

WOTUS Presentation

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Courtney Briggs, American Farm Bureau Federation

Clean Water Act

EPA's and the Corp's regulatory authority is limited to discharges into "navigable waters"—

The Clean Water Act prohibits "discharg[ing] . . . any pollutant" without a permit. A "discharge" is the "addition of any pollutant to *navigable waters* from any point source."

"Navigable waters" are "*the waters of the United States*, including the territorial seas."

Need a CWA 402 NPDES permit from EPA/state to discharge pollutants into a covered water, or a CWA 404 permit from Corps to dredge or fill a covered water.

Supreme Court Decisions

- ▶ *Riverside Bayview*: Jurisdiction over wetlands where difficult to tell where water ends and wetland begins
- ▶ *Solid Waste Agency of Northern Cook County (SWANCC)*: No jurisdiction over a water-filled gravel excavation just because it was used by migratory birds
- ▶ *Rapanos*: Scalia plurality—relatively permanent waters and wetlands indistinguishable from them; Justice Kennedy—waters and wetlands with a “significant nexus” to navigable waters.
- ▶ The Supreme Court *serves as the final arbiter of the law, ensuring equal justice under the Constitution and interpreting laws. We can't just rely on the plain test of the statute—the Court has spoken to some degree.*

Sackett v. EPA

- ▶ “We conclude that the **Rapanos** plurality was correct”: the CWA’s use of “waters” encompasses “only those **relatively permanent, standing or continuously flowing bodies of water ‘forming geographic[al] features’ that are described in ordinary parlance as ‘streams, oceans, rivers, and lakes.’**”
- ▶ A “wetland [must] ha[ve] a continuous surface connection with [a relatively permanent] water... making it difficult to determine where the ‘water’ ends and the ‘wetland’ begins.” Additionally, the Court held “that the Clean Water Act extends to only those wetlands that are as a practical matter **indistinguishable** from waters of the United States.”

What did Rapanos say on “Relatively Permanent?”

- ▶ “Only those relatively permanent, standing or continuously flowing bodies of water `forming geographic[al] features’ that are described in ordinary parlance as ‘streams, oceans, rivers, and lakes.’”
- ▶ Footnote discussed “seasonal” streams as relatively permanent but also the possibility that a river flowing for **290 days** (closer to 10 months) would not necessarily be excluded under the relatively permanent test.
- ▶ The Rapanos plurality distinguished between “continuously present, fixed bodies of water” and “ordinarily dry channels through which water occasionally or intermittently flows.”
- ▶ The plurality explained that, as a matter of “commonsense,” the phrase “waters of the United States” excludes “channels containing merely intermittent or ephemeral flow.” (However, you can tell that Scalia doesn’t actually know what these terms mean.)
- ▶ **Have to give meaning to “relatively,” can’t just be perennial streams that sometimes dry up.**

Comments

- ▶ The “relatively permanent test” is the only test.
 - (1) The territorial seas, and waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including waters which are subject to the ebb and flow of the tide.
 - (2) relatively permanent, standing, or continuously flowing bodies of water that have a connection to (1)
 - (3) adjacent wetlands with a continuous surface connection to (1) or (2).

List of Exemptions

Exemptions

- ▶ Ephemeral features: surface water flowing or pooling only in direct response to precipitation.
- ▶ Subsurface connections. Must be surface and continuously flowing.
- ▶ The use of discrete, non-relatively permanent features to stitch together a continuous surface connection.
- ▶ Relying solely on a physical connection to establish a continuous surface connection. Need to have a hydrologic connections.
- ▶ Only interstate waters that are navigable in-fact.
- ▶ All ditches, except ditches that either relocates a relatively permanent water, is constructed in a RP-water, or is constructed in an adjacent wetland as long as the ditch has standing or continuously flowing water.
- ▶ Switch the burden of proof. You are out unless proven in.

Exemptions (2)

- ▶ Groundwater
- ▶ PCC
- ▶ Wastewater Treatment
- ▶ Artificially irrigated areas
- ▶ Stormwater control features