

Are You Operating in the Dark on Clean Water Act Jurisdiction?

NACWA Clean Water Law Seminar

November 12, 2009



3 Branches of Government (Checks and Balances?)

Judicial Branch

 *US Supreme Court*

 *Lower Courts*



Executive Branch

 *EPA/ACOE Guidance*



Legislative Branch

 *Proposed Legislation*



Review of Court Opinions

Rapanos and Carabell

- 💧 **Scalia and the Plurality** – lower courts should determine whether ditches...are waters in the ordinary sense...containing relatively permanent flow, wetlands adjacent to those waters, or continuous connection...“boundary-drawing” problem.
- 💧 **Kennedy in the Middle** – do the specific wetlands at issue possess a significant nexus with navigable waters.
- 💧 **The Dissent** – there was a hydrological connection and the plurality disregards the fundamental significance of the CWA.

Review of Court Opinions Summary of Lower Courts

💧 Plurality, Significant Nexus, or Both??

💧 U.S. v. Chevron Pipe Line Co. (N.D. Tex. 2006)

💧 U.S. v. Robison (11th Cir. 2007)

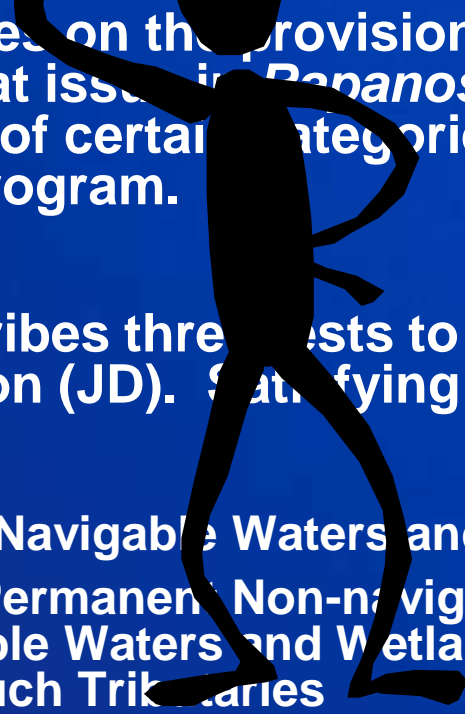
💧 Northern CA Riverwatch v. City of Healdsburg (9th Cir. 2006)

💧 U.S. v. Gerke (7th Cir. 2006)

💧 U.S. v. Johnson (1st Cir. 2006)

💧 U.S. v. Evans (M.D. Fla., 2006)

EPA and ACOE Guidance – Post Rapanos



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- 💧 The Guidance focuses on the provisions of the USACE and USEPA regulations at issue in *Rapanos*, which address the jurisdictional status of certain categories of water in the context of the 404 program.
 - 💧 The guidance prescribes three tests to use in order to make a jurisdictional decision (JD). Satisfying one of these tests results in a JD.
 - 💧 Test 1: Traditional Navigable Waters and their Adjacent Wetlands
 - 💧 Test 2: Relatively Permanent Non-navigable Tributaries of Traditional Navigable Waters and Wetlands with a Continuous Connection with such Tributaries
 - 💧 Test 3: Certain Adjacent Wetlands and Non-navigable Tributaries that are not Relatively Permanent

EPA and ACOE Guidance - Explained



Test 1

-  Traditional navigable waters, which include all the waters described in 33 C.F.R § 328.3 (a)(1) and 40 C.F.R. § 230.3 (S)(1) and adjacent wetlands

Test 2

-  Also known as the “Scalia” test because it’s derived from Justice Scalia’s opinion in the Rapanos decision.
-  Brings into focus the terms “relatively permanent” and “contiguous surface connection” in determining jurisdiction

Test 3

-  Also known as the “Kennedy” test because it’s derived from Justice Kennedy’s opinion in the Rapanos decision
-  This is the crux of the guidance; where most vulnerable waters fall, i.e. not relatively permanent, no surface water connection, ephemeral, etc.

Guidance Considerations

- 💧 There may be unintended impacts to other aspects of the CWA.
 - 💧 § 402
 - 💧 § 401 Certifications
 - 💧 Certain isolated vulnerable waters (such as headwaters)
 - 💧 USEPA action in non-delegated States
- 💧 State case studies may become invaluable in exposing weaknesses in the guidance document, especially with respect to the 402 program and isolated waters.

Clean Water Restoration Act – *Who, What, When, Where, Why...*

💧 H.R. 2421 and S. 787

💧 Introduced in 2007, 2008, 2009

💧 Rep. Oberstar and Sen. Feingold

💧 Agreement Ends Here



Clean Water Restoration Act – *What Does Do?*

- 💧 Amends the CWA to clarify jurisdiction of the U.S. over “*waters of the United States*”
- 💧 Clearly defines “waters of the U.S.” using existing regulations
- 💧 Strikes “navigable waters”



Clean Water Restoration Act – *What Isn't Covered*

- 💧 **Groundwater – isn't water of the United States...that remains true**
- 💧 **Prior Converted Crop Lands**
- 💧 **Waste Treatment Systems**

Clean Water Restoration Act – *Proposed Amendments*

💧 **Senators Baucus, Klobuchar, and
Boxer**

💧 **Interstate Commerce**

💧 **Ebb and Flow**

💧 **Intra-state Waters**

💧 **Includes Exclusions**

OFFICIAL PREPARED FOR SENATE

offered by Senators Baucus, Klobuchar and Boxer

AMENDMENT NO. _____ Calendar No. _____

Purpose: In the nature of a substitute.

IN THE SENATE OF THE UNITED STATES--111th Cong., 1st Sess.

S. 787

To amend the Federal Water Pollution Control Act to clarify the jurisdiction of the United States over waters of the United States.

Referred to the Committee on _____ and ordered to be printed

Ordered to lie on the table and to be printed

AMENDMENT IN THE NATURE OF A SUBSTITUTE intended to be proposed by _____

Viz:

1 Strike all after the enacting clause and insert the following:

2

3 **SECTION 1. SHORT TITLE.**

4 "This Act may be cited as the "Clean Water Restoration Act".

5

6 **SEC. 2. PURPOSES.**

7 The purposes of this Act are--

8 (1) to reaffirm the original intent of Congress

9 in enacting the Federal Water Pollution Control Act



Clean Water Restoration Act – *What Does It Mean to You?*

- 💧 **Jurisdictional Determinations**
- 💧 **Clean Water Act Section 402 – NPDES Discharges**
- 💧 **Uncertainty...Challenges...**

Beyond the Legislation

 **Congressional Hearings**

 **National Debate**

 **Inspector General Report**

 **National Academy of Sciences**



Questions?

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