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Supreme Court decision in Rapanos wetlands case 'a mixed bag'

[Ralph E. Wirtz](#), Midland Daily News

Developers, bureaucrats and environmentalists still are seeking answers on what is a wetland subject to regulation after the U.S. Supreme Court punted on the matter Monday in a case that involved Midlander John Rapanos.

The court voted 5-4 to remand two cases back to the 6th District Court of Appeals, saying that the U.S. Corps of Engineers might have overstepped its regulation of wetlands by giving such a broad interpretation to the term "navigable waterways" in the Clean Water Act.

That is a bittersweet, perhaps partial and short-term, victory, for Rapanos. Even though the court vacated the federal district courts' decisions involving Rapanos and June Carabell, of southeast Michigan, the cases will be heard there again, most likely by the same judge as the first trial with little change in direction, attorneys say.

Rapanos could not be reached for comment.

At the Michigan Department of Environmental Quality, which is a peripheral player in the saga since the case involves federal law, officials expect courts to uphold the previous Rapanos decision. "We continue to think the case was a solid one," said spokesman Robert McCann. "His actions were in violation of the law."

In the first 5-4 decision, Justice Antonin Scalia was joined by conservative colleagues Justice Clarence Thomas, Chief Justice John Roberts and Justice Samuel Alito. Moderate Justice Anthony Kennedy wrote a concurring opinion. Liberal justices John Paul Stevens, Ruth Bader Ginsberg, Stephen Breyer and David Souter dissented. The dissenters were joined by Kennedy on the second vote.

Russ Harding, the former director of the Michigan Department of Environmental Quality and now an analyst for the Midland-based Mackinac Center, called the decision "a mixed bag" and that in the future the regulatory agencies and the courts "are going to be all over the map."

He said Congress should step forward "and do what they were supposed to do, provide some regulatory clarity."

Scalia, who wrote for the plurality, said the enforcement proceedings against Rapanos are "a small part of the immense expansion of federal regulation of land use that has occurred under the Clean Water Act, without any change in the governing statute – during the past five presidential administrations."

He said the language of the Clean Water Act "cannot bear the expansive meaning that the Corps would give it."

But Stevens argued in his dissent that the cases should be upheld if the Corps' determination on wetlands is determined to be reasonable. "The Corps has concluded that it must regulate pollutants at the time they enter ditches or streams with ordinary high-water marks – whether perennial, intermittent, or ephemeral – in order to properly control water pollution. Because there is ambiguity in the phrase 'waters of the United States' and because interpreting it broadly to cover such ditches and streams advances the purpose of the Act, the Corps' approach should command our deference."

Kennedy's approach was more moderate, saying the Corps' "conclusive standard for jurisdiction rests upon a reasonable inference of ecologic interconnection" and that prior court decisions ruled the Corps only needed to show a "significant nexus" to "navigable waters" for a wetland to be regulated.

What that "significant nexus" might be, he left open for the Corps and the lower courts to decide.

He also suggested that evidence for a "significant nexus" might be contained in the evidence of Rapanos and Carabell's court cases, but that it was not considered during the earlier trials. He suggested the cases be remanded for reconsideration.

The decision made no one happy. Hugh McDiarmid Jr., a spokesman for the Michigan Environmental Council, said it was "disappointing that all the wetlands that the Corps thought are protected" might not be.

Reed Hopper, an attorney with the Pacific Legal Foundation and the counsel who argued the case for Rapanos before the Supreme Court, said he believes the language of the case gives hope that Congress will step in.

"We're pleased that the court has rejected the lower courts' rulings," he said. "We are encouraged by this decision and believe it represents a good first step toward common sense regulation."

Mackinac Center attorney Patrick Wright said he believes lower courts are most likely to use Kennedy's concurring opinion: That there not necessarily be a surface water connection for a wetland to be regulated, as Scalia sought.

But, he said, "the statute clearly divided this court." It's unlikely "anything will be cleared up unless Congress gets involved."

The case involving Rapanos stems from his work done on three properties in Midland, including a 170-acre parcel on Salzburg Road that has since been sold.

The two other parcels are on Hines Road and at Pine River Bluffs, off Woodcock Road in Homer Township.

The case is only the second from Midland County to reach the Supreme Court. The first was a case involving The Dow Chemical Co. and the Environmental Protection Agency in 1984.

Timeline

Advertisement

1989 – Rapanos cited for filling 30 acres of wetlands in Williams Township.

1991 – Rapanos receives EPA notice to restore wetlands he illegally filled near Auburn or face penalties.

1993 – Rapanos indicted on two federal criminal charges involving wetlands property in Williams Township.

1995 – Rapanos found guilty in U.S. District Court on two federal counts of polluting wetlands.

2003 – U.S. Circuit Court of Appeals upholds Rapanos conviction of filling a wetland without a permit.

2004 – U.S. Supreme Court rejects Rapanos' case.

2005 – Rapanos sentenced to probation, he already had served.

2005 – U.S. Supreme Court agrees to hear Rapanos' case.



Local and national reactions

"Scalia (Justice Antonin Scalia) was way off the mark. ... The lower courts have decided for the public trust and I hope they do that again. We're hopeful they will do the right thing and find Rapanos guilty again."

Local environmental group Lone Tree Council founder Terry Miller

"Some of the Corps district offices have concluded that wetlands are 'adjacent' to covered waters if they are hydrological connected 'though directional sheet flow during storm events... or if they lie with the '100 year flood plain' of a body of water -- that is, they are connected to the navigable , on average, once every 100 years."

Supreme Court Justice Antonin Scalia

"This decision provides the perfect opportunity for Congress to pass the Clean Water Authority Restoration Act (HR. 1356 & S. 912), and thus clarify that it intended the broadest possible protections for our nation's waters."

Carl Pope, Sierra Club executive director

"His (Justice Anthony Kennedy's) opinion accepts that the Clean Water Act can protect wetlands and small streams, even those that flow only some of the time, if they as a class have a substantial nexus to downstream water bodies. In the end, the protection of this country's water bodies should change little."

Tim Searchinger, a senior attorney with Environmental Defense

"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. Lower courts and regulated entities will now have to feel their way on a case-by-case basis. This situation is certainly not unprecedented. What is unusual in this instance, perhaps, is how readily the situation could have been avoided."

Supreme Court Chief Justice John Roberts

"It muddied already muddy waters on this issue."

Jim Murphy, wetlands counsel with the National Wildlife Federation

"It's really a bizarre situation."

Richard Lazarus, a Georgetown University law professor

"By remanding the case back to the lower courts, the (Supreme) Court continues to bungle the clear intent of Congress."

Rep. John Dingell, D-Mich.

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