



By John Pendergrass

Dismissing States' Brief In A Footnote

In the Supreme Court's decision in last term's wetlands cases, *Rapanos v. United States* and *Carabell v. US Army Corps of Engineers*, the justices referred to federalism concerns, justifying their differing views of the Clean Water Act's coverage in part on the need to protect the rights of states. Although the three principal opinions each proclaim their concern for protecting the responsibilities and rights of states to protect water quality and to make decisions concerning land use, that fact that they reach quite different results suggests there may be little real content in such statements.

The cases concern the scope of federal jurisdiction under the CWA. Federal jurisdiction covers navigable waters, which is in turn defined as "waters of the United States." Justice Scalia, writing for a plurality of four, asserts that only his definition of waters is consistent with the CWA's policy "to recognize, preserve, and protect the primary responsibilities and rights of the states to prevent, reduce, and eliminate pollution [and] to plan the development and use . . . of land and water resources." He also claims that the broad coverage of the CWA sought by the Army Corps of Engineers "would have brought virtually all [such planning] by the states under federal control" and that the government's interpretation would be a "significant infringement of the states' traditional and primary power over land and water use."

Scalia writes that the federal government's defense of the Corps' broad definition of waters of the United

States "would authorize the Corps to function as a de facto regulator of immense stretches of intrastate land." He adds that the Corps has done so in a manner befitting a local zoning board.

These are serious federalism issues that would be expected to raise strenuous objections from the states, particularly if they believed their authority over land use were being infringed. But, as Justice Kennedy noted in responding to this aspect of Scalia's opinion, 33 states and the District of Columbia filed a friend of the court brief in support of the government's interpretation (two states filed briefs opposing the federal government and their sister states).

The brief for two thirds of the states explicitly rebutted arguments about infringement on states' rights, stating the CWA "does not unduly intrude on the traditional and primary power of states and their municipal subdivisions over land and water use." These states also argued that Congress struck the proper federalism balance by giving the states a major role in implementing the CWA's programs and goals, leaving the states and their subdivisions ample room to exercise control over land and water use.

Scalia dismisses the states' brief in a footnote, stating that "it makes no difference to the statute's stated purpose of preserving states' 'rights and responsibilities,' . . . that some states wish to unburden themselves of them." Legislative and executive officers of the states may be content to leave "responsibilit[y] with the Corps because it is attractive to shift to another entity controversial decisions disputed between politically powerful, rival interests."

The states argued, however, that the Corps' interpretation of the CWA protects every state from upstream out-of-state pollution that they cannot regulate. They note that every state in the continental United States is downstream from another state. Scalia's footnote also ignores the states' explicit arguments that a broad federal definition of navigable waters serves their own interests in protecting wetlands and other "waters of the state" (the term commonly used to embrace

all surface water and groundwater within a state).

Kennedy notes that the two cases arose in Michigan, ironically one of only two states (the other being New Jersey) that have opted to assume state primacy of the dredge and fill permit program at issue in the cases. This program has long been a conspicuous anomaly in that the vast majority of states have declined to take over implementation of a program where the federal statute authorizes them to do so. The brief for the states acknowledged that only 20 states have specific wetlands protection statutes. The provision authorizing states to take over partial implementation of the dredge and fill permitting program is cited by Scalia and by Kennedy, but primarily because the language limiting the states authority to issue permits sheds light on the meaning of navigable waters. In the dissent, also for four justices, Justice Stevens cites the delegation section as demonstrating that the CWA implements its policy of protecting states' primary responsibility for preventing water pollution.

The result in these two cases is greater uncertainty, since Kennedy's controlling opinion calls for the Corps (or a delegated state) to make a case by case determination of whether a wetland has a "significant nexus" to navigable waters. Since neither the plurality nor Kennedy accepted the states' arguments in favor of the status quo in part because it was working well from their perspective in protecting wetlands while reducing burdens on their institutional resources, it appears it is time for the 30 states that do not have specific wetlands protection statutes to enact such law, or ensure that their water pollution statutes cover dredging and filling of wetlands. Also, although it would clearly add to their burden, the 48 non-delegated states should consider following the lead of New Jersey and Michigan in obtaining authorization for the federal dredge and fill permitting program. This would at least allow for some consistency within the state.

John Pendergrass is Director of ELI's Center for State, Local, and Regional Environmental Programs. He can be reached at pendergrass@eli.org.