

## Ninth Circuit Adopts Justice Kennedy's "Significant Nexus" Test As Described in *Rapanos*

On August 6, the U.S. Court of Appeals for the Ninth Circuit affirmed a district court holding that activities involving a pond located adjacent to a navigable water of the United States, but with typically no surface connection, are subject to the Clean Water Act (CWA). *Northern California River Watch v. Healdsburg*, Case No. 04-15442 (9th Cir. 2007). In the wake of the Supreme Court's 4-1-4 decision in *Rapanos v. United States*, 126 S. Ct. 2208 (2006), there has been much uncertainty regarding whether courts will apply the standard articulated in Justice Scalia's plurality opinion or, instead, the "significant nexus" test described in Justice Kennedy's concurring opinion. In *Healdsburg*, the Ninth Circuit relied on the concurring opinion of Justice Kennedy in *Rapanos v. United States*, 126 S. Ct. 2208 (2006) that stated federal jurisdiction under the CWA may be determined on a case-by-case basis depending on whether a wetland has a "significant nexus" to a navigable water of the United States.

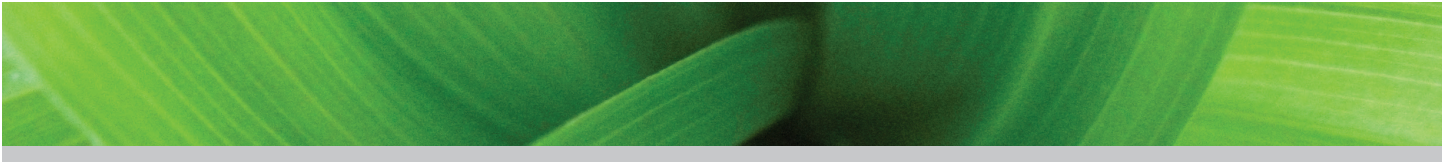
*"...the proximity of the subject waters to a navigable water, in addition to a continuous hydraulic connection via an underground aquifer, were sufficient to establish jurisdiction under the Clean Water Act."*

Although the waters at issue typically had no surface connection to the navigable river, except in cases where the navigable river overflows and the two bodies of water commingle, the Ninth Circuit held that the proximity of the subject waters to a navigable water, in addition to a continuous hydraulic connection via an underground aquifer, were sufficient to establish jurisdiction under the Clean Water Act.

### BACKGROUND

In *Healdsburg*, a key issue was whether Basalt Pond and wetlands are isolated waters or whether they constitute wetlands falling under the jurisdiction of the CWA. Basalt Pond, containing wetlands, borders additional wetlands that are adjacent to the Russian River, a navigable water of the United States. Basalt Pond was created in 1967 when the Basalt Rock Company began excavating gravel and sand from land near the Russian River. The pit subsequently filled with water up to the line of the water table and surrounding aquifer, and is separated from the Russian River by wetlands and a levee.

In *Rapanos*, the Supreme Court vacated and remanded the judgment of the U.S. Court of Appeals for the Sixth Circuit that had upheld federal jurisdiction over wetlands connected to traditional navigable waters by a series of drainage ditches and non-navigable creeks, as well as wetlands separated from a drainage ditch by a berm. The Justices produced a 4-1-4 decision, with no single opinion garnering five votes. Four Justices, in the

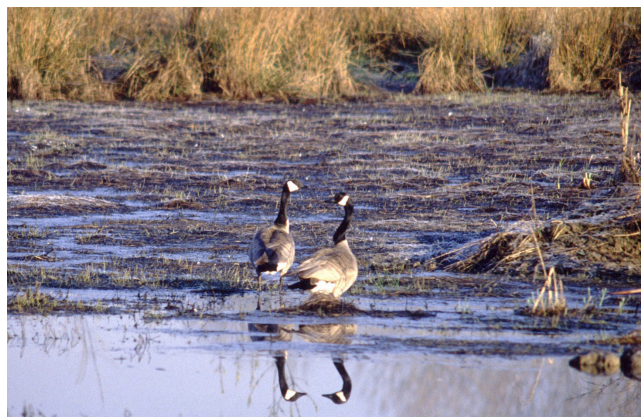


plurality opinion written by Justice Scalia, concluded that the CWA authorized federal jurisdiction only over “relatively permanent bodies of water . . . connected to traditional interstate navigable waters, as well as wetlands that have a continuous surface connection with the waters such that it is “difficult to determine where the ‘water’ ends and the ‘wetland’ begins.” Justice Kennedy, on the other hand, concurring in the judgment only, also voted to overturn the lower court, but described a separate case-by-case approach to jurisdictional determinations based on whether waters have a “significant nexus” with a traditional navigable water.

## THE DECISION

The Ninth Circuit affirmed the district court’s finding that Basalt Pond and its wetlands are not isolated and thus qualify as wetlands under the applicable regulations which define wetlands as “those areas that are inundated or saturated by surface or groundwater.” 33 C.F.R. § 328.3(b). The court then proceeded to confront the question of whether Basalt Pond is a “water of the United States” and thus, under the jurisdiction of the CWA. The court explained that this determination depends on whether the Basalt Pond and wetlands: (1) are sufficiently adjacent to the navigable Russian River to confer jurisdiction pursuant to *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985); or (2) have a “substantial nexus” to the Russian River to confer jurisdiction pursuant to Justice Kennedy’s concurring opinion in *Rapanos*.

The Ninth Circuit held that Basalt Pond and wetlands are subject to the CWA under both *Bayview and Rapanos*. The primary significance of this opinion, however, is the Ninth Circuit’s decision to apply Justice Kennedy’s “significant nexus” test rather than the *Rapanos* plurality’s two-part test (i.e., do the receiving waters have a relatively permanent flow and do those waters have a continuous surface connection to navigable-in-fact waters). A key implication of this decision to apply the “significant nexus” test, particularly if other courts similarly accept Justice Kennedy’s opinion as controlling, is that it will likely result in broader coverage for the CWA. As this case illustrates, courts applying this test may similarly conclude that waters with little or no surface connection to a navigable water of the United States, but with only underground hydraulic connections, are subject to the CWA.



*Lake St. Clair indigenous wetlands.*

## FOR ADDITIONAL INFORMATION

For additional information on this case, please contact Steve Richardson, Bob Szabo, or any member of the firm’s Environmental practice group at (202) 298-1800.

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