wetlands, mainly to development and agriculture, at an accelerating rate.[7] With Congress polarized and gridlocked, new federal wetland protection laws are unlikely to be enacted in the next several years. Some states have stepped up to fill the gap, but others have instead chosen to roll back their existing

3. *See* Rapanos v. United States, 547 U.S. 715, 779–80 (2006) (Kennedy, J., concurring).

4. Brief of Scientific Societies as Amici Curiae Supporting of Respondents, *Sackett,* at 24-31.

5. Simon Greenhill et al., *Machine Learning Predicts Which Rivers, Streams, and Wetlands the Clean Water Act Regulates*, 383 SCIENCE 406–412 (2024).

6. *Id.* The absence of post-*Sackett* data is unsurprising as scientists, scholars, and courts work to determine the scope and coverage of the decision. *See*, *e.g*., Hearing on the Implications of *Sackett v. EPA*: Hearing before the S. Comm. on Envt. & Pub. Works (Oct. 18, 2023) (statement of Chairman Tom Carper), available at https://www.epw.senate.gov/public/index.cfm/2023/10/chairman-carper-s-opening-statement-hearing-on-the-implications-of-sackett-v-epa; Ryan Day, *Assessing the August 2023 Amendments to the Waters of the United States Rule in the Wake of* Sackett v. EPA*,* 1 ENV'T & NAT'L RES. L. SYMPOSIUM 1 (2023); States Motion for Summary Judgment, Case No. 3:23-cv-00018 (S.D. Tex. June 28, 2023) (moving for summary judgment striking down the Biden waters of the United States (WOTUS) rule in its entirety); 88 Fed. Reg. 61963, 61951-62283 (Sept. 8, 2023) (discussing changes to the Department of Homeland Security and Coast Guard rules in response to *Sackett*); 88 Fed. Reg. 61964, 61951-62283 (discussing changes to the Department of Defense and Army Corps of Engineers polices); James McElfish et al., *Analyzing the Consequences of* Sackett v. EPA, 53 ENV'T REP. 10693 (2023); *What the Supreme Court's* Sackett v. EPA *Ruling Means for Wetlands and Other Waterways,* NRDC (June 5, 2023) https://www.nrdc.org/stories/what-you-need-know-about-sackett-v-epa; Anna Todd, Sackett v. EPA *and the Definition of the Waters of the United States,* HARV. ENV'T & ENERGY L. PROGRAM (June 24, 2022) https://eelp.law.harvard.edu/2022/06/sackett-v-epa-and-the-definition-of-waters-of-the-united-states/; Kirti Datla, *What Does* Sackett v. EPA *Mean for Clean Water?,* EARTHJUSTICE (May 26, 2023) https://earthjustice.org/article/what-does-sackett-v-epa-mean-for-clean-water; Colby Galliher, Sackett v. EPA*'s Aftermath and the Risk of Inflamed Western Water Conflict,* JUST SECURITY (Oct. 2, 2023) https://www.justsecurity.org/88982/sackett-v-epas-aftermath-and-the-risk-of-inflamed-western-water-conflict/.

7. *Continued Decline of Wetlands Documented in New U.S. Fish and Wildlife Service Report,* U.S. FISH & WILDLIFE SERV. (Mar. 22, 2024), https://www.fws.gov/press-release/2024-03/continued-decline-wetlands-documented-new-us-fish-and-wildlife-service-report.

protections.[8] This comes despite the fact that even before the *Sackett* ruling, people across the United States strongly favored more protection for wetlands.[9]

Private environmental governance—which includes private agreements, certifications, and other practices such as monitoring and dispute resolution to foster sustainability—can fill some of this gap. While not by any means a substitute for regulation, it can act as a stopgap while other legislative and regulatory efforts are developed. And it can complement new laws and regulations once those measures are in place.

II. CORPORATIONS AND NONGOVERNMENT ORGANIZATIONS HAVE A VARIETY OF WAYS TO ENCOURAGE PROTECTION OF WETLANDS

First, certification bodies can develop standards for wetland-friendly goods, much like fair trade labels for products that promote safe working conditions, environmental protection, and living wages for producers.[10] Greater use of such standards can allow customers, investors, and lenders to vote with their wallets. An example might be a label that identifies products made from ingredients grown on farms that preserve wetlands.

For construction, a gold standard already exists for the environmental certification of buildings: Leadership in Energy and Environmental Design, or LEED, certification.[11] LEED already incorporates some wetland protections,[12] and its requirements can be bolstered to ensure the protection of wetlands exposed as a result of the *Sackett* ruling.

Next, corporate pressure can use supply chain contracting to influence the sectors most likely to fill in wetlands: farming, construction, and forestry. Corporations could require suppliers to agree not to damage

8. *See* Michael Vandenbergh et al., *Filling the* Sackett *Gap: The Private Governance Option*, 109 MINN. L. REV. (forthcoming 2025), (manuscript at Part III).

9. WALTON FAMILY FOUNDATION, RESULTS FOR 2022 CLEAN WATER ACT RESEARCH 1 (Sept. 2022), avail. at https://8ce82b94a8c4fdc3ea6d-b1d233e3bc3cb10858bea65ff05e18f2.ssl.cf2.rackcdn.com/48/b6/e2ecb74c413eb8309401852563c9/2208158-wff-clean-water-act-memo.pdf (finding, prior to the Supreme Court decision on *Sackett*, that after learning the facts of *Sackett*, three in four (seventy-five percent) adults nationally are supportive of protecting more waters and wetlands under the Clean Water Act.).

10. *See* Lex Houf et al., *Promotion of Sustainable Products: Can Sustainability Labels Promote User Selection of Environmentally Friendly Products?*, 16 (13) SUSTAINABILITY 5390 (2024).

11. U.S. Green Building Council, *Site Design for Habitat or Wetland and Water Body Conservation*, available at https://www.usgbc.org/credits/neighborhood-development-plan-neighborhood-development/v4-draft/sllc-0.

12. *See id.*

wetlands exposed by the *Sackett* decision, in the same way that companies already use contracts to address other environmental issues.[13]

For example, Whole Foods Market requires suppliers to follow a code of conduct that includes minimizing their impacts on the environment, avoiding deforestation, and seeking opportunities to conserve water.[14] Similarly, Albertsons, the fourth-largest U.S. grocery store chain, requires suppliers to strive to reduce natural resource destruction and water contamination.[15]

III. THE ROLE OF BANKS AND INVESTORS

Large institutional investors and lenders can also play a role in protecting wetlands. Those with sustainability policies can insist that developers seeking funds follow pre-*Sackett* wetland protections.

Major banks have already shown various degrees of commitment to sustainability. In 2003, ten leading banks from seven countries adopted the Equator Principles, a set of principles designed to "serve as a common baseline and risk management framework for financial institutions to identify, assess and manage environmental and social risks when financing projects."[16]

This includes conducting environmental risk assessments of projects applying for financing, adopting measures to minimize and mitigate risks, and as a last resort compensating for unavoidable effects. This list should—in light of the *Sackett* decision—be expanded to include assessing the risk of wetlands loss in project financing.

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13. *See, e.g.,* International Paper, *Supplier Code of Conduct* 2 (2013), available at https://www.internationalpaper.com/sites/default/files/file/2023-02/Supplier%20Code%20of%20Conduct%20English.pdf ("Suppliers must comply with all environmental laws, including those related to hazardous materials, wastewater, solid waste and air emissions."); Lowes Vendor Code of Conduct, LOWE'S, available at https://corporate.lowes.com/our-responsibilities/corporate-responsibility-reports-policies/lowes-vendor-code-conduct#:~:text=Environmental%20Permits%3A%20Vendors%20shall%20obtain,%2C%20uses%2C%20and%20conservation%20opportunities.

14. WHOLE FOODS MARKET SUPPLIER CODE OF CONDUCT, WHOLE FOODS MARKET (Jan. 2023) avail. at https://assets.wholefoodsmarket.com/www/company-info/Whole%20Foods%20Market%20Supplier%20Code%20of%20Conduct%202023.pdf

15. ALBERTSONS COMPANIES, SUPPLIER SUSTAINABILITY GUIDELINES AND EXPECTATIONS 25-26 (Own Brands Jan. 7, 2022), https://s29.q4cdn.com/239956855/files/suppliers/Supplier-Sustainability-Expectations-1-7-2022-(1).pdf.

16. *See* Michael P. Vandenbergh, Sarah E. Light & James Salzman, PRIVATE ENVIRONMENTAL GOVERNANCE 138 (2024).

Several banks recently backed out of adhering to these principles[17] but pledged generally to continue to follow them.[18] Nongovernment organizations can help protect wetlands by tracking financing for proposed developments in vulnerable areas.

IV. REDUCING FLOOD RISKS

Insurance companies can also help fill the gap in wetland protection. Because wetlands are valuable buffers against floods, property insurers have a vested interest in reducing wetland losses.

Many California insurance companies facing rising costs due to climate change have stopped issuing new policies there.[19] Similar decisions are occurring in other disaster-prone states such as Louisiana and Florida.[20]

Without access to insurance, businesses will be less likely to invest in these states. Reducing flood risks due to wetland destruction could help reduce risk for insurance companies.

Private insurers could refuse coverage to properties that significantly degrade wetlands no longer protected after *Sackett*, or they could make coverage contingent on binding commitments not to degrade wetlands. Conservation groups could also work with private insurers to develop climate-focused coverage for particularly sensitive wetlands left uncovered after *Sackett*. In an example of this approach, The Nature Conservancy, an environmental nonprofit, bought insurance in 2022 to fund restoration of Hawaii's coral reefs if they are damaged by hurricanes or tropical storms.[21]

Retail customers, employees, community members, and nonprofit groups can place economic pressure on companies to incorporate such

17. *See* Anita Hawser, *Major US Banks Back out of the Equator Principles*, THE BANKER (Mar. 13, 2024), available at https://www.thebanker.com/Major-US-banks-back-out-of-the-Equator-Principles-1710330460.

18. *See* Simon Jessop, Isla Binnie & Ross Kerber, *Leading U.S. Banks Leave ESG Project Finance Group* (Mar. 6, 2024), available at https://www.reuters.com/business/finance/jpmorgan-citi-wells-boa-are-no-longer-signatories-equator-principles-website-2024-03-05/.

19. *See* Thomas Frank, *California's Insurer of Last Resort Is a 'Ticking Time Bomb'*, E&E NEWS (Mar. 18, 2024), available at https://www.eenews.net/articles/californias-insurer-of-last-resort-is-a-ticking-time-bomb/.

20. *See* Alex Brown, *States Beg Insurers Not to Drop Climate-Threatened Homes*, STATELINE (June 5, 2024), available at https://stateline.org/2024/06/05/states-beg-insurers-not-to-drop-climate-threatened-homes/.

21. *See* The Nature Conservancy, *Insuring Nature to Ensure a Resilient Future* (last updated Feb. 14, 2024), available at https://www.nature.org/en-us/what-we-do/our-insights/perspectives/insuring-nature-to-ensure-a-resilient-future/.

protections into their operations. This kind of private pressure has already spurred companies to pledge to reduce their greenhouse gas emissions. Until states and Congress pass new laws to prevent wetlands from being destroyed, such action by businesses and nongovernment organizations may be the most promising substitute.