

To: Senior Partners M. Bergman, and C. Reller  
From: Associates: Curry, Gallagher, Miles, and Pimental  
Date: Dec 14<sup>th</sup>, 2018  
Re: Quincy- The Clean Water Act

### Issues

- A) Does a wetland that intermittently flows into a water that is a ‘traditionally navigable water’ constitute a ‘water of the United States?’
- B) If preventative measures are being enacted to avert the discharge of pollutants, when is a (NPDES) permit needed?

### Short Answer

- A) No. Under the *Rapanos* plurality standard, the flow of water must be permanent.
- B) It depends. The CWA must have established the type of connection and how the pollutant is being transferred or discharged.

### Facts

Greg Quincy (our client), owner of Quincy Construction, purchased the land adjacent to Lake Lakey Boi in Ann Arbor Michigan last year. He purchased this land to begin a housing development project, which is estimated to last for two years. For the majority of the year, the land that Quincy purchased remains grassy and dry. However, during the spring, when rainfall is the heaviest, Lake Lakey Boi overflows with water, creating seasonal wetlands. These seasonal wetlands flow directly into Quincy’s property.

Earlier this year, he and his construction company began the housing development project. The first task of this project was pouring fill material over his land. Assuming he did not need to contact the Environmental Protection Agency (EPA), he continued discharging fill material over his property without a National Pollution Discharge Elimination System (NPDES) permit.

Additionally, Quincy decided to install a pipeline to prevent pollutants from being discharged into the nearby bodies of water. He assumed he did not need a permit from the Environmental Protection Agency (EPA) to install this pipeline because it was meant to uphold CWA standards and prevent pollution.

According to Quincy, homeowners surrounding the property became concerned over the alleged pollution that was taking place on his construction site. Around six months into his company’s project, Quincy received a compliance order from the Environmental Protection Agency to remove the fill material. Sent along with the compliance order was a letter indicating that if he did not comply with the Environmental Protection Agency, the United States government will consider bringing a Clean Water Act (CWA) violation claim against him, specifically a claim that he has violated Sections 1311 and 1342 of the CWA. Quincy claims he conducted his own research prior to beginning his project as to whether these seasonal wetlands would cause any complications. Additionally, he contacted the EPA through email, but did not receive any information back.

Quincy believed he did not need to request a permit because although Lake Lakey Boi is a navigable-in-fact water of the United States, water from his purchased land does not flow to Lake Lakey Boi year-round. After receiving the letter from the EPA, he has hired multiple experts to investigate his property to ensure that only a seasonal water flow exists between his land and Lake Lakey Boi, rather than continuous water flow throughout the year. It has been discovered that water flow is only present from March through May of the year. Quincy is interested in guidance as to whether he should comply with the EPA or go to court.

## Discussion

### Abstract

The Clean Water Act (CWA), formally known as the Federal Water Pollution Control Act, became effective in 1972. This federal law was passed by Congress to regulate and protect waters of the United States from any form of pollution [§1251(a)]. The U.S. Army Corps of Engineers (Corps) and the Environmental Protection Agency (EPA) have the authority to enforce the Clean Water Act. Specifically, Section 1311(a) of the Clean Water Act determines that ‘the discharge of any pollutant by any person shall be unlawful,’ with certain exceptions [33 U.S.C.A. § (1311)]. Additionally, Section 1342(a) of the Clean Water Act determines that if any person obtains a permit from the EPA, then pollutants may be discharged into waters of the United States [33 U.S.C.A. § (1342)]. The Clean Water Act broadly defines “navigable waters” in Section 1362(7) as “waters of the United States, including territorial seas.” Due to the ambiguity of the term ‘navigable waters’ provided by the Clean Water Act, there have been various attempts made by the Corps, the EPA, as well as case law, to further interpret and define “navigable waters.”

First, an attempt to define “navigable waters” was made by the Supreme Court in *U.S. v. Bayview Homes* (1985). It determined that a wetland that is connected to a ‘traditionally navigable water’ can be considered a ‘navigable water’ under the Clean Water Act.

Second, a more recent attempt to define ‘navigable waters’ was made by the Supreme Court in *Rapanos v. United States* (2006). It stated that the Clean Water Act “makes it unlawful to discharge dredged or fill material into “navigable waters” without a permit.” The plurality standard determined for a wetland to be considered a ‘navigable water’ it must be adjacent to a ‘relatively permanent body of water connected to traditional interstate navigable waters’ and, it must “have a continuous surface connection with that water, making it difficult to determine where the ‘water’ ends and the ‘wetland’ begins.” Additionally, Justice Kennedy concurred with the *Rapanos* plurality, but rather utilized a significant-nexus test, which determined that a wetland is considered a ‘navigable water’ if “the wetlands, either alone or in combination, with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as ‘navigable.’”

It is made evident that the definition of “navigable waters” is vague. Uncertainty remains throughout the courts as to what standard controls the definition.

### “Navigable Waters”

Under Section 1311(a) and 1342(a) of the Clean Water Act, as well as various case law, it is unlawful for

- 1) Any person to
- 2) Discharge a pollutant
- 3) Into ‘navigable waters,’ which are

- a) relatively permanent, standing, or flowing bodies of water, and
  - b) contain a clear surface connection or a significant-nexus to a 'navigable-in-fact' water, and
  - c) affects the chemical, physical, biological integrity of other covered waters
- 4) Without a permit

Does a wetland that intermittently flows into a water that is a 'traditionally navigable water' constitute a 'water of the United States?' This topic has two main issues: what constitutes a navigable water and when a permit is needed.

First, it is evident that the first, second, and fourth elements are easily met here. It is evident that Quincy has discharged fill material into a type of water without a permit. The fill material is categorized as a pollutant under Section 1362(6) of the Clean Water Act. Additionally, Quincy admitted to not requesting a permit from the Environmental Protection Agency.

As for the third element, the issue remains as to whether the wetlands Quincy is discharging a pollutant into are considered 'navigable waters' under the Clean Water Act. This third element can be addressed through the application of two seminal cases, *United States v. Bayview Homes* and *Rapanos v. United States*.

### ***United States v. Bayview Homes***

The Clean Water Act is specific in saying the jurisdiction thereof only applies to "waters of the United States" and those that are considered "navigable waters." However that only further calls to question what exactly is a "water of the United States" or a "navigable water?"

In 1985 Supreme court case *U.S. v. Bayview Homes*, the issue of what constitutes a "water of the United States" came to head. Riverside Bayview Homes, Inc. was in the midst of filling lands adjacent to Lake St. Clair, Michigan, this was done without permit from the Army Corps of engineers, the Corps filed suit in Federal District Court to prevent Bayview from filling of its property without the Corps' permission on the belief that wetlands were under the regulation of the CWA. Bayview argued otherwise, citing that since the water could not be considered navigable then it fell to the jurisdiction of the states. This brings about the relevant issue of water is considered a 'water of the United States.' Considering that the land was classically considered a wetland under the legal definition of being an area with saturated soil and is able to grow aquatic vegetation, this was held reasonable. Furthermore, being that the source of said conditions was groundwater, and that the wetland on the property was a tributary of traditionally navigable water, Supreme Court Held that the Corps was within its jurisdiction to regulate the conditions under which Bayview would be permitted to fill its lands.

Through this holding, the understanding that a wetland can be considered a 'water of the United States' permits the regulation thereof under the jurisdiction of the Clean Water Act section 1311 subsection 1342. Furthermore, this applies to the Quincy fact pattern in the manner that the land owned by Quincy and the land to be filled is considered a wetland.

However, the question remains of whether or not a conventionally non-navigable water is considered a "water of the United States" and valid enough to be under the purview by the Clean Water Act.

This is somewhat covered in Third District Appeals court case *U.S. v Pozsgai*, which uses the holdings of Bayview as basis for their rulings. The facts of Pozsgai are virtually identical to

Bayview but the method of argumentation is different. Here it was argued that wetlands could never be considered waters of the United States as they are not navigable. This takes a strict view of the CWA that was not fully investigated in Bayview and is therefore an important reaffirming case. In this instance, the legal intent of the Act is taken into consideration and therefore is used to provide basis for a wider interpretation of the statute. It was understood that because wetlands are more often than not, linked to a conventionally navigable water source that any discharges into wetlands could affect the navigable water which is under the purview of the CWA. Furthermore, in application to the Quincy issue, this concluded definitively that a wetland can be considered a water of the United States by its attachment to a navigable water.

### ***Rapanos v. United States***

The issue of what is or isn't classified under the Clean Water Act eventually came to a head in *Rapanos v. United States*. In this 2006 case, two developers in two separate incidents challenged the definition of "waters of the United States" as present in the Clean Water Act.

Rapanos, a developer in Michigan, was attempting to construct a mall, and thus filled a wetland he had purchased with sand without filing for a permit. He stated that he did not believe this action was in violation of the CWA due to the fact that his land was 20 miles away from any navigable waterways. The EPA stated that the land in which he was developing was in fact a protected "adjacent wetland" (it eventually empties into navigable rivers and lakes), and by not filing for a permit Rapanos was in violation of the CWA. They were able to maintain this assertion due to the breadth of the interpretation of the term "navigable waterway", which the Clean Water Act defines as "waters of the United States". Similarly to Rapanos, the Carabells in *Carabell v. U.S. Army Corps of Engineers* attempted to fill in a wetland on the property they owned to construct a condominium, but were unable to obtain a permit from the EPA as it was maintained that the land was a protected wetland. The CWA prevents developers from introducing any pollutant such as sand or dirt into "navigable waters" or "waters of the United States". In the case of the Carabells', their land was adjacent to tributaries that lead to navigable waters.

These two cases led to the court to attempt to answer the question of whether the phrase "waters of the United States", as outlined in the Clean Water Act, can include wetlands that occasionally empty into a tributary of a navigable water. The court eventually was able to reach the decision that wetlands with no direct connection to navigable water are not within the jurisdiction of the Clean Water Act.

### **Plurality Opinion: Intermittent Flow**

In Justice Scalia's plurality opinion, waters that are not actually navigable can still be regulated by the Clean Water Act. Scalia maintained that the term "waters of the United States" refers solely to "relatively permanent, standing or flowing bodies of water" (Rapanos, 2006). In this instance, occasional water flow cannot be considered a water of the United States. In addition to this distinction, whether or not wetlands are covered by the CWA was discussed. Wetlands must be more than a simple "hydrological connection" and instead must have a "continuous surface connection" with a water of the United States. In this standard, it should not be easy to determine "where the 'water' ends and the 'wetland' begins".

Through the plurality opinion, important characteristics of wetlands and non-navigable waters that are covered under the Clean Water Act are outlined. Provided that water is relatively permanent and has a surface connection with a navigable body of water it is covered under the

Clean Water Act. This is favorable for the facts of the Quincy case. For a majority of the year, the land that Quincy purchased is not a body of water, and occasional water flow can not be considered a water of the United States, making it not covered under the Clean Water Act. In this case, there is also not a continual surface connection with a water of the United States, again favoring the facts presented by Quincy.

### **Concurring Opinion: Significant Nexus**

The concurring opinion written by Justice Kennedy strongly disagreed with the reasoning presented in the plurality opinion. In this opinion, it is sometimes necessary for wetlands to have a “continuous surface connection” to a flowing body of water in order to be under the jurisdiction of the Clean Water Act. Kennedy also went on to challenge that mere adjacency to a tributary as outlined in the Clean Water Act is not sufficient enough to warrant coverage. Kennedy expands by stating that if a wetland (non-navigable body of water) needs a “significant nexus” to fall under the jurisdiction of the Clean Water Act. Essentially, the wetland must be able to significantly affect the integrity of a navigable water downstream. In the case of Rapanos, there is a lack of evidence indicating that there is a significant nexus.

Given the facts presented by Quincy, the exclusion of the “continuous surface connection” as mentioned in the plurality agreement could make the land fall under the Clean Water Act. Whether or not Quincy’s land is a significant nexus that can alter water quality downstream can be debated.

### **Application of the Plurality Standard and the Significant-Nexus Standard**

Quincy’s case regarding the third element can be compared to the United States District Court case *Simsbury-Avon Preservation Society, LLC. v. Metacon Gun Club, Inc.* 472 F.Supp.2d 219 (2007). Homeowners alleged that Metacon Gun Club, Inc. was violating the Clean Water Act by discharging munitions into a nearby vernal pond, which was connected to the navigable-in-fact Farmington River, without a permit. The issue the court was concerned about was whether the vernal pond constituted a “navigable water” under the Clean Water Act.

The district court focused on the Rapanos plurality standard, as well as Justice Kennedy’s significant-nexus test, which he set forth in his concurrence to Rapanos. First, under the Rapanos plurality standard, the first prong addresses “adjacency” and “permanence.” It was found that the vernal pond ‘at least neighbors’ the Farmington River. Comparing this to Quincy’s case, due to evidence, the wetlands are adjacent to Lake Lakey Boi, demonstrating that the wetlands satisfy the first prong of the Rapanos plurality standard.

Next, the second prong addresses the “continuous surface connection.” It was found that although water flow connected the vernal pond to the Farmington River, experts observed that this flow of water was only present two times throughout the year, rather than year-round. Comparing this to Quincy’s case, there is a continuous surface connection of water between the wetlands and Lake Lakey Boi, but this was also only observed for three months of the year. It can be argued that the wetlands owned by Quincy do not satisfy the second prong of the plurality standard, demonstrating that it is likely these wetlands are not “waters of the United States.”

Second, although it is likely the wetlands are not “navigable waters” under the plurality standard, Justice Kennedy’s concurring significant-nexus test can also be applied to determine this issue. The first prong addresses the presence of a “significant nexus.” It was found that due to flooding that occurs in the spring, a “periodic physical nexus” was present between the vernal pond and the Farmington River. Comparing this to Quincy’s case, the wetlands were created

when water from Lake Lakey Boi overflowed onto his property, creating a nexus between the two bodies of water, satisfying this prong.

Next, the second prong addresses the effect on other covered waters. It was found that, through insufficient evidence on lead concentrations from the discharge of munitions, the argument that the vernal pond was directly affecting the “chemical, physical, and biological integrity” of the Farmington River was speculative. Comparing this to Quincy’s case, further evidence would need to be conducted as to whether the fill material was directly affecting the ‘integrity’ of Lake Lakey Boi, especially year-round.

Therefore, it can be concluded that through the comparison of the *Simsbury-Avon Preservation Society v. Metacon Gun Club Inc.* case, the wetlands on Quincy’s property likely do not constitute “navigable waters,” subject under the Clean Water Act.

### **Permit Requirement**

Second, if the wetlands are established as being ‘navigable waters,’ the issue of when a permit is needed arises. An example of when a permit is explained in *Tennessee Clean Water Network v Tennessee Valley Authority*, No. 17-6155 6th Cir. (2018). The initial suit stated that the TVA is in violation of the Clean Water Act because unpermitted discharge is being leaked into navigable waterways protected by the CWA. However, these leaks are not being directly discharged into the Cumberland River, but are instead discharged into unlined coal ash ponds adjacent to the river. The suit states that the TVA is in violation of the CWA because some of these unpermitted pollutants reach the river by being “hydrologically connected” through the groundwater. The Sixth Circuit Court of Appeals found that there exists no historical or textual basis for pollutants discharged in waters that are “hydrologically connected” to waters protected by the CWA. For discharge of pollutants into navigable waters the CWA requires a (NPDES) permit because the purpose of the act was to restore and maintain the nation’s waters, and to do this meant controlling what could be discharged into these waters. The Tennessee Valley Authority possesses such permits for its Gallatin Fossil Plant to discharge certain pollutants into Old Hickory Lake which is connected to the Cumberland River, which is protected by the CWA. Before the TVA discharges these pollutants, it disposes coal by “sluicing” and allowing the coal to settle in coal ash ponds adjacent to the river. The Gallatin Plant does have a (NPDES) permit to discharge coal combustion wastewater, which contains heavy metals and other pollutants, into the river through a pipe. However, the suit alleges that additional unpermitted discharge is being leaked into the lake through the groundwater. The suit states that this is because these unlined ponds are “hydrologically connected” to the Cumberland River, which is protected by the CWA. The Court of Appeals states in the majority opinion that the first type of discharge, which is leaked into the River through a pipe, is regulated under the CWA, however the discharged caused by the “hydrological connection” is not regulated.

In comparing this case to the Quincy, because the pipeline he installed was hydrologically connected, he in fact did not need a permit because there was no mention of this type of connection in the CWA. If in fact it mentioned, Quincy would have needed a (NPDES) permit regardless of his preventative measures.

### **Conclusion**

In summary, it is likely that the wetlands Quincy was discharging a pollutant into do not constitute ‘waters of the United States.’ This was found through the application of *U.S. v.*

*Bayview Homes* and standards set forth in *Rapanos v. United States* to further define ‘navigable waters’ under the Clean Water Act.

One option for Quincy is to remove the fill material and comply with the EPA. This would ensure he has no such Clean Water Act violation claims brought against him, whether the wetlands are ‘navigable waters’ or not.

The best option for Quincy if the EPA or the United States were to bring a Clean Water Act violation claim against him would be to go to court because he can prove that the wetlands he owns are not ‘waters of the United States’ through multiple standards set forth in various case law. This would make it a highly actionable issue. Granted, all other options would point towards the waters owned by Quincy being covered by the CWA, the inclusion of the ephemeral standard negates all of these standards.

#### **Cases Discussed**

*Rapanos v. United States*

*U.S. v. Riverside Bayview Homes, Inc.*

*U.S. v Pozsgai*

*Carabell v. U.S. Army Corps of Engineers*

*Simsbury-Avon Preservation Society, LLC. v. Metacon Gun Club Inc.*

*Tennessee Clean Water Network v Tennessee Valley Authority*

# **Diction Discrepancies in the Clean Water Act**

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### **§ 1. Scope**

This annotation will be a discussion of the Clean Water Act (CWA) and the legal issues that have arisen as a result of vague wording therein. This synthesizes the interpretations of several salient cases at the federal level as well as a few seminal Supreme Court cases. These issues mostly pertain to the definition of “Waters of the United States” and the resulting uncertainty that comes from further trying to interpret the statute. There are several other issues related to the Clean Water Act but they will not be discussed here in order to narrow the level of discussion to a more in depth understanding of one important issue.

### **§ 2. General Provisions**

The Clean Water Act was a document drafted by the EPA which derives its power from the congressional power to regulate interstate commerce and the waters related to such commerce. Because of this the Clean Water Act is limited in scope to only the waters that are



effects of interstate commerce. Furthermore, the commerce clause has always been a tricky beast and this is no different in the CWA.

The CWA explicitly states that;

**1311(a)**

(a) Illegality of pollutant discharges except in compliance with law Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful. 33 U.S.C.A. § 1311

This is generally interpreted to mean that all instances of pollution discharge into water is justiciable under the CWA. However, this is a rather broad statement and is further narrowed in the aforementioned subsections. For reference related statutes 1312 consider what qualifies as a pollutant, 1316 narrows the understanding of a standard of performance when dealing with pollutants, 1317 outlines the direct consequences of violating statutes, 1342 narrows the scope to only cover navigable waters, 1344 realtedly covers dredged material as pollutants, and lastly 1328 outlines exceptions to the statute. For the purposes of this annotation the definition of navigable waters will be further investigated.

Section 1342 directly states;

1342(a 4-5)

(4) All permits for discharges into the navigable waters issued pursuant to section 407 of this title shall be deemed to be permits issued under this subchapter, and permits issued under this subchapter shall be deemed to be permits issued under section 407 of this title, and shall continue in force and effect for their term unless revoked, modified, or suspended in accordance with the provisions of this chapter.

(5) No permit for a discharge into the navigable waters shall be issued under section 407 of this title after October 18, 1972. Each application for a permit under section 407 of this title, pending on October 18, 1972, shall be deemed to be an application for a permit under this section. The Administrator shall authorize a State, which he determines has the capability of administering a permit program which will carry out the objectives of this chapter to issue permits for discharges into the navigable waters within the jurisdiction of such State. The Administrator may exercise the authority granted him by the preceding sentence only during the period which begins on October 18, 1972, and ends either on the ninetieth day after the date of the first promulgation of guidelines required by section 1314(i)(2) of this title, or the date of approval by the Administrator of a permit program for such State under subsection (b) of this section, whichever date first occurs, and no such authorization to a State shall extend beyond the last day of such period. Each such permit shall be subject to such conditions as the Administrator determines are necessary to carry out the provisions of this chapter. No such permit shall issue if the Administrator objects to such issuance.

33 U.S.C.A. § 1342.

This section of the CWA is a bit more complex and as a result it has required further legal interpretation.

### § 3. Definitions

For purposes of clarity, Section 1362(5) of the Clean Water Act defines “person” as “an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body.” Additionally, Section 1362(6) of the CWA defines a “pollutant” as “dredged soil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes...discharged into water,” etc.

### § 4. Waters of the United States

To be considered a water of the United States and thus be protected by the Clean Water Act it must be; a non-tributary feeding a water of the United States or a wetland adjacent to a classical water of the United States, a geographical feature must be navigable, reasonably capable of being made navigable, or satisfy one of the definitions in the regulation of the United States Army Corps of Engineers.

This is outlined in Tri-Realty Company v. Ursinus College, 124 F. Supp. 3d 418, 81 Env't. Rep. Cas. (BNA) 1653 (E.D. Pa. 2015). Tri-Realty was a property owner adjacent to Ursinus college under alleged discharge of oil from the college's underground storage tanks was released into small creek known as Perkiomen Creek. Ursinus College argued that this discharge was outside the jurisdiction of the CWA as Perkiomen Creek largely flowed from groundwater and storm drainage, not an in-fact water of the United States. Through this the genuine issues arise of whether or not the Water in question was a water of the united states in its own right, whether or not the creek was derived from a genuine point source that could be considered navigable in its own right, and whether or not the oil discharged had any effect on traditionally navigable waters and thus case governed by the jurisdiction of the CWA. In all considerations the holding of the court was that Perkiomen Creek was not a water of the United States in its own right, nor significantly connected to any other navigable water. That being said the case was not considered justiciable under the CWA and the stated infractions fell to state regulation. Because the Creek was lacking a significant nexus and was not considered navigable in its own right a narrow interpretation of the statute was established. This pattern carried over for a long time in which a strictly textual interpretation was garnered for the application of such a statute.

However, that standard of application was widened significantly by a seminal case through U.S. v Bayview Homes. Bayview had purchased land adjacent to a lake and planned on

filling the wetlands on their property in order to build on said land. The Army Corps of Engineers refused this motion under the CWA 1342 unless a dredging exception could be granted under regulations listed in CWA 404. This issue then went to East Michigan District Court, and from there the U.S Supreme court. Was the CWA justified in its jurisdiction of regulation US waters? Yes, as the case adopted a narrow view of US waters, saying that should the water be seasonal, not attached to a navigable source, not steady enough to support the growth of aquatic vegetation, and is non-navigable itself without attachment to a conventionally navigable source, then the water does not fall under the jurisdiction of the commerce clause and therefore the CWA by extension.

Since the wetlands in question for Bayview were indeed attached to a navigable source, the new interpretation applied even though the area would have previously not been considered an actionable land under the CWA. Furthermore, this was justified on the grounds of a legislative intent interpretation, a change from the previous textualist understanding. This sets precedent for cases regarding the jurisdiction of the CWA for years to come (until US v Rapanos in 2006 in which a broader interpretation was adopted). This was a notable case to understand as it relates to the history of the CWA and the difference in recent as compared past law. Additionally, it helped set up the standard of interpretation through legislative intent, which continues to ripple out into our current interpretations of the statute. U.S. v. Riverside Bayview Homes, Inc., 474 U.S. 121, 106 S. Ct. 455, 88 L. Ed. 2d 419, 23.

#### § 5. Navigable Waters

As stated in the first provision on waters of the United States, in order to be considered such, the water must be considered navigable. From a strictly textualist standpoint this would

exclude the majority of waters such as small rivers and most lakes within the U.S. However, under recent interpretation and as a result of the preference for a legislative intent approach.

Through *Bayview* and *Rapanos* a wider interpretation has been established. For example, in 6th circuit court case *U.S. v Ashland Oil Transportation Co.*, the defendant Ashland Oil was indicted for failing 'immediately to report the discharge of a large amount of oil into the water of Little Cypress Creek. Ashland claimed that Congress did not have the constitutional power to control pollution of non-navigable tributaries of navigable streams and has not sought to do so in the past. Furthermore, it was argued that that Little Cypress Creek was non-navigable in fact, and that the discharge would never reach 'navigable waters. Through this one major issue was set up for discussion, Does Congress have the right to regulate the discharge of pollutants into non-navigable waters? This question was decided in favor of on the logic that the ruling giving Congress the power to regulate waterways on the basis of the commerce clause was slightly outdated and should be expanded to include all things that could be considered to serve as a link in the chain of commerce or a 'highway' of commerce just as the interpretation had extended to radios and air traffic. Through this precedent, all waters would be considered waters of the United States and therefore any discharge into any water located within the U.S could be regulated by the Clean Water Act. This was a massive step towards the ultimate broad interpretation that is now utilized in all cases regarding the justiciability of the Clean Water Act.

United States of America, Plaintiff-appellee, v. Ashland Oil and Transportation Co., a Subsidiary of Ashland Oil Co., Inc., 504 F.2d 1317 (6th Cir. 1974)

Similarly, in notable case *Cape Fear watch, Sierra Club and Waterkeeper Alliance v Duke Energy Progress*, an expansion was taken to include non-traditionally navigable waters. Duke energy progress was caught dumping polluting substances into state sewers in order to

bypass water discharge cleanliness tests. This sewer ultimately empties into nearby Sutton lake, an in its own right water of the United States. Plaintiffs argued that sewers are not waters of the United States because they are not in their own right navigable and are therefore not covered via the CWA. However, contrary to what would be considered under a plain meaning doctrine, the sewer was considered a navigable water by the reasoning that the sewer had a significant enough attachment to a conventional water of the United States. The logic behind this being that even though the sewers were directly affected are most definitely not navigable waters, the impact of the pollutants on in their own right waters of the United States was significant enough to warrant regulation and therefore characterize the sewer as a water to the United States. Furthermore, within the Clean Water Act itself there are special provisions for sewers and man-made water systems seen under section 1317. This case was the perfect storm for an expansion of application of the Clean Water Act, and ultimately bridged the gap that was created by the inherent vagueness of the statute itself. This decision therefore expanded the scope of the CWA and continued along the lines of adopting a more legislative intent interpretation and expanding the power of the Clean Water Act. Cape Fear River Watch, Inc. v. Duke Energy Progress, Inc., 25 F.Supp.3d 798, 810 (E.D.N.C.2014)

Continuing the issues brought up in Bayview, *Solid Waste Agency of Northern Cook County (SWANCC) v. Army Corps of Engineers* brought forth the question of whether or not the provisions of the Clean Water Act are able to be applied to intrastate or isolated waters.

This issue arose from the SWANCC's desire to develop on land that was once a sand and gravel pit that had been abandoned since the 1960s. On this site were large excavation trenches that had become ponds frequented by migrating birds. These ponds varied in size and ranged from a few feet across to spanning multiple acres. SWANCC sought to fill in these trenches, and

subsequently contacted the Army Corps of Engineers regarding whether or not a permit would be needed under the Section 404 of the Clean Water Act. This brought to the forefront whether or not this body of water can be considered a “navigable water” (“the waters of the United States”) and if it was under the jurisdiction of the Clean Water Act.

Per *United States v. Riverside Bayview Homes, Inc.*, the Corps has the authority to regulate wetlands that are adjacent to tributaries, as well as navigable and interstate waters. Through the Migratory Bird Rule applied in 1986, the Corps also asserted that the CWA allows for the regulation of isolated waters that are the homes of migratory birds. The Corps applied this definition to include intrastate waters that could eventually affect interstate commerce and migratory birds. This series of analysis ultimately led to the Corps denying a permit to SWANCC, which the SWANCC went on to appeal in court.

The majority (5-4) ruling in this case maintained that the Corps nor the EPA could use the Migratory Bird Rule to enable section 404 permit requirement over waters that are isolated or abandoned even if these waters are habitats to migratory birds. The Court deduced that the Corps did not have jurisdiction over ponds that are “not adjacent to open water”. The Court held that by extending this definition to isolated waters, the Corps was not in line with the text Clean Water Act, which they believe does not allow this extension. The Court did not allow for ambiguous interpretation of the text to grant the Corps to interpret it as they please.

This issue greatly limited the scope of what waters are covered under the Clean Water Act by stating that those that are isolated and non-adjacent to navigable water are not covered. It ultimately impacts both privately owned land as well as isolated wetlands or waters on public lands, as neither are now covered under the Clean Water Act. This interpretation muddles the idea of what is or is not considered a navigable water, and diminishes federal control over lots of

wetland acreage, leaving its protection and control under state or local power. This act limits which waters are able to be regulated by the CWA to those that are adjacent to open water as well as brings attention to following the plain meaning of the text of the Clean Water Act. Solid Waste Agency of Northern Cook County. v. Army Corps of Engineers, et al. 531 U.S. 159 (2001)

§ 6. **Application of Standards Controlling ‘Navigable Waters’**

An attempted interpretation of the definition of ‘navigable waters,’ as set forth in Section 1362(7) of the Clean Water Act, has been conducted by the Environmental Protection Agency (EPA), the U.S. Army Corps of Engineers (Corps), as well as the courts at multiple levels. Since a majority opinion could not be reached by the *Rapanos* court, two similar standards emerged, defining “navigable waters.” The requirements of the plurality standard include “only relatively permanent, standing, or flowing bodies of water connected to traditional interstate navigable waters.” Whereas, the requirements of Justice Kennedy’s significant-nexus test, as stated in his concurrence to the *Rapanos* plurality, include “a significant nexus to waters that are or were navigable in fact or that could reasonably be so made.” Uncertainty is evident among the lower courts as to which standard should guide their rulings. The application of these standards is evident in three district court cases. *Rapanos v. United States* 547 U.S. 715 (2006).

First, the use of the *Rapanos* plurality standard is evident in *United States v. Hamilton* 952 F.Supp.2d 1271 (10<sup>th</sup> Cir.2013). This United States District Court for the District of Wyoming case involved the United States as the plaintiff and David L. Hamilton, as well as, Hamilton Properties, as the defendants. The United States brought a Clean Water Act violation



claim again Hamilton, arguing that his company was discharging a pollutant, specifically fill material, into a creek, without a permit. Additionally, the EPA notified Hamilton to remove the fill material, since he did not request a permit. However, Hamilton argued that the creek, known as Slick Creek, was not considered a “navigable water,” and therefore, was not subject to the Clean Water Act. He also used this argument to justify why he refused to comply with the EPA. The rule controlling this district court case is derived from Section 1311(a) of the Clean Water Act, providing that a person is prohibited from discharging a pollutant into waters of the United States from any point source without a permit [33 U.S.C. 1311(a)]. Before the court could rule as to whether Hamilton was violating the Clean Water Act by discharging pollutants into “waters of the United States,” it first had to explore whether Slick Creek was indeed a “navigable water.” Initially, as discussed in §3 of this Report, the elements of a “person,” “discharging a pollutant,” “any point source,” and “without a permit” are easily met. Hamilton, or specifically Hamilton Properties, discharged fill material, which is categorized as a pollutant, into Slick Creek, which can be categorized as a point source, without a permit from the EPA. These elements are easily met because the district court does not spend much of its opinion discussing these components, rather it focuses on the analysis of what constitutes a “navigable waters.”

The District Court decided to focus on the *Rapanos* plurality standard to control its case, disregarding Justice Kennedy’s significant-nexus test. The court reasons that since both the plaintiff and the defendants utilized the *Rapanos* plurality standard in their arguments, it would focus primarily on this standard, rather than comparing both to the evidence. The court’s decision to follow one standard over another demonstrates that it had the choice to decide which

standard to follow, but to avoid complication, it allowed the plurality standard to guide it through its ruling.

In terms of the word “permanence,” as mentioned in the *Rapanos* plurality standard, Hamilton first argues that the water flow “fluctuates,” rather than remaining permanent. He then argues that Slick Creek is a “manmade irrigation ditch,” rather than a ‘stream.’ However, the court rules that although the rate of water flow may increase or decrease, since evidence proves that Slick Creek has a permanent flow of water throughout the year to the navigable-in-fact Big Horn River, it constitutes a “water of the United States.” Regarding “man-made” ditches, the court compares Hamilton’s case to *Leslie Salt Co. v. United States*, 896 F.2d 354, 360 (9<sup>th</sup> Cir.1990), indicating that natural channels, as well as “artificially-created channels,” are also subject to the Clean Water Act. The court goes further to cite *Rapanos v. United States*, stating that “manmade ditches and drains can constitute waters of the United States.” *United States v. Hamilton* 952 F.Supp.2d 1271 (10<sup>th</sup> Cir.2013).

In summary, Slick Creek was found to be a ‘navigable water’ subject to the Clean Water Act. It is evident that due to diction discrepancies in the Clean Water Act’s definition of “navigable waters,” this lower court has not been given a clear standard to follow. Although the District Court for Wyoming was able to allow the parties’ preference to guide them, it stated that the Tenth Circuit remains undecided as to which standard will control its future rulings on cases involving the Clean Water Act. It is demonstrated that although *Rapanos v. United States* was ruled in 2006, the lower courts remain uncertain.

Second, the application of the *Rapanos* plurality standard, as well as Justice Kennedy’s significant-nexus standard, is evident in *United States v. Cundiff*, 480 F.Supp.2d, 940 (2007).

The United States brought a Clean Water Act violation claim in the U.S. District Court for the Western District of Kentucky against the Cundiff's, arguing that wetlands owned by the defendants are "waters of the United States" under the *Rapanos* plurality standard. However, Cundiff argued that the wetlands are not "waters of the United States" and therefore the United States does not have jurisdiction over these waters.

Rather than focusing on one standard, as was demonstrated in *United States v. Hamilton*, this district court decided to focus on both the plurality standard and Justice Kennedy's significant-nexus test to guide its ruling. First, regarding the first prong of the plurality standard, the wetlands on the Cundiff site demonstrate a "relatively permanent" flow of water connected to Pond Creek and Caney Creek. These Creeks then lead into the Green River, which the court considers an interstate navigable water. This demonstrates that the first prong is met. Regarding the second prong of the plurality standard, it was found that there is no clear distinction between the wetlands and the Creeks or the Green River, demonstrating that a 'continuous surface connection' does exist. The court rules that under this plurality standard, the wetlands are indeed "navigable waters."

Next, regarding the first prong of the significant-nexus test, it was found that a "significant nexus" does exist between the wetlands and the Green River. Regarding the second prong of the significant-nexus test, it was found that by discharging fill or dredged material into these wetlands, a negative impact on the "chemical, physical, and biological integrity" of the Creeks, as well as the Green River, is clear. Evidence demonstrated that prior to the discharge of pollutants into the wetlands, those wetlands were providing ecological benefits to the surrounding navigable-in-fact waters. For example, these wetlands function as a storage of water.

However, the court determined that the wetlands have not been able to carry out their duty due to the polluted waters, causing significant issues to the Creeks and the Green River, demonstrating that the wetlands are “navigable waters.”

Overall, the United States District Court for the District of Kentucky decided to follow both standards set forth in *Rapanos*. It was mentioned by the district court that since the Sixth Circuit has not decided on a controlling standard, it was forced to rely on how other Circuits have addressed the standards. Ultimately, this district court decided to follow the First Circuit’s use of both standards. *United States v. Cundiff*, 480 F.Supp.2d, 940 (2007).

Third, the application of the *Rapanos* plurality standard, as well as Justice Kennedy’s significant-nexus standard, is evident in *Simsbury-Avon Preservation Society, LLC. v. Metacon Gun Club Inc.*, 472 F.Supp.2d 219 (2007). A Clean Water Act violation claim was brought to the United States District Court for the District of Connecticut by the Simsbury-Avon Preservation Society, LLC. against Metacon Gun Club, Inc. indicating that Metacon was discharging munitions into a vernal pond, which flowed into the navigable-in-fact Farmington River. On the one hand, Metacon tested the concentration of lead in the wetlands, discovering that standard levels were not exceeded. However, Simsbury-Avon Preservation Society tested the soil, discovering a “potential risk to both humans and wildlife.” Additionally, Metacon argued that although pollutants are being discharged into a body of water, these waters are not ‘navigable waters’ subject to the CWA. Opposing evidence lead the courts to determine whether the munitions being shot into the wetlands were indeed being discharged into a “water of the United States.”

Similar to *Simsbury*, this court decided to rely on both the *Rapanos* plurality standard and Justice Kennedy's significant-nexus, rather than choosing a single standard to control their case. First, it is evident that although the first element of the plurality standard is satisfied, the second element is not. Regarding the first prong, which addresses "adjacency" and "permanence," it was found that the vernal pond 'at least neighbors' the navigable-in-fact Farmington River, demonstrating that this prong is met. Regarding the second prong, which addresses the "continuous surface connection," it was found that although a water flow is evident between the vernal pond and the Farmington River, this flow of water is not permanent or continuous. Rather, this flow of water is intermittent, only present two times throughout the year, demonstrating that this second prong is not met. Therefore, the plurality standard is not satisfied, guiding the court to determine that the vernal pond does not constitute and "navigable water."

Next, the court turns to Justice Kennedy's concurring significant-nexus test to determine whether the vernal pond is a navigable water under an alternate standard. Similar to the result of the *Rapanos* plurality standard, the first element is met, but the second element is not. Regarding the first prong, which addresses a "significant nexus," it was found that the vernal pond did indeed contain a "periodic physical nexus" with the Farmington River, satisfying the first element. Regarding the second prong, addressing the significant impact on other covered waters, it was found that the vernal pond does not directly affect the "chemical, physical, or biological integrity" of the Farmington River in a negative manor. The court determined that the evidence provided by Simsbury-Avon Preservation Society demonstrating that munitions were negatively impacting the waters was merely speculative, and therefore, insufficient to constitute the vernal

pond as a “navigable water.” *Simsbury-Avon Preservation Society, LLC. v. Metacon Gun Club Inc.*, 472 F.Supp.2d 219 (2007).

In summary, it is made evident that through the application of both, the plurality standard and the significant-nexus test, the vernal pond was found to not be a “water of the United States” subject to a Clean Water Act violation. Rather than applying one standard, the dictionary discrepancies in the Clean Water Act has led this district court, as well as many others, to question which standard to follow. Additionally, as made evident through these district court opinions, there is a lack of guidance from the Circuit Court of Appeals as to which standard will guide each lower court when faced with Clean Water Act cases.

#### § 7. Permit Standards

The Clean Water Act broadly defines requirements regarding permits outlined in section 1342. Specifically, once a waterway is deemed navigable, one must obtain a permit and it must comply with the standards outlined. The permit must be set for fixed terms and these terms are not to exceed more than five years, and has the ability to be terminated or modified if it violates the permit in any way. These permits also include sections pertaining to public noticing and input from the specific state in which these permits are active. However, unless a body of water is navigable there is still questions about whether a permit is needed. Further analysis of this still needs to be done and expanded on. It has been determined that if in fact a body of water is navigable a permit is necessary.

The court's interpretation of a navigable water is so broad that as time progresses there should be more analysis added to section 1311. Through this analysis one will be able to further determine when a permit is necessary other than just for navigable waters. The first example

when we see a permit is necessary is in *Tennessee Clean Water Network v Tennessee Valley Authority*, No. 17-6155 6th Cir. (2018). In this case, the district court came to the conclusion that a permit was only necessary for the first part of this case and that the second type of connection is not included in the Clean Water Act, but rather is covered in other environmental regulations. This initial suit came about when the Tennessee Valley Authority was said to be in violation of the CWA when unpermitted discharges were being leaked into navigable waterways protected by the CWA. The discharges were however not directly being released into the navigable waterways but rather were in pools adjacent to the Cumberland River (protected by the CWA). The question became whether the TVA was in violation of the CWA because the pollutants were ‘hydrologically connected’ to navigable waterways protected by the CWA. To discharge pollutants properly the CWA requires an NPDES permit and the purpose of this was to control what, and how much, was being discharged into navigable waterways. The TVA did in fact possess such permit for its Gallatin Fossil Plant because this would discharge pollutants into Old Hickory Lake which is connected to the Cumberland River. As a result of there being a ‘hydrologically connection’ the TVA was questioned if there was an unpermitted amount of pollutants being discharged through groundwater. As a result, the court decided that the first type of discharge being connected and disposed of through a pipe is permitted. Additionally, the court determined that a hydrological connection is not mentioned in the CWA and that there is no need for a permit for the pollutants being stored in man-made ponds adjacent to protected waterways. This raises the issue of the Clean Water Act being too vague and broad in certain instances where issues will arise as time goes on and it needs to incorporate amendments as necessary. The second case that discusses the use of permits is *Upstate Forever v. Kinder Morgan Energy Partners, L.P.* No. 17-1640 4th Cir. (2018). This case asks whether a suit can be brought when

the discharge of a pollutant has been contained from a broken pipeline but there is still discharge being released into surface waterways. Kinder Morgan argues that there is a violation of the CWA because if in fact no permit has been obtained and gasoline is still seeping into a navigable waterway 1,000 ft or less away from the shore then it requires a permit, and if no permit exists then there is a clear violation. Under statute 33 U.S.C 1311(a), the National Pollutant Discharge Elimination System (NPDES) permit allows for a limited amount of discharge to seep into waterways. However, Upstate Forever containing the discharge of gasoline does not change the fact that it was discharged in the first place without a permit. The containment of the gasoline is irrelevant and not having been granted a permit remains as the clear violation of the CWA. Under the CWA it is sufficient that a suit can be filed when a pollutant has been contained but still leaked discharge into surface waterways because without a permit from the NPDES there is a violation because the CWA only allows for restricted discharge with a permit. The next case addresses a scenario whether point sources themselves that do not generate pollutants require an NPDES permit and are canal and wetland areas meaningfully distinct water bodies.

*In South Florida Water Management District v Miccosukee Tribe of Indians* 541 U.S. 95 (2004), Congress wanted the Central and South Florida Flood Control project to address drainage and flood control. First, there needed to be a decision made on whether or not the C-11 and WCA-3 were distinct bodies of water because if not they would not be by definition a navigable waterway and a permit would not be definitively necessary. The purpose of the C-11 was to collect groundwater as well as wastewater while the S-9 purpose was to move water from the canal to CWA-3. The purpose of this connection was to prevent water flow from reaching the ocean and to preserve the surrounding wetland. Levees are used to connect C-11 and WCA-3 and when water is pumped across the levee this creates algae and foreign plants to grow.



The Supreme Court heard this case after the case was heard by the district court and 11th circuit court of appeals. Both of these courts decided that between the C-11 and CWA-3 that they are distinct bodies of water, and therefore they require a NPDES permit for the discharge of pollutants. The Supreme Court vacated and remanded these judgements and instructed that the case be reheard at the district court level. It also decided that during this rehearing the court can consider the Governments “unitary waters” argument. Per the opinion delivered by Justice Sandra Day O’Connor “The Government contends that all the water bodies that fall within the Act's definition of navigable waters should be viewed unitarily for purposes of NPDES permitting requirements. Because the Act requires NPDES permits only when there is an addition of a pollutant “to navigable waters,” the Government’s approach would lead to the conclusion that such permits are not required when water from one navigable waterbody is discharged, unaltered, into another navigable water body. That would be true even if one water body were polluted and the other pristine, and the two would not otherwise mix.” Under this “unitary waters” argument stated in Justice O’Connor’s opinion, the S-9 pump station would not need an NPDES permit. The Supreme Court made the decision to vacate the decision of the 11th circuit and remand back to the district court. It then decided during the rehearing the district court can consider the government's argument on the definition of “unitary waters.” It is therefore possible that when the district court hears this case again they could come to the alternate conclusion that they are not in fact distinct bodies of water and therefore do not need permits NPDES permits.

The Clean Water Act section 1311 and 1342 are broad and leave a lot of lingering questions to which these cases sought to clarify but even after these cases were heard the answers

to whether a permit is needed is not entirely clear cut and certain niche situations can trigger questions that need to be clarified.

#### § 8. Ability to Challenge the CWA

The vagueness and subjectivity of the Clean Water Act has led to large-scale uncertainty as to what is or isn't under its control. Because of this, issues of whether or not challenges can be made to the Clean Water Act (and under what circumstances those challenges must occur) are important to define. Under the Administrative Procedure Act (APA), administrative agencies (such as the EPA and U.S. Army Corps of Engineers) are provided a set of guidelines outlining how they can establish regulations, including important provisions such as judicial review of final agency actions (legally binding actions) and public involvement in decision making.

Whether EPA issued compliance orders are considered final agency actions and whether or not they are subject to judicial review culminated in *Sackett v. EPA* in 2012. The Sacketts owned a half-acre of land and wanted to fill in a quarter acre with dirt and rocks in order to construct a house. A compliance order was issued against the Sacketts stating that the land on which they were building was considered a wetland under the Clean Water Act and that a permit was required to begin developing the land. The Sacketts were ordered by the EPA to remove the sand and rock and to restore the land to its original condition.

The Sacketts sought to contest the compliance order and assertion that the land fell under the Clean Water Act. The Sacketts requested a hearing with the EPA to discuss the matter further and present their side. The EPA refused to partake in a hearing and maintained that the land was covered under the Clean Water Act and that the Sacketts had to restore the parcel to its original state. The Sacketts took the issue to the U.S. District Court for the District of Idaho and stated

that the compliance order was “arbitrary and capricious” per the Administrative Procedure Act and that the EPA’s refusal to hold a hearing in the matter violated the Sacketts’ due process rights. The Sacketts also attempted to obtain clarity on the vagueness of the Clean Water Act. These conditions led the court to question whether or not private landowners are able to challenge Clean Water Act compliance orders issued by the EPA in court.

The Supreme Court ultimately decided unanimously that compliance orders are able to be challenged through civil action. The Court held that the Clean Water Act did not preclude judicial review of the compliance orders it issues as the EPA believed. EPA compliance orders are final agency actions per the APA, which outlines judicial review of final agency actions (legally binding actions) and emphasizes public involvement in decision making. This ruling allowed for challenges to compliance orders, but did not specify whether the *terms* outlined in the order are able to be challenged. This seminal case opened the door for judicial review of EPA compliance orders and allowed for private citizens to challenge them in court. This limited the power of the EPA to act without judicial oversight and acted as a catalyst of a series challenges of the CWA. Sackett v. EPA, 566 U.S. 120 (2012)

This issue of the process of challenging the administrative actions given by the EPA and the Clean Water Act were expanded upon in 2018. In *National Association of Manufacturers v. Department of Defense*, the issue of what courts had jurisdiction of challenges and changes of definitions made in the Clean Water Act came to the forefront.

In 2015, the EPA enacted the Clean Water Rule in an attempt to clarify water bodies covered under the Clean Water Act. This rule tried to alter the scope of which bodies of water are covered under the Act and provided consistency over the application of the CWA over streams and wetlands as well as include bodies of water that were not previously covered. There

was also an attempt to modify the definition of “waters of the United States” to provide clarity and remove ambiguity. The issuance of the Clean Water Rule by the EPA is a final rule, or a rule that is enacted without having to go through the stages of proposal and commentary.

Many people considered this to be an overreach by the government. A critique of this rule is that small business, farm, and private landowners could now potentially face being taken to court by environmental groups due to the new breadth of the “waters of the United States” definition that allows expanded federal government jurisdiction of waters and limited state regulation. The rule also falls outside of the plain language of section 1369 of the Clean Water Act as it creates a new definition not explicitly stated within the text. It is seen by some as an infringement on property rights as well as detrimental to the economy.

The Clean Water Rule was ultimately challenged by numerous states who believed that it did not follow the Clean Water Act and that it was incorrectly adopted into law by violating the Administrative Procedures Act. To attempt to gain insight, challenges to the Clean Water Rule were filed in both federal district courts as well as in federal appeals courts. This was due to uncertainty over which of the courts had jurisdiction over issues regarding challenges to the Clean Water Act’s changes to the scope of its rules. This led to the question arising of which venue has jurisdiction to review EPA changes to the scope of the Clean Water Act: federal district courts or federal appeals courts.

While certain decisions of the EPA are subjected to review in federal appeals courts under section 1369 of the Clean Water Act, it was unclear whether by modifying the definition of waters of the United States would fall under federal appeals courts jurisdiction or federal district court jurisdiction as it created a definition outside of section 1369. In a unanimous decision by the Supreme Court, it was determined that definitions of “waters of the United

States” were outside of the purview of section 1369, and would therefore have to be taken up with federal district courts consistent with the Administrative Procedures Act.

This case set out the standards that states and individuals can use to challenge definition changes to the Clean Water Act made by either the EPA or the United States Army Corps of Engineers. The court refused to allow the EPA derive extra-textual inferences from the text and promoted the idea of plain text interpretation when discussing the Clean Water Act. While the Court did not discuss the content of the Clean Water Rule and whether or not the EPA’s changes were in line with the Clean Water Act, it did allow for changes to definitions made by the EPA to be challenged through the federal court system. This takes away some of the final action power the EPA possesses and allows outside groups to challenge decisions that they make. The court also holds that the plain text of the Act should take precedent in alterations to the scope of the Clean Water Act. This is an attempt to prevent further ambiguities from being created as well as prevents subjective interpretation of the text from becoming law. National Association of Manufacturers. v. Department of Defense, 583 U.S. \_\_\_\_ (2018)

## § 9. Conclusion

Overall, the ambiguity of the Clean Water Act has led to several problems and there is still much that remains in the grey when it comes to the definitions of navigable waters and waters of the United States. Furthermore, the permit requirements are clouded by the lack of clarity in this area, making it all the more confusing as to whether or not the Clean Water Act applies to a particular case. Additionally, there are special provisions that recognize the uncertainty of the Act and outline the process by which to alter it as new issues arise. Albeit the case law suggests that it is better to lean towards the justiciability of the CWA than away from it,

it is potentially possible to argue against the jurisdiction of the CWA on any case where the expectations are not directly outlined. That being said, the Clean Water Act is a long way from clear and the law will likely change in the future. This Law Report is based on current understanding as of Dec 1, 2018, and new cases or changes via legislation may alter the relevance of this report.

**SAMPLE**

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