There's already been a lot written about how Justice Scalia's untimely death will affect pending cases, not to mention speculation about the possible nominees to replace him. Less attention has been given to the effect on the lower courts. Yet Justice Scalia's departure gives liberal judges in lower courts more freedom than they've had in the past. Here, I'm specifically thinking of the D.C. Circuit and the Ninth Circuit, which between them are the most important forums for environmental litigation. It now looks like it could be at least a year until a successor is named. The 4-4 split gives lower courts more scope to take the initiative.

The main reason is that it is now much less likely that the Supreme Court will review liberal lower court decisions. In the past, the Chief Justice and Justices Thomas and Alito could look either to Justice Scalia or Justice Kennedy for a fourth vote — or indeed, it may have been Scalia who pushed them to hear a case. Now, they have to persuade Justice Kennedy. Apart from the fact that it seems pointless to take a case only to have a 4-4 ties on the merits, Kennedy has never been quite as much of a hardliner as Scalia on environmental issues. Moreover, the conservatives now have to take the risk that if they vote to hear a case, it might get affirmed if either Obama or a Democratic successor appoint Scalia's replacement. That could elevate a bad lower court ruling into Supreme Court precedent, not a happy thought from their perspective

One might say, at the risk of making a somewhat undignified analogy, that lower court judges are a bit like grade school students whose teacher has stepped outside into the hallway. Time for some fun!