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Press Release

Source: Dickinson Wright PLLC

## Supreme Court Establishes Limits on Federal Power Over Wetlands in Case Argued by Dickinson Wright

Monday June 19, 4:02 pm ET

### Case sent back to District Court for more limited application of Clean Water Act

DETROIT, June 19 /PRNewswire/ -- In a decision announced today, the U.S. Supreme Court agreed with the owners of four Michigan wetlands that the United States Army Corps of Engineers exceeded its authority in attempting to prevent the development of their properties and ruled that the scope of federal power under the Clean Water Act should be limited, especially in relation to wetlands. The decision involved two cases, Carabell v. United States Army Corps of Engineers, No. 04-1384, and Rapanos v. United States, No. 04-1034.

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The Carabell case was argued by Dickinson Wright attorney Timothy A. Stoepker of Grosse Pointe. It is a landmark ruling on how federal law controls the development and use of properties which contain wetlands, and it will lead to important new developments in water pollution and environmental law.

In their case, the Carabells sought to develop a 20-acre parcel of land in Chesterfield Township, which included 15 acres of forested wetland. Although a Michigan state agency approved the development, the Army Corps contended that the federal Clean Water Act prohibited development, even though the wetlands had no physical connection to any other body of water.

The Carabells argued that the federal government could not have any authority unless, at the very least, such a connection was present.

In a divided opinion, five justices, led by Antonin Scalia, agreed with the Carabells, ruling that a wetland could only fall under federal regulation if it was connected to a navigable river or stream by a significant, regular flow of water. Justice Anthony Kennedy differed with the four other justices in the majority about precisely how to evaluate when the necessary connection is present, but all of the justices agreed that the federal government lacks the power to regulate every body of water and wetland in the United States and that the role of state and local governments in such regulation should be expanded.

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"This is a victory," said Timothy Stoepker of Dickinson Wright. "Our job now is to help the district court define what is a navigable waterway."

The Court's majority agreed that the Army Corps had given an overly broad reading to the Clean Water Act's term "waters of the United States." As Justice Scalia wrote, "in applying the definition to 'ephemeral streams,' 'wet meadows,' storm sewers and culverts, ... man-made drainage ditches, and dry arroyos in the middle of the desert, the Corps has stretched the term 'waters of the United States' beyond parody." The question remaining after the decision is how far the definition may be allowed to stretch, and, as Chief Justice Roberts noted in his concurring opinion, the definition will have to be worked out as "lower courts and regulated entities ... feel their way on a case-by-case basis."

The case began when the Carabells, along with their co-owners, Harvey and Frances Gordenker, submitted an application to the Michigan Department of Environmental Quality ("MDEQ") for a permit to develop their property, including the wetland. After a trial before a state administrative law judge, Michigan approved the development, concluding that the Carabells' property had no connection to any body of water anywhere and lacked any of the ecologically important qualities identified by Michigan's own wetland-protection law.

After Michigan issued a permit, however, the EPA and Army Corps claimed jurisdiction over the property pursuant to section 904a of the Clean Water Act ("Clean Water Act"). The Army Corps required another permit application and denied the Carabells and Gordenkers the right to develop their property.

After exhausting administrative appeals with the Army Corps, which were denied, the Carabells and Gordenkers filed an action in the United States District Court, for the Eastern District of Michigan, which upheld the decision of the Army Corps, finding that the property, which is not connected to any water, nevertheless had a "significant nexus" to waters of the United States, although the district court did not describe exactly what that nexus was.

The Carabells and Gordenkers then appealed to the United States Court of Appeals for the Sixth Circuit. The Court of Appeals affirmed the district court's decision, thereby upholding the Army Corps' rulings. The Court of Appeals also failed to describe what characteristic of the property provided the "significant nexus" to waters of the United States.

After the decision of the Court of Appeals, the Carabells and Gordenkers filed their petition for a writ of certiorari which was granted October 11, 2005. The case was argued on February 22, 2006. The Supreme Court's ruling today requires that the Army Corps and the lower courts must be specific in defining the elements of that "significant nexus" before allowing the exercise of federal power over wetlands.

About Dickinson Wright PLLC

Dickinson Wright PLLC, founded in 1878, has more than 220 attorneys in offices located in Detroit, Bloomfield Hills, Lansing, Grand Rapids, Ann Arbor, and Washington, D.C. Dickinson Wright is a full-service law firm with more than 40 practice areas. For more information, visit <http://www.dickinsonwright.com> .

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