

# Environmental Law

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Clean Water Act

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# Clean Water Act

- Passed by Congress in 1972 under Federal Water Pollution Control Act
- Protect waters of the United States from pollution
- Ambiguity over the definition of “navigable waters”
- Results in ambiguity on whether or not to obtain a permit
- Under recent purview, the permits and definitions are able to be challenged and changed

**Section 1311(a)** - “the discharge of any pollutant by any person shall be unlawful, except in compliance with law.”

**Section 1342(a)** - “the Administrator may...issue a permit for the discharge of any pollutant.”

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# Diction Discrepancies

- Section 1362(7) defines ‘navigable waters’ as ‘waters of the United States, including territorial seas’
- The Clean Water Act’s definition of the term ‘navigable waters’ is vague, and broadly defined
- Burden placed on the EPA, the Army Corps of Engineers, and the courts, to interpret and further define the phrase

# Fused Rule

**IF** any person,  
discharges a pollutant,  
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, and  
does not obtain a permit,

**THEN** the Clean Water Act has been violated.

# U.S. v Bayview Homes

## A. First seminal case regarding the issue

- a. Clarifies the meanings of “waters of the United States” as any water within the United States or related territories that could be considered navigable or is attached to a navigable in its own right water in a significant manner

## B. Previously, only waters of the United States in their own right were explicitly protected by the CWA

- a. This broadened the jurisdiction of the CWA, and set the stage for further cases regarding the ambiguity of the statute
- b. Was the “law of the land” until the Rapanos v U.S. ruling in which the Plurality test and the Significant Nexus test

## C. Bayview was subsequently overturned on other grounds

# U.S. v Ashland Oil Transportation Co.

- A. Expanded the understanding of navigable waters with a more clear definition
  - a. The power to enforce the Clean Water Act was founded in the congressional power to regulate interstate commerce, and therefore only waters related to such commerce were covered under the CWA
  - b. Ashland expanded the definition of navigable waters to include anything that could be considered a “link in the chain of commerce” rather than something that was in its own right a water of the United States
  - c. Allowed non-traditionally navigable waters to then fall under the jurisdiction of the CWA
  
- B. Provided yet another example of the expanded interpretation of the CWA and the link to a Legislative Intent understanding

# Cases that apply Bayview and Ashland

## A) U.S. v Hartsell

- a) Expanded the CWA to include man made waters, such as sewers

## B) U.S. v Poszgai

- a) Took a legislative intent approach into applying the Bayview understanding, says that adjacent waters are covered because more often than not the waters effect each other
- b) Precursor to the significant nexus test

## C) Solid Waste Agency of Northern Cook County v U.S. Army Corps. of engineers

- a) Narrowed the understanding of the CWA to exclude intrastate waters from purview

# Rapanos v U.S.

- A. Rapanos had the same fact pattern as U.S. v Bayview Homes with the addition of the fact that the connection that joined the wetland and the traditionally navigable water was seasonal
  - a. This spawned the question of how significant must the connection be between the two water?
  - b. Two different options were discussed by Scalia in the plurality opinion, and Kennedy in a concurring opinion
  - c. These Options were known as the plurality test and the significant nexus test

# Rapanos: The Plurality Standard

## A. Set forth by Scalia in the plurality opinion

- a. Required that an area of water have a significant connection to a continuously flowing source of water from a navigable source
  - i. The connection between the two waters cannot merely be there or be ephemeral
  - ii. Rather, the connection is required to demonstrate each water has a significant impact on the other and must be continuous
- b. This significant connection must make it difficult to discern where the water in question begins and ends its connection with the navigable water in its own right

B. However, the concurring opinion set forth by Kennedy is sometimes used in lieu of this definition

# Rapanos: The Significant Nexus Test

- A. Secondary to the plurality opinion set forth by Scalia
- B. Contrastingly, Kennedy wrote a concurring opinion
  - a. The concurring opinion states that a water does not need a contiguous surface connection to be justiciable under the CWA
  - b. However, a mere adjacency to the navigable water is not a significant connection either
  - c. Rather a significant impact on the adjacent waters is the only requirement
  - d. A water is considered to have a significant nexus if it has a considerable impact on the physical, biological, or chemical state of the traditionally navigable water
- C. Both opinions have been used as precedent in lower courts

# Application in Lower Courts

A) *Simsbury-Avon Preservation Society, LLC v. Metacon Gun Club, Inc.* (2007)

- Applies both the plurality standard and significant-nexus test

B) *United States v. Cundiff* (2007)

- Applies both the plurality standard and significant-nexus test

C) *United States v. Hamilton* (2013)

- Applies only the plurality standard

# Permit Requirement

- Difficult to distinguish if a permit is required
- Regarding the 4<sup>th</sup> element of the fused rule, it is distinguished that if there is a discharge of pollutants into navigable waters, one must obtain a permit from the EPA

# Cases Applying the Permit Requirement

- Tennessee Clean Water Network v. Tennessee Valley Authority  
-hydrological connection to a navigable waterway
- Upstate Forever v. Kinder Morgan Energy Partners, L.P.  
-Accidental unpermitted discharge into a navigable waterway
- South Florida Water Management District v. Miccosukee Tribe of Indians  
-NPDES permits and distinct bodies of water

# Ability to Challenge the CWA

- Sackett v. EPA

- Can landowners go to court to challenge a CWA order made by the EPA?

- National Association of Manufacturers v. Department of Defense

- Does the clean water act enable federal courts of appeals jurisdiction to review the EPA's definition of the scope of US waters?

# Recommendations for Legislature

- Recommend the legislature create an amendment to the Clean Water Act, redefining the term 'navigable waters' more narrowly

## **Narrow Definition will provide:**

- Individuals, companies, and organizations with a clearer understanding of whether they are violating the Clean Water Act when discharging pollutants into navigable waters
- Guidance as to whether one must obtain a permit or not

# Conclusion

- Aspects of the Clean Water Act are ambiguous, even the SCOTUS was confused and did not come to a full conclusion
- *Bayview* and *Rapanos* provide minor clarity, but not enough for the courts to agree on a single standard
- Courts remain undecided as to which standard to follow when defining ‘navigable waters’
- Application of the Plurality Standard and the Significant Nexus test are helpful, but since both are interchangeably applicable, the understanding has become more clouded