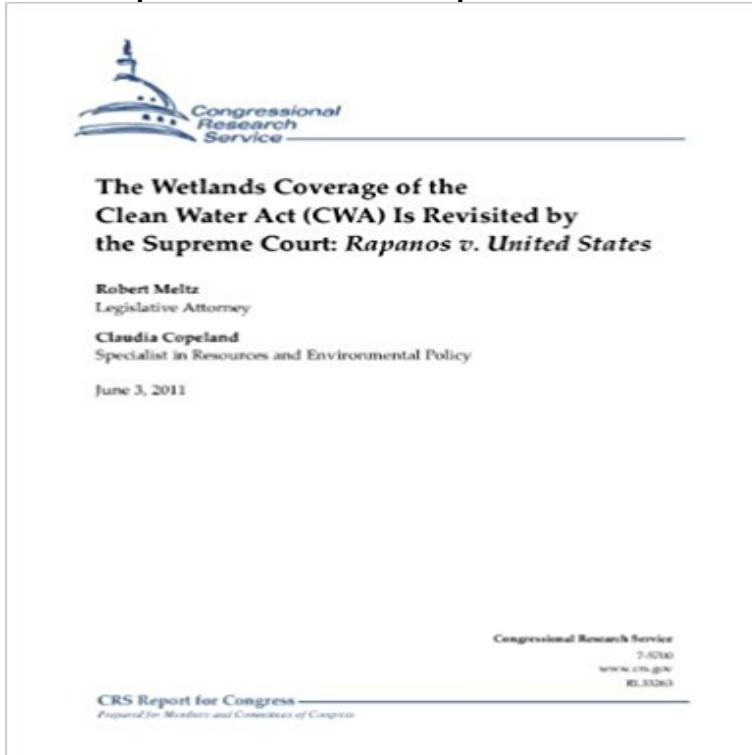


The Wetlands Coverage of the Clean Water Act (CWA) Is Revisited by the Supreme Court: Rapanos v. United States



In 1985 and 2001, the Supreme Court grappled with issues as to the geographic scope of the wetlands permitting program in the federal Clean Water Act (CWA). In 2006, the Supreme Court rendered a third decision, *Rapanos v. United States*, on appeal from two Sixth Circuit rulings. The Sixth Circuit rulings offered the Court a chance to clarify the reach of CWA jurisdiction over wetlands adjacent only to nonnavigable tributaries of traditional navigable waters including tributaries such as drainage ditches and canals that may flow intermittently. (Jurisdiction over wetlands adjacent to traditional navigable waters was established in one of the two earlier decisions.) The Court's decision provided little clarification, however, splitting 4-1-4. The four-justice plurality decision, by Justice Scalia, said that the CWA covers only wetlands connected to relatively permanent bodies of water (streams, rivers, lakes) by a continuous surface connection. Justice Kennedy, writing alone, demanded a substantial nexus between the wetland and a traditional navigable water, using an ambiguous ecological test. Justice Stevens, for the four dissenters, would have upheld the existing broad reach of Corps of Engineers/EPA regulations. Because no rationale commanded the support of a majority of the justices, lower courts are extracting different rules of decision from *Rapanos* for resolving future cases. Corps/EPA guidance issued in December 2008 says that a wetland generally is jurisdictional if it satisfies either the plurality or Kennedy tests. In April 2011, the agencies proposed revised guidance intended to clarify whether waters are protected by the CWA, but this proposal is controversial. The ambiguity of the *Rapanos* decision and questions about the agencies guidance have increased pressure on EPA and the Corps to initiate a rulemaking to promulgate new regulations,

but also on Congress to provide clarification. In the 111th Congress, legislation intended to do so was approved by a Senate committee (S. 787, the Clean Water Restoration Act), but no further legislative action occurred. Similar legislation has not been introduced in the 112th Congress. The legal and policy questions associated with Rapanos regarding the outer geographic limit of CWA jurisdiction and the consequences of restricting that scope have challenged regulators, landowners and developers, and policymakers for more than 30 years. The answer may determine the reach of CWA regulatory authority not only for the wetlands permitting program but also for other CWA programs; the CWA has one definition of navigable waters, meaning waters of the United States, that applies to the entire law. While regulators and the regulated community debate the legal dimensions of federal jurisdiction under the CWA, scientists contend that there are no discrete, scientifically supportable boundaries or criteria along the continuum of wetlands to separate them into meaningful ecological or hydrological compartments. Wetland scientists believe that all such waters are critical for protecting the integrity of waters, habitat, and wildlife downstream. Changes in the limits of federal jurisdiction highlight the role of states in protecting waters not addressed by federal law. From the states perspective, federal programs provide a baseline for consistent, minimum standards to regulate wetlands and other waters. Most states are either reluctant or unable to take steps to protect non-jurisdictional waters through legislative or administrative action.

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