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Section on Environment, Energy and Resources**

**Hot Topics:
Clean Water Act Cases Before the U.S. Supreme Court**

Constitutional Issues in *Rapanos* and *Carabell*

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Some Facts about the Real World Impact of *Rapanos* and *Carabell*

The *Rapanos* and *Carabell* cases have far broader reach than simply deciding a narrow statutory or constitutional question. Wetlands and the tributaries to navigable-in-fact waters are the lifeblood of our nation's waters.

From the mid-1950s to the mid-1970s, an estimated 550,000 acres of wetlands were lost annually in the continental United States. This rate was halved in the decade after passage of the Clean Water Act, and by 2001, the rate of loss stood at only 60,000 acres per year.¹

If the Court finds that only tributaries and wetlands directly adjacent to navigable-in-fact waters are within federal jurisdiction:

- between 50 and 99 percent of the nation's streams and wetlands could be removed from federal jurisdiction;² and
- 95% of regulated waters in Arizona, 92% of the freshwater wetlands in Delaware, and 85% of regulated streams in Rhode Island would be removed from federal jurisdiction.³

EPA's authority to regulate water pollution under Section 402 of the Clean Water Act rests upon the same definition of waters as Section 404. Many point sources (at least 20% by one estimate) may pass out of federal jurisdiction if the Court adopts the arguments advanced in these cases.

The U.S. Army Corps of Engineers received an average of 74,500 Section 404 permit requests each year from 1996 to 1999. Three-tenths of one percent (0.3%) of these were denied.⁴

Only two states, Alaska and Utah, filed amicus briefs against the U.S. Government position in *Rapanos* and *Carabell*. Thirty four states filed briefs in support.

Context for the Constitutional Questions Posed in *Rapanos* and *Carabell*

The constitutional issues raised by petitioners in *Rapanos*⁵ and *Carabell*⁶ did not arise in a vacuum. Instead, they reflect the concerted effort by property rights activists and anti-regulatory ideologues to undermine the constitutional underpinnings of federal environmental law. The history of this movement, and its relative lack of success, is detailed in the attached article from *The Environmental Forum*.⁷

While constitutional challenges to the Clean Water Act and Endangered Species Act (ESA) have failed to date, these activists are not admitting defeat. The ESA cases resulted in opinions from several circuits upholding the act, albeit using different theories. Most famously perhaps, Judge John Roberts wrote that the D.C. Circuit should rehear *en banc* the *Rancho Viejo*⁸ decision, which upheld the ESA and saved what

1. U.S. Environmental Protection Agency, "Threats to Wetlands," EPA 843-F-01-002d (Sept. 2001).

2. See Felicity Barringer, "Reach of the Clean Water Act Is at Issue in Two Supreme Court Cases," N.Y. Times, Feb. 20, 2006; Lance D. Wood, "Don't Be Misled: Clean Water Act Jurisdiction Extends to All Non-Navigable Tributaries of the Traditional Navigable Waters and to Their Adjacent Wetlands," 34 ELR 10187, 10192-10193 (Feb. 2004).

3. Eric Schaeffer & Karla Raettig, "No Swamp Is an Island," *The Environmental Forum*, Jan.-Feb. 2006, at 40.

4. "EPA's Clean Air Budget and the Corps of Engineers Wetlands Budget: Hearing Before the Subcomm. On Clean Air, Wetlands, Private Property, and Nuclear Safety of the Senate Comm. on Environment and Public Works," 106th Cong., at 2 (2000) (testimony of Michael Davis, Deputy Asst. Sect'y of the Army for Civil Works).

5. *U.S. v. Rapanos*, 376 F.3d 629 (6th Cir. 2004), *cert. granted*, 126 S.Ct. 414 (Oct. 11, 2005).

6. *Carabell v. U.S. Army Corps of Eng'rs*, 391 F.3d 704 (6th Cir. 2004), *cert. granted*, 126 S.Ct. 415 (Oct. 11, 2005).

7. Jay Austin & Scott Schang, "The Rise (And Fall?) of Fundamental Federalism," *The Environmental Forum*, Sept.-Oct. 2004 at 28.

8. *Rancho Viejo v. Norton*, 334 F.3d 1158 (D.C. Cir. 2003), *cert. denied*, 540 U.S. 1218 (2004).

he called a “hapless toad”, in order to address the lack of cohesiveness in the logic behind cases upholding the act.⁹ He did not express an opinion as to whether the ESA was constitutional. When the Supreme Court refused to hear the *GDF Realty* case,¹⁰ in which the Fifth Circuit split badly in denying a rehearing *en banc*, most people wrote off Commerce Clause challenges to the ESA.

But those who take curtailment of environmental regulation as their holy grail are not easily called off their crusade. Coordinated Commerce Clause challenges to the Clean Water Act continue, particularly using Section 404’s power to regulate discharge to or fill of wetlands. The Supreme Court’s decision in *SWANCC*¹¹ raised the specter that the constitutionality of the water statute could be successfully challenged. The vast majority of courts interpreted *SWANCC* narrowly, including panels with some of the nation’s most prominent conservative jurists.¹² But the Fifth Circuit issued decisions in two cases that interpreted *SWANCC* broadly, and kept the issue alive.¹³

Although the Court denied certiorari in the *Rapanos* case when it came up as a criminal matter, Chief Justice Roberts then joined the bench and certiorari was granted in the *Rapanos* and *Carabell* civil cases. Many Court watchers wonder whether Chief Justice Roberts is ready to make his mark on constitutional theory, or whether as he said in his *Rancho Viejo* dissent, he simply wants to clean up this area of the law. Depending upon how the Supreme Court rules, including whether the constitutional issue is even reached, this fight to limit federal environmental law under the Commerce Clause may be lost, won, or stalemated.

Constitutional Issues in *Rapanos* and *Carabell*¹⁴

Constitutional questions presented:

Rapanos: Does extension of Clean Water Act jurisdiction to every intrastate wetland with any sort of hydrological connection to navigable waters, no matter how tenuous or remote the connection, exceed Congress’ constitutional power to regulate commerce among the several states?

Carabell: Do the limits on Congress’ authority to regulate interstate commerce preclude an interpretation of the Clean Water Act that would extend federal authority to wetlands that are hydrologically isolated from any of the “waters of the United States”?

Under the Court’s Commerce Clause analysis, Congress has power to regulate:

- use of the channels of interstate commerce;
- instrumentalities of interstate commerce, or persons and things in interstate commerce; and
- activities that substantially affect interstate commerce.

9. *Id.* at 1160 (“Such review would also afford the opportunity to consider alternative grounds for sustaining application of the Act that may be more consistent with Supreme Court precedent.”).

10. *GDF Realty Investments v. Norton*, 362 F.3d 286 (5th Cir. 2004), *cert. denied*, 125 S.Ct. 2898 (2005).

11. *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001).

12. *See, e.g.*, *U.S. v. Gerke Excavating, Inc.*, 412 F.3d 804 (7th Cir. 2005) (heard by Judges Posner, Easterbrook, and Evans), *petition for cert. filed*, 74 U.S.L.W. 3309 (Nov. 11, 2005); *U.S. v. Deaton*, 332 F.3d 698 (4th Cir. 2003) (heard by Judges Wilkinson, Luttig, and Michael), *cert. denied*, 541 U.S. 972 (2004); *see generally* Jack Kerns, “A Nexus Runs Through It: Wetlands, Hydrological Connections, and Federal Jurisdiction in a Post-SWANCC World,” 36 ELR 10222 (Mar. 2006).

13. *In re Needham*, 354 F.3d 340 (5th Cir. 2003); *Rice v. Harken Exploration Co.* 250 F.3d 264 (5th Cir. 2001).

14. This section summarizes arguments advanced by the Environmental Law Institute in its *amicus* brief filed in the cases. The brief is available at http://www2.eli.org/pdf/briefs/Rapanos_and_Carabell_Amicus_Brief.pdf.

Environmental groups argue that Congress has the authority to exercise authority over wetlands that have functional connections sufficient to affect the quality of our nation's waters under the first and third analytical prongs.

Under the first prong, regulation of wetlands is necessary for maintaining the navigability of the nation's waters through flood and pollution control. A single acre of wetlands can store more than one million gallons of water.¹⁵ Non-navigable tributaries may account for more than three-fourths of the total waterway length in a river network, making regulation of these tributaries and wetlands central in controlling a river's navigability.¹⁶

Federal jurisdiction exists over tributaries to navigable-in-fact waters and functionally connected wetlands. Congress has the power to adopt rules and regulations, or to delegate that authority, to keep navigable waters open and free to trade. In fact, all courts of appeals that have addressed the issue have found that federal authority over water pollution is authorized under this first prong of the Commerce Clause.¹⁷ Constitutionality of this regulation does not rest on showing a direct impact to navigable-in-fact waters. Instead, it is sufficient that the aggregate impacts of pollution from tributaries and functionally connected wetlands could impair navigable-in-fact waters.

Under the third prong, Congress has the power to regulate the destruction or impairment of wetlands because these are economic activities that have substantial effects on interstate commerce. Filing a wetland to build a shopping center or condominium is inherently economic activity that has a manifest impact on interstate commerce. Regulating this type of activity is a critical component of the federal government's comprehensive regulatory scheme that, if disallowed, would nullify Congress' purpose to protect the nation's waters.

Destruction or pollution of wetlands with a functional connection to navigable-in-fact waters has significant economic impact on interstate commerce. These wetlands function as flood controls, and the economic impact of floods in the United States is well known. They also function as pollutant and nutrient removal systems, greatly increasing water quality and decreasing the costs of drinking water treatment. Finally, these wetlands support much of our nation's fisheries and wildlife areas, which are significant to the U.S. economy.

As for any federalism concerns, the type of cooperative federalism at issue in this case is non-controversial. Setting minimum federal standards is allowable, and states play a primary role in implementing the federal wetlands program if they choose to do so. Historically, most states have not regulated wetlands, as is demonstrated by the massive loss of wetlands in the country prior to 1970. Congress is not usurping state land use regulation by protecting wetlands and interstate waters. Federal regulation is necessary in areas such as water pollution, where the economic benefits may be enjoyed by an upstream state, while the environmental degradation is borne by downstream states.

15. U.S. Environmental Protection Agency, "Functions and Values of Wetlands," EPA 843-F-01-002c (Sept. 2001).

16. Judith L. Myer, "Where Rivers Are Born," 6-7 (2003).

17. *See* U.S. v. Johnson, No. 05-1444, slip op. at 34 (1st Cir. Feb. 13, 2006); Deaton, 332 F.3d at 707; Gerke Excavating., 412 F.3d at 807.