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Preface

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ENVIRONMENTAL LAW IN INDIAN COUNTRY

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Table of Laws and Rules

Table of Cases

Index



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Preface

In the 2006-07 term, the U.S. Supreme Court gave us a flood of new thought on the topic of environmental law.

Too bad.

1. Clean Water Act

The high court closed out the 2005-06 term with its ruling in *Rapanos v. United States*.¹ The plurality opinion of four Justices (written by Scalia, J. and joined by Chief Justice Roberts and Justices Thomas and Alito) begins with a spasm of skepticism about “the immense expansion of federal regulation of land use” under the authority of an “enlightened despot” known to most of us as the U.S. Army Corps of Engineers.² In this story, there are no beneficiaries of wetlands regulation. None are mentioned, none acknowledged. The violator, Mr. Rapanos, is entirely a victim—facing 63 months in prison and hundreds of thousands of dollars in criminal and civil fines for the simple deed of “backfilling his own wet fields.”³

Mr. Justice Scalia’s determined pursuit of his dialectical hydrology would drive “intermittent” or “ephemeral” flows (and thus many waters and prairie potholes throughout the arid west) from the protective cover of “the waters of the United States.” He would do this by adding his weighty opinion on “common understanding”⁴ to Webster’s dictionary⁵ to arrive at a disdainful conclusion: “The plain language of the statute simply does not authorize this ‘Land is Waters’ approach.”⁶

Having redefined hydrology, Mr. Justice Scalia turns next to gravity. Science, for this man, is “entirely unnecessary . . . to reach the unremarkable conclusion that the deposit of *mobile* pollutants into upstream ephemeral channels is naturally described as an ‘addition . . . to navigable waters’ . . . , while the deposit of

¹Rapanos v. U.S., 547 U.S. 715, 126 S. Ct. 2208, 165 L. Ed. 2d 159 (2006).

²Rapanos v. U.S., 547 U.S. 715, 722, 126 S. Ct. 2208, 2215, 165 L. Ed. 2d 159 (2006), citing Sunding & Zilberman, The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process, 42 Nat. Res. J. 59, 74-76 (2002).

³Rapanos v. U.S., 547 U.S. 715, 126

S. Ct. 2208, 2215, 165 L. Ed. 2d 159 (2006).

⁴Rapanos v. U.S., 547 U.S. 715, 126 S. Ct. 2208, 2222, 165 L. Ed. 2d 159 (2006).

⁵Rapanos v. U.S., 547 U.S. 715, 126 S. Ct. 2208, 2228, 165 L. Ed. 2d 159 (2006).

⁶Rapanos v. U.S., 547 U.S. 715, 126 S. Ct. 2208, 2220-21, 165 L. Ed. 2d 159 (2006) (footnotes omitted).

stationary fill material generally is not.”⁷ Gravity is left to wondering whether it can bring “*stationary*” material downstream.⁸

The fifth vote in *Rapanos* (that of Mr. Justice Kennedy) would make the question of “navigable waters” turn on whether “a water or wetland [possesses] a ‘significant nexus’ to waters that are or were navigable in fact or that reasonably could be so made.”⁹ This has the virtue of leaving “navigable waters” under the cover of legal mystery (where they have been since *SWANCC*).¹⁰ It has the twin vices of high transaction costs (the geneology of the creek is always at issue) and of turning back the inquiry to the ancient days where imagined navigability was a relevant question. In the 1972 definition of “navigable waters,” Congress intended to do away with both inquiries. It sought to achieve its “maximum” Constitutional reach¹¹ under the commerce clause—an idea ignored and denied by the *SWANCC* majority and by now long forgotten.

2. Superfund Law

In 2004, the Supreme Court held in *Cooper Industries, Inc. v. Aviall Services, Inc.*¹² that private parties could seek contribution under Subsection 113(f) of CERCLA *only after* they had been sued under § 106 or § 107(a). A dreadful decision. It contradicted twenty-five years of environmental agencies’ advising private parties to be “proactive,” to do “the right thing,” to “get ahead of the curve,” to clean up on their own initiative, and to be creative without the heavy hand of a government lawsuit.

Cooper Industries taught all private lawyers that no good deed goes unpunished.

In 2007, a unanimous Supreme Court held in *United States v. Atlantic Research Corp.*,¹³ that a private potentially responsible party (PRP) can sue for contribution under Subsection 107(a). Not Subsection 113(f). But Subsection 107(a). You will hold your

⁷*Rapanos v. U.S.*, 547 U.S. 715, 745, n.11, 126 S. Ct. 2208, 2228 n.11, 165 L. Ed. 2d 159 (2006) (emphasis added).

⁸See David R. Montgomery, *Dirt: The Erosion of Civilizations* (U. Cal. Press, Berkeley, 2007).

⁹See *Rapanos v. U.S.*, 547 U.S. 715, 759, 126 S. Ct. 2208, 2236, 165 L. Ed. 2d 159 (2006) (Kennedy, J., concurring in the judgment).

¹⁰*Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 121 S. Ct. 675, 148 L. Ed. 2d 576 (2001).

¹¹See William H. Rodgers, Jr., *Environmental Law: Air & Water*, V.2, § 4.12 at 195-96, esp. 196 (1986, West, St Paul, Minn.) (summarizing the 1972 legislative history confirming “the broadest possible constitutional interpretation” and asserting a 1986 version of the state of the law: “courts now universally perceive Section 404 as representing a maximum constitutional bite”) (citations omitted).

¹²*Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157, 125 S. Ct. 577, 160 L. Ed. 2d 548 (2004).

¹³*U.S. v. Atlantic Research Corp.*,

breath as Mr. Justice Thomas walks you through the plain meaning of this statute to the obvious conclusion.

So the carnage of *Cooper Industries* is limited to three years, more or less. Is the decision in *Atlantic Research Corp.* a cause for celebration? It's more like finding a lost dog that should not have wandered away in the first place.

3. Clean Air Act

Considerable contemporary attention will be given to the Supreme Court's 5:4 decision in the "climate change" case—*Massachusetts v. Environmental Protection Agency*.¹⁴ For the court, Mr. Justice Stevens holds that the State of Massachusetts has standing to seek relief under the Clean Air Act to protect its territory from rising seas in the same sense that the state of Georgia could bring a lawsuit to defend against incoming SO₂ from a copper smelter.¹⁵ On the particular question of redressability, it was enough that the prospect of a legal victory could alleviate the injury if not fully prevent it.¹⁶

On the merits, the court holds that greenhouse gas emissions (such as CO₂) are "pollutants" under the Clean Air Act and that the EPA has a duty to regulate "emissions" from new motor vehicles upon a finding of "endangerment."¹⁷ Thus far, according to the majority, EPA "has offered no reasoned explanation for its refusal to decide whether greenhouse gases cause or contribute to climate change."¹⁸

Chief Justice Roberts, joined by Scalia, Thomas, and Alito, JJs, dissents, insisting that the legal challenges are "nonjusticiable."¹⁹ He takes umbrage at the invocation of *Tennes-*

127 S. Ct. 2331, 168 L. Ed. 2d 28, 22 A.L.R. Fed. 2d 735 (2007).

¹⁴Massachusetts v. E.P.A., 127 S. Ct. 1438, 167 L. Ed. 2d 248 (2007).

¹⁵Massachusetts v. E.P.A., 127 S. Ct. 1438, 1455 &n.17, 167 L. Ed. 2d 248 (2007) (discussing the famous environmental case of *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907)).

¹⁶Massachusetts v. E.P.A., 127 S. Ct. 1438, 1458, 167 L. Ed. 2d 248 (2007) ("While it may be true that regulating motor-vehicle emissions will not by itself *reverse* global warming, it by no means follows that we lack jurisdiction to decide whether EPA has a duty to take steps to *slow* or *reduce* it.") (emphasis in original).

¹⁷See *Massachusetts v. E.P.A.*, 127 S. Ct. 1438, 1454, 167 L. Ed. 2d 248 (2007), discussing Subsection 302(g), 42 U.S.C.A § 7602(g) (defining "air pollutant") and Subsection 202(a)(1), 42 U.S.C.A § 7521(a)(1) (directing Administrator to regulate the "emission" of "any air pollutant" from any class of "new motor vehicles" upon a determination that it may "cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare").

¹⁸Massachusetts v. E.P.A., 127 S. Ct. 1438, 1463, 167 L. Ed. 2d 248 (2007).

¹⁹Massachusetts v. E.P.A., 127 S. Ct. 1438, 1464, 167 L. Ed. 2d 248 (2007).

see *Copper* to develop a nontraditional role of standing.²⁰ And he shows how what he describes as “traditional standing” (dating perhaps to the *Lujan* decision in 1992)²¹ creates a set of interlocking traps for would-be plaintiffs:²²

Petitioners’ reliance on Massachusetts’s loss of coastal land as their injury in fact for standing purposes creates insurmountable problems for them with respect to causation and redressability.

.....

Redressability is even more problematic. To the tenuous link between petitioners’ alleged injury and the indeterminate fractional domestic emissions at issue here, add the fact that petitioners cannot meaningfully predict what will come of the 80 percent of global greenhouse gas emissions that originate outside the United States. ... [T]he domestic emissions at issue here may become an increasingly marginal portion of global emissions, and any decreases produced by petitioners’ desired standards are likely to be overwhelmed many times over by emissions increases elsewhere in the world.

.....

Petitioners’ difficulty in demonstrating causation and redressability is not surprising given the evident mismatch between the source of their alleged injury—catastrophic global warming—and the narrow subject matter of the Clean Air Act provision at issue in this suit. The mismatch suggests that petitioners’ true goal for this litigation may be more symbolic than anything else.

The dissent concludes with a denunciation of the old *SCRAP* standing case.²³ Its choice of language would apply more fittingly to the repudiations of *SCRAP* the high court has given us in the last thirty years.²⁴

Over time, *SCRAP* became emblematic not of the looseness of Article III standing requirements, but of how utterly manipulable they are if not taken seriously as a matter of judicial self-restraint. *SCRAP* made standing seem a lawyer’s game, rather than a fundamental limitation ensuring that courts function as courts and not intrude on the politically accountable branches. Today’s decision is *SCRAP* for a new generation.

Mr. Justice Scalia (joined by Chief Justice Roberts and Thomas and Alito, JJs), writes a separate dissent, giving won-

²⁰*Massachusetts v. E.P.A.*, 127 S. Ct. 1438, 1465, 167 L. Ed. 2d 248 (“The Court has to go back a full century in an attempt to justify its novel standing rule, but even there it comes up short.”).

²¹*Lujan v. Defenders of Wildlife*, 504 U.S. 555, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992).

²²*Massachusetts v. E.P.A.*, 127 S. Ct. 1438, 1468-70, 167 L. Ed. 2d 248 (2007).

²³*United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669 (1973), with background in a book by Neil Thomas Proto, *To a High Court: The Tumult and Choices that Led to United States of America v. SCRAP* (2006, Hamilton Books, Lanham, Md.).

²⁴*Massachusetts v. E.P.A.*, 127 S. Ct. 1438, 1471, 167 L. Ed. 2d 248 (2007).

PREFACE

drous and strange instruction on the meaning of “air pollutant,” “air pollution,”²⁵ and the adequacy of EPA’s reasons for wanting no part of these petitions.

In *Environmental Defense v. Duke Energy Corp.*,²⁶ the court holds (with Justice Thomas concurring in part) that replacement and redesign work to “extend the life of the units [at several of Duke Power’s coal-fired power plants] and allow them to run longer each day”²⁷ were “major modifications” that would require PSD permits. The small legislative wrinkle that determined advocacy made Supreme Court-worthy is that Congress used the same term “modification”²⁸ in the 1970 New Source Performance Standards (NSPSs) and then again in its 1977 upgrade of the Prevention of Significant Deterioration (PSD) program. Each time, the idea was that if the “modification” gave us more “air pollutants,” the sources would be answerable for them under the NSPS and PSD programs, respectively.

Both programs have foundered, in no small part because electric utilities have endeavored to extend the life of old plants without running awry of the “modification” requirements. Different rules at different times defining “modification” (one set in 1975, another in 1980) invited the contestants to exploit contradictions that arise in any complex system.²⁹ Duke Power convinced the Fourth Circuit that “modification” could only mean one thing under the Clean Air Act and that one thing was that the claimed increase in pollutants had to be measured by the hourly rate used for NSPSs. Their adversaries (the U.S. and environmental groups) said it was appropriate to look at “actual

²⁵Massachusetts v. E.P.A., 127 S. Ct. 1438, 1477, 167 L. Ed. 2d 248 (2007):

EPA’s conception of “air pollution”—focusing on impurities in the “ambient air” “at ground level or near the surface of the earth”—is perfectly consistent with the natural meaning of that term.

²⁶*Environmental Defense v. Duke Energy Corp.*, 127 S. Ct. 1423, 167 L. Ed. 2d 295 (2007).

²⁷*Environmental Defense v. Duke Energy Corp.*, 127 S. Ct. 1423, 167 L. Ed. 2d 295 (2007).

²⁸Defined in the 1970 Act (42 U.S.C.A. § 7411(a)(4)):

any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted.

²⁹This was known from the earliest days of the Clean Air Act. See W.H. Rodgers, Jr., *Environmental Law: Air & Water*, V. 1, § 1.2 at 10 (1986, West, St. Paul, Minn.) (“courts have confronted the problems of complexity and tangled obligation by developing a rule of independency of process that permits function A to be pursued without linking it to function B”). *Duke Power* does this.

annual discharge of a pollutant that will follow the modification,” regardless of the hourly rate.³⁰

The Fourth Circuit ruled that Congress’ use of identical statutory definitions could mean only that the conditions for a “modification” must be identical. This meant the single threshold test would be whether the changes had effected an increase in “the rate of discharge of pollutants measured in kilograms per hour.”³¹ But the Supreme Court holds that “the Court of Appeals’s [sic] efforts to trim the PSD regulations to match their different NSPS counterparts can only be seen as an implicit declaration that the PSD regulations were invalid as written.”³²

From the opinions, it is a downright mystery why Duke Power is arguing for an hourly rate (usually more stringent) and the U.S. and the environmental groups are arguing for an annual rate (usually less stringent). The briefing makes clear that the NSPS “hourly emissions rate” standard is indifferent to the time of operation and the intensity of operation. Functionally, it would permit a modernization project to increase an air pollutant emitted from a source by hundreds or thousands of tons per year.³³

4. Clean Water Act/Endangered Species Act

In *National Association of Home Builders v. Defenders of Wildlife*,³⁴ the Supreme Court holds (5:4) that the U.S. EPA was not obliged to consult under Subsection 7(a)(2)³⁵ as to likely effects on listed species resulting from its decision to approve transfer of NPDES permitting authority to the State of Arizona. Justice Alito’s decision for the court reaches this result by reading the transfer provisions of § 402(b) of the Clean Water Act as mandatory and nondiscretionary (“shall approve”; “By its terms, the statutory language is mandatory and the list exclusive; if the nine specified criteria are satisfied, the EPA does not have the discretion to deny a transfer application.”).³⁶ On this premise, then, Justice Alito describes the “question presented” as “whether § 7(a)(2) effectively operates as a tenth criterion on which the

³⁰Environmental Defense v. Duke Energy Corp., 127 S. Ct. 1423, 1430, 167 L. Ed. 2d 295 (2007).

³¹Environmental Defense v. Duke Energy Corp., 127 S. Ct. 1423, 1430, 167 L. Ed. 2d 295 (2007).

³²Environmental Defense v. Duke Energy Corp., 127 S. Ct. 1423, 1432, 167 L. Ed. 2d 295 (2007).

³³Sean H. Donahue et al., Brief for the Petitioners, *Environmental Defense v. Duke Energy Corp.* (July 2006).

³⁴National Ass’n of Home Builders v. Defenders of Wildlife, 127 S. Ct. 2518, 2531, 168 L. Ed. 2d 467 (2007).

³⁵16 U.S.C.A. § 1536(a)(2).

³⁶National Ass’n of Home Builders v. Defenders of Wildlife, 127 S. Ct. 2518, 2531, 168 L. Ed. 2d 467 (2007). Actually, the “mandatory” features of state program delegation are teeming with discretion. See W.H. Rodgers, Jr., *Environmental Law: Air & Water*, Vol. 2, § 4.26 at 376-80 (1986, West, St. Paul, Minn.). The dissent of Mr. Jus-

PREFACE

transfer of permitting power under the first statute must be conditioned.”³⁷

In concluding that “it does not,” the majority concedes that the answer to the question “requires us to mediate a clash of seemingly categorical—and, at first glance, irreconcilable—legislative commands.”³⁸ Approve an NPDES transfer application if the nine criteria are met on the one hand. Consult on “any action authorized, funded or carried out” to avoid jeopardy to endangered species on the other.³⁹ The majority “reconciles” the two statutes by holding that the mandatory ESA consultation provisions apply *only* to “actions in which there is discretionary Federal involvement or control.”⁴⁰ The majority has a story about why the administrators earned deference on this point. The dissenters have a contrary story.⁴¹

A dreadful decision. Completely wrong.

This case is about complying with two statutes not one. Indeed, the EPA in this very case thought it had a duty to consult under the ESA and it did consult. It proudly announced in the Federal Register that it had “conclude[d] the consultation process required by ESA Section 7(a)(2).”⁴² But Justice Alito patiently explained that this was a “stray statement,” a mere administrative “dictum.”⁴³ Next time, to be sure, this agency will not be caught *complying* with the Endangered Species Act.

tice Stevens is quite correct on this point (Opinion, § I, National Ass’n of Home Builders v. Defenders of Wildlife, 127 S. Ct. 2518, 2539-41 (2007)). Any State Attorney General imagining victory in the mandamus action recommended by Mr. Justice Alito would be met with full fusillades of EPA “discretion.”

³⁷National Ass’n of Home Builders v. Defenders of Wildlife, 127 S. Ct. 2518, 2525, 168 L. Ed. 2d 467 (2007).

³⁸National Ass’n of Home Builders v. Defenders of Wildlife, 127 S. Ct. 2518, 2531, 168 L. Ed. 2d 467 (2007).

³⁹Section 7(a)(2) of the Endangered Species Act (16 U.S.C.A. § 1536(a)(2)) says:

“[e]ach Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such

agency . . . is not likely to jeopardize” [endangered or threatened species or result in “destruction or adverse modification” of critical habitat].

⁴⁰National Ass’n of Home Builders v. Defenders of Wildlife, 127 S. Ct. 2518, 2533, 168 L. Ed. 2d 467 (2007)), quoting 50 C.F.R. § 402.03.

⁴¹Compare National Ass’n of Home Builders v. Defenders of Wildlife, 127 S. Ct. 2518, 2524, 168 L. Ed. 2d 467 (2007) (Alito opinion) with National Ass’n of Home Builders v. Defenders of Wildlife, 127 S. Ct. 2518, 2538, 168 L. Ed. 2d 467 (2007) (Stevens opinion).

⁴²Quoted in National Ass’n of Home Builders v. Defenders of Wildlife, 127 S. Ct. 2518, 2530, 168 L. Ed. 2d 467 (2007).

⁴³National Ass’n of Home Builders v. Defenders of Wildlife, 127 S. Ct. 2518, 2530, 168 L. Ed. 2d 467 (2007).

The dissenting opinion of Mr. Justice Stevens shows how easy it would be for the EPA to comply with both laws.⁴⁴ The agency managed to do it here. More could be said. None of the opinions cite § 7(a)(1)⁴⁵ of the ESA, which says that all agencies “shall utilize” their authorities to advance the aims of protecting species. EPA clearly could undertake this consultation if it so desired. None of the opinions cite § 105 of the National Environmental Policy Act,⁴⁶ which says that environmental goals are “supplementary” to “existing authorizations.” This requires consultation for reasons mentioned in a separate dissent by Mr. Justice Breyer.⁴⁷ None of the opinions cite the *three* Supreme Court NEPA decisions that establish the “comply-unless-impossible” test that should have been applied here.⁴⁸

Justice Alito looks no farther than the sorry precedent of *Department of Transportation v. Public Citizen*.⁴⁹ Agencies are now invited to scramble to avoid compliance with environmental laws by discovering compulsion under other mandates more suitable to their temperaments and politics. Will *Calvert Cliffs*⁵⁰ be forever lost to a clumsy performance such as this?

Appreciation is expressed to my secretary, word processor, graphic design expert, and helper, Cynthia Fester; and to my second-to-none librarians (among them Peggy Jarrett, Cheryl Nyberg, Mary Whisner, Ann E. Hemmens and Nancy McMurrer) who work with Professor Penny Hazelton at the University of Washington School of Law’s Marian Gould Gallagher Law Library.

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⁴⁴National Ass’n of Home Builders v. Defenders of Wildlife, 127 S. Ct. 2518, 2538, 168 L. Ed. 2d 467 (2007) (joined by Justice Souter, Justice Ginsburg, and Justice Breyer).

⁴⁵16 U.S.C.A. § 1536(a)(1).

⁴⁶42 U.S.C.A. § 4335.

⁴⁷National Ass’n of Home Builders v. Defenders of Wildlife, 127 S. Ct. 2518, 2553, 168 L. Ed. 2d 467 (2007) (Breyer, J., dissenting) (the “shared purpose” of the Clean Water Act and the Endangered Species Act “shows that § 7(a)(2) must apply to the Clean Water Act *a fortiori*”).

⁴⁸Flint Ridge Development Co. v. Scenic Rivers Ass’n of Oklahoma, 426

U.S. 776, 778, 96 S. Ct. 2430, 49 L. Ed. 2d 205 (1976); Weinberger v. Catholic Action of Hawaii/Peace Educ. Project, 454 U.S. 139, 145-46, 102 S. Ct. 197, 70 L. Ed. 2d 298 (1981); Andrus v. Sierra Club, 442 U.S. 347, 362-63, 99 S. Ct. 2335, 60 L. Ed. 2d 943 (1979).

⁴⁹Department of Transp. v. Public Citizen, 541 U.S. 752, 124 S. Ct. 2204, 159 L. Ed. 2d 60 (2004), discussed in William H. Rodgers, Jr., The Tenth U.S. Supreme Court Justice (Crazy Horse, J.) and Dissents Not Written, 34 ELR 11033, 11034 (2004).

⁵⁰Calvert Cliffs Coordinating Comm. v. Atomic Energy Commission, 449 F.2d 1109 (D.C. Cir. 1971), cert. denied, 404 U.S. 942 (1972).

PREFACE

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