

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 04-15442

NORTHERN CALIFORNIA RIVER WATCH,

Appellee,

v.

CITY OF HEALDSBURG,

Appellant.

ON APPEAL FROM THE U.S. DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
HONORABLE WILLIAM H. ALSUP
Case Nos. 01-04686-WHA and 02-03249-WHA

**PLAINTIFF-APPELLEE'S MOTION FOR RECONSIDERATION OR
CLARIFICATION**

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conclusive standard for jurisdiction rests upon a reasonable inference of ecologic interconnection, and the assertion of jurisdiction for those wetlands is sustainable under the Act by showing adjacency alone. That is the holding of *Riverside Bayview*.” *Id.* at 2248. Justice Kennedy further explicates his position, which is accepted by the four person dissent and thus constitutes a five justice majority, by stating “[w]hen the Corps seeks to regulate wetlands adjacent to navigable-in-fact waters, it may rely on adjacency to establish its jurisdiction.” *Id.* at 2249.

Other statements in *Rapanos* also highlight Justice Kennedy’s position. “The plurality’s second limitation-exclusion of wetlands lacking a continuous surface connection to other jurisdictional waters-is also unpersuasive.” *Id.* at 2244. “The Court further observed that adjacency could serve as a valid basis for regulation even as to ‘wetlands that are not significantly intertwined with the ecosystem of adjacent waterways.’ (citations omitted). ‘If it is reasonable,’ the Court explained, ‘for the Corps to conclude that in the majority of cases, adjacent wetlands have significant effects on water quality and the aquatic ecosystem, its definition can stand. *Ibid.*’” *Id.*

Justice Kennedy also states “on the one hand, when a surface-water connection is lacking, the plurality forecloses jurisdiction over wetlands that abut navigable-in-fact waters-even though such navigable waters were traditionally

Plaintiff-Appellee Northern California River Watch requests that this Court reconsider one aspect of its ruling. At page 6 the Court held that "[a]pplying these principles in this case, it is apparent that the mere adjacency of Basalt Pond and its wetlands to the Russian River is not sufficient for CWA protection." 2006 WL 2291155 at *6. Plaintiff-Appellee believes that this statement is in clear error and that, in fact, the majority of the Supreme Court in the *Rapanos* case upheld the rule that adjacency to a navigable-in-fact river is sufficient for Clean Water Act jurisdiction. The distinction that a majority of the court made in *Rapanos* is that mere adjacency to a *non-navigable* tributary by itself is insufficient.

Justice Kennedy defined the issue to be decided as follows: "[t]hese consolidated cases require the Court to decide whether the term "navigable waters" in the Clean Water Act extends to wetlands that do not contain and are not adjacent to waters that are navigable in fact." *Rapanos v. United States*, 126 S.Ct. 2208, 2236. That is the crux of the court's decision. Justice Kennedy went on to say, "In *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 106 S.Ct. 455, 88 L.Ed.2d 419 (1985), the Court upheld the Corps' jurisdiction over wetlands adjacent to navigable-in-fact waterways. (citations omitted)." *Id.* at 2240.

Justice Kennedy clearly affirmed the holding of *Riverside Bayview* when he stated: "[a]s applied to wetlands adjacent to navigable-in-fact waters, the Corps'

subject to federal authority.” *Id.* at 2246. Justice Kennedy and the dissent strongly disagree with the plurality on this point.

As this court noted, Justice Kennedy’s opinion, along with points agreed upon by either the plurality or the dissent, makes the controlling opinion. *See Healdsburg*, 2006 WL 2291155 at *6, citing *Marks v. United States*, 430 U.S. 188, 193, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977) (quotation omitted).

It is these pronouncements of Justice Kennedy that make it clear that adjacency of a wetland to a navigable-in-fact waterway remains sufficient by itself to establish Clean Water Act jurisdiction. As is noted and held by this Court, the Russian River is indeed navigable-in-fact and the adjacency of Basalt Pond to the Russian River is therefore sufficient by itself to establish jurisdiction.

Of course, the remaining reasoning of the court as to the physical, chemical and biological interconnections between Basalt Pond and the Russian River are accurate, provide further support for jurisdiction and should remain undisturbed.

CONCLUSION

Northern California River Watch asks the Court to re-write its holding at 2006 WL 2291155 at *6 only as to the adjacency of the wetlands to a navigable-in-fact river, since a five person majority in *Rapanos* affirmed the holding in *Riverside Bayview* that adjacency to a navigable-in-fact waterway is sufficient by itself to

establish Clean Water Act jurisdiction. Northern California River Watch respectfully requests that this Court clarify its opinion to be consistent with the five justice agreement reached on this issue in *Rapanos*.

Dated: August 28, 2006.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on August 28, 2006, I served a copy of Plaintiff-Appellee's Motion for Reconsideration or Clarification on the following parties by U.S. Mail, postage-paid, addressed as follows:

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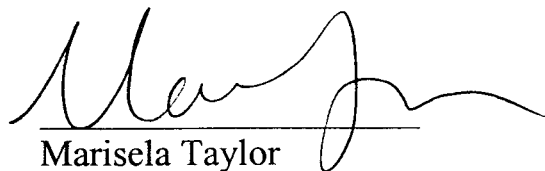
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