

Policing the Boundaries Between Law and Policy: Interpreting Section 404 of the Clean Water Act

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Legal Impediments to Federal Watershed Strategies to Protect Wetland Services

- Narrowing Judicial Interpretations of the key jurisdictional terms of Section 404
 - “Waters of the United States”
 - “Discharge of Dredged Material”
- These Decisions Represent a Triumph of an Approach to Statutory Interpretation: “Aggressive Textualism”

Formal and Functional Approaches to Statutory Interpretation

"Purposivism"

- Mid-20th century reaction to strong "formalism," which was seen as an obstacle to Congressional efforts to implement progressive social and economic programs.
- Purposivists emphasized that Courts should "interpret the words of the statute . . . so as to carry out the purpose as best it can, making sure, however, that it does not give the words . . . a meaning they will not bear." (Hart and Sachs)
- Courts viewed as facilitator and faithful servant of Congressional design.

"Textualism"

- Reaction to judicial "activism"
- Purposivism viewed as unreliable or naive because statutes don't have singular, identifiable purposes. Judicial reliance on broad statutory purposes to discern statutory meaning runs too high a risk that the courts will substitute their own preferred policies, or "purposes," ignoring the many pragmatic compromises and concessions made by Congress in creating regulatory and social programs.
- The best guide to statutory meaning is the language of the statute itself. While context is important, it should not be the primary lens through which the language of a statute should be interpreted. Instead, the "ordinary meaning" of statutory terms should be honored and given legal effect.
- Courts viewed not as facilitators of Congressional purposes because such purposes are mostly indeterminate. Instead, courts are viewed as enforcing congressional bargains among competing interests. They are, in effect, "cops on the beat," policing regulatory programs to ensure the bargained-for limits on regulatory authority are respected and robust.

Chevron and Strong Deference to Agency Interpretations of Statutes

- *Chevron* establishes a rule of strong deference to a reasonable, policy-driven, agency interpretation of a statute.
- *Chevron* is premised on the notion that when Congress entrusts an agency with authority to implement a regulatory program, it is the politically accountable agency, not the unaccountable judiciary, who should resolve statutory ambiguity. The strong deference rule thus is a hedge against judicial policy making, or “activism”

Textualism and Purposivism in the Post-*Chevron* Era

"Aggressive textualists" may tend to find more clarity in statutory text, permitting judges, under Chevron "Step One," to substitute their interpretation of what they view as the "unambiguous" language of a statute for an agency's more contextual, policy-driven interpretation.

"Purposivists," by contrast, tend to see statutory interpretation as a contextual, policy-driven enterprise. As a consequence, purposivists may tend to find statutory ambiguity more often than aggressive textualists, necessitating strong deference to an agency's policy-driven interpretations under Chevron's "Step Two."

Aggressive Textualism and Purposivism in the Section 404 Context: *Rapanos*

What constitutes “the waters of the United States”?

Justice Scalia (an admitted aggressive textualist)

- “[O]n its only plausible interpretation, the phrase ‘the waters of the United States’ includes only those relatively permanent, standing or continuously flowing bodies of water” that are described in Webster’s dictionary as “waters.” . . .
- “[O]nly those wetlands with a continuous surface connection to” Webster’s dictionary’s “waters” “implicate the boundary-drawing problem of *Riverside Bayview Homes*” for which the Corps’ “ecological judgments” are owed strong *Chevron* deference (*Riverside Bayview Homes*).
- Strikingly, Justice Scalia concludes that the Corps’ and EPA’s ecological judgments are relevant only for wetlands that implicate this “boundary-drawing problem” – i.e., wetlands with a continuous surface connection to “waters.”

Aggressive Textualism and Purposivism in the Post-Chevron Era: *Rapanos*

Justice Breyer

- “My view of the statute rests in part on the nature of the problem. The statute seeks to ‘restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.’ . . . Congress might well have decided the only way to achieve this goal is to write a statute . . . broadly and to leave the enforcing agency with the task of restricting [its] scope
- “If one thing is clear, it is that Congress intended the Army Corps of Engineers to make the complex technical judgments that lie at the heart of [jurisdictional issues under the Clean Water Act]. . . . [Having] courts . . . make ad hoc determinations [will] run the risk of transforming scientific questions into matters of law. That is not the system Congress intended.”

The “Discharge of Dredged Material”:

Section 404 requires a permit for the “discharge of dredged or fill material”

The issue: Does the release of excavated or dredged material during mechanized landclearing activities, the purpose of which often is to eliminate wetland characteristics, a regulable “discharge of dredged material”?

Discharge of Dredged Material: The Statutory Framework

- “Discharge of a pollutant” defined as the “any addition of any pollutant into the navigable waters”
- “Pollutant” defined to include “dredged spoils”
- Other statutory clues: Section 404 provides that the discharge of dredged or fill material from a list of specific activities, such as “normal farming, silviculture, and ranching” “is not prohibited or subject to regulation,” but goes on to say that “[a]ny discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced, shall be required to have a permit. “ This latter provision is known as the “recapture provision”

Regulatory Treatment of Discharges of Dredged Material: An Abbreviated History

1986 Rule: excludes "*de minimis*, incidental soil movement during normal dredging operations" (1986 rule). This exclusion was interpreted by some Corps districts to apply to large-scale mechanized landclearing in wetlands


Tulloch I: includes "any addition of dredged material into, including any redeposit of dredged material within, the waters of the United States." Exclusion for normal dredging operations retained, but made inapplicable to dredging in wetlands.

National Mining Association (1998): invalidates Tulloch I; incidental fallback is not an "addition of a pollutant"

1999 Rule: includes "any addition, including redeposit other than incidental fallback, of dredged material . . . which is incidental to any activity, including mechanized landclearing, ditching, channelization, or other excavation"

Discharges of Dredged Material: Abbreviated Historical Evolution

Tulloch II (2001): defines “incidental fallback” as “the redeposit of small volumes of dredged material that is incidental to excavation activity”; Corps regards “the use of mechanized earth-moving equipment to conduct landclearing, ditching, channelization, in-stream mining or other earth-moving activity as resulting in a discharge of dredged material . . . unless project-specific evidence shows that the activity results in only incidental fallback”



NAHB (2007): Invalidates Tulloch II. Volume is not legally relevant in determining whether a redeposit is “incidental fallback.” Directs the Corps to “reconsider” its views about mechanized landclearing .

National Mining Association: An Exercise in Aggressive Textualism

- “Incidental fallback” results from an activity designed to remove, not add, material to wetlands; “represents a net withdrawal, not an addition” and thus is not a “discharge of dredged material”
- Recognizes that material removed from a wetland undergoes a “legal metamorphosis” and becomes a “pollutant,” but refuses to recognize that its “incidental” release back into the wetland is an “addition” because no additional material is introduced into the wetland.
- The “recapture provision” dismissed because the activities “may also produce actual discharges”
- Curiously, however, “sidecasting” is an “addition” and “[s]ince the Act sets out no bright line between incidental fallback on the one hand and regulable redeposits on the other, a reasoned attempt by the agencies to draw such a line would merit considerable deference.”
- Court appears to be concerned that the Corps’ real purpose is not to regulate “discharges” but to regulate “dredging,” which is subject to regulation under a different, more limited statutory program that does not extend to wetlands.
- Court appears unconcerned that its ruling will frustrate the CWA’s purpose to restore and maintain the chemical, physical, and biological integrity of jurisdictional wetlands. In fact, there is no mention of this expressly stated purpose.

Discharges of Dredged Material: Purposivism Prevails Outside the D.C. Circuit

United States v. Deaton (4th Cir. 2000)

- “The idea that there could be an addition of a pollutant without an addition of material seems to us entirely unremarkable, at least when an activity transforms some material from a nonpollutant into a pollutant”
- recognizes that redeposited dredged material may have the same effect on wetlands as material from a source other than the wetland, and concludes “[s]urely Congress would not have used the word ‘addition’ (in ‘addition of any pollutant’) to prohibit the discharge of dredged spoil in a wetland, while intending to prohibit such pollution only when the dredged material comes from outside the wetland.
- Reasoning of *Deaton* followed by the Seventh Circuit (*Greenfield Mills*), Ninth Circuit (*Borden Ranch*), and Tenth Circuit (*Hubenka*).
- But, under *National Mining Assn*, Corps is subject to a nationwide injunction prohibiting enforcement of the Tulloch Rule.

National Association of Home Builders: Aggressive Textualism Redux

- Tulloch II's definition of "incidental fallback" improperly limited to "small volumes"; incidental fallback must be defined with reference to "(1) the time the material is held before being dropped to earth and (2) the distance between the place where the material is collected and the place where it is dropped."
- Corps advised to reconsider statement regarding use of mechanized earth-moving equipment because "agencies cannot require 'project-specific evidence' from projects over which they have no jurisdiction."

The Triumph of Aggressive Textualism and the Subversion of Statutory Objectives

- Combined, *National Mining* and *National Assn of Home Builders* leave the Section 404 Program in a state of incoherency, giving incentives to developers to avoid regulatory scrutiny by the simple expedient of selecting one method of draining or clearing over another, even though these differing methods cannot be meaningfully distinguished from a scientific perspective. These decisions, in an effort to place a legal boundary on the Corps' jurisdiction, have instead dictated a policy choice to the Corps – a policy that oddly subverts textually explicit statutory objectives and displaces the expertise of the agencies in favor of formal legal categories devoid of practical justification.
- As Justice Breyer noted in *Rapanos*: “The statute seeks to ‘restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.’ . . . Congress might well have decided the only way to achieve this goal is to write a statute . . . broadly and to leave the enforcing agency with the task of restricting [its] scope If one thing is clear, it is that Congress intended the Army Corps of Engineers to make the complex technical judgments that lie at the heart of [jurisdictional issues under the Clean Water Act]. . . . [Having] courts . . . make ad hoc determinations [will] run the risk of transforming scientific questions into matters of law. That is not the system Congress intended.”

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