

## CLIENT ALERT

### Eleventh Circuit Holds Justice Kennedy's "Significant Nexus" Test To Be Governing Rule Of *Rapanos*

October 25, 2007

In a decision issued yesterday, the U.S. Court of Appeals for the Eleventh Circuit joined the Seventh and Ninth Circuits in holding that the "significant nexus" test from Justice Kennedy's concurring opinion in *United States v. Rapanos* provides the "governing rule" for determining jurisdiction under the Clean Water Act. *United States v. Robison*, No. 05-17019 (11th Cir. Oct. 24, 2007).

Under the "significant nexus" test, a water can be considered "navigable" (and therefore subject to Clean Water Act jurisdiction) only if it possesses a significant nexus to waters that "are or were navigable in fact or that could reasonably be so made." In determining whether such a nexus exists, the factfinder must consider the chemical, physical, or biological effect of the upstream waterway or water feature in question upon a downstream navigable-in-fact waterway.

In *Robison*, Defendants were convicted (prior to *Rapanos*) of various Clean Water Act violations, including discharging in violation of an NPDES permit. Defendants argued that the jury instruction on the meaning of "navigable water" was overly broad and invalid under *Rapanos*. The waterway at issue, Avondale Creek, flowed into another creek, which flowed over 25 miles to a lake (created by damming the creek). On the other side of the dammed lake, the water flowed for another 20 miles before meeting the Black Warrior River. Because the jury was not advised "to consider the chemical, physical, or biological effect of Avondale Creek on the Black Warrior River," the convictions were reversed and remanded for a new trial, with instructions to apply Justice Kennedy's "significant nexus" test.

This opinion adds to an apparent trend among circuit courts toward the adoption of Justice Kennedy's test, to the diminishment of the *Rapanos* plurality opinion drafted by Justice Scalia. The next, and more difficult, step lies in the district courts, which must fashion the standards for the factual determinations necessary to define a "navigable water" under Justice Kennedy's analysis.

[Click for a copy of the opinion, \*United States v. Robison\*, No. 05-17019 \(11th Cir. Oct. 24, 2007\).](#)

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