

Incentivizing Contractors to Be Wetlands Conservationists

How states can license contractors rather than regulate parcels after *Sackett*



BY ANDREW P. MORRISS

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Summary

A key problem in many types of environmental regulation is not simply unclear rules, but the wrong unit of regulation. Regarding wetlands, parcel-by-parcel review forces agencies and regulated parties into repeated, costly, and adversarial interactions, even when the same actors are performing similar work across many sites. By licensing those repeat actors—such as contractors, consultants, and firms—governments can reduce compliance costs, improve environmental outcomes, and replace conflict with ongoing, expertise-based relationships.



The regulator becomes a partner in problem-solving rather than an adversary lying in wait.

Introduction

Mike and Chantell Sackett bought a small residential lot near Idaho's Priest Lake in 2004, planning to build their dream home. What should have been a straightforward construction project became a 16-year legal odyssey that went to the Supreme Court twice.¹ Their story illustrates a fundamental flaw in how environmental agencies regulate: They focus on parcels and permits rather than the actors who affect the environment. As a result, regulators leave opportunities for accomplishing environmental objectives on the table.

The Sacketts' nightmare began when they started placing fill material on their 0.63-acre lot in preparation for construction. The Environmental Protection Agency (EPA) ordered them to stop, claiming their property contained wetlands protected under the Clean Water Act. The agency demanded they restore the property to its natural state or face fines of tens of thousands of dollars per day.² But the Sacketts' lot sat in a developed residential neighborhood, separated from Priest Lake by a road and other homes. Similar lots nearby had been developed without federal intervention. Why was their property suddenly a regulated wetland?

The answer reveals a deeper problem than uncertain legal standards or overly aggressive enforcement: how regulators approach activities that affect property. The EPA evaluated the Sacketts' parcel in isolation, analyzing whether that specific 0.63 acres contained wetlands subject to federal jurisdiction. This parcel-by-parcel approach meant the agency had no advance relationship with the contractor doing work for the family, no mechanism for cooperative problem-solving before disputes arose, and no way to develop the trust and expertise that enable the effective accomplishment of environmental goals. Moreover, this approach created an adversarial dynamic: Property owners and contractors couldn't know which activities would trigger enforcement until after the fact.

There's a better way. Rather than evaluating each parcel as issues arise, agencies could license the entities whose activities affect wetlands—such as contractors who place fill material. This shifts the regulatory focus to the professionals whose repeated involvement in wetlands work makes them natural candidates for developing expertise and cooperative relationships with regulators. A licensed contractor would have strong

incentives to work with regulators, knowing that violations could cost them their license. The regulator becomes a partner in problem-solving rather than an adversary lying in wait. Equally important, licensing protects the many property owners and small operators who have no idea their activities might require a federal permit—because the licensed professional they hire does.

This entity-based approach isn't unprecedented.³ Several states already license professionals to perform environmental oversight functions, from New Jersey⁴ and Massachusetts, which delegate significant compliance functions in hazardous site remediation,⁵ to Texas and California, which impose licensing requirements for high-risk abatement.⁶

As Jennifer Pahlka argues in *Recoding America*, the challenge of modern governance is not whether to regulate but how to make regulation work—and entity-based licensing is exactly the kind of structural reform to accomplish that.⁷ The *Sackett* fact pattern illustrates why this reform matters—and how current regulatory approaches create conflicts that do not serve property owners, businesses, or the environment.



Recommendations

- 01 Shift the regulatory unit of analysis from individual parcels to the entities—contractors, consultants, and firms—whose repeated activities shape environmental outcomes across many sites.
- 02 Empower states to use existing police powers and Clean Water Act authority to establish wetlands professional licensing regimes, building entity-based licensing into new post-*Sackett* programs from the ground up.
- 03 Pilot contractor licensing programs and expand them when they demonstrate success.
- 04 Preserve individualized permitting for high-impact activities; treat the license itself as authorization for routine, low-impact work.
- 05 Tie compliance to license accountability through ongoing oversight and the credible threat of suspension or revocation.
- 06 Pursue reciprocal interstate license recognition under comparable standards.

The Regulatory Quagmire

Environmental regulation often operates through transaction-by-transaction review: Agencies evaluate each parcel, permit, or project individually to determine whether regulatory requirements apply. Additionally, the parcel-by-parcel approach requires lay landowners to understand permitting requirements and initiate the process. That approach may work when activities are rare or highly standardized. It breaks down, however, when the same contractors perform similar activities across heterogeneous sites. In those settings, parcel-by-parcel review creates uncertainty, high costs, and adversarial relationships without reliably improving environmental outcomes. The problem is not simply that rules are complex. It is that the regulatory system is organized around the wrong unit of analysis.

Consider a contractor who specializes in site preparation for residential construction. The contractor works on dozens of lots each year across multiple subdivisions. Yet under a parcel-by-parcel regulatory model, each project requires a fresh determination of whether regulatory requirements apply. The contractor may be performing essentially the same activity—grading, filling, clearing, or drainage work—but the legal treatment of that activity can vary from lot to lot depending on site conditions, shifting interpretations, and agency judgment. The same repeat actor therefore confronts the same uncertainty—where and whether a particular activity will be regulated—over and over again, while the agency must repeatedly reconstruct the same factual and legal inquiry across many projects.

Wetlands regulation under the Clean Water Act provides a clear example of this structural problem in an especially acute form. The act prohibits discharging pollutants into “navigable waters”

without a permit, and that term has long been understood to include some wetlands. But determining whether a particular parcel contains jurisdictional wetlands requires site-specific analysis of soil, vegetation, hydrology, and proximity to covered waters, layered on top of shifting legal standards about adjacency and ecological connection. These doctrinal complexities intensify the problem, but they are not its source. Even if the legal test were perfectly clear, a parcel-by-parcel system would still impose recurring information costs on property owners, contractors, and regulators alike.

For the contractor, the result is a pair of unattractive options. Before work begins, the only way to obtain certainty may be to hire wetlands experts, conduct a formal delineation, and seek a jurisdictional determination from the Army Corps of Engineers—a process that can take months and cost thousands of dollars. Even then, another regulator may disagree. The alternative is to proceed at risk, hoping no later enforcement action reclassifies the parcel or the activity. Multiply that uncertainty across thousands of projects, and the result is predictable: either high compliance costs from repeated advance determinations or arbitrary after-the-fact enforcement.

The Sacketts’ case illustrates how this structure generates conflict in practice. Their lot sat in a developed residential neighborhood where similar properties had already been built upon. They obtained local permits and began site preparation. Only after work had begun did the EPA intervene, asserting that the parcel contained jurisdictional wetlands and ordering restoration on pain of significant daily fines. At that point, the Sacketts faced a stark choice: comply at substantial cost or challenge the agency’s determination through protracted litigation.



This conflict was not an aberration; it was a predictable product of the regulatory structure. The Army Corps of Engineers had no prior relationship with the Sacketts or the contractor performing the work and no mechanism for resolving questions before activity began. The determination was made after investment had already occurred, and it differed from the apparent treatment of nearby properties. The result was an adversarial encounter in which all parties—property owner, contractor, and regulator—were pushed into positions that made cooperation difficult and dispute likely. Even if the governing legal standard had been perfectly clear, the same structural features would have produced the same dynamic. The Sackett case is unusual only because it reached the Supreme Court twice. Similar conflicts arise routinely across environmental law and land-use regulation, where agencies must evaluate activities that occur across

multiple properties over time. Whether the issue is wetlands, endangered species habitat, hazardous waste cleanup, or air emissions from distributed sources, the same pattern emerges: Parcel-by-parcel review creates uncertainty for property owners, repeated information costs for contractors, and heavy demands on agency resources, while encouraging after-the-fact enforcement rather than ex ante problem-solving. In each of these settings, the underlying issue is the same. The actors who shape environmental outcomes are not one-time participants but repeat players—contractors, consultants, and firms that carry out similar activities across many sites. A regulatory system that treats each site as an isolated problem fails to take advantage of that repetition. It prevents the development of expertise, undermines incentives for proactive compliance, and channels interactions between regulators and

regulated parties into adversarial disputes rather than cooperative relationships. The question, then, is not simply how to define jurisdiction more precisely or how to refine legal tests governing particular parcels. It is whether the parcel is the right unit of regulation at all. When the same actors repeatedly perform similar activities across diverse sites, a system organized around individual parcels is likely to generate unnecessary conflict and cost without improving outcomes. The alternative is to focus on the entities whose ongoing activities shape environmental results—and to design regulatory tools that align their incentives with environmental goals. Moreover, focusing on licensing entities would enable regulators to write more nuanced standards that a sophisticated repeat player could more accurately apply than could a lay reader such as a landowner engaged in a one-time project.



A Better Framework: Regulating Entities, Not Parcels

Building on this alternative, what if, instead of evaluating jurisdiction parcel by parcel, regulators licensed entities whose activities affect wetlands? Under this approach, contractors who regularly engage in activities such as placing fill material would need to obtain and maintain a license to operate. The license would authorize work across their entire service area, not a specific parcel. As noted earlier, this type of approach is not a radical departure from existing regulatory practice in several areas. The key insight is that licensing shifts the regulatory dynamic. Instead of the agency acting as a gatekeeper for each transaction, it becomes a partner in ensuring that the licensed entity’s overall practices protect environmental values. The entity, in turn, has incentives to develop expertise and procedures that accomplish business goals without triggering license revocation.

The institutional design is straightforward: A state environmental agency would issue entity licenses to contractors, consultants, and other firms whose business regularly involves activities affecting wetlands. The license would require demonstrated competence in wetlands identification, familiarity with applicable regulatory standards, and documented procedures for minimizing environmental impacts. License conditions would specify required practices—such as conducting pre-activity site assessments, maintaining compliance records, and consulting with the licensing agency when borderline jurisdictional questions arise. The license would authorize the holder to perform covered activities across its service area, replacing parcel-by-parcel jurisdictional determinations for routine, low-impact work (analogous to activities currently covered by general or nationwide permits), while preserving the existing Section 404 permit process for major projects with significant wetland impacts. Critically, the licensing agency would retain full authority to set substantive environmental standards; what changes is the mechanism of oversight, not the stringency of protection. In short, the license substitutes for parcel-level determinations in routine cases, while permitting is preserved for high-impact projects, with audits and license revocation serving as enforcement mechanisms.

How Entity-Based Licensing Would Work for Wetlands

Consider how entity-based licensing could have changed the Sacketts’ situation. The contractor hired to prepare the Sacketts’ lot would need a state license to perform fill activities. To obtain that license, the contractor would need to demonstrate:

- > Understanding of how to identify potential wetlands
- > Procedures for determining whether the potential wetland is regulated
- > Practices for minimizing wetlands impacts
- > Methods for maintaining records that demonstrate compliance
- > Protocols for consulting with regulators when questions arise
- > Track record of compliance, for license renewal

Once licensed, the contractor could work across multiple properties without seeking parcel-specific jurisdictional determinations—as long as they followed their approved procedures and maintained their license in good standing. Now imagine you’re that licensed contractor. You’re hired for a construction project. You examine the lot and notice indicators that wetlands might be present: hydrophytic vegetation like sedges and rushes, signs of seasonal ponding in low-lying areas, and soil characteristics suggesting high water tables. Under current rules, this triggers a complex legal analysis: Is this parcel jurisdictional? What about the drainage patterns? How do you prove the wetlands connection to navigable waters? Should you request a formal jurisdictional determination and wait months for an answer? Can you proceed at risk and hope the regulator doesn’t disagree?

As a licensed contractor, your question is how to accomplish this project while maintaining your license. You call the state environmental agency, not as an adversary preparing for possible litigation, but as a professional seeking guidance. The conversation is collaborative: “We’re looking at the Jones lot on Bay Road. I’m seeing wetland indicators in the eastern third of the property. Can we adjust the

building footprint to avoid that area?” With the agency, you explore options. Perhaps shifting the house location 20 feet west would avoid the wetland indicators completely. Or maybe a minor modification to the grading plan would achieve the drainage goals while protecting wetland functions. The state agency specialist, familiar with your track record and procedures, can make recommendations quickly because this isn’t a high-stakes jurisdictional battle—it’s a collaborative problem-solving session between professionals who share a goal of complying with environmental standards while accomplishing the project.

The state agency, for its part, develops an ongoing relationship with the contractor. Agency staff learn the contractor’s typical projects, their problem-solving approaches, and their track record. When issues arise, they’re resolved through dialogue rather than enforcement actions. Relatedly, repeat interactions could shape agency incentives. A state regulator may be motivated to save resources by clarifying policies that repeatedly trigger unnecessary interactions. But when every enforcement action is treated as a one-off with lay landowners, it’s much more difficult for the regulator to identify such reform opportunities. Shifting to an approach that regulates entities won’t end all disagreements between regulators and regulated, but it reframes the dynamic into a collaborative one that will reduce the number of conflicts.

Entity-based licensing also protects the many people who have no idea they might need a permit. A homeowner who hires someone to grade a lot or dig a drainage ditch may have no reason to suspect that wetlands regulation is implicated. Ignorance of the law provides no defense—the regulator can arrive with a compliance order after the fact, just as it did with the Sacketts. But if the person doing the work is a licensed contractor, that contractor’s training and procedures function as an early warning system. The

licensed contractor spots the wetland indicators that the landowner would never recognize. The logic is the same as hiring a licensed electrician: Most homeowners don’t know their local electrical code, which is precisely why they hire someone who does—even for work they might be capable of doing themselves. Licensing channels expertise to the point of contact, protecting both the property owner and the environmental resource without requiring every landowner to become a regulatory expert.

The Benefits of Partnership

Although licensing adds a front-end requirement, it replaces repeated parcel-level determinations, reducing the total number of regulatory interactions and the aggregate time spent by both regulators and regulated parties. This shift produces multiple benefits. First, it reduces transaction costs substantially. Clean Water Act permitting for activities affecting wetlands remains time-consuming and complex: Individual permits commonly take many months and often up to a year to acquire, while jurisdictional determinations and interagency review can extend timelines further. These processes require applicants to hire consultants, conduct site delineations, and navigate iterative review across multiple regulatory requirements. For a contractor working on dozens of properties annually, these delays and compliance burdens multiply rapidly. Earlier work found that permitting costs for even relatively small projects could be substantial, underscoring the persistence of these burdens over time.⁸

Licensed contractors could reduce these costs dramatically. Their expertise and ongoing regulatory relationships would

Most homeowners don’t know their local electrical code, which is precisely why they hire someone who does—even for work they might be capable of doing themselves.

enable reliable determinations for routine situations without formal jurisdictional processes. Complex or borderline cases would still require consultation, but the baseline of trust and expertise would make those consultations faster and more productive. Property owners would benefit from more predictable timelines and costs. Consider what this would have meant for the Sacketts: Instead of 16 years of litigation over whether their 0.63-acre lot was jurisdictional, a licensed contractor could have resolved the question in a brief consultation—or avoided it entirely through informed site planning. Regulators would benefit from not processing countless determination requests for straightforward situations.

Incentives to realize positive environmental outcomes would also improve. Licensed contractors would develop genuine expertise in wetlands protection because their livelihoods would depend on it. They would be motivated to find solutions that satisfy both business and environmental goals. They would become invested in the regulatory program’s success rather than viewing it as an obstacle to circumvent. This concentrates expertise where it matters most. Not every property owner or one-time contractor needs to master the intricacies of Clean Water Act jurisdiction. But entities that regularly engage in activities affecting wetlands should have that expertise—and licensing ensures they do. In each case, the contractor—not the parcel—is the correct unit of regulation.

Addressing Potential Concerns

Would entity-based licensing weaken enforcement by delegating too much discretion to private contractors? The opposite is true: License suspension or revocation would affect the contractor’s entire business, consequences that serve as far more powerful deterrents than fines assessed after the fact on individual parcels. License conditions would clearly specify required practices and consultation procedures, and violations would trigger license review that could result in conditions, suspension, or revocation.

The state agency would still define what counts as jurisdictional wetlands and what practices protect them. The difference is that licensed contractors would have both the expertise and the incentives to apply those standards reliably across their work. This doesn’t give contractors unfettered discretion—it creates professional responsibility backed by meaningful consequences. Just as doctors must exercise professional judgment within medical standards, or engineers must apply engineering principles to specific situations, licensed wetlands contractors would apply regulatory standards to diverse field conditions. Professional licensing works precisely because it creates accountability for judgment, not just for following scripts. This approach also addresses the information demands that overwhelm traditional permitting. Rather than requiring regulators to master the details of every coal plant’s combustion equipment, fuel composition, and maintenance schedules—or every wetland’s hydrology and vegetation—licensing focuses regulatory resources on ensuring professionals have the expertise to make those assessments reliably.

Licensed service providers are also easier to regulate than individual property owners. Regulators gain four advantages: First, higher stakes engender better behavior since license revocation would end a provider’s entire business rather than sanctioning a single violation; second, the provider has an existential interest in maintaining good relationships with regulators; third, broad authority to review the provider’s records across all activities enables regulators to identify patterns rather than investigating individual incidents; and fourth, because there are fewer contractors (who will be sophisticated and have contact information on file with states) than landowners, it will be easier to ensure they have notice of all the requirements and to enforce those requirements than it would be to ensure all landowners potentially affected by rules are aware of them.

Current regulations favor entities with resources to navigate complex jurisdictional determinations. Licensing makes those requirements transparent and provides a clear path to qualification, giving those engaging in regulated activities a skilled partner to help them navigate the regulations. Moreover, the regulator could create streamlined licensing processes for contractors whose work poses lower risks to wetlands, ensuring that the licensing framework remains accessible.

The Role of Existing Permits

Entity-based licensing wouldn’t eliminate the need for all permits. For major projects with significant wetlands impacts—large-scale development, major infrastructure, or substantial fill operations—individualized permitting may still be necessary. But licensing would fundamentally change how that process works. A licensed contractor applying for a permit would arrive at the permit review with groundwork already complete. The contractor would have already identified jurisdictional issues, consulted with the regulator on alternatives, and developed a mitigation plan consistent with their approved procedures. The permit review becomes a verification and refinement process rather than each case starting from scratch. This reduces delays and produces better outcomes because the hard work of identifying problems and developing solutions happens early, when flexibility is greatest.

For routine projects with minimal impacts—the residential lot preparations, minor drainage improvements, and small-scale activities that make up the bulk of work potentially affecting wetlands—the license itself might authorize the work without detailed project-specific permits. This would be analogous to how nationwide permits currently work under Section 404, authorizing categories of activities that meet specified conditions. The difference is that licensing creates accountability: If a contractor’s routine work repeatedly causes problems, the license itself is at risk.

Lessons from Captive Insurance

Entity-based licensing isn't theoretical. Consider captive insurance, an example of how licensing professional intermediaries can effectively regulate complex transactions. A captive insurance company is an insurer owned by a non-insurance company to insure its parent's risks. For example, a manufacturing company might establish a captive to insure its product liability risks. Captives offer various benefits: they can provide coverage not readily available in commercial markets, allow more direct control over claims handling, and create tax advantages. The captive insurance example illustrates the mechanism—not the domain—of the proposed reform.

Establishing and operating a captive requires specialized expertise. Insurance regulation is complex, varying across jurisdictions and involving technical requirements for reserves, capitalization, and compliance. Captive owners—the manufacturing companies or other businesses—typically lack this expertise because insurance regulation isn't their core business. Enter the captive manager: a professional firm that guides clients through establishing captives and ensures ongoing compliance with regulatory requirements.

The key insight is that while regulators license every captive insurance company, they do so after a dialogue with the applicant, who is guided by its licensed captive manager. The licensed captive manager guides the captive owner through the licensing process and ongoing compliance. The manager has powerful incentives to ensure each client's captive complies with regulations—because if captives under their management violate rules or create problems for regulators, the manager's own license is at risk. Losing that license means losing the ability to serve any clients.

As a result, the process of obtaining and maintaining a captive license becomes fundamentally cooperative rather than adversarial. Captive managers must demonstrate expertise in insurance regulation, maintain financial stability,

follow established procedures, and show a track record of ensuring their clients' captives comply with applicable rules. This creates exactly the dynamic desired for wetlands protection. The captive manager develops genuine expertise because their business depends on it. They work closely with regulators, building ongoing relationships and understanding how to structure captives that accomplish client objectives while satisfying regulatory requirements. When questions arise, managers consult with regulators proactively rather than proceeding at risk.

And clients benefit from this expertise without needing to become insurance regulation experts themselves. Critically, this cooperative dynamic doesn't mean regulators rubber-stamp whatever captive managers propose. Regulators maintain oversight, can reject applications, and impose conditions. The difference is that when a licensed professional is guiding the process, regulatory review starts from a foundation of expertise and good faith rather than suspicion and adversarial positioning.

Regulators, for their part, can process captive licenses efficiently because they trust that licensed managers have done the groundwork properly. The regulator-manager relationship creates a quality control mechanism that makes individual captive licensing smoother and more predictable. Problems that do arise are typically caught early through the manager's oversight, and when issues need regulatory attention, they're addressed through consultation rather than after-the-fact enforcement.

The analogy to wetlands is that property owners (like captive owners) need specialized work done but lack environmental expertise. Contractors (like captive managers) are professional intermediaries who regularly perform this work. Current wetlands regulation focuses on the parcels, evaluating each one in isolation through adversarial jurisdictional determinations. Entity-based licensing would focus on the contractors (like regulating captive

managers), creating incentives for professional expertise and cooperative relationships with regulators. Individual projects might still require permits (like captives still require licenses), but the process would be fundamentally different when a licensed professional with an ongoing relationship with the regulator is guiding the work.

The captive insurance example demonstrates several points. First, licensing professional intermediaries works even in complex regulatory environments where bright-line rules are difficult to specify. Second, it concentrates expertise where it matters most—with the professionals who regularly navigate the regulatory system. Third, it creates strong incentives for compliance because licensed contractors have ongoing businesses at stake. Fourth, it enables cooperative rather than adversarial relationships between regulators and regulated entities—even when individual transactions (whether insurance captives or construction projects) still require regulatory approval. The lesson is not that wetlands are like insurance, but that licensing repeat intermediaries allows regulators to govern complex, context-specific activities without parcel-level micromanagement.

The captive insurance model also illustrates a secondary dynamic worth noting: Regulatory competition can reinforce rather than undermine standards. Vermont dominates the captive market; it does so not by offering lax oversight but because its rigorous standards give captive owners and managers confidence in the jurisdiction's reputation. A similar dynamic could benefit state wetlands programs: States that develop credible licensing regimes would attract contractors and investment, creating a race to the top rather than the bottom.

Path Forward

The Sacketts' ordeal began with an enforcement action on a single parcel. It could have begun differently under an approach like the one described here. Imagine if the contractor who prepared their lot had been a licensed wetlands professional, with established procedures for identifying potential jurisdictions and protocols for consulting with the regulator. The contractor would have conducted a site assessment before breaking ground, spotted the wetland indicators, and contacted the regulator. A brief consultation might have led to adjusting the building footprint to avoid problematic areas or implementing simple protective measures that satisfied environmental concerns while allowing the project to proceed.

The result? The Sacketts get their home on schedule and within budget. The wetlands are protected through informed planning rather than after-the-fact restoration orders. The regulator accomplishes its regulatory mission through cooperation rather than enforcement. And 16 years of litigation—consuming countless hours of agency time, legal resources, and judicial attention—never happens.

The Supreme Court's *Sackett* decision did far more than resolve one property owner's dispute with the EPA. By adopting the narrower "continuous surface connection" test, the court removed an estimated 19 to 70 million acres of wetlands from federal protection—potentially more than half of all previously regulated wetlands in the United States. As Justice Kavanaugh noted in his concurrence, the decision had "significant repercussions for water quality and flood control throughout the United States."⁹ The resulting change in coverage is enormous: At least 18 states lack comprehensive permitting programs for dredging or filling wetlands that lost federal coverage.¹⁰ This creates an opportunity: States establishing new programs could adopt entity-based licensing from the outset, avoiding the parcel-by-parcel system that has proven costly and adversarial.

While *Sackett* clarified the federal definition of a wetland, it didn't solve the underlying problem that statutes like the Clean Water Act create: the adversarial nature of the regulatory structure. Indeed, clearer legal standards may simply enable more efficient adversarial processes rather than transforming them into cooperative ones. The EPA still has no mechanism for developing ongoing relationships with contractors who regularly work on properties that might contain wetlands. The agency still encounters projects after work has begun rather than partnering with regulated entities to prevent problems. And contractors still lack clear pathways to demonstrate expertise and build trust with regulators. Entity-based licensing could accomplish what the Supreme Court's decision cannot: transform wetlands protection from an adversarial, transaction-by-transaction system into a cooperative, expertise-based partnership.

Indeed, *Sackett*'s narrowing of federal jurisdiction makes the case for state action even more compelling. States that have historically relied on federal wetlands oversight now face a choice: Leave millions of acres unregulated, or develop their own regulatory frameworks. Colorado became the first state to act, passing HB 24-1379 in 2024 to create a state dredge-and-fill permitting program. New Mexico followed with Senate Bills 21 and 22, establishing a state-administered water quality permitting system. California reinforced its existing protections with AB 2875, codifying a "no net loss" wetlands policy.

Tennessee has created a third-party permitting approach that relies on certified wetlands professionals to classify wetlands and certify compliance with state regulations.¹¹ These states are creating new permitting structures, but permitting alone replicates the same parcel-by-parcel approach that failed at the federal level. Entity-based licensing would make these emerging state programs dramatically more effective. The most practical and immediate step is state-level licensing programs built on existing authority; federal reforms could follow once these models are tested.

States as First Movers

How could entity-based licensing be implemented for wetlands protection? The first step is state-level action through existing legislative and agency authority. States are already creating new wetlands regulatory programs in response to *Sackett*—Colorado's two-tier permitting system, New Mexico's state pollutant discharge elimination system, and California's reinforced "no net loss" framework all provide foundations on which entity licensing could be built, and Tennessee's grant of authority to certified wetlands professionals allows them to classify wetlands and certify compliance with state regulations. A state could create a license for "qualified wetlands contractors" who demonstrate expertise in identifying wetlands, understanding regulatory standards, and implementing protective practices. States could further reduce barriers by recognizing licenses issued in other jurisdictions with comparable standards, much as many professions rely on reciprocal licensing. Licensed contractors would receive streamlined treatment—perhaps exemption from parcel-specific determinations for certain categories of work, or expedited permit processing when permits are required. This approach would allow the concept to be tested at the state level without federal legislation.¹² Contractors who saw value in the license could pursue it; others could continue under existing requirements. State agencies could refine the program based on experience, gradually expanding it as both staff and contractors learned what works. A voluntary program would also generate data demonstrating the concept's value: How much faster do projects proceed with licensed contractors? How many jurisdictional disputes are avoided? Do environmental outcomes improve? Concrete evidence would strengthen the case for expansion.

States possess ample legal authority to implement entity-based licensing for wetlands work. State police power has long encompassed professional licensing as a tool for protecting public

health, safety, and welfare—the same authority under which states license physicians, engineers, and environmental site remediation professionals. New Jersey’s Licensed Site Remediation Professional program and Massachusetts’s Licensed Site Professional program both demonstrate that states can delegate significant environmental compliance functions to licensed private professionals without running afoul of constitutional constraints. Moreover, states acting under their own authority to protect wetlands that lost federal coverage after Sackett face no preemption concerns: The Clean Water Act expressly preserves state authority to adopt standards more protective than federal law. Section 510 of the act provides that nothing in the statute shall preclude any state from adopting or enforcing requirements that are not less stringent than federal standards.¹³

A more ambitious approach would make licensing mandatory for contractors whose activities regularly affect potential wetlands. This would require notice-and-comment rulemaking. The legal authority exists, though it is not beyond challenge. Section 402 of the Clean Water Act authorizes the EPA to issue permits under conditions it prescribes, and Section 404(e) empowers the Army Corps to issue general permits for categories of activities. Entity-based licensing could be framed as a general permit program conditioned on the applicant’s demonstrated qualifications—analogue to the nationwide permits already issued under Section 404(e) for categories of low-impact activities.¹⁴ A licensing requirement for contractors could be framed as a permit program for entities rather than individual discharge events.

The most comprehensive reform would involve statutory changes to the Clean Water Act itself. Congress could explicitly authorize entity-based licensing, specify how it relates to existing permit requirements, and establish transition mechanisms. Such statutory reform would provide clarity and political legitimacy even if existing statutory language might

be broad enough to authorize licensing administratively.

Each approach has trade-offs. Voluntary programs are easier to implement but may see limited uptake if contractors don’t perceive sufficient benefits—though adverse selection could be addressed by offering meaningful streamlining benefits that make licensing attractive even to contractors whose practices already meet high standards. Mandatory agency rules could face legal challenges about whether the EPA exceeded its authority. Statutory reform provides the strongest foundation but faces obvious political obstacles. The right path may be sequential: Start with voluntary guidance-based approaches, demonstrate their value, expand through rulemaking, and ultimately seek statutory codification once the concept has proven itself. This incremental strategy would build constituency support while managing implementation challenges.

The case for entity-based licensing extends beyond Clean Water Act enforcement. Numerous environmental programs face similar challenges: complex standards that are difficult to apply in advance, activities that affect multiple properties over time, and adversarial relationships between agencies and regulated parties. Consider endangered species protection under the Endangered Species Act. Property owners often discover that their land harbors protected species only when they seek to develop it—creating conflicts similar to the Sacketts’ situation.¹⁵ Entity-based licensing for developers who regularly work in habitat areas could create incentives for early consultation and creative solutions. The key is identifying repeat players—contractors, developers, operators—whose activities affect environmental values across multiple projects and properties. Current approaches treat each project separately, missing opportunities to build expertise, establish accountability through ongoing relationships, and foster cooperation that produces better environmental outcomes.

These approaches would not be susceptible to the greenwashing that has plagued wetlands banking and emissions offset programs. Unlike sellers of bogus credits who can fold up shop when caught, licensed service providers have made investments in acquiring licenses that create strong incentives to preserve their value. And unlike industry self-certification, licensing would require independent auditors and professionals to verify compliance.

Entity-based licensing faces real institutional risks—the same ones any professional licensing regime confronts. Three are worth addressing directly. First, regulatory capture: Licensed contractors who develop close relationships with agency staff might receive unduly favorable treatment, weakening environmental protections. Capture is a real risk in any licensing regime. But the captive insurance experience is instructive: Captive regulators maintain demanding standards despite close working relationships with managers, because both the regulator’s jurisdictional reputation and the value of the manager’s license depend on credible oversight. Structural safeguards reinforce this dynamic: transparent licensing criteria, public compliance records, periodic independent audits, and environmental stakeholder participation in standard-setting. Second, adverse selection: If licensing is voluntary, the most responsible contractors may be the first to participate while bad actors avoid it entirely. This argues for designing licensing programs that offer substantial benefits—such as streamlined permitting—that attract broad participation, and for eventually making licensing mandatory for contractors whose activities regularly affect wetlands. Third, a race to the bottom: States competing for business might set licensing standards too low. The captive insurance experience suggests this risk is overstated—Vermont dominates the captive market precisely because its rigorous standards give captive owners and managers confidence in the

jurisdiction’s reputation—but federal minimum standards or interstate compacts could provide additional guardrails.

Who would benefit from entity-based licensing? The answer suggests potential constituencies for reform. Contractors would benefit from clearer pathways to demonstrate expertise and build trust with regulators. Rather than facing uncertain enforcement on each project, they could invest in compliance systems knowing that good practices pay off across their entire business. Property owners would benefit from more predictable processes. If licensed contractors can provide greater certainty about whether projects require permits, transaction costs decline and delays decrease. Regulators would benefit from concentrating oversight resources on entities that matter most. Instead of processing countless parcel-specific determinations, agency staff could focus on ensuring that licensed contractors maintain adequate practices. And environmental advocates should welcome an approach that catches problems before ground is broken—because after-the-fact enforcement, however vigorous, cannot undig a wetland. This broad coalition of potential supporters suggests the idea is politically viable, and pilot programs could demonstrate it in practice.

The Sacketts spent 16 years answering a question that a licensed contractor could have resolved in a single afternoon

Conclusion

The Sacketts’ 16-year legal odyssey began with a simple question: Could they build a home on their residential lot? That such a straightforward question spawned two Supreme Court cases and nearly two decades of litigation reveals the cost of making the parcel—not the contractor—the unit of regulation. The central lesson is that courts can clarify doctrine, but they cannot redesign regulatory structure. *Sackett* fixed the legal test; it did nothing to fix the adversarial, parcel-by-parcel system that produced the conflict in the first place. The problem isn’t primarily about legal standards—though those matter—but about a parcel-by-parcel model that demands transaction-level oversight of complex, site-specific environmental conditions, asking more of regulators than any agency can deliver.¹⁶ Parcel-by-parcel analysis creates uncertainty, imposes high transaction costs, and fosters adversarial relationships between agencies and regulated parties. These problems persist regardless of which legal test courts apply, and they extend far beyond wetlands to endangered species protection, air quality management, and numerous other environmental programs.

Entity-based licensing offers an alternative. By focusing on the contractors and other professionals whose activities regularly affect environmental values, the approach creates incentives for expertise and cooperation. Licensed contractors work with regulators to accomplish project goals while protecting environmental values, knowing their license depends on maintaining good practices. Regulators develop ongoing relationships with entities that matter most rather than encountering projects after the fact. This regulatory structure has proven successful in complex, technical financial services where writing precise regulations would be difficult and where innovation is essential—exactly the characteristics that make environmental regulation so challenging under current approaches. Captive insurance, investment funds, and trusts all involve non-standard

goals and flexible solutions, yet licensing of service providers has enabled effective regulation without stifling innovation.

The path forward is clear. States should seize this moment. Colorado, New Mexico, and California have already taken the first step by creating new permitting programs to fill the post-Sackett regulatory gap—but entity-based licensing would make those programs far more effective. States that already rely on certified or approved wetland delineators, such as Minnesota,¹⁷ have the institutional foundation to lead. As state programs demonstrate their value, Congress could codify entity-based licensing across environmental laws, and the EPA could encourage adoption through cooperative federalism frameworks.

The Sacketts spent 16 years fighting over a residential lot. The underlying problems that made their ordeal possible affect countless other property owners, contractors, and environmental regulators. We can do better. Entity-based licensing could finally provide what two Supreme Court decisions could not: a regulatory approach that serves property owners, contractors, and environmental protection simultaneously. The Sacketts spent 16 years answering a question that a licensed contractor could have resolved in a single afternoon. That disproportion is not a fluke—it is what happens when regulation targets parcels instead of the professionals who work on them.

Endnotes

1. *Sackett v. EPA*, 598 U.S. 651 (2023); *Sackett v. EPA*, 566 U.S. 120 (2012).

2. *Sackett v. EPA*, 566 U.S. 120, 125 (2012); 40 C.F.R. § 19.4.

3. See Andrew P. Morriss & Roger E. Meiners, *Regulating Entities, Not Activities: Reforming the Environmental Permit Raj*, 75 CASE W. RESRV. L. REV. 333 (2024)

4. N.J. Stat. Ann. § 58:10C-1 to -29.

5. Mass. Gen. Laws ch. 21A, §19

6. 25 Tex. Admin. Code § 296.52; Cal. Bus. & Prof. Code § 7058.7.

7. JENNIFER PAHLKA, RECODING AMERICA: WHY GOVERNMENT IS FAILING IN THE DIGITAL AGE AND HOW WE CAN DO BETTER (2023).

8. See U.S. Army Corps of Eng’rs, Regulatory Program data (reporting that average processing time for standard individual permits is approximately 264 days, with substantially shorter timelines for general permits); U.S. Env’t Prot. Agency, *Permit Program Under CWA Section 404* (2025), <https://www.epa.gov/cwa-404/permit-program-under-cwa-section-404> (describing individualized review and public interest analysis for permits); see also U.S. Gov’t Accountability Off., *Army Corps of Engineers: Expedited Permitting Process Would Benefit from More Transparency*, GAO-25-107637 (2025) (describing the complexity and structure of the Corps’ permitting process). For earlier estimates of permitting costs, see David Sunding & David Zilberman, *The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process*, 42 Nat. Res. J. 59, 73–74 (2002) (reporting mean permitting costs exceeding \$270,000 for relatively small projects).

9. *Sackett*, 598 U.S. at 679–80 (Kavanaugh, J., concurring in the judgment). Justice Kavanaugh, joined by Justices Sotomayor, Kagan, and Jackson, agreed that the significant nexus test should be rejected but argued the majority’s “continuous surface connection” standard was too narrow and would exclude “adjacent” wetlands that Congress intended to protect.

10. Env’tl. Integrity Project, *One Year After Supreme Court Decision, Most States Leave Wetlands Unprotected* (2024); see also Cong. Rsch. Serv., LSB10981, *Supreme Court Narrows Federal Jurisdiction Under Clean Water Act* (2023).

11. Colo. H.B. 24-1379 (2024) (creating a state dredge-and-fill permitting program under Regulation 87); N.M. S.B. 21 & S.B. 22 (2025) (establishing a state Pollutant Discharge Elimination System); Cal. A.B. 2875 (2024) (codifying “no net loss and long-term net gain” wetlands policy); Tenn. S.B. 670 (2024-2025); Tennessee Department of Environment & Conservation, *Third-Party ARAP General Permits*, <https://www.tn.gov/environment/permit-permits/water-permits1/aquatic-resource-alteration-permit--arap-/permit-water-3rdparty-wetland.html>.

12. Env’tl. Law Inst., *Navigating Newly Non-WOTUS Wetlands: A Study of Six States’ Wetlands Programs After Sackett v. EPA* (2024).

13. 33 U.S.C. § 1370 (2018) (“[N]othing in this chapter shall . . . be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.”); see also N.J. Stat. Ann. § 58:10C-1 to -29 (Licensed Site Remediation Professional program); Mass. Gen. Laws ch. 21A, § 19 (Licensed Site Professional program).

14. 33 U.S.C. §§ 1342, 1344 (2018).

15. *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 714 (1995) (Scalia, J., dissenting).

16. Morriss & Meiners, *supra*, at 333, 336, 344-46.

17. Minn. Stat. § 103G.2242 (Wetland Conservation Act); see also Minn. Bd. of Water & Soil Res., *Wetland Conservation Act (WCA) Technical Evaluation Panel and Delineation Guidance*.

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