

Insights

Edited by David S. May

- *Energy Security Through Cross-Border Investments and Technology*
- *“Plain Meaning” Construction of Environmental Statutes*
- *States Reign in Use of Eminent Domain*
- *New Source Review Showdown*

“Plain Meaning” Construction of Environmental Statutes

Norman A. Dupont

While it is black letter law that a statute must be interpreted according to its “plain meaning,” finding that “plain meaning” has been often proved elusive. For example, in 1985 the Supreme Court noted that the term “navigable waters” as used in the Clean Water Act (CWA) was of “limited import,” at least when defining the outward limits of regulatory authority over wetlands. As the Supreme Court held in *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 132–33 (1985), the statutory term “navigable waters” also included *wetlands*, and specifically noted that: “On a purely linguistic level, it may appear unreasonable to classify ‘lands,’ wet or otherwise, as ‘waters.’” That “linguistic” difficulty aside, the Court in that case had little difficulty in expanding the term “navigable waters” to include a broad category of only seasonally inundated wetlands. This skeptical view of the “plain meaning” of a statute is well demonstrated in cases such as *Riverside Bayview*, where legislative history, often supplemented by subsequent administrative rulemaking, supported a broader or more flexible meaning than what a plain language view might otherwise suggest.

More recently, however, a case from the D.C. Circuit and more recent Supreme Court opinions suggest that the conservative notion of “strict construction” may have breathed new life into the old plain meaning canon of construction. That rule of construction is best described as one that if the “meaning” of the statute is “plain” from its literal words, then one need not resort to either legislative history or administrative interpretation set forth in regulations. See *City of Chicago v. Environmental Defense Fund*, 511 U.S. 328, 337 (1994) (“But it is the statute, and not the Committee Report, which is the authoritative expression of the law. . .”). This act of judicial resuscitation is best observed in *Friends of the Earth, Inc. v.*

Environmental Protection Agency, 446 F.3d 140 (D.C. Cir. 2006). In that case, Judge David Tatel, a Clinton appointee, joined by recently appointed conservative Janice Rogers Brown and by another recent Bush appointee, Thomas B. Griffith, breathed new meaning into the plain meaning” of the statutory term “total maximum daily loads” as used in CWA § 133. For Judge Tatel and colleagues, “daily” means “daily.” It was literally inconceivable, as Judge Tatel wrote, that “daily” could have any other meaning, for “no one thinks of ‘[g]ive us this day our daily bread’ as a prayer for sustenance on a seasonal or annual basis. *Matthew 6:11* (King James).” 446 F.3d at 144. Therefore, the U.S. Environmental Protection Agency’s (EPA) attempt to regulate discharges into the polluted Anacostia River based upon annual or seasonal discharges of pollutants (rather than on daily discharges) was held invalid. 446 F.3d at 144–146.

In reversing the district court’s grant of summary judgment in favor of EPA, the court of appeals ignored the trial court’s assertion that: “The proposition that the CWA should be liberally construed to achieve its objectives has universally prevailed over rigidly formalist challenges to CWA’s application and interpretation.” 347 F. Supp.2d 182, 189, n.2 (D.D.C. 2004). What for the district court was a “rigidly formalistic” interpretation of the term “total maximum *daily* loads” became for the court of appeals the *only* meaning of the statute—the literal meaning. In responding to EPA’s suggestion that the better policy was a more liberal construction that would allow for a seasonal (rather than daily) averaging of discharges into the Anacostia River, Judge Tatel wrote: “EPA may not ‘avoid the Congressional intent clearly expressed in the text simply by asserting that its preferred approach would be better policy.” 446 F.3d at 145.

What makes this case a potential turning point in judicial construction of statutory language is Judge Tatel’s disregard of any policy argument or deference to the administrative agency. Rather, for Judge Tatel: “The law says ‘daily.’ We see nothing ambiguous about this command. ‘Daily’ connotes every day. See *Webster’s Third New International Dictionary* 570 (1993) (“defining ‘daily’ to mean ‘occurring or being made, done, or acted upon every day.’”).” 446 F.3d at 144. Judge Tatel brushed aside EPA’s argument that other parts of the same CWA envision a broader use of setting limits for polluted waters other than solely on a daily basis. As Judge Tatel put it: “This cannot be right.” 446 F.3d at 145. It could not be “right” because it contradicted the plain meaning of the word *daily*.

Judge Tatel and his colleagues also brushed aside a contrary decision by the Court of Appeals for the Second Circuit, which allowed EPA to regulate the amounts of pollutants to be discharged into a waterway on a time period other than a daily basis. The Second Circuit in

Mr. Dupont is of counsel to the firm of Richards, Watson & Gershon in Los Angeles. He may be reached at ndupont@rwglaw.com.

Natural Resources Defense Council, Inc. v. Muszynski, 268 F.3d 91 (2d Cir. 2001), held that to read the term “daily” in the language “total maximum daily load” literally would lead to an absurd result. In that case, the Natural Resources Defense Council (NRDC) challenged the regulation by a New York state agency of a maximum load based on an *annual* average, saying it violated the plain language of the statute. The Second Circuit rejected the NRDC plain meaning argument, noting that: “We believe, however, that the term ‘total maximum daily load’ is susceptible to a broader range of meanings. Indeed, NRDC’s overly narrow reading of the statute loses sight of the overall structure and purpose of the CWA.” 268 F.3d at 98. For the Second Circuit, as for the district court below, considerable flexibility was necessary to allow EPA to regulate for hundreds of different pollutants in thousands of different bodies of water.

For the D.C. Circuit, however, the reasoning of the Second Circuit about the potential absurd results of a literal interpretation of the statute was simply unpersuasive. Unless one could positively demonstrate that Congress “did not mean what it appears to have said,” then the literal reading must prevail. 446 F.3d at 146.

This resurgent emphasis on the plain meaning doctrine is not just confined to judges on the D.C. Circuit. Rather, it appears to be a significant force in the most recent Supreme Court opinions in the environmental field. In *Rapanos v. United States*, 547 U.S. ___, 126 S. Ct. 2208 (2006), Justice Scalia writing for four members of the Court repeatedly turned to the dictionary definitions of statutory language to reject an Army Corps of Engineers regulation of wetlands that were “adjacent” to a waterway that lead to “navigable waters.” Justice Scalia parsed the statutory definition of the term “navigable waters”—the equally opaque phrase “the waters of the United States”—and cited *Webster’s International Dictionary* (2d ed., 1954) to conclude that this must mean water “as found in streams, and bodies forming geographical features such as oceans, rivers. . . .” 547 U.S. at ___, 126 S. Ct. 2208, 2220–21 (Scalia, J., with whom Roberts, C. J., Thomas, J., and Alito, J. join). Justice Kennedy in a pointed separate concurring opinion, observed that even *Webster’s International Dictionary* had alternative meanings for the term “waters.” In a vehement response, Justice Scalia stated that Justice Kennedy’s alternative definition was confined to poetic allusion and therefore was “wholly unreasonable.” 547 U.S. at ___, 126 S. Ct. at 2221, n.4. Justice Kennedy retorted in his separate and critical concurring opinion that Justice Scalia’s suggestion that the portion of the dictionary definition that Kennedy relied upon was merely “poetical” was simply “not” indicated in the dictionary. 547 U.S. at ___, 126 S. Ct. at 2242–43. While Justice Scalia has been asserting the plain meaning approach to statutory interpretation for years, the extent to which a single dictionary definition (and debates over which part of the dictionary definition was applicable) is arguably a shift from even Justice Scalia’s prior plain

meaning approach.

One need not, however, determine whether Justice Scalia or Justice Kennedy had the better dictionary definition of the term “waters,” in order to conclude that for both, the key in interpreting the CWA was neither administrative regulation nor legislative history but, rather, the plain meaning of the statutory language. Justice Kennedy appears to have a far more flexible approach than Justice Scalia, driven in part by the actual hydrogeologic conditions in the two specific cases before the Court and in the overall regulation of wetlands as they might potentially impact water quality in connected navigable waters. Nonetheless, the Justices’ vociferous debate over which dictionary definition of the term “waters” should prevail signals a shift from the Supreme Court’s approach as recently as 1985, in which a pure “linguistic approach” limiting the application of “navigable waters,” was brushed aside based upon the broader legislative policy and legislative history. See *Riverside Bayview*, 474 U.S. at 132.

Whatever the intellectual merits of turning to a 1954 edition of the dictionary to determine the literal meaning of a particular word, there can be no doubt that scholarly reliance upon any dictionary simply ignores the blunt realities of the legislative process. Modern legislation is a morass of compromises in overly long bills, and often, of last-minute substitutions of entirely different versions from those reviewed earlier in committee. Consider the remarkable example of one of the most recent pieces of legislation—the Patriot Act. In the House of Representatives, a last-minute substitution of the administration’s favored version of the bill replaced the prior bill that had been reviewed by House committees. The last minute substitute was 187 pages with some significantly different provisions that the House allowed members of Congress only a “few hours” to review and no amendments. It was time, so the leadership declared, to stand up and be counted. See Remarks of Mr. Frank of Massachusetts, Mr. Nadler of New York, and Mr. Dingell of Michigan reprinted at http://www.yale.edu/lawweb/avalon/sept_11/hr2975_house_proc.htm.

This type of last-minute substitution of bills is also found in at least one critical environmental statute, the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), originally passed in 1980. As one commentator observed: “In a non-negotiable power play, the Senate dropped an explicit reference to “strict, joint and several” liability, sending the bill over to the House with a replacement provision that alluded to the “same standard of liability which obtains under section 1321 of Title 33 [the Federal Water Pollution Control Act]” and the message that the ultimate fate of the legislation depended on House acceptance of the Senate bill without any modification. The House accepted the Senate’s ultimatum and passed the bill without changes. R. Steinzor, 9 *Duke Env’l Law & Policy Forum* 95, 98–99

(1998). Did most members of the House of Representatives pause to read the reference to the Federal Water Pollution Control Act and understand that by that reference they were basically incorporating a “joint and several liability provision” into CERCLA? A dubious proposition, but one that the plain meaning of the final act might well imply.

Environmentalists might ask what this newly revived emphasis on plain meaning means for the overall enforcement of environmental laws. If there is a judicial trend toward literalism in environmental statutes, then which way does it cut? The answer, however, is far from clear. In *Friends of the Earth*, three circuit judges held in favor of the environmental group seeking to impose daily (and presumably tighter) load limitations upon a reluctant agency. In *Rapanos*, four conservative justices, joined in the judgment by Justice Kennedy, used a literal approach to the term “the waters of the United States” to invalidate an agency position that sought to enhance the scope of pro-

tected wetlands areas. On the other hand, in the very same term, the Supreme Court unanimously supported the state of Maine in its environmental regulation of releases of water from a federally licensed dam back into the same river based in large measure on the literal definition of the term “discharge,” and again cited *Webster’s International Dictionary* (2d ed.) to explain that undefined statutory term. *S.D. Warren Co. v. Maine Bd. of Environmental Protection*, 547 U.S. ___, 126 S. Ct. 1843 (2006).

The Supreme Court will no doubt provide a better answer to this question of what the newly revived plain meaning approach means when it deals with the two Clean Air Act cases before its next Term, *Commonwealth of Massachusetts v. EPA*, No. 05-1120, and *Environmental Defense Fund v. Duke Energy Corp.*, No. 05-848. In the meantime, close reading of the statutory phrases at issue in those cases, with the various definitions in *Webster’s International Dictionary* (2d or 3d ed.) close at hand, would seem prudent for the potential prognosticator.