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The Clean Water Act: Current Status and Potential Changes

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Periodic browsing of our Read updated, and work on the cons

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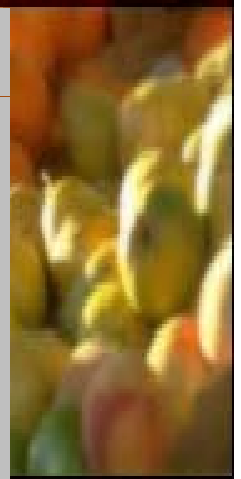
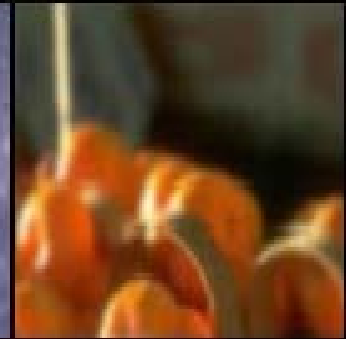
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Where are we at with the Clean Water Act?



The Clean Water Act - 33 U.S.C. §§ 1251 – 1387

- The primary federal law governing water quality
- Passed in 1972 with major amendments in 1977 & 1987
- Point v. Nonpoint Sources
- Jurisdictional limits are a major issue



Where are we at with the Clean Water Act?

Goal: Restoration and maintenance of chemical, physical and biological integrity of Nation's waters...and it is the national goal that the discharge of pollutants into *navigable* waters be eliminated by 1985.



Where are we at with the Clean Water Act?

The term “navigable waters” means the waters of the United States, including the territorial seas. 33 U.S.C.A. § 1362(7)

- The legislative history on the CWA from the House stated that the term should be given the “broadest possible constitutional interpretation unencumbered by agency determinations...”
- How broad is the interpretation of “navigable”

Where are we at with the Clean Water Act?



Supreme Court Case Law:

- *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985)
- *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001)
- *Rapanos v. United States*, 547 U.S. 715 (2006)



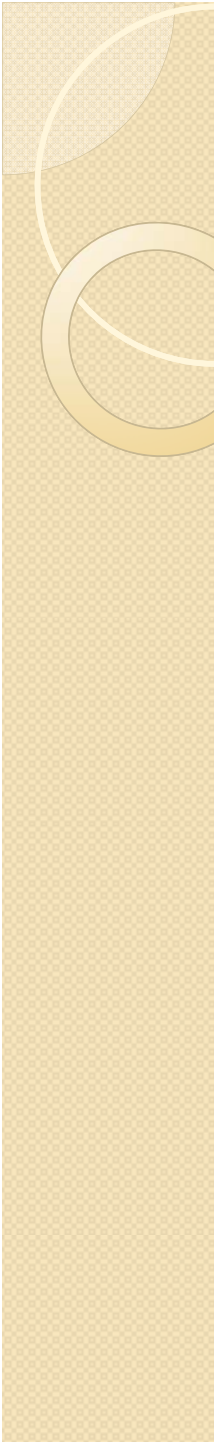
United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985)

- Issue was whether the CWA applied to wetlands adjacent to navigable waters.
 - The court held that the Corps' regulation properly extended their authority.
 - Protection of adjacent wetlands, even if “not inundated or frequently flooded by the navigable water”, was reasonable under the statutory authority.
 - Refusal by Congress to overrule an agency's construction of legislation is at least some evidence of the reasonableness of that construction

Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs, 531 U.S. 159 (2001)

- Issue was whether there was jurisdiction over an abandoned sand & gravel pit
 - “Migratory Bird Rule”
 - “[t]he term ‘navigable’ has at least the import of showing us what Congress had in mind as its authority for enacting the CWA





Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs, 531 U.S. 159 (2001)

- There was no “significant nexus” between isolated wetlands and navigable waters.
- Hydological connection between bodies of water become important
- “Where an administrative interpretation of a statute invokes the outer limits of Congress' power, agency must establish a clear indication that Congress intended that result.”

Rapanos v. United States, 547 U.S. 715 (2006)



- Issue was whether the CWA applied to filled wetlands (just like in Bayview)
- Case started in 1989
- Meant to clarify SWANCC

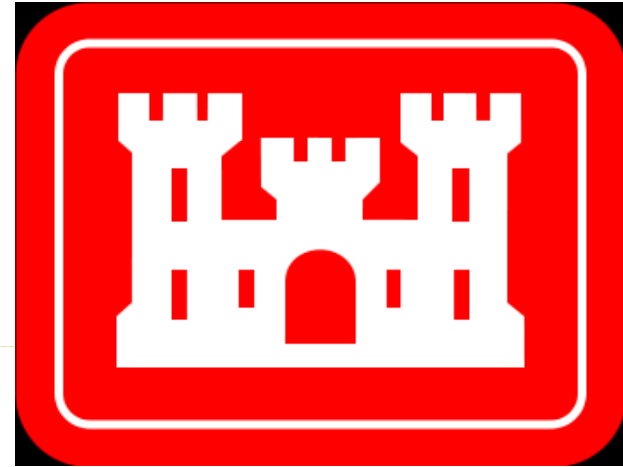
Rapanos v. United States, 547 U.S. 715 (2006)

Plurality

- “navigable waters,” under CWA, includes only relatively permanent, standing or flowing bodies of water, not intermittent or ephemeral flows of water (4)
- to constitute “‘navigable waters’ ” under the Act, a water or wetland must possess a “**significant nexus**” to waters that are or were navigable in fact or that could reasonably be so made (Kennedy)
- It is adjacent to tributaries of navigable waters and has a cumulative ecological effect on navigable waters (Dissent) (4)

Aftermath of SWANCC and Rapanos

- Split in the Circuits about jurisdiction under the Clean Water Act
- EPA and Corps forced to look at jurisdiction after Rapanos spurred them to issue a guidance memorandum





Guidance Memorandum

The agencies **will assert jurisdiction** over the following waters:

- " Traditional navigable waters
- " Wetlands adjacent to traditional navigable waters (Bayview)
- " Non-navigable tributaries of traditional navigable waters that are relatively permanent where the tributaries typically flow year-round or have continuous flow at least seasonally (e.g ., typically three months)
- " Wetlands that directly abut such tributaries



Guidance Memorandum, continued

The agencies generally **will not assert** jurisdiction over the following features :

- " Swales or erosional features (e .g., gullies, small washes characterized by low volume, infrequent, or short duration flow)
- " Ditches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water

Guidance Memorandum, continued

Questionable Jurisdiction (case by case):

- Non-navigable tributaries that are not relatively permanent
- "Wetlands adjacent to non-navigable tributaries that are not relatively permanent
- "Wetlands adjacent to but that do not directly abut a relatively permanent nonnavigable tributary



Jurisdictional Split

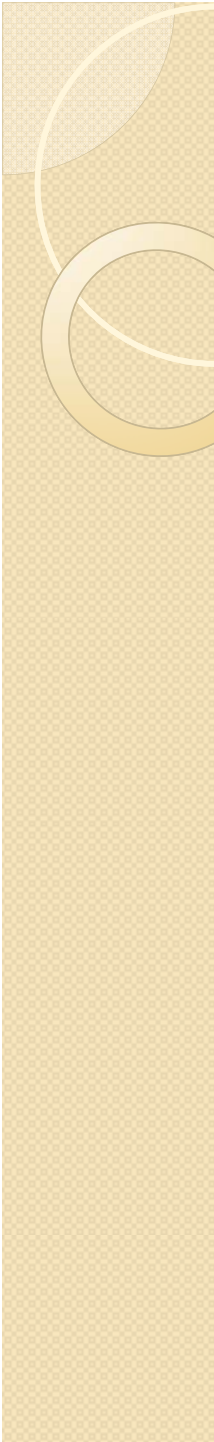
- United States v. Johnson, 467 F.3d 56 (1st Cir. 2006) (meeting either standard)
- United States v. Lucas, 516 F.3d 316, 326 (5th Cir. 2008) (plurality)
- United States v. Cundiff, 555 F.3d 200 (6th Cir. 2009) (meeting either standard)
- United States v. Bailey, 571 F.3d 791 (8th Cir. 2009) (meeting either standard)
- As of 9/1/10 there were no cases in the 10th citing *Rapanos*



Where are we at with the Clean Water Act?

Summary:

- The scope is broader than the traditional meaning of the word “navigable”
- Waters with no connection to “navigable waters” are not protected (Migratory Bird Rule)
- Water must have a “significant nexus,” a relatively permanent connection to navigable waters, or perhaps both the two

- 
- Where are we at with the Clean Water Act?
 - **What is the Clean Water Restoration Act (CWRA)?**
 - What Changes would we see under the CWRA?
 - What are the Constitutional Issues that may Arise?

Clean Water Restoration Act



- S. 787, 111th Cong. (2009)
- Introduced in the 107th, 108th, 109th, 110th, 111th Congresses.
- One stated purpose is to “reaffirm the original intent of Congress in enacting” the CWA

Clean Water Restoration Act

- to “clearly define the waters of the United States”
- to “provide protection to the waters of the United States to the maximum extent of the legislative authority of Congress under the Constitution.”





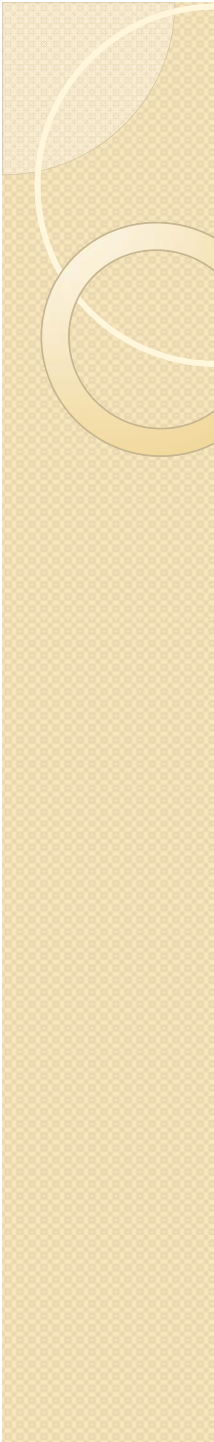
Legislative Action

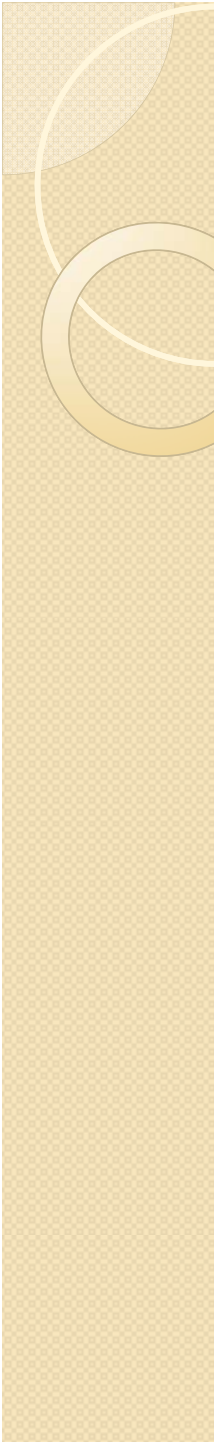
- Senator Feingold has reintroduced the same legislation as he has in the four preceding Congresses
- Current version has twenty-four cosponsors
- The Obama Administration has written a letter in support of the proposed legislation

Legislative Action



- Currently the support and opposition for the CWRA has been divided on party lines
- The proposed legislation has not moved in over a year (Congress has been busy)
- It could easily be reintroduced in the next Congress

- 
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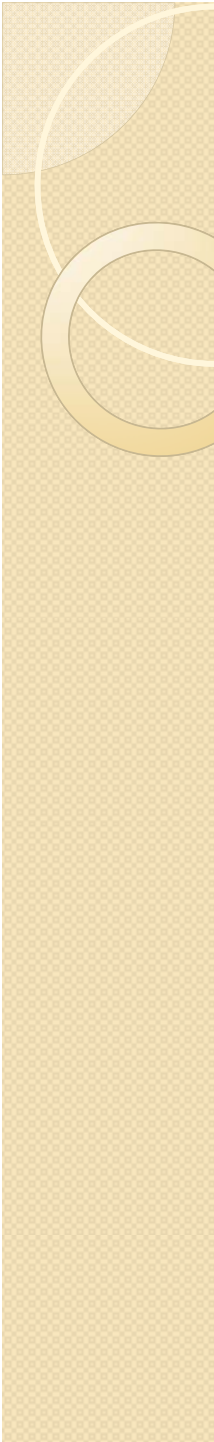


Changes under the Clean Water Restoration Act

Goal: To replace the term “navigable waters” with “waters of the United States” to cover:

- (A) all waters which are subject to the ebb and flow of the tide;
- (B) all interstate waters, including interstate wetlands;

Continued...



Changes under the Clean Water Restoration Act

- (C) **all other waters**, such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds;
- (D) all impoundments of waters of the United States;
- (E) tributaries of the aforementioned waters;
- (F) the territorial seas; and
- (G) wetlands adjacent to the aforementioned waters



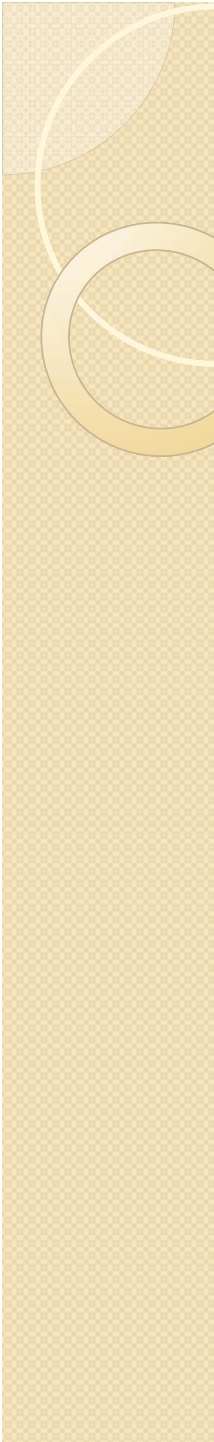
Clean Water Restoration Act

- “the ability to meet the national objective...has been undermined [by *SWANCC* and *Rapanos*], which has resulted in confusion, permitting delays, increased costs, litigation, and reduced protections for waters of the United States...”
 - Clean Water Restoration Act of 2009, S. 787, 111th Cong. §3(2009).

Clean Water Restoration Act

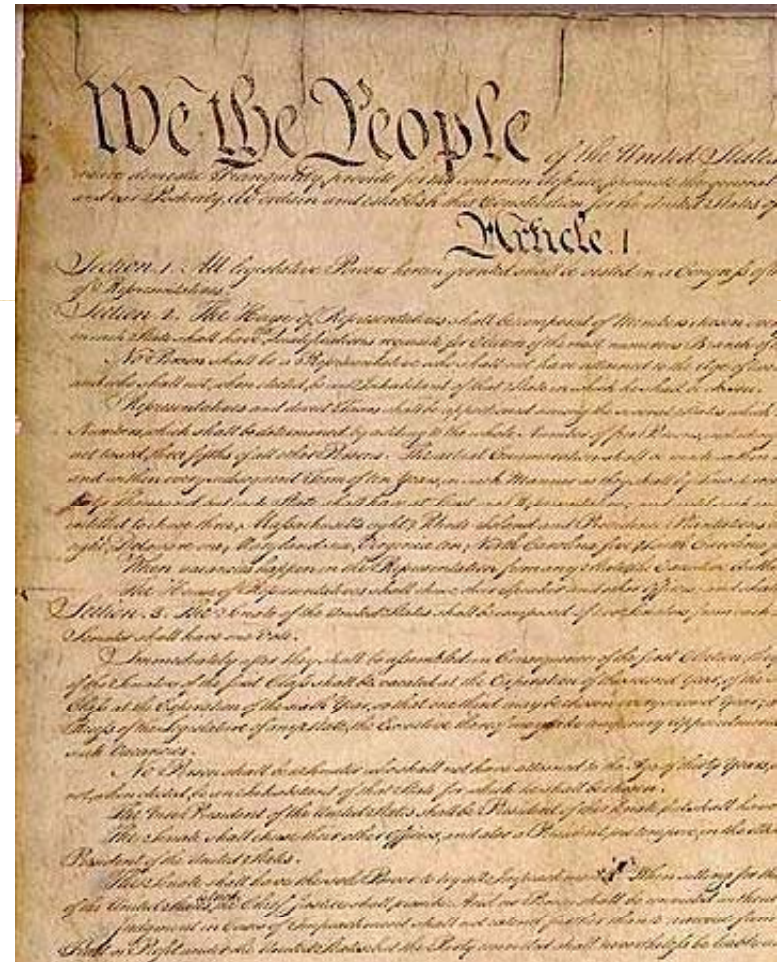
Summary:

- replace the term “navigable waters” with “waters of the United States”
- To overturn *SWANCC* and *Rapanos*
- to “provide protection to the waters of the United States to the maximum extent of the legislative authority of Congress under the Constitution.”

- 
- Where are we at with the Clean Water Act?
 - What is the Clean Water Restoration Act (CWRA)?
 - What Changes would we see under the CWRA?
 - **What are the Constitutional Issues that may Arise?**

Constitutional Issues

- What defines “the maximum extent of the legislative authority of Congress under the Constitution” for purposes of the CWRA?
- Answer?
 - The Commerce Clause (Article I, Section 8, Clause 3)



The Commerce Clause

- Brief History
 - Gibbons v. Ogden, 22 U.S. 1 (1824) – SC held that Congress was granted the power to regulate interstate commerce
 - For the most part it was largely ignored until the Interstate Commerce Act of 1887
 - Real questions about the scope of the Commerce Clause arise in the 1930s

The Commerce Clause



- FDR and the New Deal Legislation
- FDR proposed increasing the number of SC to 15
- “the switch in time that saved nine”
- The SC left the CC alone, for the most part, for 60 years

United States v. Alfonso Lopez, Jr., 514 U.S. 549 (1995)

Case challenged the federal Gun-Free School Zones Act

- This was a criminal statute that had nothing to do with economic activity or commerce
- failed “to show the requisite **nexus** with interstate commerce.”

Schools



Guns



United States v. Alfonso Lopez, Jr., 514
U.S. 549 (1995)

The 3 Categories of Activity under the CC

1. “Channels of Interstate Commerce”
(waters of the U.S.)
2. “Instrumentalities of Interstate
Commerce”
3. “Activities that have a substantial
relation to Interstate Commerce”
(migratory birds?)



United States v. Morrison, 529 U.S. 598 (2000)

Case challenging the Violence Against Women Act

- “the Court warned that the scope of the interstate commerce power ‘must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them... would effectually obliterate the distinction between what is national and what is local and create a completely centralized government.’”



Constitutional Issues

Summary:

- The Commerce Clause grants Congress broad powers to legislate
- The SC has struck down recent statutes that were created through the CC

So where would that leave the CWRA if it passes?



Issues to think about

In *Lopez* the SC found no “nexus” to IC so how will finding a nexus for the CC differ from finding a “significant nexus” under *SWANCC*?

What about the scope of a revised CWA?

Jurisdiction under *SWANCC* and *Rapanos vs.*
Jurisdiction under the CC?

Questions?



- If you have any questions than please feel free to ask
-

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