9th Circuit Sticks to the Clean Water Pragmatism of 'Rapanos'

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In an August 28 Forum column ("New Math: One of Nine Votes Equals a Majority?"), Michael M. Berger reviewed the confusing muddle of the U.S. Supreme Court's decision in *Rapanos v. U.S.*, 126 S. Ct. 2208 (2006), and concluded that the 9th U.S. Circuit Court of Appeal's interpretation of that decision in a recent case, *Northern California River Water v. City of Healdsburg*, 2006 DJDAR 10537 (Aug. 10, 2006), was incorrect. Berger's criticism of the 9th Circuit in *River Watch* is flawed both as an abstract critique and in ignoring a pragmatic interpretation of the provisions of the federal Clean Water Act.

Practically, *River Watch* involved a less than remarkable application of the Clean Water Act to a particular fact situation. The city of Healdsburg had poured sewage from its secondary treatment plant into an unlined rock and gravel pit. Predictably, some of the sewage wastewater percolated into an aquifer below the surface of the rock and gravel pit, which then moved water directly into the Russian River, a navigable waterway.

While the gravel pit was separated directly from the Russian River by a man-made levee that precluded a direct surface water flow into the river, the District Court found and the 9th Circuit emphasized that, nonetheless, there was a subsurface connection (through the aquifer) that led chemicals in the city's wastewater—including the salt chloride—to directly affect the river's water quality.

Because the Clean Water Act was designed "to restore and maintain the chemical, physical and biological integrity of the nation's waters," the 9th Circuit had little difficulty in finding that the city's disposal of wastewater into an unlined pit that allowed the percolation of the wastewater into a navigable river violated the act.

Mr. Berger does not dispute the 9th Circuit's pragmatic application of the Clean Water Act in this particular case; indeed, he expressly states that the "issue is not whether *River Watch* reached the correct result, but how it got there." But it is critical to understand the result in the *River Watch* on a practical level. The use of unlined ponds, gravel pits, or other areas for storing water is common in California. For those in the Los Angeles area, a trip up the 610 Freeway to the city of Irwindale will show large ponds of water in former sand and gravel facilities. See U.S. House of Representatives Report: Environmental Effects of Gravel Mining in Irwindale, Calif. (December 2002).

While these particular ponds may or may not be connected to navigable waterways such as the nearby San Gabriel River, an environmental lawyer must know that at least in the 9th Circuit such a pond could be subject to Clean Water Act requirements if it has the necessary connection to a navigable waterway.

Even on an abstract level, the 9th Circuit's opinion in *River Watch* correctly read the murky waters of the Supreme Court's divided opinion in *Rapanos*. In that case, involving different wetlands areas that were separated from navigable waterways by ditches, levees, or other man-made barriers, four members of the court, led by Justice Antonin Scalia, authored a plurality opinion that suggested that only wetlands areas that were marked by a continuous flow of water would be subject to federal jurisdiction under the Clean Water Act.

For Mr. Berger, this is the "narrow" interpretation of the Clean Water Act that should, as an analytical matter, be the most persuasive. But, four members of the court (in an opinion authored by Justice John Paul Stevens) vehemently disagreed, as did Justice Anthony Kennedy, a fifth member of the court.

Kennedy's comment on the Scalia plurality's efforts to cobble together an extremely restrictive (or "narrow") view of the Clean Water Act could not have been clearer: "[T]he plurality's opinion is inconsistent with the Act's text, structure, and purpose." Four other justices, led by Stevens, clearly agreed with Kennedy in rejecting this narrow approach.

Thus, what the 9th Circuit did in *River Watch* was a practical counting of the actual votes: the Stevens group had four votes for a broad reading of the Clean Water Act. Kennedy was a fifth vote supporting a reading of the Clean Water Act to allow for imposition of federal jurisdiction and regulation of a wetlands area as long as there was a convincing showing of an actual connection between the wetlands or pond area and a navigable waterway.

Although somewhat cryptic in spots, Kennedy's concurring opinion was a pragmatic approach to a difficult problem. Rather than a theoretical debate of the meaning of the word waters based upon a 1954 edition of Webster's dictionary, Kennedy repeatedly cited real world examples of possible waters that might not fit within a technical dictionary definition.

In a Los Angeles-based example, Kennedy noted that "[t]he Los Angeles River, for instance, ordinarily carries only a trickle of water and often looks more like a dry roadway than a river." Yet, as he implied, a practical determination had to be made as to whether the Los Angeles River was in fact a "waterway, whether or not it satisfied the dictionary definition implying a continuous flowing waterway. As Kennedy concluded about the Los Angeles River: "[I]t is illustrative of what often-dry watercourses can become when rain waters flow."

Kennedy and the four dissenting justices in *Rapanos* asked a pragmatic series of questions in determining whether a particular body of water (or a wetland) area was subject to federal regulation under the Clean Water Act. Was the body of water, whether or not flowing all of the time, capable of having sufficient flow at certain periods of time to impact navigable waterways? Was a body of water that was physically separated from a truly navigable waterway still capable of influencing the water quality in that navigable waterway?

This second inquiry was exactly the real world question that the 9th Circuit answered in the affirmative. Even though the sand and gravel pit used by the city of Healdsburg was physically separated from the surface of the Russian River by a levee, was the pit still capable (through subsurface percolation) of impacting the water quality in the Russian River?

For the 9th Circuit and, arguably, for five out of nine justices of the Supreme Court, the answer was yes. There is a connection that impacts water quality and therefore federal regulation of the discharge into the pond was appropriate. The 9th Circuit's opinion in *River Watch* is faithful to the narrowest majority view expressed in *Rapanos* and a correct interpretation of the Supreme Court's factual concerns in this area.

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