

Wetlands Regulation

Federal Oversight Survives Divided Supreme Court Ruling

BY JOHN M. ARMENTANO

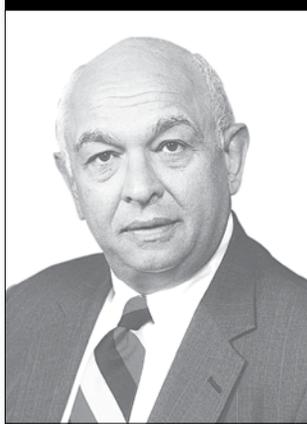
Thirty-five years ago, Congress enacted the Clean Water Act of 1972 ("CWA") in an effort to "restore and maintain the chemical, physical and biological integrity of the Nation's waters."¹ To effectuate this objective, one of the CWA's principal sections strictly prohibits discharges of pollutants into the "navigable waters of the United States" without a permit from the Environmental Protection Agency ("EPA").² The CWA defines the term "navigable waters" to mean "waters of the United States, including the territorial seas."³

Over the years, the U.S. Supreme Court has issued a number of decisions analyzing whether "waters of the United States" includes certain wetlands under the CWA or applicable federal regulations. In *United States v. Riverside Bayview Homes, Inc.*,⁴ the Court upheld CWA jurisdiction over wetlands that directly abutted a navigable creek. The Court ruled that "the relationship between waters and their adjacent wetlands provides an adequate basis for a legal judgment that adjacent wetlands may be defined as waters under the Act."⁵

The 'SWANCC' Opinion

In *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers* ("SWANCC"),⁶ the Court again interpreted the CWA term "navigable waters" and held that isolated ponds and mudflats, unconnected to other waters covered by the Act, were not "waters of

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the United States." The case involved ponds that had been formed as a result of an abandoned sand and gravel pit mining operation and were not "adjacent wetlands." The Army Corps of Engineers' regulations had defined the ponds nevertheless to be "waters of the United States" because they were "used as habitat by other migratory birds which cross state lines."⁷ Under this Migratory Bird Rule, ponds that were isolated from navigable waters could constitute "waters of the United States" if they were used as habitat by migratory birds. The Court rejected that theory and held that the CWA did not protect isolated ponds without a significant nexus. The Court explained that, "[i]t was the significant nexus between wetlands and 'navigable waters' that informed our reading of the [Act] in *Riverside Bayview Homes*."⁸

'Rapanos'

About six months ago, at the end of its last term, the Roberts Court issued its first important environmental law

ruling, discussing the intersection between *Riverside Bayview Homes* and *SWANCC*. The Court's decision in *United States v. Rapanos*⁹ involved two consolidated cases. The first consolidated case covered three land parcels near Midland, Michigan. The first parcel, known as the Salzburg site, consists of roughly 230 acres, including 28 acres of wetlands. The district court found, on the basis of expert testimony, that water from the site spills into the Hoppler Drain, which carries water into the Hoppler Creek and ultimately into the Kawkawlin River, which is navigable. The second parcel, known as the Hines Road site, consists of 275 acres, including 64 acres of wetlands. These wetlands have a surface-water connection to the Rose Drain, which carries water into the Tittabawassee River, a navigable waterway. The final parcel, called the Pine River site, consists of some 200 acres. This site includes 49 acres of wetlands, and a surface water connection links the wetlands to the nearby Pine River, which flows into Lake Huron. The wetlands at issue in all three parcels are neither directly adjacent to nor entirely isolated from a navigable water of the United States.

The United States brought an action against the Rapanos petitioners for civil violations of the CWA. Specifically, the government claimed that the petitioners discharged fill into protected wetlands, failed to respond to requests for information, and ignored administrative compliance orders. After a 13-day bench trial, the district court made factual findings upholding the Corps' jurisdiction over wetlands on the three parcels. On the merits the court ruled in the government's favor, finding that violations occurred at all three sites. The U.S. Court of Appeals for the Sixth Circuit affirmed.

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