Law & Policy

Wetlands, Streams, and . . . Civil Commitment of "Sexually Dangerous Persons"?!

With the arrival of autumn in Washington, D.C., comes another seasonal event, this one met with giddy anticipation by legal scholars, court reporters, and policy wonks: the start of a new U.S. Supreme Court term. This year, most of the buzz surrounding the Court's return concerns the seating of new Associate Justice Sonia Sotomayor. The general wisdom is that she will have little effect on the balance of power within the conservative Roberts Court in environmental cases, given that she replaces a Justice, David Souter, who typically cast his vote in favor of environmental protection (as she is expected to do).

Is there any reason to believe that the Court's work this year will shed light on the raging legal and policy debates over the reach of federal water protections? The answer, perhaps a bit surprisingly, is yes.

To be sure, there are no cases before the Court that invite the Justices to further muck up our understanding of Clean Water Act jurisdiction in the wake of the now-notorious *SWANCC* (2001) and *Rapanos* (2006) rulings. But one pending case, *United States v. Comstock*, could provide important insights on where the Roberts Court may be headed on big-ticket questions that are essential to the future of the Clean Water Act. To understand why this is so requires a quick historical aside.

For more than one-half century, from the late 1930s until the 1990s, the Supreme Court struck down not one federal statute on the grounds that it exceeded Congress' Commerce Clause authority contained in Article I, §8 of the U.S. Constitution—a mainstay of federal legislative power. But Congress's win streak came to a screeching halt in the 1995 decision of *United States v. Lopez*, where the Court invalidated the Gun-Free School Zones Act as exceeding Congress' authority over interstate commerce. In 2000, the Violence Against Women Act met the same fate in *Morrison v. United States*. In both instances, the Court determined that Congress had gone too far, using the Commerce Clause to reach local behavior better left to regulation by the states. The so-called Rehnquist federalism revolution was underway, and broad federal environmental laws were in the cross hairs.

But the widely feared invalidation of one or more environmental statutes on Commerce Clause grounds never materialized. In 2001, the Court in *SWANCC* declined to reach the question of precisely which waters Congress is constitutionally empowered to protect under the Clean Water Act, instead deciding the case—and excluding Clean Water Act coverage for certain "isolated" waters—on much narrower grounds of congressional intent. Then, the Court's 2006 *Rapanos* misadventure, which split the Justices 4-1-4, went on to cast fresh confusion on when wetlands and streams are deemed to be in or out for purposes of the Clean Water Act. Like *SWANCC* before it, *Rapanos* was not decided on constitutional grounds. This has left an opening for congressional action.

As most readers of the *Newsletter* are aware, work has been underway on Capitol Hill for some time to fashion a post-*SWANCC/Rapanos* legislative "fix" to the Clean Water Act and clarify Congress's clear intent to cover so-called "isolated" wetlands, small headwater streams, prairie potholes, and a range of intermittent waters whose protection has been left uncertain by the Supreme Court. Most observers agree that when and if this Clean Water Restoration Act amendment passes, the Court will finally be confronted with the vexing question it has long dodged: what, exactly, is the outer boundary of Congress' constitutional power to protect America's wetlands, streams, and other waters?

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Which brings us back to the present day. In *Comstock*, the U.S. Court of Appeals for the Fourth Circuit struck down part of the federal Adam Walsh Child Protection and Safety Act, which provides for the civil commitment of "sexually dangerous persons" who, though already in federal custody, are nearing completion of their federal sentences and soon to be released. Citing *Lopez* and *Morrison*, the appeals court concluded that the law represented a federal encroachment on powers traditionally reserved to the states—the statute "conflat[ed] what is truly national and what is truly local." The government argues that the lower court got it wrong—that Congress' authority to establish a federal penal system, together with its constitutional power to enact laws that are "necessary and proper" for carrying out its constitutional duties, suffice to justify the law. But the real story in this case looks to be the Commerce Clause.

Although federal power to commit sexually dangerous persons may seem a far cry from federal power to protect intermittent streams, the constitutional underpinnings appear to be the same. The roots of environmental law can take hold in odd places. Recall that the Supreme Court's last major statement on the Commerce Clause came in the 2005 decision in *Gonzales v. Raich*, which upheld broad federal authority to ban the use of marijuana—even where a conflicting California law allowed physicians to prescribe it. And recall that one of the most important Supreme Court cases in history for environmental protection—*Wickard v. Filburn*, handed down in 1942—involved plucky Ohio wheat farmer Roscoe Filburn, who argued that any excess wheat he had grown for personal consumption was not subject to federal regulation. The Court disagreed, and its ruling in *Wickard* remains good law: Congress has the constitutional power to regulate local, purely intrastate activities that, in the aggregate, substantially affect interstate commerce.

Whatever one may think of the reach of the Adam Walsh Act, the way the Court decides *Comstock* could give us a glimpse of how Justice Sotomayor views the scope of federal power under the Commerce Clause. And the case could provide the first waypoint since the 2005 *Raich* decision in charting the development of the Roberts Court's Commerce Clause jurisprudence.

So water protection advocates do have reason to pay attention to the Court this term, despite the absence of a blockbuster, *Rapanos*-style wetlands case. In fact, the Court's reluctance thus far to take another case purporting to "clarify" the *SWANCC/Rapanos* mess may be something for which we should all consider giving thanks on the fourth Thursday of November. ■

-D. Bruce Myers Jr., Senior Attorney, Environmental Law Institute

Mitigation

Corps Transparency—The Issue of Data Availability

It is time that the U.S. Army Corps of Engineers (the Corps) and the public had accurate, complete data about the §404 and §10 programs. Recently, I submitted Freedom of Information Act (FOIA) requests to four Corps districts to obtain permit data from the last 10 years—a listing of each impact, its acreage, the watershed where the impact was located, the type of impact, and the mitigation required—basic data. I was appalled at the responses.

In one district, over 80 percent of the projects showed zero in the "amount-of-fill" field in the database. This is in spite of the same record showing that a §404 permit was issued—a permit that can only be issued for placement of fill into waters of the United States. In another district, when I finally received results, the data did not include about 50 acres of mitigation in one watershed that we knew about, since it was accomplished by one of our partners within the past two years. In all districts, the watershed was either not tracked, or the districts had incomplete records of the watershed involved in the permit or mitigation.

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As a mitigation banker, I want to have this information to make business decisions and to help justify my service area request, per the new rule (33 C.F.R. §332. 8.d.6iiA). If an entity proposed an in-lieu fee, they would have to present this information to the agencies, since the compensation planning framework section of the rule (33 C.F.R. §332.8.c) requires an analysis of historic aquatic resource loss in the service area of the in-lieu fee. Many others, who are not involved in mitigation, require data for other reasons—the U.S. Congress, other federal, state, and local agencies, environmentalists, and even the Corps itself.

Part of the problem is that the Corps is extremely decentralized. Until a few years ago, the Corps did not have a consistent methodology for collecting data. Each district was responsible for collecting and holding permit data using any method and format which it chose. One district recorded permits in a paper log as late as 2006. Based on my informal inquiries, even Corps regulatory headquarters and the U.S. Army Corps of Engineers Institute for Water Resources could not give me an idea of the magnitude of the impacts and mitigation the individual districts were overseeing.

One federal official told me that the Corps' own annual report to Congress contains only one page on the regulatory program, buried amongst all of the other programs the Corps administers. Thus, legislators are not aware of the lack of data and accountability in the regulatory program. This does not excuse failure to track data, given the impact this regulatory program has on the public and the environment.

I also went to the U.S. Environmental Protection Agency (EPA) to ask for data, since they play a role in the §404 permit process with the Corps. EPA staff indicated to me that, despite progress in recent years, they too, have had a difficult time obtaining information from the Corps about overall impacts and mitigation.

Even the Corps is starting to understand that the information it collects needs to be better handled. To that end, about three years ago, Corps regulatory headquarters introduced a new, geospatially-oriented database, ORMS II (short for the Operations and Maintenance Business Information Link Regulatory Module), to track both impacts and mitigation. All Corps districts are required to use this database. This should help to provide a consistent platform across all districts and a consistent set of data that can be used.

Upon talking to regulators in various districts, however, there seems to be consistent push-back to headquarters on the ease of use of the database. Part of this push-back may be due to the idea that people do not like to change, and part of it may be because the database takes more time to fill out than the old method. Whatever the reason, it appears that headquarters is not requiring that the districts fill out all information in the database. Of course, without data entry, data reporting will be incomplete and inaccurate. The Corps should require that all districts properly fill out all the information that the database tracks. This should be put into the performance metrics of each district. The Corps should also put into place a quality assurance mechanism for ensuring that the data is correct. The Corps has extensive experience in setting up quality assurance programs for the rest of the civil works programs, which can be adapted for the regulatory program.

One of the prime ways that Congress, EPA, businesses, environmentalists, and the Corps itself can properly evaluate the

regulatory program is through the evaluation of the data that the Corps collects. This simple action requires strong cooperation within the Corps. ■

-David Urban, Director of Operations at Ecosystem Investment Partners and Vice President, National Mitigation Banking Association

Communication

Changing the Image of Wetlands in Wisconsin

We are continually faced with the realization that public consciousness still holds a negative stereotype of wetlands. Wetlands are "wastelands." They breed mosquitoes and other pests. They stand in the way of development. Even our lexicon reflects this perception: what other valuable natural resource suffers from an ocean of such dubious expressions as "swamped," "mired," and "bogged down"? At the Wisconsin Wetlands Association (WWA), it is clear to us that all of the work of our organization—and that of anyone working for wetland conservation—will be hampered until we inspire a casting change for wetlands from "obstacles" to "treasures."

This past spring, WWA announced Wisconsin's Wetland Gems—100 high-quality habitats that represent the wetland riches that historically made up nearly one-quarter of Wisconsin's landscape. These Wetland Gems have been a tool through which to promote the value of wetlands—a tool that has proven to be even more effective and powerful than we anticipated.

As a science-based organization, we felt it was critical that the selection of Wisconsin's Wetland Gems be based in science. We knew that several groups had carried out planning processes over the years that had identified important conservation sites, including The Nature Conservancy (ecoregional plans), the Wisconsin Bird Conservation Initiative (Important Bird Areas), and the Wisconsin Department of Natural Resources (the Land Legacy Report, Wildlife Action Plan, Wisconsin Coastal Wetlands Assessment Report, and State Natural Areas Program).

Our staff culled through these plans, pulling out high-quality wetland sites. We researched the wetland community types present at each site. We mapped all of the sites by geographic region using a regional system based on ecological, rather than political, features. We combined and prioritized the lists of sites, giving higher priority to sites that were identified in more than one plan. Wherever possible, we also chose sites that contained multiple wetland and upland community types representing fully functioning ecological systems. We then worked with statewide wetlands experts to winnow the list, making sure that, within each of eight geographic regions, we had a list of sites that included representatives of each of the wetland community types found within that region.

The result of this work was a list of 93 ecologically important wetland sites. Ninety-three was just too close to 100 for us to resist! To bring our number of Wetland Gems to an even 100 sites, we took the opportunity to recognize some sites that had not made the Gems list based on ecological quality, but nonetheless were important sites deserving of recognition. These seven Workhorse Wetland Gems illustrate the functional values provided by wetlands: wildlife habitat; fishery habitat; flood/stormwater attenuation; water quality protection; shoreline protection; groundwater recharge; and recreation/education.

We announced Wisconsin's Wetland Gems during American Wetlands Month last May to a large crowd including landowners, conservation partners, members, decisionmakers, journalists, and dignitaries (including Wisconsin's Lieutenant Governor) at an urban Wetland Gems site in Wisconsin's capital. We continued the celebration at a series of events through the summer and into the fall, one in each region of the state. These events, held at or near a Wetland Gems site, celebrated each region's Wetland Gems, recognized the landowners of these sites, promoted the value and importance of wetlands, and showcased one of the Gems on a field trip. The events also featured the suite of Wetland Gems outreach materials we developed that clearly showed the beauty and diversity of Wisconsin's wetlands.

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The Wetland Gems celebrations paid many dividends. They enabled us to connect with individuals and groups throughout the state who could prove to be important partners for future outreach programs. They provided win-win opportunities to interact with state senators and representatives, whom we invited to make comments about the importance of wetlands during the event program (they were happy for an opportunity to connect with voters, and we were happy to reach them with our wetland messages). They attracted new audiences, including members of local convention and visitors bureaus, chambers of commerce, and county and town boards. And they resulted in media coverage: the events were promoted and reported on by local, regional, and statewide newspapers, local and statewide radio, and regional television. One of our conservation colleagues reported: "Everywhere I go, I see stories about Wetland Gems and hear people talking about them!"

We hope these celebrations are just the start of efforts to recognize and promote these sites that collectively represent Wisconsin's wetland heritage. All of Wisconsin's Wetland Gems were gems before we gave them the designation, and the people who own and manage these sites already knew it. A moniker like "Wetland Gem" is not what makes a site important. But labels do offer a new hook with which to attract renewed attention. We are working with the owners and managers of Wetland Gems

Photo courtesy of Julie Shartner

Above, Kangaroo Lake in Wisconsin, one of the 100 Wetland Gems identified by the Wisconsin Wetlands Association.

sites to help them promote the designation in order to increase community awareness of and appreciation for these special places. Ultimately, this awareness and pride will build political will for further protection and management of wetlands.

No doubt coverage of severe flooding in Wisconsin and the upper Midwest in recent years, as well as increased public discussion about climate change, set a receptive stage for the messages of the Wetland Gems celebrations. But we think the announcement of Wetland Gems has been successful for three compelling reasons. First, because of the intrinsic, attractive simplicity of lists (think *New York Times* Best-Sellers List or *Harper's* Index). Second, people want to hear good news, particularly when so much of today's news (whether about the environment or the economy) is negative. Third, the announcement connects with core emotional values people hold for special places. At all of these celebrations, I spoke with people who came because one of the sites on the list was where they got married, where they take their grandkids to hike, or nearby a place their family spent time when they were kids. Their personal, positive memories of a place opened them up to wanting to learn more about that place and others like it.

We can change people's minds about wetlands. We have to if we are to be successful in our effort to protect these beautiful and critical resources. Change can be compelled in small ways. Our hope is that Wetland Gems serves as a "travel guide" to wetlands in Wisconsin, inspiring visits to witness sandhill cranes congregating at sunset to roost, as well as kayak explorations of a local floodplain forest.

Perhaps we can also inspire a second thought in choosing words to express one's feeling of being overwhelmed. Think about it next time you feel overwhelmed—will you be "bogged down" or "paved over"? ■

-Katie Beilfuss, Outreach Programs Director, Wisconsin Wetlands Association.

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