

SUPREME COURT HEARS LANDMARK WETLANDS CASES

On February 22, 2006, the United States Supreme Court held oral arguments for the consolidated matter of *Rapanos v. United States* and *Carabell v. U.S. Army Corps of Engineers*, two cases from Michigan arising under Section 404 of the Clean Water Act (“CWA”). The cases present the Court with the opportunity to reach a potentially landmark decision concerning the scope of the federal government’s Clean Water Act authority and the propriety of subjecting non-adjacent, non-navigable wetlands and manmade ditches to federal jurisdiction under the statute.

The arguments commenced with Reed Hopper, counsel for Petitioners John A. Rapanos, *et al.*, explaining that these cases represent “federal agency overreaching” and assertions of federal jurisdiction over entire tributary systems, not just the navigable waters which Congress intended to protect under the Clean Water Act. Hopper argued that the “limitless claims of jurisdiction” violate the Commerce Clause of the United States Constitution and “shift the entire federal-state balance” by extending federal authority to regulate wetlands and ditches far removed from navigable-in-fact waters, thereby usurping the states’ power over local land use.

Hopper seemingly received the support of Chief Justice John Roberts and Justice Antonin Scalia, both of whom expressed doubt over the validity of federalizing entire tributary systems of navigable waters. Justice David Souter took the opposite approach, suggesting that limiting CWA jurisdiction to only navigable-in-fact waters and wetlands adjacent to those waters would allow “an end-run around the Act,” a result that Congress could not have intended because it would simply “enable polluters to dump further upstream in the watershed.”

Justice Ruth Bader Ginsburg joined the argument by asking Hopper how the jurisdictional line should be drawn under the CWA. Returning to his original position, Hopper replied that the federal CWA jurisdiction should lie where Congress originally placed it—extending to navigable-in-fact waters and the discharges that reach them. According to Hopper, this includes wetlands abutting traditional navigable waters and wetlands inseparably bound up with traditional navigable waters, but not the non-navigable tributaries and tributary systems emptying into these waters. This jurisdictional line, Hopper explained in reference to Justice Souter’s concern about sanctioning upstream pollution, furthers the policy of the CWA by allowing for assertions of federal jurisdiction over distant discharges of pollution that actually reach navigable-in-fact waters, while preserving the traditional role of states in controlling local land use decisions.

The next argument presented to the Court was delivered by Timothy Stoepker, counsel for Petitioners June Carabell, *et al.* Although the Justices consolidated the arguments of both Petitioners in yesterday’s arguments, Stoepker invested significant time distinguishing the

factual background of the *Carabell* matter from that of the *Rapanos* matter. Beginning the argument by articulating the differences between the two cases, Stoecker explained that the features occurring on the Carabell's property amount to "hydrologically isolated wetlands," that, due to the presence of an upland berm and impermeable clay layer, lack both a surface water and groundwater connection to manmade ditches draining offsite. Moreover, Stoecker argued, the state of Michigan employed its reserved authority to consider regulating the features and refused to do so because they lack a hydrological connection to any waters of the United States. As Michigan realized, Stoecker continued, the lack of a surface or groundwater connection to navigable waters precludes the possibility of any discharge to navigable waters, which in turn prevents the assertion of CWA authority over the features.

Justice Scalia and Chief Justice Roberts quickly acknowledged the hydrologic connectivity distinction between the Rapanos and Carabell properties. While Justice Scalia repeated Stoecker's assertion that a hydrologically isolated wetland cannot cause a discharge into a separate navigable water, the Chief Justice questioned Stoecker about the proper test for asserting CWA jurisdiction over wetlands. Counsel replied that, based on Supreme Court precedent, the proper test for determining CWA jurisdiction over wetlands is the presence of a "significant nexus" between the wetland and a navigable water, and that a surface or groundwater connection between these features is necessary to establish such a nexus. However, Stoecker qualified, although a hydrologic connection is necessary to establish a significant nexus, a significant nexus is not established by the mere presence of a hydrologic connection; an actual discharge to navigable waters is also necessary to confer jurisdiction.

Justice John Paul Stevens and Justice Souter, while apparently recognizing the topographical differences between the two Petitioners' properties, asked Stoecker whether federal jurisdiction could attach to a wetland that was naturally isolated, but which developed a hydrologic connection to other waters as a result of human activities or a "project." When Stoecker stated that the hydrologic connection must pre-exist any impact to waters, Justice Souter responded, "Then Congress has passed a law which says, 'We'll lock the barn after the horses go.'"

The final argument was presented by Solicitor General Paul Clement, representing the United States and the U.S. Army Corps of Engineers. The Solicitor General began by focusing on the wetland features which had allegedly occurred on the Rapanos property. Clement explained that these wetlands were not isolated because they shared a hydrologic connection to manmade ditches which eventually connected through a tributary system to navigable waters.

In response to this statement, Chief Justice Roberts asked how a tributary should be defined, how it is distinguishable from waters of the United States, and whether a manmade feature may qualify as a tributary. When Clement replied that the term "tributary" incorporates both natural and manmade features and stated that infrastructure such as storm drains may be considered tributaries, Justice Scalia interjected, "I find it absurd to call these waters of the United States." The Chief Justice followed, "at some point the definition of tributary must have an end or it would transcend Congress' intent." Clement responded that a tributary ends at the point where a discharge into the hydrologic feature is no longer capable of impacting navigable

waters, but stated that the process of defining the jurisdictional reach over tributaries should be left to a future case.

The Solicitor General then turned to the facts presented by *Carabell*. He countered the Petitioner's theory by arguing that the definition of "adjacent wetland" does not require a hydrologic connection to navigable waters; proximity to these waters or their tributaries is the basis for jurisdiction. Clement explained that proximity provides the basis for extending federal jurisdiction over unconnected wetlands because, even absent a hydrologic connection, these wetlands may still serve a function that equates to a significant nexus with navigable waters. Chief Justice Roberts then asked Clement if a hydrologically isolated function may qualify as a *significant* nexus, what would qualify as an "*insignificant* nexus"? When Clement answered that the isolated ponds in *SWANCC* provided an example, Roberts responded, "no, that was 'no nexus.'" After several follow-up questions from Justice Scalia and the Chief Justice, Clement conceded that proximity alone is insufficient for establishing CWA jurisdiction, but maintained that the hydrologic connection theory espoused by Petitioner Carabell is unsupported by the statute.

Justice Steven Breyer then asked whether wetlands separated from other waters by upland berms can provide the functions that Clement asserts and if so whether any empirical data exists to support the claim. Clement replied that there is anecdotal evidence to support the assertion and added that wetlands are unique features that serve an important function. However, absent scientific verification, Justice Breyer stated that it was difficult to rely on the Respondents' theory. Notably, Justice Breyer's concerns substantially track the position of International Council of Shopping Centers ("ICSC"), *et al.*,¹ filed in an *amici* brief in support of Petitioners. In that brief, drafted by Beveridge & Diamond, P.C., *amici* argued that remote, non-adjacent, and non-navigable wetlands generally lack the ecological capacity to affect navigable waters in a manner sufficient to confer federal CWA jurisdiction.

At the conclusion of oral arguments, many Court observers opined that the Justices' decision will be an important one, but that the eventual outcome of the cases was difficult to gauge. Adding to the uncertainty over the future of federal CWA regulation was the fact that the arguments marked the first day on the bench for Justice Samuel Alito, Jr. and that Justice Anthony Kennedy, whom many believe will fill the role of the Court's "swing vote" following the recent retirement of Justice Sandra Day O'Connor, generally abstained from the discussions.

In a final interesting twist, during the days leading up to oral arguments, the United States Court of Appeals for the First Circuit issued a lengthy opinion in *United States v. Johnson*, a case involving nearly identical issues to those that the Justices heard on Tuesday for *Rapanos* and *Carabell*. The timing of this issuance is remarkable in that the First Circuit had not directly weighed in on the jurisdictional issues raised in *Rapanos* and *Carabell*, and the opinion relied

¹ Joining ICSC as *amici* on the brief were the National Multi Housing Council, National Association of Industrial and Office Properties, Real Estate Roundtable, Associated General Contractors of America, American Resort Development Association, and National Association of Real Estate Investment Trusts.

heavily on the Fourth Circuit's analysis in *United States v. Deaton*, one of the most far-reaching interpretations of federal authority under Section 404 of the Clean Water Act. At the same time, the First Circuit expressed complete disagreement with the Fifth Circuit's holdings in *In re Needham* and *Rice v. Harken*—perhaps the two most restrictive interpretations of the federal authority over remote, non-navigable hydrologic features and the opinions on which Petitioners in *Rapanos* and *Carabell* strongly relied. Over a blistering dissent, the majority opinion concluded that CWA jurisdiction may extend to wetlands located at the outermost reaches of a tributary system provided that some hydrologic connection exists between the wetlands and the tributaries of a navigable water.

Although initial reaction to the majority opinion was marked with confusion – both by commentators and by the opinion's concurring and dissenting judges – Solicitor General Paul Clement's recommendation on Tuesday to reserve for a later date the Supreme Court's evaluation of federal authority over non-navigable tributaries and tributary systems may indicate that the stage is being set for yet another showdown over the jurisdictional limits of the Clean Water Act.

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