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Supreme Court Ruling Leaves Future of Clean Water Act Murky

ADRIENNE FROELICH SPONBERG

In early 2006, more than 50 briefs were submitted to the Supreme Court in connection with two cases challenging the federal government's authority to regulate streams and wetlands under the Clean Water Act (CWA). At issue in *Rapanos v. United States* and *Carabell v. Army Corps of Engineers* was whether the CWA prohibition on unpermitted discharges into navigable waters extended to nonnavigable wetlands. In both cases, the petitioners had sought to deposit fill material in wetlands in preparation for development projects.

On 19 June 2006, the Supreme Court issued its much-anticipated ruling (*www.supremecourtus.gov/opinions/05pdf/04-1034.pdf*). Justice Scalia announced the Court's decision to remand the cases to lower courts and wrote an opinion in which Justices Roberts, Thomas, and Alito joined; Justice Kennedy filed an opinion concurring in the judgment; Justices Stevens, Souter, Ginsburg, and Breyer dissented. The 4–1–4 plurality decision might better be described as an "indecision," however: The Court failed to achieve a majority position on the broader question of whether the United States has the authority to regulate streams and wetlands under the CWA.

The ruling initially appeared to be a defeat for supporters of the CWA. In only the second paragraph of the plurality opinion, Scalia refers to the US Army Corps of Engineers (Corps), which along with the Environmental Protection Agency (EPA) administers the CWA, as "enlightened despots." The scathing tone, however, may be harsher than the actual ruling, according to Malcolm Stewart of the US Department of Justice. In a forum hosted by the Georgetown University Law Center, Stewart noted that the position staked out in the plurality statement is much closer to the government's position than it is to that of Rapanos, whose petition to the Court argued that wetlands are not subject to the CWA because they have only a surface connection to waters of the United States. Nonetheless, the tone of Scalia's opinion could influence the lower courts that will hear the cases, warned Richard Lazarus of Georgetown Law, because those courts tend to "overread Supreme Court opinions."

Scalia was not alone in taking a swipe at the Corps and the EPA. In a separate concurring opinion, Chief Justice Roberts blamed the Court's indecision on the EPA's failure to issue updated guidance after the Supreme Court's determination in January 2001 that the CWA did not extend to isolated wetlands if they are not adjacent to navigable waters (*Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers,* 531 U.S. 159). The Corps and the EPA began the process of issuing a new rule, but after receiving over 130,000 comments between January and April 2003 on the proposed rulemaking, announced that they had decided not to issue a new rule. Justice Kennedy disagreed with Roberts: "New rulemaking could have averted the disagreement here only if the Corps had anticipated the unprecedented reading of the Act that the plurality advances."

Much of the difficulty in reaching agreement can be attributed to the complex and technical nature of the issue at hand—namely, where does the federal government's jurisdiction over water end? Barbara Bedford, senior research associate at Cornell University and past president of the Society of Wetland Scientists, notes that in reality, aquatic ecosystems exist in a continuum, but says, "Legally we have to accept that a line must be drawn." How and where to draw that line has left regulators and lawmakers scratching their heads. In his dissenting opinion, Justice Breyer said that scientists, not justices, need to make that decision: "In the absence of updated regulations, courts will have to make ad hoc determinations that run the risk of transforming scientific questions into matters of law. That is not the system Congress intended."

Without a clear decision from the Court, it is up to the legislative or executive branch to clarify the scope of the CWA. Regardless of which branch of government acts first, scientists have a key role to play in the process, according to Derb Carter, an attorney with the Southern Environmental Law Center. In the case of a legislative fix, such as the pending Clean Water Authority Restoration Act (S. 912), Carter believes that "if the scientific community points out the imperative that all waters and wetlands require management to protect the integrity of the aquatic ecosystem, it could help push bipartisan legislation to enactment." Likewise, if the agencies issue a new rule, scientists can help ensure that those rules are based on the best scientific information.

Although the legal ramifications of *Rapanos* cannot yet be determined, one thing is clear: Decisionmakers need to be—and some of them even want to be—better educated about the connectivity of aquatic ecosystems.

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