2010


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Recommended Citation
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I. INTRODUCTION

It is easier to seek forgiveness than permission. While this widely quoted piece of cynical wisdom holds true in many cases, an attorney must often give the opposite advice. In the wake of several federal circuit court decisions interpreting the scope of federal jurisdiction under the Clean Water Act (CWA), any attorney wishing to give a client sound advice must direct that client to seek the permission of the Army Corps of Engineers (Corps) or the Environmental Protection Agency (EPA), pursuant to 33 U.S.C. §§ 1311, 1342, 1344, prior to beginning a construction project in many wetlands.

Construction in wetlands is exactly the situation which precipitated the litigation in U.S. v. Bailey. In Bailey, the Eighth Circuit addressed the issue of what legal test would be used to determine whether wetlands fall under the jurisdiction of the CWA. In answering that question, the Eighth Circuit expanded CWA jurisdiction over wetlands by deciding that jurisdiction can be established if either of two tests proposed by the plurality decision in the Supreme Court case of Rapanos v. U.S. are met. In doing this, the Eighth Circuit has employed a Rapanos decision intended to limit the scope of CWA jurisdiction to instead expand that jurisdiction.

This Comment will examine the Eighth Circuit’s decision in U.S. v. Bailey. First, an examination of the prior law will describe the statutes and cases that led to the Eighth Circuit’s decision. Second, the facts, reasoning, and holding of Bailey will be explicated. Finally, the implications of Bailey on CWA jurisdiction, the success of Justice Stevens’ dissenting opinion in

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2 33 U.S.C. §§ 1311, 1342, 1344 (2010) (establishing power to and procedure by which, the Administrator of the EPA and the Secretary of the Army, acting through the Corps, issue permits for the discharge of pollutants).

3 United States v. Bailey, 571 F.3d. 791, 795 (8th Cir. 2009).

4 Id. at 796-799.


6 Bailey, 571 F.3d at 799.
Rapanos becoming law, and the impact Bailey has on correctly advising clients who face possible CWA jurisdiction over wetlands they wish to develop will be discussed.

II. LEGAL BACKGROUND

The Bailey case addressed the scope of federal jurisdiction under the CWA. The CWA declares as one of its goals that “that the discharge of pollutants into ... navigable waters be eliminated.”\(^7\) The CWA defines the “navigable waters” it wishes to regulate as “the waters of the United States, including the territorial seas.”\(^8\) The term “navigable waters” under the CWA has long been interpreted by regulatory agencies, and approved by the courts, to include more than traditional navigable-in-fact waters that have generally been held to be the limits of Congress’s Commerce Clause power to regulate waters in the United States.\(^9\) According to the Corps, “waters of the United States” for the purpose of the CWA includes “[w]etlands adjacent to waters.”\(^10\) Furthermore, the CWA prohibits discharge of any “pollutants” into the waters of the United States.\(^11\) The term “pollutants” includes “rock, sand, [and] cellar dirt.”\(^12\) Thus, any construction project requiring the use of fill dirt or a “pollutant” in any wetland adjacent to a “water of the United States” is subject to a licensing requirement under the CWA.

In light of the sweeping nature of federal regulatory power over land use in wetlands, the United States Supreme Court addressed the limits of CWA jurisdiction over wetlands most recently in Rapanos v. U.S.\(^13\) As the ensuing discussion of U.S. v. Bailey will indicate, the federal circuits’ application of Rapanos has done little to limit the expansion of this broad regulatory power or to provide developers and their attorneys with meaningful guidance as to whether particular wetlands fall under CWA jurisdiction. Rapanos, decided in 2006, produced a plurality opinion with three different proposed methods of determining whether a wetland falls under CWA jurisdiction. First, Justice Scalia’s plurality opinion proposed a strict geographic test.\(^15\) Next, Justice Kennedy’s concurring opinion

\(^10\) 33 C.F.R. § 328.3 (a) (7) (2010) (defining the word “waters” in its previous provisions).
\(^12\) Rapanos, 547 U.S. 715 (2006).
\(^14\) Bailey, 571 F.3d 791, 797-98.
\(^15\) Bailey, 571 F.3d at 797 (citing Rapanos, 547 U.S. at 742(plurality opinion)).
proposed a substantial nexus test. Finally, Justice Stevens' dissenting opinion argued that jurisdiction was appropriate if either test was met. The Eighth Circuit in *U.S. v. Bailey* faced the decision of which of the proposed tests to adopt.

**A. U.S. v. Bailey: Facts**

Appellant Gary Bailey's decision to appeal an injunction from the Federal District Court of Minnesota ordering him to return a wetland he had begun developing to its original condition forced the Eighth Circuit to choose between the *Rapanos* tests. Bailey had begun residential development of a thirteen acre tract of land bordering the Lake of the Woods (Lake) in 1998. Of these thirteen acres, approximately twelve acres were wetlands as defined by the Corps. In the early 1990's, Bailey had requested a permit to evacuate a harbor on this land, which the Corps granted; however, this permit excluded any permission for Bailey to use fill material for the development of residential or commercial properties.

Bailey did not apply for a new permit before beginning his 1998 development. Instead, he hired a contractor to build a road on the site without such permission. This road ran parallel to the shore line of the Lake and was 66 feet wide and roughly a quarter mile long. On June 11, 1998, before the road was completed, the local Soil and Water Conservation District advised Bailey's contractor that Bailey did not possess the proper permits for his road construction. The contractor quickly halted construction. In response, Bailey filed a Local-State-Federal Notification Form, in which he asserted to the County that he was building an access road for logging. Bailey then instructed the contractor to resume work and he completed the road, topping it with 2000 yards of gravel by August 17, 1998. On this date the Corps received a copy of Bailey's notification form.

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16 *Bailey*, 571 F.3d at 797-798 (citing *Rapanos*, 547 U.S. at 759 (Kennedy, J., concurring)).
17 *Bailey*, 571 F.3d at 798 (citing *Rapanos*, 547 U.S. at 810 n. 14 (Stevens, J., dissenting)).
18 *Bailey*, 571 F.3d at 794.
19 Id. at 795.
20 Id.
21 Id.
22 Id.
23 Id.
24 *Bailey*, 571 F.3d at 795.
25 Id.
26 Id.
27 Id.
28 Id.
29 Id.
The Corps treated this as an after-the-fact permit application and, on September 17, 1998, instructed Bailey to cease work on the road until it granted him a permit. The Corps further informed Bailey that if it denied his permit, he would be responsible for restoring the wetlands to their previous condition. Despite these warnings, Bailey worked to dedicate the road to the county and proceeded to make the improvements necessary to meet county regulations in an effort to ensure that the county would be responsible for maintenance of the road. On June 12, 2001, three years after the completion of the road, the Corps denied Bailey's permit application and ordered Bailey to restore the property at his own expense. Bailey refused to comply and the United States brought an enforcement action in Federal District Court. The Court affirmed the Corps' order against Bailey, prompting him to appeal to the Eighth Circuit.

III. EIGHTH CIRCUIT APPLICATION OF KENNEDY'S CONCURRENCE

Bailey appealed on a number of grounds, one being that "the district court erred in applying Justice Kennedy's opinion in Rapanos." The Eighth Circuit ultimately disagreed and ruled that jurisdiction may be found if either test proposed by the Rapanos Court was met. In reaching this decision, the Eighth Circuit relied heavily on its analysis of its sister circuits' treatment of Rapanos and Marks v. United States. While Rapanos establishes the scope of CWA jurisdiction, Marks explains how federal courts are to interpret plurality opinions. A Supreme Court divided not in outcome but reasoning, is exactly what the Eighth Circuit faced in interpreting Rapanos. In cases like Rapanos, Marks mandates that "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest possible grounds." In Bailey, the Eighth Circuit faced the difficult task of determining the "narrowest possible grounds" between Justice Scalia's plurality opinion and Justice Kennedy's concurring opinion in Rapanos. As Marks indicates, the narrowest possible grounds on which these opinions agree will be

30 Bailey, 571 F.3d at 795.
31 Id.
32 Id. at 796.
33 Id.
34 Id.
35 Bailey, 571 F.3d at 796.
36 Id. at 799.
38 Bailey, 571 F.3d at 798 (citing Marks, 430 U.S. 188 (1977)).
39 Bailey, 571 F.3d at 797-98.
40 Id. at 798 (quoting Marks, 430 U.S. at 193).
viewed as the prevailing law in determining CWA jurisdiction over wetlands. However, the Eighth Circuit acknowledged that “[b]ecause there is little overlap between the plurality’s and Justice Kennedy’s opinions, it is difficult to determine which holding is the narrowest.” The examination below of the *Rapanos* decision illustrates the fundamental incompatibility between the plurality and the concurrence in *Rapanos*.

First, Justice Scalia’s plurality opinion in *Rapanos* began its analysis by concluding that based upon the definitions section of the CWA, “the CWA authorizes federal jurisdiction only over ‘waters.’” Applying a textualist reading to the term “waters” and using the definition of *Webster’s New International Dictionary* (2nd ed. 1952), Justice Scalia concluded that “waters,” as used in the CWA applies only to “relatively permanent, standing or flowing bodies of water.” Therefore, Justice Scalia contended that CWA jurisdiction over wetlands should be determined by employing a two prong test. The first prong of the test requires that a channel adjacent to the wetland contain “water of the United States.” According to Justice Scalia, a body of water is “water of the United States” if it is a “relatively permanent body of water connected to traditional interstate navigable waters.” The second prong of the test requires that the wetland have a continuous surface connection to “water of the United States” as determined by the first prong of the test. Therefore, Justice Scalia’s opinion establishes a strictly geographic two pronged test to decide whether a wetland is subject CWA jurisdiction. Though applying a restrictive standard to the finding of CWA jurisdiction, Justice Scalia makes clear that the plurality’s opinion only applies to “dredge or fill” materials, which are, by design, supposed to remain in place and not flow downstream. Because this test would only apply in such narrow circumstances, the plurality held that the jurisdictional decision in *Rapanos* should be remanded for further determination.

Justice Kennedy’s concurrence agreed with the remand outcome reached by the plurality, but proposed an entirely different method to determine jurisdiction based upon entirely different reasoning. Justice Kennedy looked to the decision in *Solid Waste Agency of Northern Cook County v. United States*.

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41. *Bailey*, 571 F. 3d at 798.
43. *Id. at 732.
44. *Id. at 742.
45. *Id.
46. *Id.
47. *Id.
49. *Id. at 757.
50. *Id. at 787 (Kennedy, J., concurring).*
County. v. Army Corps of Engineers\textsuperscript{51} and decided that the determination of whether CWA jurisdiction existed over a wetland depended on the finding of a “significant nexus” between the wetland and waters that “are or were navigable in fact or that could be reasonably made so.”\textsuperscript{52} Justice Kennedy further cited to United States v. Riverside Bayview Homes, Inc.\textsuperscript{53} and stated that the dispositive element in that case was the determination that an agency’s interpretation of a statute was “reasonable and not in conflict with the expressed intent of Congress.”\textsuperscript{54} Therefore, Justice Kennedy concluded that an assertion of jurisdiction under the CWA over a wetland by the Corps or the EPA will be deemed reasonable and, consequently, permissible if there is a “significant nexus” between the wetland and a navigable water.

Because of the vastly different tests proposed by the plurality and concurrence in Rapanos, the Eighth Circuit had a difficult choice in determining, as required by Marks, which of these opinions contained the narrowest grounds for determining CWA jurisdiction. Therefore, the Eighth Circuit looked to other federal circuits for guidance.\textsuperscript{55} First, the Court acknowledged that three circuits, the Seventh, the Ninth, and the Eleventh, had held Justice Kennedy’s grounds to be the narrowest.\textsuperscript{56} However, the Seventh and the Ninth Circuits also stated that there may be occasions where the plurality’s test would apply.\textsuperscript{57} The Fifth and Sixth Circuits had not addressed the issue of which grounds to apply directly; instead, those courts reasoned that defendants in the cases before them qualified under both tests.\textsuperscript{58} Only the First Circuit, however, had concluded that no reconciliation was possible between the plurality and concurrence and thus adopted Justice Stevens’ suggestion to find jurisdiction if either test was met.\textsuperscript{59}

The First Circuit, in United States v. Johnson,\textsuperscript{60} articulated the following problem in support of its position:

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\textsuperscript{52} Rapanos, 547 U.S. at 759 (Kennedy, J., concurring) (citing Solid Waste Agency of N. Cook County, 531 U.S. at 167,172).
\textsuperscript{54} Rapanos, 547 U.S. at 766 (Kennedy, J., concurring) (citing Riverside Bayview Homes, Inc., 474 U.S. at 131).
\textsuperscript{55} Bailey, 571 F.3d at 798-99.
\textsuperscript{56} Bailey, 571 F.3d at 798 (citing United States v. Robison, 505 F.3d 1208, 1221-22 (11th Cir. 2007); N. Cal. River Watch v. City of Healdsburg, 496 F.3d 993, 999-1000 (9th Cir. 2007); United States v. Gerke Excavating, Inc., 464 F.3d 723, 724-25 (7th Cir. 2006) (per curiam)).
\textsuperscript{57} Bailey, 571 F.3d at 798-99 (citing N. Cal. River Watch, 496 F.3d at 999-1000; Gerke Excavating, 464 F.3d at 725).
\textsuperscript{58} Bailey, 571 F.3d at 799 (citing United States v. Cundiff, 555 F.3d 200, 210-13 (6th Cir.2009); United States v. Lucas, 516 F.3d 316, 327 (5th Cir. 2008)).
\textsuperscript{59} Bailey, 571 F.3d at 799 (citing United States v. Johnson, 467 F.3d 56, 66 (1st Cir. 2006)).
\textsuperscript{60} United States v. Johnson, 467 F.3d 56 (1st Cir. 2006).
The cases in which Justice Kennedy would limit federal jurisdiction are not a subset of the cases in which the plurality would limit jurisdiction. In cases where there is a small surface water connection to a stream or brook, the plurality's jurisdictional test would be satisfied, but Justice Kennedy's balancing of interests might militate against finding a significant nexus. In such a case, if Justice Kennedy's test is the single controlling test (as advocated by the Seventh and Ninth Circuits), there would be a bizarre outcome – the court would find no federal jurisdiction even though eight Justices (the four members of the plurality and the four dissenters) would all agree that federal authority should extend to such a situation. This possibility demonstrates the shortcomings of the Marks formulation in applying *Rapanos*.

As the First Circuit indicated, there are situations where the plurality's strict geographic test would allow CWA jurisdiction and Kennedy's test would deny jurisdiction. The Eighth Circuit found the reasoning of the First Circuit to be persuasive. Therefore, the Court adopted the position that CWA jurisdiction existed if either Justice Kennedy's test or the plurality's test were met. Applying Justice Kennedy's "significant nexus" test, the Eighth Circuit held that Bailey's wetlands fell under CWA jurisdiction and that Bailey had not presented enough evidence to create any genuine issues of material fact concerning that determination. Thus, the district court correctly granted the summary judgment against Bailey.

**IV. IMPLICATIONS**

The implications of the Eighth Circuit's decision in *Bailey* to adopt an either-or approach to the *Rapanos* tests are serious and wide ranging. First, *Bailey* forces *Rapanos* to expand CWA jurisdiction while the Supreme Court clearly meant to limit such jurisdiction with its decision. Second, and following from the first, *Bailey* establishes a precedent that dissenting opinions can be used to interpret plurality decisions of superior courts. Finally, *Bailey's* either-or approach casts serious doubts as to how attorneys should advise their clients regarding applications for permits under the CWA.

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61 Id. at 64.
62 *Bailey*, 571 F.3d at 799.
63 Id.
64 Id. at 802-03.
A. An Expansion of Federal Power from an Attempt to Limit Federal Power

There can be no doubt that Justice Scalia’s plurality opinion and Justice Kennedy’s concurrence were both intended to limit the scope of federal regulatory jurisdiction under the CWA. The plurality’s desire to limit jurisdiction is best illustrated by the only endorsement given of Justice Kennedy’s concurrence: “Justice Kennedy’s disposition would disallow some of the Corps’ excesses, and in that respect is a more moderate flouting of statutory command than Justice Stevens’ [dissent].” More importantly, the plurality’s decision delineates an objective test to determine jurisdiction. As discussed above, Justice Scalia’s plurality opinion would only allow CWA jurisdiction over wetlands being filled with dredge material if the wetland had continuous surface connection to a relatively permanent body of water that is connected to a navigable water of the United States. Because this is a straightforward factual determination, the Corps and the EPA would not have any discretion to classify wetlands as falling under CWA jurisdiction if they could not provide evidence to support both prongs of Scalia’s test. Therefore, the plurality opinion sought to vastly limit the scope of CWA jurisdiction.

Justice Kennedy also clearly intended his concurrence to limit the scope of CWA jurisdiction over wetlands. Justice Kennedy approvingly cited Solid Waste Agency of Northern Cook County. v. Army Corps of Engineer (SWANCC) throughout his opinion. Specifically, Justice Kennedy stated that “in SWANCC the Court rejected the Corps’ assertion of jurisdiction over isolated ponds and mudflats bearing no evident connection to navigable-in-fact waters.” SWANCC was the most recent Supreme Court decision that articulated the limits of CWA jurisdiction prior to Rapanos. Chief Justice Rehnquist penned the opinion in SWANCC and expressed concern over giving too great an authority to administrative bodies. When the Supreme Court refused to grant CWA jurisdiction in SWANCC, the Court expressed concerns over the expansion of Commerce Clause Power beyond its proper limits. Justice Kennedy asserted that the limitations placed on CWA jurisdiction by SWANCC were appropriate as it
is a wetlands' "significant nexus" to "navigable waters" that grants CWA jurisdiction over those wetlands "as waters of the United States."\(^{73}\)

Justice Kennedy's approval and employment of the reasoning from *SWANCC* in his *Rapanos* concurrence illustrates his attempt to limit CWA jurisdiction with his opinion. In addition, Justice Kennedy asserted a concern that the plurality's strict geographic test may permit jurisdiction over waters that are far beyond the traditional scope of the CWA because the plurality would allow jurisdiction to exist where conditions met the geographic test but where no substantial nexus existed between the wetlands to be regulated and a navigable body of water.\(^{74}\) As in Justice Scalia's opinion, Justice Kennedy's concurrence is an attempt to limit CWA jurisdiction over wetlands that do not bear some kind of relation to navigable waters of the United States.

Though clearly both the opinions of Justices Kennedy and Scalia in *Rapanos* are concerned about overreaching by the EPA and the Corps, the either-or approach adopted by the Eighth Circuit in *Bailey* expands federal jurisdiction. By allowing either test to control, the Eighth Circuit has set up a situation in which jurisdiction that would be precluded by the "significant nexus" test employed in *SWANCC* and advanced by Justice Kennedy in *Rapanos* could still qualify for regulation under the CWA.

For example, imagine a developer who wishes to fill a permanent wetland that is connected by a small stream to a lake that qualifies as a navigable body of water. At great expense, the developer hires an expert who verifies that filling the wetland will have no effect on the water quality of the lake. Justice Kennedy predicted such a case when he pointed out that "in many cases wetlands adjacent to tributaries covered by this standard might appear little more related to navigable-in-fact waters than were the isolated ponds held to fall beyond the [CWA's] scope in *SWANCC*."\(^{75}\) No significant nexus is shown between the wetland and the navigable water in the above example. However, if a court should apply the either-or standard of *Bailey*, the developer's wetlands would still qualify for CWA regulation under Justice Scalia's test. The wetland would qualify despite not possessing the "significant nexus" required by Justice Kennedy's concurrence because it is a "water of the United States" and is physically connected by an overland water route to a navigable body of water.\(^{76}\) Therefore, though the Supreme Court clearly intended *Rapanos* to limit CWA jurisdiction, the *Bailey* either-or approach would expand jurisdiction beyond what was available under the "significant nexus" test of *SWANCC*.

\(^{73}\) *Rapanos*, 547 U.S. at 776-77 (Kennedy, J., concurring).

\(^{74}\) *Id.*

\(^{75}\) *Id.* at 781-82.

\(^{76}\) See *Rapanos*, 547 U.S. 747 (plurality opinion).
B. Dissenting Opinions as Controlling Opinions

Following from the expansion of CWA jurisdiction under the Bailey either-or approach is the problem that the dissenting opinion of Justice Stevens in Rapanos has effectively become controlling law. Justice Stevens closed his dissent in the following manner: "[g]iven that all four Justices who have joined this opinion would uphold the Corps' jurisdiction in both of these cases — and in all other cases in which either the plurality's or Justice Kennedy's test is satisfied — on remand each of the judgments should be reinstated if either of those tests is met." When the Eighth Circuit adopted the either-or approach endorsed by Justice Stevens, the Court did not follow the mandate of Marks that "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest possible grounds." An adoption of the either-or approach clearly ignores the intention of both the plurality and concurring opinions in Rapanos, and, instead, allows the dissent of Justice Stevens to become law.

The Eleventh Circuit, in the case of United States v. Robison, delineated the problem with adopting the either-or approach, adopted by the Eighth Circuit in Bailey. In Robison, the Eleventh Circuit explained its decision to employ only Justice Kennedy's concurrence by contrasting the implications of its adoption of the "substantial nexus" test to the implications of adopting an either-or approach: "[w]e are controlled by the decisions of the Supreme Court. Dissenters, by definition, have not joined the Court's decision. In our view, Marks does not direct lower courts interpreting fractured Supreme Court decisions to consider the positions of those who dissented." The expansion of CWA jurisdiction by the Eighth Circuit's Bailey decision when the Supreme Court intended to limit such jurisdiction illustrates the problem with relying upon dissents to interpret any divided courts' opinions. As the Eleventh Circuit stated in Robison, allowing Justice Stevens' dissent in Rapanos to become law by adopting an either-or test would conflict with Marks command to find the narrowest grounds on which those justices who participated in the decision of the court agreed. In essence, the reliance on a dissenting opinion to interpret the majority in a divided decision can empower a lower court to flout the authority of a superior court.

77 Rapanos, 547 U.S. at 810 (Stevens, J., dissenting).
79 United States v. Robison, 505 F.3d 1208 (11th Cir. 2007).
80 Id. at 1221-22.
81 Id.
82 Id. at 1221 (citing King v. Palmer, 950 F.2d 771, 783 (D.C.Cir. 1991) (en banc)).
83 See Robison, 505 F.3d at 1221.
C. Advising Clients in a Post-Bailey Era

Currently, only the Eleventh Circuit has completely foreclosed the use of the either-or approach in applying *Rapanos*. The either-or approach has been embraced not only by the Eighth Circuit in *Bailey* but also by the First Circuit in *United States v. Johnson*. Thus, there is no consensus among the circuits concerning what approach should be used when analyzing CWA jurisdiction cases concerning the development and filling of wetlands. Furthermore, the Northern District of Texas has refused to apply either Justice Scalia’s or Justice Kennedy’s *Rapanos* test and instead has relied on previous precedent. The District Court stated that “[w]ithout any clear direction on determining a significant nexus, this Court will do exactly as Chief Justice Roberts declared—‘feel [its] way on a case-by-case basis.’”

This situation poses a serious problem for attorneys attempting to advise their clients regarding wetlands development and the CWA. The best outcome for a developer/client would be if the developer’s attorney could advise the developer with a high degree of certainty whether the wetland to be developed was subject to CWA jurisdiction. A high degree of certainty is preferable because the expenses and time involved in the application process for a CWA wetlands permit are substantial. On average, an “applicant for an individual permit spends 788 days and $271,596 in completing the process, and the average applicant for a nationwide permit spends 313 days and $28,915—not counting costs of mitigation or design changes. ‘[O]ver $1.7 billion is spent each year by the private and public sectors obtaining wetlands permits.’” These are steep costs that most clients would prefer to avoid. However, because of the state of confusion over what method will be used to determine CWA jurisdiction over wetlands, a high degree of certainty is impossible. Therefore, unless a client’s land falls within the jurisdiction of a federal circuit that has clearly expressed what method will be used to find CWA jurisdiction, the safest advice that an attorney can give is for their clients to seek CWA permits if their wetlands would meet any test articulated in *Rapanos*.

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84 *Bailey*, 571 F.3d at 798-99 (explaining that the Seventh, Ninth, and Eleventh Circuits have held that Justice Kennedy’s test must govern the particular cases each has considered; however, the Seventh and Ninth have not foreclosed the possibility of utilizing the either-or rule).
85 Id. at 799 (citing *United States v. Johnson*, 467 F.3d 56, 66 (1st Cir. 2006)).
87 Id. at 613.
88 *Rapanos*, 547 U.S. at 721 (citing Sunding & Zilberman, *The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process*, 42 NAT. RESOURCES J. 59, 74-76, 81 (2002)).
V. CONCLUSION

Because of the many problems posed by the Bailey either-or method for determining CWA jurisdiction, this issue is ripe for a decision by the Supreme Court. Absent another ruling on the issue, the Federal Courts, attorneys, and developers of wetlands must do their best to feel through each CWA jurisdiction matter on a case by case basis.