The Supreme Court's opinion in the *Sackett* case dramatically curtails the permitting program covering wetlands. We urgently need to find strategies for saving the wetlands the Court left unprotected. We have a number of possible strategies and need to start work on implementing them immediately.

Sackett was unquestionably a major blow, reducing federal jurisdiction over wetlands beyond what even the Trump Administration embraced. A wetland is now covered only if it meets two requirements: "first, that the adjacent [body of water constitutes] . . . 'water[s] of the United States' (i.e., a relatively permanent body of water connected to traditional interstate navigable waters); and second, that the wetland has a continuous surface connection with that water, making it difficult to determine where the 'water' ends and the 'wetland' begins."

This myopic definition ignores the critical role of other wetlands in flood control and in protecting water quality in water bodies that can be some distance away. *Sackett* was a huge step in the wrong direction, but we're stuck with it.

Having taken the blow, we need to dust ourselves off and figure out how to salvage as much protection as possible for the wetlands the Court so blithely wrote off.

State Regulation.

The Court placed the main responsibility for protecting wetlands on the states. Some states, of course, just won't care. Otherwise would like to regulate but will need help. The first step is for NGOs to get behind model legislation. In making the case for model legislation, I would recommend involving not only traditional environmental groups but also groups like Ducks Unlimited as well as seeking support from state flood risk managers. Private foundations should pump money into this effort now because a quick start is important.

Conservative states might be reluctant to regulate. Flood control and water quality might be the best arguments for persuading them, rather than the intrinsic value of protecting wetlands.

Federal Regulatory Responses.

The ideal outcome would be new legislation expanding the scope of the wetlands program to its pre-*Sackett* breadth. Short of that, here are some possibilities.

1. *Implementing* Sackett. EPA and the Army Corps of Engineers, which co-

administer the permit program, will have to do what they can under the new standards. There are two possible approaches.

One strategy would be to issue a new regulation interpreting *Sackett* to leave as much scope for regulation as possible. If the *Chevron* decision remains in effect (iffy), this regulation would get some deference from courts. On the other hand, a new regulation would immediately become a whipping boy for conservative politicians and judges.

The other option is to issue only technical guidance about the data that the bureaucrats who issue permits should seek to obtain, leaving it to them to work out standards on a case-by-case basis. Training programs can help ensure that the permit issuers interpret *Sackett* aggressively to minimize the harm to wetlands. This would hopefully would provide less of a target for attack. However, from what I've read, it looks likely that the government actually is going to try to issue new regulations.

Since the fate of many other wetlands is unclear, federal agencies should be extremely protective of the remnant of wetlands that remain subject to federal jurisdiction under *Sackett.* In particular, they should reject proposals for construction that would risk reclassification of any portion of a wetland as non-federal, such as a levee separating the wetland from an adjoining water body.

2. ***Data needed for* post-*Sackett* enforcement.** To implement *Sackett*, the government needs to start collecting aerial surveillance and other data that will make it easier to identify which wetlands may meet the new standards and therefore require possible enforcement measures. The federal government will also have to vigilantly monitor state and local permitting to identify projects that might violate the new standards. The Fish and Wildlife Service will need to be notified if there are risks of harm to endangered species or their habitats, which could violate section 9 of the Endangered Species Act,
3. ***Other federal regulatory authority.*** Under the *Maui* case, even if pollutants aren't directly discharged into protected federal waters, they may still require a water pollution permit. This is a different program than the permitting program applying to wetlands. EPA should enforce this requirement aggressively in terms discharges in wetlands. It should also consider applying other regulatory statutes governing waste disposal where applicable.

Federal Non-Regulatory Programs

Since *Sasckett* involved a regulatory program, we are likely to think first in terms of regulatory responses. But there are important federal programs that don't involve regulation but nonetheless can do a lot to preserve wetlands.

!. Wetland conservation programs. There are several funding programs to assist in wetl1ands conservation. This is not the best time to look for additional funding, but all of these programs should be expanded dramatically after *Sackett*.

- USDA administers the Farmable Wetlands Program, which is designed to restore wetlands and wetland buffer zones on farms.
- EPA administers Wetland Program Development Grants to help state governments develop the capacity to protect and restore wetlands.
- The Fish & Wildlife Service runs the North American Wetlands Conservation program, which provides matching grants to public-private partnerships to protect wetlands.
- The Migratory Bird Conservation Commission funds North American Wetlands Conservation grants to protect habitat for migratory birds.

2. Conservation easements. The Nature Conservancy is a major private sponsor of conservation easements. USDA administer the America Conservation Easement Program, with one component focusing on wetlands. This program provides matching grants to help pay for conservation grants. The 2018 farm bill provided $450 million a year for the ACEP program. In August of 20222, Congress committed $1.4 billion to protect and restore wetlands. After *Sackett*, even more money is needed.

3. Flood insurance. The National Flood Insurance Program delineates flood risk areas. Destruction of wetlands should in general expand the flood risk zones downstream, and thus areas regarding flood insurance in order to get a mortgage. Also, community participation in the flood insurance program is conditioned on adoption of a floodplain management ordinance, These activities need to be prioritized given that reduced scope of protection under the Clean Water Act.

None of this would be necessary if the Court had made any effort to consider the purposes of the Clean Water Act or the need for wetlands expertise in interpreting the scope of wetlands regulation. But the *Sackett* majority doesn't care about the statute's goals. The *Sackett* opinion makes it clear that they care far more about real estate developers than water quality or flood control or ecosystems.

In short, we have to go to Plan B if we’re going to save the nation’s wetlands. The sooner we start, the better.