

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

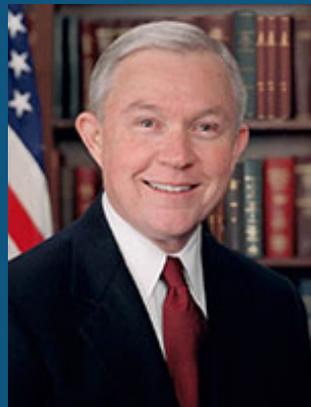
Association of State Wetland Managers
Annual State/Tribal/Federal Coordination Meeting

April 11, 2017
Shepherdstown, West Virginia

Stephen Samuels

My Miranda Rights:

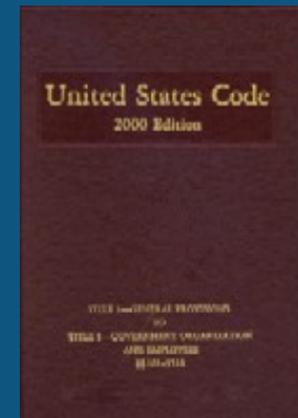
NOTHING I SAY TODAY MAY BE HELD AGAINST THE DEPARTMENT OF JUSTICE OR THE UNITED STATES GOVERNMENT. ANY OPINIONS I EXPRESS ARE MINE ALONE AND DO NOT NECESSARILY REFLECT THE VIEWS OF ANY ATTORNEY GENERAL OR PRESIDENT, PAST OR PRESENT, OR ANYONE ELSE WHO MATTERS.



CWA Statutory Framework

Section 301(a) prohibits:

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



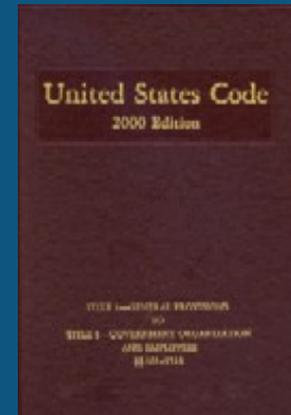
CWA Statutory Definition

“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)

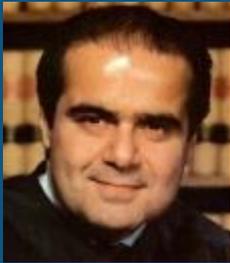
- ▶ 9-0: CWA confers federal authority to regulate adjacent wetlands
- ▶ Term “navigable” is of “limited import”

SWANCC (2001)

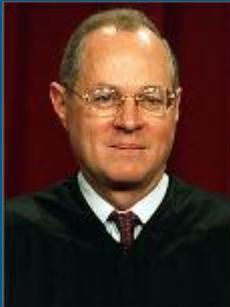
- ▶ 5-4: Corps cannot regulate isolated, non-navigable, intrastate waters based solely on their use as habitat by migratory birds
- ▶ “Navigable” may have “limited effect,” but not “no effect”



Rapanos (2006)



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

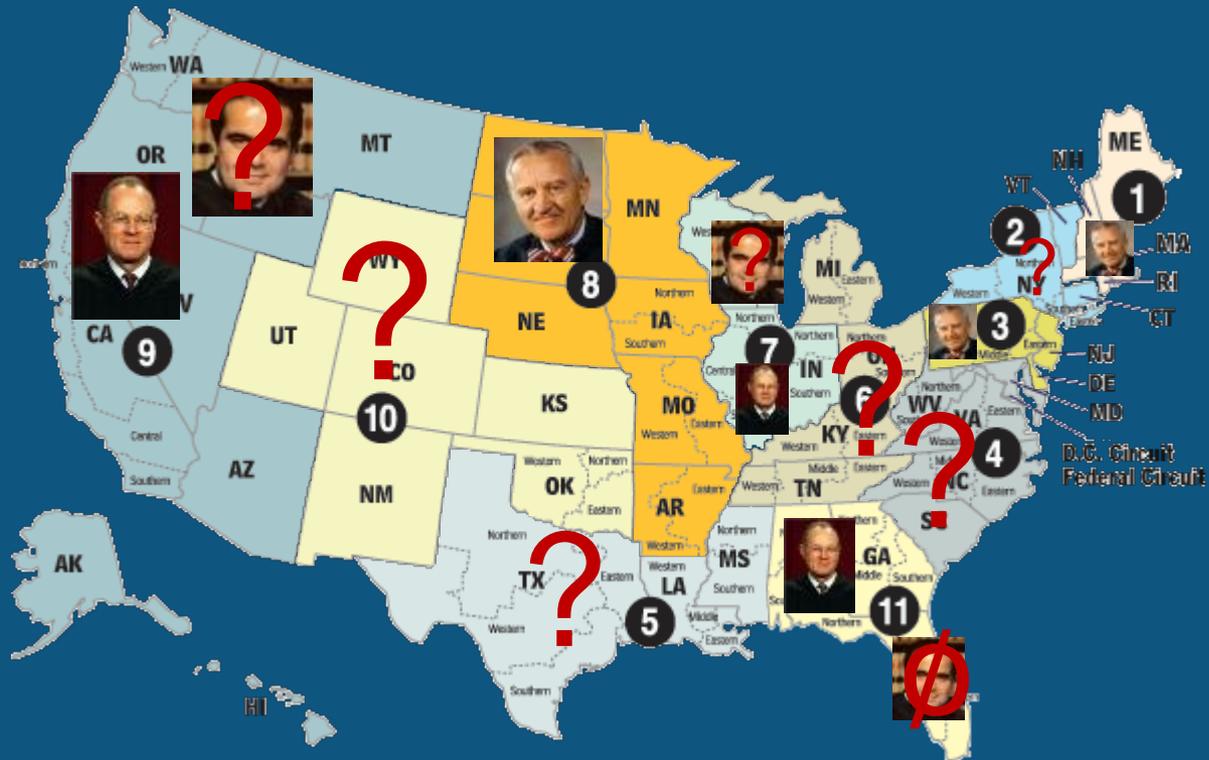


Waters that, either alone or in combination with other similarly situated features in the region, have a significant nexus with a TNW



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?