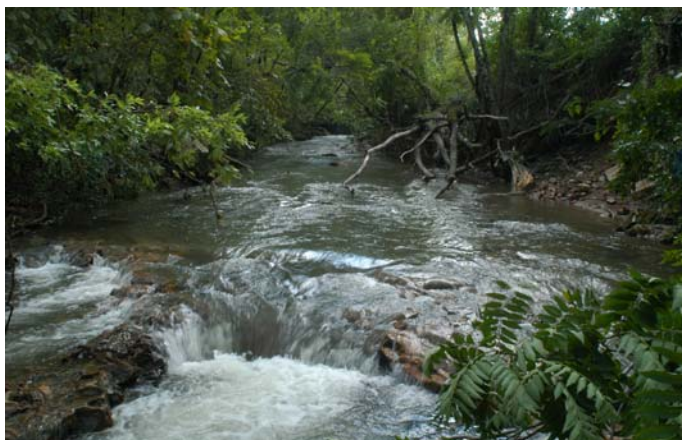


11th Circuit Court Decides a Perennial Stream is not subject to Clean Water Act for a Section 402 Discharge

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On October 24, 2007 the 11th Circuit Court of appeals (Alabama, Georgia, and Florida) overturned the lower, district court Clean Water Act convictions of several individuals for dumping waste water into a stream because the U.S. government had not sufficiently demonstrated that the stream had a “significant nexus” to navigable waters and was, therefore, a “navigable water” of the U.S. and subject to CWA jurisdiction. Rapanos had not been decided when the case was considered by the lower district court so there was no need to explicitly show “significant nexus” in the trial at this level. Just how much evidence government will need to introduce to establish a “significant nexus” in a retrial remains to be seen. It is possible that government will have little difficulty in establishing a “significant nexus” once the actual words “significant nexus” are used in the retrial jury instructions and jury deliberations. Nevertheless, the language of the court in rejecting EPA’s expert testimony presented at the district court level as insufficient suggests that this court and perhaps other courts will demand more evidence of hydrologic, biological, or other sorts of connections than government agencies are ordinarily able to supply given limited budgets and staffing.

In this case, U.S. v. Robison et. al, (11th Cir., No. 05-17019 October 24, 2007) the 11th Circuit Court of Appeals vacated several Clean Water Act convictions and remanded the case for a new trial because the court held that the jury charge in the case was erroneous under Rapanos v. United States. Robison involved the violation of NPDES for the discharge of “process wastewater” from the manufacture of pipe. The discharge was into Avondale Creek. There was testimony from EPA that Avondale Creek was a perennial stream with a “continuous uninterrupted low” into Village Creek. There was also testimony that there was a continuous uninterrupted flow from Village Creek into Bayview Lake and from Bayview Lake into Locust Fork, and ultimately into the Black Warrior River.



Avondale Creek looking upstream from the mouth at Village Creek. Photo courtesy Nelson Brooke, Riverkeeper and Executive Director of Black Warrior Riverkeeper

The parties had agreed that the definition of “navigable waters” was a key element of the CWA criminal offense in the case. The U.S. claimed that Avondale Creek’s connection with the Black Warrior River and/or Village Creek rendered Avondale Creek a “navigable water” within the meaning of the CWA. The defendants contended that

Avondale Creek was not a navigable water and that the judge had provided erroneous jury instructions in light of Rapanos. The jury instructions in the original lower district court trial of the case were consistent with an earlier 11th Circuit decision in United States v. Eidson, 108 F.3d1336 (11th Cir. 1997). On appeal, citing the plurality opinion of Rapanos, the 11th Circuit in Robinson held that Eidson's "expansive definition" of "tributaries" is no longer good law. Why the court would endorse this portion of the plurality's decision but not other portions is unclear.

The government argued that if Avondale Creek could be shown to satisfy either the plurality's test or Justice Kennedy's test, it would be sufficient to sustain CWA jurisdiction. The defendants argued that only Justice Kennedy's test ("significant nexus") applied.

The court considered the Rapanos opinions in some depth including the plurality opinion, the dissenting opinion, and Justice Kennedy's concurring opinion. The court's reasoning in Robinson is difficult to understand but the bottom line is that the court adopted Justice Kennedy's concurring opinion and his "significant nexus" test as the governing rule of Rapanos. The court rejected the plurality opinion's test for navigable waters which had been endorsed in part by Justice Stevens in his dissent.

The court concluded under Justice Kennedy's concurring opinion that "a water can be considered "navigable" under the CWA only if it possesses a significant nexus to waters that "are or were navigable in fact or that could reasonably be so made." The court observed that the lower district court in its jury instructions

“(D)id not “mention the phrase “significant nexus” in its navigable waters” instruction to the jury or advise the jury to consider the chemical, physical, or biological effect of Avondale Creek on the Black Warrior River. Rather, the district court instructed the jury that a continuous or intermittent flow into a navigable-in-fact body of water would be sufficient to bring Avondale Creek within the reach of the CWA. As such, the instruction did not satisfy Justice Kennedy's “significant nexus” test and was erroneous.”

In rejecting the jury instructions, the court noted that EPA's expert witness had presented testimony that Avondale Creek was a perennial stream with a "continuous uninterrupted flow" into Village and from Village Creek to the Black Water River. However, the expert had not conducted a tracer test or measured the volume of water discharged from the Creek or between the other bodies of water. The court observed that the expert witness' only site visit had been four years after the violations. The court observed that the government had also presented no evidence of "the chemical, physical, or biological effect that Avondale Creek waters had or might have had on the Black Warrior River." The district court had also observed that there was no evidence of any actual harm or injury to the Black Warrior River.

The 11th Circuit decision in Robison is only binding upon this Circuit. Nevertheless, other courts may follow. The decision will undoubtedly have a chilling affect on efforts to enforce the Clean Water Act here and elsewhere because of the added evidentiary requirements to establish CWA jurisdiction. The decision also sets up a conflict between Circuits which will need to be resolved in the Supreme Court or through legislation such as the Clean Water Restoration Act.

The court decision: <http://www.ca11.uscourts.gov/opinions/ops/200517019.pdf>

See also Memorandum Opinion: Judge Propst post appeal (an insightful and humorous response to the 11th Circuit court decision which is nonbinding on the Court but may have considerable influence on future decisions because it sharply defines the issues faced in this case and future similar cases.).

http://www.aswm.org/fwp/judge_propst_post_appeal_110707.pdf