



## Chapter 10

# Rivers, Streams and Swales, and the Jurisdictional Reach of the Clean Water Act After *Rapanos v. United States*<sup>1</sup>

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<sup>1</sup> *Rapanos v. United States*, \_\_\_ U.S. \_\_\_, 126 S. Ct. 2208 (2006).

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## § 10.01. Introduction.

The text of the Commerce Clause appears simple. Article 1. Section 8 at Clause 3 provides that, “Congress shall have power . . . to regulate commerce with foreign nations, and among the several states.” Applying these simple words to factual scenarios, however, has proven to be quite complex. Indeed, the Commerce Clause is the constitutional foundation upon which Congress enacts economic regulation, as well as most statutes that regulate and protect the environment. Although cases that interpreted the Commerce Clause to limit<sup>3</sup> or enlarge<sup>4</sup> Congress’ authority in economic matters have historically created the most controversy, the decision of the Court in *Rapanos v. United States*<sup>5</sup> is proving to be no less divisive.

The fact that a fractured Court reached only a judgment—but no opinion—in *Rapanos* is emblematic of the controversy. In another sense, however, the controversy over the decision is puzzling. The use of the Commerce Clause to regulate waters of the United States is among its earliest applications.<sup>6</sup> Moreover, fears that the opinion may limit congressional reach over minor stream reaches,<sup>7</sup> particularly those affected by surface coal mining in Central Appalachia, overlooks the authority of states to regulate the same streams without regard to the limitations imposed on federal authority.

The purpose of this chapter is fourfold. First, it will examine the constitutional basis—and limitations—for Clean Water Act<sup>8</sup> regulation of ephemeral and intermittent streams. Second, it will examine why *Rapanos* may be a far more significant case for limiting federal authority than it seems. Third, it will identify the options that a coal operator might have to raise a

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<sup>3</sup> See, e.g., *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936).

<sup>4</sup> See, e.g., *NLRB v. Jones and Laughlin Steel Corp.*, 301 U.S. 1 (1937); *United States v. Darby*, 312 U.S. 100 (1941); *Katzenbach v. McClung*, 379 U.S. 294 (1964); *Heart of Atlanta Motel, Inc., v. United States*, 379 U.S. 241 (1964).

<sup>5</sup> *Rapanos v. United States*, \_\_\_ U.S. \_\_\_, 126 S. Ct. 2208 (2006).

<sup>6</sup> *Gibbons v. Ogden*, 9 Wheat. (22 U.S.) 1 (1824).

<sup>7</sup> See generally, 31 *Harv. Envtl. L. Rev.* 321 (2007).

<sup>8</sup> 33 U.S.C. § 1251 *et seq.* (hereinafter CWA).

jurisdictional objection to traditional CWA § 404 permitting. Fourth, it will suggest a resolution to the on-going controversy to surface mining in Central Appalachia that avoids a Commerce Clause decision.

### [1] — The Commerce Clause as a Tool of Regulation.

The Marshall Court interpreted the Commerce Clause in *Gibbons v. Ogden*<sup>9</sup> to define the extent and authority of Congress to legislate. In one of its most famous expressions, the Court declared that “Commerce, undoubtedly, is traffic, but it is something more—it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse.”<sup>10</sup> The case actually struck down the attempt by one state to regulate coastal traffic originating in a neighboring state, thus preventing discrimination by one state against another in interstate commerce.<sup>11</sup>

Following the Civil War the American economy grew and not only developed true national markets, but became connected through the mechanism of railroads. The Court applied the Commerce Clause to uphold the “incidental” regulation of purely intrastate commerce when the full regulation of interstate commerce so required.<sup>12</sup> Notwithstanding the expansion of the application of the Commerce Clause, the Court still insisted on distinguishing certain aspects of commerce as beyond its reach. For example, “manufacturing”<sup>13</sup> and “mining”<sup>14</sup> remained activities deemed as being so purely local and “indirect” as beyond the power of Congress to regulate under the Commerce Clause.

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<sup>9</sup> *Gibbons v. Ogden*, 22 U.S. 1 (1824)(9 Wheat.).

<sup>10</sup> *Id.* at 190-191.

<sup>11</sup> *Id.*

<sup>12</sup> *Shreveport Rate Cases*, 234 U.S. 242, 251 (1914)(“[M]atters having such a close and substantial relation to interstate traffic that the control is essential or appropriate to the security of that traffic, to the efficiency of the interstate service, and to the maintenance of the conditions under which interstate commerce may be conducted upon fair terms and without molestation or hindrance.”).

<sup>13</sup> *United States v. E.C. Knight Co.*, 156 U.S. 1(1895).

<sup>14</sup> *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936).