EPA's New Clean Water Rule: An Attempt at Clarifying Muddy Waters

In light of the confusion created by prior U.S. Supreme Court decisions on the extent of what constitutes a "navigable waterway" and the Clean Water Act's ("CWA") application, EPA issued a new Clean Water Rule yesterday, May 27th. With the new rule EPA attempts to clarify the CWA's reach and eliminate the confusion created by the ***"SWANCC"*** and ***"Rapanos"*** U.S. Supreme Court decisions, cited below.

Background: In 1985, the Supreme Court sustained the assertion by the U.S. Army Corps of Engineers and EPA that waters and wetlands adjacent to navigable waters, interstate waters, or their tributaries are "waters of the United States" under section 404 of the CWA, requiring a permit. The question left for *SWANCC* was whether waters and wetlands not so adjacent - "isolated waters" - also are so covered.

Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers (USCOE), 531 U.S. 159 (2001). In *SWANCC,* the Supreme Court found that the regulations promulgated by the USCOE impermissibly extended the CWA's reach to include a gravel pit pond because the pond was a habitat for migratory birds. The Court held that the migratory bird rule did not extend CWA protection to such wetlands and water habitat.

After *SWANCC*, the Supreme Court decided ***Rapanos v. United States,*** 547 U.S. 715 (2006), a case challenging federal jurisdiction to regulate isolated wetlands under the CWA. It was the first major environmental case heard by the newly appointed Chief Justice John Roberts and Justice Samuel Alito (both conservatives).

While five justices agreed to void rulings against the plaintiffs, who wanted to fill their wetlands to build a shopping mall and condos, the court was split over further details, with four conservative justices arguing in favor of a more restrictive reading of the term "navigable waters" than the four more liberal justices. Justice Anthony M. Kennedy, often a swing vote, did not fully join either position.

The case was remanded to the lower court. Ultimately, *Rapanos* agreed to a nearly $1,000,000 settlement with the EPA while not admitting to any wrongdoing. Because no single *Rapanos* opinion garnered a majority of the justices' votes, it is unclear which opinion sets forth the controlling test for wetlands jurisdiction. The EPA's newly issued rule is an attempt to clarify that confusion, although many CWA issues will need to still be litigated to determine just how EPA's Rule is interpreted.

For example, EPA's press release dated May 27th states in part:

"A Clean Water Act permit is only needed if a water is going to be polluted or destroyed. The Clean Water Rule only protects the types of waters that have historically been covered under the Clean Water Act. It does not regulate most ditches and does not regulate groundwater, shallow subsurface flows, or tile drains. It does not make changes to current policies on irrigation or water transfers or apply to erosion in a field.

The Clean Water Rule addresses the pollution and destruction of waterways – not land use or private property rights." EPA Press Release, Clean Water Rule Protects Streams and Wetlands Critical to Public Health, Communities, and Economy, May 27th, 2015.

While "most ditches" are not regulated, ditches which are constructed out of streams, or function like streams, and can carry pollution downstream are still regulated under the act. The Clean Water Rule does not create any new permitting requirements and maintains all previous exemptions and exclusions, e.g., activities like planting, harvesting, and moving livestock have long been exempt from CWA regulation, and the Clean Water Rule preserves those exemptions.

Below is a link to the EPA May 27th Press Release:

http://yosemite.epa.gov/opa/admpress.nsf/0/62295CDDD6C6B45685257E52004FAC97