

ELI REPORT

Opening Argument

A Close Call For The Clean Water Act



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It was good to see ELI's amicus brief cited in Justice Kennedy's controlling opinion in the big Supreme Court case that had threatened to remove most wetlands from federal protection. It would have been better if Kennedy's defense of the Clean Water Act had joined Justice Stevens's in affirming jurisdiction over the wetlands in question. Instead, in a 4-1-4 decision, the Court sent back two Michigan cases upholding federal permitting authority for further consideration by the Sixth Circuit under different legal standards, principally under the test defined by Justice Kennedy.

ELI believes the decision is a victory for clean water, but a narrow one. Indeed, Justice Scalia's plurality opinion shows that support on the Court for the act's major goals has weakened. Preserving the ability of the Army Corps of Engineers and EPA to achieve these goals was our intent when ELI filed its first-ever amicus brief. With the Justice Department, we argued for the analysis in Justice Stevens's dissenting opinion that would have upheld the Sixth Circuit decisions by following the Supreme Court's unanimous 1985 decision in *Riverside Bayview Homes*

approving jurisdiction over wetlands adjacent to navigable waters.

There the Court recognized that even though not every adjacent wetland is of great importance to adjoining bodies of water, it was reasonable for the Corps to conclude that most are, and those that aren't can be developed through its wetlands permitting program. In the 30 years since the program started, the Corps has liberally granted permits to projects with minimal impacts on wetlands. Although the annual rate of loss has been reduced by about 75 percent, that figure indicates that significant development has been allowed.

Justice Kennedy did not agree with the Stevens bloc that wetlands adjacent to tributaries of navigable waters could be presumed to have significant effects on water quality. He concluded that in these cases, where the connection to navigable waters may be more remote, the Corps should be required to demonstrate a "significant nexus" between the wetland and navigable waters. Requiring this largely site-specific finding would, in his view, avoid federalism or Commerce Clause concerns regarding the proper reach of federal authority.

This requirement increases the administrative burden in resolving permit disputes by requiring both the government and the property owner to marshal data to show or disprove a significant nexus. However, his opinion also implies that the nexus is likely to be found in the two Michigan cases and demonstrates a good appreciation of the scientific and ecological side of wetlands regulation.

Justice Kennedy quotes the technical definition of wetlands in the Corps' rules, showing that there is in fact a difference between regulated "wetlands and ordinary land with moisture on it," and explains how wetlands can protect downstream waters not only by filtering water runoff but also by absorbing and preventing such runoff. He chides the Scalia bloc for seeming to dismiss the broad national interests served by the act, citing the example offered in ELI's brief of the role of wetlands loss

in creating the dead zone in the Gulf of Mexico. And he left open the possibility that the Corps can continue to regulate by defining categories of wetlands that are most likely to have ecological significance, albeit categories less broad than the adjacency rule at issue.

The plurality opinion by Justice Scalia does indeed dismiss the interests served by the act, complaining that the law is a "prosaic, downright tedious, statute." In an opinion marked by sweeping conclusions and a scornful tone, Justice Scalia makes the following assertions: that the cases represent part of an "immense expansion" of federal regulation of land use under the statute "without any change in the governing statute" (incorrect); that the statutory phrase "waters of the United States" does not include "channels through which water flows intermittently or ephemerally" because an "intermittent" stream is an oxymoron (contrary to the common understanding); and that the 33 states that weighed in to support the federal program just want to avoid responsibility for "controversial decisions between politically powerful, rival interests" (ignoring that they may be affected by wetlands losses in upstream states.)

Justice Scalia's penchant for wordplay in the service of his favored outcomes was to be expected. What was not expected was that the Court's two new members, Chief Justice Roberts and Justice Alito, would sign on to an opinion of this stripe. An opinion that would have rewritten a portion of the wetlands rules not even at issue in the case and that bashes the Corps, the states, the statute, and the Congress is not what we thought we would hear from the chief justice, who spoke in his confirmation hearings with such conviction about judicial humility and respect for co-equal branches of government. A vital Clean Water Act program has survived this latest test, but it now looks like the "hapless toad" in then Judge Roberts's dismissive comment in an Endangered Species Act case may be in more trouble than we thought.