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Office of the Clerk
U.S. Court of Appeals, Ninth Circuit
95 Seventh Street
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San Francisco, CA 94119-3939

Re: *City of Healdsburg v. Northern California River Watch*
U.S. Court of Appeals Docket No. 04-15442

Appellant City of Healdsburg's Citation of Supplemental Authority:
Rapanos v. United States, 547 U.S. ____ (June 19, 2006)

Dear Clerk:

Rapanos considered whether Clean Water Act (CWA) jurisdiction extends to wetlands adjacent to tributaries of navigable-in-fact waters.

As briefed previously, this Court need not reach these "adjacent wetlands" issues because the "gravel mining" and "waste treatment" exceptions preclude CWA jurisdiction over the Basalt Pond. Moreover, the *Rapanos* opinions do not address whether a *waterbody* such as the Basalt Pond falls under the Corps of Engineers' definition of adjacent *wetlands*.

Nonetheless, the *Rapanos* opinions provide guidance on CWA jurisdiction. Under the analyses of the three principal opinions, CWA jurisdiction does not reach the Basalt Pond or its wetlands.

Under the plurality's analysis, "only those wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between 'waters' and wetlands, are 'adjacent to' such waters and covered by the Act." Plurality 23-24. There is no "continuous surface connection" between the Basalt Pond and its wetlands, on the

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one hand, and the Russian River, on the other, so CWA jurisdiction would not reach the Basalt Pond wetlands.

Under four Justices' dissenting view, "the Corps' approach should command our deference." Stevens 19. Here, consistent with its published policy, the Corps disclaimed jurisdiction over the Basalt Pond. (AER 8: Ex. 103). From the dissent's perspective, CWA jurisdiction would not extend to the Basalt Pond and its wetlands in deference to the Corps.

Finally, Justice Kennedy, writing for himself, rejected the notion that a "hydrologic connection" alone establishes jurisdiction. Kennedy 28. Instead, under his "significant nexus" test, a wetland must "significantly affect" the navigable water for jurisdiction to attach. "When, in contrast, wetlands' effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term 'navigable waters.'" Kennedy 23. There is no evidence here that the *wetlands*, as distinct from the Basalt Pond's filtering silt lining, "significantly affect" the water quality of the Russian River. Under Justice Kennedy's analysis, those wetlands would not be "adjacent" wetlands because they have no more than a speculative or insubstantial effect on water quality in the Russian River.

Very truly yours,

ARCHER NORRIS

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cc: All Counsel (See attached list)