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Supreme Court Wetlands Rulings May Limit MF Development

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By Dees Stribling, Midwest Correspondent

In two closely watched U.S. Supreme Court cases with ramifications for the commercial real estate industry as well as environment regulation in this country, the high court has issued curiously split decisions that seem to raise as many questions as it answered regarding real estate development on or near wetlands. Observers hoping for clarity from the court in this instance were disappointed.



"In the short run, this isn't good for the commercial real estate business, because the decision lacked clarity," John Echeverria, executive director of the Georgetown Environmental Law and Policy Institute, told CPN this afternoon. "That can make life complicated for developers."

"The good news is that the plurality on the court recognized that a vague hydrological connection to a wetland isn't enough," Russ Harding, senior policy analyst for the Mackinac Center for Public Policy in Midland, Mich., told CPN this afternoon. "The bad news is the confusion. Justice Kennedy's opinion opens the door to endless litigation unless Congress acts."

The cases, Rapanos v. U.S. and Carabell v. Army Corps of Engineers, involved developers in Michigan who wanted to build retail and multi-family buildings, respectively, on different parcels of land that the federal government said included protected wetlands. The specific question was whether the parcels actually included protected wetlands or not, but the broader issue was the scope of the federal government's wetland regulatory authority under the Clean Water Act.

It is clear under existing environmental law that the government can regulate, and ban, development of wetlands with a distinct connection to a "navigable body of water." But what about wetlands with a less distinct connection? In the Rapanos case, the land drains into creeks that feed into the Kawkawlin River, which drains to Saginaw Bay; in Carabell, a berm divides the wetland from a ditch that flows into Lake St. Clair, roughly a mile away. The government and environmental groups say that land like this should be protected wetlands. Property rights groups say that the government is overreaching in such cases.

Narrowly speaking, in a 5-4 vote, the high court overturned lower court decisions on the cases, and sent both back to U.S. District Court in Detroit for hearings to determine whether there's a "substantial connection" between the wetlands and the waters they feed. In their opinion, Justices Scalia, Thomas, Alito and Chief Justice Roberts said that federal oversight was strictly limited to wetlands with

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distinct connections to navigable waterways. Justices Stevens, Breyer, Ginsburg and Souter dissented from that position.

Justice Kennedy voted with Roberts and the others in the matter of sending the case back to the lower courts, but did not concur that federal oversight should be so drastically limited. He wrote a separate opinion that, in effect, said that it wetlands oversight needed to be on a case-by-case basis until the law itself was clarified.

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