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Reach of Clean Water Act Is at Issue in 2 Supreme Court Cases

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WASHINGTON, Feb. 19 — More than half of the nation's streams and wetlands could be removed from the protections of the federal Clean Water Act if two legal challenges started more than a decade ago by two Michigan developers are supported by a majority of the newly remade Supreme Court.

One case involves a developer who wanted to sell a wetland for a shopping center and in preparation filled it with sand without applying for a permit, in defiance of the authorities. The second was brought by a would-be condominium developer who applied to the Army Corps of Engineers for a permit to fill a wetland and was denied.

Oral arguments in the cases — the first before the newest justice, Samuel A. Alito Jr. — are scheduled for Tuesday morning. They will pit developers and a phalanx of their industrial, agricultural and ideological allies against both the solicitor general and a who's who of environmental lawyers in an argument over the scope of one of the country's fundamental environmental laws.

The central question is where federal authority ends along the network of rivers, streams, canals and ditches. Does it reach all the veins and arterioles of the nation's waters, and all the wetlands that drain into them? Does it end with the waterways that are actually navigable and the wetlands abutting them? Or is it some place in between?

Also at issue are who draws those lines — and how — and who decides what the Clean Water Act means by "navigable waters" and "the waters of the United States."

Tucked into the larger question is the issue of how many of the nation's 100 million or so acres of wetlands have a close enough connection, or nexus, to regulated waters to fit under the same regulatory umbrella.

The twin cases, blending questions of hydrology and federalism, take aim at the constitutional and legal underpinnings of the federally run system that controls the health of the nation's web of waterways. The developers argue that the federal custodians of the Clean Water Act have overreached by asserting jurisdiction over ditches and wetlands far from the large waterways over which Congress has clear authority.

In addition, the cases bring a rich cast of characters to the court. It includes a cantankerous developer who has likened environmental regulators to Nazis, a legal foundation dedicated to reining in government and a diverse group of supporters on both sides, including the Western Coalition of Arid States, the Association of California Water Agencies, the American Petroleum Institute and the libertarian Cato Institute.

M. Reed Hopper of the Pacific Legal Foundation, who represents one developer, John A. Rapanos, argues that the existing interpretation of the law infringes on the rights of states and individuals and impermissibly gives the federal government authority over "any area over which water flows, including a public street with an attached storm drain, a private lawn that drains to the street or, quite literally, the kitchen sink."

In response, the government, backed by major environmental groups, federal and state regulators and a bipartisan group of former administrators of the Environmental Protection Agency, says that the theories of Mr. Rapanos and his fellow developer, June Carabell, would remove more than half of existing waterways — perhaps as many as 99 percent, by one estimate — from federal water pollution controls.

In addition, they argue, if the court were to uphold the developers' position, the result would be to upend a decades-old regulatory system.

Wetlands are nurseries for creatures at the bottom of many food chains, filters that keep some nutrients and pollutants out of streams, and buffers against flooding.

If the court interpreted the Clean Water Act as controlling only actually navigable waterways and their immediate tributaries and adjacent wetlands, "then discharges of such materials as sewage, toxic chemicals and medical waste into those tributaries would not be subject" to regulation under the law, the solicitor general, Paul D. Clement, wrote in the government's brief.

Both developers sought to fill wetlands to make way for development — in Mr. Rapanos's case, a shopping mall in Midland, Mich.; in the case of Ms. Carabell, a condominium in Chesterfield Township. Mr. Rapanos defied state regulators, who, acting with federal authority specifically delegated by the E.P.A., told him not to fill his wetland without a permit. Ms. Carabell applied for a permit from the Army Corps of Engineers and was rejected.

The two cases present physical as well as legal differences. The wetlands owned by Mr. Rapanos — two others, in addition to the one where the shopping center was once planned — are as far as 20 miles from local rivers, but adjacent to ditches that drain into tributaries of those rivers. Ms. Carabell's wetlands abut a ditch that drains into nearby Lake St. Clair, but are separated from the ditch by an earthen berm.

The legal arguments in the briefs pit two recent Supreme Court precedents against each other. In a 1985 California case, United States v. Riverside Bayview Homes, the court observed that Congress had intended "to regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term." Referring to the role of wetlands in protecting larger waterways, the court said that activity in wetlands abutting open waterways could be controlled by the corps.

In this case, the government argues that the court should extend the authority of the corps to wetlands abutting tributaries of actually navigable waters. The constitutional lever through which the control is exercised is the Commerce Clause, which provides for federal control both over direct avenues of commerce — like waterways crucial to trade — and over issues that "substantially affect" interstate commerce.

In 2001, in an Illinois case, Solid Waste Agency of Northern Cook County v. United States, the court said the corps overreached its legal and constitutional authority by claiming control over an isolated quarry. The quarry had filled with water and was used by migratory birds, which are protected under federal law. The court ruled that there had to be a "significant nexus" between the regulated wetland or stream and true "navigable waters." If not, regulation of the water body fell to the state.

Most states represented in the amicus briefs, minus Alaska (where most of the country's wetlands are located) and Utah, back the government. A brief for state and regional water pollution officials said states "know they cannot adequately protect these resources acting alone."

As Douglas Kendall, one of the lawyers for these officials, explained, a downstream state could suffer the pollution from a neighbor raking in tax revenues off the associated development. The downstream state, he said, would have clear economic incentives to do the same.

But the brief for Alaska, Utah, the California Farm Bureau and several Western water authorities argues that "the wetlands in these cases did not have a 'significant nexus' to navigable waters because they were not adjacent to navigable waters; did not significantly affect navigation or interstate commerce in such waters; and had no apparent, significant effects on the actual flows or condition of such waters."

That brief argues that it is the federal control over navigation that gives the E.P.A. and the corps authority over navigable waters, and that unless their regulations directly prevent impediments to navigation — unless, for example, they deal with issues like the level of river flows — the issues fall to the states. The act, the brief argues, "authorizes federal jurisdiction up to the limits of the navigation power but not beyond."