

Commentary

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

Dwight H. Merriam, FAICP

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.¹ 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.² *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, how they wound up in the U.S. Supreme Court, what the Court decided (short answer: not much), what is likely to

Dwight Merriam, FAICP, is the founding partner and senior member of Robinson & Cole’s Land Use Group. He is a former AICP president and a *Planning & Environmental Law* reporter. His most recent book, which he coedited with Mary Massaron Ross, is *Eminent Domain Use and Abuse: Kelo in Context* (ABA, 2006).

1. *Rapanos v. United States* (No. 04-1034) and *Carabell v. Army Corps of Engineers* (No. 04-1384).

2. To read the decision, go to www.planning.org/amicusbriefs/pdf/rapanosdecision.pdf. The American Planning Association filed an amicus curiae brief, available at www.planning.org/amicusbriefs/pdf/rapanos.pdf.

This year, the issue in *Rapanos-Carabell* was where to draw the line between *Riverside Bayview Homes* and *SWANCC*.

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!³

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 CWA 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.⁴

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 Rapanos⁵ 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 CWA §404 permit would be necessary to continue. John Rapanos hired an expert who confirmed the presence of wetlands. Rapanos then fired the expert, ordered the report destroyed, and put a bulldozer to work to clear the land without a permit. He also cleared and filled two other sites 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 rights. 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 one for the crime of moving sand on his property. “I’m finding that the average United States citizen is incredulous

3. The National Institutes of Health, Department of Health and Human Services even has a piano playing on their website: www.niehs.nih.gov/kids/lyrics/bones.htm.

4. This section is adapted from material prepared by Lora Lucero, AICP, for the American Planning Association.

5. This is an interesting couple. John Rapanos once spent a night in jail on a contempt of court charge stemming from a case where a judge slapped him with a \$322,000 fine for violating zoning. Rapanos then put up a billboard saying the judge was “dishonest” and “not fit to be a judge.” Susan J. Demas, “Pugnacious Rapanos

on verge of his biggest fight,” *The Bay City Times*, February 20, 2006. President Bush appointed Judith Rapanos as chairperson of the National Museum Services Board in 2002, noting that “her dedication to advancing the arts and culture and her proven leadership on a local, state, and national level make her an excellent choice for

this position.” “President Bush to Nominate MCACA Member Judith Rapanos as Chairperson of the National Museum Services Board,” press release, September 6, 2002, www.michigan.gov.

Sometimes an oral argument can be quite telling, revealing where the Justices are going, but not so in this case.

that it can be a crime for which the government insists on prison for a person to move sand from one end of his property to another end of his property," he said.⁶

The federal government also brought civil charges and the Federal District Court concluded that all three sites contained wetlands with surface water connections to tributaries leading into larger bodies of water and that Rapanos had violated the CWA by destroying them without permits. The Sixth Circuit Court of Appeals unanimously agreed. District Judge Danny Reeves, sitting by designation on the Court of Appeals, deadpanned the ultimate issue, which remains unresolved today: "Determining how much of a connection is necessary has proven difficult." [*U.S. v. Rapanos*, 376 F.3d 629 (Sixth Cir. 2004)] Seventeen years after it all started, 65-year old John Rapanos found himself in front of the U.S. Supreme Court.

Carabell

June and Keith Carabell wanted to build 130 condominiums on a 20-acre site (of which 16 acres were wetlands) in Macomb County, Michigan, northwest of Lake St. Clair. Adjacent to the Carabells' wetlands is a ditch that eventually flows into Lake St. Clair. A four-foot-wide berm created from the material excavated to create the ditch separates the wetlands from the ditch, so water rarely, if ever, passes from the wetlands to the ditch. The ditch connects to the Sutherland-Oeming Drain, which discharges into the Auvase Creek, which flows on into Lake St. Clair within the drainage system of the Great Lakes. The state approved their plan to clear and fill.

The Corps denied the §404 permit because, among other reasons, the forested wetlands provide valuable sea-

sonal habitat for aquatic organisms and year-round habitat for terrestrial organisms. If the wetlands were destroyed, in the Corps' view, it could result in an increased risk of erosion and degradation of water quality in the drain, creek, and ultimately, Lake St. Clair. Keith Carabell, a 78-year-old accountant, said the government was acting like "Cuba or Russia or some other despotic government deciding what's going to happen with private property."⁷

The Federal District Court and the Court of Appeals ruled in the Corps' favor. The American Planning Association, the Community Rights Counsel, 33 states, and many others filed amicus briefs urging the Court to preserve federal protections under the Clean Water Act. The opposing view, led by the Pacific Legal Foundation, asked the Court to limit the Corps' jurisdiction to large lakes and rivers that are actually navigable, and the wetlands adjacent to those waters. This viewpoint would have removed many important wetlands from protection of the Clean Water Act. No Justice supported this extreme position.

THE ORAL ARGUMENT

Sometimes an oral argument⁸ can be quite telling, revealing where the Justices are going, but not so in this case. There was not as much discussion of the Commerce Clause as many assumed there would be during the argument on February 21. There was recognition that tributaries and ditches are an issue, but it was not pursued to any definition. Chief Justice John Roberts and Justice Antonin Scalia were firmly oriented on the side of the property owners; Justices John Paul Stevens and David Souter were backing the government.

In confronting Solicitor General Paul Clement, the Chief Justice said

"There is a developing consensus that things are probably more confusing now than before the opinion was issued." Stephen Brown of Missoula, Montana, chair of the Water Quality and Wetlands Committee of the ABA Section of Environment, Energy and Resources, quoted in "Lawyers, Developers Puzzle over Wetlands Case: High Court Plurality Gives Little Guidance on Clean Water Act," *ABA Journal EReport*, June 23, 2006.

"Figuring out this opinion means you have to look at jurisprudence on how to interpret a plurality decision. Then there's 'significant nexus,' which sounds like something out of First Amendment law. It's going to be a nightmare. This is just a turn in a long and winding road." Michael Ford, Phoenix environmental attorney, quoted in "Lawyers, Developers Puzzle over Wetlands Case: High Court Plurality Gives Little Guidance on Clean Water Act," *ABA Journal EReport*, June 23, 2006.

"The fact is that some bright rules that have applied for decades haven't been thrown out . . . but have had a significant cloud set over them by Justice Kennedy." Richard Lazarus, professor of environmental law at Georgetown University Law Center, quoted in "Justices Rein in Clean Water Act: Still-Divided Court Leaves Reach of the Law Unclear," by Charles Lane, *Washington Post*, June 20, 2006, A01.

6. "Developer avoids prison time at re-sentencing in wetlands case," *The Associated Press State & Local Wire*, March 16, 2005.

7. Jack Lessenberry, "Michigan wetlands case will test Clean Water Act," *Toledo Blade*, March 3, 2006; "Supreme Court to Decide Far-Reaching Wetland

Cases, *Environmental News Network*, February 20, 2006.

8. www.supremecourtus.gov/oral_arguments/argument_transcripts/04-1034.pdf.

Kennedy decided he could not join the plurality or the dissent because neither looked at the requirement that there be a “significant nexus” between the wetlands and the navigable waters, which he felt was important.

quite plainly, “I don’t think that’s right” in response to Clement’s apparent position that there were no limits to the government’s jurisdiction. In talking about storm drains and ditches, Scalia proclaimed: “To call that waters of the United States seems to be extravagant.”

Souter’s questions and comments revealed his belief that government doubtless had the authority to prevent pollution of distant waterways. Souter told Rapanos’s counsel that limiting jurisdiction could enable polluters to make an “end-run around the regulation. . . . All you have to do is dump the pollutant far away from the watershed and you get away scot-free.” The day of the argument was Justice Samuel Alito’s first day on the bench; he asked no questions.

When all was said and done, most observers, regardless of their orientation on the larger issues, saw the debate as a draw, with a closely divided court likely.

THE FRACTURED OPINION OF THE U.S. SUPREME COURT

The decision issued by the U.S. Supreme Court on June 19, 2006, will undoubtedly create considerable confusion in the lower courts as they grapple with the definition of navigable waters under the CWA. The plurality opinion, authored by Justice Scalia (joined by Chief Justice Roberts, and Justices Clarence Thomas and Alito), ruled that the phrase “navigable waters” gives the Corps and the EPA jurisdiction only over “relatively permanent, standing, or flowing bodies of water, which might include ‘seasonal’ rivers that carry water continuously except during ‘dry months’ but not intermittent or ephemeral streams.”

Most telling, perhaps, is the timing. Up until a few weeks before the deci-

sion, the Roberts Court was the model of consensus, with many unanimous decision—nine black-robed soul mates swaying in unison, humming *Kumbaya*.⁹ The *Rapanos/Carabell* decision was the oldest undecided case on the Court’s docket, which means they were deadlocked or close to it. The decision marks the end of the honeymoon. The Chief Justice rued that fact: “It is unfortunate that no opinion commands a majority of the court. . . . What is unusual in this instance, perhaps, is how readily the situation could have been avoided.” Whether he was referring to Justice Anthony Kennedy holding out and taking the middle ground, or the failure of the administration to come up with any rules after the *SWANCC* isolated wetlands decision, is unclear.¹⁰

The plurality opinion established a two-part test to determine whether adjacent wetlands are covered by the CWA: The adjacent channel contains a relatively permanent body of water connected to traditional interstate navigable waters, and the wetland has a continuous surface connection with that water, making it difficult to determine where the “water” ends and the “wetland” begins.

Four justices dissented. In an opinion authored by Stevens (joined by Justices Souter, Ruth Bader Ginsburg, and Stephen Breyer), the dissenters opined that the Court’s earlier unanimous ruling in *Riverside Bayview Homes* squarely controls these two cases, and they voted to uphold all of the existing federal protections for tributaries and wetlands. The dissenters disagreed with the plurality opinion that “adjacent to” means there must be a “continuous surface connection to” other water in order for the wetland to fall under the Corps’ jurisdiction. The dissenters would

have affirmed the unanimous decisions from the Sixth Circuit Court of Appeals. Perhaps the clearest direction from the High Court can be found on the last page of the 105-page opinion, where Stevens concludes that “today’s opinions, taken together, call for the Army Corps of Engineers to write new regulations, and speedily so.”

The swing vote by Justice Kennedy, although sounding closer to the dissent in many respects, actually concurred with Scalia in vacating the decisions from the Sixth Circuit Court of Appeals and remanding both cases back for review. Kennedy decided he could not join the plurality or the dissent because neither looked at the requirement that there be a “significant nexus” between the wetlands and the navigable waters, which he felt was important.

Kennedy took issue with almost every point made by Scalia. He disagreed with the plurality’s two-part test and would not accept the notion that *SWANCC* supports the requirement for a continuous surface-water connection. Unlike the Scalia Four, Kennedy believed the Corps’ definition of adjacency was reasonable. But unlike the dissent, Justice Kennedy did not believe the Court should give deference to the Corps’ interpretation of the CWA that would permit federal regulation whenever wetlands lie alongside a ditch or drain, however remote and insubstantial, that eventually flow into traditional navigable waters.

Kennedy would remand for consideration whether the Rapanos and Carabells wetlands possess a significant nexus with navigable waters. He noted that the wetlands in both cases might very well fall within the Corps’ jurisdiction. Kennedy’s nexus test will probably be the key to how the lower courts interpret the Clean Water Act in the

9. www.peterpaulmary.com/music/20-13.htm.

10. Linda Greenhouse, “Justices Divided Over Wetlands Protection, The Day, June 20, 2006.

Developers and real estate industry interests want fewer regulations, less regulatory oversight, and a reduction in the number of wetland acres subject to the CWA.

future because his test has at least the implicit support of the four dissenting Justices.

ALREADY AN IMPACT

Just 11 days after the decision, the Eleventh Circuit drew upon the *Rapanos* plurality opinion in a bankruptcy case, *In re. Bracewell*, 2006 WL 1814367 (11th Circuit, June 30, 2006). Apparently, the dissenters in *Bracewell* wished to broadly interpret a section of the bankruptcy code, while the majority did not. The majority wrote: "If, in the face of plain statutory language, an opinion runs on about purposes and policies, it is a sure sign the revision knife is out and an effort is being made to slice and dice clear language to make way for the policy preferences of the writer. It justifies Justice Scalia's recent criticism that talk about 'advancing the purpose of the Act' [referring to the Clean Water Act] is the 'last resort of extravagant interpretation.'" *Rapanos v. United States*, 2006 WL 1667087, at *21."

On June 26, 2006, the Supreme Court remanded the case of *Gerke Excavating v. United States* [2006 WL 1725619] in light of the *Rapanos* decision.¹¹ *Gerke* arose in a civil enforcement action brought by the United States under the CWA. The government alleged *Gerke* violated the CWA by discharging fill material into "the waters of the United States" without a permit. The government won at trial.

The principal contested issue in the case was whether the area into which petitioner had discharged fill material was part of "the waters of the United States" for purposes of the CWA. The Federal District Court considered the physical characteristics of the discharge site and found it to be a regulated "wetlands." The court further held that the wetlands were

"adjacent" as defined by the regulations to mean "bordering, contiguous, or neighboring" to tributaries of traditional navigable waters, stating that the wetlands "are adjacent to a drainage ditch running to Deer Creek, a tributary flowing into the south fork of the Lemonweir River, which is a tributary of the Wisconsin River, which is navigable in fact and is used in interstate commerce." In light of the hydrologic connection between the wetlands and traditional navigable waters, the District Court agreed with the government that petitioner's discharge was covered by the CWA.

The Court of Appeals affirmed, explaining that Congress's power under the Commerce Clause includes the authority to prevent the degradation of traditional navigable waters. The court held "[w]hether the wetlands are 100 miles from a navigable waterway or six feet, if water from the wetlands enters a stream that flows into the navigable waterway, the wetlands are 'waters of the United States.'" *Gerke* will be worth watching, especially as it seems more grounded in the Commerce Clause than *Rapanos*.

The division within the Court is sharp and the *Rapanos* decision even made its way into the Scalia dissent, joined by Thomas and Alito, in the 5-3 decision on June 29 regarding war crime trials without specific authorization by Congress:

"After seeing the plurality overturn longstanding precedents in order to seize jurisdiction over this case, . . . and after seeing them disregard the clear prudential counsel that they abstain in these circumstances from using equitable powers, . . . it is no surprise to see them go on to overrule one after another of the President's judgments pertaining to the conduct of an ongoing war. Those Justices who today disregard the commander in chief's wartime decisions, only 10 days ago deferred to

the judgment of the Corps of Engineers with regard to a matter much more within the competence of lawyers, upholding that agency's wildly implausible conclusion that a storm drain is a tributary of the waters of the United States. See *Rapanos v. United States*, 547 U.S. ____ (2006). It goes without saying that there is much more at stake here than storm drains. The plurality's willingness to second-guess the determination of the political branches that these conspirators must be brought to justice is both unprecedented and dangerous."¹²

WHO WANTS WHAT

Everyone with a dog in this fight wants something. You can guess pretty easily who lines up where. Developers and real estate industry interests want fewer regulations, less regulatory oversight, and a reduction in the number of wetland acres subject to the CWA. "My hope is that the Army Corps of Engineers will see the light and be less aggressive in interpreting the Clean Water Act," says Kent Jeffreys, legislative counsel of the International Council of Shopping Centers. "If the Corps does go this route it's good news for ICSC members because it will streamline their process and save money and time."¹³

Shortly after the decision, the Pacific Legal Foundation issued a press release: "We're pleased that the Court has rejected the lower courts' rulings. The Court is clearly troubled by the federal government's view that it can regulate every pond, puddle, and ditch in our country. We are encouraged by this decision and believe it represents a good first step toward common sense regulation."¹⁴ At the same time, M. Reed Hopper of PLF, who argued for *Rapanos*, acknowledged that at best his side got maybe half a loaf: "Everyone is disappointed that the court did not command a clear majority on defining

11. *Gerke Excavating, Inc. v. United States*, 2006 WL 1725619 (June 26, 2006). Other cases worth tracking are *Northern California River Watch v. City of Healdsburg*, (Ninth Circuit, No. 04-15442), and *San Francisco Baykeeper et al. v. Cargill et al.*, (Ninth Circuit, No. 04-17554), as they involve adjacency. Also, word

has it that the lawyer for *Rapanos* immediately moved for reconsideration in *United States v. Johnson*, 437 F.3d 157 (First Circuit, 2006) where the First Circuit found jurisdiction over cranberry bogs.

12. *Hamdan v. Rumsfeld*, No. 05-184, U.S. Supreme Court, 2006 U.S. LEXIS 5185 at 251-252.

13. International Council of Shopping Centers electronic newsletter, June 27, 2006, www.icsc.org/srch/apps/newsdsp.php?storyid=2194®ion=main.

14. Pacific Legal Foundation, June 20, 2006, quoting M. Reed Hopper.

The National Association of Home Builders, siding with the property owners, said the decision was a “step forward” in the effort to curb the expansive view of jurisdiction.

the extent” of the Corps’ jurisdiction, he said.¹⁵ He also saw it as a “great win for the regulated public” because it “specifically rejected the idea that the Army Corps . . . could regulate no matter how insignificant” the nexus to waters of the United States.¹⁶

The National Association of Home Builders, siding with the property owners, said the decision was a “step forward” in the effort to curb the expansive view of jurisdiction. “There must be limits to how far the federal government can reach upstream,” said NAHB CEO Jerry Howard.¹⁷

Timothy Searchinger, a senior attorney with Environmental Defense, was quoted after the decision: “Justice Kennedy agrees that wetlands in the Upper Midwest can protect against vast water quality problems in the Gulf of Mexico. What his opinion seeks is that the U.S. Army Corps of Engineers set forth that proof. The proof is there, and when it is presented, I am confident that the reach of the Clean Water Act will change very little.”¹⁸

Natural Resources Defense Council lawyer Jon Devine lamented, “The court’s decision today muddies the water for applying the law.”¹⁹ He called for Congress “to reaffirm that the 34-year-old statute [the CWA] protects all of the nation’s waters, because all of those waters are connected.”²⁰

Doug Kendall, executive director of the Community Rights Counsel, sees the glass more than half full. “Five justices of the Supreme Court wrote or joined opinions that support broad protection for rivers, streams, and wetlands under the Clean Water Act,” he said.²¹

The reality may prove to lie somewhere in the middle, where the old rules are somewhat weakened with nothing to take their place. As Richard Lazarus, an environmental law professor at Georgetown University Law Center believes:

“The practical effect is that some bright-line rules that have been applied for decades haven’t been thrown out . . . but have had a significant cloud set over them by Justice Kennedy.”²²

NPR: LIVING ON EARTH

If you listen to National Public Radio, you have doubtless heard *Living on Earth* with Steve Curwood. This weekly environmental news and information program goes to about 300 stations in nine of the 10 top radio markets and reaches 80 percent of the United States. The week of the *Rapanos-Carabell* decision, *Living on Earth* syndicated a short piece on the decision that provided a balanced view of the decision and what it means. [Used with permission of *Living on Earth* and World Media Foundation.]²³

CURWOOD: From the Jennifer and Ted Stanley Studios in Somerville, Massachusetts, this is *Living on Earth*. I’m Steve Curwood.

The U.S. Supreme Court waded into the swampy territory of wetlands protection and came up with a decision that really didn’t decide much. It was the first major environmental case for the Court’s new members, Bush appointees John Roberts and Sam Alito. The issue: the reach of a landmark environmental law, the Clean Water Act. The potential stakes: protection for tens of millions of acres of wetlands and small streams. The ruling raised as many questions as it resolved. *Living on Earth*’s Jeff Young joins us from Washington, where he’s been sorting through this opinion and finding out what’s next for America’s wetlands. Jeff, remind us of the particulars of the case here.

YOUNG: Two property owners in Michigan wanted to fill in some wetlands for construction. The wetlands were not close to or obviously con-

nected to any river or lake. So the landowners argued that they were not subject to regulation under the Clean Water Act. The government said, “Oh yes, they are.” Any hydrological connection between wetlands and a larger waterway puts those wetlands under the act’s protection. The Justices were very split on this. Four said the government got it right and these regulations are okay; four said the government agency went beyond its authority, the regulation is wrong.

CURWOOD: Okay, so the math is four and four makes eight. What about justice number nine?

YOUNG: Number nine was Justice Anthony Kennedy, and he was in the middle, which makes his separate opinion on this the most important. He said, yes, the government exceeded its authority here. But he disagreed with the reasoning that the other justices used and laid out his own attempt at some sort of middle ground, a test that lower courts should follow.

CURWOOD: And what exactly is that test?

YOUNG: Justice Kennedy says the regulators must show that there is—quoting here—a significant nexus between the wetland in question and larger waterways which are clearly regulated.

CURWOOD: Significant nexus. Sounds like the name of a jazz band or something. What does it mean?

YOUNG: Good question. In fact, you might call this the 100-million-acre question—roughly, the [amount of] wetlands the country has left. Justice Kennedy says there has to be evidence that polluting or filling in the wetland would have a downstream effect. But he doesn’t really define the nexus, so it’s gonna be decided case by case.

CURWOOD: So meantime, where does that leave the landowners who brought the suit?

15. “U.S. Supreme Court Justices Fail to Agree On Extent of Clean Water Act Jurisdiction,” *Environment Reporter*, June 23, 2006.

16. “Justices Rein In Clean Water Act,” *The Washington Post*, June 20, 2006 at A01.

17. “Old Dispute Hampers New Administration Bid to Settle Water

Act Scope,” *Inside EPA*, Vol. 27, No. 25, June 23, 2006.

18. “Justices Rein In Clean Water Act,” *The Washington Post*, June 20, 2006 at A01.

19. “U.S. Supreme Court Justices Fail to Agree On Extent of Clean Water Act Jurisdiction,” *Environment Reporter*, June 23, 2006.

20. *Id.*

21. Gina Holland, “U.S. Supreme Court affirms government wetlands protections on narrow vote,” *Associated Press Worldstream*, June 20, 2006.

22. “Justices Rein In Clean Water Act,” *The Washington Post*, June 20, 2006 at A01.

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A plurality led by Justice Scalia seemed bent on cutting back the extent of federal wetlands jurisdiction.

YOUNG: Well they won, but they didn't win very much, other than another shot in the lower court. Reed Hopper is an attorney with a property rights group called the Pacific Legal Foundation. And he argued this case for one of the landowners, John Rapanos.

Recorded quote from Reed Hopper: Perhaps we didn't get what we hoped for—which was a clear rule on the scope of federal jurisdiction under the Clean Water Act. But Mr. Rapanos did get what he asked for: a determination that the agency has some limits and cannot regulate everywhere water flows.

YOUNG: So Hopper obviously had wanted a more sweeping ruling. Now he says landowners will have to wait and see how things play out in the near future as more of these cases go to court.

CURWOOD: So Jeff, let's look ahead here. Over the longer term, what do you think will happen?

YOUNG: I think eventually there will be some effort to clarify this. It could come from Congress, it could come from the Army Corps of Engineers—the Corps has responsibility for this section of the Clean Water Act, and they might try to write new rules, but the last time the court tried to do this, it was very controversial [and] they dropped it.

CURWOOD: Now you mentioned Congress. What's brewing there, if anything?

YOUNG: Rep. James Oberstar, a Democrat from Minnesota, already has a bill that would make it clear that the act does apply to these kinds of wetlands. Oberstar's been on the Hill 30 years as a congressman. Even before that he was a staffer, back in the early '70s when the Clean Water Act was drafted. He was there. He says Congress fully realized the importance of wetlands, and meant to protect them.

Recorded quote from Rep. Oberstar: If the court's decision is allowed to stand, the

result will be more pollution, more fish kills, more beach closings, and more flooding. Because wetlands, as all of us saw in the destruction of Hurricane Katrina, are the shock troops of nature.

CURWOOD: So Jeff, what are the chances for Oberstar's bill?

YOUNG: He has a lot of support, something like 160 cosponsors, and there's a companion bill already introduced in the Senate. But several members of the Republican leadership really want to move in the other direction, toward less regulation. So this is very divisive for Congress. I'd say we'll get some debate but probably not a new law, especially not in an election year.

CURWOOD: Now, of course there's another reason this case was so closely watched, and that's because it was the debut environmental decision for the new members of the court. We have Sam Alito replacing Justice Sandra Day O'Connor, and John Roberts replacing Chief Justice Rehnquist. What did we learn about these new Justices?

YOUNG: Both joined on to Justice Antonin Scalia's opinion here. Scalia leads the conservative right of the court and nearly always gets the vote of Justice Clarence Thomas. And Scalia is a very colorful, passionate writer, and this was a particularly scathing opinion that he's written here. He calls the regulatory agency "despots" and calls their view of their authority "beyond parody." Georgetown Law [school] hosted a discussion with some legal experts on this opinion a few days ago, and Professor Richard Lazarus said something pretty interesting, I thought. He said even by Scalia's standards, this opinion was pretty extreme.

Recorded quote from Richard Lazarus: And to have the two new Justices sign on to it I think sends out some serious concerns and warning signs about where the court might be going. I don't think O'Connor would have signed that opinion. I'm not even sure Rehnquist would have necessarily

signed on. If the two new Justices are really on that bandwagon, I'm surprised they joined it.

YOUNG: So a note of caution there from a widely recognized expert on environmental law, that this court may very well be more willing to limit the reach of environmental law.

CURWOOD: But even with Justices Roberts and Alito joining in, Scalia did not get a clear majority here.

YOUNG: Right. We have a narrowly—and I think fair to say, somewhat bitterly—divided court on these issues, with Justice Kennedy stepping into that role of the swing vote. And that may very well be the new dynamic for environmental cases that come before this court, which would also make them real nail-biters—very tough to predict.

CURWOOD: Jeff Young is *Living on Earth's* Washington correspondent. Thanks, Jeff.

YOUNG: You're welcome.

WHAT THE DECISION MEANS GOING FORWARD

The effect of the decision, as the editorial writers for the *Washington Post* have correctly pointed out, is not so much what the Court decided as what the Justices had threatened to do.²⁴

A plurality led by Justice Scalia seemed bent on cutting back the extent of federal wetlands jurisdiction. The only one stopping them was Justice Kennedy. He was unwilling to go as far as the others and entered into an accidental alliance with the other four Justices at the opposite end of the spectrum, those who were ready to continue to support an expansive view of federal wetlands jurisdiction. But for Kennedy's position at the center of this tenuous teeter-totter, the decision could have fallen to the side of greatly restricted jurisdiction.

Justice Kennedy is in a sense the true winner in this decision. He now

24. "This Land Is Wetland: The Supreme Court issues an environmental ruling that does little yet threatens much," *The Washington Post*, Monday, June 26, 2006; Page A20

In essence, Kennedy's position is the only way to give voice to the plurality opinion, in light of the great gulf between the Scalia Four and the Stevens Four.

"Congress, though, should clear up any confusion by passing the Clean Water Authority Restoration Act. By doing so, it will reiterate that it wants extremely broad protection for the nation's waterways, and that it, not the judiciary, should decide which ones are protected." "Clean Water at Risk," Editorial, *The New York Times*, June 20, 2006.

"Unless this uncertainty is properly corrected, the impact on our nation's waters will be devastating." Jim Murphy, wetlands counsel for the National Wildlife Federation, quoted in CNNMoney.com, "High court limits wetlands protection," June 19, 2006.

"A divided Supreme Court has created chaos for protections of over 50 per cent of the nation's waters today." Robert Perciasepe, chief operating officer, National Audubon Society, quoted in "Supreme Court Ruling Creates Problems in Protecting Water Quality; Statement of the Perciasepe, National Audubon Society," U.S. Newswire, June 19, 2006.

"... Justice Kennedy's opinion imposes a new administrative burden that potentially creates a major, real-world hurdle for federal regulators seeking to protect wetlands. Fortunately, nothing in the ruling prevents Congress from reaffirming its intent to fully protect wetlands and other waters under the Act." Leslie Carothers, president of the Environmental Law Institute, quoted in "Supreme Court Divides Sharply Over Reach of Clean Water Act," *Ascribe Newswire*, June 19, 2006.

"I'm not sure I'll live to see the end of this." Keith Carabell, age 79, quoted in "Michigan cases sharply divide Supreme Court over wetland protection," *The Associated Press State & Local Wire*, June 20, 2006.

firmly commands the middle ground and his opinion is likely to be the most influential in the courts below. Justice Scalia, joined by the Chief Justice, and Justices Alito and Thomas in the plurality opinion, would limit the CWA to waters that are "relatively permanent, standing, or continuously flowing" or immediately adjacent waters.

Justice Stevens, in his dissenting opinion, joined by Justices Ginsburg, Breyer, and Souter, would have the Corps' jurisdiction reach wetlands adjacent to not just navigable water, but also their tributaries. Remarkably, in Kennedy's opinion concurring with Scalia, which gives the Scalia Four the plurality to vacate and remand, Kennedy agrees that there should be some restrictions on jurisdiction over the most remote waters. But . . . and this is the important middle ground . . . Kennedy seeks jurisdiction over distant waters where there is a "significant nexus" such that these distant waters have a significant effect on navigable waters.

In essence, Kennedy's position is the only way to give voice to the plurality opinion, in light of the great gulf between the Scalia Four and the Stevens Four.²⁵ This is perhaps Kennedy's most progovernment environmental opinion and whether he will hold that position in other cases is uncertain. Important also is the fact that this case is a narrowly focused CWA case with the single—important and intractable—issue of where to draw a bright line between jurisdiction and no jurisdiction.

Does that tell us anything about which way this tippy plurality will fall in a land use or environmental case not under the CWA? For example, the Court has agreed to hear two Clean Air Act cases next Term. *Environmental Defense v. Duke Energy Corp.* [No. 05-

848, petition granted May 15, 2006] is a case involving the EPA's new source review program under the Clean Air Act. The second case is *Massachusetts, et al., v. Environmental Protection Agency* [No. 05-1120, petition granted June 26, 2006] involving the EPA's decision not to regulate greenhouse gas emissions under the Clean Air Act. Where will Kennedy and the 4-1-4 split end up in these two cases and any of the other cases potentially to come before the Court on petitions for review? We certainly do not know, but it will be worth watching and remaining cautious about the strength of Kennedy's position as the swing vote. Of interest also, in terms of gauging how strong the conservative side of the Court will be with the two new Justices, is what land use and environmental cases the Court agrees to hear.

The *Rapanos-Carabell* coalitions are shaky. It may well be that Kennedy was lined up with the Stevens Four and then departed the fold. Kennedy's opinion reads like a majority opinion, as if he were writing it for a majority of five. Scalia's plurality opinion, on the other hand, reads like a dissent, suggesting that it was 5-4 and then became 4-1-4.²⁶

Decisions of the Supreme Court may be a little like horseshoes and hand grenades—close counts. The fragility of the Court's position will almost certainly influence the Corps in establishing definitive regulation. The Court's split decision signals the lower courts to exercise some discretion in applying the new rules.

How will this line be drawn? When you read the transcript of the oral argument in the context of the several opinions, it becomes apparent that the judicial branch is not the best place to resolve complex issues of physical hydrology, habitat preservation, and

25. See *Marks v. United States*, 430 U.S. 188, 193 (1977) (with fragmented decision concurrence on narrowest grounds may control).

26. Also suggested in Linda Greenhouse, "Justices Divided on Protections over Wetlands," *The New York Times*, June 20, 2006, page 1, column 1.

Land use and environmental planners, in particular, have a potentially important role to play in resolving the difficult issues inherent in the fundamental jurisdictional question left unresolved by the court.

the public's interest in sustainable development. The Corps has much work ahead of it in promulgating better rules to define what is in and what is out, but perhaps in the first instance it must be Congress, as our federal legislature, to make these determinations and to establish the law within the limits of our constitutional protections and using the best science available to us.

We have been here before. Remember the affirmative action case in 1978, *California v. Bakke*?²⁷ That was a highly fractured decision with multiple opinions, some split. The havoc over what was acceptable and what was not was with us over two decades.

The EPA has officially said that after the *Rapanos* decision it will "continue to use [its] clean water regulatory tools to provide effective and predictable protection for the nation's rivers, streams, and wetlands."²⁸ Ducks Unlimited and other fishing and hunting organizations will be pushing the administration and Congress to set standards to protect the natural resources they use.

Whether it will be Congress or the Corps taking the lead is uncertain. Sen. James Inhofe (R-Okla.), chairman of the Environment and Public Works Committee, has publicly offered to assist the executive branch in devising new rules to define navigable waters. "The United States Supreme Court's 5-4 split decision leaves many issues to be resolved. What is clear from today's decision is that the United States Supreme Court continues to draw a narrow focus regarding federal reach extending into local land use decisions and which waters truly are the 'waters of the United States,'" he said.²⁹

Sen. Jim Jeffords (I-Vt.) issued this statement the day of the decision:

This split decision by the Court is an invitation for mischief by those who seek to limit the protections of the Clean Water Act. It is clear from this decision that the Court is headed in a direction that would put protections at risk for some wetlands and intermittent streams. This ruling is particularly troubling in light of the torrential rains Vermont endured this spring, which reminded us of the critical role wetlands can play in mitigating floods.

This decision provides a clear signal to Congress: We must legislate to retain the intent of the Clean Water Act and to provide broad protection for our nation's waters. I will be taking steps in the remaining days of this Congress to move S. 912, the Clean Water Authority Restoration Act, through the Senate. This is the third Congress in which I've joined Sen. [Russell] Feingold [D-Wis.] in introducing S. 912, and today's Supreme Court decision reaffirms this bill's importance.³⁰

After *SWANCC*, the decision ambiguously limiting jurisdiction over isolated wetlands, the administration tried unsuccessfully to create a set of workable rules. It may be time to pick up the effort anew. Justice Stevens, with whom the Chief Justice agrees, said as much in his opinion in tasking the Corps to ". . . write new regulations, and speedily so. . . ." "The administration has signaled that it will do just that. Malcolm Stewart, who as assistant solicitor general wrote the briefs for the government in *Rapanos-Carabell*, said the day after the decision: "It is more advantageous to do rulemaking now after the Supreme Court has issued more nuanced guidance on the subject."³¹

Make no mistake about it. This will be no easy task. The administration failed in its attempts following *SWANCC*, and Richard Lazarus, the

Georgetown Law professor, described the process of defining navigable waters including wetlands as one of "extreme difficulty" and offered: "Remember, it took EPA 60 to 80 single-spaced pages just to define solid waste."³²

As Rebecca Wodder, president of American Rivers urged Congress to take action after the decision: "The Supreme Court leaves protection of clean water law in this country in a horrible muddle with this decision. While Justice Kennedy's opinion keeps us from going over the precipice, dangling on the edge of every last wetlands case isn't a long-term solution. Congress must step in and confirm, once and for all, that you can't protect the rivers and lakes that people depend on for drinking water and more, without protecting the waters that flow into them."³³

In a sense, the issue of jurisdiction and regulation, particularly in the context of sustainability and the need to protect generations yet unborn, is too difficult and too important to leave to the judiciary. Land use and environmental planners, in particular, have a potentially important role to play in resolving the difficult issues inherent in the fundamental jurisdictional question left unresolved by the court.

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27. *Regents of the University of California v. Bakke*, 438 US 265 (1978); see "Court muddled waters on wetland disputes," *The Virginian-Pilot*, June 24, 2006, making this point.

28. "Old Dispute Hampers New Administration Bid to Settle Water Act Scope," *Inside EPA*, Vol. 27, No. 25, June 23, 2006.

29. "Lawyers say Supreme Court Did Not Resolve Question of Authority of Corps of Engineers," *Environment Reporter*, June 23, 2006.

30. "Sen. Jeffords issues statement on Supreme Court ruling on clean water," U.S. Federal News Service, June 19, 2006.

31. "Corps of Engineers Urged to

Write Rules to Clarify U.S. Jurisdiction over Wetlands," *Environment Reporter*, June 23, 2006.

32. "U.S. Supreme Court Justices Fail to Agree On Extent of Clean Water Act Jurisdiction," *Environment Reporter*, June 23, 2006.

33. *Id.*