US Supreme Court guts wetlands protections

Daniel de Vries
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The US Supreme Court on Thursday eliminated federal protections for millions of acres of wetlands across the United States. The ruling in *Sackett v. EPA* is the latest in a series of anti-democratic and anti-science dictates by the right-wing majority. It upends more than 50 years of environmental policy and represents an attack on ecological and human health.

The Court sided with Idaho landowners 9-0 on the narrow issue of whether a federal permit was required to fill wetlands on their property. However, the far-right majority also took the opportunity to redefine the water bodies covered under the Clean Water Act, in a 5-4 decision authored by Justice Samuel Alito. Justice Brett Kavanaugh penned the main dissenting opinion and was joined by the Court's three liberal judges.

In practice, the ruling means that a majority of wetlands previously overseen by the Environmental Protection Agency (EPA) and the Army Corps of Engineers will lose federal protection. It is a gift to developers and mining, oil, and other polluting industries, which have long sought to overturn the permit requirements in the Clean Water Act to maximize profits. Representatives from the American Petroleum Institute and the National Mining Association hailed the ruling.

The consequences for the environment are potentially devastating. Wetlands provide critical habitats for a variety of wildlife, including at least a third of threatened or endangered species. The ecosystems perform vital services such as filtering out pollution and controlling floods.

According to a study by the Fish and Wildlife Service, more than half of the approximately 220 million acres of wetlands in the continental United States have already disappeared over the past two centuries. Under conditions where climate change is driving more extreme rainfall and more intense hurricanes, the evisceration of wetland protections will have severe consequences. Catastrophic flooding events like the kind seen in Texas and Louisiana in 2017 with Hurricane Harvey will increase. Harvey shined a spotlight on the impact of the destruction of tens of thousands of acres of wetlands in the metro-Houston area, worsening a disaster that led to the deaths of 103 people.

The judicial gutting of the Clean Water Act marks a major step towards unraveling the regulatory regime that helped slow the loss of wetlands and improve water quality across the country, however limited. Before the adoption of the Act in 1972, water pollution had reached such crisis levels that swimming in many rivers and lakes around the country was hazardous. High-profile disasters like the fires on the Cuyahoga River in Ohio triggered widespread opposition. While overall water quality has improved in key ways over the past 50 years, the poisoning of drinking water in places like Flint, Michigan, and Jackson, Mississippi, underscores the need to extend environmental protections.

While water quality safeguards enjoy widespread support, an unelected cabal of right-wing ideologues has now asserted the power to effectively rewrite the federal government's primary mechanism to protect the environment.

Environmental advocates denounced Thursday's ruling. “The *Sackett* decision undoes a half-century of progress generated by the Clean Water Act. More than 118 million acres of formerly protected wetlands now face an existential threat from polluters and developers,” Sam Sankar, an executive at the environmental law firm Earthjustice, said in a statement. “This decision is the culmination of industry’s decades-long push to get conservative courts to do what Congress refused to do. The Court's decision to deregulate wetlands will hurt everyone living in the United States.”

The definition of “Waters of the United States” in the Act, which lays out which areas are subject to federal oversight, has long been subject to political battles. Prior to *Sackett*, the Supreme Court accepted that wetlands with a “significant nexus” to navigable waters—that is, wetlands that impact the chemical or biological health of navigable waters—should fall under federal jurisdiction. This regulatory regime recognized the physical reality of an interconnected water system. Destroying or polluting wetlands, ephemeral streams and other water bodies has an undeniable adverse impact on the health of lakes, rivers, and oceans.

The majority's ruling in *Sackett* limits federal authority to only those wetlands with a continuous surface connection to navigable waters. The new definition is absurd from a scientific standpoint, falsely attributing decisive importance to the presence of man-made or natural barriers on the surface.

The decision also disregards the plain language of the Clean Water Act, which specifies that water bodies *adjacent* to navigable waters are covered. The meanings of the word *adjacent* as “next to” or “very near” are disregarded by the majority, instead substituting a meaning of “continuous.” As Justice Elena Kagan, who, in addition to signing on to Kavanaugh’s dissent, filed a separate opinion, wrote, “The majority shelves the usual rules of interpretation—reading the text, determining what the words used there mean, and applying that ordinary understanding even if it conflicts with judges’ policy preferences.”

The legal principles involved in the majority's decision go far beyond deliberately misreading the dictionary. “The majority relies on a judicially manufactured clear-statement rule,” Kagan explained, which asserts that Congress must use only “exceedingly clear language” when it comes to the federal government’s authority over private property.

What is involved here is a usurpation of political power by a corrupt and reactionary judiciary to safeguard the privileged position of private property. As far as the court is concerned, the American people have no social rights to a livable planet.

Even this reactionary content was too limited for Justice Clarence Thomas, who authored a separate opinion that Justice Neil Gorsuch joined. Thomas's opinion attacked the long-standing interpretation of the Constitution's Commerce Clause, arguing that the federal government’s authority should be limited to keeping interstate commerce “open and free from any obstruction to their navigation.”

As Ian Millhiser explained in Vox, “Under the approach Thomas lays out in his *Sackett* concurrence, the federal ban on child labor is unconstitutional. So is the minimum wage, federal laws protecting the right to unionize, bans on workplace discrimination, and nearly all other regulation of the workplace. Thomas’s approach endangers countless laws governing private business, from rules requiring health insurers to cover people with preexisting conditions to the ban on whites-only lunch counters. And even that is underselling just how much law would be snuffed out if Thomas’s approach took hold.”

While Thomas’s extraordinary diatribe does not have the force of law, it is a striking illumination of the crisis of American democracy and the political thinking which dominates among a significant section of the capitalist ruling class. Two of nine justices are now determined to send America back to the 19th century. The *Sackett* ruling follows other decisions to roll back environmental protections, as in *West Virginia v. EPA*, along with other attacks on democratic rights, including most notably the overturning of national abortion rights in *Dobbs*.

The Biden administration issued a statement expressing its “disappointment” in the *Sackett* decision, highlighting the bipartisan support for the Clean Water Act and criticizing the upending of the legal framework of environmental regulation. As in the responses to the other reactionary Supreme Court rulings, the Democratic Party is incapable of and uninterested in waging a political struggle against these right-wing attacks. On the contrary, just three days after the *Sackett* decision, Biden announced a debt ceiling deal that includes environmental permitting “reforms” demanded by Republicans on behalf of energy giants.