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COMMENTARY

EPA: Enlightened despots or experts?

Supreme Court ‘waters of the United States’ case could have big impacts on Virginia wetlands



GUEST COLUMN

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📷 Ducks swimming in wetlands near the Potomac River in Alexandria, Va. (Sarah Vogelsong / Virginia Mercury)

By Bobby Whitescarver

Here we go again.

In the first U.S. Supreme Court case this fall, *Sackett v. Environmental Protection Agency*, the justices and lawyers wrestled with the definition of “waters of the United States”—those waters that the federal government has jurisdiction to protect from pollution and alteration. The definition has been changing ever since Congress gave the EPA and the U.S. Army Corps of Engineers joint powers to define it 50 years ago in the Clean Water Act.

The first 20 words of the Clean Water Act are these:
“The purpose of this Act is to improve and maintain the

physical, chemical, and biological integrity of the Nation's waters."

Fifty years, and we still don't have a clear definition? It's so frustrating. Poor Michael and Chantell Sackett. They've been in litigation over the definition for 16 years. The EPA contends that the Sacketts broke the law by filling in their two-thirds of an acre wetland lot with sand and gravel without a permit because the lot is within the Kalispell Bay Fen, a major wetland that feeds one of Idaho's largest bodies of water, Priest Lake.

The Sacketts, on the other hand, contend that neither the Corps nor the EPA has jurisdiction over their soggy lot because it is separated from the lake by a road and is therefore not adjacent to or touching the lake by a surface water connection.

Much of [the hour-and-a-half argument in the high court](#) was spent questioning the definition of the word "adjacent" because a wetland adjacent to navigable waters – in this case, Priest Lake – falls under the jurisdiction of the EPA. So what does "adjacent" mean exactly? Next to? Abutting? Neighboring?

Chief Justice John Roberts stated, "A train station is adjacent to the tracks even though it's not touching the tracks." Justice Elena Kagan leaned in: "If I say there are two adjacent apartment buildings, do they have to be touching each other?"

The Sacketts' lawyer argued that for the feds to have jurisdiction, the Sacketts' wetland must be touching the waters of Priest Lake via surface water. The EPA's

lawyer argued that the wetland is connected to or touching the lake by other means, such as groundwater, subsurface flow or a drainage ditch leading to a tributary of the lake.

Legal scholars use the 2006 case [Rapanos v. United States](#) to help understand how the court has interpreted the words in the past. In what the EPA considered a violation of the Clean Water Act, John Rapanos had filled in a wetland like the Sacketts', only bigger. The court did not have a majority opinion, offering five separate interpretations of what "waters of the United States" should include.

In the plurality opinion, Justice Antonin Scalia wrote that the Corps "exercises the discretion of an enlightened despot" and that for non-navigable waters like wetlands to be considered jurisdictional, they must be adjacent to and touching navigable waters through surface water. This is the definition the Sacketts' lawyer argued should be the law of the land.

Justice Anthony Kennedy, in his concurring opinion for Rapanos, however, developed the "[significant nexus](#)" rule, which the Corps has followed since 2008. It states that if a wetland has significant influence on the physical, chemical or biological functions of a jurisdictional water, whether it be surface water, ground water or subsurface flow, it should be classified as jurisdictional even if a barrier separates it from the wetland.

The ever-changing definition of "waters of the United States" goes around and around, much like the

hydrologic cycle: When rain falls on the land and soaks into the soil, it recharges the groundwater and eventually flows into streams, rivers and lakes. Evaporation takes place, clouds form and the whole process starts again.

Just where in the cycle does federal jurisdiction over water begin and end? With the Clean Water Act, Congress delegated that authority to the experts in the EPA and the Corps.

It is undisputed that groundwater feeds into surface water. Wetlands such as the Kalispell Bay Fen feed Priest Lake by surface water, subsurface water and groundwater flow. In fact, surface water makes up only 1.2% of all fresh water, and groundwater makes up an astonishing 30%, [according to the U.S. Geological Survey](#). Groundwater, indeed, has a beyond significant influence on the physical, chemical and biological integrity of surface water.

If the current heavily conservative court uses Justice Scalia's rule and sides with the Sacketts, its decision will remove the vast majority of wetlands from federal protection. It will accelerate the draining and filling of wetlands that are profoundly important for the integrity and maintenance of the nation's waters.

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