

THE CLEAN WATER ACT AND *SWANCC/RAPANOS*:

A STUDY IN FEDERALISM

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CWA UPDATE

- ◉ CWA and “Navigable Waters”
- ◉ *SWANCC* and *Rapanos* Refresher
- ◉ Recent Judicial Decisions Applying *Rapanos*
- ◉ Legislative Efforts to Resolve “Confusion”
- ◉ Considerations of Federalism

CWA IN A NUTSHELL

- Passed by Congress 1972
- Section 101: Goals and Policy
 - Objective—“restore and maintain the chemical, physical, and biological integrity of the Nation’s waters”
 - Goal—eliminate discharge of pollutants, including dredge and fill material, into the Nation’s “navigable” waters
 - Protect—propagation of fish, shellfish and wildlife; provide for recreation in and on the water (the “fishable, swimmable” goal)
 - Policy—prohibit discharge of toxic pollutants in toxic amounts

FEDERAL JURISDICTION UNDER THE CWA/SECTION 502

- CWA applies to “navigable” waters
 - Defined as “the waters of the United States, including the territorial seas.”
- EPA and Corps Regulations—Expansion of Jurisdiction
 - Traditional Navigable Waters
 - Wetlands Adjacent to Navigable Waters
 - 1986 “Migratory Bird Rule”

EXPANDING FEDERAL JURISDICTION CONT.

- ◉ 40 CFR § 230.3(s) (as amended through 1993) defines “waters of the United States”:
 - ◉ Waters used or susceptible to use in interstate or foreign commerce
 - ◉ All interstate waters and wetlands
 - ◉ Territorial Seas
 - ◉ Tributaries to and impoundments of U.S. waters
 - ◉ Wetlands adjacent to U.S. waters
 - ◉ Isolated intrastate waters (lakes, rivers, streams, mudflats, sandflats, prairie potholes, playa lakes etc.) if their use, degradation or destruction could affect interstate or foreign commerce
 - Could be used by interstate or foreign travelers for recreational or other purposes
 - Fish or shellfish could be taken from them and sold in interstate or foreign commerce
 - Could be used for industrial purposes by industries in interstate commerce

SUPREME COURT CONTRACTION OF FEDERAL JURISDICTION

- ◉ *SWANCC v. Army Corps of Engineers*,
531 U.S. 159 (2001)
 - ◉ Facts
 - ◉ No federal jurisdiction under CWA based on
Migratory Bird Rule

SUPREME COURT CONTRACTION OF FEDERAL JURISDICTION

- ◉ ***Rapanos v. United States*, 547 U.S. 715 (2006)**
 - ◉ Facts
 - ◉ Two tests for “waters of the U.S.”
 - Continuous Surface Connection (Scalia plurality)
 - (i) relatively permanent, standing or flowing bodies of water (for tributaries);
 - (ii) continuous surface connection to a navigable water (for adjacent wetlands)
 - Significant Nexus (Justice Kennedy concurrence) significant nexus between wetlands and navigable water determined on a case-by-case basis—significant effect on chemical, physical and biological integrity of a navigable water
 - Which applies?

CIRCUIT DISAGREEMENTS

- ◉ Significant–Nexus Test (No consideration of whether plurality test would also be sufficient)
 - Seventh Circuit
 - Ninth Circuit
- ◉ Only the Significant–Nexus Test
 - Eleventh Circuit
- ◉ Either Test
 - Sixth Circuit
 - Eighth Circuit
- ◉ Only the Plurality Test
 - No Circuits

POST-*RAPANOS* GUIDANCE

- ◉ EPA/Army Corps of Engineers Interpretation
 - Application of “Continuous Surface Connection” Test—Will assert jurisdiction over:
 - Traditional navigable waters
 - Wetlands adjacent to traditional navigable waters
 - Non-navigable tributaries of relatively permanent traditional navigable waters (flow year-round or seasonally)
 - Wetlands abutting these tributaries

POST-RAPANOS GUIDANCE

- EPA/Army Corps of Engineers Interpretation Cont.
 - Application of “Significant Nexus” test—maybe
 - Non-navigable tributaries that are not relatively permanent
 - Wetlands adjacent to such tributaries
 - Wetlands adjacent to (but not abutting) a relatively permanent non-navigable tributary
 - Test of significant nexus: assess the flow characteristics and functions of a tributary, and functions performed by wetlands adjacent to tributary, to determine whether they will significantly affect the chemical, physical and biological integrity of downstream traditional navigable waters (also some consideration of hydrologic and ecologic factors)

POST-*RAPANOS* GUIDANCE

- EPA/Army Corps of Engineers Interpretation Cont.
 - No assertion of jurisdiction over:
 - Ditches (including roadside ditches) if they do not carry a relatively permanent flow of water and drain only upland
 - Swales/erosional features, such as gullies, small washes, etc.—low volume, infrequent flow, short duration flows

THE LA RIVER

◉ Applying *Rapanos* and Guidance:

- Corps found two sections of 51-mile river (4 miles) to be “traditionally navigable waters” (July 2008)

- EPA declares entire river to be “traditional navigable waters” (July 2010)
 - Considered factors “beyond flow and depth”
 - Recreational and commercial opportunities, public access, susceptibility to restoration, presence of ongoing restoration and educational projects

LA RIVER



RECENT COURT DECISIONS

- ◉ *Benjamin vs. Douglas Ridge Rifle Club*, 673 F.Supp.2d 1210 (D. Ore. 2009)
 - Facts
 - Can apply either *Rapanos* test
- ◉ *National Ass'n of Home Builders v. USEPA* (D. D.C. 2010)
 - Santa Cruz River
 - No judicial review of TNW determination before enforcement

LEGISLATIVE EFFORTS TO UNDO *SWANCC* AND *RAPANOS*

- The Clean Water Restoration Act (S. 787)
 - Latest iteration introduced by Senator Feingold April 2, 2009
 - Asserted purpose to “restore” the “traditional” scope of CWA jurisdiction in response to *SWANCC*, *Rapanos*, *et al.*
 - Removes all references to “navigable” waters
 - Defines “waters of the United States” as:
 - All waters subject to the ebb and flow of the tide, the territorial seas, and all interstate and intrastate waters and their tributaries, including lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, natural ponds, and all impoundments of the foregoing, *to the fullest extent that these waters, or activities affecting these waters, are subject to the legislative power of Congress under the Constitution.*

LEGISLATIVE EFFORTS CONT.

◎ Reaction

- Raised significant concerns among the regulated community, agricultural interests and others
- Regarded as an attempt to “federalize” all waters
- Also seen as an attempt to extend federal jurisdiction to all land use activities

◎ Resulting Committee Substitute

- Eliminates reference to “activities affecting these waters”
- Codifies EPA/Corps regulatory definition of “waters of the United States” as of the day before *SWANCC*
- Still eliminates all references to “navigable waters”
- In findings, states EPA and Corps “consistently and traditionally” asserted CWA jurisdiction over all identified waters

LEGISLATIVE EFFORTS CONT.

○ Senate Committee Discussion

- Chairwoman Boxer: “restore” federal jurisdiction to what it has been for more than 30 years, as established by Nixon and Reagan
- Supreme Court cases have lead to “uncontrolled pollution”
- Proposed Republican Amendments
 - Natural Disasters
 - Mosquito control pesticides
 - Limitation of federal jurisdiction over intrastate waters
 - Agricultural exemptions
- Boxer response: amendments would create “huge loopholes” and allow pollution by farmers
- Roadside ditches will be covered

LEGISLATIVE EFFORTS CONT.

- ◉ America's Commitment to Clean Water Act (H.R. 5088)
 - Congressman Oberstar
 - To address concerns raised in opposition to S. 787
 - Removes term “navigable waters” from CWA
 - Expresses intent to regulate to same extent as day before *SWANCC*
 - No reference to “activities affecting” waters

CONSIDERATIONS OF FEDERALISM

- ◉ Statement of Senator Edmund Muskie when debating the conference bill:
 - ◉ “It is intended that the term ‘navigable waters’ include all water bodies, such as lakes, streams, and rivers, regarded as public navigable waters in law which are *navigable in fact*. It is further intended that such waters shall be considered to be navigable in fact when they form, in their ordinary condition by themselves or by uniting with other waters or other systems of transportation, such as highways or railroads, a continuous highway over which *commerce* is or may be carried on with other States

A SLOUGH



A PRAIRIE POTHOLE



A WET MEADOW



A PLAYA LAKE



A MUDFLAT



FEDERALISM CONT.

- ◉ CWA expressly states:

It is a policy of Congress to recognize, preserve and protect the “primary responsibilities and rights of States to prevent, reduce, and eliminate pollution” and to plan the development and use of both land and water resources.

33 USC § 1251 (b)

FEDERALISM CONT.

- ◉ Justice Scalia warning in *Rapanos*:

“In applying then definition [of Waters of the United States] to ephemeral streams, wet meadows, storm sewers and culverts, directional sheet flow during storm events, drain tiles, man-made drainage ditches, and dry arroyos in the middle of the desert, the Corps has stretched the term ‘waters of the United States’ beyond parody. The plain language of the statute simply does not authorize this ‘Land is Waters’ approach to federal jurisdiction.”

FEDERALISM CONT.

- Is there a shirking of state responsibility?
- New Mexico Water Quality Control Commission
 - Definition of “surface waters of the state”
 - No Commerce Clause restraint
 - *SWANCC* did not strip state jurisdiction; just limited federal jurisdiction

FEDERALISM CONT.

- ◎ The Basic Question of Federalism: Should the states or the federal government have authority over intrastate, isolated, intermittent/ephemeral, hydrologically disconnected and/or completely private waters?
 - 10th Amendment: “The powers not delegated to the United States by the Constitution, or prohibited by it to the States, are reserved to the States respectively, or to the people.”
 - Respect the Constitutional system of limited federal powers

FEDERALISM CONT.

- Who better to control pollution while protecting local values and economies
- Public buy-in: top-down imposition of regulations or local/state cooperation
- Hydrologic considerations—arid West
- Intersection of water rights and water quality
- Need for a new paradigm