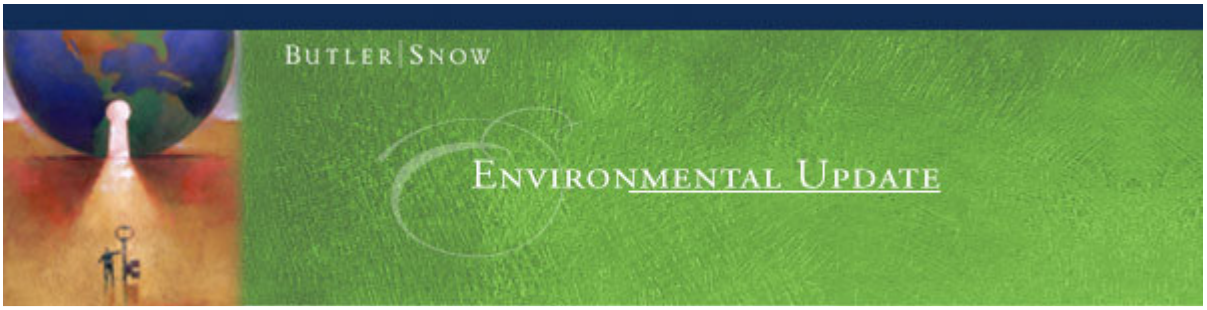

Volume 2011 - Number 6

Rapanos for Dummies: 3rd Circuit Clears Up Confusion About Scope of the Corps' Clean Water Act Jurisdiction

November 16, 2011

James R. Farrell - **Gulf Coast**

I. Rapanos Recap

It only took five years, but courtesy of the Third Circuit in *United States v. Donovan*,[1], we now have a straightforward and well-reasoned opinion that appears to have cleared up the murky wetlands jurisdiction of the U.S. Army Corps of Engineers. In June 2006, the Supreme Court decided *Rapanos v. United States*,[2] a case that many hoped would clarify the scope of the Corps' jurisdiction to regulate wetlands under the Clean Water Act (CWA). Instead of establishing a brightline rule, the Supreme Court produced two divergent and fact-intensive tests in its 4-1-4 plurality opinion, leaving the Corps and lower courts the difficult task of determining which test to apply in future jurisdictional determinations.

The plurality test, a more restrictive interpretation of jurisdictional wetlands authored by Justice Scalia, defined "'waters of the United States' as used in the CWA . . . "as only those relatively permanent, standing or continuously flowing bodies of water 'forming geographic features' that are described in ordinary parlance as 'streams, . . . oceans, rivers, and lakes.'"[3] Having narrowly defined "waters of the United States," the plurality test then concluded that "wetlands . . . only fall within the scope of the CWA if they have '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.'"[4]

Unlike the plurality in *Rapanos*, Justice Kennedy adopted an arguably more expansive view of the Corps' jurisdiction. Justice Kennedy's test concluded that "wetlands are subject to the strictures of the CWA if they possess a 'significant nexus' with 'waters of the United States,' meaning that 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.'"[5]

II. Which *Rapanos* Test Applies? Take Your Pick.

Fast Forward to October 31, 2011. In *United States v. Donovan*, the Third Circuit considered whether a portion of David Donovan's four-acre parcel in Delaware—the portion to which Donovan had added fill material without having obtained a Corps permit and despite having received numerous cease-and-desist notices from the Corps—was wetlands. The Third Circuit wasted little time dismissing Donovan's theory that his property would not be considered wetlands under pre-*Rapanos* decisions and that pre-*Rapanos* decisions should govern since *Rapanos* had failed to establish a brightline rule.[6] With Donovan's trivial legal argument out of the way, the Third Circuit then turned its attention to a more troublesome question: which of the two *Rapanos* tests should be applied to determine the extent of the Corps' CWA jurisdiction?

After providing an instructive overview of previous *Rapanos* interpretations by the Seventh and Eleventh Circuits (holding that only Justice Kennedy's test applies) and the First and Eighth Circuits (holding that either the plurality's or Justice Kennedy's test applies), the Third Circuit then aligned itself with the latter two Courts of Appeals. To explain its reasoning, the Third Circuit did not simply plagiarize the earlier opinions of its sister Courts of Appeals; on the contrary, the Third Circuit indicated those earlier opinions had focused unnecessarily on a complex analysis of *Rapanos* in the context of *United States v. Marks*,[7] which held that "when a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds."[8] Instead, the Third Circuit's decision to apply either the plurality's or Justice Kennedy's test was based largely upon its reiteration of one of its earlier holdings: "our goal in analyzing a fractured Supreme Court decision is to find 'a single legal standard . . . that when properly applied, produce[s] results with which a majority of the Justices in the case articulating the standard would agree.'"[9]

Applying this goal to its interpretation of the fractured *Rapanos* decision, the Third Circuit concluded that the *Rapanos* standard once

thought to be so elusive had in fact been staring lower courts in the face for the past five years. And as the Third Circuit explained, discerning that standard required no complex analysis—it simply required a closer reading of Justice Stevens's dissent, which explicitly "told lower courts what jurisdictional test is to be applied."[10] In his *Rapanos* dissent, Justice Stevens, who favored a broader interpretation of the Corps' jurisdiction under the CWA than allowed by the plurality test and Justice Kennedy's test, announced that "all four [dissenting] Justices . . . would uphold the Corps' jurisdiction . . . in all . . . cases in which *either* the plurality's *or* Justice Kennedy's test is satisfied."[11] As a result, the Third Circuit discovered not just the one legal standard it sought—it discovered authoritative grounds for two legal standards, either of which can be applied independently of the other to determine Corps jurisdiction in wetlands cases.

Having cleared up the confusion that best characterized wetlands jurisdiction cases in the post-*Rapanos* era, the Third Circuit then applied the alternative legal standards of *Rapanos* to the facts in *Donovan*. Whereas the district court had concluded that two expert reports submitted by the Government provided equally compelling grounds for Corps jurisdiction under both the plurality's and Justice Kennedy's tests, the Third Circuit found jurisdiction under Justice Kennedy's test and then promptly called it a day.

---

[1]No. 10-4295, slip op. (3rd Cir. Oct. 31, 2011).
[2]547 U.S. 715 (2006).
[3]United States v. Donovan, No. 10-4295, slip op. at 11 (3rd Cir. Oct. 31, 2011) (quoting Rapanos v. United States, 547 U.S. 715, 739 (2006)).
[4]*Id.* (quoting Rapanos v. United States, 547 U.S. 715, 742 (2006)).
[5]*Id.* at 11-12 (quoting Rapanos v. United States, 547 U.S. 715, 779-80 (2006)).
[6]*Id.* at 13 ("While the Courts of Appeals are split on the proper interpretation of *Rapanos*, none has adopted Donovan's position.").
[7]430 U.S. 188 (1977)
[8]*Donovan*, No. 10-4295, slip op. at 14 (3rd Cir. Oct. 31, 2011) (quoting United States v. Marks, 430 U.S. 188, 193 (1977)).
[9]*Id.* at 17 (quoting Planned Parenthood of Se. Pa. v. Casey, 947 F.2d 682, 693 (3rd Cir. 1991)) (alterations in original).
[10]*Id.* at 18.
[11]*Id.* at 19 (quoting Rapanos v. United States, 547 U.S. 715, 810 (2006) (Stevens, J., dissenting)) (emphasis added).

Butler Snow will continue to keep you informed of new and changing regulations that could affect your business. For more information, please contact one of the environmental attorneys listed below.

Michael Caples is a member of the firm's Government and Environmental Group. His practice is concentrated in the areas of environmental law and government relations. Michael can be contacted via e-mail at michael.caples@butlersnow.com. He is licensed to practice in Mississippi.

James R. Farrell is a member of the firm's Government & Environmental Group. His practice is concentrated in the areas of environmental law and real estate and development law. Jim can be contacted via e-mail at jim.farrell@butlersnow.com. He is licensed to practice in Mississippi.

James I. Palmer, Jr. is a member of the firm's Government and Environmental Group. His practice is concentrated in the areas of environmental law, natural resources law, energy law and administrative law. Jimmy can be contacted via e-mail at jimmy.palmer@butlersnow.com. He is licensed to practice in Mississippi.

Gary C. Rikard is a member of the firm's Government and Environmental Group. His practice is concentrated in the areas of environmental law and litigation, oil and gas law and governmental relations. Gary can be contacted via e-mail at gary.rikard@butlersnow.com. He is licensed to practice in Mississippi and Tennessee.

Our mailing address is:
Butler, Snow, O'Mara, Stevens and Cannada, PLLC
1020 Highland Colony Pkwy
Suite 1400
Ridgeland, MS 39157