Water Law Case Studies

Navigability

1) Navigability - What’s the big deal?
- Confers Clean Water Act (CWA) protections
- EPA administers the CWA
- Stems from early Interstate Commerce needs
- UA Army Corps of Engineers (USACE) administers CWA dredge and fill (404a) permits

The Upper Santa Cruz River

Effluent-dominated reaches
A. Tubac-Continental Rd
B. Roger Rd-Pinal Co Line

Meltzer: Santa Cruz ruled "navigable" AZ Daily Star, Fri. 12/5/08
- 12/3/08 - EPA Asst. Adm. of Water Benjamin Grumbles rules portions of Santa Cruz “navigable”
- Based on:
  - Width and depth of recorded flows
  - Presence of activities like canoeing and birding
  - Potential for more water due to on-going restoration
  - Susceptible to future navigation; has been navig. in past
- Environmentalists – new guidelines still confusing
- Rep Raul Grijalva – part of Bush admin. business agenda – a “last ditch” effort
- Opposed by SAHBA and Pima Co (initially)

Questions for Discussion - Navigability
- What was original intent?
  - What is the relevance of navigability? What kinds of navigation?
  - What is the relevance of interstate vs. intrastate commerce?
  - What is commercial? recreation; tourism; small business?
  - What is sig. of past, current or potential future navigability?
- How much water; What constitutes a signif. connection to a nav. river?
- If flow is not perennial, how much water for how long?
- How much is too much – what should be excluded?
  - Ag (why); Private property? Roadside ditches?
- Why can’t we easily revise the CWA to be more precise?

Early Cases
- The Montello, 87 U.S. 430, 441-42 (1874). In that case, the Court held that early fur trading using canoes sufficiently showed that the Fox River was a navigable water of the United States. The Court was careful to note that the bare fact of a water’s capacity for navigation alone is not sufficient; that capacity must be indicative of the water’s being “generally and commonly useful to some purpose of trade or agriculture.”
- U.S. v. Appalachian Elec. Power Co., 311 U.S. 377, 416 (1940) (“... 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.”
The Clean Water Act - 1972

- Sec. 303 Threatened and Impaired Waters List - "Pollutants"
  - Total Maximum Daily Load (TMDL) calculations
- Sec. 401 Water quality certification - Requires federal agencies to obtain certification from the state, territory, or Indian tribes before issuing permits that could result in increased pollutant loads to a water body. The certification is issued only if such increased loads would not cause or contribute to exceedances of water quality standards.
- Sec. 404: Regulates the discharge of dredged or fill materials into wetlands and other Waters of the United States. Wetlands are those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil as evidence by hydrology, ecology and soils.
- Sec. 402: National Pollutant Discharge Elimination System (NPDES) program, Covers point sources of pollutants discharging into a surface water body
- Sec. 319: Addresses nonpoint sources of pollution, such as most farming and forestry operations

Broader issues

Congress passed the CWA for the stated purpose of ‘restoring and maintaining the chemical, physical, and biological integrity of the Nation’s waters’

- How do you protect the headwaters and ephemeral streams ... to preserve downstream water quality?
- To what extent should we include:
  - wetlands; upland ephemeral streams; recreational waters; tributary waters; waters home to migrating birds?

Legal Cases

- CWA: navigable waters = waters of the US
  - traditional navigable waters include waters which, although used, susceptible to use, or historically used, to transport goods or people in commerce, do not form part of a continuous waterborne highway
  - abandoned sand and gravel pit; Limits applicability for isolated waters that are both intrastate and non-navigable and home to migratory bird
  - four Michigan wetlands lying near ditches or man-made drains that eventually empty into traditional navigable waters. Rapanos had backfilled three of the areas without a permit. SC held that Navigable Waters does not include channels through which water flows intermittently or ephemeral, or channels that periodically provide drainage for rainfall
Clean Water Act Guidance following the U.S. Supreme Court’s Decision in Rapanos v. U.S & Carabell v. U.S

### Summary of Key Points

The agencies will assert jurisdiction over the following waters:
- Traditional navigable waters
- Wetlands adjacent to traditional navigable waters
- Non-navigable tributaries of traditional navigable waters that are relatively permanent
- Wetlands that are subject to the flow of traditional navigable waters

The agencies will decide jurisdiction over the following waters based on a fact-specific analysis to determine whether they have a significant nexus with a traditionally navigable water:
- Non-navigable tributaries that are not relatively permanent
- Wetlands adjacent to non-navigable tributaries that are not relatively permanent
- Wetlands that are subject to the flow of non-navigable tributaries

### Rapano’s 2008 Guidance, 12/2

The agencies will assert jurisdiction over the following waters:
- Traditional navigable waters
- Wetlands adjacent to traditional navigable waters
- Non-navigable tributaries of traditional navigable waters that are relatively permanent (i.e., the tributaries typically flow year-round or have continuous flow at least seasonally)
- Wetlands that are subject to the flow of traditional navigable waters

The agencies will decide jurisdiction over the following waters based on a fact-specific analysis to determine whether they have a significant nexus with a traditionally navigable water:
- Non-navigable tributaries that do not typically flow year-round or have continuous flow at least seasonally
- Tributary Wetlands
- Wetlands adjacent to relatively permanent non-navigable tributary

The agencies will apply the significant nexus evaluation as follows:
- A significant nexus analysis 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 in combination they significantly affect the chemical, physical and biological integrity of downstream traditional navigable waters
- Significant nexus includes consideration of hydrologic and ecologic factors.

### Davis: Report: Army official ignored Santa Cruz data, AZ Daily Star, 12/17/08

- June 2006: The U.S. Supreme Court limits the scope of Clean Water Act protection for isolated rivers, streams and wetlands. Justice Kennedy writes that they must have a significant connection to “a navigable waterway in the traditional sense,” to be legally entitled to federal protection.
- May 2008: The USEC decides that 54 miles of the Santa Cruz River north and south of Tucson deserve classification as a navigable waterway, and, thus, regulation under the Clean Water Act.
- August 2008: The Corps suspends the river’s navigable determination for at least 60 days as part of a broader, national review of navigability.
- August 2008: Two U.S. House committee chairmen vote to investigate the Corps’ handling of the Santa Cruz decision, at the request of Rep. Raúl Grijalva of Tucson.
- August 2008: The Board of Supervisors supports navigability for a much longer stretch of the Santa Cruz, from the Mexican border to the Pinal County line. The Environmental Protection Agency moves to take over handling of the navigability issue.
- November 2008: House report – USEC decision based “a sweet whisper in the ear” or the perception that the SC was “pretty dry” despite staff’s “scientific analysis.” “This report details unethical actions taken by political appointees within the Army Corps. The Bush Administration has once again revealed its tendency to subvert science and transparent decision-making within federal agencies for the benefit of a few private interests.” Raul Grijalva.

### State of AZ vs. (ANSAC) AZ Navigable Stream Adjudication Commission (2010)

- This appeal involves the long-standing battle to determine who owns the beds of rivers within the State of Arizona, specifically bedlands of the Lower Salt River, which runs from Granite Reef Dam above Phoenix through the highly populated Salt River Valley to the confluence with the Gila River. The crucial question to be resolved is whether the River was navigable in its ordinary and natural condition.
- If it was navigable, title to the bedlands passed to the State from the federal government at statehood on February 14, 1912, and the State retains title to those bedlands.
- If the River was not navigable, the neighboring riparian owners hold title
- The commission has ruled that only the Colorado River in Arizona is navigable.
- The court held in favor of the State, agreeing that the Navigability rule was misapplied.

### Timeline

- 1985 – State assert title to bedlands
- 1987 – Leg. passes HB2017 relinquishing all rights; grandfathering existing rightholders; public retain recreational use
- 1992 – Leg. establishes ANSAC
- 1993 – ANSAC classifies Lower Salt as navigable
- 1994 – Leg. requires ANSAC to apply more stringent rules; Taken to court by Defenders of Wildlife
- 2004 – ANSAC rules Lower Salt not navigable at statehood; Taken to court by State Land Dept.
- 2010 – AZ Ct. of Appeals rules pre-statehood flows must be considered.