Maintaining - or Draining - the Swamps? The Future of the Clean Water Rule

Association of State Wetland Managers
Annual State/Tribal/Federal Coordination Meeting

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Shepherdstown, West Virginia

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My Miranda Rights:

NOTHING I SAY TODAY MAY BE HELD AGAINST THE DEPARTMENT OF JUSTICE OR THE UNITED STATES GOVERNMENT. ANY OPINIONS I EXPRESS ARE MINE ALONE AND DO NOT NECESSARILY REFLECT THE VIEWS OF ANY ATTORNEY GENERAL OR PRESIDENT, PAST OR PRESENT, OR ANYONE ELSE WHO MATTERS.
Section 301(a) prohibits:

- “discharge of any pollutant”
- to “navigable waters”
- without a permit
CWA Statutory Definition

“Navigable waters” =

“the waters of the United States, including the territorial seas”

The same definition applies throughout CWA, e.g., §§ 404, 402, 401, 311

Definition has been addressed 3 times by the Supreme Court
Riverside Bayview (1985)

- 9-0: CWA confers federal authority to regulate adjacent wetlands
- Term “navigable” is of “limited import”

SWANCC (2001)

- 5-4: Corps cannot regulate isolated, non-navigable, intrastate waters based solely on their use as habitat by migratory birds
- “Navigable” may have “limited effect,” but not “no effect”
Rapanos (2006)

Relatively permanent waters that connect to a TNW and wetlands with a continuous surface connection

Waters that, either alone or in combination with other similarly situated features in the region, have a significant nexus with a TNW

Waters that satisfy either the Scalia or the Kennedy standard
What Standard Applies?
The Clean Water Rule (6/29/15)

Purpose: To provide a simpler, clearer and more consistent approach to determining jurisdictional status of waters, based upon science, the agencies’ expertise and experience, and Supreme Court decisions.

Established 3 categories:
- Waters that are jurisdictional in all instances
- Waters that require case-by-case sig/nex analysis
- Exclusions
Clean Water Rule Litigation

18 District Court Complaints:
- 100 plaintiffs (businesses, states & environmental groups)
- U.S. motion to consolidate all complaints denied (10/13/15)
- Most complaints dismissed or stayed; one court issued PI

22 Petitions for Review:
- 100 petitioners
- Consolidated in 6th Circuit Court of Appeals
- CWR stayed (10/9/15)
- 6th Circuit ruled that it has exclusive jurisdiction (2/22/16)
- Rehearing en banc denied (4/21/16)
- Four sets of opening briefs (292 pages) (11/1/16)
- U.S. responsive brief (245 pages) (1/13/17)
- Litigation in 6th Circuit stayed (1/25/17)
Supreme Court – *NAM v. DOD*

- Cert. granted: Did 6th Circuit properly find jurisdiction under 33 USC 1369?

- Why It Matters:
  - Court for judicial review: One court of appeals or multiple district courts?
  - SOL: 120 days or 6 years?
  - Whether action can be challenged in a subsequent civil or criminal proceeding for enforcement
Rescind and Replace?

- Executive Order 13778 (2/28/17):
  - EPA shall “publish for notice and comment a proposed rule rescinding or revising the [Clean Water Rule], as appropriate and consistent with law”

- EPA FR Notice (2/28/17):
  - Advanced notice of proposed rulemaking consistent with the EO
  - Will consider interpreting WOTUS “in a manner consistent with the opinion of Justice Scalia in *Rapanos*”

- U.S motion to hold S.Ct. briefing in abeyance denied (4/3/17)
- Briefing this Spring; hearing in the Fall
To Be Determined

- How will S.Ct. decide jurisdictional question?
- If S.Ct. affirms on jurisdiction, will 6th Circuit proceed to the merits?
- If 6th Circuit proceeds to the merits, how will it rule on the numerous procedural, statutory, constitutional issues?
- If S.Ct. reverses on jurisdiction, what happens to the stay?
- What action will EPA/Army take on the CWR? How long will it take?
- Will a new rule adopt Scalia’s plurality opinion in *Rapanos*?
- How would a narrowing of CWA jurisdiction fare in light of the robust scientific record supporting the CWR?