Turtles all the way down: Justice Scalia and the Clean Water Act

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Despite his huge presence on the U.S. Supreme Court from 1986 to 2016, Justice Antonin Scalia did not loom large in Clean Water Act (CWA or Act) jurisprudence. Scalia authored only two CWA opinions during his lengthy tenure: *Rapanos v. United States,* 547 U.S. 715 (2006) and *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208 (2009). He participated in 20 CWA decisions while on the Court, and, as was his style, wrote separate concurring or dissenting opinions in almost half of those cases. The Justice frequently split his concurrence or dissent in each case based on the issues. He was anything but shy.

Because Justice Scalia authored only two CWA opinions, his impact on the Act was limited. But those two cases offer a perfect snapshot of the Scalia we all knew—at times surprising, often confounding, and, usually, strictly construing the statute at hand. In *Entergy*, the Court held that the U.S. Environmental Protection Agency (EPA) permissibly relied on cost-benefit analysis in setting national performance standards and in providing cost-benefit variances from those standards as part of the Phase II power plant regulations. Scalia gave deference to EPA's reading of the CWA, holding that "best technology available for minimizing adverse environmental impacts" can mean the technology that most *efficiently* produces a good, rather than a technology that achieves the greatest reduction in adverse environmental impacts at a reasonable cost to industry.

But no case personifies Scalia's style more than *Rapanos.* The issue in *Rapanos* was whether the petitioner's wetland, which was distant from any larger rivers and connected to downstream rivers via a series of much smaller ditches and creeks, was a "water of the United States." The CWA regulates discharges to "navigable waters." Congress defined navigable waters as "the waters of the United States" but was largely silent on what the term meant, by default leaving EPA and the U.S. Army Corps of Engineers (Corps) to flesh it out. As a result, the EPA/Corps definition of "waters of the United States" has been the source of much litigation since Congress passed the CWA in 1972.

In his plurality opinion in *Rapanos*, Scalia was foremost a textualist (a term he used to describe himself), carefully analyzing the words of the statute to divine what Congress intended. Scalia, in his usual style, attacked the ambiguous statutory language, not by referring to the Congressional Record, but by turning to *Webster's Dictionary* to discern what Congress meant by its use of the term "waters." He concluded:

> [i]n sum, on its only plausible interpretation, the phrase "the waters of the United States" includes only those relatively permanent, standing or continuously flowing bodies of water "forming geographic features" that are described in ordinary parlance as "streams[,] . . . oceans, rivers, [and] lakes." See Webster's Second 2882. The phrase does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall. The Corps' expansive interpretation of the "the waters of the United States" is thus not "based on a permissible construction of the statute."

547 U.S. at 739.

Scalia's interpretation of the CWA was completely new—he read the Act in ways no court, the agencies, or Congress itself had ever considered—and in so doing significantly curtailed the scope of the Corps/EPA definition of "waters of the United States" that had been in place for 35 years. His opinion was also internally inconsistent. He concluded that intermittent streams were not covered by the Act, but opined in footnote 5 that seasonal rivers are. Seasonal rivers are by definition intermittent. How can a river with a well-defined bed and bank (a geographic feature) that carries 15,000 cubic feet per second of flow (a torrent) for months in the spring and early summer, but dries up every summer (either naturally or through irrigation diversions), not be a "relatively permanent body of water?" Such intermittent streams exist in many places in the arid West, and they constitute an important part of the nation's hydrology. Yet one can read Scalia's opinion to conclude that such water bodies are not protected by the Act owing to Congress' use of the term "water" in the definition.

While Scalia generally professed to be motivated solely by his apolitical interpretation of the words of the statute, he tipped his conservative hand. He devoted several pages of the introduction to his plurality opinion in *Rapanos* to a discussion of how expensive and onerous the wetlands permitting procedures are. If his strict-construction methodology were correct—and we should only look to the text of the statute to divine its meaning—why lay out a background of the perceived negative impacts of the regulation? It should be irrelevant.

In *Rapanos*, Justice Kennedy wrote a solo concurring opinion that expanded on the significant nexus theory of jurisdiction that was first established in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001). Scalia harshly attacked Justice Kennedy's concurring opinion for its lack of logical foundation. To make his point, Scalia recounted the classic story of the guru who thought the world was supported on the back of a tiger, which was supported by an elephant, which was supported by a giant turtle. When asked what was under the turtle, the guru hesitated, then replied, well, it was "turtles, all the way down." Scalia thought Kennedy's significant nexus theory of CWA jurisdiction was similarly balanced on the back of turtles.

Say what you want about his politics or his arguable overreliance on strict statutory construction, Justice Scalia wielded a mighty pen. One can admire the quality of the work

without admiring the outcomes. His insistence on approaching all legal analyses as a "textualist" was arguably no less open to abuse than traditional legal analyses that rely on legislative history and policy to interpret statutory ambiguity. Nevertheless, one cannot question Scalia's sharp intellect and his willingness to challenge judicial orthodoxy. He was a gadfly and every court needs at least one to keep the majority honest. Scalia was pugnacious, dismissive of those who disagreed with him, sometimes internally inconsistent, yet always persuasive. And he was never boring.