7-2008 ELR 38 ELR 10439

ELR
NEWS & ANALYSIS

ARTICLES

The Float a Boat Test: How to Use It to Advantage in This Post-*Rapanos* World

by William W. Sapp, Rebekah A. Robinson, and M. Allison Burdette

Editors' Summary: Since the Supreme Court's decision in Rapanos v. United States*, courts, practitioners, and scholars have continued to discuss Justice Anthony M. Kennedy's significant nexus test. Under this test, to protect a wetland one must establish that there is a significant nexus between the wetland and a traditional navigable water. In this Article, authors William W. Sapp, Rebekah Robinson, and M. Allison Burdette suggest that the nearer a traditional navigable water is to the wetland, the better the chance of establishing that there is a significant nexus between the two. The authors then argue that it is in the interests of those protecting the wetland to close the gap between the wetland and the nearest traditional navigable water by showing that canoes and kayaks can navigate any creeks or small rivers close to the wetland.*

I. Introduction

It is your second post-*Rapanos*[1] wetlands case, and once again you are searching for a way to strengthen your summary judgment brief on the issue of geographic jurisdiction. In your first post-*Rapanos* case, you prevailed because you were able to show that the creek that flowed near the cypress dome you were trying to protect was once used to transport cotton on small flat-bottomed skiffs.[2] This historic use was sufficient to qualify the creek as a "traditional navigable water" and that made all the difference in the case. Unfortunately, in your current case you have not been able to identify any historic commercial use of the water to tip the jurisdictional balance in your favor.

This time you are trying to protect a much different kind of wetland. It is a bog nestled in the mountains. The High Mountain Paddling Resort, determined to guarantee its patrons a safe water supply during the current drought, intends to make the bog into a drinking water reservoir by building a levee around the wetland. The levee would capture the runoff of the bog each time the bog floods during the spring.

As in your first *Rapanos* case, where the water flows is critical to determining jurisdiction. Currently, the floodwaters from the bog flow through an ephemeral wash to a nearby intermittent stream. The stream flows 500 feet or so and then empties into what we will call the "upper reach" of the Wild Water River. This section of the river begins where the intermittent stream joins the river. This upper reach is a Class IV[3] whitewater mecca for canoeists and kayakers, who drive from distant states to test their skills against this challenging torrent.

Four miles downstream, the upper reach of the river ends and the middle reach begins. It is at this point that the Wild Water River widens enough to provide sufficient elbow room for three rafting companies. Many of the rafters who enjoy this middle reach of the river, as well as many of the paddlers who enjoy the upper reach, stay at the High Mountain Paddling Resort when they come to paddle the "W^2," as they call it.

Another eight miles downstream, the middle reach ends, and the lower reach of the river begins. It is at this point that the river loses much of its energy. Despite the beauty of the area, very few paddlers use the lower reach. The whitewater enthusiasts consider it too tame, while flat water paddlers find it too near the circus atmosphere of the upper and middle reaches. The river flows in this deserted state for 20 miles or so until it joins the Commerce River. The Commerce, because of its size and location, supports significant barge traffic.

Although you feel you have a good basis to challenge the resort's proposed reservoir, which would destroy the bog, you realize that you are never going to get the chance unless you can establish that the bog is a "water of the United

William W. Sapp is a Senior Attorney with the Southern Environmental Law Center. Rebekah A. Robinson graduated from Tulane Law School in 2008 with a certificate in Environmental Law. M. Allison Burdette is an Assistant Professor in the Practice of Business Law at Emory University's Goizueta Business School. The authors thank Patsy Burdette, Michael Creswell, Donna Downing, Peggy Livingston, Jim Murphy, Stephen Samuels, and Lance Wood for their help with this Article, though the thoughts expressed in this Article are solely those of the authors.

1. Rapanos v. United States, 547 U.S. 715, 126 S. Ct. 2208, 36 ELR 20116 (2006).

2. The first post-*Rapanos* case is detailed in William W. Sapp et al., *The Historic Navigability Test: How to Use It to Advantage in This Post-*Rapanos *World*, 37 ELR 10797 (Nov. 2007). This Article is a companion article to the earlier one on historic navigability.

States" and thus is protected by the Clean Water Act (CWA).[4] So far, the resort's attorneys have been contending that the wetland is not "jurisdictional" under the recently decided U.S. Supreme Court case *Rapanos*.[5] Under one of the tests set forth in *Rapanos*,[6] you must show that the wetland has a "significant nexus" with the nearest "traditional navigable water."[7] Considering that under this test devised by Justice Anthony M. Kennedy, you have to draw a connection between the wetland and another water downstream, you quickly realize that the nearer the downstream traditional navigable water is to the bog, the better your chances are of establishing a significant nexus between it and the bog. This Article discusses approaches to help you shorten that distance.

Before we discuss such approaches, it is important to highlight why shortening the distance is helpful in *Rapanos* cases. To do this we offer the following. First, it is important to recognize that only a federal judge can determine where traditional navigable waters begin and where non-traditional navigable waters end in a watershed. Second, although there is more than one definition used for establishing this line, federal judges enjoy a great deal of latitude in drawing the traditional navigability line. Third, a federal district court judge might find it much easier to decide that a stream with a flow of 1 cubic foot per second has a significant nexus with a creek that has a flow of 20 cubic feet per second, than to decide that that stream has a significant nexus with a large downstream river that has a flow of two million cubic feet per second.[8] In this way, getting a favorable determination on where the traditional navigable water line is located could transform a difficult case into a much easier one.

As we explain below, there are three basic tests for determining whether a water body is a traditional navigable water. The first is whether the water has been used for commercial reasons in the past—historic use. The second is whether the water is being used commercially now—present use. And the third is whether the water is susceptible, with reasonable improvements, for a commercial use in the future—susceptible use.[9]

Under the last test—which is the focus of this Article—if a water in its current state is shown to be passable by light craft such as canoes, kayaks, and skiffs, it could qualify as a traditional navigable water. Thus, in your effort to protect the bog, you may find that the canoes, kayaks, and rafts that are currently used on the upper and middle reaches of the Wild Water River are helpful in your endeavor. You may also find that by organizing a paddling trip down the lower reach of the Wild Water River, you may be able to increase your chances of showing that the section of the river is a traditional navigable water. Regardless of the approach, getting a federal judge to draw the traditional navigable waterline further up the watershed will make it easier to establish that the bog is jurisdictional under the significant nexus test.

We begin the rest of the Article by discussing the CWA. Then we focus on the *Rapanos* decision and, in particular, the important role played by traditional navigable waters in Justice Kennedy's significant nexus test. We then discuss the definitions that have arisen in this country for determining whether a water is a traditional navigable water. Next, we elaborate on the susceptible use prong of the traditional navigability test, which is affectionately referred to by some as the "float a boat test." Finally, we provide some suggestions that may prove useful should you ever desire to reduce the distance between a wetland you are attempting to protect and the nearest traditional navigable water.

II. The CWA and Navigable Waters Before *Rapanos*

In 1972, Congress passed the first comprehensive legislation that addressed water pollution. Congress gave the U.S. Environmental Protection Agency (EPA), which was only two years old, primary authority over administering the Act but gave some regulatory responsibilities under §404 of the Act to the U.S. Army Corps of Engineers (the Corps). The Corps has the day-to-day responsibility of regulating "dis-

3. Under the American version of the International Scale of River Difficulty, rivers are rated based on how difficult they are to paddle on a scale from Class I (easy) to Class VI (unrunnable). For instance, Class II rapids are described as follows: "Straightforward rapids with wide, clear channels which are evident without scouting. Occasional maneuvering may be required, but rocks and medium-sized waves are easily missed by trained paddlers. Swimmers are seldom injured and group assistance, while helpful, is seldom needed."
   In contrast, Class IV rapids are described as:

   > Intense, powerful but predictable rapids requiring precise boat handling in turbulent water. Depending on the character of the river, it may feature large, unavoidable waves and holes or constricted passages demanding fast maneuvers under pressure. A fast, reliable eddy turn may be needed to initiate maneuvers, scout rapids, or rest. Rapids may require "must" moves above dangerous hazards. Scouting may be necessary the first time down. Risk of injury to swimmers is moderate to high, and water conditions may make self-rescue difficult. Group assistance for rescue is often essential but requires practiced skills.

   See definition of Class IV rapids on the Internet at http://www.americanwhitewater.org/content/Wiki/do-op/id/safety:start (last visited Apr. 5, 2008).
4. 33 U.S.C. §§1251-1387, ELR Stat. FWPCA §§101-607. In 1977, Congress renamed the Federal Water Pollution Control Act of 1972 the Clean Water Act. Pub. L. No. 95-217, 91 Stat. 1566 (1977).
5. 547 U.S. at 715, 126 S. Ct. at 2208.
6. As explained in Part III of this Article, the *Rapanos* Court divided in a 4-1-4 split. The four-Justice dissent, which was written by Justice John Paul Stevens and joined by Justices Stephen G. Breyer, David H. Souter, and Ruth Bader Ginsburg, opined that the then-current jurisdictional test under the CWA should remain. Justice Antonin Scalia, who was joined by Chief Justice John G. Roberts Jr. and Justices Samuel A. Alito Jr. and Clarence Thomas, issued an opinion stating that in order for a water to be jurisdictional it must be a "relatively permanent water" or a wetland with a "continuous surface connection" to such water. Not happy with the Scalia standard or the status quo, Justice Anthony M. Kennedy said in his opinion that the proper jurisdictional test under the CWA is whether the water at issue has a "significant nexus" with a "traditional navigable water." Since the bog only overflows seasonally into a normally dry wash, the Kennedy standard would probably prove to be the stronger of the two tests in this case and thus is the focus of this Article.
7. *Rapanos*, 126 S. Ct. at 2248. As we explain further below, in explaining his "significant nexus" test, Justice Kennedy uses the phrase "navigable waters in the traditional sense." It is generally understood that Justice Kennedy meant for this phrase to be used interchangeably with the more common phrase "traditional navigable waters," which he also uses in his analysis. *See, e.g.*, U.S. Army Corps of Engineers (Corps)/U.S. Environmental Protection Agency (EPA), Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States* and *Carabell v. United States* 3 (2007) [hereinafter Joint Guidance].
8. Although a judge might well reach such a conclusion, we would argue that if there is any measurable flow reaching the creek or the larger river, this would be sufficient to establish a significant nexus.
9. United States v. Steamer Montello, 87 U.S. (20 Wall.) 430 (1874).

charges of dredged or fill material"[10] into the "waters of the United States" under the §404 program,[11] while EPA has the responsibility of regulating discharges of all other pollutants to those same waters under the §402 program.[12] EPA also has the responsibility of promulgating "guidelines"[13] covering §404 permit decisions and engaging in enforcement actions against unpermitted dischargers. Finally, EPA has veto authority over Corps permit decisions[14] as well as the final say (between the two agencies) on the jurisdictional reach of the CWA.[15]

This issue of the jurisdictional reach of the CWA has been gaining in importance over the last several years, namely because the Supreme Court has decided two cases on the subject since 2001.[16] Although the legislative history of the Act reveals that Congress intended for the scope of the CWA to cover nearly all of the nation's waters,[17] the Act itself is not as lucid. Under the Act, EPA and the Corps have the authority to regulate discharges of pollutants from point sources into navigable waters. Congress then defined the term navigable waters as the waters of the United States. Several passages in the legislative history of the Act make it clear that the CWA's navigable waters/waters of the United States are much broader than the "traditional navigable waters" that have been the subject of so many court decisions over the prior 150 years. As described in Part IV below, traditional navigable waters are generally those waters that had been, were, or could be used for waterborne commerce.

After the CWA was signed into law, EPA immediately promulgated a broad definition of waters of the United States to implement the §402 program. The Corps, concerned about its scarce regulatory resources, promulgated a much narrower definition of the same term for the §404 program. The Corps' narrower definition was challenged on the grounds that it was not consistent with the intent of the CWA; the Corps lost this challenge in 1975 and was ordered to promulgate regulations consistent with those of EPA.[18]

In 1977, Congress reauthorized the CWA. The waters covered by the CWA became one of the most hotly debated issues during the reauthorization hearings. At one point Sen. Lloyd Bentsen (D-Tex.) offered an amendment that would have limited CWA jurisdiction to the traditional navigable waters. The Bentsen Amendment was defeated. Congress then went on to amend the CWA to exempt certain agricultural and silvicultural activities from regulation under §404. So, while the waters covered by the CWA were left unchanged in 1977,[19] some of the farming and logging activities in these waters were no longer regulated because of the new exemption for agricultural and silvicultural activities.[20]

In 1985, the Corps again had to defend its regulatory definition of waters of the United States in the first wetlands case to reach the Supreme Court. In *United States v. Riverside Bayview Homes, Inc.*,[21] the Court held that the Corps had properly exercised its administrative discretion when it determined that wetlands adjacent to a navigable waterway are jurisdictional. Borrowing a quote from the CWA's legislative history, the Court explained that Congress recognized that "[p]rotection of aquatic ecosystems . . . demand[s] broad federal authority to control pollution, for '[w]ater moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source.'"[22] The Court found it instructive that the Bentsen Amendment—which would have narrowed the jurisdiction of §404 dramatically—was defeated in 1977, thus preserving the broad definition of waters of the United States contained in the Corps and EPA regulations.[23]

In 1986, confident that the CWA jurisdictional limits had been solidified by the *Riverside Bayview* decision, the Corps reorganized and clarified the regulations governing its regulatory program. In the Preamble of these regulations, the Corps stated that if migratory birds use or would use an intrastate isolated water as habitat, that water body would be considered a jurisdictional water of the United States.[24] This so-called migratory bird rule was challenged in the lower courts, but it was not until 2001 that such a challenge reached the Supreme Court.

The petitioner in that case, the *Solid Waste Agency of Northern Cook County (SWANCC)*, had decided in the early 1990s that it wanted to construct a solid waste landfill in an abandoned gravel mine outside of Chicago. When the Corps discovered that migratory birds frequented the numerous ponds at the site, the Corps asserted jurisdiction and denied the permit.[25] A divided 5-4 Court held in 2001 that the "migratory bird rule" was not a permissible basis for asserting jurisdiction and that the ponds were "a far cry, indeed, from the 'navigable waters' and 'waters of the United States' to which the statute by its term extends."[26] The question after

10. Certain discharges of dredged or fill material are exempt from regulation under §404. These categories include discharges associated with farming, silviculture, the maintenance of dikes, dams, and levees, and the construction of temporary sedimentation basins on a construction site. 33 U.S.C §1344(f)(1).
11. 33 U.S.C. §1344(a); U.S. EPA, *Overview of Wetlands Permitting*, http://www. epa.gov /owow/ wetlands/ pdf/ reg_ authority_pr.pdf.
12. *See* William W. Sapp et al., *From the Fields of Runnymede to the Waters of the United States: A Historical Review of the Clean Water Act and the Term "Navigable Waters,"* 36 ELR 10190, 10213, 10214 (Mar. 2006).
13. 33 U.S.C. §1344(b). The EPA guidelines are located at 40 C.F.R. §230.
14. 33 U.S.C §1344(c).
15. 43 Op. Att'y Gen. 15 (Sept. 5, 1979).
16. *See* Lance D. Wood, *Don't Be Misled: CWA Jurisdiction Extends to All Non-Navigable Tributaries of the Traditional Navigable Waters and Their Adjacent Wetlands*, 34 ELR 10187, 10193 (Feb. 2004) (explaining that some contend that the CWA covers only 1 to 2% of the nation's waters). *See also* 123 Cong. Rec. 26725 (daily ed. Aug. 4, 1977) (statement of Sen. Philip Hart (D-Mich.), *reprinted in* 4 CRS, Legislative History of the Clean Water Act of 1977, at 939-40 (1978) (traditional navigable waters only constitute 1 to 2% of the nation's waters); 123 Cong. Rec. 10401 (daily ed. Apr. 5, 1977) (statement of Rep. William Harsha (D-Ohio), *reprinted in id.* at 1280.
17. *See* Sapp et al., *supra* note 12, at 10190, 10213.
18. Natural Resources Defense Council v. Callaway, 392 F. Supp. 685, 5 ELR 20285 (D.D.C. 1975).
19. Sapp et al., *supra* note 12, at 10212.
20. 33 U.S.C. §1344(f).
21. 474 U.S. 121, 16 ELR 20086 (1985).
22. *Id*. at 132-33 (citing S. Rep. No. 92-414, at 77 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3742).
23. *Id*. at 135.
24. 51 Fed. Reg. 41206, 41217 (Nov. 13, 1986). The Corps had issued this guidance less formally a year earlier in a memorandum to the field. Memorandum from Brig. Gen. Patrick J. Kelly, to the field, Distribution on EPA Memorandum on Clean Water Act Jurisdiction Over Isolated Waters (Nov. 8, 1985).
25. Solid Waste Agency of N. Cook County v. Corps of Eng'rs, 531 U.S. 159, 165, 31 ELR 20382 (2001).
26. *Id*. at 173.

the *SWANCC* decision became the following: If the "isolated" ponds in that case were beyond the limits of CWA jurisdiction, what other classes of water bodies might the Supreme Court consider outside CWA jurisdiction?

In decisions handed down prior to *Rapanos*, the federal courts of appeals and district courts largely construed the *SWANCC* decision narrowly. The U.S. Courts of Appeals for the First, Fourth, Sixth, Seventh, Ninth, Tenth, and Eleventh Circuits held that EPA and the Corps may continue to assert jurisdiction over non-navigable waters even if those waters are small and distant from traditional navigable waters, because all that is necessary to establish such jurisdiction is a hydrologic connection.[27] Although no circuit has held that CWA jurisdiction does not encompass non-navigable waters, the U.S. Court of Appeals for the Fifth Circuit stated in dicta remarks to the effect that the CWA covers only traditional navigable waters and non-navigable waters adjacent to traditional navigable waters.[28] This was a much narrower standard than that determined by the other courts of appeals.

III. How *Rapanos* Is Shaping the Meaning of CWA Navigable Waters

In 2006, the question of what waters are covered by the CWA reached the Supreme Court for a third and fourth time in *Rapanos* and in *Carabell v. U.S. Army Corps of Engineers*.[29] The specific question in *Rapanos* was whether CWA jurisdiction extends to wetlands that do not abut a traditional navigable water.[30] The question in *Carabell* was whether CWA jurisdiction extends to a wetland that is separated from a tributary of a traditional navigable water by a man-made berm. In both cases the Court found itself right in the middle of its two previous wetlands decisions, *Riverside Bayview* and *SWANCC*.

In *Riverside Bayview*, the Court had an easy time handing down a unanimous decision that wetlands adjacent to traditional navigable waters are covered by the CWA. In *SWANCC*, the Court handed down a 5-4 decision that lopped off certain "isolated waters" from CWA protection. In *Rapanos* and *Carabell*, the Court was forced to draw a line somewhere between *Riverside Bayview* and *SWANCC*. The Justices were clearly not up to the task, and we are left to digest a fractured 4-1-4 decision.

Rapanos and *Carabell* involved four Michigan wetlands. All of the wetlands lay near ditches or man-made drains that eventually emptied into navigable-in-fact waters. In *Rapanos* the petitioners decided to construct a shopping center on three sites that totaled 605 acres. When the petitioners learned from their consultant that the sites had approximately 141 acres of wetlands on them and that they would have to get a permit to fill them, they simply commenced filling them sans a permit. Their fill activities ceased only after they received multiple cease and desist orders from state and EPA officials and after the federal government brought civil and criminal charges against them.[31] In the civil suit, the district court upheld the Corps' jurisdiction over all of the wetlands and ruled in the government's favor, finding violations at all three sites.[32] The Sixth Circuit upheld the lower court decision.[33]

In the second case, *Carabell*, the petitioners had applied for a wetlands permit to fill in 15.9 acres of forested wetlands that drained into the Lake St. Clair watershed so they could build 130 condominium units. When the Michigan Department of Environmental Quality (MDEQ), which had assumed the wetlands regulatory program from the Corps under §1344(g), denied the permit, the petitioners appealed to a state administrative law judge (ALJ). The ALJ instructed the MDEQ to issue the permit conditioned on the petitioners modifying their proposal to eliminate 18 of the units. EPA objected to the modified permit. Consequently, the permit was transferred to the Corps to be processed. The Corps denied the permit. The petitioners then challenged the permit denial in federal district court under the Administrative Procedure Act. The district court granted summary judgment in favor of the Corps.[34] The Sixth Circuit affirmed this decision.[35]

In both cases the petitioners sought redress at the Supreme Court, which accepted their petitions and consolidated the cases. The petitioners asserted that Congress had intended that only the traditional navigable waters be covered by the CWA.[36] In contrast, the U.S. Solicitor General argued that CWA jurisdiction extends to any water body that is hydrologically connected to a traditional navigable water, as well as some that are not.[37] During oral argument, despite entreaties by the Justices, neither side was willing to help the Justices draw a line between their respective all-or-nothing approaches.[38]

The 4-1-4 split among the Justices yielded five separate opinions. Chief Justice John G. Roberts Jr. and Justice Stephen G. Breyer wrote brief opinions in which they commented on the three main opinions authored by Justices Antonin Scalia, John Paul Stevens, and Kennedy.[39] In his dissenting opinion, which was joined by Justices Breyer,

27. *See, e.g.*, United States v. Charles Johnson et al., 467 F.3d 56 (1st Cir. 2006), *cert. denied*, 128 S. Ct. 375 (2007); United States v. Deaton, 332 F.3d 698, 33 ELR 20223 (4th Cir. 2003), *cert. denied*, 541 U.S. 972 (2004); United States v. Rapanos, 376 F.3d 629, 34 ELR 20060 (6th Cir. 2004), *vacated & remanded by* Rapanos v. United States, 2006 U.S. LEXIS 4887 (U.S. June 19, 2006); United States v. Rapanos, 339 F.3d 447 (6th Cir. 2003), *cert. denied*, 541 U.S. 972 (2004), *reh'g denied*, 541 U.S. 1070 (2004); United States v. Gerke, 412 F.3d 804, 35 ELR 20128 (7th Cir. 2005), *cert. denied*, 128 S. Ct. 45 (2007); Headwaters, Inc. v. Talent Irrigation Dist., 243 F.3d 526, 31 ELR 20535 (9th Cir. 2001); United States v. Hubenka, 438 F.3d 1026 (10th Cir. 2006), *cert. denied*, 127 S. Ct. 114 (2006); Parker v. Scrap Metal Processors, Inc., 386 F.3d 993, 34 ELR 20104 (11th Cir. 2004); United States v. Newdunn Assocs., Ltd. Liab. Partnership, 344 F.3d 407 (4th Cir. 2003), *cert. denied*, 541 U.S. 972 (2004).
28. Rice v. Harken Exploration Co., 250 F.3d 264, 31 ELR 20599 (5th Cir. 2001); In re Needham, 354 F.3d 340 (5th Cir. 2003).
29. 391 F.3d 704, 34 ELR 20147 (6th Cir. 2004), *cert. granted*, 74 U.S.L.W. 3228 (U.S. Oct. 11, 2005) (No. 04-1034).
30. 376 F.3d 629, 34 ELR 20060 (6th Cir. 2004), *cert. granted*, 74 U.S.L.W. 3228 (U.S. Oct. 11, 2005) (No. 04-1034).
31. *Rapanos*, 126 S. Ct. at 2239.
32. *Id.*
33. 376 F.3d at 634.
34. 257 F. Supp. 2d 917 (E.D. Mich. 2003).
35. 391 F.3d at 704.
36. Brief of Petitioner, Rapanos v. United States, 2005 WL 240650 (2005) (No. 04-1034).
37. Brief of Government at 12, Rapanos v. United States, 2005 WL 779568 (2005) (No. 04-1034).
38. Chief Justice Roberts and Justice Scalia, in particular, prodded the petitioners and the government to suggest a middle ground.
39. *Rapanos*, 126 S. Ct. at 2235, 2266.

Ruth Bader Ginsburg, and David H. Souter, Justice Stevens argued that the Agency definition for waters of the United States was entitled to Chevron deference and that the government's position should have prevailed.[40]

Justice Scalia, who was joined by Chief Justice Roberts and Justices Clarence Thomas and Samuel A. Alito Jr., attempted to craft a new test for determining what waters should be included in waters of the United States. Adopting a position between those of the petitioners and the government, Justice Scalia opined that when Congress included the term waters of the United States in the CWA, it meant for that term to cover three types of waters and nothing more: (1) traditional navigable waters; (2) water bodies that are connected to traditional navigable waters and have a "relatively permanent flow"; and (3) any wetlands that have a "continuous surface connection" to those waters.[41] This test would leave a substantial number of headwater streams and wetlands adjacent to those streams unprotected by the CWA. But it would protect the non-navigable perennial and seasonal tributaries of traditional navigable waters and their adjacent wetlands, waters that the petitioners' approach would have left unprotected.

Justice Kennedy, writing for himself, explained in his opinion that waters of the United States includes any wetland that has a significant nexus to a traditional navigable water.[42] The amount of waters that will be covered by this test will depend largely on how narrowly or broadly the courts and the federal agencies interpret the term significant nexus. Regardless, it can be said that the Kennedy standard is generally more protective of wetlands and other waters than the Scalia standard but is less protective than the Stevens approach that would have preserved the status quo.[43]

Considering the facts in our scenario, which involves a bog that overflows into an ephemeral wash, it is difficult to see how jurisdiction could be established under the Scalia standard because the ephemeral wash would not qualify as a "relatively permanent water." Thus, Justice Kennedy's significant nexus test could be the only way to establish CWA jurisdiction.

How well the bog would fare under the Kennedy standard may be determined by how close it is to the nearest traditional navigable water.[44] Certainly the large Commerce River would be considered a traditional navigable water because of the barges that float down it on a daily basis. But what about the Wild Water River, which is being used by canoeists, kayakers, and rafters; is it a traditional navigable water, and, if so, which reach or reaches of that river qualify as such? As we explain in the next section, the concept of traditional navigable waters remains somewhat fluid despite its long history; thus, the answer to that question is not an easy one.

IV. How Traditional Navigable Waters Help Define CWA Navigable Waters

Although the precise origin of the traditional navigable waters is not apparent, it was used in the early 1970s when Congress was debating the proposed amendments to the CWA.[45] The CWA uses the term navigable waters, a term also used in a number of much older statutes. Unlike in those older statutes where the term only covered waters that had been, were, or could be used for waterborne commerce, the CWA use of the term was meant to be much broader in scope. To distinguish between the navigable waters in the CWA and the navigable waters in the older statutes, some of those in Congress took to referring to the narrower navigable waters found in the older statutes as the traditional navigable waters.[46] In retrospect, it would have made more sense for Congress to have stricken the term navigable waters from the CWA altogether.[47] Unfortunately, that did not happen.

By borrowing a term from older statutes and then assigning a new definition to it, Congress set the stage for future confusion concerning CWA jurisdiction.[48] Nonetheless,

40. *Id.* at 2252-53. To view the *Chevron* case, see *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 14 ELR 20507 (1984).

41. *Rapanos*, 547 U.S. at 757.

42. *Id.* at 2248. Although it is generally understood that Justice Kennedy's standard requires that the wetlands at issue have a significant nexus to a traditional navigable water to be covered by the CWA, he does muddle the standard by stating slightly different standards in at least two other places in his opinion. In one place he states that the water at issue must have a significant nexus to *navigable waters*. In another place he states that the water must have a significant nexus to a *navigable-in-fact* water. Depending on how these tests were interpreted, they could yield results far different than the *traditional navigable water* test. For more on the significant nexus standards, see The Clean Water Act Jurisdictional Handbook 21 (Envtl. L. Inst. 2007).

43. It is important to recognize that there are some very small perennial or seasonal streams that might be more easily protected under the Scalia standard than the Kennedy standard. It is also important to recognize that the Scalia standard, while purportedly based on the plain meaning of the term "waters," is rather arbitrary from an ecological perspective. Both Justice Stevens and Justice Kennedy point out this arbitrariness in their critiques of the Scalia standard. *Rapanos*, 547 U.S. at 770-74.

44. Under the Kennedy standard, you would be able to consider all similarly situated wetlands in the same "region" as the bog in your significant nexus analysis. Unfortunately, EPA and the Corps have applied an inappropriately narrow interpretation to the term "region." In their *Rapanos* guidance, the agencies state that in considering whether a wetland is a water of the United States, they will only consider other wetlands on the same stream reach as the wetland in question. This, of course, dramatically narrows any cumulative impact analysis that the agencies are willing to perform under the Kennedy standard. For the purposes of this Article, however, we assume that the bog is the only wetland in the relevant "region." *Compare Rapanos*, 547 U.S. at 780 (wetlands 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") (emphasis added), *with* Joint Guidance, *supra* note 7 (cumulative impact analysis for wetlands limited to stream reach).

45. *See generally* Sapp et al., *supra* note 12, at 10201. Up until 1977, the CWA was called the Federal Water Pollution Control Act. When that Act was amended in 1977, it was officially renamed the Clean Water Act.

46. *Id.* at 10203; *see also* 123 Cong. Rec. 26725, *supra* note 16 (distinguishes between traditional navigable waters and CWA navigable waters); 123 Cong. Rec. 10401, *supra* note 16.

47. That is the purpose of the proposed Clean Water Restoration Act that is now making its way through House and Senate committees.

48. Despite creating this confusion by using the term "navigable waters" in the CWA, Congress did signal its intention to establish a broad scope for CWA jurisdiction by defining "navigable water" in the Act as the "waters of the United States, including the territorial seas." 33 U.S.C. §1442(7). This is a much broader definition, for instance, than the term Congress used in the Rivers and Harbors Act of 1899—"navigable waters of the United States." 33 U.S.C. §§402 & 403.

aside from an initial challenge by the Corps,[49] the scope of the CWA's navigable waters has been generally accepted to be much broader than that of the traditional navigable waters. It is not surprising that in the three wetlands cases that have reached the Supreme Court, the issue of CWA jurisdiction has been at the center of each case. In *Riverside Bayview Homes*, *SWANCC*, and *Rapanos*, the Court elected to decide how far navigable waters, as that term is used in the CWA, extend beyond traditional navigable waters.

Justice Kennedy, in his significant nexus test in *Rapanos*, uses traditional navigable waters as a reference point for determining CWA navigable waters. As mentioned above, to determine if a wetland is a navigable water under the CWA, one must first locate the nearest traditional navigable water and then determine if there is a significant nexus between the two.

However, the definition of traditional navigable waters itself is not entirely clear. There are several older statutes that include the term navigable waters. The statutes all have different purposes, and over time lines of cases have developed that interpret each statute. Thus, it is not surprising that the case law interpreting navigable water as it is used in these different statutes is not entirely consistent. To complicate matters, in setting forth his significant nexus test, Justice Kennedy does not make any attempt to specify which lines of cases are appropriate for defining traditional navigable waters.

Thus, in your Wild Water River case, you may be tempted to pull indiscriminately from several lines of cases to establish that the Wild Water River is the closest traditional navigable water to the bog you are trying to protect. Such an approach, however, may not be advisable. As the Supreme Court pointed out in *Kaiser Aetna v. United States*,[50] a case involving the navigational servitude as well as the Rivers and Harbors Act of 1899 (RHA), one must be careful when applying cases decided in one context to an entirely different context. The Court went on to state that it is important to understand the purpose behind each statute being interpreted before applying the case law that has developed around that statute.

It is for this reason that we turn to an exploration of the types of cases that you or your opponent could pull from in order to craft an argument about whether a particular water is a traditional navigable water. In all of these types of cases, the courts have had to wrestle with the question of whether the water at issue is a navigable water. In doing so they apply the definition provided in the statute they are interpreting. In the discussion below, we provide the purpose for each statute and its basic navigable waters definition. We then point to some differences between the navigable waters definitions. Because Justice Kennedy did not explain what he meant by traditional navigable waters, it would seem that you are free to draw upon any of the pre-CWA statutes and the cases that have interpreted them to support your argument that the Wild Water River is a traditional navigable water.

Just to be entirely clear, in a given case it may be appropriate to draw from any of the lines of cases discussed below to prove a water is a traditional navigable water. We simply want you to understand that there are different types of traditional navigable waters cases and that some may be more appropriate than others in a given case. For instance, when EPA and the Corps issued the Joint Guidance on the *Rapanos* decision, they based their interpretation of the term traditional navigable waters on several of the cases discussed below.[51]

Generally, there are three different lines of federal navigability cases: (1) those involving the Commerce Clause; (2) those involving admiralty jurisdiction; and (3) those involving determinations over the ownership of the beds of navigable waters. The Commerce Clause cases can be distinguished further into the following four categories: (1) regulation of commerce; (2) Federal Power Act (FPA); (3) RHA; and (4) navigational servitude. We discuss all of these types of cases below.

A. Commerce Clause Cases

Under the Commerce Clause of the U.S. Constitution, Congress has the power "to regulate Commerce with foreign Nations, and among the several states, and with the Indian Tribes."[52] All of the cases in this section are tied to the commerce power.

1. Regulation of Commerce

The first line of cases involves federal regulation of commerce on navigable waters of the United States. In the 1824 watershed case *Gibbons v. Ogden*,[53] the Supreme Court held that navigation, which had been long recognized as an important part of commerce, was within the power of the federal government to regulate under the Commerce Clause of the Constitution. Thus, the federal government could, among other things, regulate the new steamship trade that was developing on the nation's navigable waters.

One of the regulations that grew out of this power was the requirement that all steamship operators engaging in interstate commerce obtain a federal license. It was this requirement that was at issue in the seminal decision, *The Daniel Ball*.[54] In this case the operator of a steamship operating between Grand Haven and Grand Rapids on the Grand River in Michigan argued that he did not have to secure a federal license or subject his steamship to federal inspection because he was operating his steamship solely within the state of Michigan. In deciding the case the Supreme Court devised a two-part test. The Court set forth the first part of the test as follows:

> Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or *are susceptible of being used*, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.[55]

In other words, a water body is subject to regulation under the Commerce Clause if it is currently being used for commerce, or if it could be used for commerce in the future.

49. *See* Callaway v. Natural Resources Defense Council v. Callaway, 392 F. Supp. 685, 686, 5 ELR 20285 (D.D.C. 1975).

50. 444 U.S. 164, 171, 10 ELR 20042 (1979).

51. U.S. Army Corps of Engineers, Jurisdictional Determination Form Instructional Guidebook app. D (2007).

52. U.S. Const. art. 1, §8, cl. 3.

53. 22 U.S. (9 Wheat.) 1, 190 (1824).

54. 77 U.S. 557 (1870).

55. *Id*. at 563 (emphasis added).

The Court then set forth the second part of the test as follows:

> And they constitute navigable waters of the United States within the meaning of the acts of Congress, in contradistinction from the navigable waters of the States, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water.[56]

This part of the test requires that the goods or passengers that are being transported make it all the way to a state or international border via water.

Three years after it decided *The Daniel Ball*, the Supreme Court expanded its navigability test in *United States v. Steamer Montello (The Montello)*.[57] In this case involving the Fox River in Wisconsin, the Court decided that water could be found navigable, and thus subject to federal regulation, even if commerce was hindered by rapids and small waterfalls. The Court held:

> The capability of use by the public for purposes of transportation and commerce affords the true criterion of the navigability of a river, rather than the extent and manner of that use. If it be *capable in its natural state* of being used for purposes of commerce, no matter in what mode the commerce may be conducted, it is navigable in fact, and becomes in law a public river or highway.[58]

The Court found that early fur trading canoes had made it down the Fox River on a regular basis and that this trading use was sufficient to qualify the river as a navigable water of the United States that was "generally and commonly useful to some purpose of trade or agriculture."[59]

2. RHA Cases

As commerce grew in, on, and around the navigable waters during the 19th century, it became clear that the federal government would need to take action to keep these waterways clear of obstructions. Wharfs, bridges, dams, and weirs had begun to clog some of the busier waters. To complicate matters, whenever the federal government attempted to stop such obstructions, the Supreme Court held that it could not do so until it passed legislation regulating such activities.[60] In response, Congress passed §§9 and 10 of the RHA.[61] From that point on, anyone wishing to build any type of structure in the navigable waters of the United States would have to first secure a permit from the Secretary of War (later the Secretary of the Army).

One of the most important RHA cases is *Economy Light & Power Co. v. United States*.[62] In this case, a power company attempted to build a hydropower dam across the Des Plaines River in Illinois without first securing a §9 permit under the RHA. The company argued that since two previously built canals diverted water out of the river, the river was no longer navigable. The Court held that because the river had been used in the past for fur trading, it was still a navigable water of the United States. In doing so, the Court established the concept of "indelible navigability," that is, if a water was ever navigable-in-fact, it will always be at least navigable-in-law and subject to federal regulatory power.[63]

The Corps has summarized the holdings of the cases that it feels define its jurisdiction under the RHA by regulation as follows:

> Navigable waters of the United States are those waters that are subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce: A determination of navigability, once made, applies laterally over the entire surface of the water body and is not extinguished by later actions or events which impede or destroy navigable capacity.
>
> * * * *
>
> The several factors which must be examined when making a determination whether a water body is a navigable water of the United States are discussed in detail below. Generally, the following conditions must be satisfied:
>
> (a) Past, present, or potential presence of interstate or foreign commerce;
>
> (b) Physical capabilities for use by commerce as in paragraph (a) of this section; and
>
> (c) Defined geographic limits of the water body.[64]

This regulatory definition is based on such cases as *The Daniel Ball*, *The Montello*, and *Economy Light & Power*, as well as such cases as *United States v. Utah*[65] and *United States v. Appalachian Electric Power Co.*,[66] which we discuss in the sections below. It is important to note that under this definition, the Corps has not adopted the second part of *The Daniel Ball* test that requires that the commerce be transported all the way to a state or foreign border via water. Instead the Corps relies on the Supreme Court's holding in the Equal Footing Doctrine case, *Utah*,[67] discussed below, which held that a water can be a navigable water if it can be used to transport commerce even if the water is wholly within a state and the goods being transported must be transported over land to reach a state or foreign border.

While the Corps maintains this position that the second part of *The Daniel Ball* test does not apply to RHA cases, three appellant court decisions have held to the contrary. For example, in *National Wildlife Federation v. Alexander*,[68] the North Dakota State Water Commission commenced work on a channel that would allow floodwaters to flow into the 34,000-acre Devils Lake. The lake is not connected to any other water body that could serve as an interstate or international link for waterborne commerce. The commission did not apply for any RHA permit before starting work.

56. *Id*.

57. 87 U.S. (20 Wall.) 430 (1874).

58. *Id*. at 441-42 (emphasis added).

59. *Id.* at 442.

60. Wilson v. Black-Bird Creek Marsh Co., 27 U.S. (2 Pet.) 245 (1829); Willamette Iron Bridge Co. v. Hatch, 125 U.S. 1 (1888).

61. 33 U.S.C. §§402 & 403.

62. 256 U.S. 113 (1921).

63. *Id.* at 123.

64. 33 C.F.R. §§329.4, 329.5 (2008) (Note that in 1976 Congress exempted from the wharf and pier provisions of RHA §10 any body of water located entirely within one state if its classification as a navigable water of the United States rested solely on its historical use. Water Resources Development Act of 1976, §154 (codified at 33 U.S.C. §59L).

65. 283 U.S. 64 (1931).

66. 311 U.S. 377 (1940).

67. 283 U.S. at 64.

68. 613 F.2d 1054, 10 ELR 20060 (D.C. Cir. 1979).

The U.S. Court of Appeals for the District of Columbia (D.C.) Circuit decided the case by concluding that the second prong of *The Daniel Ball* does apply in RHA cases. "[W]e conclude that [navigable waters of the United States] requires a body of water to have an interstate connection by water, which Devils Lake lacks."[69] In similar cases involving lakes in Minnesota and Virginia, the U.S. Courts of Appeals for the Fourth and Eighth Circuits also concluded that both prongs of *The Daniel Ball* test had to be met for a water to be a navigable water of the United States under the RHA.[70]

3. FPA Cases

In the FPA, Congress, acting under its authority under the Commerce Clause, gave the Federal Power Commission, now the Federal Energy Regulatory Commission,[71] the authority to regulate hydropower facilities located in navigable waters. The Act actually defines navigable waters as:

> [T]hose parts of streams or other bodies of waters . . . which either in their natural or *improved condition* notwithstanding interruptions between the navigable parts of such streams or waters by falls, shallows, or rapids compelling land carriage, are used or suitable for use for the transportation of persons or property in interstate or foreign commerce, including therein all such interrupting falls, shallows, or rapids . . . .[72]

What is important to note about this definition is that it includes those waters that although they are not presently navigable, are susceptible to being made navigable through reasonable improvements.[73]

Perhaps the most important and oft-cited FPA case is *Appalachian Electric Power*.[74] The case involved regulations promulgated by the Federal Power Commission requiring the licensing of hydroelectric dams located on navigable waters. The Federal Power Commission initially declared the New River, which runs through Virginia and West Virginia, non-navigable. Two years later the commission reversed itself and adopted a resolution declaring the New River navigable. The Supreme Court recognized, as had courts from *The Montello* forward, that different types of commerce could exist to determine navigability.[75]

The use of commerce, the Court stated, need not be "continuous," explaining that "[e]ven absence of use over long periods of years, because of changed conditions, the coming of the railroad or the improved highways does not affect the navigability of rivers in the constitutional sense."[76] The Court proceeded to couple significant historical evidence with contemporary studies suggesting the New River could be made navigable with "reasonable" improvements.[77] The Court accepted surveys and reports published by government agencies as evidence that the river had been improved for navigability in the past.[78] Additionally, the Court discussed prior appropriations by the Virginia General Assembly made for the improvement of the river.[79] These official accounts were bolstered by the testimony of elderly residents that private boats and commercial ferries had sailed on the New River "in the days before railways and good roads."[80]

Appalachian Electric Power also explicitly recognized the concept of indelible navigability as it had been expressed in *Economy Light & Power*. In *Appalachian Electric Power*, the Court stated: "[W]hen once found to be navigable, a waterway remains so."[81] This is true, even if the waterway in its natural state required "reasonable" improvements to be navigable. As the Court explained: "The power of Congress over commerce is not to be hampered because of the necessity for reasonable improvements to make an interstate waterway available for traffic."[82] The decision thus clarified *Economy Light & Power*'s relation on historical use with the latter's low threshold for commercial activity.

In the case of the Wild Water River, the question would be whether any of the three reaches of the river could be made commercially navigable through reasonable improvements. The following two lines of cases include more on this test.

4. Navigational Servitude Cases

As described above under the Equal Footing Doctrine, states have title to the beds of navigable waters. Nonetheless, the federal government has an easement over those submerged lands. Under that easement or servitude, the federal government has the authority to condemn these submerged lands to make improvements to the waterways for commerce. When the federal government exercises this power, it does not have to pay compensation to riparian property owners under the Takings Clause of the Fifth Amendment to the Constitution.[83] The navigational servitude extends from the "ordinary high water mark"[84] on one bank of a navigable water of the United States to the ordinary high watermark on the other bank.[85]

The right of public access applies to all lands covered by the navigational servitude. Thus, many of the cases that deal with the navigational servitude involve public access to desirable waters. Typically, the definition for establishing the

69. *Id.* at 1055.

70. State Water Control Bd. v. Hoffman, 574 F.2d 191, 8 ELR 20358 (4th Cir. 1978); Minnehaha Creek Watershed Dist. v. Hoffman, 597 F.2d 617, 9 ELR 20334 (1979).

71. 42 U.S.C. §§7171(a), 7172(a).

72. 16 U.S.C. §796(8).

73. United States v. Appalachian Elec. Power Co., 311 U.S. 377, 407-08 (1940).

74. *Id*. at 377.

75. *Id.* at 408-09.

76. *Id.* at 409.

77. *Id.* at 416-17.

78. *Id.* at 413-14.

79. *Id.* at 414.

80. *Id.* at 416.

81. *Id.* at 408.

82. *Id.*

83. Atlanta Sch. of Kayaking, Inc. v. Douglasville-Douglas County Water & Sewer Auth., 981 F. Supp. 1469, 1472 (N.D. Ga. 1997).

84. A water body's ordinary high watermark is the "line of the shore established by the fluctuations of water . . . ." 33 C.F.R. §329.11(a)(1). It is determined by "physical characteristics such as a clear, natural line impressed on the bank, . . . changes in the character of the soil; destruction of terrestrial vegetation; . . . or other appropriate means that consider the characteristics of the surrounding areas." *Id. See* Normal Parm Jr. et al. v. Mark Shumate, 513 F.3d 135, 143 (5th Cir. 2007).

85. 33 C.F.R. §329.11(a); *see also* United States v. Rands, 389 U.S. 121, 123 (1967).

extent of the navigational servitude is the same as the one used for determining federal jurisdiction under the RHA.[86]

B. Admiralty Cases

The second line of cases involves the Constitution's admiralty provision. Under Article III of the Constitution, federal courts have "original jurisdiction . . . of [a]ny civil case of admiralty or maritime jurisdiction."[87] The purpose of federal admiralty jurisdiction is to "protect[ ] commercial shipping" with "uniform rules of conduct."[88] Admiralty jurisdiction is based on a two-part test. First, did the alleged tort happen on or over navigable waters?[89] Second, did the cause of the injury have a "substantial relationship to traditional maritime activity such that the incident had a potentially disruptive influence on maritime commerce?"[90]

For our purposes, we are most interested in the first prong of this test. The test for whether a water is navigable in admiralty law is as follows: "[Whether the] waters are navigable if they are currently being used as a highway of commerce *or* if they are susceptible of being so used."[91] This is the test that was set forth by the Supreme Court in *The Daniel Ball* in 1870. It serves as the foundation for many of the navigability definitions discussed in this Article.

Whereas other tests have broadened in scope over time, the admiralty definition for navigable waters has not. For instance, admiralty jurisdiction does not extend to certain waters that were historically used to transport commerce but are no longer capable of doing so because of obstructions.[92] The rationale for this limitation is that admiralty jurisdiction is supposed to extend only to those waters that enjoy or could enjoy maritime commerce. If a new dam were to prevent maritime commerce from reaching waters upstream of the dam, it would also make sense that admiralty jurisdiction would not reach above the dam, regardless of the historic commerce that may have occurred on the river.[93]

For our purposes in our Wild Water River scenario, while it might be possible to establish that the lower reach of the river was susceptible to serving as a highway of waterborne commerce, it might be difficult to show the same for the middle and upper reaches. On those two reaches the paddlers, although they may be from out of state, drive up, paddle their boats, and then drive home. It would be difficult to make a case that the middle and upper reaches could be improved to such an extent that they could be used for transporting goods or people to the Commerce River downstream.

C. Equal Footing Doctrine Cases

The second line of navigable waters cases arise as a result of the Equal Footing Doctrine, which is also grounded in the Constitution. When the first 13 states became the United States, they retained ownership of the submerged lands beneath their navigable waters.[94] Under the Equal Footing Doctrine, as new states joined the Union, they received the same ownership interests over the submerged lands under their navigable waters as the original states had.[95]

Many equal footing cases involve disputes over whether a state or the federal government owns the beds of certain waters. The most important issue in many of these cases is the boundaries of the navigable waters.[96] The definition of whether a water is "navigable" under this line of cases is as follows:

> [S]treams or lakes which are navigable in fact must be regarded as navigable in law; that they are navigable in law when they are used, or are susceptible of being used, in their natural and ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water; and further that navigability does not depend on the particular mode in which such use is or may be had—whether by steamboats, sailing vessels or flatboats—nor on an absence of occasional difficulties in navigation, but on the fact, if it be a fact, that the stream in its natural and ordinary condition affords a channel for useful commerce.[97]

Although this definition sounds very similar to the one for admiralty jurisdiction, it differs in two important respects. First, the latter definition includes waters that were historically used for commerce but that can no longer serve that function. Second, it does not require commerce to be waterborne all the way to a state border as does the admiralty definition. Under the equal footing definition, for example, it is enough that commerce takes place on the Great Salt Lake; the lake does not have to be "part of a [waterborne] navigable interstate or international commercial highway."[98]

It might be enough to qualify the middle reach and upper reaches of the Wild Water River as a traditional navigable water under this definition considering that many of the patrons of the rafting companies and many of the kayakers and canoeists are out-of-state paddlers. This commerce or potential commerce could be enough to pass this test.

V. Float a Boat Test

Under the lines of navigability cases discussed above, to be a navigable water (or traditional navigable water for our

86. Goodman v. City of Crystal River, 669 F. Supp. 394, 400 (M.D. Fla. 1987):

> *Kaiser Aetna* was the first and is the only case which has held that navigability for the purpose of federal regulation under the *Commerce Clause* is not coterminous with navigability for the purpose of defining the scope of the federal navigational servitude. *Kaiser Aetna*, which must be read along with its companion case, *Vaughn v. Vermillion Corp.*, 444 U.S. 206 (1979), stands for the proposition that navigable waterways built on private property with private funds, in such a manner that they ultimately join with other navigable waterways, do not create a general right of use in the public. *Id.* at 208-209.

87. 28 U.S.C. 1333(1).

88. Leblanc v. Cleveland, 198 F.3d 353, 356 (2d Cir. 1999) (citing Sisson v. Ruby, 497 358, 362 (1990)).

89. *Id.* (citing Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527, 534 (1995)).

90. *Id.*

91. Price v. Price, 929 F.2d 131, 134 (1991).

92. *Id.*

93. *Leblanc*, 198 F.3d at 359.

94. Martin v. Lessee of Waddell, 41 U.S. (16 Pet.) 367, 410 (1842); Montana v. United States, 450 U.S. 544, 555 (1981).

95. Lessee of Pollard v. Hagan, 44 U.S. (3 How.) 212, 228-229 (1845).

96. Idaho et al. v. Coeur D'Alene Tribe of Idaho et al., 521 U.S. 261 (1996).

97. United States v. Utah, 283 U.S. 64, 76 (1931) (citing United States v. Holt State Bank, 270 U.S. 49, 56 (1926)).

98. Utah v. United States, 403 U.S. 9, 10, 1 ELR 20250 (1971).

purposes), generally it is sufficient to show that the water was navigable in the past (historic use), is navigable currently (present use), or is susceptible to becoming navigable in the future (susceptible use).

In the case of the bog you are trying to protect, you would like to establish that at least one of the reaches of the Wild Water River is a traditional navigable water. Otherwise you would have to show that there is a significant nexus between the bog and the Commerce River which is 40 miles away. However, you are convinced the river fails at least one of the three tests provided above—the historic use test. There is no evidence that the river was ever used historically to transport commerce. Thus, you are left with the two remaining tests: the present use test and the susceptible use test. In this situation it probably makes sense to begin with the lower reach and work your way up toward the bog, applying these tests as appropriate.

A. Lower Reach

Since the lower reach does not have a present commercial use, you are left with the susceptible use test for that reach. The development of the susceptible use test can be traced to five Supreme Court cases. Excerpts from each follow, many of which figure prominently in the navigable water definitions set forth in the previous section of this Article.

The susceptible use test was first mentioned in *The Daniel Ball*. In *The Daniel Ball*, the Supreme Court said the following:

> Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are *susceptible of being used*, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the *customary modes of trade and travel on water*.[99]

Four years later in *The Montello*, the Court clarified that "customary modes of trade and travel on water" is not restricted to large vessels. The Court held that

> [t]he capability of use by the public for purposes of transportation and commerce affords the true criterion of the navigability of a river, rather than the extent and manner of that use. If it be capable in its natural state of being used for purposes of commerce, *no matter in what mode the commerce may be conducted*, it is navigable in fact, and becomes in law a public river or highway.[100]

In *Economy Light & Power*, the Court explained further that a waterway does not have to be continuously navigable, rather it can have "occasional natural obstructions or portages" and suffer from low water at times and still be navigable-in-fact.[101] Then, in *Utah*, the Court used evidence of small pleasure craft to buttress evidence of historic commercial use to find a reach of the Colorado River navigable.[102] The craft demonstrated that the river was susceptible to commercial use.[103] Finally, in *Appalachian Electric Power*, the Court held that so long as water is susceptible to use as a highway of commerce, it is navigable-in-fact, even if the water has never been used for a commercial purpose. As the Court stated: "[The] lack of commercial traffic [is not] a bar to a conclusion of navigability where personal or private use by boats demonstrates the availability of the stream for the simpler types of commercial navigation."[104]

The bottom line of these cases is that the use of small boats on a stream or river can serve as evidence that the water is susceptible for transporting people or goods in commerce and is thus a traditional navigable water.[105]

Consequently, the question for our purposes then becomes whether there is any way you can employ canoes, kayaks, rafts, or other small craft to demonstrate that the lower reach of the Wild Water River is a traditional navigable water. The answer could well be yes.

Federal courts have become more and more receptive to parties' attempts to demonstrate that rivers and streams are susceptible to future commerce by paddling on those water bodies with canoes and kayaks. The idea is that if a small craft can safely make it down a water without turning over, it is evidence that with reasonable improvements the water could be used for future transport of goods or people. An extension of this concept is that canoeing or kayaking down the water provides evidence that the water could be used in the future for recreational commerce.

1. Recreational Canoe, Kayak, and Raft Cases

One of the early courts of appeals' decisions involving small recreational craft was *Weiszmann v. District Engineer*, in which the Fifth Circuit explained that the "lack of commercial traffic [is not] a bar to a conclusion of navigability where personal or private use by boats demonstrates the availability of the stream for the simpler types of commercial navigation."[106] In *Alaska v. Ahtna, Inc.*, an equal footing case, the Ninth Circuit held that the current use of an Alaskan river by commercial rafting companies is sufficient evidence that the water was susceptible to commercial navigation at the time that Alaska became a state.[107] Thus, the court held that Alaska held title to the river bed. In a more recent FPA case, the U.S. Court of Appeals for the Second Circuit stated that jurisdiction under the Act has expanded "substantially, due in large measures to the broadening concept of 'navigable waters.'" The court went on to state that "the use of a river by canoeists 'demonstrates the stream's availability for commercial navigation.'"[108]

In a recent public access case that addressed the issue of whether kayakers and canoeists have the right to cross a county reservoir to reach a boat ramp, a district court quoted the applicable Corps regulations as follows: "'The presence of recreational craft may indicate that a water body is capable of bearing some form of commerce, either presently, in the future, or at a past point in time;' thus, supporting a find-

99. 77 U.S. at 563 (emphasis added).

100. 87 U.S. at 441-42 (emphasis added).

101. 256 U.S. at 122.

102. 283 U.S. at 82.

103. *Id.*

104. 311 U.S. at 416.

105. *See, e.g.*, FPL Energy Maine Hydro Ltd. Liab. Co. v. Federal Energy Regulatory Comm'n, 287 F.3d 1151 (D.C. Cir. 2002); Goodman v. City of Crystal River, 669 F. Supp. 394 (M.D. Fla. 1987).

106. 526 F.2d 1302, 1305, 6 ELR 20219 (5th Cir. 1976).

107. 891 F.2d 1401, 1404, 20 ELR 20745 (9th Cir. 1989).

108. New York ex rel. New York State Dep't of Envtl. Conservation v. Federal Energy Regulatory Comm'n et al., 954 F.2d 56, 61 (1991) (citing Connecticut Light & Power Co. v. FPC, 557 F.2d 349, 354-57 (2d Cir. 1977)).

ing of navigability."[109] The court then held that the paddlers had a right to use the reservoir and boat ramp because the reservoir was a navigable water and these paddlers had no other option since they could not paddle back up the whitewater river they had come down.[110]

In *FPL Energy Maine Hydro Ltd. Liability Co. v. Federal Energy Regulatory Commission*, an FPA case, the D.C. Circuit stated that "FERC has often relied on evidence of recreational use as a proxy for commercial suitability."[111] The court then pointed out that in the absence of both commercial and recreational use of the stream, the Federal Energy Regulatory Commission (FERC) had acted properly when it considered that one of the parties had arranged and successfully completed three canoe trips down the stream to demonstrate that the water was susceptible to commercial use.[112] The court went on to state that there is no requirement that FERC identify the potential commercial use that might take place at some future time.[113]

In another FPA case, *Knott v. Federal Energy Regulatory Commission*, the First Circuit held a stream was navigable based on a similar test canoe trip.[114] That time 30 canoeists spent four days paddling the stream at issue. When the power company challenged the "motivations" of the paddlers, the court stated that the motivation of the paddlers was irrelevant; "what matters is that the participants completed the journey, regardless of motivation."[115]

2. Paddling the Lower Reach

Although the concept of paddling the lower reach would seem quite straightforward, there are some questions you will want to answer before you grab your paddle and head for the water. Several of which are explored here:

a. Who Should Come?

Although you may want to have an "expert" paddler or two along to make sure everyone finishes the voyage unscathed, it is important to have some intermediate or novice paddlers in the group. Some FERC decisions have ruled against labeling a stretch of river navigable if it was "maneuvered by an expert paddler."[116]

Although *FPL* was decided based on three canoe "expeditions," which would probably mean six paddlers, other cases have been based on as many as 30 canoeists.[117] The rule of thumb here is to recruit as many paddlers as you can. The local paddling club or the nearest Boy Scout troop would probably be up for the adventure, especially if they knew the purpose of the paddle was to protect a wetland or stream.

b. What Type of Boats Should You Use?

So far, FERC has voiced a preference for canoes.[118] In *Pennsylvania Elec. Co.*, "FERC determined a river was non-navigable because a substantial reach of the river could only be navigated by a *kayak* (or comparably specialized sporting craft designed for river running) . . . ."[119] This canoe bias does not make sense considering the variety of water craft on our rivers and streams today. There are canoes ranging from tippy sprint boats to covered whitewater boats. Likewise, there are kayaks ranging from sleek sea kayaks to stubby rodeo boats. To say generically that canoes are useful in making navigability determinations and that kayaks are not, "misses the boat" so to speak. However, the take away from all of this is that you will improve your chances of proving your case if you ensure that your flotilla includes at least a few standard open canoes.

c. When Should You Paddle?

Go down the stream or river when the water is at its "ordinary" height. Since it would be helpful to establish how many months the river is passable, it may be necessary to take another trip down the river at or near low water. If the river is passable for only nine months of the year, you will want to document that.

d. How Should You Document the Paddle?

Unless the river appears passable through the camera lens, do not take the picture. You do not want your opponents to use your pictures against you. If the water level looks good, take lots of pictures of both the flatwater areas as well as any rapids you encounter. Again if the rapids are passable, but look impassable through the camera lens, do not take any pictures. If your opponents want to show how impassable parts of the water are, let them undertake their own expedition. If you notice any markings on bridges or trees that show how high the water gets during flood stage, it would be helpful to have pictures of those as well. Record where you take the pictures on a map so that you will be able to accurately recount the trip later on.

You may also want to get some aerial photographs of the site through an online system or through a government agency. If you have access to an organization like South Wings, which is a nonprofit organization that flies nonprofits for free, and you think low-level aerials will strengthen your case, fly the reach of the stream or river and take pictures along the way.

Before the paddling trip, it is also important to gather physical information about the water to the extent it is available. What is the average depth at different points on the stream or river?[120] How long is the reach that you are going to paddle? Are there any recommended portages along the reach? Is the reach included in any canoe trails system or on any canoeing maps?

109. Atlanta Sch. of Kayaking, Inc. v. Douglasville-Douglas County Water & Sewer Auth., 981 F. Supp. 1469, 1473 (N.D. Ga. 1997) (quoting 33 C.F.R. §329.6(a)).

110. *Id*.

111. 287 F.3d 1151, 1157 (D.C. Cir. 2002).

112. *Id.*

113. *Id.* at 1158.

114. 386 F.3d 368, 373 (1st Cir. 2004).

115. *Id.* at 373 (citing *FPL*, 287 F.3d at 1157).

116. *See, e.g.*, Pennsylvania Elec. Co., 56 FERC P 61435, 62549-50 (FERC 1991).

117. 386 F.3d at 373.

118. Richard J. Pierce Jr., *What Is a Navigable Water? Canoes Count but Kayaks Do Not*, 53 Syracuse L. Rev. 1067 (2003).

119. *Pennsylvania Elec. Co.*, 56 FERC P at 62549-50.

120. Government agencies such as the Corps and the U.S. Geological Survey maintain gauge data for many larger streams and rivers. This data can be helpful to determine whether the area is in a drought or not.

Soon after your paddling trip, have your paddlers write up declarations describing the trip. Any trial that might involve the stream may be months, if not years, down the road. It will be good to have paddlers' statements in your file so you will know which participants will make the best witnesses. The statements should contain addresses and telephone numbers for each of these potential witnesses.

e. What Other General Things Should You Think About?

Do not trespass to get access to the water. In addition, research applicable laws governing the use of the water body itself. If the state does not own the bed of the water body, you may run into some irate riparian owners along your paddle. It is always wise to get permission from these riparian owners before you paddle.

Finally, be sure that everyone on the trip is up to the challenge. Everyone needs to make it down the river intact. The last thing you want is for your opponent to discover that one of your paddlers broke his arm on the "treacherous" water.

B. Middle Reach and Upper Reach

The middle reach and the upper reach of the Wild Water River could prove to be more of a challenge than the lower reach. Both of these reaches have Class IV rapids in them. The thought of leading a flotilla of open standard canoes down either reach might seem somewhat daunting, unless there are good portages around the rapids. If that is the case, you could simply follow the plan for the lower reach and portage any rapids out of your league.

If the rapids come too fast and furious and there are no safe portages, you will have to abandon the flotilla approach on these reaches and rely on the existing uses of the river. On the middle reach, you can point to the three rafting companies, which draw paddlers from out of state. On the upper reach, there are private recreational canoeists and kayakers that travel to the Wild Water River from outside the state. As further evidence of commerce, many of the upper reach paddlers suspect that with the number of paddlers coming to the upper reach, it will not be long before an outfitter starts renting whitewater canoes and kayaks for use on the upper reach. Many of the middle and upper reach paddlers stay at the High Mountain Paddling Resort.

Before you begin your work, it is important to recognize that any time you attempt to convince a federal district court judge that a river with Class IV rapids is navigable, you are going to have to build a strong case. The case is going to have to be built on the argument that the recreational commerce, or the potential recreational commerce, stemming from the white water paddling itself, qualifies the water as a traditional navigable water. Although no courts have either embraced or rejected such an argument, EPA and the Corps have applied such reasoning in at least four similar situations. These decisions are discussed below.

1. Agency Traditional Navigability Water Determinations

As required by EPA and Corps *Rapanos* guidance, EPA regional offices review all jurisdictional determinations involving issues of significant nexus or isolated waters.[121] If an EPA region disagrees with the Corps' decision, it can elevate the determination to EPA and Corps headquarters. EPA and Corps headquarters have been issuing decisions in these elevated cases since fall 2007. Although these decisions are probably best characterized as a form of guidance, they are instructive as to both EPA's and the Corps' interpretation of the *Rapanos* decision. They also reveal the arguments that both agencies are likely to make in the event one of these disputes ends up in federal district court.

In one of the first of these decisions, the agencies were required to determine whether the North Fork Stillaguamish River (North Fork) in Snohomish County, Washington, is a traditional navigable water.[122] Based on Appendix D of EPA/Corps *Rapanos* guidance, the agencies found that the North Fork is a traditional navigable water. It based this decision by considering the totality of the circumstances including the following:

- The North Fork is accessible to the public via multiple locations, including a boat ramp located in Haller Bridge Park.
- There is documented use of the river for navigation. The North Fork is widely publicized as a popular location for canoeists and other paddlers to experience both flat and whitewater paddling. Additionally, physical characteristics, including flow data, support a determination that the North Fork is capable of navigation.
- A combination of the factors above demonstrates that the North Fork is susceptible to being used for water-based interstate commerce by interstate and foreign travelers. In addition, the nearby Mount Baker-Snoqualmie National Forest is a popular destination for travelers seeking recreational boating and guided river trips, which are also likely to use the North Fork for water-based activities.[123]

Without more, it would seem that the facts in the North Fork case are similar to those involving both the upper and middle reaches of the Wild Water River. The North Fork has whitewater sections and is a popular paddling destination. The Wild Water River has something the North Fork does not: interstate commerce. The rafting companies on the middle reach draw patrons from out of state, but the North Fork does not have any such commerce at present. The agencies were comfortable relying on the river's potential for drawing such commerce in the future.

In the next of the series of traditional navigable water decisions, the agencies found that Boyer Lake, a 310-acre lake in Minnesota, is a traditional navigable water because of the following:

- There is current access to the water body that allows members of the public to place watercraft on the water body.

* * *

- The water body has the capacity to be navigated by watercraft.

* * *

121. *See* U.S. Army Corps of Engineers Memorandum: Process for Coordinating Jurisdictional Determinations Conducted Pursuant to Section 404 of the Clean Water Act in Light of the *Rapanos* and *SWANCC* Supreme Court Decisions (Jan. 28, 2008); U.S. EPA & U.S. Army Corps of Engineers, Memorandum: Coordination on Jurisdictional Determinations (JDs) Under Clean Water Act (CWA) Section 404 in Light of the *SWANCC* and *Rapanos* Supreme Court Decisions (June 5, 2007); *see also* JOINT GUIDANCE, *supra* note 7.

122. U.S. EPA/U.S. Army Corps of Engineers, Memorandum for NWS-2006-82, Clarification of Closest Traditional Navigable Water (TNW) for Jurisdictional Determination (JD) NWS-2006-82 (Dec. 10, 2007).

123. *Id.* at 2 (citations omitted).

- The water body has the potential to be used for activities involving navigation and interstate commerce.[124]

The agencies said that the lake had the potential for interstate commerce, because (1) it is located 35 miles from North Dakota, (2) the lake had been stocked with game fish, and (3) Internet sites state that the lake is used for fishing by fishermen from as far away as Fargo, North Dakota. In this decision, the focus does not seem to be on whether Boyer Lake is part of an interstate highway of watercourses but whether the lake could support some commerce based on fishing in the future.

If that standard applies, both the middle and upper reaches of the Wild Water River would seem to meet EPA/Corps criteria for a traditional navigable water. On the middle reach, there is ongoing commerce in the form of the rafting companies, and there is the potential for commerce on the upper reach—an outfitter renting kayaks would be sufficient. Although it is true that Boyer Lake is flatwater instead of whitewater, it appears that the agencies are focusing more on the nature of the commerce or potential commerce than on the nature of the water.

The next traditional navigable water determination by EPA and the Corps involves the Little Snake River in Wyoming. The agencies found that Little Snake was a traditional navigable water based on the following factors:

- Little Snake River is accessible to the public via multiple locations on public land. In addition, access may be obtained at the County Road 4 Bridge overpass.
- There is documented seasonal navigation of the river. The Little Snake is publicized as a location for canoe trips. The Wyoming Fish and Game, U.S. Fish and Wildlife Service, and other governmental and scientific entities float various reaches of the Little Snake River downstream from Baggs, Wyoming, as part of aquatic life monitoring programs, including endangered species collections and monitoring.
- The presence of hunting and fishing lodges in the Baggs area with a national reputation are a documented source of interstate travelers in the area seeking an outdoor experience.[125]

Again, it would seem that the upper and middle reaches of the Wild Water River are even better examples of traditional navigable waters than the Little Snake River.

2. Application of the Agency Decisions to the Middle and Upper Reaches

The agency decisions provide support for the idea expressed in *Rapanos* that traditional navigable waters do not have to provide a continuous waterborne highway to a state line.[126] It is enough that there is the potential that out-of-state paddlers might use a water for water-based activities at some time in the future. The middle and upper reaches already involve actual water-based commerce under this standard so they should fare well. Although both of these reaches contain Class IV rapids, this should not be an issue because the test does not require a continuous waterborne link to interstate or foreign commerce. Whether the interstate traveler is driving from out of state to rent a sailboat on a windy lake or rent a kayak on a frothy river, the commerce is the same. Some of the agency decisions involve lakes that might be used in the future for canoeing and kayaking only. The North Fork decision supports this idea because the river had both whitewater and flatwater components, and the agencies did not distinguish between the two.[127]

VI. Conclusion

Although nothing is sure in the post-*Rapanos* world, it appears that you have some good strategies and some good arguments to establish that all three reaches of the Wild Water River are traditional navigable waters. If your paddle down the lower reach and your arguments about commerce on the upper two reaches succeed, you will have a much better chance of proving, under Justice Kennedy's significant nexus test, that the bog is a water of the United States and is protected under the CWA. Should you fail in proving that any of the reaches are traditional navigable waters, all is not lost. You still can try to make your case that the bog has a significant nexus with the Commerce River.

124. U.S. EPA/U.S. Army Corps of Engineers, Memorandum for MVP-2007-1497-RQM, Determination of Boyer Lake as Traditional Navigable Water (TNW) for Jurisdictional Determination (JD) #MVP -2007-1497-RQM (Dec. 11, 2007).

125. U.S. EPA/U.S. Army Corps of Engineers, Memorandum for NWO-2007-1550, Clarification of Closest Traditional Navigable Water for Jurisdictional Determination (JD) NOW-2007-1550 (Dec. 12, 2007) (citations omitted).

126. This is certainly consistent with the navigability test set forth for federal title cases. *See, e.g.*, United States v. Utah, 283 U.S. 64, 76 (1931). It is also consistent with the concept, as expressed by Rep. John D. Dingell (D–Mich.) during the debates over the CWA in 1972, when he stated the following:

> Although most interstate commerce 150 years ago was accomplished on waterways, there is no requirement in the Constitution that the waterway must cross a State boundary in order to be within the interstate commerce power of the Federal government. Rather, it is enough that the waterway serves as a link in the chain of commerce among the States as it flows in the various channels of transportation—highways, railroads, air traffic, radio and postal communication, water ways, et cetera. The "gist of the Federal test" is the waterway's use "as a highway," not whether it is "part of a navigable interstate or international commercial highway." *Utah v. United States*, 403 U.S. 9,11, 1 ELR 20250 (1971); [*United States*] *v. Underwood*, 4 ERC 1305, 1309, 2 ELR 20567 (M.D. Fla. June 8, 1972).

118 Cong. Rec. 33756-57 (daily ed. Oct. 4, 1972), *reprinted in* 1 CRS Legislative History of the Water Pollution Control Act Amendments of 1972, at 250 (1973).

127. U.S. EPA/U.S. Army Corps of Engineers, Memorandum for MVP-2007-1497-RQM, *supra* note 124.