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Environmental Law Summer Seminar 10
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Did the 11th Circuit Miss the Boat?:

Interpreting *Rapanos* Two Years Later in Light of *EPA's and the Corps of Engineers' Rapanos Guidance* and *U.S. v. Robison*

By Holly P. Cole, Esq.

Two years after the Supreme Court's fragmented opinion in *Rapanos v. U.S.* (Rapanos),[1] environmental practitioners, consultants and the public are still left wondering what exactly is a "waters of the U.S." Prior to Rapanos, the scope of Clean Water Act ("CWA") jurisdiction over wetlands and other non-navigable waters was an issue of great debate and uncertainty in the lower courts. When the Supreme Court granted certiorari in Rapanos to decide whether CWA jurisdiction extends to wetlands that are not adjacent to navigable-in-fact waters, many had hoped the issue would finally be resolved.[2] Unfortunately, the court split in its decision and no clear majority emerged. As Chief Justice Roberts stated in his concurrence, "it is unfortunate that no opinion commands a majority of the court on precisely how to read Congress' limits on the reach of the CWA. Lower courts and regulated entities will now have to feel their way on a case by case basis to determine if CWA jurisdiction exists."[3] This is just what has occurred creating even further uncertainty as to the reach of the CWA over non-navigable waters.

On June 5, 2007, nearly one year after Rapanos, the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) jointly issued a memorandum interpreting Rapanos (Rapanos Guidance) in order to provide guidance to EPA and Corps' field offices to ensure consistency in identifying jurisdictional wetlands, streams and rivers under the CWA.[4] EPA and the Corps decided to assert jurisdiction to the maximum extent allowed under Rapanos. As a result of the Court's split decision, EPA and the Corps evaluated Rapanos under a "counting heads" approach and thus, will now assert regulatory jurisdiction where a water body satisfies either the plurality's definition of "waters of the U.S." or Justice Kennedy's "significant nexus" test.[5] The agencies' approach is consistent with Justice Stevens' dissent wherein he advised that the four dissenting justices would uphold jurisdiction in all cases in which either the plurality's or Justice Kennedy's test is satisfied.[6] Practically speaking, the Rapanos Guidance leaves much to be desired to the consultants tasked with conducting the jurisdictional delineations in the field.

The Savannah Corps District and EPA Region 4 have significantly different interpretations of the Rapanos Guidance. Non-jurisdictional determinations are now subject to a more stringent and rigorous review by the Corps and EPA. However, the agencies lack the personnel to review and process the non-jurisdictional determinations and the waiting time for approvals on such determinations is currently at least eight months. As a result, more and more consultants and developers are finding that it is faster and more economical to delineate waters as jurisdictional, obtain permits and conduct mitigation than await review and approval of a non-jurisdictional determination. Such a practice may be short-lived, however, in light of a recent change in law in the 11th Circuit.

Almost five months after the agencies published the Rapanos Guidance, the 11th Circuit Court of Appeals issued its first post-Rapanos decision in *U.S. v. Robison* (Robison) creating a disturbing discrepancy between what the agencies will regulate under the Rapanos Guidance and what the court will uphold as jurisdictional under Rapanos.[7] While the Supreme Court has twice denied certiorari when faced with the opportunity to clarify its decision which resulted in a split among the federal circuit courts, perhaps it will revisit the issue in light of Robison.[8]

Regulated Waters under the Rapanos Guidance - Plurality's Definition of "Waters of the U.S."

Penned by Justice Scalia, the Rapanos plurality defined the term "waters of the U.S." to include only "relatively permanent standing or continuously flowing bodies of water 'forming geographic features' that are described in ordinary parlance as 'streams[,] . . . oceans, rivers, [and] lakes.'"[9] The plurality further held that, in order to qualify as "adjacent" and be covered by the Act, a wetland must have a "continuous surface connection" to a relatively permanent or continuously flowing water.[10] However, the plurality left open the possibility that certain intermittent streams which flow only seasonally or that might dry up in extraordinary circumstances would meet its definition of "waters of the U.S."[11]

Accordingly, consistent with the plurality's definition of "waters of the U.S.," EPA and the Corps will unquestionably assert jurisdiction over (1) traditional navigable-in-fact waters, (2) non-navigable tributaries (of traditional navigable waters) that are relatively permanent where the tributaries typically flow year-round or have continuous flow at least seasonally (e.g. typically three months)and (3) wetlands that directly abut such tributaries, e.g., that are not separated by uplands, a berm, dike, or other similar feature (referred to by the plurality as a continuous surface connection).

Kennedy's Concurrence and the "Significant Nexus Test"

Justice Kennedy disagreed with the plurality's limited definition of waters of the U.S. because he found that it made "little practical sense in a statute concerned with downstream water quality."[12] Rather, Kennedy agreed with the four dissenting justices that the Corps' regulation of impermanent or intermittent streams was reasonable.[13] Justice Kennedy also rejected the plurality's "surface water connection" requirement as being inconsistent with the Court's prior holding in *United States v. Riverside Bayview Homes*, Inc., which explicitly upheld the Corps' regulation of adjacent wetlands because of their ability to "affect the water quality of adjacent lakes, riversand streams even when the waters of those bodies do not actually inundate the wetlands."[14]

Using Riverside Bayview Homes and *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (SWANCC)[15] as a framework, Kennedy held that "the Corps' jurisdiction over wetlands depends upon the existence of a significant nexus between the wetlands in question and navigable waters in the traditional sense."[16] Justice Kennedy reasoned that a wetlands' importance to and impact on navigable waters (i.e., the "significant nexus" as implied in Riverside Bayview Homes and SWANCC) is the basis for the exercise of CWA jurisdiction.[17] Accordingly, a significant nexus exists "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."[18] Where the wetlands in question are adjacent to navigable-in-fact waters

such wetlands are themselves "waters of the U.S." subject to regulation under the Act.[19] Justice Stevens, in a dissent joined by three other justices also upheld the Court's exercise of CWA jurisdiction over wetlands on the basis of adjacency alone. However according to Kennedy, where the wetlands are adjacent to non-navigable tributaries, the Corps must establish a significant nexus to a navigable-in-fact water on a case-by-case basis.[20] Kennedy also indicated that a "mere hydrologic connection should not suffice in all cases" to establish a significant nexus.

Thus, consistent with Kennedy's concurrence and Stevens' dissent, EPA and the Corps will also unquestionably assert jurisdiction over wetlands adjacent to traditional navigable waters. "Adjacent" is defined in the regulations as "bordering, contiguous, or neighboring." The agencies will not require a continuous surface water connection (as would be required by the plurality) if the wetlands are adjacent to traditional navigable waters.

In accordance with Kennedy's significant nexus test, EPA and the Corps will undergo a case-by-case analysis of the following water bodies to determine if there exists a significant nexus with a traditional navigable water: (1) non-navigable tributaries that are not relatively permanent, (2) wetlands adjacent to non-navigable tributaries that are not relatively permanent and (3) wetlands adjacent to, but that do not directly abut, a relatively permanent non-navigable tributary. In performing the significant nexus analysis, the agencies will assess the flow characteristics and functions of the tributary itself and the functions performed by all wetlands adjacent to the tributary to determine if together they significantly affect the chemical, physical and biological integrity of downstream traditional navigable waters. The significant nexus inquiry requires consideration of both hydrologic and ecologic factors. Hydrologic factors may include (1) volume, duration and frequency of the flow of water, (2) proximity of the tributary to a traditional navigable water, (3) physical characteristics such as the presence of an ordinary high water mark and a channel defined by bed and banks, (4) size of the watershed, (5) average annual rainfall and (6) average annual snow pack, slope and channel dimensions. Ecological factors may include (1) functions performed by the tributary and wetland such as their capacity to carry pollutants or flood waters to traditional navigable waters, (2) capacity to transfer nutrients to support downstream foodwebs, (3) ability to provide habitat to downstream waters and (4) maintenance of downstream water quality.

In addition, as a result of the Rapanos decision, the agencies generally will not assert jurisdiction over swales or erosional features (e.g. gullies, small washes characterized by low volume, infrequent or short duration flow) or ditches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water. However, these types of "water bodies" may still contribute to a hydrologic surface water connection between an adjacent wetland and traditional navigable waters and/or may function as point sources for the discharge of pollutants into navigable waters.

Permanently and Continually Flowing Perennial Stream is Not a De Facto "Waters of the U.S." According to *U.S. v. Robison*

Since the decision came down in June 2006, courts have grappled with how to interpret Rapanos. The 1st and 5th Circuits (and a number of district courts) have followed Justice Stevens' advice and held that CWA jurisdiction will be upheld if either the plurality's or Kennedy's tests are met.[21] The 7th and 9th Circuits, however, have held that Kennedy's significant nexus test is the controlling law.[22] Following suit, on Oct. 24, 2007, almost five months after EPA and the Corps published the Rapanos Guidance, the 11th Circuit also held that Kennedy's significant nexus test provides the holding of Rapanos in *U.S. v. Robison*.[23]

Robison involved pollutant discharges in violation of an existing NPDES permit into a perennial stream with continuous uninterrupted flow into navigable waters.[24] In what appears to be a departure even from the Seventh and Ninth Circuits, the Robison Court held that "a water can be considered 'navigable' under the CWA only if it possesses a 'significant nexus' to [navigable-in-fact] waters" regardless of whether it has permanent and continuous flow into navigable waters.[25] Notably, Robison is the first case to hold that the plurality's test is never applicable.

The Robison opinion appears to hinge on two important factors. First, the court found that it was bound to follow the Supreme Court's "express di-

rection" in *Marks v. United States*[26], that "[w]hen a fragmented [Supreme] Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding . . . may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds."[27] The court focused on the language "who concurred in the judgments" rather than "the holding may be viewed" or "on the narrowest grounds." Rejecting the counting heads approach adopted by the 1st Circuit in *U.S. v. Johnson* and argued by the government on appeal, the Robison court reasoned, "Marks does not direct lower courts interpreting fractured Supreme Court decisions to consider the positions of those who dissented."[28] Rather, the court found that "[i]t would be inconsistent with Marks to allow the dissenting Rapanos Justices to carry the day and impose an "either/or" test, whereby CWA jurisdiction would exist when either Justice Scalia's test or Justice Kennedy's test is satisfied."[29] The "narrowest grounds" has been construed to mean the "less far-reaching" common ground.[30] According to Robison, the narrowest ground, i.e., the least far reaching approach to CWA jurisdiction, is that which provides for the broadest assertion of jurisdiction.[31] The court did recognize that "[t]his case arguably is one in which Justice Scalia's test may actually be more likely to result in CWA jurisdiction than Justice Kennedy's test."[32] However, because "Justice Kennedy's test, at least in wetlands cases such as Rapanos, will classify a water as 'navigable' more frequently than Justice Scalia's test" Robison adopted Justice Kennedy's "significant nexus" test as the governing definition of "navigable waters under Rapanos."[33]

The second factor critical to the court's opinion in Robison was Justice Kennedy's reluctance to rely on a hydrologic connection in order to demonstrate a significant nexus.[34] Accordingly, Robison held that evidence of a continuous uninterrupted flow between the creek at issue and a navigable-in-fact water was insufficient to establish a "significant nexus" where there was no additional evidence about the possible chemical, physical or biological effect on or any actual harm to navigable waters.[35]

Robison is extremely troubling for a number of reasons. Perhaps most importantly for practitioners in the 11th Circuit is the fact that it directly contradicts EPA's and the Corps' Rapanos Guidance under which the agencies will assert jurisdiction if either the plurality's or Kennedy's tests are met. Many of the flaws of the Robison opinion have been highlighted in opinions written by the district court on remand[36] and by the members of the Court who would have granted rehearing.[37] One glaring mistake made by the Robison court was the application of Kennedy's significant nexus outside the context of a wetland. Most notably, as stated by Judge Wilson "the panel's decision cannot be reconciled with Supreme Court and 11th Circuit precedents addressing the proper application of fractured Supreme Court decisions [and] gives no legal effect to a standard under which eight Justices would find CWA jurisdiction."[38]

As recognized by the 1st Circuit in Johnson, Judge Wilson concluded that Marks "is ill-suited as a guide to determining the holding in Rapanos," where neither the plurality's nor Kennedy's concurrence can be characterized as narrower than the other.[39] Rather than being subsets of each other, Judge Wilson found them to be different standards altogether as have most other courts interpreting Rapanos.[40] Disagreeing with the panel's strict interpretation of Marks, Judge Wilson pointed to other Supreme Court and Circuit Court precedents approving the consideration of dissenting opinions in combination with other opinions in order to identify the legal principles that have the support of a majority of the Court.[41] Indeed, the 11th Circuit itself has followed this counting heads approach in interpreting fractured Supreme Court decisions.[42] Such an approach is even more appropriate where the dissenting justices explicitly stated their agreement that waters that meet either the plurality's test or Kennedy's test are within the scope of CWA jurisdiction.[43] Judge Wilson stated that the panel's decision "constitutes a 'precedent-setting error of exceptional importance' apparent in view of the geography of the states in the 11th Circuit and the frequency with which CWA cases are likely to arise in this circuit in the future."[44] Wilson concludes his dissent by highlighting the troubling truth that, by refusing to find categorical CWA jurisdiction over perennial streams, Robison is "a more sweeping interpretation of Rapanos than adopted by any other circuit." As of the date of this article, the deadline for the government to file its petition for certiorari with the Supreme Court has not yet expired. Thus, for now it is necessary to establish a significant nexus for all perennial streams to establish CWA jurisdiction in this circuit. ELS

About the Author

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Endnotes

1. Rapanos v. United States, 547 U.S. 715, 126 S.Ct. 2208 (2006).
2. The Rapanos decision is a consolidation of two cases decided by the U.S. Court of Appeals for the 6th Circuit: United States v. Rapanos and Carabell v. United States Army Corps of Engineers.
3. 126 S.Ct. at 2236.
4. The Rapanos Guidance is limited to the regulatory provisions under Section 404 governing the dredging and filling of jurisdictional waters, including wetlands, at issue in Rapanos and does not apply to other CWA programs which share the definition of "waters of the U.S." such as Section 402 regulating pollutant discharges.
5. Prior to the Rapanos decision, EPA estimated more than fifty (50) percent of streams were subject to de-regulation should the court adopt the petitioners' narrow interpretation of the scope of CWA jurisdiction. However, the agencies now anticipate that many of those endangered streams will satisfy one of the Rapanos standards.
6. See 126 S.Ct. at 2265.
7. 505 F.3d 1208 (11th Cir. 2007).
8. Baccarat Fremont Developers, LLC v. U.S. Army Corps of Engineers, 425 F.3d 1150 (9th Cir. 2005), cert. denied, 127 S.Ct. 1258 (2007); United States v. Morrison, 178 Fed.Appx. 481 (6th Cir. 2006), cert. denied, 127 S.Ct. 1485 (2007).
9. 547 U.S. at 739, Id. at 2225.
10. *Id*. at 2226.
11. *Id*. at 2221, n5.
12. *Id*. at 2242.
13. *Id*. at 2243.
14. 474 U.S. 121, 134-35,106 S.Ct. 455 (1985).
15. Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, 531 U.S. 159 (2001).
16. 126 S.Ct. at 2248.
17. *Id*.
18. *Id*.
19. *Id*.
20. *Id*. at 2249.
21. U.S. v. Johnson, 467 F.3d 56 (1st Cir. 2006); U.S. v. Lucas, 516 F.3d 316 (5th Cir. 2008); see also U.S. v. Cundiff, 480 F.Supp. 2d 940 (W.D. Ky. 2007); Simsbury-Avon Preservation Soc., LLC v. Metacon Gun Club, Inc., 472 F.Supp. 2d 219 (D. Conn. 2007); U.S. v. Evans, 2006 WL 2221629 (M.D. Fla. 2006); U.S. v. Lippold, 2007 WL 3232483 (C.D. Ill. 2007) (stating that court is bound by 7th Circuit to employ significant test but actually used a counting heads approach in addressing the merits of the case); U.S. v. Fabian, 522 F.Supp. 2d 1078 (N.D. Ind. 2007)(same); U.S. v. Bailey, 516 F. Supp. 2d 998 (D. Minn. 2007).
22. U.S. v. Gerke Excavating, Inc., 464 F.3d 723 (7th Cir. 2006); Northern California River Watch v. City of Healdsburg, 496 F.3d 993 (9th Cir. 2007); U.S. v. Moses, 496 F.3d 984 (9th Cir. 2007); see also Environmental Protection Information Center v. Pacific Lumber, 469 F.Supp.2d 803 (N.D. Cal. 2007) ("Although there is some argument that the plurality and concurring opinions provide two alternative standards for CWA jurisdiction, the 9th Circuit's interpretation of Rapanos is binding on this Court.").
23. 505 F.3d 1208, 1220-22 (11th Cir. 2007).
24. *Id*. at 1211-12.
25. *Id*. at 1222.
26. 430 U.S. 188, 97 S.Ct. 990 (1977).
27. 505 F.3d at 1221 (emphasis added).
28. *Id*.
29. *Id*.
30. *Id*., citing Johnson v. Bd. of Regents, 263 F.3d 1234, 1247 (11th Cir. 2001).
31. *Id*.
32. *Id*. at 1223.
33. *Id*. at 1222.
34. *Id*. at 1218.
35. *Id*. at 1223.
36. U.S. v. Robison, 521 F.Supp.2d 1247 (N.D. Ala. 2007).
37. U.S. v. Robison, 521 F.3d 1319 (11th Cir. 2008) (Wilson and Barkett dissenting).
38. 521 F.3d at 1320.
39. *Id*. at 1322-24.
40. *Id*. at 1325.
41. *Id*.
42. *Id*. at 1326.
43. *Id*.
44. *Id*. at 1327.

EPA Proposes Revisions to the National Ambient Air Quality Standard for Lead

By Russell S. Kemp, P.E.

On May 1, the EPA released a Notice of Proposed Rulemaking (NPR) revising the National Ambient Air Quality Standard (NAAQS) for lead (Pb) for the first time since the initial establishment of the current Pb NAAQS in the late 1970s. The formal publication of the NPR in the Federal Register occurred on May 20, 2008. See 73 Fed. Reg. 29184 (May 20, 1998). The proposed standard dramatically lowers the current Pb NAAQS of 1.5 micrograms per cubic meter (ug/m3) on a calendar quarter average, as the EPA is proposing to set the revised NAAQS somewhere within the range of 0.1 and 0.3 ug/m3 on either a maximum calendar quarter basis or as the second highest monthly average over a three-year period. This is a substantial tightening of the standard that will likely have significant consequences beyond the lead smelting and lead-acid battery manufacturing industries that have historically been challenged to comply with the current Pb NAAQS.

The public comment period on this NPR runs until July 21, 2008. The EPA is under a court-ordered deadline to issue the final rule no later than Sept. 15, 2008. Of note, while the NPR offers a range for the level of the NAAQS of between 0.1 and 0.3 ug/m^3, the Clean Air Science Advisory Council (CASAC) panel involved with this rulemaking has stated its position that the Pb NAAQS should be set at a level no higher than 0.2 ug/m^3. Additional information about this NPR, including a fact sheet and slides from an EPA briefing, can be downloaded from www.epa.gov/air/lead/actions.html.

The implementation of a Pb NAAQS is somewhat unique in that when an ambient monitor measures a noncompliant value it is almost always known to be the result of emissions from a readily identifiable and single lead-emitting industrial facility. This is in stark contrast to implementing NAAQS for ozone and particulate matter for which non attainment is usually the result of the aggregation of impacts from a host of sources, both stationary and mobile. State Implementation Plans (SIPs) for lead have been focused directly on establishing control measures and emission limits for particular facilities on an individual basis. To date, with the current NAAQS of 1.5 ug/m^3, these Pb SIPs have been almost exclusively directed at lead smelters and lead-acid battery manufacturing facilities.

With the proposed lowering of the Pb NAAQS to levels approximately an order of magnitude below the current standard, the universe of potentially impacted facilities expands dramatically. It is still expected, however, that addressing non-attainment at a particular monitor location will remain an exercise in controlling emissions from individual and readily identifiable sources. However, with these greatly reduced target levels, facilities in other industries will now have the potential to emit sufficient lead to encounter compliance difficulties. Additional industries most likely affected include steel mills, foundries, and copper and other nonferrous smelters, including aluminum.

EPA clearly recognizes the localized nature of ambient lead impacts and the NPR includes requirements for states to expand their ambient monitoring networks to encompass the areas with the potential to be most impacted by point source lead emissions. It is this aspect of the proposal that has the potential to affect the most facilities, even those with a reasonable likelihood of attaining the new NAAQS. States will be required to install ambient lead monitors at the point of expected maximum impact from all sources of lead higher than certain thresholds which will be established depending upon the level at which EPA sets the NAAQS. This threshold will be 0.22 tons/year to 0.66 tons/year of lead emissions if the Pb NAAQS is set at 0.1 ug/m^3 to 0.3 ug/m^3, respectively.

States can seek to exempt from this source-oriented ambient monitoring any facility with lead emissions less than 1 ton/year if it can be demonstrated via dispersion modeling that the maximum off-site impact from the facility would be less than one-half of the

NAAQS level. Facilities emitting more than 1 ton/year of lead cannot be exempted and will have an ambient monitor installed nearby.

This NPR has the potential to affect a wide range of industrial facilities in the Southeast. Any facility emitting lead above these relatively low thresholds will, at a minimum, likely have to be involved with the state in either establishing appropriate monitor locations or conducting modeling to seek an exemption from the monitoring – even if neighboring impacts are expected to comply with the new NAAQS. Obviously, facilities whose emissions are expected to result in impacts above the new NAAQS level are facing the potential for capital expenditures for additional emission controls.

So, how many facilities is this? EPA released tabulations of lead emitting facilities from its National Emission Inventory (NEI) for 2002 along with the proposed rule. It is recognized that the NEI contains data of sometimes questionable quality, and states and facilities are not bound to use that data for making determinations against the monitoring threshold, but the data do provide a starting point for evaluating the potential impact of this rule. At present, only one industrial facility has source-oriented lead monitoring in Georgia. Based upon the NEI data, if the NAAQS is set at the 0.2 ug/m^3 recommended by the CASAC lead panel, six industrial facilities and two airports would be targeted for ambient monitoring in Georgia. If the final standard is set at 0.1 ug/m^3, 15 facilities in Georgia would require source-oriented ambient monitoring. A large number of facilities in states bordering Georgia would also require monitoring. With a standard set at 0.2 ug/m^3, 40 industrial facilities in Georgia and bordering states will require ambient lead monitors and the number jumps to 90 facilities if EPA sets the final Pb NAAQS at the 0.1 ug/m^3 level. The industries represented in this tally include the above mentioned lead industry facilities, steel mills, foundries, and nonferrous smelters along with facilities in the glass, cement, paper, and chemical industries, as well as coal-fired utilities and large coal-fired industrial boilers.

This Rulemaking is now on a relatively fast track. Following publication of the final rule by Sept. 15, 2008, states will be required to submit their ambient monitoring plans by July 1, 2009 and begin operation of at least half of any additional monitors required by Jan. 1, 2010. Of course, a number of ambient lead monitors are already in operation. The timeline presented in the proposal for attainment designations, SIP development, and attainment deadlines is as follows:

State Designation Recommendations
No later than Sept. 2009

Monitoring Network
Operational by Jan. 1, 2010

Final Designations Signature
No later than Sept. 2011

Attainment Demonstration SIPs due
No later than Spring 2013

Attainment Date
No later than Fall 2016

It is important to note that states can always proceed faster than this schedule and that attainment of the standard requires three full years of monitoring in compliance. Thus, meeting an attainment date in 2016 would require compliance for a full three-year period beginning in 2013.

This revised standard will represent significant challenges for some metals industry facilities and at least an administrative burden for a number of facilities in other industries. ELS

About the Author

Russell Kemp is a principal in the Atlanta office of ENVIRON International Corporation with over 20 years of experience consulting on air issues for industrial clients. Over that period he has worked for every company currently operating a lead smelter in the United States and has also worked for steel mini-mills, lead-acid battery plants, and lead oxide manufacturing facilities on lead issues. He is currently retained by the Association of Battery Recyclers to consult on technical issues regarding this NAAQS rulemaking. Kemp can be reached at 678-388-1654 or rkemp@environcorp.com.

Ethics Update: Ex parte Contacts with Former Employees

By Julie Lemmer, Esq.

Every good lawyer knows that she may not contact an employee of an opposing party without the consent of that party's lawyer. See Georgia Rules of Professional Conduct Rule 4.2. The maximum penalty for violating Rule 4.2 is disbarment. But may a lawyer contact a *former* employee of an opposing party? The answer is, of course, different in each state.

In 1994, the Georgia Supreme Court issued Formal Advisory Opinion No. 94-3, advising that: "A lawyer may properly contact and interview former employees of an organization that is represented by counsel to obtain non-privileged information relevant to litigation against the organization provided that: (1) the lawyer makes full disclosures as to the identity of his/her client; and (2) the former employee consents." According to the court, a former employee is treated differently from a current employee because a current employee's statements may be binding on the employer while a former employee's statements are not.

A key decision in 1998 addressed whether an attorney may contact the former employee of an adverse organization outside of the presence of that organization's attorney. *Sanifill of Georgia, Inc. v. Roberts*, 502 S.E.2d 343 (Ga. Ct. App. 1998). Plaintiff sued a sanitation company for the negligence of its employee in driving a sanitation truck. The driver had since left the company, but plaintiff's attorney managed to find him, fly him to Atlanta, interview him and take his written statement. Defendant's attorneys sought to prevent the introduction of the driver's statements because plaintiff's attorney had not obtained their consent to the interview. The court adopted the Supreme Court of Georiga's advisory opinion and held that when an attorney makes full disclosure to the former employee and gets his consent, the attorney may properly interview the former employee.

Since that time, only a handful of cases have addressed the issue. Each case treating the issue of *ex parte* contacts with former employees of an opposing party gives only cursory analysis, treating the issue as settled law. See *Nix v. Cox Enterprises, Inc.*, 545 S.E.2d 319, 322 (2001) ("[T]he courts have held [Rule 4.2] does not apply to former employees who are not represented by the employer's counsel"), rev'd on other grounds, 560 S.E.2d 650 (2002); *Alternative Health Care Systems, Inc. v. McCown*, 514 S.E.2d 691, 361 (Ga. Ct. App. 1999) (holding that "a lawyer may properly contact and interview former employees of an organization that is represented by counsel to obtain nonprivileged information relevant to litigation against the organization provided, if the lawyer discloses the identity of his or her client and the former employee consents").

Thus, a lawyer in Georgia may contact and interview former employees of an opposing party with confidence that she is not violating the rules of ethics so long as: (1) the lawyer does not ask for privileged information relevant to litigation against employee's former employer, (2) the former employee is not represented by counsel and consents to the interview, and (3) the lawyer makes full disclosure regarding the identity of her client, the reason for the contact, and the purpose of the interview. ELS

About the Author

Julie Lemmer is an associate in the Environmental and Land Use Group at Alston & Bird in Atlanta. In 2007, Lemmer received her J.D., magna cum laude, from the Florida State University College of Law where she served as articles editor for the Florida State University Law Review and was elected to the Order of the Coif. Lemmer received her B.A., *cum laude*, from Kenyon College.

Message from the Chair

By Martin A. Shelton, Esq.

Can you believe that 2008 is already halfway over? The Environmental Law Section is off to a great year with many other exciting events planned for the second half of 2008. We started the year with our Second Annual Kick-Off Luncheon in February at King & Spalding's new offices in midtown. The meeting featured Georgia Environmental Protection Division's Director Carol Couch providing the section with her thoughts on the water supply issues facing the state. In April, EPA Region IV hosted a lunchtime CLE on the new *Rapanos* guidance as a substitute for our first brown bag lunch seminar of the year. And, just a couple of weeks ago, we had our second brown bag of the year at the State Bar featuring real estate developer Rick Porter who discussed potential storm water policy modifications to facilitate development utilizing existing water features to control storm water. All of these events were well-attended and we thank all of our speakers and organizers for helping to make each event a success.

Our next planned event is the Annual Summer Seminar which will take place at the Crown Plaza Resort in Hilton Head, S.C. on Aug.1 and 2. Your board has worked hard as always to present a diverse and hopefully exciting slate of panels for this year including, presentations from U.S. EPA personnel on proposed new climate change rules and Federal Administrative Procedures in U.S. EPA's Administrative Courts as well as panels on Georgia's new water plan and how zoning and local land use controls impact environmental regulation. With the attention of environmentalists, companies and regulators throughout the world turning to issues such as sustainability and climate change, we have geared much of the agenda this year towards those topics. We are still looking for sponsors for the event. If you know of anyone that is interested, please contact board member Adam Sowatzka at King & Spalding. We are looking forward to another successful summer seminar and I encourage all of you to attend.

In addition to the above, we already have many other exciting events in the planning stages. Additional brown bag lunch seminars are planned for mid-September and December, including one featuring ENVRION's Russell Kemp on EPA's new proposed revisions to the lead (Pb) National Ambient Air Quality Standard (NAAQS). We will finalize the details of these shortly. Further, it is my pleasure to announce the ELS's first annual charity event to be held in mid - late October to benefit worthy environmental causes. Although the details are under wraps until planning is finalized, we anticipate a fun event and I look forward to telling you more in the next newsletter. Also, the board also has decided to present the first annual award for excellence in the practice of environmental law or service of the environment at this event. The nominations for this award will go out to the section before the summer seminar along with the criteria for nominating potential recipients.

The ELS is also sponsoring a student writing competition. The competition is part of the section's outreach to law school students headed up by Member-at-Large Brandon Bowen. Like the all sections of the State Bar, we encourage law school student participation in the ELS and all of its events throughout the year.

Finally, I want to recognize our new officers for 2008, Treasurer Susan Hanson from USEPA Region IV and Member-at-Large Brandon Bowen from Jenkins & Olson in Cartersville. They join continuing board members Secretary Adam Sowatzka of King & Spalding and Chair-Elect Bill Sapp of the Southern Environmental Law Center. I look forward to seeing many of you at ELS events this year. Please let us know if you have any questions or suggestions regarding this year's programs. We appreciate your participation in the section. ELS

FRIDAY–SATURDAY • AUGUST 1-2, 2008

Environmental Law Summer Seminar

8 CLE Hours including
1 Ethics Hour • 1 Professionalism Hour
3 Trial Practice Hours

Co-Sponsored by:
Environmental Law Section, State Bar of Georgia

CROWNE PLAZA HILTON HEAD ISLAND BEACH RESORT

130 SHIPYARD DRIVE HILTON HEAD ISLAND, SC

ADDITIONAL HOUSING

Please contact the hotel directly by calling (843) 842-2400 or (800) 334-1881 for lodging. The hotel cut-off date for room reservations in the reduced rate block of rooms is Tuesday, June 30, 2008. Please refer to "ICLE" when making your reservation

THREE WAYS TO REGISTER: check the ICLE schedule on the web at www.iclega.org

Mail: ICLE • P.O. Box 1885 • Athens, GA 30603-1885 **(make check payable to ICLE)**

Fax: 706-354-4190 (credit card payment must accompany fax to be processed)

Online: iclega.org (credit card payment only)

Duplicate registrations may result in multiple charges to your account. A $15 administrative fee will apply to refunds required because of duplicate registrations.

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Questions? Call ICLE Atlanta Area: 770-466-0886 • Athens Area: 706–369–5664 • Toll Free: 1–800–422–0893

ENVIRONMENTAL LAW SUMMER SEMINAR • August 1-2, 2008 • 6847

EARLY REGISTRATION:	**$325**
ON-SITE REGISTRATION:	**$345**

❑ A guest/spouse will accompany me. Guest's/spouse's name: ________________

❑ I am unable to attend. Please send program materials and bill me . (BOOK AND PRICE UNAVAILABLE UNTIL AFTER SEMINAR.)

NAME ________________________________ GEORGIA BAR # ____________

FIRM/COMPANY________________________ OFFICE PHONE ____________

EMAIL ____

(for registration confirmation and email notification of seminars, no postcard or brochures will be sent)

MAILING ADDRESS _____________________________ ZIP + 4 ____________

STREET ADDRESS _____________________________ ZIP + 4 ____________

CITY ____ STATE ____________

❑ **I am sight impaired under the ADA, and I will contact ICLE immediately to make arrangements.**

❑ I have enclosed a check for the early registration fee received 48 hours before the seminar.

❑ I authorize ICLE to charge the early registration fee to my
❑ MASTERCARD ❑ VISA ❑ AMERICAN EXPRESS* ❑ DISCOVER

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Expiration Date: Signature:

AGENDA

Presiding: ***Martin A. Shelton***, Program Chair; Chair, Environmental Law Section, State Bar of Georgia; Schulten, Ward & Turner, LLP, Atlanta

FRIDAY, AUGUST 1, 2008

7:15 **REGISTRATION AND BREAKFAST** (All attendees must check in upon arrival. A jacket or sweater is recommended.)

8:00 **INTRODUCTION AND PROGRAM OVERVIEW**
Martin A. Shelton

8:15 **ENFORCEMENT TRENDS AND RECENT DEVELOPMENTS**
Mary J. Wilkes, Regional Counsel, USEPA, Region IV, Atlanta

9:15 **GLOBAL WARMING AND THE RISE OF CLIMATE CHANGE REGULATION**
Elizabeth E. O'Sullivan, USEPA, Region IV, Atlanta
J. David Dunagan, Georgia Environmental Facilities Authority, Atlanta
Natalie Ellington, USEPA, Region IV, Atlanta

10:15 **BREAK**

10:30 **RESURRECTION OF CERCLA CONTRIBUTION (ATLANTIC RESEARCH) AND OTHER INTERESTING STUFF**
Michael R. Stephenson, USEPA, Region IV, Atlanta
James A. Langlais, Alston & Bird LLP, Atlanta

11:30 **PRACTICE TIPS ON FEDERAL AND STATE ADMINISTRATIVE LAW**
Susan Biro, Chief Administrative Law Judge, USEPA, Washington, DC
Deborah Benjamin, USEPA, Region IV, Atlanta
Les A. Oakes, King & Spalding LLP, Atlanta

12:30 **RECESS**

6:00 **RECEPTION**

SATURDAY, AUGUST 2, 2008

7:15 **BREAKFAST**

8:00 **WELCOME FROM THE CHAIR-ELECT**
William W. Sapp, Southern Environmental Law Center, Atlanta

8:15 **SHOPPING WHILE HUNGRY: GEORGIA'S WATER PLAN**
Panelists:
James E. Kundell, Ph.D., University of Georgia Carl Vinson Institute of Government, Athens
Gilbert B. Rogers, Southern Environmental Law Center, Atlanta
Adam G. Sowatzka, King & Spalding LLP, Atlanta

9:15 **HOW CLIMATE CHANGE IS CHANGING THE PRACTICE OF ENVIRONMENTAL LAW**
David M. Meezan, Alston & Bird LLP, Atlanta
David M. Moore, Troutman Sanders LLP, Atlanta
Additional Speaker TBA

10:15 **BREAK**

10:30 **ENVIRONMENTAL REGULATION THROUGH ZONING AND OTHER LOCAL LAND USE CONTROLS**
Frank E. Jenkins, III, Jenkins & Olson, P.C., Cartersville
Jamie Baker Roskie, Land Use Clinic, University of Georgia School of Law, Athens

11:30 **SO YOU WANT SOME ETHICS, DO YOU?**
Allison Burdette, Goizueta Business School, Emory University, Atlanta

12:30 **ADJOURN**

CANCELLATION POLICY

Cancellations reaching ICLE by 5:00 p.m. the day before the seminar date will receive a registration fee refund less a $15.00 administrative fee. Otherwise, the registrant will be considered a "no show" and will not receive a registration fee refund. Program materials will be shipped after the program to every "no show." Designated substitutes may take the place of registrants unable to attend.

SEMINAR REGISTRATION POLICY

Early registrations must be received 48 hours before the seminar. ICLE will accept on-site registrations as space allows. However, potential attendees should call ICLE the day before the seminar to verify that space is available. All attendees must check in upon arrival and are requested to wear nametags at all times during the seminar. ICLE makes every effort to have enough program materials at the seminar for all attendees. When demand is high, program materials must be shipped to some attendees.

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We're going electronic!

This will be the last printed version of the Environmental Law Section Newsletter. All future copies will be e-mailed in PDF format.

Please contact the Bar to ensure your e-mail address on file is correct.

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