The Clean Water Act and the Constitution

Legal Structure and the Public’s Right to a Clean and Healthy Environment

Second Edition

ROBIN KUNDIS CRAIG

ELI Press
ENVIRONMENTAL LAW INSTITUTE
Washington, D.C.
Permissions

Many of this book’s chapters develop ideas that I first explored in law review articles, and parts of those articles appear in this book with the permission of the original publishers. Portions of:


Robin Kundis Craig, Idaho Sporting Congress v. Thomas and Sovereign Immunity: Federal Facility Nonpoint Sources, the APA, and the Meaning of “In the Same Manner, and to the Same Extent as Any Nongovernmental Entity,” 30 EnvTL. L. 527-59 (2000), appear by permission of Environmental Law, Lewis & Clark School of Law, Portland, Oregon.


Copyright © 2009, 2004
Environmental Law Institute
2000 L Street NW, Washington, DC 20036

Published April 2009.

All rights reserved. No part of this work may be reproduced or transmitted in any form by any means, electronic or mechanical, including photocopying and recording, or by any information storage or retrieval system, without permission in writing.

Copyright is not claimed as to any part of the original work prepared by a United States government officer or employee as part of that person’s official duties.

Printed in the United States of America
to Don,
with love and gratitude
About the Author

Robin Kundis Craig

Robin Kundis Craig is the Attorneys’ Title Insurance Fund Professor of Law and Co-Director of the Environmental and Land Use Law Program at the Florida State University College of Law in Tallahassee, Florida. She specializes in all things water, including the Clean Water Act, coastal water pollution, the intersection of water issues and land issues, marine biodiversity and marine protected areas, water law, and water and climate change. She is the author of *The Clean Water Act and the Constitution* (ELI 2004; 2d Ed. ELI 2009) and *Environmental Law in Context* (Thomson/West 2005; 2d Ed. 2008), plus over 40 law review articles and book chapters. In addition, she recently completed work with the National Research Council’s Committee on the Clean Water Act and the Mississippi River, which culminated in the October 2007 release of the Committee’s report, *Mississippi River Water Quality and the Clean Water Act: Progress, Challenges, and Opportunities*, and with the Council’s follow-up Committee, which issued its report on implementation of nutrient control measures in the Mississippi River Basin in November 2008. Professor Craig also serves as Chair of the American Bar Association’s Constitutional Environmental Law Committee, as Vice Chair of its Marine Resources Committee, and as Supreme Court News Editor for the ABA’s *Administrative & Regulatory Law News*. At Florida State, she teaches Environmental Law, Water Law, Florida Water Law, International Biodiversity Law, Administrative Law, Property, Civil Procedure, and seminars on Toxic Torts, the Environmental Intersection of Land and Sea, and the Clean Water Act, plus the Environmental and Land Use Law Certificate Seminar.
Contents

Acknowledgments ................................................................. xiii
Introduction: Environmental Regulation and the Constitution .............. 1

Part I: Imposing Federal Regulation and Enforcement .......................... 7

Chapter 1. The Clean Water Act’s “Cooperative Federalism” and the
Federal/State Regulatory Balance ............................................ 9
I. A Short History of Pre-1972 Federal Water Quality Regulation in the United States .... 10
   A. The RHA (Refuse Act) .................................................. 10
   B. The FWPCA of 1948 ..................................................... 12
   C. The Water Pollution Control Act Extension of 1952 .................. 13
   D. Water Pollution Control Act Amendments of 1956 ................. 13
   E. The FWPCA Amendments of 1961 .................................. 15
   F. Water Quality Act of 1965 ............................................ 17
   G. Clean Water Restoration Act of 1966 ............................... 19
   H. Water and Environmental Quality Improvement Act of 1970 .......... 20
   I. The 1970 Changes to the RHA: A Federal Permit Program for Water Pollution .... 21
II. The 1972 Amendments and the Creation of the Contemporary CWA ............ 22
III. Cooperative Federalism in the Current CWA ................................ 27
   A. Subchapter I: Research and Related Programs ........................ 27
   B. Subchapter II: Grants for Construction of Treatment Works ........ 28
   C. Subchapter III: Standards and Enforcement .......................... 29
      1. The Elements of Federal Jurisdiction Under the Contemporary CWA ...... 29
      2. Federal Standard Setting ............................................ 31
      3. Retained State Authority Over Water Quality ........................ 32
   D. Subchapter IV: Permits and Licenses .................................. 34
      1. State Primacy Over Water Quality, Continued: Water Quality Certifications .. 34
      2. The CWA’s Two Permit Programs ................................... 34
   E. Enforcement Under the CWA ............................................ 35

Chapter 2. The Supremacy Clause and Federal Preemption of
State Water Quality Law ....................................................... 39
I. The Supremacy Clause and Federal Preemption of State Law .............. 40
II. The CWA and Preemption of State Law .................................. 43
   A. The CWA’s “Saving” Clauses ......................................... 43
   B. Express Preemption in the CWA: Marine Sanitation Devices and Traditional
      Federal Authority Over Navigation and Vessel Requirements ............ 46
      1. Section 312’s Express Preemption Provisions ........................ 46
      2. Federal Preemption of Vessel Design in General ...................... 46
Contents

C. Isolated Waters and the Commerce Clause Debate ............................................. 122
D. The Court’s Statutory Interpretation, Part II ...................................................... 125
E. Federalism as a Mode of CWA Interpretation, 2001-2006 ................................. 128
F. Rapanos v. United States: Federalism, Wetlands, and Congress’ Water Quality Goals ................................................................. 131
G. CWA Jurisdiction in the Lower Courts After Rapanos: Deciding Among the Justices ................................................................. 138

IV. “Navigable Waters” and the Commerce Clause: What Is the Constitutional Limit of Congress’ Authority to Regulate Water Quality? ................. 141
A. The Channels of Interstate Commerce: The Oceans, Contiguous Zones, Territorial Seas, and Traditionally Navigable Waters .................................................. 141
B. Non-Navigable Interstate Waters .................................................................... 144
C. Non-Navigable Intrastate Waters and the Substantial Relationship to Interstate Commerce ................................................................. 144

Chapter 6. Limiting Federal and State Enforcement of the Clean Water Act:
Fifth and Fourteenth Amendment “Takings” of Private Property ......................... 149
I. The History of the Regulatory Takings Doctrine .................................................. 149
II. Distinguishing Physical and Regulatory Takings ................................................ 157
III. Regulatory “Takings” and the CWA ................................................................ 159
   A. Is the “Taking” Claim Ripe? ........................................................................ 160
   B. Is There a Lucas-Type Categorical “Taking”? ............................................... 161
   C. Is There a “Taking” Under the Penn Central Balancing Test? ...................... 162
      1. The Character of the Government Action ............................................... 163
      2. Interference With the Claimant’s Reasonable, Investment-Backed Expectations for the Property ................................................................. 163
      3. Economic Impact of the Permit Denial ...................................................... 164
   D. Can There Be a Temporary “Taking”? .......................................................... 165
IV. The Overall Effect of Fifth Amendment “Takings” on the CWA’s Regulatory Regime ................................................................. 166

Part II: Imposition of Citizen Participation and Enforcements ............................. 169

Chapter 7. The Second Theme in Congress’ Restructuring of the Federal Water Pollution Control Act: The Addition of Citizen Participation and Citizen Suits ................................................................. 171
I. Citizen Participation in the Clean Water Act (CWA) and the Creation of the CWA’s Citizen Suit Provision ................................................................. 171
II. Later Amendments to the CWA’s Citizen Suit Provision .................................. 176
III. Bringing a CWA Citizen Suit: The Statutory Requirements ............................ 177
   A. Causes of Action ......................................................................................... 177
   B. Jurisdiction and Venue .............................................................................. 181
   C. The Notice Requirement ............................................................................ 181
   D. The Gwaltney Requirement ....................................................................... 184
   E. Preclusion by State and Federal Enforcement ............................................ 186
IV. Citizen Suit Enforcement and the CWA .......................................................... 190

Chapter 8. Article III Separation of Powers, Standing, and the Rejection of a “Public Rights” Model of Environmental Citizen Suits ............................................. 193
I. Article III and Federal Courts’ “Case or Controversy” Requirement ................... 193
II. Environmental Standing and Citizen Suits ........................................... 199
   A. Early Environmental Standing Cases ........................................... 199
   B. Sierra Club v. Morton and the Elimination of Privately Enforceable
       Public Environmental Rights .................................................... 199
   C. Further Refinement of Environmental Standing Requirement in the 1990s .... 204
   D. Relaxing Injury-in-Fact Since 2000? Resonable Fears, Climate Change,
       and Increased Risk in the Standing Analysis ................................. 208
      1. The 2000 Decision in Laidlaw .............................................. 208
      2. The Court’s 2007 Standing Analysis in Massachusetts v. EPA: 
          Liberalization of Defenders of Wildlife or Special Standing for States? .... 209
      3. The Increased Risk Standing Trend ......................................... 213
   III. Standing and CWA Litigation ..................................................... 214

Chapter 9. Citizen Suits Against the Federal Government and Tribes .......... 219
   I. The CWA’s Waiver of Sovereign Immunity for Subsection (a)(1) Citizen
      Suits Against Federal Facilities That Are Violating the Act ................. 219
      A. Section 505’s Procedurally Limited Waiver of Sovereign Immunity .......... 219
      B. Attempts to Evade §505’s Limitations ...................................... 221
      C. Civil Penalties in Citizen Suits Against the Federal Government ............ 222
   II. Section 505’s Waiver of Sovereign Immunity for Subsection (a)(1)
      Citizen Suits Against Tribes That Are Violating the CWA ..................... 226
   III. The CWA’s Waiver of Sovereign Immunity for Subsection (a)(2)
      Citizen Suits Against the EPA Administrator for Failure to Perform
      Nondiscretionary Duties .......................................................... 228
      A. Suits Against the Administrator of EPA ................................... 228
      B. Suits Against the Corps ....................................................... 229

Chapter 10. Citizen Suits Against States and Territories and the
    Eleventh Amendment ................................................................. 233
   I. Congress’ Attempt to Abrogate State Sovereign Immunity in the CWA
    and the U.S. Supreme Court’s Eleventh Amendment Jurisprudence ......... 233
   II. CWA Citizen Suits Against States After Seminole Tribe ...................... 239
      A. Citizen Suits Against States and State Agencies ............................ 239
      B. CWA Citizen Suits Against State Officials: The Ex Parte Young Doctrine .. 241
      C. Cooperative Federalism as a Waiver of Eleventh Amendment
         Sovereign Immunity? .......................................................... 245
   III. CWA Citizen Suits Against Territories and the District of Columbia
      After Seminole Tribe .............................................................. 247
         A. Citizen Suits Against Territories .......................................... 247
            1. Commonwealth of Puerto Rico ........................................... 248
            2. Virgin Islands ............................................................. 249
            3. Trust Territory of the Pacific Islands .................................. 250
            4. The CNMI ................................................................. 251
            5. Guam ................................................................... 252
            6. American Samoa ....................................................... 254
      B. CWA Citizen Suits Against the District of Columbia ....................... 254
   IV. The Effects of Seminole Tribe on Citizen Suits Against States .............. 255

Chapter 11. Article II Separation of Powers and the
    President’s Enforcement Right .................................................... 257
   I. Article II Separation-of-Powers Principles .................................... 257
A. Article II Separation of Powers and the “Take Care” Clause ......................................................... 258

B. Separation of Powers and the Appointments Clause ................................................................. 261

II. Article II Separation-of-Powers Issues and Environmental Citizen Suits:

Decisions to Date .......................................................................................................................... 264

A. The “Take Care” Clause and Environmental Citizen Suits ......................................................... 266

B. The Appointments Clause and Environmental Citizen Suits ....................................................... 269

C. Do Citizen Suits Allow the Federal Courts and Congress to Usurp the Executive? ................. 270

III. Resolving Article II Separation-of-Powers Challenges to Environmental Citizen Suit Provisions

Citizen Suit Provisions ............................................................................................................... 271

A. The Qui Tam Comparison ........................................................................................................... 272

B. Environmental Citizen Suits and Standing .................................................................................. 276

C. Would Public Interest Citizen Suits Violate Article II Separation of Powers? ......................... 277

Conclusion: Should There Be a Constitutional Right to a Clean/Healthy Environment? ............... 281

I. The Importance of Citizen Suits to Environmental Enforcement ................................................. 284

II. Constitutional Jurisprudence and Environmental Citizen Suit Litigation ................................. 291

III. Restoring Citizen Enforcement of Federal Environmental Law:

Two Possible Solutions ................................................................................................................ 292

A. Adopt a Public Rights/Public Interest Approach to Citizen Litigation ........................................ 292

B. Amend the Constitution ............................................................................................................ 293

IV. The Purely Structural Amendment .......................................................................................... 293

A. Standing ......................................................................................................................................... 295

B. Eleventh Amendment .................................................................................................................. 295

C. Federal Sovereign Immunity ......................................................................................................... 296

D. Article II Separation-of-Powers Concerns ................................................................................... 297

E. Elimination of Commerce Clause Concerns ................................................................................ 297

F. Balancing of Fifth and Fourteenth Amendment “Takings” ................................................................ 297

G. A Proposed Structural Amendment to the Constitution ............................................................. 297

V. The Amendment Adding a Substantive Constitutional Right to a Clean and Healthy Environment ................................................................................................................................. 298

A. Prior Litigation Indicates That Spontaneous Recognition of Environmental Rights in the Constitution Are Unlikely ................................................................. 299

B. Normative Arguments Favor a Constitutional Amendment Guaranteeing a Right to Sue, But Not Necessarily a Substantive Environmental Right ......................................................... 300

1. The Law Generally Recognizes That Beneficiaries Should Have the Right to Sue .................... 300

2. Constitutional Environmental Protections Are Becoming More Prevalent Among the Nations of the World, Indicating That the Environment Is Worthy of Constitution-Level Concern ................................................................. 302

3. Individual States Within the United States—the Vanguard of American Law—are Also Increasingly Recognizing That the Environment Should Be a Constitutional Concern ................................................................................................................................. 304

VI. Conclusion .................................................................................................................................. 306
Acknowledgments

Many people have participated in the creation and completion of this book, making it a much better work than it might otherwise have been. In roughly chronological order, they include:

Paul Leoni, who spent countless hours as my research assistant at the Western New England College School of Law assembling a complete set of the legislative history of the Federal Water Pollution Control Act and the Clean Water Act.

John Turner, who e-mailed the fateful question: “Hey, have you ever thought about writing a book?”

Tara Storey, my research assistant at the Indiana University School of Law, Indianapolis, who found, assembled, and organized the federal cases discussing the numerous constitutional doctrines that this book covers.

Dean Norman Lefstein and Dean Tony Tarr, as well as the Indiana University School of Law Research Committee, who collectively approved two summer research grants that supported my work on this book.

Dean Tony Tarr, Associate Dean Susanah Mead, and Profs. Ken Chestek, Paul Cox, Kenneth Crews, Jennifer Drobac, Frank Emmert, Nicholas Georgakopoulos, Helen Grant, Jeffrey Grove, John Hill, Henry Karlson, Linda Kelly, Andrew Klein, Norm Lefstein, Maria Lopez, Gerard Magliocca, Antony Page, Florence Roisman, Joel Schumm, James Torke, and Lawrence Wilkins of the Indiana University School of Law, who attended the Faculty Colloquium in which I presented the overall argument of this book, and who sharpened my reasoning throughout this book with their insightful comments, particularly respecting the book’s conclusion.

Dean Tony Tarr, Associate Dean Susanah Mead, and Profs. Daniel Cole, Florence Roisman, and George Wright, who cooperated to allow me a research leave in spring 2004 so that I could finish the manuscript.

Profs. Daniel Cole and Andrew Klein at the Indiana University School of Law and Prof. J.B. Ruhl at the Florida State University College of Law, whose
willingness (even enthusiasm) to review the manuscript of this book and to offer cogent suggestions made the book you hold a much better work.

And, most especially, my husband Don Craig, who offered unconditional emotional support and kept me supplied with Diet Pepsi and excellent meals throughout the writing process, and who has continued in his unwaivering support through the Second Edition.