

Digest of Significant Decisions Addressing Rapanos¹

(updated March 23, 2007)

A. Decisions of the Courts of Appeals

1. **Northern California River Watch v. City of Healdsburg**, 457 F.3d 1023 (9th Cir. Aug. 10, 2006), petition for rehearing pending

Summary:

In the context of a CWA § 402 citizen suit, the Ninth Circuit considered whether an NPDES permit was required for the discharge of pollutants from a waste-treatment facility into a pond separated from navigable-in-fact river by a levee. The court, after stating that Justice Kennedy’s concurring opinion in Rapanos was the controlling opinion, concluded that the pond had a significant nexus to the river and therefore a discharge of wastewater into the pond without a permit violated the CWA.

Key Passages:

The Supreme Court . . . has now narrowed the scope of [Riverside Bayview Homes]. . . . In a 4-4-1 decision, the controlling opinion is that of Justice Kennedy who said that to qualify as a navigable water under the CWA the body of water itself need not be continuously flowing, but that there must be a “significant nexus” to a waterway that is in fact navigable. Adjacency of wetlands to navigable waters alone is not sufficient.²

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Justice Kennedy, constituting the fifth vote for reversal, concurred only in the judgment and, therefore, provides the controlling rule of law. See Marks v. United States, 430 U.S. 188 (1977) (explaining that “[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds”).³

^{1/} Prepared by Stephen Samuels in his personal capacity. Any views expressed herein are those of Mr. Samuels and do not necessarily represent the views of the Department of Justice or the United States Government.

^{2/} 457 F.3d at 1025.

^{3/} Id. at 1029.

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[I]t is apparent that the mere adjacency of Basalt Pond and its wetlands to the Russian River is not sufficient for CWA protection. The critical fact is that the Pond and navigable Russian River are separated only by a man-made levee so that water from the Pond seeps directly into the adjacent River. This is a significant nexus between the wetlands and the Russian River and justifies CWA protection under the ACOE regulations and current Supreme Court jurisprudence.

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Moreover, there is an actual surface connection between Basalt Pond and the Russian River when the River overflows the levee and the two bodies of water commingle.

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In addition to these physical connections between Basalt Pond and the Russian River, the district court found that there is also a significant ecological connection. The wetlands support substantial bird, mammal and fish populations, all as an integral part of and indistinguishable from the rest of the Russian River ecosystem.

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The district court also found that Basalt Pond significantly affects the chemical integrity of the Russian River by increasing its chloride levels.

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In sum, the district court made substantial findings of fact to support the conclusion that the adjacent wetland of Basalt Pond has a significant nexus to the Russian River. The Pond's effects on the Russian River are not speculative or insubstantial. Rather, the pond significantly affects the physical, biological and chemical integrity of the Russian River, and ultimately warrants protection as a "navigable water" under the CWA.⁴

2. **United States v. Gerke Excavating, Inc.**, 464 F.3d 723 (7th Cir. Sept. 22, 2006), petition for rehearing and rehearing en banc denied Dec. 1, 2006

Summary:

In this CWA § 404 civil enforcement action, the United States alleged that a contractor violated the CWA by discharging pollutants into jurisdictional waters without a permit.

^{4/} Id. at 1030-31.

The district court granted summary judgment for the government and imposed a civil penalty on the contractor. The Seventh Circuit affirmed. The Supreme Court then granted certiorari, vacated the Seventh Circuit's decision, and remanded the case back to the Seventh Circuit for further consideration in light of Rapanos. On remand, the Seventh Circuit concluded that Justice Kennedy's standard governs the remaining stages of the litigation and remanded the case to the district court for further proceedings.

Key Passages:

When a majority of the Supreme Court agrees only on the outcome of a case and not on the ground for that outcome, lower-court judges are to follow the narrowest ground to which a majority of the Justices would have assented if forced to choose. Marks v. United States, 430 U.S. 188 (1977). In Rapanos, that is Justice Kennedy's ground.

The plurality Justices thought that Justice Kennedy's ground for reversing was narrower than their own, because they concluded their extensive and in places harsh criticism of the concurrence by saying that "Justice Kennedy tips a wink at the agency [i.e., the Corps of Engineers], inviting it to try its same expansive reading again." 126 S. Ct. at 2234 n.15.⁵

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[Justice Kennedy's] test is narrower (so far as reining in federal authority is concerned) than the plurality's in most cases, though not in all[.] . . .

* * * *

[A]ny conclusion that Justice Kennedy reaches in favor of federal authority over wetlands in a future case will command the support of five Justices (himself plus the four dissenters), and in *most* cases in which he concludes that there is no federal authority he will command five votes (himself plus the four Justices in the Rapanos plurality), the exception being a case in which he would vote against federal authority only to be outvoted 8-to-1 (the four dissenting Justices plus the members of the Rapanos plurality) because there was a slight surface hydrological connection. The plurality's insistence that the issue of federal authority be governed by strict rules will on occasion align the Justices in the plurality with the Rapanos dissenters when the balancing approach of Justice Kennedy favors the landowner. But that will be a rare case, so as a practical matter the Kennedy concurrence is the least common denominator (always, when his view favors federal authority).

^{5/} 464 F.3d at 724.

Justice Kennedy's proposed standard, which we conclude must govern the further stages of this litigation, requires factfinding not yet undertaken by the district court.⁶

3. **United States v. Charles Johnson, et al.**, 467 F.3d 56 (1st Cir. Oct. 31, 2006), petition for rehearing and rehearing en banc denied Feb. 21, 2007

Summary:

This is an enforcement action under Section 404 of the Clean Water Act. The defendants/appellants (the "Johnsons") are cranberry farmers who filled wetlands and streams near Carver, Massachusetts to expand and create cranberry bogs. The wetlands and streams flow to tributaries that form the Weweantic River, a navigable-in-fact river that empties into Buzzards Bay. In its initial ruling, the First Circuit affirmed the district court's grant of summary judgment (and the EPA's assertion of regulatory jurisdiction) in a 2-1 ruling that generated three separate opinions. The Johnsons filed a petition for rehearing *en banc*, which the First Circuit held in abeyance pending a decision by the Supreme Court in *Rapanos*. Following issuance of *Rapanos*, the Johnsons renewed their request for *en banc* rehearing. The United States opposed rehearing *en banc*, and moved instead for vacatur and remand, to permit further proceedings under the new jurisdictional standards announced in *Rapanos*. In granting the United States' motion, the First Circuit issued a lengthy opinion holding that the United States may establish CWA jurisdiction under *Rapanos* by satisfying either the standard articulated by the plurality or the standard articulated by Justice Kennedy in concurrence. A dissenting opinion would have limited remand proceedings to the *Rapanos* plurality test, stating that the Kennedy test "leaves the door open to continued federal overreach."

Key Passages from Majority Opinion:

[T]he question of what legal standard to apply is one of some complexity, and other courts have taken varying approaches to the issue. We conclude that the United States may assert jurisdiction over the target sites if it meets either Justice Kennedy's legal standard or that of the plurality.⁷

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The Marks directive that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the

^{6/} Id. at 725.

^{7/} 467 F.3d at 60.

holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds," Marks, 430 U.S. at 193 (internal citation omitted), has proven troublesome in application for the Supreme Court itself and for the lower courts.⁸

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In sum, the cases on which Marks directly relies both involve situations in which the "narrowest ground" was also the ground least restrictive of federal jurisdiction, as the Seventh Circuit indicated in Gerke. However, this coincidence does not necessarily mean that the Supreme Court in Marks equated the "narrowest grounds" of decision in a case with fragmented decisions to the grounds least restrictive of the assertion of federal authority. Such an equation leaves unanswered the question of how one would determine which opinion is controlling in a case where the government is not a party. Moreover, given the underlying constitutional question presented by Rapanos, it seems just as plausible to conclude that the narrowest ground of decision in Rapanos is the ground most restrictive of government authority (the position of the plurality), because that ground avoids the constitutional issue of how far Congress can go in asserting jurisdiction under the Commerce Clause. See Rapanos, 126 S. Ct. at 2224 (plurality opinion). The appellants argue for that result here.

As an alternative to the Seventh Circuit's reading of Marks, one might sensibly conclude, as one court has, that the "narrowest grounds" are simply understood as the "less far-reaching-common ground."⁹

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[T]he "narrowest grounds" approach makes the most sense when two opinions reach the same result in a given case, but one opinion reaches that result for less sweeping reasons than the other.¹⁰

* * * *

This understanding of "narrowest grounds" as used in Marks does not translate easily to the present situation. The cases in which Justice Kennedy would limit federal jurisdiction are not a subset of the cases in which the plurality

^{8/} Id. at 62.

^{9/} Id. at 63.

^{10/} Id. at 64.

would limit jurisdiction. As Gerke points out, in cases where there is a small surface water connection to a stream or brook, the plurality's jurisdictional test would be satisfied, but Justice Kennedy's balancing of interests might militate against finding a significant nexus. In such a case, if Justice Kennedy's test is the single controlling test (as advocated by the Seventh and Ninth Circuits), there would be a bizarre outcome -- the court would find no federal jurisdiction even though eight Justices (the four members of the plurality and the four dissenters) would all agree that federal authority should extend to such a situation. This possibility demonstrates the shortcomings of the Marks formulation in applying Rapanos.

Justice Stevens foresaw the possibility that the plurality might find jurisdiction in some cases where Justice Kennedy does not. His instruction to find jurisdiction where either test is satisfied provides a simple and pragmatic way to assess what grounds would command a majority of the Court. * * * Following Justice Stevens's instruction ensures that lower courts will find jurisdiction in all cases where a majority of the Court would support such a finding. If Justice Kennedy's test is satisfied, then at least Justice Kennedy plus the four dissenters would support jurisdiction. If the plurality's test is satisfied, then at least the four plurality members plus the four dissenters would support jurisdiction. Other circuits have previously taken this common sense approach to fragmented opinions.¹¹

* * * *

Since Marks, several members of the Court have indicated that whenever a decision is fragmented such that no single opinion has the support of five Justices, lower courts should examine the plurality, concurring and dissenting opinions to extract the principles that a majority has embraced.¹²

* * * *

Thus, it is not surprising that Justice Stevens in his Rapanos dissent explicitly directs courts to examine the views of dissenting Justices to determine which propositions have the support of a majority. This approval is consistent with the direction that the Court as a whole has taken since Marks.¹³

^{11/} Id. at 64-65.

^{12/} Id. at 65.

^{13/} Id. at 66.

* * * *

The foregoing considerations lead us to conclude that the district court should do exactly as Justice Stevens has suggested. The federal government can establish jurisdiction over the target sites if it can meet either the plurality's or Justice Kennedy's standard as laid out in Rapanos.¹⁴

Key Passages from Dissenting Opinion:

I depart from the majority in interpreting what standards Rapanos has established. The plurality's "hydrological connection" test provides the proper constitutional limit on federal regulation under the Clean Water Act. Although the majority has provided an able analysis of a thorny issue, I cannot concur that Justice Kennedy's seemingly opaque "significant nexus" test is a constitutional measure of federal regulatory jurisdiction. Extending regulatory jurisdiction to wetlands that "possess a 'significant nexus' to waters that are or were navigable in fact or that could reasonably be so made . . ." id. at 2236, leaves the door open to continued federal overreach. The plurality's restriction of federal jurisdiction to "only those wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between 'waters' and wetlands, are 'adjacent to' such waters and covered by the [Clean Water] Act . . ." id. at 2226 (emphasis in original), strikes a constitutional balance between federal and state regulatory interests, and our nation's interest in clean water and the individual land owner's right to manage their property in accordance with their dreams and aspirations, whether economic or otherwise.¹⁵

4. **San Francisco Baykeeper v. Cargill Salt Division**, No. 04-17554, 2007 WL 686352 (9th Cir. Mar. 8, 2007)

Summary:

^{14/} Id. at 66.

^{15/} Id.

In this CWA citizen suit, the Ninth Circuit reversed a district court decision that had found in favor of plaintiffs that Cargill had unlawfully discharged pollutants into waters of the United States. The Court of Appeals concluded that the waterbody into which Cargill discharged waste, a non-navigable, intrastate pond located near San Francisco Bay, was not a regulated water under the CWA based upon EPA's and the Corps' "adjacency" regulations.

Key Passages:

We conclude that the district court improperly expanded the regulatory definition of "waters of the United States" when it held that bodies of water that are adjacent to navigable waters are subject to the CWA by reason of that adjacency.¹⁶

* * * *

Under the controlling regulations, therefore, the only areas that are defined as waters of the United States by reason of adjacency to other such waters are "wetlands."¹⁷

* * * *

Baykeeper . . . argues that summary judgment was appropriately granted because "the Supreme Court has repeatedly held that the CWA protects all waterbodies with a 'significant nexus' to navigable waters." This is simply not the case.¹⁸

* * * *

Rapanos, like Riverside Bayview, concerned the scope of the Corps' authority to regulate adjacent wetlands. Justice Kennedy's controlling concurrence explained that only wetlands with a significant nexus to a navigable-in-fact waterway are covered by the Act. . . . No Justice, even in dictum, addressed the question whether all waterbodies with a significant nexus to navigable waters are covered by the Act.

^{16/} 2007 WL 686352, at *3..

^{17/} Id.

^{18/} Id. at *5.

We conclude, therefore, that nothing in Bayview, SWANCC or Rapanos requires or supports the view that Cargill's Pond is a water of the United States because it is adjacent to Mowry Slough. Baykeeper contends, however, that the Pond is more than merely adjacent; it has a nexus to Mowry Slough. It is not sufficient, however, for Baykeeper simply to make its individual case; it must establish that it was unreasonable for the EPA to confine to wetlands the CWA's reach to non-navigable waterbodies adjacent to protected waters. Even on its own terms, however, Baykeeper's argument fails. The evidence in support of Baykeeper's nexus falls far short of the nexus that Justice Kennedy required in Rapanos even for wetlands that the Corps sought to hold subject to the CWA. . . . By any permissible view of the evidence, the effect of Cargill's Pond on Mowry Slough is speculative or insubstantial; the Pond does not significantly affect the integrity of the Slough.¹⁹

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Relying on Headwaters v. Talent Irrigation District, 243 F.3d 526 (9th Cir. 2001), Baykeeper next argues that the Pond is a "water[] of the United States" because even intermittent hydrologic connections are sufficient to trigger CWA jurisdiction. . . . While Headwaters is relevant to the permissible scope of the Corps' tributary jurisdiction, it has no bearing on the issue presented here: whether the pond is protected under the CWA because it is adjacent to navigable waters. In any event, the instant record does not support a finding that the Pond is a tributary of the Slough; there is no evidence that water from the Pond has ever flowed into the Slough or the Slough's wetland.²⁰

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All told, we know of no case holding that all waterbodies adjacent to navigable waters are covered by the Act.²¹

B. Significant Decisions of the District Courts (Presently on Appeal)

1. **Simsbury-Avon Preservation Soc'y, LLC v. Metacon Gun Club, Inc.**, No. 3:04cv803, 2007 WL 268341 (D. Conn. Jan. 31, 2007), appeal pending (2d Cir.)

^{19/} Id. at 2678-80 (emphasis in original).

^{20/} Id. at 2680-81.

^{21/} Id. at 2681.

Summary:

In this citizen suit, plaintiffs claimed that defendant gun club violated CWA § 402 by failing to obtain an NPDES permit for discharges of lead at its outdoor shooting range. The issue on summary judgment was whether a vernal pool and surrounding wetlands on defendant's property constituted "waters of the United States." Although both parties asserted that the plurality standard in Rapanos controlled, the court analyzed CWA jurisdiction under both the plurality and Justice Kennedy's standards. With respect to the plurality standard, the court found that although the wetlands at the shooting range were "adjacent" to the nearby Farmington River, plaintiffs had not demonstrated that the water bodies shared a continuous surface connection. With respect to Justice Kennedy's standard, the court determined that plaintiffs had not produced sufficient evidence such that a rational trier of fact could find the required "substantial nexus" between the wetlands and the Farmington River. Accordingly, the court granted summary judgment in favor of the defendant.

Key Passages:

While following the First Circuit's common sense analysis will usually arrive at the same reading of Rapanos as the Ninth and Seventh Circuits' Marks-based approach, this Court will consider under both the plurality's and Justice Kennedy's standards the issue of whether the plaintiffs have demonstrated a genuine factual dispute about whether Metacon munitions are being discharged into the waters of the United States.²²

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[I]t is undisputed that the Farmington River is a "water of the United States." What is disputed is whether the claimed wetlands of the Metacon range "border, [are] contiguous [with], or neighboring" that river or a tributary thereof. The Army Corps regulation specifically states that "adjacency" applies to "[w]etlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like." It is undisputed that the Farmington River at least "neighbors" the claimed wetlands on Metacon property.²³

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^{22/} 2007 WL 268341, at *6.

^{23/} Id. at *8 (citations omitted).

While plaintiffs have offered evidence showing that a surface water connection does at times exist, they offer no evidence demonstrating a continuous connection between the Metacon wetland and Horseshoe Cove or the Farmington River such that there exists “no clear demarcation between ‘waters’ and wetlands” as required by the plurality in Rapanos. Therefore, the defendant is entitled to summary judgment under the plurality standard.²⁴

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Because the parties assume that the Rapanos plurality is controlling, they do not structure their arguments under Justice Kennedy’s substantial nexus test; however, both parties offer data from testing on lead concentrations, that are relevant to the Court’s assessment of whether the Metacon wetlands affect the “chemical, physical, and biological integrity” of the adjacent Farmington River.²⁵

* * * *

Given the inconclusive evidence in the AEI report, notwithstanding the proximity of the Farmington River to the Metacon wetlands and the seasonal flooding of the area, the AEI data do not present more than “some metaphysical doubt” about defendant’s claim of insubstantial nexus between the wetlands on defendant’s property and the Farmington River. Plaintiffs’ inconclusive water sampling data cannot buttress the rest of plaintiffs’ record so as to demonstrate that a rational trier of fact could find the required substantial nexus and thus find for the plaintiffs on the record taken as a whole. In short, there is insufficient evidence showing that “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,’” namely the Farmington. Instead, this is a case in which the “wetlands’ effects on water quality are speculative or insubstantial, [thus] fall[ing] outside the zone fairly encompassed by the statutory term ‘navigable waters.’”²⁶

2. **United States v. John Pozsgai**, No. 88-6545 (E.D. Pa. Mar. 8, 2007), appeal pending (3d Cir.)

Summary:

^{24/} Id. at *9 (citation omitted).

^{25/} Id.

^{26/} Id. at *10 (citations omitted).

In 1990, defendants were found liable for CWA violations and were permanently enjoined from further violations and were ordered to restore the site. The United States subsequently moved for contempt when defendants failed to comply with the court order. While that motion was pending, Rapanos was issued. The district court concluded that Rapanos did not prevent a finding of contempt.

Key Passages:

The courts have taken somewhat different approaches in interpreting Rapanos in the light of Marks. . . . For purposes of this litigation, I will apply Justice Kennedy's test.²⁷

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Under Justice Kennedy's definition, the defendants' property constitutes wetlands. The plaintiff has produced evidence in its supplemental filings that show a path from the property here to navigable waters. In particular, Kevin Maley, who was accepted as an expert witness in the interpretation of aerial photography at the hearing, submitted a declaration that in his opinion, "the stream between the Pozsgai site and the Pennsylvania Canal flows continuously for most of the year, except during summer and early fall," although rain provides some temporary flow during those times. The defendants argue that there is no evidence that the canal is navigable. Upon consideration of all the material submitted, I believe that the property is fairly encompassed within the definition of wetlands.

Even if the property could not be considered wetlands after the Rapanos decision, I find that the defendants exhausted all of their appeals, and a change in the law does not absolve them of contempt.²⁸

C. Significant Decisions of the District Courts (Not Presently on Appeal)

- 1. United States v. Chevron Pipe Line Co., 437 F. Supp. 2d 605 (N.D. Tex. June 28, 2006)**

Summary:

^{27/} Slip op. at 3 (citation omitted).

^{28/} Slip op. at 4.

The United States filed a civil action against Chevron seeking to impose fines under the CWA and the Oil Pollution Act for the discharge of oil from a pipeline leak that migrated into an unnamed channel/tributary. The district court granted Chevron’s motion for summary judgment, concluding that: (1) the unnamed channel and creek into which oil was discharged were not “waters of the United States” within the definition of “navigable waters” in the CWA and OPA; and (2) evidence that the farthest traverse of the spill might have reached navigable water was speculative and not competent to show that oil actually reached navigable water.

Key Passages:

The United States Supreme Court has now also addressed, albeit without a consensus, the issues raised in this case. In a plurality opinion, the United States Supreme Court has stated that intermittent and ephemeral streams – streams whose flow is coming and going at intervals – are not covered.²⁹

* * * *

Yet, the Supreme Court failed to reach a consensus of a majority as to the jurisdictional boundary of the CWA. . . . Justice Kennedy wrote his own concurring opinion and advanced an ambiguous test – whether a “significant nexus” exists to waters that are/were/might be navigable. This test leaves no guidance on how to implement its vague, subjective centerpiece. That is, exactly what is “significant” and how is a “nexus” determined?³⁰

* * * *

Because Justice Kennedy failed to elaborate on the “significant nexus” required, this Court will look to the prior reasoning in this circuit. The Fifth Circuit . . . has interpreted “the waters of the United States” narrowly under the OPA. Without any clear direction on determining a significant nexus, this Court will do exactly as Chief Justice Roberts declared – “feel [its] way on a case-by-case basis.” Thus, as a matter of law in this circuit, the connection of generally dry channels and creek beds will not suffice to create a “significant nexus” to a navigable water simply because one feeds into the next during rare times of actual flow.³¹

^{29/} 437 F. Supp. 2d at 612.

^{30/} Id. at 613 (citations omitted).

^{31/} Id. at 613 (citations omitted).

* * * *

Merely relying upon the fact that oil spilled into the unnamed channel/tributary and then traversed to Ennis Creek will not suffice if neither is classified as “the navigable waters of the United States.” The Fifth Circuit has clearly stated that “the proper inquiry is whether . . . the site of the farthest traverse of the spill, is *navigable-in-fact* or adjacent to an open body of navigable water.” Needham, 354 F.3d at 346 (citing Rice v. Harken Exploration Co., 250 F.3d 264, 269 (5th Cir. 2001) (emphasis added)).³²

* * * *

Besides resting on speculation, the United States failed to direct the Court to evidence showing whether any oil from the spill actually reached “the navigable waters of the United States” – as that term is defined in Needham or in the Supreme Court’s plurality opinion in Rapanos. The Fifth Circuit has clearly directed that the reaches of the CWA are not so unbounded as to allow the unnamed channel/tributary and Ennis Creek at its juncture with the unnamed channel/tributary to be covered by the CWA.³³

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Thus, absent actual evidence that the site of the farthest traverse of the spill is *navigable-in-fact* or adjacent to an open body of navigable water, the Court finds that a “significant nexus” is not present under the law of this circuit.³⁴

2. **United States v. Evans**, No. 3:05 CR 159 J 32HTS, 2006 WL 2221629 (M.D. Fla. Aug. 2, 2006)

Summary:

In this criminal enforcement action, the defendants moved to suppress evidence of CWA violations obtained via search warrants. The defendants argued that the magistrate judge who issued the search warrants lacked jurisdiction under the CWA to do so in light of Rapanos. The district court adopted the magistrate judge’s report and recommendation to deny the motions to suppress. The magistrate judge found that the allegations contained in the affidavits supporting the application for the search warrants were sufficient to

^{32/} Id. at 614.

^{33/} Id. at 614-15.

^{34/} Id. at 615.

support a finding that there was probable cause to believe the creek at issue fell within the definition of “waters of the United States.”

Key Passages:

In this case, it appears that the only common ground between Justice Scalia’s plurality opinion and Justice Kennedy’s concurrence is that the Sixth Circuit erred in merely applying the “hydrological connection” test to determine whether the CWA’s jurisdiction extended to the wetland at issue. However, because both articulated different standards to be applied on remand, it is not clear which standard is now controlling. Accordingly, consistent with Justice Stevens’ opinion, this Court will consider the jurisdictional requirement for “waters of the United States” to be met if the affidavits satisfy either the plurality’s test (a relatively permanent, standing or continuously flowing water) or the general parameters of Justice Kennedy’s concurrence (a tributary that feeds into a traditional navigable water; not necessarily a continuously flowing stream, river or ocean, but perhaps also not a ditch or drain[.]³⁵

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[I]t appears that even after *Rapanos*, the discharge of a pollutant from a point source that is then indirectly discharged into a covered water because it flows through intermittent conveyances is subject to the CWA’s jurisdiction.³⁶

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In light of the foregoing, it appears CWA jurisdiction can be established in this case if the affidavits in the instant case contained sufficient facts for the issuing judge to reasonably conclude that the creek seen running behind the Florida Camp property was itself a covered water or conveyed the pollutant downstream to a covered water.³⁷

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These allegations are sufficient to support a finding that there was probable cause to believe the creek fell within the definition of “waters of the United States”

^{35/} 2006 WL 2221629, at *19-20 (citations omitted).

^{36/} Id. at *20.

^{37/} Id. at *21.

regardless of whether one applies the plurality's test or the broad parameters suggested by Justice Kennedy.³⁸

3. **United States v. Marion L. Kincaid Trust, et al.**, 463 F. Supp. 2d 680 (E.D. Mich. Nov. 3, 2006)

Summary:

This decision relates to a CWA section 404 and Rivers and Harbors Act civil enforcement action regarding beach grading operations along the shores of Saginaw Bay of Lake Huron. After the enforcement action was voluntarily dismissed in 2003, the defendants sought to recover attorneys' fees under EAJA. In denying the motion, the court held that the government's position on the ordinary high water mark, necessary to support the RHA claim, was not substantially justified. However, the court found that the government's CWA adjacent wetlands claim was substantially justified, based upon its reading of Rapanos and the fact that the wetlands "abut[] a Great Lake."

Key Passages:

Just last term – well after the government's pre-suit investigation was completed – the Supreme Court provided additional guidance on the subject of wetlands and when they fall within the jurisdiction of the United States under the CWA. The Court stated that the waters to which the wetlands must be connected are "those relatively permanent, standing or continuously-flowing bodies of water forming geographic features that are described in ordinary parlance as streams, oceans, rivers, and lakes." Saginaw Bay certainly fits within that definition.³⁹

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The government contends that the defendants' beach constitutes a wetland under the meaning of the statute in order to claim that its jurisdiction extends to the beach where the defendants leveled the beach sand. Although current law may cast some doubt on that claim, given Rapanos' requirement that there be "a continuous surface connection" to covered waters, the Court believes that the evidence supports this contention under the law as it existed at the time this lawsuit was commenced. There is no dispute that the beach abuts a Great Lake.⁴⁰

^{38/} Id. at *22.

^{39/} 463 F. Supp. 2d at 695 (citation omitted).

^{40/} Id. at 696 (citation omitted).

4. **Sierra Club v. United States Corps of Engineers**, 464 F. Supp. 2d 1171 (M.D. Fla. Nov. 19, 2006)

Summary:

Plaintiff challenged a regional general permit issued under CWA § 404(e) by the Jacksonville District of the Corps of Engineers. While cross-motions for summary judgment were pending, the Supreme Court decided Rapanos and the district court asked for supplemental briefing. All the parties to the proceeding agreed that CWA jurisdiction was not an issue in the case and therefore should not affect the court's analysis. In upholding the regional permit, the court discussed Rapanos in a footnote.

Key Passages:

Although Rapanos, a 4-1-4 decision, did not result in any agreed standard for determining which wetlands fall under the Corps' regulation, it appears that the definition would be less expansive than the current one, not more so. See id. at 2224 (plurality opinion describing Corps' expansive view of its jurisdiction which "presse[d] the envelope of constitutional validity"), 2249 (Justice Kennedy criticizing Corps' standard as overbroad and explaining that wetlands must be either adjacent to navigable waters or have a "significant nexus" with navigable waters.)⁴¹

5. **Environmental Protection Information Center v. Pacific Lumber Co.**, No. C 01-2821, 2007 WL 43654 (N.D. Cal. Jan. 8, 2007)

Summary:

In this CWA citizen suit, plaintiff contends that defendant's logging activities require an NPDES permit. In denying plaintiff's motion for summary judgment, the court ruled that the Kennedy opinion in Rapanos establishes the appropriate standard for CWA jurisdiction in the Ninth Circuit and that plaintiff had not demonstrated the existence of a significant nexus between the streams into which defendant's discharges occurred and traditional navigable waters. This issue must therefore go to trial. The court also concluded, however, that plaintiff need not demonstrate that pollutants actually reach navigable waters.

Key Passages:

^{41/} 464 F. Supp. 2d at 1197 n.38.

First, EPIC argues that the Class II and Class III streams into which it observed discharges from each of the twelve alleged point sources are navigable waters. The Supreme Court recently refined the test for navigable waters. Rapanos, 126 S.Ct. at 2221; id. at 2251 (Kennedy, J., concurring). That case was decided 4-4-1, with Justice Scalia writing an opinion for the plurality, Justice Kennedy writing a separate opinion and concurring in the judgment, and Justice Stevens writing for the dissenters. Although there is some argument that the plurality and concurring opinions provide two alternative standards for CWA jurisdiction, the Ninth Circuit’s interpretation of Rapanos is binding on this court. In Northern Cal. River Watch v. City of Healdsburg, 457 F.3d 1023, 1023 (9th Cir. 2006), the Ninth Circuit concluded that the significant nexus test set out in Justice Kennedy’s concurrence is controlling. Therefore, EPIC must demonstrate that the streams in dispute have a significant nexus to Bear Creek.

Under the significant nexus test, the party seeking to invoke the court’s jurisdiction must present evidence of a hydrologic connection. Rapanos, 126 S. Ct. at 2250–51 (Kennedy, J., concurring). That connection may suffice in some but not all cases to show “some measure of the significance of that connection for downstream water quality.” Id. at 2251.⁴²

* * * *

PALCO has not put forth specific facts to rebut EPIC’s showing and create a genuine factual dispute as to the hydrologic connection between the streams and Bear Creek.

A hydrologic connection without more will not comport with the Rapanos standard in this case. Because the evidence indicates that certain of the Class II and all of the Class III streams are intermittent or ephemeral watercourses, EPIC must demonstrate that these streams have some sort of significance for the water quality of Bear Creek. None of the evidence offered by EPIC—field observations, the GIS map, or expert testimony—address this part of the substantial nexus standard. In Northern Cal. River Watch v. City of Healdsburg, No. 01-04686, 2004 WL 201502 (N.D. Cal. Jan. 23, 2004) (Alsup, J.), aff’d, 457 F.3d 1023 (9th Cir. 2006), a decision rendered before Rapanos but affirmed by the Ninth Circuit in light of Rapanos, the court considered both evidence of surface connections between a pond and a navigable water as well as ecological connections. Ecological evidence is not a *sine qua non* for establishing a substantial nexus; however, EPIC has provided no evidence that the streams “significantly affect the chemical, physical, and biological integrity of other

^{42/} 2007 WL 43654, at *14 (footnote omitted).

covered waters.” The court finds that EPIC has not established that the streams are navigable waters.⁴³

Finally, PALCO argues that EPIC must provide proof to “demonstrate the flow of pollutant along” the stream and into Bear Creek. Rapanos, 126 S. Ct. at 2228. See also Concerned Area Residents for Env’t v. Southview Farm, 34 F.3d 114, 118–19 (2d Cir. 1994). However, this requirement, if it exists, comes from Justice Scalia’s plurality opinion in Rapanos, which has not been adopted by the Ninth Circuit. Therefore, the court concludes that this additional showing is not necessary under the substantial nexus test.

In sum, EPIC has sufficiently shown that a hydrologic connection exists between Bear Creek and the streams in question. However, EPIC has not shown that those streams are significant to the water quality of Bear Creek. EPIC must make this showing to establish a substantial nexus and meet the definition of navigable waters under the CWA.⁴⁴

^{43/} Id. (citation omitted).

^{44/} Id. at *15.