

A Wetlands Victory (For Now)

by Mila Cobanov

[Posted on Tuesday, July 18, 2006]

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"This is the oldest case in my chambers... [It] is referred to within my chambers ... as the "Sandman Case." Everybody that talks about the Sandman knows that we are talking about Mr. Rapanos because what he did was to move sand from one end of his property to the other end of his property. This all occurred on property he owned. Nothing was brought in to fill this land except sand that was already on that land." – Judge Zatkoff, Federal District Court (Eastern District of Michigan)[1]



At the age of 70, John Rapanos has finally ended his 18-year battle with state and federal environmental regulators, and has come out on the winning end when the US Supreme Court ruled in his favor on June 19, 2006. [2] Much was at stake for Mr. Rapanos, who faced a conviction of 63 months in a federal penitentiary and approximately \$13 million dollars in civil and criminal penalties. This 12-year litigation tale begins when Mr. Rapanos decided to start moving some sand...

Mr. Rapanos owned 175 acres of land that he wanted to sell to a developer. In order to make the property more marketable, he decided to fill his property with sand so that it would be fit for development. Fifty-four acres of his property constituted "wetlands," described in the majority opinion as "land with sometimes-saturated soil conditions." [3]

A consultant hired by Mr. Rapanos informed him that he did indeed have wetlands property that would be subject to regulation by state and federal enforcement; Mr. Rapanos, a petulant man, threatened the consultant and thereafter refused further inspection from state officials (interestingly, despite the lack of a warrant these state officials nevertheless trespassed on Mr. Rapanos's property after being denied access by him). [4]

Because of his uncooperativeness, the state officials contacted the Environmental Protection Agency, which thereafter claimed jurisdiction over his property under the Clean Water Act (CWA), preventing him from filling his wetlands under threat of civil and criminal action. The US Army Corps of Engineers, the governmental body determining which property is subject to the CWA, promptly invoked their authority once Mr. Rapanos refused to seek a permit and proceeded to fill his property with sand.

Writing for the majority on the Supreme Court, Justice Scalia is quick to point out that the costs in obtaining a permit are not slight: "The average 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." [5] Overall, more than \$1.7 billion is spent each year by both private and public sectors in efforts to obtain wetlands permits. [6] Mr. Rapanos's stubbornness culminated in a guilty verdict for various CWA violations, and a criminal sentence that the federal district court judge was loath to enforce.

At his sentencing hearing on March 15, 2005, the prosecution implored the court for a sentence of 63 months for Mr. Rapanos. Judge Zatkoff made a lucid comparison to one of the most notorious water

pollution disasters in American history: the Exxon-Valdez oil spill that dumped 10.8 million gallons of crude oil in Alaskan waters, killing thousands of animals and crippling the local fishing industry. In that case, the drunken captain that caused the wreck was sentenced to serve 1,000 hours of community service in the course of 5 years — with no prison time or fine. In contrast, Mr. Rapanos's act of filling his land with sand caused no harm to the public in any appreciable sense. Moreover, his act of filling the land with sand was not polluting anything; the sand is meant (and does) "fill" and stick to the land in order to pave the way for development on the property. In light of this, Judge Zatkoff fined Mr. Rapanos \$185,000 and sentenced him to 3 years of probation that was treated as time served. The Sixth Circuit Court of Appeals overturned Judge Zatkoff's downward departure from the sentencing guidelines. Judge Zatkoff, who is otherwise known for a strict sentencing policy, nevertheless stood his ground:

I don't know if it's just a coincidence that the case that I just sentenced prior to this case has come into this court, that was the case of Mr. Gonzalez, who was a person selling dope on the streets of the United States. He is an illegal person here. He's a citizen of Cuba, not an American citizen. He has a prior criminal record....

So here we have a person who comes to the United States and commits crimes of selling dope and the government asks me to put him in prison for ten months. And then we have an American citizen who buys land, pays for it with his own money, and he moves some sand from one end to the other and government wants me to give him sixty-three months in prison. Now, if that isn't our system gone crazy, I don't know what is. And I am not going to do it. [\[7\]](#)

Why this fervor to punish a 70 year old man? Appalled at the state's trespass of Mr. Rapanos's property, and the subsequent witch hunt by the Corps, Judge Zatkoff explained that "we have a very disagreeable person who insists on his constitutional rights. And this is the kind of person that the Constitution was passed to protect." [\[8\]](#)

Before the case was heard before the Supreme Court, Mr. Rapanos amassed support from the general public and various special interest groups that sought to curb the Corps's regulation-wielding authority. Indeed, Mr. Rapanos did not just have the support of average American citizens and special interest groups. As Pacific Legal Foundation notes, "Groups representing hundreds of government agencies that provide clean water for tens of millions of Americans are supporting Mr. Rapanos. Supporters include the largest urban water district in the nation, the largest coalition of public water agencies in the nation, and a coalition of water agencies that provide clean water to more than 30 million citizens in six states in the Western United States." [\[9\]](#)

Although triumphant, Mr. Rapanos's victory at the Supreme Court had nothing to do with the state agents' unconstitutional trespass on his property. The issue before the Supreme Court was simply whether the Corps's exercise of jurisdiction was permissible under the Clean Water Act. The 5-4 majority determined that it was not.

The CWA makes it unlawful to discharge *any* pollutants (including sand) into navigable waters. [\[10\]](#) "Navigable waters" are defined as "the waters of the United States, including the territorial seas." [\[11\]](#) The Corps enjoys expanded jurisdiction over wetlands because the transition from water to solid ground is not abrupt, thus all wetlands *adjoining* a navigable waterway were subject to the Corps's jurisdiction. [\[12\]](#) Labeling the Corps as "an enlightened despot," [\[13\]](#) Justice Scalia does not mince words about the Corps's hungry desire for regulatory control over every drop of water in America.

The Corps has kept expanding its interpretation of "navigable waters" to include all forms of *intrastate* waters, including "storm drains, roadside ditches, ripples of sand in the desert that may contain water once a year, and lands that are covered by floodwaters once every 100 years."**[14]** At one point, the Corps even applied its authority over an abandoned sand and gravel pit in northern Illinois; the Supreme Court overruled this action as an overreaching of power and found that nothing in the text of CWA authorized the Corps to assert jurisdiction.**[15]**

This expansion of power came to affect Mr. Rapanos, whose saturated lands were claimed to abut navigable waterways because there were "hydrological connections" between his property and "adjacent tributaries of navigable waters."**[16]** It was clear to the Supreme Court that whatever "hydrological connections" meant, it impermissibly expanded the CWA's definition of "navigable waters" at the Corps's discretion:

In applying the definition to "ephemeral streams," "wet meadows," storm sewers and culverts, "directional sheet flow during storm events," drain tiles, man-made drainage ditches, and dry arroyos in the middle of the desert, the Corps has stretched the term "waters of the United States" beyond parody.**[17]**

To the Corps, Mr. Rapanos's land was clearly moist enough, and his disposition indignant enough that they felt a right to drag him through criminal and civil litigation over the course of 12 years. Mr. Rapanos's land was 20 miles away from a waterway; his 54 acres of wetlands (or "sometimes-saturated soil") were nowhere near adjacent to a stream of navigable water.

Thus, after years of battle, Mr. Rapanos has achieved victory against the regulators. But what sort of victory is it? He spent a considerable amount of time and money battling the federal government in defense of his own property. Mr. Rapanos is a new-age entrepreneur. In a regulated state, today's entrepreneur is the man or woman battling bureaucracy with their time, money, and effort that would have been better placed toward functional, capitalist ventures. Real entrepreneurs are supposed to be self-serving, willing to make capital risks on consumer demand. In contrast, today's entrepreneurs are selfless, risking their life savings and the possibility of incarceration in a federal penitentiary in order to give future entrepreneurs more room to maneuver in the stranglehold of regulatory policies.

The Supreme Court took care to state that "the Government's expansive interpretation would result in a significant impingement of the State's traditional and primary power over land and water use."**[18]** Nevertheless, the majority commented on the fact that the Corps's ever-expanded jurisdiction into wetlands was part of the environmental lobbying efforts attempting to effectuate increased protection for wetlands under the CWA. By stating that "a Comprehensive National Wetlands Protection Act is not before us, and the wisdom of such a statute is beyond our ken," the majority implies that if such an Act were before them, they would dutifully uphold the Act as constitutional.

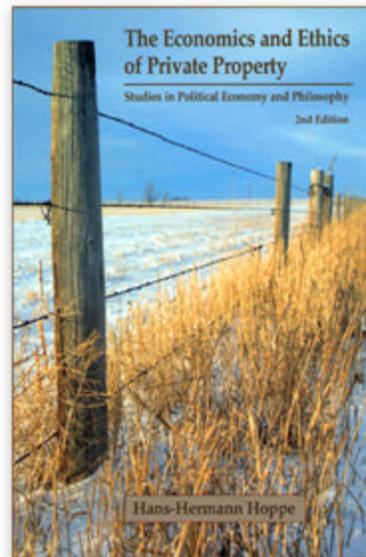
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In one sense, this reflects a pyrrhic victory for

society as a whole. As soon as Congress gets the political muster and statutorily enacts protection for all the nation's wetlands, the Supreme Court will most likely uphold the Act as constitutional.

Unfortunately, the Supreme Court's reverence for establishing precedent always supersedes the Commerce Clause limitation binding Congress against regulating intrastate affairs. As laudable as Mr. Rapanos's victory is, the sobering reality is that there are many more individuals like him who will still be subject to the regulatory authority of the federal government, and will not have his tenacious temperament to fight for their rights in a decade-long battle.

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Notes

[1] Sentencing Hearing Transcript, 7-8 ([PDF](#)).

[2] The opinion can be found [here](#) (PDF).

[3] *Rapanos v. U.S. Army Corps of Engineers*, 126 S. Ct. 2208; 2214 (online opinion at 4), hereinafter "*Rapanos*."

[4] Sentencing Hearing Transcript, *supra* Note 1, at 11.

[5] *Rapanos* at 2214 (online opinion at 4), citing Sunding & Zilberman, "The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process," 42 *Natural Resources J.* 59, 74-76 (2002).

[6] *Ibid*, Sunding & Zilberman at 81.

[7] *United States v. Rapanos*, 235 F.3d 256, 259-260 (6th Cir. 2000).

[8] Sentencing Hearing Transcript, *supra* Note 1, at 11-12.

[9] [Press Release June 17, 2006](#).

[10] Clean Water Act, 33 U.S.C. § 1311(a).

[11] Clean Water Act, 33 U.S.C. § 1362(7).

[12] *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 132 (1985).

[13] *Rapanos* at 2214 (online opinion at 4).

[14] *Rapanos* at 2215 (online opinion at 4).

[15] Solid Waste Agency of North Cook County v. Army Corps of Engineers, 531 U.S. 159 (2001).

[16] United States v Rapanos, 376 F.3d 629, 643 (6th Cir. 2004).

[17] Rapanos at 2222 (online opinion at 11).

[18] Rapanos at 2224 (online opinion at 12).