Court Has Chance To Clarify Water Act

On February 21, the Supreme Court will hear oral arguments in three Clean Water Act cases, Carabell v. U.S. Army Corps of Engineers, Rapanos v. United States, and S.D. Warren Co. v. Maine Department of Environmental Protection. My last column discussed S.D. Warren. As promised, this column discusses the Carabell and Rapanos cases, both from the Sixth Circuit, which the Court has consolidated for simultaneous review.

Of the trio, Carabell and Rapanos are the more portentous. They raise the single most contentious issue under the Clean Water Act: the extent to which the act’s Section 404 dredge and fill permit program applies to wetlands. Wetlands generate an especially stark clash of opposing interests. Landowners perceive the potential for large profits to be earned by wetlands development, while environmentalists perceive the potential for significant environmental harms resulting from their destruction.

In each case, the Sixth Circuit upheld the Army Corps of Engineers’ determination that certain wetlands constituted “navigable waters,” within the meaning of the CWA. The Corps relied on its regulation defining the act’s geographic reach as extending to wetlands “adjacent” to traditional navigable waters; i.e., waters that are, have been, or could have been made navigable in fact. The Carabell wetlands are separated by a dirt berm from a ditch that is hydrologically connected to traditional navigable waters. The Rapanos wetlands are hydrologically connected by surface water through a series of ditches and drains to a navigable waterbody about 20 miles away.

The cases raise two questions: whether the Corps reasonably construed “navigable waters,” and whether, assuming that the Corps’s construction was reasonable, such an assertion of legislative authority is within Congress’s Commerce Clause authority. Neither side can be confident of the outcome because both the relevant statutory language and Supreme Court precedent offer so many conflicting signals.

The CWA uses the term “navigable waters” to describe its geographic reach, but then defines that term to mean “waters of the United States.” The former strongly suggests that the waters must be “navigable,” which wetlands most certainly are not, but the latter omits any reference to navigability. Moreover, the CWA’s overall structure and purpose — “restoring and maintaining the chemical, physical, and biological integrity of the nation’s waters” — strongly suggest that Congress was not confining the statute’s reach to waters that are navigable in any traditional sense of that word.

The Supreme Court’s precedent only compounds the confusion. In 1985, the Court unanimously ruled in United States v. Riverside Bayview Homes that the Corps can validly construe navigable waters to reach wetlands that are not themselves navigable but that are “adjacent” to traditional navigable waters based on a groundwater hydrologic connection between the two. Relying on the CWA’s structure and purpose, the Court endorsed a non-literal, more functional approach to the meaning of navigable waters. The Court explained how the hydrologic cycle undermines regulatory boundaries based on strict notions of navigability.

But in 2001, in Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, the Court embraced a far more literal, nonfunctional approach. While not questioning Riverside Bayview, Chief Justice William Rehnquist’s majority opinion rejected the Corps’s assertion of jurisdiction over an abandoned sand and gravel pit that had evolved into a permanent and seasonal pond. The Court explained that the plain meaning of navigable waters did not reach such waters, and cautioned against reading “navigable” out of the statute. The Court further explained that even if statutory language were ambiguous, Court would still not defer to the Corps construction because it would raise significant constitutional and federal questions “by potentially exceeding congressional Commerce Clause authority and by impinging on state authority over land and water use.

Carabell and Rapanos therefore press an unresolved conflict between Riverside Bayview and SWANCC. The government argues that the two cases are simply logical outgrowths of Riverside Bayview. And those challenging the Corps argue that the Court should not tolerate the government’s efforts to circumvent SWANCC by unduly expansive notions of adjacency that go beyond the Riverside Bayview wetlands that were in close physical proximity to traditional navigable waters. The helpful truth is that there is some for both these views.

While it is not clear (at least to me) which side will prevail, the Court most certainly will not strike down the Clean Water Act as unconstitutional in either case. The threshold statutory construction issue will instead serve as the bellwether for the entire case. If a majority believes that the Corps has reasonably construed the statute, that same coalition will have little difficulty concluding that the CWA’s application is constitutional. And, if, on the other hand, a majority believes that such a construction would exceed Congress’s Commerce Clause authority, the same justices would very certainly strike down the federal agencies’ construction in the first instance and thereby eliminate the need to reach the constitutional issue, just as the Court did in SWANCC.

Whatever the outcome, the Court would be well advised to offer more needed clarity to the law. Chief Justice Rehnquist famously required his clerk to complete a draft opinion within days. Whatever the merits of the chief approach in other cases, at least in SWANCC, his chambers would have been well advised to take a few extra days. The SWANCC opinion obscures rather than clarifies. Let’s hope that the Roberts Court makes the extra effort.

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