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John Flesher / Associated Press

The Supreme Court overturned a civil suit against John Rapanos, who filled in 54 acres in Bay County. Still, he's not in the clear.

MUDDIED WATERS

Split U.S. High Court kicks back fate of wetlands development to Mich.

David Shepardson and Francis X. Donnelly / The Detroit News

Advertisement

WASHINGTON -- A sharply divided U.S. Supreme Court on Monday overturned lower court judgments against two sets of Michigan property owners who sought to develop land designated as wetlands by the government.

The ruling could eventually allow more unrestricted development on millions of land considered wetlands after more than 30 years of protection under the Clean W.

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But the court's ruling may have simply muddied the waters as it sent the two Michigan cases back to the appeals court for possibly years of further review after the property owners each spent more than a decade trying to develop the land.

Justice Anthony Kennedy, who cast the deciding vote, acknowledged that the Michigan property owners could eventually still lose. After years of fighting, the only thing that seems certain is years of additional debate -- and another trip to the Supreme Court.

"It is unfortunate that no opinion commands a majority of the court on precisely how to read Congress' limits on the reach of the Clean Water Act," Chief Justice John Roberts wrote in one of the five opinions. "Lower courts ... will now have to feel their way on a case-by-case basis."

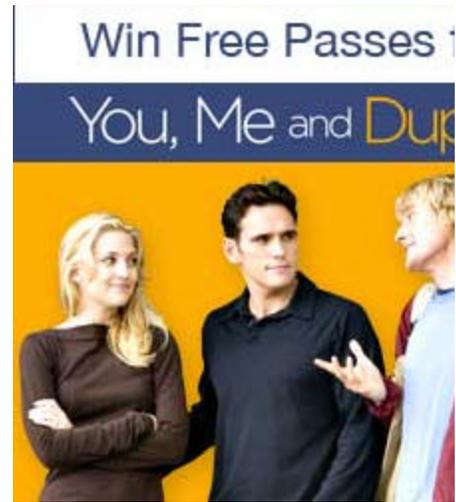
At issue is whether four manmade ditches or concrete drains in Macomb and Bay counties are affected by the 1972 landmark environmental law governing the handling of wetlands.

The primary case dates to 1989, when John Rapanos, now 72, developed 200 acres of Bay County farmland he'd owned since the late 1950s.

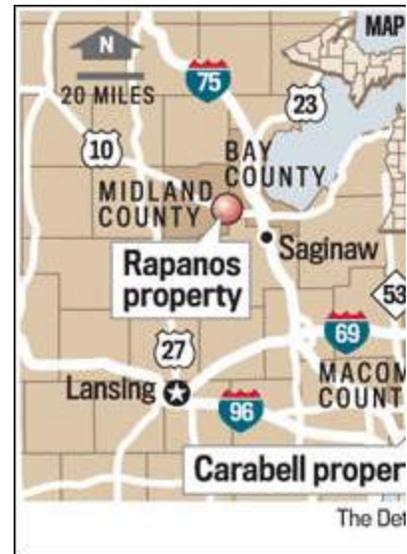
He graded part of the property -- hoping to attract a retail strip mall -- without getting proper permits, the government said, and filled in 54 acres of wetlands that were at least 11 miles from "navigable water."

When the development plans didn't pan out, he leased the land to a farmer. In 1993, Rapanos was indicted and a jury convicted him in March 1995 of two felony counts of discharging pollutants into "waters of the United States, that is wetlands located in Williams Township."

In agreeing to hear Rapanos' appeal, the U.S. Supreme Court also included the case of June and Keith Carabell, a couple who in 1993 wanted to build about 130 condominiums on 19.6 acres in Chesterfield Township. About 15 of those acres were forested wetlands. The Carabell wetlands are adjacent to a tributary that flows to Lake St. Clair -- though the actual wetlands don't



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The Michigan Department of Environmental Quality issued a permit for the development, but the U.S. Army Corps of Engineers intervened and ordered the permit denied. The Carabells sued in 2001, and wetlands were not covered by the Clean Water Act and in 2003 had their case dismissed by U.S. District Judge Paul Borman. His ruling was upheld in 2004 by the appeals court.

In the Rapanos case, the U.S. Supreme Court ruling only overturned a civil suit the Justice Department had previously won against him, and had no impact on a previous conviction. The government has sought \$10 million in fines and \$3 million in fees. It wants Rapanos to set aside 80 acres as permanent wetlands.

Rapanos' case attracted national attention from property rights activists who thought government had overstepped its authority in preventing people from doing what they want on empty, mostly dry farm fields. Environmental activists say the Rapanos legal effort is one of the most significant environmental regulations, which governs millions of acres of wetlands that are home to migratory birds and wildlife, by using an extreme example.

The Clean Water Act essentially allows the federal government to regulate waters where a person can travel on from state to state. The high court said the key issue is whether a wetland has a "significant nexus" to navigable waters, but left it to the lower courts to decide what that means.

U.S. Rep. John Dingell, D-Dearborn, said a bill in Congress with 160 sponsors would clarify that the federal government can regulate the waters in question: ditches and concrete-lined channels. The Bush administration defended the right of the government to regulate the wetland question.

"The fact that there was no clear majority upholding current Clean Water Act authority now exists, poses a threat to waters across the country," Dingell said, saying he is pleased that "five members of the court rejected the most extreme mangling of the act proposed by Justice Scalia and others that would eliminate all Clean Water Act protections for more than 50 percent of the nation's wetlands and streams."

Russ Harding, the Mackinac Center's senior environmental policy analyst, said Congress must revisit the law.

"Congress must act to clarify the law," said Harding, a former director of the Michigan Department of Environmental Quality. "The court's ruling falls short of giving Michigan the clarity they need to comfortably exercise their property rights."

Rapanos couldn't be reached for comment on Monday's ruling.

The state of Michigan said the decision would have little immediate effect on regulations. Bob McCann, a spokesman for the state Department of Environmental Quality, said he would wait to see how the lower courts rule when they reconsider the matter.

"It's kind of a mixed bag," he said. "The (lower) courts upheld the ruling before, so we're optimistic they will do it again."

Environmental activists and Rapanos' lawyer, Reed Hopper, expressed disappointment with the high court's lack of clarity.

"We're pleased that the court has rejected the lower courts' rulings. The court is clearly troubled by the federal government's view that it can regulate every pond, puddle, or stream in our country," Hopper said. "We are encouraged by this decision and believe it represents the first step toward common-sense regulation."

But Hopper added: "The Supreme Court missed an opportunity to give a clear definition of the scope of the federal authority under the Clean Water Act."

The National Wildlife Federation said the decision "placed additional hurdles to fish and wildlife protections under the Clean Water Act for more than half of the nation's remaining waters and countless stream miles, putting many of those waters at risk for pollution and degradation."

"This decision will be difficult to implement because the court was split, with no clear majority," said Jim Murphy, wetlands attorney for the National Wildlife Federation. "If this uncertainty is properly corrected, the impact on our nation's waters will be devastating."

Rapanos successfully completed a sentence in 2001 of three years' probation and a \$185,000 fine, so he will not be required to do anything else. Hopper said if the defense is successful in getting the civil case overturned, he will again ask the appeals court to overturn Rapanos' criminal conviction.

In March 2005, U.S. District Judge Lawrence Zatkoff again rejected government prosecutors' sentence of Rapanos to at least 10 months in prison, even though two earlier rulings from the appeals court called for him to serve prison time. The Justice Department has again asked that decision to the appeals court.

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