

# Illinois environmentalists push for state action to protect wetlands after Supreme Court ruling rolls back federal rules

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Credit: CC0 Public Domain

Across the country, marshes, swamps and bogs quietly soak up flood water and filter pollutants. Ecologists agree they are one of the best

natural defenses against climate change.

But after a recent U.S. Supreme Court ruling, more than half of the country's 118 million acres of [wetlands](#), according to estimates from the environmental firm Earthjustice, will effectively no longer have federal protection from developers and polluters.

Illinois, which has lost 90% of its wetlands since 1818, is among the more vulnerable states with no state-level protections for wetlands on private property. Those on public land are still protected.

In a startling precedent for [environmental law](#), experts say, the decision in Sackett v. EPA upends more than 50 years of legal protections by limiting the jurisdiction of the Clean Water Act to wetlands visibly connected to major waterways.

"(The court's rationale) is almost science fiction," said Richard Lazarus, a law professor at Harvard University who represented environmental groups before the court.

In states such as Illinois, environmentalists are rallying to draft legislation as local governments must decide whether and how to protect these wetlands.

"Right now we're in the process of building up our troops," said Eliot Clay, state programs director at the advocacy group Illinois Environmental Council.

Meanwhile, builders, developers and farmers applauded the decision, accusing the U.S. Environmental Protection Agency of encroaching on property rights.

While the Supreme Court's decision will take down federal barriers to

developing farmland and constructing buildings in certain places, eventually flooding and erosion will follow, harming farmland, residential areas and transportation infrastructure, Clay said.

"This decision by the Supreme Court was a really big win for those who believe that individual property rights are more important than the collective status of a piece of property," said Clay. "They can celebrate that in the short term, but people aren't going to be celebrating those kinds of decisions when it starts impacting their actual day-to-day way of life."

## **What does adjacent mean?**

In a 17-year legal battle against the EPA, Michael and Chantell Sackett argued the agency overstepped when it forced them to halt construction on their property 300 feet from Idaho's Priest Lake, because they were building on federally protected wetlands without a proper permit.

The dispute centers on what Congress intended with the word "adjacent" when it passed the Clean Water Act in 1972 with bipartisan support to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."

The act gives the EPA authority to regulate construction near and pollution into "waters of the United States," defined as "relatively permanent, standing or continuously flowing bodies of water connected to a traditional interstate navigable water." Recognizing the connections between wetlands and streams, oceans, rivers and lakes, the act also extends protections to "wetlands adjacent thereto."

The EPA reasoned the wetlands on the Sacketts' property are adjacent to Lake Priest since they feed water into the lake via underground channels.

The Sacketts argued they are not adjacent because a man-made ditch separates them from a stream that flows into the lake.

The Supreme Court sided with the Sacketts, stating that when the ditch was built, the wetland on the Sacketts' property lost federal protections even though none of its ecological properties were fundamentally changed.

The Illinois Farm Bureau praised the May 25 decision as a clear rule that will save farmers from having to enlist legal expertise to tend to their land as they see fit.

The National Association of Homebuilders joined them, stating that "the decision represents a victory against federal overreach and a win for common-sense regulations."

## **Up to the states**

Illinois, like many other states, depended on federal regulations to protect wetlands. Now, that responsibility falls to individual states. This worries Scott Strand, a senior attorney at the Environmental Law and Policy Center.

"The Clean Water Act was passed because the states were failing. The whole point of the law was to deal with the fact that the states were not either able or willing to do the job," he said.

The Illinois EPA is reviewing the Sackett v. EPA ruling to fully understand the implications that it will have on wetlands and waters within the state.

"How these new considerations (in the court's decision) will affect Illinois EPA's permitting and enforcement decisions going forward

cannot be determined at this time," an agency spokesperson wrote in an email to the Tribune.

The Illinois Environmental Council is calling on Gov. J.B. Pritzker to issue an executive order protecting as many wetlands as possible until the General Assembly can consider new legislation when it reconvenes in January.

"I have absolutely no question that (the proposal of a state wetland law) is now going to happen," said Paul Botts, the president and executive director of The Wetlands Initiative, a Chicago-based nonprofit.

Wetland protections have been introduced in the General Assembly before, most recently in 2020. They faced challenges from lobbying groups for farmers and builders, which ultimately won out.

Clay, who has been organizing numerous environmental groups into action since the ruling, predicts they'll face another uphill battle but remains optimistic.

"A big argument that was brought up against (the 2020 bill), especially from the business community, was that we don't need to do this in Illinois because it already exists in federal law. Now that that card has been thrown out, they don't have that argument anymore," said Clay.

Botts and Strand want a state law that will delineate wetlands based on their soils rather than their visible connection to another body of water.

"When they wrote the Clean Water Act, they had no idea that wetlands have a fingerprint called hydric soils," said Botts.

As a result of the saturation, flooding and ponding that occurs in wetlands, the soil has specific chemical and biological properties that can

be distinguished with a standardized, on-site soil test.

The common complaint among farmers and developers is that scientifically based rules require costly and time-consuming expert analysis that delay projects.

In its statement after the Sackett v. EPA ruling came out, the homebuilders association called for a practical definition of waters of the United States that won't trigger "expensive, time-consuming permitting and regulatory requirements."

Botts said these cost and time concerns are moot points with soil samples.

"It's not any kind of exotic scientific process. It's not particularly any more complicated than doing a survey, and if you're going to build a building or a house, you have to hire surveyors to come out and do a proper survey anyways," he said.

## **Natural sponges and filters**

The Supreme Court's criteria for adjacency also fails to consider the latest scientific understandings of wetlands, say environmentalists.

"The Supreme Court majority is just saying, "If I can see water, and I can see the water flowing from the wetland to the river and back, it's a wetland. And, if I can't, it's not," said Botts. "From a scientific or technical point of view, that's utterly just nonsense."

A key characteristic of wetlands is they absorb water, so much of their connections to rivers, lakes, streams and oceans are through underground networks. Surface water is often not present during periods of low rainfall when there is no excess water.

The Great Lakes, for example, are lined with adjacent wetlands that appear and disappear with water-level fluctuations. Some of the most robust examples are along Lake Michigan's Indiana dunes. Although wetlands in Indiana Dunes National Park are protected, some nearby wetlands outside the park, which also provide homes for insects and amphibians and feeding grounds for birds and mammals, are now at risk.

The spongelike quality of wetlands makes them invaluable resources for mitigating greenhouse gases and coping with the runoff from intensifying weather patterns caused by climate change, scientists say.

Wetlands are remarkable carbon sinks, filtering out pollutants before they can make it to major waterways and containing 20% to 30% of global soil carbon despite only making up 5% to 8% of land surface.

Illinois is one of the biggest contributors to nutrient pollution that flows from the Mississippi River to the Gulf of Mexico, creating a dead zone with chronic algae blooms and near-zero oxygen levels. The state's negative impact is bound to increase without state-level regulations, Clay said.

## **Years of scrutiny**

During the last three presidential administrations, the EPA has reinterpreted and revised the definition of protected wetlands. Each attempt has faced scrutiny in the courts. Most recently, the Biden EPA implemented a new definition that was immediately challenged by 26 states and must now be revised to fit the Supreme Court's narrower standard.

Some environmentalists believe changes at the federal level will likely require a new or revised law from Congress. But partisan gridlock makes passage of this kind of legislation difficult.

Sackett v. EPA, alongside other recent environmental rulings by the Supreme Court, has established the precedent that, "if EPA is trying to enact a significant pollution protection program, they have to have exceedingly clear congressional authorization," Lazarus said.

"That is a complete reversal of what the law has been for the past basically 40 years where you only could defeat an EPA program if you could show the plain meaning (of the law) did not support the agency," he said.

While the EPA's authority is being rolled back by the Supreme Court, "the states are not powerless. The states have lots of ability to take care of this problem and preserve their environments," Strand said.

In Illinois, [environmental groups](#) are ready to get to work.

"Over the next few months, as we start getting our game plan together for the next legislative session, we're gonna need to think through what we need in Illinois," Clay said. "We're really going to try to craft a bill that, at least from a Midwestern standpoint, puts Illinois in the lead in terms of wetland protection."

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