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Supreme Clean Water Day

The big environmental cases on Justice Alito's first day of argument.

By Jonathan H. Adler

Today the Supreme Court hears two challenges to federal wetlands regulations. In each case, landowners are challenging the federal government's authority to prevent them from developing wetlands under the Clean Water Act (CWA). Federal regulators claim such regulation is clearly authorized by the CWA and is necessary to safeguard the nation's waters. The landowners, for their part, assert that the federal government lacks the legal authority to regulate private land that lacks a substantial connection to navigable waters. Depending on how the Court resolves these disputes, control over millions of acres of private land may hang in the balance.

DEPENDS WHAT THE MEANING OF "WATERS" IS

At issue in the two cases—*Carabell v. U.S. Army Corps of Engineers* and *Rapanos v. United States*—is whether wetlands are “navigable waters of the United States.” According to the text of the Act, landowners must obtain a permit before they can deposit “dredged or fill material” into the “navigable waters of the United States.” Obtaining permits is no easy task. According to one recent study, the process can take over two years and \$250,000. Wetlands are covered by the regulations because the CWA defines “navigable waters” as “waters of the United States,” and, under federal regulations promulgated by the U.S. Army Corps of Engineers and the Environmental Protection Agency, “waters” are defined to include any wetlands that could affect interstate commerce including those wetlands adjacent to navigable waters and their tributaries.

The Carabells and John Rapanos each argue that these regulations exceed the scope of the CWA, and may even surpass the constitutional limits of the commerce clause. The Carabells own 16 acres of wooded wetlands in Macomb County, Michigan. The Army Corps says they cannot develop the land because it abuts a ditch that connects to a drain that empties into a creek which eventually connects to Lake St. Clair. The Carabells' wetlands are hydrologically distinct from the ditch due to a man-made beam along the edge of the land, but the parcel is nonetheless “adjacent” to the ditch. According to the Army Corps, the close proximity of a ditch that eventually deeds into navigable waters is enough to give the federal government a veto over their development plans.

John Rapanos may be a less sympathetic litigant, but his land is no more a “navigable water” than is the Carabells'. Indeed, his wetlands are over ten miles from the nearest navigable waterway. Nonetheless, the federal government maintains his land is subject to federal regulations because water from the wetlands

drain into a drain that drains into a creek that flows into a navigable river. This hydrological connection makes the drain a “tributary” of navigable water, the government claims, so it can prosecute Mr. Rapanos for altering his land without a federal permit.

The issues raised by Rapanos and the Carabells are hardly new. The precise scope of federal authority to regulate “navigable waters of the United States” has been contested since the CWA was enacted in 1970. Initially, the U.S. Army Corps of Engineers denied the law applied to wetlands, but environmentalists sued and the Army Corps changed its mind. Some years later, the Supreme Court upheld the regulation of wetlands adjacent to navigable waters, holding that the CWA covers those wetlands “inseparably bound up with the ‘waters’ of the United States.” The Court considered the scope of “navigable waters” again in 2001, this time finding the federal government had gone too far. In *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC)*, the Court rejected the federal government’s claim that the presence of migratory birds allowed the Army Corps to regulate isolated ponds lacking any hydrological connection to navigable waters.

The Carabells and Rapanos argue that *SWANCC* is proof the federal government lacks the authority to regulate their lands. It is one thing to regulate wetlands directly adjacent to navigable waters, they claim, quite another to control every parcel abutting the tributaries of such waters, let alone those lands alongside ditches that drain into the tributaries. The federal government maintains that any hydrological connection is enough to sustain federal jurisdiction, and that without control over adjacent wetlands federal regulators cannot fulfill their mandate to protect the waters of the United States from pollution and other threats. However reasonable this argument may seem, it is a license for federal regulatory control over literally millions of acres of private land.

DAMMED AS THE DAY GOES ON

If the wetland cases were not enough, there is a third Clean Water Act case on the docket today, concerning the regulation of dams. At issue is whether releasing water from the dam constitutes a “discharge.” If so, federally licensed dams must comply with state water quality rules before their licenses will issue. This case, *S.D. Warren v. Maine*, is important, but will not have nearly the significance of the holding in *Rapanos* and *Carabell*.

Today is not just Clean Water Day at the Court. It is also the first time Samuel Alito will hear oral arguments as an associate justice of the Supreme Court. Concern about how Justice Alito might rule in these cases was one of the factors that led environmental activist groups to oppose his confirmation to the Court. Groups such as Earthjustice and the Sierra Club feared that Justice Alito would be unsympathetic to far-reaching assertions of federal power. Environmental activists assume that limitations on federal power generally, and environmental regulations specifically, must come at the expense of environmental protection. But this is not necessarily so.

An amicus brief filed by the Environmental Law Institute (ELI) argues that the Court should uphold the federal regulation of the Carabells’ and Rapanos’ wetlands because states cannot be trusted to protect the environmental resources within their borders. According to ELI, without federal regulation states will engage in “destructive interstate competition,” and slash environmental safeguards in a short-sited effort to attract industrial development. Yet the history of wetland protection efforts suggests otherwise.

Federal regulation of wetlands did not begin until 1975. State wetland regulation had begun over a decade earlier, when Massachusetts adopted the first statewide wetland conservation measures. Other states quickly followed suit. Instead of a “race to the bottom,” the historical record suggests a “race to the top,” as the pattern of state regulation prior to 1975 was *precisely the opposite* of what “destructive interstate

competition” should have produced. Many states were eager to protect their environmental resources, and they were not going to wait for the federal government to do it. There is further evidence that states learn from the environmental innovations of their neighbors. That is, when one state adopts environmental measures, neighboring states are often likely to follow suit.

Today states remain on the cutting edge of wetland protection, developing innovative conservation strategies. Were federal regulatory power curtailed, there is good reason to believe that many states would step forward to fill the void, much as some enacted explicit protections of isolated waters after the Court’s decision in *SWANCC*. Equally important, there is more than one way to save a bog. Various non-regulatory programs and private conservation efforts have proven enormously successful at restoring wetlands and related ecosystems and protecting them from destruction. In short, federal regulation is not all that stands between America’s wetlands and their destruction.

The future of America’s waters is at stake—or so some environmental activists contend. Also at stake is private control over millions of acres of private land. A ruling against federal power in the two wetlands cases going before the Court would undoubtedly curtail the scope of federal regulation. But it is premature to say such a ruling would pose a threat to environmental quality. Federal environmental regulation is not the only means of effective environmental conservation.

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