

## Landowners' Supreme Court Case May Limit U.S. Clean-Water Rules

By Greg Stohr

Feb. 17 (Bloomberg) -- In 1990, three years after starting a quest to develop 19.6 acres of suburban Detroit property, Keith Carabell told his lawyer he hoped to live long enough to win his battle with environmental regulators and see the project through.

Sixteen years later, Carabell, now 78, is still trying to build condominiums, having taken his case all the way to the U.S. Supreme Court, which hears arguments Feb. 21. His appeal will test the views of new Chief Justice John G. Roberts and Justice Samuel A. Alito Jr. on federal environmental protection powers and may narrow the scope of the U.S. Clean Water Act.

"I had no idea we'd be going through all this jumping through hoops," Carabell, a semi-retired accountant said in an interview. He and his late wife bought the Chesterfield Township, Michigan, land in 1969 as an investment.

Carabell contends federal regulators have no authority over property that doesn't drain into a river, lake or other major waterway. His appeal, and that of a second Michigan landowner who raises related issues, has the backing of home builders including Bloomfield Hills, Michigan-based Pulte Homes Inc. and Dallas-based Centex Corp. Trade groups representing the real-estate, oil and farming industries are also supporting them.

They are pitted against President George W. Bush's administration, which is defending a lower-court decision that applied the Clean Water Act to Carabell's land. The administration has sparred with environmentalists in other settings; at the Supreme Court, though, it has on several occasions pressed for broad authority under the federal government's constitutional power to regulate interstate commerce, and for a robust role for U.S. environmental authorities.

### Administration Supporters

The administration has support from 33 states, New York City, a host of environmental organizations and a bipartisan group of four former administrators of the U.S. Environmental Protection Agency.

"Any change from the lower court opinion will certainly result in fewer waters protected," Carol Browner, who ran the agency under President Bill Clinton, said in an interview. "What that means is less clean water for the drinking supplies, less clean water for the environment."

Carabell and his allies say a ruling in their favor would clarify that inland wetlands are under the jurisdiction of state, not U.S., officials. They say that would restore a traditional distinction that lets the federal government regulate only what the Clean Water Act calls "navigable waters" and "waters of the United States."

### Jurisdiction

“This case is not about clean water,” said Reed Hopper, a Sacramento, California, lawyer who represents the second landowner, John Rapanos, in the Michigan dispute. “This case is about who has jurisdiction to protect the waters of the United States. Is it the federal government, or is it the state government?”

Rapanos, 70, is accused of destroying wetlands, without a permit, on three central Michigan sites he sought to develop. Unlike Carabell's land, Rapanos's property drains into navigable waterways, though only after the water travels through 20 miles or more of ditches and creeks.

The justices next week also will consider a third Clean Water Act case that asks whether water that passes through a dam constitutes a “discharge” subject to regulation under the law.

The Bush administration argues in the Carabell and Rapanos cases that the EPA and U.S. Army Corps of Engineers can't adequately safeguard navigable waterways unless they also can protect tributaries and connected wetlands.

### Degrading the Quality

“Pollution of the tributary has the potential to degrade the quality of the traditional navigable waters downstream,” U.S. Solicitor General Paul Clement argued in a court filing.

The government points to a unanimous 1985 Supreme Court decision saying the Corps can regulate wetlands that are adjacent to navigable waterways themselves.

The landowners say the government's position would let it regulate every drop of water that might eventually end up in a river, lake or ocean. They say such sweeping authority would both violate the Clean Water Act and exceed Congress's power under the Constitution to regulate interstate commerce.

The justices don't have to reach the commerce-clause question to decide the case; they might instead decide to narrow the Clean Water Act. The court took that approach in 2001, voting 5-4 to strike down a Corps of Engineers rule protecting local ponds that serve as migratory bird habitats.

“We really expect that the court isn't going to get to the constitutional question,” said Hopper, who predicted another 5-4 decision.

### Deciding Votes

The deciding votes may come from Roberts and Alito, who replaced court members -- the late Chief Justice William H. Rehnquist and retired Justice Sandra Day O'Connor -- who voted in the majority in 2001. Environmental groups, including the Sierra Club and Earthjustice, opposed Alito's appointment, saying his appeals-court record showed hostility toward the environment. Those groups, both based in the San Francisco Bay area, took no position on Roberts's nomination.

Environmentalists say that, regardless of the court's composition, they are confident the law is on their side. "We're optimistic about all nine justices, given the nature of the case here," said Howard Fox, a lawyer with Earthjustice in Washington.

Carabell's triangle-shaped plot, 25 miles northeast of Detroit, is now completely surrounded by development. Notwithstanding the "wetlands" moniker, it retains almost no water, he said.

#### An 1,800-Foot Ditch

Along one leg of the triangle is a 1,800-foot ditch, which connects to a tributary of Lake St. Clair, a mile away. A ridge alongside the ditch, created during excavation decades ago, forms a barrier that keeps water from flowing from Carabell's land into the ditch.

The berm and the thick clay soil make Carabell's land "like a bathtub with no drain in it," according to his attorney, Timothy Stoepker of Detroit.

The Bush administration says the wetland at least has the potential to overflow into the ditch. Clement argued that federal jurisdiction shouldn't depend on "the hypothetical prospect" of complete separation between a tributary and an adjacent wetland.

The government calls the property "one of the last forested wetlands in Macomb County."

Carabell has been battling regulators since 1987 when a planned sale to a developer fell through because the state wouldn't grant a permit. Carabell filed a new application in 1993, and a judge later ordered the state to issue a permit allowing construction of 112 condominium units.

#### Insisting on an Application

The Corps of Engineers then insisted that he also apply for a federal permit. That agency eventually rejected the application, and in 2001 Carabell sued in federal court. In a 2004 ruling, the Cincinnati-based 6th U.S. Circuit Court of Appeals said the Corps had jurisdiction.

Carabell says the two-decade fight has cost him \$200,000. For him, what began as a simple real-estate investment has grown into a fight over principle.

"I'm very cynical," he said. "I call them tree-huggers and extorting bureaucrats that are preventing me from the use of my property."

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