Supreme Court Issues Dam Ruling:
Discharge Triggers Permit Requirement
Even in Absence of Pollution

*The goal of life is living in agreement with nature.*
Zeno (335 BC - 264 BC), from Diogenes Laertius, Lives of Eminent Philosophers

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Introduction

This presentation addresses three cases, one recently decided and two that will be decided by the end of the current term of the United States Supreme Court, illustrating the growing importance of the Clean Water Act and its potentially controversial application to the regulation and control of discharges and wetlands.

The Clean Water Act and Groundwater

It is appropriate to make several threshold observations about the connection between the Federal Water Pollution Control Act, commonly known as the Clean Water Act, and groundwater.

First, groundwater problems and disputes are growing all across the country, and the topic of this presentation is important and an appropriate focus for GMDA’s 2006 Summer Conference. Second, groundwater is primarily within the province of state law - with a heavy dose of regional and local control.
But there are two exceptions when federal law may come into play: the Safe Water Drinking Act and the Clean Water Act (CWA).

Third, the CWA comes into play when there is a groundwater-surface water or "jurisdictional" wetlands interconnection. The interconnection to "navigable waters" (a jurisdictional prerequisite to the application of the CWA) physically takes place in three basic ways:

(1) surface waters may gain source water from the inflow of groundwater-so called tributary groundwater;

(2) surface waters may lose it to groundwater, which often occurs from pumping groundwater; and

(3) in some reaches of a surface stream, both may happen.

Fourth, there is some legal ambiguity as to the precise reach of the CWA to groundwater.¹ A strong argument can be made that Congress should amend the CWA to clarify EPA's authority to regulate groundwater-arguably to the fullest extent allowed by the Commerce Clause. This would open the way to federal groundwater quality standards and perhaps even the extension of the point source permit systems to point source discharges into groundwater. Some may disagree, preferring less federal involvement not more. It is submitted that few would take issue with the idea of Congress clarifying its intent.

It is in this context that we turn now to the United States Supreme Court’s most recent decision in which it significantly expanded the reach of the Clean Water Act.

S. D. Warren Company v. Maine Board of Environmental Protection

On May 15, 2006, the Supreme Court ruled unanimously that states have broad authority to regulate their streams under the Clean Water Act, even in situations that do not involve control of "pollution" in the strict sense of the word. The Justices ruled in favor of the Maine Board of Environmental Protection
and against the South African-based S.D. Warren Company, owner of five hydroelectric dams along the Presumpscot River that provide power for a company paper mill. Although the dispute arose over only five small dams on the Presumpscot River, the Supreme Court's decision affects an estimated 1,500 power dams in 45 states. It was the Court's first ruling in an environmental case under Chief Justice John G. Roberts Jr., and it came as a relief to environmental advocates. The surprisingly unanimous decision holds that “water that has left its natural state and has been subjected to man-made control” could be considered a discharge subject to the permit requirements of §401 of the CWA and that states may protect the health of their rivers, even though hydroelectric power dams are regulated exclusively by the federal government.²

I. State Regulation of Dams

Since 1935, S.D. Warren has operated the hydroelectric dams under licenses issued by the Federal Energy Regulatory Commission. In 1999, when the company sought license renewal, it argued that it should not have to obtain water-quality certificates from the Maine environmental authorities, as specified in the Clean Water Act, but only from the federal government. Section 401 of the Clean Water Act requires persons who engage in activities requiring federal licenses and resulting in discharges into navigable waters to obtain state certification of compliance with Clean Water Act water quality standards before obtaining a license.

The Clean Water Act Section 401(a)(1) states in pertinent part:

Any applicant for a Federal License or permit to conduct any activity including, but not limited to the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification form from the State in which the discharge originates or will originate, etc....No license or permit shall be granted if certification has been denied by the State, interstate agency, or the Administrator, as the case may be.³
With regard to the CWA jurisdictional requirement of “discharge,” S.D. Warren argued that the state had no role to play in five dams along the Presumpscot River between Sebago Lake and Portland just because water simply backed up behind the dams and spilled over its turbines without pollution being added. But the Maine Board of Environmental Protection decided the dams created a "discharge," qualifying for regulations under § 401 of the Clean Water Act because of the changes in water flow, temperature and oxygen level.

S.D. Warren eventually applied for its water quality certificate, but only after protest. The Maine Department of Environmental Protection approved the certification but imposed certain water quality conditions. Warren challenged these conditions in state court. S.D. Warren reasoned that its dams did not result in any "discharge" into the river, since nothing was added to the stream, so certificates from the State of Maine should be unnecessary.

II. Dam “Discharge”

The major issue in S.D. Warren turned on the definition of “discharge.” The Supreme Court acknowledged that the Clean Water Act does not include a definition of the term. Indeed, CWA jurisdiction is based on Congress’ authority under the Commerce Clause, and the CWA’s precise reach under the Commerce Clause has not been defined by the Supreme Court. Because the term is neither defined in the Clean Water Act nor considered a term of art, the Court concluded that it must be construed “in accordance with its ordinary or natural meaning.” The Court pointed out that the common usage of the definition of “discharge” under § 401 has been used regularly by the Environmental Protection Agency and FERC, and though the two agencies have not formally settled the definition of discharge, the agencies' usage of “discharge” confirms the court's understanding of the everyday usage of the term.
The Justices eventually turned to Webster’s Dictionary to find a suitable definition of the word. According to Webster’s, “discharge” as applied to water, commonly means “flowing” or “issuing out.” S.D. Warren had argued that “discharge” required the addition of something foreign into the water receiving the discharge. Because the release of the water through the dams added nothing to the water, the company argued, it did not constitute a discharge.

Justice Souter, writing for a 9-0 Supreme Court, however, said the pairing of “discharge” and “discharge of a pollutant” is not correct, and that using the term “discharge of a pollutant” does not shrink the broader term of “discharge” in this case. The court went further to say that just because S.D. Warren was not adding anything to the water, it cannot be said that the river is unchanged. Considerable weight was given to the fact that S.D. Warren itself admitted that its dams can cause changes in the movement, flow, and circulation of a river.

The Supreme Court stated that S.D. Warren’s reliance on *South Florida Water Management District v. Miccosukee Tribe of Indians*, was not on point. In that case, the Court looked at discharge under Section 402 of the Clean Water Act, not Section 401. Section 402 deals with the National Pollutant Discharge Elimination System and its permitting processes. Section 402 of the CWA authorizes the EPA to allow states to undertake National Pollutant Discharge Elimination (NPDES) responsibilities pursuant to an EPA-approved permit program. Like most states, Maine had approved NPDES program authority. The trigger for NPDES permit requirements is the “discharge of a pollutant,” which the Act defines as “any addition of any pollutant to navigable waters from any point source.” The Court stated that the two sections are not interchangeable for the purpose of defining a “discharge.” The Court also said the legislative history of the Clean Water Act suggested it should read “discharge” as not simply “discharge of
a pollutant. This critical distinction was outcome-determinative.

In Miccosukee, the Miccosukee Tribe of Indians and the Friends of the Everglades sued the South Florida Water Management District under the Clean Water Act (CWA). Plaintiffs believed the water district was violating §402 of the Clean Water Act by releasing pollutants from a pump system without a discharge permit. The Clean Water Act prohibits the "addition of any pollutant... from any point source" without a specific permit. The South Florida Water Management District claimed that it was not actually adding pollutants to the water, but merely transporting polluted water from one body of water to another, less polluted, body.

The U.S. District Court for the Southern District of Florida found that South Florida Water Management District had violated the CWA by using the pump. The 11th Circuit Court of Appeals affirmed.

The U.S. Supreme Court unanimously agreed to send the case back to the District Court to consider whether the water conservation area and the canal used to transport the water are distinct. If the District Court decides the two are not distinct, then the water district will not need a permit under the Clean Water Act. The Court rejected the water management district’s argument that the Act covers a point source only when pollutants originate from that source, not when pollutants originating elsewhere pass through the point source. A point source need only convey the pollutant to navigable waters.

III. State’s Dam Authority Confirmed

The opinion in the case of S.D. Warren v. Maine Board of Environmental Protection quoted from the findings of state environmental officials that the dams had caused long stretches of the natural river bed "to be essentially dry" and thus unavailable as habitat for fish and other organisms, and that some fish
and eels had been blocked from reaching their spawning and nursery waters. Environmental groups supported state regulations because dams change water temperature and oxygen levels in river water and block fish passage, even if they don't add pollutants to the water. Justice Souter said that changes in the river that destroy natural habitats of wildlife fall within a state's legitimate legislative business, and the Clean Water Act provides for a system that respects the states' concerns. Justice Souter went on to say that the Clean Water Act's state certifications under Section 401 “are essential in the scheme to preserve state authority to address the broad range of pollution.”

IV. The Dam Result

The ruling on rivers and dams resolved a clear conflict in the law. The Federal Power Act provides that hydropower dams are to be regulated by federal authorities with the aim of producing electricity. But the Clean Water Act says those who "discharge" anything into a state's navigable waters must obtain a permit from the state. As the court concluded in S.D. Warren, since water flowing over a dam is discharged back into the river, a state may regulate the operation of the dam. Had S.D. Warren prevailed, states would have lost their legal authority to protect their rivers and ensure a steady flow of water.

Environmental groups had been alarmed by the Court's decision last fall to hear S. D. Warren Company's appeal in the absence of the usual reasons for a grant of Supreme Court review, such as a conflict among the lower courts on the interpretation of a federal law. Every court to consider the meaning of "discharge" had reached the same conclusion. On an unexpected note, the Bush administration had argued in the case in support of the Maine Board of Environmental Protection.

V. S.D. Warren as Foreshadowing the scope of Federal Power under the CWA?


*S. D. Warren* has been characterized as “a reliable barometer of the importance as well as the controversy surrounding the recent application of various aspects of the CWA.” Other CWA decisions are expected to be handed down by the Supreme Court within a matter of weeks. Environmentalists are anxiously watching two other Clean Water Act cases still before the Supreme Court, *Carabell v. U.S. Army Corps of Eng’rs,* and *U.S. v. Rapanos.* Both from Michigan, they will determine whether federal regulators can continue to protect inland wetlands and small streams from development or pollution.

**A. Carabell v. U.S. Army Corps of Eng’rs,**

In *Carabell,* the plaintiffs applied to the U.S. Army Corps of Engineers to place approximately 57,000 cubic yards of fill on about 15 acres of wooded wetlands. The plaintiff’s property was next to an unnamed ditch, which connected to a drain, which emptied into a creek, which eventually emptied into lake St. Clair. When the unnamed ditch was excavated, the spoils were cast on either side of the ditch, creating a four foot wide upland berm that blocked surface water drainage from the plaintiff’s property into the ditch. The berm effectively severed the surface hydrological connection between the ditch and the plaintiff’s property.

The plaintiffs applied for a Section 404 permit to develop their land, which the Corps denied. The permit was denied on the ground that the proposed fill project would have major long term effects on water quality, terrestrial life, on wetlands, on conservation, and on the overall ecology of the area. The plaintiffs argued that the Corps lacked jurisdiction to deny their permit because the man made berm made the property no longer an “adjacent wetland”. The Sixth Circuit did not agree. It sustained the Corps definition of “adjacent”, which means “bordering, contiguous, or neighboring,” and includes “wetlands
separated by man made dikes, or barriers.¹⁶

**B. U.S. v. Rapanos**

In *Rapanos*, John and Judith Rapanos planned to construct a shopping center on property they owned. Following inspection of the property by state regulators, the Rapanoses were told that the site probably contained wetlands. They then hired a consultant who also concluded that about 50 acres or so of the property contained wetlands. Not liking the result of the two inspections, John Rapanos ordered the report and all references to it destroyed. He then proceeded to take matters into his own hands by bulldozing and filling the site. The EPA issued an order for him to cease. It was ignored. The Rapanoses were charged and convicted of illegally discharging fill material into about 54 acres of protected wetlands in violation of Section 404 of the Clean Water Act. The federal district court upheld the decision, as did the 6ᵗʰ Circuit.¹⁷ The defendants claim that the wetlands do not abut a navigable water, and that Congress has no Commerce Clause power over their property. In both *Carabell* and *Rapanos*, the private-property activists say the Clean Water Act protects only rivers and lakes where boats can float, not wetlands that are far inland. Decisions in these two cases are due by late June.

**VI. Implications for Groundwater Management Districts**

While the Supreme Court had so far refused the invitation to decide the extent of Congress’s constitutional power under the Clean Water Act (CWA), it has clarified and strengthened the power of the states under §401 in *S.D. Warren v. Maine Bd. of Environmental Protection*. This strengthened state power may in turn have an effect upon the oversight, extent of delegated authority and deference that the state provides sub-state entities, including groundwater management districts. Aside from a clarified and strengthened power that may now be exerted by states, however, the legal battle over federal regulation
of wetlands is likely to continue.

VII. Further Expansion of Federal Authority to Protect Wetlands

The Court now has the opportunity to further clarify the scope of Congress’s power under § 404 in the two upcoming consolidated cases of Carabell and Rapanos.

A continuing dispute between private property owners and governmental entities over wetlands and groundwater management is likely for several reasons. First, wetlands and groundwater management districts can be found in nearly every part of the United States, and thus present a ubiquitous concern of national importance. Second, both are highly regulated under the many sections of the CWA, especially §401 and §404. Finally, wetlands and groundwater resources are often located on private property, which means that private property owners have the incentive to contest what they deem excessive or improper regulation by the U.S. Army Corps of Engineers and/or the states.

The Supreme Court is apt to avoid the thorny constitutional issue of Congress’s general power under the Commerce Clause in the upcoming two cases concerning §404. It is likely to choose the more measured approach of clarifying the U.S. Army Corps of Engineers’s regulatory definition of the term “navigable waters” based on Congress’s intent, just as the Court chose to clarify the regulatory definition of “discharge” according to common usage by the EPA and FERC in S.D. Warren.

If this turns out to be the case, the impact of Carabell and Rapanos will be very important to federal and state regulators as well as the property owners of wetlands. The Supreme Court clearly exhibited a very strict enforcement of the Clean Water Act § 401 in S.D. Warren, and it can be expected that the Supreme Court will be just as strict in its interpretation of § 404 in the two major cases that will be decided later this month.
The Corps is currently the primary regulator of wetlands under the CWA, and not the states. To the extent that the Corps’s authority over “wetlands” will be narrowed, which is likely, this will shift additional regulatory responsibility to the states as seen in *S.D. Warren*. It is unlikely that states will embrace this “added” responsibility without enhanced federal financial aid to support their efforts. Most state budgets are already severely stretched, with little if any room for unfunded federal mandates.

So in the end, one may predict that the failure of a state to have a regulatory system to protect “isolated” wetlands or damaging discharge from groundwater sources will inevitably result in the loss of those wetlands and groundwater systems not protected by federal law.

ENDNOTES

1. Many courts have addressed the question whether the Clean Water Act governs discharges to groundwater, particularly in cases where the groundwater was shown to have a hydrological connection to nearby surface waters. See, e.g., *Riverside Bayview Homes*, 474 U.S. at 138-39 (finding that wetlands hydrologically connected to surface waters are within the jurisdiction of the Clean Water Act); *Exxon Corp. v. Train*, 554 F.2d 1310, 1312 n.1 (5th Cir. 1977) (holding that isolated groundwater is outside jurisdiction of CWA while reserving any conclusion whether that tributary groundwater is within the jurisdiction of the CWA); *United States Steel Corp. v. Train*, 556 F.2d 822, 832 (7th Cir. 1977) (concluding that groundwater is within jurisdiction of CWA); *Sierra Club v. Colorado Ref. Co.*, 838 F. Supp. 1428, 1434 (D. Colo. 1993) (concluding
that CWA does apply to groundwater hydrologically connected to surface water); *McClellan Ecological Seepage Situation v. Weinberger*, 707 F. Supp. 1182, 1193-94 (E.D. Cal. 1988) (finding that ground water hydrologically connected to surface water is regulated under the Clean Water Act); *New York v. United States*, 620 F. Supp. 374, 386 (D.C.N.Y. 1985) (assuming without discussion that groundwater is regulated if there is a hydrological connection with surface water); *United States v. GAF Corp.*, 389 F. Supp. 1379, 1383 (S.D. Tex. 1975) (holding that no permits are required under Clean Water Act for discharges into groundwater absent an allegation of hydrological connection between the ground water and the surface water); see also, Guy V. Manning, *The Extent of Groundwater Jurisdiction Under the Clean Water Act After Riverside Bayview Homes*, 47 LA. L. REV. 859 (1987) (arguing that Riverside Bayview Homes creates a convincing case resolving the issue of the Clean Water Act's jurisdiction over at least tributary groundwater).


4. John H. Minan, *Municipal Separate Storm System (MS4) Regulation under the Federal Clean Water Act: The Role of Water Quality Standards?* 42 San Diego L. Rev. 1215, 1224 n. 44 (Fall 2005) (noting the most recent guidance the Court has given on the Commerce Clause was *Solid Waste Agencies of North Cook County (SWANCC) v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001), where the Court "refused to address the constitutional reach of the Commerce Clause, holding instead that Congress, as a matter of statutory construction, did not intend the CWA to extend to isolated wetlands that provide habitat for migratory birds." Id.).


6. CWA §§502(12) and (6).


8. §402(a)(1)Except as provided in sections 318 and 404 of this Act, the Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 301(a) upon condition that such discharge will meet either (A) all applicable requirements under §301, §302, §306, §307, §308, and §403 of this Act, or (B) prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of the act.

9. CWA §402 (b)(8).


15. Sec. 404(a) of the Clean Water Act requires an issued permit, after notice and opportunity for public hearings, for the discharge of dredged or fill material into the navigable waters at specified disposal sites.
