

SCOPE OF CLEAN WATER ACT

Regulates “discharges” of “pollutants” from “point sources” into “navigable waters”

Pollutants include “dredged or fill material”

Navigable waters = “waters of the United States”



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SCOPE OF CLEAN WATER ACT

GEOGRAPHIC JURISDICTION

- “Significant Nexus”



ACTIVITY JURISDICTION

- Plowing



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SIGNIFICANT NEXUS

Current Concept: CWA reaches all waters with a “significant nexus” to traditional navigable waters

Does not appear in CWA

Derived from three Supreme Court decisions

Riverside Bayview Homes
SWANCC
Rapanos



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UNITED STATES V. RIVERSIDE BAYVIEW HOMES

Does CWA cover wetlands abutting navigable waters?



Court did not rule that CWA reaches as far as Constitution allows

Congress delegated drawing line between land and water

Corps decision to include wetlands adjacent to navigable waters as part of those waters is reasonable

Court reserved question of “isolated” waters and wetlands



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SOLID WASTE AGENCY OF NORTHERN COOK COUNTY V. U.S. ARMY CORPS OF ENGINEERS

Held, 5-4, Congress never intended CWA to regulate isolated, non-navigable, intrastate waters

Riverside noted term “navigable” has limited effect, but that does not mean no effect



Shows Congress had in mind its traditional jurisdiction over waters that are or were navigable or could be made so



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SWANCC DESCRIPTION OF RIVERSIDE

“[O]ur holding was based in large measure upon Congress’ . . . acquiescence to . . . the Corps’ regulations interpreting the CWA to cover wetlands adjacent to navigable waters. We found that Congress’ concern for the protection of water quality and aquatic ecosystems indicated its intent to regulate wetlands ‘inseparably bound up with the “waters” of the United States.’ . . . **It was the significant nexus between the wetlands and ‘navigable waters’ that informed our reading of the CWA in Riverside Bayview Homes.** Indeed, we did not ‘express any opinion’ on the ‘question of the authority of the Corps to regulate discharges of fill material into wetlands that are not adjacent to bodies of open water”



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RAPANOS V. UNITED STATES

Does CWA reach wetlands lying near ditches that eventually drain into traditional navigable waters?



Court divided into three camps

Plurality of 4 rejected Corps' jurisdictional claims and said CWA extends only to relatively permanent, standing, or continuously flowing bodies of water and wetlands connected to them

Dissent of 4 found Corps' interpretation of CWA reasonable



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KENNEDY'S CONCURRING OPINION

Kennedy concurred with Plurality that Corps claim was excessive, but for different reasons

"Significant nexus" is a test for jurisdiction

"[R]equired nexus must be assessed in terms of statute's goals and purposes"

Wetland possesses requisite nexus if it, alone or in combination with other wetlands in region, **significantly affects chemical, physical, or biological integrity of other covered waters**



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KENNEDY WAS WRONG

In SWANCC “significant nexus” refers to connection of navigable waters to adjoining wetlands — and not to some jurisdictional test

All 8 other Justices told Kennedy he was wrong

Dissent: • a judicially crafted rule
• our passing use of this term has become a statutory requirement



Plurality: • bears no easily recognizable relation to SWANCC or Riverside

- misreads SWANCC
- rewrites the statute, using gimmick
- turtles all the way down
- devised his new statute all on his own



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KENNEDY'S IDEA BECOMES LAW OF THE LAND

Appellate courts generally accept CWA jurisdiction predicated on either Plurality view or Kennedy view

Corps and EPA embrace “significant nexus”

It's malleable!



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PLOWING EXCLUSION

1975 - Corps proposed regulations

Press release: “federal permits may be required” to “plow a field” and “millions of people” may already be violating the law

Backlash. EPA said “plowing is not dredging or filling” and Corps “does not have statutory authority to revise its regulations to include plowing”

Corps regulation: Dredged and fill material “does not include . . . material resulting from . . . plowing” 40 Fed. Reg. 31325 (1975)



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PLOWING EXCLUSION

Plowing [as defined] will never involve a discharge of dredged or fill material

Plowing means all forms of primary tillage . . . utilized on farm, forest or ranch land for the breaking up, cutting, turning over, or stirring of soil to prepare it for the planting of crops.

Does not include redistribution of soil, rock, sand, or other surficial materials in a manner which changes any area of the waters of the United States to dry land.

Corps, 33 C.F.R. § 323.4(a)(1)(iii)(D); EPA, 40 C.F.R. § 232.3(d)(4)



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DUARTE CASE: IS THIS PLOWING?



Government argued tilling is not “plowing” if furrows result:

- Operations created “furrow top and bottom microtopography” resulting in upland furrow tops within wetlands
- **Furrow tops now serve as “small mountain ranges”**
- **They are “mini uplands”**



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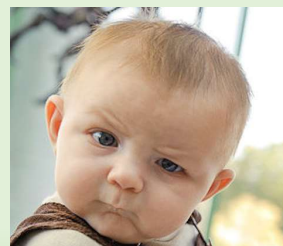
COURT SEES “DISCHARGE” OF “POLLUTANT”

Court did not adopt Government’s “mini upland” argument

But it found: • Soil is a pollutant • Equipment moved soil horizontally, creating furrows and ridges • “Redeposited” soil into waters • Activities thus “discharged” a “pollutant”

Failed to distinguish **plowing exclusion** from **normal farming exemption**

Found no established ongoing farming operation, so discharge is not exempt



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WHAT THE COURT GOT WRONG



Mistakenly analyzed normal farming exemption

Failed even to apply **plowing exclusion**

**Two elements: 1. Primary tillage
2. Does not convert wetland to dry land**

Summary judgment only if no disputed issue of fact

Evidence showed both elements No evidence of conversion
At very least, Duarte disputed conversion



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WHAT NOW?



Some Corps staff think decision enables them to regulate plowing

Decision is not binding precedent

Not even guidance on plowing exclusion

DOJ Press Release

Falsely says court found tilling converted areas of water to dry land

Helpfully says case is not a pretext for prosecuting farmers who engage in normal plowing on their farms, and no permit is required for plowing as defined in regulations

Ongoing policy discussions within Corps



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