

Criminal Prosecution (and Defense!) of Pollution Cases

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“Waters of the United States” (WOTUS)

Important definition for Clean Water Act and criminal prosecutions thereunder:

CWA generally prohibits anyone from discharging a pollutant without a permit into “navigable waters,” defined as “**the waters of the United States**”

Caselaw/interpretation

Rapanos v. US case – 2006

- Justice Scalia for the plurality: the regulatory authority of the EPA and the Army Corps of Engineers (wetlands) should extend only to “relatively permanent, standing or continuously flowing bodies of water” connected to traditional navigable waters, and to “wetlands with a continuous surface connection to” those types of waters.
- A more traditional focus on what is “navigable”: can boats move on it?
- A much **narrower** interpretation of federal authority

Caselaw/interpretation

Rapanos v. US case – 2006

- Justice Kennedy’s sole concurrence: CWA coverage depends on whether a water has a “significant nexus” to downstream traditional navigable waters and is important to protecting the chemical, physical or biological integrity of the navigable water.
- More **expansive** interpretation, including analysis of ecological factors – how “important” is the water?

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