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CLEAN WATER ACT JURISDICTION: *Bush Administration Proposed Rulemaking and Policy Guidance at Odds With Positions in DOJ's Legal Briefs*

As represented in about two dozen briefs since the Supreme Court's 2001 decision, the Department of Justice's interpretation of *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers*, 531 U.S. 159 (2001) (the SWANCC case) is considerably narrower than construed by the EPA and Army Corps of Engineers as a justification for their attempt to change Clean Water Act rules. Rather than finding that the definition of waters of the U.S. needs to be changed by a new rulemaking or policy guidance, as the Bush administration now proposes, the DOJ has steadfastly argued in its briefs filed in federal court that the agencies' existing definition of waters of the United States is valid and, indeed, required to achieve the purposes of the Clean Water Act.

Here are excerpts from two of the most recent briefs:

**Excerpts from the Brief for the United States
in *U.S. v. Newdunn*
in The United States Court Of Appeals
For The Fourth Circuit
August 30, 2002**

In SWANCC, the Court considered whether or to what extent the CWA authorized jurisdiction over discharges into isolated waters. It ruled that the Corps could not regulate such waters based solely on the Migratory Bird Rule. The Court clearly articulated the scope of its holding as follows: "We hold that 33 C.F.R. § 328.3(a)(3) (1999), as clarified and applied to petitioner's balefill site pursuant to the "Migratory Bird Rule" . . . exceeds the authority granted to respondents under § 404(a) of the CWA." SWANCC, 531 U.S. at 174.

Federal regulations reasonably construe the [Clean Water Act] term "waters of the United States" to include wetlands **adjacent to all tributaries**, not just primary tributaries, to traditional navigable waters. (Emphasis added.)

In criticizing the district court's holding, the DOJ's Newdunn brief argues that any other interpretation of the regulations would be inconsistent with the Act itself:

The court fails to explain why or how Congress could have intended to regulate discharges into all primary tributaries but not secondary tributaries, regardless of their significance to the traditional navigable waters into which they flow, directly or indirectly. (Emphasis added.)

The regulations have consistently construed the Act to encompass wetlands adjacent to tributaries to traditional navigable waters – be they primary, secondary, tertiary, etc. – since 1975, a construction that comports with **Congress's intent to control pollution at its source and broadly protect the integrity of the aquatic environment**. (Emphasis added.)

**Excerpts from the Brief for the United States
in U.S. v. Rapanos
in the United States Court of Appeals for the Sixth Circuit
July 2002**

The evidence at Rapanos' trial established that the Salzburg Road parcel [owned by Rapanos] contained a minimum of 29 acres, and at one time up to 58.73 acres, of wetlands. The evidence further demonstrated that those wetlands had a surface hydrological connection to a waterway known as the Labozinski drain, which drained into Hoppler Creek, the Kawkawlin River (a traditional navigable river), and ultimately into Saginaw Bay, a part of Lake Huron.

The issue in *SWANCC* was whether the Corps' reliance on "the Migratory Bird Rule is...fairly supported by the [Clean Water Act]." 531 U.S. at 167. (Emphasis added.) The Court rejected the government's contention that use of such non-navigable isolated intrastate ponds as habitat for migratory birds was a sufficient basis for treating those ponds as "waters of the United States" within the meaning of the CWA. The majority held "that 33 C.F.R. §328.3(a)(3) (1999)[the "other waters" regulation; same as §230.3(s)(3), the counterpart EPA regulation], as clarified and applied to petitioner's balefill site pursuant to the 'Migratory Bird Rule,' 51 Fed. Reg. 41217 (1986), exceeds the authority granted to respondents under §404(a) of the CWA." *Id.* at 174. (Footnote omitted.) The *SWANCC* Court explicitly declined to reach any constitutional question. *Id.* at 162.

The wetlands on Rapanos' property were adjacent to tributaries of traditionally navigable waters. The Clean Water Act, the Supreme Court in *Riverside Bayview*, this Court in *Ashland Oil*, and EPA regulations, all deem such wetlands to be "waters of the United States." ***SWANCC* involved only hydrologically isolated waters. Because *SWANCC* did not involve, rule on, or undermine the regulation of adjacent wetlands,** Judge Zatkoff erred as a matter of law in responding to the GVR Order by reversing Rapanos' convictions for destroying the adjacent wetlands on the Salzburg Road site in reliance on *SWANCC*. (Emphasis added.) (The term "adjacent wetlands" is used throughout this brief to refer to wetlands which are adjacent to non-navigable tributaries of traditionally navigable waters, such as those on Rapanos' property.)

SWANCC does not limit the coverage of the CWA to navigable-in-fact waters and wetlands adjacent thereto. To the contrary, the *SWANCC* Court specifically characterized as "plausible" the argument made by the petitioners that "Congress simply wanted to include all waters adjacent to 'navigable waters,' such as non-navigable tributaries and stream," with the Act's scope. 531 U.S. at 171. The Court also quoted with approval its prior holding that "Congress' concern for the protection of water quality and aquatic ecosystems indicated its intent to regulate wetlands 'inseparably bound up with 'waters' of the United States.'" *Id.* at 167 (quoting *Riverside Bayview*, 474 U.S. at 134).

To exclude non-navigable tributaries and their adjacent wetlands from the coverage of the Act would disserve the recognized policies underlying the Act, since pollution of non-navigable tributaries and their adjacent wetlands can have deleterious effects on traditionally navigable waters. (Emphasis added.)

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