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Divided circuit courts muddy regulation of wetlands.

By: Pamela MacLean

Diverging federal appellate interpretations of the limits on congressional power to regulate wetlands under the Clean Water Act have become, well, a swamp.

Federal appellate courts have shied away from cutting back on popular environmental protections of water, air and endangered species, despite U.S. Supreme Court pronouncements that the Constitution's commerce clause limits federal regulation to those activities "substantially affecting interstate commerce."

Cutting into congressional power to regulate activity purely within a single state strikes at the core of many environmental laws, which were based on commerce clause authority when passed 30 years ago.

In the case of the Clean Water Act, which authorizes federal regulation of navigable waters, this has spawned a debate over what exactly constitutes "navigable waters." In 2001, the U.S. Supreme Court, in the somewhat ambiguous language of a 5-4 decision, said that isolated wetlands were not covered by the act. It became known as the SWANCC decision, Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, 531 U.S. 159 (2001).

The ruling sparked a division between the Fifth Circuit U.S. Court of Appeals and four other circuit courts over just how far the high court's decision would restrict environmental regulation. This has intensified litigation around the country by property owners' rights groups seeking an outright split.

Their ultimate goal is for the Supreme Court to reconsider the constitutionality of the Clean Water Act and other 30-year-old environmental protections as exceeding congressional authority to regulate interstate commerce.

Among the cases, a Massachusetts cranberry farmer, whose family has been farming the area for 100 years, is fighting federal claims that he violated the Clean Water Act by dumping into wetlands without a permit, although he claims his property is dozens of miles from the nearest navigable waters. In a civil suit brought by the government against Charles Johnson for fines and mitigation costs to clean up the wetlands, the government won summary judgment at the district court level. U.S. v. Johnson, 05-14444 (D. Mass). Johnson's appeal to the First Circuit is still pending.

Michigan owners of 20 acres on a forest wetland lost a Sixth Circuit appeal challenging the requirement of a federal permit to build condominiums. They have sought a hearing before the Supreme Court. Carabell v. U.S. Army Corps of Engineers, 391 F.3d 704 (6th Cir. 2004).

A landowner in Tomah, Wis., hired Gerke Excavating Co. to prepare six acres, some of it wetlands, for development. The Army Corps of Engineers fined the firm for dumping dredged stumps, roots and sand in the wetlands without permits. The land drained into a ditch that flowed to a creek, then a river that led to navigable water 64 miles away. The Seventh Circuit said that whether wetlands were 100 miles or six

feet away, they were "waters of the United States" covered by the act. U.S. v. Gerke Excavating Inc., 412 F.3d 804 (7th Cir. 2005).

Powerful oil interests represented by the American Petroleum Institute have challenged the definition of "navigable waters" as overly broad when applied to oil spill prevention and cleanup law. Their appeal is currently before the D.C. Circuit U.S. Court of Appeals. American Petroleum Institute v. Leavitt, 02-2247 (D.C. Cir.).

They are all pressing courts to limit the reach of federal authority over dumping, filling and cleanup in what they say is every puddle and ditch, however far from navigable waters.

The interpretive split between the Fifth Circuit and other appellate courts over how far Army Corps of Engineers authority over "navigable waters" extends has opened a wedge for the new legal challenges. The split has emboldened property owners to pry a wider division between the circuits in hopes of provoking Supreme Court review in the high-stakes environmental cases - something the high court has refused to do five times in the recent past.

"The court is too shy in addressing the politically divisive question" of the constitutionality of the Clean Water Act and Endangered Species Act, said M. Reed Hopper, attorney for the Pacific Legal Foundation, which defends property rights. "I think they are not willing, politically, to address such a hot issue, but eventually they will have to."

Now, the pending confirmation of D.C. Circuit Judge John Roberts Jr. to the high court adds to the uncertainty over the fate of at least two environmental laws because of his apparent questions about the commerce clause rationale for the Endangered Species Act. The D.C. Circuit upheld federal regulation of a proposed 280-home development in San Diego because it threatened the rare southwestern arroyo toad. The majority focused on the economic impact on interstate commerce of the housing, not the toad. The Endangered Species Act regulates takings, not toads, according to the majority.

But Roberts said that the "hapless toad" spends its entire life in California and has no connection to interstate commerce. He argued unsuccessfully for a full nine-judge review by the circuit, saying that the focus on the development "seems inconsistent with the Supreme Court's holdings" in two landmark commerce clause cases.

Without suggesting how he might rule, Roberts appeared open to imposing commerce clause limits on the regulation. Rancho Viejo LLC v. Norton, 323 F.3d 1062 (D.C. Cir. 2003).

But for now, Hopper said, the real debate centers on the scope of the Clean Water Act, and that rests in the appellate courts. "We will continue to raise the commerce clause issue," he said.

"This is sort of a shotgun approach," responded Glenn Sugameli senior legislative counsel for EarthJustice, which represents environmental groups. The current Bush administration is opposing many of these new challenges, he said. "That tells you how extreme their [Pacific Legal Foundation] arguments are. This is not an administration that has gone out of its way to protect the environment," Sugameli said.

In fact, Lance Wood, an Army Corps of Engineers environmental lawyer for nearly 30 years, wrote in a recent legal analysis that if the most extreme arguments are adopted it would strip the corps of 99 percent of the area over which it and the Environmental Protection Agency assert jurisdiction.

If national water pollution regulation were limited to only navigable waters and not the tributaries or adjacent wetlands that feed them, anyone wanting to dispose of toxic wastes could dump them into wetlands near non-navigable tributary streams and be immune from Clean Water Act liability, Wood argued. The law would be reduced to a "Dumper's Bill of Rights," he wrote.

Beginning in the early 1970s, Congress enacted some of the nation's most potent environmental protections for air, water and endangered species, relying primarily on its authority under the commerce clause. Three decades later, the U.S. Supreme Court clipped congressional wings in two landmark decisions, beginning in 1995, that limited their lawmaking power under the commerce clause to regulating activities substantially related to interstate commerce.

The two 5-4 decisions are U.S. v. Lopez, 514 U.S. 549 (1995), striking down a ban on gun possession near schools, and U.S. v. Morrison, 529 U.S. 598 (2000), striking down the Violence Against Women Act, by saying Congress overreached its commerce clause authority.

Although some of the nation's best known environmental laws protecting water, air and endangered species are based on commerce clause authority, no federal appellate court has invoked either Lopez or Morrison to strike them down.

Then, in 2001, the Supreme Court ruled in the SWANCC decision that the corps had no authority to regulate isolated, non-navigable waters, reversing decades of broad federal authority over what the law termed "waters of the United States." In 2003, the Fifth Circuit embraced the SWANCC language by holding that the Clean Water Act is not so broad that it permits federal regulation of "tributaries" that are not part of navigable waters or adjacent to them. In re Needham, 354 F.3d 340 (5th Cir. 2003).

By contrast, other circuits have read SWANCC much more narrowly, including two decisions in the Fourth Circuit, U.S. v. Deaton, 332 F.3d 698 (4th Cir. 2003), and U.S. v. Newdunn Associates, 344 F.3d 407 (4th Cir. 2003); and a Sixth Circuit case, U.S. v. Rapanos, 339 F.3d 447 (6th Cir. 2003). Those panels also agree with earlier opinions in the Ninth Circuit in Headwaters Inc. v. Talent Irrigation District, 243 F.3d 526 (9th Cir. 2001), and the Seventh Circuit in U.S. v. Krilich, 303 F.3d 784 (7th Cir. 2002).

But the Fifth Circuit had a more protective view when it came to an Endangered Species Act case. An appeals panel refused to declare the 1973 law an unconstitutional expansion of the commerce clause. The Fish and Wildlife Service sought to block a commercial development near Austin, Texas, because it threatened six species of cave-dwelling spiders and beetles found only in two counties in Texas. The panel held that the endangered species could be aggregated with other takings under the act to produce a substantial effect on interstate commerce. GDF Realty Investments Ltd. v. Norton, 326 F.3d 622 (5th Cir. 2003).

Sugameli, of EarthJustice, pointed out that the argument for limiting the commerce clause has been weakened since the Supreme Court's decision earlier this year asserting federal authority over California's medical marijuana law in Gonzales v. Raich, 125 S. Ct. 2195 (2005).

But he worried that while the Supreme Court and the circuit courts are not expected to strike down the environmental laws, "we could get decisions of a thousand cuts," he said.

Law professor Jonathan Adler of Case Western Reserve University, who has written about the shifting standards, took a more measured view: "I don't think there is much chance of any substantial impact on environmental laws in the short run."

The split between the Fifth Circuit and the others over how far to read "navigable waters" is a technical difference over statutory interpretation, he said. But because of SWANCC, it is being driven by constitutional concerns in the background, he said.

It may be that because SWANCC is a relatively recent decision, the Supreme Court may want to see how the circuits deal with it, he said. It is unclear how much the Raich decision on medical marijuana will change the landscape. "But it is definitely a signal to lower courts not to be as aggressive in commerce clause cases," he said. "That means the potential of striking down environmental statutes is significantly reduced," he predicted.

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