

DAILY JOURNAL NEWSWIRE ARTICLE

<http://www.dailyjournal.com>

© 2006 The Daily Journal Corporation.

All rights reserved.

February 21, 2006

AMERICA'S WATERWAYS BELONG UNDER FEDERAL EYE

Forum Column

By Timothy J. Dowling

With so much at stake, it's surprising *Rapanos v. United States* isn't getting more attention.

Today, the U.S. Supreme Court will hear oral argument in *Rapanos*, a broad-based challenge to longstanding federal protections for the vast bulk of our nation's rivers, streams and other tributaries.

Through his attorneys at the Pacific Legal Foundation, John Rapanos is asking the court to invalidate 30-year-old protections for all non-navigable intrastate rivers and streams that flow into navigable waters. Rapanos construes the federal Clean Water Act as authorizing the U.S. Environmental Protection Agency and U.S. Army Corps of Engineers to protect intrastate waters only if they are actually navigable. On this reading, non-navigable rivers and streams and their adjacent wetlands are not "waters of the United States," the key jurisdictional term used throughout the act.

California has more than 200,000 miles of rivers and streams, but less than 1,400 miles are navigable. If Rapanos were to prevail, 99 percent of these waters would lose federal protection. The Clean Water Act no longer could be used to protect these resources from sewage and toxic pollutants, or to prevent their adjacent wetlands from being filled for development. We would see a comparable loss of protection across the entire nation because navigable waters comprise a very small percentage of total river and stream miles.

If you are reading this while enjoying a cup of coffee, consider that more than 90 percent of our drinking water intake valves are located in non-navigable headwaters. And almost half of all permits issued under the Clean Water Act limit discharges into these tributaries. Without the protection of the act, polluters could simply ignore these federal permit limits.

The rapacious Mr. Rapanos is a flagrant lawbreaker, convicted by a jury of discharging pollutants into Michigan wetlands in violation of the Clean Water Act. He is a repeat offender, unlawfully filling wetlands at three different sites to prepare the land for commercial development. When his own consultant concluded there were wetlands at one site, Rapanos ordered him to destroy the report and then fired him when he failed to do so. All the wetlands at issue are connected to tributary systems that flow into Lake Huron.

One major inconvenience for Rapanos is *United States v. Riverside Bayview Homes Inc.*, 474 U.S. 121 (1985), in which the court unanimously held that the Corps reasonably construed the term "waters of the United States" to include "all wetlands adjacent to other bodies of water over which the Corps has jurisdiction." Rapanos seeks to avoid the implications of this ruling by arguing that non-navigable tributaries are not covered by the

act.

Protecting non-navigable tributaries from toxic discharges is, of course, essential to maintaining the ecological integrity of navigable lakes and rivers downstream. But beyond these obvious benefits, their adjacent wetlands greatly assist in the control of floods by storing huge amounts of excess water during heavy rainfall, greatly reducing loss of life and economic damage to surrounding areas.

Every year, wetlands in the continental United States save more than \$30 billion in repair costs by reducing flood damage. In the upper Missouri River basin, for example, the state of Montana estimates that for every acre of wetlands destroyed, 1 million gallons of water runs quickly downstream rather than being stored and slowly released after floodwaters subside.

Wetlands also maintain water quality by trapping sediment and toxic pollutants before they reach streams, rivers or other open bodies of water. Our cities and counties save millions of dollars annually in wastewater treatment costs because wetlands filter out these pollutants. When wetlands are destroyed, more nitrogen from Pennsylvania farmland contributes to the "dead zone" in the Chesapeake Bay, and chemicals from Midwest farms add to an enormous dead zone the size of New Jersey in the Gulf of Mexico. These dead zones and others like them are commercial catastrophes for the fishers and others who depend on our waters to make a living.

Rapanos contends that the case implicates federalism and protection of non-navigable waters should be left exclusively to the states. The states themselves, however, argue overwhelmingly in favor of continued federal protection, persuasively demonstrating that the statutory text, structure and history compel this result.

These 33 states, including California, filed an amicus brief showing that while they take seriously their responsibility to protect these waters, they cannot do the job alone. Other groups representing state officials weighed in as well, including the Association of State and Interstate Water Pollution Control Administrators, which filed an amicus brief for the first time.

These state officials emphasize that each of the lower 48 states has lakes, rivers or bays downstream from other states. They are concerned that the absence of federal protections will produce a "race to the bottom" as competition for economic growth puts environmentally protective states at a severe competitive disadvantage. Without a federal floor of protection, all states will lose as their waters are despoiled by upstream pollution.

Rapanos relies on *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001), in which the court held that the Clean Water Act does not authorize the Corps to regulate a wetland isolated from any other waters where the sole basis for doing so is its use by migratory birds. But the *SWANCC* court addressed only the issue of wetlands wholly untethered from navigable waters. It is easily distinguished from the instant challenge to regulations that are necessary and proper for the protection of downstream navigable waters, our channels of commerce.

Rapanos also argues the court should construe the Clean Water Act narrowly to avoid constitutional issues regarding Congress' authority under the Commerce Clause to regulate tributaries and adjacent wetlands. There is no serious Commerce Clause issue here, however, because federal controls for tributaries and adjacent wetlands are needed to protect navigable waters. For more than 100 years, the court has recognized that federal authority

over navigable waters extends to the entire watershed, including the non-navigable portions, because protection of all tributaries is essential to protect our navigable lakes and rivers. E.g., *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690 (1899).

Longstanding precedent makes clear this authority may be exercised to promote flood control, pollution prevention, and other values. For example, in *Oklahoma ex rel. Phillips v. Guy Atkinson Co.*, 313 U.S. 508 (1941), the court unanimously upheld the assertion of federal jurisdiction over 150,000 acres surrounding the Red River, a non-navigable tributary of the Missouri River, to improve flood control and produce hydropower. The court stressed the importance of federal protection for the entire watershed: "There is no constitutional reason why Congress cannot, under the commerce power, treat the watersheds as a key to flood control on navigable streams and their tributaries."

The connection between commerce and the challenged protections is clear. Reducing flood storage capacity increases economic losses. Increased pollution impairs habitat for salmon populations and other commercially valuable species. Pollution of our lakes, rivers and streams decreases property values across the board. More pollution means more disease, leading to greater medical costs and lost worker productivity. Moreover, the overwhelming bulk of activity that leads to pollution or wetlands destruction is manufacturing, commercial development, or other economic activity.

Certain developer amici argue the Clean Water Act should not be read to protect man-made ditches and drains that form part of a tributary system. But a large percentage of the nation's streams and wetlands have been channelized or ditched to increase the natural drainage. As 7th U.S. Circuit Court of Appeals Judge Richard Posner put it: "It wouldn't make much sense to interpret the regulation as distinguishing between a stream and its manmade counterpart." *United States v. Gerke Excavating Inc.*, 412 F.3d 804 (2005).

Developer amici also portray federal wetlands protection as regulation run riot, but the Corps grants more than 99 percent of wetland fill applications. If a particular wetland is not important to the ecological health of adjacent or downstream waters, the Corps takes this into account in deciding whether to grant an application. The suggestion that the Corps applies the Clean Water Act to every backyard puddle is rhetorical rubbish.

Rapanos, the first case to be heard by Justice Samuel A. Alito Jr., is viewed as an early test for the newly constituted Roberts court. If the court is faithful to statutory text, longstanding precedent, deference to Congress, due regard for agency expertise and the overwhelming consensus among the states, the test should be an easy one.

Timothy J. Dowling is chief counsel of Community Rights Counsel, which filed an amicus brief in *Rapanos* in support of the United States on behalf of the Association of State and Interstate Water Pollution Control Administrators.