

GUEST ESSAY

The Supreme Court Is Crippling Environmental Protections. Where Is Congress?

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In 1965, President Lyndon Johnson told a room full of governors and state officials that he found the filthy river flowing a mile from the Capitol “disgraceful.” Now the Potomac River runs much cleaner, thanks to the landmark Clean Water Act of 1972 — and that adjective employed by Johnson serves as an apt description today of the failures of the Supreme Court and Congress to protect the nation’s waterways.

After half a century of painstaking restoration under the Clean Water Act, streams and wetlands nationwide are once again at risk of contamination by pollution and outright destruction as a result of a ruling on Thursday by the Supreme Court.

The Environmental Protection Agency has long interpreted the Clean Water Act as protecting most of the nation’s wetlands from pollution. But now the court has significantly limited the reach of the law, concluding that it precludes the agency from regulating discharges of pollution into wetlands unless they have “a continuous surface connection” to bodies of water that, using “ordinary parlance,” the court described as streams, oceans, rivers and lakes.

At least half of the nation’s wetlands could lose protection under this ruling, which provides an even narrower definition of “protected waters” than the Trump administration had sought.

Justice Brett Kavanaugh, who filed a concurring opinion in the judgment, acknowledged its impact, writing that it would have “significant repercussions for water quality and flood control throughout the United States.”

It is the latest sign that many decision makers in Washington have lost touch with the increasingly fragile state of the natural systems that provide drinking water, flood protection and critical habitat for people and wildlife in every state. In March, the Senate joined the House in trying to roll back clean-water regulations established by the Biden administration, even though they were less comprehensive than Clean Water Act protections before President Donald Trump weakened them. (President Biden vetoed the action.) Congress had also long failed to clarify language in the Clean Water Act that caused confusion among judges and put the law in the Supreme Court’s cross hairs.

Now it is up to Congress to defend the vision of the Clean Water Act, which Senator Howard Baker, a Republican from Tennessee, articulated in 1972 in a debate on the Senate floor.

“As I have talked with thousands of Tennesseans, I have found that the kind of natural environment we bequeath to our children and grandchildren is of paramount importance,” he said. “If we cannot swim in our lakes and rivers, if we cannot breathe the air God has given us, what other comforts can life offer us?”

We still have not made that vision a reality. Although the nation has come a long way — rivers actually caught fire before the Clean Water Act because they were so polluted — roughly 50 percent of the nation’s rivers, streams and lakes are still considered “impaired,” according to reports submitted by states to the E.P.A. that were reviewed last year by the Environmental Integrity Project.

This is not the time to backslide. Will Congress step up and undo the damage the court has done by revising the law to fulfill its stated goal to “restore and maintain the chemical, physical, and biological integrity of the nation’s waters”? Will it take a pre-emptive look at laws facing legal challenges to address potential issues? Or will lawmakers continue to allow what Justice Elena Kagan called “the court’s appointment of itself as the national decision maker on environmental policy”?

The protections eviscerated by the court are vital. It’s simple science. Water flows downhill, and you can’t protect major rivers, lakes and streams unless you also protect the headwaters that feed them. And those headwaters are often wetlands and small streams. We must protect the whole system to safeguard downstream communities and the environment.

Contrary to some very loud choruses by polluting interests, activities like agriculture have not been hurt or unduly constrained by strong protections. Longstanding exemptions have been in place for routine farming and ranching activities like plowing, harvesting, and maintaining ditches, ponds and farm roads. Both the law and its applying rules have exempted pollution from agricultural runoff as well as from stock ponds and irrigated wetlands.



A wetland near Kulm, N.D. Charlie Riedel/Associated Press

A weak Clean Water Act, by contrast, is a threat to agriculture and other business interests. Farming relies on a stable, nontoxic water supply and insulation from flood threats. Stripping away basic protections of irrigation supplies and opening up critical flood-absorbent wetlands to development hurt farmers.

Moreover, with the twin threats of increased weather variability and breakneck development, the nation is already knee-deep in an era of increased drought and more intense flooding, made worse by the loss of wetlands.

An acre of wetlands can store up to 1.5 million gallons of floodwater, reducing downstream flooding and creating resilience to drought. Hurricane Harvey in 2017 should have been an alarm for Washington about the critical role wetlands will play as our cities grow and the climate warms. It wasn't just the hurricane winds and storm surge that brought destruction to greater Houston. With lawn and concrete replacing wetlands, there was nowhere for the record rainfall to go but inside homes and businesses. It caused one of the most expensive disasters in United States history.

Americans continue to show overwhelming support for strong clean-water protections. A national poll last year found that more than four in five adults want the E.P.A. to continue to take the lead to protect clean water.

The Supreme Court's decision last week was not the first time it has ratcheted back the government's authority to protect the environment. Last summer, the court limited the E.P.A.'s power under the Clean Air Act, another landmark law, to regulate carbon emissions from power plants.

Congress needs to listen to the American people and to the science. Legislators should remember what Johnson saw that day gazing out on the putrid Potomac. They need to block the Supreme Court's retreat from protecting the environment and call it what it is: disgraceful.

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