High court limits wetlands protection

Supreme Court rules 5-4 to restrain federal regulators' ability to block private developments that affect water quality.

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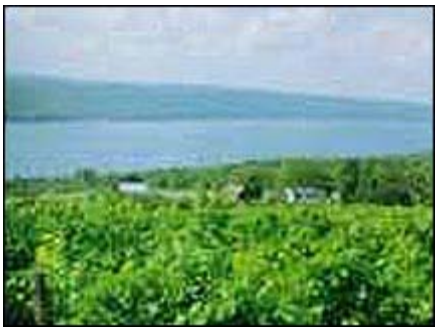
WASHINGTON (CNN) - A sharply divided Supreme Court limited the reach of federal regulators to block private development that might affect water quality, in an important property rights dispute that exposed deep divisions among the justices.

The court Monday concluded 5-4 that the Army Corps of Engineers exercised undue regulation in two cases involving plans by two Michigan landowners to build a shopping center and condominiums on land that contained wetlands.



But the justices failed to agree on the broader issue of whether the government's reach extends to tributaries - the many lakes, streams, swamps, dikes, canals, and even temporary ponds and drainage ditches that often cross state lines and feed a maze of larger so-called "navigable" waterways.

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That division left courts, the government, and developers with no clear guide over when wetlands would be subject to regulation.

Chief Justice Roberts in a brief note lamented the lack of consensus among his colleagues to interpret the scope of the Clean Water Act.

"Lower courts and regulated entities will now have to feel their way on a case-by-case basis," he said.

An estimated 100 million acres of wetlands in the lower 48 states are at the center of the debate, which pits the federal government and environmental groups against developers and business leaders. Many states and cities are split on the issue.

Justice Antonin Scalia, writing for the majority, said development should be permitted except when there is a direct connection to a larger protected waterway. He criticized the dissenting justices for ignoring the exact language of the law.

"The dissent's exclusive focus on ecological factors, combined with its total deference to the corps' ecological judgments, would permit the corps to regulate the entire country as 'waters of the United States,'" he wrote.

He was joined by Roberts, and Justices Clarence Thomas and Samuel Alito. The cases were the first Alito participated in after he joined the high court bench in late January.

Justice Anthony Kennedy agreed that in these particular cases the corps may have overstepped its bounds, but disagreed pointedly with his fellow conservatives that only "permanent bodies of waters" are subject to regulation.

Split decisions

Kennedy, a California native, has long been involved in appeals involving Western water rights. He said the Los Angeles River at times "looks more like a dry roadway than a river." But he said, "it periodically releases water volumes so powerful and destructive that it has been encased in concrete and steel over a length of some 50 miles."

And he broke with Scalia on an important point, believing even remote tributaries that have a "significant nexus" to a navigable waterway can be protected.

In a highly unusual move, Kennedy read a portion of his concurring ruling from the bench.

The bitter dispute centered on where federal authority begins and ends.

John Rapanos has wanted to build a shopping center on his property since 1988, filling in three wetlands over the years, despite orders from the government to stop. He argued the nearest navigable waterway is 20 miles away, but regulators countered there was a "hydrological connection" between the wetlands and Kawkawlin River.

The second case involves Keith and June Carabell, who applied for permits for a condo complex on their 19-acre parcel near Detroit. A ditch along the property drains into Lake St. Clair a mile away, the navigable waterway in this case.

After a state judge permitted the construction (with an on-site wetland enhancement) the Army Corps of Engineers stepped in and objected. Federal courts have sided with the government in both cases.

The high court's rulings do not mean immediate victory for the Rapanos and the Carabells. Lower courts will now have to go back and decide whether the waterways on their property are subject to regulation, guided by the more restrictive interpretation of the justices.

The Clean Water Act of 1972 gives generally broad discretion to the federal government to prevent wetlands and fresh water loss or degradation, requiring permits before waterways can be filled. But a 2001 Supreme Court ruling limited the government's reach to some extent, exempting "isolated" wetlands that did not cross state lines, and did not have a "hydrological connection" to "navigable waters."

The justices debated whether the Michigan cases were different because the wetlands in question are not adjacent to navigable waters.

In dissent, Justice John Paul Stevens said the government has a long-established authority to protect the environment. "The importance of wetlands for water quality is hard to overstate," he said.

He added, "While there may exist categories of wetlands adjacent to tributaries of traditionally navigable waters that, taken cumulatively, have no plausible discernible relationship to any aspect of downstream water quality, I am skeptical." He was backed by Justices David Souter, Ruth Bader Ginsburg, and Stephen Breyer.

Stevens too read his dissent from the bench, something that happens only occasionally and

usually in only the most contentious cases.

Property rights supporters called the ruling "a good first step toward common sense regulation." Pacific Legal Foundation attorney Reed Hopper said the Supreme Court "is clearly troubled by the federal government's view that it can regulate every pond, puddle and ditch in our country."

Environmentalists say the lack of a clear majority by the high court could undo years of efforts aimed at preserving clean water. "Unless this uncertainty is properly corrected, the impact on our nation's waters will be devastating," said Jim Murphy, wetlands counsel for the National Wildlife Federation.

The issue of property rights gained greater national prominence last year when a divided high court ruled private homes could be seized by private developers under eminent domain, in an effort to boost cash-strapped local governments. Such seizures would have to serve a definite "public use" purpose.

The decision prompted many states to consider legislation that would limit or ban the practice.

Dozens of interest groups filed briefs in the wetlands cases. Groups supporting the homeowners include the International Council of Shopping Centers, the National Stone, Sand and Gravel Association, and the Attainable Housing Alliance, along with the state of Alaska.

Supporting the Bush administration are four previous administrators of the Environmental Protection Agency, the Chesapeake Bay Foundation, Ducks Unlimited and the city of New York.

The cases are Rapanos v. United States and Carabell v. Army Corps of Engineers.

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