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# Waters of the U.S.

From SCOTUS to WOTUS to POTUS to  
WOTUS to ... SCOTUS?

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# Introduction

## What is a water of the United States (WOTUS)?

- 1) Where the WOTUS rule has been  
*Bayview, SWANCC, and Rapanos*
  - 2) Where WOTUS is today  
*WOTUS in the Trump era*
  - 3) Where WOTUS might be going, and how this affects Minnesota
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# Clean Water Act Jurisdiction

- CWA prohibits discharge of any pollutant into “navigable waters” without a permit
- ⇒ Requirements of CWA will ONLY apply to “navigable waters”
- “Navigable Waters” = the waters of the United States, including the territorial seas.  
33 USC 1362(7).

Water’s jurisdictional status can have implications on/for:

- Manufacturers
  - Developers
  - Agriculture
  - Utilities
  - Other sectors
-

1982

## EPA and Corps Take First Stab

EPA and CORPS finally agree WOTUS is defined as:

- Traditional **navigable waters**
- Interstate waters (including wetlands)
- All other waters that could affect interstate or foreign commerce (including wetlands)
- Impoundments
- Tributaries
- The territorial seas
- **“Wetlands” adjacent to waters identified above**

33 C.F.R. § 328.3 (Corps); 40 C.F.R. § 230.3(s) (EPA).

1985

## Let the Court Interpretation Begin! *Bayview, SWANCC, and Rapanos*

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

474 U.S. 212 (1985)

- Unanimous opinion by Justice White
- Is a wetland adjacent to a navigable water but sourced from groundwater a WOTUS?
  - YES!
- **ALL WETLANDS adjacent** to other jurisdictional waters are WOTUS
  - **EVEN WHEN** water does not come from the adjacent (or jurisdictional) body of water
- No discussion of wetlands not adjacent

## WOTUS Rule

### Definition:

- Navigable waters
- Interstate waters
- All other waters that could affect interstate or foreign commerce
- Impoundments of waters of the United States
- Tributaries
- The territorial seas
- Wetlands adjacent to Waters

# Court Interpretation Continues

## *Bayview, SWANCC, and Rapanos*

### *SWANCC v. Corps of Engineers*

531 U.S. 159 (2001)

- 5-4 Majority
- Majority: **Rehnquist**, Scalia, Kennedy, O'Connor, Thomas
- Does WOTUS include ponds and mudflats **unconnected** to other waters covered by the CWA?
  - No.
- Differentiated from Bayview: not adjacent, lacking significant nexus
- “Significant nexus” is born, but is not the actual test.
- Partially about the Commerce Clause

2006

## WOTUS Rule

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# Court Interpretation Continues

## *Bayview, SWANCC, and Rapanos*

### *Rapanos v. United States*

547 U.S. 715 (2006)

- 4-4-1 Split. 5 opinions. No majority.
- Plurality is Team Scalia: Scalia, Roberts, Thomas, Alito, (Kennedy)
- Team Kennedy?
- Dissent is Team Stevens: Stevens, Souter, Ginsburg, Breyer
- Does WOTUS include wetlands that at least occasionally empty into a tributary of a traditionally navigable water
  - ????

2006

## WOTUS Rule

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## *Bayview, SWANCC, and Rapanos*

### *Rapanos v. United States*

547 U.S. 715 (2006)

- Does WOTUS include wetlands that at least occasionally empty into a tributary of a traditionally navigable water?

#### The Competing Approaches Following *Rapanos*

**The Plurality's Bright-Line Rule:** Writing for a four-Justice plurality, Justice Scalia adopted the bright-line rule that the word "waters" in "waters of the United States" means only "relatively permanent, standing or continuously flowing bodies of water"—that is, streams, rivers, and lakes.<sup>161</sup> Wetlands could also be included, but only when they have a "continuous surface connection" to other "waters of the United States."<sup>162</sup>

**Justice Kennedy's "Significant Nexus" Test:** In a separate concurring opinion, Justice Kennedy concluded that the Clean Water Act requires a more malleable approach: the Corps should determine, on a case-by-case basis, whether the water in question possesses a "significant nexus" to waters that are navigable-in-fact.<sup>163</sup> For wetlands, a significant nexus exists when the wetland, either alone or in connection with similarly situated properties, significantly impacts the chemical, physical, and biological integrity of a traditionally navigable waterbody.<sup>164</sup>

**WOTUS Rule****Definition:**

- Navigable waters
- Interstate waters
- All other waters that could affect interstate or foreign commerce
- Impoundments of waters of the United States
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- Wetlands adjacent to Waters

# Court Interpretation Continues

## *Bayview, SWANCC, and Rapanos*

### *Rapanos v. United States*

#### Scalia Approach:

**The Plurality's Bright-Line Rule:** Writing for a four-Justice plurality, Justice Scalia adopted the bright-line rule that the word "waters" in "waters of the United States" means only "relatively permanent, standing or continuously flowing bodies of water"—that is, streams, rivers, and lakes.<sup>161</sup> Wetlands could also be included, but only when they have a "continuous surface connection" to other "waters of the United States."<sup>162</sup>

- **"Waters" are not water**
- Wetlands: 2 components:
  - Adjacent to jurisdictional WOTUS
  - Has continuous surface connection to WOTUS making it difficult to determine where the "water" ends and the "wetland" begins."
- **Significant Nexus = "Whatever effects waters is waters" = WRONG.**



2006

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# Court Interpretation Continues

## *Bayview, SWANCC, and Rapanos*

### *Rapanos v. United States*

#### Kennedy Approach: Significant Nexus Test

**Justice Kennedy's "Significant Nexus" Test:** In a separate concurring opinion, Justice Kennedy concluded that the Clean Water Act requires a more malleable approach: the Corps should determine, on a case-by-case basis, whether the water in question possesses a "significant nexus" to waters that are navigable-in-fact.<sup>163</sup> For wetlands, a significant nexus exists when the wetland, either alone or in connection with similarly situated properties, significantly impacts the chemical, physical, and biological integrity of a traditionally navigable waterbody.<sup>164</sup>

- **Concurs with Scalia, but . . .**
- **Wetlands:**
  - **If adjacent to navigable water, its WOTUS**
  - **If adjacent to a non-navigable water, need significant nexus to navigable water**
    - Sig. Nexus: wetland significantly affects a navigable water

1982

## EPA and Corps Take First Stab

WOTUS is defined in mirror regs as:

- Traditional **navigable waters**
- Interstate waters
- All other waters that could affect interstate or foreign commerce
- Impoundments
- Tributaries to navigable waters
- The territorial seas,
- **Wetlands adjacent to Waters above**

2015

## EPA and Corps Take Second Stab

Clean Water Rule:

WOTUS is defined in mirror regs as:

- Traditional navigable waters
  - Interstate waters
  - **Other / Isolated Waters (sig. nexus)**
  - Tributaries (to NW) **are now defined**
  - The territorial seas,
  - **Adjacent wetlands are now defined**
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<b>Subject</b>	<b>Old Rule</b>	<b>Proposed Rule</b>	<b>Final Rule</b>
<b>Navigable Waters</b>	Jurisdictional	Same	Same
<b>Interstate Waters</b>	Jurisdictional	Same	Same
<b>Territorial Seas</b>	Jurisdictional	Same	Same
<b>Impoundments</b>	Jurisdictional	Same	Same
<b>Tributaries to the Traditionally Navigable Waters</b>	Did not define tributary	Defined tributary for the first time as water features with bed, banks and ordinary high water mark, and flow downstream.	Same as proposal except wetlands and open waters without beds, banks and high water marks will be evaluated for adjacency.
<b>Adjacent Wetlands/Waters</b>	Included wetlands adjacent to traditional navigable waters, interstate waters, the territorial seas, impoundments or tributaries.	Included all waters adjacent to jurisdictional waters, including waters in riparian area or floodplain, or with surface or shallow subsurface connection to jurisdictional waters.	Includes waters adjacent to jurisdictional waters within a minimum of 100 feet and within the 100-year floodplain to a maximum of 1,500 feet of the ordinary high water mark.
<b>Isolated or "Other" Waters</b>	Included all other waters the use, degradation or destruction of which could affect interstate or foreign commerce.	Included "other waters" where there was a significant nexus to traditionally navigable water, interstate water or territorial sea.	Includes specific waters that are similarly situated: Prairie potholes, Carolina & Delmarva bays, pocosins, western vernal pools in California, & Texas coastal prairie wetlands when they have a significant nexus.  Includes waters with a significant nexus within the 100-year floodplain of a traditional navigable water, interstate water, or the territorial seas, as well as waters with a significant nexus within 4,000 feet of jurisdictional waters.
<b>Exclusions to the definition of "Waters of the U.S."</b>	Excluded waste treatment systems and prior converted cropland.	Categorically excluded those in old rule and added two types of ditches, groundwater, gullies, rills and non-wetland swales.	Includes proposed rule exclusions, expands exclusion for ditches, and also excludes constructed components for MS4s and water delivery/reuse and erosional features.



**32 states sue to prevent Clean Water Rule from taking effect**

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2015

# 2015 Rule in the Courts

Oct. 9, 2015-The Sixth Circuit issues a national stay on implementation.

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# 2015 Rule in the Courts

**January 22, 2018**

- *Nat'l. Ass'n. of Mfrs. V. DOD*, U.S., No. 16-299, (SCOTUS)
  - Jurisdiction with Fed Dist. Ct. not Circuit Ct. ⇒ Vacates 6th Circuit stay
  - Result: Clean Water Rule back in effect in all but 13 states

**June 8, 2018**

- U. S. Dist. Southern Dist. Georgia
    - Enjoining Clean Water Rule in 11 states (in addition to 13 in N.D. case)
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# 2015 Rule in the Courts

August 16, 2018

- *South Carolina Coastal Conservation League v. Wheeler (U. S. Dist. South Carolina)*
    - nationwide injunction on “suspension rule”
    - Clean Water Rule back in play (but only 26 states and DC)
    - 24 states not affected (ND, GA suits)
    - By September 12, 2018, Clean Water Rule stayed in Texas, Louisiana, and Miss. Iowa too.
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# What Rule Applies Here?

## **Previous Rule applies:**

Alabama, Alaska, Arizona, Arkansas, Colorado, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, Nevada, New Mexico, North Carolina, North Dakota, South Carolina, South Dakota, Texas, Utah, West Virginia, Wisconsin, and Wyoming

## **Clean Water Rule applies:**

California, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Hampshire, New Jersey, New York, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Vermont, Virginia, and Washington.

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2017

# Clean Water Rule gets Trumped

February 28, 2017

- **Trump issues EO 13778 directing EPA and Corps to review Clean Water Rule under a “Two Step” Approach**
  - Begin rulemaking to withdraw Clean Water Rule
  - “Consider” defining “navigable waters” per Scalia

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2017-2018

# Clean Water Rule gets Trumped

Step One:

**July 27, 2017** -- Proposed rule rescinding the 2015 WOTUS rule and reinstating the prior regulations.

**June 29, 2018** -- Supplemental Notice of Proposed Rulemaking, clarifying that the agencies propose to repeal the 2015 rule in its entirety.

*Step One is Not Yet Final.*

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2018

# Clean Water Rule gets Trumped

Step One and a Half:

**January 31, 2018** -- Agencies issue a final rule providing that the 2015 Rule will not be applicable until February 6, 2020.

*The Final Rule was published on February 6, 2020.*

Issued to avoid uncertainty caused by the litigation over the 2015 rule.

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2018

# Clean Water Rule gets Trumped

Step Two:

**December 11, 2018** — the Agencies issue a pre-publication version of the new definition of Waters of the United States.

The new definition is based on Justice Scalia's opinion in the *Rapanos* decision.

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# Clean Water Rule gets Trumped

What remains a WOTUS:

- Traditional navigable waters (mostly large rivers and lakes, tidal waters and the territorial seas and tidally-influenced waterbodies, including wetlands).
  - Tributaries to traditional navigable waters.
  - Certain ditches that are traditional navigable waters (such as the Erie canal), are subject to the tides, or were constructed in a tributary or were built in adjacent wetlands.
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# Clean Water Rule gets Trumped

What remains a WOTUS:

- Certain lakes and ponds, including those that are traditional navigable waters, lakes and ponds that contribute flow to a traditional navigable water and those that are flooded by a WOTUS in a typical year.
  - Impoundments of WOTUS.
  - Adjacent wetlands, meaning those that physically touch other jurisdictional waters or have a surface water connection to a WOTUS in a typical year.
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# Clean Water Rule gets Trumped

Not a WOTUS:

- Ephemeral features, meaning those that flow only when it rains.
  - Groundwater.
  - Most farm and roadside ditches.
  - Certain agricultural areas.
  - Stormwater control features in upland.
  - Wastewater recycling structures in upland.
  - Wastewater treatment systems.
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# Clean Water Rule gets Trumped

What's the Difference?

- Interstate waters are no longer their own category - they must satisfy the conditions of another category.
  - No ephemeral features included (there were some previously).
  - Fewer ditches.
  - Fewer lakes and ponds.
  - Fewer “adjacent” wetlands.
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## Water Pollution Control Act

### Minn. Stat. § 115.02, subd. 22

"Waters of the state" means all streams, lakes, ponds, marshes, watercourses, waterways, wells, springs, reservoirs, aquifers, irrigation systems, drainage systems and all other bodies or accumulations of water, surface or underground, natural or artificial, public or private, which are contained within, flow through, or border upon the state or any portion thereof.

## Water law

### Minn. Stat. § 103G.005, subd. 17

"Waters of the state" means surface or underground waters, except surface waters that are not confined but are spread and diffused over the land. Waters of the state includes boundary and inland waters.

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# Minnesota's Water Resource Protection Framework

- Water Pollution Control Act
  - Wetland Conservation Act
  - Buffer law
  - Watershed law
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# Thanks!



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