

**Qwest High-Speed Internet™**  
 For as low as **\$21.99/mo.**  
 Limited time offer - FREE \$25 gift card with online order.  
 Download large files in seconds. Free activation.  
 Offer for new DSL customers until 10/14/06. Restrictions apply.  
 Enter your phone number to check availability  
 SEE DETAILS  
 Qwest Spirit of Service

**JournalStar.com**  
 Lincoln, Nebraska  
 76°  
 Full Forecast

Wednesday August 2, 2006 Jobs Cars Homes Make Us Your Homepage Bookmark Us Try LJS Free

- Home - JournalStar.com
- Search News
- Search Ads
- Coupons **NEW!**
- News
  - Local
  - Nebraska News
  - National / World
  - Editorials & Letters
  - Schools
  - Business & Markets
  - Legislature
  - Obituaries
- Sports
- HuskerExtra.com
- Blogs
- Galleries
- Classifieds
  - Apartments For You
  - Wheels For You
  - Work For You
  - Classified Ads
- Featured Sections
  - Ask The Expert
  - Business Achievements
  - Celebrate! Nebraska
  - Environment
  - Family
  - Food
  - Ground Zero
  - Health
  - Home & Garden
  - Movies
  - Podcasting
  - Religion
  - Special Reports
  - Sunday A.M.
- Contact Us
  - Subscription & Delivery
  - Advertising
  - Newsroom
  - General Contacts
- About Us
  - Employment
  - Other Information

Letters: Editorial Sound Off Neal Obermeyer Cartoons (New!) Submit a letter to the Editor

Originally Published Online: Monday, Jul 10, 2006 - 12:11:35 am CDT

**Supreme Court drops the ball on wetlands protection**  
 By Sandra Zellmer

Send to a Friend Enlarge Text  
 Print this Story Shrink Text

In one of the most anxiously awaited decisions this session, the Supreme Court struck a blow against environmental protection by ruling for a couple of commercial developers. The issue in play in *Rapanos v. United States*: Can federal protection be extended to small tributaries and wetlands near, but not directly abutting, navigable waters? The lower court officials said yes, but the Supreme Court referees, in a 4-1-4 split decision, disagreed and vacated the judgments against the developers.

Brought to you by:

- Stories in Letters:
- Letters, 7/4: Taxing away our freedom
  - Letters, 7/2: Why not both locations?
  - Letters, 7/5: What goes around ...
  - Letters, 7/6: It doesn't feel right
  - Letters, 7/7: Legislating morality
  - Letters, 7/8: Beware dangers in parks
  - Letters, 7/9: Court decision a slap
  - Letters, 7/10: Incorrect claims
  - Supreme Court drops the ball on wetlands protection

The lead opinion by Justice Antonin Scalia, joined by justices John Roberts, Clarence Thomas and Samuel Alito, would clear the way for development of most wetlands and streams. According to the court's most conservative members, the regulation of nonperennial streams, wet meadows and arroyos under the federal Clean Water Act stretches the law's coverage "beyond parody." But as the dissent by justices John Paul Stevens, David H. Souter, Ruth Bader Ginsburg and Stephen G. 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 Anthony 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.

Justice Scalia cavalierly dismissed the dissenters' concerns, saving his most heated rhetoric for Justice 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 boot-strapping 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 to 60 percent of all turtles in the world face extinction. United States' populations reflect this trend: around half of our turtle species are imperiled. Freshwater fishes are in equally bad shape. The primary culprit: habitat loss. In the last 200 years, the United States has lost over half of its original wetlands to development, the equivalent of 60 acres of wetlands every hour.

If Scalia had convinced 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 National Hydrology Dataset shows that nearly 60 percent of the total stream miles in the United States are nonperennial. In Western states like New Mexico, Colorado and Nebraska, the figure is much higher: 80 to 90 percent of their 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 their view, wetlands preservation — a political "hot potato" if ever there was one — is best accomplished by the feds.

Confusion reigns. The impasse between the most conservative justices, who champion laissez-

tarCityDeals.com  
 AD-VSNTURS  
 Lincoln EXPERTS.com

Featured Links:  
 SIX IN THE CITY  
 Husker Posters Clearance  
 InterLinc  
 City of Lincoln/Lancaster County

faire, pro-development interests under the guise of federalism, and the moderates, who believe that government can and should serve an important role in advancing the public interest, demonstrates a new level of acrimony on the court. The result: an erosion of the goals of the Clean Water Act — chemical, biological and physical integrity — and, quite possibly, many other environmental laws.

Yes, it could've been worse for conservation interests. As a result of the split, Justice Kennedy's concurring opinion will likely become the law of the land. But his opinion 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 resource-intensive, case-by-case fashion.

At least the U.S. soccer team's tie with Italy was enough to keep it alive in the World Cup, albeit briefly. As a result of the Court's 4-4 "tie," the turtles (and wetlands) hang in the balance while more legal skirmishes ensue. Let's hope that the Corps and the lower courts are vigilant referees.

*Sandra Zellmer is a professor and Hevelone research chair at the University of Nebraska College of Law.*

Subscribe Today! 

#### Viewer Comments:

**Phil** wrote on July 11, 2006 1:20 PM:

"A terrible precedent has been set repeatedly, in placing the well-being of a few dozen insects over the life and liberty of property owners. It is high time that government step away from the idea that we should play God and try to protect every living thing on this earth. Cases where a small population of some "whatevers" will stop projects that are badly needed are pathetic. On any given day, a large rock from the heavens might fall and smash the "whatevers" anyway. A stray flock of birds may fly in and devour the last 100 "whatevers" in an afternoon. There are sensible things we can do to take care of the land we live on, such as not dumping toxic waste. Most of these common sense steps are for our own benefit. When common sense goes out the door, and we forget that we are also co-inhabitants of this dirt ball, and when we start thinking we have the abilities of the Creator to determine the ebbs and flows of nature, then we simply are doomed to failure. I hope the court will now take a more reasoned look at environmental policy, and will indeed do away with the fanatical decisions of the past."

**Hemet** wrote on July 11, 2006 11:52 AM:

"The conservative wing of the supreme court clearly did not follow the law. they became activists against nature. They set a terrible precedent."

**Allen T.** wrote on July 10, 2006 1:15 PM:

"Your article is strikingly devoid of legal argument considering that you are a law professor. Wetlands are important, but if the law doesn't allow for the protection, then the court is bound to apply the law. I'm sure it would be more convenient had the court simply applied the law in the fashion most favorable to your own position; however, as a law professor I hope you know that it does not and should not work that way."