Singing the Blues: Muddy Waters and the Scope of Federal Authority Over Isolated, Inland Wetlands under the Clean Water Act

I. INTRODUCTION

With little more than his dreams, Muddy Waters left his Mississippi Delta home in 1943 for the bright lights of the Windy City.\(^1\) His innovative guitar techniques and soulful tales about life as a sharecropper led Muddy Waters to become known as “the father of Chicago blues.”\(^2\) His name, however, has become a homophone associated with judicial decisions, especially those related to the Clean Water Act (CWA),\(^3\) which concern the definition of “navigable waters of the United States.” Specifically, the metaphor “muddy waters” has been used to describe the confusion associated with the scope of federal jurisdiction over isolated, inland wetlands with little or no hydrological connection to navigable waters. On February 21, 2006, the United States Supreme Court heard consolidated oral arguments by two Michigan landowners challenging the regulatory jurisdiction asserted by the U.S. Army Corps of Engineers (Corps) and the Environmental Protection Agency (EPA). The broad jurisdiction asserted over these inland wetlands raises serious questions in administrative and constitutional law, and this federal control has fueled tension between private property rights and environmental protection.

A. United States v. Rapanos\(^4\): “Messin’ With the Man”\(^5\)

Sixty-nine year old John Rapanos, a land developer, was charged with illegally dumping fill material into wetlands on his 175-acre plot of land in Williams Township, Michigan, between 1988 and 1997. Rapanos, in hope of obtaining a permit to construct a shopping center, asked the state to inspect a parcel of his land. Upon inspection, the Michigan Department of Natural

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\(^2\) Id.
\(^3\) 33 U.S.C. 1251 et seq.
\(^5\) Muddy Waters (Geffen 1994).
Resources (MDNR) cautioned Rapanos that the site likely contained protected wetlands. Rapanos believed that the site was merely a cornfield filled with drainage ditches and allegedly violated a MDNR cease-and-desist order and an EPA compliance order by filling in parcels of his property with sand. The government subsequently brought civil and criminal actions against Rapanos. During Rapanos’s original sentencing hearing in 1998, Judge Zatkoff pointed out a drug dealer he had sentenced earlier that day and stated:

Here we have a person who commits crimes of selling dope and the government asks me to put him in prison for 10 months. And then we have an American citizen, who buys land, pays for it with his own money, and moves some sand from one end to the other and [the] government wants to give him 63 months in prison. Now if that isn’t our system gone crazy, I don’t know what is.

Rapanos challenged the authority of the federal jurisdiction because the wetlands on his property allegedly did not abut navigable water, nor did the wetlands have a “significant nexus” to navigable waters. Additionally, the wetlands were as far as twenty miles away from the nearest navigable water. Regardless, the Sixth U.S. Circuit Court of Appeals court held that the Corps had jurisdiction over Rapanos’s property because it was part of the same hydrological system, as a result of tributaries and other waterways, as the nearby waters of the United States. This decision prompted Rapanos to appeal to the Supreme Court.

**B. Carabell v. United States Army Corps of Engineers**¹¹: “No Escape From the Blues”¹²

Developer Keith Carabell was refused a permit to develop a condominium complex in Macomb County, Michigan, because the Corps determined that his property contained wetlands.

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⁷ Muddy Waters (Epic/Legacy 2001).
The wetlands are adjacent to a ditch, which connects to a drain, which then flows into Lake Clair. The lake is part of the Great Lakes drainage system, which is a regulated navigable water of the United States. Carabell challenged the jurisdiction, alleging that no hydrological connection existed to navigable water since a manmade berm (a manufactured barrier) completely separated the wetland from the drain. In other words, the presence of the berm blocked the water from the wetland from reaching the drain. Even without a hydrological connection, the Sixth Circuit affirmed the district court’s decision, finding that a “significant nexus” existed between the wetland and the ditch based on the adjacency of the wetland itself. Consequently, Carabell sought review from the Supreme Court.

II. ADMINISTRATIVE LAW: “WHO DO YOU TRUST” TO ENFORCE THE CWA?

A. The CWA and Congressional Delegation to the EPA and Corps

In 1946 Congress passed the federal Administrative Procedure Act (APA), which established how federal administrative agencies may propose and promulgate regulations and how agency decisions were to be reviewed by the federal courts. The APA is the major source for federal administrative law and was enacted to provide some sort of uniformity among all federal administrative agencies.

The Federal Water Pollution Control Act Amendments of 1972, better known as the Clean Water Act (CWA), was enacted “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” One way to achieve this purpose is Congress’s prohibition of discharging pollutants, including dredged or fill material, into “navigable waters”
except pursuant to a permit issued in accordance with the Act. The CWA defines “navigable waters” as the “waters of the United States, including the territorial seas,” which federal regulations delineate as including “wetlands adjacent to” navigable waters or their tributaries. Wetlands are defined by federal regulations as those areas “inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions.”

Determining which wetlands are “adjacent to” navigable waters has been difficult. According to the Code of Federal Regulations, “adjacent” means “bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are ‘adjacent wetlands.’” Wetlands must have some connection to navigable waters or interstate commerce in order for federal jurisdiction to be invoked.

Two federal administrative agencies, the EPA and the Corps, have concurrent jurisdiction authorized under Section 404(a) of the CWA to issue or deny permits over the dredging and filling of material into the waters of the United States. CWA “empowers the agencies to issue administrative compliance or ‘cease and desist’ orders, assess administrative penalties, or initiate judicial enforcement proceedings seeking injunctive relief and fines for civil and criminal violations.” The principle authority for overseeing the Section 404 program is left to the

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22 33 U.S.C. 1362(7).
23 33 C.F.R. §§ 328.3(a)(1), (5), (7); 40 C.F.R. §§ 230.3(s)(1), (5), (7).
24 33 C.R.R. § 328.3(b).
25 33 C.F.R. § 328.3(c).
28 33 U.S.C.A. §§ 1319 (a)(3), (b), (c), (d), & (g).
Corps, and it receives guidance from the EPA. However, both agencies share the duty to enforce noncompliance with the terms and conditions of the 404 permitting program.\textsuperscript{29}

\textbf{C. Chevron\textsuperscript{30} Doctrine}

The \textit{Chevron} deference or “administrative deference” pertains to the review of statutory interpretations by an agency. When Congress delegates authority to an administrative agency to enforce a statute, and that statute is silent or unclear, Congress will defer to the agency’s reasonable interpretation of the statute.\textsuperscript{31} Unless the agency’s interpretation of the statute is “arbitrary, unreasonable, or manifestly contrary to the statute,” the interpretation by the agency should be applied.\textsuperscript{32}

In \textit{Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers}\textsuperscript{33} (\textit{SWANCC}), another battle over CWA jurisdiction, the Supreme Court did not apply the \textit{Chevron} deference to the Corps’ Migratory Bird Rule. This rule allowed the Corps to assert jurisdiction over isolated wetlands that had no hydrologic connection to navigable waters through the movement of migratory birds across state lines. The Court held that “where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.”\textsuperscript{34} “Where an administrative interpretation of a statute invokes the outer limits of Congress’[s] power, we expect a clear indication that Congress intended that result.”\textsuperscript{35} The Court further noted that the Migratory Bird Rule impeded the state’s

\textsuperscript{29} 33 U.S.C.A §§ 1319; 1344(s); 1365.
\textsuperscript{32} Id. at 844.
\textsuperscript{33} 531 U.S. 159 (2001).
\textsuperscript{34} Id. at 173-74.
\textsuperscript{35} Id. at 172.
"traditional and primary power over land and water use" and therefore was not entitled to
*Chevron* deference.\(^{36}\)

However, in *United States v. Riverside Bayview Homes, Inc.*\(^{37}\) the Supreme Court applied
the *Chevron* deference to the Corps' interpretation that "waters of the United States" included
wetlands adjacent to navigable waters.\(^{38}\) In *SWANCC*, the Court recognized that the deference
afforded in *Riverside* was appropriate because there was a "significant nexus" between adjacent
waters and navigable waters that was not present in the "nonnavigable, isolated, intrastate ponds"
at issue in *SWANCC*, whose only connection to interstate commerce was the occasional visiting
by migratory birds. In the *Rapanos* and *Carabell* cases, the government is hoping the Court
relies on its reasoning from *Riverside*, which would allow for the broad reading of CWA and
thus allow the Corps to assert broad jurisdiction.

The *Rapanos* and *Carabell* cases involve wetlands that lie somewhere between the
remote, nonnavigable wetlands in *SWANCC* and the wetlands that were adjacent to waters in
*Riverside Bayview*. If the Court applies the *Chevron* deference to the *Rapanos* and *Carabell*
cases, property owners will be singing the blues because the federal government will be able to
assert jurisdiction over every ditch, drain, and puddle in the United States. During oral
arguments before the U.S. Supreme Court, Justice Scalia said, "I do not see how a storm drain
under anybody's concept is a water of the United States."\(^{39}\) "In other words, the agencies argue
they can and should define their own jurisdiction, which they attempt to do here by laying claim
to the entire tributary system of a traditional navigable waterway, whatever its form."\(^{40}\)

\(^{36}\) *Id.* at 173-74.

\(^{37}\) 474 U.S. 121.

\(^{38}\) *Id.* at 134-35.

\(^{39}\) Transcript of Oral Argument at 53, *Rapanos* v. United States, No. 04-1034; *Carabell* v. U.S. Army Corps of
Eng'rs, No. 04-1384 (U.S. argued Feb. 21, 2006).

Conversely, if the Chevron deference is not applied, then the Corps and the EPA will have less authority, and such a narrow reading of the statute may subject thousands of acres of wetlands vulnerable to degradation. If “waters of the United States” in the CWA “were read to exclude nonnavigable tributaries, then discharges of such materials as sewage, toxic chemicals, and medical waste into those tributaries would not be subject to the CWA’s permitting requirements...and...would impair the quality of traditional navigable waters downstream.”

Justice Souter, during the oral arguments, stated that “[a]ll they have to do is get far enough upstream and they can dump anything they want to.” The Justice was referring to “evil polluters” who could escape getting a permit and “wreck” the navigable waters of the United States with no consequence.

III. CONSTITUTIONAL LAW & WETLAND JURISDICTION: “THEY CALL ME MUDDY WATERS”

A. Commerce Clause

Article I, Section 8, Clause 3 of the United States Constitution, known as the Commerce Clause, empowers the United States Congress “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” In United States v. Lopez the Court restricted Congress’s authority under the Commerce Clause to regulate only the channels of commerce, the instrumentalities of commerce, and action that substantially affects interstate commerce. To determine which activities fall within the last category, the court must examine (a) whether the statute controls a commercial activity or some activity necessary to the regulation of commercial or economic activity; (b) whether the statute’s language includes a jurisdictional requirement ensuring that the regulated activity affects interstate commerce; and (c) how far the

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41 Brief of Respondent, supra note 40, at 20-21.
42 Transcript of Oral Argument, supra note 39 at 7.
43 Muddy Waters (Geffen 2000).
45 Id. at 558-9. See also United States v. Morrison, 529 U.S. 598 (2000).
rationale for upholding the statute extends.\textsuperscript{46} These standards were promulgated "to assure that the federal government's powers will not become co-extensive with the general regulatory powers of the states, and legislation must not be interpreted or applied to compromise these standards."\textsuperscript{47}

The Corps and the EPA have asserted jurisdiction under the CWA to regulate the isolated, inland wetlands with little or no hydrological connection to navigable waters in \textit{Rapanos} and \textit{Carabell} under Congress's Commerce Clause power to regulate (1) the channels of interstate commerce and (2) the activities that substantially affect interstate commerce.

The government asserts that Congress's power to regulate the channels of interstate commerce includes the power to keep navigable waters free from pollution. To pursue this objective, the government contends that Congress may regulate conduct that occurs outside traditional navigable waters if such nonnavigable tributaries or their adjacent wetlands could affect the conditions of the channels in commerce. "So long as the inclusion of such tributaries and wetlands within the Corps' jurisdiction is a reasonable means of protecting... traditional navigable waters, the constitutionality of the Act does not depend on the directness of the link to traditional navigable waters..."\textsuperscript{48} The Fourth Circuit recently held in \textit{United States v. Deaton}\textsuperscript{49} that Congress's "power over navigable waters is an aspect of the authority to regulate the channels of interstate commerce"\textsuperscript{50} and deferred to the Corps' interpretation of "waters of the United States" to include upland property that contained wetlands when the owners excavated a ditch and deposited the fill into the wetlands. Significantly, the wetlands in \textit{Deaton} were not

\textsuperscript{46} \textit{Lopez}, 514 U.S. at 563-64.
\textsuperscript{47} Brief of Petitioner, \textit{supra} note 13, at 26, citing \textit{SWANCC}, 531 U.S. at 172.
\textsuperscript{48} Brief of Respondent, \textit{supra} note 40 at 16.
\textsuperscript{49} 332 F.3d 698 (4th Cir. 2003), \textit{cert. denied}, 541 U.S. 972 (2004).
\textsuperscript{50} 332 F.3d at 706. \textit{See also} Kaiser Aetna v. United States, 444 U.S. 164, 173 (1979). ("It has long been settled that Congress has extensive authority over this Nation's waters under the Commerce Clause" as "channels of interstate commerce.").
adjacent to navigable water, but instead the water from the wetlands drained into a roadside
ditch, which flowed into a culvert, and into a second roadside ditch before flowing into several
creeks connected to navigable waters.51 Furthermore, the government in Rapanos asserts, as did
the Court in Deaton, that “in the aggregate, pollutant discharges into wetlands adjacent to
tributaries can be expected to have substantial impacts on interstate commerce, including but not
limited to the deleterious effects of such discharges on the traditional navigable waters
downstream.”52

Conversely, section 404(a) of the CWA applies to “navigable waters,” and the Court
ruled in SWANCC that “navigable” expresses Congress’s intent to use “its traditional jurisdiction
over waters that were or had been navigable in fact or which could reasonably be so made.”53
Actual navigable waters can be used as channels of commerce by their definition; however, the
wetlands at issue in the Rapanos and Carabell cases are not navigable and cannot be made
navigable.54 To expand the federal regulation of the wetlands at issue, one of which is nearly
twenty miles from the nearest navigable stream in the Rapanos case,55 “is to render meaningless
any notion of limits on federal power.”56 The landowners contend that the government is “not
regulating the channels themselves . . . but only activities that arguably may affect the channels
of commerce, the discharge of dredged or fill materials into wetlands adjacent to any
‘tributary.’”57 Rapanos and Carabell each sought to make improvements on his private property,
not move anything into interstate commerce. “Land, of course, is the quintessential thing that

52 Brief of Respondent, supra note 40, at 16.
53 SWANCC, 531 U.S. at 172.
54 Brief of Petitioner, supra note 40, at 8.
56 Brief for Claremont Institute Center for Constitutional Jurisprudence as Amicus Curiae in Support of Petitioners,
supra note 39 at 16, 2005 WL 3309661.
57 Brief of Petitioner, supra note 40, at 15.
does not move in interstate commerce.”

B. Tenth Amendment and State’s Rights

According to the Tenth Amendment of the U.S. Constitution, the federal government has the power to regulate only matter specifically delegated to it by the Constitution. Powers that are not enumerated to the federal government are reserved to the States, or to the people. The Commerce Clause is one of those few powers specifically delegated to the federal government; therefore, its interpretation is very important in determining the scope of federal legislative power.

In New York v. United States the Court acknowledged that the principle of reserved powers fundamental to the Tenth Amendment serves as a barrier to the exercise of power by Congress. Fundamentally, this division of power serves as an independent check by the states on the federal government preventing the expansion of its powers over the rights of ordinary citizens. This check “was designed so that decisions affecting the day-to-day activities of ordinary citizens would continue to be made at a level of government close enough to the people so as to be truly subject to the people’s control.” When Congress, or a federal agency in reliance on an act of Congress, acts beyond the scope of its enumerated powers, it intrudes upon the sovereign powers of the states and acts without constitutional authority. Property right advocates allege that the jurisdiction asserted by the Corps is “[a] pretext for the exercise of police powers by Congress, powers that were and of right ought to be reserved to the States, or to

61 Supra note 56 at 4.
62 See, e.g. The Federalist No. 33, at 204 (Hamilton) (noting that laws enacted by the Federal Government “which are not pursuant to its constitutional powers, but which are invasions of the residuary authorities of the smaller societies…will be merely acts of usurpation, and will deserve to be treated as such.”).
the people." Further, the stated purpose of the CWA is not to preserve the navigability of the nation’s waters, but to preserve the physical integrity of the nation’s waters. The preservation of these waters is arguably an exercise of the states’ police power to protect the health, safety, and welfare of its citizens. The landowners contend that their cases are not about the regulation of wetlands, but rather, who has the authority to regulate them: the state or the federal government?

The Corps contends that the asserted jurisdiction does not violate states’ rights since the CWA expressly allows states to regulate activities that fall under 404(a). This complementary permitting program is authorized under Section 404(g), which allows state officials to assume responsibility for certain discharges of dredged or fill materials into navigable waters. Pursuant to Section 402, the discharge of pollutants, other than dredged or fill material, may be authorized by the EPA, or by a state with an approved program under the National Pollutant Discharge Elimination System (NPDES) program. This partial delegation "gives a state the authority to render a comprehensive federal/state wetland permit decision with the federal government playing the role of overseer in the consideration of permit applications." Notably, the state of Michigan does participate in a state-approved permitting program through the Michigan Department of Environmental Quality (MDEQ). The Carabells applied for and were ultimately granted a permit by MDEQ to fill 15.9 acres of forested area for their condominium project. However, the Corps subsequently asserted its federal jurisdiction and denied the Carabells the 404(a) permit because the permit expressly stated that the issuance of the permit by the state did not waive the jurisdiction of the Corps.

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63 Supra note 56 at 20.
64 33 U.S.C. § 1344(g).
65 Examples of "pollutants" include sewage, toxic chemicals, and medical waste.
66 33 U.S.C. § 1342 (look this up -- could be 33 U.S.C. § 1344(g)).
68 United States v. Carabell, 391 F.3d 704, 706 (6th Cir. 2004).
As the Sixth Circuit noted in Rapanos’s civil case, the CWA’s allowance for state involvement in the permitting program does not allow the state to alter the CWA. The state program must be conducted in accordance with the CWA and “[w]hile States may impose more stringent requirements, they may not impose any less stringent requirements for any purpose.”

According to Michigan’s Geomare-Anderson Wetlands Protection Act, wetlands are defined with slight variations to the CWA. Michigan allows wetlands that are not contiguous to the Great Lakes, an inland lake or pond, or a river or stream and less than five acres in size to escape Michigan’s Wetlands Protection Act. The Court held that the allowance of Michigan to participate in enforcing portions of the CWA did not allow the state to weaken the CWA.

IV. CONCLUSION: “LONESOME ROAD BLUES”

The aggressive tug of war between private property owners and environmentalists would certainly leave anyone’s hands blistered. The tension over the balance of state and federal power to regulate inland wetlands has escalated, especially since the 2001 decision in SWANCC. And since the federal circuits are in conflict over this jurisdictional issue, the Court carries a heavy burden in deciding whether to allow the broad jurisdiction asserted under the CWA to continue. Many are hoping the Court clarifies the definition of “navigable waters” and Congress’s intent to regulate these wetlands under the CWA. Regardless of how the Court decides, one thing is certain: someone will be singing the blues. My suggestion? Listen to a little Muddy Waters, and if you are a property owner, get a wetland delineation before you buy property. Otherwise, you could be fighting the government for years, just like Mr. Rapanos.

69 United States v. Rapanos, 376 F.3d 629, 646 (6th Cir. 2004).
70 40 C.F.R. § 233.1(d).
71 Mich Comp. Laws § 324.30301(p) and (p)(ii).
72 United States v. Rapanos, 376 F.3d 629, 646 (6th Cir. 2004).
73 Muddy Waters (Geffen 1997).
74 The 5th U.S. Circuit Court of Appeals held that the government failed to establish federal jurisdiction over upstream waters. See In re Needham, 354 F.3d 340 (5th Cir. 2003); See D.E. Rice v. Harken Exploration Co., 250 F.3d 264 (5th Cir. 2001).