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Turtles all the way down

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By Sandra Zellmer

In one of the most anxiously awaited decisions this session, the Supreme Court recently struck a blow against environmental protection by ruling for a couple of commercial developers.

The issue in play in Rapanos vs. United States: Can federal protection be extended to small tributaries and wetlands near, but not directly abutting, navigable waters? A lower court said yes, but the Supreme Court referees, in a 4-1-4 split decision, disagreed and vacated the judgments against the developers.

The lead opinion by Justice Scalia, joined by Justices Roberts, Thomas and Alito, would clear the way for development of most wetlands and streams. According to the court's most conservative members, the regulation of non-perennial streams, wet meadows and arroyos under the federal Clean Water Act stretches the law's coverage "beyond parody."

But as the dissent by Justices Stevens, Souter, Ginsburg and Breyer noted, as the wetlands and their inhabitants go, so goes the entire watershed. The Scalia opinion, they argued, is nothing but blatant "antagonism to environmentalism."

Justice Kennedy concurred in the court's judgment but not in its reasoning. He opined that, to come within federal protection, regulators must make a scientific determination that the wetland in question has a significant hydrological "nexus" to a navigable water body.

Scalia cavalierly dismissed the dissenters' concerns, saving his most heated rhetoric for Kennedy. In a shot that would draw a "red card" in soccer, he accused Kennedy of misreading the court's prior decisions, hiding behind the statutory purpose of protecting water quality rather than adhering to the statute's plain language, and then bootstrapping his conclusion by claiming that anything that might affect waters of the United States bears a "significant nexus" to those waters and thus is those waters.

In a parting shot, Scalia disparaged Kennedy's logic as unsubstantiated "turtles all the way down." The turtle metaphor refers to a fictional exchange between an astronomer and a little old lady in a lecture hall. The astronomer described how the Earth orbits around the sun.

The lady remarked: "That's rubbish. The world is a flat plate supported on the back of a giant tortoise." When the astronomer, humoring her, asked what the tortoise was standing on, the lady replied, "Why, it's turtles all the way down."

The irony of Scalia's metaphor is palpable. According to Conservation International, 40 percent to 60 percent of all turtles in the world face extinction. United States' populations reflect this trend: About half of our turtle species are imperiled. Freshwater fishes are in equally bad shape, and the primary culprit is habitat loss. In the last 200 years, the United States has lost over half of its original wetlands, the equivalent of 60 acres of wetlands every hour.

If Scalia had persuaded Justice Kennedy to join in his opinion, many - in fact, most - wetlands and streams would be excluded from federal protection. Many of the remaining wetlands are not adjacent to navigable waters, and the

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National Hydrology Dataset shows that nearly 60 percent of the total stream miles in the U.S. are non-perennial.

In arid Western states like New Mexico and Arizona, the figure is much higher: 90 percent of assessed streams flow only in wet weather.

Will states step up to the plate? It seems unlikely. Although Justice Scalia expressed his concern for preserving "primary state responsibility for ordinary land-use decisions," 33 states and the District of Columbia filed "friend of the court" briefs on behalf of the United States, seeking to maintain broad federal jurisdiction over wetlands and tributaries. In the states' view, wetlands preservation - a political "hot potato" if ever there was one - is best accomplished by the feds.

But confusion reigns. As a result of the split, Justice Kennedy's concurring opinion has become the law of the land. Yes, it could have been worse for conservation interests. But the Rapanos decision places the burden of proving a "significant nexus" squarely on the shoulders of the U.S. Corps of Engineers, which itself is experiencing a crisis of legitimacy in the wake of Hurricane Katrina. It isn't unreasonable to question whether this beleaguered agency, subject to an array of contradictory statutory mandates, from wetlands protection to dredging navigational channels and constructing flood control levees, is up to the task of going toe-to-toe with well-heeled developers in this case-by-case fashion.

At least the U.S. soccer team could claim a tie, which can keep hope alive in the World Cup. Not so for the turtles, who swing in the balance while legal skirmishes continue.

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