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Almost Infamous—Another Circuit Tries to Determine Scope of Clean Water Jurisdiction After *Rapanos*[*]

By Jessica Ferrell[**]

In the three years that have passed since the United States Supreme Court's now infamous *Rapanos* decision on the scope of Clean Water Act (CWA) jurisdiction, the case has been cited, interpreted and applied over 90 times by federal district, appellate and claims courts. Nine of the United States' courts of appeal have weighed in on the decision, taking various, often inconsistent, positions. The Supreme Court has denied at least eight petitions for writs of certiorari seeking to clarify its decision. The U.S. Army Corps of Engineers (the "Corps") and the Environmental Protection Agency (EPA) jointly issued guidance which is unclear itself, and the U.S. Congress is again considering—for the fourth time in six years—legislation to clarify the situation.[1]

Now comes the Eighth Circuit, which, in *U.S. v. Bailey,* 571 F.3d 791 (8th Cir. 2009), joined the First Circuit in holding that the United States has jurisdiction over wetlands if the site at issue either: (a) has "a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between 'waters' and wetlands"; or (b) has "a significant nexus to waters that are or were navigable in fact or that could reasonably be so made" so that, "either alone or in combination with similarly situated lands in the region," the site "significantly affect[s] the chemical, physical, and biological integrity of the covered waters more readily understood as 'navigable.' "

Background

The CWA

The CWA prohibits the unpermitted discharge of pollutants into "navigable waters" from any point source.[2] The CWA defines "navigable waters" to mean "waters of the United States."[3] The CWA § 404 permitting regime is jointly administered by the Corps and EPA.[4] The Corps has interpreted "waters of the United States" to include adjacent wetlands and tributaries.[5] Corps regulations also extend the definition of "waters of the United States," and hence Corps jurisdiction, to "[a]ll other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes or natural ponds, … [t]ributaries of [such] waters," and "[w]etlands adjacent to [such] waters [and tributaries]"—even if these adjacent wetlands are separated from U.S. waters by man-made structures.[6]

Rapanos and its Aftermath

In 2006, the Supreme Court addressed the scope of CWA jurisdictional issue in *Rapanos v. United States.*[7] By a 4:4:1 plurality, the Court remanded to the Sixth Circuit the issue of whether the Corps exceeded its statutory authority under the CWA by requiring property owners to acquire permits before dredging and filling certain wetlands. In *Rapanos*, the Court advanced conflicting tests for determining whether wetlands are

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IN THIS ISSUE:

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protected by federal law. For example, writing for a plurality, Justice Scalia advanced a two prong test for determining whether wetlands are covered by the CWA. The plurality test requires a finding that: 1) "the adjacent channel contains a 'water of the United States;' " and 2) "the wetland has a continuous surface connection with that water, making it difficult to determine where the 'water' ends and the 'wetland' begins."[8]

Justice Kennedy rejected the plurality's interpretation of "waters of the United States," and advanced a test that would require the United States to establish a significant nexus between wetlands and navigable waters on a case-by-case basis. Under Justice Kennedy's "significant nexus" test, "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.' When, in contrast, wetlands' effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term 'navigable waters.' "[9]

The Facts in *Bailey*

In *Bailey*, the Eighth Circuit addressed the legal consequences of the construction of a logging access road in Minnesota. In 1993, the Corps advised Gary Bailey, defendant and counterclaimant in *Bailey*, that the site that he planned to develop contained wetlands, and that he would therefore require a § 404 permit to build on it. In 1998, Bailey commenced construction of the road without a permit. He stopped when instructed to by local soil and water district officials. A Corps official subsequently told Bailey that he could not continue construction until obtaining a § 404 permit, and that he would be subject to enforcement if he did not heed the warning.

Later in 1998, Bailey filed a Local-State-Federal Project Notification Form with Lake of the Woods County (the "notification") in which he proposed building the road. Without waiting for a decision on his application, Bailey continued construction. The Corps treated Bailey's notification as an after-the-fact application for a § 404 permit. After Bailey had nearly finished building the road, the Corps notified him that the work violated § 404, that no further work could be done, and that, if he continued construction and the Corps denied his application, the Corps would require him to restore the land to its previous condition. Regardless, Bailey completed construction later in 1998.

In 2001, the Corps denied Bailey's § 404 permit application and ordered him to restore the property at his own expense.[10] Bailey refused, and the United States brought an enforcement action under § 309(b) of the CWA to enforce the restoration order and to enjoin Bailey from discharging further pollutants into the wetland. Bailey counterclaimed against the United States, alleging that the Corps did not have jurisdiction over the parcel and that its restoration order was arbitrary and capricious. Bailey also filed a third-party complaint against the County, alleging that it should pay to restore the land. All parties moved for summary judgment.

The district court granted the United States' motion in part; dismissed Bailey's counterclaim against the United States and his third-party complaint against the County; and issued a final injunction, ordering Bailey to restore the wetland to its previolation condition.[11] Bailey appealed to the Eighth Circuit, raising the following arguments: (1) that the district court erred in applying Justice Kennedy's concurring opinion in *Rapanos* to determine whether the Corps had jurisdiction and that, even if Justice Kennedy's opinion controls, the Corps failed to show that the wetland has a significant nexus to or is adjacent to the Lake of the Woods (the lake); (2) that the Corps' denial of Bailey's after-the-fact permit and its restoration order were arbitrary and capricious; and (3) that the district court abused its discretion when it approved the restoration plan.

The Eighth Circuit's Opinion in *Bailey*

To decide how to apply *Rapanos*, the court first considered the so-called "narrowest-grounds-rule" established by the Supreme Court in *Marks v. United States*.[12] Under that rule, "[w]hen a majority of the Supreme Court agrees only on the outcome of a case and not on the grounds for that outcome, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.' "[13] Of the circuit courts that have interpreted *Rapanos*, most have concluded that Judge Kennedy's concurring opinion constitutes the narrowest holding.[14] The First Circuit, however, concluded that the narrowest-grounds-rule cannot be applied to *Rapanos*. The *Bailey* court agreed, as it was unable to identify

the narrowest holding due to the lack of overlap between the plurality's and Justice Kennedy's opinions. The *Bailey* court therefore joined the First Circuit in following the dissent's instruction to find jurisdiction over wetlands if either the plurality's test *or* Justice Kennedy's test is met.[15]

Justice Kennedy's opinion, which is broader than the plurality's, "holds that when a wetland is adjacent to the navigable-in-fact waters, then a significant nexus exists as a matter of law."[16] Applying that test to the facts in *Bailey*, the Eighth Circuit affirmed the district court, which determined that Bailey built the road on a wetland adjacent to the lake, which is undisputably a navigable-in-fact water. The court found that the Corps presented evidence that the site extends to the edge of the lake, and therefore borders or is contiguous to the lake under the CWA. In reaching that conclusion, the court applied the Corps' regulatory definition of wetlands, which provides that wetlands include "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 conditions."[17] The court was swayed by the fact that Bailey did not rebut the Corps' evidence, and did not offer any expert opinion on the hydrological characteristics of the site.

The *Bailey* court also upheld the Corps' restoration order. Bailey did not challenge the order's substance, but instead argued that it was "arbitrary and capricious because the Corps should have approved his permit application and allowed him to mitigate the damage, rather than denying his permit application and ordering him to restore the site."[18] Bailey framed that argument as a constitutional equal protection violation, which the court rejected.

Finally, the court upheld the injunction, which it reviewed for abuse of discretion. The CWA authorizes district courts to issue injunctive relief for violations of CWA § 1311(a). The district court assessed the propriety of the permanent injunction and restoration order under the standard set forth in *United States v. Sexton Cove Estates, Inc*. Under that opinion, a restoration plan must: "(1) be designed to confer maximum environmental benefits tempered with a touch of equity; (2) be practical and feasible from an environmental and engineering standpoint; (3) take into consideration the financial resources of defendants; and (4) include consideration of defendants' objections." Both courts found that the plan met all elements.

Ultimately the appellate court held that the district court: (1) properly found that the Corps had jurisdiction because the wetland formerly underlying the road was adjacent to a lake; and (2) did not abuse its discretion in its evidentiary rulings or its order enjoining Bailey to comply with the restoration order.

Practical Considerations

Bailey is yet another in a long string of post-*Rapanos* opinions illustrating the widely divergent interpretations of the Supreme Court's 2006 opinion, as well as the ad hoc, fact specific analysis required to determine whether the United States has jurisdiction over areas that could constitute wetlands. Those opinions could be superseded by the Supreme Court or abrogated by Congress in pending federal legislation. Still, the opinion is significant now in its practical implications for developers. As the Ninth Circuit clarified last year in *Fairbanks North Star Borough v. U.S. Army Corps of Engineers*,[19] if the Corps determines that wetlands exist on properties sited for development, then municipalities, counties, and other developers must submit to that regulation and apply for a § 404 permit, and cannot challenge the wetlands determination in federal court unless and until a permit application is denied and the applicant exhausts its administrative appeal options.[20] If the decision is made to proceed with development without a § 404 permit, those who place dredged or fill material into waters of the United States over which the Corps has asserted jurisdiction can face enforcement action. The jurisdictional question may be raised in such an enforcement action, but this latter course of action is risky for several reasons, including: (1) the uncertainty of federal regulatory jurisdiction after *Rapanos*, as highlighted recently by the Eighth Circuit in *Bailey*; and (2) the fact that an adverse ruling could result in the imposition of substantial administrative or civil penalties, or even criminal sanctions.

ENDNOTES

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1. This legislation, the Clean Water Restoration Act of 2000, S. 787, is currently stalled in committee. For additional information on S. 787, the EPA/Corps guidance, and the case law mentioned in the text above, *see* the following articles by Jeff Kray, published in the Marten Law Group Environmental News: Three Strikes–You're Still Not Out: Senate To Again Consider Controversial Legislation to Broaden Federal Clean Water Authority; Legislative Solution Possible to Resolve Uncertainty Surrounding Clean Water Act Jurisdiction; Post-*Rapanos* Guidance on Clean Water Act Jurisdiction Issued by EPA and Corps; Federal Circuit Courts Split on Application of Supreme Court's *Rapanos* Decision; Ninth Circuit, In First Case Applying Supreme Court's *Rapanos* Decision, Holds NPDES Permit Required for Sewage Discharge to Excavated Pit; Latest Ninth Circuit Decision Interpreting *Rapanos* Extends Clean Water Act Jurisdiction to Intermittent Streams; Supreme Court Passes on Post-*Rapanos* Opportunities to Clarify "Navigable Waters" Jurisdiction; Clear as Mud: Newest Ninth Circuit Case Interpreting *Rapanos* Test for Clean Water Act

Jurisdiction Offers Little Clarity.

2. *See, e.g.*, 33 U.S.C.A. §§ 1311(a), 1362(6), (12).
3. 33 U.S.C.A. § 1362(7).
4. 33 U.S.C.A. § 1344; *Leslie Salt Co. v. U.S.*, 55 F.3d 1388, 1391 (9th Cir. 1995); *U.S. v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 123, 106 S. Ct. 455, 88 L. Ed. 2d 419 (1985).
5. 33 C.F.R. § 328(a)(7).
6. 33 C.F.R. §§ 328.3, 328.3(a)(3), 328.3(a)(5), 328.3(a)(7), 328.3(c).
7. *Rapanos v. U.S.*, 547 U.S. 715, 126 S. Ct. 2208, 165 L. Ed. 2d 159 (2006).
8. 547 U.S. at 742.
9. 547 U.S. at 759, 779-81 (Kennedy, J., concurring). Justice Roberts also filed a concurring opinion. Justice Stevens filed a dissenting opinion, in which Justice Souter, and Ginsburg joined. Justice Breyer also filed a dissenting opinion. For a complete analysis, see J. Kray and L. Fandino, Long Anticipated Supreme Court Wetlands Decision Leaves Much to be Decided, Marten Law Group Environmental News (June 21, 2006).
10. The restoration order required Bailey to: (1) remove the dredged and fill material used in construction of the road; (2) fill in the ditches with native, loamy soils; (3) seed the restored area with a specified seed mixture; and (4) control certain weed species for three years following restoration.
11. *U.S. v. Bailey*, 556 F. Supp. 2d 977 (D. Minn. 2008), aff'd, 571 F.3d 791 (8th Cir. 2009).
12. *Marks v. U.S.,* 430 U.S. 188, 97 S. Ct. 990, 51 L. Ed. 2d 260 (1977).
13. *U.S. v. Bailey,* 571 F.3d 791 (8th Cir. 2009).
14. *U.S. v. Bailey,* 571 F.3d 791 (8th Cir. 2009) (citing *U.S. v. Robison,* 505 F.3d 1208, 1221-22 (11th Cir. 2007), cert. denied, 129 S. Ct. 627, 172 L. Ed. 2d 609 (2008) and cert. denied, 129 S. Ct. 630, 172 L. Ed. 2d 609 (2008); *City of Healdsburg, Cal. v. Northern California River Watch,* 128 S. Ct. 1225, 170 L. Ed. 2d 61 (2008); *U.S. v. Gerke Excavating, Inc.,* 464 F.3d 723, 724-25 (7th Cir. 2006), cert. denied, 128 S. Ct. 45, 169 L. Ed. 2d 12 (2007).
15. 571 F.3d at 798-99 (citing, inter alia, *U.S. v. Johnson,* 467 F.3d 56, 66 (1st Cir. 2006), cert. denied, 128 S. Ct. 375, 169 L. Ed. 2d 260 (2007).
16. 571 F.3d at 799 (citing *Rapanos*, 547 U.S. at 780).
17. 571 F.3d at 800-802 (citing 33 C.F.R. § 328.3(b)).
18. 571 F.3d at 803.
19. *Fairbanks North Star Borough v. U.S. Army Corps of Engineers*, 543 F.3d 586 (9th Cir. 2008), cert. denied, 129 S. Ct. 2825, 174 L. Ed. 2d 552 (2009).
20. For an analysis of the *Fairbanks* opinion, *see* J. Ferrell, Ninth Circuit Limits Judicial Review of Wetlands Determinations by Corps of Engineers, Marten Law Group Environmental News (Oct. 29, 2008).