No.: 04-15442

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**IN THE UNITED STATES COURT OF APPEALS**

**FOR THE NINTH CIRCUIT**

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CITY OF HEALDSBURG

Appellant,

vs.

NORTHERN CALIFORNIA RIVER WATCH,

Appellee.

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On Appeal From the United States District Court,
Northern District of California
Nos. C01 04686 WHA & C02 03249 WHA

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# PETITION FOR PANEL REHEARING AND REHEARING *EN BANC*

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Michael E. Gogna (Bar No. 168144)
Amrit S. Kulkarni (Bar No. 202786)
MEYERS NAVE RIBACK, ET AL.
401 Mendocino Avenue, Suite 100
Santa Rosa, CA 95401
Telephone: (707) 545-8009
Facsimile: (707) 545-6617

Peter W. McGaw (Bar No. 104691)
John L. Kortum (Bar No. 148573)
ARCHER NORRIS
A Professional Law Corporation
2033 North Main Street, Suite 800
Walnut Creek, CA 94596
Telephone: (925) 930-6600

Attorneys for Appellant CITY OF HEALDSBURG

## I.
## INTRODUCTION

This petition seeks a rehearing by the Panel or a rehearing *en banc* of the opinion in this matter filed on August 10, 2006. (Exhibit 1). This petition raises important issues of national significance including:

- Whether, in applying a fragmented Supreme Court opinion (the recent *Rapanos* "adjacent wetlands" decision),[1] the holding is reflected by a concurrence advancing a test rejected by all other Justices, as the Panel has done, or the point on which at least five Justices would agree under the particular facts in question;
- Whether an agency's interpretation of its own regulations can be ignored, as the Panel has done, or whether the Court must defer to the agency's expertise as required by the Supreme Court;
- Whether the Panel's decision correctly imposes a circular interpretation on regulations governing "waste treatment systems," an issue of first impression before any Circuit Court; and
- Whether Congress intended the Clean Water Act ("CWA") to regulate percolating groundwater that may contain residual constituents of waste treatment, an issue that has split Circuit and District Courts.

[1] *Rapanos v. United States*, 547 U.S. __, 126 S.Ct. 2208 (June 19, 2006).

As a result of the Panel's decision, the City of Healdsburg will lose the final stage of its municipal waste treatment process, a gravel mining pit being used as a final polishing and percolation pond for the City's treated wastewater. Replacement of the treatment and disposal provided by this percolation pond will cost the 11,000 residents of this small community in excess of $20 million, with no consequent benefit to the environment. At the most basic level, the City simply wants to retain the use of this valuable waste treatment resource.

From a larger perspective, however, the Panel's decision – the first in the country to substantively apply the *Rapanos* decision – sets troubling precedent. It concludes, without significant analysis, that the "controlling" opinion of the fragmented Supreme Court *Rapanos* decision is the opinion by one Justice that "concurs in the judgment only." There is no discussion of whether this concurring opinion actually represents the "narrowest grounds of agreement" among the Justices, as required by Supreme Court precedent.

The Panel's decision also fails to acknowledge important interpretations of Army Corps of Engineers ("Corps") regulations governing federal jurisdiction over mining operations, and Corps and Environmental Protection Agency ("EPA") regulation of "waste treatment systems." In conflict with binding Supreme Court precedent, the Panel's decision fails to give deference to Agency interpretations squarely on point and creates circular requirements without any supporting

authority.

Finally, the Panel's decision concludes that CWA jurisdiction may be based on underground "seepage." This is an issue that has created a significant split among the Circuits and District Courts, yet the Panel's decision neither reflects nor resolves that controversy.

The issues raised by the present case, and its application of the *Rapanos* decision in particular, are of considerable interest nationally and within the Ninth Circuit. Nationally, the *Rapanos* case drew 21 *amicus* briefs,[2] and the present case drew *amicus* briefs from both National and California-based organizations on both sides. The United States Department of Justice has recently filed an "*amicus* motion" here seeking "clarification" (i.e., rehearing) of the Panel's decision. (See Exhibit 2). Within the Ninth Circuit, in addition to the present case, the Court has recently addressed similar issues of CWA jurisdiction in *Baccarat Fremont Developers, LLC v. U.S. Army Corps of Engineers*, No. 03-16586 (opinion filed October 14, 2005; rehearing denied August 3, 2006) and another case, *San Francisco Baykeeper v. Cargill Salt Division*, No. 04-17554, is pending. In fact, the *Cargill* decision has been re-briefed based on *Rapanos* and the Panel's decision in this case and is set for re-argument on September 27, 2006, before Judges Canby, Hawkins and Gould. (See Exhibit 3).

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[2] *See*, *Rapanos*, 126 S.Ct. at 2259 n.9 (Stevens, dissenting).

In short, this decision has gained national attention and threatens to set erroneous national precedent on a number of important issues. The Ninth Circuit, either as the Panel or sitting *en banc*, should rehear the significant issues raised by this case so that the Court's decision can properly apply recent Supreme Court precedent and so that it can reflect proper deference to regulatory agencies.

## II.
## STATEMENT OF THE CASE

The principal issue in this case is whether a man-made gravel mining pit undergoing active reclamation, which is simultaneously being used by the City of Healdsburg as part of its municipal waste treatment system, is a "water of the United States." If so, Healdsburg will be deprived of the use of a significant element of its wastewater treatment system. If not, the City will continue to use the pit as a treatment and percolation pond as it has for the last 30 years, under a state discharge permit and with no adverse impact to the nearby Russian River.

The Corps determined that this pit, known as the "Basalt Pond," is not a water of the United States based on a regulatory exception for gravel mining pits still in commercial use. (*See* Exhibit 4; AER 8: Ex. 7). This application of the Corps' regulations is consistent with previous Corps' interpretations published in the Federal Register. This jurisdictional determination, requested by Appellee, was never challenged directly under the Administrative Procedure Act. 5 U.S.C. § 500

*et seq*.

Nonetheless, the District Court and the Panel found that the Basalt Pond is a "water of the United States." The Panel based its decision on a reading of Justice Kennedy's lone concurrence in *Rapanos*. The Panel held that underground seepage establishes a "substantial nexus" between the pit and the Russian River. Although the District Court had alluded to the transmission of wastewater constituents ("chloride," or salts) that migrate though the groundwater to the river, it had not found any "significant impact" on the water quality of the river itself.

In addition, without discussing the Corps' interpretation of its own regulations, the Panel also concluded that a gravel mining "excavation operation" means "active extraction" only, and not "reclamation." The Panel also rejected an exception to CWA jurisdiction for "waste treatment systems" that is directly on point.

Finally, the Panel's decision also leaves unresolved whether water leaving a treatment pond and percolating through the underground aquifer requires a federal permit *at the point of entry to a navigable waterway*, or whether it is more properly regulated by a state discharge permit. Healdsburg believes it is clear, however, that the gravel mining pit itself is not a "water of the United States," so that no Federal permit is required to discharge treated wastewater *into* the pit.

## III.
## ARGUMENT

### A. The Panel's Decision Erroneously Followed Justice Kennedy's Lone Concurrence Rather Than Looking For Agreement Among The Justices In *Rapanos*

The Panel summarily concluded that Justice Kennedy's concurrence in *Rapanos* "provides the controlling rule of law" (Slip Op. 9309-10), even though the eight other Justices disagreed with Justice Kennedy's position. *See Rapanos*, Plurality Opinion, 126 S.Ct. at 2233, and Dissenting Opinion, *id*. at 2264-65. With eight Justices disagreeing with Justice Kennedy, his concurrence cannot be applied as the "holding" of *Rapanos* without further analysis.

The procedure for determining the effect of a "fragmented" Supreme Court opinion is to determine the narrowest ground of *agreement* among a majority of the Justices concurring in the judgment:

> When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . ."

*Marks v. United States*, 430 U.S. 188, 193 (1977).

The narrowest ground of agreement is not necessarily reflected in the *concurring* opinion. For example, in the decision followed by *Marks*, *Memoirs v. Massachusetts*, 383 U.S. 413 (1966), the *plurality* represented the narrowest

ground of agreement. *Marks*, 430 U.S. at 193-94. Accordingly, the "view of the *Memoirs* plurality therefore constituted the holding of the Court and provided the governing standards." *Id*.

As observed by the United States here, "in *Rapanos*, . . . no opinion commands a majority of the Court and neither the plurality nor the concurring opinion is in any sense a 'lesser-included' version of the other. In that instance, the principles on which a majority of the Court agreed may be illuminated only by consideration of the dissenting Justices' views." (*See* Exhibit 3, at 4-5). This Court must look at *all* of the *Rapanos* opinions to find the "narrowest ground of agreement" and determine how the Supreme Court would rule on the particular facts here, and not just consider the sole concurring opinion.

### 1. The *Rapanos* Plurality Would Find There Is No Jurisdiction Over The "Isolated" Waters Of The Basalt Pond Mining Pit

For the *Rapanos* plurality, CWA jurisdiction requires a continuous or nearly continuous surface water connection to the navigable waterway. *Rapanos*, 126 S.Ct. at 2226 (Plurality). Here the gravel mining pit used by Healdsburg is separated from the Russian River by natural uplands, so there is no "difficulty . . . drawing any clear boundary between the two." *Rapanos*, 126 S.Ct. at 2222 (Plurality). The Plurality's test results in an absence of federal CWA jurisdiction over the Basalt Pond mining pit.

### 2. The Dissent Would Not Find CWA Jurisdiction Under Its "Deference To The Corps" Test, Since The Corps Had Already Disclaimed Jurisdiction Over The Mining Pit

The gravamen of the *Rapanos* dissents is that the Corps of Engineers has the scientific and technical expertise to determine which wetlands are significant to protecting water quality. As Justice Breyer noted, "If one thing is clear, it is that Congress intended the Army Corps of Engineers to make the complex technical judgments that lie at the heart of the present cases (subject to deferential review)." *Rapanos*, 126 S.Ct. at 2266 (Breyer, dissenting). *See also Rapanos*, 126 S.Ct. at 2262 (Stevens, *et. al*, dissenting) ("the Corps' approach should command our deference") *and* 126 S.Ct. at 2263 (Stevens, *et. al*, dissenting) ("While wetlands that are physically separated from other waters may perform less valuable functions, this is a matter for the Corps to evaluate . . . ."). The dissent would defer to the Corps' determination of jurisdiction under the CWA, so long as that determination is reasonable.

In the present case, applying the dissent's deferential standard would result in a finding of *no* CWA jurisdiction over the mining pit. Here, the Corps made a formal jurisdictional determination, deciding the mining pit was *not* a water of the United States. (Exhibit 4). This decision was consistent with the Corps' interpretation of its own regulations and was never challenged directly. The *Rapanos* dissents' standard of deferring to the Corps' expertise would clearly result

in a determination that the gravel mining pit is not presently a water of the United States.

In short, application of either the plurality's approach (continuous surface water connection) or the dissents' approach (deference to the Corps) would reach the same result. Eight Justices would conclude the "Basalt Pond" mining pit is *not* a "water of the United States."

### B. The Panel Misapplied Justice Kennedy's "Significant Nexus" Test Because It Failed To Recognize The Lack Of Demonstrated Effect On Water Quality

Justice Kennedy's "significant nexus" test for determining federal jurisdiction over wetlands requires a showing that the wetlands "significantly affect" the water quality of the navigable water:

> [W]etlands possess the requisite nexus, and thus come within the statutory phrase "navigable waters," if the wetlands, either alone or in combination with similarly situated lands in the region, *significantly affect the chemical, physical, and biological integrity of other covered waters* more readily understood as "navigable."

*Rapanos*, 126 S.Ct. at 2248 (Kennedy, concurring) (emphasis added). Justice Kennedy further opined that when "wetlands' effects on *water quality* are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term 'navigable waters.'" *Id*. (emphasis added).[3]

[3] Justice Kennedy's focus on water *quality* is shared by the four dissenting Justices. "[I]t is enough that wetlands adjacent to tributaries generally have a significant nexus to the watershed's water *quality*." *Rapanos*, 126 S.Ct. at 2258

Here, although the Panel stated that the "district court also found that Basalt Pond significantly affects the chemical integrity of the Russian River by increasing its chloride levels," the District Court never made such a finding. Instead, the District Court simply focused on the *quantity* of chloride reaching the River:

> One may reasonably infer, as this order does, that . . . pollution reaches the nearby river. It, of course, is then greatly diluted by the river. Nonetheless, the total volume of pollutants reaching the river over a year is substantial. . . .

*Northern California River Watch v. City of Healdsburg*, 2004 U.S. Dist. LEXIS 1008 at *35.

In fact, the evidence showed that Healdsburg's use of the mining pit does not significantly affect the *water quality* of the Russian River:

- The water in the aquifer surrounding Basalt Pond meets all drinking water standards. (AER 7: Flugum at 317:13-318:5.)
- Healdsburg's use of the Basalt Pond produces no discernable changes to the water quality in the Russian River. (AER 7: Lambie at 541:2 – 556:20; AER 8: 59 (Ex 101, Figure 4)).
- Any change to the composition of the Russian River is purely theoretical and would be indiscernible in the river itself. (AER 7: Lambie at 564:4-19.)

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(Stevens, *et. al,* dissenting) (emphasis added).

This evidence was undisputed. As a result, although the District Court found the *amount* of chloride reaching the River was "substantial," it did not find that the *effect* on the River was "significant." There was no evidence that chloride or any other wastewater constituents from the mining pit "significantly affects" the water quality of the Russian River and the Panel was in error to conclude that it did so.[4]

### C. The Panel Erred In Assuming, Without Discussion Of Contrary Authority, That CWA Jurisdiction May Be Premised On A Groundwater Connection

The Panel relies heavily on the existence of groundwater seepage between the Pond and the River as "the critical fact" in finding CWA jurisdiction:

> The critical fact is that the Pond and navigable Russian River are separated only by a man-made levee so that water from the Pond seeps directly into the adjacent River. This is a significant nexus between the wetlands and the Russian River and justifies CWA protection under the ACOE regulations and current Supreme Court jurisprudence.

Slip Op. 9311

Groundwater flow as a basis of CWA jurisdiction is no settled issue. The Seventh Circuit has found an absence of federal jurisdiction over groundwater flows. *See, e.g., Village of Oconomowoc Lake v. Dayton Hudson Corp.*, 24 F.3d

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[4] As in *Rapanos*, it may be necessary to remand this matter for further proceedings.

962, 965 (7th Cir. 1994) (artificial pond not subject to CWA solely because water in it percolated into the groundwater which ultimately traveled to lakes and streams). District Courts in this Circuit are split. *Idaho Rural Council v. Bosma*, 143 F.Supp.2d 1169, 1180 (D. Idaho 2001) (requiring an effect on surface water, and tracing back to the source of pollution); *Umatilla Waterquality Protective Assoc., Inc. v. Smith Frozen Foods, Inc.*, 962 F. Supp. 1312, 1318-20 (D. Ore. 1997) (Congress did not intend to regulate discharges to groundwater, whether or not "hydrologically connected" to surface waters). The Panel sweeps aside this issue with a brief reference to *Rapanos*, yet *Rapanos* dealt only with surface water flows and did not discuss federal CWA authority over groundwater. This difficult issue that has troubled so many courts deserves full consideration by this Circuit.

## D. The Panel Erred In Failing To Apply, Or Even Mention, The Corps' Interpretation Of Its Own Gravel Mining Exception To CWA Jurisdiction

### 1. The Panel Failed To Defer To The Corps' Interpretation That A Gravel Mining Pit Is Not "Abandoned" While It Is Being Reclaimed

The Corps' "gravel mining exception" states that "waters of the United States" does not include "pits excavated in dry land for the purpose of obtaining fill, sand or gravel unless and until the construction or excavation operation is abandoned." 51 Fed.Reg. 41206, 41217 (1986). The Corps has consistently stated that a gravel mining pit is not "abandoned" so long as reclamation activities are

ongoing. The Corps states, "mining activity must have stopped, *and the reclamation completed*, before the area can be considered a water of the United States." 64 Fed. Reg. 39252, 39335 (July 21, 1999) (emphasis added). The Corps further states that ten years or more may elapse after reclamation ends before a pit would be considered abandoned: "In most cases, a mining site where no construction, mining, excavation, processing, *and/or reclamation* activities have occurred during the last 10 years would be considered abandoned, at the district engineer's discretion." 65 Fed. Reg. 12860 (March 9, 2000) (emphasis added).

There is no dispute that the "Basalt Pond" is a gravel mining pit that is still being reclaimed. Had the Panel deferred to the Corps' interpretation of its own regulation, the Panel would have concluded that CWA jurisdiction does not reach the Basalt Pond mining pit.

Deference is not optional. "When considering the Corps' interpretation of the Clean Water Act we defer to the agency's analysis if it is 'reasonable and not in conflict with the expressed intent of Congress.' *United States v. Riverside Bayview Homes*, 474 U.S. 121, 131 (1985); *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 844-45 (1984). The agency's interpretation of its own regulation is entitled to even greater deference, amounting to a plain error standard." *Leslie Salt v. United States*, 896 F.2d 354, 357 (9th Cir. 1990) (parallel citations omitted) (deferring to the Corps' interpretation of the gravel mining exception), *cert. denied*, 408 U.S.

1126 (1991).

Here, the Panel failed to defer to, or even mention, the Corps' interpretation of the term "abandoned." Instead of giving the Corps deference, the Panel imposed it own interpretation on the Corps' regulations, concluding that an "excavation operation" is "abandoned" the moment the extraction of material ceases.[5] Slip Op. 9314-15. This clear error sets a precedent that will discourage reclamation nationally, the precise concern expressed by the Corps.

### 2. The Panel Failed To Defer To, Or Even Mention, The Corps' Determination That The Mining Pit Is Not A Water Of The U.S.

At Appellee's request, the Corps of Engineers conducted a formal jurisdictional determination, concluding that the mining pit is not a "water of the United States" because it is subject to ongoing commercial usage and therefore is not "abandoned." (See Exhibit 4). "This type of factual determination – as the Corps termed it, 'judgment call' – is precisely the type of determination that the Corps is entrusted to make." *Golden Gate Audubon Soc., Inc. v. U.S. Army Corps of Engineers*, 796 F.Supp. 1306, 1315 (N.D. Cal. 1992) (citing *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 911 (9th Cir. 1983)). The Panel

[5] The Panel also misconstrues *Leslie Salt* as supporting this conclusion. The Panel states that "[o]ur holding in *Leslie Salt* clarifies that the ACOE extraction operations exemption does not apply to a body of water which might be part of general commercial activity." Slip Op. at 9315. In fact, *Leslie Salt* states just the opposite: "the Corps intends to exempt from its jurisdiction only those artificially created waters which *are* currently being used for commercial purposes." *Leslie Salt*, 896 F.2d at 360 (emphasis added).

failed to defer to the Corps' finding. In fact, the Panel *failed even to mention* this critical and dispositive determination by the Corps.[6]

### E. The Panel Erred In Its Interpretation Of The Waste Treatment System Exception

Under both the Corps' and EPA's regulations, "[w]aste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA . . . are not waters of the United States." 33 C.F.R. § 328.3(a)(8) (Corps); 40 C.F.R. § 122.2 (EPA). Healdsburg's waste treatment system was specifically designed to use existing gravel mining pits as finishing and percolation ponds. These pits were *not* waters of the U.S. when they were incorporated into Healdsburg's waste treatment system. [7]

The Panel erroneously rejected the straightforward conclusion that the Basalt Pond mining pit falls within the exception. Instead, the Panel concluded that although the "Basalt Pond may be part of a waste treatment system," it does not fall under the exemption because "it is neither a self-contained pond nor is it incorporated in an NPDES permit as part of a treatment system." Slip Op. 9314.

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[6] Although the District Court had concluded the Corps' jurisdictional determination was not credible, the District Court did not have the benefit of the Corps' own interpretation of the term "abandoned."

[7] The District Court expressly found that the Basalt Pond pit was *not* a water of the U.S. in 1986. Healdsburg had been using the pit as part of its waste

### 1. There Is No Regulatory Requirement That A "Waste Treatment System" Be "Self-Contained"

The Panel states that the waste treatment exception "was meant to avoid requiring dischargers to meet effluent discharge standards for discharges *into* their own closed system treatment ponds." Slip. Op. 9314 (emphasis in original). The term "closed system treatment ponds" appears nowhere in either the regulations, 33 C.F.R. § 328.3(a)(8); 40 C.F.R. § 122.2, nor in any of the Agencies' commentary on the regulations. The closest reference to "closed system treatment ponds" seems to be in the preamble to the 1979 waste treatment exception. There, however, the term "closed" is used only in the context of paraphrasing public comment: "Some commenters suggested that EPA exclude certain types of impoundments of navigable waters from the definition, such as holding ponds, cooling ponds and closed cycle lagoons." 44 Fed. Reg. 32858 (June 7, 1979). EPA never suggested that a waste treatment pond needs to be "closed" (presumably meaning impermeable) in order to quality for the exception. In fact, such a requirement would render the exception superfluous. If the system is "closed" in the sense of having no discharge whatsoever, then by definition it could not be a "jurisdictional" waterbody, since it could not impact a navigable waterway.

The case cited by the Panel, *In The Matter Of: Borden, Inc./Colonial Sugars*,

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treatment system since 1978. (AER 10: Opinion at 6:24.)

1984 1 E.A.D. 895, 1984 EPA App. LEXIS 19, *33 (E.P.A. 1984), sheds no light on the subject. The issue there was whether a facility could expropriate an existing, natural wetland (indisputably a water of the United States) and use it for its own private waste treatment system. The case merely stands for the proposition that "there must be a containment or an impoundment of the wastewaters thereby establishing the existence of a wastewater treatment system and not merely a discharge into a portion of water of the United States which are segregated from the remainder of such waters by an imaginary barrier, such as a property line." *Id.* The "requirement" that a treatment pond must be part of a "closed system" seems to be an original construct of the Panel.

### 2. There Is No Regulatory Requirement That A "Waste Treatment System" Be "NPDES Permitted"

The Panel's conclusion that the "waste treatment system exemption was intended to exempt . . . waters that are incorporated in an NPDES permit as part of a treatment system" is also without authority and circular. Neither the regulation nor the preamble, cited above, support this conclusion. The circularity of the Panel's holding is as follows: Healdsburg has a state discharge permit but not a Federal permit for its facility, so the Basalt Pond does not fall into the waste treatment system exception, so Healdsburg must obtain a Federal permit for its facility, at which point it will have a Federal permit, so the Basalt Pond will qualify

for the waste treatment system exception, and Healdsburg will not need a Federal permit. The Panel's decision establishes a rule of law that you must have a permit to be exempt from the requirement to get the permit. This cannot be so.

## IV.
## CONCLUSION

For the foregoing reasons, Healdsburg respectfully requests that the Panel reconsider its decision and correct the errors identified, or, in the alternative, that the full Court reconsider this case *en banc*.

Date: August 31, 2006

ARCHER NORRIS
A Professional Law Corporation

By: _____
Peter W. McGaw
Attorneys for Appellant
CITY OF HEALDSBURG

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