Justice Kennedy and environmental water cases: A pragmatic approach to water from a Western perspective

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"Go west, young man" was the famous advice given to Civil War veterans. Justice Kennedy's opinions in U.S. Supreme Court cases involving the Clean Water Act have a similar western flavor. The Justice grew up and practiced law in Sacramento, California. Although Kennedy moved east to Washington, D.C., with his unanimous Senate confirmation in 1988, he still kept some of this western perspective throughout his opinions in key water cases during his tenure on the Court.

SWANCC (2001)

In *Solid Waste Agency of Northern Cook County v. U.S. Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC)*, Justice Kennedy joined a 5–4 majority opinion authored by Chief Justice Rehnquist holding that the so-called "migratory bird" rule issued by the U.S. Army Corps of Engineers was invalid. Justice Kennedy did not write separately, and his subsequent discussion of the Court's holding in *SWANCC* is reflected in a critical concurring opinion that he authored five years later.

Rapanos (2006)

In *Rapanos v. U.S.*, 547 U.S. 715 (2006), Justice Kennedy wrote a separate opinion that left an indelible impression on Clean Water Act jurisdiction. Kennedy was the sole vote in the middle of two warring 4-person separate opinions, one plurality authored by Justice Scalia and the dissent authored by Justice Stevens. By concurring only in the judgment but diverging dramatically from Justice Scalia's rationale, Justice Kennedy's separate concurring opinion resulted in a 4–1–4 split that still animates the debate over the scope of "navigable waters" today. Critically, it was in part Justice Kennedy's California roots that led to this stunning departure from what might otherwise have been a conservative majority that would have definitively limited the jurisdictional scope of the Clean Water Act.

In *Rapanos*, the Court considered two consolidated cases from Michigan involving the scope of the Clean Water Act's jurisdiction over wetlands and specifically the actions of two sets of individuals who deposited fill materials into three separate wetlands areas, all of which had either man-made or other intermediary connections that lead to undisputed navigable waters (such as Lake Huron). As Justice Scalia noted for the plurality, it was unclear whether the connections between the wetlands and the nearby drains or ditches were continuous or intermittent or whether those drains were the source of continuous or merely occasional flows of

water. 547 U.S. at 729. For four Justices, Scalia, Chief Justice Roberts, and Justices Thomas and Alito, the lack of a demonstrated permanent water connection or flow was fatal to the attempt to regulate the wetlands under the Clean Water Act. Instead, Justice Scalia reverted to a 1954 second edition of Webster's New International Dictionary to define the word "waters" as those "found in streams and bodies forming geographical features such as oceans, rivers, [and] lakes." 547 U.S. at 732. Justice Scalia then took his "originalist" dictionary-based definition to conclude that none of the terms "encompasses transitory puddles or ephemeral flows of water." 547 U.S at 733. Hence, Scalia wrote for four justices and concluded for the plurality, the "plain language of the statute simply does not authorize this '[Wet]Land is Waters' approach to federal jurisdiction." 547 U.S. at 734.

Justice Kennedy took an entirely different approach to the scope of the Clean Water Act. He started by noting that the plurality opinion's limitation of the statutory term "waters of the United States" to a permanent standing body of water of more or less continuous flow makes "little practical sense." He then cited as an example the Los Angeles River, which Justice Kennedy, the Californian, notes "ordinarily carries only a trickle of water and often looks more like a dry roadway than a river." *Rapanos*, 547 U.S. at 769 (Kennedy, J., concurring). Justice Kennedy, as a long-term western resident, knew that such a seemingly innocent river or stream bed can periodically "release water volumes so powerful and destructive that it has been encased in concrete and steel over a length of some 50 miles." *Id*. Kennedy then observed that although Congress could have excluded irregular waterways from the scope of the Clean Water Act, "nothing in the statute suggests it has done so." He took direct and devastating aim at a footnote in the plurality opinion suggesting that its favorite dictionary's (Webster's Second) reference to "flood or inundation" could be summarily ignored (as Justice Scalia attempted to do) as merely a "poetic reference." *Rapanos*, 547 U.S. at 770 (Kennedy, J., concurring).

Justice Kennedy next rejected the plurality's attempt to construe the Court's prior opinion in *SWANCC* as support for a proposition that there *must* be a direct wetlands–surface-water connection to impose regulatory requirements on the wetlands area. In rejecting the plurality's assertion that dredged or fill material such as that deposited by Rapanos into a wetlands area was unlikely to wash downstream, Justice Kennedy again took a utilitarian approach, noting that fill or silt could indeed wash downstream and have serious consequences for aquatic environments and waterways. Justice Kennedy cited several newspaper articles about the impacts of dams and other projects in creating silt and debris that damage the environment. Among his citations was a 1987 article from the Los Angeles Times discussing the impact of deforestation in Hawaii and in California on downstream water systems. *Rapanos*, 547 U.S. at 775 (citing, *inter alia*, MacDougall, *Damage Can Be Irreversible*, LOS ANGELES TIMES, June 19, 1987, pt. 1, p.10, col.4). The real-world observations Justice Kennedy used in rejecting the proposed plurality interpretation of the Act stem in part from his practical approach sharpened by personal knowledge and reading about western states.

Justice Kennedy's statutory interpretation concluded with a final rejection of the plurality's tone and approach to the interests of the United States in this area as "unduly dismissive." Rather, Justice Kennedy emphasized that: "Important public interests are served by the Clean Water Act in general and by the protection of wetlands in particular." *Rapanos*, 547 U.S. at 777 (Kennedy, J., concurring). Once again, his approach to the statute's outer jurisdictional boundaries was founded in a pragmatic approach. The Justice specifically observed that: "Scientific evidence indicates that wetlands play a critical role in controlling and filtering runoff." *Id.*

Finally, Justice Kennedy rejected the plurality's heavy reliance upon the Court's *SWANCC* opinion issued five years earlier. Justice Kennedy noted that the Court in *SWANCC* employed the "significant nexus" test to avoid a potential constitutional difficulty and federalism concerns. *Rapanos*, 547 U.S. at 776. Kennedy dismissed the applicability of such concerns, including federalism concerns, by noting that some 33 states plus the District of Columbia had filed an amici brief supporting a broader interpretation of the Clean Water Act. *Rapanos*, 547 U.S. at 777.

Coeur Alaska, Inc. v. Southeast Alaska Conservation Council **(2009)**

In this case, Justice Kennedy wrote for a conservative-minded majority of the Court holding that provisions of the Clean Water Act allowed the Army Corps, rather than the U.S. Environmental Protection Agency (EPA), to issue a permit under the act for a "slurry" discharge from a gold mining operation.

Kennedy's opinion is notable in two distinct ways: First, he stressed that the environmental damage to a small lake (an agreed-upon "navigable water") was temporary and that the alternative would be to place a pile of mining tailings on nearby wetlands which would rise "twice as high as the Pentagon." *Coeur Alaska, Inc.*, 557 U.S. 261, 269 (2009). Thus, Justice Kennedy for the majority was careful to emphasize that in this case there was at least a valid argument that the balance of environmental impacts tilted in favor of the issuance of the permit. *Id*. at 270.

Second, Justice Kennedy invoked a form of deference to an internal EPA memorandum, finding that both the statutory text and existing regulations were ambiguous. As a tie-breaker, Justice Kennedy for the majority deferred to the EPA memorandum interpreting the statutory text, citing to *Auer v. Robbins*, 519 U.S. 452, 461 (1997). The notion of deference to agency internal determinations under *Auer* is, however, the subject of considerable recent judicial skepticism, *see Keys v. Barnhart*, 347 F.3d 990, 993 (7th Cir. 2003) (Posner, J.), and even prompted a special concurrence by Justice Scalia about whether the type of administrative deference that the Court was according was really old-fashioned *Chevron* deference to agency interpretation of an ambiguous statute. 557 U.S. at 295–296.