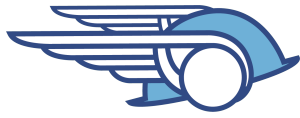


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## COMMENTARY

# I nominate Alexa for the Supreme Court

In its recent decision on Sackett v. Environmental Protection Agency, the Supreme Court severely limited federal regulatory authority to protect the waters of the United States.



**GUEST COLUMN**

JULY 6, 2023 12:04 AM





📷 Coastal wetlands off the Eastern Shore of Virginia. (Sarah Vogelsong / Virginia Mercury)

***By Robert “Bobby” Whitescarver***

The erosion of federal protection for our country’s natural resources continues down a slippery slope into the canyon of our political divide. In its recent 9-0 decision on [Sackett v. Environmental Protection Agency](#), the Supreme Court severely limited federal regulatory authority to protect the waters of the United States.

Do all states have the resources, the political will, or even the desire to pick up the slack and ensure that wetlands are adequately protected? No. Will there be 50 different methods of protection? Likely. The high court

continues to spawn confusion and has abandoned the intent of Congress to protect our natural resources.

In Sackett, the Court's conservative majority gave no deference, not one bit, to science or the EPA's expertise. Instead, Justice Antonin Scalia, who died in 2016, rules from the grave in the Court's opinion. The law of the land for federal protection of wetlands is Scalia's

unscientific definition of wetlands from the 2006 [Rapanos v. United States](#) decision, which states that wetlands must have "a continuous surface connection to bodies that are waters of the United States."

By using this test, the Sacketts won their 16-year court battle to gain the right to destroy a wetland on their property without a U.S. Army Corps of Engineers permit so they could build a house.

Never mind the first 20 words of the Clean Water Act (CWA) that Congress wrote in 1972: "The purpose of this act is to protect and maintain the physical, chemical,

## Virginia wetlands protections remain robust despite Supreme Court ruling, say enviro groups



Following a ruling from the U.S. Supreme Court that narrows environmental protections for wetlands, environmental groups say

and biological integrity of the nation's waters.”

Ask any hydrologist how wetlands, springs, streams, rivers and lakes are charged, and they will answer that groundwater is the major contributor for most of them. Even Amazon's Alexa knows that.

“Alexa, what role does groundwater play in streams?”

“Groundwater is a major source of water to streams, lakes, and wetlands,” she'll say.

Groundwater profoundly affects surface waters' physical, chemical and biological integrity. Alexa, hydrologists and this farmer agree that wetlands and the water underneath those wetlands (groundwater) affect the physical, chemical and biological integrity of the nation's waters.

On our farm in the Shenandoah Valley, the soil and wetlands recharge our well and two public wells that supply water for the community. Those wetlands provide critical wildlife habitat; they also capture and filter any runoff from our land so that the water leaving our farm – either through surface or groundwater – is clean and pollution-free. Farmland plays a huge role in supplying clean water for our country.

In the Rapanos case, in which there was no majority opinion, Justice Anthony Kennedy articulated the “significant nexus,” or connection, test to determine which wetlands are protected under the CWA. This long standing scientific test is what the EPA used to

determine that the Sacketts' property contained wetlands that required a permit to destroy.

If a wetland significantly affects the physical, chemical or biological integrity of a navigable waterway, then that wetland warrants federal protection. It doesn't have to touch the navigable waterway through a surface connection. Instead, it can be connected through the groundwater or shallow subsurface flow.

In Sackett, all nine justices agreed to reverse and remand the case back to the Ninth Circuit Court of Appeals but disagreed on how regulatory agencies should define wetlands to be protected through the CWA.

Five justices agreed with using Scalia's test, four disagreed. The text of the case reads more like a 5-4 decision, instead of the 9-0 ruling that it was.

Justice Brett Kavanaugh stated, "I write separately because I respectfully disagree with the Court's new test for assessing when wetlands are covered by the Clean Water Act. ... The Court's erroneous test not only will create real-world consequences for the waters of the United States but also is [so] sufficiently novel and vague (at least as a single standalone test) that it may create regulatory uncertainty for the Federal Government, the States, and regulated parties."

Justice Elena Kagan wrote, "I'll conclude, sadly, by repeating what I wrote last year [in [West Virginia v. United States](#)], with the replacement of only a single

word [“air”]. The Court substitutes its own ideas about policymaking for Congress’s. The Court will not allow the Clean [Water] Act to work as Congress instructed. The Court, rather than Congress, will decide how much regulation is too much. Because that is not how I think our government should work – more, because it is not how the Constitution thinks our government should work – I respectfully concur in the judgment only.”

Justice Kagan’s remarks refer to the conservative majority in Sackett doing to water what it did to air last year in *West Virginia v. U.S.*: it is stripping federal agencies’ authority to protect the integrity of our environment. In *West Virginia v. U.S.*, the Court ruled that the EPA cannot force coal-burning power plant utilities to “switch” to renewable energy generation methods to reduce greenhouse gas emissions.

It’s now up to Virginia’s Department of Environmental Quality to protect many of our waters and wetlands. Virginia has broad language in our laws to do this, even broader than the CWA’s. But do we have the resources and the political will to do it?

I have my doubts.

*Robert “Bobby” Whitescarver is co-owner of Whiskey Creek Regenerative Farming, a watershed restoration consultant, an award-winning writer, and teaches natural resources management at James Madison University. He can be reached through his website at [www.gettingmoreontheground.com](http://www.gettingmoreontheground.com)*

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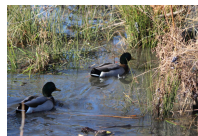
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**GUEST COLUMN**

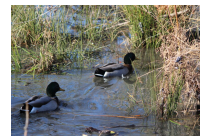
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