

University of Richmond Law Review

Volume 40

Issue 4 *Allen Chair Symposium: State of the Chesapeake Bay in the Twenty-First Century*

Article 4

5-1-2006

Rapanos, Carabell, and the Isolated Man

Joel B. Eisen

University of Richmond School of Law

Follow this and additional works at: <https://scholarship.richmond.edu/lawreview>

 Part of the [Environmental Law Commons](#), [Legislation Commons](#), [Natural Resources Law Commons](#), and the [Water Law Commons](#)

Recommended Citation

Joel B. Eisen, *Rapanos, Carabell, and the Isolated Man*, 40 U. Rich. L. Rev. 1099 (2006).

Available at: <https://scholarship.richmond.edu/lawreview/vol40/iss4/4>

This Article is brought to you for free and open access by the Law School Journals at UR Scholarship Repository. It has been accepted for inclusion in University of Richmond Law Review by an authorized editor of UR Scholarship Repository. For more information, please contact scholarshiprepository@richmond.edu.

RAPANOS, CARABELL, AND THE ISOLATED MAN

Joel B. Eisen **

We gather yet again this year at the University of Richmond to discuss the deplorable state of the Chesapeake Bay and the concerted effort needed to bring it back from the brink of death. The state of the Bay seems not much better than it did eleven years ago, when a group of wise souls who cared deeply about the Bay assembled at this law school to revisit the Kepone incident and call for more action to stem pollution in the Bay.¹ To no one's surprise, unfortunately, that august group assembled in our Moot Court Room did not solve the Bay's problems.

In some respects, the news today is even worse. The Chesapeake Bay Foundation reports that:

Pollution is choking the Bay and many of its tributary rivers. In the summer of 2005, 41 percent of the volume of the Bay was considered a "dead zone," an area with insufficient oxygen to support marine life. The Chesapeake Bay Program, an arm of the U.S. Environmental Protection Agency (EPA), recently declared that the size of this area is the largest on record.²

** Professor of Law, University of Richmond School of Law. J.D., 1985, Stanford Law School; B.S., 1981, Massachusetts Institute of Technology.

The author thanks students Clarissa Berry, Michael Wall, and Crista Whitman for their research assistance, and Jon Mueller of the Chesapeake Bay Foundation for his insights. Also, thanks are due to my colleague Carl Tobias and the *University of Richmond Law Review* for keeping the issue of Bay cleanup in the public eye, and to Erin Ryan for her wise counsel.

1. See generally The Honorable Robert R. Merhige, Jr., et al., Panel Discussion, *Allied Chemical, the Kepone Incident, and the Settlements: Twenty Years Later*, 29 U. RICH. L. REV. 493 (1995) (discussing the environmental effects and legal consequences of the release of the chemical Kepone from a manufacturing facility into the James River, a tributary of the Chesapeake Bay).

2. Brief for the Chesapeake Bay Foundation as Amici Curiae Supporting Respondents at 1, *Rapanos v. United States*, 376 F.3d 629 (6th Cir. 2004) (No. 04-1034), *Carabell v. U.S. Army Corps of Eng'rs*, 391 F.3d 704 (6th Cir. 2004) (No. 04-1384) [hereinafter *CBF Amicus Brief*]; see also Jon A. Mueller & Joseph Tannery, *Why Does the Chesapeake Bay Need Litigators?* 40 U. RICH. L. REV. 1113 (2006).

What's different now, and possibly encouraging, is the emergence of a high-profile effort, first announced by outgoing Governor Mark Warner, to steer millions of dollars of state funding toward the Bay.³ The Virginia General Assembly is likely to go along with this request.⁴ Even if it does, that is just a down payment on the eventual billions it will take to curb pollution and bring the Bay back.⁵

More than that, we know, as we have known for years, that real action will take enforceable limits on personal and commercial behavior, both of which have been exceedingly difficult to put into place⁶—if you don't believe me, just ask the poultry farmers.⁷

3. See Rex Springston, *Board OKs Bay Rules: Warner Proposes Funds 'Strict' Regulations Require Improvements to About 125 Sewage Plants and Factories*, RICH. TIMES-DISPATCH, Nov. 22, 2005, at B1; see also *Gov. Warner's Budget Proposal*, RICH. TIMES-DISPATCH, Jan. 8, 2006, at C2.

4. See Chesapeake Bay Foundation, *Va. House Republicans Back \$240 Million for Bay Cleanup*, Jan. 25, 2006, <http://www.cbf.org/site/News2?abbr=VAGA2006b&page=NewsArticle&id=13417>. While the news is good, the source of these funds poses a continuing problem. The millions spent in 2006 would be a short-term allocation of funds in the current Virginia state budget. Fred Carroll, *Fight for Funds Might See Highways vs. Waterways*, DAILY PRESS (Newport News, Va.), Jan. 17, 2006, available at 2006 WLNR 923781. The remaining problem, then, is that Bay cleanup funding continues to be subject to the vagaries of budgetary winds blowing in each General Assembly session. If too much funding is needed for transportation, then there is perhaps less Bay cleanup funding. This untenable situation has been the subject of much recent attention. See, e.g., *id.* Virginia House Joint Resolution 640, enacted in 2005, established a joint subcommittee that met throughout 2005 to analyze long-term funding options for Bay cleanup. H.J. Res. 640, 2005, Gen. Assem., Reg. Sess. (Va. 2005). The joint subcommittee meetings produced much heat but no light: there was no agreement on a specific funding mechanism. In the 2006 General Assembly session, a number of bills were introduced to create just that (in different imaginative ways), see, e.g., S.B. 626, 2005 Gen. Assem., Reg. Sess. (Va. 2005), but none of them passed and the fate of permanent cleanup funding is uncertain. Senator Frederick Quayle (R-Chesapeake) sponsored Senate Bill 626, to establish a dedicated source of \$70 million in annual funding for Bay cleanup from a lodging fee and recordation tax. See *id.* In February 2006, the General Assembly carried over Quayle's bill for one year, which is the equivalent of killing a bill in Virginia's part-year legislature. See Chesapeake Bay Foundation, *Dedicated Funding Bill Carried Over for One Year*, http://www.cbf.org/site/DocServer/626_Carryover-doc?docID=4983 (last visited Mar. 30, 2006). Still, proponents of long-term funding solutions were optimistic that the Assembly would eventually implement some form of solution. See *id.*

5. The resolution establishing the joint subcommittee that examined long-term funding options stated in part, "the cost of achieving the required reductions in nitrogen and phosphorous pollution in Virginia is estimated to exceed \$3 billion." H.J. Res. 640, 2005 Gen. Assem., Reg. Sess. (Va. 2005).

6. See CHESAPEAKE BAY FOUNDATION, *MANURE'S IMPACT ON RIVERS, STREAMS AND THE CHESAPEAKE BAY 3* (2004), available at <http://cbf.org/site/DocServer/0723ManureReportEmbargoed.pdf?dpcID=2083>.

7. See generally *id.* at 4 (documenting the severe impacts of poultry and other animal wastes on the Bay). Making those involved take responsibility for this problem can be difficult. In 2003, the Maryland Department of the Environment stopped its "co-permitting"

Market-based “trading” programs such as the proposed “nutrient trading” system⁸ may or may not be the answer. Unlike the well-known program of trading acid rain allowances under the Clean Air Act (“the CAA”),⁹ there are far more sources of water pollution involved. Therefore, complex mechanisms would be required to achieve some improvements in water quality. The idea of “nutrient trading” raises more questions than answers,¹⁰ and I suspect it will be quite a few years before a scheme of this sort is in place, let alone before we can know if it worked.

The size of the Chesapeake Bay watershed and the multiplicity of polluters dashes any hope for a quick fix to the Bay’s problem. In the dense lingo of environmental law, cleanup of the Bay relies on the adoption of workable measures to deal with pollution from a wide array of “nonpoint sources”¹¹—essentially sources you can-

process that required chicken processors to help farmers dispose of wastes. See Tim Craig, *Farmers Are Left To Dispose of Waste; Md. Reverses Policy Forcing Poultry Processors to Help*, BALTIMORE SUN, June 15, 2003, at 1B; see also *Progress in Safeguarding Chesapeake Bay: Hearing Before the H. Comm. on Government Reform*, 108th Cong. (2004) (statement of Donald F. Boesch, President, University of Maryland Center for Environmental Science), available at <http://www.chesapeakebay.net/pubs/GovtReformBoeschFinal.pdf> (observing that “[r]eductions in agricultural nonpoint sources have been difficult because of limitations in the effectiveness of management practices and economic constraints”).

8. See VA. CODE ANN. §§ 62.1-44.19:12 to :19 (Cum. Supp. 2005) (establishing a “Chesapeake Bay Watershed Nutrient Credit Exchange Program”); Va. Dep’t of Env’tl. Quality, Notice of Intended Regulatory Action: Adopt General Virginia Pollution Discharge Elimination System (“VPDES”) Watershed Permit Regulation For Total Nitrogen and Total Phosphorus Discharges and Nutrient Trading In the Chesapeake Bay Watershed in Virginia (May 2, 2005), available at <http://www.deq.state.va.us/vpdes/pdf/pnnu-trienttradingNOIRA.pdf> (proposing a watershed-based permit to serve as a foundation for nutrient trading). The Virginia Department of Environmental Quality’s (“VDEQ”) home page for the Watershed General VPDES Permit for Nutrient Discharges to the Chesapeake Bay is located at <http://www.deq.state.va.us/vpdes/>.

9. See Clean Air Act, 42 U.S.C. §§ 7651, 7651a-7651o (2000).

10. For a discussion of the challenges facing Virginia’s program, see Scott Harper, *Virginia Program To Let Facilities Trade Water-Pollution Credits*, VIRGINIAN-PILOT (Norfolk, Va.), Apr. 9, 2005. The extensive literature on nutrient trading programs includes Tom Arrandale, *Trading for Clean Water*, GOVERNING, Apr. 2004, at 32; James Boyd, *The New Face of the Clean Water Act: A Critical Review of the EPA’s New TMDL Rules*, 11 DUKE ENVTL. L. & POL’Y F. 39, 78–85 (2000) (discussing economic considerations and practical challenges of nutrient trading); Richard D. Horan & James S. Shortle, *When Two Wrongs Make a Right: Second-Best Point-Nonpoint Trading Ratios*, 87 AM. J. AGRIC. ECON. 340 (2005) (discussing the economic theory underlying nutrient trading); Thomas K. Rupert, *Water Quality Trading and Agricultural Nonpoint Source Pollution: An Analysis of the Effectiveness and Fairness of EPA’s Policy on Water Quality Trading*, 15 VILL. ENVTL. L.J. 1 (2004) (explaining the theory behind, advantages of, and disadvantages of trading); Andrew M. Wolman, *Effluent Trading in the United States and Australia*, 8 GREAT PLAINS NAT. RES. J. 1, 11–12 (2003) (discussing the history and economics of effluent trading programs in the United States).

11. E.P.A., *What is Nonpoint Source (NPS) Pollution? Questions and Answers*,

not “point to,”¹² as we instruct our students in environmental law courses. It may not seem like much when I put fertilizers on my suburban lawn, but when combined with the acts of numerous others in my subdivision, it is obvious that cleaning up the Bay is going to require a lot of effort on the part of many individuals. I wish my suburban neighbors did more for the Bay than just put “Save the Bay” bumper stickers on their wagons and SUVs, but they do not. They are not alone, of course, and the fact that controlling nonpoint source pollution has proven difficult to do in the mid-Atlantic region and nationwide, despite efforts by Congress and the states for several decades,¹³ only adds to the magnitude of the task at hand.

Of course, progress in environmental law always starts with a problem like this. We are always trying to take a long-term view, and requiring (or cajoling, in the case of incentive programs) someone—or a lot of someones—to internalize environmental costs they would not otherwise consider. We assume that in the absence of Clean Water Act (“CWA”) permits,¹⁴ widget factories would dump their excess wastes into water bodies without so much as a fare-thee-well. Environmental protection also has had a collective nature about it: we are all in it together or not at all.¹⁵

<http://www.epa.gov/OWOW/NPS/qa.html> (last visited Apr. 8, 2006) (“Nonpoint source (NPS) pollution . . . comes from many diffuse sources.”). There is no statutory or regulatory definition of a nonpoint source; instead, any source of water pollution that is not a point source is treated as a nonpoint source. *See, e.g.*, Joel B. Eisen, *Toward a Sustainable Urbanism: Lessons From Federal Regulation of Urban Stormwater Runoff*, 48 WASH. U. J. URB. & CONTEMP. L. 1, 37–38 (1995) (describing this basic division in the Clean Water Act as applied to the problem of urban stormwater runoff, which originates from a nonpoint source—driveways and land—and flows through point sources—outfalls—into water bodies).

12. *See* 33 U.S.C. § 1362(14) (2000) (defining the term “point source” to include a number of tangible sources to which you could actually point).

13. *See* Eisen, *supra* note 11, at 38–39 & 38 n.189 (discussing the failure of the non-point source regulatory programs established under sections 208 and 319 of the Clean Water Act). Evidence that nonpoint sources remain major problems is not hard to find. The Chesapeake Bay Foundation’s depressing annual report card on the state of the Bay notes that the “primary sources of nitrogen and phosphorus pollution [include] agricultural, urban, and suburban runoff.” CHESAPEAKE BAY FOUNDATION, STATE OF THE BAY REPORT 2005, at 4 (2005), available at <http://cbf.org/site/DocServer/sotb2005lores.pdf?doc ID=4564>. Nor is the Mid-Atlantic region alone in facing a nonpoint source problem. *Budget Focus on ‘Partnerships’ Misdirects Key State Funds, Critics Say*, INSIDE THE EPA, Feb. 10, 2006, available at 2006 WLNR 2262920 (“Most state officials [say] that their biggest water problem is nonpoint source pollution.”).

14. *See* 33 U.S.C. § 1342 (2000) (delineating the structure of the National Pollution Discharge Elimination System permitting process).

15. This, of course, often leads to derision from the far right. *See, e.g.*, The Rush Lim-

Most law students are familiar with the “Tragedy of the Commons” and the notion that left unchecked, private actors will have every incentive to maximize their use of common resources.¹⁶

So from the early heady days of environmental law during the 1960s, we have frequently been reminded about the interconnected nature of environmental protection and the major effects that can result from a seemingly insignificant act. The “butterfly flapping its wings has global impacts” scenario may be clichéd,¹⁷ but as is the case of all clichés it has some merit. Thus, in a successful program of regulation—whether the problem at hand is unwanted pollution in the Chesapeake Bay or global warming—every relevant actor has to be involved. A successful program cannot allow one polluter to skate by while another is restricted. The Chesapeake Bay cleanup program has this pan-regional sort of ambition, as it must to gain some traction on this vexing set of problems.¹⁸

Now just as we consider the ramping up of a massive multi-jurisdictional program of environmental protection that could affect millions of people in several mid-Atlantic states, the Supreme Court has heard arguments in two cases that could create an opt-out provision for environmental protection, so to speak. In *Rapanos* and *Carabell*,¹⁹ the Court may well cross a threshold it stopped at in 2001 with the *Solid Waste Agency of Northern Cook County v. U.S. Army Corp of Engineers (SWANCC)*²⁰ case: declar-

baugh Show Audio Transcript, *Professor Limbaugh Debunks Junk Earth Science* (Aug. 10, 2005) (“[T]he modern environmental movement is simply the latest refuge for communists and socialists who are opposed to capitalism.”).

16. See Garrett Hardin, *The Tragedy of the Commons*, 162 SCI. 1243 (1968).

17. See, e.g., Anthony D’Amato, *Do We Owe a Duty to Future Generations to Preserve the Global Environment?*, 84 AM. J. INT’L L. 190, 192 (1990) (“An environmental intervention as slight as a butterfly flapping its wings near a weather station will chance long-term weather predictions.”).

18. In its amicus brief on *Rapanos* and *Carabell*, the Chesapeake Bay Foundation observes that Bay cleanup will take considerable cooperation among affected states and the District of Columbia. Of course, cleaning up the Bay has been enshrined in law as a multi-jurisdictional responsibility for decades. The CBF makes clear that to achieve program goals, states cannot opt out of the cleanup program. *CBF Amicus Brief*, *supra* note 2, at 27 (noting that, “[t]o achieve these ambitious pollution reduction commitments[,] all six Bay watershed states and the District of Columbia must ‘pull their weight’”).

19. See *United States v. Rapanos*, 376 F.3d 629 (6th Cir. 2004), *cert. granted*, 126 S. Ct. 414 (2005); *Carabell v. U.S. Army Corps of Eng’rs*, 391 F.3d 704 (6th Cir. 2004), *cert. granted*, 126 S. Ct. 415 (2005). The two cases were consolidated for oral argument, which was held on February 21, 2006.

20. See *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng’rs (SWANCC)*, 531 U.S. 159 (2001).

ing that the Commerce Clause does not permit the U.S. Army Corps of Engineers to engage in Clean Water Act regulation of so-called isolated wetlands. In *SWANCC*, the Court ducked the difficult issue. It invalidated the Corps of Engineers' "Migratory Bird Rule" but stated that it was not basing its decision on the Commerce Clause.²¹ An adverse decision in *Rapanos* and *Carabell* would fly in the face of the collective spirit needed to accomplish a task so massive as cleanup of the Bay. It would in effect create the "isolated man," the resident of watersheds such as the Chesapeake Bay who opts out of environmental protection scheme. This is potentially dangerous and should be avoided.

The facts of *Rapanos* and *Carabell* are well known and summarized at painstaking length in the Sixth Circuit opinions. The legal challenge is much the same as in *SWANCC*: determining whether the wetlands in question are "adjacent to" protected "interstate waters," which are in turn defined in the CWA as "waters of the United States,"²² that is, waters over which the federal government has Commerce Clause jurisdiction. The question is how much of a connection (hydrological or other) is required between the wetlands and a water body that is navigable in the true sense of the word. As the Washington Legal Foundation attempts to frame the issue in its amicus brief, if we don't require a significant physical connection to navigable waters before we regulate, then "[t]he distance to the river—twenty miles—is irrelevant; all that matters is that the water eventually reaches the river."²³ This question, hardly one of mere semantics, has provoked intense debate, and various Courts of Appeal, including the Fourth Circuit in *Deaton* and *Newdunn*,²⁴ have struggled with the issue.

21. See Migratory Bird Rule, 33 C.F.R. § 328.3(a)(3) (2005), *invalidated by SWANCC*, 531 U.S. at 159.

22. 33 U.S.C. § 1362(7) (2000).

23. Brief for the Washington Legal Foundation et al. as Amici Curiae Supporting Petitioners at 7, *Rapanos v. United States*, 376 F.3d 629 (6th Cir. 2004) (No. 04-1034) [hereinafter *Washington Legal Foundation Amicus Brief*].

24. *United States v. Deaton*, 332 F.3d 698 (4th Cir. 2003), *cert. denied*, 541 U.S. 972 (2004); *Treacy v. Newdunn Assoc.*, 344 F.3d 407 (4th Cir. 2003), *cert. denied*, 541 U.S. 972 (2004). In *SWANCC*, the Court stated, based on its 1985 decision in *Riverside Bayview Homes*, that the Corps has CWA jurisdiction over some waters that are not actually "navigable" in the lay sense of the word:

In *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), we held that the Corps had § 404(a) jurisdiction over wetlands that actually abutted on a navigable waterway. In so doing, we noted that the term "navigable" is of "limited import" and that Congress evidenced its intent to "regulate at least some waters that would not be deemed 'navigable' under the

It is not all too surprising that the question has landed once again in the Supreme Court.

The decision in these combined cases could have profound implications for not just Michigan but watersheds in other states and regions, including, of course, the Chesapeake Bay. The Chesapeake Bay Foundation's amicus brief makes clear that the failure to regulate isolated wetlands will have broad impacts in a watershed such as that of the Chesapeake Bay.

The Chesapeake Bay receives fully half of its water from an intricate network of 110,000 streams and 1.7 million wetlands most of which are non-navigable tributaries and non-tidal wetlands that drain or "tend to drain" to those tributaries, very much like the wetlands and tributaries at issue in these cases. This brief will demonstrate that the headwater streams and wetlands, and other non-navigable tributaries and associated wetlands, of the 64,000 square mile Chesapeake Bay watershed are indeed "inseparably bound up" with the Susquehanna, the Potomac, the James, and the other large navigable rivers that flow to the Bay. This intricate hydrological network cleanses the surface water, recharges the groundwater, moderates the flood flows, and provides the aquatic habitat on which the ecological and economic life of the Chesapeake Bay and its watershed depends. The health of the Chesapeake Bay truly does begin at its source.²⁵

There is even more at stake than this. Because the CWA's definition of "waters of the United States" is at issue, reversals in these two cases could mark the first time the Supreme Court has put the brakes on the use of the Commerce Clause to justify envi-

classical understanding of that term."

SWANCC, 531 U.S. at 167 (citations omitted). While the Court acknowledged that it had previously recognized that the Corps has jurisdiction over waters that are "adjacent" to navigable waterways, it declined to find that "isolated ponds, some only seasonal, wholly located within two Illinois counties, . . . because they serve as habitat for migratory birds" were adjacent to navigable waters (and hence subject to the Corps' jurisdiction). *Id.* at 171-72.

The pivotal question for lower courts deciding cases in the wake of *SWANCC*—and now for the Supreme Court in *Rapanos* and *Carabell*—then became the meaning of the word "adjacent" in situations where the wetlands in question had some degree of interconnectivity to navigable waters. Would only those wetlands directly abutting navigable waters qualify for protection? Some courts said "yes." *See, e.g., In re Needham*, 354 F.3d 340, 345-46 (5th Cir. 2003) (limiting the Corps' jurisdiction under the CWA to navigable waters and non-navigable waters that directly abut navigable waters). Other courts (including the Fourth Circuit and, of course, the Sixth Circuit in *Rapanos* and *Carabell*) declined to read *SWANCC* that broadly, and limited the decision to its precise holding that the CWA does not reach isolated waters that have no connection with navigable waters. *See, e.g., Deaton*, 332 F.3d at 708-12; *Newdunn*, 344 F.3d at 416-17.

25. *CBF Amicus Brief, supra* note 2, at 2.

ronmental laws. In his petition for certiorari, John Rapanos invited the Court to go down this road, claiming that these isolated waters are not subject to federal jurisdiction because they have nothing to do with commerce.²⁶ To date, since *Lopez*²⁷ and *Morrison*,²⁸ the Court has not yet been willing to tackle this issue in any meaningful sense in an environmental case; it simply declined to do so in *SWANCC*.²⁹ If, however, the barn door opens, and the Court issues a pronouncement that there are in fact significant limits to the nexus between commerce and environmental protection, there is no telling where this new Commerce Clause jurisprudence might go once it gets rolling.³⁰

26. Brief of Petitioner-Appellant at 22–24, *Rapanos v. United States*, 376 F.3d 629 (6th Cir. 2004) (No. 04-1034).

27. See *United States v. Lopez*, 514 U.S. 549 (1995).

28. See *United States v. Morrison*, 529 U.S. 598 (2000).

29. The Court stated, “[w]e thus read the statute as written to avoid the significant constitutional and federalism questions raised by respondents’ interpretation.” *SWANCC*, 531 U.S. at 174.

30. See, e.g., Benjamin Wittes, *The Hapless Toad*, ATL. MONTHLY, May 2005, available at <http://www.theatlantic.com/doc/200505/wittes> (“Amid all the liberal hysteria about the threats posed by a conservative Supreme Court, one threat tends to be ignored—and it happens to be the biggest one . . . the threat to basic environmental protections.”).

Once Judge John G. Roberts had been nominated to become a member of the Supreme Court, the more general discussion about threats posed by a changing Court took on a focused slant, even if it was still in the nature of the predictive and speculative. In this day and age, of course, speculation about “what might happen next” is the fodder for the gristmill of the Internet. First there was the usual legwork of those gearing up for a nomination fight: searching his record for decisions giving views on how Roberts might decide on cases involving the Commerce Clause, and calls for probing questions in the nomination hearings. See, e.g., John W. Dean, *Judiciary Committee Chairman Arlen Specter Presses Judge John Roberts on His Commerce Clause Views*, FINDLAW, Aug. 12, 2005, available at <http://writ.findlaw.com/dean/20050812.html> (commenting on the need for questions about Robert’s Commerce Clause views before his confirmation hearings). Yes, this commentary comes from *that* John W. Dean, and yes, it is a bit ironic that the former White House counsel and Watergate central figure is now offering views on the power of the federal government. But his analysis is pretty darn good.

Then, a dissection of the hearings themselves. No sooner had Senators quizzed thenominee Roberts about his views on the Commerce Clause than the exchange was repeated and analyzed voluminously in cyberspace. See, e.g., Alex Kaplun, *Roberts Ducks Questions on E-Commerce Clause But Addresses ESA, ENV’T & ENERGY DAILY*, Sept. 14, 2005, available at <http://www.eenews.net/EEDaily/print/2005/09/14/1>.

There are numerous views out there on what decisions in *Rapanos* and *Carabell* could portend in this regard. A poster on the liberal “Daily Kos” website offers a detailed and interesting analysis, based on a “class essay” from blogger “renaissance grll.” See *Mr. Rapanos Goes to Washington, Posing a Threat to the Clean Water Act*, DAILY KOS, Nov. 30, 2005, <http://www.dailykos.com/story/2005/11/30/12571/111> (commenting that “[n]ow the U.S. Supreme Court, trending toward a less and less expansive reading of the Constitution, is signaling that it may be prepared to significantly limit the power of Congress to enact environmental legislation, and the power of federal agencies to enforce it.”). I’d give the essay an “A.”

Certainly the Endangered Species Act would be in jeopardy, as then-Judge John Roberts intimated in his confirmation hearings when he largely ducked sharp questioning about his opinion discussing government regulation of a “hapless toad” that spent its whole life in California.³¹ Our newest Justice, Samuel Alito, has a restrictive view of the government’s power under the Commerce Clause, as evidenced perhaps most prominently by his dissent in *U.S. v. Rybar*, a gun case from 1996.³² We may well find years from now that the most significant impact that our new Justices have had on the law has little to do with contemporary hot button social issues such as abortion³³ and guns and more with federal regulation that has for decades been justified under the Commerce Clause. But that is a subject for another day.

Beyond that, what strikes me as truly compelling about the juxtaposition of *Rapanos* and *Carabell* on the one hand, and our symposium on the Bay on the other, is something I will call the paradox of the “isolated man.” John Rapanos is the David Lucas³⁴ of his time, a put-upon man who simply wants to get on with his shopping center without having to worry about those pesky wetlands, and whose means of choice for accomplishing this is becoming embroiled in an almost perfect test case situated at the outer limits of environmental laws. Rapanos seems particularly blameworthy, having well earned (it seems) the title of “jerk.”³⁵ He built

31. The word “jeopardy” is a deliberate choice. Section 7(a)(2) of the Endangered Species Act requires each federal government agency that is “likely to jeopardize the continued existence” of an endangered or threatened species to consult with the relevant agency that administers the ESA about means to protect the species. 16 U.S.C. § 1536(a)(4) (2000). Then-Judge Roberts may have criticized the broad reach of the ESA in his opinion in *Rancho Viejo v. Norton*, 334 F.3d 1158, 1160 (D.C. Cir. 2003), but as various commentators have made clear, the procedural context of his opinion made it extremely difficult to read the tea leaves. Roberts was dissenting from a denial of rehearing, not offering a position on the substantive reach of the ESA. Nonetheless, the “gratuitous” nature of the dissent suggests Roberts’s discomfort with a broadly read Commerce Clause. See Dean, *supra* note 30 (noting that Roberts intended to “make the point that the majority holding was, in his view, ‘inconsistent with the Supreme Court’s holdings in *United States v. Lopez*, and *United States v. Morrison*” and that “[a]lthough this dissent does not say how Judge Roberts would have decided the case, it certainly suggests that he views the Commerce Clause extremely narrowly”) (citing *Rancho*, 334 F.3d at 1160 (Roberts, J., dissenting)).

32. *U.S. v. Rybar*, 103 F.3d 273, 286 (3d Cir. 1996) (Alito, J., dissenting).

33. See Wittes, *supra* note 30, at 48 (noting that the threat to environmental protection in a conservative Court is more serious than that to *Roe v. Wade* because “[l]iberals have been overselling the threat to reproductive rights for decades”); *Mr. Rapanos Goes to Washington*, *supra* note 30 (observing that “*Roe v. Wade* is not the only precedent threatened by a rearranged Supreme Court”).

34. See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992).

35. *Mr. Rapanos Goes to Washington*, *supra* note 30.

a subdivision, filled in wetlands, and then dared the government to sue him; which, naturally, it did. When a consultant, Dr. Goff, told him his property contained wetlands, he ordered Dr. Goff to destroy the report and paid no heed to it.³⁶ Then, after he had gone forward over the government's objection, he had the nerve to claim that his behavior did not warrant stiff sanctions, but instead, that he should be allowed to go scot-free.³⁷ The courts eventually disagreed.³⁸

Rapanos and Carabell have attracted notoriety for having utter disregard for the environmental consequences of their actions. They argue, in effect, that if a river is going to be cleaned up it is not their problem. In the immortal words of Fleetwood Mac, a decision that favors John Rapanos is a license to anyone else to "Go Your Own Way."³⁹

But, as John Rapanos would protest, that is exactly what I am entitled to do: because the connection between my behavior and pollution of the distant river is so attenuated, the government has no business regulating my actions. Consider this the new mindset of the "isolated man," if you will. Instead of submitting his project to the delay and cost it would entail to obtain a dredge and fill permit, his starting point—the very place where he begins to think about environmental protection—is an objection based on the premise that government has no reason to become involved in his affairs. This mindset could have far-ranging consequences. A decision in Rapanos's favor might embolden others to challenge regulatory activity, whether or not those challenges were meritorious. That these challenges would divert resources that might otherwise be used for environmental protection would be of no consequence to the isolated man, who sees himself as an individual with rights, not a citizen of a broader polity.

Of course, the likelihood of increased litigation is hardly going to be the most significant effect of a decision in John Rapanos's

36. See *United States v. Rapanos*, 376 F.3d 629, 632 (6th Cir. 2004). Rapanos "stated he would 'destroy' Dr. Goff if he did not comply." *Id.* Nice guy, this Rapanos.

37. *Id.* at 633–35.

38. I say "courts" (emphasis on the plural) because the *Rapanos* case made its way up and down through various federal courts for well over a decade. See *id.* at 633–34, 649 (giving a chronology of the civil and criminal proceedings). The length of the proceedings is attributable in part to courts struggling to determine the applicability of *SWANCC* (decided after he was convicted and sentenced) to Rapanos's case. *Id.*

39. FLEETWOOD MAC, *Go Your Own Way*, on *RUMOURS* (Warner Bros. 1977).

favor, leaving aside the possible wild card of opening up the Pandora's Box of Commerce Clause jurisprudence. John Rapanos does not see (or cares not to see, as he can hardly claim he acted inadvertently) what others might see about the environmental impacts of his actions. Expressing alarm that regulation of isolated wetlands "expand[s] . . . Congress's Commerce Clause power . . . to envelop any molecule of water that might one day reach a river,"⁴⁰ as the Washington Legal Foundation so pithily (and wrongly) puts it, constitutes blatant disregard for the interconnected nature of water resources, for the notion that wetland functions that can be performed by even those wetlands that have only a hydrologic connection to a nearby river.

The isolated man, with his "me first" attitude about environmental protection, can hamper the process of protecting an entire watershed. Imagine, if you will, a symposium on the Bay such as those we have held here—or, perhaps, a General Assembly meeting to discuss funding for the Bay (or a Department of Environmental Quality meeting to discuss water quality standards)—with John Rapanos in the room. Let us now also assume, as we must, that Rapanos has prevailed in the Supreme Court (otherwise his stance would not have been vindicated and there would be no need to heed his argument) and that a new pollution reduction program of some sort would involve him in its reach. Perhaps, let's say, the regulatory program would have required him to adopt "best management practices"⁴¹ to reduce pollution from his parking lot, or to do so with incentives offered through a new funding program.

At that point, Rapanos's presence in the meeting where new pollution control strategies are being discussed will have that galvanizing effect common to all who feel the concentrated pinch of government in a room of beneficiaries whose benefits are diffuse and indirect at best. He is, for better or worse, a lightning rod. Here, we think, is that precise person whose ox is gored if we implement the pollution reduction program. Unless we want progress to be minimal at best, someone has to look that person in the eye and say, "Yes, sir, if this program goes forward, you would

40. *Washington Legal Foundation Amicus Brief*, *supra* note 23 at 8.

41. BMPs are authorized under Section 319 of the Clean Water Act. See 33 U.S.C. § 1329(b)(2)(A) (2000); Eisen, *supra* note 11, at 26–29 (discussing BMPs available for control of pollution from stormwater runoff and discussing the considerable challenges in implementing them).

be required to make a small sacrifice for the public good.” If Judge Merhige were still with us, he would be that person,⁴² but alas, he is not. I miss him for his backbone and integrity.

Unfortunately, this scenario is hardly hypothetical. In the case of the Chesapeake Bay, the far-reaching pollution reduction program under the Chesapeake Bay Agreement might take the form of “a regulatory TMDL covering the entire 64,000-square-mile Bay watershed [that] will be put in place by 2011 if Bay water quality is not restored by 2010.”⁴³ A TMDL, or “total maximum daily load,” is, as the name implies, the total amount of pollution allowed in a body of water without violating the water quality standards established under the CWA.⁴⁴ Once the total load is established, the regulatory body determines for specific point sources and nonpoint sources the amounts that each are allowed to contribute toward that total load.⁴⁵ There must be a TMDL in place before trading occurs; you need to know what reductions you want to accomplish before you begin trading.⁴⁶ A more collective response to water pollution in a watershed is hard to imagine: one sets a total amount of pollution and then requires everyone to reduce their individual pollution loads to get the aggregate amount below that level. As Jon Mueller points out, a negative decision in *Rapanos* would mean that the state or the EPA (as appropriate) probably would not be able to set a TMDL for waters over which it did not have jurisdiction, so *Rapanos* would be in the clear by definition.⁴⁷

One possible response to all of this is that *Rapanos* might not resist a broad pollution reduction program because what we

42. The Virginia Environmental Endowment, a major force in providing funding and support for cleanup of the environment, exists because this visionary jurist approved a settlement of Kepone litigation that directed \$8 million of the fine to creation of the VEE. See The Virginia Environmental Endowment, *History of Virginia Environmental Endowment*, <http://www.vee.org/history.cfm> (last visited Apr. 8, 2006).

43. *CBF Amicus Brief*, *supra* note 2, at 22–23; CHESAPEAKE BAY PROGRAM, CHESAPEAKE 2000 BAY AGREEMENT 6, available at <http://www.chesapeakebay.net/pubs/chesapeake2000agreement.pdf>.

44. Under Section 303 of the Clean Water Act, TMDLs are set for impaired waters not meeting water quality standards despite the imposition of effluent limitations. 33 U.S.C. § 1313(d) (2000).

45. *Id.* § 1313(d)(1).

46. See, e.g., Water Quality Trading Policy, 68 Fed. Reg. 1608, 1610 (Jan. 13, 2003) (specifying that “[a]ll water quality trading should occur within a watershed or a defined area for which a TMDL has been approved”).

47. *CBF Amicus Brief*, *supra* note 2, at 25–27.

would ask of him is no sacrifice at all. That is, if he chose voluntarily to take the funding, it might actually be a benefit to him. Or, in some other respect, we might allow him to trade in such a manner that it would be in his economic self-interest to do so. I am by no means an expert on the intricacies of what it would take to create a watershed-wide TMDL or trading program, but it seems to me that it would be extraordinarily difficult to construct a program where everyone is better off if it is implemented. There will be winners and losers, and one of them may well be John Rapanos.

One might also say that I am not comparing apples to oranges: after all, we have not been all that successful until now in avoiding the conflict between prospective winners and losers in a Bay protection program. The poultry farmers in the region have flexed their collective muscle to keep tough nonpoint source regulations from taking effect. And let's not forget about the suburban homeowners who profess to be interested in saving the Bay but contribute day by day to its demise. Still, to me there appears to be a significant difference between the homeowners (and even the poultry farmers) on the one hand and John Rapanos on the other. The former have evinced at least some interest in saving the Bay, even if they are as yet unwilling to swallow the serious medicine it would take to get the job done right. By contrast, Rapanos is unwilling in any significant respect to engage in a public conversation about the means to the end of protecting valuable resources.

That is the central feature of the mindset of the isolated man: he just says no, without regard for any arguments to the contrary. The Chesapeake Bay Foundation's amicus brief is bolstered with citations to the work of dozens of scientists who show ably that a watershed is a complex system full of interdependent processes.⁴⁸ Against all the weight of this evidence stands one man, John Rapanos. Like a heroic figure in a Western movie, he thinks he is the last principled man standing, but the difference is that he is wrong. He does not have the humility to understand that there may be forces at work that are larger than he can comprehend. More to the point, he does not care.

48. *Id.* at 4–20.

Of course, this spotlights the true danger of a decision in *Rapanos* or *Carabell* that reverses the lower courts' rulings. As the CBF brief puts it, "a decision to strip Clean Water Act ("CWA") safeguards from non-navigable tributaries and their adjacent wetlands will cause great harm to the Chesapeake Bay, its watershed, its aquatic ecosystem, and its people."⁴⁹ This does not cause John Rapanos great concern. He does not lose sleep wondering whether oysters in the Chesapeake Bay are going to perish because he stood firm. The question, then, is what is to be done about it.

Start with the most obvious: the Court should refuse to take the bait and decline to allow Rapanos to opt out of the environmental protection system. Assume the ultimate decision is to be based on the Commerce Clause; if it is not, it is hard to see why the Court bothered to take on two cases that effectively would serve as pocket parts to *SWANCC*. Tell John Rapanos that if he fills in what he and his cronies at the Washington Legal Foundation think is a mere "mud puddle," his activity "falls within Congress' power to regulate intrastate activities that [']substantially affect['] interstate commerce," in the words of *Lopez* as reflected in *SWANCC*.⁵⁰ There is more there—much more—than meets the eye.

Then, we need to continue to work proactively on the state, local, and regional level. Assume that even if Mr. Rapanos and Mrs. Carabell are recognized for what they truly are (that is, if they lose their appeals), where there is smoke, there is fire. Someday, a more appealing litigant may well come along and, given the Court's new dynamics, it might be the CWA's turn to fall. There is not much time before the *raison d'être* for federal jurisdiction is undermined in part or in whole, and it will be up to the states (or regions, in the case of the Chesapeake Bay) to stem the trend, overcome the mindset of the isolated man, and design environmental protection programs that bring in everyone. We need to have the vision today to recognize that at that crucial juncture, it will fall to the states and regions to design programs that bring every polluter to the table and require them to save the Bay. This gives Bay cleanup programs now underway a sense of true urgency.

49. *Id.* at 2.

50. *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 160–61 (2002); *United States v. Lopez*, 514 U.S. 549, 559 (1995).