

Clean Water Act Update
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Note: Any opinions in this presentation are those of the author alone and do not necessarily represent official positions of the United States.

I. **Post-Rapanos**

A. **June 2007 Guidance**

See <http://www.epa.gov/owo/wetlands/guidance/CWAwaters.html>.

1. **Tributaries**

EPA will assert jurisdiction over tributaries when

- they are navigable-in-fact or “traditional navigable waters” (TNWs); or
- if they are not TNWs, if they are either a “relatively permanent water” (typically flowing year-round or having continuous flow at least seasonally, typically three months) or have a “significant nexus” to a TNW.

2. **Adjacent Wetlands**

EPA will assert jurisdiction over adjacent wetlands when

- the wetlands are adjacent to TNWs, according to the Corps’ regulatory definition of “adjacent,” which does not require a continuous surface connection; or
- the wetlands have a continuous surface connection to non-navigable tributaries of TNWs, where the non-navigable tributaries are relatively permanent, i.e., typically flow year-round or at least seasonally (typically three months); or
- the wetlands are adjacent to non-navigable, non-relatively permanent tributaries and the wetlands have a significant nexus to a TNW.

B. Caselaw

1. Which Standard Applies?

The United States takes the position that as long as *either* the plurality or Kennedy standard is met, then (a) at least eight Justices would find jurisdiction whenever the plurality would support it and (b) at least five Justices would do so whenever Justice Kennedy would support it.

The First Circuit Court of Appeals has agreed that either test is sufficient. U.S. v. Johnson, 467 F.3d 56 (1st Cir. 2006), cert. denied 2007 U.S. LEXIS 11216 (2007). So have U.S. v. Bailey, 2007 U.S. Dist. LEXIS 71188 (D. Minn. 2007), U.S. v. Cundiff, 480 F.Supp.2d 940 (W.D. Ky. 2007), and U.S. v. Evans, 2006 U.S. Dist. LEXIS 53335 (M.D. Fla. 2006).

The Seventh Circuit has held that “as a practical matter the Kennedy concurrence is the least common denominator, noting that it would be “rare” when Justice Kennedy votes against CWA coverage while the plurality supports it. U.S. v. Gerke Excavating, Inc., 464 F.3d 723 (7th Cir. 2006), cert. denied 2007 U.S. LEXIS 10115 (Oct. 1, 2007). The Ninth Circuit originally held that Justice Kennedy’s concurrence was controlling, but, after the United States filed a motion for rehearing, modified its opinion to state that Justice Kennedy’s concurrence was controlling in the case before it, at least arguably leaving open the possibility of holding that either test would suffice in another instance. Northern California River Watch v. City of Healdsburg, 2007 U.S. App. LEXIS 18615 (9th Cir., 2007), withdrawing 457 F.3d 1023 (9th Cir. 2006). The Eleventh Circuit has adopted Justice Kennedy’s “significant nexus” test as governing. U.S. v. Robison, 2007 U.S. App. LEXIS (11th Cir. 2007). For the case before it, so did the court in U.S. v. Pozsgai, 2007 U.S. Dist. LEXIS 23450 (E.D. Pa. 2007).

2. Tributaries

a. Tributary covered

In U.S. v. Moses, 496 F.3d 984 (9th Cir. 2007), the court found CWA coverage over a creek in which, due to irrigation withdrawals, water flowed only during spring runoff, which lasted about two months per year. The court also held that in Rapanos, the Supreme Court had “unanimously agreed that intermittent streams (at least those that are seasonal) can be waters of the United States.” 496 F.3d at 991.

In U.S. v. Evans, 2006 U.S. Dist. LEXIS 53335 (M.D. Fla. 2006), where pollutants were discharged directly into a stream that was seven to eight feet wide, with visibly flowing water and a depth of one foot, the court held that both the plurality’s standard and Justice Kennedy’s standard had been met.

An EPA ALJ found that a creek “undeniably has a significant nexus with navigable waters of the United States,” although the parties had not litigated that issue. (See In the Matter of J. Phillip Adams, Docket No. CWA-10-2004-0156 (ALJ Moran, October 18, 2006).)

b. **Tributary not covered**

In U.S. v. Chevron Pipe Line Company, 437 F.Supp. 605 (N.D. Tex. 2006), the court relied on unfavorable Fifth Circuit pre-Rapanos precedent and held that a spill was not covered by the Oil Pollution Act, due to lack of “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.” It also held, with no detailed discussion other than the statement that Justice Kennedy’s standard was unclear, that no significant nexus had been shown.

In San Francisco Baykeeper v. Cargill Salt Division, 2007 U.S. App. LEXIS 5442, 2007 WL 686352 (9th Cir. 2007), a pond in the San Francisco Bay Area was found not to have a significant nexus with a nearby slough, because the particular evidence before the court did not indicate that water from the pond had ever flowed into the slough.

c. **Issue remanded**

In Robison, *supra*, the Eleventh Circuit reversed a pre-Rapanos conviction and remanded for a new trial as to whether the creek at issue in that case satisfied Justice Kennedy’s “significant nexus” test. The court expressed no opinion as to whether the creek actually did satisfy that test. 2007 U.S. LEXIS 24825, n. 21.

3. **Adjacent Wetlands**

a. **Significant nexus found**

In Healdsburg, *supra*, a California pond and its adjacent wetlands were held to “significantly affect the chemical, physical, and biological integrity of other covered waters understood to be navigable in the traditional sense,” where court also found that there was an actual surface connection between the pond and a navigable-in-fact water when the river overflowed its levee and the two waterbodies commingled.

In Cundiff, *supra*, a Kentucky wetland was found to have a significant nexus with the Green River, a TNW, on the basis of testimony the wetlands’ effect on the physical, chemical, and biological integrity of Green River and other waterbodies, including ecological functions such as water storage, filtering acid mine drainage and sediment, supporting habitat, reducing flood potential and erosion.

In Pozsgai, *supra*, a contempt proceeding based on violations of a 1990 injunction, the court impliedly found a significant nexus. The court, applying Justice Kennedy’s standard, held that the defendants’ property constituted wetlands and cited the government’s evidence, based on an expert witness’s interpretation of aerial photography, that “the stream between the [defendants’] site and the Pennsylvania Canal flows continuously for most of the year, except during summer and early fall,” with rain providing some temporary flow during those times. The court added that even if the property could not be considered wetlands, “a change in the law does not absolve them of contempt.”

In U.S. v. Fabian, 2007 U.S. Dist. LEXIS 24254 (N. D. Ind. 2007),¹ the court held that wetlands adjacent to the Little Calumet River, also known as Burns Ditch, were waters of the United States, because “the United States has produced evidence that [Burns Ditch] is a navigable body of water, and Fabian has failed to adequately refute that evidence.” This was the case even though the court “question[ed] how likely it is that this body of water will be used for any substantial commerce.” The court noted that under Justice Kennedy’s concurrence, adjacency to a navigable-in-fact water was sufficient to make wetlands “waters of the United States,” with no separate determination of significant nexus necessary.

In Bailey, *supra*, the court found that the wetlands in question were adjacent to a navigable-in-fact water and thus as a matter of law under Justice Kennedy’s opinion had a significant nexus to the navigable-in-fact water. It held that some separation of wetlands and navigable-in-fact waters (in this case, 15 feet) did not destroy adjacency, according to the Corps’ definition.

b. **Significant nexus not found**

In Simsbury-Avon Preservation Society, LLC v. Metacon Gun Club, Inc., 2007 U.S. Dist. LEXIS 7177 (D. Conn. 2007), a wetland was found not to have a significant nexus with a nearby navigable-in-fact river, even with periodic, seasonal flooding between a wetland and the river, because court was not given evidence of the possibilities of contaminants migrating from the wetland to the river. However, the parties had not briefed the case on the “significant nexus” standard. Instead, they had focused on the plurality’s standard, which the court found had not been met, due to lack of evidence of a “continuous connection” between the wetlands and the nearby river.

c. **Significant nexus deferred**

In EPIC v. Pacific Lumber Company, 2007 U.S. Dist. LEXIS 3715 (N.D. Calif. 2007), the parties conceded that some streams had a hydrologic connection to a downstream river that parties agreed was a “navigable water,” but the pre-trial evidence was not enough for court to find if the streams “significantly affect the chemical, physical, and biological integrity of other covered waters.” The court held off on ruling on that until trial. The court did say, however, that it was not necessary to prove flow of pollutants along a stream into the navigable-in-fact river and that a hydrologic connection may be enough in some, but not all, cases to measure the significance of the connection to downstream navigable-in-fact waters. To establish a hydrologic connection, the court rejected the argument that firsthand observations were necessary, stating that GIS maps would be enough to “establish some sort of a hydrologic connection, even for those streams . . . which are intermittent waterflows.”

¹A motion for reconsideration was denied on October 5, 2007.

C. Pending Legislation

The Clean Water Restoration Act of 2007, H.R. 2421, would replace the term “navigable” in the CWA with “waters of the United States” It would also define “waters of the United States” much as it is defined now in EPA and Corps regulations, i.e., to include “all waters subject to the ebb and flow of the tide, the territorial seas, and all interstate and intrastate waters and their tributaries, including lakes, river, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, natural ponds, and all impoundments of the foregoing, to the fullest extent that these waters or activities affecting these waters, are subject to the legislative power of Congress under the Constitution.”

II. Upcoming Rulemakings

A. CAFO rule

On June 30, 2006, in response to the decision in Waterkeeper Alliance v. U.S. E.P.A., 399 F.3d 486 (2d Cir. 2005), EPA published a proposal to revise its permitting requirements and Effluent Limitations Guidelines for concentrated animal feeding operations (CAFOs). See 71 FR 37744-37787 (June 30, 2006). EPA has been working on a final rule, which is now in interagency review, which we expect to be finished in November. Typically, a final rule is published in the Federal Register about a month after completion of interagency review; the final rule may therefore be published later this year.

B. Water Transfers Rule

On June 7, 2006, EPA proposed an amendment to 40 C.F.R. §122.3 that would add an exclusion for water transfers to the NPDES permit requirement. (See 71 Fed. Reg. 32887-32895 (June 7, 2006).) EPA’s final rule is now going through interagency review. We expect a final rule to be issued in the next few months.

C. Wetlands Mitigation Rule

On March 28, 2006, EPA proposed a rule on compensatory mitigation for losses of aquatic resources. (See 71 FR 15520-15556 (March 28, 2006).) EPA is working on a final rule that may be issued in early 2008.