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Community Rights Report

CRC's Monthly Newsletter

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FEATURE CASE

Supreme Court Issues Mixed Wetlands Ruling: *Rapanos v. United States* (No. 04-1034)

On June 19, the U.S. Supreme Court issued its long-awaited ruling in *Rapanos v. United States*, a challenge to longstanding federal protections for wetlands and tributaries under the Clean Water Act. The court split 4-1-4, with Justice Kennedy supplying a moderate concurring opinion that should be the key to determining how lower courts will apply the ruling in future cases.

Mr. Rapanos deliberately destroyed wetlands on three different sites in Michigan to prepare the land for commercial development. The wetlands are adjacent to tributaries that feed into Lake Huron. In a companion case, another couple, the Carabells, applied for a permit to destroy 12 acres of wetlands in order to build condominiums in Michigan about a mile from Lake St. Clair. There's an earthen berm that separates those wetlands from a series of ditches, drains, and tributaries that empties into the Lake.

Mr. Rapanos, represented by Pacific Legal Foundation, asked the court to limit federal authority under the Clean Water Act to large lakes and rivers that are actually navigable, and the wetlands adjacent to those waters. On this nonsensical reading, federal officials would have no authority to protect the smaller non-navigable streams and tributaries that feed into those larger lakes and rivers, or to protect the wetlands next to those smaller streams. This radical position did not get a single vote.

Beyond that, that ruling is difficult to untangle because there's no clear majority position. Four members of the court, led by Justice Scalia, voted to read the Act as applying to tributaries only where they have a virtually permanent or continuous flow of water, which calls into question protections for many seasonal streams or channels that flow only at certain times. Four other members of the court in dissent, led by Justice Stevens, voted to uphold all existing federal protections for tributaries and wetlands. Justice Kennedy, writing only for himself, concluded that the Act allows EPA to protect any stream, tributary, or wetland that has a significant ecological nexus to navigable waters. Although this position only received one vote, lower courts in future cases should look to Kennedy's nexus test because five Justices would support regulation whenever this test is met.

Fortunately, Kennedy's nexus test is a flexible one. Kennedy recognizes that protecting tributaries is essential to maintaining the ecological integrity of navigable lakes and rivers downstream. He considers the cumulative impact of wetland loss, rather than telling the lower courts to look at each proposed project in isolation. He makes clear that wetlands assist in the control of floods and maintain water quality by trapping sediment and toxic pollutants before they reach our streams, rivers, and lakes. He voted to remand the cases for analysis using this nexus test, recognizing that facts in the record supported a nexus in both cases.

Community Rights Counsel filed an amicus brief on behalf of a national association of state water pollution control administrators, urging the court to preserve the federal protections at issue. As we argued in our brief, and as Justice Kennedy makes clear, the States can't protect our nation's waters without a strong federal floor due to the economic incentives that promote in-state economic development while ignoring the harm caused by pollution and flooding in downstream States.

Legislation is pending that would clarify federal authority over tributaries and wetlands, thereby putting an end to unproductive litigation over these much-needed federal protections. Congress should move quickly to enact it.

ON THE HORIZON

High Court Agrees to Hear Global Warming Case

On June 26, the U.S. Supreme Court granted the cert. petition in *Massachusetts v. U.S. EPA* (No. 05-1120), a major global warming case raising the issue of whether EPA has authority under the federal Clean Air Act to regulate greenhouse gas emissions from cars and trucks. CRC prepared an amicus brief supporting the petition on behalf of the National Association of Counties, U.S. Conference of Mayors, American Planning Association, and the city of Seattle, arguing that the case raises issues of exceptional importance. Indeed, local officials and planners will be the first responders to the whole range of disasters that global warming threatens.

The court will hear oral argument in the fall and issue a ruling later this year or in early 2007. The cert.-level filings are available at http://www.communityrights.org/legalresources/crcbriefs/indexofbriefs.asp#COMEPA. We'll keep you apprised of developments.

OUTRAGE OF THE MONTH

The "Hammer to the Head" Bill is Back

In June, the House Judiciary Subcommittee on the Constitution held a hearing on H.R. 4772, the *Private Property Rights Implementation Act*, a bill designed to weaken local land use, zoning, and environmental laws by encouraging costly and unwarranted takings litigation in federal court against local officials. The bill purports to alter the procedures governing regulatory takings litigation required by the U.S. Constitution. The bill would change these procedures by allowing takings claimants to bypass local land use procedures and state courts.

Existing ripeness rules articulated by the Supreme Court require a takings claimant to exhaust local zoning procedures and obtain a "final decision" from the land use authorities prior to filing a claim. H.R. 4772 proposes a broader and more subjective standard of a "definitive decision." This standard would allow takings claimants to short-circuit local land use procedures, avoid compliance with local laws, and proceed to federal court much earlier in the land use process. The bill also purports to alter the substantive standards for liability for takings and substantive due process claims.

H.R. 4772 is designed to allow big developers and other takings claimants to use the threat of premature federal court litigation as a tool to coerce local government officials. In fact, the National Association of Home Builders candidly referred to a prior version of the bill as a "hammer to the head" of local officials.

Prior versions of this bill failed in the 105th and 106th Congress. But these measures moved very quickly through the House, and it's possible H.R. 4772 will receive similar fast-track treatment. In addition to the House bill, there has been a strong push in the Senate to include ripeness provisions in legislation responding to the *Kelo* eminent domain ruling. Opposition letters have been sent by several national associations representing state and local officials, the American Planning Association, environmental groups, and others. We'll keep you up-to-date on whether the bill continues to move.

EYE ON WASHINGTON

The *Kelo* Executive Order

On June 23, President Bush signed an Executive Order articulating federal policy on the use of eminent domain in the wake of *Kelo*. The President is to be applauded for striking a thoughtful balance between the legitimate concerns of property owners and the needs of state and local officials who seek to use eminent domain to create new jobs and new hope in economically distressed communities.

The operative portion of the Executive Order (available at http://www.whitehouse.gov/news/releases/2006/06/20060623-10.html) provides that it is federal policy to limit "the taking of private property by the Federal Government to situations in which the taking is for public use, with just compensation, and for the purpose of benefiting the general public and not merely for the purpose of advancing the economic interest of private parties to be given ownership or use of the property taken."

Two points are worth noting. First, this language on its face is limited to takings "by the Federal Government" and thus does not appear to implicate directly condemnations by state and local officials, even where the project is federally funded. Second, and more importantly, the policy embraces a public-benefits standard, and prohibits only those takings that are "merely" for the purpose of advancing private interests. In other words, it appears designed to ban abusive situations in which the only beneficiary is a third party (the classic abusive scenario of taking from A to give to B only for B's benefit), but allows for takings to promote economic development that will benefit the general public. The E.O. also contains a list of nine types of condemnations that are excluded from the general policy, including takings to quiet title or acquire abandoned property.

The E.O. directs the Attorney General to issue implementing instructions, and requires all agency heads to comply with it to the extent permitted by law. And so it remains to be seen exactly how the Order will be administered. But compared to other responses to *Kelo*, the E.O. seems to reflect a measured and nuanced approach that recognizes the need to use eminent domain to promote the public good.

In view of the public and media response to *Kelo*, the Executive Branch no doubt felt considerable political pressure to "do something." It is encouraging that the President resisted the calls of the so-called property rights movement for a more extreme response. If the Congress moves additional *Kelo* legislation, we hope it follows suit.