Up the Creek Without a Paddle: The U.S. Supreme Court Decides Little in Deciding Rapanos and Carabell

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Commentary

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LOOKING FOR THE CASE OF THE YEAR

Each term of the U.S. Supreme Court, land use and environmental planners, public officials, and lawyers latch onto the “big” case and have fun with it—intellectual Wiffle Ball if you will—not too serious, not too competitive, something to play in the backyard on warm, summer nights. A year ago it was the magnificent Kelo v. New London [125 S. Ct. 2655 (2005)], the eminent domain dust-up that did not change the law, but did fracture the Court and stir the political pot at all levels of government. You had to love the colorful debate between the bare majority and the dissenters; for example, Justice Sandra Day O’Connor’s so-quotable quote from her dissent: “Nothing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory.”

Congress, 48 states, and countless local governments wrestled with proposals to change eminent domain. President George W. Bush, taking a few moments away from his job as commander in chief, issued an executive order on June 23, 2006, on eminent domain which, remarkably, went on for over a page limiting the federal power and then sliced off those restrictions with numerous exceptions such that overall the order does nothing.

We were not so lucky this year in having a big case, but that is not stopping the pundits from tumbling over each other like so many Chinese acrobats after the Court swayed back and forth on the high wire of the Commerce Clause and hydrological connections, only to take the safe way out by falling back on its three-point safety harness of little guidance, subjective terminology, and a remand to the lower courts, which now have the unhappy task of figuring out what the Court could not. The decision is actually two companion cases—an arranged marriage for the convenience of the Court—of Rapanos and Carabell. They concern the extent of federal wetlands jurisdiction and could have blown the roof off the shaky little shack of expansive jurisdiction thrown up by the regulators.

The plurality decision of the Supreme Court, however, did little to advance the law. There are more opinions in the decision than your mother-in-law has on how to raise your children, and way too much written, with over 100 pages in the officially reported decision. Rapanos/Carabell is important because the lower courts will interpret and apply the new rules, the regulators—in particular the U.S. Army Corps of Engineers—will promulgate new guidance, Congress may act, and the resulting changes will affect developers and regulators at all levels of government. The context within which these cases arose is important to understand along with the history of the cases, but we wound up in the U.S. Supreme Court, what the Court decided (short answer: not much), what is likely to happen, and how the cases may change the law.

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1. Rapanos v. United States (No. 04-1034) and Carabell v. Army Corps of Engineers (No. 04-1035).
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happen on remand, and how the decision will affect our day-to-day lives.

**THE BACKDROP OF THE CLEAN WATER ACT**

To get in the proper frame of mind for understanding what really is at stake, sing a few verses of *Dry Bones*, particularly:

The foot bone connected to the leg bone,
The leg bone connected to the knee bone,
The knee bone connected to the thigh bone,
The thigh bone connected to the back bone,
The back bone connected to the neck bone,
The neck bone connected to the head bone,
Oh, hear the word of the Lord!

The issue all along has been what connection to federal navigable waters is necessary to bring water or wetlands within federal jurisdiction.

Congress enacted the Clean Water Act in 1972 to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” (33 U.S.C. §1251 et seq.) The Corps prohibits “the discharge of any pollutant” into navigable waters without a permit from the U.S. Army Corps of Engineers or the Environmental Protection Agency. New developments and other land use activities that might discharge pollutants into navigable waters require a review and §404 permit. Some argue the permitting process is time-consuming and expensive; others believe the process is essential to mitigate the harmful impacts from development.

The Corps reviews developments and land use activities that might impact navigable waters. Congress defines “navigable waters” to mean “the waters of the United States.” (33 U.S.C. §1362(7)). The Corps broadly interprets “waters of the United States” to cover all traditionally navigable waters, tributaries of these waters, and wetlands adjacent to traditionally navigable waters (or their tributaries). (33 CFR §§328.3(a)(1), (5) and (7)(2005); §§323.2(a)(1), (5), and (7) (1985)).

Where does land end and water begin? What sort of connection or nexus must there be between that distant water—like a small pond, an intermittent stream, or even a drainage ditch—and a navigable river or lake to make that distant water part of the waters of the United States and subject to the Corps’ jurisdiction? That tough question of connection is at the very center of the controversy. Is that foot bone really part of the head bone if they are so distantly and tenuously connected to have little or no functional relationship?

In its 1985 *Riverside Bayview Homes* decision, the Court held unanimously that the Corps was correct to assert jurisdiction over “wetlands adjacent to but not regularly flooded by rivers, streams, and other hydrographic features more conventionally identifiable as ‘waters.’” [*United States v. Riverside Bayview Homes, Inc.*, 474 U.S.121, 106 S. Ct. 455 (1985)]

Sixteen years later and after many controversies over the line-drawing problems inherent in the jurisdiction over adjacent wetlands, the Court decided a case about isolated wetlands, *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers* [*531 U.S. 159, 121 S. Ct. 675 (1991)*] (SWANCC) The Court held that the Corps did not have jurisdiction over nonnavigable, isolated waters because there was no “significant nexus” to traditionally navigable waters.

This year, the issue in *Rapanos-Carabell* was where to draw the line between *Riverside Bayview Homes* and *SWANCC*; the former provided for jurisdiction over adjacent wetlands, while the latter limited jurisdiction over isolated wetlands where the sole basis was migratory birds. *Carabell* raised the further question of whether a manmade berm between a nonnavigable wetland and navigable water cuts off the jurisdiction.

**THE RAPANOS AND CARABELL FACTS**

**Rapanos**

John and Judith Rapanos wanted to build a shopping center in Bay County, Michigan, some 20 miles from the nearest navigable waterway. The Michigan Department of Natural Resources told them of the likelihood of wetlands on the site and that a $1.5 million §404 permit would be necessary to continue. John Rapanos hired an expert who confirmed the presence of wetlands. Rapanos then fired the expert and ordered the report destroyed, and put a bulldozer to work to clear the land without a permit. He also cleared an area of land without seeking or obtaining §404 permits. Federal officials ordered him to stop. He didn’t.

The United States charged Rapanos criminally with violating the CWA. He was convicted. Ultimately, he was sentenced to the probation he had already served, 200 hours of community service, and a $185,000 fine. The sympathetic judge who sentenced him said: “We have a very disagreeable person who insists on his Constitutional right. This is the kind of person the Constitution was passed to protect.” The judge called it the “sandman” case because he saw the conviction as an example of the crime of moving sand on his property. “I’m finding that the average United States citizen is incredible.