TAKE BACK THE COURT

The Supreme Court is Set to Gut Environmental Protections — Again

For 50 years, the Clean Air Act and Clean Water Act stood as twin pillars of America's environmental protection efforts. These monumental laws, passed with overwhelming bipartisan support, served as the foundation for successful efforts to dramatically reduce pollution and clean up the air we breathe and water we drink. The overwhelming success — and ongoing popularity — of these laws has long stymied efforts by big polluters and politicians they bankroll to roll them back legislatively. Unable to accomplish their agenda through democratic means, these corporate polluters have found an eager ally in the right-wing Supreme Court. Last term, the Court gutted the EPA's ability to regulate emissions from power plants under the Clean Air Act.[1] This term, the Supreme Court will now determine the fate of the Clean Water Act. *Sackett v. Environmental Protection Agency (EPA)* is a fossil-fuel and industry-backed case and functions as the latest installment in a decades-old attempt by the country's biggest polluters to circumvent the primary federal safeguard protecting the nation's waters with the aid of the Supreme Court.

The Court Could Rewrite the Clean Water Act in this Case

The Clean Water Act was passed with overwhelming bipartisan support in 1972 and has protected America's navigable waters, tributaries, and adjacent wetlands, marshes, and fens for more than 50 years. It remains extremely popular: 3 in 4 Americans support *expanding* strong federal protections to more waters and wetlands. But the Supreme Court is likely to side with polluters and industry stakeholders to remove crucial protections and roll the country back to a time when polluting with impunity was cheap and reckless. Before the Clean Water Act, we lost an average of 450,000 acres of wetlands per year.[2]

Facially, the case revolves around an Idaho couple who own an excavation company and dumped fill onto a protected wetland in violation of the Clean Water Act while developing a lot. When the EPA took action to get the Sacketts to comply with the Clean Water Act, the Sacketts filed a federal lawsuit and are now asking the Supreme Court to rewrite the law — specifically narrowing the definition of "waters of the United States."

But the case is even more insidious than it appears: the effort to rewrite and desecrate the Clean Water Act is backed by major industry stakeholders who have unsuccessfully lobbied for decades to take us back to a simpler time for polluters. Since they can't win the legislative fight, they are turning to their industry-sponsored activist justices to do their dirty work for them. The American Petroleum Institute, the American Exploration and Mining Association, the National Homebuilders Association, mining giant Freeport-McMoRan, the Chamber of Commerce, the

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[1] *See West Virginia v. Environmental Protection Agency,* 597 U.S. __ (2022). *See also* Umair Irfan and Neel Dhanesha, The Supreme Court's EPA ruling isn't the only legal attack on the environment, *Vox* (Jun. 30, 2022).

[2] Brief of Environmental and Community Organizations as Amici Curiae in Support of Respondents, No. 21-454, 7.

National Cattlemen's Beef Association, and the Association of American Railroads are just some of the corporate interests who have filed briefs in favor of gutting the Clean Water Act in *Sackett v. EPA.*.

The record before the Court is clear: the Clean Water Act was enacted with the express objective to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[3] The text, structure, and history of the Act along with Supreme Court precedent show that Congress enacted a comprehensive statute to address the nation's water quality that included tributaries and upstream wetlands. But by taking up this case, the Court has indicated a willingness to revisit its recent precedent[4] and potentially adopt a narrow definition of "waters of the United States" that would allow all non-abutting wetlands and non-navigable tributaries to be destroyed or polluted — despite the obvious fact that upstream fill and pollution would necessarily degrade downstream water quality.[5] Not even the Trump administration advocated for such a narrow definition of protected waters — 7 administrations in a row have disagreed with the Sacketts' proposed definition.

An Adverse Ruling will Have Extreme Consequences for Communities and the Environment

An adverse ruling in *Sackett v. EPA* could strip the EPA of its ability to regulate protected waterways and half of America's wetlands — which could put the drinking water of 1 in 3 Americans at risk. If the Court opens up protected waterways to pollution and destruction, it could also expose families and communities to flooding, drought, and threats to their health and safety.

More than 50 million acres of wetlands, marshes, and fens are at risk of destruction. These habitats provide crucial ecosystem services to abutting and downstream communities, including water filtration, flood control against storm surges, and drought prevention — they act as a sponge that soaks up excess water and releases it back slowly over time, while also filtering pollutants. Wetlands, marshes, and fens also soak up carbon dioxide from the air and function as vital carbon sinks. Millions of miles of streams and small, non-navigable tributaries could also be impacted. These smaller bodies of water, if polluted with impunity, will carry impurities and toxins downstream and into larger rivers, lakes, reservoirs, and other bodies. This is the water that communities rely on for drinking, swimming, and recreation.

The impact on the nation's waters will be devastating even if the justices don't give the Sacketts and their industry backers everything on their wishlist.[6] The Supreme Court's right-wing justices seem likely to at least implement a narrow reading of the Clean Water Act first proposed by the late Justice Scalia in *Rapanos v. United States* that "would also exclude 51% (if not more) of the

[3] 33 U.S.C. 1251 §101(a).
[4] *See Rapanos v. United States,* 547 U.S. 715 (2016) and *Cnty. of Maui v. Hawai'i Wildlife Fund*, 140 S. Ct. 1462 (2020).
[5] Brief of Environmental Organizations, No. 21-454, 4.
[6] Ian Millhiser, The Supreme Court case that's likely to handcuff the Clean Water Act, *Vox* (Sept. 27, 2022).

Nation's wetlands" from protections under the act.[7] It could potentially exclude an even higher percentage of the nation's streams.

Beyond the devastation to water quality, communities, and the environment, this case fits into a broader war on the government's ability to meet today's most pressing challenges — and aligns with the radical Court's plot to repeal the major advancements of the 20th century. The conservative justices are actively complicit in an anti-regulatory mission that goes beyond environmental threats: our social safety nets, anti-discrimination protections, voter safeguards, and workplace regulations are all on the chopping block this term as the Supreme Court races to enact one-party, minority rule from the bench. Only rebalancing and expanding the Supreme Court can end this Court's insidious, radical, and deadly opinions from continuing for decades to come.

[7] *Id.*