



By Richard Lazarus

## Out Of The Soup Pot And Into The Fire?

Sooner is not always better. Or at least that is likely what environmentalists are thinking in finding themselves back in the Supreme Court led by newly minted Chief Justice John G. Roberts Jr. Only one week after his investiture, the Court granted review in three significant Clean Water Act cases: *Carabell v. U.S. Army Corps of Engineers*, *Rapanos v. United States*, and *S.D. Warren Co. v. Maine Department of Environmental Protection*. Because the lower courts in each had embraced broad constructions of the act's jurisdiction, lawyers for regulated industry celebrated the grants of review. All three cases will likely be argued this February on the same day. This column discusses only *Warren* in detail, leaving *Carabell* and *Rapanos* for a subsequent column.

*Warren* concerns the meaning of "discharge" under Section 401 of the act, which grants states the authority to certify whether federally licensed discharges adversely affect state water quality and to impose conditions on those discharges. In *Warren*, the Maine Supreme Court held that the flow from several dams amounted to such a "discharge." The state court ruled that the existence of a discharge did not require that water being conveyed either contain pollutants or be deposited into a water body different from its source of origin.

The Supreme Court likely granted review in *Warren* to address surface tension between the Maine court's reasoning and the Supreme Court's own opinion two years ago in *South Florida Water Management District v. Miccosukee*

*Tribe*. In *Miccosukee* the Court characterized as "not dispute[d]" that moving pollutants from one place to another within the same navigable water would not amount to a "discharge of a pollutant." Relying on the act's defining "discharge of a pollutant" to "mean[] ... any addition of any pollutant to navigable waters from any point source," the Court reasoned that movement of pollutants within a single body of water would not constitute an "addition" of a pollutant to navigable waters.

Quoting from a lower court opinion, the Court stated that "if one takes a ladle of soup from a pot, lifts it above the pot, and pours it back into a pot, one has not 'added' soup or anything else to the pot." The petitioner in *Warren*, accordingly, presented the Court with a simple argument: the Maine court should be reversed because there is no "addition" and therefore no "discharge" when unpolluted water is being redeposited in the same water body from which it originated.

Environmental law, however, is rarely simple. The first complication is that *Warren* is a Section 401 case and *Miccosukee* was a Section 301 case. Section 301 makes unlawful the "discharge of a pollutant," but the statutory trigger for Section 401 is a "discharge" without more. And while the Water Act provides that the term "discharge . . . includes a discharge of a pollutant." It does not provide that the term "discharge" "means" discharge of a pollutant.

That difference in wording might, in other contexts, seem to be much ado about nothing. But not clearly so for the Water Act. The act's definition provision uses the restrictive verb "means" in defining each of the other 22 terms of art set forth and only the term "discharge" is accompanied by the patently more open-ended verb "includes." Consequently, Maine can forcefully argue that neither the requirement of a "pollutant" nor an "addition" is required for a "discharge" and that the corresponding language in the *Miccosukee* is inapposite.

The second complication is that the serious federalism concerns that troubled the Court in *Miccosukee* are not present in *Warren*. In *Miccosukee*, many states argued that a broad construction of Section 301 would impede state agency ability to manage their water

supplies by requiring them to obtain federal permits for water allocation measures. But, in *Warren*, a broad construction of Section 401 empowers only those same state agencies by allowing them to oversee federal agencies that license activities that adversely affect water quality within each state's borders. Federalism concerns therefore support a broad construction of the act.

Finally, the analogy to ladles made by the Court in *Miccosukee* can be fairly distinguished from the actual operation of a dam and its impact on water quality. While conveyances within a single waterbody that are instantaneous in both time and space to the initial withdrawal may not implicate Water Act concerns, not all conveyances of pollutants within a single waterbody are similarly so benign. A pipe that conveys pollutants from one part of the Mississippi River to another part in a more concentrated form hundreds of miles away should trigger the full scope of the act's concerns, as would a pipe that withdraws polluted water from one part of Lake Tahoe at one time of year and deposits it back several months later in far more concentrated form when the lake temperature is less able to assimilate the pollution.

Indeed, there is even reason to question the *Miccosukee* Court's assumption that the parties in that case agreed that conveyances within a single waterbody do not trigger Section 301. The *Miccosukee* Tribe filed a petition for rehearing that cited statements at oral argument and in the brief directly contradicting the Court's supposition. The Court's denial of that petition does not amount to a ruling on the underlying merits.

The outcome in *Warren* necessarily remains uncertain until the Court rules next spring. But what is certain is that, whatever that outcome, the ruling will be the first sign of where the Roberts Court is going in environmental law.

(NOTE: Immediately before this column went to press, the author was retained to serve as counsel for American Rivers and Friends of the Presumpscot River, intervenors in the case aligned with Maine.)

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