

95509 #4

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

¹ The Official Muddy Waters Website, http://en.wikipedia.org/wiki/Muddy_Waters (last visited Mar. 24, 2006).

² *Id.*

³ 33 U.S.C. 1251 et seq.

⁴ *United States v. Rapanos*, 376 F.3d 629 (6th Cir. 2004), *cert. granted*, 126 S. Ct. 414 (2005).

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.⁶ The government subsequently brought civil and criminal actions against Rapanos.⁷ 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.⁸

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.⁹ 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.¹⁰

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.

⁶ *United States v. Rapanos*, 376 F.3d 629, 632 (2004).

⁷ *United States v. Rapanos*, 339 F.3d 447 (6th Cir. 2003), *cert. denied*, 541 U.S. 972 (2004).

⁸ *Wetlands Desperado*, Wall St. J., August 23, 2004, at A12.

⁹ *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001).

¹⁰ *United States v. Rapanos*, 376 F.3d 629, 632 (2004).

¹¹ *Carabell v. U.S. Army Corps of Eng'rs*, 391 F.3d 704 (6th Cir. 2004), *cert. granted*, 126 S. Ct. 415 (2005).

¹² *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.¹³ 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.¹⁴ 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.¹⁵ Consequently, Carabell sought review from the Supreme Court.

II. ADMINISTRATIVE LAW: "WHO DO YOU TRUST"¹⁶ 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.¹⁷ The APA is the major source for federal administrative law and was enacted to provide some sort of uniformity among all federal administrative agencies.¹⁸

The Federal Water Pollution Control Act Amendments of 1972,¹⁹ 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."²⁰ One way to achieve this purpose is Congress's prohibition of discharging pollutants, including dredged or fill material, into "navigable waters"

¹³ Brief of Respondent at 7, *Carabell v. U.S. Army Corps of Eng'rs*, No. 04-1384 (U.S. argued Feb. 21, 2006).

¹⁴ Brief of Petitioner at 5, *Carabell v. U.S. Army Corps of Eng'rs*, No. 04-1384 (U.S. argued Feb. 21, 2006).

¹⁵ Brief of Respondent, *supra* note 13, at 13.

¹⁶ *Muddy Waters* (Epic/Legacy 2005).

¹⁷ 5 U.S.C. § 500 et al.

¹⁸ *Id.*

¹⁹ Pub. L. No. 92-500, 86 Stat. 816, as amended, Pub. L. No. 95-217, 91 Stat. 1566.

²⁰ 33 U.S.C. 1251(a).